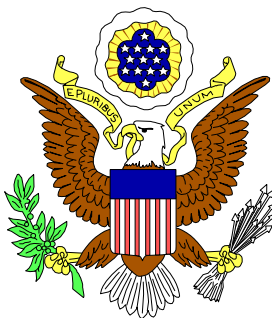


PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission



Sean Buckley, 1st Circuit
John P. Bendzunas, 2nd Circuit
Beth Neugass, 3rd Circuit
Kristi O. Benfield, 4th Circuit
Juliana Moore, 5th Circuit
Anthony John Merolla, 6th Circuit
Open Seat, 7th Circuit
Rick Holloway, 8th Circuit
Open Seat, 9th Circuit
Richard Bohlken, 10th Circuit
Amanda M. LaMotte, 11th Circuit
Open Seat, DC Circuit
Elizabeth K. Thomas, FPPOA Ex-Officio
LeAndrea Drum-Solorzano, OPPS Ex-Officio

August 4, 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 telephonically on July 28, 2014, 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, 2015. Our comments follow.

Priority No. 1: Expanding the "Safety Valve"

POAG welcomes the Commission's consideration of expanding the "safety valve." We would suggest the Commission consider the expansion to include defendants in Criminal History Category II. By way of support, POAG offers the following: If a defendant is convicted of Driving While License Suspended and is sentenced to a term of probation exceeding one year, that defendant could end up with three criminal history points following application of USSG §4A1.1(d). As such, the defendant would be ineligible for the "safety valve." In comparison, another defendant is also convicted of Driving While License Suspended, but is sentenced to 45 days confinement. With one criminal history point, the defendant is eligible for the "safety valve" provided the remaining prongs of USSG §5C1.2 are met. Perhaps, "safety valve" eligibility could be expanded to include defendants with three criminal history points, if the points all stem from a single conviction.

Priority No. 2: Economic Crimes

POAG supports the Commission's work on economic crimes and requests the Commission consider the applicability of USSG §2B1.1(b)(11) when a defendant is convicted of an offense referenced to USSG §2B1.1 and also convicted of a violation of 18 U.S.C. § 1028A (Aggravated Identity Theft).

Pursuant to USSG §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 five or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, a two level increase is applicable. USSG §2B1.6, comment. (n. 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 circuits¹ have determined that USSG §2B1.6, comment. (n. 2) does not preclude an offense level increase, pursuant to USSG §2B1.1(b)(11), for possession or use of device-making equipment or production of counterfeit access device. Other districts, however, have determined that application of **any** enhancement² at USSG §2B1.1(b)(11) is prohibited by USSG §2B1.6, comment. (n. 2).

POAG requests clarification as to whether the enhancement at USSG §2B1.1(b)(11) can be applied based on conduct other than identification documents if the defendant is also convicted of a violation of 18 U.S.C. § 1028A. If the intention is to apply the enhancement, one suggestion might be to separate USSG §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 is to add a clarifying comment to USSG §2B1.6.

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 USSG §1B1.1, comment. (n. 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.

POAG would also request the Commission consider moving the definition of a “victim,” as it relates to Undelivered United States Mail, to the definition of a “victim” at USSG §2B1.1, comment. (n.1). The “amended” application note might read as follows: “Victim” means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense; or (C) any person who was the intended recipient, or addressee, of undelivered United States mail.

Priority No. 3: Statutory & Guideline Definitions

POAG encourages the Commission to continue to examine the possible consideration of an amendment to provide an alternative to the “categorical approach.” Multiple definitions and interpretations of the various terms lead to difficulty in application of various guideline enhancements and statutory penalties.

At present, there are at least three differing definitions of the term “crime of violence.” First, there is a statutory definition at 18 U.S.C. § 16. Second, there is a guideline definition relating to immigration offenses at USSG §2L1.2. Third, there is a guideline definition relating to firearms offenses and criminal history calculation at USSG §4B1.2. Adding an additional level of confusion, a “crime of violence” is included in the definition of an “aggravated felony,” pursuant to 8 U.S.C. § 1101(a)(43). There is a similarly termed “violent felony,” but with a different definition at 18 U.S.C. § 924(e)(2). Moreover, there are definitions for “drug trafficking offense” at USSG §2L1.2, “controlled substance offense” at USSG §4B1.2 and “serious drug offense” at 18 U.S.C. § 924(e)(2).

The aforementioned definitions are interpreted differently in various Circuit Courts using either a categorical or modified categorical approach, and this results in significant discrepancies in guideline application and subsequent sentencing decisions by the Courts. As such, POAG supports a continued study with the goal of simplifying the process.

Priority No. 5: Mitigating Role

POAG believes the “super” mitigating role reduction, pursuant to USSG §2D1.1(b)(15)(A) and (B) could be simplified for ease of application. Specifically, an application note clarifying USSG §2D1.1(b)(15)(A) and the re-wording of USSG §2D1.1(b)(15)(B).

Presently, USSG §2D1.1(b)(15) provides for a two level decrease “if the defendant receives the 4-level (“minimal participant”) reduction in USSG §3B1.2(a) and the offense involved all of the following factors...” One factor is (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense. There are no application notes regarding whether or not the “intimate or familial relationship” has to be with another participant. POAG questions whether or not this prong is met if a drug courier is motivated to commit the crime by an “intimate or familial relationship” with non-participants, such as a spouse or children. POAG has received feedback that defendants are requesting reductions because they were motivated to commit the offense to earn money to support their family members who were not part of the crime.

Another factor is (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances. A plain reading of the sentence suggests the defendant ***must not have received*** any monetary compensation for his/her illegal conduct. The guideline, as constructed, allows it to be applied to a drug courier who had not received agreed upon monetary compensation at the time of arrest. In the Supplement to the 2010 Guideline Manual, Reasons for Amendment 748, USSG §2D1.1(b)(15)(B) reads ***was to receive no*** monetary compensation. POAG views ***received no*** and ***was to receive no*** as very different. POAG recommends the wording of the guideline be changed to reflect the defendant ***was to receive no*** monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances. In lieu of this suggestion, an application note clarifying this “super” mitigating role reduction may be appropriate.

Priority No. 6: Immigration Offenses

POAG believes the simplification of USSG §2L1.2 remains an important concern and encourages the Commission to continue examining the guideline. Across the United States, Probation Officers are struggling with the application of USSG §2L1.2(b)(1)(A)(ii). Given Circuit Court opinions, Probation Officers must conduct cumbersome, detailed, difficult legal analysis to determine if a predicate conviction qualifies as a “crime of violence.” Many circuits are challenged to decide whether to apply a purely “categorical approach” or the “modified categorical approach” when making a determination. The definition of “crime of violence” at USSG §2L1.2, comment. (n. 1(B)(iii)) is interpreted more narrowly than the definition for an “aggravated felony” or “crime of violence,” pursuant to 18 U.S.C. § 16; “crime of violence,” pursuant to USSG §4B1.2(a)(1) and (2); and “violent felony,” pursuant to 18 U.S.C. § 924(e)(2).

An examination of the enumerated offenses at USSG §2L1.2, comment. (n. 1(B)(iii)) has also become quite cumbersome. Case law in various circuits has dictated that state law must be compared to a generic definition for an enumerated offense to qualify as a “crime of violence” under USSG §2L1.2.

POAG members also ask the Commission to contemplate an amendment to either add a new specific offense characteristic or restore³ an encouraged departure to USSG §2L1.2 that takes into account multiple illegal re-entries.

Priority No. 10: Child Pornography Offense

POAG supports the Commission’s continued work with Congress and other interested parties on child pornography offenses, including the incidences of, and reasons for, departures and variances from the advisory guideline sentencing range, as well as an analysis of recidivism by child pornography offenders.

³ Earlier versions of the *Guidelines Manual* contained an application note in USSG §2L1.2 which read “In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.1 (Adequacy of Criminal History Category).”

POAG discussed the cumulative effect of the specific offense characteristics associated with the child pornography guidelines, specifically USSG §2G2.2, and the disproportionately high sentencing ranges resulting from these enhancements. POAG is concerned that a defendant convicted of Possession of Child Pornography can have a Total Offense Level higher than a defendant convicted of actual contact with a minor victim. POAG proposes that for possession only cases there be a cap set, similar to USSG §2K2.1 offenses, in order to achieve a reasonable sentence. The Commission might consider either including language at USSG §2G2.2 that addresses a pattern of activity (two or more incidents of possession) or add a new specific offense characteristic.

Priority No. 12: Cross References and Guideline Simplification

POAG applauds a multi-year effort to simplify the operation of the guidelines, including a review of cross references. Application of cross references have proven problematic to many and remains worthy of the Commission's review. Cross reference provisions are generally thought to be confusing and appear to result in numerous objections by counsel, especially if application of a cross reference results in "jumping" from guideline to guideline. The following are examples of areas of difficulty.

- USSG §2X3.1 (Accessory After the Fact) and USSG §2X4.1 (Misprision of a Felony) are especially problematic in the determination of relevant conduct provisions and Chapter Three adjustments. USSG §2J1.2(c) directs the user to apply USSG §2X3.1 (Accessory After the Fact), if the offense involved obstructing the investigation or prosecution of a criminal offense. However, once at USSG §2X3.1, the user must determine the appropriate Chapter Two guideline and the manner in which Chapter Three adjustments are to be applied. Should they be applied based on the Accessory After the Fact guideline which suggests a defendant not receive a minor role adjustment? Or, are they to be applied based on the underlying offense for which the defendant was originally charged with obstructing?
- A violation of 18 U.S.C. § 1001 is referenced to USSG §2B1.1. USSG §2B1.1, comment. (n. 16) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Probation Officers often have difficulty determining the appropriate Chapter Two guideline for the count of conviction.
- USSG §2S1.1, comment. (n. 6) instructs that counts be grouped under USSG §3D1.2(c) and the guideline application begins with a Base Offense Level determined by either the offense level for the underlying offense or 8 plus the number of offense levels from the table in USSG §2B1.1. This has created confusion for some.

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
August 2014