

POAG Minutes
Thurgood Marshall Building
Washington, DC
February 8-9, 2017

I. Meeting Dates/Times

February 8, 2017, 8:27 a.m. to 4:21 p.m.
February 9, 2017, 8:27 a.m. to 11:42 a.m.

II. Attendees

Richard Bohlken (Chair – 10th Circuit); John Bendzunas (Vice Chair – 2nd Circuit); Sean Buckley (1st Circuit); Beth Neugass (3rd Circuit); Kristi Benfield (4th Circuit); Juliana Moore (5th Circuit); Tracy Gearon (6th Circuit); Jill Bushaw (8th Circuit); Jaime Delgado (9th Circuit); Lori Baker (7th Circuit); Joshua Luria (11th Circuit); Renee Moses-Gregory (DC Circuit); Craig Penet (FPPOA); Carrie Kent (PPSO).

Also present: Raquel Wilson, Director of the Office and Education Sentencing Practices (OESP); Peter Madsen, Education and Sentencing Practice Specialist; and USPO David Abraham (Ohio Northern - USSC TDY).

III. Welcome

Director Wilson provided an overview of the new process whereby the advisory groups will have a chance to reply to the submissions of the other advisory groups. She also provided POAG with an update regarding the status of the current and pending members of the United States Sentencing Commission.

IV. Review of Minutes from June 2016 Meeting

The meeting minutes were adopted with an amendment to item 12 and a few minor corrections.

V. 2017 National Seminar Agenda

Director Wilson discussed that the USSC continues to make progress with streamlining the training material based upon feedback received from prior sessions and that the USSC plans to continue with that progress by shortening the plenary session and resuming the 90-minute training sessions. The tentative agenda items were discussed, including potentially organizing the Probation Officer's Forum by circuit.

VI. Review of Proposed Amendments

a) Drugs / Synthetic Drugs and Most Closely Related Substances

Pete Madsen discussed that the USSC is studying cases from 2015 to evaluate how courts are addressing the large number of various synthetic drugs, including the drug equivalent used to determine the offense level and if the courts are varying from the advisory guideline imprisonment range. He noted that the USSC is also monitoring the trafficking patterns of synthetic drugs.

POAG members discussed the issue of synthetic drugs in each circuit and how it is being addressed. POAG members noted that the prevalence of synthetic drugs varied by circuit and that some circuits were seeing corporation cases as a result of synthetic drugs being sold out of storefronts. The circuits that are seeing several of these types of cases commented that it is not uncommon for the advisory guideline imprisonment range to exceed the statutory maximum. POAG members discussed that the manner in which cases involving synthetic drugs are charged varies from controlled substance violations, charges pertaining to mislabeled products, and money laundering. POAG members discussed the difficulties associated with cases involving synthetic drugs include the fact that there are many different types of synthetic drugs that could correspond to several different drug equivalents, whether just the illegal chemical should be used to determine the offense level or if the carrier should also be included, the fact that the drug the defendant was involved with may not be the actual drug the defendant attempted to obtain from his/her source, tracking when the drugs became illegal, and monitoring for knowledge that the defendant knew the substance was illegal. POAG members also discussed that it is difficult to train new officers on how to compute synthetic drugs given the complicated nature of these types of cases.

Madsen requested that POAG members continue to keep him informed of court practices, including agent testimony regarding the substances, and issues pertaining synthetic drugs as the USSC continues to collect data regarding these substances.

b) Consolidation of Zones B and C in the Sentencing Table

POAG members discussed that, while the expansion of Zone B is favored, the proposed amendment may present issues pertaining to long-term use of location monitoring for defendants who were formally in Zone C and would fall into the new Zone B. Trent Cornish from PPSO presented on issues related to the long-term use of location monitoring, including the concern that the U.S. Probation Office would be using additional resources to over supervise low risk offenders, disrupting officers and offenders during non-traditional hours due to equipment issues, and increasing the number of offenders being supervised by location monitoring due to lack of attrition.

c) Tribal Issues: Criminal History and Court Protection Orders

SUSPO Baker briefed POAG members regarding the research and the basis for the recommendations of the Tribal Issues Advisory Group. POAG discussed the recommended departure factors and noted concerns with disparity between tribes, the fact that tribes may continually change their position regarding whether the tribe would prefer convictions be used to determine a departure, and evidentiary issues that would

arise. POAG members also noted that the departure motion seemed to focus more on due process issues, but that there is potentially a need to focus on the seriousness of the tribal convictions and if the defendant was under a form of post-conviction supervision in tribal court at the time the defendant committed the instant federal offense.

POAG agreed with the recommendation to address the definition of “protection order” in Chapter 1.

d) Youthful Offenders: Excluding Convictions in Determining Criminal History Score

POAG members who were in favor of the amendment cited concerns with disparity given that, in some jurisdictions, the juvenile records are sealed. POAG members also discussed the difficulty of obtaining the records in cases where the records are not sealed, and how additional time and resources are needed to obtain the records. It was noted that there is also a disparity regarding access to adult criminal records, but not necessarily to the exact same extent.

POAG members who were not in favor with the proposed amendment to not score juvenile adjudications focused on the fact that convictions prior to age 18 suggest that the defendant will be at high risk to recidivate; the fact that juvenile offenders are often initially offered leniency and serious convictions suggest escalating conduct; the concern that such an amendment would be equivalent to turning a blind eye on serious prior juvenile conduct; the belief that our system should seek to distinguish those who became involved with the criminal justice system at a young age from those who were law abiding; and concerns with increasing violence and criminal conduct involving young offenders that, if ignored, would underrepresent their risk and harm to society.

POAG members disliked the idea of scoring certain juvenile adjudication if the offense involved “violence” given the difficulties of determining if an offense was violent in other sections of the Guidelines Manual.

POAG members discussed that, if the amendment to not score juvenile adjudications is adopted, POAG would recommend an upward departure to account for the serious nature of the conduct.

POAG members were not in favor of a downward departure based upon juvenile adjudications in certain jurisdictions qualifying as an adult conviction. The concerns with this amendment relate to application issues and the need to fully understand the various laws in each jurisdiction before the departure would apply.

e) Criminal History and the Treatment of Revocation Sentences

POAG members uniformly disfavored this proposed amendment given the following concerns: the amendment does not distinguish between defendants who have done well from the higher risk defendants who have a history of poor performance while under correctional supervision; the impact of the revocation sentence is already limited to one

set of points in cases where several terms of supervision were revoked based upon the same conduct; the concern that the point cap under USSG §4A1.1(c) will become more frequent given that it is very common for defendants to receive an initial sentence of probation in the state system; and the concern that this amendment suggests that poor performance under court supervision is insignificant. POAG members also discussed that probation revocations are often revoked due to several technical violations, some of which are very serious, and are not necessarily the result of a new law violation.

POAG members also uniformly disliked the proposed amendment to consider a downward departure in cases where the time actually served is significantly less than the term imposed. POAG members anticipate inconsistency related to what constitutes “significantly less,” which will be an issue in nearly every case given the common and regular application of good conduct time. Further, the sentence imposed is a more accurate measure of the severity of the offense, whereas time served is often a measure of issues unrelated to the defendant, including state and local budget constraints. For the same several reasons POAG members did not recommend this method be used to determine the initial scoring, POAG members also recommend that this method not be used in determining if a downward departure is warranted.

f) Bipartisan Budget Act: Social Security Fraud and Position of Trust

POAG members noted that they have very little experience with this statute given that it is a fairly new law. However, POAG members did favor the reference to 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) at USSG §2B1.1(b)(13) as such a citation makes it clear which cases the enhancement was intended to apply, which has the effect of decreasing litigation at sentencing. Further, POAG members preferred the two-level increase under USSG §2B1.1(b)(13), with a notation that a two-level increase under USSG §3B1.3 is permissible, thereby limiting the increase for these types of offenses to four levels.

g) Acceptance of Responsibility

POAG members generally supported the proposed amendment in order to bring consistency with this practice and provide reasonable due process to defendants who have legitimate factual disputes based upon the nature of the evidence. POAG members discussed the use of the term “non-frivolous,” the need for such a term to be defined, and additional guidance regarding what constitutes a “non-frivolous” objection in order to assist with cases where defendants are objecting to relevant conduct. POAG members discussed a preference for the use of the term “frivolously deny” over “falsely deny” based upon the commonly understood legal meaning of those terms. POAG members discussed whether the determination of acceptance of responsibility should be limited to elements of the offense. POAG members noted that focusing on the elements of the offense would likely have the effect of increasing the amount of litigation at sentencing. Further, it would be inconsistent with the rest of the guideline applications that are based upon relevant conduct.

h) Miscellaneous

No comments.

i) Marijuana Equivalency Terminology

POAG discussed that such a change could be more confusing given that the case law up to this point has used the term “marijuana equivalency” and the proposed amendment makes several references to the term “converted.” As such, POAG recommends no changes to this terminology absent a clear benefit and urgency for the change.

j) Technical Issues

No comments.

k) First Offenders / Alternatives to Incarceration

POAG members generally liked the intent of the proposed amendment and the desire to distinguish “first offenders” from those who have prior convictions, but fall within criminal history category I.

POAG members favored Option 1 because a one-level decrease effectively creates a criminal history category of “zero” for first offenders.

POAG members engaged in an extended discussion of who would qualify as a “first offender,” and whether there should be consideration of the type of the offense of conviction, whether the offense was ongoing, or whether the defendant received an enhancement under USSG §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

POAG members also discussed concerns regarding application issues and the determination of who qualifies as a “first offender.” The application issues that were discussed include the fact that there is inconsistency between districts regarding which “minor” offenses are included in the presentence report, which inconsistencies would preclude defendants from receiving the benefit of this enhancement. However, because this guideline is conferring a benefit, rather than adding punishment, it may be appropriate to expect a defendant to not even have convictions for very minor offenses. POAG also discussed the eligibility criteria for the “first offender” reduction and how it may result in the unintended consequence of creating socio-economic and racial disparities. POAG members discussed that defendants of lower socioeconomic status and/or minority populations are often subject to more police presence in their neighborhoods, which increases their likelihood of sustaining minor convictions.

Another application concern POAG members discussed is that the proposed amendment makes older criminal history records relevant, unlike the other sections of Chapter 4 that focus on the most recent conduct, and the concern that there will be difficulties obtaining the older records given that there are already enough obstacles with obtaining current records. In light of these concerns, POAG also discussed whether such a one-level decrease should be addressed as a departure motion under USSG §4A1.3 (Departure Based on Inadequacy of Criminal History) to allow for the flexibility of a departure that isn't ordinarily available when determining an offense level.

VII. Concluding Discussion

POAG members discussed the various levels of feedback they receive from the district representatives in their circuit. For those circuits receiving very little feedback, it was discussed that the Chiefs Advisory Group may be of assistance in finding district representatives who have a genuine desire to serve as the district representative if the current district representative is showing little interest.

Relevant Dates:

Rough draft is due by the close of business on February 16, 2017

Final paper is due by the close of business on February 21, 2017

POAG Conference call to discuss POAG's potential reply is scheduled for February 28, 2017, at 3 p.m. (EST).