Testimony Before The United States Sentencing Commission

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Written Testimony Regarding Illegal Reentry and Supervised Release

I am pleased to have the chance to testify once again on behalf of the Sentencing Commission's Practitioners Advisory Group. As members of one of the Commission's three standing advisory groups, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

In addition to the comments presented by Eric Tirschwell on the fraud proposals, I would like to offer the PAG's input on the proposed amendments and requests for comment regarding the illegal reentry and supervised release guidelines.

1. Illegal reentry – § 2L1.2

The Practitioners Advisory Group supports the Commission's decision to amend U.S.S.G. §2L1.2, which sets the offense level for illegal immigrants who unlawfully reenter or remain in the United States following a criminal conviction. The Commission's proposal addresses how to apply some of the most severe upward enhancements when the prior sentences on which those enhancements are based are too old to qualify for criminal history points in Chapter Four of the Manual. As proposed by the Commission, the substantial 16-level or 12-level enhancements would be limited to 8 levels if the prior sentence was imposed for a so-called ancient or stale conviction—typically a conviction for which the defendant completed service of his sentence more than 15 years ago.

The PAG supports the type of change that is under consideration. We believe, though, that the amendment should be modified to maintain consistency throughout the Manual with how outdated convictions are treated in Chapter Two. The firearms guideline, §2K2.1, contains a similar provision. Under that guideline, subsections (a)(2), (a)(3), and (a)(4)(A) all provide for upward adjustments to the base offense level in cases where the defendant who committed the firearms offense has a prior conviction for a felony crime of violence or a controlled substance offense. Application Note 10 to §2K2.1 states that for purposes of these subsections, "*use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c).*"

The firearms guideline therefore reflects the Commission's judgment, expressed in Chapter Four, that there comes a point when a prior sentence is too old to serve as a predictor of recidivism or a reliable measure of culpability. Thus, for purposes of offense level determinations in the firearms guideline, if a prior sentence is too old to earn criminal history points, it is also too old to count in Chapter Two. The Manual provides guidance for the rare case in which a court finds reason to consider a prior sentence despite its staleness. §4A1.2, comment., n. 8 ("*If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider whether an upward departure is warranted under §4A1.3* [Adequacy of Criminal History Category]."). Therefore, to make §2L1.2 consistent with §2K2.1 (and §4A1.2), the PAG supports adding an application note to §2L1.2 mirroring Application Note 10 to §2K2.1, thereby simplifying the consideration of stale convictions. This suggested application note to §2L1.2, in place of the one in the proposed amendment, would state: "*For purposes of applying subsection (b), use only those*

convictions that receive criminal history points under §4A1.1(a), (b), or (c)." Under our recommended approach, the Commission's proposed additions to the text of § 2L1.2(b)(1)(A) & (B) would be unnecessary.

If the Commission instead elects to allow some stale convictions to trigger enhancements under § 2L1.2(b)(1), we would limit them to subsections (b)(1)(C) (8 levels for aggravated felony), (b)(1)(D) (4 levels for any felony), and (b)(1)(E) (4 levels for three or more qualifying misdemeanors). The difference between our second proposed version and the Commission's proposed amendment is that under ours the courts would not need to determine whether a "non-aggravated" felony nonetheless satisfies one of the criteria in (b)(1)(A) (for a 16-level increase) or (b)(1)(B) (for a 12-level increase). To accomplish this, we would delete the following proposed language from § 2L1.2(b)(1)(A) & (B): "***or by 8 levels if the conviction does not receive criminal history points***." In other words, if the Commission does not adopt the approach used in the firearms guideline (*i.e.*, if the Commission does not require all prior conviction offense level enhancements in § 2L1.2 to be based on convictions that count for criminal history points), at a minimum it should impose that requirement, without exception, for the most severe prior offenses listed in (b)(1)(A) & (b)(1)(B). The version published for comment would force courts, probation officers, and counsel to wrestle with whether a stale conviction that does not meet the statutory definition of aggravated felony nonetheless meets one of the criteria that would trigger a 16-level or 12-level enhancement under §2L1.2(b)(A) and (B) if only the conviction were not stale. Our approach would avoid this potentially complicated and confusing analysis, which is sure to spark litigation. As with the Commission's proposal, our alternative approach would still provide an 8-level enhancement for stale aggravated felony convictions. And a 4-level increase would be imposed for all other prior felonies, regardless of how old they are.

One of our aims is to avoid overly complicating illegal reentry sentencing, in which multiple, categorical analyses have increasingly come into play. We would simplify the process by limiting the inquiry to whether a stale conviction is a felony or an aggravated felony (a distinction that already must be drawn to determine the statutory maximum), and leaving out additional questions, such as whether a non-aggravated felony nonetheless fits under (b)(1)(A) because it was a "crime of violence" that received too short a sentence to be an aggravated felony.

All that being said, our suggested modifications should not obscure the fact that we applaud the Commission for recognizing the problem of counting stale convictions under a guideline that applies to a huge and growing number of cases, especially in border districts. Whether or not the Commission further refines its proposal along the lines suggested, it will be a significant improvement over the current sentencing framework.

2. <u>Supervised Release</u>

By statute, the Commission must promulgate guidelines that determine "the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18." 28 U.S.C. § 994(a)(2)(B). Section § 944(c) further provides that "[t]he Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of

. . . or the length of a term of . . . supervised release, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;
(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
(4) the community view of the gravity of the offense;
(5) the public concern generated by the offense;
(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
(7) the current incidence of the offense in the community and in the Nation as a whole."

The PAG believes, for the reasons explained in the Commission's recent report "Federal Offenders Sentenced to Supervised Release," that far too often supervised release is being overused. The PAG believes that the factors spelled out in Section 994(c), much like those in 18 U.S.C. § 3553(a), provide the necessary guidance to the courts as to when supervised release is appropriate. Unfortunately, judges have grown accustomed to imposing supervised release terms based on the statutory maximum rather than a careful consideration of the facts and circumstances of the individual case. Given the already overtaxed probation department, and the overall interest in reducing unnecessary government expenditures, PAG believes that the imposition of supervised release should be less reflexive and more reasoned, consistent with Congress's vision when it enacted the Sentencing Reform Act. Such a change would reduce the burden on probation departments across the country and allow sentencing judges to focus the supervisory function of the court on those defendants who truly would benefit from the supervision. Research has also shown that concentrating supervision resources on high-risk offenders produces a better public safety return on our corrections investments; conversely, focusing supervision resources on low-risk individuals may be counterproductive because it can increase their likelihood of reoffending.[1]

[1] See Council of State Governments, Report of the National Summit on Justice Reinvestment and Public Safety 17-21 (February 2011), available at: http://www.justicereinvestment.org/summit/report#summitrpt. *See also* Edward Latessa, Lori Brusman Lovins, and Paula Smith, *Follow-up Evaluation of Ohio's Community Based Correctional Facility and Halfway House Programs—Outcome Study* (Cincinnati: University of Cincinnati Center for Criminal Justice Research, February 2010); Christopher Lowenkamp and Ed Latessa, "Increasing the Effectiveness of Correctional Programming Through the Risk Principle: Identifying Offenders for Residential Placement," *Criminology and Public Policy* 4, no. 2 at 263-290 (2005).

Accordingly, with respect to USSG §5D1.1, the PAG respectfully urges the Commission to adopt Option 1B, which would also lessen the burden on southern districts dealing with large immigration case loads. We are aware of no empirical basis for the 15-month threshold found in Option 1A and believe that the length of the sentence should be one factor among many that the court considers when deciding on supervised release.

Likewise, the PAG respectfully urges the Commission to adopt Option 2B for USSG §5D1.2 rather than set a minimum term for supervised release. Experience teaches that it is difficult to change widespread and longstanding practices, especially when those practices are ingrained in hundreds of separate decision-makers. It will take a substantial amount of time and effort before judges get accustomed to a new approach to supervised release. Imposing a new minimum, especially one without empirical support, will prolong that adjustment with little hope of any benefit in return.

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As I noted at the outset, the PAG appreciates the chance to offer our input on the 2011 proposals and issues for comment. We also look forward to the opportunity to work with the Commission on completing this amendment cycle with final language for the 2011 Manual.