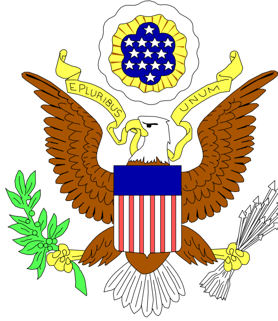
PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Teresa M. Brantley, Chair
9th Circuit



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Juliana Moore, 5th Circuit
Anthony John Merolla, 6th Circuit
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February 27, 2014

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 in Washington, D.C., on February 4, 2014, to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment dated January 17, 2014.

1. PROPOSED AMENDMENT: USSG §1B1.10

POAG supports Option 2 which provides that in cases involving a statutorily required minimum sentence wherein the court has the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance, for purposes of USSG §1B1.10 the amended guideline range shall be determined *after* operation of USSG §5G1.1 or USSG §5G1.2, as appropriate.

POAG believes this approach insures consistent application for defendants who are similarly situated. POAG believes Option 2 addresses the Sentencing Commission's intent for application of USSG §5G1.1 and USSG §5G1.2 as they operate in conjunction with statutory penalty provisions.

The statutory mandatory minimum is a factor that impacts the advisory guideline at original sentencing; if Option 1 is adopted the statutory mandatory minimum is ignored at resentencing. In essence, this puts defendants at re-sentencing in a better position than defendants being sentenced for the first time. POAG perceives this as unfair and anticipates arguments to that effect to be raised by defendants at their first sentencings which, in turn, will lead to application problems and inconsistency at such proceedings.

2. PROPOSED AMENDMENT: VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT

This proposed amendment addresses the Violence Against Women Reauthorization Act of 2013, which provided new and expanded criminal offenses and increased penalties for certain crimes involving assault, sexual abuse, stalking, domestic violence, harassment, and human trafficking. The majority of the cases prosecuted under this Act occurs in Indian Country and fall within the General Crimes Act, 18 U.S.C. § 1152 and Major Crimes Act 18 U.S.C. § 1153. Two of the POAG members, those representing the 8th and 10th Circuits, are from Districts that prosecute a high percentage of crimes within Indian Country and were able to provide application information about this issue.

Part A: 18 U.S.C. § 113 (Assaults Within Maritime and Territorial Jurisdiction)

1. The Commission seeks comment on how, if at all, the guidelines under §2A2.2, §2A2.3 and §2A6.2 should be amended to address cases involving strangling, suffocating, or attempting to strangle or suffocate.

POAG endorses Option 1 of Part A of the proposed amendments to §2A2.3 and §2A6.2 and Option 2 to §2A2.2 (with some modification) to most effectively serve the purposes of incorporating the Act into the guidelines and to hold individuals accountable for their total offense behavior.

POAG suggests that a new specific offense characteristic (SOC) of 4 levels be added to §2A2.2 to account for strangling, suffocating, or attempting to strangle or suffocate. POAG discussed how strangling and suffocating are means to inflict injury to another comparable to the use of a dangerous weapon, which is addressed at USSG §2A2.2(b)(2)(B). For instance, assault or domestic abuse can involve the use of a shod foot to inflict bodily injury. A shod foot is defined as an instrument used as a weapon with the intent to commit bodily injury. Accordingly, an argument could be made that the use of one's hands or another object to strangle or suffocate a victim is also an instrument used as a weapon with the intent to commit bodily injury. Accepting this analogy, a 4-level enhancement would be consistent and similar to the 4-level increase for the use of a dangerous weapon at §2A2.2(b)(2)(B).

POAG suggests this new SOC be positioned after §2A2.2(b)(2), the weapon enhancement. The new SOC and the SOC at (b)(2) both address aggravating factors that concern the manner or means of how the assault was committed. This modification would reposition the bodily injury SOC to §2A2.2(b)(4). POAG suggests that the new SOC should interact with the SOCs for the use of a dangerous weapon and bodily injury on a cumulative basis. This way, an individual who committed domestic violence using his or her shod foot on the victim and by attempting to strangle the victim would be held accountable under the new SOC, plus §2A2.2(b)(2) the use of shod feet, plus §2A2.2(b)(4) if either caused a degree of injury. POAG recommends that the cumulative adjustment language be continue to be part of the bodily injury SOC (which would be §2A2.2(b)(4) as proposed by POAG) capping the cumulative adjustments from subdivisions (2), (3), and (4) at 12 levels. POAG suggested an increase of two levels for the cumulative adjustments (from 10 levels to 12 levels) to capture the additional conduct, believing that failure to do so would effectively result in the amendment having no impact, particularly in those instances involving the use of a dangerous weapon and resulting in serious or permanent bodily injury.

POAG also discussed at length if the proposed enhancement should be limited to those cases described by the statute (i.e., cases in which the victim was a spouse, intimate partner, or dating partner) or whether it should apply to any case directed to §2A2.2. POAG members from the 8th and 10th Circuits noted that Native Americans under federal jurisdiction tend to receive higher terms of imprisonment than defendants receive in state courts for similar offenses of assault. As a result, POAG suggests the proposed enhancement in §2A2.2 be limited to the victims described by the statute - which would be consistent with Option 1 for §2A2.3 and the proposed amendments to §2A6.2. Applying the proposed enhancement in all assault cases may only increase perceived disparity. POAG thought this limit would be acceptable because it is rare for strangulation or suffocation to occur in cases when domestic violence was *not* involved. And if strangulation or suffocation does occur in any of the other offenses (in other words, not a domestic violence situation), the sentencing Court still has the ability to explore a departure under §5K2.8 Extreme Conduct (Policy Statement) which encourages an upward departure for "unusually heinous, cruel, brutal, or degrading" conduct. Finally, POAG acknowledged that while there may be some initial challenges to interpreting the terms spouse, intimate partner, or dating partner, POAG believes 18 U.S.C. § 2266 clearly defines these terms.

The POAG also endorses the way this proposed amendment references 18 U.S.C. § 113 in Appendix A (Statutory Index).

2. The Commission seeks comment on the imposition of supervised release in cases involving domestic violence and if there should be additional guidance on the imposition of supervised release, or length of term.

POAG suggests that in all cases of domestic violence a period of supervised release be imposed, regardless of the length of imprisonment. POAG's collective experience is that offenders who commit domestic violence tend to have a long history of such acts, much of which is unreported or not prosecuted, and are at higher risk of re-offending with similar offenses in the future. A period of supervised release provides an opportunity to monitor the offender and limit the short-term risk to the public. Additionally, a mandatory period of supervision provides time to assist the offender in participating in treatment and programs that can reduce long-term risks of re-offending.

3. The Commission invites comment on offenses involving an assault with intent to commit a sex offense and if the proposed amendment to Appendix A (Statutory Index) referencing one or more sex offenses is sufficient or should there be reference to one or more assault guidelines.

POAG endorses the proposed amendment to Appendix A noting that individuals who commit assaults with the intent to commit a sex offense present high risks of harming others in the future. This proposal provides for the application of the highest available Total Offense Level under either the assault guideline or the sex offense guidelines.

3. PROPOSED AMENDMENT: DRUGS

This proposed amendment has three parts. With regard to Part B, POAG sees no application issues with amending the Drug Quantity Table in USSG §2D1.1 and USSG §2D1.11 as proposed. POAG notes that the proposed change will bring sentences more in line with what is already being done, as outlined in the USSC Webcast: Analysis of Drug Trafficking Offenders and Guidelines. POAG did not determine a need to increase existing specific offense characteristics, or to promulgate new ones, to offset the proposed change.

One of the requests for comment in Part C asks, what is the nature and seriousness of the environmental and other harms posed by the cultivation of marijuana on public lands? This topic did not garner a great deal of discussion by POAG as most members had little or no experience with such cases. The Chair of POAG, who is from the Central District of California, contacted representatives of the Northern, Eastern, and Southern Districts of California to pose the question to them. The feedback was that cases are not frequent, that information regarding restitution is becoming more readily available in such cases, that these cases usually involve one or more illegal aliens whose job it is to tend the crop, and that the imposition of huge restitution obligations on such individuals seems illogical.

Beyond that, if there are facets of these offenses that are not being captured by the application of the guidelines, the feedback is that either there are such facets but Officers are not aware of them because the information is not being provided in discovery materials, or there are no such facets. Finally, POAG points out that the behavior involving environmental damage might be adequately addressed through the existing upward departure provisions at USSG §5K2.5: Property Damage of Loss (Policy Statement) which encourages an upward departure "If the offense caused property damage or loss not taken into account within the guidelines."

4. PROPOSED AMENDMENT: FELON IN POSSESSION

In deliberating the proposed amendment to USSG §2K2.1, POAG was unable to reach consensus. Circuit representatives engaged in a lengthy discussion of the application rules associated with subsections (b)(6)(B) and (c)(1) and the developments in case law creating conflicts in the interpretation of expanded relevant conduct. Part of our evaluation of this proposal involved debating the merits of real offense versus charged offense sentencing approaches, particularly with regard to the cross-reference at subsection USSG §2K2.1(c)(1).

The majority of circuit representatives favored Option 2; which maintains the current language of subsections (b)(6)(B) and (c)(1), but provides clarifying commentary addressing the issues highlighted by United States v. Horton, 693 F.3d 463, 478-79 (4th Cir. 2012), et al. The majority believed that the various circuits placing limits on the cross-reference misinterpret the application of expanded relevant conduct under USSG §1B1.3(a)(2) which considers conduct that would be grouped under USSG §3D1.2(d) and was either part of the same course of conduct or common scheme or plan. By way of example, in the case of an offense involving a prohibited person, the grouping analysis should be grounded in a defendant's *status* (that of being a felon in possession) and should, therefore, consider all acts that were part of the same course of conduct or common scheme or plan while the defendant maintained the *status* as a prohibited person. This expanded relevant conduct application would then be guided by USSG §1B1.3, comment. (n.9), which defines the terms "same course of conduct" and "common scheme or plan." Once a firearm is deemed groupable under this §1B1.3(a)(2) analysis, Courts may then apply the §2K2.1 guideline on the basis of all applicable firearms.

A minority of circuit representatives expressed concern about potential due process issues applying the cross reference for firearms grouped under §1B1.3(a)(2). The minority asserted that in practice, an expansive application of the subsection (c)(1) could allow prosecutors to obtain a conviction for one firearm, but seek significant sentence enhancement based on conduct associated with a different firearm - under the more favorable preponderance of evidence standard. It was further noted that many district

courts are uncomfortable cross-referencing for conduct that falls outside count of conviction.

POAG reached consensus with regard to concerns of how Option 1 could impact the §2K2.1 guideline, potentially creating a new and different relevant conduct standard applicable to USSG §§2K2.1(b)(6)(B) and (c)(1) that would be operationally inconsistent with the remainder of the guideline. Specifically, POAG worried that carving out a different way to apply relevant conduct to this guideline would lead to misunderstanding the concept of relevant conduct generally. Ultimately, POAG opined that Option 1 could lead to the question - If the relevant conduct analysis is not appropriate for subsections (b)(6)(B) and (c)(1), why is it appropriate for the rest of the guideline, or, for that matter, for any other point within the guidelines?

With specific regard to the cross-reference, POAG would rather see subsection (c)(1) (the cross reference) stricken from §2K2.1 than to have an exception to the relevant conduct concept carved out for this guideline alone as proposed in Option 1.

5. PROPOSED AMENDMENT: USSG §2L1.1

The proposed amendment responds to concerns that have been raised about aliens transported through dangerous terrain. POAG agreed there are aggravating factors that exist in such cases and that the existing guideline under USSG §2L1.1 may not adequately account for such harms. Although this proposal seems to be driven by offense characteristics from Southern border cases, circuit representatives from the Northern border-states indicated that similar dangers exist when smuggling activities are committed during severe winter weather or when smugglers attempt to traverse frozen bodies of water.

In discussing Issue for Comment No. 1(A), POAG agreed the application of the enhancement at USSG §2L1.1(b)(6) can account for these factors with an expanded list of examples at Application Note 5 as proposed. Some circuit representatives expressed apprehension about Courts struggling to define "dangerous terrain" and "adequate" food, water, clothing or protection from the elements; however, they acknowledged that this presents no more of a challenge than similar phrasing does in other parts of the guidelines.

In discussing Issue for Comment No. 1(B), POAG that the behavior involving damage to private lands is adequately addressed through the existing upward departure provisions at USSG §5K2.5: <u>Property Damage of Loss</u> (Policy Statement) which appears to cover such concerns. Specifically, this section encourages an upward departure "If the offense caused property damage or loss not taken into account within the guidelines."

In discussing Issue for Comment No. 1(C) regarding the rescue of aliens by special border patrol search and rescue teams, POAG agrees that this behavior is adequately addressed through the existing upward departure provisions at USSG §5K2.7: Disruption of Governmental Function (Policy Statement), which appears to cover such concerns. Specifically, this section encourages an upward departure, "If the defendant's conduct resulted in a significant disruption of governmental function."

6. PROPOSED AMENDMENT: USSG §5D1.2

This proposed amendment presents two options to address a circuit split in how the guideline term of supervised release is determined. POAG sees no application issues with either option and acknowledges that from POAG's perspective either one of the options will provide consistency among the courts. Nevertheless, POAG notes the Option 1 will likely require additional steps by the sentencing court in having to structure the sentence to include an upward departure to impose a term of supervised release of greater than 5 years.

In discussing the portion of Issue for Comment No. 1 which asks what term of supervised release the guidelines should provide for offenses under 18 U.S.C. § 2250, POAG believes that the guidelines term of supervised release for these offenses should be precisely five years with the reference to Chapter 109B offenses omitted from the definition of a "sex offense" under Application Note 1 of the Commentary. This would allow the courts to impose a term of supervised release up to life via a departure[1] should a case warrant such a term.

In discussing the portion of Issue for Comment No. 1 which asks whether there are distinctions among offenses contained in 18 U.S.C. § 2250 (particularly in relation to the previous sex offense being against a minor) that should be accounted for in the supervised release guidelines, POAG does not take a position regarding this issue.

1 The Commission might consider adding commentary addressing the considerations for imposing a term of supervised release in excess of five years. Such considerations might include the nature and circumstances of the predicate sex offense, prior sex offenses against minor victims, the commission of an offense while on failure-to-report status, a history of violence, or a history of failing to report.

Although not presented as an issue for comment, POAG suggests that the Commission consider specifying that the language at USSG §5D1.2(b)(2), which recommends the statutory maximum term of supervised release for sex offenses, does not apply to Failure to Register as a Sex Offender cases. Since the offense of Failing to Register as a Sex Offender is a status offense, POAG believes that this statement is confusing to courts and is a source of inconsistency with what is being recommended by officers and what is being imposed by the courts.

7. PROPOSED AMENDMENT: 5G1.3

Part A of this proposed amendment allows credit against a sentence the federal sentence for and undischarged term of imprisonment, even if the conduct underlying that undischarged term did not increase the offense level. POAG supports this proposed amendment because it eases application and reduces confusion.

POAG considered the Issue for Comment and agrees that the relevant conduct requirement in USSG §5G1.3(b) should be kept but not expanded to include USSG §1B1.3(a)(4). As the Issue for Comment points out, expanding the relevant conduct consideration here would unnecessarily complicate application in guidelines such as USSG §2L2.1 (expansion could require the sentencing court to give sentencing credit for the offense considered to be the aggravated felony). In the experience of the members of POAG, the application issue with USSG §5G1.3(b) was not whether a prior offense was relevant conduct, but whether it was the basis for an increase in the offense level. Therefore, only the language about whether the offense level increased should be addressed.

Part B of this proposed amendment addresses whether the sentence should be adjusted for an *anticipated* state term of imprisonment. POAG is deeply concerned about the application issues associated with this proposed amendment and cannot support it. One concern is that the federal sentence might be adjusted but the state sentence is not imposed thereby affording an individual false credit. Another concern is how to determine what sentence might be imposed for the state conviction. POAG worries that such an application would require Probation Officers to have expertise in all state criminal sentencing laws, would require additional investigation and liaison with various agencies. Therefore, POAG strongly disagrees with this proposal.

Part C of this proposed amendment addresses the sentencing of “Deportable Aliens” with unrelated terms of imprisonment. POAG is concerned about the application issues associated with this proposed amendment and does not support it. POAG has historically found that making the determination of whether or an individual is truly a “deportable alien” or is “likely to be deported” is impossible. The reasons an individual might not be deported include the discretion and administrative decisions by prosecutors as to which

individuals are pursued. The decisions necessary to make a "deportation" determination are not made in a time frame that allows consideration of such status at the time of sentencing. As a result, for ease of application, POAG does not support the proposed amendment to USSG §5G1.3 in this regard. POAG believes that addressing this issue as a departure consideration in USSG §2L1.2 might be a better way to accomplish the intent of this proposal. Alternatively, the language could be changed to consider only a defendant's status as that of an illegal alien and remove references to "deportable" and "likely to be deported."

POAG is also concerned that Part C gives the appearance that offenders classified as illegal aliens receive consideration not afforded to individuals who are not classified as illegal aliens. In any other instance, the court would sentence an individual independently on a federal charge without consideration of an unrelated state charge. While POAG acknowledges the potential cost savings, POAG believes this proposal will lead to a potentially unintended consequence, specifically, arguments for sentencing disparity for defendants who are not illegal aliens. Should the Commission go forward with the concept of this proposal, POAG suggests that instead of adding a specific offense characteristic, a comment be added to USSG §2L1.2 encouraging a downward departure to account for the benefits this proposal seeks to address. POAG believes this would provide for ease and consistency of application, as well as discretion of the Court in application.

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

Respectfully,

Probation Officers Advisory Group
February 2014