PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

February 26, 2007

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. 20008-8002

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 21 and 22, 2007 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2007.

Sex Offenses Pursuant to the Adam Walsh Act

Discussion of the proposed sexual offender registration guideline at §2A3.5 raised potential application issues. First, the proposed guideline references Tier I through III offenses. As 42 U.S.C. § 16911 is not included in the Federal Criminal Code and Rules and therefore not readily available to probation officers, POAG would request that the commentary to this guideline include definitions of each tier. Regarding the proposed guideline, the consensus of POAG is that Option One provides a clearer format and ease of application. In both options, there is a specific offense characteristic (SOC) increase for committing a sex offense while in a failure to register status. POAG is requesting clarification as to whether a conviction is required to apply this increase or if officers are to apply a preponderance of evidence standard.

Both options also contain a SOC with a decrease if "the defendant voluntarily attempted to correct the failure to register." POAG finds this SOC problematic in that there are states currently unable

to register sex offenders as required by the Adam Walsh Act. Further, although POAG recognizes the burden lies with the defendant in proving he or she attempted to register, probation officers will address this SOC in preparation of the presentence report. POAG questions how a probation officer or defendant can confirm, for example, that an unsuccessful telephone call or visit was made in an attempt to register. The group asks that specific examples be provided as to what is and is not a voluntary attempt to comply, i.e., severe infirmity, mental impairment, etc. POAG also requests specific instruction advising whether a decrease for voluntarily attempting to correct the failure to register should be applied for a defendant who receives an increase for the proposed SOC at §2A3.5(b)(1) of Option One.

Lastly, POAG suggests the proposed guideline at §2A3.6 specifically state that the guideline term of imprisonment is the minimum term required by the statute if the intent is to mirror the application in §2K2.4 for a conviction for a violation of 18 U.S.C. § 924(c).

Drug Offenses

POAG recognizes the ease in application of the proposed two-level enhancement at §§2D1.1(b)(5) and 2D1.11(b)(5) for a defendant convicted of 21 U.S.C. § 865. If the Commission references an enhancement in either of Chapters Two or Three for the use of a facilitated entry program to import drugs in addition to methamphetamine and methamphetamine precursor chemicals, POAG would request inclusion of the definition and/or examples of a facilitated entry program in the corresponding application notes.

While Option 1 referencing 21 U.S.C. § 841(g) would be the easiest to apply, POAG recommends Option 2 as it also requires a conviction of 21 U.S.C. § 841(g), and addresses the more serious conduct of distributing the drug knowing or having reason to believe it would be used to commit criminal sexual conduct. POAG is concerned that Option 3, the tiered approach, could result in numerous objections in trying to differentiate between "knew" and "had reasonable cause to believe" that a drug would be used to commit criminal sexual conduct.

POAG recommends Option 1 regarding 21 U.S.C. § 860a as it provides straightforward application instructions. The group believes Option 2 will prove more difficult to apply as the proposed SOCs at 2D1.1(b)(10)(D) are similar in nature and have the potential to produce incorrect application.

Immigration

The group concentrated on Option 6 for §2L1.2 which eliminates the “categorical approach” to determine offense severity and replaces it with “term of imprisonment imposed” as the measure of offense severity. POAG supports the change to an imprisonment imposed approach. However, the group has concerns with the application as presented in Option 6. POAG would recommend the reexamination of the imprisonment terms proposed which trigger the increased offense levels. The group is concerned the lower level imprisonment terms, specifically sentences of imprisonment of at least 60 days, may capture too many minor offenses for which the increases in the offense levels appear too severe, resulting in application disparity. For example, in many courts, a 60-day jail term

may be imposed in multiple driving without a license or with a revoked or suspended license offenses, which may not warrant a 16 or 12 level increase in the offense level. POAG would also urge the Commission to avoid using "actual time served" as a measure of offense severity, as the records are not readily available and in many instances, unobtainable.

The group also recommends language be modified in Option 6, §2L1.2, comment. (n.1)(B)(iii) similar to the language found in §4B1.4, comment (n.1), indicating that the time periods for the counting of prior sentences under §4A1.2 are not applicable when applying the SOCs.

Criminal History

Minor Offenses

POAG discussed the use of the misdemeanor and petty offenses listed in §4A1.2(c)(1) in determining a defendant's criminal history score. The group recognizes that certain of these offenses are sentenced differently in various jurisdictions resulting in inequity in criminal history scores. Specifically, in many courts, sentences of at least one year of probation or thirty days of imprisonment are routinely imposed for careless or reckless driving, driving without a license or with a revoked or suspended license, fish and game violations, leaving the scene of an accident and local ordinance violations. Further, if a defendant is serving a probationary sentence for one of these offenses at the time they are arrested for a federal drug offense, they are precluded from application of the safety valve. The group concluded, due to jurisdictional differences in sentencing these specific offenses, criminal history scores often over represent the seriousness of a defendant's past criminal conduct and their propensity to commit further crimes. As such, POAG recommends consideration of eliminating these specific offenses from the list at §4A1.2(c)(1) and including them in the "never counted" list at §4A1.2(c)(2). This shift should reduce the disparity in criminal history application and may also decrease the number of downward departures pursuant to §4A1.3, Inadequacy of Criminal History Score.

The group also recommends that the language found at §4A1.2(c)(1)(B) regarding prior offenses that are similar to the instant offense be deleted. This subsection is rarely if ever relied upon as the misdemeanor and petty offenses generally do not mirror federal offenses.

Related Cases

As noted in past position papers, the definition for related cases is still a source of confusion for practitioners and results in numerous objections regarding criminal history computations. In an effort to reduce confusion, POAG recommends the second sentence at §4A1.2, comment. (n.3), beginning with the word "Otherwise," be revised to read "*If there was no intervening arrest,* prior sentences are considered related if they resulted from offenses that..." This should help eliminate the continuing effort by practitioners to proceed to the second prong even when cases are separated by an intervening arrest. POAG also requests the Commission resolve the circuit conflict regarding formal versus functional consolidation as another measure to reduce confusion. Another area of confusion resulting from the related cases instruction is the application of criminal history points for

multiple probation or parole revocations for the same violation conduct, as outlined in §4A1.2(k), comment (n.11).

Pretexting

POAG thinks violations of 18 U.S.C. § 1039 should be referenced to §2H3.1 as it is proposed to be amended in the Miscellaneous Laws section. The group would not recommend including these offenses under §2B1.1, nor do we recommend an expansion of the definition of victim in §2B1.1 to include non-pecuniary harm. Probation officers experience great difficulty in determining specific financial harm and believe any attempt by officers to determine loss for theft of a means of identification, invasion of privacy, reputation damage or inconvenience would be problematic with disparity likely in application.

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 questions or need clarifications, please do not hesitate to contact us.

Respectfully,

2007 Probation Officers Advisory Group