

2014 Federal Practice Institute

Some Amendments to the Guidelines Manual effective November 1, 2014

1. Retroactive Application of the Drug Table , U.S.S.G. § 1B1.10, to defendants who got below min/mand sentence due to substantial assistance.

Pre-amendment, if a D's GSR was, for example, 108-135 months (OL 34 - 3 (AOR) = 31, CHC I) but there was a 10-yr min mand, the applicable GSR was 120-135. Suppose D cooperated, and govt recommends 5 level offense level reduction, yielding GSR 63-78 (TOL 26, CHC I), and court imposes 72 months.

Under US v. Roa-Medina, 607 F.3d 255 (1st Cir. 2010)., D would not be entitled to a 3582(c)(2) reduction, on the theory that he was not sentenced "based on" a GSR that had been lowered, but rather based on the min mand (which has not been lowered) + cooperation.

Effective 11/1/2014, 1B1.10 was amended to overrule cases like Roa-Medina. So cooperators in these circumstances will be eligible. In the above example (from Roa-Medina), the calculation would be 32-3-5 = TOL 24, CHC I GSR 51-63.

“This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance.”

2. Aggravated Assault - U.S.S.G. § 2A2.2

Implements statutory changes made by the Violence Against Women Reauthorization Act of 2013, which adds new & increased penalties for domestic assaults (assaults v spouse, intimate partner, or dating partner) within federal maritime and territorial jurisdiction [VA, FCI Berlin]

3. “Stalking” – U.S.S.G. § 2A6.2, 18 U.S.C. § 2261A

Interstate travel or foreign travel “with the intent to kill, injure, harass, intimidate or place under surveillance” another person or a family member, spouse or intimate partner, now also includes use of an electronic communication or interactive computer service to place them in reasonable fear

of death or serious bodily injury or causing or trying to cause “substantial emotional distress.”

4. Supervised release & domestic violence rehabilitation program required for first-time domestic violence offense, 18 U.S.C. § 3561(b), 18 U.S.C. § 3583(a) & (d).
5. Reduction in Drug Offense Levels-U.S.S.G. § 2D1.1(c): Drug Quantity Table – 2-level across the board decrease in Drug Quantity Table.
6. Enhancement for cultivating marijuana on state or federal land or while trespassing on tribal or private land - U.S.S.G. § 2D1.1(b)(14) – 2-level enhancement but only if Defendant receives an aggravating role adjustment under U.S.S.G. § 3B1.1.
7. Firearms Cross Reference – U.S.S.G. § 2K2(c)(1) & Note 14

Amendment to subsection (c)(1) inserts after firearm or ammunition “cited in the offense of conviction.” The application note explains that U.S.S.G. § 1B1.3 “relevant conduct” rules apply, so that if the defendant committed offenses with 2 different firearms, only one of which was covered by the count of conviction, then the cross reference does not apply unless the charged and uncharged firearm offenses were part of the same course of conduct or common scheme or plan

8. Supervised Release – U.S.S.G. § 5D1.2(b)(2), Application Note 1

Failure to Register, 18 U.S.C. § 2250, is not a “sex offense” requiring a maximum of SR term of life, citing United States v. Goodwin, 717 F.3d 511, 518-520 (7th Cir. 2013), which holds that the guideline range for a SORNA violation is five years of SR.

9. Departures for defendants serving time in state custody when located by immigration authorities – U.S.S.G. § 2L1.2, Application Note 8 (Illegal re-entry)

In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, ... the court may consider whether a departure is appropriate to reflect all or part of the time served in state

custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Departure should be considered only in cases where departure is not likely to increase risk to public from further crimes of defendant. Court should consider, among other things, (A) whether defendant engaged in additional criminal activity after illegally reentering US; (B) seriousness of any such additional criminal activity, including (1) whether defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether criminal activity resulted in death or serious bodily injury to any person, and (3) whether defendant was an organizer, leader, manager, or supervisor of others in criminal activity; and (C) seriousness of defendant's other criminal history.

10. Undischarged Terms of Imprisonment – U.S.S.G. § 5G1.3(c)

Where the court anticipate that after defendant is sentenced in federal court, defendant will be sentenced in state court and serve a sentence in state prison for an offense that's relevant conduct to the instant federal offense, the sentence for the instant offense shall run concurrently to the anticipated term of imprisonment.