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January 8, 2001

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PAG's submission on proposed amendments

Dear Judge Murphy:

I am writing to provide the Commission with the PAG's submission on the pending amendments for which public comment was due on January 8, 2001.

For the most part, the PAG has already presented the Commission with written submissions regarding each of the specific proposals; however, for the convenience of the Commissioners and the Commission staff, we wanted to provide our position papers in a consolidated package. As always, the PAG appreciates the opportunity to provide the Commission with its perspective on these important issues.

With regard to the specific proposed amendments, the PAG recommends the following:

1. **Unauthorized compensation.** The PAG opposes passage of this proposed amendment. We have not submitted a separate position paper, but agree with the views expressed by the Defenders in its submission to the Commission.
2. **Counterfeiting.** The PAG, for the most part, opposes passage of this proposed amendment. A detailed submission is attached at tab 2.
3. **Tax Privacy.** The PAG does not oppose passage of this proposed amendment.

4. Stipulations. The PAG supports passage of this proposed amendment. A detailed submission is attached at tab 4.
5. Aggravated assault. The PAG opposes passage of this proposed amendment (either option). We agree with the Defender's position that the Commission should add commentary consistent with the reasoning set forth in United States v. Farrow, 198 F.3d 179 (6th Cir. 1999).
6. Fraudulent misrepresentations. The PAG does not oppose passage of this proposed amendment, but agrees that the Commission should revise application note 5 in the manner suggested by the Defenders.
7. Mitigating role. The PAG supports passage of this proposed amendment. A detailed submission is attached at tab 7.

As always, we appreciate the opportunity to provide the Commission with our input.

Sincerely,



Barry Boss

cc: Jim Felman, Esq.
Andy Purdy, Esq.

PROPOSED AMENDMENT: COUNTERFEITING

Like many of the past and present guideline amendment proposals that increase offense levels and thus result in increases in punishment, the Practitioners Advisory Group (PAG) is concerned that no actual or demonstrable basis exists to justify the changes being proposed. Put another way, while we appreciate the fact the changes are being put forward at the suggestion of the Department of the Treasury to address the alleged "additional harm" that these crimes present due to the "erosion of public confidence in the currency" and because of "the large expenditures required to craft and implement anti-counterfeiting safeguards," we believe that no data has been developed to demonstrate that either the current sanction levels are inadequate in those regards or that the proposed increases directly or proportionately address that so-called additional harm.¹

Importantly, the proposal itself seeks to promote proportionality with other similar economic crimes. Yet, the existing offense level of 9 is already set above the otherwise typical starting point of 8 (base of 6 + 2 for more than minimal planning) for those matters with nothing being put on the table to concretely demonstrate why more punishment is required. Furthermore, while we appreciate the fact that part of the motivation here stems from the apparent ease of creating passable currency through the use of readily available digital equipment, there appears no reason to increase punishments for all counterfeiters just because technology has afforded a subset of these offenders with a better mousetrap.

¹The presentation of such data might serve to address/eliminate our belief that the harsher punishments being proposed amount to the use of a howitzer when a flyswatter is more appropriate. If the bulk of these offenses involve college kids printing up a few \$20's for beer money, then the proposed sanction increase appears totally unjustified.

In that latter regard, the Commission might wish to consider a 1 level increase as a specific offense characteristic reserved for digital counterfeiting. Alternatively, the Commission might consider a 2 level increase for such offenses, but limit its imposition to situations where the currency produced (face value) is \$5,000.00 or less. At that dollar point and higher, the fraud table will provide any necessary increment in harm/punishment.

While the PAG has no objection to replacing the existing level 15 floor for manufacturing/device possession crimes at §2B5.1(b)(2) with a 2 level increase for such offenders as proposed, it appears necessary that the application notes that accompany this change clearly express the Commission's intent that such SOC is meant to address the more sophisticated counterfeiting offense conduct like that associated with offset printing. Put another way, it is important for the Commission to make it clear that the mere possession of a personal computer and an inkjet printer is not sufficient in-and-of-itself to secure this (now) additional enhancement if such readily available items were the devices/materials used for the manufacturing/production/counterfeiting. If the Commission were to accept our proposal for a 1 or 2 level increase for digital offenses, then a second enhancement for possessing the means to do so would seemingly amount to impermissible double-counting.

Next, while the PAG understands the intent of the deletion of the phrase "merely photocopy notes or otherwise," we remain concerned that the use of digital equipment and fancy inkjet printers can still result in the production of obviously phony currency. Some language needs to be crafted to accompany the (our) proposed digital equipment SOC if the Commission chooses to include same. To avoid what we view as an unwarranted result, we suggest that Application Note 4. be amended to read: "Subsection (b)(2) does not apply to persons who, by

whatever means, produce items that are so obviously counterfeit”

Finally, the PAG agrees with the drafters of the proposal that a “sophisticated means” enhancement is not an appropriate way to address the digital counterfeiting problem. We believe that our above suggestions better address that issue.

PAG CIRCUIT CONFLICT POSITION PAPER:
THE BREADTH OF ORAL STIPULATIONS TO CONDUCT CONSTITUTING
MORE SERIOUS OFFENSES UNDER USSG §1B1.2

DAVID F. AXELROD
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I. Introduction

Plea bargaining is an essential part of the criminal justice system. It allows defendants to limit their exposure, and both parties to resolve criminal cases without the expense of a trial. It also permits the system to operate without the chaos that would ensue if every indicted case were to go to trial.

Most plea bargaining in the federal system results in written plea agreements. Such agreements usually include a statement of the factual basis for the plea, and agreements to resolve various guidelines issues. In entering these agreements, both parties – defendants especially – consider it essential to be able to make a reasonable prediction of the sentencing range. That essential value, predictability, is lost if the court can dramatically alter the parameters of the sentence through the simple expedient of the plea colloquy.

Under USSG §1B1.2(a),² the Court is to apply "the offense guideline section most applicable to the offense of conviction (i.e., the offense conduct charged in the

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² The Commission has proposed an amendment to the Guidelines, effective November 1, 2000, that would clarify when a court may sentence under a guideline other than that for the statute of conviction. It would do so by replacing §1B1.1(a), modifying §1B1.2(a), replacing paragraph one of Application Note 1 to §1B1.2, and striking current Application Note 3 to §1B1.2. See Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, at 1-3. The amendment:

count of the indictment or information of which the defendant was convicted)." A limited exception to this general rule is the source of controversy: "in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense." Id.; accord USSG §1B1.2(c).

A circuit split has arisen regarding what constitutes such a stipulation. The central question concerns whether the defendant's colloquy with the court at a plea hearing can constitute such a stipulation. The PAG's position is that commentary should be added to §1B1.2 to adopt the position of the majority of circuits, namely, that a defendant's responses to questions by the court constitute neither a stipulation to a more serious offense, nor any other part of a plea agreement, and therefore cannot authorize the court to shop for the guideline that it considers to be most applicable to the defendant's conduct. As noted above, if the rule becomes otherwise, predictability will be lost with the result that many cases will unfairly be forced to trial.

clarifies that the courts must apply the offense guideline references for the statute of conviction listed in the Statutory Index unless the case involves a stipulation to a more serious offense or additional offenses set forth in §1B1.2(a). This amendment will make it clear that a court may not look to the defendant's relevant conduct in determining the offense guideline to be used.

United States Sentencing Commission, Office of Education & Sentencing Practice, 2000 Amendments to the Federal Sentencing Guidelines, at 4-5. Thus, while this amendment narrows consideration of the use of §1B1.2(a) stipulations, it does not resolve what constitutes a "stipulation to a more serious offense."

II. The Circuit Split

In Braxton v. United States, 500 U.S. 344 (1991), the United States Supreme Court declined to decide whether a stipulation for purposes of USSG §1B1.2(a) could be made orally at a plea hearing, or by a formal assent to a set of facts. Id. at 348-49. The Court demurred because the Sentencing Commission had requested comment on whether a stipulation under USSG §1B1.2(a) had to be part of a formal plea agreement. USSG §1B1.2(a) was subsequently amended to provide that a stipulation may be put on the record at an oral hearing. Significantly, the amendment also requires that such an oral stipulation occur "between the parties." USSG §1B1.2(a), Application Note 1, para. 2.

A circuit split nevertheless persists regarding whether a defendant's admissions in response to questions by the court can constitute a stipulation to a more serious offense. The approach of the majority of the courts of appeal that have considered the issue is consistent with the requirement in §1B1.2(a) that a stipulation be between the parties:

A statement is a stipulation only if: (i) it is part of a defendant's written plea agreement; (ii) it is explicitly annexed thereto; or (iii) *both the government and the defendant explicitly agree* at a factual basis hearing that the facts being put on the record are stipulations that might subject a defendant to the provisions of section 1B1.2(a).

United States v. Nathan, 188 F.3d 190, 201 (3d Cir. 1999) (emphasis added); accord, e.g., United States v. Timley, No. 98-3226, 1999 U.S. App. LEXIS 9737 (10th Cir. May 20, 1999); United States v. Saaverda, 148 F.3d 1311 (11th Cir. 1998); United

States v. McCall, 915 F.2d 811 (2d Cir. 1990); United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988). The Fifth and Seventh Circuits constitute the minority, holding that any admission by the defendant may be deemed a stipulation. See United States v. Loos, 165 F.3d 504 (7th Cir. 1998); United States v. Domino, 62 F.3d 716 (5th Cir. 1995).

The Tenth Circuit's decision in Timley illustrates the better view. There, the defendant's sentence was increased because of his oral admission to the court that his offense occurred within 1000 feet of a school. The Tenth Circuit remanded the case for resentencing because it "[could not] conclude that Timley's admissions at the plea hearing ... were part of an agreement 'made between the parties.'" 1999 U.S. App. LEXIS 9737 at *17. The appeals court observed that "the parties treated the written agreement as encompassing their entire agreement", and that "[o]nly after the parties' agreement had been presented to the court did the court . . . elicit admissions from Timley that his offense occurred within 1000 feet of a school." Consequently, the court found "no indication that any of these admission were part of an agreement between the parties, as required by § 1B1.2(a)." Id. at *19.

The Timley court explicitly rejected the minority approach, that §1B1.2(a) is a grant of authority to the court that does not require the defendant's consent. Id. at *19 n.8 (disagreeing with Loos, 165 F.3d at 506-508). Reasoning that "§ 1B1.2(a) by its very terms requires 'a plea agreement . . . containing a stipulation'" (ellipsis in original), the court stated the obvious, namely, that "a stipulation ... requires a defendant's consent (or there would be no agreement)." Id.

Similarly, the Third Circuit's decision in Nathan, 188 F.3d at 190, explains why a careful reading of the Guidelines supports the majority position:

[S]ection 1B1.2(a)'s reference to a stipulation as something contained within the plea agreement strongly suggests that statements made in factual basis colloquies are not stipulations. Section 1B1.2(a) speaks of stipulations as part of a plea agreement. A scrupulous reading of section 1B1.2(a), which will require that all of the defendant's stipulations be either part of or annexed to his plea agreement, would provide notice to the defendant as to exactly what facts underlying his offense he is agreeing to and will ensure that the defendant receives the benefit of his bargain. In addition, though section 1B1.2 itself provides for oral plea agreements and, presumably, oral stipulations contained therein, the Guidelines favor written stipulations over oral ones. [Application Note 1] also suggests that we should give a common sense reading to "stipulation," such that it refers to situations in which both parties specifically and explicitly agree, on the record, to the truth of the relevant facts. We thus think the language of the Guidelines compels the conclusion that Nathan's and Lander's statements should not be construed as stipulations.

Id. at 200-201.

III. Position of the Practitioners Advisory Group

While we believe that the text of §1B1.2 is clear, the existence of the circuit split requires clarifying action. We therefore urge the Commission explicitly to adopt the majority view.

In addition to the cases cited above, that view finds support in the text of the Guidelines as presently written. For instance, the Guidelines state clearly the Commission's preference for written stipulations. The Commentary to §6B1.4 states that, "Because of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing." Additionally, the Guidelines strongly presume

that Appendix A identifies the guidelines applicable to the offense of conviction. See USSG App. A Introd. (Statutory Index “specifies the guideline section or sections ordinarily applicable to the offense of conviction”). Accord, United States v. Saaverda, 148 F.3d 1311 (11th Cir. 1998) and cases cited therein.

The majority view is also consistent with the practical realities of day-to-day practice in the district courts. Almost all plea agreements in the federal system are reduced to writing following careful negotiation. Adherence to the majority view allows both parties – prosecution and defendant – to receive the benefit of their bargain, and ensures that the defendant’s waiver of his rights is knowing and intelligent. By contrast, allowing a court to alter the fundamental premises of a plea agreement based on the defendant’s extemporaneous statements deprives the defendant of his negotiated consideration, and eliminates the predictability that is often essential to the decision to enter a plea agreement in the first place.

Finally, the majority view is consistent with the district court’s role in the plea process. The court is to determine whether a factual basis exists for the plea, not to develop (purposefully or inadvertently) other facts so that a harsher sentence may be imposed. If the district judge is dissatisfied with a plea agreement or its factual basis, the proper recourse is to reject the agreement, not to steer a defendant toward a harsher sentence in finding a way to approve the agreement. See USSG §6B1.2 Commentary.

For the foregoing reasons, the Practitioners Advisory Group respectfully urges the Commission to add commentary to §1B1.2 limiting “stipulations” as used

• in §1B1.2(a) to those that are negotiated and entered by the parties, and contained in a plea agreement.

PROPOSED AMENDMENT 7

Proposed Amendment 7 resolves a circuit conflict regarding the application of USSG §3B1.2 (Mitigating Role). The proposed language would permit a mitigating role adjustment for a drug offender whose sentence is based on the drugs he personally stored or transported. Accompanying this proposal are two issues for comment, seeking input on (1) whether the adjustment should be prohibited or limited under the stated circumstances or, on the other hand, (2) whether the language should be broadened to include non-drug offenses.

In our view, proposed application note 3(C), which directly addresses the circuit split, represents a modest step in the right direction. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG Crim. Just. 28, 35 (1999) (“the scope of certain offense characteristics, such as ‘role in the offense,’ can be broadened”); Stephen J. Schulhofer, *Excessive Uniformity — And How to Fix It*, 5 Fed. Sent. Rep. 169 (1992) (advocating larger role adjustments at the higher offense levels). This issue arises frequently but not exclusively in the drug trafficking context; accordingly, PAG recommends additional language that would affirm the principle’s applicability to non-drug cases (per Issue for Comment 2).

Finally, PAG opposes two collateral provisions, contained in proposed application notes 3(A) and (B), which might unintentionally discourage mitigating role adjustments in deserving cases.

THE CIRCUIT CONFLICT

At the lowest level of many drug trafficking enterprises are couriers and individuals who merely store drugs. These defendants frequently “lack knowledge or understanding of the scope and structure of the enterprise and of the activities of others” and are “substantially less culpable” than the other participants in the offense. USSG §3B1.2, comment. (n.1 & backg’d). See generally Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 Fed. Sent. R. 63 (1990). This is true irrespective of the drug quantity used to calculate the base offense level. The contrary holding of some circuits is inconsistent with the language and purpose of the mitigating role guideline. See §3B1.2, comment. (n.2) (minimal participant adjustment “would be appropriate . . . where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs).

Proponents of the narrow view say the mitigating role guideline “appears to contemplate a defendant who, because of his role in concerted activity, is held accountable for the acts of others.” *United States v. Isienyi*, 207 F.3d 390, 393 (7th Cir. 2000). See also *United States v. Burnett*, 66 F.3d 137, 141 (7th Cir. 1995) (mitigating role guideline’s “principal office is to give the district judge a means to mitigate unduly harsh punishment that mechanical application of the relevant-conduct rules might yield.”). The introductory commentary to Chapter 3, Part B, instructs that role in the offense is determined based on “all the conduct within the scope of §1B1.3 (Relevant Conduct)” — that is, acts “committed, aided, [or] abetted” by the defendant, §1B1.3(a)(1)(A), and the “reasonably foreseeable acts” of others. §1B1.3(a)(1)(B). However, there is no sound reason — and, notwithstanding the courts’ assumption, no basis in the Guidelines — for confining the mitigating role guideline to cases where the defendant receives

additional punishment based on the “reasonably foreseeable acts” of others.

Indeed, the scope of relevant conduct on which an adjustment may be based is not limited to the relevant conduct that is included in the defendant’s base offense level. For example, the offense of drug importation involves a number of tasks beyond the courier’s actions — purchasing the drugs, recruiting participants, arranging delivery, etc. “All of these activities . . . constitute ‘relevant conduct,’ *United States v. Rodriguez De Varon*, 175 F.3d 930, 951 (11th Cir. 1999) (Barkett, J., dissenting), and must be considered in determining the defendant’s role in the offense. It makes no difference that the other participants’ activities, unlike drug quantity, have no effect on the defendants’ base offense level. Thus, a defendant whose base offense level corresponds to the acts “committed, aided, [or] abetted” by that defendant may still be deemed to play a mitigating role in “concerted activity.” §3B1.2, comment. (n.1).

Another specious reason for denying the adjustment to drug couriers is that they play “an important or essential role” in the offense. *United States v. Rodriguez De Varon*, 175 F.3d 930, 942-43 (11th Cir. 1999). *See also United States v. Burnett*, 66 F.3d 137, 140 (7th Cir. 1995). (“When a courier is held accountable for only the amounts he carries, he plays a significant rather than a minor role in that offense.”). This reasoning, if applied consistently, would eviscerate the mitigating role guideline. Concerted-activity offenses, by their very nature, involve several different tasks, each of which is “essential” to the objective.

OTHER PROPOSED CHANGES

Current commentary states that a mitigating role adjustment is “ordinarily not warranted” in cases where the defendant “has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct.” §3B1.2, comment. (n.4). Expanding this commentary, proposed application note 1 discourages an adjustment if the defendant receives an “offense level lower than warranted by the defendant’s actual conduct” because the defendant “was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under §1B1.3 (Relevant Conduct).” This language undermines the amendment’s purpose and, more significantly, appears to legitimize guideline subversion.

The current commentary — which the proposed amendment would greatly expand — weighs heavily in decisions denying any mitigating role adjustment to the very drug couriers granted relief by the amendment. *See, e.g., United States v. Isienyi*, 207 F.3d 390, 393 (7th Cir. 2000). This proposed change, according to the synopsis, is intended to address situations where the defendant receives a reduced offense level pursuant to a plea agreement. But the Sentencing Guidelines advise judges to reject guideline-evading plea agreements (absent grounds for a downward departure), §6B1.2, p.s., and prohibit judges from imposing a sentence “lower than warranted by the defendant’s actual conduct.” The Commission embarks on a dangerous course when it begins barring certain adjustments in order to compensate for guideline evasion. *See, e.g., United States v. Holley*, 82 F.3d 1010, 1011 (11th Cir. 1996) (no mitigating role adjustment where district court excluded relevant conduct that should have increased defendant’s sentence); *United States v. Lampkins*, 47 F.3d 175, 47 F.3d 175, 181 (7th Cir. 1995) (same).

PAG also opposes the following new language contained in proposed application note 2: "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." While this is an accurate statement of the law, no other guideline (including the many upward adjustments that the government must prove) contains such a caveat. By singling out mitigating role, an issue on which the defendant has the burden of proof, the proposed language suggests a special need for corroboration and may create a double standard.

In conclusion, given the prominence of drug quantity in the sentencing determination, a sentence based solely on the defendant's own conduct under §1B1.3(a)(1)(A) may nonetheless overstate that defendant's relative culpability. *See generally* Kyle O'Dowd, *The Need to Re-assess Quantity-based Drug Sentences*, 12 Fed. Sent. R. 116 (1999). "Indeed, a courier who possesses drugs for distribution as part of a trafficking scheme may be substantially less culpable than a defendant who possess the same amount of drugs for distribution but has no ties to a drug trafficking scheme." *United States v. Demers*, 13 F.3d 1381, 1385 (9th Cir. 1994). Failure to acknowledge such culpability differences exacerbates the drug guidelines' excessive reliance on quantity.

Therefore, PAG urges the Commission to pass this amendment with three minor changes: (1) Delete the paragraph beginning "However, a reduction . . ." in proposed application note 3(A) and insert the language from current application note 4; (2) delete the last sentence of proposed application note 3(B) beginning "As with any other factual issue . . ."; and (3) insert the following sentence at the beginning of proposed application note 3(C): "The scope of relevant conduct on which an adjustment may be based is not limited to the relevant conduct that is included in the defendant's base offense level."