

**Probation Officers Advisory Group to the United States Sentencing Commission**  
**June 26 - 27, 2001 Meeting**  
**Washington, D.C.**  
**Minutes**

Probation Officers Advisory Group members in attendance were: Chair, Ellen Moore (11<sup>th</sup> Circuit); Vice-Chair, Joseph J. Napurano (3<sup>rd</sup> Circuit); Kathy Battistelli (1<sup>st</sup> Circuit); Colleen Rahill-Beuler (2<sup>nd</sup> Circuit); Betsy Ervin (4<sup>th</sup> Circuit); Barry Case (5<sup>th</sup> Circuit); David Wolfe (5<sup>th</sup> Circuit); Phelps Jones (6<sup>th</sup> Circuit); Rex Morgan (7<sup>th</sup> Circuit); Jim Mitzel (8<sup>th</sup> Circuit); Ken Ramsdell (9<sup>th</sup> Circuit); Debbie Marshall (10<sup>th</sup> Circuit); Ray Owens (11<sup>th</sup> Circuit); and Theresa Brown (DC Circuit). Also present was Deborah Panzer, USSC Staff Member. Absent was FPPOA Ex-Officio Member, Cynthia Easley.

**Morning Session - June 26, 2001**

***Welcoming Comments by Ellen Moore and the Introduction of Three New Members: Barry Case, 5<sup>th</sup> Circuit; Jim Mitzel, 8<sup>th</sup> Circuit, and Ken Ramsdell, 9<sup>th</sup> Circuit.***

Ellen advised that Cynthia Easley was unable to attend the meeting due to illness. Ellen noted that it has been brought to her attention that questionable e-mails were being received by certain members and asked if any other members had received such e-mails. The only member who had received such an e-mail was Rex Morgan. The intent/purpose of the website was reviewed.

Ellen read a letter from Judge Diana Murphy regarding our prior position paper and our response to the proposed Illegal Alien guideline amendment. Judge Murphy commended the Probation Officers Advisory Group's timely response and suggestions.

**Pam Montgomery -- Director of the Office of Education and Sentencing Practices, USSC**

Mrs. Montgomery thanked everyone for attending the meeting and stated that POAG's presentation at the National Guideline Sentencing Conference in Palm Springs, California, was very well received. There were approximately 180 probation officers in attendance at the conference. Mrs. Montgomery noted that the USSC training staff has a full training agenda scheduled for this fall and that Margaret Olaghere is the contact person at the Commission if anyone wished to schedule training for their circuit.

Mrs. Montgomery noted that although there was no formal agenda published for POAG's meeting, this would be POAG's proactive opportunity to discuss issues we would like to present to the Commission for further consideration in upcoming amendment cycles. She noted that the Commissioners have completed almost all of the items on their prior agendas and are now exploring other avenues. The Commissioners are currently looking at two broad areas for possible change, that being criminal history and drug guidelines. Mrs. Montgomery noted that the 1997 Crack/Cocaine Report that was previously sent to Congress is being reviewed and there may be some interest in re-exploring this issue. The Commissioners are likewise trying to envision what is a true first-time offender. Likewise, this fall, the Commissioners may address circuit splits concerning USSG §2D1.1 issues and Chapter Four issues. Mrs. Montgomery noted that the

Commission has not received any responses/comments from Congress regarding proposed May amendments. Therefore, it is perceived that the proposed amendments will be adopted as presented.

Mrs. Montgomery noted that the Department of Justice still does not have all of their key people in place and their position is unknown on some of the proposed May amendments. The Commission staff is currently working on "anticipated most-frequently-asked questions" regarding the new amendments and hopes to have something in place on the web site by this fall. She noted that there will be a FJTN broadcast regarding the new amendments and a July 26, 2001, broadcast regarding criminal history. She encouraged the Probation Officers Advisory Group to make this known to the field.

### **Other Issues**

Ellen advised that she sent a thank-you letter to the Commission staff for inviting POAG to the Palm Springs Conference and allowing us to conduct one of the training sessions. A suggestion was made by another representative that if POAG conducts future training, perhaps we should request ideas from the field.

Ellen noted that POAG's Mission Statement as presented on the web currently indicates that our meetings are scheduled for the fall and spring. She noted that this probably needs to be updated as our current schedule is now February/March and June. Ellen noted that the Commission has agreed to change the fall presentation format when POAG is asked to review proposed amendments and respond. POAG will now have 20 to 30 minutes following each presentation to discuss the proposed amendment before the next presentation is made.

### **New Issues**

#### *Adjustment for Acceptance of Responsibility*

During the break-out sessions for probation officers at the Palm Springs training seminar, the adjustment for acceptance of responsibility guideline appeared to be a national issue of concern. According to officers, many judges in a large number of districts are automatically applying this adjustment if the defendant enters a guilty plea. In other districts, unless the defendant discusses the offense with the probation officer during the presentence interview, the adjustment is not given. POAG discussed the discrepancy between "real acceptance" and pleading guilty and questioned if there is a need for an expanded version of acceptance with a possible range of points to be applied. This continuum could encompass all behavior from time of arrest until sentencing. The Acceptance of Responsibility issue appears to be under consideration by the Criminal Law Committee as well. There was unanimous agreement among POAG members that this was a problem which needs to be addressed due to the disparity in application. POAG recognizes that the issue revolves around true guideline application versus real-life scenarios of the need to move the case through the system as granting the adjustment to the defendant saves the court's resources and time. POAG also discussed whether the type of case necessitates the defendant discussing the offense with the USPO (such as rape cases) to determine their motivation for committing the crime, their motivation in future treatment,

and their success/failure while on supervision. The PSR is used by treatment providers and the supervision officer to determine discrepancies and motivation for success. Unlike other sections of the guidelines, this adjustment is determined on a subjective basis by the USPO and the Court. Another question was raised as to whether the provisions of USSG §1B1.8 provides sufficient protection to the defendant to allow him or her to discuss the entire offense and the fact that not all districts have USSG §1B1.8 provisions in the plea agreement.

### *Criminal History*

In exploring changes to criminal history, the Probation Officers Advisory Group engaged in a discussion on what a defendant who fell within a criminal history category of zero would truly depict. Would that category encompass an individual without prior convictions, but prior arrests, or would it apply to individuals who have never been arrested for anything before committing the instant offense. There was some initial discussion regarding the creation of a criminal history category VII or VIII and the impact it may have on the career offender guideline and the proposed sexual predator guideline.

POAG reviewed our prior position on the USSG §4A1.2(c) convictions and the possible need to help those defendants who are prohibited from the Safety Valve reduction because of points assigned to these offenses.

Discussion was also held regarding the current definitions for expunged/vacated sentences. It was noted that many officers are having difficulty in applying the guidelines and determining whether a conviction has been expunged, vacated, or set aside. Possible clarification needs to be addressed and the timing of when prior convictions are expunged or vacated. There appears to be a national trend by defense attorneys to have prior predicate offenses, which could be used in determining whether an individual is a career offender, vacated in state court prior to federal sentencing. This issue was also brought to POAG's attention at Palm Springs. It appears defendants are allowed to manipulate the sentence by attacking the prior convictions in state court prior to federal sentencing. A question was raised as to whether it was within the Commission's authority to place a temporal requirement on when a defendant could challenge a prior state conviction. It was also discussed that there was a need for clarification with respect to related cases as defined at USSG §4A1.2 and a definition for "consolidated sentence".

The morning session ended and the group broke for lunch.

### **Afternoon Session - June 26, 2001**

After returning from lunch, United States Sentencing Commission Staff Director, Tim McGrath, addressed POAG. Mr. McGrath welcomed the group and noted POAG's significant role in the last amendment cycle. Mr. McGrath reported on the Commissioners' recent meeting with the Criminal Law Committee to assess the last amendment cycle and their South Dakota hearing to address issues raised by the American Native population., Mr. McGrath noted that over the next 12 to 24 months the Commission will investigate the

ratio between powder cocaine and cocaine base, review the criminal history guidelines at the conclusion of a recidivism study now underway, and address various circuit conflicts. Mr. McGrath also noted that all the congressional directives have been resolved. It was suggested that we discuss the identified issues and other issues as practitioners of the guidelines and report our findings to the Commissioners at their August or September meeting.

Joe Napurano inquired of Mr. McGrath about standardizing the transmittal of presentence reports to the Commission. Mr. McGrath provided insight into this decision and the recent improvements implemented by Acting Director Deon Haynes. Suggestions were offered by Mr. Napurano to formulate a standardized transmittal sheet. Colleen Rahill-Beuler suggested that support staff could serve temporary duty assignments at the Commission to assist with data input. Debra Marshall suggested that a short video could be made for the purpose of explaining data correction and input process. Joe Napurano inquired about the renewal of the visiting probation officer program and suggested a discussion with the Chiefs Advisory Group which might be beneficial in helping to reinstate the program. Mr. McGrath's closing comments related to the Commission and the Bureau of Prisons problems with courts sealing statement of reasons forms in 5K1.1 departure cases. The Commission is concerned that attempts to protect reports and documents will cause a loss or delay in information provided to the Commission. Mr. McGrath requested that we convey to various districts that complete case information be forwarded to the Commission without delay.

#### **Pam Montgomery/Deborah A. Stephens-Panzer – Election of POAG Officers**

At the request of Mrs. Montgomery and with agreement of POAG members, Ellen Moore will stay on as chairperson until the conclusion of the February/March 2002 meeting. All members agreed that Ellen's continuance would make transition easier among persons who fill the chair's position. Mrs. Montgomery suggested that elections be held and that we elect a chairperson-elect and a vice-chair. Nominations were held and votes were tabulated. The chairperson-elect was identified as Cathy Battistelli and vice-chair as David Wolfe. Ray Owens and Phelps Jones were asked and agreed to serve an additional year to ease the transition in light of the recent rotation of several POAG members. A discussion followed wherein all members agreed that positions on POAG would be best filled by guideline practitioners.

Pam Montgomery addressed the group and indicated the Commissioners' intent to give judges more discretion. This appears to be the line of thinking of the Supreme Court as evidenced by recent decisions in *Koon* and *Buford*. One consideration remaining from the last amendment cycle was the "flexibility option" which would move the ranges in the sentencing table to allow for more probation sentences. Mrs. Montgomery noted that departures are still few and plea agreements rarely rejected. Other areas allowing flexibility for discussion by the Commission are: increases in Zones A and B of the Sentencing Table, any factual areas, and mitigating roles.

*Criminal History – Discussion Continued*

POAG resumed their discussion of criminal history issues, specifically, the attempt to identify a true first offender, possible expansion of the sentencing table to reflect criminal history categories of 0 and VII, and potential technical language amendments. The group recognized the term “true first offender” would need to be explicitly defined. Cases of mistaken identity and false arrest precipitated a discussion as to whether the true first offender designation should hinge on convictions in lieu of arrests. While POAG agreed difficulties exist in defining the true first offender, the group did not oppose a criminal history category of Zero. Technical language amendments were suggested to address continuing Chapter Four application problems regarding intervening arrests, related and consolidated cases, sentences vacated, expunged, or set aside.

Our discussion then turned to the possibility of a criminal history category VII. The group recognizes that a category VII would have statutory implications in instances where the guideline range, often tied to the career offender guideline, exceeds the statutory maximum. POAG noted the court’s current inability to impose a sentence higher than category VII based on a USSG §4A1.3 departure but realizes the difficulty in fashioning language to achieve this result. The group agreed that unless the courts provide adequate analysis to depart, the appellate courts will reverse the district court’s sentence. A guided departure might achieve the goal of higher sentences for extensive criminal histories while maintaining a judge’s discretion. POAG questioned whether there has been a “heartland” created in category VI depending upon mean criminal history points. A study of criminal history category VI cases could determine the median score, thus determining whether a category VII is justified.

The meeting closed at approximately 5:10 p.m. Ellen advised that tomorrow’s meeting would begin at 8:00 AM.

### **Morning Session - June 27, 2001**

Ellen opened the morning session noting that we would begin our discussion regarding drug penalties for cocaine and cocaine base to be followed by other issues that had been presented to each circuit representative for discussion.

#### *Penalties for Cocaine Base and Powder Cocaine*

It was the general consensus of POAG that judges do not like sentencing defendants to the lengthy terms of imprisonment sentences required by the guidelines. The group was of the opinion that most of the cases presently prosecuted at the federal level are street dealers and not high-level dealers. POAG encourages the Sentencing Commission to continue examining this issue as we are of the opinion that specific offense characteristics and Chapter Three adjustments are being manipulated with respect to drug violations in light of the sentencing court’s opinion that the sentencing guideline range based on the drug amount and quantity alone is extremely lengthy. Officers noted that on several occasions sentencing judges in their districts have expressed concerns regarding the youthful age of the offender and the lengthy imprisonment sentence that is required.

*Field Questions For Discussion*

Ellen noted this would be the appropriate time for the respective circuit representatives to present questions from the field.

*Colleen Rahill-Beuler* raised the issue of 5K departures and where the departures should begin. Through discussion, it was learned that many districts handle this differently. Colleen raised the issue that in light of the Ecstasy guideline amendment, the manual does not specify a dosage unit for Ecstasy. According to Mrs. Montgomery, this was inadvertently left off the equivalency table and can be remedied. Colleen also addressed the use of a new section titled "Factors That Impact Special Conditions". Everyone agreed this is an issue that would be addressed by the AO in the monograph as it is in reference to supervision plans.

***Ray Owens* discussed the specific offense characteristic for gun enhancements at USSG 2D1.1. In his experience, the gun enhancement generally requires a strict nexus between the gun(s) and the drugs. Furthermore, in light of the lengthy sentences associated with drug offenses, if the weapon connection to drugs is not abundantly clear, the enhancement is often viewed as being excessive.**

*Barry Case* advised he had several issues/questions that were presented to him by various members in his circuit. The first issue was with respect to the definition at USSG §2P1.2(a)(3) - Providing or Possessing Contraband in Prison. He noted that the terminology "narcotic drug" is not specifically defined. Various members of the group referenced that the statutory definition would be applicable. Another issue was the specific offense characteristics of (b)5 and (b)6 at USSG §2L1.1. The question was whether or not these enhancements were cumulative. He suggested that clarification was needed with respect to the guideline application notes. He also asked for definition of "victim" and whether they would be eligible for restitution. It is noted that these questions were addressed by Cathy Goodwin in a letter responding to the officers' inquiry.

*Ken Ramsdell* noted that he also had several questions. The first was the definition of "personal use" in regard to drugs and what quantity would qualify as "personal use". This also impacts Role in the Offense adjustment. It was noted that a determination with respect to personal use would be subjective. Another issue presented by Ken was Use of a Minor to Commit a Crime – USSG §3D1.4. The question: When a minor is present in illegal transportation of aliens or drugs, does this adjustment apply? Ken noted that it was felt the commentary should be stronger and suggested perhaps it should be utilized like the weapon enhancement, saying that unless it is clear and probable, the adjustment would be applicable. Ken also noted it would be helpful if when the amendments are published, the Commission could be more specific in determining whether the amendment was clarifying or substantive. It was determined that they could be either depending on the application of the district prior to the amendment.

*Cathy Battistelli* had several concerns with the first area of concern being the ambiguity in interpretation of the language found in the special instruction at USSG §2B1.3(d)(1) and whether a defendant could receive an alternative sentence of imprisonment to satisfy the requirement of six months custody. Cathy noted that she had contacted the Sentencing Commission for guidance and was advised the general consensus was that alternative sentences could be imposed. However, she and other members of her circuit are of the opinion that clarification could be made to eliminate any issue of whether or not alternative sentencing options were available. Cathy also expressed concern with respect to child support cases in that no specific guideline has been promulgated for this statutory offense. Based upon relevant conduct, some of the cases are going to jail due to the amount of arrearage; and likewise, some offenses are being charged as felonies while others are charged as misdemeanors. The issue was raised that there needs to be more consistent treatment of these cases within the system. Ellen noted that this issue had also been raised before the Commission in July 2000 but that would not restrict us from raising it again.

*Jim Mitzel* discussed several issues regarding Driving Under the Influence offenses and Serious Bodily Injury to Children. As there is no guideline to specifically address Driving Under the Influence offenses, these cases are often not sentenced consistently with others. It was suggested that there was a need for a guideline to be promulgated for this type of crime. Likewise, it was noted that there is a new statute which provides for a six-year maximum sentence for cases which occur on reservations or military installations.

*Phelps Jones* questioned whether or not Chapter Seven would be made as guidelines or remain as policy statements. According to Sentencing Commission representatives, the Commission has not looked into Chapter Seven at all. There was some feeling that the ranges were too lenient and some of the language was a bit different in Chapters Five and Seven. It appears the judges are using discretion with regard to violation consequences. Phelps also addressed gun enhancements. Some officers have asked if this could be an enhancement under Chapter Three that would apply to all guidelines if a firearm was present. The consensus was that this was probably not feasible. There was also some discussion held about USSG §5G1.3(c). It was noted that prior members of the Probation Officers Advisory Group were involved in the creation of this guideline/amendment and this was not really a guideline issue.

*Debbie Marshall* discussed the value of a “career - fraudster offender” guideline for Fraud offenses if a defendant has more than ten prior convictions. She proposed that this new guideline would capture the offenders who continue to be involved in fraudulent offenses. The consensus was to wait until the new Fraud and Theft guidelines have been in effect and the impact they may have. Debbie also had a letter from an officer asking if a defendant had a criminal history category of One or Two, could the judge put the defendant in a treatment facility and suspend imposition of the sentence, that being if the defendant did not comply, he could be returned to court and face the maximum possible sentence. It was noted that the Sentencing Reform Act of 1984 made such sentences no longer an option for the court.

*Rex Morgan* addressed a concern about Safety Valve issues and stated that he has often encountered situations where Assistant U.S. Attorneys wait until the day of sentencing to identify whether or not the Safety Valve adjustment applies. This causes confusion and sometimes sentencing delays as adjustments

are made to the presentence report. There was some difference of opinion among procedures in various districts; and so, this was deemed to be a local policy procedure that could be remedied by the appropriate personnel in each district.

*Theresa Brown* identified an issue concerning Campaign Contribution cases. The defendants are people who are not eligible to make campaign contributions but do so. This becomes an issue as to whether the guidelines would apply. In our discussion, it was determined that this appears to be an isolated issue in the DC District and predominantly hinges on how the defendant is charged.

*Joe Napurano* discussed a scenario in which short-wave radios were used to determine police presence or alarm presence of the police during a bank robbery. He asked if this was something the guidelines should address. The consensus was that this was not an issue and that perhaps if it was such an aggravating factor, it could warrant a departure.

Discussion was held with respect to the issues that had been presented and POAG identified issues of concern which we were of the opinion were important to address to the Sentencing Commission. The position paper will cover these issues. Ellen will be responsible for composing the position paper and forward it to Mrs. Montgomery by the designated date. Ellen asked that the individuals who had taken notes with respect to our meeting have these notes to her by July 16, 2001, so that she could comprise a formal record of the minutes. Ellen thanked everyone for their contributions.

Certificates of Appreciation were presented by Ellen to Cathy Ismail and Joe Napurano in recognition of their service and contributions to the Probation Officers Advisory Group. These members' terms expire after this meeting and the process of naming replacements will be conducted to ensure that the new circuit representative is named by our next formal meeting.

The meeting was adjourned at 12:30 PM.