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July 31, 2003

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

RE: 2004 Priorities (Response to Request for Comment)

Dear Judge Murphy:

As we begin a new amendment cycle, we write on behalf of the Practitioners' Advisory Group to address the notice of proposed priorities published in the Federal Register notice and to suggest a number of additional priorities we would like to see the Commission address. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to provide comment on the issues identified by the Commission as its priorities. We hope we can also be of assistance in a secondary manner by bringing potential issues to the Commission's attention for possible addition to its priorities.

1) Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)

Initially, we commend the Commission for including consideration of guideline amendment proposals relating to compassionate release programs as proposed priority #9. As a follow-up on a recommendation we made last year, we continue to believe that the issue of sentence reduction under 18 U.S.C. § 3582(c)(1)(A) warrants Commission action. As Professor and former commissioner Michael Goldsmith noted in his letter to you in October of 2001, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. 18 U.S.C. § 994(t), specifically directed the Commission to describe the criteria to be applied by a court in considering sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), including specific examples of "extraordinary and compelling circumstances" warranting sentence reduction. Although it has been nearly twenty years since the 1984 legislation, the Commission has not yet responded to this directive. We urge that the Commission develop policy guidance to

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implement 18 U.S.C. § 3582(c)(1)(A) as specified in § 994(t) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

2) Drug Offenses

We continue to believe that the drug guidelines are overly punitive and, thus, strongly oppose any reconsideration of the limitation on the base offense level that was enacted less than a year ago (in November of 2002), and which the Commission has identified as proposed priority #12. The PAG remains convinced that the current drug guidelines place undue emphasis on the quantity of the drugs involved and not enough emphasis on other factors such as role in the offense and violence. At the same time, we are obviously concerned that a measure as limited, well reasoned, and technical as the "mitigating role cap" has been identified for reconsideration by the Commission. Depending on the reaction to these issues in the Congress, the PAG is hopeful that additional steps can be taken to tailor drug sentences more closely to the true severity of offenses and culpability of offenders.

3) Criminal History.

The Commission has again identified criminal history as an area for review during the upcoming amendment cycle, proposed priority #13. The PAG agrees that this is an important issue requiring Commission attention. We are particularly concerned that in some cases criminal history may be overstated through the inclusion of relatively minor matters which do not serve the predictive or punitive functions of criminal history well. It is also our understanding that variations in state and local sentencing practices cause ambiguity and uncertainty in the application of the current criminal history guidelines, giving rise to disparity and unfairness in some cases.

The Commission's mandate in the PROTECT Act to reduce the number of departures makes reconsideration of criminal history categories particularly appropriate, since overstatement of criminal history has been identified as one of the most frequent grounds for departure.

Finally, criminal history issues play an important role in determining the availability of alternatives to incarceration for first-time non-violent offenders. The PAG continues to believe that the availability of alternatives to incarceration for first-time non-violent offenders should be increased, and we are concerned about new limitations that have recently been placed on the ability of the Bureau of Prisons to designate offenders to serve their sentences in a community corrections setting. While we have previously suggested accomplishing this through an expansion of Zones B and C within criminal history category I of the sentencing table, the same goals could be achieved through the creation of a new criminal history category 0.

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In the course of its ongoing recidivism study, the Commission should obtain and review data regarding recidivism by first-time offenders punished by alternatives to incarceration. The PAG believes such data would demonstrate the success of alternative punishments at greatly decreased cost to the criminal justice system. Indeed, we are aware that recent studies have refuted, at least in the white collar context, the notion that extensive terms of incarceration have a general deterrent effect. Rather, the deterrent effect is best achieved by certainty and swiftness of punishment. *See* Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35. (Cambridge University Press) (2002). In addition to these positive policy considerations, the creation of a criminal history category 0 would better effectuate the original Congressional intent expressed in 28 U.S.C. Section 994(j).

4) **Recommendation to the Federal Rules Advisory Committee.**

As we have mentioned to the Commission before, the PAG believes that the existing Federal Rules of Criminal Procedure could be improved to better reflect practice under the sentencing guidelines. Although the Rules are not within the Commission's scope of authority, they greatly impact the manner in which the guidelines are applied. For this reason, the PAG believes that it is appropriate for the Commission to consider making a formal recommendation to the Federal Rules Advisory Committee to study and potentially revise rules which directly affect sentencing practice and procedure. In addition, the Commission could suggest such practice and procedure matters through an amendment to its policy statements in Chapter 6.

Specifically, the PAG believes that sentencing practice and procedure would benefit from greater disclosure of facts affecting guideline calculation between and among the parties. More than 95% of cases are disposed of by a guilty plea. At present, the government is not required to disclose any facts affecting the application of the guidelines to the defense prior to the entry of a guilty plea. Perhaps even more remarkable, the government is not required to disclose any facts affecting the application of the guidelines to the defense *after* the entry of a guilty plea. Instead, both the government and the defense begin the litigation of guidelines application through the presentation of evidence to the court – in the person of its agent, the probation officer – on a strictly *ex parte* basis. Although the Court ultimately hears evidence in the presence of both parties at a sentencing hearing, by that time there is a presentence report which is often afforded deference approaching a presumption of correctness. This process of dueling *ex parte* submissions is foreign to any conception of an appropriate adversarial system. The rules should, at a minimum, require any party wishing to present evidence to the court's probation officer to disclose such evidence to the opposing party.

The Sentencing Commission is in a unique position to assess and evaluate the interplay of its guidelines with the Rules of Criminal Procedure. Because the current rules hamper the most efficient execution of the guidelines in practice, the PAG believes the Commission should recommend to the Federal Rules Advisory Committee that these issues receive consideration. The Commission should also address these issues in its policy statements in Chapter 6.

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5) **Relevant conduct**

A long term project deserving of the Commission's attention are questions relating to the use of relevant conduct, and particularly the use of acquitted conduct, to punish criminal offenders. In reference to the larger question of relevant conduct, we strongly endorse a paper published by the American College of Trial Lawyers entitled "Proposed Modifications to the Relevant Conduct for the Provisions of the United States Sentencing Guidelines." This paper recommends eliminating consideration of acquitted conduct, limiting the increases for uncharged and dismissed conduct, eliminating the application of certain cross references, clarifying and narrowing the definition of liability for the conduct of others, utilizing no less than a clear and convincing standard of proof to all relevant conduct sentencing elements, and requiring full notice of all relevant conduct before the entry of a guilty plea. While some aspects of a real offense sentencing process appear essential, these limited but compelling reforms would provide considerably greater fairness in the difficult and still evolving process of sentencing by means of "relevant conduct."

In closing, we realize that not all of our priorities will be able to be addressed. We hope that as the Commission sets its agenda for the upcoming amendment cycles, it will do its best to try to incorporate at least some of these suggestions. As always, we appreciate the opportunity to provide input regarding potential Commission priorities, and look forward to working with the Commission through the coming cycle.

Sincerely,



James E. Felman
Barry Boss

JEF/elm

cc: Hon. William K. Sessions
Hon. John R. Steer
Hon. Rubin Castillo
Hon. Ricardo H. Hinojosa
Hon. Michael E. Horowitz
Hon. Michael O'Neill
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