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 Susan Lin, 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 U.S. Sentencing Guidelines. 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) the career offender guideline and (2) criminal history.

I. Proposed Amendment to Career Offender Guideline, USSG § 4B1.2

A. The Categorical and Modified Categorical Approach

The PAG appreciates the concerns expressed by commenters regarding the difficulties of using the categorical approach and the modified categorical approach to determine whether an offense is a crime of violence or a controlled substance offense for purposes of the career offender guideline. While these analytical approaches may be challenging to apply, the Supreme Court has explained the rationale for this approach: "an elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary."[1] The PAG believes that this reasoning applies equally in the context of the career offender guideline, so we cannot support the Commission's current proposal to eliminate the categorical and modified categorical approach. Moreover, it appears that the Commission's current proposal does not do away with the categorical approach, but adds a separate elements and fact based analysis for state convictions. The PAG contends that this will make the application of §4B1.2 even more unwieldy and result in greater disparities in sentencing.

In explaining the elements-based categorical approach, the Supreme Court states that "allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. . . only a jury, not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction."[2] Thus, "[a] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense."[3] There is a significant body of law that employs the categorical approach to interpret statutes and the guidelines, and despite the difficulties in implementation, courts and attorneys have been doing these analyses for the

[1] *Mathis v. United States*, 136 S.Ct 2243, 2253 (2016).

[2] *Mathis*, 136 S.Ct. at 2252 (citation omitted).

[3] *Id*. (citation omitted).

past twenty-five years.[4] This precedent is firmly established, and the PAG believes that adopting the Commission's proposed amendment will upend the manner in which the career offender guideline is applied, to the detriment of our clients.

The Commission's approach will result in courts employing both the categorical approach and the Commission's proposed factual approach in cases involving the Armed Career Criminal Act ("ACCA"). Under ACCA, the first step of analysis will use the categorical and modified categorical approaches for determining whether a prior conviction is a predicate offense under 18 U.S.C. § 924(e). Once that analysis is completed, then the court will turn to the guidelines, where it will use the Commission's proposed factual approach to determine the ACCA defendant's base offense level. Thus, the Commission's proposal will require the use of two different approaches to evaluate the same prior convictions. The PAG submits that this will create confusion and even greater litigation in these cases, where, conceivably, a predicate offense may not provide enhancement under ACCA but may result in an enhancement based on the Commission's approach.

For example, Pennsylvania's "Robbery of a Motor Vehicle" statute does not include the use of force as an element; it only requires the taking of a car in the presence of an owner.[5] This is not an ACCA predicate. Under the Commission's proposal, however, a sentencing court can look at the facts of the prior state conviction as read by the prosecutor at a change of plea or sentencing hearing and decide that it qualifies as a crime of violence under §4B1.2 and, by incorporation, §2K2.1.

The Commission's proposal with respect to state court convictions is even more problematic. First, it does not eliminate the categorical approach. A court is still required to look at the statute of conviction and its underlying elements. That is no different than employing the categorical approach. The difference is that where the categorical approach generally precludes the court from considering the manner in which an offense was committed, the Commission's approach would require this. For the reasons that the categorical approach was developed, allowing the court to consider the manner in which an offense was committed – which is often not clear from the documents that are available for the court's review – will create even more uncertainty in the way that this guideline is applied.

Second, the PAG is concerned that this approach will not reflect the importance of plea bargaining that is often used to resolve state cases. Take a prior assault conviction. The underlying documents may reflect some degree of force that the defendant may have used to commit the offense, but because of evidentiary issues or other considerations, the state may agree to the defendant resolving the case with a plea to a lesser charge involving a negligent or reckless mens rea. In those situations, what controls? The actual offense of conviction, or what is contained in the plea agreement, the colloquy or other *Shepard* documents? In PAG members' experience, the state may require the defendant to stipulate to certain facts in order to resolve the

[4] "*Taylor* [*v. United States*, 495 U.S. 575 (1990)] set out the essential rule governing ACCA cases more than a quarter century ago." *Mathis*, 136 S.Ct. at 2251.

[5] 18 Pa.C.S. § 3702.

case with a lesser offense. This type of plea bargaining is pervasive at the state level. The PAG believes that the Commission's proposal will create confusion and uncertainty over how such prior convictions are considered under this guideline.

For the same reasons, the PAG also believes that the Commission's proposal may exponentially expand the number of convictions that may qualify as predicate offenses, and thereby increase the number of defendants potentially eligible for enhanced sentences under the career offender guideline. The Commission's proposed amendment runs counter to the Commission's 2016 report 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.[6]

Expanding the number of defendants to whom this guideline's significant enhancements apply does not comport with the uneven and inequitable manner in which this guideline already operates. The Commission's current proposal will only make it more unfair.

B. Robbery

As the Commission notes, its proposal to define robbery as Hobbs Act Robbery, with reference to 18 U.S.C. § 1951(b), is contrary to the view of every circuit court of appeals that has considered it. The PAG agrees with these courts' analyses that this offense is too broad and can be committed in too many ways to be considered a crime of violence. If Hobbs Act robbery is not a crime of violence for purposes of statutory construction, then it should not be considered a crime of violence for purposes of the guidelines.

The Commission's proposed amendment would expand crimes of violence to include robberies where force or injury is directed solely at property, and not at a person. Thus, crimes that do not involve violence towards another person, such as vandalism, criminal mischief and destruction of property, could potentially qualify as crimes of violence under the Commission's proposed definition of robbery. The PAG cannot support such a radical expansion of "crimes of violence" to encompass property crimes.

In addition, the PAG cannot support the Commission's proposed language defining actual or threatened force as "force sufficient to overcome a victim's resistance." The PAG believes that this terminology is too vague and subjective and does not provide clear guidance on what conduct is covered. For example, will it depend on the type or vulnerability of the victim? Establishing the contours of what meets this standard will result in extensive litigation, and the PAG believes that it will create significant disparities across the country as courts grapple with determining what exact conduct this targets.

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[6] *See* U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* at 25-37 (August 2016) (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).

C. Inchoate Offenses

The PAG believes that inchoate offenses should not be considered crimes of violence or controlled substance offenses for the purposes of the career offender guideline. For starters, Congress's career offender directive at 28 U.S.C. § 994(h) is generally silent on the issue of whether "crime of violence" and "controlled substance offense" include inchoate offenses. Only inchoate offenses under the Drug Trafficking Vessel Interdiction Act are specifically cited in the directive. *See* 46 U.S.C.A. § 70506(b).

By definition, inchoate offenses reflect a lower level of culpability and seriousness than for the related substantive offense. *See United States v. Trevino*, 720 F.2d 395, 399 (5th Cir. 1983) (recognizing that "culpability [for an inchoate offense] is based on a defendant's intent rather than on the consummation of the underlying offense"). This is true even if, for example, a conspiracy offense requires an overt act in furtherance of the conspiracy. *See United States v. Robinson*, 547 F.3d 632, 638 (6th Cir. 2008) (noting the established rule that "conspiracy is an inchoate offense that needs no substantive offense for its completion" and that "culpability for the conspiracy itself [is to be distinguished] from culpability for the substantive offenses of co-conspirators").

Take attempts as another example. "An attempt to commit a crime, which is recognized as a crime distinct from the crime intended by the attempt, punishes conduct that puts in motion events that would, from the defendant's point of view, result in the commission of a crime but for some intervening circumstance." *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003). And while "[m]ere preparation for the commission of a crime" does not constitute an attempt, "the line between mere preparation and a substantial act done toward the commission of a crime is . . . not always a clear one." *Id.* at 136. Thus, given the slim, ill-defined margin between conduct that constitutes an attempt versus conduct that isn't even criminal, there is good reason to exclude attempts—and all inchoate offenses—from the definitions of "crime of violence" and "controlled substance offense."

Given the difference in responsibility for inchoate offenses, the PAG believes that inchoate offenses should be excluded as potential predicate offenses for the career offender enhancement.

D. Offers to Sell

Like inchoate offenses, offers to sell a controlled substance are one step removed from the actual act of selling a controlled substance. For that reason, these offenses reflect a lower level of culpability and seriousness, and the PAG believes that they should not be considered controlled substance offenses for purposes of the career offender guideline.

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