

PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

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

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on July 23 and 24, 2003 to discuss the directives in the PROTECT Act, issues pertaining to the Commission's "Notice of Proposed Priorities," and other areas of concern from probation officers around the country.

The primary focus of our meeting addressed the PROTECT Act directives and the Commission's request for public comment. In a general discussion, POAG noted that downward departures are appropriate when valid reasons exist and officers do not want to lose the ability to recommend departures to the courts. While Commission staff presented information regarding rates of downward departure, POAG believes that significant data found only in sentencing transcripts is missing. The group believes this information would allow staff to conduct a more detailed analysis regarding the departure rate.

One downward departure area that surprised members involved the category marked as "plea agreement." The group does not believe this is a valid reason for departure. POAG discussed whether Chapter 6 should be a guideline and not a policy statement to ensure that the departures agreed upon are factually and legally based. It was noted that the Courts were perhaps stating more specific departure findings on the record, however, since sentencing transcripts are not provided to the Commission, the reasons specified can not be determined. The group suspects that binding stipulations for drug weight or other factors were cited in the plea agreement which if accepted by the Court, would cause the Judgment in a Criminal Case to reflect a downward departure pursuant to the plea agreement. It is thought that the new proposed Statement of Reasons might help Commission staff gather more accurate departure information. The new form includes blocks to be checked for specific departures and adds a

section titled "Additional Supporting Explanation." The form should make Sentencing Commission coding more accurate. It was also noted that this downward departure category involved either the explicit or implicit approval of the Department of Justice. Therefore, while it appears this is a "judicial departure" perhaps it should be categorized as a downward departure which involves the government's participation, similar to §5K1.1.

POAG discussed the appropriateness of a standard downward departure in immigration cases. The group recognizes in districts with a high volume of immigration cases that departures are prevalent, while defendants in districts with few immigration cases will likely not be privy to these benefits, thus creating sentencing disparity. The possibility of a specific offense characteristic for defendants subject to deportation was considered but concerns were raised that not all deportation cases are for simple re-entry offenses. As many are serious drug offenses, POAG realized a specific offense characteristic would be difficult to draft. That being said, POAG recognizes that if this departure was added to Chapter 5 and addressed separately from "judicial departures," similar to §5K1.1, then the rate of other "judicial departures" would be significantly reduced as the authority for this departure would rest with the government.

Issue for Comment #1 How should subsection (a) of §5K2.0 be revised?

Once again POAG wishes to emphasize that downward departures under this guideline are appropriate and should not be more restrictive. However, we recognize the PROTECT Act mandates a reduction in downward departures. POAG believes as to §5K2.0, additional wording could be added to strengthen the application instructions of this guideline or perhaps some clarifying examples of appropriate and inappropriate departures could be included.

Issue for Comment #2 – How, if at all, should Chapter Five, Part H be revised?

POAG recommends clarifying the purpose of §5H as to whether it addresses departures or guideline sentences within the applicable range. The group requests guidance and examples as to what is outside the heartland as it relates to departures for a combination of factors involving §5H. POAG notes the specificity of the guideline instructions for Aberrant Behavior and Diminished Capacity and suggests similar language in §5H would be beneficial in reducing the number of inappropriate departures.

Issue for Comment #3 –How, if at all, should guideline provisions governing downward departures for criminal history be revised?

While commission data preliminarily indicates that the over-representation of the defendant's criminal history is a frequent basis for downward departure, there is insufficient data at the present time to determine what specific factors the courts are relying on in making these departures. POAG hypothesized several possible reasons for this event, including §4A1.2 offenses, the recency factors, as well as related cases. Simply adding up criminal history points does not necessarily provide the court with an idea of whether an individual is a violent recidivist who needs to be treated more severely than another defendant with the same number of points. For example, ten years prior to the instant offense, a defendant is convicted of theft (for failure to return a videotape); six months later he is convicted of

Operating After Suspension and receives a one year probation sentence, and within that one year period, the defendant is convicted of DWI and fined \$500. The defendant's probation for the Operating After Suspension charge is violated and he receives a sixty-day sentence. As a result, this defendant is a criminal history category of III. Since that time period, the defendant has no other countable convictions. Compare that individual with another defendant who is convicted of three separate assaults for assaulting different women over a two-year period within five years of the commission of the instant offense and receives sentences ranging from a fine to twelve months imprisonment. These individuals are both a criminal history category III but represent a different picture to the court. The court needs the flexibility to make departure considerations regarding an individual's criminal history. POAG believes the Commission should continue to pursue a detailed analysis of the reasons behind the downward departures before making any decisions in restricting these departures. In addition, POAG strongly believes the Commission needs to review Chapter 4 in its entirety. Specifically reviewing the concept of "related cases," §4A1.2 issues, recency points, revocations, and the staleness factor should be addressed.

Issue for Comment #4 --Should the Commission provide additional and/or more restrictive guidance for any downward departure authorized in Chapter Two (Offense Conduct) for specific offenses?

POAG does not think the guidelines require any more restrictive guidance, however, the group believes specific examples in those sections suggesting a downward departure could be helpful to the practitioner in applying these departures correctly.

POAG declines to comment on Question #5. The group does not believe that any of the aforementioned downward departure issues should be prohibited.

Notice of Proposed Priorities

Of the thirteen proposed priorities published by the Commission, POAG selected three issues on which the group wishes to provide comment.

Involuntary Manslaughter

POAG believes this guideline warrants change as the conduct for this type of crime can vary substantially. The guideline does not provide for any specific offense characteristics. Consideration should be given as to whether the defendant has a prior history of assaultive behavior, whether a weapon was used, or the number of victims injured in the offense.

Immigration

There was a suggestion by the group that the ambiguous language in the Immigration guidelines needs to be corrected. It appears this is a question frequently asked on the Help Line and Commission staff are aware of the problem. Due to the large number of immigration cases, POAG suggests this language be corrected.

In addition, a suggestion was also made that if a defendant agreed to waive deportation, there could be a two to four level reduction as a specific offense characteristic, which could impact the downward departure rate. However, if a defendant was eligible for the Early Disposition Program, then this specific offense characteristic should not be applied.

Review of the Limitation on the Base Offense Level

The mitigating role cap was discussed by the group and no application difficulties with applying this specific offense characteristic in the drug guideline were noted, however, POAG has an ongoing concern with the definition of mitigating role. The group believes more examples or guidance are needed in Chapter Three regarding this issue and notes that this is a circuit conflict which the group wishes the Commission to address.

Other Issues

POAG suggests that the Commission consider adding a two level reduction in the §2D1.11 guideline if an offender meets the criteria for the safety valve. Defendants who are similarly situated as defendants sentenced pursuant to §2D1.1, are not receiving the benefit of the safety valve. POAG believes this sentencing disparity should be corrected.

The group believes an index to Appendix C should be created to ease application of research regarding amendments

There was discussion by the group about 18 U.S.C. § 545 violations and whether a violation of this statutory provision should be listed in the commentary at §2D1.11.

Closing

We hope you will find our comments beneficial. Please do not hesitate to contact us if you have any questions or need clarification of any issue. We appreciate the opportunity to participate with the Commission in this process.

Respectfully,

Cathy A. Battistelli
Chair