

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION
ON PROPOSED AMENDMENTS TO THE GUIDELINES

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Judge Reeves and members of the Sentencing Commission:

My name is Marlo Cadeddu, and on behalf of the Practitioners Advisory Group, I thank you for the opportunity to provide testimony to the Commission regarding proposed amendments to the United States Sentencing Guidelines now under consideration. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We appreciate the Commission's willingness to consider our positions on the Commission's proposed amendments to the guidelines.

My testimony will address the PAG's positions on proposed amendments regarding: (1) Firearms; (2) Fake Pills; (3) First Step Act-Drug Offenses; and (4) Circuit Conflicts.

I. Proposed Amendment to U.S.S.G. §2K2.1, Firearms

Many of the Commission’s proposed changes to U.S.S.G. §2K2.1 are in response to the passage of the Bipartisan Safer Communities Act (BSCA), which requires the Commission to both “review” and “amend” its guidelines. The PAG recommends against any amendment of §2K2.1 at this time and instead recommends that review and study be conducted before any amendment. While the BSCA directs the Commission to amend its guidelines, it does not contain any timetable for amendment and directs the Commission to “**review and amend.**” BSCA § 12004. Amendment without review would be contrary to Congress’s directive. There are several reasons why careful review should precede any amendment.

First, as other commentators have noted, there are disproportionate racial disparities in charging under the current firearms statutes. The PAG recommends that any amendment to §2K2.1 be structured to reduce rather than exacerbate racial disparities. Accordingly, the PAG asks the Commission to consider reviewing and studying this topic before amending this guideline.

Second, historically, courts have imposed below guideline sentences at a significant rate when sentencing straw purchasers and other offenders under §2K2.1. The Commission’s statistics show that for Fiscal Year 2017-2021, over 42% of sentences imposed pursuant to §2K2.1 were below the guidelines. Now, the Commission is considering *increasing* the recommended sentencing ranges under §2K2.1 for many defendants. Implementing substantial increases, without first understanding and accounting for the reasons behind the historical prevalence of below-guideline sentences, either ensures an even higher rate of below guideline sentences in the future or guarantees that less-culpable individuals will be incarcerated for longer. Review and study would yield an understanding of why courts so frequently elect to depart downward and could suggest more appropriate modifications to the guideline.

Third, many sentences under §2K2.1 arise from prosecutions under 18 U.S.C. § 922. One provision of this statute, § 922 (g)(8), criminalizes possession of a firearm by persons subject to domestic violence protective orders. Recently, the Fifth Circuit held this portion of § 922 unconstitutional. *United States v. Rahimi*, ___ F. 4th ___, 2023 WL 1459240 (5th Cir., February 2, 2023). The rationale of the *Rahimi* Court potentially calls into question the constitutionality of several other portions of § 922 (g). The applicability of the current version of §2K2.1 and of the proposed amended versions depends, in some respects, on a defendant being a “prohibited person” under § 922 (g). Likewise, some of the new offenses created by the BSCA and accounted for in the proposed amendments to §2K2.1 depend on the transfer of firearms to persons who are prohibited from possessing firearms due to domestic violence protective orders. If the *Rahimi* decision withstands further challenge, is adopted in other Circuits and/or is applied to other portions of § 922 (g), substantial revisions to §2K2.1 will likely be necessary. It seems prudent that any changes to §2K2.1 should await a review and study of the impact of *Rahimi*.

There are other aspects of §2K2.1 that merit review and study prior to amendment. These include the changing the standard of proof from “knowingly” to the ambiguous “having reason to believe;” the impact of “triple counting” of a defendant’s criminal history; and the need for a

mens rea requirement for the receipt and transfer of “ghost guns.” For all of these reasons, the PAG recommends against any amendment of §2K2.1 at this time.

In the alternative, if the Commission decides to amend §2K2.1 without further study, the PAG recommends Option 1 because it is more narrowly drawn. However, the PAG recommends an important change to Option 1. This recommended change is based on the PAG’s opinion that the current version of §2K2.1(b)(9) in Option 1 is inconsistent with the BSCA in several respects.

First, the BSCA requires that mitigating factors be considered for defendants who are “straw purchasers without significant criminal histories.” BSCA § 12004. However, Option 1 places a number of additional limitations on the consideration of mitigating factors. There should be no limitations beyond those expressed in the BSCA. Second, the BSCA does not define “without significant criminal histories,” but Option 1 is written so as to apply §2K2.1(b)(9) only to a defendant who “does not have more than 1 criminal history point.” It is the position of the PAG that what constitutes “without significant criminal histories” should be left to the discretion of the sentencing judge and should not be limited to defendants with no more than 1 criminal history point. Third, the BSCA requires that any guideline amendment in this area should “reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.” But the language of Option 1 is more restrictive. For example, instead of directing consideration of “any coercion [and] domestic violence survivor history,” Option 1 contemplates only consideration of a defendant motivated by “an intimate or familial relationship or by threats or fear.” Moreover, nowhere in Option 1 is the sentencing court directed to consider the all important catch-all of “other mitigating factors.” Finally, the BSCA does not quantify the extent of any reduction that a defendant should receive, yet Option 1 would limit a reduction to 1 or 2 levels.

In order for Option 1 to be consistent with the directives of the BSCA, the PAG recommends that §2K2.1(b)(9) be redrafted as follows:

“(b)(9) A downward departure may be warranted for any defendant convicted under 18 U.S.C. §§ 922 (a)(6), 922(d), 924 (a)(1)(A), 932 or 933 if that defendant is without significant criminal history. The extent of the downward departure may be based upon consideration of:

- (A) the defendant’s role and culpability;
- (B) any coercion;
- (C) the defendant’s domestic violence survivor history; or
- (D) other mitigating factors”

Without these changes to §2K2.1 (b)(9), straw purchasers with these and other mitigating factors risk being sentenced to longer terms than the prohibited persons for whom they are purchasing - a concept that runs contrary to the BSCA and common sense.

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