PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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United States Sentencing Commission
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Washington, D.C. 20002-8002

Dear Commissioners:

The Probation Officers Advisory Group (POAG) held a telephone conference on May 27, 2004 to identify and discuss recommendations to the United States Sentencing Commission regarding guideline application difficulties.

During my testimony before the Commissioners in March of this year, Commissioner Horowitz expressed interest in hearing from probation officers regarding areas of the guidelines in need of simplification. As a result, POAG used this topic as a focal point during the Probation Officer session at the National Guideline Training held in Miami this past May. During our discussions, officers from around the country cited problems with USSG §2B1.1 in determining loss and the potential for double counting; role adjustments, the unit application process in USSG §3D1.4, criminal history application, and the money laundering guideline. POAG expanded on this discussion during our telephone conference and offers the following areas of concern.

Cross References

Cross reference provisions in the guidelines are generally thought to be confusing and appear to result in numerous objections by counsel, especially, if the application results in "jumping" from guideline to guideline. One example of this difficulty involves USSG §2J1.2, the Obstruction of Justice guideline. USSG §2J1.2(c) directs the user to apply §2X3.1 (Accessory After the Fact) if the offense involved obstructing the investigation or prosecution of a criminal offense. Once at §2X3.1, the user must determine the offense level for the underlying offense. Problems then arise when attempting to determine the appropriate Chapter Two guideline and secondly, how are the Chapter Three adjustments to be applied? Are they applied based on the Accessory After the Fact guideline which suggests a

defendant normally should not receive a minor role, or are they to be applied based on the underlying offense for which the defendant was originally charged with obstructing? Another area of concern regarding cross reference application involves a violation of 18 U.S.C. § 1001 which is referenced to USSG §2B1.1. However, §2B1.1, comment. (n.14) provides a cross reference to another guideline in Chapter Two in "cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense more aptly covered by another guideline." Officers have difficulty determining the appropriate Chapter Two guideline for the "count of conviction." Lastly, another example of cross reference application difficulty arises in USSG §2K2.1(c). In discussing this issue, officers expressed concerns between the interplay of USSG §2K2.1(b)(5) and §2K2.1(c). Difficulties were noted when attempting to determine the difference between the two applications and officers question whether the cross reference is missed. According to Commission staff, the Help Line receives numerous calls regarding the cross reference application issues both in §§2B1.1 and 2K2.1.

Chapter Four Issues

There are several areas of concern regarding Chapter Four which POAG hopes the Commission will address now that the recidivism study has been completed.

USSG §4A.1.2(c)

POAG has requested clarification regarding crimes listed in §4A1.2(c) in the past and the impact these crimes have on whether a defendant receives a safety valve reduction. In some jurisdictions, minor offenses such as driving with a suspended license results in a two-year term of unsupervised probation and if the defendant commits a drug offense while under this sentence, he or she would be precluded from a safety valve reduction. This issue frequently results in objections based on Adequacy of Criminal History requiring additional work for all parties involved.

USSG §4A1.2(k)

Officers across the country believe this is a problematic area, especially if there are multiple revocations occurring at the same time for the same violation conduct. There appears to be disparity in how this guideline is applied, and the interplay between the application of the time frames for the original charge and the revocation proceeding. POAG believes this area needs to be simplified in some fashion. Further, in some districts, defendants who violate probation are allowed to "elect" to serve the time, however, a formal order of revocation is never entered and no criminal history points can be assigned. In other jurisdictions, courts sanction or admonish a defendant but never enter a revocation finding. Or a court may revoke and reinstate the sentence. Furthermore, disparity appears to exist when attempting to define the term "original sentence of imprisonment." If the original sentence was a probationary term, should that also be interpreted as a zero month imprisonment sentence? Perhaps if the language found in USSG §2L1.2 regarding the term "sentence of imprisonment" is added, this situation could be resolved.

USSG §4A1.2(m) - Effect of a Violation Warrant

In reading this guideline, POAG finds the wording "otherwise countable" to be confusing and believe districts are applying this guideline in a variety of methods. In reviewing a question posed to the Sentencing Commission Help Line, several members of POAG realized they may have been applying

§4A1.1(d) incorrectly. For example, if a defendant received a three-year probation term in 1990 but absconded supervision resulting in the issuance of a bench warrant which remains active, should criminal history points be assessed? Would it be different if probation was revoked in the defendant's absence and a bench warrant issued, or if the probation case was tolled open pending service of the warrant?

USSG §4A1.2, comment. (n.3) - Related Cases

The definition for related cases is an area in which probation officers receive numerous objections to the criminal history computations. It appears attorneys fail to read the first sentence in §4A1.2, comment. (n.3) regarding intervening arrests or that they do not understand the sentence. Perhaps the language in the commentary could be modified to make the definition clearer. An example of another problem regarding this concept involves prior convictions for bank robberies. A defendant has prior convictions for several bank robberies that were committed within weeks of each other and sentenced prior to the instant federal offense which also involves a bank robbery committed close in time to the aforementioned charges. If there was no intervening arrest, should the bank robberies be considered "related" as part of an ongoing scheme or plan or should the officer look at guidance from other sections of the guideline manual (e.g., relevant conduct and the grouping rules) which would appear to indicate they could not be considered related?

The wording "consolidated for sentencing" has also posed application difficulties for officers. Should cases that were sentenced on the same day for administrative convenience, but were not otherwise connected, receive one set of criminal history points or be scored separately? Should there be a requirement that a factual or logical connection between the offenses and the crimes represent one composite harm? State court documents are not always available for the probation officer to review in making a determination that offenses are "related" and officers are facing greater difficulties in obtaining verifiable documents related to convictions, especially from other jurisdictions. There does not appear to be uniformity at the state level for noting a reason on the record, or in court documents, to determine if cases are related.

USSG §4A1.2, comment. (n.6) Reversed, vacated, or invalidated convictions

Many officers continue to struggle with these concepts in determining whether a conviction can be scored when defendants have challenged their prior convictions. In addition, defense attorneys attempt to vacate state court convictions prior to federal sentencing to avoid a career offender determination or to lower the defendant's criminal history category. A question has been raised by officers as to whether a temporal requirement should be implemented as to when a defendant can challenge a state conviction.

Chapter 5

A concern was voiced regarding USSG §5G1.1(b) and §5K1.1 departures. Officers stated procedures vary around the country regarding the starting point for the §5K1.1 departure. For example, if the original guideline range (37 to 46 months) was lower than the five-year minimum mandatory sentence, pursuant to §5G1.1(b) the guideline sentence becomes 60 months. In many districts, the prosecutor recommends a reduction for the defendant's cooperation by a number of specific levels. In this scenario, does the Court depart from the sentence of 60 months or does the Court pick the first range which has a 60-month sentence available to accommodate the methodology chosen by the prosecutor?

POAG is not suggesting the Commission provide guidance on how a prosecutor recommends §5K1.1 departures, rather, officers need guidance on where the departure should start. A commentary note in §5G1.1 with an example explaining the practical application of this issue would help clarify the issue for practitioners.

Other Issues

USSG §2H4.1 Peonage, Involuntary Servitude, and Slave Trade

In 2000, new crimes involving human trafficking offenses (e.g., forced labor and unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor) were enacted by Congress. Effective November 1, 2001, the Sentencing Commission referenced these crimes to §2H4.1 as the appropriate guideline for violations of these laws, however, the Commission did not make any modifications to the existing §2H4.1 guideline. Currently in §2H4.1(b)(3), there is an enhancement if a victim was held in a "condition of peonage or involuntary servitude" for a specified period of time and at §2H4.1(b)(4) there is an increase if another felony offense was committed during the commission of, or in connection with, the "peonage or involuntary servitude offense." A question arises as to whether these two specific offense characteristics should also include the newer offense of forced labor.

Mitigating Role

POAG once again requests some guidance from the Commission regarding the definition of mitigating role and examples to differentiate between minor and minimal participants. This issue becomes more problematic when viewed with the reduction for mitigating role in USSG §2D1.1. POAG recognizes that the guideline as currently written allows judges discretion in determining this adjustment, however, the lack of guidance results in objections to the presentence report which then results in lengthier sentencing hearings.

Closing

POAG appreciates the willingness of the Commission to listen to our issues and hopes you find the comments beneficial. Should you have any questions or require clarification of any issue please do not hesitate to contact us.

Respectfully,

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