KEVIN BENNARDO
TEACHING FELLOW & ASSISTANT PROFESSOR
OF PROFESSIONAL PRACTICE

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United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Request for public comment, notice of proposed amendments

Judge Saris and Members of the Commission,

I am pleased to respond to the Commission's request for public comment published in the January 17, 2014, edition of the Federal Register. My comments are directed toward the first and third issues identified in the Commission's request for public comment (section 1B1.10 and the drug quantity table). I have separately addressed these two issues in the pages that follow.

As always, I appreciate the opportunity to share my views with the Commission.

Respectfully,

Kevin Bennardo

Law Center Building W325 ▪ East Campus Drive ▪ Baton Rouge LA ▪ 70803 ▪ 225-578-7832 ▪ kevin.bennardo@law.lsu.edu

ISSUE #1: SECTION 1B1.10

Introduction

The Commission should adopt Option 2 in its amendment to section 1B1.10. Amendment of section 1B1.10 is proper to help resolve the circuit split over the application of 18 U.S.C. § 3582(c)(2). (The better solution would really be for Congress to amend subsection 3582(c)(2) to provide clarification because the issue is one of *statutory* interpretation rather than *guideline* interpretation.)

A. Option 2 is the Faithful Interpretation of Subsection 3582(c)(2)

Option 2 is faithful to the statutory language of subsection 3582(c)(2). The statute permits a district court to amend the defendant's term of imprisonment if (1) the defendant's sentence was based on a "sentencing range" that has been subsequently lowered by the Commission, and (2) the reduction is consistent with applicable policy statements issued by the Commission.

The main issue is the interpretation of the words "sentencing range" in the statute. Either "sentencing range" refers to the output of the Sentencing Table after inputting the defendant's offense history and criminal history category (in which case Option 1 would be the correct amendment to effectuate Congress's intent), or "sentencing range" refers to the output of the Guidelines after section 5G1.1 "trumps" the Sentencing Table to ensure conformity to any applicable statutory limits on sentencing (in which case Option 2 would be the correct amendment to effectuate Congress's intent). It is a matter of statutory interpretation and the Commission cannot alter the meaning of the statute through amendment of the Guidelines.

Option 2 is the better reading of the statute. The "sentencing range" is the output of the entire Guidelines calculation through subsection 1B1.1(a)(8). Stopping anywhere short of that point (e.g., after subsection 1B1.1(a)(7)) is simply arbitrary and not reflected in the statutory reference to the defendant's "sentencing range." (Note: "Sentencing range" does not include any departures made under subsection 1B1.1(b) because these additional steps do not result in a sentencing range. Parts H and K of Chapter 5 permit departures *from the sentencing range*. They are not part of calculation of the sentencing range.)

The cases cited in the notice of proposed amendment endeavor to interpret the statutory language. True, the opinions look at the Guidelines and commentary as an aid to interpreting the statute, but the key question remains: what do the words "sentencing range" mean in subsection 3582(c)? In amending section 1B1.10, the Commission should endeavor to abide by the language of the statute.

B. Option 2 Makes Sense

Upon a motion by the government, a district court may sentence a defendant to a term of imprisonment below an otherwise-applicable mandatory minimum if the defendant provides substantial assistance in the investigation or prosecution of another offender. Such a substantial assistance motion may be brought either under 18 U.S.C. § 3553(e) at the defendant's original sentencing hearing or under Federal Rule of Criminal Procedure 35(b) to reduce a sentence that was already imposed.

A district court may only consider assistance-based factors when determining the extent of the reduction below the mandatory minimum. It may not increase the extent of the reduction based on factors unrelated to the defendant's assistance to the government.[1] In what has been described as a 'one way ratchet,' the court may *limit* the extent of the sentence reduction based on factors unrelated to the defendant's assistance to the government.[2]

Now, applying that doctrine to the examples from the notice of proposed amendment:[3]

1. Original Guideline Range Above the Mandatory Minimum

Because the court reduced the defendant's below the mandatory minimum, the 39% reduction for substantial assistance should have only been based on the defendant's assistance to the government. Put differently, the extent of the defendant's reduction (here, 39%) should not have been increased based on factors unrelated to the defendant's assistance.

Thus, the amendment to the (pre-5G1.1) guidelines range should not affect the substantial assistance reduction. The only difference is that the 39% reduction would come off of the 240 month mandatory minimum/post-5G1.1 guidelines range rather than the pre-amendment 262-327 month guidelines range. The 39% reduction is the product of the district court's assessment of the defendant's assistance to the government. (If the sentence were calculated based on a 39% reduction from the post-amendment/pre-5G1.1 guidelines range of 168-210 months, then part of the sentence reduction would be based on the lowering of the guidelines range – a factor unrelated to the defendant's assistance to the government. That is forbidden by the cases cited in footnote 1 below.)

2. Bottom of Original Guideline Range Below the Mandatory Minimum

In the original sentencing, the district court's reduction of the defendant's sentence to 96 months from 240 months should have been based solely on assistance-based factors. Assuming that the district court properly followed the precedents, it should not have taken the pre-5G1.1 guidelines range of 140-175 months into account at all. The court should have been looking solely looking at the extent of the defendant's assistance when it reduced the sentence by 60% below the mandatory minimum of 240 months.

Thus, the change to the defendant's pre-5G1.1 guidelines range to 110-137 months should have no effect on the district court's sentencing calculation. Its original sentence of 96 months was the result of the mandatory minimum of 240 months minus the extent of the defendant's substantial assistance. The same result should occur regardless of whether the pre-5G1.1 guidelines range was 140-175 months or 110-137 months. Under either scenario, the proper calculation is {mandatory minimum} minus {extent of defendant's substantial assistance}. The pre-5G1.1 guidelines range should have no impact on this calculation.

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[1] *See, e.g.*, United States v. Grant, 636 F.3d 803, 809-15 (6th Cir. 2011) (en banc); United States v. Poland, 562 F.3d 35, 37-38 (1st Cir. 2009); United States v. Shelby, 584 F.3d 743, 745 (7th Cir. 2009). *But see* United States v. Tadio, 663 F.3d 1042, 1055 (9th Cir. 2011) (in Rule 35(b) sentence reduction, district court may increase the extent of a defendant's sentence reduction based on factors unrelated to the defendant's assistance to the government, but not to the extent of "a *de novo* sentencing").

[2] *See* United States v. Davis, 679 F.3d 190, 196-97 (4th Cir. 2012) (collecting cases).

[3] Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 79 Fed. Reg. 3280, 3281 (Jan. 17, 2014).

Conclusion

Thus, the Commission should amend section 1B1.10 according to Option 2. This option is most faithful to the current language of 18 U.S.C. § 3582(c). It also makes sense because the extent of substantial assistance reductions are limited to the consideration assistance-based factors, and the pre-5G1.1 guideline range is not an assistance-based factor.

ISSUE #3: DRUGS

Before offering any suggestions, I must say that I support the spirit of this proposed amendment. Although I believe that an ideal amendment would go further, I see the proposed changes as a modest improvement over the current drug distribution guideline. My comments are directed at three aspects of the proposed amendment: (1) the resulting 'squeezing out' of downward adjustments for drug defendants in criminal history category I, (2) the amendment's decision not to revise the boundaries of the Drug Quantity Table for each type of controlled substance, and (3) the inappropriateness of the fundamental coupling of the Drug Quantity Table to mandatory minimum drug sentences.

A. Squeezing Out Downward Adjustments

By reducing the minimum base offense level to the lowest offense level that captures the mandatory minimum for offenders in criminal history category I, the proposed amendment reduces the availability of downward adjustments for those offenders. Because the Guidelines range will bottom out at the mandatory minimum under the proposed amendment, not enough "wiggle room" exists between the bottom of the Guidelines range and the mandatory minimum to allow for further offense level reductions.

Under the proposed amendment, an offender in criminal history category I convicted of distributing a drug quantity necessary to trigger the five year mandatory minimum would receive a Guidelines range of 60-63 months in the absence of any adjustments or departures. Obtaining an offense level reduction for acceptance of responsibility under section 3E1.1 would not lower the bottom end of that range because the range already bottoms out at the statutory minimum.[4] The acceptance of responsibility adjustment could only reduce the top end of that range by three months, ultimately producing a Guidelines sentence of 60 months. Thus, the offender would have little incentive to accept responsibility for the offense through a guilty plea.[5]

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[4] U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c)(2) (providing that an offender's Guidelines range may not extend below an applicable statutory minimum sentence).

[5] The same concern is less prominent for substantial assistance departures, because, with the benefit of a government motion, courts are permitted to sentence offenders who provide substantial assistance to the government to a term of imprisonment *below* an otherwise-applicable mandatory minimum. *See* 18 U.S.C. § 3553(e) (2012); FED. R. CRIM. P. 35(b); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

However, as noted in the notice of proposed amendments, past experience does not necessarily bear out this result. Between 2007 and 2010, the base offense levels corresponding to the five- and ten-year mandatory minimums were lowered to 24 and 30, the same levels proposed in the current amendment, for distribution of cocaine base.[6] During this period, the Commission found that "the overall rates at which crack cocaine defendants pled guilty remained stable."[7] Thus, this recent experiment tends to dispel any concern that a significant decrease in guilty pleas would accompany the proposed amendment, perhaps because many offenders sentenced for these offenses do not fall within criminal history category I and therefore are able to reap a real benefit by accepting responsibility. Note, however, that the percentage of all drug offenders falling within criminal history category I (53.0%) is much greater than the percentage of crack cocaine offenders falling within criminal history category I (21.5%).[8] Thus, the same consistent level of offenders pleading guilty that was observed among crack cocaine defendants may not follow across all drug types. The Commission should consider whether it truly can expect the same results across all drug types because a much higher percentage of non-crack cocaine offenders fall in criminal history category I.

B. Setting the Boundaries of the Drug Quantity Table

The proposed amendment reduces all base offense levels in the Drug Quantity Table by two, except the base offense levels applicable to the smallest and largest distributions of each controlled substance. The boundaries of the Drug Quantity Table are not changed under the proposed amendment. The base offense levels applicable to cocaine traffickers will still range from 12 to 38. For traffickers of schedule IV substances, the base offense levels will still range from 6 to 12.[9] And so on for each drug type – the proposed amendment does not affect the base offense levels for distributions of the largest and smallest drug quantities.

It is not apparent, at least to me, why the proposed amendment should retain the current boundaries of the Drug Quantity Table. The Drug Quantity Table is an extrapolation of the drug distribution statute's fixation on quantity.[10] A simpler amendment would be to retain all of the current drug quantities in the Drug Quantity Table and simply reduce the corresponding base offense level for each quantity by two levels. Thus, the table would range from base offense

[6] U.S. SENTENCING GUIDELINES MANUAL app. C, amends. 706, 750.

[7] Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 79 Fed. Reg. 3280, 3290 (Jan. 17, 2014) (citing a plea rate for crack cocaine defendants of 93.1 percent in the fiscal year before the offense level reduction and plea rates of 95.2 and 94.0 percent during the two fiscal years that the reduction was in effect). The Commission reports only minimal changes in the rates of substantial assistance departures granted to crack cocaine defendants during those same years. *Id.*

[8] *See* U.S. Sentencing Comm'n, 2012 Sourcebook of Federal Sentencing Statistics, at Table 37.

[9] Except flunitrazepam, which will continue to range from base offense level 8 to 38.

[10] The base offense levels in the Drug Quantity Table are extrapolated from the quantity-based mandatory minimum sentences set forth in the drug distribution statute, section 841 of title 21 of the U.S. Code. The Drug Quantity Table is anchored to these two data points – the two drug quantities that trigger the five year and ten year mandatory minimums in the drug distribution statute. *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 49 (2004) ("The Commission drafted a drug trafficking guideline that … linked the quantity levels in the [drug trafficking statute] to guideline ranges corresponding to the five- and ten-year mandatory minimum sentence."). From these two data points, the Commission extrapolated the remainder of the Drug Quantity Table's base offense levels for drug quantities "falling below, between, and above the two amounts specified in the statutes." *Id.*

level 4 to 36 instead of 6 to 38. This change to the amendment would avoid ballooning the drug quantity within the lowest base offense level for each drug type.[11] It would also avoid unwarranted sentencing uniformity by providing incrementally graded punishment for offenders who distribute relatively small drug quantities. In further refining its proposed amendment, the Commission should consider simply shifting the entire Drug Quantity Table down by two levels across the board rather than maintaining the current base offense level boundaries of 6 and 38 and increasing the drug quantities required to trigger most of the base offense levels within the table. It would both be easier and fairer to drop the whole Drug Quantity Table down by two offense levels and establish new boundaries of offense levels 4 and 36 rather than the current boundaries of offense levels 6 and 38.

C. Binding Guidelines to Mandatory Minimums

Under the proposed amendment, the Drug Quantity Table remains fundamentally tied to the mandatory minimums contained in the drug distribution statute. The extrapolation of those mandatory minimums across the Drug Quantity Table results in unfair Guidelines ranges, particularly to defendants who are not subject to the statutory minimums. To the extent that the Commission disagrees with the statutory reliance on drug quantity as an appropriate measure of culpability, or with the mandatory minimum levels of punishment, it should further amend the drug distribution guideline by uncoupling it from mandatory minimums. Punishment under the drug distribution guideline should be based upon whatever offense characteristics the Commission deems most relevant "based on empirical data and national experience,"[12] rather than a rote extrapolation of the quantity-based approach embedded in the mandatory minimums.

Not all drug traffickers are subject to the mandatory minimums in the statute, even if they are responsible for a drug quantity that would otherwise trigger a mandatory minimum. Drug offenders may totally avoid the operation of an otherwise-applicable mandatory minimum through either the statutory "safety valve" or the failure of the prosecutor to adequately charge the triggering drug quantity in the indictment or prove it beyond a reasonable doubt.

A drug defendant qualifies for the statutory safety valve by satisfying the five requirements set forth in the statute, which are meant to identify the least culpable drug offenders.[13] Once the safety valve requirements are met, the defendant is wholly unbridled from the otherwise-applicable mandatory minimum sentence.[14] The sentencing court may not consider the mandatory minimum even as a departure point from which to calculate the sentence, but must "disregard any mandatory minimum in imposing sentence."[15]

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[11] The proposed amendment roughly doubles the drug quantity necessary to trigger the second lowest base offense level for most drug types. Thus, instead of placing the threshold for offense level 14 at a distribution of 25 grams of cocaine (as in the current Drug Quantity Table), the proposed amendment would require a distribution of 50 grams of cocaine to trigger offense level 14. For less harmful substances with lower minimum base offense levels like schedule V substances, the proposed amendment quadruples the drug quantity necessary to trigger the second lowest base offense level.

[12] Kimbrough v. United States, 552 U.S. 85, 109 (2007).

[13] Briefly stated, the five requirements of the statutory safety valve are: (1) one or zero criminal history points, (2) no use of a firearm or violence or threatened violence, (3) no resultant serious injury or death, (4) no supervisory status or continuing criminal enterprise, and (5) truthful provision of all information regarding the offense to the government. 18 U.S.C. § 3553(f) (2012).

[14] Upon finding that the safety valve criteria are met, the sentencing court is to impose a sentence "without regard to any statutory minimum sentence." *Id.*

[15] United States v. Jeffers, 329 F.3d 94, 100 (2d Cir. 2003).

Because any fact that increases a defendant's statutory minimum punishment must be charged in the indictment and proven beyond a reasonable doubt,[16] prosecutors have considerable ability to structure prosecutions to avoid the operation of a statutory mandatory minimum sentence. Attorney General Holder recently directed federal prosecutors to structure indictments to avoid the operation of statutory mandatory minimums on low-level, non-violent drug offenders.[17] If a drug defendant meets each of the four criteria in the Attorney General's directive, the prosecutor is instructed to omit the triggering drug quantity from the indictment.[18] These defendants are not subject to any statutory minimum sentence because the jury (or the plea agreement) did not find them accountable by proof beyond a reasonable doubt for the drug quantity necessary to trigger the statutory mandatory minimum.

As described above, defendants who qualify for either the statutory safety valve or the Attorney General's "charging safety valve" are totally unyoked from an otherwise-applicable mandatory minimum sentence. At sentencing, however, the district court will still make a finding by a preponderance of the evidence of the drug quantity attributable to the defendant in order to calculate the defendant's offense level under the drug distribution guideline. Regardless of the quantity found at sentencing, the defendant will remain free from the statutory mandatory minimum. However, because the drug distribution guideline is extrapolated from the drug quantities necessary to trigger the statutory mandatory minimums, the mandatory minimums continue to play a large role in the actual sentences imposed on these defendants.[19]

Drug quantity is a poor proxy for culpability,[20] especially when coupled with the Guidelines' system of relevant conduct. The Commission has unanimously recommended that Congress reduce the quantity-based mandatory minimum sentences for drug distribution offenses.[21] But, by keying the drug distribution guideline to the statutory mandatory minimum drug quantities, the Commission perpetuates the unfairness of the harsh quantity-based statutory minimums. Defendants who are not subject to mandatory minimum penalties still receive

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[16] *See* United States v. Alleyne, 133 S. Ct. 2151, 2161-62 (2013); *see also* United States v. Claybrooks, 729 F.3d 699, 708 (7th Cir. 2013) ("After *Alleyne*, [the defendant's] mandatory minimum sentence must be determined by the drug quantity described in the jury's special verdict form . . . . The district judge cannot raise the mandatory sentencing floor based on its own determination that [the defendant's] offense involved additional amounts of narcotics beyond those determined by the jury."); Kevin Bennardo, *Decoupling Federal Offense Guidelines from Statutory Limits on Sentencing*, 78 MO. L. REV. 683, 706-10 (2013).

[17] Memorandum from Attorney General Eric Holder, Jr. on Charging Mandatory Minimum Sentences and Recidivist Enhancement in Certain Drug Cases to United States Attorneys and Assistant Attorney General for the Criminal Division at 1 (Aug. 12, 2013), *available at* http://www.justice.gov/oip/docs/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf (last visited Mar. 12, 2014).

[18] Briefly stated, the four criteria contained in the Attorney General's memorandum are: (1) no possession of weapon, use of violence, credible threat of violence, trafficking with minors, or death or serious bodily injury, (2) no supervisory status, (3) no significant ties to large-scale drug trafficking organizations, and (4) no significant criminal history (generally no more than two criminal history points). *Id.* at 2.

[19] Defendants who qualify for the safety valve receive a two offense level reduction under the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(b)(16), 2D1.11(b)(6). This reduction, however, is very crude approximation. *See* Bennardo, *supra* note 16, at 712.

[20] *See* Statement of the Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n, for the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" before the U.S. Senate Committee on the Judiciary at 5 (Sept. 18, 2013), ("[T]he Commission's research has found that the [drug] quantity involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. A courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization.").

[21] *See id.* at 2, 7-8 ("The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking.").

Guidelines calculations that are tied to the mandatory minimums. This result is not necessary to ensure that Guidelines calculations are "consistent with all pertinent provisions of any Federal statute"[22] because the Guidelines already alter or constrict any Guidelines range at the back end of the calculation to ensure that it does not extend above or below any applicable statutory limit on sentencing.[23] Thus, the Commission should totally detach the drug distribution guideline from the statutory mandatory minimums to provide guidance to sentencing courts regarding the proper sentencing of drug offenders. The amended guideline should reflect the Commission's judgment, based on empirical data and national experience, of the specific offense characteristics that best correlate to accurate indicators of the seriousness of the defendant's offense conduct.

Conclusion

In conclusion, the proposed amendment to the drug distribution guideline is a step in the right direction. Hopefully more steps will follow.

[22] 28 U.S.C. § 994(a) (2006).
[23] U.S. SENTENCING GUIDELINES MANUAL § 5G1.1.