PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

February 21, 2017

United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C., on February 8 and 9, 2017, to discuss and formulate recommendations to the United States Sentencing Commission (USSC). We are submitting comments relating to issues published for comment dated December 9, 2016.

1. FIRST OFFENDERS/ALTERNATIVES TO INCARCERATION

First Offenders

The First Offender Amendment garnered much discussion amongst the members of POAG. While the idea of conferring a benefit to those offenders who pose the lowest risk of recidivism was generally agreed upon, the practicality of defining who falls into this "first offender" definition proved rather difficult.

The majority of the members favored Option 1, which suggested a decrease of one level from the offense level determined under Chapters Two and Three. This approach was favored because it was similar to the upward departure from category VI directive under USSG §4A1.3(a)(4)(B) where the departure is structured by moving incrementally down the sentencing table. It was believed that this option provided a way around the prohibition of a departure from Criminal History Category I by resulting in a reduced offense level as if there were a Criminal History Category 0. While the idea of creating, in essence, a Criminal History Category 0 was pleasing, POAG had concerns about how to appropriately define a "first offender."

POAG was unable to reach a consensus as to the criminal history characteristics of a first offender. While some agreed that a defendant who does not receive any criminal history points under Chapter Four, Part A, and has no convictions of any kind is a "first offender," others favored a stricter adherence to the definition of the term wherein a defendant with any criminal history, including an adjudication, arrest, or infraction, is disqualified from the adjustment. Given the variety of reasons for the dismissal of criminal charges, it was believed by some that a defendant with several law enforcement contacts, despite having no convictions, is not the quintessential first offender. Additionally, it was believed that there may exist unintended consequences and disparate application of the adjustment. First, the consequences for certain minor offenses, including driving with a suspended license, vary greatly by state and can involve either criminal or civil punishments. As such, a defendant's civil punishment for these minor offenses, despite not being attributed criminal history points, could be considered a "conviction" resulting in the defendant being precluded from the adjustment. Second, POAG recognized that defendants of lower socioeconomic status and/or minority populations are often subject to more police presence in their neighborhoods which increases the likelihood of sustaining convictions for minor offenses resulting in them being precluded from the adjustment more often than the typical white collar or even child pornography defendant.

POAG discussed whether the nature and the duration of the instant offense should be a factor in the determination of a first offender. For example, should a defendant who commits a firearms-related offense or who commits a tax fraud over a prolonged period of time involving the submission of several fraudulent tax returns be considered a first offender? Given the complexity of establishing an elements-based analysis for a first offender and the need to simplify guideline applications, it was agreed that criminal history should be the determinative factor in deciding who is a first offender and that the nature and duration of the offense should be considered in determining the application of the rebuttable presumption for a non-custodial sentence at USSG §5C1.1. POAG believes the severity and/or the extended duration of the offense should not bind the court to the presumption of an alternative sentence and that it could impose imprisonment in those cases.

Alternatives to Incarceration

POAG appreciates the Commission's continuing work to expand the use of alternatives to incarceration within the structure of the guidelines. POAG has encouraged the Commission to adopt a bifurcated Sentencing Table that expands the availability of probation-only sentences. POAG stands by this proposal and believes this cost-effective alternative is under-utilized within the present framework. The Federal Probation system provides national leadership in its approach to risk-based supervision – tailoring higher intensity interventions for high risk cases. However, POAG has concerns that the well-intentioned Zone B/C consolidation will lead to longer terms of location monitoring (LM) for low risk cases that may result in a higher rate of negative supervision outcomes.

As POAG discussed in its two previous papers, there is a legitimate concern that longer terms of home detention with LM in low risk cases will ultimately run afoul of the "risk principle" and actually reduce successful outcomes. POAG argues that LM should be imposed mindfully, to address specific risks and needs, rather than being imposed in a blanket fashion to everyone within a particular guideline imprisonment range. Anecdotal feedback from officers in the field is strongly critical of home detention terms that exceed six months. It is a very restrictive intervention that can impact the mental health of those under supervision, and the longer someone is subject to LM, the more likely they are to test the limits of the equipment.

Officers responsible for LM supervision have a number of policy requirements to meet in all cases. Monthly home contacts are required to examine the equipment and officers must respond to certain key alerts during the day and night – expanding the range of non-traditional working hours. LM officers are responsible for verifying the activities of offenders outside their homes and must review geo-locational data for all offenders enrolled in GPS systems. In short, individuals sentenced to home detention with LM receive resource intensive supervision consistent with that of a sex offender or violent recidivist.

Location Monitoring Specialists are known to experience high stress levels/burnout due to the nature of their work and the national system has dedicated resources to provide education on officer wellness. POAG is concerned the proposed amendment will embolden courts to impose long terms of LM in a blanket fashion more often – significantly adding to the overall workload of LM officers and taking resources away from the true high-risk cases that deserve the most intensive supervision.

POAG encourages the Commission to exercise caution in its approach to this proposal and instead seek to expand probation-only dispositions rather than authorizing lengthy terms of home detention with LM. At the district court level, probation officers work hard to educate judges and attorneys about the most effective use of LM, and POAG hopes that the Commission can strike a balance that expands the use of probation without overly relying on home detention as the vehicle to achieve that end.

2. TRIBAL ISSUES

The proposed amendment incorporates recommendations from the Tribal Issues Advisory Group (TIAG) regarding the use of tribal convictions to compute criminal history scores under Chapter Four and how to account for protection orders issued by tribal courts.

POAG concurs with TIAG's recommendations and the Commission's proposed changes to the guidelines for consideration of tribal convictions. The convictions should not be assessed criminal history points under USSG §4A1.1, and should remain under USSG §4A1.2(i). POAG recognizes procedures may vary among the many tribal courts. Due process issues and lack of documentation of tribal convictions are a concern and impact the correct assessment of criminal history points.

The policy statement under USSG §4A1.3 (Adequacy of Criminal History) will continue to provide a means for the court to grant departures based on information available regarding tribal convictions. Additionally, important changes have expanded the jurisdiction of tribes in criminal prosecution (i.e. Tribal Law and Order Act of 2010 and Violence Against Women Reauthorization Act of 2013). POAG concurs with the proposed commentary under USSG §4A1.3, comment. (n.2(C)(i) –(iv)) and agrees this provision will provide clear guidance. However, POAG recommends that (iv) be expanded to include language to also allow for a departure if the defendant was under tribal court post-conviction supervision at the time of the federal offense, similar to the application of USSG §4A1.1(d). POAG believes there will be difficulties with practical application of USSG §4A1.3, comment. (n.2(C)(v)) in determining if the tribal government has "formally expressed" a desire for the convictions from the tribal court to be used for computation of criminal history points. It is unclear who determines this formal expression, how it is determined, and how it will be documented. The definition of "formally expressed" may lead to additional disparity because the procedures vary among tribal courts. POAG believes (v) could be eliminated from the list because (i)-(iv) provide sufficient guidance.

POAG concurs with the recommendations of TIAG and the Commission's proposed language to define "court protection order" under USSG §1B1.1, as it will provide consistency with statutory definitions.

3. YOUTHFUL OFFENDERS

POAG discussed the amendment on whether the Commission should consider changing how the guidelines account for juvenile sentences for purposes of determining the defendant's criminal history pursuant to Chapter Four, Part A. Specifically, to amend the guidelines to provide that sentences resulting from juvenile adjudications not be counted in the criminal history score.

After a lengthy discussion, POAG was unable to reach a consensus on this issue. Those in favor of the amendment cited disparity, both curable and incurable, as the primary reason for change. This includes the wide range of varying access to juvenile records, from state to state, as well as jurisdiction to jurisdiction. While some locations have relatively easy access, in others access is non-existent. This is based on records being sealed or destroyed, while in other locations the length of time to obtain records was problematic. It was also discussed how the search for juvenile records is inefficient and costly as it relates to our daily work formula, specifically in relation to time and resources. POAG also noted the frequent inability to obtain records from other states via our system's "collateral" process, which POAG agreed is not reliable or consistent within our own system. POAG also cited the many differences in how juvenile offenses of a similar nature are treated from state to state. POAG generally observed that the issues above, along with inconsistent scoring of juvenile adjudications, lead to certain disparity between offenders from court to court.

Those who were in favor of no longer scoring juvenile offenses were in agreement of then having these adjudications considered for purposes of an upward departure under USSG §4A1.3. The group also did not agree to count juvenile sentences only if the offense involved violence or was otherwise serious, citing recent debate with the definitions of these offenses.

Chapter Four, Part A – Criminal History was designed to quantify prior criminal behavior by a defendant from those defendants without any criminal behavior history and as noted in the Introductory Commentary, "a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." Currently all juvenile status offenses and truancy are not scored pursuant to USSG §4A1.2(c)(2). All other juvenile sentences are counted only if the sentence imposed was done so within five years of the defendant's commencement of the instant offense. Those opposed to the proposed amendment indicated this five-year recency provision captures and accounts for only those juveniles who have a higher likelihood of recidivism and future criminal behavior based upon their criminal past. Accounting for past criminal behavior is especially important given that our system is seeing more violent and repeat young offenders than in the past. Any minor behaviors (those captured in USSG §4A1.2(c)(2) and those stale (beyond the five-year point)) have already been excluded based upon these other provisions.

POAG members in opposition to the proposed amendment also commented that historically juvenile offenders receive graduated sanctions where they are often offered initial leniency from the juvenile courts and more serious sanctions were only imposed upon new, repeated or more serious behaviors. Given this pattern, the scoring of juvenile adjudications within five years would continue to identify those juveniles who have committed recent and more serious, or escalating behaviors. To not score or account for the adjudications would be essentially "turning a blind eye" or treating juvenile offenders equal to those individuals with no juvenile criminal past, thus promoting disparity. The scoring of juvenile adjudications distinguishes those who became involved in the juvenile system from those who were law abiding. If juvenile adjudications were ignored in the scoring system, the young offenders' risk of recidivism and potential harm to society would be underrepresented because their pattern of juvenile criminal conduct would be unaccounted for in the sentencing guideline scheme.

Obtaining juvenile records in some jurisdictions and not in others, thus creating unintended disparity, is also concerning to those in opposition to the amendment. This concern, however, is not outweighed by the need to punish those who demonstrate repeated criminal behavior.

4. CRIMINAL HISTORY ISSUES

POAG discussed the proposed change to USSG §§4A1.2(k) and 4A1.3 (Revocations and Downward Departure). POAG members were unanimous that revocations of supervision should be counted toward a defendant's criminal history, and therefore, not considered as a departure under USSG §4A1.3. Several areas of concern were discussed. Although there may be multiple terms of supervision, the application of additional points for the violation is limited to one case, which prevents double counting. This application has been included in the guideline since its inception and the need for change is not apparent. Under the amendment, a potential exists for not capturing the more serious (higher risk) defendants who have failed to comply and thereby affording them the same benefit as offenders who have successfully completed prior terms of

supervision. Additionally, for those individuals who initially received a supervisory sentence, with the four-point cap under USSG §4A1.1(c), there is a likelihood that their noncompliance, which may not include recidivist criminal conduct, but instead serious technical violations, would not be considered. Currently under USSG §4A1.1(d), points are assessed for committing the instant offense while on supervision. This same logic should be applied to assessing points for violations.

Regarding the proposed amendment for a downward departure in a case where the actual time served is substantially less than the length of the sentence imposed, POAG expressed a concern with the inconsistencies which may occur based on jurisdictional computations. As previously discussed by POAG members, there are a number of issues with determining why the "time served" and the "time imposed" varies. Some of the controlling factors are unrelated to the defendant and the offense of conviction, and therefore, should not be a consideration for a departure.

5. BIPARTISAN BUDGET ACT

POAG members noted that they have very little experience with this statute given it is a fairly new law. However, POAG members did favor the reference to 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) at USSG §2B1.1(b)(13) as such a citation makes it clear which cases the enhancement was intended to apply, which has the effect of decreasing litigation at sentencing. Further, POAG members preferred the two-level increase under USSG §2B1.1(b)(13), with a notation that a two-level increase under USSG §3B1.3 would ordinary apply, thereby limiting increase for these types of offenses to a total of four levels.

6. ACCEPTANCE OF RESPONSIBILITY

A defendant who enters a plea of guilty must admit to the elements of the offense; however, at the time of sentencing, the focus is on the concept of relevant conduct when determining if a defendant is eligible for an Acceptance of Responsibility reduction. The Commission is seeking comment on whether the references to relevant conduct should be removed from USSG §3E1.1 and, instead, focus only on the elements of the offense of conviction. POAG notes that relevant conduct is a broad concept that seeks to capture actual offense conduct versus the charged conduct, and that it can include conduct underlying charges that have been, or will be dismissed. As such, the current structure of USSG §3E1.1 requires defendants to "not falsely deny" any additional alleged conduct that is considered to be relevant conduct. POAG recommends that relevant conduct continue to serve as a basis for determining if a defendant is eligible for an Acceptance of Responsibility reduction out of concern that focusing on the elements of the offense would likely have the effect of increasing the amount of litigation at sentencing. Further, relying on relevant conduct in determining if a defendant is eligible for an Acceptance of Responsibility reduction is consistent with the rest of the guideline applications that are based upon relevant conduct. POAG believes that this approach has generally worked well and does not have any concerns regarding this part of the process.

The Commission is also seeking comment on whether USSG §3E1.1, comment. (n.1), should be amended by striking "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility," and replacing it with "In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)." POAG supports this amendment, but recommends that references to "not falsely deny" or "non-frivolous" in USSG §3E1.1, comments. (n.1(A)) and (n.3), be replaced with "frivolously deny" so as to avoid the use of double negatives in the application instructions. Further, POAG supports this amendment as it seeks to distinguish defendants who have objections based upon reason and fact from defendants who have objections that have no good faith basis. POAG also recommends that the Commission consider defining what constitutes "frivolous," as the layperson's understanding of that term may differ from the common legal definition.

The Commission identified the above noted issue as a priority out of concern that the Commentary to USSG §3E1.1 encourages courts to deny an Acceptance of Responsibility reduction when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessment of relevant conduct or the application of a Specific Offense Characteristic. As it is currently written, the Commentary in USSG §3E1.1 requires a defendant to "not falsely deny any additional relevant conduct," which has been interpreted by some to mean that a reduction is not appropriate if the defendant falsely denies conduct that is determined to be relevant conduct. If that was not the Commission's intent, then POAG would support an amendment to the Commentary to USSG §3E1.1 to clarify that unsuccessful challenges to relevant conduct do not preclude a defendant from being eligible for an Acceptance of Responsibility reduction and that such amendment be significant enough that it creates a new standard under this guideline. POAG believes the aforementioned amendments to USSG §3E1.1 could increase due process for defendants who have legitimate challenges to relevant conduct and lessens their risk for automatic acceptance of responsibility denials in these cases.

Further, POAG recommends that USSG §3E1.1, comment. (n.5), which directs that "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review," be stricken from the Guidelines Manual. POAG believes that the Guidelines Manual should focus on application instructions while leaving the issue of standard of review to the discretion of the appellate courts.

7. MISCELLANEOUS

In August 2016, the Commission indicated that one of its priorities would be the "[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study." See United States Sentencing Commission, "Notice of Final Priorities," 81 FR

58004 (Aug. 24, 2016). The Commission intends that this study will be conducted over a two-year period and will solicit input, several times during this period, from experts and other members of the public. The Commission further intends that in the amendment cycle ending May 1, 2018, it may, if appropriate, publish a proposed amendment as a result of the study.

POAG supports the continuation of this study. Officers noted this is a growing problem with an increase in synthetic cathinones and synthetic cannabinoids appearing in various districts. Currently there are approximately 256 synthetic cannabinoids listed as controlled substances and controlled substance analogues. POAG also discussed the ongoing problems with Methylone, Molly, Fentanyl, and bath salts.

When a drug trafficking offense involves a controlled substance not specifically referenced in the guidelines, the Commentary to USSG §2D1.1 instructs the court to "determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in [§2D1.1]." USSG §2D1.1, comment. (n.6). The guidelines then provide a three-step process for making this determination. USSG §2D1.1, comment. (n.6, 8). In following this three-step process, POAG members indicated probation officers are doing extensive research and evaluation for the Presentence Report, and then the courts are holding similarly extensive hearings before ruling on the analysis. Further discussion revealed that, even after the analysis is made, there is inconsistency in the marijuana equivalencies that are used around the country. Some courts determine the synthetic smokeable cannabinoid substances are most closely related to Synthetic Tetrahydrocannabinol (THC), and others, marijuana. This is creating an inconsistency in guideline calculations utilizing various marijuana equivalency ratios; however, the majority of the POAG members indicated their officers were utilizing a 1:167 ratio with synthetic smokeable cannabinoids being most closely related to THC. There have been instances when courts have used a 1:167 ratio, that they found the result to be extremely excessive, and sentenced the defendant outside of the advisory guidelines.

Courts have also struggled with issues of notice, wherein the defendants were manufacturing, producing, and/or selling synthetic smokeable cannabinoids that were analogues of JWH-018 without public information or legal guidance available that could put the defendants on notice that AM-2201 and XLR-11 are analogues of JWH-018.

Courts have also struggled in determining the correct ratio for Methylene, and some have compared it to MDMA, while others have held hearings with expert witnesses in order to fashion what they believe to be a reasonable drug conversion rate. In some instances, courts have used a 1:500 ratio, while others have found that a 1:250 ratio or a 1:200 ratio is more appropriate.

In addition, POAG discussed the means by which the synthetic smokeable cannabinoids are made. Defendants frequently obtain a pure form of the chemical from companies that obtain the chemical from outside of the United States. The defendants use warehouses, garages, or storage units as locations for producing the final product of synthetic smokeable cannabinoids. The defendants utilize cement mixers to effectively coat inert plant material by putting the plant material and the

liquid based synthetic cannabinoids into the cement mixer. Defendants have also utilized sprayers to spray the synthetic cannabinoid suspended in a delivery liquid onto the inert plant material. After the plant material is coated, the defendants allow it to dry. The defendants collect the dried, coated plant material and grind it up. It is then packaged for sale. POAG discussed the inconsistency in guideline applications when determining the quantity of synthetic smokeable cannabinoids used to calculate the guidelines. For example, some courts are using the entire weight of the substance (the inert plant material as well as the synthetic substance applied to the inert plant material), while others are attempting to extract the actual or estimated weight of the inert organic material and only using the weight of the synthetic, controlled substance.

Another issue POAG members discussed was the varying charging options prosecutors are using with synthetic cases. For example, defendants with synthetic smokeable cannabinoid cases have been charged with offenses involving drug distribution with guidelines found in USSG §2D1.1; fraud with guidelines found in USSG §2B1.1; misbranding with guidelines found in USSG §2N2.1; and money laundering with guidelines found in USSG §2S1.1.

The Commission asked for additional comments regarding the defendants involved in such cases. POAG noted that, like most offenses, defendants vary tremendously. The defendants involved in these cases range from young people who work as cashiers at establishments that sell these items and other legal items, all the way to business owners who own one or multiple such stores. The cases involve people who accept the pure form of the synthetic substance and engage in the activities necessary to coat the inert plant material with the illicit compounds. Defendants include chemists who test and submit fraudulent laboratory reports on the contents of the products. Some are corporations that finance the operations.

Finally, the Commission asked for comments regarding the harms posed by these activities. POAG members noted the dangers of these synthetic substances. In many cases, defendants are obtaining a chemical substance from China or other foreign location. The substance may be accurately labeled, but many times, it is not. The substance is then sprayed on an organic plant-type material, packaged, and sold in stores. It is made easily accessible and highly attractive to individuals, who are frequently younger, looking to get high. Courts have accepted information from the American Association of Poison Control Centers that describes the effects of synthetic smokeable cannabinoid usage that can be life threatening and can include severe agitation and anxiety; fast racing heartbeat; nausea and vomiting; muscle spasms, seizures, and tremors; psychotic episodes; and suicidal or other harmful thoughts and/or actions. In court cases, the argument has been made that the synthetic smokeable cannabinoids are more serious because they involve a single, highly pure chemical that causes a variety of outcomes depending on the user. The substance is not tempered by other chemicals naturally present in marihuana.

POAG supported the idea of additional study of all synthetics and would like a methodology to deal with these designer drugs. Determining these equivalencies is difficult and time consuming. These cases sometimes require chemical analysis reports and in some instances, chemists and other

experts to resolve contested drug quantity issues at sentencing. This causes disparity between districts/judges, and therefore, sentences. Additionally, POAG supports the Commission's efforts to further investigate Fentanyl, Methylone, Ethylone and other illicit synthetic compounds. POAG members observed that the producers of illicit synthetic compounds are continuously changing the formulas of the compounds to achieve the same effects through different, not-yet-illegal, means, and POAG respectfully recommends the Commission consider the continuous evolution of these substances when fashioning a solution.

The POAG members will continue to forward cases of interest to the Commission as the members observe them.

8. MARIHUANA EQUIVALENCY

The proposed amendment makes technical changes to USSG §2D1.1 to replace the term "marihuana equivalency" with "converted drug weight." The term "marihuana equivalency" is used in cases that involve a controlled substance that is not specifically referenced in the Drug Quantity Table as well as cases with more than one controlled substance where it is necessary to convert each of the drugs to its marihuana equivalency. Although the Commission received comment expressing concern that the term "marihuana equivalency" is misleading and results in confusion for individuals not fully versed in the guidelines, the POAG unanimously agreed that they have never experienced similar confusion by counsel, the defendant, or the court. POAG suggests that the confusion may be a result of the presentation of the information in the Presentence Report and noted that the report should be clear as to the actual drug(s) and drug quantity(ies) for which the defendant is accountable with a notation thereafter of the marihuana equivalency. POAG also suggests that the Commission should include clarification of the term in its training sessions both nationally and district wide. Additionally, there is considerable case law in every circuit that references "marihuana equivalency" and changing this term could potentially lead to further litigation with regard to determining drug equivalencies. The change will make it much harder to compare sentencing recommendations between newer cases, using the new conversion process, and older cases. Moreover, POAG noted the potential confusion that could result from the use of the term "converted drug weight." The proposed guideline defines this term as a "nominal reference designation that is to be used as a conversion factor…" Nevertheless, upon inspection of the Drug Quantity Table and the Drug Conversion Table, it is clear this term is the same as marihuana. Therefore, to avoid further confusion, it is POAG's recommendation to make no changes to the term "marihuana equivalency."

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed amendments.

Respectfully,

Probation Officers Advisory Group

February 2017