

SENTENCING GUIDELINES UPDATE

GREGORY S. PARK
ASSISTANT FEDERAL PUBLIC DEFENDER
1200 JEFFERSON AVENUE, SUITE 100
OXFORD, MISSISSIPPI 38655
(662) 236-2889

Amendments Address:

- Compassionate Release
- Animal Fighting
- Child Pornography Circuit Conflicts
- Immigration
- Conditions of Probation and Supervised Release
- Miscellaneous

COMPASSIONATE RELEASE

U.S.S.G. § 1B1.13

Pre – 2016 Compassionate Release Video

Compassionate Release

- Broadens Certain Eligibility Criteria
- Encourages BOP Directors to File Motions
- “Extraordinary and Compelling Reasons”
 1. Medical Condition of the Defendant
 2. Age of the Defendant
 3. Family Circumstances
 4. “Other Reasons”

Medical Condition of the Defendant

Two Prongs –

One for defendants with a “terminal illness” and one for defendants with a “debilitating condition.”

Terminal Illness – “a serious and advanced illness with an end of life trajectory” and the amendment explicitly states that a “specific prognosis of life expectancy (i.e. a probability of death within a specific time period) is not required.”

Medical Condition of the Defendant

Non-Exhaustive Examples of Terminal Illnesses in
U.S.S.G. 1B§1.13:

Metastatic Solid-Tumor Cancer

Amyotrophic Lateral Sclerosis (ALS)

End-Stage Organ Disease

Advanced Dementia

Medical Condition of the Defendant

Debilitating Condition – Three Broad Criteria

1. Suffering from a Serious Condition
2. Suffering from a Serious Functional or Cognitive Impairment
3. Experiencing Deteriorating Health Because of the Aging Process (the condition must “substantially diminish” the defendant’s ability to provide self-care within a BOP facility, and he or she must not be expected to recover)

Age of the Defendant

1. Defendant must be at least 65 years old (was 70, but the Commission's recidivism research shows that inmates 65 and older have an extremely low rate of recidivism (13.3%) as compared to other groups)
2. Experiencing a serious deterioration in health because of the aging process
3. Has served "at least 10 years" or "75 percent of his or her term of imprisonment (whichever is less)

Family Circumstances

1. Applies to the death or incapacitation of the caregiver of the defendant's minor child, or
2. The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver.

“Other Reasons” and Foreseeability

1. There can be other cases, either alone or in combination with the factors listed in the Guideline, which represent “extraordinary and compelling reasons” warranting release.
2. The “extraordinary and compelling reasons” need not be unforeseen at the time of sentencing.

ANIMAL FIGHTING

U.S.S.G. § 2E3.1



Animal Fighting

1. Base Offense Level for an Animal Fighting Venture Increased from 10 to 16.
2. Base Offense Level for causing a person under 16 to attend is raised to a 10.
3. Finally, Base Offense Level of 6 for the new Class A misdemeanor of attending an animal fighting venture.

Animal Fighting

An upward departure is recommended if the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as prolonged suffering), or if the offense involved animal fighting on an exceptional scale (such as a large number of animals).

CHILD PORNOGRAPHY

U.S.S.G. §§ 2G2.1 and 2.2

Addressing Circuit Splits in Two Areas

§2G2.1. Production of Sexually Explicit Material

(b)(1) - If the offense involved a minor who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.

(b)(4) - If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

§2G2.2. Possessing Material Involving the Sexual Exploitation of a Minor

(b)(2) - If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(b)(4) - If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

Circuit Split # 1

Circuits have split on whether a defendant receiving an age enhancement may also receive a vulnerable victim adjustment at U.S.S.G. § 3A1.1. “Vulnerable victim” is defined in the commentary as a victim “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” The commentary also states that this adjustment does not apply if that factor (such as age) is incorporated into the offense guideline “unless the victim was unusually vulnerable for reasons unrelated to age.”

Circuit Split

The Fifth and Ninth Circuits have held that it is permissible to apply both enhancements in cases involving infants and toddlers because their level of vulnerability is not fully incorporated into the offense guidelines.

Both circuits reasoned that although the victim's small physical size and extreme vulnerability tend to correlate with age, such characteristics *are not the same as compared to most children under the age of 12*. U.S. v. Jenkins, 712 F.3d 209 (5th Cir. 2013)

U.S.S.C. Resolution of Circuit Split

Revised §2G2.1 (production) by adding a 4-level increase if the offense involved material portraying “sadistic or masochistic” conduct or other depictions of violence, or if an infant or toddler.

Revised §2G2.2 (possession) by adding a 4-level increase if the offense involved material portraying “sadistic or masochistic” conduct or other depictions of violence, or the sexual abuse or exploitation of an infant or toddler.

OLD VERSION - §2G2.1. Production of Sexually Explicit Material

(b)(1) - If the offense involved a minor who had (A) **not attained the age of twelve years, increase by 4 levels**; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.

(b)(4) - If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

NEW VERSION - §2G2.1

(b)(1) - If the offense involved a minor who had (A) **not attained the age of twelve years, increase by 4 levels**; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.

(b)(4) - 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.

OLD VERSION - §2G2.2. Possession

(b)(2) - If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(b)(4) - If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

NEW VERSION - §2G2.2

(b)(2) - If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(b)(4) - If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence, **or (B) sexual abuse or exploitation of an infant or toddler**, increase by **4** levels.

Circuit Split # 2

§2G2.2(b)(3) provides increases for the distribution of child pornography ranging from 2 to 7 levels depending on certain factors.

Circuits have split over the required mental state for the 2-level increase for “generic” distribution as compared to the 5-level increase for distribution not for pecuniary gain.

The circuit conflicts generally involve the use of peer-to-peer file-sharing programs or networks.

Circuit Split # 2

The Fifth, Tenth, and Eleventh Circuits have held that the 2-level increase for distribution applies if a file-sharing program is used, regardless of whether the defendant did so purposefully, knowingly, or negligently. U.S. v. Baker, 742 F.3d 618, 621 (5th Cir. 2014).

The Second, Fourth, and Seventh Circuits have held that there must be a showing that the defendant knew of the file-sharing properties of the program.

The Eighth Circuit held that knowledge is required, but can be inferred absent “concrete evidence” of ignorance.

The Sixth Circuit held that there is a presumption that users understand that others can access their files, but the presumption can be overcome.

The new Amendment provides for a 2-level increase if the defendant “**knowingly engaged in distribution**,” adopting the approach of the Second, Fourth, and Seventh Circuits.

Circuit Split # 2

The 5-level Increase for Distribution Not for Pecuniary Gain

Courts generally agree that the mere use of a file-sharing program, without more, is insufficient for the 5-level distribution enhancement.

The Fifth Circuit has indicated that when a defendant knowingly uses file-sharing software, the requirements for the 5-level enhancement are generally satisfied. U.S. v. Groce, 784 F.3d 291, 294 (5th Cir. 2015).

The new Amendment clarifies that the 5-level enhancement applies “if the defendant distributed in exchange for any valuable consideration,” which means “the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.”

IMMIGRATION

U.S.S.G. §§ 2L2.1 and 1.2

Smuggling Unaccompanied Minors

Old Version – 2-level increase if the defendant smuggled “a minor who was unaccompanied by the minor’s parent or grandparent.”

New Version – the enhancement is increased to 4 levels.

The term “unaccompanied minor” is revised, and now applies only if the minor was not accompanied by a “parent, adult relative, or legal guardian.”

Finally, the definition of a “minor” is increased to the age of 18 rather than the current age of 16.

ILLEGAL RE-ENTRY

Old Version – involved the definition of “crimes of violence,” which has led to an abundance of litigation and is affected by the *Johnson* decision in 2015.

New Version – adopts a much simpler approach based upon the length of the sentence imposed in a prior conviction rather than the type of offense.

Also, only convictions that receive criminal history points are counted.

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

CONDITIONS OF PROBATION
and SUPERVISED RELEASE
U.S.S.G. §§ 5B1.3 and 5D1.3

Applicable Standard for Conditions

Conditions must be reasonably related to statutory sentencing factors contained in 18 U.S.C. § 3553(a), so long as those conditions “involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in 3553(a)(2).”

There have been challenges throughout the circuits on the basis that certain conditions are vaguely worded, involve constitutional concerns, or have been listed as “standard” conditions improperly on certain offenders.

The amendments attempt to revise, clarify, and rearrange conditions order to make them easier for defendants to understand and probation officers to enforce.

FIREARMS and DANGEROUS WEAPONS

Old condition – a “special” condition that the defendant not possess a firearm or other dangerous weapon.

New condition – a “standard” condition that the defendant must not “own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon.”

The amendment defines “dangerous weapon” as “anything that was designed for the purpose of causing bodily injury or death to another person, *such as nunchakus or tasers.*”

SUPPORT OF DEPENDENTS

Old condition – a “standard” condition that the defendant support “his or her dependents and meet other family responsibilities.”

New condition – a “special” condition that the defendant must support their dependents, and if “ordered to make child support payments, he or she must make the payments and *comply with the other terms of the order.*”

ALCOHOL AND CONTROLLED SUBSTANCES

Old condition – a “standard” condition that the defendant “refrain from excessive use of alcohol, not possess or distribute controlled substances or paraphernalia, and not frequent places where controlled substances are illegally sold” has been deleted.

New condition – the Commission determined that these conditions are either best dealt with as special conditions or are redundant with other conditions. For example, if a defendant has alcohol abuse problems, a new special condition would be that the defendant “must not use or possess alcohol.” Abstaining from the illegal use of drugs is covered by the “mandatory” conditions prohibiting the commission of additional crimes and requiring substance abuse treatment.

MISCELLANEOUS

FIREARMS AS NON-MAILABLE ITEMS

18 U.S.C. § 1715

The statute makes it unlawful to deposit for mailing or delivery pistols, revolvers, and other firearms capable of being concealed on the person.

Statutory maximum term of imprisonment is two years.

U.S.S.G. § 2K2.1(a)(8) now lists this statute specifically and provides a base offense level of 6.

THANK YOU FOR ATTENDING.

**FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN and SOUTHERN DISTRICTS OF MISSISSIPPI**

