

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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August 10, 2018

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 of Practitioner's Advisory Group to Request for Comment on Proposed 2018-2019 Priorities

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's request for comment on its proposed 2018-2019 priorities.

I. PROPOSED PRIORITY NUMBER 1 — EXAMINATION OF OVERALL STRUCTURE OF THE GUIDELINES POST-BOOKER

The PAG continues to support the Commission's continuing efforts to: (1) appropriately account for each defendant's role, culpability and relevant conduct; and (2) study and encourage the use of alternatives to incarceration in appropriate circumstances.

The PAG has previously urged that the ABA Task Force Report on the Reform of Federal Sentencing for Economic Crimes presents a sound and workable framework that could be expanded beyond economic crimes to the Guidelines more broadly. We agree with those who have acknowledged concerns about tying punishment more closely and proportionately to culpability across the Guidelines for all offenders. An approach which places primary focus on individual culpability and *mens rea*, and not on relatively simplistic (even if more easily

measured) factors such as loss or drug quantity, would promote proportionality and reduce unwarranted sentencing disparities.

To these ends, in its prior submissions to the Commission, **the PAG has recommended** that:¹

- Chapter Four be amended to provide lower Guideline ranges for “first offenders,” which should be defined to include defendants who have a criminal history category of zero, as a means to appropriately account for the reduced culpability of first offenders;
- Zones B and C be consolidated into Zone B, in order to increase the universe of defendants for whom a sentence of probation is authorized under U.S.S.G. § 5B1.1, as a means to appropriately account for the culpability and relevant conduct of defendants in these Zones; and
- U.S.S.G. § 4A1.2(d) be amended so that any offense committed prior to age 18 would not be included in calculating a defendant’s criminal history score, recognizing that those under 18 bear lesser culpability for their actions.

Despite widespread bipartisan recognition of the need for sentencing reform to address prison overuse and curb excessive sentences, on May 10, 2017, the Attorney General issued new federal charging and sentencing policies, rescinding the Justice Department’s 2013 “Smart on Crime” initiative.² With this policy reversal, **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.

Accordingly, **the PAG does not support** additional limitations on sentencing judges’ discretion to vary from the Guidelines; that would be inconsistent with the statutory 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 agrees** with the Probation Officers Advisory Group’s statement that: “It is believed that, by providing more judicial discretion, courts would have increased flexibility to use an array of

¹ See PAG Letters to Hon. William H. Pryor, Jr. at 2-3 (Oct. 10, 2017); at 12-14, 14-16 (July 31, 2017); at 1-4, 7-9 (Feb. 20, 2017).

² Justice Department Memorandum, *Department Charging and Sentencing Policy* (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.

alternatives to incarceration and tailor sentences commensurate with a defendant's risk and needs."³

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

II. PROPOSED PRIORITY NUMBER 2 — STUDY OF SYNTHETIC DRUG OFFENSES COMMITTED BY ORGANIZATIONAL DEFENDANTS

The PAG supports the Commission's proposed priority to conduct a multiyear study of synthetic drug offenses committed by organizational defendants and suggests consideration of U.S.S.G. § 2N2.1, among others, as it relates to organizational violations of the Food Drug and Cosmetic Act. **The PAG believes** that the focus of this study should include pharmaceutical manufacturers, distributors, and pharmacists in the context of the current opioid abuse crisis and that the Commission should seek input from a variety of sources, including the bench and bar, industry, addiction specialists, probation officers and communities particularly affected by the opioid crisis.

III. PROPOSED PRIORITY NUMBER 3 — CONTINUED WORK TO IMPLEMENT THE RECOMMENDATIONS OF THE COMMISSION'S 2016 REPORT TO CONGRESS, CAREER OFFENDER SENTENCING ENHANCEMENTS

The PAG continues to support the Commission's work 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 various recidivist statutes, because, in so doing, it may broaden the reach of those statutes and trigger even more mandatory minimum sentences.) **The PAG has also suggested** that to focus the Career Offender Guideline on the most dangerous repeat offenders, the definition of crime of violence be limited to offenses that pose sufficiently serious threats of violence or harm to qualify as predicate offenses.

The PAG offers below additional considerations for further study.

A. Treatment Of Conspiracy And Inchoate Offenses

The Career Offender Guidelines involve crimes of violence and controlled substance offenses. U.S.S.G. § 4B1.1(a). The Commission's enacting legislation defines controlled substance offenses as the those described in 21 U.S.C. § 841 (manufacture, distribution), 21 U.S.C. §§ 952(a), 955, 959 (importation), and Chapter 705 of Title 46 (offenses on board a

³ See POAG Letter to Hon. William H. Pryor, Jr. at 2 (July 31, 2017).

vessel). 28 U.S.C. § 994(h). These specified offenses involve completed acts (or possession with intent to commit a completed act) but exclude conspiracy, attempt, or other inchoate offenses, e.g. 21 U.S.C. § 846 (conspiracy and attempt to manufacture or distribute controlled substances). The Career Offender Guidelines similarly define a controlled substance offense and exclude attempt, conspiracy, or other inchoate offenses. U.S.S.G. § 4B1.2(b).

The Guidelines commentary, however, broadens the definition to include inchoate crimes. See U.S.S.G. § 4B1.2, Comment, App. n.1 (“‘Crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”). As the D.C. Circuit recently noted in a controlled substances case, “there is no question that... the commentary adds a crime, ‘attempted distribution,’ that is not included in the guideline.” *United States v. Winstead*, 890 F.3d 1082, 1090-91 (D.C. Cir. 2018) (finding plain error in sentencing; holding that commentary may interpret or explain a guideline, but cannot provide an inconsistent or plainly erroneous reading of the guideline).

Crime of violence is not defined by statute. See 28 U.S.C. § 944(h). The Guideline defines it to include attempted use of force, but does not specify conspiracy or aiding and abetting. U.S.S.G. § 4B1.2(a). As noted, Application Note 1’s inclusion of conspiracy and aiding and abetting expands Career Offender liability to defendants not covered either by statute or Guideline.

The PAG urges the Commission to follow *Winstead* and delete Application Note 1’s expansion of the definition of Career Offender offenses to inchoate crimes. At a time when stakeholders recognize that the Career Offender Guidelines lead to excessive guideline ranges (and frequent downward variances back to the otherwise applicable range), the Commission should be loath to expand the definition of either crimes of violence or controlled substance offense to encompass a range of conduct not specified in 28 U.S.C. § 944(h).

B. Aggravated Assault

The Career Offender provisions define crime of violence in two ways. U.S.S.G. § 4B1.2. The “elements clause” includes “an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1). The “enumerated offenses” clause lists “murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm...or explosive material...” U.S.S.G. § 4B1.2(a)(2).

The PAG recommends that the Commission consider removing aggravated assault from the enumerated offense clause of the Career Offender provisions for the following reasons.

First, almost any aggravated assault serious enough to merit an enhanced sentence should and will meet the elements clause definition. See, e.g., *United States v. Ramos*, 892 F.3d 599 (3d

Cir. 2018) (Pennsylvania’s second-degree aggravated assault with a deadly weapon qualifies under the elements test). If most egregious assaults qualify under U.S.S.G. § 4B1.2(a)(1), there is no reason to include aggravated assaults as an enumerated offense in U.S.S.G. § 4B1.2(a)(2).

Second, state laws sweep broadly and can encompass conduct that is not truly violent, yet still result in a predicate offense under the Career Offender Guideline. In this regard, **the PAG also recommends again** that the Commission amend the definition of felony offense, in U.S.S.G. § 4A1.2(o), to exclude state offenses classified as misdemeanors or punished by a term of imprisonment of less than two years.⁴ As the Commission recognized by its amendment restructuring U.S.S.G. § 2L1.2 for illegal reentry offenses, the length of the prior sentence is generally a better proxy for the seriousness of that offense as well as the future risk posed by the offender.⁵

Third, the enumerated offenses clause still requires an elemental analysis to determine whether a particular offense qualifies as a generic enumerated offense. *Taylor v. United States*, 495 U.S. 575, 598 (1990). As the Sixth Circuit pointed out, “[d]efining aggravated assault generically is particularly difficult because many states define assault in terms of degrees rather than with the terms simple or aggravated...and because some states still retain the common law distinction between assault and battery.” *United States v. McFalls*, 592 F.3d 707, 716-17 (6th Cir 2010) (citations omitted). However, if the Commission believes aggravated assault requires enumeration, **the PAG recommends** that it conduct a nationwide study to determine both the scope of offenses described as “aggravated assault” and which elements should be included to qualify as a career offender predicate. At a minimum, the focus of a “qualifying” aggravated assault should be on bodily contact, intent and actual injury.⁶

C. Hobbs Act Robbery

The PAG agrees that Hobbs Act robbery convictions under 18 U.S.C. § 1951(b)(1) do not qualify as crimes of violence. *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017) (a Hobbs Act robbery can be committed via threats to property and, therefore, it is broader than generic robbery which is limited to threats to a person). It is not an enumerated “robbery”

⁴ Even for assaults that may technically qualify, often the conduct involved is far from egregious. **The PAG suggests** consideration of a requirement of a minimum sentence imposed to provide further assurance that the prior offense was truly violent so that only the most dangerous individuals qualify as Career Offenders.

⁵ See Angela L. Campbell Testimony before the Commission at 4-5, 9-10 (Nov. 5, 2015).

⁶ See Angela L. Campbell Testimony, *supra*, at 5-6.

offense under U.S.S.G. § 4B1.2(a)(2), and it does not meet the elements clause offense which requires use of force “against the person of another” under U.S.S.G. § 4B1.2(a)(1).

As stated in *O’Connor*, “[t]here is nothing incongruous about holding that Hobbs Act robbery is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A), which includes force against a person or property, but not for purposes of U.S.S.G. § 4B1.2(a)(1), which is limited to force against a person.” *Id.* at 1158 (citing *United States v. Andino-Ortega*, 608 F.3d 305, 310–12 (5th Cir. 2010)). Accordingly, **the PAG recommends** that the Commission supply commentary excluding Hobbs Act robbery as a crime of violence covered by the Career Offender Guidelines.

IV. 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” INCLUDING THE SAFETY VALVE

In July 2017, the Commission published a comprehensive Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (“Report”).⁷ While the Report finds 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 over 2010.

Two months earlier, in its May 10, 2017, Department of Justice “Charging and Sentencing 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.”⁸ An increase in mandatory minimum sentences is anticipated with any recent declines in the imposition of mandatory minimum sentences likely soon to be erased. Indeed, anecdotal information from the defense community confirms that prosecutors are increasingly filing cases with mandatory minimums.⁹

⁷ Available at <https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system>.

⁸ *Supra* at note 2.

⁹ The laudable objectives of reducing mandatory minimum sentences and restoring sentencing discretion to the judiciary underlay the introduction of the Justice Safety Valve Act of 2017. S.1127. If enacted, the JSVA would amend 18 U.S.C. § 3553 to allow a court to impose a

The PAG urges the Commission to continue its work in the following areas:

1. Examination of the scope and severity of statutory mandatory minimum penalties;
2. 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 stakeholders to eliminate and reduce many mandatory sentencing provisions.¹⁰ More generally, **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.

1. Safety Valve

The PAG encourages the Commission to continue to evaluate the efficacy of mandatory minimums and eligibility for avoiding those minimums based on the application of the “safety valve” under U.S.S.G. § 5C1.2. **The PAG suggests** that the Commission reconsider the qualifying eligibility criteria for certain minor offenses for which a defendant presently will receive one criminal history point under U.S.S.G. § 4A1.2(c) (“Sentences Counted and Excluded”).

An example highlights the need for reassessment. A defendant in the Southern District of Indiana, with a prior state court felony conviction for possession of marijuana, plead guilty to one count of conspiracy to possess with the intent to distribute 1,000 kilograms or more of marijuana. The defendant successfully completed a safety valve proffer with the prosecution in hopes of avoiding a 20-year mandatory minimum sentence. However, as it turned out, the defendant was not eligible for the safety valve because of his misdemeanor conviction for driving while suspended for which he served a sentence of more than 30 days.

sentence below a statutory minimum if appropriate to comply with the requirements of Section 3553(a). The bill was referred to Committee; to our knowledge, no action has been taken.

¹⁰ See generally *United States v. Dokmeci*, 2016 WL 915185 (E.D.N.Y. March 9, 2016) (discussion and citations therein).

The defendant was sentenced to the mandatory minimum of 240 months, despite a Guideline range of 97-121 months – essentially doubling his sentence. In light of recent retroactive revisions to the drug quantity table, that defendant’s Guideline range would be 78-97 months. Had U.S.S.G. § 4A1.2(c) of the Guidelines excluded this defendant’s driving while suspended conviction, the defendant would have received a substantially lower sentence, saving the government the money and resources to be expended on housing the defendant for an extra twelve years.

Therefore, the PAG supports amending U.S.S.G. § 4A1.2(c) to exclude sentences for minor offenses unless the defendant received a sentence over 120 days.¹¹

2. Stacking

When multiple violations of 18 U.S.C. § 924(c) are charged in the same indictment, upon conviction, the mandatory minimum punishments for those charges must be served consecutively. This “stacking” of multiple mandatory minimum penalties typically results in extremely lengthy sentences. Since at least 2011, the Commission has recommended that Congress consider statutory changes to eliminate mandatory stacking under Section 924(c) and instead allow judicial discretion.¹² Congress has not yet acted on the Commission’s recommendation. **The PAG continues to support** the Commission’s effort to bring about this statutory change.

Short of a statutory change, **the PAG recommends** that the Commission consider adding commentary recognizing the court’s authority to order downward departures or variances for other counts of conviction when Section 924(c) mandatory minimums are determined to provide a sufficient sentence, after consideration of all relevant factors under 18 U.S.C. § 3553(a). *Dean v. United States*, 581 U.S. ____, 137 S.Ct. 1170, 1177 (2017) (recognizing that a court may impose a 30-year mandatory minimum sentence under § 924 (c) and a one-day sentence for the predicate violent or drug trafficking crime).

¹¹ The point also applies more generally to Criminal History scoring which presently, and in **the PAG’s view** unnecessarily, counts certain minor crimes. *See, e.g., United States v. Tatum*, 2018 WL 3492002 (July 20, 2018) (an Ohio “minor misdemeanor” conviction for possession of marijuana – which carries a maximum penalty of a \$150 fine and is not even recorded on the defendant’s criminal record in Ohio – nonetheless counts towards the defendant’s Criminal History score).

¹² U.S. Sentencing Comm’n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* at 13 (July 2017).

The PAG continues to support the Commission’s efforts to bring about significant and meaningful reforms in the area of mandatory minimum sentences.

V. PROPOSED PRIORITIES NUMBER 5 – CONTINUATION OF THE COMMISSION’S STUDIES ON RECIDIVISM

A. Continued Study

The PAG supports the Commission’s continued, comprehensive, multi-year study of recidivism among federal offenders, and, in particular, recommends that it examine the impact on rates of recidivism of alternative to incarceration programs,¹³ pre-trial diversion programs, collateral consequences of convictions and effective re-entry programs.

The PAG urges the Commission to examine and aggregate for better sample size the results of alternatives to incarceration and reentry programs currently operating in some federal districts.¹⁴ **The PAG also urges** the Commission study in the following areas:

- The contribution of evidence-based probation practices to lower rates of recidivism as noted in a recent report from the U.S. Courts;¹⁵
- State and local prison reform legislation and programs for data that may recommend effective strategies for the federal system. For example, Louisiana has an aggressive reentry program, Kentucky is investing in drug courts, and many states are considering specialty courts to reduce the prison population and combat recidivism.¹⁶ These programs have proven to be effective in reducing both recidivism rates and the costs of incarceration;¹⁷ and

¹³ The PAG incorporates by reference its prior extensive discussion of alternatives to incarceration. PAG Letter to Hon. William H. Pryor, Jr. at 9-20 (July 31, 2017).

¹⁴ For example, the Eastern District of Pennsylvania recently reported on the substantial progress achieved by its Supervision to Aid Reentry (STAR) Program (also known as Reentry Court). *See generally* http://www.paed.uscourts.gov/services/specialized_court_programs.

¹⁵ *See* “Using Evidence-Based Strategies to Protect Communities” (Aug. 2, 2018), *available at* <http://www.uscourts.gov/news/2018/08/02/using-evidence-based-strategies-protect-communities>

¹⁶ Congress recognized the importance of promoting effective re-entry programs. In 2008, it passed the Second Chance Act, funding local programs to provide offenders in prison with educational, vocational, and job placement services, and offenders reentering the community with transitional services to facilitate reentry. *See* Second Chance Act of 2007: Community Safety Through Recidivism Prevention. Pub. L. No. 110-99, 122 Stat. 657 (2008) (codified at 42

- Defense practitioners note that it would be helpful to have updated recidivism data as well as additional research that considers rates of recidivism in connection with: (a) alternatives to incarceration; (b) reentry programs; (c) pre-trial diversion programs;¹⁸ (d) multiple, variables taken together, like age and offense, or age and criminal history category; and (e) child pornography given research concerning whether or not it is a “gateway” offense.

A poll of PAG members and their networks confirms the usefulness of Commission reports of recidivism data in their sentencing practice. **The PAG will continue** to poll its members to gain information on state and local federal programs and can supplement this submission if the Commission believes it would be helpful and not duplicative of other data collection efforts.

B. Other Concerns

- 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.¹⁹
- 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

U.S.C. § 17501 *et seq.*)

¹⁷ An analysis of Second Chance Act programs 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. Davis, L.M., *et al.*, RAND Corp., *Evaluating the Effectiveness of Correctional Education* at xvi-xvii (2013), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf.

¹⁸ For innovations in diversion programs at the state level, *see* Collateral Consequences Resource Center, *Vermont AG supports opportunities for diversion and expungement* (Aug. 5, 2018), available at <http://ccresourcecenter.org/2018/08/05/vermont-ag-supports-opportunities-for-diversion-and-expungement/>; *see generally* PAG Letter to Hon. Patti B. Saris at 17 (July 29, 2014) (Deferred Adjudication).

¹⁹ The PAG incorporates by reference its prior discussion of this issue. PAG Letter to Hon. William H. Pryor, Jr. at 9-12 (July 31, 2017).

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.

- **The PAG still 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. The United States Attorneys' Manual specifically authorizes the use of pretrial diversion programs,²⁰ and the Commission's prior research indicates that these programs have significant support within the legal community.²¹ Yet research and the PAG's experience suggests that diversion is not widely implemented – an audit conducted by the Justice Department's Office of Inspector General indicates that fewer than half of all federal districts operate diversionary programs. 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 study the effect of potential statutory amendments that would allow *courts*, in addition to prosecutors, to defer adjudication and dismiss charges upon successful completion of a program's requirements.

VI. PROPOSED PRIORITY NUMBER 6 — IMPLEMENTATION OF LEGISLATION WARRANTING COMMISSION ACTION

The PAG has no comment on this proposed priority. The PAG, of course, stands ready to provide input to the Commission as appropriate.

²⁰ U.S.A.M. § 9-22.100; *see also* U.S.A.M. § 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).

²¹ *See* U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* at 1 (2015), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

**VII. PROPOSED PRIORITY NUMBER 7 — STUDY OF CHAPTER FOUR, PART
(CRIMINAL HISTORY)**

**A. Revocations Under U.S.S.G. § 4A1.2 For Non-Criminal Technical Violations
Of Supervision**

As noted in prior submissions, **the PAG supports** the Commission's 2016 proposal to amend U.S.S.G. § 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 U.S.S.G. § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))”. The proposed amendment accords with the Commission’s findings on recidivism and its study of revocation sentences. However, **the PAG would limit** such consideration only to *criminal* violations of supervision. Accordingly, **the PAG supports** the Commission engaging in any additional studies needed to justify these proposals.

The PAG believes that the current regime, which increases offenders' criminal history points based on revocation sentences, can result in excessive terms of incarceration. This is especially so for technical, non-criminal violations. 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 Commission’s 2016 Study revealed that most individuals who were re-arrested for revocation of supervision were not convicted of any crime.~~ ²² U.S. Sentencing Comm’n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016), available at <https://www.uscc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>.

imposed upon criminal convictions, accounting for them in computing criminal history points is inconsistent with the Commentary. Therefore, **the PAG advocates** an approach that excludes non-criminal technical violations of supervision in determining criminal history points.

B. Unwarranted Sentencing Disparities Under the Single Sentence Rule of U.S.S.G. § 4A1.2(a)(2)²³

Prior to the November 1, 2007 guideline amendments, U.S.S.G. § 4A1.2(a)(2) provided that:

[P]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c).

To assist in understanding the “related case” concept, U.S.S.G. § 4A1.2, comment. (n. 3) instructed that:

[P]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. . .

Therefore, prior to November 1, 2007, if prior offenses were factually related, courts would not score them as separate offenses.²⁴ However, in the 2007 amendment cycle, U.S.S.G. § 4A1.2(a)(2) was amended per Amendment 709, replacing the Guideline text above with the following language:

²³ In its prior submissions, **the PAG recommended** that the Commission also 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 for criminal history calculations as well as the application of the Career Offender Guideline. *See United States v. Marcoccia*, 2017 U.S. App. LEXIS 6719, No. 16-2781 (3-D Cir. 2017).

²⁴ *United States v. Dunn*, 431 F.3d 436, 437 (5th Cir. 2005); *United States v. Moreno-Arrendondo*, 255 F.3d 198, 204 (5th Cir. 2001); *United States v. Connor*, 950 F.2d 1267, 1270-71 (7th Cir. 1991).

If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day.

The Commission's rationale was:

The Commission has heard from a number of practitioners throughout the criminal justice system that the "related cases" rules at subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History) and Application Note 3 of §4A1.2 are too complex and lead to confusion. Moreover, a significant amount of litigation has arisen concerning application of the rules, and circuit conflicts have developed over the meaning of terms in the commentary that define when prior sentences may be considered "related."

* * *

The amendment eliminates use of the term "related cases" at §4A1.2(a)(2) and instead uses the terms "single" and "separate" sentences. This change in terminology was made because some have misunderstood the term "related cases" to suggest a relationship between the prior sentences and the instant offense.

Appendix C, (Volume III), Amendments to the Guidelines Manual at 238-39 (emphasis added).

The laudable impetus for Amendment 709 – to clarify the application of U.S.S.G. § 4A1.2(a)(2) for situations in which there was no intervening arrest between offenses – led to an unintended consequence. Those defendants whose arrest spawned multiple charges that are prosecuted in different courts now face the prospect of higher criminal history scores.

Consider this hypothetical: A defendant is arrested for drunk driving and in the course of an inventory search of his car, a large quantity of drugs are found. Both offenses are prosecuted in state court; however, the drunk driving offense is a misdemeanor whereas the drug offense is a felony. Under the applicable state laws, the misdemeanor is prosecuted pursuant to a complaint in the municipal court, a court of limited jurisdiction where only misdemeanors are prosecuted, and the felony is prosecuted in the court of common pleas by indictment (also a court of limited jurisdiction where only felonies are prosecuted). Because of delays in securing laboratory results for the drugs, the drunk driving offense is resolved by guilty plea months before the felony was

even indicted. The sentence imposed for the drunk driving offense was a weekend alcohol education program and a fine whereas the sentence for the felony was a two-year prison term.

Under the pre-2007 version of U.S.S.G. § 4A1.2(a)(2), because the two offenses arose out of the same arrest only the drug offense would be scored. This is true because the two offenses would be, under the applicable definitions, “related” and when these offenses were scored under the Guidelines, the defendant would receive three criminal history points. Under the post-2007 regime, the defendant would receive four criminal history points, because the sentences resulted from offenses that were contained in separate charging instruments (complaint and indictment) and the sentences were imposed on different days as well as different courts (municipal and common pleas).

A real life example of this Guideline application is found in *United States v. Lamont Cox*, Case No. 2:17-cr-211 (SD of OH). In *Cox*, the defendant was arrested for two drug offenses on April 19, 2007, one misdemeanor and one felony. Both convictions were assessed one criminal history point, because the offenses were charged in different courts, and sentences were imposed on different dates.

Disparate sentences for similar offenses across jurisdictions can result. For some jurisdictions (like Ohio), as a matter of state law arrests resulting in both misdemeanor and felony offenses are charged in different charging instruments and in different courts. Defendants in such jurisdictions will score more criminal history points than those in jurisdictions where felonies and misdemeanors are charged in the same charging instrument, the cases processed in the same court, and sentences imposed on the same date.

The PAG recommends that the Commission consider reinstating the concept of “related cases” or otherwise clarifying that offenses stemming from conduct on the same occasion are not separately scored regardless of whether the offenses are charged in different charging instruments or the cases are resolved on different occasions or in different courts.

VIII. PROPOSED PRIORITY NUMBER 8 – RESOLUTION OF CIRCUIT CONFLICTS

The PAG respectfully requests that the Commission resolve four important conflicts between the U.S. Courts of Appeals that concern the Guidelines. Resolving these conflicts will advance important goals of federal sentencing and the Commission, including providing “certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”²⁵ These four conflicts, or circuit splits, are:

1. Whether courts may include departures and variances during a resentencing based on a retroactive amendment to the Guidelines (U.S.S.G. § 1B1.10(b)(2)(B));
 2. Whether false statements made to obtain appointed counsel qualify for the obstruction-of-justice enhancement (U.S.S.G. § 3C1.1);
 3. The meaning of “arrest” for purposes of the single-sentence rule (U.S.S.G. § 4A1.2(a)(2)); and
 4. Grouping of offenses when the defendant is also convicted under 18 U.S.C. § 924(c) for a firearm-related offense (U.S.S.G. § 3D1.2(c)).
- A. U.S.S.G. § 1B1.10(b)(2)(B) Should Make Clear That Courts May Consider Departures And Variances During A Resentencing Based On A Retroactive Amendment**

The PAG recommends amending U.S.S.G. § 1B1.10(b)(2)(B)’s “Exception for Substantial Assistance” provision to expressly permit consideration of grounds other than substantial assistance when calculating a sentence during a resentencing based on a retroactive amendment to the Guidelines. The First, Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits²⁶ prohibit the consideration of such grounds, while the Seventh and Ninth Circuits²⁷ permit their consideration.

U.S.S.G. § 1B1.10 applies to a defendant when the applicable Guidelines range has subsequently been lowered because of an amendment to the Guidelines Manual. In such cases, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As explained, however, a majority of circuit courts have found that district courts may not impose a new below-Guidelines sentence based on any factor but a departure for

²⁵ 28 U.S.C. § 991(b)(1)(B).

²⁶ See, e.g., *United States v. Hogan*, 722 F.3d 55, 58 (1st Cir. 2013); *United States v. Erskine*, 717 F.3d 131, 134 (2d Cir. 2013); *United States v. Berberena*, 694 F.3d 514, 520–23 (3d Cir. 2012); *United States v. Perez*, 703 F. App’x 200, 201 (4th Cir. 2017) (*per curiam*); *United States v. Taylor*, 815 F.3d 248 (6th Cir. 2016); *United States v. Anderson*, 686 F.3d 585, 589 (8th Cir. 2012); *United States v. Valdez*, 492 F. App’x 895 (10th Cir. 2012); *United States v. Wright*, 562 F. App’x 885, 886, 888 (11th Cir. 2014).

²⁷ See, e.g., *United States v. Phelps*, 823 F.3d 1084 (7th Cir. 2016); *United States v. D.M.*, 869 F.3d 1133 (9th Cir. 2017).

substantial assistance—that is, the district court may not impose a new below-Guidelines sentence based on other variances or departures.

All but one of the courts that have reached this conclusion rely on Amendment 759 to the Fair Sentencing Act of 2010.²⁸ Courts in the Seventh and Ninth Circuits, by contrast, have held that such sentence reductions may take into account grounds other than substantial assistance—as long as the defendant also receives credit for substantial assistance.²⁹ They have further explained that a contrary conclusion would be inconsistent with Amendment 759 to the Fair Sentencing Act of 2010, the same provision that the circuits above rely upon when disagreeing with the Seventh and Ninth Circuits.

In *United States v. D.M.*, 869 F.3d 1133 (9th Cir. 2017), the Ninth Circuit explained that the purpose of Amendment 759 was to further reward cooperating witnesses, and:

In enacting Amendment 759, the Sentencing Commission implemented Congress's direction to take into account a defendant's substantial assistance. We have found nothing in the guideline or comments to the guideline that preclude a court from considering various departures in a prior sentence when resentencing a defendant under USSG § 1B1.10(b)(2)(B), which is an exception within USSG § 1B1.10. We interpret this silence as allowing a court, when implementing USSG § 1B1.10(b)(2)(B), to consider departures that resulted in the previous sentence that were not directly attributable to substantial assistance.

Id. at 1145.

In the PAG's view, this reasoning of the Seventh and Ninth Circuits is more sound and better reflects the purposes of federal sentencing, the Guidelines' and courts' approach to rewarding cooperating witnesses, and is otherwise most consistent with the Guidelines and their history. As the Ninth Circuit has further explained, a “natural reading” of U.S.S.G. § 1B1.10(b)(2)(B) and its application notes does not support a strict reading of the exception.³⁰

²⁸ See, e.g., *United States v. Taylor*, 815 F.3d 248, 250-51 (6th Cir. 2016) (“Amendment 759.... limited the district court's discretion to reduce a sentence below the amended guideline range, permitting a reduction only when the defendant originally received a below-guidelines sentence based on substantial assistance.”).

²⁹ *Phelps, supra*, 823 F.3d 1084; *D.M., supra*, 869 F.3d 1133.

³⁰ *D.M., supra*, 869 F.3d at 1139–40.

Further, the Guideline’s history reveals an intent to benefit cooperators, which “becomes obscure or illusory” when the cooperator is deprived on resentencing of the benefit of multiple departures that he originally received.³¹ Finally, even if these reasons were not persuasive, courts “would be reduced to guessing what Congress and the Sentencing Commission intended, and the rule of lenity would apply.”³²

The approach of the First, Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits poses unfair practical difficulties. First, if the original sentencing judge had failed to clearly apportion the share of the substantial-assistance reduction and the share of the other reductions, then the resentencing judge would be forced to speculate on the reasons for the original below-Guidelines sentence. Second, such an approach “creates the anomaly that those who have additional mitigating circumstances strong enough to merit formal downward departures equal to or greater than the amendment effects, are categorically barred from a reduction,” thus denying defendants the continuing benefit of their cooperation.³³ Accordingly, courts in the Seventh and Ninth Circuits have properly read the substantial-assistance departure as the “triggering event” that allows a court to lower a sentence below the amended Guidelines range on any basis that was part of the original sentence reduction.³⁴

Finally, the approach to sentencing reductions should be consistent with *Pepper v. United States*, 562 U.S. 476 (2011). In *Pepper*, the U.S. Supreme Court ruled that when a defendant’s sentence has been set aside on appeal, the district court on resentencing may consider evidence of the defendant’s post-sentencing rehabilitation to vary downward from the Guidelines range.³⁵ Thus, a resentencing court may lower a sentence based on substantial assistance under U.S.S.G. § 5K1.1, and then lower that sentence further based on the defendant’s rehabilitation under 18 U.S.C. § 3553(a).³⁶ The majority approach limiting resentencing reductions to departures for

³¹ *Id.* at 1140–41.

³² *Id.* at 1144.

³³ *Id.* at 1141–42.

³⁴ *Phelps, supra*, 823 F.3d at 1088; *D.M., supra*, 869 F.3d at 1139–40.

³⁵ *Pepper, supra*, 562 U.S. at 481; *see generally United States v. Booker*, 543 U.S. 220 (2005) (holding that the Guidelines are advisory, not mandatory).

³⁶ *See Pepper, supra*, 562 U.S. at 491 (stating that a “categorical bar on the consideration of post sentencing rehabilitation evidence would directly contravene Congress’ expressed intent in” 18 U.S.C. § 3661). Section 3661 states, “No limitation shall be placed on the information

substantial assistance, however, would bar such rehabilitation-based sentence reductions, contrary to *Pepper*.

For these reasons, **the PAG respectfully recommends** that the Commission amend U.S.S.G. § 1B1.10(b)(2)(B) and Application Note 3, concerning the application of subsection (b)(2)'s exception, to make clear that courts should consider reductions based on substantial assistance and reductions based on other grounds, including rehabilitation post-sentencing. One example of a possible application note is as follows: "When the original sentencing court departs below the Guidelines range based on substantial assistance and other grounds, the resentencing court may also do so."

B. False Statements Made To Obtain Appointed Counsel Should Not Qualify For The Obstruction Of Justice Enhancement Under U.S.S.G. § 3C1.1

The PAG supports amending Application Note 4 or 5 to U.S.S.G. § 3C1.1 to clarify that false statements made to qualify for appointed counsel do not warrant an obstruction-of-justice enhancement under U.S.S.G. § 3C1.1. **The PAG recommends** that such an amendment expressly state that these types of false statements are ineligible for the enhancement.

Currently, the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have said that false statements made to qualify for court-appointed counsel are eligible for the obstruction-of-justice enhancement under U.S.S.G. § 3C1.1.³⁷ These courts reason that procuring the court's financial resources under false pretenses interferes with the proper administration of justice, and such false statements occur in connection with prosecution. In doing so, they note that U.S.S.G. § 3C1.1's Application Note 4 identifies a list of examples of obstructive conduct eligible for the enhancement, which includes "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding," and "providing materially false information to a judge or magistrate judge."³⁸

concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." As a result, courts may look to a broad range of considerations to determine what kind of resentence would be "sufficient, but not greater than necessary" under § 3553(a).

³⁷ See, e.g., *United States v. Westmoreland*, 72 F. App'x 29, 31 (4th Cir. 2003) (*per curiam*); *United States v. Iverson*, 874 F.3d 855 (5th Cir. 2017); *United States v. Jallad*, 468 F. App'x 600, 606–08 (6th Cir. 2012); *United States v. Hernandez-Ramirez*, 254 F.3d 841, 843 (9th Cir. 2001); *United States v. Ruff*, 79 F.3d 123, 125–26 (11th Cir. 1996) (predating the addition of Application Notes 4 and 5).

³⁸ U.S.S.G. § 3C1.1 n.4(C), (F) (providing examples of obstructive conduct).

The First and Second Circuits, on the other hand, have held that a defendant must have the specific intent to affect the disposition of criminal charges when making false statements to obtain appointed counsel.³⁹ This reasoning is based on Application Note 5, which explains that “[l]ying to a probation officer or pretrial services officer about defendant’s drug use while on pre-trial release” is one example of conduct that does not rise to the level of obstruction of justice.⁴⁰ The Commission added this example because, according to the Commission, it is not conduct that impedes the government’s investigation of the offense.⁴¹ When false statements are made merely to avoid paying for counsel, the Second Circuit has concluded, there is no obstructive intent to impede any investigation by law enforcement.

Consistent with the First and Second Circuits, U.S.S.G. § 3C1.1 should be amended to expressly preclude the obstruction of justice enhancement from applying when a defendant makes false statements to obtain appointed counsel, unless there is evidence that the statements were made with the specific intent to obstruct or actually resulted in significantly obstructing the investigation or prosecution. Such an amendment would properly address the concern that such false statements obstruct a government investigation, while not unfairly punishing a defendant when her false statements do not obstruct any government investigation. It would also be consistent with Application Note 5, which explains that U.S.S.G. § 3C1.1 ordinarily does not cover providing false identification at arrest (unless it actually resulted in a significant hindrance to the investigation or prosecution); making false statements to law enforcement when not under oath (unless Application Note 4(G) applies); providing incomplete or misleading information, not amounting to a material falsehood, with respect to a presentence investigation; and lying to a probation or pretrial services officer about drug use while on pretrial release.⁴² As with these examples, using false statements to obtain court-appointed counsel does not, on its own, obstruct the government’s investigation or otherwise reveal obstructive intent.

³⁹ *United States v. Frazer*, 4 F.3d 982 (1st Cir. 1993) (unpublished); *United States v. Gumbs*, 286 F. App’x 763, 765 (2d Cir. 2008); *United States v. Khimchiachvili*, 372 F.3d 75, 80, 82–83 (2d Cir. 2004), *supplemented by United States v. Sherry*, 107 F. App’x 253 (2004), *vacated and remanded on other grounds by Berwick v. United States*, 544 U.S. 917 (2005) (vacating and remanding in light of *United States v. Booker*, 543 U.S. 220 (2005)). Further, at least one judge on the Court of Appeals for the District of Columbia Circuit has agreed with the First and Second Circuits’ requirement of specific intent. *See United States v. Reeves*, 586 F.3d 20, 27–28 (D.C. Cir. 2009) (Rogers, J., concurring in part)

⁴⁰ U.S.S.G. § 3C1.1 n.5(E).

⁴¹ *Khimchiachvili*, 372 F.3d at 79–80 (*citing* U.S.S.G., App. C, amend. 582).

⁴² U.S.S.G. § 3C1.1, notes 4(A)–(C), (E).

Accordingly, **the PAG recommends** that U.S.S.G. § 3C1.1 and Application Note 4 or 5 be amended to clarify that courts generally should not apply the obstruction-of-justice enhancement when a defendant makes false statements to obtain appointed counsel. One example of a possible addition to Application Note 5 is as follows: “(F) making false statements to qualify for court-appointed counsel, except where there is evidence of specific intent to obstruct the investigation or prosecution or where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense.”

C. Criminal Summonses And Traffic Citations Should Not Constitute “Arrests” For Purposes Of The U.S.S.G. § 4A1.2(a)(2) Single-Sentence Rule

The PAG recommends clarifying Application Note 3 of U.S.S.G. § 4A1.2 to state that summonses and citations are not “arrests” under U.S.S.G. § 4A1.2(a)(2).

The Seventh Circuit is the only circuit to have concluded that summons and citations may be considered intervening arrests under U.S.S.G. § 4A1.2(a)(2).⁴³ In that case, the defendant was convicted of a drug offense and received a sentence increase for a previous traffic “arrest.” The defendant argued that he was merely stopped and given a citation, not arrested. The Seventh Circuit disagreed, ruling that a traffic stop can constitute an arrest for purposes of U.S.S.G. § 4A1.2(a)(2). The court reasoned that “a traffic stop is an ‘arrest’ in federal parlance,” citing Fourth Amendment automobile-stop cases,⁴⁴ and that an arrest does not require that the defendant be taken into custody. “That a simple arrest did not become a full custodial arrest does not matter for the Guidelines’ purpose. . . .”⁴⁵ As a result, the Seventh Circuit held that traffic stops count as intervening arrests under U.S.S.G. § 4A1.2(a)(2).

The majority of courts, however, have reached the opposite conclusion.⁴⁶ The First, Third, Sixth, Ninth, and Eleventh Circuits have taken a plain-language approach, noting that the

⁴³ *United States v. Morgan*, 354 F.3d 621, 623–24 (7th Cir. 2003). The Eighth Circuit has also suggested that it might agree with this position, similarly holding that service of a bench warrant to a defendant already in custody is the functional equivalent of an intervening arrest. *United States v. Armstrong*, 782 F.3d 1028, 1037 (8th Cir. 2015).

⁴⁴ *Morgan, supra*, 354 F.3d at 624 (citing *Whren v. United States*, 517 U.S. 806 (1996); *California v. Hodari D.*, 499 U.S. 621 (1991); *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (*en banc*)).

⁴⁵ *Id.* (referring to Application Note 3 as it then existed).

⁴⁶ *See, e.g., United States v. Ley*, 876 F.3d 431, 436–40 (3d Cir. 2017); *United States v. Powell*, 798 F.3d 431, 436–40 (6th Cir. 2015); *United States v. Leal-Felix*, 665 F.3d 1037 (9th

ordinary usage of “arrest” does not sensibly include the issuance of a summons. A citation or summons involves no material detainment, while an arrest involves detaining the defendant and placing him in extended custody, often in a police station.⁴⁷ Further, the rule of lenity resolves any ambiguity in favor of the defendant.⁴⁸

The PAG recommends revising Application Note 3 to instruct courts that a criminal summons or traffic citation is not an intervening arrest for purposes of U.S.S.G. § 4A1.2(a)(2)’s single-sentence rule. It is imperative that “arrest” be cabined from “summons” and “citation.” Otherwise, it is possible that being stopped by law enforcement for failing to use a turn signal, or receiving a red-light ticket in the mail, could constitute an “arrest” and thus risk a defendant later receiving a much higher sentence. Further, reading U.S.S.G. § 4A1.2(a)(2) to distinguish arrests from summonses and citations would better reflect any differences in the degree of culpability of re-offenders. The Sixth and Ninth Circuits have reasoned that a defendant who re-offends after an arrest potentially could be more culpable than one who has merely received a summons or citation, because an arrest can have a stronger deterrent effect than either a summons or citation.⁴⁹ The Commission should therefore amend Application Note 3 to clarify that “intervening arrest” does not include summonses or citations for the purpose of the single-sentence rule.

D. Offenses Should Be Grouped Under U.S.S.G. § 3D1.2(c) Even When the Defendant Is Also Convicted Under 18 U.S.C. § 924(c) For A Firearm-Related Offense

Cir. 2011) (en banc); *United States v. Wright*, 862 F.3d 1265, 1282–83 (11th Cir. 2017); *see also United States v. Matos*, 611 F.3d 31, 39 (1st Cir. 2010) (“We have previously noted, without deciding the issue, that treating an intervening summons as the functional equivalent of an intervening arrest for the purposes of § 4A1.2 seems problematic.”).

⁴⁷ *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (*per curiam*) (describing what is sufficiently like an arrest for Fourth Amendment purposes); *Knowles v. Iowa*, 525 U.S. 113, 115 (1998) (describing Iowa’s practice of issuing citations in lieu of making an arrest for traffic offenses); *see also Powell*, 798 F.3d at 439 (quoting *Leal-Felix*, 665 F.3d at 1044–45) (McKeown, J., concurring)) (“[T]he common understanding of the term arrest does not include being pulled over and ticketed for a traffic violation. . . . I am confident that the average citizen—with or without a law degree—would not believe he had been pulled over, briefly detained and issued a traffic ticket.”).

⁴⁸ *Powell, supra*, 798 F.3d at 440 (“At best, the word ‘arrest’ is ambiguous in this context, and the rule of lenity requires that we resolve that ambiguity in favor of Powell.”).

⁴⁹ *Id.* at 439 (quoting *Leal-Felix*, 665 F.3d at 1042–43).

The PAG supports adding an application note to U.S.S.G. § 3D1.2 approving the grouping of offenses under U.S.S.G. § 3D1.2(c) when the defendant is sentenced for a firearm-related offense under 18 U.S.C. § 924(c) and for related offenses that also entail a specific offense characteristic involving the same firearm.

The Sixth, Eighth, and Eleventh Circuits⁵⁰ are at odds with the Seventh Circuit⁵¹ over whether offenses that share a firearm-related specific offense characteristic may be grouped when the defendant is also convicted under 18 U.S.C. § 924(c).⁵² U.S.S.G. § 3D1.2(c) directs that offenses be grouped when they reflect “substantially the same harm,” which occurs “when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.” For instance, if a defendant is convicted of being a felon in possession of a firearm, and of trafficking drugs with a firearm enhancement, both convictions share the specific offense of wrongly possessing or using a firearm.⁵³ Application Note 4 to U.S.S.G. § 2K2.4, however, provides that “if a sentence [for a 18 U.S.C. § 924(c) conviction] is imposed in conjunction with a sentence for an underlying offense, do not apply the specific offense characteristic for use of a firearm in connection with the underlying offense.”

The Sixth, Eighth, and Eleventh Circuits have concluded that the offenses underlying a 18 U.S.C. § 924(c) conviction should be grouped based on relevant specific offense characteristics, even if those offense characteristics are not applied to the offenses related to the § 924(c) conviction.⁵⁴ These courts have acknowledged that what matters for grouping under U.S.S.G. § 3D1.2(c) is whether each count includes conduct that is “treated as a specific offense characteristic” in the other offense, regardless of whether that characteristic is actually applied. According to the introductory comment to U.S.S.G. Chapter 3, Part D, the grouping rules implement a policy of incremental punishment and seek to avoid unwarranted punishment

⁵⁰ See, e.g., *United States v. Gibbs*, 395 F. App’x 248 (6th Cir. 2010); *United States v. Bell*, 477 F.3d 607, 616 (8th Cir. 2007); *United States v. King*, 201 F. App’x 715 (11th Cir. 2016).

⁵¹ *United States v. Sinclair*, 770 F.3d 1148, 1158 (7th Cir. 2014), *cert. denied* 136 S. Ct. 399 (2015).

⁵² 18 U.S.C. § 924(c) relates to penalties for firearm-related offenses in which a firearm was used, carried, or possessed during a crime of violence or a drug trafficking crime, in addition to the punishment for the underlying crime of violence or drug trafficking crime.

⁵³ See, e.g., *Sinclair*, *supra*, 770 F.3d at 1149–50.

⁵⁴ *Supra* at note 50.

increases for the same essential conduct. Barring the grouping of the offenses underlying an 18 U.S.C. § 924(c) conviction would upend this policy.

Only the Seventh Circuit has reached the opposite conclusion.⁵⁵ Taking a more formalistic approach, the court reasoned that grouping occurs only after the offense level for each count has been determined. Thus, because 18 U.S.C. § 924(c) prohibits considering specific offense characteristics to determine offense level, those characteristics cannot then be used for grouping. The Seventh Circuit also stated that U.S.S.G. Chapter 3, Part D's introductory comment did not change this outcome, because the Guidelines governing specific offense characteristics are found in Chapter 2. By contrast, U.S.S.G. § 3D1.2 Application Note 5 provides that, under some circumstances, even if a less serious count could constitute a specific offense characteristic on its own, it would not be grouped with other offenses, because the offense-characteristic adjustment would not apply.⁵⁶

Consistent with the Sixth, Eighth, and Eleventh Circuits, U.S.S.G. § 3D1.2(c) Application Note 5 should be revised to indicate that courts may group specific offense characteristics even when an accompanying 18 U.S.C. § 924(c) conviction prevents those characteristics from being used to enhance sentences for the underlying offenses. As the Guidelines commentary states, the purpose of the grouping provisions is to “prevent multiple punishment for substantially identical offense conduct.”⁵⁷ Allowing grouping in this context would effect that purpose without impeding the objectives set out in criminal statutes such as 18 U.S.C. § 924(c). Even if the statute prohibits certain offense-characteristic enhancements under the Guidelines, it does not expressly bar characteristic-based grouping.

Therefore, **the PAG recommends** that the Commission clarify U.S.S.G. § 3D1.2 Application Note 5 to permit the grouping of offenses under U.S.S.G. § 3D1.2(c) when the defendant is sentenced for a firearm-related offense under 18 U.S.C. § 924(c) and for underlying offenses.

IX. PROPOSED PRIORITY NUMBER 9 — MISCELLANEOUS ISSUES

A. Study of Operation Of U.S.S.G. § 5H1.6 With Respect To Loss Of Caretaking Or Financial Support Of Minors

⁵⁵ *Supra* at note 51.

⁵⁶ *Id.* at 1159.

⁵⁷ U.S.S.G. Pt. 3, Ch. D, introductory comment.

The PAG supports the study of U.S.S.G. § 5H1.6 in connection with the impact of incarceration on family and minors as consistent with developing social scientific scholarship in this area and the mandate of 18 U.S.C. § 3553(a)(1) that sentencing courts must consider a “defendant’s history and characteristics”.

U.S.S.G. § 5H1.6 ordinarily negates the relevance of family ties and responsibilities in imposing sentence:

[I]n sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities **are not ordinarily relevant** in determining whether a departure may be warranted.

* * *

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine. (Emphasis added).

The social sciences are beginning to study and confirm, what has long been widely assumed – incarcerating parents has a deleterious impact on their children. Between 2011 and 2012, it was estimated that nearly 7% of children in the United States lived with a parent who was incarcerated at some time after the child’s birth; that is more than 5,000,000 children.⁵⁸ In addition, research provides support for the following findings⁵⁹:

- The parental incarceration rate for children ranging in age between 6 to 17 years of age is roughly 8%. It appears that most initial episodes of parental incarceration occur before the child is nine years old.
- When a child’s parent is incarcerated, traumatic stress may occur through multiple pathways. First, the parent’s incarceration presents the child with the loss of an attachment figure, particularly troubling to the child because the loss is neither easily explained nor understood. Second, regardless of whether or not the child witnessed the parent’s arrest, he or she may have ongoing contact with law

⁵⁸ Murphey and Cooper, *Parents Behind Bars, What Happens to Their Children* at 2 (Oct. 27, 2015), available at <http://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>. (last visited on July 18, 2018).

⁵⁹ *Id.* at 2-4, 6-7, 9.

enforcement, judicial, corrections, and child welfare systems, all of which can contribute to further traumatization.

- Research has linked parental incarceration to childhood health problems, including asthma; depression, emotional difficulties and anxiety; acting-out behavior; school problems; stigma; and, in adulthood, an increased likelihood of poor mental or physical health.
- For children ranging in age from 6 to 17 years old, parental incarceration was also significantly associated with the number of additional “adverse childhood experiences,” or “ACEs.” Research has shown that ACEs, especially when they are cumulative, often cause childhood trauma, which ultimately result in poor immunity and mental-health problems in adulthood and even early mortality.

Given the substantial evidence that parental incarceration has a long-lasting and catastrophic impact on their children, **the PAG recommends** that the Commission study and consider amending U.S.S.G. § 5H1.6 to delete “not ordinarily” from the first paragraph to provide the sentencing court with the discretion, in appropriate circumstances, to take into account the collateral damage caused by incarceration.

B. Study of Whether U.S.S.G. § 1B1.13 Effectively Encourages the Department of Justice To File Motions For Sentence Reduction For “Extraordinary And Compelling Reasons”

The PAG supports the Commission’s proposed priority to conduct a study of whether U.S.S.G. § 1B1.13 “effectively encourages” the Director of the Bureau of Prisons to file a motion for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i) when “extraordinary and compelling reasons” exist. The PAG appreciates the Commission’s 2016 clarification and expansion of its policy guidance to BOP and the courts under U.S.S.G. § 1B1.13. Information recently supplied by the Justice Department to Congress, however, indicates that the number of motions filed by BOP since the Commission modified its policy guidance has not changed.⁶⁰ It would also appear, based on that BOP data, that the 2016 amendments to U.S.S.G. § 1B1.13 have had little if any effect on the criteria BOP applies to decide whether to bring cases back to court under Section 3582(c)(1)(A)(i). A Commission study could determine whether this is in fact the case, and, if it is, what can and should be done to encourage the filing of motions when the properly established criteria are met.

⁶⁰ Letter from Stephen E. Boyd, Ass’t Attorney General, Office of Legislative Affairs to the Honorable Brian Schatz, United States Senate (Jan. 16, 2018), discussed *infra*.

The PAG has a longstanding interest in facilitating access to courts under this statute. We have repeatedly expressed concern that “BOP’s narrow interpretation and limited exercise of its authority under § 3582(c)(1)(A)(i) have frustrated Congress’ intent to make courts primarily responsible for deciding whether to reduce a prisoner’s sentence for ‘extraordinary and compelling reasons.’”⁶¹ In testimony on the proposed amendment of U.S.S.G. § 1B1.13 at the Commission’s hearing on February 17, 2016, the PAG stated:

We have no doubt that federal judges would embrace a more fulsome interpretation of the ‘extraordinary and compelling’ standard and would respond affirmatively if more motions were filed by the Justice Department under authority of § 3582(c)(1)(A)(i). Indeed, it is our understanding that no court has ever denied such a motion. This in turn suggests that the real locus of decision-making under this statute has been the Justice Department in the exercise of its gatekeeping function, not the courts. That Justice plays a role reserved by law to courts is further evidenced by the fact that the eligibility criteria set forth in the applicable BOP program statement include many factors that are committed to the sentencing court, including whether a defendant poses a public safety risk.

In a letter submitted to the Commission shortly after this February 17, 2016, hearing, the PAG expressed concern that the Justice Department’s testimony evidently failed to recognize any role for the Commission under Section 3582(c)(1)(A)(i), effectively eliding “the judiciary’s responsibility for making sentencing policy under 28 U.S.C. § 994(t) with the executive’s responsibility for administering that policy, assigning both to itself.”⁶²

⁶¹ See PAG letters to Hon. Patti B. Saris at 8-12 (July 15, 2013) (urging the Commission to make U.S.S.G. § 1B1.13 a priority for the 2014 amendment cycle); at 14-16 (July 29, 2014) (same); at 1-4 (July 27, 2015) (“Proposed Additional Priority” – noting that “the underutilization of the sentence reduction authority in § 3582(c)(1)(A)(i) reflects flaws in execution by the Justice Department.”).

⁶² See PAG letter to Hon. Patti B. Saris at 1-3 (March 18, 2016) (reporting that, from 2013 to 2017: the BOP approved just 6% of the 5,400 applications for compassionate release; 266 inmates who requested compassionate release died while in custody; and BOP’s denials of compassionate release requests often were at odds with the opinions of the inmates’ treating physicians and warden); New York Times, “Frail, Old and Dying but Their Only Way Out of Prison is a Coffin” (July 3, 2018), available at <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html>.

The Commission took the initiative in the 2016 amendment cycle to modify and expand its policy guidance in U.S.S.G. § 1B1.13. The PAG was hopeful that the Justice Department would respond positively to the Commission’s formal encouragement to the BOP Director to file motions in cases meeting any of the circumstances set forth in Application Note 1 to U.S.S.G. § 1B1.13.⁶³ It is therefore deeply disappointing to see that the Justice Department’s administration of the “reduction in sentence” program (RIS) appears to have changed very little if at all since the Commission amended its policy statement in April 2016.

For example, information the Justice Department supplied to Congress in January 2018, shows that BOP has filed fewer motions since the Commission amended U.S.S.G. § 1B1.13 than it did in the immediately preceding years.⁶⁴ Moreover, at least some of the grounds relied upon most commonly by BOP to deny RIS requests between 2014 and 2017 may be inconsistent with the revised criteria in U.S.S.G. § 1B1.13. One common ground for denial identified by the Justice Department is that a prisoner has not served sufficient time to be considered for sentence reduction under the elderly prisoner criteria in the applicable BOP Program Statement.⁶⁵ But these periods are generally much longer than those set forth in U.S.S.G. § 1B1.13. Another common ground for denial is that a prisoner does not satisfy the medical criteria established under the BOP Program Statement.⁶⁶ But these criteria are substantially stricter than those in the revised U.S.S.G. § 1B1.13, particularly when combined with other disqualifying criteria related to the prisoner’s offense or supposed risk of recidivism.⁶⁷ In its January 2018 report to Congress,

⁶³ See U.S.S.G. § 1B1.13, Application Note 4 (“The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction)...”).

⁶⁴ See Letter from Stephen E. Boyd, *supra*, note 60 at 1, informing Congress that BOP filed a total of 306 sentence reduction motions between January 2014 and January 2018; the BOP denied 536 requests that had been recommended favorably by wardens; and 81 prisoners died while their requests were under consideration. The Justice Department reported in its testimony at the February 17, 2016, Commission hearing that it had filed 61 motions in 2014 and 99 in 2015, a total of 160 motions in those two years. This means that BOP filed a total of only 146 motions in 2016 and 2017.

⁶⁵ Letter from Stephen E. Boyd, *supra*, note 60 at 2.

⁶⁶ *Id.*

⁶⁷ The eligibility criteria set forth in the BOP’s Program Statement include many factors that are quintessentially assigned to the court under 18 U.S.C. § 3553(a), and not to the Justice Department, including whether a defendant poses a public safety risk, the nature and

the Justice Department made clear that while BOP has reviewed the amended U.S.S.G. § 1B1.13, it continues to consider RIS requests under its own Program Statement.⁶⁸

The PAG agrees with the Commission’s proposal to study the motions filed and RIS applications denied by BOP since March 2016.⁶⁹ Such a study will provide additional information about whether and to what extent BOP’s decisions are consistent with the Commission’s policy guidance. More fundamentally, it would shed light on whether the Justice Department’s administration of the RIS program is properly respectful of the authority of

circumstances of the defendant’s offense, criminal and personal history derived from the PSR, comments from victims, and “[w]hether release would minimize the severity of the offense.” *See* BOP Program Statement 5050.49 at § 7.

Moreover, it does not appear that the Department is authorized, when deciding whether “extraordinary and compelling reasons” exist in a particular defendant’s case, to take into account whether the defendant is “a danger to the safety of any other person or the community, as provided under [18 U.S.C. §] 3142(g).” That responsibility is assigned to the BOP Director only under Section 3582(c)(1)(A)(ii), governing sentence reduction for certain repeat violent offenders sentenced to mandatory life under 18 U.S.C. § 3559(c). While the BOP Director will generally be in a good position to advise the court about a prisoner’s present public safety risk based on his or her disciplinary history while incarcerated, public safety considerations should not be a basis for declining even to bring a case to court. More specifically, BOP’s broad application of an “able to reoffend” criterion may exclude almost any prisoner capable of using a telephone. *See* BOP Program Statement 5050.49 at 3 (“A cognitive deficit is not required in cases of severe physical impairment, but may be a factor when considering the inmate’s ability or inability to reoffend.”)

⁶⁸ In June 2016, BOP proposed several changes to its Program Statement that would have brought it more into line with the 2016 amendments to U.S.S.G. § 1B1.13. *See* 81 Fed. Reg. 36485 (June 7, 2016). For example, it proposed deleting language providing that BOP will only file motions in circumstances that “could not reasonably have been foreseen by the court at the time of sentencing,” and using the phrase “extraordinary and compelling” rather than “particularly extraordinary or compelling.” It also proposed to expand the authority of various persons at BOP headquarters to review requests for reduction in sentence in order to “expedite processing of the requests.” The procedures, however, have not been changed, and are still the same as those in effect at the time U.S.S.G. § 1B1.13 was amended.

⁶⁹ The PAG understands that bi-partisan legislation has been introduced and co-sponsored by Republican Senator Mike Lee and Democratic Senators Brian Schatz and Patrick Leahy that would permit prisoners to petition the sentencing court for reduction in sentence in the event the BOP either denies or fails to act promptly on their requests. *See* S. 2471. **The PAG urges** all stakeholders to support this legislation.

sentencing courts under Section 3582(c)(1)(A)(i). **The PAG urges** the Commission to include in its study a wide range of issues, in consultation with public and private groups that are knowledgeable about sentence reduction, including but not limited to reasons related to age, disability and medical condition. We have reviewed and concur generally with the recommendations of the Federal Defenders on the topics to be included in a Commission study, emphasizing our own special concern with the BOP's consideration of the nature of the prisoner's offense and public safety risk.⁷⁰ We also note that a Commission study could usefully seek an update of the 2013 report of the Justice Department Inspector General on BOP's administration of the RIS program.⁷¹

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 proposed 2018-2019 priorities. We look forward to further opportunities for discussion with the Commission and its staff.

⁷⁰ Among the topics recommended by the Federal Defenders are the specific reasons given by each decision-maker, from warden to BOP Director to Deputy Attorney General, for approving or denying a request for release; how each decision-maker considers the factors listed in Section 7 of the BOP Program Statement, especially the criteria used to assess whether the "inmate's release would pose a danger to the safety of any other person or the community" or whether the inmate has the "ability or inability to reoffend"; the time required to process an RIS request after its submission to the BOP central office; and a breakdown of demographics, offense type, percentage of time-served, reasons for applying for RIS, inmate classification, opinion of AUSA contacted by BOP, and reasons for denial/approval.

⁷¹ See Office of the Inspector General (OIG), U.S. Department of Justice, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013), available at <https://oig.justice.gov/reports/2013/e1306.pdf>; see also OIG, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (May 2015), available at <https://oig.justice.gov/reports/2015/e1505.pdf>.

Hon. William H. Pryor, Jr.
Acting Chair, United States Sentencing Commission
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