

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. 5: Miscellaneous

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Part E: The proposed amendment to USSG §2D1.1(a)(1)-(4) is intended to resolve questions regarding how the base offense level is intended to function, specifically whether the defendant should receive the base offense level if the enhanced penalty provisions of 21 U.S.C. §§ 841 or 960 apply or whether the base offense level should apply to a defendant regardless of whether the defendant was in fact convicted under the enhanced penalty provision. In both of the options proposed, the Commission has included a clause within USSG §2D1.1(a)(1)(A) and (B) triggered by the filing of a notice of enhanced penalties based on prior convictions under 21 U.S.C. § 851.

POAG overwhelmingly supports the adoption of the Option 2 amendment. POAG has observed that the current language of “the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance,” which would change to “subject to a statutorily enhanced sentence under 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance” under Option 1, has caused some rather erroneous results that don’t fully incorporate the criminal conduct it is intended to capture. For instance, defendants who have distributed drugs that have caused death or serious bodily injury are frequently only accountable for a very small quantity of drugs. Additionally, in many instances

and for a variety of reasons, the prosecution does not want them to be statutorily bound to a higher sentence, but they still want them held accountable for the death or serious bodily injury that they have caused. If the defendant is charged with an offense that involves death or serious bodily injury and has a correspondingly higher statutory minimum, then the Judge is bound to a higher sentence and much of the mitigating factors are outside the ability to have an impact on the sentence. If, however, the defendant is not charged with the death or serious bodily injury component, then the guidelines remain based on quantity (frequently only the extremely small quantity that is connected with the death or serious bodily injury) without any specific offense characteristic or guideline method of capturing the harm the defendant's conduct has had on others. The difference can be as profound as the difference between a total offense level in the mid to low 30s and a total offense level that is in the mid to low teens, resulting in a difference in many years between these guideline ranges. While Judges can vary up or down in instances where they are not bound by a statutory maximum or minimum, they frequently and appropriately rely on the guidelines to provide a semblance of an appropriate outcome based on the various aggravating and mitigating factors. Without the guidance of that calculation, the outcomes in these cases can be quite disparate from each other. When the outcome of the base offense level is based directly on the statutory penalty without a relevant conduct method of capturing the significant aggravating factor that produced that higher statutory penalty, it will inevitably cause an odd outcome in the guideline range. Under the current method and the proposed Option 1, there is no method to capture the causation of death or serious bodily injury through relevant conduct. By allowing for relevant conduct to be the basis for the base offense level, USSG §2D1.1(a) will function better at capturing actual harms and mesh more consistently with the standards used in other guideline considerations. In most instances, the determination about whether a cause of death was related to the substance the defendant was distributing is as easy a determination as any other guideline consideration. When it is unclear whether the substance the defendant distributed was the "but for" cause of death, the base offense level would not be increased. While it would be a more frequent application under a relevant conduct approach, it would at least provide a method for capturing the harm caused by the defendant, even if there are other mitigating factors that later reduce the sentence.

While USSG §1B1.2(a) provides for a work around on this issue, it is complicated to execute, infrequently used, and often it seems a bit misunderstood by practitioners. The more methods that operate to add and then remove accountability for something, the more likely these methods will create disparities as different circuits interpret these areas of give and take in different ways. If the accountability for causing serious bodily injury or death is made a relevant conduct consideration, the degree of accountability can also then be mitigated within the normal sentencing paradigm.

POAG unanimously supports the inclusion of the 21 U.S.C. § 851 filing and enhancement as a metric under USSG §2D1.1(a)(1)(A) and (B). The current language of "one or more prior convictions for a similar offense" caused some confusion in its application. The proposed amendment clarifies the intent of how this standard should be achieved. POAG discussed that 851 filings are sometimes used as leverage in plea negotiations, which is a function that will occur with or without this amendment. However, POAG also observed that this amendment could potentially incentivize the filling of the 851 enhancements given that they would become imperative to the guideline application.

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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