

Probation Officers Advisory Group
Priorities Meeting Minutes
July 14 - 15, 2009
Washington D.C.

POAG members present: **Jennifer Sinclair (Massachusetts, 1st Circuit); Jineen Forbes (Southern New York, 2nd Circuit); Doug Moyle (Pennsylvania Middle, 3rd Circuit); Landy Burton (North Carolina Middle, 4th Circuit); Gail Winkler (Texas Southern, 5th Circuit); Philip Miller (Michigan Eastern, 6th Circuit); Jon Gobert (Illinois Southern, 7th Circuit); Rebecca Chaiken (Minnesota, 8th Circuit); Teri Brantley (Central California, 9th Circuit); Bryce Beckett (Kansas, 10th Circuit); Suzanne Ferreira (Florida Southern, 11th Circuit); Kathie McGill (District of Columbia, DC Circuit); and Cinnamon Ornelas (Texas Western, FPPOA Rep.)**

USSC Proposed Priorities 2009 - 2010 - POAG members discussed tentative priorities proposed by the Sentencing Commission for the amendment cycle ending May 1, 2010. The Commission has held public hearings in Atlanta, GA (February 10-11, 2009), Palo Alto, CA (May 27-28, 2009) and New York, NY (July 9-10, 2009). Additional regional hearings will be held in Chicago, IL (September 9-10, 2009); Denver, CO (October 20-21, 2009), Austin, TX November 19-20, 2009) and Phoenix, AZ (January 20-21, 2010), soliciting information from the public on these proposed priorities. These eleven (11) priorities generally relate to priorities identified in previous amendment cycles, which were not completed, or require on-going review and action by the Commission.

- ❖ POAG members support the priorities set forth by the Commission. The priorities are relevant to concerns raised across the nation by probation officers and relate to on-going sentencing issues experienced by courts.
- ❖ Priorities identified by the Commission address many global issues relative to sentencing, but which remain very important in the sentencing landscape.
- ❖ POAG members expressed a desire for the Commission to address the priority identified at number 6, relating to a study of the statutory and guideline definitions of "crime of violence", "aggravated felony", "violent felony", and "drug trafficking crime", including an examination of relevant circuit conflicts regarding whether any offense is categorically a "crime of violence", "aggravated felony", "violent felony", or "drug trafficking crime" for purposes of triggering an enhanced sentence under certain federal statutes and guidelines.

Priorities Identified at National Guidelines Seminar - POAG members discussed priorities identified by probation officers attending the 2009 National Guidelines Seminar recently held in New Orleans, LA.

- ❖ Officers requested the Commission continue to review and “revamp” the “crime of violence” definitions at the immigration guideline (§ 2L1.2).
- ❖ Officers requested the Commission develop a definition for “simple assault” at the immigration guideline (§ 2L1.2).
- ❖ Officers requested the Commission develop clearer definitions for authentication features and means of identification (§ 2B1.1(b)(10)).
- ❖ Officers requested the Commission consider developing a two (2) level reduction under the “Precursor” guideline (§ 2D1.11) similar to the “safety valve” reduction found at § 2D1.1.
- ❖ Officers requested the Commission clarify the “felony conviction” definitions found the Application Notes at § 2K2.1. Application Note 1 makes reference to a definition for a “prior felony conviction.” Application Note 10 makes reference to a definition for a “felony conviction.”
- ❖ Officers requested the Commission continue to review the ramifications of the recent change to the definition of a “single sentence” and concerns related to consistent application of this definition and the potential loss of “career offender” classifications.
- ❖ Officers requested the Commission consider developing a mitigating role reduction for defendants identified as “mules.” These defendants are not automatically precluded from this consideration, but generally do not qualify, as additional conspiracy information is not available and/or hypothetical participants can not be considered.
- ❖ Officers requested the Commission consider an enhancement at § 2B1.1 for quantifying loss relative to blank checks.

Priorities Identified by POAG Circuit Reps - POAG members discussed priority concerns identified by officers throughout the various districts:

- ❖ Many circuits struggle with determination of the appropriate guideline enhancement under §2L1.2 with regard to the previous sentence imposed in immigration cases. Specifically, in cases where the defendant received a suspended sentence, was placed on probation and deported. Once the defendant is located, many times the probation sentence is revoked, and an imprisonment sentence imposed. Officers are requesting clarification if the final custodial sentence imposed subsequent to revocation, and at times after the defendant has been “found”, is to be used for determining the appropriate increase in the offense level.
- ❖ POAG members expressed a concern with disparity in sentencing nationally under a post *Booker* advisory guideline system.
- ❖ POAG members discussed the removal of the words “occurred on separate occasions” from § 4A1.1(f). This change has resulted in ex post facto issues.
- ❖ POAG members requested the Commission consider clarifying Application Note 2(A) at § 3B1.3, regarding postal employees, to include employees contracted by the USPS.
- ❖ POAG members feel that individuals who are “self trained” in computer/ technology systems should qualify for an Abuse of Position/ Special Skills enhancement at § 3B1.3.
- ❖ POAG members continue to struggle with issues determining if computer generated images should count in the total number of images. (Congress may have recently passed a law that resolves this issue, if not the definition for images should be amended to include computer generated issues).
- ❖ POAG members requested the Commission review the Circuit split regarding the scoring of prior sentences involving multiple revocations (§ 4A1.2 Application Note 11).
- ❖ POAG members note a needed correction at §2K2.1 Application Note 10, removing reference to § 4A1.2 comment (n. 3).
- ❖ Some districts are excluding images of children that have not previously been identified as “actual” victims. Officers noted a trend moving away from images toward videos. Due to the current conversion of videos to images, most cases involve a total number of images that “significantly exceed” the 600 image maximum. The current application note allowing for upward departures in such cases needs to provide additional guidance in determining an appropriate departure in such cases.
- ❖ Some districts are experiencing difficulty obtaining information relative to dates of arrest. This presents particular problems when addressing whether prior sentences are separated by an intervening arrest and apply the “single sentence” provisions. Additional language would allow officers to use other known dates (i.e. - date of arraignment) for applying this provision. Officers discussed the possibility of separating rules at § 4A1.2(a)(2) for determining a “single sentence.” In other words, provide a rule if prior sentences involved an intervening arrest, and a second rule if no intervening arrest occurred which set forth subdivisions § 4A1.2(a)(2)(A) and (B).
- ❖ POAG members discussed concerns expressed by border districts relative to the counterfeiting of passports, driver’s licenses and other identifying documents, which contain new “laser chips.” SOC’s at §§ 2L2.1 and 2L2.2 don’t appear to capture this conduct.

- ❖ POAG members commented that the ability to obtain certified court record is becoming more difficult with more and more agencies going “paperless.”
- ❖ POAG members discussed a “reasonableness” element when Court’s are imposing significantly long or “symbolic” sentences pursuant to § 5G1.2. That is should Court’s maintain a “reasonable expectation that a defendant could serve the majority of a sentence” when stacking multiple sentences to achieve the “total punishment.”
- ❖ POAG members discussed when a defendant’s instant offense involves convictions for two firearms/ explosive offense, that the four level increase for used in connection with another felony offense would not apply.
- ❖ POAG members discussed a recent difficulty in determining the amount of loss in bankruptcy and mortgage fraud cases.
- ❖ 8th Circuit case law requires the specific offense characteristic (SOC) at U.S.S.G. § 2K2.1(b)(6) apply to any prior criminal conviction, even if the conviction is not relevant conduct. POAG members discussed discrepancies which may exist in the application of this SOC as a result of circuit conflicts.
- ❖ POAG members requested the Commission consider implementation of an intermediate mitigating role reduction between “minor” and “minimal” roles as opposed to the current guidance allowing for a three level reduction for “cases falling between (a) and (b).”
- ❖ POAG members discussed the importance of resolving circuit conflict whenever possible.
- ❖ POAG members discussed the recent increase in the request for restitution in child pornography offenses. This matter is being considered by the AO and additional information will likely be available in the future.
- ❖ POAG members discussed application concerns at the child pornography guideline regarding disparity in the SOC application with regard to distribution for “something of value” particularly in cases involving a file sharing software.
- ❖ POAG members discussed the importance of pursuing alternatives to incarceration where appropriate.
- ❖ POAG members requested the Commission consider an enhancement at § 2B1.1 for quantifying loss relative to blank checks.