PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

January 29, 2018

Hon. William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: WRITTEN TESTIMONY ON BEHALF OF THE PRACTITIONER'S ADVISORY GROUP REGARDING PROPOSED AMENDMENTS, SUBMITTED BY RONALD H. LEVINE, ESQ., CHAIR

Thank you, Mr. Chairman. I come to this hearing having been a defense lawyer based in Philadelphia for the past 16 years. For the 17 years prior to that, I sat on the other side of the aisle - a federal prosecutor at the U.S. Attorney's Office in that city. I want thank the Commission for my appointment to the Practitioners Advisory Group and for the opportunity to serve currently as its Chair. Along with our very able Vice Chair, Knut Johnson, and our equally able cadre of 15 Circuit-specific and at-large members, I can assure you that we very

much value the opportunity the provide insight and input to the Commission from the trenches of private defense practice.

The Practitioner's Advisory Group – we call it the PAG – has written to Commission about the three issues being discussed today in its detailed letters dated February 20, 2017, and October 10, 2017. Please allow me address these issues in this order: Acceptance of Responsibility, Bipartisan Budget Act and Tribal Issues.

I. Acceptance of Responsibility

Probably one of the most sensitive interactions a defense attorney has with a client is the discussion about what it means to plead guilty and accept responsibility while at the same time maintaining credibility with the client and assuring that client that he or she will be zealously represented during the sentencing phase. In this context, the issue of relevant conduct can be exceedingly problematic.

It is our experience is that a significant number of guilty plea agreement negotiations and sentencings are unduly influenced by the perceived risk of losing acceptance credit if the defense makes a good faith, legitimate legal and factual challenge to the government's description of relevant conduct. That is, the potential upside of bringing good faith arguments against conduct that is believed to be irrelevant or legally inconsequential, must be balanced against the risk of losing credit for acceptance.

Defense counsel face this dilemma in various contexts including the litigation of loss amount, whether a firearm was actually used in or connected to the offense, or whether a defendant's conduct constituted leader and organizer activity. A similar risk arises when advocating for mitigating factors or refuting aggravating factors at sentencing, or when seeking downward variances or opposing upward variances.[1] Arguments about mental health and capacity, or the untoward influence of others on the defendant, or whether the offense conduct proximately caused injury to others are additional examples of situations in which defense counsel must navigate this risk.

Good, creative, and potentially valid legal arguments may be abandoned, and facts and government witnesses not challenged to put the allegations in the proper legal perspective, for fear of losing acceptance of responsibility credit for

[1] *See, e.g., United States v. Singh*, 877 F.3d 107, 119-22 (2nd Cir. 2017) ("To the extent the district court increased Singh's punishment because of a perception that in attempting to explain his actions and plead for mercy he did not fully accept responsibility, it committed procedural error.").

the underlying offense. This, even though the defendant quite clearly has not contested *the facts* of the offense of conviction.

Therefore, **the PAG supports** the Commission's view that § 3E1.1 should be clarified; however **the PAG believes** that the proposed wording of the amendment should be modified to eliminate ambiguity about challenges to relevant conduct as a matter of law. The Commission's proposal reads:

> ....a defendant who makes a **non-frivolous challenge to relevant conduct** is not precluded from consideration for a reduction under subsection (a).

While this wording affirmatively acknowledges the right of a defendant to make good faith *factual* challenges to the relevant conduct alleged in a presentence report or a government submission, **the PAG thinks** it equally important to acknowledge that challenges to relevant conduct may be *legal*, and should not be subject to this "non-frivolous" standard. After all, defense counsel

have an ethical obligation to zealously represent their clients, reasonable lawyers can disagree on the merits, and, of course, the law evolves over time when defense lawyers are able to raise novel issues and preserve them for appeal.

Perhaps most dispositive, a defendant's eligibility for acceptance of responsibility should not be tied to the perceived quality of his lawyer's legal arguments – which of course says nothing about the client's acceptance of responsibility. **The PAG proposes** that the Commission recognize this distinction by clarifying that the type of "frivolous" challenge that might entitle a judge to deny acceptance of responsibility credit is limited to "frivolous" factual challenges.

The PAG recommends the following modified wording of the proposed new sentence in Application Note 1(A):

> In addition, a defendant who makes **a legal challenge or a non-frivolous factual challenge** to relevant conduct is

not precluded from consideration for a reduction under subsection (a).

This modified wording accords defense counsel broad deference to assert aggressive and creative legal challenges to relevant conduct without causing their clients to risk losing acceptance of responsibility credit.

II. Bipartisan Budget Act

The Bipartisan Budget Act increased the statutory maximum from five years to ten years in prison for fraud by a person who either (1) is paid for services performed in connection with any determination Social Security benefits, or (2) is a health care provider who submits evidence in connection with Social Security benefits determinations. 42 U.S.C. §§ 408(a), 1011(a), 1383a(a).

The Commission proposes to amend the Fraud Guideline § 2B1.1 by adding 2 or 4 levels and/or an offense level floor of 12 or 14 for defendants convicted under these 10-year max statutes and seeks comment on the interaction between these proposed specific offense characteristics and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Of course, an increase in the statutory maximum does not inevitably or logically require the addition of a Guidelines floor or special offense characteristic. Here, **the PAG recommends** that the Commission not adopt either this additional offense characteristic or offense level floor for three reasons.

First, with regard to these Social Security offenses, there is little or no research or empirical sentencing data suggesting that the Guidelines calculations fail to generate sufficiently lengthy sentences in these cases.

Second, the Guidelines already adequately address the subset of Social Security fraud cases that are subject to the higher statutory maximum through § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). § 3B1.3 exists precisely to further penalize – if applicable – the more culpable defendants who exploit their trust or skill to facilitate Social Security benefit-related fraud, be it, for example, a translator or a physician.

Third, as recognized by many stakeholders, § 2B1.1 – laden with 19 special offense characteristics many of which contain their own subsections – is already complicated and unwieldy; further offense characteristic provisions contributes to Guidelines "creep", potentially resulting in more harsh sentencing ranges or disparate sentences. Yet given the absence of data suggesting that sentences are too low for this category of cases, further tinkering with § 2B1.1 is unnecessary.

The PAG notes, however, that if the Commission determines to differentiate these new cases from other forms of Social Security fraud, changes to the Guidelines should be, at most, incremental. In that case, **the PAG recommends** that the Commission only adopt the proposed 2-level enhancement and make clear that: (a) it applies only to those defendants who are convicted of committing the offenses subject to the 10-year statutory maximum; and (b) that if this enhancement applied, 3B1.3 would not be applicable. This would allow the Commission to isolate and analyze cases brought under the new provisions and use that information to tailor further consideration of this offense characteristic to actual experience and demonstrated need.

III. Tribal Issues

1. Tribal Court Convictions

The PAG supports the Commission's recognition, based on the recommendations of the Tribal Issues Advisory Group (TIAG), that tribal court convictions should not be assigned criminal history points and that only some, and certainly not all, tribal court convictions may warrant consideration for an upward departure. **The PAG makes** the following comments and recommendations regarding the proposed amendment of § 4A1.3:

a. **The PAG recommends** that, as regards upward departures based on tribal court convictions, proposed Application Note 2(C) be modified to the effect that a threshold finding of either (1) the absence of due process (the rights to counsel and trial by jury and other protections provided to defendants under the Constitution) or (2) a conviction based on the same conduct that formed the basis for another conviction which is counted for *criminal history* points would bar the use of a tribal court conviction for an upward departure.

b. Similarly, **the PAG recommends** that the last clause of the preamble to proposed Application Note 2(C), which currently reads "....and in addition, may consider relevant factors such as the following:....", be modified to read:

"...and, in addition, **should** consider **the presence or absence of** relevant factors such as the following:...."

The PAG makes these recommendations to emphasize that because tribal convictions may not be a reliable basis for departure, the sentencing court *should* first consider whether these factors exist.

2. Court Protection Orders

The PAG supports defining "court protection order" to clarify that the phrase includes tribal court protection orders which meet certain due process requirements, but **the PAG recommends** a slight change in the language of the proposed amended Application Note 1(D) to make clear that the due process requirements of § 2265(b) must be met. The Commission's proposal currently

reads "court protection order" means any "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)." The phrase "consistent with" in the context of due process rights appears to afford latitude which may be unintended. The PAG recommends that the language be modified to read:

> "**court protection order**" means any "protection order" that meets the definition of 18 U.S.C. §2266(5), as long as the protection order also meets the requirements of 18 U.S.C. §2265(b)."

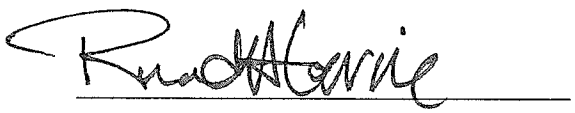
Finally, t**he PAG does <u>not</u> support** a general Chapter 3 adjustment for violations of protection orders, an adjustment is not needed for the bulk of cases in which a protection order violation may be of concern.

The assault and threat-related Guidelines found in §§ 2A1.4, 2A1.5, 2A2.1(b), 2A2.2(b)(3), (b)(4) and (b)(6), 2A2.3(b)(1), 2A6.1(b)(3), 2A6.2(b)(1), either carry extremely high offense levels, have an applicable adjustment for

degree of injury or injury to a partner, or already contain an adjustment for violation of protection orders.

Thank you again for seeking and considering comments from the Practitioner's Advisory Group.

Respectfully submitted,



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