

**PROBATION OFFICERS ADVISORY GROUP  
to the United States Sentencing Commission**

February 3, 2010

The Honorable William K. Sessions III, 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 Sessions,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C. on February 2 and 3, 2010, to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2010.

This session of POAG was more lively than in recent months, likely because of the nature of the issues under discussion, which is a shift from past issues contemplating the harm caused by criminal conduct to greater consideration of an offender's characteristics. Overall, POAG embraces these ideas, but we suggest any change in this new direction be undertaken with caution.

**Alternatives to Incarceration**

The proposed amendment seeks to expand the authority of the Court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria. This is achieved by creating a new guideline, § 5C1.3, which provides the Court with authority under the guidelines to impose a sentence of probation with a requirement that the offender participate in a residential treatment program, rather than a sentence of imprisonment, without regard to the applicable Zone of the Sentencing Table.

After discussing the issues for comment, POAG agreed with the Commission that alternatives to incarceration should be considered and encouraged; however, we believe that this new Guideline does not achieve the intended goals, is too complicated and creates too many issues for interpretation. The problems posed by this amendment discussed by POAG include:

- Certain key terms must be defined, including “residential,” “addicted to a controlled substance” and “licensed, certified, accredited or otherwise approved by the relevant state agency.” Further clarification is also needed to determine who sets the criteria and whether such terms alter how districts contract with treatment providers. It is also unclear who will monitor drug treatment programs and ensure that the program is operated by “well trained, qualified and experienced” professionals who are “experienced in the evaluation and treatment of participants and who follow established ethical and professional standards.”

- The proposed Guideline blurs the line between treatment and punishment making the administration of such programs unnecessarily difficult.
- There is no “day-for-day” equity between treatment programs and punishment (i.e., treatment programs have their own schedules, including a determination of when the offender has successfully completed treatment), which could potentially result in offenders being kept in treatment programs beyond their treatment needs or offenders being released against the advice of treatment providers. Treatment programs have their own criteria and restrictions for program participants (i.e. individuals with prior convictions for sex offenses or violent offenses may not be eligible for placement) which may conflict with the terms of the proposed amendment.
- The proposed Guideline sets criteria which is too narrow and fails to capture those offenders most needing services (i.e., it omits non drug offenders who have a history of drug use and those with higher criminal history categories).
- Further guidance is needed to determine how, if at all, drug treatment commenced prior to sentencing would be credited against treatment ordered under the proposed Guideline.
- Offenders may exaggerate their drug use, drug history or both in order to meet the requirements called for by the proposed Guideline.
- Most importantly, great concern was expressed over who will bear the anticipated increased costs resulting from this proposal.

During our discussion, POAG members agreed that probation officers already seek to identify those defendants requiring special conditions, including drug treatment, and the Courts already have the authority to fashion sentences as envisioned by the proposed amendment. It was also noted that those defendants who are facing lengthy terms of imprisonment are eligible for placement in the BOP’s 500 - hour drug treatment program, which makes them eligible for a reduction in actual time served. We believe that rather than promulgating a new Guideline, the goals of the proposed amendment might be better addressed through adding departure or variance language to Chapter Five, Part K. Nevertheless, since probation officers are already identifying grounds for departures or variances for defendants for whom the guideline range appears to be greater than necessary to achieve the sentencing objectives of 18 U.S.C. § 3553(a), POAG does not believe that a new Guideline is necessary at this time.

The proposal also seeks to expand Zones B and C in the Sentencing Table in Chapter Five. POAG supports this proposal, as it encourages the Court to consider alternative sentences for defendants who would otherwise not be eligible under the Guidelines for non-custodial sentences, absent a variance or departure.

## **Specific Offender Characteristics**

1. Are specific offender characteristics already adequately addressed in the Guidelines Manual? If not, how should the Commission amend the Guidelines Manual to more adequately address specific offender characteristics?

The initial response voiced by many POAG members was one of gratitude for the forum to discuss departures and variances. It is a good time to take an in-depth look at this process and POAG encourages smaller, slower changes.

POAG believes that the Court already has the authority to consider all of the specific offender characteristics highlighted by the Commission through the language of 18 U.S.C. § 3553(a). The highlighted specific offender characteristics are already included in every Presentence Report and therefore are already provided to the Court. However, the language in the statute and the language in the Guidelines appear to conflict as the statute says the Court “shall” consider these factors, but the Guidelines identify them as “not ordinarily relevant.” Therefore, POAG recommends that the Guidelines be amended to clarify that the Court should consider the factors, either alone or in combination, to determine the appropriate sentence for a particular defendant.

2. The Commission requested comment regarding five Specific Offender Characteristics: Age (§ 5H1.1), Mental and Emotional Condition (§ 5H1.3), Physical Condition including drug dependence (§ 5H1.4), Military, Civic, Charitable, or Public Good Works (§ 5H1.11) and Lack of Guidance as a Youth (§ 5H1.12).

POAG believes that the five factors under consideration, as well as the other Specific Offender Characteristics at § 5H, should mirror the language contained in 18 U.S.C. § 3553(a). The current language “not ordinarily relevant” suggests the issue is a discouraged departure while § 3553(a) directs these issues “shall” be considered. We also suggest that it would best serve the sentencing Court if policy guidelines be provided as to how each of the factors impacts the likelihood of recidivism.

In terms of providing guidance to sentencing Courts, POAG believes it would be more helpful to the Courts to have the sentencing statistics gathered by the Sentencing Commission provided on a more frequent basis than the annual Sourcebook of Federal Sentencing Statistics. POAG believes this would be far more helpful to Courts than any attempt to define or limit the circumstances under which specific offender characteristics might be considered. By the very nature of such factors, their relevance will be different in every case.

3. What changes should be made to Chapter Five, Part K?

The discussion period during this POAG meeting was filled with discussion about other proposed amendments; therefore, this issue was not discussed.

#### 4. Collateral Consequences & Cultural Assimilation

The Commission requested comment on when, if at all, the “collateral consequences” of a defendant’s status as a non-citizen may warrant a downward departure and whether, if at all, a departure may be warranted in an illegal re-entry case on the basis of “cultural assimilation.”

After lengthy discussion, POAG decided that perhaps these options should remain open for consideration and should not be restricted. The myriad of facts that could support or oppose such departures would be voluminous and would vary from case to case.

POAG discussed whether either of the departure considerations should be limited to non-violent offenses. With respect to cultural assimilation, some POAG members expressed concern about how many times the departure may be granted as illegal reentry offenses tend to be repetitive with defendants returning to the United States multiple times, thus, such a departure might be over-used. It was also noted that specific offender characteristics which fall under the headings of “collateral consequences” or “cultural assimilation” could be addressed through the use of U.S.S.G. §§5K2.0 and 4A1.3.

#### **Application Instructions**

POAG supports the proposed changes to § 1B1.1 which adopts a three-step process to determine an appropriate sentence. The proposed amendment will provide clarity, as it structures § 1B1.1 to (a) apply the provisions in the manual to properly determine the kinds of sentences and the Guideline range; (b) address the need to consider the policy statements and commentary to determine whether a departure is warranted; and (c) address the need to consider the applicable factors under 18 U.S.C. § 3553(a) to determine the appropriate sentence. POAG also supports defining the terms “departure” and “variance” as stated in the commentary.

#### **Recency**

The Group discussed the proposed Recency Amendment. Although the Group recognized the Commission’s concerns, the consensus was that no changes should be made to § 4A1.1(e). This adjustment measures a different factor than does § 4A1.1(d) and could be important in predicting recidivism. Sentencing Commission statistics demonstrate that the elimination of § 4A1.1(e) would not impact the Criminal History Category for two-thirds of the cases. The Group believes that § 4A1.1(d) and (e) should be applied to all offenses.

Should the Commission decide to amend § 4A1.1(e), POAG recommends, for ease of application, that the Commission adopt Option 2 for all offenses, without limiting such application to specific offenses. This option still allows the Court to consider recency when a defendant is not under a criminal justice sentence.

## **Hate Crimes**

POAG reviewed the proposed amendment referencing violations of 18 U.S.C. § 249 (Hate Crime Acts) to § 2H1.1 (Offenses Involving Individual Rights), as well as referencing violation of 18 U.S.C. § 1389 (Prohibition on Attacks on U.S. Servicemen on Account of Service) to § 2A2.2 (Aggravated Assault), § 2A2.3 (Minor Assault), and § 2B1.1 (Theft, Property Destruction and Fraud). In addition, the amendment responds to directives to amend § 3A1.1(a) to include crimes motivated by actual or perceived “gender identity” and makes conforming changes to § 2H1.1 and § 3A1.1. The amendment notes it is anticipated that the official victim adjustment in § 3A1.2 (Official Victim) would apply in such a case.

POAG supports the proposed changes set forth in the amendment and believes the referenced guidelines appropriately address the new violations created at 18 U.S.C. §§ 249 and 1389.

## **Organizational Guidelines**

POAG agrees that § 8C2.5(f)(3) should be amended to provide the benefit from a three-level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct.

POAG supports the proposed probation conditions which include an independent corporate monitor or expert employed by the Court to monitor the effective compliance program approved by the Court. Some Group members expressed concern that without an independent corporate monitor or expert employed by the Court, probation officers might be limited in their abilities to determine whether or not an ethics program is effective.

## **Miscellaneous**

POAG reviewed the proposed Miscellaneous Amendments. The Group agreed the changes are clear, easily understood, and appropriately address the issues at hand.

## **Technical Amendments**

POAG reviewed the proposed Technical Amendments and agreed the changes are clear, easily understood, and appropriately address the issues at hand.

POAG recommends two additional Technical Amendments:

- First, as referenced in our July 2009 position paper, POAG members note a needed correction at § 2K2.1, Application Note 10, removing references to § 4A1.2, comment (n. 3). (This note discussed related sentences which is a concept deleted from the Guidelines and replaced with the single sentence concept.)

- Second, POAG recommends the example of the Structure of the Guidelines under § 1B1.6 be expanded to include the subsection, paragraph, and subparagraph, etc.

In closing, POAG appreciates the opportunity to express its concerns and the willingness of the Commission to work with POAG to provide input into the issues the Commission has raised. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Sincerely,

Probation Officers Advisory Group  
February 2010