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DISTRICT OF KANSAS

UNITED STATES SENTENCING COMMISSION
REGIONAL HEARING ON THE 25th ANNIVERSARY OF THE PASSAGE OF THE SENTENCING REFORM ACT OF 1984

DENVER, COLORADO
OCTOBER 20, 2009

VIEW FROM THE PROBATION OFFICE

Judge Hinojosa and Members of the United States Sentencing Commission:

I thank you for this opportunity to testify before the United States Sentencing Commission at this regional hearing marking the 25th Anniversary of the passage of the Sentencing Reform Act of 1984. I appreciate being given this opportunity on behalf of both myself and the staff of the District of Kansas to express the ***View from the Probation Office*** regarding how the federal sentencing system is operating and to offer recommendations for consideration by the Commission.

Before continuing further with this statement, I would think it bad form if I did not acknowledge the outstanding work of the Commission and the members of the staff who work day in and day out to provide us with quality service and guidance. In particular, the training of officers by the Commission staff has resulted in an exceptional level of quality provided to our Courts and the process of justice. Please know that your efforts are appreciated by the staff in the District of Kansas.

The Commission has already received many thoughtful comments and recommendations through these public hearings. This is the fifth of seven regional hearings. In preparation for this day, I thought it best to review the testimony presented by my colleagues in Probation during the previous four hearings. It was no surprise to me that a concise and complete history of the Sentencing Reform Act of 1984 has been set forth by several Chiefs and Deputy Chiefs, along with recommendations for action by the Commission. Further, a review of the Probation Officer Advisory Group (POAG) meeting minutes and position papers outlines specific issues which, if addressed by the Commission, would enhance the ability of officers to clearly apply the Guideline applications to the convictions subject to investigation by the Probation Office. It will be my goal in these brief minutes here today to address specific issues for consideration, rather than repeat the comments already presented at regional hearings held to this point.

A quick poll of staff in the Presentence Unit in Kansas resulted in the following issue for the Commission to consider. Based on the results, the second question contained in Topic 4 (*What, if any, changes should be made with respect to accounting for offense and offender characteristics?*) will be addressed in my testimony.

The biggest issue we currently face on a regular and recurring basis is the need to simplify the definitions for Crime of Violence under USSG §2L1.2 and §4B1.2. Because of case law that has developed, probation officers and Courts are required to employ a *"categorical approach"* and sometimes *"modified categorical approach"* to determine whether a particular prior conviction qualifies. This requires dissecting and analyzing the actual statute.

Case law, both 10th Circuit and recent Supreme Court decisions, seem to have only compounded the complexity of this issue. In determining whether a conviction qualifies as a Crime of Violence under § 4B1.2, the Supreme Court has instructed courts to engage in " *'a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.' "* *United States v. Dennis*, 551 F.3d 986, 988 (10th Cir.2008) (quoting *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). Under this approach, we "*consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.*" *Begay v. United States*, --- U.S. ----, 128 S.Ct. 1581, 1584, 170 L.Ed.2d 490 (2008); *Nijhawan v. Holder*, --- U.S. ----, 129 S.Ct. 2294, 2299, 174 L.Ed.2d 22 (2009) (noting the Court looks to the word " *'felony' to refer to a generic crime as generally committed*") (emphasis supplied). If the statute is "*ambiguous, or broad enough to encompass both violent and nonviolent crimes*," *Dennis*, 551 F.3d at 988, we employ the so-called "*modified categorical approach*" which allows analysis of "*certain records of the prior proceeding, such as the charging documents, the judgment, any plea thereto, and findings by the sentencing court*." *Id.* (alterations, citations, and quotations omitted); *Nijhawan*, 129 S.Ct. at 2299. Such review does not involve a subjective inquiry into the facts of the case, but rather its purpose is to determine "*which part of the statute was charged against the defendant and, thus, which portion of the statute to examine on its face*." *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1211 (10th Cir.2007) (internal quotation and citation omitted).

The issue of clearly defining what is encompassed in a Crime of Violence is actually long standing and has been brought to the attention of the Commission by the POAG. In a position paper prepared on July 24, 2008, members of the POAG expressed their concern about the need to clarify definitions such as Crime of Violence. Specifically, the POAG stated in the "*Immigration"* section of the paper they were "*concerned about the application of this guideline and hope that the guideline can continue to be simplified, in part, by clarifying definitions, such as the crime-of-violence definition. It is believed that any clarification in this area will continue to prove beneficial and eliminate inconsistencies in application. POAG also recognizes that in some districts, defendants enter the United States on multiple occasions prior to the instant offense and that the immigration guideline may not adequately address this issue.*" In the "*Definition for Crimes of Violence (in General)"* section of this same paper, the POAG stated, "*Having only one definition for a crime of violence would minimize misapplication and/or inconsistency in application, as well as time spent responding to counsel's objections in this area. POAG believes that any step toward unifying the statutory and guideline definitions of a crime of violence would prove beneficial, and create more uniformity in guideline application.*"

Further, the POAG position paper prepared on August 15, 2005, was more specific in addressing the issue of definitions. In the "*Immigration"* section of this paper, the "*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*."

And finally, in their *Priorities Meeting Minutes* from the POAG meeting on July 14-15, 2009, in Washington, DC, "*members expressed a desire for the Commission to address the priority identified at number 6, relating to a study of the statutory and guideline definitions of 'crime of violence', 'aggravated felony', 'violent felony', and 'drug trafficking crime', including an examination of relevant circuit conflicts regarding whether any offense is categorically a 'crime of violence', 'aggravated felony', 'violent felony', or 'drug trafficking crime' for purposes of triggering an enhanced sentence under certain federal statutes and guidelines*."

In summary, some officers feel this issue has become a convoluted mess (as many in our district and across the 10th Circuit could attest) in terms of reviewing individual state or other jurisdictional statutes and making the determination if a prior conviction qualifies as a "*Crime of Violence*," all within the parameters of the Categorical Approach. It is therefore my recommendation, and the recommendation of the staff in the District of Kansas, that the Commission continue the simplification of the Immigration guideline (this has particular impact in the 10th Circuit, with the number of immigration cases filed in the 10th Circuit Districts), with specific emphasis on clarifying the multiple definitions of *"Crime of Violence"* and the Categorical and Modified Categorical approach used to determine whether a prior conviction qualifies as a Crime of Violence, for purposes of USSG §2L1.2 and §4B1.2.

Again, thank you for this opportunity to provide these comments and recommendations.