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United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 3 and 4, 2004 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments published for comment January 13, 2004. We are submitting comments relating to the following proposed amendments.

Proposed Amendment #1 - Child Pornography and Sexual Abuse of Minors

POAG strongly supports the consolidation of §§2G2.2 and 2G2.4. It is the experience of the group that the current cross references create a tremendous amount of confusion and disparity in application, often resulting in lengthy sentencing hearings. When viewing the new combined guideline, POAG chose Option 1 for ease of application and notes that Option 2 could produce the same issues in the existing cross reference applications.

Issue for Comment #1

POAG thinks it is appropriate to consider relevant conduct and recognizes that this approach is consistent with guideline application as a whole. There does not appear to be any compelling reason to justify treating child pornography cases differently from those defendants who commit bank robberies, drug crimes, or fraud.

Issue for Comment #2

POAG suggests the proposed definitions would assist the field in guideline application. There are continuing concerns as to the lack of instruction for counting the number of images and POAG would request more guidance in the form of an application note. In addition, if the existing specific offense characteristics (SOCs) regarding an increase for the number of items as well as the number of images remain, the group would request an application note explaining whether this is “permissible double counting” or whether these SOCs should be applied in the alternative.

Issue for Comment #3

The group does not think the Commission should include definitions for sadistic or masochistic or other depictions of violence (which may include bestiality or excretory functions). It is our experience that this SOC is factually based and not difficult to apply given the existing case law. POAG suggests the interpretation for these definitions should remain with the courts.

Issue for Comment #4

POAG supports the creation of a new guideline for “travel act” offenses at §2G1.3 with specific offense characteristics to distinguish these acts from other crimes. In addition, the group recommends Option 1A as it provides ease of application by remaining in a “travel act guideline.” Option 2A is preferable to the group as Option 2B could pose ex post facto problems if there are changes to the statutory definitions. In addition, there may be some confusion over whether a conviction of 18 U.S.C. § 2423(d) is required for this enhancement.

Issue for Comment #5

POAG proposes there should be some proportionality between the §2A3.1-2A3.3 guidelines and the §2G guidelines. In §2A3.1, there is a concern regarding a potential double counting issue between Option 1 and §2A3.1(b)(2) as this SOC already provides for increases based on the age of the minor. If Option 1 is chosen, the group would request an instruction as to whether this is “permissible double counting.”

POAG recognizes the Native American Advisory Group has concerns about the interaction between the new definition for pattern of activity enhancement at §4B1.5 and offenses sentenced under § 2A3.2. POAG defers to their judgement on this issue.

Issue for Comment #6

While recognizing that incest cases may be more egregious than other types of sexual assaults due to the loss of trust issue, POAG believes a significant problem could arise if the Commission attempted to define “incest.” The group discussed whether it is worse to be sexually assaulted by an “absent” blood relative versus a live-in step parent who has had a long term relationship with the victim. Perhaps the relationship between the abuser and the victim is the more critical factor than the familial bloodline.

Other Application Issues

During our meeting, POAG agreed that the guidelines for production of child pornography should be higher than mere receipt or possession of child pornography. In addition, POAG noted no application difficulties with the proposed SOCs in the production guideline.

In addition, as to §2A3.3, we would recommend an application note be added directing whether or not a Chapter Three adjustment for Abuse of Position of Trust should apply.

POAG recognizes conditions of probation and supervised release are an area of increasing litigation and suggest a complete ban of computer use would be inappropriate. However, in an attempt to safeguard the public, a limit on the defendant's use of a computer needs to be established. This is best left to the Court's discretion at sentencing hearings when imposing limited restrictions.

Proposed Amendment #3 - Body Armor

In viewing the January 13, 2004 draft of this proposed amendment, POAG believes the active employment of body armor should be included in the commentary notes. Otherwise, there are no application difficulties associated with this new guideline.

Proposed Amendment #4 - Public Corruption

POAG agrees with the proposal to consolidate §§2C1.1 and 2C1.7, and §§2C1.2 and 2C1.6, with the inclusion of attempts and conspiracies under these guidelines. The group also reviewed the cross reference in §2C1.1 and noted no application issues rising to a level warranting removal. We take no position on Issue for Comment #3 as our experience reveals that offense conduct varies widely in public corruption cases.

In analyzing Issue for Comment #4, POAG suggests there may be a double counting concern if both SOCs at (b)(3) and (b)(4) regarding public officials are applied. POAG would not recommend tiered enhancements based on the degree of public trust held by the public official involved in the offense as application difficulties could arise in establishing the defendant's actual job duties. The proposed SOC at (b)(5) was discussed, with the group not reaching a consensus. Another double counting concern was raised as to why a specific group of individuals and documents were identified as warranting the increase at (b)(5) or whether this conduct was already included in the base offense level (BOL).

According to staff, based on the quoted percentages, raising the BOL to accommodate multiple incidents could unduly punish as many as one-third of the defendants sentenced under these guidelines. Therefore, POAG suggests not increasing the BOL as the enhancement at (b)(1) is a preferable way to sanction this conduct.

Lastly, the group is appreciative of the proposed definitions and examples contained in the application notes as inclusion of these should decrease disputed application issues.

Proposed Amendment #5 - Drugs (Including GHB)

Issue for Comment #2

In discussing this issue, the group had concerns with this concept. For example, a person who is

publicizing the sale of drugs over the Internet in an attempt to create a larger distribution network is easier to factually distinguish from an individual who may be a lower level purchaser of the drugs but who then redistributes the drugs to a friend using the Internet. Potentially both could receive an increase for use of the Internet in the distribution drugs. It is suggested that a mass marketing approach may be more appropriate method to sanction distributors using the Internet to sell drugs. The definition and the resulting increase in offense levels could be similar to that found in §2B1.1.

Issue for Comment #3

In discussing this issue with staff, it appears these cases are minimal and POAG suggests an encouraged upward departure be added to include this conduct. This would allow the sentencing court discretion in imposing an appropriate sentence.

Issue for Comment #4

POAG encourages the Commission to resolve the circuit split regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. The group did not reach consensus on this issue.

Proposed Amendment #6 - Mitigating Role

POAG generally agrees with the tiered approach to the mitigating role cap, however, we suggest unless the language is modified, application difficulties will result. Applying a Chapter Three adjustment based on a Chapter Two offense level may be confusing in itself. As currently proposed, §3B1.2(b) refers to “the defendant’s Chapter Two offense level.” This leaves open the possible application of the reduction after specific offense characteristics have been added or subtracted. POAG suggests that the language be explicit in that the reduction should be premised on the “base offense level” with clear instructions including an example to be added in the commentary at §3B1.2.

Currently, defendants sentenced using the §2D1.2 guideline receive the benefit of the mitigating role cap, however, under this new provision, they would not receive this reduction. Similar application problems might also be present at §§2D1.6, 2D1.7, 2D1.10, and 2D1.11. There may be other guidelines that also contain a cross reference instruction to the 2D1.1 guideline where this issue may arise. Perhaps if the word “pursuant” was changed to “using” this issue would be resolved. A separate issue was discussed whereby a defendant was a minor participant for behavior accounted for at §2D1.1, but a full participant for behavior accounted for at the original guideline. POAG requests some clarification regarding these application issues.

Historically, POAG has requested guidance and examples in application of role reductions. This also extends to the current mitigating role cap issue.

Proposed Amendment #7 - Homicide and Assault

The Chapter Two Homicide and Assault guidelines as written and the current proposals will produce appropriate punishment and pose little application difficulty. In fact, the group recognizes these guidelines along with the robbery guideline to be among the easiest to apply. As to the Chapter Three issue for comment, POAG does not recommend a tiered approach in application of §3A1.2 as additional fact-finding issues would be required and could increase the number of contested sentencings.

Proposed Amendment #8 - Miscellaneous Amendment Package

(D) USSG §2X6.1 -Use of a Minor

POAG noted some concerns with the guideline as written in the January 13, 2004 version. In particular, a question arose as to how multiple counts of this offense would be grouped and suggest a commentary note be added regarding grouping instructions. In addition, POAG found the language in §2X6.1, comment. (n.1) to be confusing and we had difficulty interpreting the wording “the offense of which the defendant is convicted of using a minor.” POAG noted a problem in applying role adjustments to this guideline absent additional instruction.

Proposed Amendment #12 - Immigration

Members of POAG suggest gathering the facts to warrant the proposed enhancements at §2L1.1(b)(4) may be difficult for the probation officer to obtain. This issue may be resolved if the language tracks the provisions found in 8 U.S.C. § 1327 wherein the charging document would outline the specifics of the conduct.

POAG supports an enhancement for multiple deaths noting there are certainly several cases in which more than one illegal alien has died while being smuggled into the United States. However, there would seem to be problems in applying a multiple count calculation from Chapter Three. Therefore, an encouraged upward departure either in the commentary at §2L1.1 or in §5K2.1 could address this issue.

The group found no application problems if the table for the number of aliens smuggled is amended.

POAG opposes an enhancement in the case of a fugitive from another country. Probation officers have a difficult time obtaining criminal record information within the United States and foresee greater difficulty in timely obtaining foreign arrest information. In addition, there are concerns about defendants who are fugitives from countries who are escaping political or religious persecution. There also seem to be inherent conflicts within the guideline structure in that a defendant is prohibited from receiving criminal history points for foreign convictions, but may receive an increase for a mere warrant. POAG takes no position with regard to fugitive status from a United States jurisdiction but notes a potential conflict with Chapter Four in that mere arrests cannot be considered in determining an upward departure in a defendant’s criminal history category.

Remaining Amendments

POAG takes no position on remaining amendments and relies on the expertise of the Commission staff and other working groups.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarifications, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli
Chair