

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 Susan Lin, 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 U.S. Sentencing Guidelines. 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) the career offender guideline and (2) criminal history.

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## II. Proposed Amendment to Criminal History

### A. Status Points, USSG § 4A1.1

The PAG endorses Option 3, the Commission’s proposal to eliminate the assignment of status points under §4A1.1(d). Additionally, the PAG does not support the alternative of applying status points to certain categories of prior offenses and not others. Status points lengthen a defendant’s sentence, by increasing the criminal history score, which in turn increases the advisory guidelines range. But as the Commission’s recent study reflects, status points are not predictive of recidivism. Thus, assigning status points does not further any of the purposes of sentencing under 18 U.S.C. § 3553(a)(2)(A)-(C),<sup>7</sup> and there does not appear to be any evidence-based rationale for assigning status points even in a limited category of cases involving particular offenses. The Commission should keep in mind that a defendant’s “back judge” (or parole board) will have the authority to appropriately punish a defendant for any direct violation of parole or probation. The elimination of status points thus also prevents a defendant from being doubly punished for a parole or probation violation.

The PAG also opposes the assessment of status points for defendants “recently placed under a criminal justice sentence” when their federal offense was committed. The PAG believes that it would be difficult to define “recently placed under a criminal justice sentence” and provide adequate guidance to sentencing courts. Rather, the departure that the Commission proposes in §4A1.3 would allow courts to address a defendant’s status at the time the federal offense is committed if the court concludes that a departure is warranted.

#### B. §4C1.1, Zero Point Offenders

The PAG welcomes the Commission’s proposal to create a new adjustment for zero-point offenders. The PAG, however, prefers that the Commission implement its 2016 proposal for “First Offenders” which proposed a decrease in offense level for defendants who are “true” first time offenders – zero-point offenders who have no prior convictions of any kind.<sup>8</sup> The Commission’s 2016 proposal included two options for the treatment of true first time offenders. One option provides for a decrease of one level regardless of the total offense level. The other option provides for either a one- or two-level reduction in offense level depending on whether the offense level is 16 or greater.<sup>9</sup>

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<sup>7</sup> These purposes are to: (1) reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense; (2) afford adequate deterrence to criminal conduct; and (3) protect the public from further crimes of the defendant. *See* 18 U.S.C. § 3553(a)(2)(A)-(C).

<sup>8</sup> The Commission’s 2016 proposal defined “First Offenders” as “(a) A defendant is a first offender if [(1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind.” 81 FR 92005 (Dec. 19, 2016).

<sup>9</sup> The two options were:

Option 1:

(b) If the defendant is determined to be a first offender under subsection (a) decrease the offense level determined under Chapters Two and Three by [1] level.

Option 2:

The PAG previously endorsed the Commission’s 2016 proposal regarding Zero Point Offenders, and it continues to believe that this is the optimum approach for zero point offenders with no prior convictions. The PAG’s position is supported by two Commission recidivism reports showing that defendants without any criminal history have a demonstrably lower risk of recidivism.<sup>10</sup>

The PAG further suggests that the Commission incorporate the second option found in the body of 2016 proposed amendment. Thus, a zero point offender’s reduction would correspond to their offense level, similar to the Commission’s treatment of acceptance of responsibility in §3E1.1.

In the alternative, if the Commission does not revisit its 2016 proposal, the PAG prefers Option 1 of the proposed amendment, because its definition of zero point offenders is consistent with the 2016 proposed amendment discussed above. The PAG, however, recommends eliminating the five criteria proposed in §4C1.1(a)(2)-(6). If any of the first four of these aggravating factors are present, they would already be accounted for in other guideline enhancements. Just as importantly, the presence of any of the five criteria would not diminish the fact that zero point offenders recidivate at a much lower rate than any other defendant punished in the federal system.

With respect to the Commission’s proposal to amend the commentary in §5C1.1, the PAG supports the proposal regarding Zone A and B defendants. The PAG recommends that the proposal regarding Zone C and D defendants be modified to eliminate the requirement that alternatives to incarceration should only be considered if the conviction is not “an otherwise serious offense.” This qualification would virtually eliminate the possibility for alternatives to incarceration for all Zone C and D defendants. In PAG members’ experience, sentencing judges consider virtually every felony offense a serious one. Accordingly, the PAG recommends that the comment be modified as follows:

If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range is in Zone C

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- (b) If the defendant is determined to be a first offender under subsection (a) decrease the offense level as follows:
    - (1) If the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or
    - (2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.

*Id.*

<sup>10</sup> The Commission’s earlier report found a “22.1 percentage point difference in rearrest rates between offenders with no criminal history and one-point offenders.” *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 14 (May 2017). Four years later, this data was relatively unchanged, and showed that zero point offenders with no prior convictions are 15.5% less likely to be rearrested than those defendants with one criminal history point. *See Recidivism of Federal Offenders Released in 2010* at 26 (Sept. 2021).

or D of the Sentencing Table, a departure to a sentence other than a sentence of imprisonment may be appropriate.

C. §4A1.3, Simple Possession of Marijuana

The PAG welcomes the Commission’s proposal to provide for a downward departure where a defendant “receive[s] criminal history points from a sentence for possession of marijuana for personal use.” The PAG, however, believes that treating this issue as a departure will lead to inconsistent treatment across the nation of prior marijuana possession offenses.

Accordingly, the PAG asks the Commission to consider adding simple marijuana possession convictions to the 13 convictions enumerated in §4A1.2(c)(1). This way, simple possession of marijuana convictions would be scorable where a jail sentence of more than 30 days or a term of probation of more than one year was imposed.