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FEDERAL DISTRICTS, STATE OF CALIFORNIA

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November 25, 2015

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002:

Dear Chief Judge Saris:

We are the Federal Public Defenders and Executive Director for the four federal defender organizations in California: the Central, Eastern, Northern and Southern Districts. Together, our offices were appointed to over 13,400 cases in Statistical Year 2015.[1] These four offices represent the significant majority of all federal indigent defendants in California.

We write to provide comments on proposed amendments to U.S.S.G. Sections 4B1.2 and 2L1.2 relating to the definition of a felony. Specifically, we offer comments on a widespread practice in California with important ramifications for this amendment: the "wobbler." Given the volume of federal cases handled by our offices, and the widespread prevalence of California's "wobbler" procedure, this is an important concern affecting many of our clients each year.[2]

[1] In FY 2014, over 6,700 federal court defendants were sentenced under the guidelines in our combined districts. California is second only to Texas for the greatest number of "guideline offenders." *See* United States Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*, tbl. 2. Additionally, the Southern District of California was one of the top five districts for the number of illegal reentry cases in FY 2013. In that district, the 16-level enhancement in §2L1.2 was applied at a higher rate than in the other top districts. United States Sentencing Commission, *Illegal Reentry Offenses*, at 8, 13 (Apr. 2015).

[2] Our recommendation on the proposed amendment is consistent with Defenders across the country, and we fully support the testimony and comments of Defenders on this issue. *See*, *e.g.*, Statement of Molly Roth on Behalf of the Federal Public and Community Defenders (Nov. 5, 2015). We write separately to emphasize how this issue is of particular importance to federal sentencing litigation in California, presenting unique concerns for thousands of our clients. We also write separately pursuant to the Commission's specific request for comment on how the proposed amendment would apply to California wobblers. *See* Proposed Amendment to the Sentencing Guidelines, Issues for Comment, No. 8 (Aug. 12, 2015).

The California wobbler is an offense that may be classified and punished either as a felony or a misdemeanor, or it may start as a felony and change to a misdemeanor over time.[3] California Penal Code Section 17(b) and related provisions provide mechanisms for offenses to begin as felonies but end as misdemeanors. This can be accomplished in several ways. A state judge may suspend imposition of sentencing in the wobbler case at the original "sentencing hearing,"[4] place the person on probation, and anytime thereafter (such as when a defendant successfully completes probation) expressly declare the offense to be a misdemeanor. *See* Cal. Penal Code § 17(b)(3). It can also occur when a state judge suspends imposition of sentencing in the wobbler case, places the person on probation, subsequently terminates probation and imposes a sentence of one year or less in county jail. *See* Cal. Penal Code § 17(b)(1); *United States v. Bridgeforth*, 441 F.3d 864, 871-72 (9th Cir. 2006) ("Although . . . initially granted probation, the state court terminated that probation… and imposed a sentence of 365 days in county jail. Upon imposition of that sentence, the wobbler became a misdemeanor 'for all purposes' under section 17(b)(1)."). In both scenarios, the offenses are technically felonies until they become misdemeanors, either through imposition of a year or less county jail sentence , or by express judicial declaration in the court's discretion. The state court typically uses its option to place a defendant on probation in cases where the wobbler's offense conduct is less serious than one warranting a permanent felony classification and a prison term of more than one year. With this system, California law intentionally created a class of wobblers whose classifications may be determined at sentencing, but may also change after the initial "sentencing hearing."

This system creates challenges when a defendant is later convicted in federal court and Probation, the court, and the parties must determine the important question of how the Guidelines interpret the wobbler offense under significant Guideline sentencing enhancements. When a defendant with a wobbler conviction is placed on probation, all must investigate whether:

(1) The wobbler was charged as a misdemeanor, Cal. Penal Code § 17(b)(4);

(2) The wobbler was reduced to a misdemeanor, Cal. Penal Code § 17(b)(5);

(3) The wobbler was later declared to be a misdemeanor, Cal. Penal Code § 17(b)(3); and

(4) The court later imposed a year or less county jail sentence , which converts the wobbler to a misdemeanor, Cal. Penal Code § 17(b)(1).

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[3] *See generally, People v. Sung-Uk* Park, 56 Cal. 4th 782, 789 (Cal. S. Ct. 2013) (describing the classification of California wobbler offenses under California Penal Code § 17).

[4] We use quotation marks around "sentencing hearing" because "no judgment is actually rendered" when a state court grants probation or suspends imposition of the sentence; "only if the state court were to impose sentence and then order its execution stayed would there be a judgment." *Bridgeforth*, 441 F.3d at 871.

Adding to this confusion is the great difficulty of securing accurate conviction documents, on an expedited manner, from county clerk offices. Delays in securing those documents mean we cannot meaningfully advise our clients on sentencing exposures, and create delays in case dispositions and trial settings. The many permutations presented by wobblers also lead to confusion and litigation at sentencing. These problems are magnified when the California offender is later sentenced in federal court in another state, where the district court, probation, and the parties are less familiar with the wobbler procedure.

Our concerns are for more than just efficient case resolution: the ambiguities and confusion pervading the federal significance of wobblers lead to unjust and disparate sentences. When one cannot establish that a low-level wobbler offense is officially a misdemeanor under California law, even though it is the offense type and conduct typically considered a misdemeanor in California and other jurisdictions, the federal defendant receives dramatic sentencing enhancements – resulting in custodial sentences far beyond what defendants with similar criminal histories will receive. This disparate treatment for like offenders creates unwarranted sentencing disparity.

The Commission proposes amending the "felony" definition in §4B1.2 and §2L1.2 to require it be "classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted." We favor a federal sentencing process respecting the states' classifications. We question, however, the fairness of assessing the classification *at the time the defendant was initially sentenced*. For a defendant originally "sentenced" to probation on a wobbler, that timing of the proposed classification assessment can dramatically overstate the seriousness of the original offense conduct, by not acknowledging the impact of the California wobbler process.

Therefore, to provide a clear, efficient, and just determination of these wobbler events, we jointly recommend the Commission include in the definitions this requirement:

> At the time the defendant was initially sentenced, the sentence imposed and not suspended exceeded 13 months imprisonment.

Considering the actual custodial sentence "imposed and not suspended" improves upon the current definition. This proposal would quickly, consistently, accurately, and fairly differentiate between more and less-serious California wobbler convictions. Offenses where the individual was placed on probation and successfully completed probation would – appropriately –not be felonies for purposes of the Career Offender guideline, regardless of whether the court subsequently entered an order declaring the offense to be a misdemeanor, or subsequently imposed a year or less in county jail sentence as authorized by Cal. Penal Code § 17(b).

Moreover, looking to the actual sentence imposed and not suspended simplifies the practice in federal court of determining whether a California wobbler conviction is a crime of violence or a controlled substance offense. Where the sentence originally imposed and not suspended was 13 months or less, including where a defendant was placed on probation (subject to a jail term or not)

and imposition of the sentence was suspended, it would be clear the California wobbler is not a crime of violence or a controlled substance offense. This would eliminate the current long investigations, delays, and ambiguities in the current system, where we need to investigate any post-sentencing state court actions to determine the state conviction's significance. It would eliminate the current unwarranted sentence disparities for like offenders, caused when it is impossible to determine the entire procedural history and true nature of a prior wobbler offense.

If the Commission proceeds with looking only at the offense's classification, and does not include in its definition the requirements associated with the actual sentence originally imposed and not suspended, we jointly oppose the proposal to assess classification only whenthe defendant was initially sentenced.[5] If the term "initially sentenced" is defined as the hearing when a California state court places a defendant on probation, the definition fails to respect California law allowing for classification at a later time. The definition would, therefore, upset settled California and federal law on this issue. *See Bridgeforth*, 441 F.3d at 872 ("a state court's *subsequent treatment of a wobbler* is controlling for purposes of the career offender enhancement") (emphasis added). To count these convictions as felonies, despite a later express adjudication to the contrary, is simply unjust, and does not respect the established processes of California's sentencing structure.

This injustice is easily avoided by considering the classification *as it stands at the time of federal sentencing*. Again, we urge the Commission to adopt our proposed definition above, the one looking at the custodial term imposed at the original sentencing hearing. If, however, the Commission adopts a definition focusing solely on the State's classification of the offense, the just approach is to determine that classification status at the time of the federal sentencing.

[5] The *classification* for a wobbler can change over time, but the *actual sentence* for the wobbler does not (except for revocations for new conduct which are not relevant to measuring the seriousness of the **underlying** offense). Because of this, it is necessary to evaluate the *classification* at the time of federal sentencing, but the *actual sentence* imposed and not suspended should be determined at the time of the original state sentencing proceeding.

Thank you for your consideration of our comments.

Sincerely,

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