PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

United States Sentencing Commission
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Circuit Conflicts Testimony
February 27, 2023

Part A: Acceptance of Responsibility

The Commission is seeking comment regarding the circuit conflicts related to acceptance of responsibility, with one issue occurring at the pretrial stage in relation to suppression motions and the other occurring at the post-conviction stage in relation to objections at the sentencing hearing. While each pertain to different stages in the process, both relate to defendants seeking to use the due process procedures available to them as they proceed through the federal court system.

The probation office becomes involved with a case after the plea or verdict and, therefore, acknowledges that motion to suppress proceedings are generally outside of our purview. However, comparing the case law addressing this matter reveals that, in cases where acceptance of responsibility has been denied on this basis, the crux of the argument is that the amount of work preparing for a suppression hearing is akin to that of preparing for trial, calling into question whether a defendant has actually accepted responsibility and saved resources. POAG favors the case law rationale that there are marked differences between the amount of resources expended for a suppression hearing and the amount of resources expended to conduct an entire trial. POAG also stresses the importance of recognizing that, at the core of this issue, is whether the defendant has accepted responsibility for his or her conduct, even if they choose to avail themselves of some of their due process protections.

Further, POAG believes defendants should not be penalized for exercising their due process right to file a motion to suppress. Motion to suppress hearings are part of the process and assists both parties in identifying the evidence that will lawfully be considered as they determine whether to proceed to trial. If acceptance of responsibility was automatically denied in cases where defendants exercise their right to file a motion to suppress, there would be no further incentive to plead guilty.

Therefore, POAG supports the proposed amendment to USSG §3E1.1(b) to clarify that litigation related to a charging document, early discovery motions, and early suppression motions ordinarily are not considered "preparing for trial" under this subsection. POAG does note there could be varying interpretations of the term "early" and court calendar processes are impacted by other factors, as well as variations of the use of term "ordinarily." Therefore, in order to ensure this amendment has the intended impact, POAG would recommend these terms not be included in the final amendment.

POAG further believes such an amendment would be a comparable instruction to that set forth under USSG §3E1.1, comment. (n.6), which directs that "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." POAG's position on this matter is consistent with the majority of the circuits that have concluded that a motion to suppress does not preclude the defendant from being eligible for the additional one-level reduction for acceptance of responsibility.

In relation to this issue, POAG notes that the Court's discretion remains relevant in light of the fact that the Court also engages in trial preparation. According to USSG §3E1.1(b), the defendant's plea notification allows the government to avoid preparing for trial and permitting the government and *the court* to allocate their resources efficiently. Consider, for example, a plea agreement stipulation that the government would move for the additional one-level reduction, even if the government did engage in some trial preparation, regardless of the fact that the Court had already contributed resources in preparing for trial. POAG notes this point due to case law discussions on whether USSG §3E1.1(b) is discretionary after the listed criteria have been met, but the Court's discretion remains relevant as it is a listed factor. Meaning, a prosecutor could move for the additional reduction under USSG §3E1.1(b), but the court could decline to accept the motion based on their own assessment of expended resources related to trial preparations.

With regard to the second proposed amendment pertaining to objections at sentencing, POAG notes that the Commission heard testimony on this issue in 2018. At that time, the amendment was in relation to the two-level decrease under USSG §3E1.1(a) addressing circumstances in which the defendant files objections to relevant conduct, but there is overlap with the current proposed amendment to USSG §3E1.1(b), which notes "Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered 'preparing for trial.'" The fact that the issue of sentencing objections continues its relevance suggests it may need further revision.

The proposed amendment seeks to resolve the circuit conflict regarding whether the government may withhold a motion for the additional one-level reduction under USSG §3E1.1(b) in cases where defendants exercise their due process right to raise a sentencing challenge. However, POAG notes this amendment does not in any way preclude the government from taking the position that the defendant's conduct in filing objections constitutes a false denial or a frivolous contestation of relevant conduct, thus making defendants ineligible for the two-level decrease under USSG §3E1.1(a). Therefore, POAG questions whether the issue of instances where defendants raise sentencing challenges is better addressed in relation to USSG §3E1.1(a), rather than USSG

§3E1.1(b). Under subsection (a), objections to the defendant receiving a two-level decrease ordinarily pertain to an allegation that the defendant has falsely denied or frivolously contested relevant conduct. Alternatively, the defendant's same sentencing challenges could also be used as a basis for the government to decline to move for the additional one-level reduction, or for the Court to deny the reduction, under subsection (b). Subsection (a) historically has focused on accepting responsibility for the instant federal offense and subsection (b) has historically focused on doing so in a timely manner. The issue for comment for this proposed amendment cited *United States v. Jordan*, 877 F.3d 391 (8th Cir. 2017). The concurring opinion in *Jordan* very succinctly summarized this very issue as follows:

> But a defendant who has not accepted responsibility for the offense of conviction, or who has falsely denied or frivolously contested relevant conduct, has likely not earned the two-level reduction under § 3E1.1(a) in the first instance. See USSG § 3E1.1 cmt. n.1. The government is free to refuse a third-level reduction motion pursuant to any interest contained in § 3E1.1, but as acceptance of responsibility under § 3E1.1(a) is an absolute prerequisite to eligibility for a third-level reduction, the government's interest in acceptance of responsibility has already been satisfied by the time the third-level reduction comes into the picture. Nothing in the plain language of subsection (b) suggests consideration of the degree to which a defendant has accepted responsibility for the offense of conviction or some other relevant conduct. *Id.* at 397.

POAG acknowledges the concurring opinion's analysis in *Jordan* and questions if addressing the objections to sentencing challenges under subsection (b) would further confuse the ongoing application principles for acceptance of responsibility. Though, POAG considers the prospect of addressing the issue in both USSG §3E1.1(a) and (b) may better effectuate the Commission's intentions.

On February 24, 2023, POAG provided testimony before the Commission in relation to the proposed amendment regarding acquitted conduct, advocating that acquitted conduct, like dismissed and uncharged conduct, were equally reliable at the time of sentencing because the due process in relation to each was the same. In each instance, defendants would have the right to object, the right to confront witnesses, and the right to a hearing on the matter, and the Court would make a finding based upon a preponderance of the evidence. However, while preparing for the instant testimony, POAG reviewed several case law examples similar to the finding in *United States v. Burns*, 781 F.3d 688 (4th Cir. 2015), wherein defendants who exercised that right were deemed ineligible for an acceptance of responsibility reduction. POAG notes the interplay of these two pending amendments for the Commission's consideration. POAG maintains that acquitted conduct remains relevant at sentencing and, in the event it is deemed that it conflicts with the acceptance of responsibility provisions, POAG would recommend that the acceptance of responsibility provisions be amended to address the defendant's ability to object to relevant conduct without jeopardizing their ability to receive an acceptance of responsibility reduction under USSG §3E1.1(a) and (b). The feedback POAG received suggested that, while there was

some disparity with regard to the application of acceptance of responsibility, a majority of the districts liberally apply the acceptance of responsibility adjustment, even in cases where defendants object to relevant conduct. Therefore, POAG believes such an amendment would resolve those due process concerns and would follow the already existing practice in most districts.

Part B: Definition of Controlled Substance

Part B of the proposed amendment amends USSG §4B1.2 to address a circuit conflict regarding whether the definition of a "controlled substance offense" in USSG §4B1.2(b) only covers offenses involving substances controlled by the federal Controlled Substances Act pursuant to 21 U.S.C. § 801, or whether the definition also applies to offenses involving substances controlled by applicable state law. Resolution of this issue is significant, given that the definition in USSG §4B1.2(b) applies to the career offender guideline at §4B1.1, as well as several other guidelines that incorporate this definition by reference and rely on prior convictions for a "controlled substance offense" to determine the offense level.

Option 1 and Option 2 each define "controlled substance" as an offense under the Controlled Substances Act pursuant to 21 U.S.C. § 801, however, Option 2 has the added language "or otherwise controlled under applicable state law."

POAG further observed that Option 2 is clearly broader than Option 1, meaning more convictions would qualify as a controlled substance offense. During July 2017, POAG submitted a response to the proposed priority in light of the Commission's 2016 Report to the Congress: Career Offender Sentencing Enhancements, including its recommendations to revise the career offender directive at 28 U.S.C. § 944(h) to focus on offenders who have committed at least one "crime of violence." At that time, POAG recognized the Commission's research that revealed defendants who qualify as a career offender received lower sentences, including variances below the guideline range, in cases where defendants qualify as a career offender as a result of "controlled substance offenses." POAG members at that time indicated that courts were varying downward from the career offender range in these circumstances as a way to differentiate between defendants who qualify as a career offender based upon "controlled substance offenses" from defendants who qualify based upon at least one "crime of violence." The Commission's 2016 Report to the Congress also indicated that defendants who qualified as a career offender due to at least one "crime of violence" recidivate at a slightly higher rate than those who qualified based solely on "controlled substance offense" predicates. As such, Option 2 will result in more defendants qualifying as a career offender based upon "controlled substance offense" predicates and potentially lead to a higher variance rate under USSG §4B1.1, though this may be the cost of creating a higher continuity of application.

Potential disparity concerns regarding the applicable state law within Option 2 were discussed as well. The controlled substance schedules and their corresponding quantity thresholds vary from state to state. Meaning a defendant with a prior conviction from one state will qualify as a career offender, but a defendant in the neighboring state who trafficked the same substance would not qualify as a career offender because the substance trafficked was not a controlled substance offense in that state or the same quantity received different treatment state-to-state. Though often times these substances are not the mainstream types of drugs involved in the drug trade, when relying

on state law to determine a guideline provision, such as career offender, it does invite some disparity into the process. These concerns notwithstanding, when one looks at it from the perspective of the defendant and accepts that the core conduct involves the defendant knowingly selling an illicit substance, the various differences in the schedules or quantities becomes less important. Certainly, one jurisdiction may select a specific substance to criminalize for the betterment of their respective citizenry, but the defendant's choice to violate those rules is the central issue that should be focused upon. It then matters less whether one state criminalizes an obscure substance when the neighboring state does not. The core of the offense is the knowing violation of prohibition on the sale or distribution of a specific substance.

When discussing this proposed amendment, POAG reviewed the Second Circuit's interpretation of the guidelines on this issue as it pertains to New York State's criminalization of the sale of Human Chorionic Gonadotropin (HCG), a drug that is not listed under the Controlled Substance Act. The circuit court found that HCG was not a "controlled substance" under the guideline definition. See *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018). The Second Circuit also has a similar case dealing with naloxegol, which is substance that was removed from the federal controlled substances schedules promulgated under the Controlled Substances Act, but was a controlled substance as it pertains to New York's controlled substance schedule. See *United States v. Gibson*, 55 F.4th 153 (2nd Cir. 2022). These two examples from the second circuit highlight the disparity that can occur, which is a large factor for why POAG supports Option 2.

POAG discussed each option thoroughly before determining the majority ultimately favored Option 2, consistent with the majority of the circuits that have addressed this issue. This option provides clarity, but it does not substantively change the characterization of controlled substance offense that has been the long-standing definition prior to recent varied interpretation.

POAG is likewise in favor of the Commission amending USSG §2L1.2, comment. (n.2), to include the same definitions of "controlled substance" for the purposes of the "drug trafficking offense" definition, regardless of whether the Commission chooses Option 1 or 2. POAG believes it is important to have internal consistency within the guidelines.