PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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The Honorable Patti B. Saris, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

Re: Proposed Considerations for 2012/2013 Amendment Cycle

Dear Judge Saris:

The Probation Officers Advisory Group ("POAG") met in New Orleans Louisiana, on June 13, 2012, to discuss and formulate recommendations to the United States Sentencing Commission. POAG offers the following issues for consideration by the United States Sentencing Commission in the 2012/2013 amendment cycle.

1. Guidance for Determining "Tier" in Failure to Register Cases

The Probation Officer's Advisory Group discussed the difficulty in determining the tier classification of defendants convicted of failure to register as a sex offender as charged in 18 U.S.C. § 2250. Such convictions are covered by U.S.S.G. § 2A3.5 which specifies different base offense levels depending on whether the offender is a Tier I, Tier II, or Tier III offender. Although the terms for each tier are provided in 42 U.S.C. § 16911, these terms are confusing and present difficulties if the statute of conviction for the qualifying offenses arise in states outside of the respective district.

2. Determining the Length of Supervised Release Terms in Sex Offender Cases

POAG continued to discussed aligning the policy statement at U.S.S.G. § 5D1.2(b)(2) with 42 U.S.C. § 16915 [Duration of Registration Requirement]. Pursuant to the policy statement, if the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended. The statutory maximum term is life which results in the consistent recommendation of a life-time term of supervised release. This does little to help sentencing courts grapple with defense arguments that lesser terms are appropriate.

POAG also discussed the possibility of the Commission evaluating whether a life term of supervised release is appropriate in all of these cases. Discussion revealed that districts are recommending different terms of supervised release, including some that recommend five years in these cases, some that recommend a life term in these cases, and some that don't have a policy on the number of years recommended.

POAG suggests that recommendations for terms of supervised release track with duration of registration requirements of 42 U.S.C. § 16915 by creating a Tier I, II and III Guide in Chapter Five.

3. Guidance in applying U.S.S.G. § 2X3.1(b)(3)(B) - What does "harboring" mean?

POAG would like clarification of the meaning of "limited to harboring" under U.S.S.G. § 2X3.1(a)(3)(B), in non-terrorism cases.

Under U.S.S.G. § 2X3.1, accessory after the fact, the base offense level is determined by focusing on the underlying offense. U.S.S.G. § 2X3.1(a)(3)(B) provides an offense level cap if the defendant's conduct is "limited to harboring a fugitive." Is the defendant's conduct "limited to harboring" if he engages in activities which further the harboring conspiracy (i.e., helping the fugitive obtain false identification documents)? Or, if the defendant engaged in any criminal activity, even if the activity was only done in furtherance of the harboring, does his conduct go beyond "harboring"? PAOG is concerned that this specific offense characteristic is not being uniformly applied.

4. Clarify interplay between U.S.S.G. §2B1.1(b)(11) and U.S.S.G. §2B1.6

POAG discussed the specific offense characteristic at U.S.S.G. §2B1.1(b)(11), the enhancement for, among other things, the possession of device making equipment, and its interplay with U.S.S.G. §2B1.6, aggravated identity theft. If a defendant is convicted of a statute which is referenced to U.S.S.G. §2B1.1 and convicted of a violation of 18 U.S.C. § 1028A, Aggravated Identity Theft which is referenced to U.S.S.G. §2B1.6, there are differing opinions as to the applicability of the specific offense characteristic at USSG §2B1.1(b)(11).

Pursuant to U.S.S.G. §2B1.1(b)(11), if the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the

unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, a 2-level increase applies. However, U.S.S.G. §2B1.6, Application Note 2, states, in part, that if a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense.

At least two circuits[1] have determined that U.S.S.G. §2B1.6, Application Note 2, does not preclude an offense level increase for possession or use of device making equipment or production or counterfeit access device. Other districts take the view that U.S.S.G. §2B1.6, Application Note 2, prohibits the application of *any* enhancement[2] at U.S.S.G. §2B1.1(b)(11).

POAG requests clarification, as to whether the enhancement at U.S.S.G. §2B1.1(b)(11) can be applied based on conduct other than identification documents if the defendant is also convicted of 18 U.S.C. § 1028A. If it is intended that the enhancement can apply, one suggestion might be to separate U.S.S.G. §2B1.1(b)(11) into two parts so that the language encompassing prongs (A) and (B) would become independent of the language encompassing prong (C). Essentially, this would create a specific offense characteristic to address possession of device-making equipment and production of access devices and a specific offense characteristic to address means of identification. Another suggestion was to add a clarifying comment at U.S.S.G. §2B1.6.

5. Clarify the Application of U.S.S.G. § 2E1.1

U.S.S.G. § 2E1.1 is the RICO guideline. Any officer who has ever used it will agree that it presents some major application problems. We need clarification as to how to interpret Application Notes 1 and 4 in terms of what is counted as criminal history versus what is relevant conduct and thus counted as a separate count of conviction. We also need clarification as to the meaning of the term "last overt act" in Application Note 4. The meaning of these two application notes is being interpreted very differently among the districts that have had the need to apply this guideline. POAG believes clarification is needed.

Application Note 1 instructs that either the specified base offense level applies, or the offense level from the underlying racketeering activity applies, which ever results in the higher offense level. However, Application Note 4 states,

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[1]U.S. v. Sharapka, 526 F.3d 58 (1st Cir., 2008) and U.S. v. Perez, 432 Fed.Appx. 930, 2011 WL 2565201 (11th Cir. 2011).

[2]The reasoning is based on U.S.S.G. §1B1.1, Application Note 4, which states that within each specific offense characteristic subsection, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. This suggests that each specific offense characteristic is to be considered as a whole.

> "Certain conduct may be charged in the count of conviction as a part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a **conviction prior to the last overt act of the instant offense**, treat as a prior sentence under §4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be appropriate." [Emphasis added.]

a. Is it Criminal History, Part of the Offense, or Both?

Consider this hypothetical case. The defendant is convicted of a RICO offense and agrees that the underlying conduct is attempted murder. The defendant has been convicted of the attempted murder in state court and is currently serving his sentence. Most districts interpret the RICO guideline to mean that the state case is treated as criminal history and it gets criminal history points. The point of contention is whether the murder conviction is considered in determining the base offense level. Some districts say no and go with the default base offense pursuant to U.S.S.G. § 2E1.1(a)(1); others use the attempted murder as the base offense at pursuant to U.S.S.G. § 2E1.1(a)(2). Which is correct?

Consider this slight change to the hypothetical case. The same defendant was first arrested for the federal RICO offense, then was convicted of the attempted murder in state court. Many districts would interpret this to mean that the state case does not get criminal history points because it should be treated as part of the RICO guideline computation. However, U. S. Attorney's offices in various districts take the view that the state murder case should be considered for both offense level determination and get criminal history points. Which is correct?

b. When does the Defendant's involvement in the RICO Conspiracy Start and End?

Consider some additional facts of the hypothetical case. The defendant is convicted of a RICO offense and agrees that the underlying conduct of the organization is attempted murder and identity theft. The defendant as been convicted of the attempted murder and is currently serving his sentence. The "organization" at issue is a generations-old street gang that has been involved in violence and identity theft for as long as the gang has been in existence. The defendant joined the gang five years ago.

> For purposes of calculating his criminal history, do we use the defendant's first overt act as the date his participation started, or do we use the first overt act of anyone acting in furtherance of the organization even if it happened before the defendant's first overt act?
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> For the purpose of calculating his criminal history, do we use the defendant's last overt act (or the date, if it can be determined, that the defendant withdrew from the conspiracy) as the

date his participation ended, or do we hold him accountable for the acts of others as they continue to commit the same crimes after the defendant withdrew from the conspiracy?

While these may seem like straight forward issues that turn on the instructions at U.S.S.G. § 1B1.3(a)(1)(B), the U. S. Attorney's offices in various districts take the view (and apparently have some supporting case law[3]) that the defendant should be accountable for the continuing acts of other members of the conspiracy, no matter when the defendant started or ended his participation.

The determination of these issues has drastic effect on the calculation of the advisory guideline range. POAG asks for help with this guideline.

6. Clarification for Base Offense Level Determination in U.S.S.G. § 2S1.1

This guideline offers two choices for the determination of the base offense level. What it does not seem to do is specify which one to use. Usually, there is an instruction to use which ever produces the higher result. That instruction does not appear for this guideline. Assuming all information is available to make a determination under either base offense level calculation, which base offense level applies?

7. Continued Review of Child Pornography Offenses.

POAG supports the Commission's continued work on this topic as POAG continues to be concerned that it is possible for some defendants convicted of possession of child pornography to have total guideline offense levels higher that other defendants convicted of actual contact with minor victims.

8. Career Offender Determination

Career Offender and Diversionary Sentences that Score under U.S.S.G. §§ 4A1.1(c): POAG believes it would be useful to have application notes clarifying whether prior sentences scored as diversionary dispositions pursuant to U.S.S.G. §§ 4A1.1(c) qualify as "convictions" either for the purposes of setting the base offense level for firearms cases under § 2K2.1(a) or for determining whether a defendant is a career offender per § 4B1.2(c). POAG believes they should not qualify for Career Offender purposes and notes that such an application note would effectively overrule some circuit[4] law. However, POAG is concerned that an individual with two diversionary sentences, who

[3]Citations in Government sentencing papers on this issue include U.S. v. Marrone, 48 F.3d 735 (3rd Cir. 1995); U.S. v. Garecht, 183 F.3d 671 (7th Cir. 1999); US v. Riccobene, 709 F. 2d 214 (3rd Cri. 1983); US v. Robinson, 2009 WL 4249851 (2nd Cir. 2009); and U.S. v. Benabe, 2011 WL 3624961 (7th Cir. 2011). These cases do not appear to address whether or not the conduct underlying the prior sentences was considered for calculating the offense level.

[4]For example, U.S. v. Fraser, 388 F.3d 371 (1st Cir. 2004) which held that diversionary dispositions qualify as convictions under § 2K2.1(a) if they receive criminal history points.

may never have served any time in jail, could be classified as a career offender. It seems unlikely that Congress meant for individuals who have never served a day in prison to face the enhanced guideline ranges set forth in U.S.S.G. § 4B1.1.

Career Offender and § 4A1.1(c) Offenses: It would be useful to some districts to reduce over-classification of offenders as career offenders by making sure that the guidelines only capture people who have prior sentences of 60 days or more. Perhaps U.S.S.G. § 4B1.2(c) (2) could be amended as follows:

> (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a) or (b).

By eliminating sentences that receive criminal history points under § 4A1.1(c) from consideration as career offender predicates, the guidelines would essentially establish a floor of minimum jail time before the career offender enhancements attach. In this way, only individuals who have previously been sentenced to at least 60 days in prison on two occasions will qualify as career offenders. POAG believes this may be a better approach for career offender determination.

Closing

POAG appreciates the opportunity to express its concerns and the willingness of the Commission to work with POAG to address issues we believe are important. Should you have any questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Sincerely,

Probation Officers Advisory Group
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