PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 7 and 8, 2006 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to several issues which were published for comment in January 2006.

IMMIGRATION:

Part One: USSG § 2L1.1:

National Security Concerns:

POAG recommends Option One under National Security Concerns as it would require the government to make the charging decision at the time of indictment, rather than a probation officer attempting to make the determination on facts which may not be readily available and difficult to obtain.

Number of Aliens:

As to the number of aliens proposal, POAG identified no application issues but recommends Option Two due to the specificity of the table.

Endangerment of Minors:

POAG recommends Option One which makes no distinction relative to the age of the illegal minor as

information to establish the age of an illegal minor would be difficult, if not impossible to obtain.

Offenses Involving Death:

POAG discussed whether this proposal captures multiple harms to a large number of victims. If there is more than one death, the harm can be addressed in USSG §5K2.1 which lists an encouraged upward departure for multiple deaths. However, if multiple victims suffer bodily injury, serious bodily injury, or permanent or life- threatening bodily injury, is it the intent of the Commission to treat cases involving one victim in the same manner as cases involving multiple victims? Perhaps a special instruction should be included explaining how this enhancement would apply in a case involving multiple victims with a variety of injuries. POAG does agree with the proposal in the cross reference to apply the appropriate homicide guideline, rather than solely directing application of the murder guideline.

Abducting Aliens, or Holding Aliens for Ransom:

The group agrees with the proposed change at USSG §2L1.1(b)(10) addressing concerns that sometimes aliens are coerced without the use of physical force which is unaccounted for in the current guideline system. Based on our discussion, the group believes this is a separate harm from the "typical" smuggling case. The proposed increase appears consistent with the application in USSG §2A4.1 and the minimum base offense level in USSG §2A4.2.

Part Two: USSG § 2L2.1:

Fraudulently Obtaining or Using United States Passports or Foreign Passports:

POAG would not recommend the inclusion of documents other than passports for the proposed enhancements at USSG §§2L2.1 and 2L2.2. Identity documents relating to naturalization, citizenship, resident status, and passports provide the basis for the offense of conviction and are therefore addressed in the base offense level. It is unclear why identity documents such as drivers' licenses and Social Security cards should receive a further increase. In the past, we were told an increase for U.S. passports was needed because they were "the gold standard" in identity documents. This factor does not seem to apply with respect to other identity documents. In addition, the ease in obtaining other identification documents varies from state to state. If the Commission chooses to provide for this increase, then an application note is requested addressing a potential double counting issue.

The group would also suggest adding an application note similar to the note in USSG §2B5.1 instructing the court not to apply the increase if the documents are obviously counterfeit.

Alternative Approaches to Sentencing Under USSG §2L1.2:

The members recommend Option One in the Alternative Approaches to Sentencing Under §2L1.2. The group has experienced no difficulty in determining whether a sentence of imprisonment exceeded thirteen months. However, officers have struggled when trying to interpret a time-served sentence less than thirteen months. Obtaining verification from local jails to corroborate the amount of time spent in detention is difficult to accomplish in a timely fashion. Option One alleviates this

application problem. Furthermore, Option One appears to simplify application of this guideline as the analysis to be made is limited to a determination of aggravated felony and the sentence of imprisonment imposed resulting in a more consistent application of the guideline.

FIREARMS:

POAG appreciates the attempt to resolve the issue surrounding the Sunset Provision for weapons described in 18 U.S.C. § 921(a)(30). Based on our discussion, courts are handling this issue in a variety of manners, whether applying it and granting a downward departure and/or variance, or not applying it and giving an upward departure and/or variance, resulting in disparity in sentences imposed nationally. POAG's preference is Option One as the upward departure method would not resolve the disparity issue. POAG does recommend the definition of "high-capacity semiautomatic firearm" be consistent between USSG §2K2.1 and §5K2.17.

There was great concern that the definition of trafficking as written was overly broad and could apply to low level "straw purchasers," some of whom may commit this offense under duress. For example, the girlfriend of a weapons trafficker who is a victim of domestic violence buys the weapon(s) and does not receive any monetary gain or receives a small amount of drugs for her participation. The convicted felon then turns around and sells the weapon on the street for a substantial amount of money. Yet, under the proposed definition, if the government cannot prove that the convicted felon sold the weapon on the street, the girlfriend would receive a higher sentence. We recognize that putting any firearm on the street has the potential for serious harm, however, this proposal may result in sentencing disparity.

If the Commission chooses to use the number of firearms in conjunction with the trafficking enhancement, the group perceives a potential double counting issue between USSG §§ 2K2.1(b)(1) and (b)(7). POAG requests an application note be provided giving direction as to whether this is "permissible double counting."

POAG believes the majority of the investigations completed by group members involve the exchange of guns for drugs. As such, we recommend the trafficking definition include "as consideration for anything of value" rather than inserting the pecuniary gain clause.

The group sees no application issues in raising the enhancement for an altered or obliterated serial number, however, members recommend also capturing illegally manufactured guns with no serial numbers.

As the "in connection with" issue has produced ongoing application issues, POAG recommends resolution of this circuit conflict. There does appear to be an inconsistency among all three of the proposed options and the gun enhancement in USSG §2D1.1. In Options One and Two, the mere presence of the firearm would justify the application in USSG §2K2.1, however, the standard in USSG §2D1.1(b)(1) provides a provision that the adjustment should be applied if the weapon was present unless it was clearly improbable that the weapon was connected with the offense. Option Three presents an additional application problem for defendants convicted of both drug and firearm offenses. It appears mere presence of the weapon is not enough to trigger this enhancement in USSG §2K2.1which would then appear to be inconsistent with the application provision at USSG §2D1.1. This could also produce disparity in charge bargaining if the defendant is not eligible to receive this

enhancement in both guidelines.

POAG does not think it necessary to add language prohibiting downward departures in USSG §5K2.11 for cases involving a conviction under 18 U.S.C. § 922(g). In some instances where this departure has been applied, it appeared to be appropriate given the circumstances of the offense and the characteristics of the defendant. Therefore, the group recommends this policy statement be left to the Court's discretion based upon the specific facts of each case.

Officers have difficulty determining the distinction between the terms "brandishing" and "otherwise used." In reviewing the proposed changes, the majority view in Option 2(A) appears to resolve many of our concerns, however, the group recognizes there may be some inconsistency between this option and the definition of brandishing in 18 U.S.C.§ 924(c).

STEROIDS:

Although Option One provides for a more precise measure of the actual amount of steroids, the drug analysis could prove problematic due to the many different forms of steroids available and whether the DEA or state laboratories are equipped to make a qualitative analysis. Currently, probation officers have difficulty in obtaining laboratory results in routine drug cases. We would therefore expect greater difficulty in obtaining reports in this specialized area. POAG believes steroids should be punished as other schedule III controlled substances. Based on our discussion it appears defendants abusing steroids should be treated in a similar fashion as those defendants who abuse other schedule III controlled substances as the groups share many similar characteristics. As such, POAG recommends Option Two.

Regarding masking agents, POAG agrees an enhancement is warranted, however, the current definition of a masking agent appears somewhat limited.

POAG recommends adoption of Option One regarding coaches of athletic activities for the following reasons. It is felt many times Chapter Three adjustments are overlooked by the new or inexperienced practitioner, whereas Chapter Two specific offense characteristics generally are not. As such, it appears this increase would be applied in a more uniform manner in Chapter Two. Secondly, the group recognizes the current proposal is for a two-level increase, however, in our discussions, POAG believes there is a large distinction between the coach who provides the substance to a professional athlete versus a college or high school athlete. It is recommended that a larger increase be applied to a coach for a college or high school athlete to reflect the greater degree of vulnerability of the athlete, and the greater degree of influence a coach has over those young athletes. Recognizing this is not a current issue for comment, we suggest at a future time, the Commission revisit this issue as to whether a distinction should be made between these two groups in Chapter Two.

When the Commission re-promulgates this emergency amendment as permanent, POAG agrees the proposed enhancements pertaining to masking agents and distribution of a steroid to an athlete should be expanded to involve any controlled substance as we see no distinction between steroids and other controlled substances.

As to Issue for Comment Two, in this type of quantity-based penalty structure, this change appears consistent. While we realize there is precedent for the language "mid-level" to "high-level" dealers in

Amendment 621 regarding MDMA, some members of POAG initially confused the language with a possible Chapter Three role adjustment. POAG takes no position on what offense levels should be established.

MISCELLANEOUS LAWS:

The proposed new guideline at USSG §2X5.2 would greatly benefit those districts with numerous Class A misdemeanor offenses not referenced elsewhere. We would not recommend consolidating all misdemeanor offenses under this new guideline as it could result in charge bargaining practices by the parties.

The suggested language at USSG §2X5.1 is confusing and appears circular. The members felt the example in the synopsis more clearly explained the application principals than the guideline as written. However, problems appear to exist for multiple offenses. For example, if the indictment alleged the death or bodily injury to a child in utero was caused by an assault during the commission of a robbery, which guideline should the officer apply? Would the assault guideline, the robbery guideline or the higher of the two apply?

APPLICATION ISSUES:

POAG agrees with all the recommended changes in this section, many of which have been outlined as problematic in our past position papers. We appreciate the Commission's proposals to address these issues.

USSG §3C1.1 - CIRCUIT CONFLICT RE: OBSTRUCTION OF ADMINISTRATION OF JUSTICE:

The suggested change for pre-investigative conduct appears to unnecessarily complicate the application of this guideline and could capture unintended behavior, potentially punishing defendants on a broader scope than a relevant conduct standard. This recommended change in all likelihood will result in lengthier sentencing hearings to respond to additional objections.

POAG agrees with the proposal to include "perjury in the course of a civil proceeding," as members have previously applied an Obstruction of Justice enhancement for this conduct. However, we do not recommend inclusion of "false statement on a financial affidavit" as we do not see a clear connection between this conduct and its relationship to the offense of conviction.

Closing

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

Sincerely,

Cathy A. Battistelli

Chair