National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

February 21, 2017

The Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Pryor:

The National Association of Assistant United States Attorneys (NAAUSA) submits the following comments in response to the proposed amendments to the Sentencing Guidelines dated December 19, 2016, regarding first time offenders, criminal history calculations and challenges to relevant conduct.

The National Association of Assistant United States Attorneys represents the interests of 5,600 Assistant United States Attorneys employed by the Department of Justice and responsible for the prosecution of federal crimes and the handling of civil litigation throughout the United States. United States Attorneys and Assistant United States Attorneys are the gatekeepers of our system of justice. Our primary responsibility is to protect the innocent and convict the guilty.

NAAUSA takes no position on the majority of the proposed guideline amendments, but rather has chosen to voice our opposition to those amendments we believe would be most harmful to the fair application of the guidelines. As the nation's federal prosecutors, we will be affected on a daily basis by the real consequences of these amendments, as detailed below.

1. Creation of a New "First Time Offender" Status Under §4C1.1

The first proposed amendment adding a special category of criminal history for "true" first time offenders would create a set of special new benefits to offenders who have no prior conviction, including further offense level reductions of one or two levels. Yet the new guideline would go even farther, providing that for "first offenders" of an offense that is "not a crime of violence" or where the "defendant did not use violence or credible threats of violence" or possess a firearm who fall within Zone A or B of the Sentencing Table, the court "ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline."

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The Sentencing Commission's own report, entitled Recidivism Among Federal Offenders: A Comprehensive Overview (2016), does not support the reasoning behind this proposed amendment. In fact, according to that study, offenders with no conviction still reoffend at a rate of over 30%, and the average rate of recidivism for all those in Criminal History Category I (including individuals with zero or one criminal history point) is only slightly higher, 33.9%.

One area where the proposed amendment would wreak particular havoc involves the prosecution of individuals who supply a large number of the firearms utilized by violent felons. As has been well documented, the majority of firearms used to commit serious felonies were either stolen, or were obtained through the use of a non-prohibited "straw purchaser" by the convicted felon or firearms trafficker. Due to the need for the straw firearm buyer to pass a federal background check, this person is, of necessity, a "first time offender." These straw buyers are most typically prosecuted under Title18, United States Code Sections 922(a)(6) or 924(a)(1)(A).

As it is now, the guideline range for providing even dozens of firearms to a felon or felons typically falls within only 12 to 18 months' imprisonment. Adoption of the proposed guideline recommending non-incarceration of these "first time offenders" would effectively result in no specific or general deterrence of these precursor offenses to crimes of violence.

In the white collar crime context, creating this new category of offender would render the sentencing factors of Title 18, United States Code, Section 3553(a)(2) meaningless. Many, if not most, white collar offenders have no prior scoreable offenses for sentencing purposes, and come to federal court for the first time having committed serious and significant fraud. By further reducing their guidelines, the Commission would reduce the disincentive to defraud others by reducing the penalty.

Carving out an entirely new category for offenders with zero criminal history points would unnecessarily weaken the deterrent value of the Sentencing Guidelines for offenders who already are subject to sentencing at the lowest range available for their offense conduct. Given the fact that judges already have the discretion to vary downward in extraordinary cases of uncharacteristic criminal conduct, NAAUSA believes this new class of low level offenders is not warranted and should be rejected.

2. Eliminating Consideration of Revocation Sentences Under §4A1.2(K)

Proposed amendment 4(A) would dramatically reduce punishment for revocations of Supervised Release, Probation, Parole and variations thereof, by essentially eliminating consideration of those violations other than under the "catch-all" provision of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Criminal history score is included in the Sentencing Guidelines because criminal history is a strong predictor of recidivism. Among all the components of criminal history that serve as predictors of recidivism, revocation is likely the strongest. Offenders who have had their

sentence of probation or supervised release revoked not only have committed a prior criminal offense, but they have breached the trust of the court. The additional period of time imposed reflects the seriousness of the breach of trust and indicates a very strong likelihood to re-offend despite being under court supervision. NAAUSA strongly believes that this additional time should be included in the criminal history score.

Indeed, the Introductory Commentary to Chapter Four Part A, confirms this, stating: "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." There can be no serious question that a significant revocation of supervision is criminal behavior and is "thus deserving of greater punishment." The question is how should it be weighted. NAAUSA believes revocations, resulting in additional incarceration, are serious violations, and therefore should be measured and accounted for consistently across our country by continuing to include them in the criminal history calculation.

There are many examples of offenders who are prosecuted in the state and are given a break on the original sentence, but when they continue to commit crimes are brought back before the original sentencing judge and finally given a prison sentence. In essence, this prison term becomes the only significant punishment for the original offense because the offender has breached the trust given in a non-incarcerative sentence. Under the proposed amendment, these offenders will be treated as though they never broke that trust, a benefit they have not earned.

True instances of injustice under §4A1.2(k) are already addressed by the Guidelines in §4A1.3, providing for a downward departure when necessary and appropriate. NAAUSA believes the current system properly addresses the revocation issue by specifically acknowledging and fairly accounting for the serious nature of a revocation violation, and recommends that it remain as currently written.

3. New Downward Departure Based on Indeterminate Sentences in §4A1.2

NAAUSA respectfully submits that proposal 4(B) to amend the Commentary to USSG § 4A1.2 to provide for a downward departure when an indeterminate sentence is substantially greater than the amount of time actually served for that sentence is unnecessary because such scenarios already are accounted for in the Sentencing Guidelines. USSG § 4A1.3 provides for departures based on over- or under-representation of criminal history. Adding a new downward departure based on an imposed sentence being substantially greater than the time actually served would be redundant to § 4A1.3(b)(1), which states: "If reliable information indicates that the defendant's criminal history substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." This language easily encompasses the notion of an indeterminate sentence imposed being substantially greater than the sentence actually served, especially when the judge has the ability to look behind the circumstances of the prior offense and depart or vary under Section 3553(a). This proposed amendment is unnecessary and duplicative, and ought to be rejected. At most, this proposed amendment should be considered for addition as an example of over-represented criminal history in USSG § 4A1.3, Application Note 3.

4. Allowing Defendants to Challenge Relevant Conduct While Still Receiving a Reduction for Acceptance of Responsibility Under §3E1.1

Proposal 6, which would amend the Application Notes to §3E1.1 to allow challenges to relevant conduct without the loss of credit for acceptance of responsibility, is wholly unnecessary and weakens the incentive for a defendant to take responsibility for his or her actions.

Under the guidelines, the reduction in sentence allowed for a defendant's acceptance of responsibility is significant because the timely notification of a guilty plea permits the government "to avoid preparing for trial" and permits "the government and the court to allocate their resources efficiently." §3E1.1(b). Only those who falsely deny or frivolously contest relevant conduct which the court finds to be true are penalized. This change to the application notes would water down the level of acceptance required of a defendant and lead to increased litigation in the sentencing phase over challenges to relevant conduct. The cost of this increased litigation is precisely one of the societal costs that was sought to be avoided by encouraging defendants to accept responsibility for their actions.

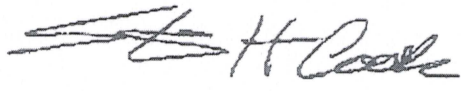
By way of example, the proposed amendment will affect drug prosecutions where a defendant contests the relevant drug weight attributed to him. In many cases, this will necessitate a multi-day sentencing hearing and require the government to produce witnesses. In a typical wiretap case, for instance, the government may now be required to produce testimony from the representative of a phone company, surveillance agents, chemists, and cooperating defendants in a de facto bench trial on this sentencing issue. This will result in a large expenditure of time and money, and is not markedly different from having to prepare for a jury trial, the precise burden that this guideline was designed to prevent.

NAAUSA sees no compelling reason to inject unnecessary uncertainty into the question of acceptance of responsibility, and recommends that the proposed revision of the application notes to §3E1.1 be rejected.

Conclusion

In summary, NAAUSA urges the rejection of the proposed changes described above. We appreciate your consideration of these comments in finalizing your proposed amendments to the Guidelines.

Sincerely yours,



Steven H. Cook
President