PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

July 17, 2015

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) met in Washington, D.C., on July 9 and 10, 2015, to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. POAG comments on the selected Proposed Priorities and proposes additional issues for consideration.

Proposed Priority No. 1

Expansion of the Safety Valve

POAG welcomes the Commission's consideration of expanding the "safety valve." We suggest the Commission consider the expansion to include defendants in Criminal History Category II with one exception. POAG believes that defendants with prior convictions for crimes of violence and/or serious drug trafficking offenses be excluded from safety valve consideration under Criminal History Category II. Defendants with such convictions in Criminal History Category I would continue to receive safety valve relief.

"Stacking" of Penalities Under 18 U.S.C. § 924(c)

POAG supports the Commission's work with Congress and other interested parties on elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation. The determination to charge one or multiple 18 U.S.C. § 924(c) counts, not only varies greatly across the country but also within in a single district. This practice leads to large sentencing disparities. As each additional 18 U.S.C. § 924(c) carries an additional 25 year mandatory minimum consecutive to any other sentence, eliminating the mandatory stacking will encourage less disparity and consistency in sentencing practice.

Proposed Priority No. 2

Mitigating Role

POAG supports the November 2015 amendment to the mitigating role adjustment and believes the modifications are steps in the right direction. We hope the additions to the commentary result in consistent guideline application nationally. As the guideline system is structured, mitigating role applications can significantly impact offense level computations. In drug cases, for instance, when considering the mitigating role cap in USSG §2D1.1, there is a potential swing of eight offense levels for defendants who are categorically denied a mitigating role adjustment.[1] In methamphetamine importation cases, there could even be a ten-level swing when defendants receive a two-level upward adjustment pursuant to USSG §2D1.1(b)(5) if mitigating role is not granted. The enumerated factors added to Application Note 3(A) at USSG § 3B1.2 should help with the "facts-based" determination of role. However, the question remains whether this amendment will address the disparity across the country in terms of how the mitigating role adjustment is applied. To help address this issue, POAG suggests the following modification to USSG §3B1.2 during the next guideline amendment cycle.

POAG recommends increased clarification on the applicability of mitigating role adjustments for single-defendant courier drug offenses. The commentary now focuses application on a defendant's relative culpability with other criminal participants in the offense, rather than a theoretical drug trafficking organization, or to other drug couriers within the district. An unintended consequence of this amendment could arguably foreclose relief in single-defendant courier cases. In these cases, courts often have limited information about other participants in the offense, making a proper role analysis difficult. While the new commentary notes at USSG §3B1.2 provide a general example of defendants who should be considered for the adjustment, POAG believes this falls short of addressing defendants in drug trafficking cases. Guidance on this issue would be helpful to border districts whose drug trafficking caseloads represent a

1 Consider, for example, USSG §2D1.1(a)(5), in which the Base Offense Level is reduced from 38 to 34 (four levels) and a defendant receives a minimal role reduction (four levels), resulting in an aggregate eight-level reduction.

significant number compared to other districts.[2] The Commission could also address the issue of role in single-defendant drug courier cases with a scenario which sets forth a position in these cases.

POAG also recommends continued national/regional training on the applicability of mitigating role in all cases, including drug trafficking offenses. Informed practitioners applying the guidelines need to know Commission's intent on application to forward the equal administration of justice. This becomes even more relevant today in a post-Booker world in which the guidelines are advisory and one of several factors to be considered at sentencing.

Simplicity of Guidelines – Alternative Sentencing Options

POAG supports the Commission's work on examining and encouraging the use of alternatives to incarceration for defendants positioned in the lower ranges of the Sentencing Table. Those offenders who generally fall in Zones A through C of the Sentencing Table typically present lower risks to reoffend based on their offense of conviction and/or their criminal history. USSG §5C1.1(c) and (d) provides courts with multiple sentencing options that encourage the use of alternatives to imprisonment; including a probation sentence in Zone B or shorter periods of detention in both Zone B and Zone C. To fulfill the guideline range balance of any period of detention not imposed, alternatives to detention in the form of conditions of supervision such as intermittent confinement, community confinement, and home detention are listed at §5C1.1 and elsewhere in the guidelines. No other alternatives are authorized.

POAG observes that this approach to imposing conditions of supervision generally provides a high level of defendant/officer contact, and can also expose defendants to others who have criminal behaviors and beliefs, which may have unintended consequences on low-risk defendants. Those consequences in many cases result in an increased risk of recidivism through over-supervision and exposure to antisocial peers. However, for some defendants, whose risks and needs require increased officer contact along with treatment-specific conditions, the use of identified alternatives may assist in a balanced approach of addressing risks and needs.

The key objective of innovative sentencing is to match the intensity of the intervention to the individual's risks, needs, and criminal behavior; reserving custody for individuals who commit the most serious crimes or who pose the most serious threat to the community[3]. It is noted in the legislative history of 28 U.S.C. § 994 the Commission "expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions." "It may very often be that release

2 U.S. Sentencing Commission Quick Facts – Drug Trafficking Offenses. There were 9.6% fewer drug trafficking offenders in fiscal year 2013 than in fiscal year 2012. Despite this reduction, drug trafficking offenses accounted for 30.4% of all offenses in fiscal year 2013. The top five districts with drug trafficking offenders were the Western District of Texas, Southern District of California, Southern District of Texas, District of Arizona, and the District of Puerto Rico. Based on this data file, drug trafficking sentences were decreased for 18% of offenders because they were a minor or minimal participant in the offense.

3 Criminal Justice Brief, Office of National Drug Control Policy, August 2011.

on probation under conditions designated to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose."[4]

Research is clear that even a relative short period of incarceration/detention for low risk offenders, either in pretrial or post-conviction, correlates with a higher risk of reoffending. In addition, prison may also increase the risk of recidivism for all defendants by exposing them to more serious defendants/offenders, disrupting their legal employment, and weakening of their family ties. The requirements of Zone C limit a sentencing court from imposing a guideline sentence that does not incorporate a term of imprisonment for at least one-half of the minimum guideline range. Additionally, the requirements of Zones B and C limit the Court's and probation officer's ability to tailor to each individual's risks with appropriate conditions and be pro-active in the supervision process because specific conditions are required for the sentence to be considered a guideline sentence.

Restrictive alternatives to imprisonment such as residential reentry center placement, work release, or intermittent confinement for low-risk offenders also are contradictory to effective community supervision practices. As with terms of imprisonment, low-risk individuals intermingled with high-risk individuals in group settings risk disrupting already established pro-social behaviors, activities, or relationships (such as jobs, school, parenting, or religious observances), as well as exposes them to anti-social attitudes. This can increase the individual's risk of reoffending.[5] Community supervision alternatives that promote pro-social community networking help avoid the unfortunate byproducts of punishment placements in custody or in residential reentry centers. To extend and sustain behavioral changes, individuals in treatment also require positive support, especially from the persons closest to them: family members, friends, religious institutions, and supporting others in their communities.[6]

Research has consistently demonstrated individuals who are highest risk to reoffend require the highest intensity interventions in order to reduce recidivism. Additionally, providing too much intervention to individuals who are lowest risk to reoffend actually can create an increase in poor outcomes with this offender subpopulation.[7] The use of location monitoring and home detention requires a high level of monitoring, contact, and intrusion with defendants. Even those defendants considered a low risk to reoffend require a higher contact rate when they are under a

4 Alternative Sentencing in the Federal Criminal Justice System, U.S. Sentencing Commission (January 2009)

5 Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries, U.S. Department of Justice National Institute of Corrections (August 2007), quoting *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, in Topics in Community Corrections, National Institution of Corrections Annual Issue (2004).

6 Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries, U.S. Department of Justice National Institute of Corrections (August 2007), quoting D.A. Andrews & James Bonta, *The Psychology of Criminal Conduct* (Anderson Publishing 1996) and Wayne Scott, Evidence-based Practices in Correctional Treatment, unpublished manuscript (2007).

7 Criminal Justice Brief, Office of National Drug Control Policy, August 2011.

form of location monitoring.[8] However, over-exposure to supervision of these offenders disrupts the pro-social factors like employment, family ties, and positive peer relations that make the individuals low-risk in the first place. Furthermore, providing more services than necessary to low-risk offenders depletes resources that should be devoted to the more serious offenders.[9]

In summary, POAG believes that appropriate considerations in the use imprisonment alternatives should always include probationary dispositions – allowing courts to impose conditions that match the needs and risks of individual defendants. Encouraging the use of alternatives to detention that may include location monitoring, home confinement, or residential reentry center placements will allow sentencing courts to tailor conditions of supervision to the individual defendant and their needs, rather than require the imposition of these highly restrictive conditions or periods of incarceration that contradict current federal community supervision practices/theories.

Simplicity of Guidelines – Re-Zoning Sentencing Table

POAG discussed several operational issues within the guidelines that would promote greater simplicity and the use of alternative sentencing options. In November 2010, the Commission provided a greater range of sentencing options to courts with respect to certain offenders by expanding Zones B and C of the Sentencing Table. While the changes to the Sentencing Table widened the potential use of sentence alternatives for defendants who did not previously qualify, courts also have to impose longer terms of home detention and community confinement to make up for the higher ranges in the expanded zones. As previously discussed, this blanket approach to imposing location monitoring and community confinement alternatives may have unintended consequences on low-risk defendants – ultimately increasing their risks of recidivism through over-supervision. The four-zone system has been the paradigm of federal sentencing throughout the life of the guidelines, but current research in risk management suggests that it may be time to rethink this approach.

It is respectfully recommended that the Commission consider simplifying the Sentencing Table to a two-zone system. Within the new Zone B (current Zone D), there would be no changes to current operation. The new Zone A, however, would encompass current Zones A-C and would authorize imposition of a probationary term anywhere in the zone. Probation could be imposed alone or in combination with any of the sentencing alternatives that exist within current Zones B and C.

While the applicable guideline imprisonment range would no longer proscribe location monitoring and community confinement in probationary dispositions, POAG believes courts will continue to use these options, and the two-zone system will ultimately self-regulate in operation. Courts will recognize that offenses in the upper threshold of the new Zone A will be more serious in nature and will impose straight-probation less often – either ordering imprisonment or utilizing other

8 Guide to Judiciary Policy, Volume 8: Probation and Pretrial Services, Part F: Federal Location Monitoring Program.

9 Evidence-Based Practice to Reduce Recidivism: Implications for State judiciaries, U.S. Department of Justice National Institute of Corrections (August 2007).

alternatives. However, Courts will have more flexibility to impose straight-probation in the situations where they currently depart or impose variances to achieve the same result – thereby increasing the number of within guideline sentences the system produces.

POAG believes Courts should be encouraged to provide strong factual findings in the exercise of this new discretion and should make considerations including, but not limited to: (a) the statutory sentencing factors in 18 U.S.C. § 3553(a); (b) the extent of a defendant's acceptance of responsibility; (c) pretrial supervision adjustments; (d) rehabilitation efforts; (e) restorative actions to compensate victims of the offense; and (f) participation in a judge-involved pretrial supervision program.

POAG could not come to a consensus on the line of demarcation between the new zones on the Sentencing Table. Some members believed the current high-end range of Zone C was appropriate and others believed that the pre-November 2010 Zone C delineation was preferred.

With a two-zone system, the Commission would have to address situations in which defendants have served terms of pretrial detention and how this time would be factored into the imposition of a sentence. The Commission could retain the current rule mandating service of a one month term, but determinations would need to be made how the use of sentencing alternatives factor into the guideline imprisonment range.

POAG believes that the Commission should consider expanding judicial authority to impose probation-only dispositions. By providing more judicial discretion within a two-zone system, courts would have increased flexibility to use an array of alternatives to incarceration and tailor those sentences commensurate with the risks presented. A system of this nature could have an impact on the number of offenders who are incarcerated within the Federal Bureau of Prisons and increase the number of sentences imposed within the guideline system.

Proposed Priority No. 3

Crime of Violence Definition

POAG encourages the Commission to simplify and/or standardize the definition of the term "crime of violence." Currently, there are at least three differing definitions of the term 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 USSG §2L1.2. Third, there is a definition relating to firearms offenses and criminal history calculations in USSG §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). These multiple 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.

These differing definitions have been further complicated by the recent decision in Johnson v. U.S. which held that the residual clause of the violent felony definition is unconstitutionally vague. Because there are circuit courts which have determined the definitions of violent felony and crime of violence are interchangeable, determining guideline levels using these definitions has become increasingly complicated. POAG asks the commission to consider one comprehensive definition for crime of violence which is the same as, or mirrors, the statutory definition of violent felony.

POAG suggests limiting the definition of "crime of violence" to USSG §4B1.2(a)(1)—any offense under federal or state law punishable by imprisonment for a term exceeding one year that has an element the use, attempted use, or threatened use of physical force against the person of another. This would eliminate the list of enumerated offenses as well as the problematic residual clause at USSG §4B1.2(a)(2). An inherent problem with the enumerated offenses and the residual clause at USSG §4B1.2(a)(2) is that application hinges not on the specifics of a defendant's actions, but rather the charges for which they were convicted. As such, the same conduct committed in neighboring states can result in significantly different results in USSG §§2K2.1 and 4B1.1. To apply and support prior criminal convictions in the guidelines, probation officers are required to obtain court documents from other jurisdictions which is often difficult and, sometimes, impossible. In addition, some probation offices are permitted to pay for criminal records while other offices are not. Therefore, the jurisdiction of the predicate offense and the budgetary/policy constraints of the probation office have great bearing on the application of the guidelines. POAG acknowledges this will result in fewer offenses meeting the definition of crime of violence; however, it is believed that limiting the crime of violence definition to §4B1.2(a)(1) would promote the Commission's aim to increase simplicity/ease of application, consistency and proportionality within the guidelines, and reduce sentencing disparity between similarly situated defendants.

To further simplify application issues, POAG also suggests the inclusion of language in the guidelines, or application notes, that provides for the employment of a categorical or modified-categorical approach in the determination of predicate offenses, whether or not the underlying statute is divisible.

Proposed Priority No. 10

Animal Fighting Offenses

The POAG members continue to experience a limited case volume related to animal fighting offenses in the majority of Circuits. While there were a small number of cases reported out of the 11th Circuit, no other representative expressed concern over the lack of an animal fighting specific guideline.

Other Issues

Repeat and Dangerous Sex Offender Against Minors

USSG §4B1.5, Repeat and Dangerous Sex Offender Against Minors, provides an enhancement for offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public. Specifically, USSG §4B1.5(a) provides two options for the determination of the offense level for offenders who commit a covered sex crime, when USSG §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one prior sex offense conviction. In these instances, the offense level is the greater of: (a)(1)(A) the offense level determined under Chapters Two and Three, or (a)(1)(B) the offense level from a table similar to the table contained in the Career Offender guideline, and (a)(2), the criminal history category shall be the greater of (A) the criminal history category determined under Chapter Four, Part A, or (B) criminal history category V. USSG §4B1.5(b) sets forth the guidelines for determining the offense level for defendants who have committed a covered sex crime and neither USSG §4B1.1 (Career Offender) nor USSG §4B1.5(a) applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct. In those instances, under (b)(1), the offense level shall be 5 plus the offense level determined under Chapters Two and Three, but shall not be less than 22, and under (b)(2), the criminal history category shall be determined under Chapter Four, Part A. This application can result in a disparity in the guideline range between offenders who have a prior conviction and those who do not, whose offense conduct are similar. For example:

Defendant #1 is convicted of Production of Child Pornography with a statutory term of imprisonment of 15 to 30 years. The defendant molested multiple minors prior to the instant offense, which constitutes a pattern of prohibited sexual contact with children, and has **no prior sex offense conviction**.

Base Offense Level [USSG §2G2.1]:	32
SOC for Offense Involving a Minor Under 12 [USSG §2G2.1(b)(1)(A)]:	+4
SOC for Offense Involving a Sexual Act/Contact [USSG §2G2.1(b)(2)(A)]:	+2
SOC for Defendant Being a Parent/Legal Guardian [USSG §2G2.1(b)(5)]:	+2
Adjusted Offense Level:	40
Chapter 4 Enhancement [USSG §4B1.5(b)(1)]:	+5
Acceptance of Responsibility:	-3
Total Offense Level:	42
Criminal History Category [USSG §4B1.5(b)(2)]:	I

Guideline Provisions: Based upon a total offense level of 42 and a criminal history category of I, the guideline imprisonment range is 360 months to life imprisonment. However, the statutorily authorized maximum sentence of 30 years is less than the maximum of the guideline range; therefore, the guideline range is 360 months.

Defendant #2 is convicted of Production of Child Pornography with a statutory term of imprisonment of 25 to 50 years. The defendant molested multiple minors prior to the instant offense, which constitutes a pattern of prohibited sexual contact with children, and has **one prior sex offense conviction**.

Base Offense Level [USSG §2G2.1]:	32
SOC for Offense Involving a Minor Under 12 [USSG §2G2.1(b)(1)(A)]:	+4
SOC for Offense Involving a Sexual Act/Contact [USSG §2G2.1(b)(2)(A)]:	+2
SOC for Defendant Being a Parent/Legal Guardian [USSG §2G2.1(b)(5)]:	+2
Adjusted Offense Level:	40
Chapter 4 Enhancement [USSG §4B1.5(a)(1)(A)]:	40
Acceptance of Responsibility:	-3
Total Offense Level:	37
Criminal History Category [USSG §4B1.5(a)(2)(B)]:	V

Guideline Provisions: Based upon a total offense level of 37 and a criminal history category of V, the guideline imprisonment range is 324 to 405 months, 36 months below the bottom of the guideline range for Defendant #1 who has no prior sex offense conviction.

POAG's suggestion for eliminating this disparity is to add at the beginning of the guideline that the greater of USSG §4B1.5(a) or (b) is applied with regard to the determination of the offense level, if the defendant has one or more prior sex offense convictions. Further, if the defendant has one or more prior sex offense convictions, then the criminal history category is to be determined under USSG §4B1.5(a)(2). Otherwise, the criminal history category is to be determined under USSG §4B1.5(b)(2).

In 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 further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

Probation Officers Advisory Group
July 2015