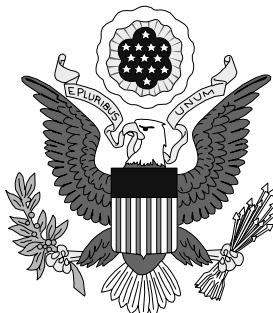


PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

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August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on August 10 and 11, 2005 to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. We are submitting comments relating to three issues which appear on the Commissioner's list of priorities, as well as other issues which POAG believes should be addressed.

Implementation of Crime Legislation regarding the Family Entertainment and Copyright Act of 2005 and the Intellectual Property Protection and Courts Amendment Act of 2004

POAG recognizes there is a broad category of offenses which could be captured in USSG §2B5.3. The group believes a separate prerelease specific offense characteristic should be added to this guideline as it is viewed as a distinct harm to the victim. POAG realizes conduct involving the prerelease of movies varies. An individual could digitally record the movie while watching it in a theater and then release it, or obtain a pirated copy of the movie and release it prior to the premier. This problem is similar to "zero-day release" of protected copyrighted video games where the harm to the industry is not ordinarily covered in the existing guideline. POAG also noted that computer technology involved in these types of offenses changes very quickly which makes it almost impossible to capture the correct terminology to be used in the guidelines. For example, would peer-to-peer sharing of information via networked computers be considered under the current definition of uploading? Another problematic area in this guideline is determining the dollar amount associated with the crime. If an individual is found with 100

Calvin Klein labels, how is the dollar amount to be determined as the Calvin Klein label can be found on underwear or jeans? Or, in the case of an individual who has pirated copyrighted materials, including multiple high end items of computer software, should the dollar amount be based on what is found on the defendant's computer during a search or should it be determined on the number of times the items were uploaded or downloaded? Depending on how the dollar amount is determined, sentencing disparity can result throughout the system with some individuals receiving probationary sentences and others receiving significant prison sentences.

Immigration

Regarding the immigration guidelines, POAG urges the Commission to continue its work in this area. It is believed that the Commission should continue to simplify the guidelines by clarifying definitions, such as the crime of violence definition, for ease of application. The definition in this guideline differs from the definition contained in 8 U.S.C. § 1101. Moreover, the group suggests the Commission address whether a sentence of 13 months or less as noted in USSG §2L1.2(b)(1)(B), includes a sentence of probation. The definition for "sentence imposed" as included in this particular guideline, conflicts with the definition contained in USSG §4A1.2(b)(1). When the user refers to §4A1.2(b)(1) as the application note suggests, this guideline notes a "sentence of incarceration," and to many users, probation does not qualify under the provision for a twelve-level increase. Another issue associated with this guideline is whether it is appropriate to impose a threshold quantity for a defendant who is convicted of possession of a large quantity of drugs which are clearly intended for distribution purposes; however, under the various state laws, the defendant is charged with (and convicted of) a straight possession offense. In other districts, if a defendant had the same quantity of drugs, it would be a distribution offense. This clarification would hold defendants accountable for possession of large amounts of drugs, regardless of where they are convicted. This issue appears to be very problematic among the "border states." Lastly, the group would like the Commission to clarify the commentary contained in USSG §2L1.2, comment. (n.1[A][i] and [ii]) as to the timing of when the defendant incurs the predicate conviction and his immigration status at the time the conviction occurs.

Circuit Conflicts

POAG encourages the Commission to resolve circuit conflicts whenever possible which gives greater guidance to the field and ensures consistency in the application process.

Other Issues

Issues Relating to USSG § 2B1.1

There are four particular areas noted by Commission Staff regarding this guideline which POAG wishes to address: the number of victims, the intended loss determination in a blank check case, the definition of "means of identification," and the cross references.

Regarding the determination of the number of victims, the group agrees that at times, determination of the number of victims is problematic. For example, how do you count the number of victims in a theft from twelve different stores with the same parent company? Are there twelve victims as twelve stores were victimized or only one victim that being the parent company?

The determination of intended loss in a blank check case is also problematic, and perhaps some clarification in the commentary notes would be of assistance.

The group also finds that use of the statutory definition “means of identification” has caused problems with application, especially if the identification involves a deceased individual.

Lastly, USSG §2B1.1 contains a number of cross references in subsection (c) which present challenging application problems. The provisions found in §§2B1.1(c)(2) and (c)(4) specify that the cross reference application is to be applied only if the resulting offense level is greater, however, this direction is lacking in (c)(1) and (c)(3). Is this the intent of the Commission?

Drug Issues

POAG agrees with Commission staff regarding suggested technical and conforming changes in USSG §2D1.1 with respect to the parenthetical statement “or the equivalent amount” which is found in the Drug Quantity Table. The group discussed this parenthetical statement and discovered that application errors have occurred due to misinterpretation of the phrase. Application Note 10 clearly outlines the procedure for drug conversion/equivalency when a specific controlled substance is not included in the Drug Quantity Table. POAG believes the elimination of the confusing phrase would ensure proper application of Note 10.

Commission of Offense While on Release - USSG § 2J1.7 and 18 U.S.C. § 3147

POAG recommends reconsideration of guideline application of the statutory enhancement set forth in 18 U.S.C. § 3147. This statute requires a sentence of imprisonment be imposed in addition to the sentence for the underlying offense; furthermore, the sentence of imprisonment under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment.

Currently, in calculating an offense level for an offense committed while on federal release, §2J1.7 provides for a three-level enhancement as a specific offense characteristic. POAG observes this enhancement could easily be missed because users are not accustomed to accessing enhancements through Chapter Two sections. POAG supports converting §2J1.7 into a Chapter Three adjustment.

POAG requests clarification as to whether the government must actually file an enhancement pursuant to 18 U.S.C. § 3147. Also, POAG recommends that a circuit split be resolved regarding whether the three-level increase can be imposed on a defendant who was not notified of the specific enhancement at the time of his release.

Clarification in two other areas is suggested to avoid possible confusion. Currently, *Background* notes remind the user that this enhancement only applies in the case of a conviction for a federal offense committed while on release for another federal charge. Perhaps that important caveat could be highlighted. Additionally, guidance is requested regarding the interplay between this enhancement and acceptance of responsibility and/or obstruction of justice. Confusion could arise, especially in cases where both offenses (i.e., the offense for which the defendant was on pretrial release and the offense committed by the defendant while he was on pretrial release) are consolidated for sentencing. POAG recommends adding language in one or more of these sections (i.e., §2J1.7 or its successor; §3E1.1; or §3C1.1) to address any confusion that could arise. There is also concern about double counting. For example, if the two cases were consolidated

for sentencing, the defendant could lose the reduction for acceptance of responsibility because the conduct, which has been charged as the second offense, is inconsistent with acceptance of responsibility. Furthermore, such conduct could, in some cases, constitute obstruction of justice.

Firearms

Felon in possession of firearm prosecutions have been a priority in all districts, while at the same time the guideline applications in this section have become problematic. POAG strongly encourages the Commission to resolve several circuit conflicts found at USSG §2K2.1(b)(5).

With respect to “Possession of a Firearm In Connection With Another Felony Offense,” POAG has concluded that applying this four-level increase has become problematic due to the circuit conflicts involving the “in connection with” standard. POAG suggests the Commission provide better definitions for the “in connection with” standard and also recommends that the Commission resolve the circuit conflicts in the cross reference section under USSG §2K2.1.

The expiration of the Firearms Sunset Provision with respect to the type of firearms defined in 18 U.S.C. § 921(a)(30) has resulted in numerous application problems for the field. POAG urges the Commission to make a determination as to whether the types of firearms identified in this statute are more dangerous than other types of weapons and should still be considered in determining the higher guideline offense level or, because they are now legally allowed to be possessed by nonfelons, this requirement should be deleted from the guideline.

POAG is cognizant that there have been cases where the definition of a destructive device has excluded a sawed-off shotgun, while in other districts this type of weapon is considered to be a destructive device. A clearer definition would be helpful and avoid inconsistent application.

Chapter Four

There are a number of Chapter Four issues which concern POAG that parallel help line phone calls frequently received by Commission staff.

Crime of Violence

There are a plethora of definitions for crimes of violence found in different criminal statutes, as well as within the Sentencing Guidelines, for example §2L1.2 and §4B1.2. It would simplify the guideline application process and eliminate current inconsistencies to adopt one guideline definition. POAG recognizes adopting one guideline definition for crime of violence will not rectify the problem between statutory and guideline differences for crime of violence; however, one definition can begin to develop better uniformity and consistency of guideline application and reduce confusion.

Simplification

POAG recognizes “Guideline Simplification” has been an ongoing debate throughout the last several years and believes it is an issue that should be placed on the Commission’s long term agenda. While there are several problematic areas in the guidelines, many on the group believe that through ongoing training and

daily use of the guidelines, practitioners are able to master the vast majority of the manual. However, the application of cross references is problematic to the experienced user of the guidelines and is worthy of the Commission's review. As noted in an earlier POAG position paper, cross reference provisions in the guidelines are generally thought to be confusing and appear to result in numerous objections by counsel, especially, if the application results in “jumping” from guideline to guideline. The Accessory After the Fact and Misprision of a Felony guidelines are especially problematic in the determination of relevant conduct provisions and Chapter Three adjustments.

Addressing the “Career Fraudster”

Finally, POAG believes there is a need to address the white collar defendant who is not always at the high end of the fraud table and repeatedly engages in a pattern of fraudulent behavior. This topic has been an ongoing concern of POAG and was discussed during the Probation Officers' session at the recent national training in San Francisco. POAG believes there is a distinction between the career confidence man/“career fraudster” and other white collar offenders which should be specifically addressed in the guidelines. During our discussions, it was recognized that state prosecutors have limited access to criminal history information in other states; therefore, the defendant’s multiple arrests and/or convictions for similar misconduct may not be available to the state courts when imposing sentence. As a result, this individual may receive a number of lenient sentences. While an upward departure pursuant to USSG §4A1.3 may be part of the answer, POAG believes an enhancement should be determined based on the defendant’s pattern of behavior rather than prior convictions alone. POAG has submitted additional information relative to this issue to Commission staff for their review.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli
Chair