

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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February 22, 2024

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to Sentencing Guidelines, December 26, 2023

Dear Judge Reeves:

The Practitioners Advisory Group (“PAG”) provides comments on the Commission’s proposed amendments regarding: (1) the rule for calculating loss under §2B1.1; (2) the treatment of youthful individuals; (3) the use of acquitted conduct; (4) the resolution of two circuit conflicts; (5) miscellaneous amendments related to §2D1.1(a) and §4C1.1; and (6) the simplification of the three-step process for calculating the guideline range.

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V. Miscellaneous Amendments

The Commission is proposing amendments related to six miscellaneous guideline issues. The PAG offers comments on two issues: (1) application of the base offense levels in §2D1.1(a)(1)-(4); and (2) the scope of the definition of “sex offense” in the newly promulgated §4C1.1(b)(2).

A. The Base Offense Levels in §2D1.1(a)(1)-(4)

The Commission addresses the issue of when the enhanced base offense levels at §§2D1.1(a)(1)-(4) should apply, and offers two options. The first option proposes amending §§2D1.1(a)(1)-(4) to apply these offense levels when a defendant is convicted under 21 U.S.C. §§ 841 or 960, and is subject to a statutorily enhanced sentence for the offense of conviction because the specific statutory elements are established. Option 2 proposes amending §§2D1.1(a)(1)-(4) to apply when a defendant is convicted under 21 U.S.C. §§ 841 or 960, and the offense “involved” the statutory requirements. Both options clarify that where the application of an offense level requires that the defendant also have one or more prior convictions, that those convictions be established by the filing of an information under 21 U.S.C. § 851.¹⁰²

The PAG understands that this proposed amendment addresses an issue raised by the Federal Defenders, in light of the First Step Act.

While Congress swapped out “felony drug offense” from the mandatory minimum penalties in 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), 960(B)(1) and 960(b)(2) [which reflect the most serious offenses], it failed to do the same in the remainder of these statutes, including in §§ 841(b)(1)(C) and 960(b)(3). There is no rational explanation for this omission, and its consequences are severe: it requires a lesser showing to trigger mandatory life under §§ 841(b)(1)(C) and 960(b)(3) than it does to trigger mandatory life under the more serious [subsections]. This anomaly means that a person with a less serious criminal history, who traffics in a lower quantity of drugs, would be

¹⁰² See, e.g., §§2D1.1(a)(1)(A) & (B) & §2D1.1(a)(3).

subject to a mandatory life penalty, but if that same person was convicted of selling more drugs, the mandatory life penalty would not be triggered.¹⁰³

In effect, §2D1.1(a)(1)(B) could be “interpreted to recommend a guideline sentence of life in cases where the statutory minimum sentence is not life, but twenty years.”¹⁰⁴ As the Defenders explain, the base offense levels in §§2D1.1(a)(1)-(4) “should recommend a life sentence only for an individual convicted of distribution resulting in death or serious-bodily injury, where the government filed a § 851 information, and the court sustained it.”¹⁰⁵ In practice, “courts have long applied those elevated base offense levels regardless of whether the offense of conviction established the death- or serious-bodily-injury resulting element, and even where the government declined to seek the statutorily specified § 851 enhancement.”¹⁰⁶

The PAG generally agrees with the Defenders’ analysis and supports Option 1 because it requires the government to prove that the statutory elements for the enhanced penalty are met. Option 2 would allow the increased base offense to be applied based on relevant conduct, when the government establishes that an offense involved the statutory factors. Given the significant increase that results from these higher offense levels, the PAG agrees that these enhanced sentences should only be imposed in those limited cases where there is sufficient proof that the statutory elements for enhancement are met.

While the PAG supports Option 1, it has questions about relying on the filing of § 851 informations, and how that will impact the small group of defendants subject to these enhanced penalties. The PAG is interested in data reflecting differences in sentences for defendants who are subject to these enhanced base offense levels based on the filing of an § 851. The PAG remains particularly concerned about increases in the application of the § 851 enhancement in light of the Commission’s 2018 findings that § 851 enhancements are applied “inconsistently, with wide geographic variations in the filing, withdrawal, and ultimate application of the 851 enhancements for eligible drug trafficking offenders.”¹⁰⁷ This is compounded by the PAG’s further concern that the enhanced base offense levels in §§2D1.1(a)(1)-(4) open the door to unwarranted disparity due to localized prosecutorial decisions. As reflected in the data that the Commission has collected and analyzed, in fiscal year 2016, the average sentence for a defendant with a filed § 851 was, on average, more than five times longer than when an § 851 was not

¹⁰³ See Statement of M. Caruso on First Step Act – Drug Offenses and Counterfeit Pills 13-14 (Mar. 7, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=485.

¹⁰⁴ See Letter from H. Williams to Hon. Reeves at 14-15 (Aug. 1, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=64.

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. Sent’g Comm’n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* at 6, 21-23 (July 2018), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf

filed.¹⁰⁸ For this reason, while the PAG supports Option 1, we also recommend that the Commission study how if at all this change to the guidelines affects charging decisions by prosecutors in each district. This is particularly important given that, despite these higher sentences, defendants subject to a higher base offense level under §2D1.1 recidivate at lower rates than defendants with lower base offense levels.¹⁰⁹

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¹⁰⁸ *Id.* at 30.

¹⁰⁹ U.S. Sent’g Comm’n, *Recidivism of Federal Drug Trafficking Offenders Released in 2012* at 33 (Jan. 2022), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220112_Recidivism-Drugs.pdf.

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VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding these proposed amendments. Our PAG colleagues look forward to providing testimony on several of these amendments during the Commission's upcoming

hearing, and the PAG welcomes further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

/s/ Natasha Sen

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