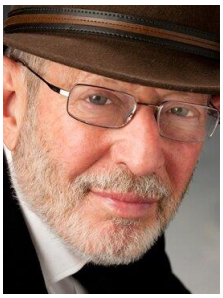
How Zero-Point Offender Change Should Work Retroactively

By **Alan Ellis, Mark Allenbaugh and Doug Passon** (October 6, 2023)



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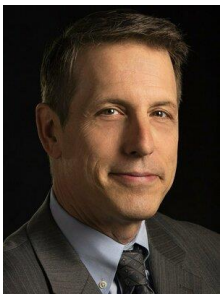

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Part one of this two-part article focused on the mechanics of the new zero-point offender amendment that will appear in Section 4C1.1 of the U.S. sentencing guidelines and is set to go into effect on Nov. 1.

As we noted in part one, the commission voted on Aug. 24 to make the zero-point offender amendment retroactive, but with an effective date of Feb. 1, 2024. That means any reduction as a result of the retroactive application of the amendment cannot take effect until then.

This article — part two in the series — examines how the zero-point offender amendment applies retroactively and points out some important issues for further advocacy.

In particular, we argue that in light of a new ground for a departure down to "a sentence other than a sentence of imprisonment" for those qualifying for the zero-point offender adjustment, the same is available for courts to consider when applying the adjustment retroactively.

Because courts may not impose a sentence other than imprisonment on someone who already is serving time, we argue that this new ground for a departure permits courts to impose a time-served sentence on retroactive application of the zero-point offender adjustment.

The guidelines state that when applying any guideline's amendment retroactively, "the court shall not reduce the defendant's term of imprisonment ... to a term that is less than the minimum of the amended guideline range."[1]

Courts and prosecutors may be quick to presume that new amendments limit reductions by two levels, or that they don't apply at all if a defendant received a sentence below the guidelines.

A closer look at the guidelines, however, reveals that if a defendant previously received a downward departure or variance below the original range, the defendant may still qualify for a retroactive adjustment, provided the original sentence is not below the new amended guideline range.

The guidelines use the following example of how to apply an amendment retroactively subject to this limit:

> [I]n a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months. ... [I]f the term of imprisonment

> imposed ... was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.[2]

As discussed in part one, the commission added a new note for the zero-point offender amendment to Section 5C1.1 of the guidelines. According to the commission, 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."

This then raises the question of what constitutes "the minimum of the amended guideline range" for purposes of retroactive application.[3]

For example, assume a defendant's original sentencing range is 12-18 months in Zone C. The defendant receives a 10-month sentence. Assume also that applying the zero-point offender adjustment reduces the defendant's advisory sentencing range to eight to 14 months, which is in Zone B.

In this situation, is the court limited to reducing the defendant's sentence to no lower than eight months?

As we discussed in part one, a court may impose a sentence other than a sentence of imprisonment in this circumstance, i.e., the court could sentence an individual whose sentencing range is in Zones A or B to probation in the first instance. But what about in the case where retroactive application moves a Zone C sentence into Zone B?

As a sentencing range falling within either Zones A or B already allows a court to impose a noncustodial sentence without departing from the guidelines, we believe in this situation that the minimum of the amended range is zero, i.e., a noncustodial sentence.

So, either prospectively or retroactively, a court is not limited to the minimum of the amended guideline range as set forth in the sentencing table should the amended range fall within either Zones A or B.

Thus, our example defendant who originally received a 10-month sentence would now be eligible for a noncustodial sentence, assuming they had yet to serve any time. If they are serving time — a far more likely occurrence — then they are eligible for a time-served sentence.

While those falling within Zone A or B of the guidelines are primed for a noncustodial sentence, the bigger question is whether those with greater sentences might still be entitled to a bigger zero-point offender adjustment payoff. The answer is, in our opinion, definitively yes.

As we also discussed in part one, the commission states in the new application note to Section 5C1.1 of the guidelines:

> 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.[4]

This unprecedented ground for a departure has potentially massive implications with respect to its prospective application. The commission here is encouraging courts to consider noncustodial sentences for those receiving the zero-point offender adjustment, regardless of the defendant's applicable guideline range, if the applicable guideline range "overstates the gravity of the offense," and the offense is nonviolent and not otherwise serious.[5]

As the commission notes in its reason for the amendment,

> [t]he changes to the Commentary to §5C1.1 respond to Congress's directive to the Commission at 28 U.S.C. § 994(j), directing the Commission to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.[6]

This amendment is undoubtedly in response to the commission's observation that "[d]espite the array of sentencing options available to sentencing courts, there have been decreases during the past ten years in both the proportion of offenders eligible for such sentences, as well as in the proportion of such sentences imposed for those eligible."[7]

The question then becomes whether this ground for a downward departure can be applied retroactively. We think not only that it can, but that it should.

It can because the guidelines themselves state that when applying an amendment retroactively, "the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines ... had been in effect at the time the defendant was sentenced."[8]

Moreover, "the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a 'cohesive and integrated whole' rather than in a piecemeal fashion."[9]

Therefore, as this amendment contains a new departure provision, it must be considered if the amendment is to be applied as if it had been in effect at the time the defendant was sentenced.

Moreover, as the U.S. Supreme Court held in its 2008 Irizarry v. U.S. decision, while "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences," departures — as opposed to variances — are nonetheless "imposed under the framework set out in the Guidelines."[10]

The guidelines specify the steps a court is to apply to "determine the kinds of sentence and the guideline range."[11] One of those steps is to consider the grounds for departure set forth in Parts H and K of Chapter Five.[12]

Thus, a departure simply is the last step of the guidelines framework for determining the ultimate guideline range. This is often exemplified when courts depart downward by a specified number of offenses levels to determine the ultimate guideline range.[13]

Accordingly, as the guidelines are to be applied cohesively and as an integrated whole, and a departure results in an amended range, the new ground for a departure to a sentence other than imprisonment constitutes the minimum of the amended range, at least where a sentencing court is so inclined to depart.

To be sure, consistent with the intent of both Congress and the commission, courts should exercise their discretion to depart in cases involving first time, nonviolent offenders whose offense conduct was not otherwise serious.

If the defendant already is incarcerated, such a departure could result in a time-served sentence.

Not only can the new ground for a departure for those receiving the zero-point offender adjustment result in a time-served sentence, but it should always be considered.

It should at least be considered in every retroactive application in order to prevent unwarranted sentencing disparities.[14] To only consider the new ground for a departure prospectively will necessarily result in significant sentencing disparities between similarly situated defendants. But avoiding unwarranted sentencing disparities is perhaps the ultimate principle integrating the entire purpose of the guidelines.

Conclusion

We encourage counsel to actively advocate for both retroactive and prospective application of the zero-point offender adjustment, especially where retroactive application could result in significantly shortening the sentence of a defendant who is incarcerated.[15]

As we noted in part one, those with zero criminal history points have been empirically shown by the commission to present the lowest risk of recidivism. To even qualify for the amendment weeds out not only recidivists, but generally dangerous offenders.

As we also previously stated in part one, this is an important step by the commission toward decarceration that long has been needed.

We hope these articles educate and prompt counsel to work diligently to utilize the new zero-point offender amendment toward that end.

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[1] USSG §1B1.10(b)(2).

[2] USSG §1B1.1, comment. (n.3).

[3] USSG §4C1.1, comment. (n.10(A)).

[4] USSG §4C1.1, comment. (n.10(B)).

[5] Unfortunately, the Commission does not define "gravity of the offense" or what would constitute "an otherwise serious offense."

[6] U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, 80, Apr. 27, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

[7] U.S. Sentencing Comm'n, Alternative Sentencing in the Federal Criminal Justice System, 20, May 2015, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

[8] USSG §1B1.10(b)(1).

[9] USSG §1B1.11, comment. (backg'd) (quoting United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990)).

[10] Irizarry v. United States, 553 U.S. 708, 714 (2008).

[11] USSG §1B1.1(a).

[12] USSG §1B1.1(b).

[13] See, e.g., Koon v. United States, 518 U.S. 81, 113 (1996) (affirming district court's "five-level departure" for "susceptibility to prison abuse" and "three-level departure" for "the burdens of successive prosecutions"); United States v. Green, 946 F.3d 433, 442 (8th Cir. 2019) ("we cannot say that the district court abused its discretion in departing upward three offense levels") (emphasis added); United States v. Rivera-Cruz, 904 F.3d 324, 328 (3d Cir. 2018) ("the District Court explained that its decision to express Rivera-Cruz's departure in terms of offense levels — rather than simply departing from the statutory maximum by a certain number of months — was based on this Court's precedent"); but cf. United States v. Smith, No. 22-5559, 2023 U.S. App. LEXIS 18859, *4, 2023 FED App. 0339N (6th Cir. July 23, 2023) ("It is unsettled whether granting a downward-departure motion results in a below-Guidelines sentence or creates a new Guidelines range.") (Citations omitted).

[14] See Alan Ellis and Mark H. Allenbaugh, Unwarranted Disparity: Effectively Using Statistics in Federal Sentencing, 101 Crim. L. Rptr 71 (2017).

[15] For a particularly informative podcast on the retroactive application of the ZPO, see Doug Passon, Goin' RETRO: Retroactive Application of ZPO and Status Point Amendments, Sept. 13, 2023, https://setforsentencing.com/podcast/goin-retro-retroactive-application-of-zpo-and-status-point-amendments/.