U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 27, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts,* 88 Fed. Reg. 7180 (Feb. 2, 2023).

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3. "Circuit Conflicts"

A. Part A—Acceptance of Responsibility (§3E1.1)

In response to a disagreement among the courts of appeals regarding the government's authority under §3E1.1(b) to withhold a third point for acceptance of responsibility, the Commission proposes to amend that section to define the term "preparing for trial."[25] Although the Department agrees that the Commission should resolve the issue by clarifying the circumstances in which the government can withhold a third point for acceptance of responsibility, the government does not support doing so through an attempt to define "preparing for trial."

1. The Department Supports Resolving the Disagreement Among the Circuits by Preserving the Government's Congressionally Afforded Discretion to Withhold a Third-point Reduction

Under §3E1.1, a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level reduction in offense level. USSG §3E1.1(a). A defendant may receive an additional one-level reduction "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." *Id.* §3E1.1(b).

Although the Commission primarily proposes to define the term "preparing for trial," it requests comment on alternative solutions, such as by incorporating the framework from *Wade v. United States*, 504 U.S. 181 (1992). The Department supports this alternative proposal. In *Wade*, the Supreme Court held that the government may decline to move for a downward departure for substantial assistance to law enforcement under 18 U.S.C. § 3553(e) or §5K1.1—provisions that

[25] In a statement respecting denial of a petition for certiorari in a case in which the government withheld a third-level reduction in offense level for acceptance of responsibility because a defendant litigated a motion to suppress, two Supreme Court Justices stressed the "need for clarification from the Commission" concerning the application of §3E1.1(b). *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

similarly require a "motion of the government"—even if the defendant has in fact provided substantial assistance, so long as the government's decision "rationally related to [a] legitimate Government end," and not, for example "based on an unconstitutional motive" such as "the defendant's race or religion." *Id.* at 185-87. As the Department has explained in court filings, *see, e.g.*, Br. in Opp. 6-15, *Longoria v. United States*, No. 20-5715 (filed Jan. 29, 2021), §3E1.1(b) confers on the government discretion to move for an additional third-point reduction in the defendant's offense level if the stated criteria are satisfied, but it does not require the government to file such a motion. The requirement that the government file a motion before a defendant may receive the third-point reduction was inserted directly by Congress in 2003, and Congress used the same language interpreted in *Wade* to confer broad discretion on the government. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 671-672. Congress further emphasized the government's discretion by directly amending the application note to §3E1.1 to emphasize that "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." *Id*. § 401(g)(2)(B); *see* USSG §3E1.1, comment. (n.6). Accordingly, the standard articulated in *Wade* is the appropriate one, and the Department supports amending §3E1.1(b) to state that the government may not withhold a motion based on an unconstitutional motive or a reason not rationally related to any legitimate government end.

2. The Commission's Proposal to Define "Preparing for Trial" Would not Resolve the Disagreement Among the Circuits, Would be Unworkable, and may Lead to Arbitrary Results

The Commission's proposal to amend §3E1.1 to define "preparing for trial" would not fully resolve the existing disagreement among the circuits and, in any event, would likely prove unworkable.

As a threshold matter, nothing in §3E1.1 or its commentary suggests that Congress intended to permit the government to consider only certain trial-preparatory activities when determining whether to move for a third-level reduction. Section 3E1.1(b), as amended by the PROTECT Act, does not focus exclusively on the government's interest in avoiding "preparing for trial" but more generally recognizes the government's interest in "allocat[ing its] resources efficiently." Most circuits that have reached the question therefore have rejected the view that the interests encompassed by §3E1.1(b) are limited to those unique to trial preparation.[26] As a result,

[26] *See, e.g.*, *United States v. Jordan*, 877 F.3d 391, 396 (8th Cir. 2017) (a defendant's denial of relevant conduct at sentencing "did not allow the government and the court to allocate their resources efficiently" and thus was appropriate basis for government to decline to recommend the third point); *United States v. Collins*, 683 F.3d 697, 706 (6th Cir. 2012) (Section 3E1.1(b) is not limited solely to the "government interest in avoiding preparing for trial," but instead "explicitly identifies a broader government interest in allocating its resources efficiently"); *United States v. Sainz-Preciado*, 566 F.3d 708, 715 (7th Cir. 2009) (Section 3E1.1(b) reflects "Congress's intent to leave third-point reductions to the government's discretion"); *United States v. Beatty*, 538 F.3d 8, 16 (1st Cir. 2008) ("As amended, the touchstone of § 3E1.1 is no longer trial preparation, but rather the presence of a government motion for the third-level reduction."); *United States v. Drennon*, 516 F.3d 160, 163 (3d Cir. 2008) (upholding government's decision not to file a third-point reduction motion where the court found "no basis for concluding that

regardless of whether a defendant's challenge to a charging document, motion to suppress evidence, or challenge to sentencing issues could be described as falling within (or outside) a definition of "preparing for trial," under many circuits' governing law, the government could still appropriately withhold a motion if those activities prevented the government from allocating its resources efficiently.

In any event, it will be difficult in many cases to distinguish between the litigation of suppression motions (or various other pre- and post-trial challenges) and trial preparation. Indeed, the litigation of suppression or other motions quite often can be tantamount to trial—involving the same witnesses, evidence, and testimony. The Commission proposes to define "preparing for trial" as "ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists." In the Department's experience, however, the most significant amount of time spent preparing for trial typically involves witness preparation. And where the evidence in a case turns on items recovered as a result of a search or seizure, the trial evidence may overlap substantially with the evidence proffered during the litigation of a suppression hearing.[27] A defendant who elects to litigate a suppression motion before determining whether to plead guilty and accept responsibility therefore may not have "timely" notified authorities of his intention to plead guilty or have "permit[ed] the government to avoid preparing for trial" or "to allocate [its] resources effectively." USSG §3E1.1(b). The same may be true in cases where a defendant pleads guilty but challenges the factual basis for particular sentencing enhancements, which in effect may require litigating the factual basis for some of the conduct underlying his conviction.[28] At a minimum, should the Commission choose to define "preparing for trial," it should include efforts to prepare witnesses and evidence that would be presented at trial.[29]

The proposed definition of "preparing for trial"—particularly its focus on excluding "early pretrial proceedings"—also will create difficult line-drawing problems that may lead to

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[the decision] was motivated by anything other than a concern for the efficient allocation of the government's litigating resources"); *United States v. Blanco*, 466 F.3d 916, 918 (10th Cir. 2006) ("Ensuring efficient resource allocation is a legitimate government end and a stated purpose of §3E1.1(b).").

[27] *See, e.g.*, *United States v. Sanders*, 208 F. App'x 160, 163 (3d Cir. 2006) (explaining that although the defendant "allowed the government to avoid voir dire, jury instructions and jury selection" his suppression motion "forced the government to litigate the essential element of a § 922(g)(1) offense—[his] possession of a firearm—and his only arguable defense"; because the motion "compelled the government to prepare and examine [the arresting officer] and to cross-examine five defense witnesses," the government "essentially tried [the defendant] at the suppression hearing").

[28] *See, e.g.*, *Blanco*, 466 F.3d at 919 (defendant's request that cocaine base be reweighed at an independent testing facility before sentencing resulted in a "concomitant resource expenditure" of "governmental time, resources, and energy of agents to ensure that the evidentiary chain of custody remains unbroken"); *Jordan*, 877 F.3d at 395 (defendant's denial of relevant conduct at sentencing—that defendant possessed a firearm in connection with another felony—necessitated the government having "to subpoena and present testimony of six witnesses in a hearing lasting almost four hours").

[29] Many witnesses require preparation well in advance of trial. For example, Rule 16 of Federal Criminal Procedure requires that parties disclose, inter alia, the opinions of expert witness "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Fed. R. Crm. P. 16(a)(1)(G), (b)(1)(C). For some witnesses, the parties must retain interpreters to assist at preparation and at trial. Other witnesses require pre-trial travel for preparation. And for many witnesses, recorded calls must be transcribed and translated. In short, the government frequently incurs many expenses, and expends significant amounts of time, preparing witnesses well in advance of trial.

extensive ancillary litigation and arbitrary application of §3E1.1(b). Some courts permit suppression motions to be filed on the eve of trial, but even when a defendant files a motion early in the district court proceedings, the court may not resolve the motion until close to or on the eve of trial. The filing of an early motion thus may not relieve the government of its obligation to prepare for trial, and if a defendant decides to change his plea on the eve of trial after losing such a motion, the government will have substantially completed its trial preparation. This may be true even if a defendant indicates a willingness to enter a conditional guilty plea that would preserve his right to appeal the denial of a motion to suppress. If a court does not rule on the motion to suppress until the eve of trial, the government will have to prepare for trial in the event the motion to suppress is granted (particularly if there is other evidence in the case that would prove some or all of the charges). Nor, in all cases, can a defendant meaningfully be expected to evaluate whether to plead guilty without knowing what evidence the government will be permitted to offer at trial. In many circumstances, then, whether the government has been required to begin preparations for trial will depend substantially on the district court's own docket-management decisions, and not on circumstances within the defendant's control. The proposed definition of "preparing for trial" thus may have disparate outcomes, resulting in applications of §3E1.1(b) that might not correlate with each defendant's relevant level of cooperation.

For these reasons, and consistent with Congress's determination in the PROTECT ACT,[30] the government is best positioned to determine whether the defendant's assistance to authorities in any particular case—including by timely notifying authorities of his intention to enter a plea of guilty—in fact avoided the need to prepare for trial or assisted the government in allocating its resources efficiently. The Commission should decline to define "preparing for trial" and instead incorporate the *Wade* standard in §3E1.1(b).

3. Because the Guidelines are Advisory, Constraining the Government's Discretion in §3E1.1(b) is Unnecessary

Finally, and importantly, amending §3E1.1(b) to constrain the discretion Congress afforded to the government to recommend a third-point reduction is unnecessary to ensure that district courts are able to sentence a defendant commensurate with the court's evaluation of the defendant's acceptance of responsibility. Because the Guidelines are advisory, if a district court disagrees with the government's decision not to recommend a third-point reduction in a particular case, the court is free to vary downwards from the advisory Guidelines' range when imposing its sentence.[31]

[30] Pub. L. No. 108-21, § 401(g)(2)(B), 117 Stat. 672.

[31] *See, e.g.*, *Blanco*, 466 F.3d at 918 (varying downward after the government declined to recommend a third point, to a sentence "seven months shorter than what the low end of the Guidelines range would have been had the government moved for a § 3E1.1(b) departure").

B. Part B—Definition of "Controlled Substance Offense" (§4B1.2)

As the Commission has noted, two courts of appeals have concluded that the term "controlled substance" in §4B1.2(b) refers exclusively to a substance controlled by the federal Controlled Substances Act, while several others have interpreted the term to include substances that are either federally controlled or controlled under applicable state law. In a statement respecting the denial of a petition for certiorari, two Justices of the Supreme Court called for the Commission to "address this division" among the courts of appeals "to ensure fair and uniform application of the Guidelines." *Guerrant v. United States*, 142 S. Ct. 640, 640-41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari). In response to this issue, the Commission proposes to amend §4B1.2(b) to define "controlled substance," and the Commission has provided two options for that definition. The Department agrees that the Commission should resolve the issue by defining "controlled substance" in §4B1.2(b), and the Department supports the definition in Option 2, which would provide that the term "controlled substance" refers to substances that are either included in the federal Controlled Substances Act or otherwise controlled under appliable state law.

1. The Commission Should Adopt the Broader Definition of "Controlled Substance" set Forth in Option 2

Section 4B1.2(b) defines the term "controlled substance offense" to mean "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." USSG §4B1.2(b). Two courts of appeals—the Second and Ninth Circuits—have concluded that the term "controlled substance" in §4B1.2(b) "refers exclusively to a substance controlled by the" federal Controlled Substances Act.[32] In contrast, at least five other courts of appeals—including, most recently, the Third Circuit—have issued decisions that decline "to engraft the federal Controlled Substances Act's definition of 'controlled substance'" onto §4B1.2(b).[33]

The Commission proposes adding a definition for the term "controlled substance" to §4B1.2(b) and has provided two options for that definition. Option 1 would define "controlled

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[32] *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018); *see United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021). Because New York controls several substances that are not scheduled under the Controlled Substances Act, almost no New York state drug trafficking offenses are considered "controlled substances offenses" in the Second Circuit, even though the additional substances (such as naloxegol and positional isomers of cocaine) are rarely if ever prosecuted in New York state. This has been a huge windfall for some recidivist drug traffickers. *See United States v. Swinton*, 495 F. Supp. 3d 197 (W.D.N.Y. 2020)(New York offense of Criminal Possession of a Controlled Substance in the Third Degree not a prior controlled substance offense because state's list of "narcotic drugs" includes naloxegol, which is not federally scheduled); *United States v. Fernandez-Taveras*, No. 18-CR-455 (NGG), 2021 WL 66485, at *4-5 (E.D.N.Y. Jan. 7, 2021), appeal withdrawn sub nom. *United States v. Taveras*, No. 21-155, 2021 WL 1664107 (2d Cir. Apr. 5, 2021) (New York offense of Criminal Possession of a Controlled Substance in the Second Degree not a prior controlled substance offense because state's list of "narcotic drugs" includes positional isomers of cocaine that are not federally scheduled).

[33] *United States v. Ruth*, 966 F.3d 642, 652 (7th Cir. 2020); *see, e.g.*, *United States v. Lewis*, __ F.4th __, 2023 WL 411362 (3d Cir. Jan. 26, 2023); *United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020); *United States v. Henderson*, 11 F.4th 713, 718-19 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021).

substance" to mean "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*)." Option 2 would define "controlled substance" to mean "a drug or other substance, or immediate precursor, *either* included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) *or otherwise controlled under applicable state law*."

The Commission should adopt the broader definition set forth in Option 2. Option 2's definition of "controlled substance" is faithful to the current language of §4B1.2(b), which defines a "controlled substance offense" as an offense "under federal *or state law*" that prohibits the manufacture, import, export, distribution, or dispensing of a "controlled substance," or the possession of a "controlled substance" with intent to engage in one of those activities. USSG §4B1.2(b) (emphasis added). Because §4B1.2(b) specifically refers to state law in defining the offense, it follows that §4B1.2(b)'s definition of "controlled substance offense" covers offenses involving substances controlled under federal *or* relevant state law.[34]

Option 2 also avoids the substantial problems presented by Option 1, which is that Option 1 is unduly narrow and would lead to unnecessary complexities at sentencing. Because Option 1 defines "controlled substances" to mean only those substances listed in the federal drug schedules, a state drug offense would qualify as a "controlled substance offense" under Option 1 only if the state's definition of a particular controlled substance is no broader than the federal definition. If the state's definition of the controlled substance is even slightly broader than the federal definition, then every state conviction involving that substance would no longer qualify as a "controlled substance offense" under §4B1.2(b). Likewise, if a particular state drug offense is not divisible by drug type, and the relevant state drug schedules include any chemical compound that is not federally controlled, then every violation of that state statute would fail to qualify as a "controlled substance offense," even if a particular defendant's offense conduct indisputably involved a federally controlled substance.

This concern is not merely speculative. In recent years, federal courts have grappled with slight differences between the federal and state definitions of cocaine, heroin, and methamphetamine, including in the context of §4B1.2(b), with some courts holding that the relevant state definitions are categorically broader than the federal definitions.[35] For example, in 2015, the federal definition of cocaine was amended to exclude ioflupane, a substance used in the diagnosis of Parkinson's disease that previously fell within the federal definition of cocaine.[36] As far as the government is aware, no one has ever been criminally prosecuted for a drug offense involving ioflupane. Nevertheless, because many state definitions of cocaine still encompass ioflupane, criminal defendants have argued—sometimes successfully—that *all* cocaine convictions under those states' laws fail to qualify as "controlled substance offenses"

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[34] *See* U.S. Br. in Opp., *Guerrant v. United States*, S. Ct. No. 21-5099, at 9 (filed Nov. 3, 2021).

[35] *See, e.g.*, *Ruth*, 966 F.3d at 645-51 (holding that Illinois's definition of cocaine is categorically broader than the federal definition because the relevant Illinois statute includes cocaine's positional isomers, while the federal definition covers only cocaine's optical and geometric isomers); *United States v. Owen*, 51 F.4th 292 (8th Cir. 2022) (holding that Minnesota's definition of cocaine is categorically broader than the federal definition because Minnesota's statute bans all cocaine isomers); *United States v. Rodriguez-Gamboa*, 946 F.3d 548, 551-53 (9th Cir. 2019) (considering whether California's definition of methamphetamine, which includes its geometric and optical isomers, is categorically broader than the federal definition, which includes only its optical isomers.)

[36] *See* 80 Fed. Reg. 54715-01 (Sept. 11, 2015), available at 2015 WL 5265212; 21 C.F.R. § 1308.12(b)(4)(ii).

under §4B1.2(b) or "serious drug offenses" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).[37]

If the Commission were to adopt the "controlled substance" definition in Option 1, this kind of litigation would only increase, as would the associated burden on the sentencing courts. For example, in some cases, the United States might have to present scientific evidence to the sentencing court to demonstrate that a particular state's drug definition is not actually broader than the corresponding federal definition.[38]

2. The Commission Should Clarify that the Substance at Issue Must Have Been Controlled when the Defendant Committed the Predicate Offense

The Department also suggests that the Commission add language to the end of Option 2's definition to clarify that the substance at issue must have been controlled "at the time the defendant committed the predicate offense." Because the "controlled substance offense" definition applies to prior convictions, a federal sentencing court should look to the applicable drug schedules in effect at the time of the prior crime to determine whether the defendant engaged in conduct involving a "controlled substance." Without that clarification, the courts of appeals might continue to adopt different views about which version of the applicable drug schedules a sentencing court should consult when deciding whether a prior offense qualifies as a predicate "controlled substance offense."[39] Clarification would also preclude defendants who committed serious drug crimes from arguing that any subsequent narrowing of a particular drug definition—for example, the exclusion of ioflupane from a state's cocaine definition—renders all prior state convictions involving that drug categorically overbroad for purposes of §4B1.2(b).[40]

3. The Department Supports Adding Option 2's Definition to Application Note 2 to §2L1.2

The Commission has also requested comment on a possible amendment to Application Note 2 to §2L1.2, which contains a definition of "drug trafficking offense" that is similar to the definition of "controlled substance offense" in §4B1.2(b). If the Commission were to amend §4B1.2(b) to include the definition of "controlled substance" set forth in Option 2, the Department recommends that the Commission add the same definition to Application Note 2 to §2L1.2, without otherwise changing Application Note 2's definition of "drug trafficking offense," in order to promote consistency in the Guidelines Manual.

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[37] *See, e.g.*, *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022) (finding that defendant's prior Iowa cocaine offenses were not serious drug offenses under the ACCA because the relevant Iowa statute "included Ioflupane").
[38] *See, e.g.*, *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1155 (9th Cir. 2020) ("In this case, the district court held an evidentiary hearing, heard the testimony of expert witnesses, and concluded that geometric isomers of methamphetamine do not chemically exist.").
[39] *See, e.g.*, *United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022) (concluding that a sentencing court should "consult[] the drug schedules in place at the time of the prior conviction" to determine whether the conviction is a controlled substance offense); *Bautista*, 989 F.3d at 704 (concluding that a sentencing court should consult "federal law at the time of [the] federal sentencing" to determine whether a prior state conviction qualifies as a controlled substance offense).
[40] *See Lewis*, __ F.4th __, 2023 WL 411362, at *6-*7.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

Jonathan J. Wroblewski

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