

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

March 7, 2023

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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.

#### IV. Circuit Conflicts

##### A. U.S.S.G. §3E1.1(b), Acceptance of Responsibility

The PAG generally endorses the Commission’s proposed amendment to resolve the circuit conflict that has arisen regarding when the government may withhold a motion under §3E1.1(b) to credit a defendant with a third point for acceptance of responsibility.

The PAG’s experience with this issue varies widely across the country. In some districts, the government rarely, if ever, withholds motions for the third point of acceptance. In other districts, practitioners face a dilemma over how to advise clients who may have grounds to file a motion to suppress or sentencing objections, but by doing so may face a penalty at sentencing – loss of the third point of credit for acceptance of responsibility. Importantly, requiring defendants to forgo filing suppression motions in order to obtain the third point insulates law enforcement misconduct from judicial oversight. This amendment thus will serve the important salutary purpose of promoting the integrity of the criminal justice system.<sup>4</sup> Accordingly, the PAG welcomes the Commission’s proposal to clarify the circumstances when the third point for acceptance of responsibility may be withheld by defining the term “preparing for trial.”

The PAG suggests that this definition be further modified by replacing the term “drafting” in the second sentence with “filing,” so that it reads:

“Preparing for trial” is ordinarily indicated by actions taken close to trial, such as **filing** in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists.

The PAG believes that this minor modification will limit litigation about whether an action is in fact preparation for trial, and it will facilitate district courts’ ability to make this determination, since the docket will accurately reflect what, if any, motions the government prepared and filed in advance of trial.

In addition to the Commission’s proposal to define “preparing for trial,” the PAG recommends that the Commission modify the “allocation of resources” phrase in the last sentence of the current version of §3E1.1(b). The PAG asks the Commission to consider modifying this phrase to read “thereby permitting the government to avoid preparing for trial and permitting the court to schedule its calendar efficiently.” The PAG believes that this additional modification will clarify the circumstances where the government may withhold the third point of credit for acceptance of responsibility.

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<sup>4</sup> American Bar Association, Criminal Justice Section, *2023 Plea Bargain Task Force Report*, at 15, 25; available at: <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf> (last viewed Feb. 27, 2023).

## B. U.S.S.G. §4B1.2, Definition of Controlled Substance Offense

The PAG supports the Commission's proposed Option 1, which defines "controlled substance" as those substances identified under the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* This definition provides a straightforward framework for analyzing whether a defendant's prior conviction is a predicate offense for purposes of the Career Offender guideline, and it will promote uniformity in sentencing law across the country.

In contrast, the PAG believes that the second option's use of inconsistent state law definitions of controlled substances will increase unwarranted sentencing disparities among similarly situated defendants nationwide. Under Option 2, two defendants convicted of the same offense and with similar criminal records may be subject to vastly different guidelines ranges, depending on the state in which s/he is prosecuted.

For example, cannabidiol (CBD) has been legal in Wisconsin since 2014. Thus, a defendant's pre-2014 CBD distribution conviction would serve as a career offender predicate, even though CBD is legal both in Wisconsin and federally. Such a conviction is not a proxy for dangerousness or recidivism, given that the state and federal governments have legalized CBD.

Hemp is another good example. In 2018, the federal government removed hemp from the list of controlled substances, and as of 2020, all states except Idaho had legalized hemp. If state law is used to determine the definition of controlled substance for purposes of the Career Offender guideline, an Idaho conviction for hemp manufacturing prior to 2021 would be categorized as a predicate offense. This is so, even though this conduct is now legal in Idaho, and was legal across the country at the time. Whether a defendant is subject to the enhanced penalties under the Career Offender guideline should not be driven by an accident of geography.

The sentencing implications for the second option are especially troubling given the astronomical increases in sentences for career offenders, and the fact that between 2016 and 2021, 75% of defendants sentenced as career offenders were people of color.<sup>5</sup> The PAG believes that adopting the second option will undermine the uniformity that the guidelines strive to promote and could exacerbate unwarranted race-based sentencing disparities.

Accordingly, the PAG asks the Commission to adopt Option 1 and define "controlled substance" consistent with the federal Controlled Substances Act.

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<sup>5</sup> See U.S. Sent'g Comm'n, *Quick Facts, Career Offenders*, Fiscal Years 2016, 2017, 2018, 2019, 2020, & 2021.