

POAG Minutes
USSC - Washington, DC
June 29-30, 2016

I. Opening 8:30 a.m.

Chairman Richard Bohlken called to order the summer 2016 meeting of the Probation Officer Advisory Group (POAG) at 8:30 a.m. on June 29, 2016, at the Thurgood Marshall Building in Washington, DC.

II. Attendees

Richard Bohlken (Chair - 10th Circuit Representative); John Bendzunas (Vice Chair - 2nd Circuit); Sean Buckley (1st Circuit); Beth Neugass (3rd Circuit); Kristi Benfield (4th Circuit); Juliana Moore (5th Circuit); Tracy Gearon (6th Circuit); Jill Bushaw (8th Circuit); Jaime Delgado (9th Circuit); Joshua Luria (11th Circuit); Renee Moses-Gregory (DC Circuit); Craig Penet (FPPOA Representative); Carrie Kent (PPSO Representative).

Also present: Raquel Wilson, Director of the Office of Education and Sentencing Practices (OESP), and OESP staff member Peter Madsen.

Absent: Lori Baker (7th Circuit)

III. Welcome

Raquel Wilson addressed POAG and introduced a new member of the OESP staff, Ebise Bayisa, Senior Attorney. She also gave an overview of the OESP's current activities and the USSC's Priorities.

IV. Review of Minutes from February 2016 Meeting

Juliana Moore moved the Minutes be accepted, Sean Buckley seconded the motion, and the Minutes were adopted unanimously.

V. Proposed Priorities for Amendment Cycle

1. *Continuation of its work with Congress and other interested parties on statutory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of the "safety valve" at 18 U.S.C. § 3553(f), and elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation.*

POAG discussed the various mandatory minimums established by Congress as well as the Commission's Mandatory Minimum Report from 2011. The general feeling was this is not a guideline issue, per se, as it is controlled by Congress; however, POAG supported the Commission's continued work with Congress on these matters.

POAG discussed expansion of the safety valve. POAG members talked about the position taken by the group on this issue in the past. POAG discussed the expansion of the safety valve to include Criminal History Category II, but felt there should be a safety valve exclusion for

any defendant in Criminal History Category II that had a 3-point conviction calculated under USSG §4A1.1(a). Raquel Wilson indicated Congress has included an amendment to consider this.

One POAG member also brought up boat cases; cases that are prosecuted under Title 48. These cannot qualify for the safety valve because they are not prosecuted under Title 21. He asked if the Commission would consider adding Title 48 cases to USSG §5C1.2(a).

POAG discussed support of the elimination of the mandatory stacking of 18 U.S.C. § 924 penalties. POAG members talked about the position the group has taken on this issue in the past. There was discussion of the way this varies greatly across circuits and districts; thereby leading to disparity.

2. *Continuation of its multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate. As part of this examination, the Commission intends to study possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant's role, culpability, and relevant conduct.*

POAG discussed post-Booker guidelines and what members felt was working and what was not working. POAG discussed the notions of the parties manipulating the guidelines to get to a desired sentence and trying to resolve an incarceration issue by "blaming the book." POAG members discussed the operation of the guidelines being plainly laid out in Chapter 1, but that many practitioners do not read Chapter 1, but instead, go straight to Chapter 2. Many POAG members expressed it as a possible training issue and stated the key is to educate.

POAG discussed the number of enhancements and other adjustments that have come from congressional mandates. The Commission has little to no discretion with these matters. POAG praised the USSC for reducing the drug guideline and adjusting the fraud guideline for inflation.

POAG discussed a survey of judges that indicated a general approval of the system, but noted disparity is increasing. POAG talked about the ongoing need for simplification and ease of application. There are still issues determining relevant conduct and understanding the categorical approach. POAG members discussed the struggle between real offense conduct and charged conduct. POAG members debated the impact of going to a reasonable doubt standard and the possibility of proving all enhancements beyond a reasonable doubt instead of by a preponderance standard. All POAG members seemed to find this troubling and believed it would make the system more burdened, increase complication, and lead to mini-trials during sentencing hearings. POAG members discussed the preponderance standard and its benefits. Members felt applying the guidelines as intended and using a preponderance standard yields an advisory guideline range that is outcome driven.

POAG further discussed the idea of unconstitutional vagueness and whether or not this applied to the guidelines.

POAG discussed the ongoing examination of the guidelines in an attempt continue to simplify, promote proportionality, and reduce disparity and praised the USSC for its ongoing efforts. The Commission's efforts through advisory groups, the amendment cycle, and public comment were greatly commended.

3. *Continuation of its study of approaches to encourage use of alternatives to incarceration, including possible consideration of amending the Sentencing Table in Chapter 5, Part A to consolidate and/or expand Zones A, B, and C, and any other relevant provisions in the Guidelines Manual.*

POAG discussed condensing the Sentencing Table into less than four zones. Members talked about using probation in and of itself as an alternative to incarceration. POAG has discussed this issue in the past, specifically, consolidating from four zones to two or three zones, with some debate over where to draw the line of demarcation.

POAG discussed the paradigm shift in U.S. Probation regarding working with the offenders: i.e., Evidence Based Practices, PCRA, STARR, residential drug treatment, and other initiatives which are all alternatives to incarceration and can be used when not confined to a specific zone.

A POAG member inquired about zone departures and Raquel Wilson noted the only zone departure option available at this time is referenced in Application Note 6 at USSG §5C1.1 for defendants with specific drug/mental health treatment needs.

POAG also discussed the possibility of creating a Criminal History Category of Zero. POAG talked about recidivism data and particularly about those individuals without any law enforcement contact.

4. *Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense") and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.*

POAG discussed the continued difficulties with the statutory and guideline definitions related to the nature of a defendant's prior convictions. The question was asked if we are still capturing the defendants that this was designed to capture or are the violent offenders slipping through the cracks based upon the case law. POAG concurred the definition of Crime of Violence is still difficult and convoluted. POAG discussed expanding the enumerated list and trying to get away from an elements test. One POAG member suggested the categorical approach be abandoned for a strict enumerated list. For example, if it is an aggravated assault, it is an aggravated assault. POAG engaged in a significant amount of debate over this topic and whether or not the categorical approach can be eliminated in its entirety. A POAG member

suggested that taking away the comparison to the generic definition will help with simplification and eliminate the categorical approach.

POAG discussed the desire for the Judge to be able to factor into the guideline range a more extensive view of the person and their criminal history. If a different rule (other than the categorical approach) was adopted, the Judge could look at it and make a decision. On some level, the correct starting point is not what results from a categorical approach because we cannot use the offense because of the complicated elements analysis.

POAG discussed that the definition of drug trafficking offense is clear and there do not seem to be the issues with that definition.

5. *Continuation of its comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and promote effectiveness of reentry programs; and (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.*

POAG discussed the recent reentry court study which is posted on the FJC website. This issue ties back to the rezoning of the Sentencing Table which was discussed previously today.

6. *Study of the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.*

POAG discussed the TIAG. Our TIAG representative was not present for today's meeting. POAG will defer to the TIAG findings and recommendations.

7. *Study of the treatment of youthful offenders under the Guidelines Manual, including possible amendments to Chapter Five, Part H.*

POAG discussed this as relating to TIAG as well. POAG will defer to the TIAG findings and recommendations.

8. *Study of the operation of Chapter Four, Part A of the Guidelines Manual, including (A) the feasibility and appropriateness of using the amount of time served by an offender, as opposed to the sentence imposed, for purposes of calculating criminal history under Chapter Four; and (B) the treatment of revocation sentences under §4A1.2(k).*

POAG discussed this issue at length and members were unanimous in opposition to using a time served method of calculating criminal history. POAG members felt that attempting to do so would be too cumbersome and too complicated and lead to significant sentencing disparities.

Specifically, POAG was unable to determine a method to accurately calculate time served. The availability of records is a huge hurdle to overcome. Individual jail and prison records are almost impossible to obtain. If records are available, their accuracy is questionable and many times, illegible. It would also be highly difficult to calculate a time served for anyone serving multiple sentences or those with detainers, on furloughs, or work-release.

POAG discussed collateral requests and the fact that many districts do not provide this service, thus making records even more difficult to obtain.

POAG discussed the idea that this would negate the weight of the sentence imposed by the Judge and allow the criminal history score to be determined by extra-judicial decisions. Inmates are released frequently because of overcrowding or other prison-specific issues.

POAG debated the need for a fall-back provision. For example, if there is a Judgment that shows a 3-year sentence of imprisonment was imposed but no custody records can be located, how would that be scored: 1-point under USSG 4A1.1(c)? Since there can be only 4 points under USSG §4A1.1(c), this could significantly undermine/underrepresent this specific defendant's criminal history.

POAG also discussed how this could prejudice some people, for instance, the individuals who remain in custody pending sentencing. Because they could not or did not make bail, some individuals serve a much longer sentence. Under a time-served system, these individuals could have a higher criminal history score. In addition, those individuals who were sentenced in a jurisdiction with good jail/prison record-keeping could get penalized more than those in a jurisdiction with poor record-keeping.

POAG discussed the issue of adding revocation time to the underlying offense. POAG members expressed a belief that revocations are based largely on Grade C violations. POAG believed adding the revocation sentence to one underlying offense is beneficial for the defendant and highly fair. POAG expressed feelings this provision works very well and is generally simple and easy to apply. If revocations are ignored, much of an individual's criminal history would be discounted.

9. *Study of offenses involving 3,4-Methylenedioxy-N-methylcathinone (Methylone) and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.*

POAG discussed the increase in synthetic/designer drugs that are beginning to appear in various districts. In addition, POAG discussed beginning to see drugs as coating materials. POAG discussed Methylone, Molly, Spice (synthetic cannabinoids), and bath salts.

POAG supported the idea of additional study of all synthetics and would like a methodology to deal with these designer drugs. Determining these equivalencies is difficult and time consuming. These cases sometimes require chemical analysis reports and in some instances,

chemists and other experts to resolve contested drug quantity issues at sentencing. This causes disparity between districts/judges, and therefore, sentences.

10. *Implementation of the Bipartisan Budget Act of 2015, Pub. L. 114–74, and any other crime legislation enacted during the 114th or 115th Congress warranting a Commission response.*

POAG had no comment.

11. *Resolution of circuit conflicts, pursuant to the Commission’s continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.*

POAG had no comment.

12. *Consideration of any miscellaneous guideline application issues coming to the Commission’s attention from case law and other sources, including possible consideration of whether a defendant’s denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1.*

POAG discussed USSG §4A1.5(a) & (b), Repeat and Dangerous Sex Offender Against Minors. POAG discussed the need for "apply the greater" between USSG §4A1.5(a) and (b).

POAG discussed acceptance of responsibility and relevant conduct. POAG members discussed how relevant conduct and acceptance of responsibility are viewed and applied differently among the circuits, districts, divisions and Judges. Disparities were identified across the various circuits relating to how USSG 3E1.1(a) and (b) are being applied, and disparities as to factors that would cause defendants to lose their acceptance of responsibility during the presentence process.

POAG discussed the terms "falsely denies" and "frivolously contests." POAG debated removing this sentence or taking relevant conduct out of the acceptance of responsibility determination so that acceptance only applied to the elements of the offense.

POAG discussed a desire for the Commission to look into this issue.

VI. USSC National Seminar

Raquel Wilson and Rachel Pierce addressed POAG and discussed an Advanced Guidelines Issues session for Wednesday morning of the seminar. They also inquired about issues to cover during such a session. POAG members supported the use of scenarios and discussed the benefits of scenario-based training.

POAG members discussed the USPO Forum at the National Conference. Members talked about last year and the information provided on iPad/tablet initiatives and the new PSX calculator. Chair Bohlken advised of the possibility of reviewing the new PSR workload formula and reentry initiatives. One POAG member suggested adding the names of each

district's representative to POAG as well as the Circuit Representatives. She further suggested POAG representatives talk about different initiatives in their respective districts/circuits.

POAG members debated possible PCRA training for PSR writers; not certification-level training, but getting a general understanding and perhaps adding some of the questions into the PSR interview that could improve Part C information that would later be used in PCRA. This was not met with universal approval. POAG members avowed PSR is not a risk assessment tool although at least one district is using the PCRA during the PSR phase and including the score in the PSR.

Chair Bohlken discussed a request from the USSC Public Affairs Office website redesign team needing volunteers for a usability test. POAG members Jaime Delgado and John Bendzunas volunteered.

VII. Other Business

POAG discussed district representative response rates to POAG members. POAG members talked about the how some have difficulty filling the district representative slots. Carrie Kent indicated she could add this to the Chief's Advisory Group call. This might also be put in News and Views as well.

Each POAG member discussed their district representative response rates and any particular issues being faced by their specific circuit.

Specific issues noted and discussed:

- a. Organizational Guidelines/Chapter 8 - do the employees have to be counted throughout the scheme and do they have to be employees or can they be contractors? Organizational guidelines are used infrequently and still give officer's problems. POAG noted that an application note that defines employees and gives direction might be helpful.
- b. A mixture and substance containing methamphetamine was discussed as it compares to methamphetamine actual. POAG discussed this discrepancy and its relation to cocaine as compared with cocaine base.
- c. USSG §1B1.3 - all the examples have been here for years. Would it be possible to update the examples to show some of the newer scenarios?
- d. USSG §2G2.2 cross reference to 2G2.1 and grouping. This is a common helpline call.
- e. Several Hobbs Act robberies cases in which defendants are dressed as law enforcement officials. Could there be an enhancement in USSG §2B3.1 or a Chapter 3 adjustment for such egregious behavior?
- f. 18 U.S.C. § 3146(a)(2) is not listed in Appendix A, only the penalty statute for this offense, which directs the reader to USSG §2J1.5. This is an anomaly to be brought to the Commission's attention.
- g. USSG §2B1.1(a)(1) - it is a base offense level of 7 if it is an offense "referenced in this guideline." There is confusion about what "referenced in this guideline" means. For example money laundering; it is not an offense referenced under this guideline and this is a common mistake. Could the Commission consider adding the word "directly" in front of "referenced" or add an example involving money laundering to the application note?

- h. People do not understand that just because you cannot group under (d) does not mean you would never group under (a), (b), or (c).
- i. USSG §2B1.1 credit against loss in a Mortgage Fraud case - loss is the amount the victim has recovered, but the time frame is problematic. If loss is determined at the time of the plea, it can be different among members of a conspiracy. POAG discussed perhaps using the date of the relevant charging instrument or the date of the detection of the offense.
- j. Sophisticated means. Did the Commission intend to word the sophistication enhancement at USSG §2T1.4(b)(2) the same as in USSG §2B1.1(b)(10)(C)?
- k. POAG members indicated an interest in the Commission having a helpline email address.
- l. Victim enhancement under USSG §2B1.1(b)(2) is being applied inconsistently and leading to sentencing disparity.

VIII. Adjournment

Chairman Richard Bohlken adjourned the meeting at 11:40 a.m. on June 30, 2016.

Minutes submitted by Juliana Moore, July 6, 2016.