

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

July 24, 2008

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008-8002

Dear Judge Hinojosa:

The Probation Officers Advisory Group ("POAG") met in Washington, D.C. on July 16, 2008, following the Alternatives to Incarceration Symposium held at the Hyatt Regency on July 14th and July 15th. The purpose of our meeting was to discuss and formulate recommendations to the United States Sentencing Commission. As such, we submit the following comments to assist you in deciding the issues of consideration for the next amendment cycle.

General Comments

The members of POAG would like to thank the Commission for inviting us to attend the Alternatives to Incarceration Symposium. We found this program to be enlightening and educational, and were pleased with the variety of speakers and topics. We were excited about the prospect of future modifications to the existing statutory and guideline policies which may provide more flexibility in sentencing, and, ultimately more services to defendants in need of employment, mental health, substance abuse, and other treatment. We look forward to working with the Commission to develop ways to work within the existing guidelines and/or ways to modify the guidelines to help effectively achieve a more enriched federal criminal justice system.

Immigration

Although POAG recognizes and appreciates that the Commission gave this guideline a great deal of consideration during the last amendment cycle, the members of POAG remain concerned about the application of this guideline and hope that the guideline can continue to be simplified, in part, by clarifying definitions, such as the crime-of-violence definition. It is believed that any clarification in this area will continue to prove beneficial and eliminate inconsistencies in application. POAG also recognizes that in some districts, defendants enter the United States on multiple occasions prior to the instant offense and that the immigration guideline may not adequately address this issue.

Definition for Crimes of Violence (in General)

The guidelines continue to contain a number of differing definitions for crimes of violence, some of which, recognizably, are based on statutory directives. POAG believes that the guideline-application process would be greatly simplified if a more universal definition could be adopted. Having only one definition for a crime of violence would minimize misapplication and/or inconsistency in application, as well as time spent responding to counsel's objections in this area. POAG believes that any step toward unifying the statutory and guideline definitions of a crime of violence would prove beneficial, and create more uniformity in guideline application.

Criminal History - New Definition at § 4A1.2(a)(2), Single Sentence

The group discussed this issue at length. Several group members were concerned that this "new" guideline was being inconsistently applied, as not all districts are interpreting the guideline directives in the same manner. In some cases, the result of this inconsistent/incorrect application was the "loss" of a career offender predicate. Others expressed concern that the fact that arrest dates were not always available created difficulty in determining whether or not cases should be considered a "single sentence," as that term is defined in § 4A1.2(a)(2).

Similarly, there was discussion about some apparent confusion regarding the assignment of criminal-history points under § 4A1.1(c) in relation to the application of career offender and with respect to the assignment of criminal history points pursuant § 4A1.1(d) (being under a criminal justice sentence) and/or § 4A1.1(e) (being released from a sentence within two years of the instant offense). There appears to be some inconsistency in application and scoring based on the chronology of prior criminal convictions. One district noted that in some instances, officers were only assigning points to the "first" four cases, rather than assigning points to all relevant cases, and then only ultimately "counting" a total of four points under § 4A1.1(c). This caused some career-offender predicates to "drop out," and/or at times, no points were being assigned under § 4A1.1(d) and (e).

Because of the above, POAG considered recommending to the Commission that it clarify the language under § 4A1.2(a)(2) and/or § 4A1.1(c). Nevertheless, after much discussion, the group ultimately decided that the issues may be better addressed as training issues, rather than as amendments to the guidelines. The group expects that it may reevaluate these issues at future meetings, as these inconsistencies appeared to be present in a number of districts. The group also discussed the best manner to detail the above-noted "single-sentence" cases in the report so as to avoid confusion/counsel objections regarding the assignment of criminal-history points. Again, the group decided that this issue was better dealt with as a training issue.

Criminal History - Career Offender Predicates and Singles Sentences

POAG is concerned that under the new definition at § 4A1.2(a)(2), i.e., single sentences, some cases which had previously been considered career-offender predicates are no longer career-offender predicates, as they are no longer scorable under § 4A1.1(a), (b), or (c). POAG encourages the Commission to monitor the frequency of this issue to determine what, if any, change to the career-offender guideline should be made.

Guideline Simplification

This issue appears to be a factor in all of the above-detailed concerns raised. POAG recognizes that "Guideline Simplification" has been an ongoing area of consideration for the Commission, and that the Commission is aware of, and actively works to, simplify the guidelines whenever possible.

As noted in several of POAG's earlier position papers, cross references to other guidelines continue to be an area of confusion which often results in misapplication of the guidelines and/or greater objections by counsel. While the application of a "simple" or "single" cross reference may not be particularly problematic, issues/objections often arise when one must "jump" to multiple guidelines in order to determine the "final" guideline. The guidelines most often impacted by the confusion in application appear to be as follows: § 2A3.1(c) and 2A3.4, and other guidelines involving sexual contact; § 2J1.2, the obstruction-of-justice guideline; § 2X3.1, the accessory-after-the-fact guideline; and § 2K2.1(c), the cross reference under the firearms guideline, compared with § 2K2.1(b)(6), the specific offense characteristic under § 2K2.1 which appears to "overlap" the cross reference. POAG speculates that some of these issues can be (and are being) resolved or reduced through training, but notes that any effort to minimize the addition of "new" cross references in the guidelines would be beneficial and would help to ensure greater consistency in guideline application.

Circuit Conflicts

POAG encourages the Commission to continue to resolve circuit conflicts whenever possible.

Closing

POAG appreciates the opportunity to express its concerns and the willingness of the Commission work with POAG to address issues we believe are important. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Sincerely,

Probation Officer's Advisory Group
July 2008