PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

March 10, 2017

Honorable William H. Pryor, Jr., Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Pryor,

The Probation Officers Advisory Group (POAG or the Group) is submitting the following response to public comments relating to the proposed amendments dated December 9, 2016.

ALTERNATIVES TO INCARCERATION

In reviewing the feedback provided by the advisory and advocacy groups on the proposed zone consolidation, POAG wished to provide additional commentary. While it is encouraging to see overall support for the use of alternatives to incarceration, the proposal's blanket approach to home detention and location monitoring (LM) represents a shift that may conflict with the original goals of probation and supervised release. The legislative history of the Comprehensive Crime Control Act of 1984 shows Congress's intent that probation and supervised release be leveraged with an eye toward rehabilitation and re-integration. Congress recognized that punishment was still an important element of probation, but that these restrictive elements be applied based on individualized assessments of each defendant –

"When the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be preferable to imprisonment. This does not mean, however, that it is not possible to formulate conditions of probation that will serve deterrent and punishment purposes – or even limited incapacitative purposes – in an appropriate case. Thus the committee feels that the best course is to provide no presumption either for or against probation as opposed

to imprisonment, but to allow the Sentencing Commission and, under its guidelines, the Courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases" (S. Rep. No. 225 at pg. 77).

The Congressional record provides much more clarity on the role of punishment and incapacitation in relation to supervised release –

"The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release – that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for a punishment or other purposes but still needs supervision and training programs after release" (S. Rep. No. 225 at pg. 107).

POAG believes that authorizing courts to impose home detention within the zoning structure for 12 or even 18 months is a significant policy shift. The Congressional record supports the contention that high intensity interventions such as home detention with LM should be guided by individualized risk and needs assessments rather than a blanket measure that shifts incapacitation and punishment from the Federal Bureau of Prisons to community corrections.

POAG asks that the Sentencing Commission look critically at the resource impact the zone consolidation would have on the United States Probation system and engage with the Administrative Office of the United States Courts in fully understanding LM policy implications at the national level and in the field. POAG also notes that there is an education gap surrounding the realities and limitations of LM technologies and encourages the Sentencing Commission to take evidence on what technologies are currently utilized in the field and emerging LM technologies such as smart phone applications. This knowledge will be essential in determining what role LM plays in the future of the Sentencing Guidelines. Finally, the Sentencing Commission may want to explore policy that permits flexibility when supervisees demonstrate sustained compliance in LM programs – stepping down home detention to curfew, or even permitting early termination from LM requirements.

CRIMINAL HISTORY ISSUES

POAG continues to maintain our position that revocation of probation and supervised release should continue to be scored in criminal history application based upon the reasons noted in our paper dated February 21, 2017. POAG members reviewed the submissions of the other advisory groups, and decided a response was needed regarding support for the amendment that removes USSG §4A1.2(k), proposals that revocations based upon technical violations should not be considered, and proposals that revocations based upon new criminal conduct should be addressed through a potential departure motion pursuant to USSG §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

As indicated in the Chapter Four Introductory Commentary, the defendant's history of criminal behavior is an indicator of his likelihood of recidivism. A court imposes conditions of supervision to aid the defendant in their rehabilitation, to promote respect for the law, to provide just punishment for the offense and to protect the public from further crimes of the defendant. When a defendant abides by these conditions, his or her compliance increases that defendant's likelihood of successful rehabilitation. In contrast, the defendant's history of revocation, where the defendant has breached the Court's trust by not following through with court-imposed conditions, is a clear indication of his or her likelihood of recidivism.

Additionally, USSG §4A1.2(k), as written, has continuity with the other sections of the guidelines. Chapter Five provides the courts with guidance on imposing conditions of probation and of supervised release. Chapter Seven exists to provide guidance to the courts on sentencing a defendant for violating the conditions of probation or supervised release. Both Chapters Five and Seven reflect the Sentencing Commission's serious consideration of issues of rehabilitation. The proposed amendment to USSG §4A1.2(k) sends a clear message to defendants that their conduct on probation or supervised release can have an impact on their future beyond the consequences imposed for the violation, which is well supported by the rest of the guidelines. Removing the accountability created under USSG §4A1.2(k) could send mixed messages about the seriousness of abiding by probation and supervised release conditions.

When determining what factors are relevant in criminal history scoring or a departure motion, strong consideration should be given to whether the information is routinely available in court records. With regard to probation revocations, in some cases, the only information available from court records is that a term of probation was revoked, with no available information regarding the basis for the revocation. In other cases, the violations alleged are known, but the order revoking probation does not consistently or even normally specify which violations the court relied on when revoking the term of probation. Variations in record-keeping across courts and jurisdictions makes it difficult to differentiate the factual basis of a revocation-whether it is technical or a law violation. For this reason, POAG disagrees with the proposal to consider the type of revocation or distinguishing revocations based upon technical violations from revocations based upon new criminal conduct, because the information needed is not consistently available.

Further, it was suggested that the Sentencing Commission consider the structure of Chapter Seven in determining what constitutes a revocation for a serious violation, including consideration if the revocation basis would qualify as a Grade A or Grade B. Notwithstanding the impractical amount of resources it would take to consider Chapter Seven with regard to each and every state probation revocation, as noted above, POAG believes there is generally not sufficient information available to consider Chapter Seven for prior probation revocation sentences.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide a thoughtful response to public comments received regarding the proposed amendments.

Respectfully,

Probation Officers Advisory Group

March 2017