Testimony Before The United States Sentencing Commission

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Chair, Practitioners Advisory Group

Jointly Undertaken Criminal Activity -- 1B1.3

Mitigating Role -- 3B1.2

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Written Testimony Regarding Jointly Undertaken Criminal Activity and Mitigating Role

I am pleased to have the opportunity to testify on behalf of the Sentencing Commission's Practitioners Advisory Group regarding the proposals and issue for comments that deal with jointly undertaken criminal activity in the relevant conduct guideline and mitigating role. As one of the Commission's standing advisory groups, the PAG strives to provide the perspective of those in the private sector who represent individuals investigated and charged under the federal criminal laws. We appreciate the Commission's willingness to listen to and consider our thoughts on various possible approaches to issues that arise under the guidelines.

I. The PAG Supports Changes to Section 1B1.3 (Relevant Conduct) for Jointly Undertaken Criminal Activity

The PAG agrees with the Commission's proposal to clarify and simplify the test for whether a defendant is held accountable under the Relevant Conduct guideline for conduct by others that might be characterized as part of jointly undertaken criminal activity. Application Note 1 of USSG §1B1.3 states that "[t]he principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability." Under the guidelines "the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator." *Id.* This distinction, while important, is not applied consistently.

As the Commission is aware, district courts often overlook this directive in conspiracy cases, attributing the entire loss or drug amount to a co-conspirator without carefully examining how the provisions of §1B1.3 apply. *See, e.g., United States v. Flores-Alvarado*, __ F.3d __ No. 13-4464 (4th Cir. Mar. 3, 2015), slip op. at 10-11 (reversing sentence that was based on conduct found to be foreseeable because the district court failed to find that it was also "within the scope of the defendant's agreement to jointly undertake criminal activity"); *United States v. Jordan,* Fed. Appx. 319, 323 (6th Cir. 2001) (reversing district court loss finding because "a defendant *is not* necessarily responsible for all acts of other conspirators that are reasonably foreseeable and 'in furtherance of the conspiracy'") (emphasis added); *id.* at 323-24 (criticizing *United States v. Brown*, 147 F.3d 477, 485 (6th Cir. 1998) for inaccurately setting forth law as holding defendants automatically responsible for all acts that merely are reasonably foreseeable and in furtherance of conspiracy). And while some courts read §1B1.3 to narrow the scope of liability, *see, e.g., United States v. Oakyfor*, 996 F.2d 116, 121 (6th Cir. 1993) ("the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is *significantly narrower* than the conduct embraced by the law of conspiracy") (emphasis added, quotation marks and citation omitted), others appear to read it expansively, *see, e.g., United States v.* Bradley, 644 F.3d 1213, 1293 (11th Cir. 2011) ("Accordingly, under § 1B1.3(a), when a defendant is acting in concert with others, the appropriate conduct to consider for sentencing purposes is *far broader* than the conduct that drove the original conviction.") (Emphasis added).

The PAG therefore endorses the proposal to clarify and make explicit the three separate elements required to hold a defendant accountable for the conduct of others under a "jointly

undertaken" theory. The proposed changes to both the text of §1B1.3 and the corresponding application notes would better express the Commission's intent in this area, serving the purposes of sentencing.

The Commission additionally seeks comment "on whether additional or different guidance should be provided" on how to apply the "jointly undertaken criminal activity" provision. The PAG believes that more guidance would be helpful. In particular, the Commission should provide further guidance on the criteria relevant to a determination of the first element, namely, whether the conduct at issue was "within the scope of the criminal activity that the defendant agreed to jointly undertake."

The guideline provides only minimal assistance on this point. Application note 3(B) states that in determining the scope of the activity a particular defendant agreed to jointly undertake, the court may consider any "explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." USSG §1B1.3, comment. 3(b). But what that means in practice is hard to say. While the Commission supplies various examples to illustrate conduct for which a defendant may be held accountable, sentencing courts have taken varying approaches to this fact-intensive inquiry.[1]

The PAG believes that the factors identified by the Second Circuit in *Studley* provide the most helpful and comprehensive guidance to a court in determining the "scope" of a defendant's agreement. Using illustrations provided by the Commission, the *Studley* court identified the following factors as relevant to a court's consideration of whether conduct by others was within the "scope" of the criminal activity agreed to by the defendant:

> (1) whether the participants "pooled" profits and resources, or worked independently,

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[1] *See e.g.*, *United States v. Studley,* 47 F.3d 569, 595 (2d Cir.1995) (setting forth a number of specific factors relevant to whether conduct is within the scope of the criminal activity agreed to by the defendant), *United States v. Green*, 175 F.3d 822, 837 (10th Cir. 1999) (reaching a similar conclusion without specifying the same factors; "the district court must make particularized findings tying the defendant to the relevant conduct used to increase the base level offense," based on the fact that the scope of the criminal activity jointly undertaken by the defendant is not necessarily the same as the scope of the entire conspiracy) (citing *United States v. Melton*, 131 F.3d 1400, 1404 (10th Cir. 1997)); *cf. United States v. Collado*, 975 F.2d 985, 995 (3d Cir. 1992) (using an illustration from the application notes, different from that in *Studley*, to confirm the Third Circuit's conclusion that courts should look to the defendant's *role* in the conspiracy instead of particularized factors: "a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to ensure that the defendant's sentence accurately reflects his or her role"), *United States v. Duglia*, 204 F.3d 97, 101 n.1 (3d Cir. 2000) (rejecting the defendant's arguments for applying the Second Circuit's decision in *Studley*, and choosing to be governed by *Collado* and "the wisdom of that case" instead). *Compare United States v. Hunter* 323 F.3d 1314 (11th Cir. 2003) (applying *Studley*) *with United States v. McCrimmon*, 362 F.3d 725 (11th Cir. 2004) (affirming lower court's finding that the full amount attributed to the defendant was proper because he was "fully aware of the objective of the conspiracy and was actively involved in… the… scheme.").

(2) whether the defendant assisted in "designing and executing" the illegal scheme; and

(3) the role that the defendant agreed to play in the operation.

Id. at 595.

Importantly, the *Studley* court emphasized that a defendant's mere knowledge either of the other participant's criminal acts or of the scope of the overall operation would not be sufficient to hold him or her accountable for the activities of the entire operation. *Id.* Because other courts appear to be selective in applying the criteria from the illustrations in the application notes, or give different weight to those factors, *see e.g.*, *id.* at 575; *United States v. Collado*, 975 F.2d at 992 (focusing exclusively on illustration (c)(3)), the PAG recommends that the Commission add the following language indicated in bold to application note 3(b):

> In doing so, **the court should consider, among other things: (1) any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others; (2) the role the defendant agreed to play; (3) whether the participants "pooled" profits and resources, or worked independently, and (4) whether the defendant assisted in "designing and executing" the illegal scheme. Knowledge of the other participants' criminal conduct, or even of the scope of the overall criminal operation or enterprise, is not sufficient to conclude that the scope of the defendant's agreement encompassed the criminal activity of others.** Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

The Commission has also requested comment on two possible policy changes that would provide greater limitations on the extent to which a defendant is held accountable at sentencing for the conduct of co-participants. With respect to Option A, the PAG firmly believes a standard higher than mere "reasonable foreseeability" is essential to effectuating the full intent of §1B1.3, and thereby ensure that, at least in conspiracy cases, defendants with less culpability than other defendants are not unfairly sentenced for conduct that substantially over-represents both their culpability as well as the seriousness of their particular offense conduct. Tightening the intent requirement for jointly undertaken criminal activity is also consistent with the Commission's proposal regarding mitigating role—an underutilized downward adjustment. A higher standard for jointly undertaken criminal activity together with more frequent application of the mitigating role adjustment will better ensure appropriate sentences for those defendants convicted of conspiracies whose culpability is truly lower, as well as those who are responsible for only a subset of the harm caused by the conspiracy.

In order to implement a higher state of mind requirement, the Commission should modify the reasonable foreseeability standard in §1B1.3(a)(1)(B)(iii) using the language noted in bold:

> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, all acts and omissions of others that were—
>
> > (i) within the scope of the criminal activity that the defendant agreed to jointly undertake,
> >
> > (ii) in furtherance of the jointly undertaken criminal activity, and
> >
> > (iii) **intended by the defendant** in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

This intent requirement will ensure that the culpability of the defendant is appropriately captured when a court determines the scope of relevant conduct attributable to the defendant.

Finally, the PAG also supports the Commission's proposal in Option B, amending the guideline to require a conviction of conspiracy (or at least of a "Pinkerton" crime) before a defendant may be held accountable for "jointly undertaken criminal activity." As currently drafted, §1B1.3 makes clear that a defendant may be held responsible for the conduct of others "whether or not charged [in] a conspiracy[.]" *See* §1B1.3(a)(1)(B). While in some jurisdictions, the provision is rarely applied in non-conspiracy cases, in others, courts routinely find a defendant responsible for "jointly undertaken criminal activity" where a defendant is charged only with a substantive offense. *See, e.g.*, *United States v. Harvey,* 413 F.3d 850 (8th Cir. 2005). In the latter situations, defendants are subjected to enhanced and disproportionately lengthy sentences even when the government has determined that conspiracy charges are unwarranted. Indeed, PAG members report repeated instances of courts holding defendants liable for additional conduct undertaken by others even when neither the Government nor the Probation Department seeks such an enhancement.

Thus, given the disparate approaches taken by courts across the country, as well as the substantial due process concerns at issue when a defendant is punished for the acts of others, the PAG believes that the Commission should, in addition to requiring a higher state of mind than "reasonable foreseeability," require that "jointly undertaken activity" apply only when a defendant has been convicted of a conspiracy count. This change could be implemented by changing the language of §1B1.3(a)(1)(B) to the following:

> (B) in the case of a defendant convicted of a conspiracy charge, convicted by a jury that was specifically instructed on *Pinkerton* liability for a substantive offense, or who admitted facts sufficient to constitute *Pinkerton* liability, all acts and omissions of others that were – . . . .

This change would ensure that the §1B1.3 is applied uniformly across the country.

If the Commission does not adopt a heightened intent requirement for jointly undertaken criminal activity, and if the Commission also does not limit §1B1.3(a)(1)(B) to those convicted of conspiracy or under a *Pinkerton* instruction, at a minimum a higher intent requirement should apply in cases where the defendant has not been convicted of a conspiracy or found criminally liable under a *Pinkerton* instruction. Thus, as to those defendants, the Commission should adopt the PAG's proposed subsection (iii), which would confine relevant conduct to acts and omissions that were "intended by the defendant in connection with that criminal activity." For defendants convicted of conspiracy or under instructions as to *Pinkerton* liability (or who plead guilty while admitting the elements needed for *Pinkerton* liability), the defendant could be held liable for the activity of others so long as the three elements articulated in the proposed amendments are satisfied – the acts or omissions of the others were within scope of the jointly undertaken criminal activity, the acts or omissions of the others were in furtherance of the jointly undertaken criminal activity, and the coconspirator conduct was reasonably foreseeable to the defendant.

II. The PAG Supports Changes to the Mitigating Role Guideline -- §3B1.2

The PAG believes that mitigating role adjustments are applied less frequently than the facts of individual cases warrant. The proposed amendments to USSG §3B1.2 are a step in the direction of solving that problem, and the PAG supports them. The PAG further urges the Commission to make more clear that when courts apply this provision they should evaluate whether the defendant's actions contributed significantly to the harm that the conduct caused. Most often this will mean looking to whether and to what extent the defendant was responsible for the loss amount computed under §2B1.1 or the drug amount computed under §2D1.1.

The PAG believes that the proposed amendment is an improvement in three ways.

First, it resolves the split in the circuits on the meaning of an "average participant," advising courts to compare the defendant to those who actually participated in the criminal activity that led to the defendant's conviction, instead of comparing to typical offenders who commit similar crimes. *Compare United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994) *and United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993) *with United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004) *and United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999). This amendment gets at a distinction that is often subtle and, hence, a source of inconsistent application. The Chapter 2 provisions operate the same regardless of whether the offense was committed by one person or several. When it comes to offenses with multiple participants, Chapter 2 still generally focuses on culpability and seriousness for the offense itself, without asking how culpable the defendant himself or herself was when participating in the offense. Chapter 3B, though, is more defendant-specific. Thus, so long as the specific offense characteristics in Chapter 2 distinguish the more culpable version of a crime from its less culpable type, the mitigating role provision need not take on that task. Circuits that look to whether, for example, the defendant is "less culpable than the majority of those within the universe of persons participating in similar crimes," *Santos*, 357 F.3d at 142, are asking §3B1.2 to do what Chapter 2 already should have done.

Second, we approve of new language affirmatively stating that when certain factors are present a defendant may receive the reduction, as opposed to the current version which says that

under those same circumstances a reduction is not foreclosed. It remains to be seen whether changing to a "glass half full" formulation will affect the outcome in individual cases, but it sends the right message about the frequency with which a mitigating role reduction should apply.

Third, the amendment will provide a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment, and if so, the amount of the adjustment. Part of the problem with the current application of this guideline is that almost every criminal participant can be described as important to the success of the criminal activity, no matter their relative role. These examples help direct the inquiry to the relative extent of each participant's contribution as well as the relative extent of their reward.

The Commission also requests comments on the need for additional or different guidance. We believe that more can and should be done. The mitigating role downward adjustment is infrequently applied. According to the Commission's fiscal year 2013 data, 92.7% of the defendants seeking such an adjustment received none; 5.4% received a minor participant adjustment; 1.4% received a minimal participant adjustment; and 0.5% received the less-than-minor-but-not-minimal adjustment. *2013 Sourcebook*, Table 18.

In our experience, courts reject the application of the mitigating role adjustment based on such things as the seriousness of the crime, the amount of money involved in the overall scheme, and other factors that fail to get at the nub of the issue, which is the actual role that the particular defendant played in the criminal activity. Moreover, in our experience, courts will often deny a mitigating role adjustment when a defendant's base level is appropriately limited, under Relevant Conduct principles, to a smaller amount of conduct than that of other participants. This is contrary to how aggravating role adjustments are often applied. It is also an important part of our reason for supporting the Commission's proposed amendments to USSG §3B1.2, including how the "average participant" is explained.

The PAG further recommends, as a way to solve the problem, adding two more items to the proposed amendment's non-exhaustive list of factors relevant to whether a defendant should receive a downward adjustment under USSG §3B1.2. The proposed amendment does not expressly state that courts should evaluate whether the defendant's role in the scheme contributed significantly to the harm (*e.g.*, in fraud or theft cases, the amount of loss determined under USSG §2B1.1). The PAG believes that such express guidance should be included in this list. Indeed, courts have found that §2B1.1 produces sentences that often are too high in those instances where the defendant's limited role in the scheme bore little relationship to the overall amount of loss determined under the guideline. *See, e.g.*, *United States v. Brennick*, 134 F.3d 10, 13 (1st Cir. 1998); *United States v. Broderson,* 67 F.3d 452, 459 (2d Cir. 1995); *United States v. Monaco*, 23 F.3d 793, 799 (3d Cir. 1994); *United States v. Stuart*, 22 F.3d 76, 82 (3d Cir. 1994); *United States v. Nachamie*, 121 F. Supp. 2d 285, 295-97 (S.D.N.Y. 2000), *aff'd*, 5 F. App'x 95 (2d Cir. 2001); *United States v. Costello*, 16 F. Supp. 2d 36, 39-40 (D. Mass. 1998); *United States v. Jackson*, 798 F. Supp. 556, 557 (D. Minn. 1992). Given the attention courts have given to this important issue, the PAG submits that express guidance is needed.

Accordingly, the PAG believes that causation and intent to cause harm should be added as fourth and fifth factors in the non-exhaustive list that the Commission has proposed. These factors are consistent with the general precepts of relevant conduct set forth in §1B1.3, as well as

the specific directives in provisions such as §2B1.1(b) to determine the harm caused by the crime. Therefore, the PAG recommends the following non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment:

> In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:
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> (i) the degree to which the defendant understood the scope and structure of the criminal activity;
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> (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
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> (iii) the degree to which the defendant stood to benefit from the criminal activity;
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> (iv) the degree to which the defendant caused harm to identifiable victims; and
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> (v) the degree to which the defendant intended to cause harm to identifiable victims.

Conclusion

On behalf of the PAG, thank you again for the opportunity to provide our perspective on these very important issues.