

March 22, 2000 through March 23, 2000 meeting of the Probation Officer Advisory Group to the United States Sentencing Commission

Probation Officer Advisory Group Members in Attendance: Chair Ellen Moore (11th Circuit), Vice Chair Joseph J. Napurano (3rd Circuit), Cathy Battistelli (1st Circuit), Matthew Rowland (2nd Circuit), Blake Brown (4th Circuit), Pat W. Hoffmann (5th Circuit), Willie Leday (5th Circuit), Phelps Jones (6th Circuit), Kathie L. Sylvester (7th Circuit), J. Craig Saigh (8th Circuit), Sue Sorum (9th Circuit), Debra J. Marshall (10th Circuit), Raymond F. Owens (11th Circuit), Susanna Seto Pike (DC Circuit).

March 22, 2000

Tim McGrath Staff Director

Welcome to the Commission. McGrath was recently hired as staff director after serving in an acting capacity for about a year and a half. He described the focus of the newly assembled Sentencing Commission. According to Staff Director McGrath, the Commission has the strong leadership of Diana Murphy.

Sharon Hennegan Director of the Office of Education and Sentencing Practice.

Sharon focused on the goals of the POAG meetings. She related that she does not want us to focus on rewriting the language of proposed amendment. She would like for the group to focus on what will work versus what will not work in the application of the proposed language and to choose the option that appears most viable.

Andv Purdv and Jenneine Gabriel Economics Crime Group (Identity Theft Cases & Cellular Telephone Cloning .)

Identity Theft Offenses: Option 1 The group recommended that the commission add a higher level of culpability when identifying instruments or means are created with the victim(s) identifiers as this reflects the greater seriousness of the harm by offenders who market these types of identifying instruments. The language is intended to cover identity theft cases. The foundation for proposed provisions are statutory in nature. Means of identification refers to any identifiers like name, social security numbers, date of birth, retinal print, PIN numbers, etc. which are used to take over someone's identity to use their credit for pecuniary or other gain. Theft of a credit card and forging a name on a document would not qualify as an identity theft crime. Possession of five or more instruments would result in an two level upward adjustment to reflect the seriousness of those types of offenses.

The staff asked about cellular phones and identity theft issues. Option 3 targets the issues. In Option 3 you have to make a decision about the amount of damage to the credit of the victim.

**Is a 25% greater penalty for identity theft reasonable.

The proposed Option 3 raises the minimum loss amount for thefts involving cloned phones or stolen accounts numbers and other unauthorized or counterfeit access devices. The proposed amendments would set a minimum amount of loss per account. In cases where the loss cannot be determined, this would provide a minimum loss to set the offense level. Should the commentary include some basic, common sense examples which illustrate the types of cases in which the guideline would be applied?

**The staff requested input in the general concepts which should be included in the final draft. General comments are requested. Should they provide a bump if someone used a cloned phone in relation to another crime? What types of cases might involve such a bump like drug cases (where DEA says that 80% of the drug cases involve the seizure of cloned phones.) which would add on 25% or just other types of crimes like fraud or other illegal operations.

The statute covering identity theft is written so broadly that it includes credit card theft. The staff was trying to carve out the parts of the statute that Congress intended to have implemented. This would include the more egregious conduct which includes a real loss to victims, their credit, or their reputation which goes beyond a simply monetary loss for the use of the stolen credit card.

POAG Discussion: It is difficult to determine the extent of the impact on a victim's economic, credit, and personal standing. Consequential damages and personal damages are quite often difficult to determine. It would be difficult to assign a monetary value to unused pairs and credit card numbers. It might be more meaningful to use increase in levels in if a subject is in the business of selling cloning phones. (Option 1)

Louis Reedt, Director of the Office of Policy Analysis, Offenses relating to methamphetamine.

The 1998 Act where Congress changed the penalties of methamphetamine and mixture and substance containing methamphetamine. The Commission proposed two options. Option 1 is the easy fix. Option 2 removes the methamphetamine actual consideration and introduces a presumptive purity for methamphetamine mixture.

P2P is used in the production of methamphetamine. P2P had the same level as meth mixture. Should the commission work on the P2P precursor chemical to increase penalties consistent with the increase in the offense levels for methamphetamine mandated by the Act?

There was discussion about whether purity is available in all cases. Purity is not available in most cases that we encounter in the field and methamphetamine (actual) cannot be considered when qualitative analysis is not available. The framers of the language in Option 2 were under the assumption that qualitative analysis was available in the field. Option 2 might increase the sentences for methamphetamine offenders who deal in low purity cases in the event that a high percentage of presumptive purity.

The group needs to discuss and recommend which option would be most optimum.

Diana E. Murphy, Chair of the U.S. Sentencing Commission

Met briefly with the POAG to welcome the group and encourage the group. She related that she looks forward to consideration of our response to the proposed amendments

Kenneth Cohen, Director of Legislative Affairs, No Electronic Theft Act

Congress enacted the NET Act in 1997 to cover copyright offenses which occur the internet. Criminalized copyright infringement over the internet was mentioned. There are Congressional directives to the Sentencing Commission's intellectual property guidelines which include the following: 1) the guidelines should be stringent in order to deter others 2) there should be a consideration of the value of the legitimate (infringed upon) item.

Counterfeit trademark items like sweatshirts, purses, watches, etc...are factored at the retail sale value and not the street value of the item (infringing item).

Option 3: Used infringed value and tried to address types of cases where the infringed value may be a better estimation of harm than the infringed upon item. Option 3 supplies a retail value when the value of the infringing items is almost equivalent to the infringed upon item. Option 3 includes a provision for consideration of the retail value when the value of the infringing item is within 75% of the infringed item. Use the infringed value when the offense involves satellite transmissions and receiving. The value of the infringing value is difficult or impossible to determine. Pecuniary harm may be difficult in trademark infringement case.

Option 4: Is a little more straight forward with respect to pecuniary harm. Uses a two level downward adjustment based on the lesser penalty given by Congress for this type of offense. A consideration is given when the infringing item has a considerably less value than the infringed upon item. Upward departure provisions and downward departure provisions.

**Would like to know which is most clear and easiest to apply? Is Option 3 manageable at all? There is a proposed increase of two levels in the base offense level which reflects the two levels which is part of the more than minimal planning (MTMP) upward adjustment that is most often evident fraud cases.

Pamela Montgomery, Deputy General Counsel, Sexual Predators Act & Circuit Conflicts

Circuit Conflicts: Downward departure for Aberrant Behavior - recommended to be removed from Chapter 1 and move it over to where it is more appropriate in Chapter 5. The departure is recommended not to apply to cases which involve several defined factors as listed . "Totality of circumstances" used in the 9th Circuit is not used nationwide. Option 3 adopts the majority view which is the narrower view.

Drug Sales and protected location. Some district court judges have been applying the enhancement under Section 2D 1.2 (Offenses Involving Protected Locations) even when the defendant was not convicted of the statute involving distribution in a protected location. The

proposed amendment provides for changes in Chapter 1 to more clearly give direction in how to apply the guidelines and what factors are prohibited. Changes are also recommended in Chapter 2 to make it clear that a conviction is required to apply the adjustments in Section 2D1.2.

Violation of judicial order in bankruptcy fraud cases. (2F1. 1) What is proposed Option 1 amends the application note. The current guideline does include the bankruptcy provision. Option 2 adds a provision to the guideline which says that a material misrepresentation or other fraudulent action during the course of a bankruptcy proceeding would result in a two level upward adjustment. Option 3 allows for an increase only if a prior order has been entered. Pam believes that Option 2 is the most clear of the three options and provides more guidance in the application of the enhancement.

Post sentencing rehabilitation: the Bailey case is the impetus behind this proposed resolution of the circuit conflict involving whether or not postsentencing. The 8th circuit decided that the Court could consider postsentencing rehabilitation in re-sentencing on remand, Rule 35, 2255 etc...

Option 1 - postoffense rehabilitation; by this amendment the court cannot take this into consideration.

Option 2 - postoffense rehabilitation efforts undertaken prior to sentencing are appropriately considered by the Court in determining whether the defendant qualifies for a downward departure. Option 3 - postoffense rehabilitation (notes **incomplete**)

Section 5K2.19: Upward departure available in cases where conduct is dismissed or uncharged.. Proposes changes in Section 1B1.4 and Section 6B1.2 in relation to Section 5K2.19.

Sexual Predators Act. Offense of Prohibiting Transfer of Obscene Materials to a Minor. 18 U.S.C. § 1470. The proposed Section 2G3.1 would provide increases when certain circumstance are present in a case involving violations of Title 18 U.S.C. §§ 1460-1463, 1465, 1466 and 1470.

Language proposed to amend §§ 2A3.1, 2A3.2, 2A3.3, and 2A3.4. Most of the cases were generated from undercover “sting” operations. The computer enhancement is written to be applied in these cases. Increased the base offense level for statutory rape guidelines. Pam wants us to look at the ten year age difference enhancement guideline, application note on Page 17 under Section 2A3.2. A victim of the offense could be an undercover agent. What would be some viable direction for sexual predators offenses?

Paul Hofer, Senior Research Associate of the Office of Policy Analysis. Offenses Relating to Firearms

A team looked into the effects of the changes in 18 U.S.C. Section 924(c). Changes are recommended in Chapter 1 in the definition of “brandished.” The proposed language includes all weapons whether or not they are actually visible to the victim. The intimidation factor is incorporated. The issues for comment eliminates the word “displayed” which has been included in the definition of “brandished.” Currently the language under 2K2.4 is “The term of imprisonment is the minimum required by statute.” This is no longer meaningful with the changes in 18 U.S.C. §§ 924 (c) and 929(a). A sentence above the minimum would be a

departure. The team recommended language in the application notes that make the application more clear as to the minimum sentence and clearer that the specific offense characteristic for the firearm or weapon would not be added for the underlying offense. In 1997, the Commission added the note that a conviction 18 U.S.C. § 924(c) could count as a crime of violence or controlled substance offense based on a qualifying underlying offense under the career offender guideline. Proposed Amendment D under “Firearms” would add language (note 4) to eliminate Chapter 3 and Chapter 4 from consideration when a defendant has been convicted and Section 2K2.4 applies. **Paul would like reactions to this as a solution.

Priorities:

Section 2F 1.1 (Economic Crimes)

* Identity Theft: Does what they have give us something that is workable. **Breeded** documents Is the language sufficient. Comparing DOJ’s position (Option 2) to the most recent version of the identity theft guideline(Option 3 - staff position) **Is the language too simple? **What problems might be inherent in the proposed language and approach?

* Credit Card Theft Loss: is the \$100 loss per card high enough? Increase the minimum loss \$. Cellular Phones: what is reasonable to determine a loss amount in cellular phone cases. An average loss for used v. unused numbers. What is the right amount of loss for cellular phone ESN/MIN pairs \$ for used and a different amount for \$ unused.. *Should the same \$ floor be set for cellular phones and credit cards. Analog phones were the ones that were cloned and digitalized phones are not yet a problem because the technology does not yet exist to clone the digital phones.

* Consequential damages: ?

Section 3A1.1 (Hate Crime Motivation or Vulnerable Victim)

Section 2D1.1 (Methamphetamine)

* Focus: Should they use **meth(actual)** or bring in the presumptive purity for all mixture and substance containing methamphetamine cases. Can we agree that the tables should be raised or not with regard meth levels to bring the table up to the level of the statute.

Section 2B5.3 (Criminal Infringement or Copyright or Trademark)

No Electronic Theft Act (NET Act) Look at Options 3 and 4 as options 1 and 2 are basically gone. Which one is easier to do? Congress is getting quite a push from lobbying forces on the Hill. Staff would go with Option 3 as being the fairest. The focus is the harm to the holder of the copyright. Option 1 is the simplest way to proceed. Option 1 includes the departure provision.

Sexual Predators

Look over this area to provide our advice on whether or not the proposed amendments provide

the correct result. Look most at 2A3.2. And determine whether the proposed guideline reaches an appropriate result. The definition of participant should include undercover officer in a sting operation? Definitions and examples should be included to illustrate those cases in which a particular guideline is changed so that a more correct application can be made.

Congressional directive to increase penalties. The statutory rape guideline has been a problem. The penalty needed to be increased in 2A3.1.

The special instruction under 2G2.1 should be removed?

Circuit Conflicts

Aberrant Behavior :

Option 3 is the most restrictive of the options and limits use. The staff likes and Sharon likes Option 2 which includes four factors which have to be present for a departure. A crime of violence would be excluded from consideration. This is based on the language out of Chapter 1.

Option 3 is the majority view.

Drug Sales in a Protected Location:

One cannot guideline shop.

Bankruptcy Fraud Do they want the bankruptcy fraud (POAG liked Option 1)

Firearms POAG would like to mention retroactivity.

Make clear that 2K2.4 needs to be changed to reflect that the sentence is the minimum required by statute but should it be retroactive. Should be violations that qualify under 2K2.4 be predicate offenses for the career offender provision. Sharon takes the position that 924(c) should not be an offense that qualifies as a crime of violence or controlled substance offense under the career offender provision. Could be a predicate offense for .

Uncharged or Dismissed Conduct: Sharon likes the inclusion of this provision.

Post Offense Rehabilitative Effort: POAG recommends the Option 1

POAG Business:

Old Business: Motion adopt minutes from June 1999 meeting. Motion seconded and motion carried. Minutes adopted.

There was some discussion about group members who will be rotating off of the group. About six members are near the end of their terms and one will be leaving before the next meeting.

The next POAG meeting date was set for the week of July 10, 2000.

The group discussed the qualifications for the new group members that will be replacing the outgoing members. It was agreed that the new members should have an expertise as a guideline

specialist or be active in reviewing presentence reports on a regular basis.

District representatives: Discussion about the level of activity of the district representatives. Generally no responses have been received from the district representatives on minutes and issues related to the proposed amendments. It was generally felt that the district representatives should be informed and we should involve them as needed. Each circuit representative should compile a list of the district representatives to turn in to the Chair. An open forum for soliciting information was recommended. Use of the Sentencing Commission **website** was explored as a point of disseminating information to the district representatives and to the field. We could post our minutes and charter on a POAG button on the Sentencing Commissions **website**. It was suggested that a link be made available for each circuit representative so that an e-mail message could be forwarded directly to the circuit representatives e-mail. The Chair will address this with Sharon Hennegan to determine whether this is a possibility.

We see the need to improve communication of materials and topics for discussion well in advance of our meetings so that we can be better prepared and be more effective as an advisory group. The group reiterated an interest in becoming more involved in meetings and the amendment process with the Commission.

It was suggested that the group should send a more complete record of the content of the meeting to district representatives instead of an abbreviated version of the minutes. We should inform the district representatives of the topics discussed and what we anticipate will be happening in the future.

Look at State Sentencing Commission link site to see how it is laid out to see if that format would meet our needs.

Ask for Most Frequently asked Questions to be updated and placed on the Sentencing Commission **website.

Some conclusions of the group.

Phone Cloning and identity theft:

Prefer Option 3 without consequential damages so that consequential damages remain a restitution issue and not drive the offense level.

Minimum loss amount (page 7) We agreed that it should be raised. All agree that the phone cloning \$ amount per number should not be the same as credit card \$ amount. Very dissimilar facts and potential harm.

Methamphetamine: Contrary to the report, purity is hard to determine and that is why we see meth mixture and methamphetamine actual - going with the mixture is less onerous. Report that we often see cases where no drugs are seized

Probation Officer Advisory Group
Recommendations and Comments on Amendment Proposals
March 23, 2000

Economic Crimes: Identity Theft/Cellular Telephone Cloning

2F1.1 - Option 3 - but the group would not like to include consequential damages which requires additional fact finding by the Court on the issue of loss. Consequential damages will continue to be a consideration for restitution.

The minimum loss amount all agree that the \$100 loss amount rule for each credit card is unrealistic and does not reflect the types of cases we are We lean toward the \$750 to \$1,000 figures. It is our position that the amount that is used for credit card not be the same amount as for the ESN/MIN pairs. However, we could not come up with a proposal for determining the value of pairs that were not used.

Methamphetamine -

We take the position that we feel the guidelines are appropriate as they currently are, however it is our option that the Commission should be consistent in applying the mandatory min. authorized by statute at the Drug Quantity Table.

A concern is the Safety Valve issue. (Example)

For the Commission's background. In the past, the reason that the cases have been treated under the mixture instead of the actual method is that laboratory reports are not available in the majority of the cases.

NET Act -

We prefer Option 3 even though it is a very a laborious guideline. We feel that it explains the application in a very methodical approach.

Sexual Predators -

The Commission needs to make sure that the reference throughout all of the guideline changes in relation to the victim/minor also refers to a sting operation.

Section 2A3.2 We would prefer that the placement (a) (2) be moved to just before the cross reference. This approach forces the **presentence** writer to consider all SOC.'s up front. In the commentary notes at 2A3.2 we would prefer the Commissions definition to a term rather than referencing a statute's definition.

Section 2G1.1 Special instruction at (d) we note that it is not open for discussion but we would like to point out the problems with the grouping rules.

Section 262.2 We like the pecuniary gain definition and distribution definition.

Circuit Conflicts

Aberrant Behavior-

Our group strongly supports that this provision should be take out of Chapter 1 and moved to Chapter 5. We recommend Option 2 , omitting the second paragraph and (4) of the first paragraph. We strongly suggest that the Commission not defer a decision on this conflict.

The statutory index revision is a good way to address the circuit conflict associated with offenses which involve protected locations (2D1.2).

Violation of a Judicial Order - Bankruptcy Fraud cases we prefer Option 1 as it is simpler and addresses the issue by providing a definition in the application notes and that has been the process which was previously used.

Post Offense Rehabilitation - The group supports option 1, however, we feel as though application Note 1 is a poor example and really does not address the issue at hand. What is discussed at Note 1 is already in the commentary at application note 6 found at 5C 1.1.

We note and understand a judge's dilemma in these types of cases but, we feel, to allow consideration for post offense rehabilitative efforts would only increase disparity from one court to another.

Dismissed and Uncharged Conduct - We are in favor of the proposed as set forth in the proposed amendment.

Firearms 18 U.S.C. 924(c) - The group has a problem with the Commission defining a term with reference to a statute. The group would like to see, at the commentary note level, a revision clarifying that a sentence other than the minimum mandatory is an upward departure.