

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION  
ON PROPOSED AMENDMENTS TO THE GUIDELINES

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Judge Reeves and members of the Sentencing Commission:

My name is Marlo Cadeddu, and on behalf of the Practitioners Advisory Group, I thank you for the opportunity to provide testimony to the Commission regarding proposed amendments to the United States Sentencing Guidelines now under consideration. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We appreciate the Commission's willingness to consider our positions on the Commission's proposed amendments to the guidelines.

My testimony will address the PAG's positions on proposed amendments regarding: (1) Firearms; (2) Fake Pills; (3) First Step Act-Drug Offenses; and (4) Circuit Conflicts.

## II. Proposed Amendment, Fake Pills

The PAG understands the DEA's concern about the proliferation of fake pills that contain fentanyl and the public's concern about the sharp increase in overdose deaths from synthetic opioids containing fentanyl. Based on PAG members' experiences with the drug guidelines, however, we cannot support the new two-level enhancement proposed in §2D1.1(b)(13).

First, it is unclear what evidence supports the creation of this new enhancement with its reduced *mens rea* standard. Other than the increases in the availability of fake pills and the increase in overdose deaths, there does not appear to be any other evidence-based reason for establishing this two-level enhancement. The Commission has not explained what correlation there is between this new enhancement and the concerns raised by DEA.

Second, the proposal sweeps far too broadly. In the PAG's experience, this enhancement could apply in any case where a defendant provided pills that were not directly obtained from a pharmacy. Assuming that a defendant obtains pills from anywhere other than a pharmacy, there is an argument that he or she may have reason to believe that the pill was not legitimately manufactured. The "reason to believe" standard is akin to a strict liability standard, where any pill not obtained through a legitimate, legal source, such as a pharmacy, would subject a defendant to this two-level enhancement.

Finally, the PAG believes that the existing 4-level enhancement in §2D1.1(b)(13) adequately addresses the concerns regarding fentanyl-laced pills using an appropriate *mens rea* standard.

For these reasons, the PAG cannot endorse this proposed amendment.

### III. First Step Act-Drug Offenses

#### A. §5C1.2, Safety-Valve

The PAG supports the Commission’s amendment of §5C1.2 to reflect the provisions contained in the First Step Act, including the proposed amendments to the commentary and conforming changes to §4A1.3.<sup>1</sup> The PAG asks the Commission to consider providing an explanation in the commentary that these criteria be read conjunctively. Given the circuit conflict regarding identical language under 18 U.S.C. § 3553(f)(1), the PAG believes that clear guidance about how this provision should be read is necessary in order to promote uniformity in applying safety-valve relief that is not dependent on the jurisdiction where a defendant is prosecuted.

The PAG notes that Congress’s rationale for revising this provision in the First Step Act was to expand the class of defendants eligible for safety valve relief.<sup>2</sup> Reading this provision conjunctively provides judges with greater discretion to sentence individual defendants below any required mandatory minimum sentence where a defendant meets the other eligibility requirements for safety-valve relief and in light of the sentencing factors under 18 U.S.C. § 3553(a). Providing judges discretion to sentence below the mandatory minimum sentence, however, does not mean that judges should or will do so. Thus, a conjunctive reading of this provision allows a court the flexibility to fashion a sentence that is tailored to an individual defendant. As the Eleventh and Ninth Circuit courts have explained, a conjunctive reading of this provision is consistent with the plain language of the statute and the rule of lenity. Courts must presume that when Congress uses the word “and” it means “and.”<sup>3</sup>

With respect to the amendments to §2D1.1(b)(18) and §2D1.11(b)(6), the PAG endorses Option 1. This proposal does not resolve the circuit conflict regarding whether the criminal history criteria for safety-valve relief should be read disjunctively or conjunctively. As a result, this option may result in sentencing disparities among similarly situated defendants; a defendant in a jurisdiction where this provision is read disjunctively would be disqualified from relief, while a defendant in a jurisdiction that reads this language conjunctively is eligible for relief. Between the two options presented, however, the PAG believes that the first option better reflects the rationale for providing this relief and will result in relief for a broader range of defendants.

Like its request related to §5C1.2, the PAG also asks the Commission to consider providing guidance in the commentary to recommend that this provision be read conjunctively,

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<sup>1</sup> These criteria are contained in the amended §5C1.2, which in turn reflects the provisions of the First Step Act: (1) the defendant does not have (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guidelines. *See* U.S.S.G. §5C1.2(a)(1)(A)-(C).

<sup>2</sup> *See, e.g., United States v. Lopez*, 998 F.3d 431, 442 (9<sup>th</sup> Cir. 2021) (citing statements of senators explaining rationale for First Step Act).

<sup>3</sup> *See United States v. Garcon*, 54 F.4<sup>th</sup> 1274, 1277-1280, 1285 (11<sup>th</sup> Cir. 2022); *see also Lopez*, 998 F.3d at 435-437, 443-444.

rather than disjunctively. If the Commission provides the requested guidance for reading §5C1.2(a)(1)(A)-(C), then providing the same guidance under §§2D1.1(b)(18) and 2D1.11(b)(6) is consistent. For the reasons described above, the PAG favors a conjunctive reading of this provision.

In addition, the PAG believes that the Commission should provide guidance on what constitutes “1-point,” “2-point” or “3-point” offenses. To the extent that this language is contained in the text of guidelines §5C1.2, §2D1.1(b)(18) and §2D1.11(b)(6), the PAG believes that the Commission should explain what it means by these terms, just as it proposes to define “violent offense” in §5C1.2, Application note 1(A). The PAG’s position is that these terms should be defined as they are used to calculate criminal history points under §4A1.1 and its commentary. This will make these terms consistent across the guidelines and provide uniformity in the application of this guideline provision across the country.

**B. Recidivist Penalties for Drug Offenders**

The PAG is unopposed to this amendment conforming §2D1.1 to the relevant First Step Act statutory provisions.