

PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

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May 31, 2002

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. May 29 and 30, 2002, to discuss and formulate recommendations to the United States Sentencing Commission regarding the *Federal Sentencing Guidelines*. In developing our recommendations, POAG identified issues we suggest may be addressed by means of the Consent Calendar, additional training for the field, and issues we would like the Commission to consider in the near future.

The primary focus of the meeting centered on criminal history issues as there has been lengthy discussion about simplifying Chapter Four for the past several years. One school of thought suggests changing the current process of assigning criminal history points based on the length of sentence imposed to a system relying more on the nature of the prior offense, including the associated level of violence. POAG strongly suggests that this approach would be problematic because of the variance from state to state in the charging mechanisms, plea bargaining procedures, availability of police reports, and court documentation. Many officers already have difficulty receiving documentation regarding the sentence imposed and would have a difficult, if not impossible task, in receiving additional information relative to the offense. Officers routinely consider the type of offense committed, the level of violence associated with the offense, and offense characteristics in determining whether a departure is warranted

or imposition of the appropriate sentence within a guideline range. Overall, POAG believes Chapter Four works well. While recognizing that some problematic areas exist, many of these issues can be addressed through the amendment process, addition of clarifying language, and departures.

Issues for Consideration

- *Criminal History Category Zero*

The Probation Officers Advisory Group discussed at length the definition of a "true first time offender." POAG addressed various potential working definitions to include: defendants with no prior juvenile arrests, no prior adult arrests, prior arrests but no convictions, prior convictions which have been expunged, vacated, set aside and/or annulled, the decay factor and prior foreign or tribal convictions which are not countable. We also considered whether the type of crime committed by the defendant for the instant offense, e.g., a violent crime or aggravated sexual offense, should be precluded from a true first time offender status. After a lengthy discussion, POAG no longer believes a working definition is viable. However, recognizing a need to differentiate defendants with zero criminal history points from other defendants and the large number of individuals in Criminal History Category I, perhaps the Commission could alter the current language in USSG §4A1.3 which reads, "...a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." By changing this language, it would remove the departure availability from a prohibited to an encouraged departure. Furthermore, additional guided departure language could assist the court in making this determination. In conjunction with this potential change, POAG also suggests an Aberrant Behavior departure, alone or with a §4A1.3 departure may be appropriate in providing relief to those defendants who appear to have no prior criminal history.

- *Criminal History Category VII or Higher*

POAG again discussed imposition of Criminal History Category VII or higher categories. Potential problem areas in developing higher criminal history categories such as the application of overrides in career offender, armed career offender, repeat and dangerous sex offender against minors; the point structure in the new categories; changes in the Sentencing Table and the relationship of each of these to statutory maximum sentences suggest that this methodology is impracticable. Although the guidelines provide for an upward departure in accordance with USSG §4A1.3, there appears to be disparity in the frequency of a court's willingness to utilize this departure. POAG believes that adding language to assist the court in imposing a guided departure with some structured examples for the court to follow may be more beneficial than creating higher criminal history categories. This methodology also allows the court to retain the discretion it currently uses in imposing appropriate sentences.

- *Sentences Counted and Excluded - USSG §4A1.2(c)*
Safety Valve - USSG §5C1.2

This has been an ongoing area of concern warranting review. Primarily, POAG is concerned about the interrelationship between this guideline and application of the Safety Valve. Defendants who commit the instant offense while on probation for a crime listed at USSG §4A1.2(c) are prohibited from Safety

Valve relief because they fall in Criminal History Category II. POAG is interested in receiving information from the Recidivist Study and the Criminal History Working Group as it appears these situations create a "category" of offenders deserving of some relief. Even if a USSG §4A1.3 departure is granted by the court, defendants are still subject to minimum mandatory penalties absent a USSG §5K1.1 or 18 U.S.C. § 3553(e) departure.

- *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment - USSG §5G1.3*

Recognizing that the Commission recently proposed a new amendment allowing for a downward departure provision in USSG §5G1.3 for a discharged term of imprisonment, POAG urges the Commission to adopt new language explaining the term "fully taken into account." Officers indicate this is a difficult concept to apply when faced with complex situations involving a wide range of criminal behavior when the prior conduct was only partially considered. There appears to be little guidance in this area, either in the guidelines or existing case law. Perhaps an explanation with examples could be added to the Commentary to avoid unwanted disparity.

- *Role Adjustments - USSG §§3B1.1 and 3B1.2*

POAG recognizes circuit splits remain relating to both the Aggravated Role guideline at USSG §3B1.1 and the Mitigating Role guideline at §3B1.2. With the potential enactment of Amendment Four, Drugs, as it relates to mitigating role, POAG expects to see an increase in the number of requests for application of a mitigating role adjustment triggering the maximum base offense level of thirty at USSG §2D1.1(a)(3). Our discussion centered around the proposed Amendment Four cap; the involvement of relevant conduct; the number of participants required and the definition of an "average participant" in the criminal activity. POAG recommends the Commission add language describing a variety of conduct warranting the various adjustments. This may be accomplished by the inclusion of a non-exhaustive list of examples relevant to both aggravating and mitigating roles such as the list existing at USSG §3C1.1, Obstructing or Impeding the Administration of Justice. These additions could resolve the circuit splits, decrease disparity in application and reduce the length of sentencing hearings.

Consent Calendar Issues:

POAG suggests the following items be addressed by way of the Consent Calendar. If the Commission believes further action is warranted, then POAG recommends these items be considered for appropriate resolution.

- *Revocations of Probation, Parole, Mandatory Release or Supervised Release - USSG §4A1.2(k)*

Disparity exists when adding time received in a revocation proceeding to the "original sentence of imprisonment" if the original sentence was a probationary term or suspended sentence. The problem seems to center around the language "the sentence given upon revocation should be added to the

original sentence of imprisonment, if any," By way of example, if the original sentence imposed was probation and a subsequent revocation resulted in imprisonment, is the original sentence viewed as a sentence of zero months imprisonment or no sentence of imprisonment at all? The application difficulty then arises in determining whether to add the time received on the probation revocation to the "original sentence." For example, if a defendant receives six months imprisonment on the revocation, does the defendant have one criminal history point because there was no "original sentence of imprisonment" or does the defendant have a total of two points for the revocation? Additionally, some courts sanction or admonish a defendant for a violation and although a defendant may serve some period of incarceration, questions arise as to whether this is countable. Other districts have partial revocations where a sentence is "revoked and reinstated" and there is some debate as to whether time received on this sentence can be added to the original sentence. POAG suggests resolution by the addition of clarifying language in USSG §4K1.2, comment, (n.11).

- *Immigration - USSG §2L1.2*

Sentencing Commission staff informed POAG that 20% of all current federal cases involve the application of USSG §2L1.2. The term "sentence imposed" presents the same application difficulty as described above in USSG §4A1.2(k). In addition, although there is some direction about this term in 2L1.2, the guideline remains silent on the issue of revocation. Circuits are struggling to determine if it is permissible to use the application rules regarding revocations at 4A1.2(k) in the Immigration guideline. For example, if a defendant receives a six-month sentence for a felony drug trafficking offense and upon revocation of supervised release receives an additional twelve month sentence, does the defendant have a "sentence imposed" of six months resulting in an increase of twelve-levels, or a sixteen level increase for the total sentence of eighteen months? POAG suggests the addition of clarifying language to the Immigration guideline regarding revocations could resolve this disparity.

Training Issues:

In reviewing other problem areas, POAG suggests additional ongoing training by Sentencing Commission staff may alleviate some application disparity and is essential in keeping probation officers current in all areas of guideline application.

- *"Related Cases" - USSG §4A1.2*

Historically, POAG has believed that the "related case" definition has been problematic to the field. Recognizing the terms "intervening arrest" and "formal order of consolidation" have been defined in some circuits, perhaps remaining difficulties can be overcome through additional training.

- *Methamphetamine Labs - USSG §2D1.1(b)(5)(A)*

Additionally, POAG reviewed USSG §2D1.1(b)(5)(A) regarding an enhancement for an unlawful discharge, emission or release into the environment of a hazardous or toxic substance. Statistically, it appears this enhancement has been infrequently applied. POAG suspects this is due to a lack of

understanding of this Specific Offense Characteristic and believes this application problem may be resolved through training.

Miscellaneous Issues:

POAG discussed numerous other issues introduced by POAG members and/or the field. Several issues were labeled problematic and are worthy of mention; however, our concerns do not appear to rise to a level warranting attention by the Commission at the present time. The following issues may best be addressed when these guidelines are reviewed by the Commission for amendment purposes or resolution of circuit splits.

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

Using a Minor to Commit a Crime is the subject of a circuit split and remains problematic, primarily in the border districts. POAG addressed this issue in our Position Paper dated August 5, 2001 and suggested strengthening the commentary, however, we realize this guideline applies to a minimal number of cases.

- *Expunged Convictions - USSG §4A1.2(j)*

The term "expunged" appears to have a variety of definitions and case law directives resulting in disparity in the calculation of criminal history points. Our discussion in determining whether to assess criminal history points centered around the question of what drives a particular expungement and the availability and use of records retained for criminal justice/law enforcement purposes versus deleted public records.

- *Substantial Assistance to Authorities - USSG §5K1.1*

Lastly, Substantial Assistance departures remain a source of frustration for officers and many courts. There is disparity in the level of involvement of probation officers in the determination and extent of departures, ranging from no probation officer involvement to districts where the officer makes the recommendation to the court as to the applicability and extent of a departure. There also remains a great variance in the extent of the departures awarded nationwide. While POAG recognizes this as a function of the Department of Justice, our officers and courts continue to request guidance.

- *Criminal Livelihood - USSG §4B1.3*

Over the past several years, POAG has discussed recommending an increased punishment for white collar defendants who have a pattern of fraudulent behavior, whether or not this prior activity resulted in a criminal conviction. POAG recognizes the Commission has recently modified the fraud and theft guidelines and this problem may be resolved for defendants at the top level of the loss table. However, POAG questions whether defendants at the lower end of the loss table who engage in a pattern of fraudulent behavior receive sufficient punishment. In examining this issue, POAG reviewed whether

application of the Criminal Livelihood guideline could produce increased sentences for these white collar defendants. However, this guideline has a very low offense level and is seldom applied. In an attempt to gather more information on this topic, POAG has created a subcommittee to review a sampling of presentence reports with an eye toward discerning characteristics which describe and identify defendants warranting an increase. Dependent upon our study, we may ask the Commission to review available data to determine if an increase in the Criminal Livelihood guideline or an alternative adjustment is warranted.

Closing

POAG encourages the Commission to continue its efforts to reduce the disparity in the area of the crack/cocaine ratio and changes in the associated statutory penalties. Furthermore, POAG has discussed with Director Pamela G. Montgomery the feasibility of participating with the Commission's working groups on guideline application issues at an earlier stage in the process. This would enable staff to receive input from probation officers prior to developing guidelines which could become problematic to the field.

We trust you will find our comments and suggestions beneficial. Should you have any questions or require clarification of any issue, please do not hesitate to contact us. We appreciate the opportunity to participate with the Commission in this valuable process.

Respectfully,

Cathy A. Battistelli
Chair