# PROBATION OFFICERS ADVISORY GROUP
## to the United States Sentencing Commission

Ellen S. Moore
Chairperson, 11th Circuit

U.S. Probation Office
P.O. Box 1736
Macon, GA 31202-1736

Phone # 478-752-8106
Fax # 478-752-8165



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The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, DC on June 25 - 27, 2001, for the purpose of identifying and discussing priority recommendations to the United States Sentencing Commission with respect to the *Federal Sentencing Guidelines*. In developing our recommendations, POAG identified issues that we are of the opinion may be addressed by means of a clarifying amendment as well as issues we would like the Commission to consider in the near future.

**Issues POAG identified that may be addressed by a clarifying amendment:**

- USSG §2B1.3(d)(1) – Special Instruction for Violations of 18 U.S.C. §1030 – Fraud and Related Activities in Connection With Computers

- USSG §3B1.4 – Using a Minor to Commit a Crime

- Criminal History - "Reversed, vacated, or invalidated sentences" and "Related cases/consolidated for sentencing"

**Issues POAG identified for consideration in the near future:**

- USSG §3E1.1 – Acceptance of Responsibility Adjustment
- Criminal History – Sentencing Table
- Native American Issues
- Promulgating a Guideline for 18 U.S.C. §228 Violations (Failure to Pay Legal Child Support Obligations)
- Powder Cocaine and Cocaine Base – Penalties

**Following is a discussion in reference to the identified issues:**

***Issues That May be Addressed by Clarifying Amendments:***

- *Special Instruction at USSG §2B1.3(d)(1)*

There appears to be ambiguity in the interpretation of the special instruction found at USSG §2B1.3(d)(1). The special instruction directs that if the defendant is convicted under 18 U.S.C. §1030(a)(5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months imprisonment. It appears that some courts are interpreting this literally to mean that the Court has no other option but to impose a six-month imprisonment sentence while others are imposing alternative sentences such as home confinement. It appears the special instruction was added to implement a directive as authorized by §805(c) of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1305, which states: "Pursuant to its authority under §994(p) of Title 28 United States Code, the United States Sentencing Commission shall amend the Sentencing Guidelines to ensure any individual convicted of a violation of 18 U.S.C. §1030(a)(4) or (5) is imprisoned for not less than six months." POAG requests that the Commission clarify whether the defendant must actually serve six months imprisonment or whether an alternative sentence of imprisonment to satisfy the six months is an option. This clarification is requested for the purpose of avoiding continued unwarranted sentencing disparity.

- *USSG §3B1.4 – Using a Minor to Commit a Crime*

This guideline directs that a two level increase is applicable if the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detention of, or apprehension for, the offense. Many officers in the border districts reported they are having difficulty in communicating to the sentencing judges that this adjustment is applicable. The most common scenario wherein the application concern appears deals with the presence of young children in a vehicle that is operated and also occupied by several adults who are attempting to cross the border while transporting/smuggling illegal drugs. Essentially, the children are being used as a guise to give the appearance that this was a family outing such as returning from a day of shopping in Mexico. The adjustment is being applied by the probation officers in situations where the defendants at the time of arrest are disclosing that the children were brought to aide in masking the illegal activity. Some

officers are applying the increase based on the prong that the defendant used/attempted to use the minors to avoid apprehension, however, other officers and some judges have not applied the adjustment unless additional evidence is present. POAG is of the understanding that the Commission has taken the position that minors should be kept far removed from criminal activities much less "used" in the criminal activity. It has been suggested that perhaps the commentary could be strengthened to include that the enhancement would be applicable unless it was clearly improbable that the minors were not connected with the offense.

- *Criminal History - "Reversed, vacated, or invalidated sentences" / "Related cases, consolidated for sentencing"*

The Probation Officers Advisory Group has several comments to offer with respect to Chapter Four of the *Sentencing Guidelines*. It has come to our attention that clarification with respect to the definitions for "reversed ,vacated, or invalidated sentences" and "related cases,consolidated for sentencing" would be beneficial. Many officers are experiencing difficulty in applying the guidelines and determining a defendant's criminal history category when defendants have challenged their prior convictions. Clarification is needed at USSG §4A1.2, comment.( n.6) as there appears to be a national trend by defense attorneys to have a defendant's prior predicate offenses, which have been used in classifying the defendant as Career Offender, vacated in state courts prior to imposition of a federal sentence. This rises to the appearance that defendants are allowed to manipulate the federal sentence by attacking the prior convictions at the state court levels prior to federal sentencing. A question has been raised as to whether it was within the Commission's authority to place a temporal requirement on when a defendant could challenge a prior state conviction. POAG recognizes that 21 USC §851 sets forth parameters wherein a defendant can challenge prior convictions that were considered for statutory sentence enhancement purposes under Title 21. The issue at hand is does the statue of limitations of 21 USC §851(e) likewise apply to challenges for prior convictions in other situations such as the challenge of prior convictions that precipitated the defendant's classification as a Career Offender?

It is suggested that clarification is likewise needed at USSG §4A1.2, comment. (n.3) with specific attention to clarifying the meaning of "consolidated for sentencing". One interpretation has been that if two cases are combined for sentencing whether or not factually or logically related, the definition of consolidated for sentencing has been met. Another interpretation has been construed that the sentencing courts have combined cases either procedurally or functionally because the cases had some factual or logical connection and then imposed a sentence to reflect the composite harm. Some cases that were combined for sentencing because of the court's administrative convenience would not be related to each other and would, therefore, be scored separately. This is especially important in career offender application where a ruling that the cases are related could have a dramatic impact on the ultimate sentence. When reviewing the State Court's file in reference to the prior conviction, the probation officer can not always determine the purpose/intent of the prosecutor or the Judge for sentencing the cases on the same date. If the state prosecutor is still available, they may be able to inform of the reasoning for handling the cases in the specified manner, however, this option may not always be available. Ultimately, there is no uniformity at the state level for noting the reasoning of why cases were combined for sentencing purposes. In light of the recent ruling in *Buford vs United States,* 121 Sup. Ct. 1276 (2001), wherein the Supreme Court held that the decision whether an offender's prior convictions were consolidated

for Guideline purposes will be reviewed deferentially, the Probation Officers Advisory Group strongly encourages the Commission to provide clarification.

***Issues to Consider in the Near Future:***

- *Adjustment for Acceptance of Responsibility – USSG §3E1.1*

It has come to the attention of the Probation Officers Advisory Group that there appears to be a national concern surrounding the application of USSG §3E1.1. Unlike other sections of the guidelines, this adjustment is made on a subjective basis. In many districts, the application is automatically applied if a defendant pleads guilty, while in other districts, the defendant must discuss the details of the offense during the presentence investigation in order to receive the adjustment. POAG recognizes that this disparity in application may be the result of a desire to save the court's resources and time as well as defense counsel's concern with having a client reveal information which may possibly increase his or her sentence. Additionally, it appears this adjustment is inevitably applied in drug cases for the purpose of lowering the lengthy imprisonment sentences faced by drug defendants. In the United States Sentencing Commission's Annual Report 1999, statistics reflect that 90% of drug offenders received the acceptance adjustment. It is POAG's concern that the philosophy regarding the purpose for this adjustment has become lost not only in the application of the guidelines, but also in the sentencing process. POAG brings to the Commission's attention that treatment providers and supervision officers frequently review this portion of the presentence report in making a determination as to an offender's motivation for treatment. This assessment may be skewed if the application of the adjustment is not correctly applied. Throughout this position paper, POAG has identified several areas of the Guidelines where this adjustment is presenting application concerns.

- *Criminal History – Sentencing Table*

The Probation Officers Advisory Group is aware that the Sentencing Commission has been exploring approaches to the expansions of Zones B and C of the sentencing table. Likewise, there has been discussion about the creation of a criminal history category which reflects a defendant who has zero criminal history points, thereby distinguishing them from defendants who have one or more criminal history points. This defendant is characterized as a "true first offender".

In discussing the formulation of a criminal history category which would reflect zero points, POAG identified several issues to include: Would this category encompass individuals without prior convictions, but prior arrests? Would a defendant be excluded from this category based on an arrest that was later determined to be a case of mistaken identity? Would it apply to individuals who have never been arrested for any criminal conduct before committing the instant offense? Although POAG identified areas in which it may be difficult to define a true first offender, the group does not oppose a distinguished criminal history category for defendants who have zero criminal history points.

Our discussion on identifying a true first offender led to a discussion of the creation of a criminal history category above VI as POAG recognizes that defendants who are classified as a criminal history category VI normally

have more than 16 criminal history points. Presently, defendants who have 13 or more criminal history points fall into criminal history category VI. Although the guidelines provide for departure in accordance with USSG §4A1.3, it is the group's experience that Courts are somewhat hesitant to upwardly depart as appellate courts will reverse the sentence unless the courts provide adequate analysis to support the departure. A guided departure might achieve the goal of increased sentences for extensive criminal histories while maintaining a judge's discretion. POAG suggests that a study of criminal history category VI cases could determine the median score for defendants falling in category VI, thus determining whether a category VII is justified. In essence, the concern is does there now exist a "heartland" criminal history category VI defendant? POAG recognizes that a category VII could have statutory implications in instances where the guideline range, often correlated to the career offender guideline, would exceed the statutory maximum penalty.

- *Native American Reservations*

POAG recognizes the uniqueness in the federal system of cases which arise from Native American reservations. We are in agreement that training opportunities have the potential to alleviate many of the perceived guideline disparities which were presented to the Commission in Rapid City, South Dakota, in June 2001. It is suggested that increased dialogue among guideline practitioners could identify whether the current guidelines produce unjust results for Native Americans.

There are currently two areas of concern: Cases involving Native Americans frequently involve victims, i.e. murder, assault, sexual assault, thus necessitating conversation by the probation officer with the defendant to explore the offense. This is particularly important in sexual assault cases where a specific admission of guilt is required for participation in sexual offender programs. If defendants are given a blanket reduction for a guilty plea in lieu of actual compliance with USSG §3E1.1, the probation officer's ability to address offense issues with the defendant is drastically decreased. Another area of concern not only for Native Americans but for any defendant charged on federal lands is that no guideline has been promulgated for an Impaired Driving offense, a violation of 18 U.S.C. §13(a)(2)(A). In cases where defendants are subject to enhanced penalties, calculations have been prepared under a variety of guidelines to include §2A1.4 – Involuntary Manslaughter, §2A2.1 – Assault With the Intent to Commit Murder, and §2A2.2 – Aggravated Assault. This has created a disparity that could be addressed by creating a specific guideline for Driving While Impaired or directing the use of an existing guideline.

- *18 U.S.C. §228 Violations – Failure to Pay Legal Child Support Obligations*

POAG again requests that the Commission review the need to promulgate a guideline for 18 U.S.C. §228 violations, especially in light of the combination of USSG §§ 2B1.1 and 2F1.1 guidelines. Currently, if a defendant is charged with this violation, Appendix A of the Sentencing Guidelines directs one to the Contempt guideline found at USSG §2J1.1. However, USSG §2J1.1, comment. (n.2) provides that the most analogous guideline is §2B1.1 for offenses involving the willful failure to pay court-ordered child support. It appears that prosecution of these cases is increasing on the national level. POAG suggests to the Commission that a closer study of promulgating a specific guideline for this violation be conducted.

- *Powder Cocaine and Cocaine Base – Penalties*

Public officials, private citizens, criminal justice practitioners, researches, and various interest groups have previously challenged the fairness of the current approach of sentencing the two principal forms of cocaine offenses, that being powder cocaine and cocaine base. Based on the concerns that have been expressed, Congress directed the Sentencing Commission in 1994 to issue a report and recommendations on cocaine federal sentencing policy. The Commission issued a comprehensive report to Congress on February 28, 1995, which was followed by a special report in April 1997.

It is our experience that the present penalties continue to have significant impact with respect to sentencing issues. In the United States Sentencing Commission's *Annual Report 1999*, it was reported that drug offenses were the largest single category of federal convictions in 1999. Just under half of the cases involved cocaine trafficking, that being 22.1% powder cocaine and 22.9% crack cocaine. Almost 90% of drug offenders received the acceptance of responsibility reduction. It has been our experience that in almost all drug cases, the defendant received the adjustment for acceptance of responsibility even though such application may not have been warranted. The probation officers have witnessed on numerous occasions that the courts justify awarding defendants the acceptance adjustment in light of the already lengthy imprisonment sentence that is required as a result of the drug amount and drug type. Likewise, it is our experience that specific offense characteristics at USSG §2D1.1 as well as other Chapter Three Adjustments are not being applied as intended for the very same reason. The Probation Officers Advisory Group strongly encourages the Commission to continue to pursue recommending modifications for federal cocaine sentencing policy.

*Closing*

We trust that you will find our comments and suggestions beneficial when considering future amendments. Should you have any questions or need clarification, please do not hesitate to contact us. We sincerely appreciate the willingness of each commissioner to listen to our views.

Respectfully,

Ellen S. Moore
Chairman