

NAAUSA Testifies on Proposed 2024 Amendments to Federal Sentencing Guidelines

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The U.S. Sentencing Commission has proposed a variety of amendments to the federal sentencing guidelines. The proposed changes impact seven areas: (1) rules for calculating loss, (2) youthful offenders, (3) acquitted conduct, (4) circuit conflicts, (5) miscellaneous, (6) technical amendments, and (7) simplification of the three-step process. NAAUSA provided written testimony on several of these areas, either to raise points for the Commission to consider or to express concern with the proposed changes.

Rules for Calculating Losses

First, the Commission proposed moving some general rules related to loss from the guideline's commentary to the guidelines itself. In recent year, the Supreme Court has limited the amount of deference it affords to agency interpretation of regulations to situations in which the regulation is "genuinely ambiguous." *Kisor v. Wilke*, 139 S. Ct. 2400, 2415 (2019). Applying this, the Third Circuit recently held that rules outlined in the commentary related to theft, property destruction, and fraud were not entitled to deference.

The Third Circuit is the only appellate court to reach this conclusion, however, the Commission noted that lower courts in the circuit now compute loss calculations differently than in other circuits.

To increase consistency across the circuits, the Commission is moving the commentary into an official regulation. NAAUSA appreciates the Commission for acknowledging the ongoing debate regarding the amount of deference afforded to various guideline commentary provisions. Due to this, the Commission's effort to move general rules from the commentary to the guidelines makes sense.

Youthful Offenders

Next, the Commission proposed a two-part amendment to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score; and an amendment to address unique sentencing considerations relating to youthful individuals.

NAAUSA opposed the first part of this amendment. In our view, the existing guidelines for counting convictions for offenders sustained before the age of 18 strike the proper balance.

Prior criminal conduct continues to be a major predictor of future recidivism. The Commission has found that "younger offenders were more likely to be rearrested than older offenders, were rearrested faster than older offenders, and committed more serious offenses after they were released than older offenders." Indeed, the Commission's research shows that the "younger than 30 age group" had the highest rearrest rate at 64.8%. Given this, it is important that the criminal convictions by younger offenders, including those juvenile convictions currently

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counted under the Guidelines, are factored into the criminal history calculation.

Additionally, after decades of decline, juvenile crime is on the rise across the nation. Homicides committed by juveniles acting alone rose 30% in 2020 from 2019 while those committed by multiple juveniles increased 66%. The impact is most acute in cities. For example, New York City reported 124 juveniles committed shootings in 2022, more than double the number from 2020. Similarly in Washington D.C. there were 214 firearm-related arrests of minors in 2022, a higher count than each of the prior three years, and in Philadelphia there were 117, up from only 43 in 2019.

These numbers represent a startling trend that can only be solved with community intervention before a crime is committed, not leniency after a crime is committed, particularly when many victims are youths themselves.

The Guidelines currently allow for judges to consider factors to allow for a downward departure—such as if the criminal history category substantially overrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will reoffend. This scheme provides the correct balance between the need for justice, punishment, judicial discretion and protection of public safety.

Acquitted Conduct

For the second time, the Commission proposed an amendment to restrict judges’ consideration of “acquitted conduct” at sentencing.

Currently, a judge may consider conduct proved by a preponderance of evidence when determining an appropriate sentence for a convicted individual. Judicial discretion to consider “acquitted conduct” acknowledges the realities of federal prosecutions and the high burden of proof required to convict an individual. Protections are already in place to ensure individuals are not improperly connected to unrelated conduct during sentencing. Allowing some consideration of conduct an individual has either not formally admitted to as part of a guilty plea or which has been found not to be proven by a jury beyond a reasonable doubt ensures the court has a full picture of the individual’s conduct.

The proposed amendments adopt a more modest definition of “acquitted conduct” limiting it to “conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.”

The proposed amendments essentially adopt a carve out for conduct constituting an element of] a charge of which the defendant has been acquitted. This will only cause confusion in the courts, resulting in mini trials during sentencing to determine if conduct is close enough to constitute an element of a charge of which the defendant has been acquitted. Ultimately, the proposed amendment would impermissibly obstruct judges from conducting the statutorily required analysis for imposing a sentence under 18 U.S.C. § 3553(a) and constitutes a bridge to the eventual elimination of consideration of relevant conduct at sentencing.

Further, it is important to note that acquitted conduct is not synonymous with notions of actual innocence. Rather, the term refers to any conduct that was determined by the factfinder to not have been proven beyond a reasonable doubt. Judges are more than capable of appropriately exercising their discretion when deciding to consider acquitted conduct or conduct not otherwise admitted to by the defendant at sentencing. Indeed, the law requires that such conduct be proven at sentencing by a preponderance of the evidence to even be considered. This burden of proof ensures the defendant is not held responsible for conduct based on insufficient evidence, while at the same time enabling the court to understand the full scope of the defendant's criminal activity.

NAAUSA opposes this amendment because it will do nothing more than allow defendants to cherry pick those facts that reflect positively on the offender at sentencing while hamstringing the court from giving relevant conduct its due weight in calculating the offender's sentencing range.

Circuit Conflicts

The Sentencing Commission proposed two amendments related to circuit conflicts. First, the Commission proposed a change addressing circuit conflicts concerning the “altered or obliterated serial number” enhancement at §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Second, the Commission proposed an amendment addressing the interaction between subsection (c) of §3D1.2 (Groups of Closely Related Counts) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).

For the first issue, NAAUSA supported the option based on the reasoning of the Fourth, Fifth, Ninth, and Eleventh Circuits. The subsection provides an enhancement for a firearm with an “altered or obliterated serial number.” As the Fourth Circuit correctly held “a serial number that is made less legible is made different and therefore is altered for purposes of the enhancement.” *United States v. Harris*, 720 F.3d 499, 501 (4th Cir. 2013). This interpretation aligns with the common sense understanding of the term “altered.” It is not broad enough to cover incidental damage, but also is not so narrow enough to allow a defendant to avoid enhancement by merely making sure the serial is somewhat readable.

Conversely, the Second, Sixth, and Ninth Circuit add an extra-statutory requirement that the firearm's serial number be altered to the point that it is no longer legible. This undermines what is otherwise a straightforward and commonsense application of the enhancement.

On the second issue, NAAUSA did not have substantive feedback. We wrote only to note that the Seventh Circuit in *Sinclair* admitted that the usual analysis normally requires grouping. However, the court went on to find “the usual analysis is incomplete in the specific circumstances of this case.” *United States v. Sinclair*, 770 F.3d 1148, 1157 (7th Cir. 2014). The court ultimately held that “in the specific circumstances of *Sinclair*'s case, the grouping rule of § 3D1.2(c) does not apply.” Thus, the Seventh Circuit's analysis may be viewed as an outlier that does not reflect the traditional understanding of grouping as outlined in the Sixth, Eighth, and Eleventh Circuits.

Simplification of the Three Step Process

NAAUSA opposed the proposed amendment related to simplifying the three step process pending additional study and consideration. As an initial matter, it is not clear whether the Commission has the authority to enact this change. Congress has taken affirmative action to alter the court's consideration of policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence. For example, in the PROTECT Act (Public Law No: 108-21), Congress restricted a court's authority to provide downward departures at step two in child pornography cases.

The Department of Justice made clear in its [factsheet](#) celebrating the Act's passage that Congress was concerned about judges sentencing criminal defendants to less time in jail than the Sentencing Guidelines permit.

The Commission also claimed that the change was content neutral. In our view, it is not clear that this proposal is merely a content, neutral technical correction that would simplify the three step process. This proposal will likely have an effect and that effect will be a less clear and complete sentencing record.

While this may simplify a judge's process for granting departures, it also enables judge's to be vaguer at sentencing about their reason for departing from the guidelines. As a result, it will be less clear at the appellate level how sentencing decisions were made. Ultimately, this may lead to less transparency and more confusion.

We urged the Commission to conduct a study on (1) the magnitude of the proposed change, (2) the authority under which the Commission may enact the change, and (3) the change's potential impact on sentencing. Until this clarity is provided, we instructed the Commission to reject this proposal.