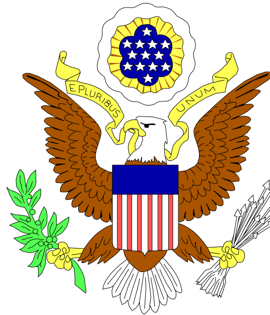
PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

Teresa M. Brantley, Chair
9th Circuit



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July 19, 2013

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

Dear Judge Saris,

The Probation Officers Advisory Group (POAG or the Group) met telephonically on July 15, 2013, to discuss and formulate recommendations to the United States Sentencing Commission based on the Commission's Notice of Proposed Priorities for the amendment cycle ending May 1, 2014. We are submitting comments relating to this request.

Tentative Priority No. 5: Guideline Definitions of "Crime of Violence," "Aggravated Felony," "Violent Felony," and "Drug Trafficking Offense."

POAG members encourage the Commission to continue to examine the possible consideration of an amendment to provide an alternative to the "categorical approach" for determining the applicability of guideline enhancements. The multiple definitions and interpretations of the various terms lead to difficult application of various guideline enhancements and statutory penalties.

Currently, there are at least three differing definitions of the term "crime of violence" when applying sentencing guidelines. First, there is a statutory definition at 18 U.S.C. §16. Second, there is a definition relating to immigration offenses in U.S.S.G. §2L1.2. Third, there is a definition relating to firearms offenses and criminal history calculations in U.S.S.G. §4B1.2. There is also a similarly termed "violent felony" which has a different definition under 18 U.S.C. § 924(e)(2). Adding an additional level of confusion, a "crime of violence" is included in the definition of an

"aggravated felony" under the Immigration Code at 8 U.S.C. § 1101(a)(43).

Similarly, there are different definitions of "drug trafficking offense" at U.S.S.G. §2L1.2, "controlled substance offense" at U.S.S.G. §4B1.2, and "serious drug offense" at 18 U.S.C. § 924(e)(2).

The differences in these definitions are interpreted in various Circuit Courts across a wide spectrum of narrow to broad applications, using either a Categorical or Modified Categorical analysis which causes significant discrepancies in the application of these guidelines and subsequent sentencing decisions by the Courts. Therefore, POAG members support a continued analysis of these varying definitions with the goal of simplifying this process.

Tentative Priority No. 9: Firearms Offenses

POAG members encourage the Commission to continue to examine the possible consideration of an amendment to address application inconsistencies on this issue and notes the following concerns and observations regarding the guidelines applicable to firearm offenses:

1. There appears to be a circuit split regarding the definition of "any"in the Cross Reference at U.S.S.G. §2K2.1(c)(1), and regarding whether the Cross Reference even applies. Pursuant to U.S.S.G. §2K2.1(c)(1), if the defendant "used or possessed **any** firearm or ammunition in connection with the commission or attempted commission of **another offense**, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense," then a different guideline is to be applied. Some circuits define "any" firearm, as only those named in the indictment while other circuits do not have such a restriction. Moreover, some circuits require that the criminal conduct used to warrant the Cross Reference meet the definition of relevant conduct at U.S.S.G. §1B1.3 while other circuits define "another offense" as all illegal conduct committed or intended to be committed by the defendant.

2. The requirements for application of a four-level enhancement pursuant to U.S.S.G. §2K2.1(b)(5), if the defendant engaged in the trafficking of firearms, are so narrow that it is difficult to apply. Application Note 13(A)(ii) narrows the application to the defendant who, " knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual (I) whose possession or receipt of the firearm would be unlawful; or (II) who intended to use or dispose of the firearm unlawfully." Based on this, the enhancement cannot be applied unless it can be shown that the defendant knew the weapons were going to a prohibited person or were going to be used unlawfully. In an unpublished 5th Circuit opinion, US v. Green, 360 Fed. Appx. 521, 2010 WL 28501, the Court found that absent any other evidence, smuggling weapons to Mexico is not enough to show the defendant knew the weapons were to be used unlawfully.

   In the following cases, the enhancement was not applied after considering the current Application Note.

In Houston, Texas, 23 straw purchasers obtained 336 assault-type firearms. 88 of the firearms were later seized by authorities in Mexico, including one recovered from the "Acapulco Police Massacre." Many of the straw purchasers (some of whom recruited each other) were instructed to limit their purchases to 20 assault weapons each. Due to the narrow requirements of Application Note 13, the four-level enhancement was not applied to the straw purchasers, despite the government's argument that it was egregious trafficking conduct. [The adjustment was applied to those in Mexico, selling directly to the cartel.]

In Los Angeles, California, a defendant sold three "pen guns" to a confidential informant (CI). ["Pen guns" are guns concealed, as pens, and meet the definition of firearms, pursuant to 26 U.S.C. § 5845(a).] The four-level enhancement was not applied because the defendant only knew the CI's "people" wanted the weapons. This puts investigators into the position of having to coach undercover agents or confidential informants as to what information to obtain to warrant the enhancement.

POAG suggests that one way to address this is to define the phrase "dispose of the firearm unlawfully" to include a presumption of unlawfulness in certain circumstances, i.e., smuggled weapons (to Mexico), weapons that have no lawful purpose ("pen guns") and particularly dangerous weapons (armor piercing ammunition or firearms). In the alternative, POAG suggests broadening Application Note 13, but providing a downward departure, if the exchange of firearms was for the purpose of obtaining things like automobiles, household items or personal items. To POAG, this suggestion would be an approach a similar to U.S.S.G. §2K2.1(b)(2), which provides a decrease in offense level if the defendant possessed ammunition and firearms solely for lawful sporting purposes or collection.

3. POAG suggests the Commission consider adding commentary to U.S.S.G. §2K2.1, Application Note 14, similar to that provided at U.S.S.G. §2K2.4, Application Note 4. In formulating the suggestion, the following scenario was considered: A defendant is convicted of a drug offense, a violation of 18 U.S.C. §924(c), and a violation of 18 U.S.C. §922(g) offense. The drug offense and the § 922(g) offense group, and U.S.S.G. § 2K2.1 is used to compute the Total Offense Level. The §924(c) offense is addressed separately. Due to the instruction at U.S.S.G. §2K2.4, Application Note 4, the four-level enhancement is not applied at U.S.S.G. §2K2.1(b)(6). Since U.S.S.G. §2K2.1 is used to compute the Total Offense Level for the gun and § 922(g) offense, and does not contain the Application Note included at U.S.S.G. §2K2.4, it is easy to miss. Including an Application Note which addresses the issue at both guidelines eases application and reduces the chance of erroneous application of the enhancement.

In addition to the priorities listed in the Commission's Notice of Proposed Priorities for the amendment cycle ending May 1, 2014, POAG asks the Commission to consider the following.

Guidance for Determining "Tier" in Failure to Register Cases

Feedback from probation officers nation wide is that we continue to have 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.

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 continue to request 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 from one district to another.

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, "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?

Now, 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?

Please 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*?
>
> 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[1]) 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 significant impact on the calculation of the advisory guideline range. POAG asks for help with this guideline.

In closing, POAG appreciates the opportunity to express its concerns and the willingness of the Commission to consider our input. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

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[1]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 Cir. 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.

Probation Officers Advisory Group
July 2013