PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

July 31, 2017

The 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) met in Washington, D.C., on July 25 and 26, 2017, 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.

Priority #1 – Continuation of its multi-year examination of the overall structure of the guidelines post-Booker, including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate.

Priority #5 – Continuation of its comprehensive, multi-year study of recidivism, including examination of circumstances that correlate with increased or reduced recidivism; possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and promote effectiveness of reentry programs; and consideration of any amendments to the Guidelines Manual that may be appropriate, including possibly amending Chapter Four and Chapter Five to provide lower guideline ranges for "first offenders" generally and to increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table.

Priority #9 – Continuation of its study of alternatives to incarceration, including issuing a publication regarding the development of alternatives to incarceration programs in federal district courts and possibly amending the Sentencing Table in Chapter 5, Part A, to consolidate Zones B and C, and other relevant provisions in the Guidelines Manual.

POAG encourages the Commission's study of alternatives to incarceration to reduce the federal prison population. It is believed that, by providing more judicial discretion, courts would have increased flexibility to use an array of alternatives to incarceration and tailor sentences commensurate with a defendant's risk and needs. To increase judicial discretion, POAG proposes two amendments to the guidelines.

In its submissions to the Commission dated July 17, 2015, and July 22, 2016, POAG advocated for the bifurcation of the Sentencing Table into two zones, which POAG now proposes be deemed the new Zone A and Zone D. Current Zones A, B, and C would be consolidated into the new Zone A. There would be no application changes with respect to Zone D—the minimum term would require a sentence of imprisonment. The new Zone A, however, 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 currently exist within Zones B and C. Concomitant with the bifurcation of the Sentencing Table would be a modification to the language at both USSG §§5B1.1 and 5C1.1, authorizing the imposition of a probation-only sentence for the new Zone A ranges and the conditions necessary to meet the low-end term of the guideline imprisonment range.

Additionally, POAG recommends the Commission create departure authority in both USSG §§5B1.1 and 5C1.1, allowing imposition of probation-only sentences at a 0 to 6-month range for defendants whose ranges otherwise fall within current Zones B or C and who are considered by the Court to be at low risk to re-offend. The Commission can draft appropriate considerations for courts to make in exercising this new discretion. This departure would provide flexibility to impose probation-only sentences and likely increase the number of within guideline sentences the system produces. Such departure authority is not without precedent. The Commission has already promulgated a departure within this spirit for individuals with substance abuse and mental health issues. See USSG §5C1.1, comment (n.6).

POAG maintains that the current blanket approach to location monitoring (LM) and community confinement may have unintended consequences on low-risk defendants who currently fall within those zones by ultimately increasing their risks of recidivism through over-supervision and/or placing them in an environment exposing them to criminogenic peers. Any individual subject to the LM requirement is supervised in the community at the equivalent level as a high-risk case (throughout the life of the LM condition). Research in community corrections has clearly established that over-supervising low-risk cases increases the likelihood of supervision failures through either recidivism or technical violations. Additionally, POAG asks that the Commission consider the impact this blanket location monitoring paradigm has on supervision resources—the over-supervision of low-risk cases reduces the amount of time a supervision officer can devote to true high-risk/high-need cases. POAG believes most terms of home detention with LM should not exceed six months, but that exceptions should be made only for certain high-risk cases. The Commission can also explore a step-down approach that provides less restrictive alternatives with sustained compliance.

POAG believes that the rezoning/departure proposal has a justification under the Commission's directive that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." See 28 U.S.C. § 994(j). POAG has struggled to find consensus on how the Commission should define a "first offender" in its current request for comment. On one hand, defining "first offender" as a defendant with no historical criminal justice contact seems far too restrictive to provide meaningful relief to low-risk defendants or incarceration rates. On the other hand, providing application conditions based on the number and severity of prior misdemeanor convictions or the nature and duration of the instant offense will inevitably create application issues that strikes against the Commission's goal to simplify the guidelines. POAG asserts that expanding judicial discretion within the Sentencing Table may be the appropriate way to provide relief to first time offenders, prevent the use of unnecessary alternatives to imprisonment, and provide more flexibility within the guidelines.

Priority #2 – Continuation of its multi-year study of offenses involving MDMA/Ecstasy, THC, synthetic cannabinoids, and synthetic cathinone; amendments to the Guidelines Manual that may be appropriate; and more generally to study possible approaches to simplify the determination of the most closely related substance under Application Note 6 of the Commentary to USSG §2D1.1.

POAG intends to submit its position regarding Priority #2 via a separate submission in response to the Commission's request for public comment due by August 7, 2017.

Priority #3 – Continuation of its work with Congress and other interested parties to implement the recommendations set forth in the Commission's 2016 report to Congress, titled Career Offender Sentencing Enhancements, including its recommendations to revise the career offender directive at 28 U.S.C. § 944(h) to focus on offenders who have committed at least one "crime of violence" and to adopt a uniform definition of "crime of violence" applicable to the guidelines and other recidivist statutory provisions.

POAG strongly encourages the Commission to continue its work to implement the recommendations set forth in its 2016 report to Congress titled Career Offender Sentencing Enhancements. As indicated in the priority, this report recommends the revision of the career offender directive at 28 U.S.C. § 994 to focus on defendants who have committed at least one crime of violence and the adoption of a uniform definition of crime of violence.

The Commission's research has found that defendants who currently qualify as a career offender are receiving lower sentences, including variances below the guideline range, in cases where defendants qualify as a career offender as a result of drug trafficking offenses. POAG members can attest that courts are varying downward from the career offender range in these circumstances as a way to differentiate between defendants who qualify as a career offender based upon drug trafficking offenses from defendants who qualify based upon at least one crime of violence.

Of further concern is the disparate level of analysis required to justify application of predicate convictions. Controlled substance offenses apply with very little difficulty compared to the threshold now required under either the elements clause or the enumerated offense clause for crimes of violence. As a result, it is more likely that defendants whose criminal history consists of drug trafficking offenses will qualify as a career offender and be subject to a higher guideline imprisonment range than defendants who have a history of committing acts of violence. Therefore, POAG supports amending the career offender directive at 28 U.S.C. § 994 to focus on defendants who have committed at least one crime of violence as the research reveals those individuals have a higher recidivism rate and are categorically different than those who have not committed a crime of violence.

Also of concern is the definition of crime of violence and the continued challenges associated with applying the categorical or modified categorical approach. POAG discussed numerous examples of application issues that defy logical conclusions, thus creating disparity among defendants who were convicted of offenses involving violence yet, because of the limitations of the categorical and modified categorical approach, they were not sentenced as a career offender.

In its previous letter to the Commission dated July 22, 2016, POAG discussed the Supreme Courts' interpretation of the enumerated crimes clause under USSG §4B1.2 and the difficulty associated with analyzing the generic definition against the state statutory definition. POAG noted that the outcome of this analysis creates sentencing disparity between defendants who were convicted of offenses involving violent conduct in states with statutes that closely follow the generic definition and those who were convicted of offenses involving the same violent conduct in states with broader statutes than the generic definition. Therefore, POAG agrees that Congress should adopt a single, uniform definition of "crime of violence" for use in the guidelines and statute. POAG suggests the Commission adjust the enumerated crimes clause to create a per se list of offenses for which a conviction is to be considered a crime of violence and disavow the use of the generic definition analysis. POAG further recommends the Commission express that any federal or state statute that shares a title of the offenses in the enumerated list is a crime of violence. It is believed that this approach creates a more simplified, just, and uniform result.

Priority #4 – Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the "safety valve" at 18 U.S.C. § 3553(f), and elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c).

POAG welcomes the Commission's consideration of expanding the "safety valve" and POAG suggests expanding "safety valve" to include defendants in Criminal History Category II with the following exceptions. POAG believes defendants in Criminal History Category II with three criminal history points pursuant to USSG §4A1.1(a), or two of their three criminal history points pursuant to USSG §4A1.1(d), present a greater likelihood of recidivism and should not receive the benefit of the "safety valve."

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 a single district. As each additional 18 U.S.C. § 924(c) conviction carries a 25-year mandatory minimum term of imprisonment that must be served consecutively to any other sentence, eliminating the mandatory stacking will encourage less disparity, promote flexibility, and reserve consecutive sentences for only the most severe of circumstances.

Priority #6 – Implementation of the Bipartisan Budget Act of 2015 and any other crime legislation enacted during the 114th or 115th Congress warranting a Commission response.

No response

Priority #7 – Continuation of its study of the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group and consideration of any amendments to the Guidelines Manual that may be appropriate, including (A) revising how tribal court convictions are addressed in Chapter Four and (B) providing a definition of "court protection order" that would apply throughout the guidelines.

POAG supports these priorities and concurs with TIAG's recommendations for consideration of tribal convictions and the definition of "court protection order." As reflected in POAG's submission dated February 21, 2017, the group recognized that 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. A policy statement under USSG §4A1.3 (Adequacy of Criminal History) may provide options for departures and consideration of criminal history that was not assessed criminal history points under USSG §4A1.2(i). POAG also supports further clarification and definition of "court protection order" under USSG §1B1.1 (Application Instructions) to provide consistency with statutory definitions and guideline application.

Priority #8 – Examination of Chapter Four to study (A) how the guidelines account for prior federal and state convictions resulting from the same criminal conduct under USSG §4A1.2(a)(2); (B) the treatment of convictions for offenses committed prior to age 18; (C) the treatment of revocation sentences under USSG §4A1.2(k); and (D) a possible amendment of USSG §4A1.3 to account for instances in which the time actually served was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

With regard to item (A), POAG discussed that prior federal and state convictions resulting from the same criminal conduct is uncommon. Therefore, POAG recommends that the single sentence rules, which have otherwise been working well, should not be changed in order to account for cases that present such infrequently occurring scenarios.

With regard to item (B), POAG addressed this issue extensively in its February 2017 submission and has since reached a general consensus that offenses committed under the age of 18 should still be considered in criminal history scoring. However, there was significant discussion about the rules governing the applicable timeframe for three-point convictions committed under the age of

18. The current rules allow for a 15-year timeframe under USSG §4A1.2(e)(1) that commences upon release from custody on such a sentence. As such, POAG observed that defendants under the age of 18 occasionally have convictions for predicate crimes of violence and controlled substance offenses that can continue to count into their mid-thirties or longer because of these scoring rules. The decision to prosecute juveniles as adults varies by state, which leads to disparity with regard to the applicable timeframe for the purpose of scoring criminal history points. For instance, a juvenile in one state may receive a juvenile adjudication, which implicates the 5-year applicable timeframe, but a juvenile in another state may be prosecuted as an adult as a matter of practice, which could implicate the 15-year applicable timeframe. While POAG was unable to reach consensus on a specific policy, it recommends the Commission explore the utility of the current rule structure for three-point convictions committed under the age of 18 and consider shortening the applicable time period and/or triggering the window to the date of sentencing rather than the custody release date.

With regard to item (C), POAG members unanimously agreed that there should be no change to the scoring of revocation sentences under USSG §4A1.2(k) and that revocation sentences should continue to be observed as part of the punishment for the original offense. POAG believes that including revocations strike to the heart of a defendant's risk to recidivate. POAG maintains that the impact of scoring multiple revocations is limited based upon the provisions of USSG §4A1.2, comment. (n.11), which directs that, where a revocation applies to multiple sentences, add the term of imprisonment to the sentence that will result in the greatest increase in criminal history points, as opposed to adding it to each sentence.

With regard to item (D), POAG sees no benefit to amending USSG §4A1.3 by adding possible language permitting a downward departure when the sentence imposed is far greater than the sentence actually served, nor does POAG believe providing an example of such an occasion would be helpful to this guideline. POAG believes the current structure and commentary of USSG §4A1.3 allows for courts who wish to consider such a factor in determining whether or not a downward departure is appropriate. POAG is unanimous in their opposition to using "time served" as opposed to "sentence imposed" in Chapter 4 of the guidelines for the reasons noted below.

Obtaining well recorded and valid documentation in determining the time served for a prior conviction is an ongoing concern. POAG members universally experience difficulty obtaining information from state correctional departments regarding time served calculation issues. Records are often compartmentalized within specific facilities at the state, county, and local levels, and they are notoriously difficult to interpret. Some systems are automated and some are memorialized in handwritten notes kept by caseworkers. In the case of multiple undischarged terms of imprisonment running at once, it is often impossible to know what service time is being attributed to specific convictions and dockets.

Even when records are obtained, the reliability of the documents can come into question with no uniform standards or format. Criminal record queries and court documents generally do not include information on entry and exit dates, so the task of determining the period of time a defendant was incarcerated will fall on presentence writers. Unfortunately, not all jurisdictions are managed equally and the ability to obtain this information from local and state facilities can be cumbersome

to near impossible. In seeking correctional records outside of their judicial district, probation officers will be forced to navigate unfamiliar state systems. Further, calculation issues will arise from penal and rehabilitative controls, such as furloughs, work-release, halfway house, and home confinement. Multiple convictions resulting in one term of incarceration will also cause calculation problems. Of equal concern is the fact that a defendant's release date is sometimes determined by external factors, such as prison overcrowding, which is unrelated to the severity of the offense or the defendant's risk to recidivate. Finally, in cases where the sentence imposed is "time served," this practice could be prejudicial to those defendants who served a lengthier sentence simply because of their inability to make bail.

Priority #10 – Resolution of circuit conflicts to resolve conflicting interpretations of the guidelines by the federal courts.

No response.

Priority #11 – Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources, including consideration of whether a defendant's denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of USSG §3E1.1.

POAG discussed whether denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of USSG §3E1.1 as opposed to an elements based approach. The feedback POAG received suggests that, while there is some disparity with regard to the application of acceptance of responsibility, a majority of the districts liberally apply the acceptance of responsibility adjustment, even in cases where defendants object to relevant conduct. However, POAG also recognized that, because of the structure of the commentary of USSG §3E1.1, which directs that a defendant "falsely denies" or "frivolously contests" relevant conduct has acted in a manner inconsistent with acceptance of responsibility, defendants may not pursue valid objections out of concern they will jeopardize their eligibility for an acceptance of responsibility reduction. Therefore, POAG supports further consideration of this issue in order to bring a more consistent application of this guideline, yet provide due process to defendants who have legitimate factual disputes.

POAG members also discussed the interplay between acceptance of responsibility and obstruction of justice at USSG §3C1.1. POAG notes that the obstructive conduct can occur at various times over the course of a case, including pre-arrest, prior to the defendant's guilty plea, or after the defendant's guilty plea. In cases where the obstruction of justice enhancement is warranted, POAG recommends the commentary in USSG §3E1.1, comment. (n.4), be amended to include language to address whether it is relevant if the obstructive conduct occurred pre-plea or post-plea. POAG believes that such an amendment would lessen the risk of automatic denials for acceptance of responsibility in these types of cases and help to clarify the intent of "extraordinary circumstances."

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

Respectfully,

Probation Officers Advisory Group

July 2017