PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

September 28, 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 February 8 and 9, 2017, to discuss and formulate recommendations to the United States Sentencing Commission (USSC). After the meeting, POAG submitted comments relating to issues published for comment dated December 9, 2016. The document was dated February 21, 2017. On August 17, 2017, the USSC released Proposed Amendments to the Sentencing Guidelines (Preliminary). This letter will serve as POAG's official comment to this latest publication, and we look forward to engaging in further discussion on these important amendments.

1. 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 increases for these types of offenses to a total of four levels.

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. 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, a contributing factor to the national system dedicating 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.

4. 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.

6. 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, 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

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