PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

United States Sentencing Commission
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Criminal History Testimony
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Part A: Status Points Under USSG §4A1.1

POAG did not reach a consensus with respect to Part A of the proposed amendment pertaining to "status" points provided in subsection (d) of §4A1.1 (Criminal History Category). A slight plurality of POAG supported Option 3, eliminating "status" points, based on the statistics related to the risk of recidivism, including from a recent study completed by the Commission (Revisiting Status Points, June 2022), which found that "status" points only minimally improve the criminal history score's prediction of re-arrest – by .2 percent. Those supporting elimination of "status" points also cited the fact that the underlying conviction for which the defendant was under a criminal justice sentence would score criminal history points under USSG §4A1.1(a) through (c). In the event that a criminal justice sentence was revoked prior to sentencing for the instant federal offense, the term imposed upon revocation would also contribute to the number of points assessed under USSG §4A1.1(a) through (c). Further, there are instances where the criminal justice sentence is revoked and the sentence imposed exceeded 13 months. In those instances, defendants receive three criminal history points under USSG §4A1.1(a) for the underlying offense, as well as two criminal history points for being under a criminal justice sentence under USSG §4A1.1(d), for a total of five criminal history points and a Criminal History Category of III based upon just one conviction.

Those in favor of Option 3 also noted that this option functioned to streamline the guidelines where possible and reasonable. They articulated that, in some jurisdictions, determining whether someone is, in fact "under a criminal justice sentence" proves challenging, based on the variety of sentences that must be considered (e.g., deferred adjudication, conditional discharge, a prison sentence that has been stayed, unsupervised probation).

The POAG members that were in favor of Option 1 or Option 2 shared a common concern that, while recidivism considerations are important, that is not the only reason for "status" based increases

to criminal history. POAG observed that, if a defendant committed the instant offense while under a criminal justice sentence, judges consider the defendant's actions in terms of seriousness of the offense and as a metric for that defendant's respect for the law. The inclusion of "status" points or a "status" point creates some structure of inclusion of these considerations within the guidelines rather than leaving it to a within guideline range consideration, departure, or variance.

As noted, a significant contingency of POAG supported Option 2, which would reduce, but not eliminate, "status" points, recognizing the minimal impact on prediction of re-arrest, but also noting that, of the offenders who received "status" points over the last five years, 61.5 percent had a higher Criminal History Category as a result of those points. The POAG members who supported Option 2 did not think that the "status" points need to have as much weight as they currently have in order to appropriately reflect the other sentencing factors.

Another contingency supported Option 1, which would leave USSG §4A1.1(d) as written but add a downward departure provision in Application Note 4 of the Commentary to §4A1.1 for cases in which "status" points are applied. This contingency expressed that the current structure is working well to effectively capture the seriousness of the offense and the need to promote respect for the law.

Also, with respect to Options 1, while POAG supported adding departure language in the commentary, POAG did agree that the addition was likely unnecessary, as existing language in USSG §4A1.3 provides an applicable departure structure for criminal history overrepresentations.

With respect to the additional issues for comment, POAG did not support predicating the elimination or reduction of "status" points on the nature of the underlying prior offense, noting the significant difficulties presented with trying to compare and reconcile a myriad of state offenses, difficulties the system has already encountered in defining what offenses amount to "crimes of violence." Similarly, given the varied nature of state court dispositions, it would be challenging to delineate points based on what type of "criminal justice sentence" a defendant is under. Additionally, the type of "criminal justice sentence" the defendant is under does not really diminish the concerns of seriousness of an offense committed while under a judicial sentence or the lack of respect for the law associated with such conduct.

Part B: Zero Point Offenders

While the idea of conferring a benefit to those offenders who pose the lowest risk of recidivism was generally agreed upon, POAG was unable to reach a consensus with respect to this determination given the complexity of this two-pronged amendment, application concerns, the need to simplify guideline applications, and the potential disparate benefit of this reduction to a narrow class of offenders.

This proposed amendment requires a two-step analysis before eligibility for the one or two-point reduction could be accurately assessed. For example, if Option 1 was adopted, the first step would be to compute the criminal history to determine if the defendant had zero criminal history points, the scoring of which are determined first by the timeframe and the parameters of relevant conduct. If that criterion was met, the second step would be to determine if the offense of conviction and applicable guideline computations meet the stated criteria. Essentially, it operates to first seek to

define "zero-point offender" and then narrow that pool of eligible defendants.

POAG did discuss the fact that either Option 1 or Option 2 would tie one's criminal history to the offense level calculation in such a way as to make determination of one's offense level reliant upon calculation of criminal history in every case, whereas the current structure only has reliance like that on limited circumstance such as drug, firearm, and immigration cases. Practically speaking, it would mean that neither part of the presentence investigation report could be completed independently of the other, making the process of preparing and revising the presentence reports more complicated. Further, because this proposed amendment intertwines Chapters Two, Three, and Four, a court finding in one area at the time of sentencing will impact "zero-point offender" eligibility.

One concern raised by POAG about either of the proposed options was that offenders who fall into these categories may have numerous pending charges, which might suggest that they are, in fact, at higher risk of recidivism than reflected by their criminal history score or lack of prior convictions, and that those offenders may not be the type of offender contemplated by the amendment. Another complication discussed was whether litigation would ensue regarding various types of juvenile adjudications and if they would be considered "convictions."

Of further significant concern was that, for certain types of serious offenses, such as certain sex offenses and significant financial schemes, lack of prior criminal history may not merit "zero-point offender" consideration given that their status gave them access or ability to commit the instant federal offense. Further, if USSG §4C1.1(b)(4) related to victims suffering substantial financial hardship was intended to limit eligibility for defendants who commits financial schemes for that reason, its limited function would not be significant as serious financial crimes are committed in instances where the financial hardship criterion is not applied. It actually measures the impact on the victim or victims rather than the severity of the offense. As another example, the Commission is looking to amend the guidelines in relation to the new legislation set forth under 18 U.S.C. § 2243(c) for Sexual Abuse of an Individual in Federal Custody, and POAG noted that the vast majority of the defendant's committing those offenses will have had no prior convictions based on the background checks required to obtain those positions, though those individuals could potentially receive a benefit from this structure of guideline reduction (unless this conviction is ultimately included as a covered sex crime and that option also included in the §4C1.1 criteria). Sex offenses and financial schemes also ordinarily have identifiable victims. This amendment primarily focuses on recidivism, but the sentencing options of deterrence, retribution, and rehabilitation are also relevant considerations.

Alternatively, POAG was unanimously in favor of expanding Zone A (or merging Zones A and B) to provide alternatives to incarceration/non-custodial guideline sentences for more low-risk offenders, rather than creating a new guideline structure for "zero-point offenders." Further, POAG notes that the Commission is seeking comment on Alternatives to Incarceration Programs. POAG believes alternatives to incarceration could potentially be the vehicle used to address the types of offenders the "zero-point offender" amendment is intending to capture without the numerous application issues and litigation concerns.

Nonetheless, in the event this proposed amendment is adopted, the majority of POAG preferred Option 1, with one suggested expansion of the criteria. Most of POAG believed that an offender who has no convictions, aside from convictions for very minor offenses (those that do not receive criminal

history points, under USSG §4A1.2(c)), should be deemed a "zero-point offender." With respect to an expanded Option 1, it was noted that 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, under Option 1, a defendant's punishment for these minor offenses in some jurisdictions may result in a "conviction," such that the defendant would be precluded from the adjustment. This is an outcome that POAG thought should be avoided. POAG observes that the guidelines already have a mechanism under USSG §4A1.2(c) for identifying these minor infractions or misdemeanors, and the reference to that section provides an easy path to excluding them from "conviction" consideration. POAG also 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 and resulting in them being precluded from the adjustment.

POAG also observed that many of the criteria involved in the proposed USSG §4C1.1, specifically, reduced criminal history, no firearm or violence, and no aggravating role, are similar to those involved in guideline safety valve considerations. For those cases that benefit from guideline safety valve, they could further benefit from this reduction for much of the same criteria.

With respect to Option 1, POAG members did believe that the proposed USSG §4C1.1(a)(2)-(6) should be tied to other guideline determinations where possible. For instance, for USSG §4C1.1(a)(4), replace "the defendant's acts or omissions did not result in substantial financial hardship…" with "the defendant did not receive an adjustment under USSG §2B1.1(b)(2)(A)(iii), (b)(2)(B), or (b)(2)(C)."

Along those same lines, POAG recommends the reference to USSG §4C1.1(a)(5) regarding "the defendant was not an organizer, leader, manager..." be replaced with "the defendant did not receive an aggravating role adjustment under USSG §3B1.1." This would result in less duplication throughout the presentence investigation report, in terms of justification and analysis.

POAG was not in favor of Option 2, which would make the adjustment applicable to all offenders who had no countable convictions, noting that many such persons may have lengthy criminal records and/or may have had serious prior offenses that are simply "stale," distinguishing them from the archetypal "first offender."

Also, with respect to Options 1 and 2, POAG supported adding departure language in the commentary and recommends that the addition should be made with the language "may be appropriate."

With respect to additional issues for comment, POAG was reluctant to support any amendment that would require analysis of what amounts to "not an otherwise serious offense," given the significant challenges the system has faced with the similar analysis of what makes an offense a "crime of violence."

Part C: Impact of Simple Possession of Marihuana Offenses

POAG does not believe guidance is necessary for determining whether a downward departure is

appropriate for defendants who receive criminal history points for simple marijuana possession offenses. POAG noted that the possession of marijuana has not been legalized federally and that state laws pertaining to marijuana vary greatly and are continually evolving, such that these measures may create greater sentencing disparities. Additionally, judges can already accomplish this through a departure under USSG §4A1.3. Therefore, POAG does not recommend the adoption of the proposed amendment or the adoption of alternative language on this issue.