
PUBLIC COMMENT

2005 AMENDMENT CYCLE

Proposed priority policy issues for the
amendment cycle ending May 1, 2006



United States Sentencing Commission

August 2005



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

August 15, 2005

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit at least annually to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report pursuant to that provision.

We would first like to note the invaluable work the Commission has done this year in response to the Supreme Court's decision in United States v. Booker, 125 S.Ct. 738 (2005). The hearings held by the Commission and the statistics it has regularly released have greatly contributed to the public dialogue and analysis of the Booker aftermath. The Department looks forward to continuing to work with the Commission on this important matter to ensure that the sentencing system that emerges from Booker preserves, to the extent possible, the protections and principles of the federal sentencing guidelines.

We understand that the Commission will continue to monitor the emerging litigation and to evaluate any legislative proposals which address the deficiencies in sentencing created by Booker. Notwithstanding Booker, as the Commission continues its regular work during this amendment cycle, the Department of Justice has a number of issues which we believe warrant consideration, of which we have identified national security issues, gun trafficking, and steroids as our highest priorities. We are aware that the Commission has its own additional priorities, including its response to a number of legislative directives from the last two Congressional terms.

Terrorism

Guidelines section 3A1.4 provides for an enhancement where a felony promoted a federal crime of terrorism. The Department has encountered a number of problems in the application of this enhancement, which has been interpreted differently by different courts. We urge the Commission to amend the section in order to clarify the scope of cases where the enhancement is applicable and to settle the circuit splits that have arisen in relation to this enhancement.

In United States v. Arnaout, 282 F.Supp.2d 838 (N.D. Ill. 2003), the district court refused to apply § 3A1.4 in a case where a defendant pled guilty to a racketeering offense under 18 U.S.C. § 1962(d) because that offense is not listed in 18 U.S.C. § 2332b(g)(5). The interpretation of the district court in Northern Illinois renders superfluous the words "involved, or was intended to promote," as contained in § 3A1.4(a). Such a construction is disfavored. By contrast, the Sixth Circuit has ruled that § 3A1.4 should not be read so restrictively. United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001) ("Based on our interpretation of the word 'involved' and the phrase 'intended to promote,' as well as our understanding of the relevant conduct provision, we believe that this statement of law is correct: the defendant need not have been convicted of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) for the district court to find that he intended his substantive offensive condition or his relevant conduct to promote such a terrorism crime.") Similarly in United States v. Meskini, 319 F.3d 88 (2d Cir. 2003) and United States v. Lindh, 227 F.Supp.2d 565 (E.D. Va. 2002), the courts applied §3A1.4 even though the defendants were not convicted of an enumerated federal crime of terrorism, although neither court directly addressed that issue. Finally, in United States v. Jordi, ___ F.3d ___, 2005 WL 1798055 (11th Cir. 2005), the Eleventh Circuit court held §3A1.4 does not require the government to prove the offense conduct transcended national borders. While this issue was correctly decided on appeal, the district court decision perhaps indicates a need to clarify that §3A1.4 also applies to domestic terrorism cases to avoid confusion by other circuits.

In light of the above, the Department urges the Commission to amend the language of the enhancement to clarify that a defendant need not have been convicted of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) for the district court to find that he intended his substantive offense of conviction or his relevant conduct to promote such a terrorism crime.

In addition, the Department has also encountered problems applying the terrorism enhancement in the case of an attempted obstruction of a terrorism investigation. In United States v. Biheiri, 356 F. Supp.2d 589 (E.D. Va. 2005), the court noted that where the government has a false statement intended to obstruct a terrorism investigation – but no proof that it *actually* obstructed the investigation – the enhancement will not apply because §3A1.4 (unlike the obstruction statute or its corresponding sentencing guideline) does not mention attempts to obstruct. We urge the Commission to amend the guideline to ensure that the enhancement applies to attempts to obstruct terrorism investigations.

Gun Trafficking

Firearms trafficking, the illegal diversion of firearms out of lawful commerce, is frequently the source of firearms used in violent crimes. Firearms traffickers deliberately circumvent the background check and record keeping requirements of legal commerce in order to supply firearms to convicted felons, drug dealers, juvenile gang members and other prohibited persons. A June 2000, ATF report entitled "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," notes that 50 percent of the investigations classified as trafficking by ATF between July 1996 and December 1998 involved at least one firearm recovered during a crime; seventeen percent of these firearms were associated with a homicide or robbery. The strong tie between trafficked firearms and violent crimes underscores the great harm of firearms trafficking.

However, the Sentencing Guidelines do not currently treat firearms trafficking in a manner that recognizes the harm caused by those who traffic illegally in firearms. As a result, firearms traffickers may often receive sentences that do not match the seriousness of the harm caused by their offenses. To address these issues, the Department recommends that the Commission consider the creation of a new specific offense characteristic in §2K2.1 based on firearms trafficking conduct. Such a guideline could provide for a new scale of enhancements specifically applicable to offenses related to firearms trafficking schemes. The Commission also should consider whether to increase the sentencing enhancement in §2K2.1(b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers, as these offenses are often committed in furtherance of firearms trafficking. By increasing sentences for firearms-trafficking offenses to reflect the serious harm these offenses may cause, the guidelines would provide a stronger deterrent and better reflect the harm of these offenses.

Steroids

As part of the Anabolic Steroids Act, Pub. L. 108-358, Congress directed the Commission to implement appropriate guidelines for steroids. We appreciate the work the Commission has already done on the issue of anabolic steroids, including holding a hearing at which the Department and others testified.

To respond to the directive, the Department believes that the Notes to the Drug Quantity Table should be amended so that anabolic steroids are treated the same as other Schedule III controlled substance pharmaceuticals. Recent congressional hearings and the attention brought to the issue by the passage of the Act have highlighted the dangers associated with illicit anabolic steroid use – including the harm to young people. The current dosage equivalency is clearly inadequate to address the problem.

For all Schedule III drugs other than anabolic steroids, a "unit" is defined as one tablet or pill. Thus, a dosage unit for sentencing purposes equates to a therapeutic dose of the Schedule III drug. Similarly, we believe that a dosage unit under the Guidelines for anabolic steroids should be equal to one tablet, which constitutes a therapeutic dose. The Physician's Desk Reference

dosing information clearly indicates that therapeutic doses of anabolic steroids are consistent with the therapeutic doses of other Schedule III controlled substances. Accordingly, for sentencing purposes, anabolic steroid dosage equivalencies should be made to conform to other Schedule III substances.

We also urge the Commission to include guidance on how to compute dosage unit equivalencies for anabolic steroids in non-pill form. For instance, steroid creams can be packaged and dispensed in a tube and applied directly to the skin, and some designer steroids in liquid form are ingested orally by eye dropper under the tongue. For creams, we suggest that the commentary direct the court to determine the typical number of applications of steroid cream in a tube, and use that as the basis for computing the number of dosage units. For liquids, the court should determine the typical quantity injected or otherwise ingested (e.g., orally) at a single point in time (divide the total volume of liquid by the number of milliliters per dose) to determine the number of doses. This would substitute for the current "unit" measure of 10 cc regardless of the steroid (per Note (G) to the Drug Quantity Table at §2D1.1(c)).

In sum, the Department asks the Sentencing Commission to acknowledge the dangerous effects of anabolic steroids and to amend the guidelines to more accurately reflect the seriousness of offenses involving such substances. For the purposes of the guidelines, there is no principled basis for distinguishing between anabolic steroids and all other Schedule III controlled substances. If anabolic steroids were treated as other Schedule III substances, then a large scale distributor would face a base offense level of 20 based on a drug trafficking scheme involving 40,000 or more dosage units. DEA drug seizure data suggests that modification of the dose equivalencies as advocated by the Department would yield more appropriate sentences for large scale traffickers without capturing those who handle personal use quantities.

Downward Departures in Gun Cases

The Department reiterates our request from last year that the Commission address downward departures for felons who possess guns based upon the court's finding that the defendant would not have done anything illegal with the guns. *See e.g. United States v. Vanleer*, 270 F.Supp. 2d 1318 (D. Utah 2003) (downward departure found appropriate where felon possessed gun only for the purpose of pawning it); *United States v. Bayne*, 2004 WL 1488548 (4th Cir. July 6, 2004) (departure upheld for possession of a sawed-off shotgun under §5K2.11 under PROTECT Act standard of review). Courts granting these departures generally rely on §5K2.11 and *United States v. White Buffalo*, 10 F.3d 575, 576-577 (8th Cir. 1993) holding that a departure could be granted under §5K2.11 when a sawed-off rifle was not loaded when police discovered it, the defendant had no criminal record, and it was undisputed that the defendant had shortened the weapon so he could shoot varmints in the confined spaces underneath his shed.

It is our position that §5K2.11 should not apply in cases involving felons who possess a gun. *See United States v. Guess*, 131 F. 3d (4th Cir. 1997) (lack of intent to commit another crime is not a basis for a downward departure in a felon in possession case). Section 5K2.11

allows the court to depart when a defendant commits a crime that did not cause or threaten the harm sought to be prevented by the law at issue. Applying downward departures in felon-in-possession cases goes directly against the original purpose of the prohibition: to prevent persons who have demonstrated an inability to conform their conduct to the law from having control of lethal weapons. As such, §5K2.11 should not be applied to these types of cases. The Department agrees with the Ninth Circuit's reasoning (in the context of a non-felon possessing a sawed-off shotgun) that "[n]either Congress nor the [Sentencing] Commission limited punishment for the offense to those who possess the guns for evil reasons." United States v. Lam, 20 F.3d 999, 1004-1005 (9th Cir. 1994). We ask the Commission to clarify this point this coming term.

In addition, we ask the Commission to consider whether downward departures should be permitted on the basis of injuries sustained by a defendant after he threatens a police officer with deadly force and is subsequently shot by such officer. In United States v. Clough, 360 F.3d 967 (9th Cir. 2004), the defendant assaulted police officers with a sawed-off shotgun and was subsequently shot by those officers. After pleading guilty to both state assault charges and federal gun charges, the defendant asked the federal court at sentencing for a downward departure because of his injuries. The Ninth Circuit held that being shot could possibly be considered punishment, thus making a reduced sentence potentially acceptable. Because the Sentencing Commission has neither categorically proscribed consideration of the factor nor discouraged consideration of it, the circuit court held a district court has the discretion to consider a defendant's gun shot injuries suffered when attacking police with a sawed-off shotgun in deciding whether to depart downward from the Guidelines sentence. We think this issue warrants Commission consideration.

Legislative Directives and Commission Priorities

The Department is aware that the Commission intends to continue its work regarding immigration offenses. The Department looks forward to working with the Commission to ensure appropriate immigration guidelines. Specifically, we urge the Commission to increase the applicable base offense levels for all passport offenses, so that the penalties more properly reflect the seriousness of these offenses and their potential threat to national security.

In addition, Congress has directed the Commission to implement crime legislation enacted during the 108th Congress and the first session of the 109th Congress, such as the Family Entertainment and Copyright Act of 2005, Pub. L. 109-9; the Intellectual Property Protection and Courts Amendment Act of 2004, Pub. L. 108-482; and the Intelligence Reform and Terrorism Reform Act of 2004, Pub. L. 108-458. In addition, there is an issue pending from the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, that is, creating a guideline for spamming of sexually explicit material. The Department looks forward to working with the Commission to appropriately amend the guidelines as part of the implementation of this important crime legislation.

The Department notes that the Commission's work in response to Booker – including continuing data compilation and analysis and consideration of responsive guideline amendments and legislation – will consume a great deal of the Commission's time and resources. Consequently, we have limited our requests to our highest priorities in order to allow the Commission to address them. At the same time, we take this opportunity to draw the Commission's attention to other important issues that warrant consideration either during this amendment cycle or in the future, such as: (1) creating a guideline for violations of the foreign agent notification offense found at 18 U.S.C. § 951, which has no direct or clearly analogous guideline provision, resulting in a disparity in the sentences received by defendants convicted of the offense; (2) adding an enhancement to §2T1.4 to address violations of 26 U.S.C. § 7206(2) (aiding and assisting in the filing of false returns, statements or other documents) in cases involving high volumes of tax returns, such as in abusive tax shelter programs or fraudulent tax return schemes; and (3) addressing the guidelines for trafficking of British Columbia or "B.C. Bud" marijuana, which is five times more potent than regular marijuana (based on THC levels), has a higher monetary value and, consequently, should not be equated to marijuana for sentencing purposes.

We look forward to working with the Commission during this coming year to improve federal sentencing policy, through specific amendments to the sentencing guidelines, and by ensuring that the sentencing system that emerges from Booker provides protection to the American people and equal justice to defendants.

Sincerely,


Deborah Rhodes
Counselor to the Assistant Attorney General