

POAG MINUTES
U.S. SENTENCING COMMISSION
THURGOOD MARSHALL BUILDING, WASHINGTON DC
JULY 18 AND JULY 19, 2018

1. **Opening:** Chair John Bendzunas called the Summer 2018 meeting of the Probation Officer's Advisory Group (POAG) to order at 8:27 a.m. He introduced and welcomed the new representatives Laura M. Roffo (1st Circuit), Laura Ensley (4th Circuit), and Kali Funderburk (10th Circuit). All other members present with Peter Madsen and Raquel Wilson.

Chair Bendzunas discussed the unique networks for feedback from the Circuits and Districts. The group adopted the minutes from last meeting.

2. **USSC 2018 National Training:** Director Wilson discussed the commentary that was received from the Roundtables of the 2018 National Training Program and requested to share the commentary with the working groups. Discussed next year's USSC Seminar location and timing. Discussed the content of 2018 and content planning for 2019. The group discussed how to set the metrics for Beginner, Intermediate, and Advanced. The group discussed new topics and training gaps for new officers. The group discussed the prospect of creating a FLETC supplemental training dedicated to PSX/USSG for continuity. Discussed efforts of the AO to engage in streamlining the monograph and that the PSR audits will eventually be moved back to mandatory audits.
3. **POAG Process:** Discussed strategies for the new Circuit Representatives to adapt to writing for POAG submission. Strategized on enhancing national feedback network with District Representatives.
4. **Reviewed Proposed Priorities – Simplification:**

- a. 2G2.2: There was overwhelming feedback from the field revealing a desire for the simplification of §2G2.2. It was acknowledged that legislation is driving many of the Special Offense Characteristics. Discussed Commission ideas regarding the number of images and how this issue was reported in 2012 in a similar manner. Discussed mandatory directives as opposed to discretionary directives. Emerging technology on this issue reflects two types of defendants: those who possess and those who view. Discussed risk factors. The group discussed the degree of variance from 2G2.2 and to what degree the guideline is good at capturing the culpability metrics the judiciary appears to consider valuable. Discussed cloud technology and cryptocurrency presenting a new horizon of problems. Looked at guideline fidelity statistics.

- b. Armed Career Criminal Act, Crime of Violence, and Serious Drug Offenses: Crime of Violence (COV) is no longer capturing true crimes of violence. The Commission has autonomy to re-author Career Offender and COV material. Discussed the degree of USSC autonomy available. The group discussed recommending Congressional action to change Career Offender to have at least one prior crime of violence sustained as instant offense or predicate convictions. Discussed disparity created by COV. Observed how Career Offender cases that are based on serious drug offenses are getting lower sentences than those with Crime of Violence, but still too high a sentence. Discussed prospect of moving COV out of §2K2.1 base offense level. Discussed excising as much of the categorical approach from the guidelines as possible. Requested variance rates on Career Offender as a measure. Discussed the substitutions for the categorical approach. Discussed including §4A1.1(e) and Chapter Seven to remain internally consistent.

Break at 11:38

- c. §2B1.1: Discussed the implications of cybercrime and new technologies. The group discussed TOR usage, cryptocurrency/blockchain (Bitcoin, but also privacy secure coins), money laundering, phishing accounts, and hacking. The group observed that these issues were increasing and recommend a focus study on emerging technology and its broad impact on the guidelines.
 - d. Alternatives to Imprisonment: The group discussed the progress made. The group discussed areas where the recidivism study could brush up against this topic. Expansion of the safety valve was discussed.
5. **Synthetic Drug Offenses Committed by Organizational Defendants:** Discussed whether this needed to be expanded. The group observed that Chapter Eight would just reference to USSG §2D1.1, and many did not see any problem with the current guideline.
 6. **Career Offender and COV:** The group discussed adopting a uniform definition. Discussed the controlled substance predicates.
 7. **Expanding Safety Valve and Eliminating 924(c) Stacking:** The group discussed our previous positions on this issue. Discussed the prospect of expanding safety valve to other offenses, boat cases. Discussed how this may connect with “First Offender”

directive. The group discussed criminal history studies, expansion of 5C1.2, non-statutory safety valve relief to other offenses outside of §2D1.1.

8. Recidivism: The group discussed ways to reduce recidivism and alternatives to incarceration. The group observed that youthful offender programs and alternatives may no longer be an active issue. Discussed §4A1.2(k) and the disparity between technical violations and single sentence issues. Discussed our old position on this. The group discussed the commission's effort to look at different criminal history scoring methods. Discussed the seriousness of three-pointers, and some expressed concerns about essentially reducing the windows for poor conduct by however much time they were in custody (i.e. a person sentenced to 10 years, then only has 5 years of good conduct). Discussed the concern of people being released on the same day for multiple, unrelated concurrent/consecutive sentences. Discussed recommending additional language to departures for over/under representation of the criminal history.

9. Miscellaneous – Technical Issues:

- a. §1B1.10: Discussed this guideline in context of *Koons* – The group indicated that it does not seem to be an issue that needs our input.
- b. §5H1.6: Discussed cases involving the family ties and responsibilities reduction. The cases discussed generally involved both parents having been convicted but have special needs/family circumstances, and the family is dependent on at least one of them being available. The group discussed how families are frequently impacted by poor decisions of defendants. Discussed suggestion of moving §5H1.6 to 5K. The group explored statistics about frequencies of departures and variances grounded in family circumstances.
- c. §1B1.13: Discussed the encouragement of the Director of the BOP to file a motion when “extraordinary and compelling reasons” exist. Discussed how this impacts supervision officers. The group discussed how there was the prospect of letting defendants file these motions, and the history concerning this issue. We support the study of this issue, and the group noted that the BOP utilizes compassionate release very infrequently.

10. Cybercrime Issues: Discussed identifying emerging technologies and trends in cybercrime and areas of opportunity for guideline amendments. There was some cross-over discussion with 2G2.2, discussing technology material/update from 2012 and discussion from §2B1.1.

Group broke for the evening around 5:00 p.m.

Thursday, July 19, 2018 – Resume at 8:58 a.m.

11. Succession Planning Discussion: Three, perhaps Four POAG members have expiring terms in 2019. Jaime Delgado and Lori Baker will have their final meeting in the Winter 2019. Renee Moss-Gregory and possibly Tracy Gearon will have their final meeting in Summer 2019. Discussed hand-off and mentoring. The group discussed the prospect of working more closely with those who are replacing you.

12. Responses from the Field:

- a. First Circuit: Discussed look at application note 4 under acceptance and the interaction with pre-plea conduct. The group discussed that per guidelines it is correct to pull acceptance, but often it is not adopted by the parties or Court. Discussed including cases to the application note that could provide guidance. We had previously requested clarity on what constitutes extraordinary circumstances in the 2017 Summer paper. Also, discussed firearms made in a 3D printer and the lack of serial number issue.
- b. Eighth Circuit: Discussed escaping or attempting to escape results in obstruction. The issue of a person who absconds from supervision has left, but is not failing to appear because no sentencing date or notice of a sentencing date has been communicated to the defendant. The group agreed this would not be written upon. Discussed child abuse and how ill-fitting it can be within the guidelines. It is a crime brought in from another jurisdiction (non-federal) (§2X5.1). The group discussed how a variety of issues can be ill-fitting. Discussed Child Abuse on federal land, DUI manslaughter, and Aggravated Assault. Discussed referring this issue to TIAG as well.
- c. Fourth Circuit: Discussed MacCullum and Whitley cases (already addressed). Discussed the clarification of 2G2.1(d)(1), pseudo counts, and relevant conduct. The relevant conduct does not set up pseudo counts – conspiracy, specific videos with multiple victims. The group discussed how it may be good to have an example of what it is meant for and what is an erroneous application of it. The commission received lots of help calls on this issue. Discussed when extra evidence is found beyond the Indictment and instances when misapplication or miscreation of pseudo counts occurs. Discussed alteration of 1B1.2, comment. (n.3) to mirror or support 2G2.1. Discussed how emerging technology could

connect with this. Also, discussed if possession of firearm can be a Grade A Violation.

- d. Tenth Circuit: All topics of interest previously discussed.
- e. DC Circuit: Discussed lack of definition for §3A1.1(b)(2) – large number of vulnerable victims. The group discussed how some clarity would be helpful. Discussed victim numbers under §2B1.1 and how the numbers of substantial financial hardship may be a good guide. Discussed how the effort should be to capture the harm, not the number. Discussed how to remain internally consistent with the substantial financial hardship metrics/numbers. Discussed how the change to §2B.1.1 was positive and bringing that concept to §3A1.1(b)(2) would be helpful. The group discussed how the threshold concept can be helpful, especially when contemplating victims who suffer losses outside of the current metrics (i.e. Cancer victim whose technicians do not do the sample testing for which they have been hired).

Discussed §2P1.1(b)(3) and defense counsel arguments that they haven't committed anything by mere arrest. Discussed the problem of people who are found on the street are the same as a person who is arrested for committing a violent offense, because they have not yet sustained a conviction for the arrested offense. Also discussed clearer definition, similar to §2K2.1, comment. (n.14(C)).

- f. Seventh Circuit: Discussed 2G2.2 and the prospect of putting hyperlinks for SOCs in the USSC pseudo-app to help address the Court's concerns/needs. Discussed Career Offender and ACCA application difficulties. Discussed some of the restrictions on supervision division for where contacts can be made.
- g. Third Circuit: Many topics of interest have been previously discussed. Discussed the combining of various offenses, separated out, but still sentence for all the different offenses on the same date. The group discussed how it is okay to separate them so long as the sentencings occur on different dates. Discussed criminal contempt cases, §2J1.1, and applying §2X5.1
- h. Sixth Circuit: Discussed special skill in context of emerging technology. Discussed §2B5.3 and fraud training. Discussed the difficulties in this application. Also discussed §3C1.3, offenses on release and whether the application of this guideline is structurally problematic or whether we just needed training on it. The group discussed whether this was a relevant conduct

issue and how this guideline connects with acceptance of responsibility and Chapter Five. Discussed the need for clarification as to which offense it is intended to apply to.

- i. Eleventh Circuit: Discussed 2K2.1(b)(5) and 2K2.1, comment. (n.13(B)) regarding how individuals who receive an automatic weapon or illicit explosive are not considered to be people whose receipt of the firearm would be unlawful. Discussed extreme examples in which the possession of that item (Machine gun, pipe bomb, and short-barreled shotgun) is unlawful in and of itself, which is not adequately reflected in the trafficking concept. The group will solicit feedback from their respective circuits to see how often this is happening. Also, the issue of §3C1.3, as previously discussed.
- j. Fifth Circuit: All topics of interest previously discussed.
- k. Ninth Circuit: Discussed minor role (§3B1.2(c)) and there being more reliance on the five factors. Discussed §2L1.1(b)(5) when a firearm may be fired by law enforcement officers in an effort to stop a boat. Discussed Application Note 3, and the increase for substantial risk, in which you are not to apply the (b)(6) if the defendant has already received an enhancement for (b)(5). The group discussed getting clarification about whether or not a law enforcement officer's actions instigate the enhancement.
- l. FPPOA: Discussed Carolina drug conspiracy and minor role.
- m. Second Circuit: Discussed 2G2.2 briefly. Discussed the Robbery guideline and the grounds for an upward departure for the use of false insignias. The group discussed how the increase in the loss amounts makes this rarely an issue.

Discussed travel changes. Review of additional writing assignments for the field.

Meeting adjourned at 12:00 p.m.