

POAG MINUTES
U.S. SENTENCING COMMISSION
THURGOOD MARSHALL BUILDING, WASHINGTON DC
FEBRUARY 14 AND FEBRUARY 15, 2018

- I. Opening:** New Chair John Bendzunas called the Winter 2018 meeting of the Probation Officer's Advisory Group (POAG) to order at 8:31 a.m. He welcomed Sentencing Guidelines Specialist Lori Baker-Dowd, the new 3rd Circuit representative, from the Middle District of Pennsylvania. The Chair thanked and presented certificates to Sean Buckley, Kristi Benfield and Richard Bohlken for their service to POAG as this was their last meeting.

Chair Bendzunas discussed the process and goals for the meeting to include (1) distributing writing assignments for our position paper on synthetic drugs and immigration, (2) determine draft deadlines for finalization by Chair and Vice Chair, (3) prepare opening statements for upcoming Re-zoning/First Offender testimony and (4) update POAG members on Tribal Issues Advisory Group (TIAG). The draft deadline of February 27 was agreed upon. Position Paper drafts should be sent to the Chair and Vice Chair.

- II. Attendees:** In attendance were Chair John Bendzunas (Chair and 2nd Circuit); Vice Chair Jill Bushaw (8th Circuit); Sean Buckley (1st Circuit); Lori Baker-Dowd (3rd Circuit); Kristi Benfield (4th Circuit); Gwendolyn Drews (5th Circuit); Tracy Gearon (6th Circuit); Lori Baker (7th Circuit); Jaime Delgado (9th Circuit); Former Chair Richard Bohlken (10th Circuit); Joshua Luria (11th Circuit); Renee Moses-Gregory (DC Circuit); Craig Penet (FPPOA); and Carrie Kent (PPSO). Also in attendance were the USSC Director of the Office of Education and Sentencing Practice Raquel Wilson and Education and Sentencing Practice Specialist Peter Madsen.

- III. Review of Minutes:** The minutes from the July 2017 POAG meeting were unanimously approved and adopted with minor amendments. They will be posted to the website.

- IV. USSC 2018 National Training:** Director Wilson discussed the USSC 2018 National Seminar to be held in San Antonio, Texas, between May 30 and June 1. To assist the trainers, POAG members were asked to reach out to the districts to obtain case information and fact patterns to be used as scenarios for the training sessions. The national training agenda can be consulted for the break-out subjects the training staff plan to present. The agenda can be located on the Commission's website under the Education tab. Types of cases suggested were anything new, unique or notable, to

include, but not limited to bitcoin, hacking, celebrity information theft, ransomware and exploitations. Conspiracy cases which have significant relevant conduct and roles applied are of particular interest. Case information should be emailed to Peter Madsen.

Chair Bendzunas discussed the success of the Probation Officer's Forum (interactive facilitated round tables) at last year's National Training Seminar in Baltimore and Denver. It was suggested we send out the Forum subjects prior to the training so participants can better prepare to offer feedback. Based upon last year's Forums, it was believed three subject blocks was the appropriate amount. Subject suggestions should be sent to the POAG Chair and Vice Chair. POAG members suggested soliciting feedback regarding the presentence monograph and current presentence processes as the AO has a new working group in place. Details about the AO presentence working group was presented by the POAG's AO representative. It was also suggested we solicit feedback regarding challenging guideline applications which may assist us in preparing suggestions for commission priorities in the future. When Forum subjects are finalized, they can be emailed to all registrants in early May. This will allow the registrants to prepare for the session, to include discussing the subjects with their non-attending peers prior to their travel to the seminar.

- V. **Succession Planning:** In 2018, we will have three POAG vacancies as this is the last meeting for Sean Buckley, Kristi Benfield and former Chair Richard Bohlken. The vacancies are for the 1st, 4th and 10th Circuits. Discussion was had regarding advertising or announcing the vacancies in News and Views, in the published newsletter and at the National Training Seminar. Possible candidates can be obtained from the district representatives in those circuits with the hope they could recommend individuals who have demonstrated a passion for the subject matter. Names should be forwarded to Peter Madsen as soon as possible as the selected individuals can be approved by the commissioners at their June meeting. The individuals could then participate in the July POAG meeting.

Mentoring was utilized with the new 3rd Circuit representative and demonstrated positive results so as new POAG members are selected, it is planned that a current POAG member mentor a new circuit representative. POAG members should contact the Chair and Vice Chair to volunteer to be a mentor. The need for developing a feedback network should be stressed to all new circuit representatives as this feedback network is vital to our mission.

VI. **Proposed Amendments – Synthetic Drugs**

Information was obtained from each circuit representative regarding synthetic drug prevalence, rate of prosecution, and supervision issues, including testing. A telephone

conference was completed with Probation Administrator Chris Mangione. He discussed urinalysis limitations and treatment issues experienced by the field with offenders' use of synthetic drugs. Of particular interest was the short time span (one day to four days) that these drugs remain in the system and the significant cost of specialized urinalysis to the system. He revealed some districts using medically assisted treatment for opiate and alcohol abusers.

A. Synthetic Cathinones (Part A)

POAG members noted cathinone use was not widespread but localized to specific areas of the circuits. It was discussed that the lack of scientific research on humans made decisions regarding synthetic cathinones difficult. POAG members were in favor of adoption of the (1) class approach since the basic chemical structure of cathinones are the same, (2) Circuit representatives were split equally as to whether to adopt the equivalency option of 1 gram = 380 grams of marijuana (consistent with Methcathinone) or whether to adopt a 1 gram = 250 grams (an alternative utilized by many district Courts in data briefing), and (3) minimum base offense level of 12. It was decided Methcathinone, as a member of the class, should be deleted as currently referenced and become part of the synthetic cathinones class.

B. Synthetic Cannabinoids (Part B)

POAG members noted synthetic cannabinoid use was also not widespread but scientific testimony was available on these substances. POAG members were in favor of the class approach because new cannabinoids are being developed at a rapid rate. Representatives agreed that synthetic cannabinoids should be broken down into two equivalencies based on the two stages of production – (1) the pure powder (pre-production), and (2) the pure powder applied to inert smokable plant material (post-production).

Based on available professional testimony observed in court and scientific professionals testifying before the USSC, POAG believes synthetic cannabinoids (actual) should have an equivalency of 1 gram = 334 grams marijuana and synthetic cannabinoids (smokable) should have an equivalency of 1 gram = 24 grams of marijuana. The latter equivalency is based on testimony suggesting that 1 gram of the pure substance can manufacture 14 grams of smokable product.

The 1:334 ratio recognizes that offenders with the pure substance are generally more culpable in the distribution chain as wholesalers, high-level suppliers or manufacturers. POAG has observed that many offenders caught with only post-production smokable material are often at or near the statutory maximum of 20 years – causing courts to vary from the guidelines.

After significant conversation, POAG members decided the marijuana equivalency for synthetic THC should remain 1 gram = 167 grams of marijuana with other synthetic cannabinoids being 1 gram = 334 grams of marijuana due to their more severe toxicity and serious adverse effects. POAG was also in favor of defining the term synthetic cannabinoid as “any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors” and proposed the minimum base offense level of 12.

C. Fentanyl and Fentanyl Analogues (Part C)

POAG members are in favor of the increase in the marijuana equivalency for fentanyl to parallel the equivalency of fentanyl analogues because of the increase in deaths and its high potential for abuse and addiction. POAG members approved of the chemical definition of fentanyl analogue without the word “substantially” which does not add clarity to the definition. It was believed a single marijuana equivalency applicable to all fentanyl analogues of 1 gram = 10 kilograms was appropriate. Deleting the references to alpha-methylfentanyl and 3-methylfentanyl and their equivalencies is appropriate and consistent with our other opinions.

POAG members discussed the new Specific Offense Characteristic proposed at (b)(13) for Fentanyl/Fentanyl Analogues misrepresented or marketed as another substance or any additional penalties for a substantial threat to the public health or safety. Representatives discussed the potential broad application of both proposals and the potential for significant litigation. POAG was concerned that in hindsight, this SOC could be considered reactionary and could capture unintended street level dealers rather than those higher up in the supply chain. It was believed existing Chapter 3 adjustments and Chapter 5 departures could be used to capture misrepresentation and/or public safety harm. Members also discussed that many judges vary from the 2D1.1 guidelines and that this SOC may just increase variances and result in disparity among districts. POAG felt that quadrupling the penalties for fentanyl sufficiently addressed these issues.

VII. IMMIGRATION AMENDMENTS (PART A AND B)

POAG members were unanimously in favor of both parts of the proposed amendments, which remedies the gap in coverage in (b)(2) of Section 2L1.2 and revises the definition of “sentence imposed” in Application Note 2 of this guideline to include revocations as noted in Section 4A1.2, regardless of when the revocation occurred.

VIII. TECHNICAL ISSUES

No comments were made on the proposed technical amendment.

IX. TESTIMONY PREPARATION

POAG members revisited the prior proposed amendments of First Offender and Criminal History Category 0 and POAG's prior positions in preparation of upcoming testimony and in light of the multi-variate recidivism study. The Vice Chair summarized POAG's past positions. It was decided utilizing Section 4A1.2 for over-representation of criminal history was a better way to account for the lack of criminal history as opposed to the First Offender amendment. POAG suggested amending Application Note 3 to eliminate the prohibition.

The POAG Chair reminded the members of our past positions on Zone Consolidation. The 25% rule was discussed. It was the continuing opinion that zone consolidation was a better means to promote alternatives to incarceration. It was discussed how this may violate the statutory 25% rule. POAG strongly opposes lengthy terms of location monitoring as an alternative of incarceration. Intermittent confinement was discussed as an option but found to be not available in most districts. POAG members noted alternatives to incarceration must be consistent with the risk principle and not drain our resources.

X. TIAG

USPO Winter Martinez updated POAG members on the current focuses of this advisory board. She indicated TIAG will be meeting next week to address the proposed amendments and discuss current tribal issues. She indicated they are not seeing synthetic cathinones and cannabinoids on tribal lands but seeing fentanyl, methamphetamine and marijuana use. USPO Martinez stated that intravenous drug use is taboo in tribal society.

XI. USSC WEBSITE AND GUIDELINES APP

Members of the Commission's Education staff presented an overview of the USSC website and demonstrated the new app, which will be rolled out to end users in March 2018.

XII. GUIDELINE ISSUES FROM THE FIELD

POAG members suggested the commission look at simplification of section 2B1.1, revisit the scoring anomaly at section 4B1.5, revisit the application of distribution in section 2G2.2 and address Fentanyl in liquid form in the drug guideline. Peter Madsen discussed the misapplication of section 3C1.3.

XIII. Meeting adjourned at Thursday, February 15, 2018, at 11:30 am.