PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

September 23, 2022

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Response to Request for List of Priorities

Dear Judge Reeves:

The Practitioners Advisory Group ("PAG") welcomes the opportunity to provide a list of issues for the United States Sentencing Commission ("Commission") to consider as it begins its work for this amendment cycle. The PAG is aware that there are several immediate issues for the Commission to address, and its suggestions are tailored accordingly. The PAG respectfully asks the Commission to: (1) update provisions of the United States Sentencing Guidelines ("Guidelines") in light of the First Step Act, 132 Stat. 5194 (2018); (2) address Congress's directive in the Bipartisan Safer Communities Act, 136 Stat. 1313 (2022) regarding penalties for straw purchasing and firearms trafficking offenses; (3) amend provisions of the Guidelines related to first offenders; scoring prior convictions; and defining "related" offenses; and (4) bar the use of acquitted conduct at sentencing.

In addition to these priorities, the PAG offers a list of issues for the Commission's future consideration.

I. The First Step Act

The PAG requests that the Commission update three areas of the Guidelines related to the First Step Act: (A) the safety valve provision; (B) definitions relevant to the career offender guideline; and (C) motions for compassionate release.

A. Safety Valve

The First Step Act expanded the population of defendants eligible for safety valve relief, which allows sentencing courts, in certain cases, to impose a sentence below the statutory minimum sentence. *See* First Step Act, 132 Stat. 5194, 5221. Specifically, 18 U.S.C. § 3553(f)(1) was amended to permit defendants who have up to 4 criminal history points, and who meet certain other requirements, to receive this relief. *See* 18 U.S.C. § 3553(f)(1)-(5). Under the Guidelines, however, safety valve relief is limited to defendants who have no more than 1 criminal history point. *See* §5C1.2(a)(1). Accordingly, the PAG recommends that the Commission amend §5C1.2 to mirror the criteria found in 18 U.S.C. § 3553(f)(1).

B. Career Offender Guideline

The PAG proposes that the First Step Act's definitions of "serious drug felony" and "serious violent felony" be incorporated into the career offender guideline. In the First Step Act, Congress restricted the types of prior convictions that trigger enhanced penalties for repeat offenders under the Controlled Substances Act. *See* First Step Act, 132 Stat. 5194, 5220-5221. Previously, mandatory minimum provisions were triggered if a defendant had a prior conviction for a "felony drug offense." *See* 21 U.S.C. § 802(44) (defining felony drug offense as an offense that "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances," punishable by more than one year in prison).

Under the First Step Act, the recidivist mandatory minimums are triggered only for defendants who have prior convictions for a "serious drug felony" and/or a "serious violent felony." *See* 21 U.S.C. § 841(b)(1)(A)-(B); 21 U.S.C. § 960(b)(1)-(2). A "serious drug felony" is a drug offense that carries a maximum term of imprisonment of ten years or more, for which the defendant served a term of imprisonment of more than 12 months, and for which the defendant was released within 15 years of the commencement of the instant offense. *See* 21 U.S.C. § 802(57), 18 U.S.C. § 924(e)(2). A "serious violent felony" is an offense punishable by a term of imprisonment of ten years or more, that has as an element the use, attempted use, or threatened use of physical force against another person; or involves a substantial risk that physical force against another person may be used; or is one of certain enumerated offenses, for which the defendant served a term of imprisonment of more than 12 months. *See* 21 U.S.C. § 802(58), 18 U.S.C. § 3559(c)(2)(F). By using these terms, Congress recognized that defendants with prior convictions for a "felony drug offense" should not be treated in the same manner as those who have prior convictions for a "serious drug felony" or a "serious violent felony." The PAG asks the Commission to amend the career offender provisions in §§4B1.1 & 4B1.2 to incorporate these concepts and definitions.

While the statutory directive found in 28 U.S.C. § 994(h) restricts the Commission's discretion to amend the career offender guideline, the Commission has the authority to modify this guideline pursuant to its general promulgation authority under 28 U.S.C. §

994(a)-(f). The Commission could define "crime of violence" in §4B1.2(a) to be consistent with 21 U.S.C. § 802(58). Alternatively, the Commission could amend §4B1.1(b) so that defendants who do not have a prior "serious drug felony" or "serious crime of violence" are not placed in criminal history category VI. Another option for the Commission would be to recommend a downward departure where a defendant's prior convictions do not constitute either a "serious drug felony" or a "serious crime of violence." *See*, *e.g.*, §4B1.1 n.4 (noting that a downward departure may be appropriate where application of the career offender guideline results in a substantial overrepresentation of the defendant's criminal history or a substantial overstatement of the seriousness of the instant offense). These are possible approaches that the Commission could take to ensure that Congress's intent in revising sentencing law through the First Step Act is reflected in the Guidelines.

C. Compassionate Release

Before the First Step Act, motions for compassionate release could only be filed on behalf of defendants by the Director of the Bureau of Prisons. The First Step Act enlarged this authority by allowing defendants to file motions for compassionate release. *See* First Step Act, 132 Stat. 5194, 5239; 18 U.S.C. § 3582(c)(1)(A). The PAG proposes that the Commission amend its policy statement in §1B1.13 to reflect this change in the law. Currently, the policy statement only addresses motions for sentence reduction filed by the Director of the Bureau of Prisons. *See* §1B1.13. The PAG proposes that §1B1.13 be amended to authorize courts to consider motions for compassionate release filed by defendants.

The PAG also proposes that the Commission remove language in Application Note 1(D) to §1B1.13 that refers to the role of the Director of the Bureau of Prisons in determining whether "other reasons" warranting compassionate release are "extraordinary and compelling." This would resolve a circuit split. The Eleventh Circuit has held that §1B1.13 empowers only the Director of the Bureau of Prisons with the authority to determine whether "other reasons" are "extraordinary and compelling," even for motions filed by a defendant. In contrast, the Second, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth Circuits have reached the conclusion that the current version of §1B1.13 is not applicable to compassionate release requests filed by defendants.[1]

[1] *Compare U.S. v. Bryant*, 996 F.3d 1243, 1262-1265 (11th Cir. 2021) (holding that §1B1.13, including the language in Note 1(D), applies to motions filed by defendants) *with U.S. v. Brooker,* 976 F.3d 228, 237 (2d Cir. 2020) (holding that §1B1.13 does not apply to motions filed by defendants); *U.S. v. McCoy,* 981 F.3d 271, 284 (4th Cir. 2020) (same); *U.S. v. Shkambi,* 993 F.3d 388, 392-393 (5th Cir. 2021) (same); *United States v. Jones,* 980 F.3d 1098, 1108-1111 (6th Cir. 2020) (same); *U.S. v. Gunn,* 980 F.3d 1178, 1180 (7th Cir. 2020) (same); *U.S. v. Aruda,* 993 F.3d 797, 802 (9th Cir. 2021) (same); *U.S. v. Maumau,* 993 F.3d 821, 836-837 (10th Cir. 2021) (same).

In addition, the PAG requests that the Commission consider revising its policy statement in §1B1.13 to expressly authorize courts to consider a defendant's health risks when considering the merits of motions for compassionate release. According to the Commission's recent report on compassionate release data, courts cited health risks associated with COVID-19 as at least one reason for granting relief for 61.5% of offenders granted relief in Fiscal Year 2020; for 50.2% of offenders granted relief in Fiscal Year 2021; and for 17.7% of offenders granted relief in Fiscal Year 2022.[2] These decisions reflect the reality that health risks posed by the spread of a pandemic disease in the federal prison system are relevant factors that courts have considered, and must continue to consider, when making compassionate release determinations. The Commission's study of compassionate release cases, however, found the lack of an explicit framework or recommendation in the Guidelines for how to evaluate the health risks posed by pandemics led to considerable variability in the application of 18 § 3582(c)(1)(A) across the country.[3] Accordingly, the PAG suggests that the Commission address this issue by outlining factors or circumstances, including health-related risks, for courts to weigh when making compassionate release determinations. The PAG recommends that §1B1.13 be amended to explicitly authorize courts to consider health risks and similar factors when adjudicating compassionate release motions.

Finally, a circuit court split has emerged over whether non-retroactive changes in the law should be considered in the context of a motion for compassionate release.[4] In June, the Supreme Court held that "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained. Nothing in the First Step Act contains such a limitation." *Concepcion v. United States*, ___U.S.___, 142 S.Ct. 2389, 2396 (2022). Relying on *Concepcion*, an appellate court recently held that "district courts may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant, when analyzing

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[2] *See* U.S. Sent'g Comm'n, *Compassionate Release Data Report Fiscal Years 2020-2022*, Tables 10, 12, 14 (Sept. 2022).

[3] *See* U.S. Sent'g Comm'n, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic* at 46 (Mar. 2022).

[4] *Compare U.S. v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) (holding that non-retroactive changes in the law cannot contribute to exceptional and compelling reasons for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)); *U.S. v. Andrews*, 12 F.4th 255, 260-261 (3d Cir. 2021) (same); *U.S. v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021) (same) *with U.S. v. Ruvalcaba,* 26 F.4th 14, 26-28 (1st Cir. 2022) (holding that courts may consider non-retroactive changes in the law when determining motions for sentence reduction); *U.S. v. Maumau,* 993 F.3d 821, 836-837 (10th Cir. 2021) (same); *U.S. v. McCoy,* 981 F.3d 271, 274 (4th Cir. 2020) (same); *U.S. v. Chen,* 2022 WL 4231313, at *5 (9th Cir. 2022) (same).

extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)." *United States v. Chen*, ___F.4th___, 2022 WL 4231313, at *5 (9th Cir. Sept. 14, 2022).

The PAG recommends that the Commission amend §1B1.13 to expressly authorize courts to consider non-retroactive changes in the law when determining whether extraordinary and compelling reasons exist to reduce or modify a sentence under 18 U.S.C. § 3582(c)(1)(A).

II. The Bipartisan Safer Communities Act

The Bipartisan Safer Communities Act created two new laws targeting the transfer and trafficking of firearms, 18 U.S.C. §§ 932 & 933. *See* Bipartisan Safer Communities Act, 136 Stat. 1326-27. Section § 932 expands the scope of the existing straw purchasing law, 18 U.S.C. § 922(d), and provides for a maximum term of imprisonment of 15 years. This statutory maximum is increased to 25 years if the defendant knows or has reasonable cause to believe that the firearm involved will be used to commit a felony, a federal terrorism crime, or a drug trafficking crime. *See* 18 U.S.C. § 932. Section § 933 prohibits the transfer or receipt of a firearm, along with attempting or conspiring to do so, if an individual knows or has reasonable cause to believe that the transfer or receipt would constitute a felony. *See* 18 U.S.C. § 933(a). The maximum sentence for violating this law is 15 years. *See* 18 U.S.C. § 933(b). In this new law, Congress also increased the maximum sentences for violating 18 U.S.C. §§ 922 (d) & (g), from 10 years to 15 years. *See* Bipartisan Safer Communities Act, 136 Stat. 1329.

Along with this new legislation, Congress directed the Commission to amend the Guidelines and its policy statements to increase penalties for persons convicted of violating 18 U.S.C. §§ 932 & 933, "and other offenses applicable to the straw purchases and trafficking of firearms." *Id.*, 136 Stat. 1328. This directive includes amendments containing higher penalties for individuals convicted under these statutes and who are affiliated with gangs, cartels, organized crime rings, or similar enterprises. In addition,

> the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.

Bipartisan Safer Communities Act, 136 Stat. 1328.

The primary guideline applied in federal firearms offenses is §2K2.1.[5] Currently, §2K2.1 addresses conduct involving straw purchases, firearms trafficking, and possessing a firearm in connection with another felony offense. Under §2K2.1(a)(6), the base offense level for straw purchasers is set at level 14. There are 4-level increases for firearms trafficking and for using or possessing a firearm in connection with another felony offense, or possessing or transferring a firearm with knowledge, intent or reason to believe that it would be used or possessed in connection with another felony offense. *See* §2K2.1(b)(5) (firearms trafficking); §2K2.1(b)(6)(B) (use, possession or transfer of a firearm in connection with a felony offense). Section 2K2.1 also provides for the application of a cross-reference where a firearm was possessed or transferred with knowledge or intent that it would be used or possessed in connection with another offense. *See* §2K2.1(c)(1). Thus, §2K2.1 already contains significant enhancements that address much of the conduct encompassed by 18 U.S.C. §§ 932 and 933.

The PAG believes that the current version of §2K2.1 already provides for the higher penalties envisioned by Congress. As the Commission reported in its recent study on federal firearms offenses, in fiscal year 2021, the 4-level increase for possessing or transferring a firearm in connection with another felony was applied in 28.1% of cases, while the enhancement for firearms trafficking was applied in 3.5% of cases.[6] Very small percentages of defendants were sentenced as straw purchasers under §2K2.1.[7] Because these provisions are applied in a small percentage of cases, the PAG proposes that the Commission study sentences imposed under §2K2.1 in connection with this new legislation before determining that new enhancements are warranted in addition to the increase in statutory maximum penalties enacted by Congress.

Enhanced penalties under 18 U.S.C. § 932 also can be imposed by applying cross-references under §2K2.1(c) to other guidelines in cases where firearms are used to further other felonies, federal terrorism crimes, or drug trafficking offenses. *See, e.g.,* 18 U.S.C. §§ 932 (b)(2) & (3). Further, terrorism offenses are subject to a Chapter 3 adjustment that increases the resulting offense level by 12 levels, to at least level 32, and a criminal history category of VI. *See* §3A1.4. Similarly, offenses where a defendant is affiliated with a gang, cartel, organized crime ring, or other such enterprise, are subject to enhancement via Chapter 3 adjustments for aggravating role under §3B1.1.

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[5] *See, e.g.*, U.S. Sent'g Comm'n, *What do Federal Firearms Offenses Really Look Like?* at 6 (July 2022) ("firearms offenses are sentenced primarily under Chapter Two, Part K, Subpart Two (Firearms)").

[6] *See id., supra* n. 5 at 12-13.

[7] *See id., supra* n. 5 at 25, 28.

In light of Congress's specific directive that the Commission consider mitigating circumstances for individuals convicted of straw purchases, the PAG proposes that the Commission create new specific offense characteristics under §2K2.1 that decrease the offense level for individuals "without significant criminal histories;" defendants who are coerced into committing the offense; defendants who are survivors of domestic violence; or in cases where other mitigating factors warrant a reduction in the offense level.

III. First Offenders, Prior Convictions, and Related Offenses

A. First Offenders

In December 2016, the Commission proposed adding §4C1.1, "First Offenders," to the Guidelines. This proposed guideline would have applied to a defendant who "did not receive any criminal history points from Chapter Fourt, Part A, and . . . has no prior convictions of any kind." 81 FR 92005 (Dec. 19. 2016). The proposed §4C1.1 set forth two options for these defendants. The first option "provides a decrease of [1] level from the offense level determined under Chapters Two and Three." *Id*. The second option provides a 2 level decrease if the defendant's final offense level is less than level 16, and a 1 level decrease if the offense level is level 16 or greater. *Id*.

An additional base offense level reduction for "First Offenders" would be in line with the Commission's empirical research demonstrating that defendants without any criminal history have a demonstrably lower risk of recidivism. In its 2017 report, data showed a "22.1 percentage point difference in rearrest rates between offenders with no criminal history and one-point offenders."[8] Accordingly, the PAG asks the Commission to revisit this issue and adopt a new category for "First Offenders."

B. Prior Convictions

The PAG asks the Commission to consider narrowing the scope of §§4A1.1 and 4A1.2 to eliminate assigning criminal history points for convictions for which jail time can never be imposed. For example, under Ohio Revised Code § 2925.11(C)(3)(a), a person possessing fewer than 100 grams of marijuana would be convicted of a minor misdemeanor offense. The statutory penalties would be a maximum sentence of a $150.00 fine, court costs, and a possible driver's license suspension for six months. Moreover, under Ohio Revised Code § 2925.11(D), this conviction does not constitute a criminal record. Nonetheless, it is counted as a "prior sentence" under §§4A1.1 and 4A1.2. *See United States v. Tatum*, 743 Fed. Appx 589, 592-93 (6th Cir. 2018); *United States v Stubblefied*, 265 F.3d 345, 348-49 (6th Cir. 2001).

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[8] U.S. Sent'g Comm'n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 14 (Mar. 2017).

C. Related Offenses

Consistent with its prior submission in August 2018,[9] the PAG proposes that the Commission revisit how related offenses are scored under §4A1.2(a)(2). Prior to November 1, 2007, if separate convictions arose out of the same arrest, they were considered related and were not separately scored, even if sentences were imposed in different courts at different times. In 2007, however, §4A1.2(a)(2) was revised by Amendment 709. The impetus for Amendment 709 was to clarify §4A1.2(a)(2) by focusing on whether a "single sentence" was imposed as opposed to whether offenses were "related."

Under Amendment 709,

> If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence.

Amdmt. 709, *U.S. Sent'g Guidelines Manual*, App. C., vol. III at 1083 (Nov. 1, 2021).

By prosecuting offenses arising out of one arrest in different courts, these convictions, under the applicable definition, can never produce a "single sentence." In PAG members' experience, it is not unusual for a state court arrest to spawn both misdemeanor and felony charges. Because of the differing maximum penalties available for these offenses, the charges are often filed and adjudicated in different courts. As a result, one of the unintended consequences of Amendment 709 is that defendants whose arrest results in multiple charges, prosecuted in different state courts, now face higher criminal history scores. Accordingly, the PAG proposes that §4A1.2(a)(2) be amended to focus not on whether a "single sentence" was imposed, but on whether the offenses were "related."

IV. Acquitted Conduct

The PAG remains concerned about sentencing courts' reliance on acquitted conduct at sentencing through application of the relevant conduct guidelines, §§1B1.3 & 1B1.4. The PAG is aware that the Commission has long shared this concern regarding the use of acquitted conduct at sentencing. *See, e.g.*, 61 FR 34465 (July 2, 1996) (identifying as a Commission priority "developing options to limit the use of acquitted conduct at sentencing"); 79 FR 49378 (Aug. 20, 2014) (identifying as a Commission priority "the use of acquitted conduct in applying the guidelines"). Current and former Supreme Court Justices also have questioned the constitutionality of using acquitted conduct at

[9] *See* Letter from PAG to Hon. William Pryor, Jr., *Response of Practitioner's Advisory Group to Request for Comment on Proposed 2018-2019 Priorities*, at 13-15 (Aug. 10, 2018).

sentencing,[10] as have a number of civil rights and criminal advocacy groups.[11] Moreover, legislation now pending before Congress to abolish this practice has received bipartisan support. *See* Prohibiting Punishment of Acquitted Conduct Act of 2021, 117 S.601.

Based on the questionable constitutionality as well as the fundamental unfairness of using acquitted conduct at sentencing, the PAG respectfully asks the Commission to clarify that under §§1B1.3 & 1B1.4, courts may not rely on acquitted conduct at sentencing.

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[10] *See Jones v. United States*, 574 U.S. 948, 949, 135 S. Ct. 8, 9 (2014) (Justice Scalia, joined by Justices Thomas and Ginsburg, dissenting from denial of certiorari on the basis that the disregard of the Sixth Amendment when sentencing defendants on the basis of acquitted conduct "has gone on long enough"); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Now-Justice Gorsuch citing Justice Scalia's dissent in *Jones* for the proposition that it is "far from certain" that the Constitution allows a district judge to decrease or increase a sentence based on facts that the judge finds without the aid of a jury or with the defendant's consent); *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J. dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness.").

[11] *See, e.g.,* Families Against Mandatory Minimum's Priority Letter to the U.S. Sentencing Commission (Aug. 1, 2014) ("If the Commission does nothing else in this area, it should abandon, once and for all, the acquitted conduct rule. We cannot fathom (and have great difficulty explaining to our members) why the Commission would direct judges to count conduct at sentencing that a jury has examined and rejected.") available at https://famm.org/here-is-famms-priority-letter-to-the-u-s-sentencing-commission/; Brief of The Cato Institute as *Amicus Curiae* Supporting Petitioner at 2 (Jul. 7, 2021), *Osby v. United States*, No. 20-1693 (S. Ct.) ("Permitting sentencing based on acquitted conduct not only denies criminal defendants their Sixth Amendment right to a jury trial, but also denies the community their proper role in overseeing the administration of criminal justice."); Brief of *Amici Curiae* Americans for Prosperity Foundation, The National Association Of Criminal Defense Lawyers, Dream Corps JUSTICE, And The R Street Institute in Support of Petitioner at 5 (Jun. 30, 2021), *Osby v. United States*, No. 20-1693 (S. Ct.) ("Acquitted-conduct sentencing flips the presumption of innocence on its head by allowing judges to overrule unanimous jury acquittals based on judge-found facts using the far lower preponderance standard, gutting the Sixth Amendment's jury-trial right.").

V. Priorities for Future Amendment Cycles

The PAG offers the following list of priorities for the Commission to consider in future amendment cycles.

A. Addressing the circuit split on whether §2B3.1(b)(4)(A), the "abduction" enhancement for robbery, applies when an individual is moved only to another part of the same building where the robbery was committed; for example, from the front to the back of a store.

B. Reexamining the drug quantity table where Ice is treated more harshly than "regular" methamphetamine since almost all methamphetamine seized is at least 80% pure.

C. Reconsidering the continued disparity in the treatment of powder and crack cocaine under the drug trafficking guideline, §2D1.1.

D. Adding an application note clarifying that the enhancement in §2T1.9(b)(2) does not apply in payroll cases.

E. Revising the "sophisticated means" enhancement in §2T1.1(b)(2) to mirror the definition for this same enhancement under the fraud guideline, §2B1.1(b)(10)(C).

VI. Conclusion

On behalf of our members, who work with the Guidelines daily, we appreciate the opportunity to offer the PAG's input regarding priorities for the Commission to consider in the upcoming amendment cycle. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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