PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

October 17, 2022

Judge Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (USSC) regarding the proposed priorities issued on September 29, 2022.

Proposed Priority #1: **Consideration of possible amendments to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) to (A) implement the First Step Act of 2018 (Pub. L. 115–391); and (B) further describe what should be considered extraordinary and compelling reasons for sentence reductions under 18 U.S.C. § 3582(c)(1)(A).**

POAG favors changes that would amend USSG §1B1.13 to implement the First Step Act of 2018 (FSA), which authorizes defendants to directly file motions under 18 U.S.C. § 3582(c)(1)(A) with the sentencing court. POAG also supports the Commission addressing circuit splits that have arisen regarding what circumstances constitute "extraordinary and compelling" reasons warranting a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A).

The FSA adjusted the manner in which compassionate release may be sought, allowing defendant-filed motions to seek sentence reductions for elderly inmates, terminally ill inmates, or other inmates faced with dire life circumstances. As a result of the amendment, according to the Commission's Compassionate Release Data Report, Fiscal Years 2020 to 2022, compassionate

release filings increased somewhat during 2019 and early 2020; however, with the start of the COVID-19 pandemic, courts faced an increase in the number of compassionate release filings. During this time, courts faced numerous issues regarding interpretation of the FSA changes to 18 U.S.C. § 3582(c)(1)(A). Although the statute directs courts to consider applicable policy statements from the Commission, the majority of Courts of Appeal have held that the current version of USSG §1B1.13 is not an "applicable policy statement," as it specifically refers to determinations made by the Director of the Bureau of Prisons. *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228 (2nd Cir. 2020), *United States v. Andrews*, 12 F.4th 255 (3rd Cir. 2021), *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), *United States v. Shkambi*, 993 F.3d 388 (5th Cir. 2021), *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020), *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021), *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021), and *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021). Only the Eleventh Circuit has held that it is still an applicable policy statement, and thus binding on district courts considering defendant-filed motions. *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021). POAG supports amending §1B1.13 to implement the FSA by adding language allowing the district court to make the same determinations that were previously the sole provenance of the Director of the Bureau of Prisons, thereby increasing the uniform application of §1B1.13 for all compassionate release motions, whether filed by the defendant or by the Bureau of Prisons.

With most Courts of Appeal finding the existing version of §1B1.13 inapplicable to defendant-filed motions, courts have reached varying conclusions about what circumstances rise to the level of "extraordinary and compelling" reasons warranting a reduction in sentence. In order to promote uniformity in the treatment of compassionate release motions, POAG supports amending §1B1.13 to address some of these issues. In particular, the Commission should consider addressing the circuit split as to whether changes in sentencing law can be considered as extraordinary and compelling reasons warranting a reduction in sentence. *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022) as compared to *United States v. Crandall*, 25 F.4th 582 (8th Cir. 2022).

Proposed Priority #2: **Consideration of possible amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses), §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), and related provisions in the Guidelines Manual, to implement the First Step Act of 2018 (Pub. L. 115–391).**

POAG favors amending the above-noted guideline sections to be consistent with the First Step Act of 2018. As a result of the unforeseen delays that have precluded such an amendment since the First Step Act was signed in 2018, districts have been employing different methods to account for the fact that the sentencing guidelines have not yet been amended to correspond with the current

version of 18 U.S.C. § 3553(f). Some districts have continued to apply the guidelines as they appear in the 2018 (and 2021) guidelines manual. Others follow that same process, but then account for the reduction by way of a two-level variance. However, other districts have applied the two-level reduction, treating the current version of 18 U.S.C. § 3553(f) as being incorporated into USSC §5C1.2 based upon the guidance set forth under 18 U.S.C. § 3553(a)(4)(i), which directs that, when imposing a sentence, factors to consider include any amendments to the guidelines by an act of Congress, regardless of whether such amendments have yet to be incorporated by the Sentencing Commission. As such, amending USSG §2D1.1(b)(18), §2D1.11(b)(6), and §5C1.2(a)(1) to be consistent with the current safety valve provisions at 18 U.S.C. § 3553(f) will address the discrepancy with which this guideline has been applied.

POAG would suggest including a clarifying comment to address another disparate application issue that has created a circuit split, specifically pertaining to the new criminal history criteria regarding whether or not the "and" between 18 U.S.C. §3553(f)(1)(B) and (C) should be considered conjunctive or disjunctive. In other words, whether or not an individual is eligible for the safety valve if they have each of the three criteria, none of the three criteria, or only one or two of the criteria. In *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), it was held that the "and" was conjunctive, meaning that a defendant is eligible for safety valve relief unless all three subparagraphs are met. Therefore, the Ninth Circuit has determined a defendant is ineligible for safety valve relief if the defendant has each of (A) more than four criminal history points, (B) a prior three-point offense, and (C) a prior two-point violent offense. With this structure, a three-point violent offense can simultaneously satisfy both subsections 18 U.S.C. §§ 3553(f)(1)(B) and (C). On the other hand, *United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021) held that the "and" should be read disjunctively. Therefore, the Eleventh Circuit determined that a defendant who has any one of the three criminal history criteria is ineligible for safety valve relief. See also *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022) and *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022). The *Garcon* opinion, however, was vacated on January 21, 2022, when the Eleventh Circuit agreed to rehear the case *en banc*. Clarification of how 18 U.S.C. §3553(f)(1)(A)-(C) should be interpreted would resolve the circuit split and any ambiguity pertaining to the language. However, POAG also recognizes the concern that such a clarification could lead to further issues related to the guideline criteria being applied differently than the statutory criteria.

POAG would also add that the First Step Act revised 18 U.S.C. § 924(c)(1)(C) by providing that the higher penalty for a "second or subsequent count of conviction" under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final. As such, POAG recommends amending the illustrative example of a multiple count 18 U.S.C. § 924(c) scenario under USSG §5G1.2, comment. (n.4(B)(iii), to comply with the statutory changes under 18 U.S.C. § 924(c).

Proposed Priority #3: **Consideration of possible amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses.**

POAG favors amendments to these areas of the guidelines. Offenses involving firearms have become a significant occurrence all across the United States, and nation-wide efforts are being made to reduce the number of firearms that are available to obtain through illegal means. As a result, The Stop Illegal Trafficking Firearms Act, Section 12004 of the Bipartisan Safer Communities Act (Pub. L. 117–159), was enacted. POAG welcomes the Commission's consideration of making additions to USSG §2K2.1, regarding the following areas involving firearms: adding the new Federal offense of Straw Purchasing of Firearms, a violation of 18 U.S.C. § 932; adding the Federal offense of Trafficking in Firearms, a violation of 18 U.S.C. § 933; incorporating firearms without serial numbers, or "Ghost Guns" into the Specific Offense Characteristic for possessing a firearm with an obliterated serial number covered under §2K2.1(b)(4)(B); incorporating automatic weapons and explosive devices into the application notes in relation to §2K2.1(b)(5) and §2K2.1(b)(6)(B); and incorporating some form of increase (starting at a higher Base Offense Level or the development of a new Specific Offense Characteristic) for individuals who commit federal crimes that are covered under §2K2.1 who have previous convictions (on the state of federal level) for offenses that are covered under §2K2.1.

The Stop Illegal Trafficking Firearms Act, Section 12004 of the Bipartisan Safer Communities Act (Pub. L. 117–159), added the important sections to 18 U.S.C. §§ 932 and 933. POAG encourages the Commission to incorporate violations of those sections of the United States Code into guideline at USSG §2K2.1.

"Ghost guns" are classified and defined as unregulated and untraceable firearms that do not have a serial number. Currently the application within USSG §2K2.1 discounts any enhancement for this type of weapon. POAG asks the Commission to consider an enhancement for these weapons without serial numbers. As noted in the April 2022, White House Briefing, the recent Safer Communities Act [Public Law 117-159] enacted in June 2022, was promulgated in part to, "…rein in the proliferation of ghost guns…Last year alone, there were approximately 20,000 suspected ghost guns reported to ATF as having been recovered by law enforcement in criminal investigations." In order to comport to the Act, commercial manufacturers of these kits must become licensed and include serial numbers on the kits' frame or receiver. For those ghost guns already in circulation, federally licensed dealers and gunsmiths who receive any such weapon are then responsible for serializing the weapon before resale.

These weapons can be assembled by individuals using parts or kits requiring additional minor drilling and/or assembly. In many cases, the purpose of a ghost gun is to avoid the tracking and tracing systems associated with a firearm's serial number. Typically, a defendant in possession of a firearm with an altered or obliterated serial number would be subject to a four-level guideline enhancement, pursuant to USSG §2K2.1(b)(4)(B). However, the law has not kept up with the technology, and there is no specific enhancement for a ghost gun. Nevertheless, the spirit of the USSG §2K2.1(b)(4)(B) enhancement should be considered; the government has an interest in tracking and tracing firearms, and those who circumvent this responsibility should be penalized accordingly.

In recent years, the number of individuals being processed in the federal system for repeat offenses involving firearms has increased significantly. The United States Sentencing Commission made some interesting and relevant findings in their study of firearms offense, as published in What do Federal Firearms Offenses Really Look Like? (July 2022). POAG encourages the Commission to consider incorporating either a new Base Offense Level or a Specific Offense Characteristic increase for individuals who commit federal crimes that are covered under §2K2.1 and have previous convictions for offenses that are covered under §2K2.1 (in the state and/or federal system).

Proposed Priority #4: **Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991), including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to subsection (b) of §3E1.1 (Acceptance of Responsibility) because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. § 801 et seq.) to qualify as a "controlled substance offense" under subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).**

Acceptance of Responsibility

POAG favors the Commission addressing the circuit conflict concerning whether the government may withhold a motion pursuant to USSG §3E1.1(b) if the defendant moves to suppress evidence. In cases where acceptance of responsibility has been denied on this basis, the crux of the argument is that the amount of work preparing for a suppression hearing is akin to that of preparing for trial, calling into question whether an individual has actually accepted responsibility and saved resources. POAG believes there are marked differences between the amount of resources a court expends for a suppression hearing and the amount of resources a court expends to conduct an entire trial.

POAG believes defendants should not be penalized for exercising their due process right to file a motion to suppress. Motion to suppress hearings are part of the process and assists both parties in identifying the evidence that will lawfully be considered as they determine whether to proceed to trial. If acceptance of responsibility was automatically denied in cases where defendants exercise their right to file a motion to suppress, there would be no further incentive to plead guilty. Therefore, POAG favors an amendment to USSG §3E1.1 to clarify that unsuccessful challenges during suppression hearings do not preclude a defendant from being eligible for an acceptance of responsibility reduction. POAG believes such an amendment is essential in establishing a consistent process, regardless of the district or circuit within which the defendant was charged. This would be a comparable instruction to that set forth under USSG §3E1.1, comment. (n.6), which directs that "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

Controlled Substance Offense

POAG favors the Commission addressing whether the definition of "controlled substance offense" under 21 U.S.C. § 801 is controlling in determining if an offense qualifies as a "controlled substance offense" under USSG §4B1.2. The implications of this issue are broad, as this analysis is relevant in drug and firearms cases, which constitutes a substantial portion of the cases presented in federal court.

POAG's primary concern is the fact that the overly broad issues presented within the statutory definition have led to the sentencing guidelines no longer functioning as designed when it comes to ensuring prior convictions for serious drug trafficking offenses are accounted for under USSG §4B1.2. In several jurisdictions, controlled substances such as cocaine, hemp, and marijuana have been deemed too broad because they aren't a categorical match to the federal statutory definition of a controlled substance offense. For example, all drug convictions charged out of New York do not qualify as a "controlled substance offense" under the sentencing guidelines pursuant to *United States v. Townsend,* 897 F.3d 66 (2nd Cir. 2018), which found that New York drug schedules were broader than the federal statutory definition of controlled substance offense. This is one of several similar examples of state offenses being deemed overly broad compared to the federal definition, thus precluding every state drug offense from qualifying as a controlled substance offense under the sentencing guidelines. The varying applicability and interpretation of the definition of a "controlled substance offense" is causing significant sentencing disparities among defendants, and the enhancement turns on how broad each state defines their controlled substance offenses when compared to the federal statutory definition, producing what seems to be arbitrary results.

On the other hand, there are circuits who do not require the state offense to categorically match the federal statutory definition of controlled substance offense. See *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020); *United States v. Sheffey*, 818 Fed. Appx. 513 (6th Cir. 2020); *United*

States v. Ruth, 966 F.3d 654 (7th Cir. 2020); and *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021). POAG favors the addition of commentary that is consistent with the findings in this line of cases, enhancing the already existing language under USSG §4B1.2(a) that defines controlled substance offense as "any offense under federal or state law." Such an amendment would resolve the disparity within the circuits regarding whether the state offense must categorically match the federal statutory definition under 21 U.S.C. § 802 and return the focus to the guideline definition, as it appears was originally intended.

Furthermore, in terms of defining controlled substance offenses, POAG supports adding "offer to sell" to the definition of controlled substance offense at USSG §4B1.2(b) to eliminate overly broad indivisible state drug statutes from disqualifying as controlled substance offenses. For example, a Texas statute for Possession with Intent to Deliver a Controlled Substance includes alternate means of committing the offense to include an offer to sell. This is just one example of several state offenses that the current definition fails to capture, causing sentencing disparity among repeat drug traffickers. Since offenses including an offer to sell do not require the actor to possess a controlled substance, it is analogous to aiding and abetting, conspiring to commit, and attempting to commit a controlled substance offense. POAG encourages the Commission to mirror the definition of drug trafficking offenses found in USSG §2L1.2, which includes offers to sell and would provide consistency within the guidelines.

Proposed Priority #5: **Implementation of any legislation warranting Commission action.**

POAG appreciates the significance of this identified priority as prompt consideration of any such legislation is essential to the sentencing guidelines evolving at the same pace as the legislation that guides our work. Further, avoiding unwarranted delays in responding to such legislation minimizes the workload and organizational burden of addressing matters after the fact by way of retroactive amendments. However, POAG is unaware of any legislation beyond the First Step Act and the Bipartisan Safer Communities Act that would warrant corresponding amendments to the sentencing guidelines.

Proposed Priority #6: **Continuation of its multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.**

As previously addressed in prior submissions, POAG favors the Commission providing an alternative to the categorical approach. Even after guidance found in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the analysis required to

employ the categorical approach and the modified categorical approach is becoming increasingly complex, leading to unpredictable results and circuit disparity. Further, the documentation necessary to apply the modified categorical approach is often lacking the required details or not available. As a result, the sentencing guidelines no longer function as designed in capturing the type of offense that should qualify as a predicate offense.

As previously discussed above in response to priority number four pertaining to controlled substance offenses, some courts have held that convictions under certain state drug statutes do not qualify as a controlled substance offense because the state statute criminalizes an offer to sell, which encompasses conduct that is broader than the definition of a controlled substance offense under USSG §4B1.2. For example, the Fifth Circuit held that a Texas conviction for Possession With Intent to Deliver a Controlled Substance does not qualify as a controlled substance offense because the Texas drug statute includes an offer to sell as an alternate means of committing the offense. See *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017).

Further, USSG §4B1.2, comment. (n.1), includes convictions for inchoate offenses and offenses arising from accomplice liability, such as aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" or a "controlled substance offense." Some circuits have held that the sentencing guideline definition of a controlled substance offense does not include inchoate offenses, despite the commentary to the contrary. Specifically, some courts have found that the commentary is not authoritative because it is inconsistent with the plain text of the guideline itself. See *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3rd Cir. 2021) (*en banc*); *United States v. Hovis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018). However, other circuits have held that inchoate crimes qualify as a controlled substance offense under USSG §4B1.2(b), thus finding that the commentary is authoritative. See *United States v. Smith*, 989 F.3d 575, 583-85 (7th Cir. 2021); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151 (2nd Cir. 2020); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019); and *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017).

The complications presently involved in analyzing inchoate offenses are further noticed with conspiracy offenses. For example, in *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018), the Court determined that generic conspiracy for purposes of the §4B1.2 analysis requires an overt act. As a result of *McCollum*, probation officers must first research the state conspiracy offense to determine if an overt act is necessary to complete the conspiracy offense, and then determine whether the substantive offense underlying the particular conspiracy meets the definition of a "crime of violence."

Furthermore, some states require an overt act to be proven as an element of a conspiracy offense while others do not. For example, states such as Virginia and North Carolina that follow common law do not require an overt act. See *State v. Gibbs*, 436 S.E.2d 321 (N.C. 1993). However, states such as Tennessee and Nebraska require an overt act as an element of the conspiracy offense. See *United States v. Pascacio-Rodriguez*, 749 F.3d 353 (5th Cir. 2014). Based on the *McCollum* analysis, a conspiracy offense from a state requiring an overt act would qualify as a predicate crime of violence or a controlled substance offense, while a conspiracy offense from a state not requiring an overt act would not qualify as a predicate crime of violence or a controlled substance offense.

Notably, in *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019), the Fourth Circuit extended the *McCollum* generic conspiracy/overt act holding to a federal drug conspiracy pursuant to 21 U.S.C. § 846. The Tenth Circuit has also held that federal drug conspiracies do not qualify as a controlled substance offense for lack of requiring an overt act. See *United States v. Crooks*, 997 F.3d 1273 (10th Cir. 2021) and *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016). As a result, federal controlled substance offenses no longer qualify as a "controlled substance offense" under USSG §4B1.2.

Along those same lines, some circuits have held that Hobbs Act robbery is overly broad and no longer constitutes a "crime of violence" under USSG §4B1.2 because there is no categorical match between Hobbs Act robbery and the enumerated offense of robbery. See *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); and *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017). Therefore, POAG recommends that USSG §4B1.2 should be amended to specify that Hobbs Act robbery qualifies as a crime of violence. Further, the illogical results from application of the modified categorical approach could be avoided if the Commission adjusted the enumerated crimes clause to create a per se list of offenses for which a conviction is to be considered a crime of violence and clarify that any federal or state statute that shares a title of the offenses in the enumerated list qualifies as a crime of violence.

POAG believes a uniform approach to defining crimes of violence, addressing conspiracies, attempts and other inchoate crimes (including accessory after the fact and accessory before the fact), and limiting the number of controlled substance offenses that are included as predicate offenses will help create simplicity in guideline application and address sentencing disparities throughout the country.

Proposed Priority #7: **In light of the Commission's studies on recidivism, consideration of possible amendments to the Guidelines Manual relating to criminal history to address (A) the impact of "status" points under subsection (d) of §4A1.1 (Criminal History Category); and (B) the treatment of defendants with zero criminal history points.**

POAG favors the Commission examining this issue. According to a recent study completed by the Commission (Revisiting Status Points, June 2022), status points only minimally improve the criminal history score's prediction of re-arrest – by .2 percent. Furthermore, in some jurisdictions, determining whether someone is, in fact "under a criminal justice sentence" proves challenging, based on the variety of sentences that must be considered (e.g., deferred adjudication, conditional discharge, a prison sentence that has been stayed, unsupervised probation). For example, in the 6th and D.C. circuits, being under a "conditional discharge" is akin to unsupervised probation and "parole with inactive supervision," amounts to being "under a criminal justice sentence," while in the Ninth Circuit, being subject to a "deferred sentence" (suspended without probation) is not considered "under a criminal justice sentence." *United States v. Miller*, 56 F.3d 719 (6th Cir. 1995), *United States v. Johnson*, 49 F.3d 766 (D.C. Cir. 1995), and *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993). In the Second, Fourth, and Tenth Circuits, a state's authority to revoke a suspended sentence if a defendant violates a good behavior condition is sufficient to establish that a defendant was "under a criminal justice sentence." *United States v. Brown*, 909 F.3d 698, 699 (4th Cir. 2018), *citing United States v. Gorman*, 312 F.3d 1159, 1166-67 (10th Cir. 2002) and *United States v. Labella-Szuba*, 92 F.3d 136, 138 (2nd Cir. 1996).

With respect to (B), as in previous years, POAG encourages the Commission to explore the creation of a criminal history category zero within the Sentencing Table. As POAG noted in its October 2017 response to requests for public comment on proposed holdover amendments, according to the recidivism studies completed by the Commission and released in 2016 and 2017 (2017 Recidivism Criminal History Report, and Recidivism Among Federal Offenders: A Comprehensive Review, March 2016), offenders with zero criminal history points had a 30.2% re-arrest rate compared to a 46.9% re-arrest rate for offenders with one criminal history point. In a more recent version of the study (September 2021), offenders with zero criminal history points had a rearrest rate of 26.8 percent, while offenders with one criminal history point had a rearrest rate of 42.3 percent.

This data provides justification to explore an expansion to the Sentencing Table to include a stand-alone category for offenders with zero criminal history points. A new criminal history category zero will further individualize federal sentencing and provide courts flexibility to utilize alternatives to imprisonment upon a class of offenders shown to recidivate at a statistically lower rate than defendants sentenced with one or more criminal history points.

Proposed Priority #8: **Consideration of possible amendments to the Guidelines Manual addressing 28 U.S.C. § 994(j).**

POAG favors exploring appropriate alternatives to incarceration for certain defendant. POAG has previously commented on proposals by the Commission to address 28 U.S.C. § 994(j), specifically, to ensure the guidelines reflect the general appropriateness of imposing a sentence other than

imprisonment in cases in which a defendant is a first offender, under certain circumstances. Specifically, in September 2017, in response to a proposed amendment, POAG indicated that, while the idea of conferring a benefit to those offenders who pose the lowest risk of recidivism was generally agreed upon, the practicality of defining who falls into this "first offender" definition proved rather difficult. POAG was unable to reach a consensus as to the criminal history characteristics of a first offender. Furthermore, adding another classification of offenders may result in even greater disparity among districts based on the wide variety of sentencing schemes in the various states and the impact that may have on defining a first offender. POAG believes the Commission could address offenders who pose lower risk of recidivism, instead, by focusing on Priority #7 (pertaining to defendants with zero criminal history points).

Proposed Priority #9: **Consideration of possible amendments to the Guidelines Manual to prohibit the use of acquitted conduct in applying the guidelines.**

POAG has reviewed pending legislation on Acquitted Conduct before Congress (S. 601) to amend 18 U.S.C. § 3661, which essentially reflects that the court should not consider acquitted conduct for the purposes of determining the appropriate sentencing range in the Guidelines, or to sentence a person outside of that sentencing range, except for the purposes of mitigation. Instances where a defendant is found guilty of some offense and acquitted of others tend to be rare. The narrowest of approaches may be well advised here. There has been long-standing debate about the consideration of acquitted conduct in a defendant's sentencing. POAG notes that the purpose and evaluative effort engaged in by a jury is different from that of the sentencing judge. The ability for the sentencing judge to contemplate the broader aspects of the defendant's life and offense activities is paramount to the process. POAG believes that the Court should be able to consider all relevant facts at sentencings.

Proposed Priority #10: **Multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary.**

POAG welcomes the Commission's consideration of continuing a multiyear study to address case law concerning the validity and enforceability of guideline commentary. The instruction set forth under USSG §1B1.17 directing that the commentary is authoritative and has been a core part of guideline application since the guidelines were implemented. POAG believes that failure to include the commentary as part of guideline application undermines the purpose of the Sentencing Reform Act. As such for the following reasons, POAG favors a uniform approach to review the current commentary and determine if the commentary should be incorporated within the guideline itself, including consideration of eliminating ambiguous commentary and limiting commentary that expands guideline provisions.

As with other guideline matters discussed above, courts differ in how they apply the deference doctrine to the guideline commentary. A few examples to illustrate how application of the guidelines without consideration of the commentary includes the career offender guideline at USSG §4B2.1, which means the career offender guideline isn't even considered for some defendants it was intended to address. The underlying guideline at issue is whether a "controlled substance offense" includes attempt/inchoate offenses within that definition. The guideline provision itself does not include attempt offenses, but the commentary to that guideline expanded that definition to include attempt offenses.

Some circuits have concluded that the commentary including "attempt" offenses under § 4B1.2(b) merited deference, which subjected the defendant to the increased sentence. See *United States v. Smith*, 989 F.3d 575 (7th Cir. 2021); *United States v. Lewis*, 963 F.3d 16, 21–23 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151 (2nd Cir. 2020); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019); *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017). However, other circuits have held that the commentary is not authoritative because it is inconsistent with the plain text of the guideline itself. See *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459, 468-72 (3rd Cir. 2021) (*en banc*); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (*en banc*); *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018).

Likewise, USSG § 2B1.1, comment. (n.3(F)(i)), addresses the $500-per-card multiplier per access device. There is presently a circuit split on this issue, which has created disparity across circuits. Some circuits have continued to apply the guidelines as they appear in the 2018 (and 2021) Guidelines Manual, including applying the $500 per access device. In *United States v. Riccardi*, F.3d 476 (6th Cir. 2021) and *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022), the courts determined that USSG §2B1.1, comment. (n.3(F)(i)), which requires mandatory $500-per-card minimum, conflicts with the plain meaning of "loss" under §2B1.1, and is therefore non-binding. Therefore, POAG encourages the Commission to review USSG §2B1.1, comment. (n.3(F)(i)), and make necessary changes to provide uniform application in access device cases.

Proposed Priority #11: **Continuation of its multiyear examination of the structure of the guidelines post-Booker to simplify the guidelines while promoting the statutory purposes of sentencing.**

POAG continues its ongoing support to simplify the guidelines, which has been an identified factor in POAG's response to prior proposed priorities and amendments. POAG believes the state of federal sentencing is becoming increasingly complicated, part of which is related to predicate offenses and application of the categorical approach, but other complex application issues could use equal attention. The court system is facing an unprecedented turnover in the workforce. Simplification of the guidelines would put the court system in a position to continue its mission without such an extensive and significant investment in training. It is imperative that the officers

who prepare the guidelines understand them at the level needed to accurately determine a recommended range of incarceration, which is especially important given the consequences of misapplication of the sentencing guidelines. Simplification is also an investment in efficiency, which is directly related to our commitment to judicial economy and being good stewards of government resources, which will assist the court system in maintaining its workload with less available resources. Most importantly, but harder to quantify, is the fact that simplification helps defendants, their families, victims, and the community better understand the process of federal sentencing and their perception that the process is fair and just.

Proposed Priority #12: **Multiyear study of court-sponsored diversion and alternatives-to-incarceration programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the Guidelines Manual that might be appropriate.**

While those charged in federal court who may be appropriate for a formal diversion program will be minimal, those are the cases that are sometimes the most difficult to sentence. POAG believes that providing the Court with another option at the time of sentencing is worth further research, especially if it addresses the goals of sentencing while potentially reducing the incarceration rate. Therefore, POAG favors the Commission reviewing the unifying principles of existing diversion programs as part of their research to further develop the diversion options within the federal system.

Proposed Priority #13: **Consideration of other miscellaneous issues, including possible amendments to (A) §3D1.2 (Grouping of Closely Related Counts) to address the interaction between §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and §3D1.2(d); and (B) §5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program.**

POAG favors the Commission's consideration of an amendment to address the interaction between §§2G1.3 and 3D1.2(d). As presently written, relevant conduct under USSG §2G1.3 is limited to USSG §1B1.3(a)(1). The expanded relevant conduct provisions under USSG §1B1.3(a)(2) do not apply as USSG §2G1.3 is not listed as a groupable offense under USSG §3D1.2(d). However, the special instruction under USSG §2G1.3(d) directs that, if the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction. The conflicting instruction

leads to confusion if additional victims need to be specified in the charging document or if they are included as relevant conduct under USSG §1B1.3(a)(2) given the reference to Chapter Three, Part D.

POAG favors an amendment or removal of USSG §5F1.7, in light of the Bureau of Prisons no longer operating a shock incarceration program.

POAG recommends the Commission to consider previous recommendations, including USSG §4B1.5 and some observed disparity, which was previously detailed in POAG's July 22, 2016, submission.

POAG recommends continued study and refinement of USSG §2G, which was previously detailed in POAG's August 10, 2018, submission.

In addition, POAG recommends the Commission consider providing further clarification on USSG §2D1.1(b)(13), pertaining to the misrepresentation of fentanyl or fentanyl analogues. The specific offense characteristic is one of a few without further guidance in the commentary. Reports from the field indicate there is a lack of consensus on when to apply this enhancement, while fentanyl and fentanyl analogue cases have been on the rise. POAG believes clarification regarding the mens rea requirement and whether or not explicit mismarketing is required for the enhancement to apply.

POAG also recommends the Commission consider providing further guidance on USSG §3C1.2, Reckless Endangerment During Flight, particularly as it pertains to firearms offenses and defendants who discard firearms during flight. There has been a growing body of precedent pertaining to when the enhancement should be applied; however, the application is still somewhat inconsistent. See *United States v. Brown*, 314 F.3d 1216 (10th Cir. 2003); *United States*, 327 F.3d 551 (7th Cir. 2003); *United States v. Easter*, 553 F. 3d 519 (7th Cir. 2009); *United States v. Rogers*, 423 Fed.Appx 636 (7th Cir. 2011); *United States v. Vega-Rivera*, 866 F.3d 14 (1st Cir. 2017); *Unites States v. Atwood*, 761 Fed.Appx 651 (7th Cir. 2019); *United States v. Dennings*, 922 F.3d 232 (4th Cir. 2019); *United States v. Esquibel*, 964 F.3d 789 (8th Cir. 2020); *United States v. Mukes*, 980 F.3d 526 (6th Cir. 2020).

Finally, POAG recommends the Commission provide clarity pertaining to the application of USSG §2J1.2 (Obstruction of Justice) and would recommend further instruction on what constitutes "administration of justice" to assist with applying a guideline that pertains to such a wide variety of conduct.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed priorities.

Respectfully,

Probation Officers Advisory Group
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