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Subject:

Proposed Amendments Comments

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Regarding the proposed amendment related to supervised release, and whether the guidelines should instruct judges to not ordinarily impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner, I am seeing this as applying to all 1326 cases regardless of time ordered since 18 USC 3583 says the court may impose a term of supervised release following a term of imprisonment unless it is required by statute (mandatory minimums, etc.), in which case they shall. So with 1326 cases, the imposition of TSR (or not) appears to be a discretionary option per statute, which trumps guidelines. Not imposing TSR on these unsupervisable cases may save the district personnel hours in terms of advising the court of a new arrest, new 1326 cases, etc. However, if we get a stat for these, it may be worthwhile.

As for the next amendment consideration, which would revise §2L1.2 to provide a limitation on the use of convictions under subsections (b)(1)(A) and (B) when the prior conviction is too old to score as criminal history, in which case it would result in only an 8-level increase, for the sake of disparity, this should be the case. All other predicate offense driven guidelines (e.g., Career Offender, Felon in Possession) require that the predicate offense score criminal history points before they can be considered for guideline application purposes.

The final proposed amendment for consideration, is whether the Fair Sentencing Act emergency temporary amendment (Appendix C, Amendment 748, effective November 1, 2010 for one year) should be a permanent amendment, and whether this amendment should be amended and/or applied retroactively.

I believe it should be permanent based on the very reason why it was amended (fairness) but it should not be applied retroactively as it would put districts under a heavy burden to recalculate, etc., the retroactive cases.