POAG Minutes
USSC – Washington, DC

February 17-18, 2016

I. Opening 8:30 am

Chairman Richard Bohlken called to order the winter 2016 meeting of the Probation Officer Advisory Group (POAG) at 8:30 am on February 17, 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 – by telephone); Beth Neugass (3rd Circuit); Kristi Benfield (4th Circuit); Juliana Moore (5th Circuit); Tracy Gearon (6th Circuit); Lori Baker (7th Circuit); Jill Bushaw (8th Circuit); Jaime Delgado (9th Circuit); Joshua Luria (11th Circuit); Renee Moses-Gregory (DC Circuit); and Craig Penet (FPPOA Representative).

Absent: Leandrea Drum-Solorzano (PPSO Representative)

III. Welcome and U.S. Sentencing Commission Announcements

The Chair welcomed three new members to POAG – Tracy Gearon (SD/OH - 6th Circuit); Jill Bushaw (ND/IA - 8th Circuit); and Joshua Luria (MD/FL - 11th Circuit), announced the new Vice Chair – John Bendzunas (D/VT – 2nd Circuit); and the new POAG designee to the Tribal Issues Advisory Group (TIAG) – Lori Baker (WD/WI – 7th Circuit).

Raquel Wilson, Director of Education and Sentencing Practice, addressed POAG to discuss various education initiatives and other POAG business for discussion:

(1) The USSC received positive feedback about the national seminar in New Orleans from many of the Judges in attendance regarding the value of attending with probation officers from across the country. In response, the USSC is in the beginning stages of planning a National Judges Conference in June 2016 in Chicago and may seek the assistance of POAG members to serve in speaking roles as panelists.

(2) The USSC is currently planning the agenda for the August 2016 National Seminar in Minneapolis and is developing a curriculum that has more of an emphasis on teaching – targeting an audience of experienced practitioners. Sessions will focus more upon advanced guideline application issues. The program will start on Wednesday morning and conclude prior to noon on Friday.

(3) For 2017, the USSC is looking at the possibility of putting on two smaller national conferences on the east and west coasts – which would allow districts to send more officers without a cap.

(4) The USSC is in the process of updating the POAG charter and would like feedback on the current rules – most notably the length of terms. USSC staff asked if there would

be an interest in shorter terms, which could potentially increase diversity and have more districts rotating in-and-out.

(5) POAG was asked to choose between the USSC funding a summer meeting to discuss USSC priorities for the next amendment cycle, or attendance to the national conference in August and a meeting at the training site.

IV. 2016 Guideline Amendment – Issues for Comment

Proposed Amendment to §2L1.2 (Illegal Reentry)

USSC ESP Staff Alan Dorhoffer and Krista Rubin provided a briefing on the background of the proposed amendment, historic trends with regard to the current immigration guideline and how Courts applying the 16 level SOC have also have a high incidence of imposing variance sentences – compared to defendants receiving SOC's of 12 or lower.

Commission staff stated that the most significant change in the proposed amendment is the elimination of the categorical approach and new enhancements focusing on recidivism. Commission staff expect the proposed amendment to be "penalty neutral" in that the guideline sentences will *on average* remain the same. It is the hope that defendants producing higher offense levels will be sentenced within the guideline range at a higher rate because these defendants will demonstrate higher levels of recidivism.

POAG members received near unanimous positive feedback about severing the categorical approach from the application of the SOC at §2L1.2(b)(1)(A). Probation officers often had difficulties obtaining records to support crimes of violence and drug trafficking offenses. Probation officers express that the categorical approach takes a significant amount of resources and analysis, becoming a cumbersome and time intensive process. For years, POAG has received critical feedback of the categorical approach in this guideline (and others) and the changes to a more objective standard were felt to be a step in the right direction.

With regard to the BOL structure of the proposed amendment, POAG members agreed that recidivism should be a consideration in providing a tiered increase based on the number of prior illegal re-entry convictions – without regard for whether or not these convictions fall within the applicable time period for criminal history scoring. It was felt that recency is not as important a factor in this part of the application. Southern Border districts indicate that it is common for defendants to have multiple convictions for illegal re-entry.

With regard to the structure of the specific offense characteristics, POAG members generally liked the new approach, capturing criminal activity during the two time periods (pre/post first deportation-removal). It was unanimously agreed that having a line of demarcation at the first date of deportation or first order of removal would be easy to apply. These dates are generally available and should have an ease of application. However, POAG members wished to dissuade the USSC from adopting "voluntary return" within the demarcation structure. These dates are sometimes difficult to determine.

POAG did want to note a few aspects of the proposed guideline that could potentially create disparity issues or difficulties in application:

First, a POAG member observed that the proposed amendment creates the possibility of five instances of permissible double-counting in Chapters 2 and 4 – something that is unprecedented in the manual. However, the group agreed that the utilizing the applicable time period structure from Chapter 4 will temper this issue – allowing less serious 1 and 2 point convictions age out faster than sentences receiving 3 criminal history points.

Second, the adoption of the "felony" definition from Chapter 4 (federal, state, or local offense punishable by imprisonment for a term exceeding one year) opens the door for two year misdemeanors to be treated the same as felony convictions. USSC staff advised that approximately 8 states have misdemeanor penalty structures that exceed one year – including relatively minor driving offenses such as driving without a license. POAG believes that this issue can be resolved by adopting a similar departure provision that was employed in the Johnson amendment at USSG §4B1.1, comment. (n.4) (Departure Provision for State Misdemeanors).

Third, POAG discussed how different state and local jurisdictions on the Southern Border approach prosecutions differently for aliens. Representatives from the Border States indicate that aliens charged with serious state offenses often receive low sentences for serious convictions (such as sexual assault) because state authorities know that deportation will ultimately occur. Jurisdictions also differ in how aggressively they prosecute drug trafficking/distribution compared to possession. Aliens receiving lenient treatment in their prior prosecutions will receive a benefit under the guideline, in comparison to aliens prosecuted more assertively in other jurisdictions.

Fourth, POAG discussed the impact the new guideline may have in Fast-Track districts. For example, differences were noted between the District of New Mexico, which has Fast-Track and the Western District of Texas, which has not initiated a Fast-Track program. The POAG representative from the 10th Circuit noted that the only individuals categorically denied Fast-Track processing in D/NM are those in Criminal History Category VI or with crimes of violence.

Fifth, the group discussed that the categorical approach would still need to be employed in subsection (D) of both tiered specific offense characteristics for "misdemeanors involving drugs or crimes against the person." POAG believed that application commentary would be useful setting parameters around what types of convictions are contemplated by the USSC to apply. For instance, is possession of drug paraphernalia or forging a prescription be contemplated as a misdemeanor involving drugs?

Sixth, there are also potential issues for prior federal convictions where an illegal reentry conviction is paired with another conviction, such as alien smuggling or drug trafficking. Where should these paired convictions considered – within the base offense level application or within specific offense characteristics, or both? POAG agreed that if left to their own devices, individual districts will take inconsistent approaches.

Lastly, POAG discussed other items of potential ambiguity within application including, how the operation of revocation sentences will impact the determination of SOC tiers; or whether or not the language was strong enough to include probationary dispositions within the SOC structure.

As a technical note, one POAG member observed that Application Note 1(A)(vi) omitted a reference to (b)(2).

With regard to the overall advantages of the new guideline structure, POAG agreed that the structure of the guideline should be approved as proposed – with clarifying changes to the commentary as discussed above. POAG is in favor of the focus connecting guideline increases to recidivism. While the new guideline will not eliminate disparity, the proposed departure provisions and the addition of the 2-year misdemeanor departure (Johnson amendment), will give Courts the flexibility to account for anomalous situations producing high or low guideline ranges.

POAG also advocates for the deletion of the departure grounds set forth in §5K2.23 for illegal re-entry defendants with time spent in state custody on convictions unrelated to their immigration convictions.

Lastly, POAG agrees that if the USSC does not approve the changes to the immigration guideline as proposed, that the current guideline be modified to adopt the new crime of violence definition set forth in the Johnson amendment.

Proposed Amendment to §2L1.1 (Alien Smuggling/Harboring)

USSC ESP Staff Alan Dorhoffer and Krista Rubin provided a briefing on the background of the proposed amendment and DOJ's ongoing commentary that the alien smuggling guideline is not producing sentences commensurate with the seriousness of offense conduct. It has been reported to the USSC that smugglees are an extremely vulnerable class of individuals – often being subjected to abuse and dangerous conditions. It was noted that unaccompanied minors are also an issue requiring attention, as sexual abuse has been an ongoing concern in these cases.

In discussing §2L1.1 globally, POAG representatives commented on how USAO's across the country vary in terms of their consistency charging mandatory minimum alien smuggling cases. The FPPOA representative from NDNY stated that they often see mandatory minimums charged while others on the Southern Border rarely see such prosecutions.

POAG unanimously agreed that Option 1 is more favorable to the approach in Option 2. Option 1 provides a clean approach and an ease of application, where Option 2 will likely become cumbersome with evidentiary evaluations of what constitutes an "ongoing commercial organization."

POAG discussed the difference in smugglers seen under this guideline – which generally fall into two categories: Low level individuals who drive or guide smugglees with little knowledge of the organization and repeat smugglers who operate more professionally. Representatives discussed nuances of smuggling operations in Florida

(involving Cubans and fast-boat operations), Mexican smuggling groups and Canadian smuggling operations. Representatives from the Northern Border indicated that Canadian law enforcement partners would be better able to assist investigations to prove organizational elements of an operation that exist outside the country.

POAG members discussed that in well-run alien smuggling conspiracies, low-level individuals may have one or two contacts within an organization, but are purposefully compartmentalized to protect the organization. POAG discussed how these two classes of smugglers would be treated in Option 2.

It was believed that if the USSC adopted the "reason to believe" standard in its "ongoing commercial organization" definition, the enhanced BOL could become over-inclusive and lead to inconsistent application – or more/inconsistent utilization of the mitigating role adjustment. POAG unanimously agreed that should the USSC adopt Option 2, that the commentary defining "ongoing commercial organization" should contain the *knowledge only* requirement. However, Option 1 is the preferred choice.

POAG discussed whether or not there was a need for the "ongoing commercial organization" enhancement when this factor can already be considered in the aggravating role adjustment – when a criminal activity is "otherwise extensive." POAG representatives discussed how the interaction of these two enhancements could provide for inconsistent application.

POAG next discussed the proposed SOC for unaccompanied minors and the ramifications of the proposed SOC potentially containing two relevant conduct standards – with references to both the offense and the defendant. Considering the strong concerns set forth by DOJ, POAG believed that a strict liability standard is appropriate and proposed the SOC to read as follows – *If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels.*

With regard to the amendments addressing the sexual abuse of minors, the group strongly supported adopting the federal definition of a minor (under 18) and the serious bodily injury clarification that included criminal sexual abuse. However, the group questioned whether 4 offense levels appropriately captured the physical/emotional damage caused by sexual abuse. POAG questioned how the new language would apply to individuals who personally committed the sexual assault; aided and abetted the conduct; were deliberately indifferent to the conduct; or were simply part of the organization in which the conduct occurred.

POAG proposes that the USSC expand Application Note 4 to include a new subsection (E) – permitting upward departure if the defendant was personally responsible for carrying out a sexual assault. See also USSG §§5K2.8 (Extreme Conduct) and 5K2.3 (Extreme Psychological Injury).

Child Exploitation – Offenses Involving Unusually Young and Vulnerable Minors

USSC ESP Staff Rachel Pierce provided an introduction to the various proposals in §§2G2.1 and 2G2.2 to address circuit splits. POAG discussed concurrent application of

the age related enhancements in the Production/Possession guidelines and the Vulnerable Victim adjustment. The group discussed infants and toddlers as an especially vulnerable class of child exploitation victims due to their inability to communicate and protect themselves due to their cognitive development and small size. POAG questioned whether the proposed language in Application Note 2 was objective enough to provide clarity in application – "extreme youth and small physical size." POAG felt that using the specific terms "infants and toddler," while not perfect, provided more direction than the proposal and left less to interpretation.

POAG engaged in a lengthy discussion comparing the appropriateness of the Vulnerable Victim adjustment relative to the Production and Possession guidelines. Members unanimously agreed that concurrent increases should be permitted in §2G2.1. First, due to the severity of the offense and secondly due to the fact that defendants generally have direct contact with their victims and will have specific knowledge about the age of the victim.

With regard to the possession guideline at §2G2.2, POAG discussed some of the complications associated with the application. First, possession defendants do not typically have direct contact with the individual victims and often obtain large volumes of images in "data dumps" that contain a variety of materials that they may or may not actually view or be interested in. Other cases have evidence of defendants actively seeking out media involving infants and toddlers. POAG discussed the merit of providing a higher burden of proof in the §2G2.2 that targets defendants actually seeking out this material or have focused collections of this nature. Ultimately the group could not come to consensus.

With regard to §2G2.2, POAG also discussed the potential applicability for a 4 level Vulnerable Victim adjustment for cases involving a large number of victims. As previously noted, this media can be downloaded in a high volume and could result in the 4 level enhancement being inconsistently applied.

POAG members also discussed the high variance rate in §2G2.2 and how adding the vulnerable victim adjustment could increase sentence disparity across the country. The circuits frequently imposing non-guideline sentences will likely continue doing so and circuits with lower variance rates will likely impose sentences consistent with the higher guideline ranges – that will be 2 to 4 levels higher with the vulnerable victim adjustment.

The 2-Level Distribution Enhancement at Subsection (b)(3)(F)

POAG engaged in discussion as to what kind of situations warrant the 2-level distribution enhancement – specifically in peer-to-peer (P2P) file sharing situations. Members debated the merit of P2P defendants receiving the 2-level enhancement as a matter of course (for simply participating in file-sharing and having a shared directory) or whether there should be a higher evidentiary standard with a knowledge requirement.

The group discussed the spectrum of cases courts are seeing that range from unsophisticated users with little knowledge of the technology to higher level users who communicate with other users, barter and trade through email, forums and by other

means. It was noted that some sophisticated users actually disable sharing. Members also discussed the nuances of P2P technology.

POAG supported the addition of a knowledge requirement in the application of §2G2.2(b)(3)(F). Members discussed the variety of P2P users and the effectiveness of investigators conducting interviews to assess user sophistication and knowledge of the applications. Forensic evaluations of computers/cell phones also provide evidence of distribution at times. Members observed that the knowledge requirement will not substantively change the operation of the guideline as it currently exists and will assist in stratifying the guideline to provide more punishment to the user with a higher level of knowledge.

The 5-Level Distribution Enhancement at Subsection (b)(3)(B)

POAG also agreed with the proposed changes to §2G2.2(b)(3)(B), which creates a higher standard to apply the SOC involving distribution "for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." For many of the reasons stated above, POAG believed that investigators are generally discovering evidence from interviews and/or forensic computer analysis, when defendants are engaging in *quid pro quo* exchanges involving child pornography. This change will help provide consistency across the country.

Animal Fighting

USSC ESP Staff Peter Madsen briefed POAG on the animal fighting offenses charged throughout the country – predominantly in the Southeast and Oregon. It was noted that the majority of the cases involved dog-fighting operations of 30-40 dogs and more extensive operations involved animals numbering in the hundreds. Animals who lost fights were often euthanized in cruel and inhumane ways including electrocution and hanging. It was noted that there were a high incidence upward departures in these cases to account for harm under-represented in the guideline.

POAG was unable to find significant examples of animal fighting cases through discussion with district representatives, but generally agreed that the class of offense is serious in nature. POAG agreed the USSC should adopt the higher base offense levels out for comment in §2E3.1(a)(1) & (a)(3).

POAG agreed that a specific offense characteristic is appropriate in this guideline, particularly with the prevalence of firearms utilized to euthanize injured animals and the enhanced risk of violence that could be occasioned by a gambling dispute. POAG observed that a similar enhancement exists in §2B1.1.

Conditions of Probation & Supervised Release

Raquel Wilson, Director of Education and Sentencing Practice, briefed POAG members on the history of the proposed changes and the parallel efforts of the USSC and PPSO to obtain public comment on the proposed conditions and the ratification timelines for the USSC and Criminal Law Committee.

POAG members all received passionate commentary from districts across the country about the national conversation generated by the body of case law that began in the 7th Circuit. Probation officers around the country consistently expressed that the entire probation system is being forced to adopt the views of a minority of circuits perceived to impact USPO discretion. The District Representative from the 7th Circuit explained how many of the districts in her circuit were evolving to address issues related to narrowly tailoring conditions, justifying recommendations and providing notice to defendants regarding conditions. Many USPO's expressed frustration about what is becoming a burdensome process that is adding to the workload of presentence writers and judges – especially having to address these issues with "standard conditions."

The FPPOA representative also received strong feedback from members throughout the national system regarding changes to conditions (30-40 individual comments). FPPOA members perceive that the changes being initiated by the appellate courts insinuate probation officers are abusing their discretion when recommending and enforcing conditions.

POAG discussed the ramifications of having to justify "standard" conditions of probation and supervised release. If individual courts are tailoring their own definition of what is "standard," it will create disparity. Furthermore, this practice will make transfer of jurisdiction cases more difficult. As the landscape currently exists, some districts already refuse to accept transfers of supervision unless defendants avail themselves to the receiving district's definition of "standard conditions." If a defendant fails to agree, they may deny the transfer request.

POAG engaged in a lengthy discussion of what should constitute "standard" vs "special" conditions relative to risk and offense types – and how certain blanket conditions may conflict with principles of evidence based practices.

POAG wished to make comments on the following proposed conditions:

(3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

POAG discussed the merits of a strict liability standard versus the knowledge requirement in the proposal. Ultimately, POAG came to consensus that any strong violation brought under either version of the condition would need a showing of knowledge or purposeful conduct. Although the change would raise the evidentiary bar, the group generally believed that the vast majority of violations brought to a court's attention under this condition already show knowledge.

(4) The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer.

POAG engaged in a lengthy discussion of the Fifth Amendment privilege in relation to this condition and the difference that exists (if any) between the two options presented. POAG unanimously disfavored any reference to invocation of the Fifth Amendment within the structure of this condition and agreed that the USSC should adopt the

“answer truthfully” option. This particular condition generated a significant amount of feedback from districts around the country – cautioning against a condition structure that empowers resistance to probation officers’ legitimate responsibility to engage in questioning to detect non-compliance and protect the community.

(5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

POAG unanimously agreed that the old condition structure was preferable to the proposed condition. The new condition is more complicated and will not be easily remembered by supervisees. Although the new condition provides more of an objective standard, it provides mixed messages. POAG notes that a supervisee can arguably move to a new (unapproved) residence without instructing the probation officer, so long as they make the disclosure after-the-fact within 72 hours. This would have the effect of taking away a probation officer’s ability to investigate the proposed residence. To address this issue, the first sentence be altered to replace “approved” with “pre-approved.”

(6) The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant’s supervision that he or she observes in plain view.

POAG representatives preferred the use of the term “contraband” in the old condition structure. POAG received feedback from officers in the field that the new language will have the effect of eroding USPO discretion. By way of an example, one POAG member discussed supervising a fraud defendant in possession of a neighbor’s mail – would this constitute and item “prohibited by the conditions of the defendant’s supervision”?

(7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full- time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

Similar to proposed condition (5), POAG thought that the structure of this condition was too cumbersome and would be very difficult for supervisees to recall from memory. Members strongly disapproved of the “lawful type” language choice used in the first sentence. The first sentence can also be read to give the probation officer

discretion to excuse supervisees from working a "lawful-type" of employment – meaning unlawful employment. POAG believed that the hours requirement is higher than the Post-Conviction Risk Assessment employment standard – which is directly correlated with recidivism. POAG also did not like the requirement for reporting changes of positions within a given employer. While the requirement would be useful for certain offenders – fraud defendants (subversively entering a position of fiduciary responsibility) or sex offenders (gaining access to children) – overall it could create more of a burden than is necessary as a blanket condition. Generally, POAG members believed proposed condition is a solution looking for a problem and preferred the old condition structure in previously listed (5) and (6).

(8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

POAG expressed positive feedback for this condition – particularly because is closed a potential loophole involving inmate communications. Representatives agreed that adding the knowledge requirement does not significantly change the landscape because a strong violation will necessitate knowledge anyway.

(9) If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours.

POAG engaged in a discussion as to what constituted "official contact" with a law enforcement officer – being questioned directly about an incident or as a person of interest; engaging in a conversation with a police officer tasked with community policing (more casual in nature), or having one's plates run by an officer on patrol.

(10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

POAG unanimously agreed that individuals who are convicted of felonies (either instant or prior offense) should be prohibited from possessing a firearm, ammunition or destructive device as a "standard condition." If they are a prohibited person, there is an interest in officer/community safety for them not to possess these items.

The dangerous weapon restriction has more nuance. POAG representatives with rural areas noted that many supervisees engage in bow and muzzle-loader hunting as a legal and pro-social activity that can actually be beneficial in their re-integration efforts. POAG members agreed that the dangerous weapon restriction should be imposed as a "special condition" for those whose history and characteristics demonstrate that dangerous weapons should be prohibited in the interests of community and officer safety.

POAG members also discussed the differences among districts where defendants are convicted only of misdemeanors – who are not prohibited persons. Districts did not have consistent practices.

Support of Dependents

POAG generally liked the language crafted, but would prefer that subsections (A) and (B) be connected with an "or" rather than "and."

V. Other Business

Term Limits

POAG discussed the current 5 year term limits and extensions of 4 years or more for Vice Chair and Chair. Representatives discussed the importance of group cohesion and felt that members can better contribute after going through the amendment process one or two times. Furthermore, it is important for POAG Representatives to have time to develop their network of district representatives within their circuits. There was a general feeling that a three year term would ultimately hurt the group, resulting in higher turnover and a loss of expertise. Representatives agreed that terms of four or five years are beneficial to POAG and decided to recommend leaving the five year term unchanged in the Charter.

Summer Meeting or Funding for National Seminar

POAG members were asked to choose when they wanted to meet next to discuss the USSC priorities – in July 2016 in Washington or prior to the National Seminar in Minneapolis. Members unanimously agreed that having an in-person meeting in Washington for USSC priorities was much more preferable than a meeting prior to the national seminar. All members thought the summer 2015 was a highly productive meeting that resulted in a good product sent to the USSC Commissioners. The group unanimously agreed to the summer meeting.

However, POAG asked that the USSC provide each of the member districts a non-transferable +1 for POAG members to attend if their district would finance the trip.

Richard Bohlken set deadlines for small groups to submit a finished version of their section of the position paper by March 4, 2016. Written testimony is due to the USSC by March 9, 2016.

VI. Adjournment

Chairman Richard Bohlken adjourned the meeting at 11:45 am on February 18, 2016.

Minutes submitted by: John Bendzunas, February 21, 2016