PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

United States Sentencing Commission
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Career Offender Testimony
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Part A – Listed Guideline Approach

POAG appreciates the Commission's efforts in providing an alternative method to the categorical approach and modified categorical approach. The categorical approach has created ever-increasing difficulties when determining whether an offense is a "crime of violence" or a "controlled substance offense." The application of the current §4B1.2 definitions has created considerable consternation as practitioners work to keep up with the changes in interpretation and the pending litigation. The various interpretations around the country also have resulted in significant disparity across the various circuits. Further, the fact that the issue is heavily litigated makes it more difficult for defendants to fully understand, at the time of their plea, the full impact their prior convictions will have on their final sentence until the sentencing hearing or subsequent appeal. Most importantly, the guideline definition no longer functions as it was originally designed.

POAG is in favor of eliminating the categorical approach by defining a "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. This is a comparable approach and within the spirit of POAG's August 2018 position paper in response to the proposed priorities to adjust the enumerated crimes clause to create a *per se* list of offenses for which a conviction is to be considered a "crime of violence." POAG further supports changes to the guidelines where the use of the terms "crime of violence" and "controlled substance offense" are present and define these terms by making specific reference to §4B1.2. By replacing the categorical, modified categorical, and enumerated clauses, the career offender guideline becomes more simplified and less likely to produce illogical outcomes. Under the current guidelines, in Florida, if a defendant had previously run towards a law enforcement officer, kicking, punching, and chocking that officer, their conduct may have resulted in a conviction for Battery on a Law Enforcement Officer, under F.S. §784.07(2)(b). However, the conviction for Battery on a Law Enforcement Officer has as an element, "touch or strike." Because of that *de minimus* component of

"touch," the categorical approach would result in that conviction not being considered a "crime of violence" under the definition at USSG §4B1.2. See *United States v. Williams*, 609 F.3d 1168 (11th Cir. 2010), referencing *United States v. Johnson*, 599 U.S. 133 (2010). In the alternative, if that same defendant had instead shoved the law enforcement officer away from them as they fled from the officer, their conduct may have resulted in a conviction for Resisting Arrest with Violence, under F.S. §843.01. Under the categorical approach, that conviction is always a "crime of violence" because there is not a *de minimus* component to that statute. See *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012). While the conduct in both could be argued to be violent, it would be unreasonable to argue that the defendant who runs towards the law enforcement officer to do him or her violence is somehow less violent than the defendant who pushes away from the same officer to escape a physical confrontation. This example can be further compounded when a defendant has been charged with Battery on a Law Enforcement officer, but is allowed to plea to an alternative offense of Resisting Arrest with Violence. While that may have been an advantageous choice at the state level, the defendant has now pleaded himself into a predicate conviction when standing before a federal judge. The federal system is riddled with these types of illogical results. One may be hard pressed to find a jurisdiction in which the current categorical/modified categorical approach does not produce similar results in some facete or corner of the law. POAG has yet to see a proposed amendment that could address these types of results until now. Under the proposed amendment, these offenses would both likely qualify as predicates because the probation officer, parties, and court would have the ability to look at the conduct in a limited way and because the offense is being compared to a class of offenses as described by the enumerated guidelines.

Under the proposed amendment to remove the categorical and enumerated clauses, probation officers, the parties, and the Court would no longer have to make divisibility determinations based on the elements and means. Additionally, because the federal guideline approach allows for use of the *Shepard* documents to consider the type of conduct involved in the offense, the new approach will allow Judges to more adequately determine whether a defendant's criminal conduct was a "crime of violence" or was a "controlled substance offense." One of the components of the jurisprudence surrounding the categorical and modified categorical approach that has created a lot of disparity and problems has been that the methodology requires the judiciary to close an eye to the conduct involved and focus solely on the conduct as described by the statute. The proposed amendment returns conduct into the consideration, allowing the judiciary a less restricted view of the predicates being considered. With that additional observational ability, POAG anticipates that there will be less disparity in outcome and less risk that the method produces an illogical result.

While POAG is in favor of the Commission's approach in redefining "crime of violence" and "controlled substance offense" based upon a list of federal guidelines, POAG does have some concerns about the execution of this new approach, and respectfully requests that the Commission consider refining/removing some of these listed guidelines, adding commentary to instruct the reader to refer to the specific federal guideline during the assessment process, and/or adding a possible departure provision. We believe that some may look to certain listed guidelines and revert to using generic definitions when analyzing certain offenses. Therefore, POAG recommends that further assessment should be conducted as to whether some of the listed offenses should be included, and/or an application note should be added to clarify that, upon determining whether an offense meets the definition of a "crime of violence" and "controlled substance offense," one must refer to the specific federal guideline to determine if the offense meets the definition in the guideline. POAG also

discussed the possibility of a departure being considered to address any extraordinary cases.

POAG also supports the change in the guidelines to insert the sources expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) in determining whether a conviction is a "crime of violence" or a "controlled substance offense." We believe that the listed sources in the proposed amendments should remain as-is, and no other changes are needed in this area.

POAG is in favor of the Commission also amending the Commentary in §2L1.2 to mirror the proposed approach for §4B1.2, for added consistency and ease of applicability.

In conclusion, POAG discussed that the process of determining a predicate offense largely functioned as designed until the *Descamps* divisibility analysis became incorporated into the guideline process in 2013 and the *Mathis* means and elements analysis became incorporated into the guideline analysis in 2016. The amendment to USSG §4B1.1, comment. (n.2), resolves the *Descamps* and *Mathis* inspired issues in relation to guideline application by allowing *Shepard* documents to be reviewed without statutory prerequisites, thereby removing the categorical and modified categorical approach from the analysis. Further, the amendments discussed below resolve issues with inchoate offenses, robbery, and "controlled substance offenses," including the involvement of an offer to sell. The listed offense approach is an entirely new process, rather than an amendment to the existing process. Therefore, *ex post facto* issues will need to be considered for a period of time. If the listed offense process functions as designed, the arbitrary results produced by the categorical approach will finally be replaced by a workable solution. If the listed offense process does not function as designed, it could overwhelm the system for a period of time with application issues and ensuing litigation for the foreseeable future, pending the development of a new body of case law. As such, POAG discussed whether the listed offenses approach should be delayed to see if the other amendments set forth in this section resolve the ongoing issues and allow for further vetting of the listed guidelines process prior to implementation. However, after analyzing the potential benefits and consequences, POAG still overwhelmingly favors the listed offense approach and looks forward to the possibilities this new approach brings and the concerns it resolves.

Part B: Meaning of Robbery

As previously discussed, POAG is in favor of the Commission adopting the listed guidelines approach to potentially eliminate the categorical approach from the guidelines. However, in the alternative, POAG is in favor of the proposed amendment relating to the meaning of Robbery. First, the proposed amendment would move the clarifying definitions of certain enumerated offenses and the phrase "prior felony conviction" from the commentary to a new subsection in USSG §4B1.2. POAG believes the proposed amendment would reduce potential issues where courts have found that the commentary is not authoritative because it is inconsistent with the plain text of the guideline itself. See *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3rd Cir. 2021) (en banc); *United States v. Hovis*, 927 F.3d 382 (6th Cir. 2019) (en banc); and *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018).

Second, the proposed amendment would provide a definition of Robbery for purposes of USSG §4B1.2 and §2L1.2 that mirrors the Hobbs Act definition of Robbery at 18 U.S.C. § 1951(b)(1).

POAG believes the proposed definition as listed is appropriate. Some circuits have held that Hobbs Act Robbery is overly broad and no longer constitutes a "crime of violence" under USSG §4B1.2 because there is no categorical match between Hobbs Act Robbery and the enumerated offense of Robbery. See *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); and *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017). POAG believes that defining Robbery using the Hobbs Act Robbery definition would eliminate any confusion over whether the offense qualifies as a "crime of violence."

With regard to the issues for comment, POAG is in favor of the Commission defining the phrase "actual or threatened force" for purposes of the proposed "Robbery" definition based on the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019).

Part C: Inchoate Offenses

As previously discussed, POAG is in favor of the Commission adopting the listed guidelines approach to potentially eliminate the categorical approach from the guidelines. However, in the alternative, POAG is in favor of the proposed amendments to USSG §4B1.2 relating to inchoate offenses and offenses arising from accomplice liability. Of the two options presented, POAG unanimously agreed that Option 1 is more favorable with modification.

Option 1 provides a simpler approach that eliminates (1) any question as to whether inchoate offenses qualify as a "crime of violence" or a "controlled substance offense," and (2) the need for the two-step analysis which some courts have employed to determine whether inchoate offenses qualify under the career offender guideline as a "crime of violence" or a "controlled substance offense." POAG believes that a two-step analysis is time-consuming, complicated, and unnecessary. When applying Option 1, courts will only need to look to the underlying substantive offense to determine whether that offense qualifies as a "crime of violence" or a "controlled substance offense." POAG further believes that any inchoate conspiracy crime should receive consideration regardless of whether overt acts occurred or what overt act is required by the state law or statute in question. Therefore, POAG would suggest the first bracketed language as noted in Option 2 be included with Option 1.

POAG believes that Option 1 with the above-noted modification will promote consistency in application of the guideline, address the Commission's original intent (as currently noted in §4B1.2, comment. (n.1)) that "crime of violence" and "controlled substance offense" should include inchoate offenses and resolve circuit splits and state-to-state disparities. The proposed amendment would address issues in some circuits where it has been held that inchoate offenses are not included in the definition of a "controlled substance offense" because the commentary is inconsistent with the plain text of the guideline itself and is, therefore, not authoritative. See *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3rd Cir. 2021) (en banc); *United States v. Hovis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018); and *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc). However, other circuits have held that an inchoate crime does qualify as a "controlled substance offense" under USSG §4B1.2(b), thus finding that the commentary is authoritative. See *United States v. Smith*, 989 F.3d 575, 583-85 (7th Cir. 2021); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States*

v. Richardson, 958 F.3d 151 (2nd Cir. 2020); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019); and *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017).

The complications presently involved in analyzing inchoate offenses are illustrated well in the Fourth Circuit, where, in *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018), the Court determined that generic conspiracy for purposes of the §4B1.2 analysis requires an overt act. As a result of *McCollum*, probation officers must first research the specific state conspiracy offense at issue to determine if an overt act is necessary to prove the conspiracy offense under state law, and then must determine whether the substantive offense underlying the particular conspiracy meets the definition of a "crime of violence" or "controlled substance offense."

Furthermore, some states require an overt act to be proven as an element of a conspiracy offense while others do not. For example, states such as Virginia and North Carolina that follow common law do not require an overt act. See *State v. Gibbs*, 436 S.E.2d 321 (N.C. 1993). However, states such as Tennessee and Nebraska require an overt act as an element of the conspiracy offense. See *United States v. Pascacio-Rodriguez*, 749 F.3d 353 (5th Cir. 2014). Based on the *McCollum* analysis, a conspiracy offense from a state requiring an overt act would qualify as a predicate "crime of violence" or a "controlled substance offense," while a conspiracy offense from a state not requiring an overt act would not qualify as a predicate "crime of violence" or a "controlled substance offense." Notably, in *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019), the Fourth Circuit extended the *McCollum* generic conspiracy/overt act holding to a federal drug conspiracy under 21 U.S.C. § 846. The Tenth Circuit has also held that a federal drug conspiracy does not qualify as a "controlled substance offense" under USSG §4B1.2 because an overt act is not necessary to prove the offense. See *United States v. Crooks*, 997 F.3d 1273 (10th Cir. 2021) and *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016). As a result, at least in the Fourth and Tenth Circuits, a federal controlled substance conspiracy offense no longer qualifies as a "controlled substance offense" under USSG §4B1.2. This line of cases has resulted in confusion, disparate application, and disparate sentencing, all which would be ameliorated by the proposed amendment.

Part D: Definition of "Controlled Substance Offense"

As previously discussed, POAG is in favor of the Commission adopting the listed guidelines approach to potentially eliminate the categorical approach from the guidelines. However, in the alternative, POAG favors the proposed amendment that would amend the definition of "controlled substance offense" at USSG §4B1.2(b) to include offenses involving an "offer to sell" a controlled substance and offenses described in 46 U.S.C. § 70503(a) or § 70506(b). The proposed amendment would eliminate any questions as to whether the offenses qualify as a "controlled substance offense." Regarding the "offer to sell" offense, the current definition precludes state statutes containing the broader language from qualifying as a predicate offense under the career offender guideline. For example, the Fifth Circuit held that a Texas conviction for Possession with Intent to Deliver a Controlled Substance, under Texas Controlled Substance Act §§ 481.002(8) and 481.112 *et seq.*, does not qualify as a "controlled substance offense" because the Texas drug statute includes an "offer to sell" as an alternate means of committing the offense. See *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). The current definition does not capture a vast number of defendants because of these jurisdictional differences, despite them being engage in similar conduct. POAG believes adding this language would correct the current disparities among repeat drug traffickers.

Apart from the "offer to sell" issue identified by the Commission, POAG believes there are likely numerous state statutes that prohibit additional drug-related activities similar in kind to those types of activities already included in the guideline definition of a "controlled substance offense." One such example is the "transport" of a controlled substance, as prohibited in North Carolina G.S. 90-95(h).

Further, POAG recommends the Commission revise the definition of "controlled substance offense" at USSG §2L1.2 to conform to the revised definition suggested in USSG §4B1.2(b), in order to provide consistency within the guidelines.