How Zero-Point Offender Change Will Work Prospectively

By **Alan Ellis, Mark Allenbaugh and Doug Passon** (October 5, 2023)

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On April 27, the U.S. Sentencing Commission promulgated a series of important amendments to the U.S. sentencing guidelines that will go into effect on Nov. 1, unless Congress vetoes the amendments — a highly improbable occurrence.

One of those amendments is the focus of this two-part article: the so-called zero-point offender amendment, which will appear in Section 4C1.1 of the U.S. sentencing guidelines.

On Aug. 24, along with another amendment pertaining to the scoring of criminal history, the commission voted to make the zero-point offender amendment retroactive.

Part 1 of this article reviews how the zero-point offender amendment works prospectively. Part 2 will address how it applies retroactively, and points out some issues for further advocacy.

The zero-point offender amendment reduces a qualifying defendant's total offense level by two offense levels. As the name implies, the defendant must have zero criminal history points.

A defendant generally receives criminal history points for prior criminal conduct, depending on its severity, unless it occurred too far in the past. Thus, it is possible for a defendant to have zero criminal history points while also having a criminal history.

So, eligibility under the amendment does not require that the defendant have zero criminal history, i.e., that they be a literal first-time offender, but simply that if the defendant does have any criminal history, it is not scorable, i.e., they did not receive any criminal history points for such conduct under the guidelines.

To be sure, merely having zero criminal history points is not sufficient. The amendment requires that the defendant meet nine additional criteria:

> (2) the defendant did not receive [a terrorism] adjustment;
>
> (3) the defendant did not use violence or credible threats of violence in connection with the offense;
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> (4) the offense did not result in death or serious bodily injury;
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> (5) the instant offense of conviction is not a sex offense;
>
> (6) the defendant did not personally cause substantial financial hardship;
>
> (7) the defendant did not possess, receive, ... or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with

> the offense;
>
> (8) the instant offense of conviction [was not for violating civil rights];
>
> (9) the defendant did not receive an adjustment under [the hate crime or serious human rights offense guidelines]; and
>
> (10) the defendant did not receive an [aggravating role] adjustment ... and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848.[1]

The last criterion likely will be the subject of significant litigation. On its face, it would appear to preclude any otherwise eligible defendant from receiving the zero-point offender adjustment simply if the defendant had received a role adjustment for being an organizer, leader, manager or supervisor in a criminal conspiracy. We believe this is too narrow of a reading, as it ignores the continuing criminal enterprise prong.

The commission took the language in Criterion 10 of the amendment nearly verbatim from a criterion for receiving the so-called safety valve at Title 18 of the U.S. Code, Section 3553(f)(4), which states that "the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise."

The safety valve was created by Congress to allow judges to sentence certain low-level defendants below an otherwise applicable mandatory minimum. Section 3553(f)(4) was meant to preclude defendants who were at least supervisors in a criminal drug conspiracy from receiving the safety valve, hence the reference to a continuing criminal enterprise.

Thus, this last criterion for the zero-point offender adjustment should only preclude supervisors and up within criminal drug conspiracies from receiving the zero-point offender adjustment, and not, for example, a supervisor of a wire fraud conspiracy.

Perhaps most notably, the commission added a new application note for the amendment to Section 5C1.1 of the U.S. sentencing guidelines, something it has never added to any prior amendment in its history. Now, if a defendant receives the zero-point offender adjustment, "and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment ... is generally appropriate."

For example, assume a defendant's total offense level is 13 and their criminal history category is I. This results in an advisory sentencing range of 12-18 months in Zone C prior to the application of the zero-point offender adjustment. Applying the adjustment in this case would reduce the defendant's total offense level to 11, with a resulting advisory sentencing range of 8-14 months in Zone B.

While a sentencing range in either Zone A or B already allows a court to impose a noncustodial sentence without departing from the guidelines, the commission now affirmatively encourages courts to impose a noncustodial sentence in such situations.

Additionally, the new application note to Section 5C1.1 states:

> A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable

guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense.[2]

This situation will likely occur most often in the case of economic offenses — for example, when a defendant with no scorable criminal history pleads guilty to having committed wire fraud that resulted in $2 million of loss to the victims. In such a situation, the total offense level will be at least 20, which entails an advisory sentencing range of 33-41 months.

At sentencing, the court would determine that the defendant is eligible for the zero-point offender adjustment, thereby reducing the total offense level to 18, which corresponds to a sentencing range of 27-33 months.

As is often the case in such high-loss fraud cases, the court decides to depart downward because the loss amount substantially overstates the seriousness of the offense. But generally, such departures are not down to a noncustodial sentence.

Now, the fact that the defendant was eligible for the zero-point offender adjustment can be argued as an additional ground for a departure to a noncustodial sentence.

Conclusion

We encourage counsel to actively advocate for the application of the new zero-point offender amendment, and especially to advocate for noncustodial sentences per the new application note to Section 5C1.1.

Those with zero criminal history points, after all, have been shown by the commission to present the lowest risk of recidivism, and those qualifying for the adjustment necessarily did not commit a violent offense or sex offense.

The zero-point offender amendment, and the grounds for a sentence other than imprisonment, are important steps by the commission toward necessary and long-neglected efforts at decarceration. We hope that counsel nationwide work to take advantage of this new tool provided by the commission toward that end.

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[1] USSG §4C1.1(a)(1-10).

[2] USSG §5C1.1, comment. (n.10(B)).