

# PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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February 21, 2019

Hon. Charles R. Breyer  
Hon. Danny C. Reeves  
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 Commission’s December 13, 2018 Proposed Amendments to the Sentencing Guidelines.**

Dear Commissioners:

The Practitioners Advisory Group (“PAG”) respectfully submits this response to the Commission’s request for comment on Proposed Amendments to the Sentencing Guidelines dated December 13, 2018.

### **I. Proposed Amendment: §1B1.10**

The Commission has proposed amending § 1B1.10 in two parts. Part A of this proposed amendment includes possible amendments considering *Koons v. United States*, 138 S. Ct. 1783 (2018). The PAG believes these proposed amendments are not needed because *Koons* is limited to the facts of that case and specifically left open the question of whether “§3553(e) prohibits consideration of the advisory Guidelines ranges in determining how far to depart downward.”

Part B includes proposed amendments to resolve a circuit split. The PAG supports option 2.

- **Part A: miscellaneous issues, including possible amendments considering *Koons v. United States*, 138 S. Ct. 1783 (2018)**

The PAG believes that *Koons* does not require any changes to the commentary of §1B1.10. The Court in that case did not hold that all “below defendants” are ineligible for § 3582(c) relief. Instead, the Court held that a below defendant is ineligible only if the district court at the original sentencing in fact calculated the defendant’s sentence solely according to the mandatory minimum and the defendant’s degree of assistance.

The Court in *Koons* left open whether a below defendant may receive § 3582(c) relief if — as often happens — the district court at the original sentencing calculated the defendant’s sentence with reference to the Guidelines range that applied without taking the mandatory minimum into account. *See Koons, supra* at 1790, n. 3 (“Many courts have held that §3553(e) *prohibits* consideration of the advisory Guidelines ranges in determining how far to depart downward. *See, e.g., United States v. Spinks*, 770 F. 3d 285, 287-288, and n. 1 (CA4 2014) (collecting cases). We take no view on that issue. All we must decide today is that, at the least, neither §3553(e) nor the Guidelines *required* the District Court to use the advisory ranges in determining how far to depart downward.” (Emphasis in original.)

*Koons* is properly confined to only a subset of below defendants. Thus, there would still be some residual disparate treatment but only insofar as required by statutory law and the choice the judge made at the original sentencing whether to tie the defendant’s sentence somehow to the now-amended guideline range. Therefore, the PAG believes this proposed amendment is unnecessary.<sup>1</sup>

- **Part B Resolving circuit conflicts**

The Commission seeks comment regarding amendments to § 1B1.10, including an amendment that would resolve a circuit court conflict regarding the application of U.S.S.G. § 1B1.10 pursuant to the Commission’s authority under 28 U.S.C. § 991(b)(1)(B) (U.S. Sentencing Commission; Establishment & Purposes) and *Braxton v. United States*, 500 U.S. 344 (1991).

The PAG recommends that the Commission amend § 1B1.10 to resolve a circuit conflict regarding the discretion of district court judges to consider additional departures and variances when resentencing a defendant who qualified for a substantial assistance departure during the original sentencing after a retroactive amendment to the U.S. Guidelines that amended the defendant’s applicable Guideline range.

The proposed amendment would revise Application Note 3 of the Commentary to § 1B1.10 in accordance with one of two options identified by the Commission. **Option 1** would allow district court judges to consider only “substantial assistance” upon resentencing—thus prohibiting judges from considering additional departures and variances. **Option 2** would permit consideration of other grounds besides “substantial assistance,” including additional departures and variances.

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<sup>1</sup> The PAG notes the detailed discussion in the August 10, 2018 Comment on the Commission’s priorities by the Federal Defender Sentencing Guidelines Committee, available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/FPD.pdf> (“Defender Letter”), at pp 11-14.

For the reasons discussed below, **the PAG supports Option 2.**<sup>2</sup>

**1. Option 1 Is Inconsistent with the Purpose of the Guidelines and May Lead to Unfair Disparities in Sentencing and Unnecessary Litigation.**

**Option 1** would revise Application Note 3 to be consistent with decisions from the Sixth and Eleventh Circuits, which have held that, where a defendant has received a substantial assistance departure and is thus eligible for a reduction below the Guidelines sentencing range (the “**Substantial Assistance Exception**”),<sup>3</sup> a district court may not give a defendant the benefit of any additional departure or variance received at the original sentencing.<sup>4</sup> Accordingly, Option 1 would state where the Substantial Assistance Exception applies, and the defendant received both a substantial assistance departure and at least one additional departure or variance, a reduction “comparably less” than the defendant’s amended Guideline range may involve only the substantial assistance departure.

In the relevant Sixth and Eleventh Circuit decisions, the courts relied on a strict reading of the exception’s text<sup>5</sup> and Amendment 759,<sup>6</sup> as well as each other’s precedent,<sup>7</sup> but neither court advanced underlying policy reasons for favoring this approach to resentencing. There are no such sufficient policy reasons. As the Commission appreciates, the aims of federal sentencing include providing “certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . found guilty of similar criminal conduct while

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<sup>2</sup> As in its August 10, 2018 submission, the PAG continues to support this approach to resolving the circuit split. *See* PAG Letter to the U.S.S.C. at 16 – 19 (Aug. 10, 2018), available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/PAG.pdf>.

<sup>3</sup> *See* U.S.S.G. § 1B1.10(b)(2)(B).

<sup>4</sup> *United States v. Taylor*, 815 F.3d 248 (6th Cir. 2016) (holding that a defendant who received a substantial assistance departure and a separate downward variance was not entitled to the benefit of the additional variance on resentencing after a retroactive amendment to the Guidelines); *United States v. Marroquin-Medina*, 817 F.3d 1285 (11th Cir. 2016) (holding that a defendant who received a substantial assistance departure and a separate downward departure was not entitled to the benefit of the additional departure on resentencing after a retroactive amendment to the Guidelines); *see also United States v. Wright*, 562 F. App’x 885 (11th Cir. 2014) (holding that a defendant who received a substantial assistance departure and a separate downward variance was not entitled to the benefit of the additional variance on resentencing after a retroactive amendment to the Guidelines).

<sup>5</sup> *Marroquin-Medina*, 817 F.3d at 1290; *Wright*, 562 F. App’x at 888–89.

<sup>6</sup> *Taylor*, 815 F.3d at 250–51; *Wright*, 562 F. App’x at 887.

<sup>7</sup> *Taylor*, 815 F.3d at 251–52; *Marroquin-Medina*, 817 F.3d at 1290.

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.”<sup>8</sup> The decisions of the Sixth and Eleventh Circuit decisions are, however, inconsistent with these purposes, at least because they result in: (a) courts being able to consider relevant “mitigating . . . factors” at the initial sentencing, but not resentencing; and (b) courts treating defendants differently even where they have “similar records . . . found guilty of similar criminal conduct.”<sup>9</sup> These points are discussed further below.

## **2. Option 2 Permits Courts to Reward Cooperating Witnesses, Promotes Certainty, Flexibility and Fairness in Sentencing, and Is Consistent with Supreme Court Precedent.**

**Option 2** would revise Application Note 3 to state that a reduction “comparably less” than the amended Guideline range include all the departures and variances that the defendant received if the exception under subsection (b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one additional departure or variance. This approach follows the Seventh and Ninth Circuits, which have held that cooperators should receive the benefit of additional departures and variances, once they have qualified for the Substantial Assistance Exception by “triggering” it with a substantial assistance departure.<sup>10</sup>

**The PAG recommends** adopting Option 2 because it would permit courts to reward cooperating witnesses, promote certainty, flexibility and fairness in sentencing, and is consistent with Supreme Court precedent on departures for rehabilitation.

### **a. Option 2 Permits Courts to Properly Reward Cooperating Witnesses**

Option 2 better implements the objective of the Guidelines and relevant statutes to recognize the value of cooperators. The Guidelines historically have afforded special consideration for cooperators. Section 5K1.1 (Substantial Assistance to Authorities), for example, establishes a directive to the Commission in its implementing statute to “assure that the guidelines reflect the general appropriateness of imposing a lower sentence than

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<sup>8</sup> 28 U.S.C. § 991(b)(1)(B).

<sup>9</sup> *Id.*

<sup>10</sup> *United States v. Phelps*, 823 F.3d 1084 (7th Cir. 2016) (holding that a defendant who received the benefit of a substantial assistance departure and a separate downward variance was entitled to the benefit of the additional variance on resentencing after a retroactive amendment to the Guidelines); *United States v. D.M.*, 869 F.3d 1133 (9th Cir. 2017) (holding that a defendant who received the benefit of a substantial assistance departure and a separate downward departure was entitled to the benefit of the additional departure on resentencing after a retroactive amendment to the Guidelines).

would otherwise be imposed . . . to take into account a defendant's substantial assistance."<sup>11</sup>

As the Commission stated when implementing Amendment 759:

The [G]uidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum.<sup>12</sup>

Amendment 759, therefore, added an exception to the rule that district courts should not resentence defendants below their amended Guideline range by providing that a "reduction comparably less" than the amended Guideline range "may be appropriate" where the original sentence was less than the applicable Guideline range "pursuant to a government motion to reflect the defendant's substantial assistance to authorities."<sup>13</sup> In amending § 1B1.10(b)(2)(B) to allow for this specific benefit to cooperators, the Commission made clear that it "appropriately maintains [the] distinction" between cooperators and noncooperators, which furthers the "purposes of sentencing."<sup>14</sup> Amendment 759 thus intended to provide additional benefits and protections to cooperators, particularly in the form of below statutory minimum sentences.<sup>15</sup>

Denying cooperators the benefit of additional departures and variances would create, as the Ninth Circuit stated, an "anomaly" by which "those who have additional mitigating circumstances strong enough to merit formal downward departures . . . are categorically barred from a reduction."<sup>16</sup> This would effectively make the benefits of the Substantial Assistance Exception "obscure or illusory" and could disincentivize future cooperation.<sup>17</sup> Accordingly, Option 2 would provide greater certainty regarding the

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<sup>11</sup> 28 U.S.C. § 994(n) (establishing the duties of the Commission).

<sup>12</sup> U.S.S.G. app. C, amend. 759 (Reason for Amendment).

<sup>13</sup> U.S.S.G. § 1B1.10(b)(2)(B).

<sup>14</sup> U.S.S.G. app. C, amend. 759.

<sup>15</sup> *D.M.*, 869 F.3d at 1140, 1144 ("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.").

<sup>16</sup> *Id.* at 1142.

<sup>17</sup> *Id.* at 1141-42.

benefits of cooperation by offering cooperators the full extent of the special consideration envisioned by the Commission.

**b. Option 2 Promotes Administrative Ease in Resentencing and is Consistent with U.S. Supreme Court Precedent on Departures for Rehabilitation**

Option 2 also provides for greater ease and certainty in recalculating sentences after retroactive amendments and is consistent with *Pepper v. United States*, 562 U.S. 476 (2011), which recognized the value of defendants' rehabilitation for departures.

First, allowing cooperators the full benefit of their original departure or variance will streamline resentencing after retroactive amendments. Retroactive amendments usually affect large amounts of inmates, all at once. For example, Amendment 759 generated 13,990 applications for resentencing, 7,748 of which were granted.<sup>18</sup> This volume is complicated when courts fail to make clear whether their below-Guidelines sentences are the result of a departure or variance in the original sentence,<sup>19</sup> or in the case of multiple departures and variances, the percentage of the below-Guidelines range sentence attributable to each. In such circumstances, as the Ninth Circuit observed in *D.M.*, limiting departures to substantial assistance "would create uncertainty and inconsistencies as the parties would be relegated to speculating as to the court's reasons for imposing the initial sentence."<sup>20</sup>

This is no illusory concern as several of the courts which declined to consider additional departures and variances involved a sentencing court that did not attribute the percentage of their reduction to the departure(s) and/or variance(s) granted.<sup>21</sup> As Judge Merritt stated in dissent in *Taylor*, "[t]he mathematical percentage estimated for 'substantial assistance' almost five years ago at the original sentencing is not a scientific fact, [it is] just a guess or speculation."<sup>22</sup> Thus, allowing cooperators the full benefit of

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<sup>18</sup> U.S. Sentencing Commission, Final Crack Retroactivity Data Report Fair Sentencing Act Table 1 (Dec. 2014), available at [https://www.usc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final\\_USSC\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf).

<sup>19</sup> In 2017, courts failed to indicate whether their below Guidelines sentence was the result of a departure or variance in 1,142 cases. See U.S. Sentencing Commission, 2017 Sourcebook of Federal Sentencing Statistics S-53 (2017), available at [https://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB\\_Full.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf).

<sup>20</sup> *D.M.*, 869 F.3d at 1141.

<sup>21</sup> See, e.g., *Taylor*, 815 F.3d at 249; *Wright*, *supra* 562 F. App'x at 886; *United States v. Berberena*, 694 F.3d 514, 517 (3d Cir. 2012).

<sup>22</sup> *Taylor*, 815 F.3d at 252 (Merritt, J., Dissenting).

their original departure or variance avoids the “unwarranted sentencing disparities” and “undue complexity” that spurred the adoption of Amendment 759.<sup>23</sup>

Second, the Commission should consider *Pepper*. In *Pepper* the Supreme Court held that when a defendant’s sentence is set aside on appeal, at resentencing the district court may consider evidence of the defendant’s post-sentencing rehabilitation to vary downward from the Guidelines range.<sup>24</sup> Thus, *Pepper* made clear that a resentencing court may lower a sentence based on substantial assistance under § 5K1.1 and other factors, in that case the defendant’s rehabilitation under 18 U.S.C. § 3553(a) (Imposition of a Sentence – Factors to be Considered in Imposing a Sentence).

*Pepper* stands for the proposition that district courts should have wide discretion in sentencing, consistent with the principles that “the punishment should fit the offender and not merely the crime,”<sup>25</sup> and that evidence of rehabilitation is “highly relevant” to resentencing.<sup>26</sup> Contrary to *Pepper*, Option 1’s approach unreasonably limits a judge’s discretion to consider additional departures, variances and reductions for rehabilitation during resentencing.

Additionally, **the PAG recommends** neither drawing a distinction between departures or variances when considering additional reductions, nor limiting the applicable departures and variances.<sup>27</sup> Amendment 759 explicitly removed any distinction between departures and variances in Section 1B1.10(b)(2)(B) based on “public comment and testimony indicating that this distinction has been difficult to apply and has prompted litigation.”<sup>28</sup> As the Commission stated, “a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases.”<sup>29</sup> This conclusion is further supported by the

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<sup>23</sup> U.S.S.G. app. C, amend. 759.

<sup>24</sup> *Pepper*, 562 U.S. at 491.

<sup>25</sup> *Pepper*, 562 U.S. at 487–88 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

<sup>26</sup> *Id.* at 491.

<sup>27</sup> The Issue for Comment under Option 2 was: “Should the Commission limit the departures and variances that may be considered” and/or “take into account only certain, specified types of departures or variances?” U.S. Sentencing Commission, Proposed Amendments to the Sentencing Guidelines (Preliminary) (Dec. 13, 2018).

<sup>28</sup> U.S.S.G. app. C, amend. 759; *see, e.g., United States v. Tynes*, 546 F. Supp. 2d 319, 323–25 (E.D. Va. 2008) (requiring a lengthy and involved analysis to determine whether a Rule 35(b) modification of a sentence due to post-sentencing substantial assistance qualified as a “guideline sentence” or “functional equivalent to a guideline sentence” in order to trigger the pre-Amendment 759 § 1B1.10(b)(2)(B) exception.).

<sup>29</sup> U.S.S.G. app. C, amend. 759.

case law at hand, which drew no distinction between departures and variances when examining the defendants' resentencing.<sup>30</sup>

For these reasons, **the PAG respectfully recommends** that the Commission adopt Option 2 of the Proposed Amendment and amend § 1B1.10(b)(2)(B) accordingly.<sup>31</sup>

## II. Proposed Amendment: Career Offender

- **Part A: Amend §4B1.2 to eliminate the categorical and modified categorical approaches**

The Commission proposes amending the Career Offender Guideline to establish that the categorical and modified categorical approaches, developed by the Supreme Court in cases interpreting the Armed Career Criminal Act, do not apply in determining whether a conviction is a “crime of violence” or “controlled substance offense” for purposes of assessing whether a prior conviction qualifies as a predicate offense under U.S.S.G. §4B1.2. Instead, courts “shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction.” Courts would be permitted “to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction.”

**The PAG respectfully disagrees with this proposal** because: (1) it is not supported by the Commission's research on the application of the Career Offender Guideline; (2) it undermines relatively well-established precedent; and (3) it would allow courts to consider less reliable materials, such as complaints and police reports, in determining whether a prior conviction qualifies as a predicate offense under U.S.S.G. §4B1.2. Below, the PAG sets forth its concerns with the proposed amendment and responds to the Commission's issues for comment.

### 1. The Commission's 2016 Report on Career Offenders

The PAG believes that the Commission's proposed amendment runs counter to the Commission's recent study showing that the Career Offender guideline sweeps broadly and appears to be over-inclusive of certain categories of defendants, especially defendants convicted of a drug offense who have prior drug convictions. The proposed amendment would include even more potential defendants and further broaden the reach of the career offender's enhanced guideline range. For the reasons detailed below, the PAG does not support this proposed amendment.

As the Commission is aware, its *Report to the Congress: Career Offender Sentencing Enhancements* (August 2016) contains the results of a “multi-year study of

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<sup>30</sup> See *D.M.*, 869 F.3d 1133 (departure); *Taylor*, 815 F.3d 248 (variance); *Phelps*, 823 F.3d 1084 (variance); *Marroquin-Medina*, 817 F. 3d 1285 (departure); *Wright*, 562 F. App'x 885 (variance); *Valdez*, 492 F. App'x 895 (departure).

<sup>31</sup> The PAG agrees with the technical changes proposed by the Commission in Option 2 and makes no further amendments.

statutory and guideline definitions relating to the nature of a defendant's prior conviction. . . and the impact of such definitions on the relevant statutory and guideline provisions. . . [focusing on] the application and impact of the career offender guideline." Report at 7. From 2005 until 2014, the Report found that career offenders consistently accounted for approximately 3% of all federal offenders sentenced each year, and that career offenders are sentenced to lengthy sentences that average more than 12 years (147 months). Report at 18. Over the same time period, career offenders sentenced within the applicable guideline range decreased from 43.3% in Fiscal Year 2005 to 27.5% in Fiscal Year 2014. In addition, between 2005 and 2014, the Report found that these decreasing rates for guideline sentences were the result of increasing rates of government-sponsored and non-government sponsored below-range sentences. Government-sponsored below-range sentences increased from 33.9% to 45.6%, while non-government sponsored below-range sentences increased slightly from 22.2% to 25.9%. The rate of sentences above the guideline range was consistently at approximately 1%. Report at 22.

The length of sentence imposed also has decreased over time. In Fiscal Year 2005, the average sentence length was 182 months imprisonment, while in Fiscal Year 2014 the average sentence imposed was 147 months imprisonment. And when compared to the average guideline minimum, the difference between the sentence imposed and the guideline minimum has increased over time. In 2005, the average minimum guideline was 225 months, and the average sentence length was 182 months, 19.1% lower. In 2014, the average minimum guideline was 207 months, and the average sentence length was 147 months, 29% lower. "Thus, the anchoring effect of the guidelines for career offenders appears to be diminishing." Report at 23.

Overall, the Report suggests that the career offender guideline is sweeping too broadly, especially with respect to drug trafficking defendants. *See* Report at 25-37 (finding that the career offender guideline has the greatest impact on defendants whose instant offense is a drug trafficking offense and whose predicate offenses are controlled substance offenses, and that these defendants are frequently sentenced below the applicable career offender guideline range). Conversely, defendants whose instant offense was a crime of violence and who had at least one predicate crime of violence offense are sentenced more severely. Report at 34. Accordingly, sentencing courts distinguish among career offenders and sentence those with more violent criminal records more harshly than those where records are perceived to be less serious. This is exactly the way the sentencing system should work – defendants with more serious and violent records are sentenced to longer terms of imprisonment than defendants with less significant records.

During the time period of this study, the categorical and modified categorical approaches to determining whether a prior offense qualified as a predicate offense for purposes of the career offender guideline was being used by sentencing courts across the country. The Commission's proposal to abolish this system would potentially expand the number of prior convictions that qualify as predicate crimes of violence and would potentially increase the number of defendants subject to the career offender guideline.

Given that the Commission’s findings suggest that the career offender guideline already appears to be over-inclusive, this potential expansion of defendants subject to the career offender enhancement would exacerbate the concerns that the Commission identified in its 2016 Report, and it will not make the application of the career offender guideline more fair or equitable.

## 2. The Value of Precedent

The categorial and modified categorial approaches to determining whether a prior conviction is a predicate crime of violence for purposes of the career offender guideline have been in place for more than a quarter century. *See, e.g., Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016) (“For more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense.”). While the career offender guideline is distinct from a statute such as ACCA, the rationale for relying on an elements-based approach, rather than a facts-based one, applies equally in both contexts. Like ACCA, the career offender guideline focuses on a defendant’s prior conviction, not on a defendant’s prior conduct. *Compare* 18 U.S.C. § 924(e) (applying mandatory minimum sentence to a defendant who “has three previous *convictions* by any court . . .”) *with* 28 U.S.C. § 994(h) (directing Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized” for defendants with certain prior *convictions*).

The Supreme Court has provided three reasons for the elements-based approach. First, Congress, through ACCA’s text, directed sentencing courts to consider “whether ‘the defendant had been convicted of crimes falling within certain categories,’ and not about what the defendant had actually done.” *Mathis*, 136 S. Ct. at 2252 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The text of Congress’s directive to the Commission regarding the career offender guideline similarly focuses on a defendant’s prior convictions rather than a defendant’s prior conduct. *See* 28 U.S.C. § 994(h).

Second, permitting sentencing judges to consider facts in prior cases “would raise serious Sixth Amendment concerns . . . [because] only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction.” *Mathis*, 136 S. Ct. at 2252 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). “[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.” *Mathis*, 136 S. Ct. at 2252 (citing *Shepard v. United States*, 544 U.S. 13, 25 (2005)). A judge “is barred from making a disputed determination about ‘what the defendant and state judge must have understood as the factual basis of the prior plea’ or ‘what the jury in a prior trial must have accepted as the theory of the crime.’” *Mathis*, 136 S. Ct. at 2252 (citing *Shepard*, 544 U.S. at 25; *Descamps v. United States*, 570 U.S. 254, 269-270 (2013)).

Third, “an elements-based focus avoids unfairness to defendants.” *Mathis*, 136 S. Ct. at 2253. As the Supreme Court explained:

Statements of “non-elemental fact” in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he “may have good reason not to” – or even be precluded from doing so by the court. When that is true, a prosecutor’s or judge’s mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

*Mathis*, 136 S. Ct. at 2253 (citations omitted).

As discussed above, if anything, the application of the career offender guideline has been too broad, rather than too narrow, and potentially expanding the reach of this guideline by allowing sentencing courts to go beyond the elements of a defendant’s prior conviction to the facts underlying a prior conviction will expand the reach of the guideline and subject many more defendants to its enhanced penalties. To the extent that there is a concern that the career offender guideline is not currently encompassing the most dangerous repeat offenders, sentencing courts can use other provisions within the guidelines, such as an upward departure to an above-guidelines sentence, to address that category of defendants.

While cumbersome and sometimes complex, the categorical and modified categorical approaches have been in place for years, and practitioners who work with these guidelines have become familiar with these approaches. To change this method of analysis would cause great upheaval, particularly because it is unclear how the Commission’s proposal would operate. It appears that the Commission’s proposal would still require sentencing courts to engage in a complicated factual analysis, but it is unclear how this would simplify or streamline the process. *See Mathis*, 136 S. Ct. at 2257 (“[F]or good or for ill, the elements-based approach remains the law. And we will not introduce inconsistency and arbitrariness into our ACCA decisions by here declining to follow its requirements. Everything this Court has ever said about ACCA runs counter to the Government’s position. That alone is sufficient reason to reject it: Coherence has a claim on the law.”).

### **3. The Reliability of Source Materials for Prior Convictions**

The Commission’s proposal to move from an elements-based to a conduct-based analysis of prior convictions would require sentencing courts to rely upon a wider range of materials. The PAG believes that this shift will make the predicate offense analysis less trustworthy and result in at least as much, if not more, litigation at sentencing. In order to determine whether a defendant’s conduct qualifies as a “crime of violence,” courts will have to examine disputed factual documents, such as criminal complaints and police affidavits. Unless a defendant expressly endorsed the conduct at issue in the underlying complaint or affidavit, relying on police affidavits or criminal complaints will make a sentencing court’s analysis less certain. As the Supreme Court has explained,

“non-elemental” facts contained in prior conviction records are “prone to error” precisely because they are not required to be proved in order to obtain a conviction. *See Mathis*, 136 S. Ct. at 2253. As a result, relying on such records will decrease their reliability and increase the number of disputed issues at sentencing.

For example, defendants who are potentially subject to the career offender guideline will be more likely to challenge disputed facts related to their prior convictions. These challenges will be subject to the same concerns about the lack of reliability that currently occurs with the modified categorical approach. Witnesses may be difficult to locate, their memories faded, and evidence may become unavailable. Thus, the vagaries of old records would only be replaced by similar issues related to aging memory and the availability of evidence underlying old convictions not to mention serious Sixth Amendment concerns.

#### 4. The Commission’s Authority Under 28 U.S.C. § 994

Congress has authorized the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants” who qualify as career offenders. *See* 28 U.S.C. § 994(h), U.S.S.G. §4B1.1. The Commission’s proposed amendment, however, goes well beyond specifying a particular term of imprisonment or guideline range. Instead, the proposal directs how sentencing courts should analyze whether a conviction qualifies as a predicate offense for purposes of the career offender guideline. The PAG believes that the proposed amendment is beyond the Commission’s authority.

While the Commission has the authority to recommend sentences and guideline ranges for particular offenses, the Commission’s authority to direct how courts determine whether a prior conviction is a predicate offense is limited by the Sixth Amendment. As the Supreme Court explained in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Booker*, 543 U.S. 220, 231 (2005), “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Booker*, 543 U.S. at 231 (quoting *Apprendi*, 530 U.S. at 490). The Sixth Amendment is implicated when a defendant faces a significantly higher sentence “because a judge found true by a preponderance of the evidence a fact that was never submitted to a jury.” *Booker*, 543 U.S. at 238.

Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, “[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the States should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbours, rather than a lone employee of the State.’”

*Booker*, 543 U.S. at 238 (quoting *Blakely v. Washington*, 542 U.S. 296, 313-314 (2004)).

The categorical and modified categorical approaches are designed to avoid having sentencing judges engage in fact-finding in order to enhance a defendant's sentence. As the Supreme Court most recently explained in *Mathis*, sentencing courts cannot delve into the facts of prior convictions and are limited to examining prior convictions in order to avoid Sixth Amendment concerns. *See Mathis*, 136 S. Ct. at 2252. Thus, the PAG views the Commission's proposed amendment as one that is beyond the Commission's authority because it would impermissibly allow sentencing courts to engage in fact-finding in order to increase a defendant's sentence, in violation of the Sixth Amendment.

#### **5. Expanding the Source Materials Courts May Consider**

For the reasons discussed above, the PAG's position is that expanding the source materials that a sentencing court may consider in determining whether a prior conviction qualifies as a predicate offense for purposes of the career offender guideline will result in greater uncertainty and increase the number of disputed issues litigated at sentencing. Accordingly, the PAG does not recommend expanding the types of records that a sentencing court may consider, because the most reliable records are already addressed by the *Taylor* and *Shepard* line of cases.

#### **6. Enumerated Offenses**

As outlined in its August 10, 2018 letter to the Commission on Proposed 2018-2019 Priorities, the PAG reiterates its recommendation that aggravated assault be removed from the list of enumerated offenses in U.S.S.G. §4B1.2(a)(2), for the reasons set forth there. *See* Letter from PAG to Hon. William H. Pryor, Jr. at 4-5 (Aug. 10, 2018).

With respect to the Commission's request for comment on whether the Commission should set forth specific definitions for all the enumerated offenses, the PAG believes that this may provide clarity and reduce the amount of litigation surrounding the predicate offense inquiry. The PAG suggests that one approach is to define these enumerated offenses according to the Model Penal Code ("MPC").

- Arson, MPC Article 220.1, defined in the MPC as starting a fire or causing an explosion with the purpose of destroying a building or occupied structure or destroying or damaging any property to collect insurance for loss.
- Murder, MPC Article 210.2, defined as purposely or knowingly killing another human being.
- Manslaughter, MPC Article 210.3, reckless criminal homicide or murder committed under the influence of extreme mental or emotional disturbance.

- Kidnapping, MPC Article 212.1, unlawfully removing a person from his or her residence or unlawfully confining a person for a ransom, reward or as a shield or a hostage; to facilitate a felony or flight; or to inflict bodily injury or to terrorize the person.
- Robbery, MPC Article 222.1: in committing theft, inflicting serious bodily injury or threatens a person in order to purposely put that person in fear of immediate bodily injury.

- **Part B: Meaning of “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” offense under § 4B1.2(a)(2), and it does not meet the elements clause offense which requires use of force “against the person of another” under § 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 § 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)).

The **PAG opposes amending § 4B1.2** to define robbery as an “offense described in 18 USC § 1951(b)(1).” The PAG believes that defendants prosecuted under the Hobbs Act who have committed violent offenses already are subject to sever sentences, particularly when the conduct results in dangerous conduct, uses a weapon, or harms victims. Courts are also free to vary or depart upward. However, broadening the meaning of Robbery to include force to property (which the PAG believes is far less egregious than force to people) sweeps too broadly and will cause unnecessarily long sentences for less serious offenses and offenders.

- **Part C: Inchoate Offenses**

The Commission proposes amending the career offender guideline by moving the inchoate offenses provision currently within the commentary, *see* U.S.S.G. §4B1.2 n. 1, into the substance of the guideline itself. The amended guideline would define the terms “crime of violence” and “controlled substance offense” “to include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a ‘crime of violence’ or a ‘controlled substance offense.’” *See Proposed Amendment*, U.S.S.G. §4B1.2 (c). The Commission also proposes three separate options for how inchoate offenses should be considered by a sentencing court.

The PAG respectfully disagrees with the Commission's proposed amendment to incorporate inchoate offenses into the career offender guideline. As the PAG explained in its August 2010 letter to the Commission, the inchoate offense provision in the commentary should be deleted entirely. *See* Letter from PAG to Hon. William H. Pryor, Jr. at 4 (Aug. 10, 2018). The PAG continues to view the inchoate offense provision as impermissibly broadening the definitions of "crime of violence" and "controlled substance offense." Accordingly, the PAG recommends that the Commission limit the reach of the career offender guideline by removing the inchoate offense provision in its entirety.

To the extent that moving the inchoate offense provision currently located in the commentary into the text of the guideline addresses the PAG's concern that the commentary impermissibly expands the guideline definitions of "crime of violence" and "controlled substance offense," the PAG suggests that the Commission adopt Option 3. This option amends the definitions of "crime of violence" and "controlled substance offense" under U.S.S.G. §4B1.2 to "include the offenses of aiding and abetting, attempting to commit, [soliciting to commit], or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.'"

Given the PAG's concern with the expansion of the career offender guideline, if the career offender guideline is amended to include inchoate offenses, then the PAG urges the Commission to limit the scope of the guideline. One way to do so is by requiring courts to conduct a two-step analysis to determine whether an inchoate offense qualifies as a crime of violence or controlled substance offense. First, courts must consider whether the underlying substantive offense is a crime of violence or controlled substance offense, and second, whether the inchoate offense matches the elements of the generic definition for that inchoate offense. *See, e.g., United States v. McCollum*, 885 F.3d 300, 307-309 (4<sup>th</sup> Cir. 2018) (comparing the elements of generic conspiracy to the elements of conspiracy to commit murder in aid of racketeering and finding that the latter lacked the element of an overt act, which generic conspiracy requires); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1313-1314 (10<sup>th</sup> Cir. 2016) (finding prior conviction for conspiracy to possess with intent to distribute 50 kilograms or more of marijuana broader than the generic crime of conspiracy).

In addition to requiring a two-step analysis, a second way to limit the scope of the guideline is to require inchoate offenses to have as an element an overt act, or equivalent. A majority of state statutes "define conspiracy to require an overt act[, and] the general federal conspiracy statute requires an overt act." *McCollum*, 885 F.3d at 307-308. Thus, with respect to proposed suboptions 3A and 3B, the PAG recommends adopting the narrow version of suboption 3A, which limits the offenses of conspiracy to commit a crime of violence or a controlled substance offense "only if an overt act must be proved as an element of the conspiracy offense."

While DOJ suggests that the "overt act" requirement for conspiracy creates a circuit split with the Ninth and Sixth Circuits, a close reading of these cases suggests

otherwise. The Ninth Circuit case, *United States v. Rivera-Constantino*, 798 F.3d 900 (9<sup>th</sup> Cir. 2015), addressed the question of whether a prior conviction for conspiracy to possess marijuana with intent to distribute was a drug trafficking offense under U.S.S.G. §2L1.2(b)(1). While “drug trafficking offense” under §2L1.2(b)(1) is similar to the definition of “controlled substance offense” under U.S.S.G. §4B1.2, the PAG submits that these two different guidelines treat these prior drug convictions differently.

Likewise, *United States v. Molinar*, 881 F.3d 1064 (9<sup>th</sup> Cir. 2017) involved a defendant subject to the career offender guideline. The 9<sup>th</sup> Circuit held the Arizona offense of attempted armed robbery categorically matched the elements of robbery and of attempt. With respect to attempt, the 9<sup>th</sup> Circuit referenced another case, *United States v. Taylor*, 529 F.3d 1232 (9<sup>th</sup> Cir. 2008) (abrogated on other grounds), where it had previously found that the Arizona attempt statute was co-extensive with generic attempt and holding the generic definition of attempt required proof of an overt act. While different than conspiracy, the fact that there are other inchoate offenses where the 9<sup>th</sup> Circuit requires proof of an overt act suggests that the DOJ's concern about a circuit split is not as strong as it presents.

With respect to the Sixth Circuit, a recent case suggests that this Circuit may reconsider whether an attempt to commit a controlled substance offense constitutes a controlled substance offense. *See United States v. Havis*, 907 F.3d 439, 441-444, 442 (6<sup>th</sup> Cir. 2018) (finding that attempted drug delivery under Tennessee law is a controlled substance offense based on binding Circuit precedent and suggesting that this may need to be revisited because including the offense of attempt in the guidelines' commentary impermissibly expands it “because the Guideline's actual text says nothing about attempt, *see* U.S.S.G. §4B1.2(b), and the Sentencing Commission cannot add to the text in commentary.”).

Similarly, with respect to the other inchoate offenses, such as attempt, solicitation, and/or aiding and abetting, the PAG recommends that the Commission provide guidance that requires these offenses to include an overt act or “substantial step” towards commission of the underlying substantive offense. For example, over twenty states use the “substantial step” test of the Model Penal Code in their definition of the offense of attempt. *See, e.g., United States v. Ellis*, 564 F.3d 370, 373-374 (5<sup>th</sup> Cir. 2009); *see also United States v. Gorny*, 655 Fed. App'x 920, 925-26 (3<sup>d</sup> Cir. 2016) (observing that the offense of attempt includes the element of a “substantial step” in most modern statutes).

- **Part D Definition of a “controlled substance”**

This proposed amendment would add as a “controlled substance offense” an “offer to sell.” The PAG agrees that a “drug trafficking offense” should include an “offer to sell.”

This proposed amendment would also include “an offense described in 46 U.S.C. § 70503(a) or § 70506(b) (the penalties for § 70503).” The PAG agrees that §



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