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Presented to the
United States Sentencing Commission
Public Hearing on March 14, 2018 on the
Proposed Amendments Regarding “First Offender” and Zones B and C Consolidation

On behalf of the National Association of Assistant United States Attorneys¹, I thank you for the opportunity to appear before the Sentencing Commission to discuss the important proposed amendments relating to first offenders.

The National Association of Assistant United States Attorneys (NAAUSA) represents the interests of 5,400 Assistant United States Attorneys who are responsible for the prosecution of federal crimes and we will witness on a daily basis the real consequences of these amendments.

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

The proposed amendment adding a special category of criminal history for “true” first time offenders would create a set of special new benefits for offenders who have no prior conviction, further reducing their offense level by one or two levels. Yet carving out an entirely new category for offenders with zero criminal history points would unnecessarily weaken the deterrent value of the Sentencing Guidelines for offenders who already are subject to sentencing at the lowest range available for their offense conduct. Given the fact that judges already have the discretion to vary downward in extraordinary cases of uncharacteristic criminal conduct, NAAUSA believes this new class of low-level offenders is not warranted and should be rejected.

One claim made by those in favor of this reduction for offenders with no prior criminal conviction is that they have a lower recidivism rate than those with one criminal history point. However, the Sentencing Commission’s own report, *Recidivism Among Federal Offenders: A Comprehensive Overview (2016)*, does not support this reasoning. In fact, according to that study, offenders with no conviction still reoffend at a rate of over 30%, and the average rate of recidivism for all those in Criminal History Category I (including individuals with zero or one criminal history point) is only slightly higher at 33.9%.

One area where the proposed amendment would wreak particular havoc involves the prosecution of individuals who supply a large number of the firearms utilized by violent felons. As has been well documented, the majority of firearms used to commit serious felonies were either stolen, or were obtained through the use of a non-prohibited

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“straw purchaser” by the convicted felon or firearms trafficker. Due to the need for the straw firearm buyer to pass a federal background check, this person is, of necessity, a “first time offender.” Yet as drafted, this proposed amendment would make no exception to the reduction of such an offender’s offense level by one or two levels, as a reward for having a clean criminal history, even though the guideline range for providing even dozens of firearms to a felon or felons typically falls within only 12 to 18 months’ imprisonment.

In the economic crime context, creating this new category would offer a windfall to offenders who commit a wide range of white collar crime, from tax fraud to Medicare fraud, and from consumer-targeting mail fraud to public corruption crimes. Many, if not most, white collar offenders have no prior scoreable offenses for sentencing purposes, and come to federal court for the first time having committed serious and significant fraud. Even in cases where other enhancements apply, such as those for aggravating role, and where the fraud loss is substantial, these offenders would be handed lower sentencing ranges solely because they had no prior conviction.

If, however, the Commission intends to move forward with this proposed amendment, we strongly recommend the use of Option 2 to award first offender status only where the offender has “no prior convictions of any kind,” since offenders with “stale” prior criminal convictions obviously present a higher recidivism risk than true first offenders. We also urge the Commission to limit any reduction for this new category to one level, rather than granting two levels for those who fall at offense level 16 or below.

Creating a Presumption of No Prison Time for “First Offenders”

The proposed amendment would go even farther, providing that for “first offenders” who fall within Zone A or B of the Sentencing Table, the court “ordinarily should impose a sentence” other than prison. This would be perhaps the most powerful prize for white collar offenders in the current package of proposed amendments. These perpetrators bring financial ruin to hundreds and sometimes thousands of people, and creating a presumption of no jail time sends the wrong message not only in terms of deterrence but also to crime victims - that the harm to them just doesn’t matter enough to warrant prison time for the people who ruined their financial futures.

Faced with 64,000 overdose deaths in 2016 in the United States, many of which were a direct result of drug dealing, NAAUSA strongly disagrees with any characterization of drug trafficking crimes as “non-violent” for purposes of the presumption of no jail time for first time offenders. If, however, the Commission moves forward with this amendment to §5C1.1, we highly recommend the definition in the second option be used, “where the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense,” and to avoid using the term “crime of violence” in this context due to the problems associated with the categorical approach.

Collapsing Zones B & C Into One Zone

Finally, NAAUSA respectfully urges the Commission to reject the proposed amendment to eliminate Zone C, which will further reduce the sentences of offenders on the cusp of higher guidelines indicating more serious criminal conduct than those in Zone B. In 2010 the Commission increased the reach of Zones B and C by one level, to “expand the availability of alternatives to incarceration” to offenders at these higher levels. NAAUSA sees no need for yet another dilution of the requirement of incarceration under the guidelines applied to offense levels 12 and 13.

Conclusion

We at the National Association of Assistant United States Attorneys greatly appreciate the opportunity to express our views on these critical proposed amendments. Thank you for your consideration.