PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

July 31, 2017

Hon. William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Response to Request for Comment on Proposed 2017-2018 Priorities

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's request for comment on its proposed 2017-2018 priorities.[1]

A. Proposed Priority Number 1 – Examination of Overall Structure of the Guidelines Post-*Booker*

The PAG supports the Commission's continuing efforts to appropriately account for each defendant's role, culpability and relevant conduct. We agree with those who have acknowledged that concerns about tying punishment more closely and proportionately to culpability is an issue that the Commission should address across the Guidelines for all offenders. We believe that an approach which places primary focus on individual culpability and *mens rea,* and not on simplistic (even if more easily measured) factors such as loss or drug quantity, would promote proportionality and reduce *unwarranted* sentencing disparities. **The PAG reiterates its support** for the premises and recommendations of the ABA Task Force Report on the Reform of Federal Sentencing for Economic Crimes which presents a sound and workable framework that could be expanded beyond economic crimes to the Guidelines more broadly.

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[1] The PAG has no comment on proposed Priorities Numbers 6 and 10. **The PAG also suggests** an additional priority, Examination of Collateral Consequences, which is found at Section I of this letter.

As discussed more fully below, at Priority Number 9, **the PAG continues to strongly support** the Commission's efforts to study and encourage the use of alternatives to incarceration and diversionary dispositions in appropriate circumstances. We believe that the availability of such alternatives is essential to appropriately account for the defendant's role, culpability, and relevant conduct.

Despite widespread bipartisan recognition of the need for sentencing reform to address prison overuse and curb excessive sentences, DOJ recently reversed critical measures it had taken under its Smart on Crime initiative. With DOJ's recent reversals of these measures, the PAG believes that it is all the more important that the Guidelines provide sentencing judges mechanisms to curb excessive sentences, and minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons. Therefore, **the PAG does not support** the imposition of additional limitations on sentencing judges' discretion to vary from the Guidelines. The PAG believes that the imposition of such limits would be inconsistent with 18 U.S.C. § 3553(a)'s mandate that sentencing judges consider the history and characteristics of the individual defendant and the nature and circumstances of the offense and impose a sentence which is sufficient, *but not greater than necessary*, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2).

The PAG looks forward to continuing to work with the Commission and other stakeholders to improve the Guidelines.

B. Proposed Priority Number 2 - Study of Offenses Involving MDMA/Ecstasy, etc.

The PAG awaits the results of the Commission's long term study of MDMA, THC and synthetics. The PAG notes there are pending bills in Congress (S. 1327 and H.R. 2851) addressing controlled substance analogues. This legislation would create a new Schedule A consisting of such analogues, and modifies the Controlled Substances Act's sentencing provisions. The PAG believes the Commission and relevant stakeholders should defer adopting guidelines amendments pending legislative activity.

The PAG favors simplifying the determination of closely related substances under Application Note 6 of the Commentary to U.S.S.G. § 2D1.1. Considering the importance, breadth, and complexity of U.S.S.G. § 2D1.1, **the PAG supports** of the Commission's efforts to simplify its use, such as with the Commission's previous recommendation to substitute a uniform "converted drug weight" for the marijuana equivalencies in the Commentary.

C. Proposed Priority Number 3 – Implementation of the Recommendations Set Forth in the Commission's 2016 Report to Congress, Titled "Career Offender Sentencing Enhancements"

The PAG strongly supports the Commission's proposals to: (1) limit the predicate offenses that qualify a defendant for an enhanced sentence under the Career Offender Guideline;

and (2) adopt one definition of "crime of violence" *within the Guidelines*. **The PAG does not recommend** that the Guidelines' definition of crime of violence be used in other contexts.

The PAG respectfully offers additional suggestions to ensure that the career offender statute, 28 U.S.C. § 994(h), and the resulting Career Offender Guideline, focus on the most dangerous repeat offenders, and that the definition of crime of violence be limited to those offenses that pose a serious threat of violence or harm, and are sufficiently serious to be treated as predicate offenses for purposes of enhancing a defendant's sentence under the career offender Guideline.

1. Proposed Revisions to the Career Offender Statute, 28 U.S.C. § 994(h)

Based on its analysis of Guideline application, sentencing and recidivism data for three groups of defendants sentenced as career offenders – those with (1) only drug trafficking convictions; (2) only convictions for crimes of violence; and (3) a mixed category with both drug trafficking and crime of violence convictions – the Commission recommends that Congress amend the career offender directive so that defendants with an instant drug conviction and two prior drug convictions are not treated as career offenders. *See* U.S.S.C., *Report to the Congress: Career Offender Sentencing Enhancements* 45 (August 2016) ("Report") for full text of proposed amendment. **The PAG agrees** that this proposed amendment is supported by the analysis contained in the Report.

The PAG, however, remains concerned that the proposed revision may still have an overly broad reach by including defendants who have only one conviction for a crime of violence, and that even the revised directive, and eventual Guideline, will continue to have a disproportionate impact on defendants with drug-trafficking convictions.

Given the broad range of controlled substance offenses that can qualify as predicate offenses under the Career Offender Guideline,[2] the same concerns that led the Commission to look more closely at drug-trafficking only career offender defendants may continue to exist in cases involving defendants sentenced as career offenders who have only one conviction for a crime of violence, either the instant offense of conviction or a prior offense. For example, a defendant with an instant drug trafficking conviction, with one prior crime of violence conviction and one prior drug trafficking conviction, may have more in common with those defendants with only drug trafficking convictions – fewer convictions for more serious, and violent, offenses, and less likelihood to recidivate – and less in common with that group of defendants with two or more convictions for crimes of violence.

To determine whether there are meaningful differences between defendants with mixed convictions for drug-trafficking and crimes of violence, **the PAG respectfully recommends** that the Commission examine in more detail the data that it already has collected about this mixed offender category.[3] This data was reviewed as one group for purposes of the Report, but the

[2] For example, the definition of "controlled substance offense" under the career offender Guideline includes the offenses of aiding and abetting, conspiring, and attempt. *See* U.S.S.G. §4B1.2 n.1.

PAG proposes that the Commission divide this group into those career offender defendants with one crime of violence conviction and those with two crimes of violence convictions. Comparing Guideline application, sentencing, and recidivism data for these two groups may highlight significant differences and support further revisions to the career offender statute, such as requiring that a career offender have at least two convictions for crimes of violence (either the instant offense of conviction and one prior conviction, or two prior convictions).

In addition, to the extent that the Commission's proposed revision to the career offender statute is designed to remove less violent and less serious offenders from the enhancements imposed by the Career Offender Guideline, the Commission should consider revising the category of controlled substance offenses that qualify as predicate offenses for purposes of the Career Offender Guideline. **The PAG suggests** that the Commission undertake a study to determine whether it can narrow the offenses that are considered controlled substance offenses[4] under the Career Offender Guideline to target only the most serious drug trafficking offenses.

For example, in the experience of the PAG, the offenses of aiding and abetting, conspiring and attempting to commit some controlled substance offenses often result in relatively low-level drug convictions being used as predicate offenses under the Career Offender Guideline. *See generally United States v. Newhouse*, 919 F. Supp. 2d 955, 970-974 (N.D. Iowa 2013) (Bennett, J.) (explaining how less serious drug offenses qualify as predicate offenses under the career offender Guideline).

2. A Uniform Definition for "Crime of Violence"

The PAG supports the Commission's proposal to adopt one uniform definition for the term "crime of violence" across the Guidelines. However, **the PAG does not recommend** that Congress incorporate the Guideline definition of crime of violence in various recidivist statutes, because, in so doing, it may broaden the reach of those statutes and trigger even more mandatory minimum sentences. The PAG respectfully offers some considerations for further study of the current definition of crime of violence within the Guidelines, consistent with its comments on this proposed Guideline in years past.

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[3] As the Commission recognizes, "the sentencing outcomes for offenders in the mixed pathway may also support Congressional consideration of a more graduated approach for these career offenders." Report at 43.

[4] "Controlled substance offense" is defined as

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

As of August 1, 2016, the Commission revised the definition of crime of violence to remove the residual clause and to alter the list of enumerated offenses and the commentary related to the enumerated offenses.[5] The Commission explains that it added specific definitions for forcible sex offense and extortion, but otherwise "continues to rely on long-existing case law for purposes of defining the remaining enumerated offenses." Report at 54.

The current crime of violence definition closely tracks the definition that the PAG previously proposed.[6] At the time the PAG proposed this modification, it was waiting to see whether and how Congress would amend 18 U.S.C. § 924(e) to conform to the U.S. Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidating the residual clause in the similarly worded 18 U.S.C. § 924(e)(2)(B). As of the submission of this letter, Congress has not amended 18 U.S.C. § 924(e)(2)(B), and there is no pending legislation that amends this statute. Accordingly, the PAG recommends that the Commission maintain the current definition of crime of violence in the Guidelines, with some suggestions for further study as set forth in the PAG's prior submissions on this issue as noted below.

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[5] A crime of violence is

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
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> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. §4B1.2(a). The commentary provides definitions for the enumerated offenses of "forcible sex offense" and "extortion." *See* U.S.S.G. §4B1.2 n. 1.

[6] The PAG proposed that the Commission amend U.S.S.G. §4B1.2 to read:

> "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if that offense (A) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device).

Letter from the PAG to Hon. Patti B. Saris at 12-13 (July 27, 2015).

The Supreme Court's recent decision in *Beckles v. United States*, 137 S. Ct. 886 (Mar. 6, 2017) does not compel a different result. In *Beckles*, the Supreme Court examined whether the residual clause in the career offender Guideline, U.S.S.G. § 4B1.2(a), is void for vagueness under the Due Process Clause of the Fifth Amendment. The Supreme Court found that because the Guidelines are discretionary "and merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range," they cannot be challenged for vagueness under the Due Process Clause. *Beckles*, 137 S. Ct. at 892. Well before *Beckles*, and after reviewing the issues raised by the residual clause and considering the views of outside groups, the Commission determined that the residual clause

> implicated many of the same concerns cited by the Supreme Court in *Johnson* and has given rise to significant litigation both before and after *Johnson*. Removing the residual clause alleviates the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants.

Report at 52. For these reasons, **the PAG concurs** with the removal of the residual clause from the Guidelines' definition of crime of violence.

In its comments on the crime of violence definition in 2015, the PAG recommended that the Commission adopt a definition of crime of violence that enumerated crimes and supplied required elements for these crimes. *See* Angela L. Campbell, Testimony Before the U.S. Sentencing Commission at 1 (Nov. 5, 2015) ("Campbell Testimony"). In light of the Commission's subsequent decisions to retain the elements clause, remove the residual clause and to narrow the enumerated offenses set forth in U.S.S.G. § 4B1.2(a)(2), t**he PAG reiterates its previous recommendations** regarding certain of the currently enumerated offenses.

- Regarding aggravated assault, the PAG continues to believe that state laws sweep broadly and can encompass conduct that is not truly violent, yet still results in a predicate offense under the career offender Guideline. *See* Campbell Testimony at 4-5. At a minimum, the PAG recommends that aggravated assault should include bodily contact, intent and injury in order to qualify as a crime of violence. *See, e.g*., Campbell Testimony at 5-6.

- With respect to the definition of forcible sex offense, the PAG reiterates its suggestion that the Commission "further study if statutory rape should ever be included" in this definition for crime of violence. *See* Campbell Testimony at 7.

- The PAG again recommends that the Commission amend the definition of felony offense, in U.S.S.G. § 4A1.2(o), to exclude state offenses classified by the state as misdemeanors and punished by a term of imprisonment of less than two years. *See* Campbell Testimony at 9-10.

The PAG does not support the Commission's proposal that the Guidelines' definition of crime of violence be adopted in other federal recidivist statutes. Federal recidivist statutes define "crime of violence" or "violent felony" more narrowly than the current Guidelines' definition of crime of violence. For example, "crime of violence" is defined as:

> an offense that is a felony and –
>
> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another; or,
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Unlike the Guidelines' definition of crime of violence, this statute contains no enumerated offenses, and a residual clause that is similar to the clause that the Supreme Court invalidated in *Johnson*.[7] "Crime of violence" is defined almost identically in 18 U.S.C. § 16, with no enumerated offenses. *See* 18 U.S.C. § 16. "Violent felony" is defined in the Armed Career Criminal Act ("ACCA") as

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). Compared to the Guidelines' definition of crime of violence, this statute contains a smaller set of enumerated offenses, and, of course, its residual clause was invalidated in *Johnson*.

Broadening the definitions of crime of violence and violent felony contained in these statutes could have far-reaching consequences for federal criminal defendants convicted of these offenses. Unlike the Guidelines, which remain advisory, 18 U.S.C. §§ 924(c) & (e) trigger mandatory minimum sentences that are not subject to discretion. Expanding the predicate offenses that make a defendant eligible for these enhancements would work at cross-purposes with the greater goal to promote fairness and proportionality in sentencing, particularly in cases involving the most serious offenses and offenders. For these reasons, while the PAG supports uniformity in the Guidelines, it does not support adopting the Guidelines' definition of crime of violence in related federal statutes.

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[7] The residual clause in this statute is currently being challenged as void for vagueness in violation of the Due Process Clause before the Supreme Court in *Sessions v. Dimaya*, No. 15-1498 (S. Ct. reargument scheduled for Oct. 2, 2017).

D. Proposed Priority Number 4 – Work on the Recommendations Set Forth in the Commission's 2011 Report to Congress, Titled "Mandatory Minimum Penalties in the Federal Criminal Justice System"

The PAG continues to oppose mandatory minimum sentences for all but the most serious offenders and respectfully requests that the Commission continue to prioritize policies and initiatives that aim to curtail the application of mandatory minimum sentences.

In July, 2017, the Commission published a comprehensive Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System ("Report"). While the Commission's recent Report demonstrates a slight decrease in the number of defendants sentenced to a mandatory minimum sentence, more than half of the current prison population is serving a mandatory minimum sentence. One fifth of all federal sentences imposed in 2016 were mandatory minimum sentences, and the bulk of those were for drug trafficking offenses. For federal crimes involving sex abuse and pornography, 62.6 percent of defendants were sentenced to a mandatory minimum sentence, an increase of 10 percent since 2010.

In light of the May 10, 2017, Department Charging and Sentencing Policy memorandum issued by the Attorney General, an increase in mandatory minimum sentences can be anticipated. In this policy memorandum, the Attorney General stated that prosecutors "should charge and pursue the most serious, readily provable offense" which are those offenses "that carry the most substantial Guidelines sentence, including mandatory minimum sentences." Thus, any recent declines in the imposition of mandatory minimum sentences as evidenced by the Commission's study are likely soon to be erased.

Various bipartisan bills aimed at reducing the use and prevalence of mandatory minimum sentences and restoring sentencing discretion to the judiciary have been introduced in recent years. Most recently, the Justice Safety Valve Act of 2017 was introduced. If enacted Section 3553 would be amended to allow a court to impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements of Section 3553(a). This bill would not only expand the safety valve beyond the limited scope of drug offenses, but it would also give judges real and meaningful discretion to impose sentences in accordance with the factors set forth in 3553(a).

The PAG urges the Commission to continue focusing its efforts on the following priorities:

1. Continued examination of the scope and severity of statutory mandatory minimum penalties;

2. Continued expansion of "safety valve" consideration under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2; and

3. Elimination of mandatory "stacking" of penalties under 18 U.S.C. § 924(c).

There is widespread, bipartisan support from many and various stakeholders to eliminate and reduce many of the existing mandatory sentencing provisions. **The PAG continues to support** the Commission's efforts to bring about significant and meaningful reforms in the area of mandatory minimum sentences.

E. Proposed Priorities Numbers 5 and 9 – Continuation of the Commission's Studies on Recidivism and Alternatives to Incarceration

Because the PAG believes that alternatives to incarceration are a critical component of any program to reduce recidivism, the PAG has combined its responses to priorities (5) and (9) below. First, as to "examination of circumstances that correlate with increased or reduced recidivism," **the PAG recommends** that the Commission continue its comprehensive, multi-year study entitled *Recidivism Among Federal Offenders: A Comprehensive Overview* (the "*Study*") and, in particular, examine the impact of collateral consequences and effective re-entry programs on rates of recidivism. Moreover, consistent with the data reported by the Commission, **the PAG supports** amending the Guidelines to promote lower Guidelines ranges for "first offenders" and to increase the availability of alternative to incarceration programs at the lower levels of the Sentencing Table.

The PAG also fully supports the Commission's continued focus on programs offering alternatives to incarceration. To the extent such programs can ameliorate – or in some cases avoid altogether – the collateral consequences of conviction, such programs can be effective tools in reducing recidivism, as well as reducing costs associated with incarceration and overcapacity of prisons. In particular, **the PAG respectfully urges** the Commission to examine alternative to incarceration programs currently operating in several federal districts.

The PAG also believes that it is at least as important to develop alternatives to *conviction* as it is to develop alternatives to incarceration. Accordingly, as in previous years, the **PAG recommends** that the Commission study the operation of the deferred adjudication authority set out in 18 U.S.C. § 3607(a) and consider ways in which such authority can be expanded. In recent years, a great many states have expanded programs offering alternatives to conviction, and the American Law Institute has approved proposals on diversion and deferred adjudication as part of its Model Penal Code: Sentencing project.

1. Examination of Circumstances that Correlate with Increased or Reduced Recidivism

In prior submissions to the Commission, **the PAG has emphasized** the importance of developing policy recommendations based on the one of the *Study*'s central findings – namely, that length of incarceration has little effect on recidivism.[8] As the *Study* and other research demonstrates, except for very short sentences (less than 6 months), the rate of recidivism changes very little by length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, and 55.5% for sentences between 5 to 9 years). This data is consistent with earlier research showing that *long prison terms have little impact on public safety*

[8] *See* the PAG's Letter to Hon. Patti B. Saris at 12-13 (July 25, 2016).

outcomes. The National Research Council, for example, concluded in a 2014 report that "statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime."[9] The empirical research is consistent with the experiences of the PAG – longer sentences do not reduce the likelihood of recidivism and, in some instances, seem to increase the likelihood of recidivism, as the longer term of imprisonment increases an offender's detachment from his community.

In light of the Commission's findings, as well as the Congressional mandate that the Guidelines should "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which a defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,"[10] **the PAG respectfully urges** the Commission to consider amendments to Chapter Two that would lower the recommended sentences, at least for certain categories of offenses.[11]

Finally, given the devastating impact of collateral consequences on employment, housing, and benefits, *see infra* at Section K, **the PAG recommends** that the Commission study the impact of collateral consequences on recidivism rates and encourage corresponding Guidelines amendments.

2. Reducing Recidivism Through Effective Re-Entry Programs

Given the often devastating effects of a conviction on employment, housing, public benefits and licensing, **the PAG strongly recommends** that the Commission focus on recommending effective re-entry programs that will help individuals successfully reenter the community and avoid returning to crime.

The *Study* demonstrated that the critical time for individuals released from prison is the first two years, and that lengthy periods of probation or supervised release are unnecessary and may even be counterproductive. Because rates of recidivism drop precipitously after the second year of supervision,[12] allowing participants to receive early termination from supervised release by completing an intensive program of counseling and treatment will not only encourage

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[9] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), available at: http://www.nap.edu/read/18613/chapter/1.

[10] 18 U.S.C. § 994(j).

[11] *See United States v. Jenkins*, 854 F.3d 181, 196 (2d Cir. 2017) (holding Guidelines sentence for defendant, a "first time felony offender" for possession and transportation of child pornography was "substantively unreasonable"); *see also* Transcript of Sentencing at 26:12-17, 54:10-19, *United States v. Faibish*, No. 12-cr-265 (ENV) (E.D.N.Y. Mar. 10, 2016) (applying the ABA's "Shadow Guidelines" for offenses covered by § 2B1.1 to impose a sentence of 63 months on a first-time offender in a securities fraud case when the Guidelines range would have called for life imprisonment).

[12] *Study*, at 16.

compliance with the terms of supervised release, but will avoid expending resources on individuals who need little supervision and are unlikely to reoffend.

Indeed, Congress has recognized the importance of promoting effective re-entry through various federal grants and initiatives. [13] For example, in 2008, Congress passed the Second Chance Act,[14] which provided funds to state, local, and tribal programs designed to, among other things, provide offenders in prison with educational, vocational, and job placement services, and offenders reentering the community with transitional services designed to facilitate reentry.[15] More than 700 Second Chance Act grants have been made to state and local government agencies and nonprofit organizations to fund programs serving more than 137,000 people.[16] These programs have proven to be effective in reducing both recidivism rates and the costs of incarceration.[17] The PAG urges the Commission to examine these state and local programs, as the data generated can be used to recommend effective strategies in the federal system.

3. Amendments to the Sentencing Guidelines

a. First Offenders

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[13] *See* Press Release, White House Office of the Press Secretary, FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly- Incarcerated (Nov. 2, 2015), available at https://www.whitehouse.gov/the-pressoffice/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation (discussing the Executive Branch efforts to mitigate "unnecessary collateral impacts of incarceration," in particular, advancement of "numerous effective reintegration strategies through the work of the Federal Interagency Reentry Council, whose mission is to reduce recidivism and victimization").

[14] Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-99, 122 Stat. 657 (2008) (codified at 42 U.S.C. § 17501 *et seq.*).

[15] 42 U.S.C. § 17501(a).

[16] U.S. Dep't of Just., The Second Chance Act (2016), *available at* https://csgjusticecenter.org/wp-content/uploads/2014/08/SCA_Fact_Sheet.pdf.

[17] A meta-analysis of Second Chance Act programs conducted by the RAND Corporation found that, on average, inmates who participated in correctional education programs had 43% lower odds of recidivating and 13% higher odds of obtaining post-release employment than those who did not. Lois M. Davis et al., RAND Corp., Evaluating the Effectiveness of Correctional Education xvi-xvii (2013), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf. The study further found that reincarceration costs over three years are approximately $870,000 to $970,000 less for those who receive correctional education than those who do not. *Id.* at xviii.

As the PAG has previously recommended, in light of the *Study*'s finding that an individual's criminal history as calculated under the federal sentencing Guidelines is "closely correlated with recidivism rates,"[18] the **PAG continues to encourage** the Commission to amend the Chapter Four Guidelines so as to provide lower Guideline ranges for "first offenders"[19] and supports the Commission's proposals to provide for new Chapter Four Guidelines reducing offense levels for first offenders.[20] However, **the PAG also recommends** expanding the definition of "first offender," as well as additional offense level reductions, specifically a two-level reduction for offense levels less than 16, and a three-level reduction for offense levels equal to or greater than 16.

First, **the PAG recommends** that the Guidelines' definition of "first offenders" – *i.e.,* those eligible for additional offense level reductions – not be limited to defendants "with no prior convictions of any kind."[21] Rather, "first offender" should include defendants who have a criminal history score of zero (*i.e.*, no prior convictions countable under U.S.S.G § 4A1.2) or who have no prior felony convictions.[22]

The Commission's research supports this position. In 2004, the Commission evaluated three proposed first offender groups: one with offenders having no prior arrests, the second with offenders previously arrested, but not convicted; and the third with offenders with prior convictions which did not count towards criminal history. The Commission found that individuals in the three proposed first offender groups:

> are readily distinguishable from offenders with one or more criminal history points . . . . They are more likely to have committed a fraud or larceny instant offense. They have less violent instant offenses, receive shorter sentences, and are less likely to go to prison. They are less likely to use illicit drugs, more likely to be employed, more likely to have a high school education (or beyond), and more likely to have financial dependents. . . .

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[18] *Study*, at 27.

[19] *See* the PAG's Letter to Hon.William H. Pryor, Jr. at 1-5 (Feb. 20, 2017).

[20] *See* U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines 1-18 (Dec. 19, 2016), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf.

[21] *Id.* at 4.

[22] If the Commission determines that the definition of a "first offender" should be limited to persons with no convictions of any kind, as proposed in the Commission's December 19, 2016 Proposed Amendments to the Sentencing Guidelines, **the PAG recommends** adding an Application Note to § 5C1.1 clarifying that § 5C1.1(g) is not intended to restrict a court's consideration of alternatives to incarceration only to "first offenders."

> [and] compared to other Guideline offenders, have instant offenses that are less culpable and less dangerous.[23]

In its most recent recidivism study, the Commission found that an individual's criminal history, as calculated under the federal sentencing Guidelines, "was closely correlated with recidivism rates," and that re-arrest rates were at their lowest for those in the lowest criminal history category.[24] Individuals with no criminal history at all had only a 14.7% reconviction rate; the reconviction rate for those with prior criminal justice contact without a conviction counting toward criminal history was only slightly higher, at 21.8%. Re-incarceration rates were 4.1% and 7.4%, respectively.[25] Finally, defining "first offender" as a person with no criminal history points and who has never been convicted of a felony finds support in state first offender statutes.[26]

Second, because the *Study* shows that length of incarceration has relatively little effect on recidivism, **the PAG also recommends** that the first offender Chapter Two reduction not be limited to defendants with low offense levels. This position is supported by other research that has consistently shown that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects."[27] Any "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," *i.e*., there was no basis to connect severity of a sentence with deterrence.[28]

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[23] U.S. Sentencing Comm'n., "Recidivism and the 'First Offender'" ("2004 Study") at 11 (2004), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

[24] *Id.* at 5.

[25] U.S. Sentencing Comm'n., "Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment" ("2017 Data Presentation") at 20 (2017), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20161209/20160109_DB_alternatives.pdf.

[26] *See*, *e.g.*, Georgia First Offender Act, Ga. Code Ann. § 42-8-60 (West 2017) (a "first offender" is defined as, *inter alia*, a person who has never been convicted of a felony or previously sentenced as a First Offender); Wyo. Stat. Ann. §7-13-301 (West 2017) (same).

[27] Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) ("Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence."); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.").

[28] Andrew von Hirsch et al*., Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, at 1-2 (1999), summary available at

Finally, if the Commission adopts a rebuttable presumption in favor of the first offender provision, as proposed in the Commission's December 19, 2016 Proposed Amendments to the Sentencing Guidelines,[29] **the PAG recommends** that this provision should not exclude certain categories of non-violent offenses. As the presumption is rebuttable, it is not necessary to restrict further the application of the first offender provision. While there is some empirical support for the proposition that violent offenses should be excluded from the benefit of a first offender reduction, as violent offenders recidivate at higher rates and sooner than their non-violent counterparts,[30] there is no empirical evidence to support exclusion of certain categories of non-violent offenses. Studies show no significant difference between recidivism rates for white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.[31]

b. Enacting provisions to expand the use of non-jail sentences

The Commission should also consider Guideline amendments that will encourage judges to consider noncustodial sentences for individuals who are not first offenders, especially for individuals whose Guideline range falls within Zones A, B and C. (As noted above, 28 U.S.C. § 994(j) pointedly directs that "[t]he Commission shall insure that the Guidelines reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . ." (emphasis added).)

In the past, the Commission has noted that a significant percentage of defendants in Zones A and B do not receive the non-custodial sentences for which they are eligible.[32] Thus, **the PAG encourages** the Commission to consider issuing commentary or a policy statement reminding judges of the availability of non-custodial sentencing options for defendants in Zones A and B, and commentary or a policy statement suggesting non-exclusive categories or examples of cases that merit imposition of non-incarceration sentences (*e.g.*, probation, half-way house, community service) upon appropriate fact-finding by the sentencing court pursuant to 28 USC 994(j). [33]

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http://members.multimania.co.uk/lawnet/SENTENCE.PDF.

[29] *See* U.S. Sentencing Comm'n, *supra* note 13, at 6.

[30] S*ee* 2017 Data Presentation at 20-21.

[31] *See* Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 Southern Ill. U. L. J., 485, 495 (Winter 1999); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995).

[32] *See* U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* at 3 (Jan. 2009) (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

[33] Though some courts have found that the Commission has followed the mandate of

The Commission also should consider modifying the zones contained in the Sentencing Table to increase the universe of defendants for whom a sentence other than imprisonment would be permitted under the Guidelines. Such a revision would satisfy the purposes of federal sentencing: to fashion individualized sentences that are "sufficient, but not greater than necessary,"[34] to meet the statutory purposes of sentencing including the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[35] By modifying the minimum term requirements for Zone C, or collapsing Zones B and C, the Guidelines can provide for community and home confinement alternatives to a greater number of defendants.[36] **One approach that particularly commends itself to the PAG** would be to eliminate the requirement for Zone C that at least half of the minimum term be served as actual imprisonment. This change would encourage courts to sentence Zone C defendants who are otherwise ineligible for probation to community custody after a lesser term of imprisonment in the way for which Zone B defendants are now eligible. **The PAG therefore encourages** the Commission to

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§ 994(j), *see, e.g.*, *United States v. Belgard*, 894 F.2d 1092, 1100 (9th Cir. 1990) ("Congress . . . . did tell the Commission to 'insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .' The Sentencing Commission has followed that mandate."), many of those cases were decided prior to the amendment of the Guidelines in 2001 to combine the fraud, theft and embezzlement Guidelines into a single Guideline and the implementation of a loss table that significantly increased loss amount calculations. *See United States v. Corsey*, 723 F.3d 366, 380 (2d Cir. 2013) (Underhill, J., concurring); *see also* U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines 15-34 (2001), *available at* http://www.ussc.gov/sites/default/files/20010501_Amendments.pdf. In more recent cases, district courts have found that, in setting Guidelines ranges that call for incarceration in the vast majority of cases, regardless of whether the defendant is a first offender, the Commission avoided its statutory mandate. *See United States v. Kupa*, 976 F. Supp. 2d 417, 420 n.10 (E.D.N.Y. 2013), *aff'd*, 616 F. App'x 33 (2d Cir. 2015) ("[T]he statutory presumption of . . . 28 U.S.C. § 994(j), was also snuffed out by the original Sentencing Commission, which made a categorical determination that *every* white collar offense, no matter how small in scope or effect, is comparable in seriousness to a violent crime."); *United States v. Watt*, 707 F. Supp. 2d 149, 158 (D. Mass. 2010) (finding that "the Commission . . . redefined 'serious offense' in a way that was entirely inconsistent with prior practice, and not at all based on any real data or analysis," which "led to a far higher incarceration rate for non-violent first offenders than had been the pattern pre-Guidelines").

[34] 18 U.S.C. § 3553(a).

[35] J.P. Hanlon, *et al*., Am. Bar Ass'n, *Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing*, 24 Crim. Just. 26 (2010).

[36] 18 U.S.C. § 3553(a)(1)(D).

address the overuse of incarceration and support approaches to reduce recidivism by revising U.S.S.G. § 5B1.1 and § 5C1.1.

c. Alternatives to Incarceration

As the PAG has previously recommended, implementing meaningful alternatives to incarceration has the potential to decrease recidivism by allowing low-risk offenders to retain ties to their community, as well as ties to family and potential employment, and by conserving scarce resources for higher-risk offenders who require more services to successfully avoid returning to crime. The United States Attorneys' Manual specifically authorizes the use of pretrial diversion programs,[37] and in the PAG's experience, prosecutors who utilize pretrial diversion have seen decreased recidivism among program participants. The Commission's prior research indicates that these programs have significant support within the legal community,[38] and the ABA has consistently voiced support for such alternatives.[39]

Paradoxically, despite this support, research suggests that alternatives to incarceration are not being widely implemented. The Commission's previous work has found that the imposition of alternative sentences has declined over the previous decade.[40] Similarly, a new audit

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[37] The United States Attorneys' Manual ("USAM") provides the parameters of the program, and excludes those who are "1. Accused of an offense which, under existing Department Guidelines, should be diverted to the State for prosecution; 2. A person with two or more prior felony convictions; 3. A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or 4. Accused of an offense related to national security or foreign affairs." USAM 9-22.100. For those who are not excluded but "against whom a prosecutable case exists," United States Attorneys have discretion to divert prosecution following the procedures in USAM at 712. *See also* USAM 9-27.250 (encouraging prosecutors to consider an "adequate, non-criminal alternative to prosecution" for a person who has committed a federal offense but for whom some remedy other than a criminal sanction is appropriate).

[38] U.S. Sentencing Comm'n, Results of 2014 Survey of United States District Judges: Modification and Revocation of Probation and Supervised Release tbl. 5 (February 2015).

[39] *See, e.g.*, James E. Felman, Co-Chair, Criminal Justice Section Committee on Sentencing, Am. Bar Association, Testimony Before the United States Sentencing Commission, at 9 (Mar. 17, 2010) ("[T]he ABA has long supported the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness and who pose no substantial threat to the community . . . . We encourage the Commission to make the greatest use of such treatment possible because we believe this will maximize the opportunities for better outcomes, reduced recidivism, and the avoidance of unnecessary incarceration.")

[40] *See* U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* 1 (2015), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

conducted by the Justice Department's Office of Inspector General indicates that fewer than half of all federal districts operate diversionary programs.[41] Thus, **the PAG recommends** the Commission continue its studies of alternatives to incarceration and consider how effective alternatives may be more widely adopted.

As of 2016, twenty-two of the ninety-six federal districts have adopted alternative to incarceration programs.[42] The structure of the programs in existence varies widely. Some programs require individuals to plead guilty to a less serious offense with the prospect of avoiding any imprisonment by successfully completing programs that involve counseling in the areas of substance abuse, anger management, or employment opportunities. Under some programs, successful graduates may be permitted to withdraw their guilty pleas, and either have their charges dismissed or enter into deferred prosecution agreements, thereby avoiding conviction altogether.

By way of example, the Eastern District of New York has implemented two model diversion programs – the Pretrial Opportunity Program and Special Opportunity Services Program.[43] While the programs are similar, the former is aimed at substance abuse offenders, while the latter is aimed at youthful offenders aged 18 to 25, providing participants with additional community, education and volunteer resources to enable to them establish a foundation to lead law-abiding lives as they enter adulthood.[44] Both programs require participants to attend and comply with an inpatient or outpatient drug treatment program, meet with their Pretrial Services officers, remain drug-free for twelve consecutive months, obtain a

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[41] *See* Office of the Inspector General, U.S. Department of Justice, Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration (July 2016) ("OIG Pretrial Diversion Report"), https://oig.justice.gov/reports/2016/a1619.pdf. The OIG report notes that pretrial diversion and court-based diversion are being used in only about half of all districts.

[42] The Central, Eastern, and Northern Districts of California, the District of Connecticut, the Central District of Illinois, the District of Massachusetts, the District of New Jersey, the District of New Hampshire, the Eastern District of New York, the District of South Carolina, the Western District of Texas, the District of Utah, the District of Vermont, and the Western District of Washington have programs aimed at substance abuse offenders. The Southern District of California, the Eastern and Southern Districts of New York, and the Southern District of Ohio have programs aimed at youthful offenders. The Eastern District of Missouri and District of Oregon have programs aimed at high-risk offenders. The District of Arizona and Western District of Virginia have programs aimed at veterans. *See id.* at 17 tbl. 3.

[43] Second Report to the Board of Judges, United States District Court for the Eastern District of New York 4 (Aug. 17, 2015), *available at* https://www.nyed.uscourts.gov/news/second-report-board-judges-alternatives-incarceration-2015.

[44] *Id.* at 12.

high school equivalency certificate (if they do not have one), and seek and retain employment. Both programs are court-directed; participants meet monthly with the judge and pretrial services officers who lead the programs to discuss their progress and goals for the upcoming month.[45] As they near completion of these programs, defense counsel negotiate with the government regarding sentencing.[46] Participants who successfully completed the programs received sentences that did not include incarceration.[47] For some of the participants, the programs also acted as diversion programs; successful participants had their charges dismissed or entered into deferred prosecution agreements.[48]

Data gathered over the course of the programs' operation show a variety of benefits: 71.8% of participants successfully completed the programs, and the programs saved the district more than $3 million in the costs of incarceration alone.[49] The programs also reduced other costs that are more difficult to quantify, including the costs of lost employment and productivity and recidivism. As of 2015, all of the program participants had maintained employment during their period of post-conviction supervision, and only one was re-arrested (for a misdemeanor drug charge that was later dismissed).[50] A national study sponsored by the Department of Justice found that participants in similar programs reported 13 percent less criminal activity and had 10 percent fewer arrests than comparable offenders not participating in such programs.[51] Program participants were also significantly less likely than non-participants to test positive for drug use, and reported higher rates of employment and income.[52] Empirical results from the EDNY programs, as well as the programs of other districts, should be examined by the Commission.

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[45] *Id.* at 8-13.

[46] *Id.* at 10, 13.

[47] As of March 2016, all but two of the twenty-eight participants who successfully completed the programs (92.9%) received sentences that did not include incarceration. Statement of Reasons, *United States v. Dokmeci*, No. 13-cv-455 (RJD) (SMG) (E.D.N.Y. Mar. 9, 2016), ECF No. 21.

[48] As of March 2016, eight participants had had the charges against them dismissed outright, and two others entered deferred prosecution agreements. *Id.* at 13.

[49] *Id.* at 14.

[50] *Id.*

[51] Shelli B. Rossman *et al*., Urban Inst., *The Multi-Site Adult Drug Court Evaluation: Executive Summary* 5 (2011), *available at* http://www.urban.org/sites/default/files/publication/27361/412353-The-Multi-site-Adult-Drug-Court-Evaluation-Executive-Summary.PDF.

[52] *Id.*

Because programs that allow a participant to avoid conviction entirely depend on the exercise of discretion by the United States Attorney's Office in each district, **the PAG encourages** the Commission to examine and consider statutory amendments that would allow *courts*, in addition to prosecutors, to defer adjudication and dismiss charges upon successful completion of a program's requirements. In particular, **the PAG encourages** the Commission to consider recommendations to expand the scope of the "Federal First Offender Act," 18 U.S.C. § 3607, which currently authorizes a disposition of prejudgment probation leading to dismissal of charges for misdemeanor drug possessors who have no prior drug convictions, and expungement of the record in cases where the defendant is youthful. **The PAG urges** the Commission to study how frequently this statutory authority is used, and how successful it has been in providing incentives to less serious offenders, thereby reducing recidivism. The Commission would then have a basis on which to determine whether to recommend to Congress that the authority in 18 U.S.C. § 3607(a) be expanded to additional offenses or to explicitly reference court supervised diversionary programs.

It is worth noting that more than half the states now have laws offering less serious offenders the possibility of avoiding conviction through deferred adjudication by courts, leading to dismissal of charges and expungement notwithstanding a state prosecutor's position.[53] Many of these state laws are relatively new, or have expanded in recent years, in light of the growing consensus about the detrimental effect of collateral consequences.[54] In addition, the American Law Institute has recently approved model proposals for diversion and deferred adjudication for inclusion in the Model Penal Code; these could provide a useful model for an expanded federal statutory scheme.[55] Accordingly, data generated by the state and local programs, as well as the MPC guidance, should be considered by the Commission in making statutory recommendations to Congress and proposing new Guidelines provisions.

Finally, in its most recent report on alternative sentencing, the Commission has found that sentencing alternatives were more often imposed for Caucasian defendants than for African

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[53] *See* Love, Roberts and Klingele, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY AND PRACTICE § 7:18, pp. 499-506 (West/NACDL, 2016 ed.). A 50-state chart showing deferred adjudication authorities in effect in every state is accessible through the Restoration of Rights Project, Collateral Consequences Resource Center *et al*., http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ (last accessed July 30, 2017).

[54] *See, e.g*., Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013-2016, Restoration of Rights & Relief from Collateral Consequences (*February 2017), http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf.

[55] See Model Penal Code: Sentencing, § 6.02B ("Deferred Adjudication"), Proposed Final Draft (April 2017). *See also id.* at § 6.02A ("Deferred Prosecution"). Under § 6.02A, the prosecutor decides whether to pursue charges or forego prosecution entirely, whereas under § 6.02B, the court decides whether to conditionally dispose of a case prior to entry of judgment.

American and Hispanic defendants.[56] **The PAG requests** that the Commission study and report on the reasons for this trend.

F. Proposed Priority Number 7 – Study of the Findings and Recommendations Contained in the May 2016 Report Issued by the Commission's Tribal Issues Advisory Group

1. Note and Commentary Additions to U.S.S.G. § 4A1.3 in Considering a Departure from the Guidelines for Tribal Court Convictions

Consistent with the PAG's previous comments to the Commission, **the PAG continues to support** the Tribal Issues Advisory Group's ("TIAG['s]") proposal to add an application note and commentary to U.S.S.G. § 4A1.3 "Departures Based on Inadequacy of Criminal History Category (Policy Statement)" to provide sufficiently specific guidance about when tribal court convictions may be considered for upward departure in the defendant's criminal history category. **The PAG agrees** that the following factors merit consideration, though none is intended to be determinative. Collectively, these factors reflect important considerations for sentencing courts, balancing the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences, and the aim of accurately assessing a defendant's criminal history.

a. Due Process Considerations

The PAG agrees that due process considerations may be important to the upward departure analysis, but **the PAG believes** that more guidance is needed about the scope and criteria to be considered in light of *United States v. Bryant*, 136 S. Ct. 1964 (2016). *Bryant* held that uncounselled tribal convictions are not unconstitutional if the proceeding complied with the Indian Civil Rights Act.[57] The Court also held that uncounselled misdemeanor convictions can be a valid basis for upward departures.[58] In the year following *Bryant,* at least several Illinois state courts have limited *Bryant's* holding to cases involving lack of counsel and recidivist statutes.[59] **The PAG recommends** that the Commission study how courts interpret *Bryant*, and

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[56] *See* U.S. Sentencing Comm'n, *supra* note 5, at 15 ("Black and Hispanic offenders consistently were sentenced to alternatives less often than White offenders.").

[57] *See Bryant*, 136 S. Ct. at 1956 (stating that "[t]he Indian Civil Rights Act of 1968 ("ICRA") . . . provides indigent defendants with a right to appointed counsel only for sentences exceeding one year. 25 U.S.C. § 1302(c)(2). ICRA's right to counsel therefore is not coextensive with the Sixth Amendment right.")

[58] *See id*. at 1965 (explaining that an uncounseled misdemeanor conviction . . . is also valid when used to enhance punishment at a subsequent conviction) (citing to *Nichols v. United States*, 511 U.S. 738, 748-49 (1994)).

[59] *See e.g., People v. Delgado,* No. 1-15-2247, 2017 WL 1052051, at *8 (IL App 1st March 16, 2017) (refusing to extend *Bryant* holding beyond defendants raising claims relating to

in doing so, consider how best to balance the interests of indigent habitual offenders against the interests of victims of domestic violence by Indian and non-Indian offenders,[60] and concerns about federal and state court deference to tribal sovereignty.[61]

b. Tribal Exercise of Expanded Jurisdictions

The PAG agrees that it is important to consider whether the tribal court had expanded jurisdiction under the Tribal Law and Order Act and the Violence Against Women Reauthorization Act of 2013 ("VAWA") when determining whether to depart upward. There are special circumstances where the prosecution of non-Indians[62] is allowed.[63] If expanded jurisdiction is relevant, courts should consider the circumstance(s) that gave rise to such expanded jurisdiction and the tribal court's ruling. Expanded jurisdiction under VAWA could better protect against non-Indian abuse of Indian children on reservations."[64]

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lack of counsel); *People v. Fields,* 75 N.E. 3d 503, 516 (IL App 1st 2017) (refusing to extend *Bryant* holding beyond recidivist statutes, which depend on the reliability of prior convictions).

[60]*Compare* Monique Kreisman, *United States v. Bryant, Federal Habitual Offender Laws, and the Rights of Defendants in Tribal Courts: A Better Solution to Domestic Violence Exists,* 39 Campbell L. Rev. 205, 205 (2017) ("It seems backhanded to use uncounseled [domestic violence] tribal convictions to prove an element of a federal offense when those same convictions could not be used if they had been obtained in a different court.") *to* Mary K. Mullen, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence,* 61 St. Louis U. L. J. 811, 833 (2017) (stating Title IX finally grants domestic violence victims efficient access to protection through allowing tribal courts jurisdiction over non-native partners of the victims).

[61]Laura Oppenheimer, *Untangling the Court's Sovereignty Doctrine to Allow For Greater Respect of Tribal Authority in Addressing Domestic Violence,* 76 Md. L. Rev. 847, 848 (2017) (stating that because *Bryant* "upheld a repeat offender law that expands federal authority over Native American domestic violence offenders… [*Bryant*] could further minimize the degree of respect or deference Congress accords tribal sovereignty").

[62]*See* definition of "Indian" in May 2016 TIAG Report at 4.

[63]*See* ICRA, 25 U.S.C. § 1302(a)-(c) (codifying the Tribal Law and Order Act of 2010, which allows tribal courts to prosecute felonies, increases their sentencing authority, and requires certain due process safeguards); *see also* § 1304 (establishing a new "special domestic violence jurisdiction" to allow tribes to prosecute non-Indians who commit acts of domestic violence within the tribe's jurisdiction and requiring tribal courts to provide counsel to those defendants). *But see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) ("Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."); *United States v. Lara*, 541 U.S. 193, 227 (2004) (Souter, J., dissenting) ("[A]ny tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a 'delegation' of federal power.").

c. Possibility of "Double-counting" in Computing Criminal History Category

The PAG agrees that it is important to consider the potential for "double-counting" in computing the criminal history category to promote fairness and consistency in the Guidelines calculation, even though the Double Jeopardy Clause does not apply to tribal court convictions.[65] More guidance should be provided to aid the assessment of whether the conduct underlying the punished offense is the same. Where the conduct is found to be the same, the tribal court conviction should not be taken into account.

d. Similarity of Tribal Conviction Offense in Type and Age

The PAG agrees that courts should consider whether a tribal court conviction is for an offense that would otherwise be counted under U.S.S.G. § 4A1.2 based on the type and age of the offense. Courts currently consider uncounted criminal records when deciding to depart upward from the Guidelines.[66] Providing additional guidance on when to consider offense similarities between tribal court convictions and convictions that would otherwise be counted under U.S.S.G. § 4A1.2 would allow for more uniformity in upward departures.

e. Tribal Court's Express Desire for Consideration of Tribal Convictions in Federal Sentencing

The PAG agrees that greater consideration should be given to any formal expression by tribal courts of a desire for their courts' convictions to be counted towards U.S. federal court

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[64]*See, e.g.,* Brittany Raia, *Protecting Vulnerable Children in Indian Country: Why and How the Violence Against Women Reauthorization Act of 2013 Should Be Extended To Cover Child Abuse Committed on Indian Reservations,* 54 Am. Crim. L. Rev. 303, 306 (2017) ("While VAWA 2013 is a powerful tool for tribal governments, it is not a complete solution. For example… [it] does not reach child or elder abuse, unless such abuse involves the violation of a protection order.").

[65]*See Lara*, 541 U.S. 193 (holding that Double Jeopardy did not bar federal prosecution after an Indian tribe had prosecuted and punished the defendant absent any showing that the source of the tribal prosecution was federal power).

[66]*See, e.g., United States v. Sayers*, 580 Fed. App'x. 497, 500 (8th Cir. 2014) ("[A]n upward variance of six months was appropriate, noting [defendant's] criminal history, which includes numerous tribal court convictions for which he did not receive criminal-history points."); *United States v. Sechrist*, 493 Fed. App'x. 778, 780 (7th Cir. 2012) (noting court's "mistrust of the Guidelines range as calculated, which did not account for [defendant's] [] convictions in tribal court").

sentences. While the current Guidelines do not consider this factor, the proposed amendment provides only minimal assistance on this point. Additional research should be conducted to determine which tribal courts have expressed a desire for their convictions to be considered federally, how many courts have expressed such a desire, and whether those desires have specified the types of convictions that should be considered, among other considerations. In addition, if this amendment (or a similar proposed amendment) is added, the underlying information regarding tribal courts' formal positions on the issue should be made readily available to federal courts.

2. The PAG Supports the Proposal to Add a Definition for "Court Protection Order" in U.S.S.G. § 1B1.1.

The PAG generally supports TIAG's proposal to include a definition for "court protection order" that references 18 U.S.C. § 2265 and 18 U.S.C. § 2266 but suggests further revision to the proposed amendment once additional research is conducted. **The PAG recommends** clarifying the definition to promote greater uniformity in the application and scope of court protection orders. The PAG agrees that additional data should be collected to best assess the use of protection orders as enhancements in federal sentencing, including: their frequency; the issuing court; whether notice was provided to the defendant; and the type of offense. This data about protection orders should be analysed before considering any expansion of their use as enhancements because violations of court protection orders already trigger enhancements under U.S.S.G. §§ 2A2.2, 2A6.1 and 2A6.2.

3. The PAG Supports the Policies Behind the Proposed Changes to U.S.S.G. §§ 5H1.1 and 5K2.25, but Recommends Further Revision to the Proposed Amendment.

a. Policy Behind the Proposed Changes

The PAG agrees with the TIAG's recommendation to focus on the rehabilitative nature of the juvenile justice system. The PAG also agrees with the TIAG's findings regarding the effects of treating juveniles like adults and sentencing them to detention or imprisonment. District courts applying U.S.S.G. § 5H1.1 often have considered a defendant's age only generally, without conducting a more detailed analysis.[67] The Guidelines only consider a youth's

[67] *See, e.g., United States v. Logan*, Crim. No. WDQ-10-0203, 2015 WL 6437611, at *1 (D. Md. Oct. 21, 2015) (granting a downward departure because defendant was 48 years old); *United States v. Murphy*, No. 3:11-CV-559-P, 2011 WL 3204375, at *2 (D. Tex. July 26, 2011) (considering defendant's age in a motion to correct, vacate, or set aside the sentence); *United States v. Law*, 806 F.3d 1103, 1106 (D.C. Cir. 2015) (finding that the district court considered defendant's age and health in determining sentence); *United States v. Jefferson*, 816 F.3d 1016, 1021 (8th Cir. 2016) (rejecting defendant's argument that it was procedural error to not grant a downward departure due to defendant's young age at the time of the crimes because the decision to refuse downward departure is generally unreviewable).

age in special circumstances and do not fully address the differences between juveniles and adults.

Recent Supreme Court jurisprudence highlights the important differences in psychological development between juveniles and adults in sentencing. In *Roper v. Simmons*, the Supreme Court considered the imposition of a life sentence on a juvenile as opposed to an adult, noting: (i) children lack maturity and have an underdeveloped sense of responsibility; (ii) children are more vulnerable to negative influences and outside pressures; and (iii) a child's character and traits are not as "well formed" or fixed as an adult's.[68] In *Miller v. Alabama*, where a juvenile faced life imprisonment without parole for a murder he committed at age 14, the Court reaffirmed that children are constitutionally different from adults in sentencing because of their diminished culpability and greater prospects for reform.[69] That holding was extended in *Montgomery v. Louisiana*, where the court held that the *Miller* ruling applies retroactively to all inmates who were sentenced to life without parole previously.[70] The Supreme Court's reasoning, although applied to extreme sentences, is applicable here, as it demonstrates that children are different than adults under the law and thus should be treated differently.

A punitive approach to juvenile justice especially impacts Indian youth. "[A]lthough Native youth are only 1 percent of the national youth population," a 2009 report from Campaign for Youth Justice observed that, "70 percent of youth committed to the Federal Bureau of Prisons (BOP) as delinquents are Native American, as are 31 percent of youth committed to the BOP as adults."[71]

b. U.S.S.G. §§ 5H1.1 and 5K2.25

The PAG recommends revising the amendments proposed during the last cycle, because they are overbroad; additional study is needed to clarify their scope and to facilitate their implementation. For example, the statement in U.S.S.G. § 5H1.1 "in a case in which a sentence

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[68]*Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (holding that life imprisonment is an unconstitutional sentence for juveniles without consideration of special circumstances); *See also Graham v. Florida*, 560 U.S. 48, 68 (2010) (holding that a juvenile offender who did not commit homicide cannot be sentenced to life without parole… "[A] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.") (citing *Thompson v. Oklahoma,* 487 U.S. 815 (1988)).

[69]*Miller v. Alabama*, 567 U.S. 460, 470 (2012) (holding that the penological justifications for imposing life without parole on juvenile offenders was so diminished that it was not constitutionally permissible).

[70]*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

[71]Neelum Arya & Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, 1 Race and Ethnicity Series 1, 26 (2009) (http://www.campaignforyouthjustice.org/images/policybriefs/race/CFYJPB_TangledJustice.pdf).

of imprisonment or detention may expose the defendant to anti-social peers" would apply to every young person sentenced to detention or imprisonment. Prisons and juvenile detention centers all house individuals who committed crimes, and the commission of those crimes is often considered antisocial behavior. Including this amendment as proposed may result in a blanket departure for all juveniles, thus undermining the purpose of a "departure" from the Guidelines. Additionally, the statement on "pro-social behaviors, activities, or relationships" is duplicative across both sections and requires further clarification. Determining if a relationship, activity, or behavior is pro-social requires a subjective evaluation that may result in judges applying the provision unevenly.

G. Proposed Priority Number 8 – Examination of Chapter Four, Part A (Criminal History)

1. U.S.S.G. § 4A1.2(a)(2) – Federal and State Convictions for the Same Conduct

The PAG recommends that the Commission undertake an examination of the definition of "Prior Sentence" set forth in U.S.S.G. § 4A1.2(a)(2) in order to determine whether it is appropriate to treat federal and state convictions for the same criminal conduct as two separate sentences rather than as a single sentence. The treatment of such convictions has implications with respect to assigning criminal history points as well as the application of the Career Offender Guideline.

The latter issue arose recently in *United States v. Marcoccia*, 2017 U.S. App. LEXIS 6719, No. 16-2781 (3rd Cir. 2017). In that case, the Third Circuit affirmed the district court's determination that the defendant was properly classified as a career offender where his two prior convictions for controlled substance offenses—one state and one federal—arose from the same course of conduct. Importantly, the court noted that it made no difference whether there was an intervening arrest between the two convictions under the plain language of U.S.S.G. § 4A1.2(a)(2), because the convictions were charged by separate indictments and sentenced on the different dates.

Addressing this issue in a concurring opinion, Judge Krause noted that while the plain language of U.S.S.G. § 4A1.2(a)(2) mandated the result reached by the majority, such an application was likely not considered by the Commission. Judge Krause recognized that given "the profound increase in sentence that follows from [the career offender enhancement], this result is a troubling one . . . ." *Marcoccia*, 2017 U.S. App. LEXIS 6719, at *14.

As a practical matter, anytime both state and federal authorities decide to prosecute a defendant for the same course of conduct, those cases invariably arise from separate indictments and will almost certainly be sentenced on different days. Thus, that defendant will always be deemed a career offender even though, in reality, he committed only one crime. This would appear to run counter to the policy underlying the Career Offender Guideline.

The PAG recommends that the Commission review U.S.S.G. § 4A1.2(a)(2) in order to determine: (a) whether such an application results in unwarranted disparities in sentencing among defendants with similar records; (b) whether such an application is in keeping with the

purpose of the career offender enhancement to punish recidivism for certain three-time offenders; and (c) whether such an application runs afoul of Due Process protections.

2. Treatment of Convictions for Offenses Committed Prior to Age 18

The PAG supports the previously proposed amendments concerning youthful offenders.[72] **The PAG recommends** the Commission adopt amendments to eliminate consideration of all juvenile adjudications for any purpose. **The PAG also supports** the adoption of a downward departure from the defendant's criminal history category in circumstances where the defendant had an adult conviction for an offense committed prior to age eighteen. These changes reflect the scientific consensus, cited by the Supreme Court, that even normal adolescents "have less control, or less experience with control, over their own environment" than adults and that because of that immaturity, their "irresponsible conduct is not as morally reprehensible as that of an adult."[73]

However, **the PAG also recommends** that the Commission adopt the recommendations set forth in the PAG's *Response to Request for Comment on Proposed Amendments to the Sentencing Guidelines Issued on Dec. 19, 2016* at 7 (Feb. 20, 2017). For the following reasons, the PAG recommends that any offense committed prior to age 18 — whether sentenced as a juvenile or as an adult — should not be included in calculating a defendant's Criminal History score:

- First, assigning criminal history points when a juvenile is sentenced as an adult in the underlying jurisdiction ignores the substantial evidence that, regardless of whether the proceeding was "adult" or "juvenile," those under 18 bear lesser culpability for their actions.[74]

- Second, state jurisdictions have different practices with respect to when individuals under the age of 18 are sentenced as "adults."[75] As a result, similarly situated defendants may end

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[72] U.S. Sentencing Comm'n., *Proposed Amendments to the Sentencing Guidelines*, Dec. 19, 2016 at 29.

[73] *Ropers v. Simmons,* 543 U.S. 551, 569-570 (2005) (citations omitted); *Graham v. Florida,* 560 U.S. 48, 68 (2010); *see Miller v. Alabama,* 132 S. Ct. 2455, 2458 (2012); *Montgomery v. Louisiana,* 136 S. Ct. 718, 733 (2016).

[74] *Gall v. United States,* 552 U.S. 38, 58 (2007).

[75] *See, e.g., United States v. Moorer*, 383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not "permit a judge to impose a juvenile 'sentence' based on an adult conviction for a crime" is "in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction"); *United States v. Clark*, 55 F. App'x 678, 679 (4th Cir. 2003) (noting that there is a "West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent," but that "North Carolina

up with substantially different criminal history scores, simply by virtue of different state rules concerning the treatment of juvenile offenses. Unwarranted disparities in sentencing are precisely what the Guidelines were designed to avoid.

- Third, juvenile offenders in many state jurisdictions are technically sentenced as adults —triggering points under Chapter 4 — but are nonetheless subject to the protections of the state's juvenile court system.[76]

Further, for the same reasons that the PAG does not support using such convictions for calculating criminal history points, **the PAG does not support** adding an upward departure for juvenile convictions under U.S.S.G. § 4A1.3. Without a similar amendment that addresses youthful age as a mitigating factor when sentencing an offender, the PAG believes that permitting such upward departures would disregard the science that demonstrates that the human brain is not fully developed until an individual is in their middle to late 20's.

Finally, if the Commission accepts the PAG's position seeking the elimination of all criminal history points for offenses committed before the age of 18, and opposing an upward departure based on such offenses, there would be no necessity for a downward departure for cases in which a juvenile has been sentenced as an adult, because those offenses would never be counted. In sum, the PAG supports the elimination of counting juvenile adjudications, but urges the Commission to eliminate the counting of any sentence for an offense committed before the age of 18.

3. Treatment of Revocation Sentences under U.S.S.G. § 4A1.2(k)

The PAG supports the Commission's previous proposal to amend § 4A1.2(k) to provide that:

> Sentences upon revocation of probation, parole, supervised release, special parole, or mandatory release are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).[77]

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has no analogous statutory provision").

[76] *See, e.g., United States v. Jones,* 260, 264 (2d Cir. 2005) (noting that "[y]outhful offender status carries with it certain benefits, such as privacy protections," and "New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing," yet federal courts have "still found it appropriate to consider the adjudications for federal sentencing purposes").

[77] U.S. Sentencing Comm'n., *Proposed Amendments to the Sentencing Guidelines*, Dec. 19, 2016 at 45.

The PAG believes that the current regime, which increases offenders' criminal history points based on revocation sentences, can result in excessive terms of incarceration. The Commission's previously proposed amendment is a well-informed change in accord with the findings of its multi-year study on recidivism in the federal justice system[78] and the Commission's study of revocation sentences.

The *Introductory Commentary* to Chapter Four, Part A, emphasizes patterns of *criminal* behavior in discussing criminal history:

> A defendant with a record of **prior criminal behavior** is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that **repeated criminal behavior** will aggravate the need for punishment with each recurrence. . . . **Repeated criminal behavior** is an indicator of a limited likelihood of successful rehabilitation.
>
> The specific factors included in §4A1.1 and §4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and **patterns of career criminal behavior.** (emphasis added).

By contrast, many revocations result from violations of conditions of release that do not constitute criminal conduct *(e.g.,* failure to report, failure to fulfill financial obligations, failure to comply with instructions of probation officer, association with prohibited persons, etc.). Indeed, the 2016 Study revealed that most individuals who were re-arrested for revocation of supervision were not convicted of any crime. Since many revocation sentences are not imposed upon criminal convictions, accounting for them in computing criminal history points is inconsistent with the Commentary. Therefore, the PAG does not support an approach that would count revocation sentences in determining criminal history points.

With one modification, the PAG also supports the portion of the proposed amendment that would provide that revocation sentences may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). **The PAG recommends** that the Commission limit consideration of revocation sentences under U.S.S.G. § 4A1.3(a) to those which are based on criminal conduct. Consideration of revocation sentences based on criminal conduct is consistent with the types of information currently listed in U.S.S.G. § 4A1.3(a)(2) (*e.g.*, prior similar adult criminal conduct not resulting in a criminal conviction, and prior sentences resulting from foreign and tribal convictions).

4. Amendment to U.S.S.G. § 4A1.3 to Account for Time Actually Served

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[78] U.S. Sentencing. Comm'n., "Recidivism Among Federal Offenders: A Comprehensive Overview" (2016), *available at* http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview.

For several reasons, **the PAG also supports** Commission's previously proposed amendment to U.S.S.G. § 4A1.3, which would amend the Commentary to provide that a downward departure from the defendant's criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.[79]

First, this would encourage recognition of the fact that the severity of a defendant's prior conduct may be more accurately measured by the length of time actually served rather than by the length of the sentence imposed, without putting the onus on probation officers to determine actual time served in each case. Second, the time a prisoner serves for a particular sentence varies wildly from state to state. Judges in some states may impose a 48-month sentence knowing that a typical prisoner will serve only 24 months for that sentence. However, in another state a judge may sentence an identical defendant to a 30-month sentence because in that state a 30-month sentence will result in 24 months of custody. Thus, using time actually served in custody, rather than the sentence imposed, may reduce "unwarranted sentencing disparities"[80] when sentencing offenders with identical prior convictions from different states.

Note that **the PAG thinks it is impractical** to exclude from downward departure consideration cases in which the time served by the defendant was substantially less than the length of the sentence imposed for reasons unrelated to the facts and circumstances of the defendant's case. The PAG believes that this is an administratively unworkable distinction, because time served is inextricably intertwined with the facts and circumstances of a defendant's case. For example, if an institution granted inmates early release in order to minimize overcrowding or due to state budget concerns, the criteria used to identify the individuals to be released would in all likelihood have some nexus to the facts and circumstances of the inmates' particular cases.

H. Proposed Priority Number 11 – Consideration of Miscellaneous Guideline Application Issues

1. The Proper Application of Relevant Conduct to Credit for Acceptance of Responsibility

In the PAG's February 20, 2017 submission, the PAG responded to proposed Amendment No. 6, addressing the issue the proper application of relevant conduct to credit for acceptance of responsibility. The PAG explained that a challenge to relevant conduct could

[79] U.S. Sentencing Comm'n., *Proposed Amendments to the Sentencing Guidelines*, Dec. 19, 2016 at 45.

[80] 28 U.S.C. § 991(b)(1)(B).

either be legal or factual. **The PAG's position**, then, as now, is that the Guideline should allow broad deference to defense counsel to assert *legal* challenges to assertions of relevant conduct without causing their clients to risk acceptance of responsibility credit, because such defenses are almost always attributable to the lawyer, not the client, and say nothing about the client's acceptance of responsibility. Moreover, a factual challenge involving the lack of an admission to asserted relevant conduct may be equated to "frivolously contesting" relevant conduct.[81]

Accordingly, **the PAG recommended** the following modification to the wording of the proposed new sentence of Application Note 1(A) to clarify that both legal challenges and non-frivolous factual challenges should not lead to the loss of acceptance of responsibility credit:

> In addition, a defendant who makes a legal challenge or a non-frivolous factual challenge to relevant conduct is not precluded from consideration for a reduction under subsection 1(A).

Our position is shaped by our collective experience. There are few reported cases dealing with the denial of acceptance of responsibility credit on relevant conduct grounds; it is our experience, however, that many pleas have been thwarted or reluctantly accepted, because of the risk of losing acceptance of responsibility credit when the probation officer or the prosecutor assert relevant conduct that is subject to good-faith legitimate legal and factual attack. Under those circumstances, a defendant must decide whether to abandon what appears to her or his lawyer to be a perfectly valid legal objection to the proposed relevant conduct or risk losing acceptance of responsibility credit. In this way, the Guidelines as written sometimes contribute to an increased jail sentence due simply to an individual's legitimate fear that contesting the relevant conduct would result in an even greater penalty because of the potential loss of acceptance credit.

2. The Ability to Consider a Previous Criminal History Category Downward Departure in Connection with a Motion to Reduce a Sentence Based on a Retroactive Change to the Guidelines

A recent Circuit Court decision addressed the issue of whether a district court considering a motion to reduce a sentence based on a retroactive change to the Guidelines must disregard a criminal history category downward departure previously granted. The court determined that it

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[81] *See, e.g., U.S. v. Smith*, 13 F.3d 860, 866 (5th Cir. 1994) (affirming denial of acceptance credit because "....even though [defendant] admitted the conduct comprising the offense, she steadfastly refused to admit any connection, even vicarious, with the additional cocaine found in the floor of the house."); *United States v. Edwards*, 635 F. App'x 186 (6th Cir. 2015) (affirming district court's decision to deny acceptance credit because drug defendant had "frivolously denied conduct relevant to the leadership-role enhancement"); *United States v. Sandidge,* 784 F.3d 1055 (7th Cir. 2015) (affirming district court's decision to deny acceptance credit because defendant contested the factual basis for a four-level enhancement based on relevant conduct). In none of these cases did the defendant testify at sentencing. Rather, relying on the language of the application note, courts characterized appropriate sentencing arguments as "frivolously contesting" or a "falsely denying" relevant conduct and denied the acceptance credit.

did not have the discretion to take into account the prior criminal history category downward departure. *United States v. Leatch*, No. 16-10701 (5th Cir. filed June 6, 2017). However, the court noted that several circuits have criticized this Guidelines disallowance on the grounds that a criminal history score that exaggerates a defendant's past crimes during an initial sentencing will continue to do so at a reduction hearing. *Id*. at 8-9. **The PAG respectfully suggests** this disallowance be reconsidered.

I. PAG Proposed Priority – Examination of Collateral Consequences

As in prior years, **the PAG urges** the Commission to consider as a proposed priority the examination of the impact of the collateral consequences of convictions. Collateral consequences – the legal penalties and restrictions that take effect automatically without regard to whether they are included in the court's judgment – are frequently the most important aspect of punishment from a defendant's perspective. Convicted individuals face reduced employment and housing opportunities, legal barriers to occupational and business licensure, driver's license suspensions, voting restrictions, and many other collateral consequences that make successful re-entry more difficult. Some states still have full or partial bans on welfare and food stamps for people who have felony drug convictions. Such limitations can have a crippling effect on the individual, who may have to support a family, yet is unable to rely on any of these important programs.

In a number of recent cases, federal courts have imposed more lenient sentences in consideration of the severe collateral consequences a defendant would experience. In other cases, courts have sought creative ways to relieve defendants from the effect of collateral consequences long after the court's sentence has been fully served.

We briefly describe below the ways in which collateral consequences affect the work of sentencing courts. The PAG urges the Commission to take this matter under advisement and to consider scheduling hearings on this issue.

1. Understanding Collateral Consequences and Ensuring that a Defendant has been Notified about Them

In general, the constitutional obligation of advisement is defense counsel's under the Sixth Amendment, not the court's. The one situation in which judicial advisement is required under the Federal Rules of Criminal Procedure is where a defendant considering a guilty plea is not a citizen.[82] That said, a federal court is permitted to inform itself about the collateral consequences that may apply in a particular case in order to decide whether to take such consequences into account when fashioning a sentence. The court may ask the probation office, which is part of the judicial branch, for information about collateral consequences, and probation ought to be informed about collateral consequences in any event so that it can assist defendants with reentry and reintegration. Similarly, the court may ask defense counsel for reassurance that counsel has advised the defendant about applicable collateral consequences before accepting a

[82] *See* Fed. R. Crim. P. 11(b)(1)(O).

guilty plea or imposing a sentence, if only as a prophylactic measure to guard against subsequent claims of ineffective assistance.[83]

While judicial notice about collateral consequences may not be mandated in the federal system outside the immigration context, either by counsel or court, such notice has been recognized as sound practice by the major national law reform and professional organizations of lawyers.[84] The Model Penal Code gives the sentencing commission responsibility for collecting collateral consequences and providing guidance to sentencing courts relating to their consideration of collateral consequences at and after sentencing.[85] The PAG believes that the Commission could usefully consider what if any role it might play in this regard.

2. Considering Collateral Consequences in Imposing Sentence

Sentencing courts have been increasingly aware in recent years of the devastating life-long effects of federal convictions in matters such as employment, housing, licensure, public benefits and immigration status. Some courts have varied from the Guidelines (or departed down) in consideration of the severe collateral consequences to which a defendant is already exposed. One striking recent example is Judge Block's recent decision in *United States v. Nesbeth*, 2016 U.S. Dist. LEXIS 68731 (2016), which was the subject of considerable attention in the media.[86] Some federal courts of appeal have upheld the relevance of collateral consequences to a determination of "just punishment" and the need for deterrence under 18 U.S.C. § 3553(a), allowing them as a basis for varying downwards from the Guidelines range.[87]

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[83] Just last month, the Supreme Court reaffirmed a defense lawyer's obligation to warn defendants about immigration consequences of conviction. See *U.S. v. Jae Lee*, 137 S. Ct. 1958 (2017). In state courts, the judicial advisement obligation may be more robust, both under the state constitution and applicable court rule, such as where sex offender registration or firearms dispossession may result from conviction. However, such notice has generally not been required in the federal system. Case law developments, notably in the past few years since the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), are described in Chapters 4 and 8 of Love, Roberts and Klingele, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY AND PRACTICE (West/NACDL, 2016 ed.).

[84] The Uniform Law Commission and the American Law Institute have both proposed that sentencing courts should ensure that a defendant has been informed about collateral consequences that might affect willingness to plead, and at sentencing. See Model Penal Code: Sentencing, § 6x.04(1); Uniform Collateral Consequences of Conviction Act §§ 5, 6 (2010). The ABA Standards for Criminal Justice also impose this requirement. *See* Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standards 19-2.3, 19-2.4(b) (2003).

[85] *See* Model Penal Code: Sentencing § 6x.02.

[86] *See, e.g.*, Lincoln Caplan, *Why a Judge Refused to Send a Drug Courier to Prison*, The New Yorker, June 1, 2016, *available at* http://www.newyorker.com/news/news-desk/why-a-brooklyn-judge-refused-to-send-a-drug-courier-to-prison.

Others have disallowed them based on because of the resulting risk of socioeconomic bias in favor of more privileged defendants who have the most to lose in the civil sphere.[88]

In light of the considerable disagreement about the scope of a court's authority to adjust the length of a prison sentence because of collateral consequences, **the PAG strongly urges** the Commission to study and consider developing guidance on the interplay between collateral consequences and the Guidelines. **The PAG urges** the Commission to consider, in connection with any study of collateral consequences it may undertake, whether it should encourage courts to consider the impact of collateral consequences in order to further the rehabilitative goals of sentencing and to avoid issues of disproportionate severity.

3. Relief from Collateral Consequences after Service of Sentence

The PAG also encourages the Commission to consider the role of federal courts in mitigating the impact of collateral consequences after a defendant has served a sentence. As the Commission is aware, the issue of a federal court's inherent authority to expunge a conviction appears uncertain. See *Doe v. United States*, 833 F.3d 192 (2d Cir. 2017), rev'g 110 F. Supp. 3d 448 (E.D.N.Y. 2015). One district court in New York recently denied expungement citing lack of sufficient hardship, but granted a "Certificate of Rehabilitation" to enable a defendant to overcome her inability to secure employment in her chosen profession because of her conviction. *Doe v. United States*, 2016 U.S. Dist. LEXIS 29162 (E.D.N.Y. 2016).

Although many states now allow for expungement or sealing of some minor convictions, the effect of this type of relief is uneven from state to state and unclear even within a single state.[89] Moreover, it may not offer sufficient mitigation. Notably, even if expunged and sealed convictions do not count as predicate offenses under state law, they may still count as prior convictions under the Guidelines if they are not based on "innocence or errors of law." *See* U.S.S.G. § 4A1.2(j), Application Note 10.[90]

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[87] *See* cases collected and discussed in Margaret Colgate Love, Collateral Consequences Resource Center, *Federal Sentencing & Collateral Consequences* (Apr. 15, 2016), *available at* http://ccresourcecenter.org/wp-content/uploads/2016/05/CCRC-Federal-Sentencing-Collateral-Consequences-4-2016.pdf.

[88] *See, e.g., United States v. Morgan*, 635 F. App'x 423, 444 (10th Cir. 2015); *United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014).

[89] *See* Restoration of Rights Project, Collateral Consequences Resource Center *et al*., http://restoration.ccresourcecenter.org (last visited July 29, 2017).

[90] For a discussion of the types of relief that may constitute "expungement" under U.S.S.G. § 4A1.2(j), *see United States v. Matthews*, 205 F.3d 544, 546-549 (2d Cir. 2000). We note in this regard that the New York Times has expressed doubts about the efficacy of expungement, *see* Editorial Bd., *Job Hunting with a Criminal Record*, N.Y. Times, Mar. 19, 2015, at A26, and the Marshall Project has commended judicial "forgiving" remedies newly popular in the states. *See* Eli Hager, The Marshall Project, *Forgiving vs. Forgetting* (Mar. 17, 2015; 5:53 PM), https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting#.ovB3clBJh.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we very much appreciate the opportunity to offer the PAG's input regarding the Commission's 2017-2018 priorities. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

___/s/_____

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