

045-9

**PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission**

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Joshua M. Wyne, 9th Circuit
Robert W. Jacobs, 10th Circuit
James B. Bishop, 11th Circuit
Robert C. Hughes, Jr., 11th Circuit
Gennine Hagar, DC Circuit
Magdeline E. Jensen, Probation Div. Ex officio
John S. Koonce, III, FPOA Rep. Ex officio

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: 1994 Amendment Proposals

Dear Chairman Wilkins:

This letter is for the purpose of documenting recommendations of the United States Probation Officers Advisory Group pertaining to the 1994 proposed amendments.

As you know, we are most concerned about the issue of sentencing concurrently and consecutively where a defendant is already serving an undischarged term of imprisonment in a case unrelated to the federal case at hand (5G1.3(c)). We feel that the changes proposed in Amendment #23 would be better than what we have now. However, after testifying before the Commission and discussing the matter further, we suggest that even a better approach would be to eliminate all reference to the grouping rules at Application Note 3 of 5G1.3(c). This would avoid all confusion as to the application of the multi-count rule to state offenses and the issue of 5G1.3(c) would be permanently settled. The argument that one may advance against such a proposal would be that judges, given the option of sentencing concurrently or consecutively, would not proceed similarly, creating unwarranted disparity. That argument would have some reliable basis if sentences currently being imposed as a result of the application of 5G1.3(c) were

not disparate anyhow. Given the confusion of applying 5G1.3(c), we currently have many districts incorrectly applying this guideline, while at the same time relying on state sentences that in most cases have little relation to the actual time served. Our recommendations to the judges, where this issue is involved, are generally not based upon reliable information. I would be surprised if giving judges total discretion within the provisions of 18 USC 3553 and 3584(a) would result in an increased and unwarranted disparity. Further, if this guideline was changed as we propose, the hours saved in probation officer, defense attorney and judges time would be immeasurable. Therefore, the Probation Officers Advisory Group recommends the following in place of the current guideline.

5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

- (c) in any other case, the sentence for the instant offense may run concurrently or consecutively to the prior undischarged term of imprisonment, except to the extent otherwise required by law.

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Commentary

Application Notes:

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3. Where the defendant is subject to an undischarged term of imprisonment in circumstances other than those set forth in subsection (a) or (b), subsection (c) applies. In imposing sentences under this section, the factors listed in 18 USC 3553(a) should be considered along with the statutory authority of the imposition of concurrent and consecutive terms under 18 USC 3584(a).

Using the district response survey, a copy of which was provided to each Commissioner prior to our testimony on February 24, 1994, the Probation Officers Advisory Group identified seven (7) proposed amendments and/or issues that received almost unanimous support (90% or better) for this year's amendment cycle. They are listed as follows and are identified as they appear in the document, Proposed Guideline Amendments for Public Comment published by the Commission.

<u>AMENDMENT</u>	<u>PAGE</u>	<u>ISSUE</u>
5A	8	This amendment makes adjustments for value of payment and high level official cumulative under 2C1.1; 2C1.2; and 2C1.7. Currently they are alternative. This amendment would increase offense levels where both high value of payment or benefit and high level officials are involved. Ninety-six percent (96%) of the districts that responded to our survey favored the passage of this amendment.
8B	21	Option I of this amendment provides an enhancement for discharge of firearm and serious bodily injury under the drug trafficking guideline, 2D1.1. Ninety-one percent (91%) of the districts that responded chose this option over Option 2, which creates a cross-reference to attempted murder and aggravated assault. The question came up at the Commission meeting as to whether the probation officers wanted either option. Our survey does not address that question. However, during last year's amendment cycle, probation officers were not enthusiastic about adding additional specific offense characteristics and in fact, changes in this area of the drug guidelines were not proposed by the probation officers. Therefore, if the Commission is inclined to place less emphasis on weight of drugs in guideline calculations, probation officers support by a wide margin the addition of specific offense characteristics involving weapon use and bodily injury.
11	28	This amendment revises the money laundering guideline. During last year's amendment cycle, the probation officers by greater than a two-thirds (2/3) majority recommended changes to the money laundering guideline. The money laundering guideline as currently written is rigid and as a result may be used as a tool for manipulation by prosecutors. If the guideline had more basis in the underlying offense as proposed Amendment #11 provides, the ultimate sentence would be more reflective of the defendant's actual criminal conduct and you still have a

monetary table for which a sentence can be based for the professional money launderers.

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| 12B | 36 | This amendment raises the base offense level in 2B1.1 from level 4 to level 6, the same as 2F1.1 and it conforms the loss table in 2B1.1 to that in 2F1.1. All of the districts that responded to our survey support this change. The amendment essentially makes theft and fraud the same and results in the same sentence for low guideline exposure defendants charged under either 2B1.1 or 2F1.1. |
| 26 | 88 | This amendment provides for a base level of 12 in 2H2.1 in all cases where the defendant corrupts the registration or votes of others while the alternative base level of 6 applies where the defendant corrupts only his or her own registration or ballot. Ninety-six percent (96%) of the districts responding to our survey support this amendment. |
| 28 | 90 | This is an issue for comment as to whether 2K2.5 be amended to include enhancements if the firearm was discharged or loaded or if the defendant possessed both a firearm and ammunition in a school zone. Ninety-four percent (94%) of the districts were in favor of increasing the base offense level from 12 to 14 for persons who sell firearms with knowledge or reason to believe the recipient is a felon or other prohibited person or an underage person. Although responses from the field did not include extensive written comments, it seems reasonable to conclude that this amendment was favored because it equalizes the base offense level of the person who sells to a prohibited individual with a base offense level now assigned to the prohibited person who possesses, receives, or transports the firearm. |
| 30 | 90 | This is an issue for comment pertaining to changing 4A1.1 (Criminal History Category) and Chapter 5, Part A (Sentencing Table). Comment was invited as to whether or not 3-point convictions should be counted as they have been or should distinctions be made for longer sentences. The question is also raised as to whether a distinction should be |

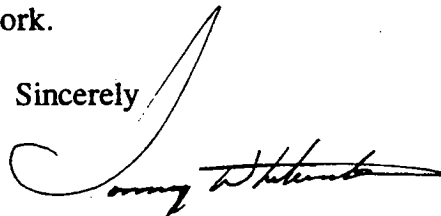
made where the prior offense and instant offense are similar. Further inquiry was made as to whether or not new criminal history categories should be created on both the low end (no record) and on the high end where defendants have significantly more criminal history points than 13. Of all the options listed, the probation officers favored only one, and that was to leave the counting of 3-point convictions as is. This received favor from ninety-three percent (93%) of the districts that responded to our survey.

Although we did not poll the probation officers on their feelings about consolidation and clarifying amendments, it is our position based upon last year's work that probation officers generally support any amendments that clarify, define and/or consolidate guidelines. Changes to the commentary that make application of guidelines clearer pay many dividends. Not only do they provide for more consistent application across the board thereby narrowing the possibility for disparate sentences, they cut down on the hours that we spend debating the intent of the guideline.

Also, as an addition to this letter I am attaching a separate letter addressed to you from Robert Hughes, Deputy Chief Probation Officer, Middle District of Georgia and member of the Advisory Group, which best advances our position on the retroactivity amendments. Robert testified as to this issue before the Commission on February 24 and his letter best reflects the feelings of the probation officers on the retroactivity issue.

Again, let me on behalf of the Probation Officers Advisory Group take this opportunity to thank the Commissioners for the attention that they have given to our concerns about changes in the guidelines. The probation officers are enthusiastic about providing input because they know that the Commission is genuinely interested in their work.

Sincerely



Thomas N. Whiteside
Chairman
Probation Officers Advisory Group

TNW/jsd
Enclosures