Testimony Before The United States Sentencing Commission

March 13, 2014

Michael McCrum

Member, Practitioners Advisory Group

Michael McCrum
McCrum Law Office
One Riverwalk Place, Suite 1900
700 N. St. Mary's Street
San Antonio, TX 78205

Written Testimony
Regarding the Proposed Amendments to USSG §2K2.1

March 13, 2014

It is my privilege to have the opportunity to testify on behalf of the Practitioners Advisory Group regarding the proposed amendments to the guidelines governing firearms offenses. The members of the PAG appreciate the opportunity to give the Commission our thoughts on this important issue.

The PAG believes that Option One set forth in the proposed amendments is superior to Option Two. We also propose ways in which Option One should be modified to make the application of the firearms guidelines more consistent with the purposes of sentencing and consonant with fundamental principles of fairness.

Proposed Amendment

USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) sets forth eight possible base offense levels between 6 and 26 for a defendant who is convicted of being a felon in possession of a firearm, as well as seven additional specific offense characteristics and a cross reference.

The Commission's proposed amendment addresses the special offense characteristic found at subsection (b)(6). In relevant part, that provision adds four levels and an offense level floor of eighteen if the defendant "used or possessed any firearm or ammunition in connection with another felony offense." *See* USSG §2K2.1(b)(6)(B). In addition to that enhancement, §2K2.1 contains a cross reference in cases where "the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense." *See* USSG §2K2.1(c)(1).

As described in the Notice for Comment, the Courts of Appeal have developed differing approaches for whether and how the relevant conduct guideline interacts with subsections (b)(6) and (c)(1) in two situations. Situation 1 involves cases where the defendant unlawfully possessed one firearm on one occasion, and also possessed a different firearm on another occasion. Situation 2 involves cases where the defendant is convicted of unlawfully possessing a firearm, and there is also evidence that he used a firearm in connection with another offense. In each of these two situations, courts routinely apply subsections (b)(6)(B) and/or (c)(1) even if the defendant was acquitted of the underlying conduct.

The Commission proposes two options to clarify the operation of the firearms guideline in these situations. Option One would address Situation 1 by limiting application of subsections (b)(6)(B) and (c)(1) to the firearm or firearms identified in the offense of conviction. In cases involving Situation 2, however, where the court finds that the defendant used the firearm in connection with another offense, Option One would create a *per se* rule that the use of the

firearm in the second offense is relevant conduct because it "is a factor specified in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4)."

Option Two would address Situation 1 by clarifying in the Commentary that the court must determine as a threshold matter whether possessing the second firearm was part of the same course of conduct or common scheme or plan as the unlawful possession underlying the offense of conviction under §1B1.3(a)(2). Thus, Option Two would continue to allow courts to sentence defendants on the basis of uncharged, dismissed or acquitted conduct relating to a different firearm, so long as the court found that §1B1.3(a)(2)'s standard was met. For Situation 2, Option Two would apply the same *per se* approach to the relevant conduct analysis as proposed in Option One.

The Commission seeks comment on whether the proposed amendments adequately clarify the operation of subsections (b)(6)(B) and (c)(1) in these situations. In addition, the Commission seeks comment on the operation and scope of subsections (b)(6)(B) and (c)(1), including whether the Commission should consider narrowing or clarifying the scope of the provisions, and whether the cross reference in subsection (c)(1) should be deleted.

The PAG supports Option One insofar as it would limit application of the enhancement and cross reference to the particular firearm or firearms identified in the offense of conviction. But Option One is an incomplete solution, because it does not rectify the problem that a defendant convicted of one crime (unlawfully possessing a firearm) can be sentenced for another (*e.g.*, murder) regardless of the difference in the severity of the unconvicted offense or the absence of a common scheme or same course of conduct. *See, e.g., United States v. Horton*, 693 F.3d 463, 473 n.10 (4th Cir. 2012) (defendant convicted of unlawfully possessing firearm sentenced to life in prison under cross reference to murder guidelines). The best fix for this problem is to delete subsection (c)(1) and subsection (b)(6)(B) in their entirety.

The use of uncharged, dismissed or acquitted conduct to enhance a defendant's sentence violates fundamental principles of fairness and transparency, creates unwarranted disparity, and promotes disrespect for the law.[1] The unfairness is particularly severe under these two subsections in Section 2K, because those enhancements—unlike the usual use of relevant conduct—are almost always based on conduct very different from the elements of the offense of conviction.

To see the point, it helps to consider the two most familiar uses of relevant conduct in the guidelines: drug trafficking offenses and theft or fraud offenses. When a drug defendant gets a higher offense level for drugs he trafficked as part of the same course of conduct or common

[1] *See, e.g.*, PAG's Response to Request for Public Comment on Proposed Priorities (August 18, 2010) at 6; *see also* comments to USSC, submitted by Federal Public Defenders (May 17, 2013) at 24-31 (citing authorities, including federal judges, who question use of acquitted, dismissed and uncharged conduct under relevant conduct rules); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599 (2012); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420 (2008).

scheme or plan, the increased penalty is based on proof that he did "more of the same." It is one thing to hold a drug dealer responsible for engaging in the same sort of conduct on different occasions (assuming the close relatedness required by the relevant conduct rules). But subsections (b)(6)(B) and (c)(1) operate differently. Under those subsections, a defendant convicted of a possessory offense such as felon-in-possession, which merely requires proof that the felon had the ability to exercise control over a firearm, is sentenced for a robbery or a murder or some other active use of the firearm. Rather than prove to a jury that the defendant is a robber or a murderer (or have guilt for such an offense establish through a guilty plea), the government charges a different and often much less severe kind of offense and relies on the sentencing phase to establish the different offense that will drive the sentence.

Option One is a step in the right direction because it would require the defendant to be sentenced for using only the firearm he was convicted of possessing. Under this option, there is no need to put the parties and the court through the often difficult process of figuring out what to do about a firearm that is not included in the offense of conviction. Rather, if the government intends to prove that the defendant used or possessed any additional firearms, it is free to charge the defendant with that use or possession.

Although we prefer Option One over Option Two, our main difficulty with it is that, by retaining the enhancement and cross reference, it would continue to allow a defendant convicted of unlawfully possessing a firearm to be sentenced for a completely different crime involving that firearm – even if the government never charged him with that crime, or a jury acquitted him of it. The PAG appreciates that the proposed amendment may be one brick in the wall that will ultimately foreclose the use of dismissed, uncharged and acquitted conduct at sentencing, and for that reason, we support it over Option Two. It is still only one brick, however, and more sweeping reforms are sorely needed.

The PAG also opposes Option One's proposed Commentary change for cases in which the defendant is found to have used a firearm from the count of conviction to commit a different offense. We believe that the language would be confusing because it is circular at best. The proposed Commentary language states that the court should "consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1) – (4) and accompanying commentary." The example following that statement, however, essentially directs the court to find that the use of the firearm of conviction in a second offense is *per se* relevant conduct simply because it "is a factor mentioned in subsections (b)(6)(B) and (c)(1) and therefore is relevant conduct under §1B1.3(a)(4) ('any other information specified in the applicable guideline')." The proposed example thus contradicts the Commission's overarching principle that courts should consider the relationship between both offenses by applying the relevant conduct rules set forth in §1B1.3(a)(1) through (4). Moreover, the reference to §1B1.3(a)(4) in this context is confusing at it creates a tautological rule for no apparent purpose.

One way to harmonize the proposed language and resolve the Circuit split might be to amend Application Note 14(E) to read as follows:

> (E) Relationship Between the Instant Offense and the Other Offense. – In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense. A sufficient relationship exists if:
>
> (i) the other offense was
>
> (a) an act or omission that the defendant committed, aided, abetted, counseled, commanded, induced, procured or willfully caused, or
>
> (b) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), a reasonably foreseeable act or omission of another in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for the offense; or
>
> (ii) the other offense was an act or omission described in (E)(i)(a) or (E)(i)(b) that was part of the same course of conduct or common scheme or plan as the offense of conviction.
>
> For example:
>
> Defendant A is convicted of being a felon in possession of a shotgun. The court determines that Defendant A acquired that shotgun so that he could use it in a robbery, and further determines that Defendant A followed through on his plan by committing the robbery with that shotgun. Because the use of that shotgun during the planned robbery was part of Defendant A's common scheme or plan, the "in connection with" requirements of subsections (b)(6)(B) and (c)(1) are satisfied.

* * * * *

This proposed approach would strike a fair compromise by incorporating the familiar relevant conduct principles of § 1B1.3(a)(1) - (2) but eliminating the requirement under (a)(2) that the offenses also be groupable under § 3D1.2(d). The PAG believes that the requirement of a common scheme or plan or the same course of conduct, as illustrated in the example, will allow judges to account for conduct with a close nexus to the offense of conviction without opening the door to conduct that should be charged and proven if the defendant is to be sentenced for it**.**

Thank you again for the opportunity to present the views of the PAG.