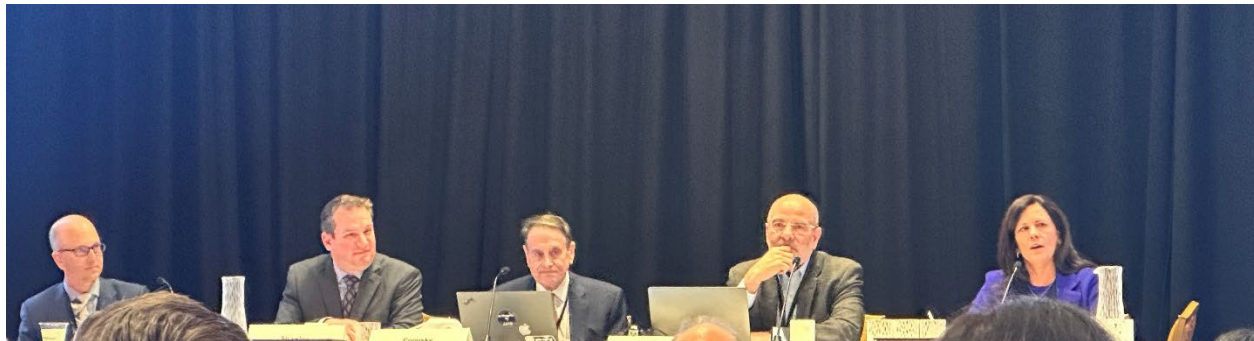


Major Sentencing Guideline Changes for Most Tax Offenders, With More on the Way: ABA Sentencing Panel

By Evan J. Davis



ABA Civil and Criminal Tax Conference 2023, Sentencing Guidelines Panel, Evan Davis and other panelists

Those who commit tax crimes are among the least likely to re-offend, as statistics from the United States Sentencing Commission – the group that drafts the Federal Sentencing Guidelines used by judges to help determine what sentence to impose – have consistently shown. Mostly well-educated, older, and without any prior criminal history, tax offenders almost always are deeply ashamed of having committed their crime and don't want to see the inside of a courtroom or, even worse, a federal prison, ever again.

The Sentencing Commission has been actively discussing lowering Guideline sentences for defendants with little or no criminal history since at least 2007. Some discussions surrounded reducing sentences for all Criminal History Category I offenders, which includes those with zero or one criminal history point. Others looked at those with no criminal history, ever, and a middle ground was to reduce sentences for those with zero criminal history points. Keep in mind, old convictions often don't count toward criminal history points, so defendants can have serious but old criminal history and still end up with no criminal history points.

There are good reasons it took years to change the Guidelines, including because there are Commission members and outside groups (including the Department of Justice primarily) that push hard against any changes that would reduce sentences. The evaluation process included comprehensive statistical analyses to determine which type of offenders pose the least risk of reoffending. Some results are as you would expect, but some are surprising, at least to me, such as that there's no evidence of specific deterrence (meaning, a lower risk of recidivism for that defendant) for sentences under 60 months, which includes the overwhelming majority of tax offenses. [Length of Incarceration and Recidivism \(ussc.gov\)](https://ussc.gov) Put another way unless a tax crime is so severe that it merits a sentence exceeding 60 months, there's no good specific deterrence basis to impose any custodial sentence. To the contrary, there's a (statistically insignificant) finding that the recidivism rate goes up for lower sentences, meaning going to prison makes it more likely that an offender will re-offend than if they had not been given a custodial sentence. It's food for thought for judges; I won't delude myself into thinking that the Department of Justice Tax Division will start seeking non-custodial sentences, as for the most part DOJ Tax cares about

general deterrence and thinks that there's a strong correlation between obtaining lengthy custodial sentences and deterring other would-be offenders. I'm not aware of any studies showing that they are right – I would think that general deterrence would stem primarily from learning someone had been convicted of a tax crime, had to pay tax, interest, and a 75% fraud penalty plus tens or hundreds of thousands in attorneys' fees. If you aren't going to be deterred by that, then a sentence of a year or two in custody probably won't make a difference either.

Back to the Guidelines. As of November 1, 2023, the Guidelines have been changed in several ways. Most of those aren't going to apply to tax offenders except in exceedingly rare cases so I won't discuss them. One unlikely but possibly relevant change is that the Commission made it harder to bump criminal history for those who have "status points," meaning those who committed the crime for which they are being sentenced, while they were on probation, supervised release, or parole. Under the old Guidelines, everyone in this situation received two criminal history points. Now, only those who otherwise would have at least seven criminal history points will receive "status points," and now only one point instead of two.

The primary change that will affect tax offenders is the addition of the "Zero Point Offenders" offense level reduction of two points for defendants whose criminal history is calculated as zero, absent one of eleven exceptions applying. The new Section 4C1.1's exceptions primarily are rare in tax cases – violent crimes, terrorism, firearm offenses, and hate crimes – but one could appear frequently: the aggravating role enhancement. DOJ Tax has even indicated that it will more aggressively argue for an aggravating role enhancement to offset the two-point reduction for Zero Point Offenders. I'm disappointed but, sadly, not surprised that DOJ Tax has adopted this approach, as DOJ Tax focuses almost exclusively on improving voluntary compliance through long sentences, and rarely agrees that a defendant deserves a below-Guideline sentence based on personal factors. Of note, the "substantial financial hardship" and "vulnerable victim" exceptions could apply in standard fraud cases, so watch out for those in non-tax cases.

I participated in a fascinating panel recently at the American Bar Association's 2023 Civil and Criminal Tax Conference. My co-panelists included James Strawley, Deputy Staff Director at the Sentencing Commission. Mr. Strawley noted that DOJ argued unsuccessfully to exempt tax crimes from the Zero Point Offender reduction, just as violent and terrorism crimes were. He also put to rest whether the aggravating role exemption also requires a finding of a continuing criminal enterprise, saying that the Commission intended that each be a disqualifying factor separately and that the Commission may issue a "fix" for the confusing language that has given rise to assertions that a defendant is disqualified only with an aggravating role and CCE finding. There's also a change to "relevant conduct" likely coming as well, to exclude acquitted conduct that at present can be used to increase a defendant's Guideline calculation despite the defendant having been acquitted of that conduct. Tax Notes published a nice article on our panel, which is available here: [Tax-Related Sentencing Revisions May Be on the Horizon | Tax Notes](#).

One point I made on the panel: because DOJ Tax is taking increasingly severe positions at sentencing, defense counsel should redouble their efforts to humanize their client and find reasons for the Court to connect with the client. Hopefully, the Court will take a dim view of the government's drive to elevate general deterrence over the other 18 U.S.C. Sec. 3553(a) factors

and do what that sentencing statute requires – impose a sentence sufficient but not greater than necessary to satisfy all the sentencing factors, of which the Guidelines is only one.

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