United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 23, 2012

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Comments on Proposed 2013 Priorities

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments on the Commission's possible priorities for the amendment cycle ending May 1, 2013. We look forward to working with the Commission on these priorities and the resulting proposed amendments.

MANDATORY MINIMUMS AND SAFETY VALUE

The PAG has testified consistently in its opposition to mandatory minimums. We have read with care and applaud the Commission's October 2011 Report to the Congress on Mandatory Minimum Criminal Penalties in the Federal Criminal Justice System. We support many of the Recommendations to Congress set forth in the Report and stand ready to support the Commission in its efforts to implement those recommendations.

One important aspect of mandatory minimums is the availability of a safety valve, as the Report discusses at some length. The PAG continues to support broadening the availability of that tool beyond the drug context. Moreover, in conjunction with the Commission's continuing work on mandatory minimum sentences and safety valves, the PAG offers an important proposed change for consideration.

Specifically, as the PAG has suggested before, we submit that the Manual should be amended to ensure that defendants receive the protection provided under Section 1B1.8 when they endeavor to comply with the safety valve's requirement that "not later than the time of the sentencing hearing, the defendant has truthfully

provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." § 5C1.2(a)(5).

As currently drafted, the Manual leaves to the government the power to invoke Section 1B1.8's protection against the adverse use of information that a defendant discloses in his or her effort to provide the government, in a truthful manner, all information and evidence that was part of relevant conduct. That is, the safety valve provision creates the default that information disclosed in an effort to qualify for the safety valve "may be considered in determining the applicable guideline range," with an exception "where the use of such information is restricted under the provisions of §1B1.8 (use of certain information)." Because "subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant," the defendant is unprotected from adverse use of the information provided unless the defendant has "agree[d] to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant."

As private practitioners, we and our colleagues know of many instances where a defendant is willing to tell everything he or she knows about the offense and all relevant conduct, yet the government is not interested in pursuing a cooperation agreement. Among other things, the government may learn through an attorney proffer that the defendant knows too little to be in a position to provide what would qualify as substantial assistance in the investigation or prosecution of another. Or the government may not need an additional witness to prove what the defendant knows. Thus, the government may have no motivation to offer the protections of a cooperation agreement in the very cases where a safety valve was intended: a defendant who is willing and able to tell all that he or she knows but will be unable to qualify for a substantial assistance departure. This problem could be avoided by amending the safety valve commentary to include the protections of Section 1B1.8 in any case where the defendant attempts to satisfy the requirement of Section 5C1.2(a)(5).

***BOOKER* STUDY AND REPORT**

Chair Saris, in her testimony to Congress last October, noted the Commission's concerns about "troubling trends in sentencing" that include "disparities among circuits and districts and

demographic disparities which the Commission has been evaluating."[1]

Recent analysis confirms that measuring the extent of unwarranted "disparity" is more complicated than a district-by-district comparison of reported results.[2] The PAG is concerned that there is a perception of increased unwarranted disparity that is not supported by reliable empirical data, and that proposals under consideration to cabin sentencing judges' discretion that are based upon a perception of disparity in the post-*Booker* era are much more drastic than any underlying problem would warrant.[3]

Consequently, to the extent the Commission intends to collect and disseminate information and data about the use of variances and the specific reasons for imposition of sentences outside the guidelines, the PAG encourages the Commission to employ methods that result in as close to an apples-to-apples analysis as can be accomplished – recognizing that no two offenses and no two offenders are identical. In addition, the PAG urges the Commission to continue on its path of making available the relevant data needed to: 1) assist judges in their assessment of offender characteristics to improve consistency and proportionality and 2) identify those offenses and guideline provisions that routinely generate a disproportionate number of below-guideline sentences, to bring those guidelines more in line with what judges are identifying as an appropriate punishment range.

This latter use of sentencing data is one of the most beneficial results of *Booker*. Prior to *Booker*, the Commission received very little tangible and case-specific judicial feedback because judges were required to adhere to the guidelines lest they be reversed for imposing a sentence based on their disagreement with how the guideline provisions operate. In the absence of meaningful judicial feedback, all too often the guidelines moved in the direction of greater severity.

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[1] Prepared Testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Oct. 12, 2011).

[2] *Compare* TRAC, "Surprising Judge-to-Judge Variations Documented in Federal Sentencing (Mar. 5, 2012), http://trac.sy.edu/tracreports/judge/274/ [hereinafter "TRAC Report"] *with* http://www.fd.org/docs/latest-news/src-trac-report.pdf?sfvrsn=8 (Federal Defenders' Report identifying flaws in the statistical analysis set forth in the TRAC Report).

[3] *See, e.g.*, Statement of Michael Nachmanoff, Federal Defender for the Eastern District of Virginia, Testimony Before the United States Sentencing Commission (Feb. 16, 2012), http://www.fd.org/docs/select-topics---sentencing/Nachmanoff_statement_2_16_12.pdf (analyzing *Booker* "fix" proposals and describing why a *Booker* "fix" is unnecessary and would be harmful).

Since *Booker*, the Commission now receives meaningful judicial feedback that it considers when assessing whether a guideline might need revision. The evolution of the crack cocaine guideline is the best example of the impact of this judicial feedback; the Commission's study of the guideline for possession of child pornography is another good illustration of beneficial judicial feedback post-*Booker*. The Commission – and the federal sentencing system – now benefit from the input of experienced judges who are making their views about sentencing policy known in their judicial opinions. We fear that limiting the discretion afforded to these judges with more intrusive appellate review, especially in cases where judges express a policy disagreement with the guidelines, will hinder this exchange of opinion and diminish the input of sentencing judges.

Of course the goal is the elimination of *unwarranted* disparity, not disparity that may be warranted by differences between cases for which the guidelines do not adequately account. Any post-*Booker* changes that reduce or eliminate judicial feedback will deprive the Commission and the sentencing system of an invaluable perspective. The PAG hopes that the Commission's *Booker* study and report enhance the opportunity for meaningful judicial feedback on the guidelines.

CHILD PORNOGRAPHY OFFENSES

The PAG supports the Commission's work on child pornography, a difficult but pressing area in need of reform. Earlier this year, we submitted our position regarding the need to reform the child pornography guidelines to better distinguish offenders on the basis of relative culpability.[4] Specifically, we urged the Commission to revise the guidelines to distinguish in a more meaningful manner between offenders with different levels of culpability by eliminating the enhancements for use of a computer and for the number and content of images. These enhancements apply the same way in nearly every case and result in extremely high offense levels for "heartland" offenders. The guideline should instead focus on whether truly aggravating factors are present, such as producing child pornography, making money from the sale of child pornography, and using child pornography to facilitate a contact sex offense on a minor.

We continue to believe that drawing meaningful distinctions between the more culpable and the less culpable offenders is critically important. As the Commission heard from many sources in the testimony and comments submitted during the February 15, 2012 child pornography hearing, and as discussed in the cases decided since that hearing, "there remains an important distinction between those who create and facilitate child pornography and those who

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[4] *See* Letter from Practitioner's Advisory Group (Feb. 13, 2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Agenda_15.htm.

only view it," and this is a distinction that the guidelines should draw.[5] The failure to do so has been noted recently in several ways, including in the report accompanying ABA Resolution 105A, adopted in August 2011 by the House of Delegates, the Commission's own survey of federal judges in 2010 revealing that 70% of the judges find that the guidelines for child pornography are too high,[6] and the Commission's most recent quarterly sentencing statistics.[7]

We urge the Commission to respond expeditiously to this pressing need for reform.

ECONOMIC CRIMES AND SECTION 2B1.1

The PAG urges the Commission to continue the "comprehensive review" of Section 2B1.1 and related guidelines that it began last year. The Commission's recently proposed amendments aimed at implementing the directives of the Dodd-Frank Act are a start. We believe, though, that additional significant changes to Section 2B1.1 are still needed. We continue to believe that Section 2B1.1's overriding emphasis on loss amount and multiple overlapping enhancements result in unduly severe guidelines ranges that do not fairly or accurately measure a defendant's culpability. The PAG therefore strongly urges the Commission to continue to explore amendments that would expressly incorporate into the guidelines additional factors that would prevent overreliance on loss, such as motivations for committing the crime, the extent to which the offender personally profited or intended to gain from the crime, the offender's level of participation in the scheme, and the nature and extent of the impact on the actual victims.

More specifically, the PAG respectfully submits that the Commission should consider the following revisions to Section 2B1.1, which we believe would go a long way toward mitigating unwarranted severity of sentences and reduce unwarranted disparity between offenders:

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[5] *United States v. Kelly*, __ F.Supp.2d __, 2012 WL 2367084, *2 (D. N.M. June 20, 2012); *see also United States v. Marshall*, __ F.Supp.2d __, 2012 WL 2510845, *3-6 (N.D. Ohio June 29, 2012) (enhancements for use of a computer and number and type of images skew guidelines recommendation).

[6] *See* USSC, *Results of Survey of United States District Judges January 2010 through March 2012* at Part III, Question 8, available at http://www.ussc.gov/Research/Research_Projects/projects.cfm.

[7] *See* USSC, *Preliminary Quarterly Data Report: 2d Quarter Release through March 31, 2012* at Table 5, available at http://www.ussc.gov/index.cfm (reflecting that prosecutors moved for a below-guideline sentence in 18% of child pornography cases – 74% of the time for reasons other than substantial assistance – and that judges imposed sentences below the guidelines in an additional 47% of cases).

1. To reduce the dominance of the amount of loss as a sentencing factor, we suggest that the Commission broaden the brackets of loss amounts in the loss table and return to the pre-2001 approach of one-level increases from one bracket to the next. Alternatively, the Commission may wish to consider a progressively decreasing scale, in which each doubling of the loss amount has a smaller relative effect on the offense level than currently is the case.

2. To limit the impact of the loss table for those defendants whose personal gain was small in proportion to the loss incurred, the PAG believes that the Commission should consider tiered loss-table caps for those defendants who receive a mitigating role reduction under Section 3B1.2. In 2011, the Commission made clear that a mitigating role adjustment could be applied when the loss amount under Section 2B1.1 "greatly exceeds" defendant's personal gain and the defendant "had limited knowledge of the scope of the scheme." A tiered offense level "cap" for defendants with mitigating role adjustments already exists in the drug Guidelines, *see* U.S.S.G. § 2D1.1(a)(5), and thus could serve as a useful model for crafting a parallel provision in the fraud context.

3. The PAG also urges the Commission to offer sentencing courts further guidance on departures where the facts suggest that the offender's culpability is not fairly measured by the offense level triggered by the loss table. This would allow the Commission to offer non-exclusive examples of factors – such as mitigating motives, different levels of intent, or low or no personal gain – that might warrant a departure and allow feedback from judges on which combination of factors in practice in fact warrant lower sentences. In addition, by encouraging a departure, rather than trying to describe comprehensively the different mitigating factors that might warrant reductions, the Commission would avoid adding complexity to an already complicated and cumbersome guideline provision with yet another series of specific offense characteristics or other adjustments.

4. Fourth, we urge Commission to take steps to rationalize the proliferation of overlapping specific offender characteristics in Section 2B1.1. Duplicative SOCs should be eliminated to solve the problem, acknowledged by the Commission in its 15-year report, of "factor creep"—where the cumulative effect of increasing enhancements does not properly track offense seriousness. In our experience there are still too many cases where 2B1.1's focus on both the magnitude of a fraud (loss table) and some of its methods (SOCs) results in piling on or double-counting. We continue to believe that the Commission can achieve substantial benefits by providing sentencing courts with further guidance on how to avoid unduly harsh results from a mechanical application of Section 2B1.1.

MULTI-YEAR STUDY OF RECIDIVISM

The Commission's proposed priorities include a "comprehensive, multi-year study of recidivism." The PAG believes this study will provide valuable data and opportunities to reduce recidivism, the costs of incarceration, and prison overcrowding.

Rapidly escalating costs associated with imprisonment and the explosion in the number of inmates in federal custody in recent decades make the Commission's proposed recidivism study an essential priority. Data that help identify circumstances in which offenders are less likely or unlikely to re-offend can help ease the burdens associated with overuse of incarceration. Compliance with the statutory mandate that a sentence be "sufficient, but not greater than necessary" to accomplish the purposes of sentencing[8] is more easily achieved if the circumstances that correlate with increased or reduced recidivism are identified and understood.

In recent years, criminal justice stakeholders from across the federal system – judges, prosecutors, defenders, pretrial services officers, and probation officers – have collaborated to identify factors that correlate with recidivism and have worked together to develop and expand alternatives to incarceration that are premised, in part, on reduced likelihood of recidivism. Some of these programs exist at the "front-end" of the process: after pleading guilty to certain less serious offenses, certain eligible offenders may avoid jail time by completing programs that involve counseling in the areas of substance abuse, anger management, and employment opportunities. After successfully completing these programs, graduating defendants may be permitted to withdraw their guilty pleas and avoid serving a prison sentence. Other programs exist at the "back-end," such as allowing participants to receive early termination from supervised release by completing an intensive program of counseling and treatment.

The PAG encourages the Commission, as part of its recidivism study, to explore both types of programs: so-called "diversion" programs and reentry programs. Despite the increased use of such tools, there is a dearth of empirical data that would help match participants with the programs that have the best chance of success for them. The Commission can fill that gap.[9] Study of the efficacy of these programs – particularly the appropriate eligibility criteria; mix of sanctions; and type and level of involvement of court personnel, probation officers, and treatment providers – would provide useful guidance to criminal justice stakeholders as they consider and implement deferred adjudication options and alternatives to incarceration.

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[8] 18 U.S.C. § 3553(a).

[9] The Commission's past work in analyzing alternatives to incarceration makes the Commission well suited to study different options for different offenders. *See* United States Sentencing Commission, "Alternative Sentencing in the Federal Criminal Justice System" (2009) [hereinafter "Alternative Sentencing"], http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf.

The Commission should also study and report on federal programs already in place that provide for pretrial diversion or deferred adjudication. Prejudgment probation, a disposition authorized by 18 U.S.C. § 3607(a) for misdemeanor drug possessors who have no prior drug convictions, provides a useful starting point. We are not aware of public data showing how frequently this "Federal First Offender Act" is used, or how successful it has been in providing incentives to less serious offenders to reduce recidivism and promote rehabilitation. We believe it would be worthwhile for the Commission to compile this information to determine, among other things, whether Congress should expand the authority in § 3607(a) to additional offenses. Some federal districts have been successfully experimenting with deferred adjudication on an informal basis, but it would encourage greater use of post-plea non-conviction dispositions if courts' authority to implement them was regularized.

State programs provide another helpful source of data and ideas for case dispositions that recognize decreased risk of recidivism while also reducing the risk of recidivism. Almost half the states have laws offering less serious offenders the possibility of avoiding conviction through deferred adjudication, which carries the opportunity for dismissal of charges and even expungement.[10] These dispositions offer practical advantages that diversion alone does not. Because of the requirement of a guilty plea, prosecutors have a degree of leverage that encourages successful completion of probation. Because of the prospect of avoiding a criminal record, offenders have a greater incentive to comply with the terms of probation. And an offender who successfully completes a deferred adjudication program has no conviction that would discourage a potential employer from hiring him or her, presumably reducing the risk of recidivism associated with unemployability. In the PAG's experience, these types of post-plea dispositions have improved case outcomes for certain individuals who would otherwise be convicted and sentenced to probation.

In this same vein, the Commission should also consider the impact on recidivism of collateral consequences from a criminal conviction. These collateral consequences often are more severe than the sentence itself, and they can contribute to recidivism by limiting access to employment, housing, and a stable and positive role in the community. In the PAG's experience, access to employment and housing are the best predictors of successful reentry, and unemployment and homelessness dramatically increase the likelihood of a return to crime. In recent years, barriers to employment from conviction have multiplied in codes, rules, and policies, and the judicial and executive mechanisms for overcoming these barriers have atrophied. In the federal system there are no judicial mechanisms for relief, such as

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[10] *See* Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G. REP. 6 (2009) (Nineteen states authorize expungement or sealing of the entire case record following successful completion of probation where judgment has been deferred, and another six states authorize withdrawal of the guilty plea and dismissal of the charges upon successful completion of a period of probation, but make no provision for expungement or sealing). Since this article was written, several more states have implemented deferred adjudication mechanisms.

expungement or sealing, and executive pardons have become so exceptionally rare that this tool cannot be counted upon as a meaningful option for alleviating conviction consequences.

Some states are pioneering methods of relief from collateral consequences, and those methods are worthy of consideration in the federal system. Until a few years ago, only a handful of states had effective ways of avoiding or mitigating collateral consequences, but the growing need has begun to manifest itself in new laws and policies to afford rehabilitated offenders a second chance. For example, Ohio has recently given its trial courts authority to remove absolute barriers to employment.[11] Additional states have implemented reforms to promote employment of those with criminal records.[12] The American Bar Association and the Uniform Law Commission have recently proposed ways of addressing the collateral consequences problem,[13] and the American Law Institute's Model Penal Code Sentencing project[14] has joined this discussion. We encourage the Commission to begin its own inquiry into post-sentence relief mechanisms in the federal system. While recidivism can be addressed with alternatives to conviction at the front end of a criminal case, it is equally important to mitigate the effects of a criminal record at the back end to permit offenders a fair opportunity to return to a law-abiding and productive life.

Finally, and perhaps most importantly given the existing sentencing framework, we recognize that alternatives to incarceration are effective only when viewed as actual alternatives in fact. In the past, the Commission has noted that a significant percentage of offenders in Zones A and B do not receive the non-custodial sentences for which they are eligible.[15] We encourage

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[11] *See* Ohio Revised Code §§ 2961.21-2961.24.

[12] *See* National Employment Law Project, "State Reforms Promoting Employment of People With Criminal Records: 2010-2011 Legislative Round-Up" (December 2011), http://www.nelp.org/page/-/SCLP/2011/PromotingEmploymentofPeoplewithCriminalRecords.pdf?nocdn=1.

[13] *See, e.g.*, American Bar Association "Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies" (2007), http://www.americanbar.org/content/dam/aba/migrated/cecs/ secondchances.authcheckdam.pdf; Uniform Collateral Consequences of Conviction Act (2010), http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.htm.

[14] American Law Institute, MODEL PENAL CODE: SENTENCING (2012), http://extranet.ali.org/docs/ Model_Penal_Code_PD8_online.pdf.

[15] *See* Alternative Sentencing at 3 (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

the Commission to address this phenomenon by updating its prior research[16] on the use of alternatives to incarceration. This study should account for the disparate outcomes correlated with citizenship status, as well as the effect of offense type, offender characteristics, and criminal history. In the PAG's experience, district court judges are not always aware of the many options available to them when sentencing Zone A and Zone B offenders. The Commission ought to consider avenues, including language in the Guideline Manual, for educating district courts about the availability of programs and the circumstances in which non-custodial sentences for Zone A and B offenders are appropriate. Commentary reminding judges that non-custodial sentences for those in Zones A and B may often be "sufficient, but not greater than necessary" to achieve the purposes of sentencing would constitute an easy first step toward reducing federal prison overcrowding and wasteful incarceration of offenders for whom incarceration increases the risk of recidivism.

SETSER V. UNITED STATES

The Commission has asked for comment about "whether any amendments to the *Guideline Manual* may be appropriate in light of *Setser v. United States*, __ U.S. __ [, 132 S. Ct. 1463], (March 28, 2012)." The PAG believes that U.S.S.G. § 5G1.3 requires a few limited changes to remain in step with the broadened sentencing authority vested in district courts by the *Setser* opinion.

Setser establishes that a federal judge, when imposing punishment in a case where primary jurisdiction of the defendant is held by the state, may enter an order requiring the federal term to run concurrently or consecutively with a *later-imposed* state punishment. *Setser*, 132 S. Ct. at 1467-1468. Before *Setser*, district courts were generally recognized to have such authority only with respect to *prior-imposed* state sentences. *See id.* at 1468.

Section 5G1.3 gives direction to judges in cases, like *Setser*, that involve multiple terms of imprisonment. Only the latter two subsections of the Guideline are affected by *Setser*, and of these, only Section 5G1.3(c) requires amendment.

Section 5G1.3(c) offers a policy statement intended to apply "[i]n any other case involving an undischarged term of imprisonment." This category would include *Setser*-type later-imposed state punishments. For these cases, the Guideline advises the federal court to impose the sentence for the "instant offense" to run "concurrently, partially concurrently, or consecutively to the *prior* undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." (Emphasis added.) The same "*prior* undischarged" specification appears in Application Notes (3)(A)(ii),(3)(A)(iv), and (3)(B), and in the Background

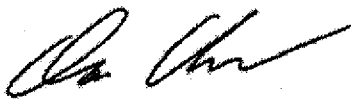
[16] *See generally id.*

commentary. By including the qualifier "*prior* undischarged term," the Guideline as presently written does not offer the federal court any advice about how to adjust the "instant offense" punishment in cases involving a *later*-imposed "undischarged term" like the one in *Setser*. Conceptually, though, the advice in the policy statement seems to apply as well to later-imposed undischarged terms as to prior undischarged terms. Therefore the PAG believes that the guideline and commentary can be brought fully into accord with *Setser* just by striking the word "prior" from all references to "undischarged term."

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input on the proposed priorities. We look forward to an opportunity to discuss them further in the coming months.

Sincerely,



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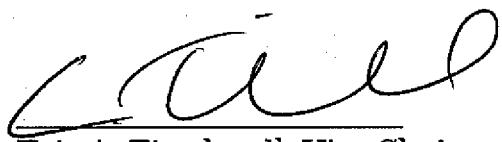

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