National Association of
Assistant United States Attorneys
Safeguarding Justice for All Americans

October 10, 2017

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

Dear Chief Judge Pryor:

The National Association of Assistant United States Attorneys (NAAUSA) submits the following comments in response to the proposed amendments to the Sentencing Guidelines made public on August 17, 2017, regarding first time offenders and challenges to relevant conduct.

The National Association of Assistant United States Attorneys represents the interests of 5,400 Assistant United States Attorneys employed by the Department of Justice and responsible for the prosecution of federal crimes and the handling of civil litigation throughout the United States. United States Attorneys and Assistant United States Attorneys are the gatekeepers of our system of justice. Our primary responsibility is to protect the innocent and convict the guilty.

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

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

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

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

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

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

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

If, however, the Commission intends to move forward with this proposed amendment despite our objection, we make the following recommendations. We strongly recommend the use of Option 2 to award first offender status only where the offender has "no prior convictions of any kind," since offenders with "stale" prior criminal convictions obviously present a higher recidivism risk than true first offenders. With regard to the decrease in offense levels, we urge the Commission to adopt Option 1, providing a one-level reduction to this category of offenders.

Finally, if the Sentencing Commission moves forward with the amendment to §5C1.1, regarding a recommendation of a non-prison sentence for "first time offenders," we highly recommend the definition in the second option be used, "where the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense." We urge the Commission to avoid using the term "crime of violence" in this context due to the problems associated with the categorical approach.

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

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

NAAUSA recommends against the change to the Application Notes to §3E1.1 to allow challenges to relevant conduct without the loss of credit for acceptance of responsibility, as this change is wholly unnecessary and weakens the incentive for a defendant to take responsibility for his or her actions.

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

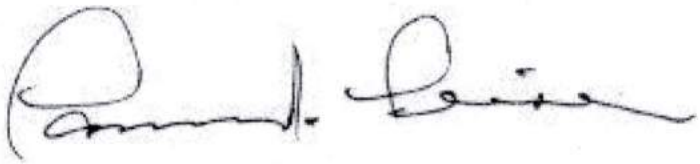
By way of example, the proposed amendment will affect drug prosecutions where a defendant contests the relevant drug weight attributed to him. In many cases, this will necessitate a multi-day sentencing hearing and require the government to produce witnesses. In a typical wiretap case, for instance,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

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

Conclusion

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

Sincerely yours,



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