PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

August 10, 2018

The Honorable William H. Pryor, Jr., Acting 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 Pryor,

The Probation Officers Advisory Group (POAG) met in Washington, D.C., on July 18 and 19, 2018, to discuss and formulate recommendations to the United States Sentencing Commission (USSC) regarding the Notice of Proposed 2018-2019 Priorities and ongoing POAG concerns. The commentary below addresses the Proposed Priorities with additional issues raised for consideration.

(1) Continuation of its multiyear examination of the structure of the guidelines post-Booker and consideration of legislative recommendations or guideline amendments to simplify the guidelines, while promoting proportionality and reducing sentencing disparities, and to account appropriately for the defendant's role, culpability, and relevant conduct.

During 2018, POAG conducted extensive outreach efforts to obtain feedback from the field regarding issues within the United States Sentencing Guidelines that would serve to simplify application of the guidelines in the interest of judicial economy as well as identify issues to appropriately account for role, culpability, and relevant conduct. These efforts included conducting roundtable discussions involving over 300 United States Probation Officers during the 2018 National Seminar, as well as requesting input from representatives in each of the 94 judicial districts. After discussing and analyzing the voluminous feedback received, POAG identified the following issues as priorities that POAG respectfully recommends be addressed by the USSC.

USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)

The Special Instruction at USSG §2G2.1(d)(1) directs that, "If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction." According to USSG §2G2.1, comment. (n.7), "For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."

POAG believes that these instructions are unclear with the interchangeable use of the terms "the offense," "count of conviction," and "relevant conduct." As offenses covered by USSG §2G2.1 are specifically excluded from grouping under USSG §3D1.2(d), they are not subject to expanded relevant conduct analysis. Therefore, application of USSG §2G2.1 is restricted to the offense of conviction (*i.e.,* the victim or victims cited in the count of conviction). It is POAG's recommendation that both the Special Instruction set forth at USSG §2G2.1(d)(1), as well as the application instructions set forth under comment. (n.7) be revised to delete any references to "the offense" and "relevant conduct," and clarify the Special Instruction applies to victims of the count of conviction. It is further recommended that examples be provided at USSG §2G2.1 and USSG §1B1.2 (Applicable Guidelines) to assist with guideline application.

Investigation of these offenses often reveals additional victims who are not cited in the count of conviction or stipulated to in a plea agreement. Although this conduct cannot be accounted for under USSG §2G2.1, it can be considered under USSG §4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The provisions of USSG §4B1.5(b) direct that the defendant should be assessed with a five-level increase "in any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct."

It is further noted that, in July 2016, POAG identified a disparity issue at USSG §4B1.5 that remains unaddressed. Specifically, USSG §4B1.5(a) provides two options for determining the offense level in cases in which the defendant's offense of conviction is a covered sex crime, USSG §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction after sustaining at least one prior sex offense conviction. In these instances, the offense level is the greater of: (a)(1)(A) the offense level determined under Chapters Two and Three, or

(a)(1)(B) the offense level from a table similar to the table contained in the Career Offender guideline, and (a)(2), the criminal history category shall be the greater of (A) the criminal history category determined under Chapter Four, Part A, or (B) criminal history category V.

As noted above, USSG §4B1.5(b) sets forth the guidelines for determining the offense level for defendants who have committed a covered sex crime and neither USSG §4B1.1 (Career Offender) nor USSG §4B1.5(a) applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct. In those instances, under (b)(1), the offense level shall be 5 plus the offense level determined under Chapters Two and Three, but shall not be less than 22, and under (b)(2), the criminal history category shall be determined under Chapter Four, Part A. This application can result in a disparity in the guideline range between offenders who have a prior conviction and those who do not.

The July 2016 POAG submission provided an example of a husband and wife who both molested multiple minors on several occasions and were both convicted of production of child pornography. The husband had one prior sex offense conviction, resulting in the application of USSG §4B1.5(a). Because the offense level determined under Chapters Two and Three was greater than the offense level contained in the table at USSG §4B1.5(a)(1)(B), there was no increase to his total offense level. As a result, he was assessed a total offense level of 37. Conversely, the wife, who had no prior sex offense conviction, received a five-level increase pursuant to USSG §4B1.5(b). As a result, she was assessed a total offense level of 42. This situation exemplifies a sentencing disparity in which a defendant with a prior sex offense conviction, who clearly presents a greater risk of danger to the community, can be assigned a lower total offense level than a defendant with no such conviction.

POAG's suggestion for eliminating this disparity was to simply add at the beginning of the guideline that the greater of USSG §4B1.5(a) or (b) is applied with regard to the determination of the offense level, if the defendant has one or more prior sex offense convictions. Further, if the defendant has one or more prior sex offense convictions, then the criminal history category is to be determined under USSG §4B1.5(a)(2). Otherwise, the criminal history category is to be determined under USSG §4B1.5(b)(2).

USSG §2G2.2 (Sexual Exploitation of a Minor)

During the roundtable discussions held at the 2018 National Seminar, nearly every group identified USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) as the guideline most in need of amendment and updating. Unlike any other guidelines, nearly all §2G2.2 specific offense characteristics apply in every case, resulting in a one-sized approach for every defendant that fails to individualize risk. Suggestions from the field range from eliminating the use of a computer enhancement (applied in vast majority of cases) to updating the number of images enhancement given that defendants routinely possess over 600 images. Furthermore, technology

has evolved tremendously with the increasing use of the dark web and anonymization techniques to the storage of images on cloud-based services. The volume of media on a storage drive is increasingly unrelated to a defendant's risk where defendants consume pornographic matter on-demand with no artifacts left behind for forensic analysis. These sophisticated and disciplined defendants actually benefit in guideline analysis. Furthermore, it was also observed that defendants participating in an offense as part of a community of offenders is also unrecognized within the guidelines. Sex offenders who reinforce like-minded criminogenic thought processes are universally associated with higher risk. Accordingly, it is recommended that the USSC work with Congress to modernize §2G2.2 to account for the contemporary and ever-evolving technological landscape.

POAG notes that many of these issues were addressed in the Commission's 2012 report to Congress, Federal Child Pornography Offenses, which observed,

> *"The non-production child pornography sentencing scheme should be revised to account for recent technological changes in offense conduct and emerging social science research about offenders' behaviors and histories, and also to better promote the purposes of punishment by accounting for the variations in offenders' culpability and sexual dangerousness."*
>
> *"The current sentencing scheme in 2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders' collecting behavior and insufficient emphasis on offenders' community involvement and sexual dangerousness. As a result, penalty ranges are too severe for some offenders and too lenient for other offenders."*

Feedback from the field mirrors the USSC's findings and recommendations in the 2012 report and validates the continued importance to work with Congress on this issue. Courts around the country have also collectively spoken to this issue in their rate of within-guideline sentences imposed under §2G2.2. During 2017, only 26.7% of sentences imposed under §2G2.2 were within the advisory guideline imprisonment range. POAG notes that many judges routinely drop certain specific offense characteristics, such as use of a computer, and instead rely on the statutory sentencing factors to establish an individualized sentence that §2G2.2 fails to deliver.

POAG communicates this feedback with the knowledge that §2G2.2 was the culmination of a Congressional directive. Even in the absence of Congressional action following the 2012 report, POAG recommends continued collaboration with legislators to address this important issue. Alternatively, POAG asks the USSC to look for areas within the guideline for amendment that do not contravene the existing Congressional directives, but can account for changing trends and emerging technologies, with the goal of establishing a meaningful measurement of the seriousness of the offense.

USSG §2P1.1 (Escaping, Instigating, or Assisting Escape)

The guideline pertaining to escape offenses is USSG §2P1.1. Under this guideline, defendants are eligible for either a two-level or a four-level decrease if they escaped from non-secure custody and did not commit any federal, state, or local offense punishable by a term of imprisonment of one year or more while in escape status. POAG discussed a common scenario involving defendants

arrested for new charges in escape status from a half-way house, whose charge remains pending at the time of sentencing. POAG discussed application issues related to this guideline as there are different interpretations of what constitutes "committed." If interpreted to require a conviction or guilty finding for the new offense, those with pending charges would be eligible for the reduction and would be treated similarly to defendants who committed no new law violations while on escape status. Therefore, POAG recommends this reduction should not apply when defendants are arrested for a new law violation, regardless if that law violation remains pending. POAG recommends the adoption of similar language used in USSG §2K2.1, comment. (n.14(C)), defining "another felony offense," "as any federal, state, or local offense…punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." POAG believes such an amendment would appropriately account for the defendant's conduct and eliminate the need to litigate this issue at sentencing.

USSG §3A1.1(b)(2) (Hate Crime Motivation or Vulnerable Victim)

The enhancement set forth under USSG §3A1.1(b)(2) directs that, "If (A) subdivision (1) applies; and (B) the offense involved a *large* number of vulnerable victims, increase the offense level…by 2 additional levels." Application of this guideline can be subjective and result in litigation as this guideline does not provide a measurable definition for the word "large." As such, POAG recommends that this guideline be amended to include language similar to that used in USSG §2B1.1(b)(2), which specifies threshold numbers of victims needed in order for the enhancement to apply.

USSG §3C1.1 (Obstructing or Impeding the Administration of Justice) and USSG §3E1.1 (Acceptance of Responsibility)

POAG has previously provided commentary regarding the interplay between acceptance of responsibility at USSG §3E1.1 and obstruction of justice at USSG §3C1.1, including addressing the fact that obstructive conduct can occur at various times over the course of a case – pre-arrest, pretrial, or post-conviction. As observed anecdotally, when the obstructive conduct is committed pre-arrest or prior to the defendant's guilty plea, Courts often grant the full three-level reduction pursuant to USSG §3E1.1, despite the commentary to USSC §3E1.1, comment. (n.4), which requires "extraordinary circumstances." However, in other courts, "extraordinary circumstances" can represent an insurmountable barrier to concurrent applications of obstruction of justice and acceptance of responsibility – regardless of the timing of the obstructive conduct.

POAG members believe that when obstructive conduct is committed pre-arrest or prior to the defendant's guilty plea, the defendant should remain eligible for the three-level reduction for acceptance of responsibility, even in the absence of "extraordinary circumstances."

POAG recommends USSG §3E1.1, comment. (n.4), be amended to include language addressing whether it is relevant if the obstructive conduct occurred pre-plea or post-plea. In the alternative,

POAG recommends an amendment to leave more discretion in the application of USSG §3E1.1 in conjunction with USSG §3C1.1. For example, USSG §3E1.1 could be amended to state that conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) "may" indicate that the defendant has not accepted responsibility for their criminal conduct. POAG believes that such an amendment would lessen the risk of automatic denials for acceptance of responsibility in these types of cases, creating wider judicial discretion.

USSG §3C1.3 (Commission of Offense While on Release)

POAG recommends action to clarify the application of USSG §3C1.3 (Commission of Offense While on Release). Under USSG §3C1.3, a three-level enhancement is applicable if "a statutory sentencing enhancement under 18 U.S.C. § 3147 applies." A review of 18 U.S.C. § 3147 states "a person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to – (1) a term of imprisonment of not more than ten years if the offense is a felony; or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor. A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment."

It is not explicitly stated in the commentary at USSG §3C1.3 that the § 3147 statute is a sentencing enhancement rather than a separate crime; thus, no indication is given as to whether there is a requirement for the government to charge a § 3147 enhancement (similar to the statutory penalty enhancement at 21 U.S.C. § 851 – Enhanced Penalties for Federal Drug Trafficking Offenders). Nor is there any indication that a conviction is required. The Third Circuit Court of Appeals addressed this as a first impression issue that was unaddressed by any other circuit courts and found plain error in the district court's treating § 3147 as a separate offense instead of a sentence enhancement statute. *United States v. Lewis*, 660 F.3d 189 (3rd Cir. 2011).

Next, there needs to be clarification in the commentary as to which offense is subject to the Chapter Three enhancement – the original federal offense or the secondary offense committed on pretrial release. There has been some confusion in regard to which offense receives the Chapter Three enhancement, but a review of the history of the amendment makes it clear the enhancement was intended for the offense committed while on release. (See Amendment 734). Clarifying commentary would encourage consistent application for the offense to which it was intended. POAG recommends that the USSC consider the former language under USSG §2J1.7, which specifically directed to "add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release."

Proposal of Emerging Technology/Cybercrime Study

POAG recommends the Commission initiate a multi-year study that focuses on a wide array of emerging technologies that have either already started to facilitate criminal activity or are extremely likely to present unique guideline application issues in the future. POAG proposes the emerging technology study take evidence regarding virtual private network (VPN) anonymization technologies (i.e., the Onion Router), crypto-currencies/blockchain technology, hacking/data-breach trends, 3-D printing, swatting, and doxing.

The Onion Router (TOR) is software used to conceal the user's true Transmission Control Protocol/Internet Protocol (TCP/IP) address. TOR was developed by the United States Armed Services for securing communications on the internet, but it is also used by criminals to access websites that sell illicit material, including child pornography, illicitly obtained credit card information, illicitly obtained personal identification information, firearms and various illegal drugs, particularly synthetic drugs. TOR is not inherently illegal, but it is being leveraged by criminals in many spheres. It also presents challenges during law enforcement investigations due to its sophistication and the added effort of uncovering the user's true TCP/IP address.

Blockchain technology/cryptocurrencies, while also a legal technology, can be used for illegal activity. Blockchain technology has been used as a money laundering instrument and to facilitate extortion payments to hackers. There have also been notable prosecutions of illegal blockchain exchanges, fraudulent blockchain investment schemes, and takedowns of illegal marketplaces on the dark web that leverage cryptocurrencies in the purchase of illegal goods (*e.g.* Silk Road and Silk Road 2.0). A criminal's use of blockchain technology to facilitate a crime is harder to investigate and track than the use of money in a bank account and is more technologically sophisticated than cash. Blockchain based cryptocurrencies are also notoriously volatile, creating issues with valuation of loss and restitution. As this technology becomes more widely adopted, perhaps it may eventually be considered to be less sophisticated. The USSC should initiate a study of this technology to determine how its use and sophistication in criminal conduct should be considered within the context of sentencing.

There have been several methods of computer hacking that have become regular occurrences within criminal activity. "Phishing" and "Spear Phishing" scams, "Ransomware" attacks, "swatting" and "doxing" are becoming more prevalent and pernicious. The guidelines on these types of offenses are gradually becoming ill-fitting. Some offenses may end up in §2A6.1, others may end up in §2B1.1, and others, somewhere else entirely. The guidelines, especially at §2B1.1, tend to focus on financial loss/financial gain of the defendant as the primary motivator. In these types of crimes, the motivation can be non-monetary – personal malice, political, or anarchy/terror based. The guidelines do not have adequate methods of capturing these motivations. POAG recommends the Commission conduct a study of the emerging technologies involved in these types of hacking crimes to determine if and how the guidelines may be improved to capture the relevant sentencing factors.

3-D printers are gradually becoming more common. There was a recent lawsuit in the Western District of Texas regarding the posted designs for a 3-D printed functional firearm. This emerging technology presents a variety of legal challenges and implications, especially in the area of firearms and counterfeit goods. The Commission should include 3-D printing as part of a multi-year study on emerging technologies.

Society and technology are changing and adapting at an incredibly fast pace. This rapid growth presents new opportunities for criminals, and they are exploiting both the knowledge gap and the legal system's ability to adapt. The Courts are starting to face problems that are not adequately addressed by the guidelines. The Commission's study of synthetic drugs was a great example of how a multi-year study could be leveraged to take in evidence and utilize that information to amend the guidelines to quickly changing circumstances in the field. As such, POAG recommends the Commission start a multi-year study on emerging technologies/cybercrime in order to provide the Courts with the necessary guidance on how to address these types of offenses.

(2) A multiyear study of synthetic drug offenses committed by organizational defendants, including possible consideration of amendments to Chapter Eight (Sentencing Organizations) to address such offenses.

Under Chapter 8 of the United States Sentencing Guidelines, USSG §8C1.1 (Determining the Fine – Criminal Purpose Organizations) applies if the court determines that an organization operated primarily for a criminal purpose or primarily by criminal means. Alternatively, in circumstances where the court determines that an organization did not operate primarily for a criminal purpose or by criminal means, but was nonetheless involved in criminal conduct, USSG §8C1.2 (Applicability of Fine Guidelines) applies. This guideline directs to apply the provisions of USSG §§8C2.2 through 8C2.9 to each count for which the applicable guideline is determined and lists several guidelines under Chapter 2. However, because USSG §2D1.1 is not a listed guideline under USSG §8C1.2, there are no provisions under Chapter 8 that would allow application of USSG §2D1.1 for the organizational defendants who did not operate primarily for a criminal purpose, yet committed an offense involving synthetic drugs. POAG believes that addressing this issue is a priority given the serious nature and potential harm associated with synthetic drug offenses, as well as the fact that organizational defendants are positioned to engage in such conduct on a large-scale basis. Therefore, POAG recommends USSG §8C1.2 be amended to incorporate a reference to USSG §2D1.1 such that this criminal conduct can be appropriately accounted for in organizational sentencings.

POAG is unaware of any organizational prosecutions that involve controlled substance offenses and does not believe this to be an acute issue the Commission needs to take up as a multi-year study.

(3) Continuation of its work with Congress and others to implement the recommendations of the Commission's 2016 report to Congress, Career Offender Sentencing Enhancements, including its recommendations to revise the career offender directive at 28 U.S.C. § 994(h) to focus on offenders who have committed at least one "crime of violence" and to adopt a uniform definition of "crime of violence" applicable to the guidelines and other recidivist statutory provisions.

As reflected in the previous letters submitted to the Commission dated July 22, 2016, and July 31, 2017, POAG strongly encourages the Commission's continued work to implement the recommendations set forth in its 2016 report to Congress titled Report to the Congress: Career Offender Sentencing Enhancements. This report recommends the revision of the career offender directive at 28 U.S.C. § 994(h) to focus on defendants who have committed at least one crime of violence and the adoption of a uniform definition of crime of violence. The Commission's research has found that defendants who currently qualify as a career offender are receiving lower sentences, including variances below the guideline range, in cases where defendants' predicate offenses are controlled substance offenses. POAG members continue to attest that courts are varying downward from the career offender range in these circumstances.

The level of analysis required to justify application of predicate convictions continues to be problematic with the categorical approach analysis being driven by the case law for each circuit. The task is extremely time consuming for probation officers because of various jurisdictional practices and lack of supporting documentation, as well as the complicated legal analysis that challenges even experienced practitioners. The complexities of categorical/modified categorical approach analysis was one of the most common concerns voiced by probation officers at the 2018 National Seminar. While the complexity of analysis is a major issue, the concern at the policy level is becoming alarming – the guideline fails to capture recidivists and produces inconsistent and illogical results. It is broken. POAG discussed numerous examples where prior convictions involved violence, but because of statutory construction and/or the limitations of *Shepard* documents, defendants who clearly meet the spirit of the career offender directive are not being sentenced as such.

POAG notes that controlled substance offenses historically have not required nearly the level of analysis as crimes of violence. However, recent developments in case law have raised the scrutiny of state drug statutes, particularly post-*Mathis*. For instance, some indivisible state drug statutes do not qualify as controlled substance offenses because they include an offer to sell, while others do not qualify because they penalize controlled substances that are not federally scheduled. As a result, defendants with similar conduct and similar backgrounds face widely divergent guideline ranges. See *United States v. Sanchez-Fernandez*, 669 Fed. Appx. 415 (Mem.) (unpublished) (9th Cir. 2016); *Zu-Chen Horng v. Lynch*, 658 Fed. Appx. 415 (unpublished) (10th Cir. 2016); *United States v. Townsend*, No. 17-757-CR, 2018 WL 3520251 (2nd Cir. July 23, 2018); and *Cintron v. United States Attorney General*, 882 F.3d 1380 (11th Cir. 2018).

Some circuits have recently added another layer of complexity to the predicate offense determination, as they require strict analysis of conspiracy, attempt, and aiding and abetting offenses for both crimes of violence and controlled substance offenses. Under USSG §4B1.2, comment. (n.1), attempts, conspiracies, and aiding and abetting offenses have historically qualified if the underlying offense qualified as a crime of violence or controlled substance offense. However, due to changes in case law, practitioners are now required to engage in an in-depth analysis to determine whether a state conspiracy, attempt, or aiding and abetting statute meets the "generic definition" of conspiracy, attempt, or aiding and abetting. The result is often counterintuitive and results in disparities among defendants with similar backgrounds, as there is a circuit-split on this issue.

The circuits requiring this analysis have primarily addressed conspiracy offenses, finding that conspiracy statutes need to require an overt act to constitute "generic conspiracy." See *United States. v. Martinez-Cruz,* 836 F.3d 1305 (10th Cir. 2016)*; United States v. Aguirre*, 710 Fed. Appx. 342 (10th Cir. 2018)*; United States v. McCollum,* 885 F.3d 300 (4th Cir. 2018)*; United States v. Whitley,* --- Fed. Appx. ---, 2018 WL 2972662 (4th Cir. 2018). This may also lead to additional disparity for defendants who are found guilty of conspiracy under 21 U.S.C. § 846, rather than the underlying offense under 21 U.S.C. § 841. In the circuits on the other side of the split, a court need only look to the "plain meaning" of the guidelines, which is the approach probation officers have generally applied historically.

The difficulties in the analysis of crimes of violence, and now controlled substance offenses, impact other commonly applied guideline applications, such as USSG §§2K2.1(a), 4A1.1(e) and 7B1.1. Feedback from the roundtable discussions at the 2018 National Seminar included recommendations that the USSC consider eliminating reliance on predicate crimes of violence and controlled substance offenses in the aforementioned guidelines, which would reduce issues and simplify application in a significant number of cases. The recent revision to USSG §2L1.2 (Illegal Reentry) eliminating the application of the categorical approach/modified categorical approach was very well received in the field – promoting the USSC's long term priority of simplification.

As noted in previous submissions, POAG agrees that a single, uniform definition of "crime of violence" for use in the guidelines and statute should be adopted. POAG suggests the USSC adjust the enumerated crimes clause to create a per se list of offenses for which a conviction is to be considered a crime of violence to remove analysis that is now required. POAG further recommends the USSC express that any federal or state statute that shares a title of the offenses in the enumerated list is a crime of violence. Based on the USSC's findings in the 2016 report to Congress, POAG supports changes to the Career Offender application to include at least one crime of violence as a qualifying offense. A uniform approach to defining crimes of violence, addressing conspiracy and attempt, and limiting the number of controlled substance offenses that are included as predicate offenses will help create simplicity in guideline application, and address sentencing disparity.

(4) Continuation of its work with Congress and others to implement the recommendations of the Commission's 2011 report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System—including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding 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 preparation of a series of publications updating the data in the report.

POAG continues to support the Commission's work with Congress to potentially broaden the criteria for "safety valve" relief pursuant to 18 U.S.C. § 3553(f) and USSG §5C1.2(a). POAG believes "safety valve" criteria could be conditionally expanded to include certain defendants in Criminal History Category II. POAG would set exceptions for defendants in Criminal History Category II with three criminal history points derived pursuant to USSG §4A1.1(a), or with two of their three criminal history points derived pursuant to USSG §4A1.1(d). Defendants with convictions of this character present a greater likelihood of recidivism and should not receive the benefit of the "safety valve." Feedback also included concerns that older convictions, including some juvenile convictions, preclude safety valve eligibility because, under USSG §§4A1.2(e)(1), 4A1.2(d) and 4A1.2(k), the offense is scored based upon their discharge date from incarceration for certain sentences, rather than the date the sentence is imposed. POAG recommends that the USSC evaluate these recommendations in order to expand safety valve eligibility and provide district courts much needed flexibility from mandatory minimum sentences. These proposals are also consistent with the "first-offender" directive in the U.S. Sentencing Commission's organic statute. See 28 U.S.C. § 994(j).

POAG also supports the Commission's work with Congress and other interested parties on elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c) and recommends development of guideline amendments in response to any related legislation. The determination to charge one or multiple 18 U.S.C. § 924(c) counts not only varies greatly across the country, but also within a single district. As each additional 18 U.S.C. § 924(c) conviction carries a 25-year mandatory minimum term of imprisonment that must be served consecutively to any other sentence, eliminating the mandatory stacking will encourage less disparity, promote flexibility, and reserve consecutive sentences for only the most severe of circumstances.

(5) Continuation of its comprehensive, multiyear study of recidivism, including the circumstances that correlate with increased or reduced recidivism.

POAG supports the Commission's multi-year study of recidivism and notes that the recent published reports have served the amendment process well by providing a common platform of empirical data to advisory groups and interested parties. As part of this continuing study, POAG recommends that the Commission collaborate with the Probation and Pretrial Services Office (PPSO) of the Administrative Office of the United States Courts (AO) to take evidence regarding national initiatives in supervision practices that leverage outcome driven evidenced based practices. In September 2017, the Commission published Federal Alternative-To-Incarceration

Court Programs and also held public hearings on Alternatives to Incarceration Court Programs (April 2017) and Alternatives to Imprisonment generally (March 2018). POAG encourages the Commission to gain familiarization with supervision practices in the federal system and how they might influence outcomes, as all defendants in the recidivism studies are subject to pretrial and/or post-conviction supervision for some portion of time. Sentencing policy is an important subject of empirical study, but recidivism is also impacted by what happens outside the courthouse walls in community supervision.

As detailed in several of POAG's historical written submissions and testimony at the public hearing on Alternatives to Imprisonment, United States Probation and Pretrial Services is engaged in a national supervision initiative that leverages cognitive based treatment methodologies – Staff Training Aimed at Reducing Re-Arrest (STARR). STARR is a training on a set of supervision skills officers use in their interactions with persons under supervision to address and mitigate criminogenic risk. The skills taught in STARR relate to risk-need-responsivity principles and include: active listening, role clarification, effective use of reinforcement, effective use of disapproval, effective use of authority, effective use of punishment, cognitive behavioral interventions and problem solving.[1] This set of supervision interventions work toward teaching, applying and reviewing the cognitive model, which is essential to long term change – helping persons under supervision understand the link between the relationship between thoughts and behavior. STARR, in combination with risk-based supervision, allows officers to target high-risk populations most likely to recidivate with cognitive behavioral interventions, specifically targeting individualized criminal thinking patterns.

POAG believes contemporary supervision practices warrant examination by the Sentencing Commission due to their importance in the milieu of factors impacting recidivism rates. With a greater understanding of these evidence-based initiatives and practices, the Commission will have an important perspective of the federal justice process, which may also reveal opportunities to better leverage alternatives to imprisonment within the sentencing guidelines.

(6) Implementation of any legislation warranting Commission action.

POAG has no comment regarding this subsection.

[1] See Alarid, L.F., Jones, M. (2018) Perceptions of Offender Satisfaction on Probation and Supervised Release with STARR Skill Sets. Federal Probation, 82(1); 37-54 Clodfelter, T. A., Holcomb, J. E., Alexander, M. A., Marcum, C. D., & Richards, T. N. (2016). A Case Study of the Implementation of Staff Training Aimed at Reducing Rearrest (STARR). *Federal Probation,* 80(1), 30-38.

(7) Study of Chapter Four, Part A (Criminal History), focusing on (A) How the guidelines treat revocations under §4A1.2(k) for violations of conditions of supervision for conduct that does not constitute a federal, state, or local offense punishable by a term of imprisonment; and (B) Whether unwarranted sentencing disparities arise under the single sentence rule at §4A1.2(a)(2) as a result of differences in state practices.

POAG appreciates the Commission's continued attention to the operation of Chapter Four (Criminal History). With nationwide eccentricities in federal, state, and local court practice, it is important to evaluate and re-evaluate the scoring criteria and supporting commentary. Notwithstanding, POAG is generally satisfied with the refinements to date in the operation of Chapter Four, including the treatment of revocation sentences under §4A1.2(k) and the current scoring commentary supporting the single sentence rule at §4A1.2(a)(2). The Commission's March 2016 publication on recidivism identified criminal history scoring as being remarkably predictive of recidivism for offenders in the federal system. See Recidivism Among Federal Offenders: A Comprehensive Overview. Based upon this report's findings, POAG believes the current Chapter Four scoring rules work as intended, with defendants with ascending criminal history point totals demonstrating incrementally higher recidivism rates. However, we see an opportunity to amend USSG §4A1.3 (Departures Based on Inadequacy of Criminal History Category) to account for differences in state practices that produce anomalous results.

With regard to priority item (A), POAG members unanimously agree there should be no change to the scoring of revocation sentences under USSG §4A1.2(k) and that revocation sentences should continue to be observed as part of the punishment for the original offense. POAG believes revocation sentences strike to the heart of a defendant's risk to recidivate. A court imposes conditions of supervision to aid in rehabilitation, promote respect for the law, provide just punishment for the offense, and protect the public from further crimes of the defendant. Abiding by these conditions increases the defendant's likelihood of successful rehabilitation and serves to protect the public.

POAG believes the creation of conditions distinguishing technical violations from new law violations is fraught with issues ranging from the availability of court documents to the varied patterns of practice in federal, state and local jurisdictions. Within state and local systems, acquisition of records can be difficult (particularly when courts are outside the state of practice) and court records do not always adequately specify the grounds for revocation. Furthermore, state and local jurisdictions differ with regard to thresholds for revocation based on new criminal conduct. Some state systems revoke based on a new arrest supported by probable cause, while others require a guilty finding before a revocation can be finalized. As a consequence in the latter circumstance, courts often seek to revoke on lesser technical grounds for the sake of expedience. For these reasons, POAG does not favor any amendment distinguishing revocations based upon technical violations from revocations based upon new criminal conduct constituting a federal, state, or local offense punishable by a term of imprisonment.

With regard to item (B), POAG believes the single sentence rule located at USSG §4A1.2(a)(2) generally works well as intended. This section has been amended several times over the lifecycle of the guidelines and the current broad language provides an ease of application that has been well received in the field. One notable exception exists within the Fourth Circuit where multiple concurrently imposed sentences under North Carolina law have been ordered to be consolidated under the guidelines – whether or not separated by intervening arrests. *United States v. Davis*, 720 F.3d 215 (4th Cir. 2013). Furthermore, where a state has multiple layers of judicial jurisdictions (*e.g.* local, city, municipal, district, county or superior courts), proceedings not separated by an intervening arrest, which are prosecuted in different courts, cannot always be consolidated on the same docket or disposed on the same date. In recognition of this potential disparity, POAG believes the appropriate place to account for this circumstance is an amendment to USSG §4A1.3. POAG believes this policy recommendation is consistent with the Commission's ongoing priority to address unwarranted sentence disparity.

With all the diversity of practice between federal, state and local court systems, it will be nearly impossible to account for every variation of practice within the scoring instructions at USSG §§ 4A1.1 and 4A1.2. Expanded commentary in USSG §4A1.3 permitting departures for variations in state practice would ameliorate circumstances which produce results under and over-representing the seriousness of a defendant's criminal history category.

(8) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

POAG has no comment regarding this subsection beyond what has already been noted regarding circuit conflicts in other sections of this document.

(9) Consideration of other miscellaneous issues, including (A) Possible amendments to the commentary of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) in light of Koons v. United States, No. 17-5716 (June 4, 2018);

POAG has no comment regarding this subsection.

(B) Study of the operation of §5H1.6 (Family Ties and Responsibilities (Policy Statement)) with respect to the loss of caretaking or financial support of minors; and

According to USSG §5H1.6, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted. However, family ties and responsibilities were identified as one of the factors under 18 U.S.C. § 3553(a) justifying a sentence below the guideline imprisonment range in 2,922 (4.7%) of the cases sentenced during the 2017 fiscal year. Therefore, POAG would support the USSC researching this issue further in an effort to determine whether there are any factors related to family ties and responsibilities that can appropriately be

incorporated into the guidelines or if courts should continue to consider these factors on a case by cases basis by way of a variance.

(C) Study of whether §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) effectively encourages the Director of the Bureau of Prisons to file a motion for compassionate release when "extraordinary and compelling reasons" exist.

The provisions of USSG §1B1.13 (Policy Statement) provides that, upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that (1) (A) extraordinary and compelling reasons warrant the reduction or (B) the defendant (i) is at least 70 years old and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned; (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and (3) the reduction is consistent with this policy statement.

As noted above, because motions for compassionate release are solely within the discretion of the Director of the Bureau of Prisons, POAG, as well as the courts and other agencies within our system, would not necessarily be aware of cases where a defendant meets the criteria, but a motion is either not filed or it is not filed in a timely manner such that the defendant realizes a benefit. As such, POAG supports the concept of studying this issue in order to identify if there are areas where this process can be improved, including potential amendments to 18 U.S.C. § 3582(c)(1)(A) and USSG §1B1.13, especially given the humanitarian purpose of compassionate release and our empathy for the infirm and their families.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed priorities.

Respectfully,

Probation Officers Advisory Group
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