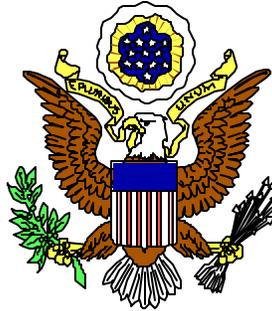


PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

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March 13, 2002

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, D.C., February 19 - 21, 2002, for the purpose of discussing recommendations to the United States Sentencing Commission with respect to the proposed amendments to the *Sentencing Guidelines* that were published in the *Federal Register* November 27, 2001, and January 17, 2002. We are submitting comments relating to the following proposed amendments:

- ▶ Proposed Amendment One -- Cultural Heritage;
- ▶ Revised Proposed Amendment Three -- Career Offenders and Convictions Under 18 U.S.C. §§ 924(c) and 929(a);
- ▶ Proposed Amendment Four -- Expansion of Official Victims Enhancement;
- ▶ Revised Proposed Amendment Five -- Acceptance of Responsibility;
- ▶ Proposed Amendment Seven -- Terrorism;
- ▶ Proposed Amendment Eight -- Drugs;
- ▶ Proposed Amendment Nine -- Alternatives to Imprisonment; and
- ▶ Proposed Amendment Ten -- Discharged Terms of Imprisonment.

Proposed Amendment One -- Cultural Heritage

The Probation Officers Advisory Group supports the creation of this new guideline which recognizes the special harm caused by theft, damage, or destruction of items of cultural heritage as many of these objects are priceless and irreplaceable. It is apparent that the current guidelines do not address the severity of harm these offenses may cause to Native American cultures, national memorials, archeological resources, national parks, and national historic landmarks. Offenses of these types of crimes are dissimilar to property crimes due to the special significance of the artifacts, the non-pecuniary harm associated with the resources, and the fact that many of the items cannot be replaced. Other property crimes are currently covered by USSG §2B1.1. POAG is of the opinion that offenses of this type should be held separate and distinct from the ones ordinarily governed by §2B1.1.

With respect to issues for comment, POAG does not have a position with respect to the enhancement for pattern of similar violations or for use of explosives. However, it is our opinion that an application note regarding the applicability of an upward departure is appropriate if the value of the cultural heritage resource underestimates its actual value. We found that many of the specific offense characteristics were straightforward and application would not appear burdensome. However, there was concern regarding determination of the value of the object. It was suggested by Paula J. Desio, Deputy General Counsel to the United States Sentencing Commission, that this information would be provided by the prosecutor. POAG is of the opinion that this may be an area of litigation at the sentencing hearing with defense attorneys filing objections and presenting their expert witnesses. However, it is recognized that this issue, likewise, occurs in many loss-related cases.

Additionally, POAG identified a potential grouping problem with this offense. If an individual is charged with multiple counts wherein the Chapter Two guideline is §2B1.5, it appears these counts would be grouped together under §3D1.2(d). That being the case, it is suggested that this guideline be listed as an offense covered under §3D1.2(d). If an individual is charged with a cultural heritage offense as well as theft/destruction of other government property at the same time, those counts may or may not group in accordance with USSG §3D1.2(c) as we are aggregating the loss amount. It is POAG's opinion that an application note relative to potential grouping problems/solutions should be considered when this guideline is promulgated.

Revised Proposed Amendment Three -- Career Offenders and Convictions Under 18 U.S.C. §§ 924(c) and 929(a)

Please note that the following comments are in response to the revised proposed amendment of March 7, 2002.

It has been presented to the Probation Officers Advisory Group that the impetus for development of this proposed amendment is based on the statutory directive at 28 U.S.C. §994(h) in conjunction with *U.S. vs Labonte*, 520 USC 751 (1997). Recognizing the laborious efforts that have already been expended with respect to this amendment and the Commissioners' desire to provide a guideline that adheres to the philosophy and justification for the amendment, POAG has identified several problematic issues to include the need to complete two sets of calculations in every case, the complexity of the procedure for imposition of sentence in conjunction with §5G1.2, imposition of sentence with respect to multiple counts in 18 U.S.C. §924(c) convictions, as well as the concern of what the impact would be if at some point a defendant was successful on appeal with respect to the §924(c) conviction when an imprisonment sentence of one day was imposed with respect to the underlying offense of

conviction. Furthermore, it is our opinion that probation officers will have a difficult task when imparting the application of the proposed amendment to their respective judges and other practitioners of the guidelines.

As the proposed amendment distinctly connects USSG §2K2.4 with USSG §4B1.1, it is POAG's recommendation that the Commission defer consideration of this amendment until the results of the recidivist study are available. It has been presented to POAG that consideration of the structure of Chapter Four and general scoring of prior convictions has been deferred until the results of the study are finalized.

Proposed Amendment Four -- Expansion of Official Victims Enhancement

POAG recognizes the need for an expansion of the enhancement for official victims at §3A1.2(b) and agrees that sanctions for injury to non-correctional officers to be considered as victims is lacking in the current edition of the *Guidelines Manual*. It is our opinion that the proposed amendment accomplishes the intended purpose and that the proposed definition for the term "prison employee" will be helpful when applying this guideline.

Revised Proposed Amendment Five -- Acceptance of Responsibility

The Probation Officers Advisory Group continues to support our previous position as set forth in our position paper dated August 5, 2001. It is our experience that there is no uniformity in the application of USSG §3E1.1. Many courts require the defendant to address offense issues with the probation officer, whereas other courts do not hold the defendant to that same requirement. It is difficult for the probation officer to make a proper analysis of the defendant's acceptance of responsibility without engaging in such a discussion with the defendant. However, it is an adjustment that appears to be applied in the majority of cases that enter guilty pleas.

It is the majority view of POAG members that the timeliness component for the additional one-level decrease is best left to the recommendation of the government and the discretion of the court. It has been our experience that the lateness of a defendant's plea may be attributable to a number of factors, some of which are not directly caused by the defendant. It is our opinion that the proposed amendment is successful in resolving the existing circuit conflict as to whether or not the court may deny acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction. It is perceived that this clarification will decrease the current disparity with respect to this issue.

For these reasons, POAG supports Option Two of the revised proposed amendment for acceptance of responsibility.

Proposed Amendment Seven -- Terrorism

POAG recognizes the extensive efforts that have been put forth by the various work groups in fashioning this proposed guideline amendment. These guidelines are evolving and driven primarily by statute. At this time, POAG does not have the prior experience with these type of offenses to formulate an informed response to the proposed amendment.

Proposed Amendment Eight -- Drugs

The Probation Officers Advisory Group strongly supports the Commission's attempt to generally improve the overall operation of the drug guidelines and decrease the reliance on drug quantity as a means of measuring the penalty levels. Furthermore, we strongly support a change in the crack/cocaine ratio but do not take a position on the specifics of the ratio. POAG recognizes that the proposed specific offense characteristics for violence as a distinguishing factor in separating the violence associated with the more serious drug traffickers. After reviewing the proposed amendment in its entirety, POAG generally found the proposed amendment to be straightforward with the exception of several areas which are later addressed. POAG is very conscious of the affect on guideline sentencing if the implementation of this proposed amendment is passed without a corresponding decrease in the crack/cocaine ratio. The group has routinely maintained that many aggravating adjustments are not upheld by the courts when determining the defendant's guideline sentencing range in an attempt to lower the lengthy sentences to which drug defendants are exposed. It is our position that drug defendants will receive proportionately higher sentences in comparison to other offenses of a similar nature if the adjustments are implemented without a decrease in the ratios.

Base Offense Level -- Mitigating Role Enhancement

POAG has concerns regarding the inclusion of consideration of the calculation of what is considered normally a Chapter Three adjustment when calculating a Chapter Two specific offense characteristic. This application is contrary to the instructions at USSG §1B1.2 and the methodical approach that has been used since the inception of the guidelines. Additionally, POAG has concerns regarding the problematic application of mitigating role as an adjustment under USSG §§ 3B1.2(a) and (b) and is of the opinion that application of the adjustment is too nebulous to warrant level reductions exceeding the normal two to four levels. It is our recommendation that the Commission first address the circuit conflicts that remain pertaining to mitigating role before proceeding with the specific proposed amendment at USSG §2D1.1(a)(3).

Enhancement -- Protected Locations, Underage or Pregnant Individuals

POAG supports the specific offense characteristic; however, it is noted that a potential application problem was identified with respect to attempts or conspiracies charged under 21 U.S.C. §846. To simplify application, POAG would recommend that the language contained in the specific offense characteristic include 21 U.S.C. §846 as a considered charge statute when used in conjunction with the other listed statutes.

Enhancement - Violence

As previously noted, the group is in favor of inclusion of the specific offense characteristic if there is a corresponding change decreasing the penalties for powder cocaine and cocaine base. We bring to your attention an area of concern with respect to the specific offense characteristic involving firearms. These specific offense characteristics appear in two forms, that being "defendant specific" versus "offense related". There could possibly exist an inequity in the specific offense characteristics in a case where a defendant does not actually discharge the weapon but is held accountable for a dangerous weapon being possessed and the bodily injury caused by the shooting. It is our opinion that there may be some confusion surrounding the application of relevant conduct with respect to these enhancements. A commentary note that addresses the distinction between the two concepts and its dissimilarity to USSG §1B1.3 -- Relevant Conduct -- may aid in addressing

this issue.

Enhancements -- Prior Criminal Conduct

POAG opposes the proposed amendment for providing a floor offense level of 26 at USSG §2D1.1(b)(3) but supports the two-level enhancement for defendants who possess a felony conviction of either a crime of violence or a controlled substance offense. It is our opinion that this application is consistent with the approach taken in §2K2.1 and provides an enhancement for the repeat drug trafficker.

Reduction For No Prior Conviction

POAG does not support this reduction and is of the opinion that the Safety Valve reduction as currently provided is sufficient. However, we encourage the Commission to look at this proposal in connection with possible changes in Chapter Four and the potential creation of a new criminal history category for a true first-time offender. Furthermore, this relief should be awarded to all defendants who fall within this category and not just defendants who commit drug violations.

Proposed Amendment Nine -- Alternatives to Imprisonment

Of the three options presented, POAG supports Option One. Option Two provides for lengthy commitments in a community correctional center and may cause confusion to practitioners when attempting to implement a sentence which involves serving at least half of the minimum in a form of confinement other than home detention. It is our experience that probation officers, attorneys, and judges already find a “split sentence” option to be confusing. Implementing the additional requirement in Option Two may cause additional application difficulties. We find that Option Three limits expansion of sentencing alternatives to those offenders in Criminal History Category I. POAG has previously expressed concerns that there appears to be a significant number of defendants who fall within Criminal History Category II based on minor misdemeanor offenses and petty offenses. If Option Three is selected, these defendants would be excluded from receiving an alternative sentencing option even though their criminal history points may be for offenses less significant and less violent than an individual found to be in Criminal History Category I. Again, it is our recommendation that further review of the problems identified within Chapter Four may address some of the Commission’s concerns.

Again, we bring to the Commission’s attention that community correctional center placement is not available in all jurisdictions. It has been brought to our attention that information has been presented to suggest that there are community correctional center resources for individuals to complete sentences within the community. However, field experiences indicate many of the community correctional centers identified by BOP are actually county jails and not as effective in integrating offenders back into the community. Generally, it has been our experience that a period in excess of six months under either home confinement or in a community confinement center is not advisable as the impact of this punishment loses its effectiveness. Additionally, many of the local jails used as community confinement centers do not allow the defendants to work unless the defendant is able to provide his or her own transportation. Sometimes, the facilities are located in remote areas without public transportation. POAG would discourage the use of community correctional center placement as a condition of probation.

Proposed Amendment Ten -- Discharged Terms of Imprisonment

It is the consensus of POAG that Option One would provide the clearest application of the guideline amendment proposal. The plain and simple addition of language including "discharged terms of imprisonment" was preferred over Option Two. However, POAG has identified a potential application problem in cases that may require minimum mandatory sentencing since the court, absent a substantial assistance motion, would be incapable of departing below the minimum mandatory sentence. For example, a defendant is convicted of a drug conspiracy offense which has a minimum mandatory term of five years imprisonment. As part of the conspiracy, a substantive drug sale occurred where the defendant has already served a two year sentence. The defendant is not eligible for a safety valve reduction because he is a criminal history category II and his total offense level is 26 which results in a guideline imprisonment range of 70 to 87 months. If the government does not file a § 5K1.1 motion, how does the court give the defendant credit for the two year state sentence he has already served? POAG also notes that the meaning of "conduct taken fully into account" was questioned, as many districts appear to have trouble applying this guideline when the conduct was only partially considered. We recommend consideration of an explanation in detail as to the intent of this concept.

Closing

It is our desire that you will find our comments and suggestions beneficial during your discussions of these proposed amendments. We appreciate the opportunity to provide the Commission with our perspective with respect to guideline sentencing issues. Should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Ellen S. Moore
Chair

Cathy Batistelli
Chair Elect

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