

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

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The Honorable Carlton W. Reeves
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (USSC) regarding the proposed amendments issued on December 26, 2023

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Proposed Amendment No. 2: Youthful Individuals

Part A: POAG appreciates the Commission’s efforts to examine the juvenile court systems and sentencing of youthful offenders. POAG wrote extensively regarding the application of criminal history scoring as it relates to juvenile offenders during [July 2017](#), [February 2017](#), and [July 2023](#), which are linked and incorporated by reference.

As it was discussed both within the proposed amendment and as part of POAG’s prior written submissions, there is a wide variation in how jurisdictions handle the prosecution and ultimate sentences of these types of cases. These differences may start with an age standard for who is a juvenile offender. In the prosecution of these cases, the offense charged for a juvenile offender may differ from what the charge would be in one jurisdiction versus another. POAG notes that, particularly with juvenile offenses, there are significant variations in how each state handles the prosecution and the type of sentence imposed, including even a variation in the age standard for who is a juvenile offender.

Another ongoing and prominent concern is the inability to obtain supporting documentation of the conviction. Probation officers across the nation expressed varying practices among their districts. A very small minority of districts reported they have access to juvenile record systems, while the majority of districts, even in the age of digitized records, are still faced with difficulty in obtaining the necessary documents in order to properly score the adjudication. The only consistency related to juvenile records reported by probation officers was that there is a consistent pattern of varying levels of access to records between counties, jurisdictions, states, and even judicial officials. Further, in some instances, the defendant's Records of Arrests and Prosecutions (RAP sheet) does not reflect juvenile history and local reports also do not contain juvenile history information. In other districts, the records may be sealed or destroyed or require additional processes, such as a signed release of information or a subpoena, to obtain the necessary information. Further, probation officers may only learn about the juvenile history during the presentence interview, when the defendant discusses social history and mentions residing at a community placement facility or being under some term of supervision as a juvenile. Other ways probation officers may learn about defendants' juvenile history is by examining prior adult criminal records that reflect involvement in the juvenile system.

This challenge leads to a disparity in how a juvenile offender's criminal history is captured and eventually scored. POAG recognizes though, that when juvenile records are obtained, those records provide valuable information that may go beyond the defendant's criminal history. For instance, the records may provide more insight into the defendant's history and characteristics and provide details regarding the defendant's upbringing, educational history, substance abuse history, and mental health history. POAG is concerned that excluding juvenile history information may result in a greater difficulty in obtaining beneficial documents from custodians of the records, especially if these prior convictions are deemed less relevant if they are no longer scorable offenses.

POAG also expressed concern that the guidelines do not provide guidance for what meets the definition of "a juvenile sentence to confinement," in USSG §4A1.2(d)(2)(A). What is considered "confinement" is inconsistent among districts and differs from the meaning of "confinement" in adult cases. For example, in the Fourth Circuit, a suspended sentence conditioned on commitment to a youthful offender center constituted confinement. *See U.S. v. Adams*, 988 F.2d 493 (4th Cir. 1993). In the Sixth and Eighth Circuits, a juvenile sentence is a "sentence to confinement" if the juvenile was not free to leave. *See U.S. v. Hanley*, 906 F.2d 1116 (6th Cir. 1990) and *U.S. v. Stewart*, 643 F.3d 259 (8th Cir. 2011). In the Ninth Circuit, the appropriate inquiry "is not whether juvenile hall is equivalent to prison." *See U.S. v. Williams*, 891 F.2d 212 (9th Cir. 1989). Further, in the Tenth Circuit, custody to the Department of Human Services, which is primarily a secure facility, and a sentence to a federal institution for drug treatment were considered "confinement." *See U.S. v. Wilson*, 41 F.3d 1403 (10th Cir. 1994); *U.S. v. Vanderlaan*, 921 F.2d 257 (10th Cir. 1990).

The issue of confinement provides a second layer of complexity in the scoring of juvenile adjudications. The above case law summary illustrates the confinement issue, but before the case law can even be applied, the first step is determining if the defendant has a prior juvenile conviction and then determine if the records are available to even discern if the defendant was placed in a facility. Second, there are numerous types of juvenile placements in every jurisdiction. The case

law cannot be applied until information regarding each facility and its level of security has been obtained and assessed. Juvenile placements vary in their level of security, but they also vary in purpose. POAG also recognized that procedures and decisions regarding placement in rehabilitation programs, supervision, and confinement vary among jurisdictions. Juvenile offenders present with issues that are not common when compared to adult offenders. Their issues at that time in their life may very well be related to the product of the environment of where they are raised, whether or not it is a safe place, and whether it fosters education and rehabilitation. At times, juvenile offenders are placed in facilities in order to protect the public, but at other times the placement can be to protect the juvenile at a time in their life when they need the structure and stability of a residential facility. As such, the purpose of some of these facilities may be more focused on rehabilitation rather than punishment. Regardless, each and every placement needs assessment regarding its level of confinement in order to determine the scoring of that prior conviction.

Moreover, probation officers experience difficulty obtaining information from state correctional departments and similar facilities to determine when a defendant is last released from “confinement.” Criminal record queries and court documents generally do not include information on entry and exit dates, so determining the period of time a defendant was under a term of confinement is not easily obtained or always formally documented when compared to adult institutional placements. POAG unanimously agreed that eliminating the term “juvenile sentence to confinement,” as well as focusing on the date a juvenile sentence was imposed rather than when the defendant was last released from confinement, will create more consistency with guideline application.

Further, POAG observes that the data suggests the weight of juvenile adjudications is already limited and impacts less than 2% of cases sentenced. For instance, during fiscal year 2022, there were 60,878 sentenced individuals. Specifically, 40,234 of those individuals received criminal history points, and of those, 940 individuals received at least one juvenile adjudication point. Notwithstanding that statistical observation, POAG maintains the issue of juvenile history scoring remains important in relation to the impacted cases. Further, while POAG members also shared a common concern that recidivism considerations were important, they are more concerning in instances where the conduct is assaultive or violent. The USSC public data document reflects that a significant portion of the scorable juvenile offenses were for larceny, property, public order, and fraud, namely nonviolent offenses (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf). The seriousness of the prior convictions are already likely considerations the Court balances in determining the sentence that should be imposed, regardless if the prior conviction was assessed with criminal history points. As such, POAG recommends that the process of scoring juvenile adjudications not be made unduly complicated by scoring only certain types of juvenile offenses, specifically those that are deemed more serious. POAG believes that certain prior offenses are serious enough that jurisdiction may be transferred to adult court.

With regard to the options available under Part A, POAG was unable to reach a consensus with respect to the proposed amendment which addresses juvenile sentences and sentences for offenses committed prior to age eighteen for purposes of Chapter Four, Part A (Criminal History). POAG was divided between supporting Option 1, which would result in all scored juvenile adjudications

receiving one point, and Option 2, which would exclude all juvenile sentences. POAG was unanimously opposed to Option 3, which would exclude all offenses committed prior to age 18, even if the defendant was convicted as an adult.

Those who advocate for Option 2, which excludes all juvenile sentences from garnering criminal history points, note that this option helps resolve most of the identified concerns, including the disparity in obtaining records, the disparity regarding how states handle the prosecution of juvenile offenders, and application issues related to the term “confinement.” For instance, a defendant may have received juvenile adjudications in one county where records are easily available, but a defendant in a neighboring county who received the same juvenile adjudication may not have available records. When relying on the records to determine the criminal history score, this invites some disparity into the process. Those in favor of Option 2 believe that by adopting this option, it would allow for more uniform accountability as it relates to juvenile offenses.

Similarly, the POAG members who support Option 2 express that there are various factors that influence the transfer of a case from juvenile court to adult court. The decision to prosecute an individual in adult court who commits a crime prior to age 18 typically rests on the seriousness of the crime. Those in favor of this option believe that a level of accountability would still be considered for the serious offenses that are ultimately prosecuted as adult convictions.

Those opposed to Option 2 noted their concern that excluding all juvenile sentences does not hold defendants accountable for past criminal behavior, which is important to understanding the risk of recidivism and distinguishing defendants who have prior juvenile convictions from those who did not sustain any juvenile convictions. While the Court could depart or vary upward based on inadequacy of criminal history, in practice, above range sentences are rarely imposed, but they may become more common in the event this amendment is adopted. POAG did agree that additional departure language was likely unnecessary, as the existing language in USSG §4A1.3 provides an applicable departure structure for inadequacy of criminal history. POAG was also concerned with limiting considerations of such departures to certain offenses, noting the significant difficulties the system has already encountered in defining what offenses amount to “crimes of violence” and “controlled substance offense.”

Those in favor of Option 1, which would score all juvenile adjudications with one point, note that this option reduces the impact of juvenile adjudications but also holds the defendant accountable for their recent criminal conduct. POAG observed that Option 1 limits the sentences to those adjudications imposed within five years and does not expand the time period to defendants released within five years of the commencement of the instant offense. Option 1 also resolves issues regarding defining “confinement,” as detailed above. Those in favor of Option 1 note that the inclusion of juvenile adjudications imposed within five years of the commencement of the instant offense creates some structure within the guidelines rather than leaving it to a within guideline range consideration, departure, or variance. Those opposed to Option 1 note that this option still does not resolve the disparity in obtaining records and concerns regarding how differently states handle the prosecution and ultimate sentences. One suggestion made during the discussion of this issue was to place a cap on the number of points that a defendant could receive from juvenile offenses; similar and in conjunction with the criminal history point maximum of four points that can be received from USSG 4A1.1(c).

With regard to Option 3, where offenses committed prior to age 18 do not receive points, POAG reached a general consensus that offenses committed under the age of 18 should still be considered in criminal history scoring if the defendant was charged and convicted as an adult. POAG recognizes that the decision to prosecute juveniles as adults varies by jurisdiction, which leads to disparity with regard to the applicable scoring criminal history points. However, POAG discussed that Option 3 does not appear to capture the seriousness of the defendant's prior conduct because it is likely that a youthful individual faces charges in an adult court due to the seriousness of the charge. Option 3 could create further disparity because those with more serious juvenile offenses are not held accountable for aggravating criminal behavior. For instance, if a defendant commits a murder at age 17, and is charged as an adult, the defendant would not be assessed criminal history points. However, a defendant who commits a drug possession offense at age 17 and charged in juvenile court would also not be assessed criminal history points. Under Option 3, these two offenses would be viewed similarly and would not garner criminal history points. The defendant with a more aggravating criminal history would not be held responsible for their criminal past under the guidelines if Option 3 was adopted. This would lead to a lack of uniformity, as courts would need to make a determination if the defendant's criminal past warrants a within guideline range sentence, departure, or variance.

POAG also highlights that the proposed amendment may impact a defendant's credit and/or placement in the Federal Bureau of Prisons (BOP). While the guidelines only consider the defendant's Criminal History Category for advisory sentencing range purposes, the BOP considers the sentenced individuals' criminal history points when making placement and credit determinations. Another potential implication related to both Options 2 and 3 is that defendants with prior criminal records could become eligible for the zero-point offender reduction under USSG §4C1.1.

Part B: The Commission also seeks comment on the proposal to amend §5H1.1 (Age (Policy Statement)) as it concerns youthful individuals. POAG is in favor of the changes proposed by the Commission as it relates to this departure, except for the latter portion of the amendment to this section. Specifically, POAG is concerned with including the proposed language, which reads as follows: “[...] In determining whether a departure based on youth is warranted and the extent of such departure, the court shall consider the following: (1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision-making, and resistance to peer pressure, is generally not developed until the mid-20s; and (2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals.”

POAG believes that the guidelines may not be the most appropriate place to include such specificity about research and statistics, especially given that scientific studies and research are analyzed on an ongoing basis. Also, for the sake of consistency, no other section in the guidelines mentions specific research studies to support a departure from the guidelines. POAG acknowledges, however, that certain changes to the guidelines were likely impacted by, among other things, research, recidivism rates, new and/or updated laws, and directives. Therefore, while POAG appreciates the Commission's focus on the impact of youthful individuals and §5H1.1 (Age (Policy Statement)), POAG believes that the language and proposed changes that precedes the above-referenced section properly captures the significant message that a departure may be

considered during the sentencing of youthful individuals. This would include varied sentencing options and punishment other than imprisonment, which may be appropriate for certain youthful individuals. Therefore, POAG respectfully does not believe that the above cited section should be included as part of the amendments to the guidelines.

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In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
February 2024