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A Standing Advisory Group of the United States Sentencing Commission

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February 22, 2024

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to Sentencing Guidelines, December 26, 2023

Dear Judge Reeves:

The Practitioners Advisory Group (“PAG”) provides comments on the Commission’s proposed amendments regarding: (1) the rule for calculating loss under §2B1.1; (2) the treatment of youthful individuals; (3) the use of acquitted conduct; (4) the resolution of two circuit conflicts; (5) miscellaneous amendments related to §2D1.1(a) and §4C1.1; and (6) the simplification of the three-step process for calculating the guideline range.

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VI. Simplification of the Three-Step Process

As a part of its policy priority to simplify the guidelines, the Commission proposes multiple amendments to the guidelines to remove references to the “three-step process” and reclassify various departure grounds that exist throughout the guidelines as factors that may be relevant to the § 3553(a) analysis. The Commission has also published six issues for comment related to this proposal.

The PAG does not comment here item by item on each proposed change to the guidelines but instead provides overarching comment on the Commission’s proposal as described in the Synopsis of Proposed Amendment. Before responding to the specific proposals, the PAG wishes to reiterate its support for the Commission’s decision to prioritize simplification efforts, a policy priority that is both welcome and much needed. Sentencing guidelines tailored to fit “every conceivable wrinkle of each case” are impossible, unworkable, and unjust.¹¹⁸ For more than thirty years, stakeholders have urged that the guidelines be “more, not less, generic,” and that the Commission avoid the urge to reflexively amend the guidelines in order to capture new offenses or offender details in the absence of a demonstrated empirical need.¹¹⁹ The PAG has long supported efforts to simplify the guidelines by removing and/or ameliorating the effects of

¹¹⁸ See U.S.S.G. Ch. 1, Pt. A, subpart 1.

¹¹⁹ See, e.g., Statement of Mary Lou Soller on behalf of the American Bar Association Concerning Sentencing Guideline Amendments at 11 (March 14, 1995) (noting the “impressive consensus . . . between judges, practitioners, and current Sentencing Commissioners on the need to simplify the Guidelines,” and urging Commission to avoid the temptation “to construct new guidelines, or to concoct new specific offense characteristics, to address . . . specific criminal activity” when the guidelines already “produce appropriately stiff punishment”), available at: <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/19950314/Testimony-Pt.3.pdf>.

guideline provisions that add to the phenomenon of “factor creep” and sentencing recommendations that too often skew too high.¹²⁰

The PAG also supports the Commission’s efforts to find ways that the guidelines can better reflect modern sentencing practice. In the experience of PAG members, the three-step process complicates the sentencing analysis unnecessarily, in large part because many of the guideline departure provisions conflict with sentencing courts’ statutory obligations. This includes, in particular, the cabined-in departure policies reflected in Chapter 5, Part H that run counter to courts’ statutory obligation to consider the full panoply of defendant- and case-specific factors and impose a sentence sufficient but not greater than necessary to satisfy the purposes of punishment. This is an area ripe for simplification, and the PAG commends the Commission’s interest in revisiting its departure policies.

Notwithstanding these areas of commonality, the PAG does not support the Commission’s proposal to simplify the three-step process by reclassifying departure provisions as factors that may be relevant to statutory sentencing factors at various points in the guideline analysis. Far from simplifying the process of sentencing, the proposal confuses it by conflating the guideline calculation with the separate and distinct § 3553(a) analysis required to be performed in each case as a matter of law. Moreover, the proposal ignores overwhelming empirical data that the guideline’s departure provisions are not ordinarily found to be relevant in individual cases. The PAG believes that any effort to identify and list only certain factors that “may be relevant” to the § 3553(a) analysis would likely overstep the Commission’s own statutory authority, and it inherently risks elevating consideration of the identified factors over the infinite variety of other factors to be considered – thereby potentially bringing the guidelines into unnecessary conflict with sentencing courts’ statutory duty to “conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.”¹²¹

As set forth below, the PAG agrees that the Commission should delete Part A of Chapter 1, and partly agrees with the proposed revisions to §1B1.1(b). Instead of the proposal to “re-classify” the guideline’s departure provisions, however, the PAG recommends that the Commission simply delete all departure provisions in Chapters Two, Three, Four, and Five as well as Chapter Five’s Specific Offender Characteristics. The PAG recommends that the Commission not adopt the proposed revisions to Chapter Six of the guidelines. If the Commission intends to list factors

¹²⁰ See, e.g., Letter of PAG Chair at 9 (March 14, 2007) (urging the Commission to avoid “blindly recommending increases that may well be unnecessary and unjustified”); 16 (opposing proposed specific offense characteristic for facts “that are not directly associated with a higher level of culpability or harm”); Letter of PAG Chair at 12-13 (March 14, 2007) (advocating for application note that “eliminates the need for additional listings in the Drug Quantity and Drug Equivalency Tables” and “advances the aim of simplification”), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt16.pdf; U.S.S.C., Letter of PAG Chair at Attachment pp. 3 (March 24, 1997) (opposing proposed amendment concerning a special skills enhancement “in the spirit of ‘simplification’ . . . unless evidence is presented which overwhelmingly demands special treatment”), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199703/199703_PCpt7.pdf.

¹²¹ *Concepcion v. United States*, 597 U.S. 481, 492 (2022) (citations omitted).

that “may be relevant” to the § 3553(a) analysis in the Guidelines Manual, the PAG suggests that the Commission do no more than report the factors that have been relied on by courts as reflected in sentencing data.

A. The Commission’s Proposal

1. *Proposed Amendments to Chapter One*

The Commission’s proposal would amend Chapter One in the following ways. First, it would delete the “Original Introduction to the Guidelines Manual” currently contained in Chapter One, Part A. The PAG supports this proposal.

Next, it would revise the application instructions in §1B1.1 to reflect the simplification of the “three step” process into two steps. The PAG supports the goal of eliminating the “three-step” process and most of the proposed changes to §1B1.1, with the following exceptions. The PAG does not recommend adding proposed §1B1.1(a)(9), which would instruct courts to “[a]pply, as appropriate, Part K of Chapter Five,” because in the PAG’s view, Chapter Five, Part K should simply be deleted from the guidelines as more fully discussed below.

Further, the PAG recommends that the Commission consider making the following changes to the proposed language in §1B1.1(b):

STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a) ~~AND RELATED GUIDANCE~~ — The court shall then consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) ~~and the guidance provided in Chapter Six~~ to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). See 18 U.S.C. § 3553(a).

Additionally, the PAG suggests that the Commission omit the last sentence of the proposed amendment to the Commentary to §1B1.1 that reads “and also instructs courts to consider guidance provided by the Commission in Chapter Six.” These changes are necessary because, as discussed below, the PAG recommends that the Commission not adopt proposed Chapter Six.

2. *Proposed Amendments to the Remainder of the Guidelines*

Beyond the proposed changes to Chapter One, the Commission proposes to further simplify the three-step process by: (1) converting the departure provisions set forth in specific guidelines in Chapters Two and Three into “Additional Offense Specific Considerations;” (2) converting the departure provisions set forth in Chapter Four into “Additional Considerations;” and (3) converting Chapter Five, Part H’s “Specific Offender Characteristics” and Part K’s “Departures” into “Factors Relating to Individual Circumstances” and “Factors Relating to the Nature and Circumstances of the Offense,” respectively, both of which would appear in a newly organized Chapter Six. Each of these proposed changes appears to reclassify the relevant departure grounds as considerations that “may be relevant to the court’s determination under 18 U.S.C. § 3553(a).”

The PAG does not support this approach. The policies reflected in the Sentencing Guideline’s departure provisions have been developed under myriad circumstances, and often for very different purposes than the required considerations set forth in § 3553(a).¹²² Perhaps because of their disjointed provenance, those provisions are not neutral and instead skew heavily toward consideration of aggravating circumstances. By our count, there are approximately 182 departure provisions set forth in the first five chapters of the guidelines.¹²³ Of these, 120 – fully two-thirds – are upward departure provisions. Only approximately 16% are downward departure provisions; the remaining 17% authorize both upward and downward departures or provide that downward departures on that ground are not ordinarily relevant and may be permitted only under certain circumstances.¹²⁴

In marked contrast to the Manual’s heavy emphasis on upward departures, courts do not find any reason to depart or vary upward in the vast majority of cases. The PAG has reviewed the statistics related to departures and variances for the past five years for which data are available. During that time, upward departures as a percentage of total cases sentenced have ranged from 0.4% to 0.6%. Upward variances as a percentage of the total cases sentenced have ranged from 1.8% to 2.3%. In no year did the percentage of defendants receiving an upward adjustment in the form of either a departure or a variance exceed 2.9% of total sentences. By contrast, during the past five years, between 46.2% and 55.2% of defendants received some sort of downward departure or variance. Even when departures pursuant to §5K1.1 and §5K3.1 and other government-sponsored departures and variances are excluded, between 19.9% and 23% of defendants – more than 1 in 5 – received a non-government-sponsored departure.

Clearly, the vast majority of federal judges believe the guidelines to be too harsh without reference to the upward departure options; upward departures are vanishingly rare and applied in fewer than half a percent of all cases sentenced. Yet fully two-thirds of the departure provisions

¹²² The statutory authorization for departures appeared in the now-excised 18 U.S.C. § 3553(b)(1), and their original purpose was to provide a carefully circumscribed pathway for judges to impose sentences outside of the guidelines “in specific, limited cases.” See *United States v. Booker*, 543 U.S. 220, 234 (2005) (discussing departure authority under 18 U.S.C. § 3553(b)(1)).

¹²³ We say approximately because counting departure provisions is necessarily somewhat inexact as some departure provisions contain subparts. The current version of the sentencing guidelines contain sentencing provisions authorizing departures in Chapters Two, Three, Four, and Five. The vast majority of those departure provisions – approximately 117 – are found in Chapter Two of the guidelines, most set forth in Application Notes to individual guideline sections with a few others in the Background or Introductory Comments. There are an additional 10 departure provisions in Chapter Three and 12 in Chapter Four. An additional 43 specific departure provisions are found in Chapter Five. Where a departure provision contains subparts that each set out a separate departure condition, we have counted those separately. Where a departure provision provides for various factors within a single part, we have counted that as one provision.

¹²⁴ §5H1.4 provides that alcohol or drug dependence or abuse and gambling addiction are not appropriate bases for departure, but that extraordinary physical impairment may be a reason to depart downward. Physical condition or appearance may be a basis for departure if present to an extraordinary degree.

in the Guidelines Manual provide for upward departures. For this reason alone, the PAG cannot endorse the current proposal; there is no empirical reason for the guidelines to call out these types of considerations – and not others – as potentially relevant to the § 3553(a) analysis when they have not been found relevant in the vast majority of sentencings.

Moreover, “[t]here is a long and durable tradition that sentencing judges enjoy discretion in the sort of information they may consider” at sentencing, and “[t]he only limitations on a court’s discretion to consider any relevant materials at . . . sentencing are those set forth by Congress in a statute or by the Constitution.”¹²⁵ Any attempt to list some of the infinite possibilities of factors that may bear on the § 3553(a) analysis inherently risks elevating the listed factors above others. It is not at all clear how the Commission is legally authorized to weigh in on what may (or may not) constitute a relevant sentencing consideration under § 3553(a) – but even if it were authorized to do so, as a matter of policy, the PAG submits that the Commission should steer clear of offering guidance to courts that could be viewed as elevating some statutory factors over others. If the Commission feels strongly that the Guidelines Manual should list some of the factors that “may be relevant” to the § 3553(a) analysis, the PAG proposes that it do no more than report the factors that have in fact been relied on by courts as reflected in sentencing data. There appears to be no justification for listing factors that data tells us are not relied on by courts.

In sum, the PAG respectfully submits that simply converting departure provisions into variance provisions does not simplify the process, particularly when the vast majority of the departure provisions are not used and are not relevant to the process. If the Commission implements this one-for-one conversion, it would miss a prime opportunity to streamline the guidelines. An empirical approach that takes into account actual sentencing practice across the country is consonant with the Commission’s mandate. Any other approach risks undermining the legitimacy of the process.

B. The PAG’s Proposal

Rather than adopting the Commission’s proposed approach, the PAG recommends that the Commission take the following steps:

- (1) Delete Part A of Chapter One;
- (2) Amend §1B1.1 as set forth in this letter;
- (3) Delete all departure provisions in Chapters Two, Three, Four, and Five; and
- (4) Conduct an empirical evaluation of the reasons sentencing courts have given for departures and variances in the years since *Booker* to identify other guideline provisions that correlate to such decisions and could simply be deleted.

Such an approach would serve the salutary purpose of streamlining and simplifying the guidelines, reflect actual sentencing practice, and permit the Commission to continue to revise

¹²⁵ *Concepcion*, 597 U.S. at 491, 494 (2022) (citations and internal punctuation omitted).

the guidelines to reflect empirical data. If the Commission decides to go further and list some of the factors that may be relevant to the § 3553(a) analysis, the PAG strongly recommends that such a listing be based in empirical data and include only factors that courts have actually used to depart or vary at sentencing.

VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding these proposed amendments. Our PAG colleagues look forward to providing testimony on several of these amendments during the Commission's upcoming

hearing, and the PAG welcomes further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

/s/ Natasha Sen

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