The U.S. Sentencing Commission Continues to Make Fundamental Fixes to the Sentencing Guidelines

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On April 15, 2016, following last year's important amendments to relevant conduct, mitigating role, and fraud guidelines, the U.S. Sentencing Commission voted to continue to make fundamental fixes to the U.S. Sentencing Guidelines (USSG) that have long been in need of repair. These fixes became final on November 1, 2016.

During this amendment cycle, with respect to matters most pertinent to the white collar practitioner, the Commission addressed needed reform expanding the invocation of compassionate release for elderly and/or seriously ill inmates, addressed a circuit split regarding the sentencing of child pornography offenders who use peer-to-peer software to commit their offenses, and modified conditions of probation and supervised release. While this article focuses on these proposed amendments, the authors note that the Commission also passed important amendments regarding sentencing for animal fighting offenses in light of new legislation and amended the guidelines for alien smuggling. The Commission finally undertook a wholesale rewrite of USSG section 2L1.2, the illegal reentry guideline.

COMPASSIONATE RELEASE

A sentencing court, "upon motion of the Director of the Bureau of Prisons," may reduce an inmate's sentence where it finds that:

> (i) extraordinary and compelling reasons warrant such a reduction; or
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> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(18 U.S.C. § 3582(c)(1)(A).)

This provision commonly is referred to as "compassionate release." USSG section 1B1.13 sets forth the Commission's policy on compassionate release. On the heels of two Department of Justice reports and a public hearing, the Commission found it necessary to "broaden the criteria for eligibility, to add guidance to the medical criteria, and to remove other administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants." (U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary 4 (2016), [hereinafter 2016 Amendments], *available at* http://tinyurl.com/jkggaoz.)

Accordingly, the Commission revised the application notes of USSG section 1B1.13 to provide, first, that "extraordinary and compelling reasons" encompass medical conditions. Specifically, extraordinary and compelling reasons for compassionate release exist where a defendant is suffering from a terminal illness that is "a serious and advanced illness with an end of life trajectory[]. A specific prognosis of life expectancy . . . is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ diseases, and advanced dementia." (*Id.* at 2.) This amendment thus removes the prognosis of an 18-month life expectancy now contained in the Bureau of Prisons' program statement because "it is extremely difficult to determine death within a specific time period" and "requiring a specific prognosis . . . is unnecessarily restrictive both in terms of the administrative review and the scope of eligibility for compassionate release applications." (*Id.* at 5.)

Second, the Commission removed the requirement that the defendant be suffering from a "permanent" physical or medical condition, or one "for which conventional treatment promises no substantial improvement." Instead, extraordinary and compelling reasons now exist where an inmate is suffering from a "serious," but not necessarily permanent, physical or medical condition, include "suffering from a serious functional or cognitive impairment," and still encompass "experiencing deteriorating physical or mental health because of the aging process." (*Id.* at 2.) Finally, these conditions need only be conditions "from which [the inmate] is not expected to recover." (*Id.*)

Third, the Commission added a consideration for the age of the defendant. If the defendant is at least 65 years old, is "experiencing a serious deterioration in physical or mental health because of the aging process," and "has served at least

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10 years or 75 percent of his or her term of imprisonment, whichever is less," the defendant should be considered for compassionate release. This amendment considerably relaxes the current requirement at 18 U.S.C. § 3582(c)(1)(A)(ii) that a defendant be at least 70 years old and have served "at least 30 years in prison" in order to qualify for compassionate release. While the amendment "adds a limitation that the defendant must be experiencing seriously deteriorating health because of the aging process," the Commission nonetheless "expects that the broadening of the medical conditions categories . . . will lead to increased eligibility for inmates who suffer from certain conditions or impairments, and who experience a diminished ability to provide self-care in prison, regardless of their age." (2016 AMENDMENTS, *supra*, at 5.)

Fourth, the Commission expanded the family circumstances scenario to include the death or incapacitation of the "caregiver" of the defendant's minor child or children, where formerly the circumstance was limited to an actual family member who cared for the children. (*Id.* at 2.) The Commission also added to family circumstances the "incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver" for that person. (*Id.*) The Commission left in the statement that the director of the Bureau of Prisons may find extraordinary and compelling circumstances that otherwise were not listed in the amended application note.

Fifth, the Commission added as application note 2 that "an extraordinary and compelling reason need not have been unforeseen at the time of the sentencing in order to warrant a reduction in the term of imprisonment" for compassionate release. (*Id.*) Indeed, "the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement." (*Id.* at 2–3.)

Finally, the Commission added at application note 4 that it "encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1." The Commission added this specific, permanent note of encouragement (albeit nonbinding) to the director inasmuch as it had found that there were "inefficiencies that exist within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility." (*Id.* at 6.)

CHILD PORNOGRAPHY: VULNERABLE VICTIM AND PEER-TO-PEER FILE-SHARING SOFTWARE

The Commission resolved a circuit split between the Fifth and Ninth Circuits and the Fourth Circuit regarding whether, in cases applying the two-level enhancement for depictions of sadistic or masochistic conduct, the two-level vulnerable victim enhancement also could be applied. Additionally, the Commission resolved a circuit split regarding whether an enhancement for distribution requires a finding that the defendant knowingly used peer-to-peer file-sharing software during the offense of conviction.

The vulnerable victim enhancement now includes an age-related component. In *United States v. Jenkins*, 712 F.3d 209, 214 (5th Cir. 2013), and *United States v. Wright*, 373 F.3d 935, 943 (9th Cir. 2004), the Fifth and Ninth Circuits held it is permissible to apply both the two-level enhancement for portrayals of sadistic or masochistic conduct (USSG §§ 2G2.1(b)(4), 2G2.2(b)(4)) and the two-level vulnerable victim enhancement (USSG § 3A1.1(b)(1)), which applies where a victim "is unusually vulnerable due to age." These circuits reasoned that certain graphic depictions of the extremely young, i.e., infants and toddlers, constituted sadistic content per se. Furthermore, due to the victims' extreme youth, they necessarily were especially vulnerable. Accordingly, both enhancements could be applied simultaneously inasmuch as they arguably captured distinct facets of harm.

The Fourth Circuit disagreed and held that if the sadistic or masochistic enhancement applies, then the vulnerable victim enhancement cannot. (*See* United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014).) The Fourth Circuit reasoned that if the extreme youth of a victim is a consideration for applying the sadistic or masochistic enhancement, then age cannot also serve as a basis for application of the vulnerable victim enhancement. (*Id.*)

The Commission resolved the split by amending the sadistic or masochistic enhancement to expressly include an "infant or toddler" provision. Thus, the enhancements at sections 2G2.1(b)(4) and 2G2.2(b)(4) now read: "If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) *an infant or toddler*, increase by 4 levels" (emphasis added). Furthermore, a new application note 4 for both guidelines now expressly provides: "If subsection (b)(4)(B) applies, do not apply § 3A1.1(b)." In other words, the Commission resolved in favor of the Fourth Circuit's reading, effectively overruling the contrary holdings in the Fifth and Ninth Circuits. To be sure, the other age-related enhancements still apply. (*See* USSG § 2G2.1(b)(1) (adding four levels if victim under age 12, two years if between ages 12 and 16); USSG § 2G2.2(b)(2) (adding two levels if victim under age 12).

Distribution now requires knowing engagement. Motivating this amendment was the Commission's finding that "[t]he circuits have reached different conclusions regarding the mental state required for application of the 2-level enhancement for 'generic' distribution as compared to the 5-level enhancement for distribution not for pecuniary gain. The circuit conflicts involving these two enhancements have arisen frequently, although not exclusively, in cases involving the use of peer-to-peer file-sharing programs or networks." (2016 AMENDMENTS, *supra*, at 14.) And such peer-to-peer file-sharing programs or networks are not as uniform in their operation as one might think.

According to the Commission, "[t]he Fifth, Tenth, and Eleventh Circuits have held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether the defendant did so purposefully, knowingly, or negligently." (*Id.* at 15 (citing United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015)).)

In contrast, "[t]he Second, Fourth, and Seventh Circuits have held that the 2-level distribution enhancement requires a showing that the defendant knew of the file-sharing properties of the program." (*Id.* (citing United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013)).)

The Commission adopted the approach of the Second, Fourth, and Seventh Circuits so that now, in order for the distribution enhancement to apply, there must be a showing that "the defendant knowingly engaged in distribution." (*Id.*) The distribution enhancements at USSG sections 2G2.1(b)(3) and 2G2.2(b)(3)(F) now require that the defendant "*knowingly engaged* in distribution" (emphasis added).

While the Commission did not address it in its reasons for the amendments, this resolution in favor of knowing engagement also is consistent with the manner in which peer-to-peer software platforms operate—all are not equal and their actual operation sometimes can be overlooked even by experts. For example, in *United States v. Vallejos*, 742 F.3d 902, 908 (9th Cir. 2014), the Ninth Circuit held that "the knowing use of a file-sharing program to download child pornography involves not merely the receipt of illicit material, but also the reciprocal distribution of it." Accordingly "a two-level distribution enhancement under U.S.S.G. § 2G2.2(b)(3)(F) [is warranted where a defendant] used a file-sharing program to download child pornography that, *whether knowingly or unknowingly*, allowed others access to those files." (*Id.* (emphasis added).) In *Vallejos*, the relevant file-sharing program was LimeWire, which is materially different in its operation than, say, BitTorrent, another popular file-sharing platform.

BitTorrent, however and unlike LimeWire, does *not* distribute files, but rather only file segments, and only simultaneously with the actual download. As one district court judge has observed:

> Mere possession of child pornography on a computer on which a P2P [peer-to-peer] application has been installed, or even using a P2P application to download child pornography, is not enough. Although a defendant may have used a P2P application to download the pornographic files, it does not always follow that he made those files available for upload to other users.
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> Indeed, not all P2P applications operate in the same fashion. Some applications, for instance, LimeWire, allow users to select not only what folders they want to make available for uploading, but also permit users to restrict the universe of files they are willing to make available for upload to certain types of file extensions (e.g., a user can share the folder "Pics," but only allow harmless .GIF and .JPG image files to be uploaded from the folder—not movie files involving child pornography which have different extensions such as .MOV or .AVI that happen to also be stored in the same folder). . . . Other P2P applications, such as . . . BitTorrent, actually begin uploading a file as soon as a user starts downloading it from someone else—even before the download is complete. In short, the specific type of P2P application installed on a defendant's computer, and what settings are in place within that P2P application, are critical to the determination of whether a defendant's Guideline sentence should be enhanced pursuant to § 2G2.2(b)(3)(F).

(United States v. Handy, No. 6:08-cr-180-Orl-31DAB, 2009 U.S. Dist. LEXIS 6471, at *5–8 (M.D. Fla. Jan. 21, 2009) (emphasis added) (footnote omitted) (citations omitted).)

Thus, not only does the amendment resolve a circuit split, but it also serendipitously resolves an epistemic problem that otherwise has not been fully addressed by the circuits, namely, the many different and complicated ways in which peer-to-peer file-sharing software functions—which often is above the ken not only of laypersons, but experts too.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE

Finally, following up on its multiyear review of probation and supervised release, and in light of successful legal challenges to various standard terms of probation and supervised release that "are vaguely worded, pose constitutional concerns, or have been categorized as 'standard' conditions in a manner that has led to their improper imposition upon particular offenders," the Commission made several substantive changes to the standard conditions and "special" conditions of probation (USSG § 5B1.3) and supervised release (USSG § 5D1.3). (*See* 2016 Amendments, *supra,* at 43.)

Some of the more pertinent changes are as follows:

The condition to remain in the judicial district now carries a scienter requirement and reads: "The defendant shall not *knowingly* leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer." (2016 Amendments, *supra*, at 35, 40 (revised USSG §§ 5B1.3(c)(3), 5D1.3(c)(3) (emphasis added)).) The Commission found that this condition in its current iteration could be unfairly applied to defendants who unknowingly move between districts. (*See id.* at 44–45.)

The condition that defendants "answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer" is split into separate requirements to answer truthfully and follow instructions. (*Id.* at 35–36, 40–41 (revised USSG §§ 5B1.3(c)(4), (13); 5D1.3(c)(4), (13)).) Most pertinently, however, the Commission now has added commentary that if the defendant exercises his or her Fifth Amendment right to remain silent when questioned by a probation officer, that exercising of his or her constitutional right to remain silent cannot be said to be a violation of the condition to answer truthfully. (*See id.* at 37, 42.) These changes addressed such concerns set forth in *United States v. Kappes*, 782 F.3d 828, 848 (7th Cir. 2015), and *United States v. Saechao*, 418 F.3d 1073, 1081 (9th Cir. 2005).

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ETHICS...

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returned them. (*Id.*) The Indiana Supreme Court found that the prosecutors' actions interfered with the defendant's right to communicate freely with counsel and violated Indiana's Rule 4.4, as well as Indiana's version of Rule 8.4(d), engaging in conduct that is prejudicial to the administration of action. For these violations, and for trying to conceal their behavior, the prosecuting attorney received a six-month suspension from the practice of law, and the deputy prosecuting attorney received a two-month suspension.

Another possible remedy for obtaining information protected by attorney-client privilege, work product, and confidentiality.is disqualification. Courts have relied on violations of state versions of Model Rule 4.4(a) to disqualify a lawyer. (*See*, Maldonado v. New Jersey, 225 F.R.D. 120 (D.N.J. 2004).) Once a prosecutor has knowledge of confidential communications between a defendant and his or her defense lawyer, disqualification may be a suitable remedy to ensure that the confidential information will not be used against the defendant in either pretrial negotiations or at trial.

CONCLUSION

Recent cases involving the monitoring of attorney-client communications or work product raise ethical red flags for lawyers advising prisons and jails, as well as for prosecutors who come into possession of such material. Lawyers advising prisons and jails should ensure that attorney-client communications are protected and that there is no secret recording. Prosecutors coming into possession of such material should not review it and should, at least, alert the defense. Such corrective action is consistent with protecting the defendant's right to counsel guaranteed under the Sixth Amendment and applicable ethics rules.■

FEDERAL SENTENCING...

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Defendants on probation or supervised release must now work at least 30 hours a week, give 10 days' notice before moving or changing employment (or if not possible within 72 hours of the change), and allow probation officers, during location visits, to confiscate any items "prohibited by the defendant's terms of release." (2016 Amendments, *supra*, at 35, 40, 45 (revised USSG §§ 5B1.3(c)(6), (7); 5D1.3(c)(6), (7)).)

Finally, the Commission clarified conditions relating to a probation officer's duty to "notify others of risks the defendant may pose based on his or her personal history or characteristics" (*id.* at 36, 41, 47 (revised USSG §§ 5B1.3(c)(12); 5D1.3(c)(12)), and made clarifications and amendments to the now special condition regarding support of dependents in light of concerns over clarity raised by the Seventh Circuit in *Kappes*, 782 F.3d at 849, and *United States v. Thompson*, 777 F.3d 368, 379–80 (7th Cir. 2015) (2016 Amendments, *supra*, at 36–37, 42, 47 (revised USSG §§ 5B1.3(d)(1); 5D1.3(d)(1)).

CONCLUSION

The Commission is to be applauded for its continued, progressive approach to the sentencing guidelines. The Commission's express encouragement of the Bureau of Prisons to move more often for compassionate release is most welcomed, as are the steps to clarify the standard conditions of probation and supervised release. Most importantly, the trend toward including scienter requirements in the guidelines to more accurately account for the culpability of the defendant as opposed to simply assessing the serious of the offense (often at the expense of measures of culpability) signals a more balanced and indeed fair approach toward sentencing. The authors hope this trend continues.■