



Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

June 14, 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

Re: 2006 Priorities

Dear Judge Hinojosa:

We write on behalf of the Practitioners' Advisory Group to suggest priorities we would like to see the Commission address in the next one or two amendment cycles. This letter also briefly reiterates the approach that the Practitioners' Advisory Group ("PAG") recommended previously to the Commission with respect to Booker. We hope that this letter will be of assistance to the Commission.

I. Booker

In Booker, the Supreme Court declared that the United States Sentencing Guidelines could no longer be applied to mandate increases to defendants' sentences without subjecting the relevant facts to the Sixth Amendment right to jury trial. The Supreme Court made the Guidelines "effectively advisory" by excising two provisions of the Sentencing Reform Act ("SRA") that made the Guidelines mandatory. The Supreme Court left in place a statutory framework that takes into account the Guidelines Manual as well as other statutory considerations with the ultimate goal of ensuring that the final sentence be sufficient but not greater than necessary to achieve the goals of sentencing in the individual case. Sentencing courts must now consider the advisory guidelines, see 18 U.S.C. § 3553(a)(4), together with the sentencing goals and other factors set forth in 18 U.S.C. § 3553(a).

The Supreme Court created a remedy in which courts are required to exercise *guided* discretion within the framework of 18 U.S.C. § 3553(a), subject to review for reasonableness. In doing so, the Supreme Court created a perfect opportunity for the Sentencing Commission to collect information about actual sentencing in a system of guided discretion, and to determine whether that system "continue[s] to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." Booker, 125 S. Ct. at 767. The Court created a remedy that is a reasoned and workable system.

As we have indicated previously, through letters and testimony before the Commission, we believe that Congress should give the Booker remedy an opportunity to work. No immediate change to the federal statutes is required to clarify sentencing procedures or standards consistent with the Court's decision in Booker. This is an ideal opportunity for the Commission to collect and analyze sentencing data and other relevant information. The Commission is uniquely suited for this task because of its substantial expertise in sentencing policy and the historical data it already has collected and studied on actual sentencing practice.

II. Other Priorities

We urge the Commission to give priority to the following issues during the 2005-2006 amendment cycle.

1) Mandatory Minimums

In 1991, the Sentencing Commission published *Mandatory Minimum Penalties in the Criminal Justice System*. This comprehensive study explored the impact of mandatory minimum sentencing and the interaction of mandatory and guideline sentencing, and provided invaluable data and insights in the years following the advent of the sentencing guidelines.

It is now 14 years since that study, undertaken pursuant to a directive from Congress, was completed by the Commission. On the eve of this 15-year anniversary, PAG believes it is time for the Commission to consider a fresh look at mandatory minimums – just as the Commission recently completed a 15-year study on the Guidelines themselves. The questions the original Commission's report answered are as timeless as when they were first posed in 1990. They include: how mandatory sentencing affects the goal of eliminating unwarranted sentencing disparity; an assessment of the compatibility of mandatory minimums and guideline sentencing; a discussion of the interaction of mandatory sentencing and plea agreements; and means other than mandatory minimums that Congress can use to further sentencing goals. Since the report was released, Congress has adopted new and increased mandatory minimum sentences and instituted the Safety Valve to ameliorate the harsh impacts of mandatory minimum sentencing on low level, first time drug offenders. Indeed, given the many recent bills that have been introduced in the House that would require additional mandatory minimums as a response to Booker, an updated study and report by the Commission is urgently needed to provide relevant empirical information and policy insights. We therefore strongly urge the Commission to conduct another study of mandatory minimum sentencing.

2) Extraordinary and Compelling Circumstances: Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)

For several years, PAG has urged the Commission to develop policy guidance for courts and others considering sentence reduction motions under § 3582(c)(1)(A)(i), as provided in 28 U.S.C. § 994(t). We once again call on the Commission to promulgate a policy statement and urge the Commission to include both medical and non-medical examples of "extraordinary and compelling reasons" potentially justifying a sentence reduction.

It is essential to have some "safety valve" in a determinate sentencing scheme, so that the government may respond to any extraordinary and compelling situations that arise after sentencing that render continued imprisonment unjust or meaningless. The legislative history of § 3582(c)(1)(A)(i) indicates that Congress intended this authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration. See Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. Rptr. 188 (2001). The potentially broad applicability of this section is further evidenced by the direction to the Commission in the final sentence of § 994(t) that "rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason." (Emphasis added.) This proviso evidences an assumption on the part of Congress that, when considered with other equitable circumstances, a prisoner's rehabilitation would be appropriately considered in a request for sentence reduction. The predecessor authority for sentence reduction, which Congress professed to be continuing unchanged in the 1984 law, was used to reduce sentences in a variety of circumstances, including cases of extreme old age, terminal illness, medical disability, compelling changes in personal or family circumstances, and unjustifiable disparity of sentence among similarly situated co-conspirators.¹

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A)(i), has interpreted its responsibilities under this statute very narrowly, authorizing sentence reduction motions only in those cases in which a prisoner is near death or profoundly ill or disabled. Lack of policy guidance from the Commission may explain the Bureau's conservative interpretation of its statutory mandate. See John R. Steer and Paula K. Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is in an excellent position to ensure that the statute can be implemented in a broad range of situations, as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in exercising its discretion. In this regard, we hope the Commission will avoid promulgating policy that relies upon rigid categories of eligibility.

3) Chapter 6, Recommendation to the Federal Rules Advisory Committee

PAG continues to believe that the existing Federal Rules of Criminal Procedure should better reflect and improve practice under the sentencing guidelines. Although the Rules are not directly within the Commission's scope of authority, they greatly impact the manner in which the guidelines are applied. Just as the Commission provides input to Congress on pending legislation, PAG believes it is even more appropriate, and vital, for the Commission to provide input within its own Judicial Branch, recommending that the Federal Rules Advisory Committee

¹ See, e.g., United States v. Diaco, 457 F. Supp. 371 (D.N.J., 1978) (federal prisoner's sentence reduced pursuant to old law analogue of § 3582(c)(1)(A)(i) (18 U.S.C. § 4205(g)) because of unwarranted disparity among codefendants); United States v. Banks, 428 F. Supp. 1088 (E.D. Mich. 1977) (same). One of our members with experience as a Pardon Attorney reports that § 4205(g) was used in an extradition case and in a spy swap case, and that the pardon power was used frequently to reduce sentences in cases involving compelling equitable circumstances.

study and potentially revise rules which directly affect sentencing practice and procedure. In addition, the Commission can and should suggest such practice and procedure matters through an amendment to its policy statements in Chapter 6.

a) Disclosure of Sentencing Facts

PAG believes that sentencing practice and procedure would benefit from greater disclosure of facts affecting guideline calculation between and among the parties. Over 95% of federal criminal cases are disposed of by guilty plea, yet 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. Even more troubling is the fact that the government is not required to disclose to defendants any facts affecting the application of the guidelines even *after* the entry of a guilty plea. Instead, at present, 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, and in many districts this is on an *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 not consistent with an appropriate adversarial system. The rules, at a minimum, should require any party wishing to present evidence to the court's probation officer to disclose such evidence to the opposing party prior to issuance of the presentence report, at least absent some protective order or showing of need for non-disclosure by the prosecution. In the experience of our members, it is extremely difficult to explain to clients the fairness of a system that allows routine, *ex parte* disclosures to the probation office in advance of sentencing. This does not promote respect for the process generally. We urge the Commission to consider making formal recommendations to change the Federal Rules of Criminal Procedure in this area.

b) Appeal Waivers

We also ask the Commission to consider revising Chapter 6 to address the issue of waivers of appeal. We believe that Chapter 6 should strongly discourage such waivers and make clear that a sentencing court may reject a plea agreement that contains a waiver of appeal or strike such a waiver from a plea agreement.

In enacting the Sentencing Reform Act of 1984, Congress for the first time adopted a "comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means of correction of erroneous and clearly unreasonable sentences." See S. Rep. No. 225, 98th Cong., 1st Sess. 155 (1983). Congress explained that the right to appeal by the defendant and the government alike was necessary to a fair and rational sentencing system:

Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law

development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the sentencing commission in refining the sentencing guidelines as the need arises. . . . It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient. This consideration has led most western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the committee considers it to be a critical part of the foundation for the bill's sentencing structure. The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.

Id. at 151.

The government routinely insists on a provision in the plea agreement stating that the defendant waives his right to appeal his conviction and sentence while the government retains all appellate rights. The defendant is also often pressured to waive the right to file a post conviction motion based on ineffective assistance of counsel, even though defense counsel cannot ethically recommend such a course of action.

The Courts of Appeal have generally upheld appeal waivers if knowing and voluntary. Even if technically knowing and voluntary, however, defendants as a practical matter often have little or no bargaining power before signing a plea agreement. It is easy to imagine cases in which a one-sided appeal waiver results in injustice; for example, the government successfully appeals a downward departure but the defendant cannot obtain relief for an erroneous upward adjustment. Moreover, one-sided appeal waivers damage the system as a whole by skewing the case law in the government's favor, thwarting the rational development of the Guidelines, and promoting unwarranted disparity. A few district court judges, recognizing the individual and systemic injustice and the inability of defendants to prevent it, either reject plea agreements with appeal waivers or strike the waiver from the agreement. Requiring a defendant to forego the right to appeal an error that has not yet occurred, or which has occurred but is undiscovered or unappreciated, guarantees that flawed guideline applications will unjustly lengthen sentences, as well as hinder the development of appellate case law that in turn serves to inform guideline refinement.

Plea agreements with one-sided appeal waivers promote unwarranted disparity, deprive the Commission of the feedback the 1984 Congress intended, and are simply unjust. As such, they should be strongly discouraged as a policy matter.

4) Criminal History

Criminal history continues to be a troubling area of sentencing that deserves the Commission's attention. PAG applauds the Commission for its ongoing review of this important area, and wishes to emphasize certain points.

As we have noted before, we are particularly concerned that criminal history may be overstated through the inclusion of minor matters that do not serve the predictive or punitive functions of criminal history. It also appears that variations in state and local sentencing practices with respect to minor offenses causes ambiguity and uncertainty in the application of the current criminal history guidelines, and creates disparity and unfairness. We therefore believe that the offenses listed in section 4A1.2(c)(1) should be excluded regardless of the sentence imposed, as the Probation Officers' Advisory Group has previously recommended.

Criminal history issues also 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 recent limitations 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, particularly within criminal history category I of the sentencing table, the same goal could be achieved through the creation of a new criminal history category 0.

The Commission also should consider obtaining and reviewing 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 certain studies have refuted, at least in the white collar context, the notion that long terms of incarceration have a general deterrent effect. Rather, the deterrent effect is best achieved by certainty and swiftness. 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. § 994(j).

5) Relevant Conduct, Cross References

Reconsideration of the use of uncharged, dismissed, and acquitted conduct through the relevant conduct and cross reference guidelines also remains important notwithstanding Booker. By preserving some flexibility for individualized sentencing through the departure power, Congress sought to avoid the untenable choice between the unwarranted disparity inherent in an entirely discretionary system and the burden on the criminal justice system of providing full constitutional safeguards for all sentencing factors. Justice Rehnquist and others objected to the Feeney Amendment, for example, on the basis that a drastically reduced departure power "would

do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences.” See 149 Cong. Rec. S5113-01.

Apparently because of the above considerations, Chief Judge Young of the United States District Court for the District of Massachusetts now requires that all relevant conduct be charged and proved beyond a reasonable doubt. While this may burden Judge Young’s docket and the prosecutors with cases before him, the alternative in many cases would be unconstitutional.

As suggested in an article published by the American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001), PAG 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 at least a clear and convincing standard of proof, but preferably beyond a reasonable doubt, to all relevant conduct sentencing elements, and requiring full notice of all relevant conduct before the entry of a guilty plea. These limited but compelling reforms would honor the due process concerns that informed the Booker opinion, provide needed fairness and safeguard the constitutionality of the Guidelines sentencing system.

Post-Booker, the courts have held that a beyond a reasonable doubt standard must be used at least for acquitted conduct. For example, Judge Gertner adopted a beyond a reasonable doubt standard and rejected the use of acquitted conduct in sentencing. She explained that pre-1984, the jury and judge had specialized roles and rules to match -- juries *found facts* with determinate consequences and their decision-making was thus constrained by the rules of evidence and the highest burden of proof, while judges exercised something like a clinical judgment about the appropriate sentence and thus were not so constrained. With mandatory Guidelines, the roles blurred and judges found facts with determinate consequences but without procedural safeguards, which culminated in the holdings in Apprendi, Blakely and Booker that this violates the Sixth Amendment. Under the Booker remedy, sentencing is a hybrid, neither purely discretionary nor mandatory, but “still profoundly influenced by the rules, namely the Guidelines.” United States v. Pimental, 367 F.Supp.2d 143, 152, 2005 WL 958245 (D. Mass. Apr. 15, 2005). For this reason, the consideration of acquitted conduct (particularly acquitted facts that amount to separate crimes) is inconsistent with logic or recent law. Id. (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense – as a matter of law or logic.”).²

² Judge Marbley in United States v. Coleman, ___ F.Supp.2d ___, 2005 WL 1226622 (S.D. Ohio May 24, 2005), held that the court must use the beyond a reasonable doubt standard when considering acquitted conduct because to do otherwise disrespects and ignores the jury’s verdict. Similarly, but with less discussion, the court in United States v. Carvajal, No. 04-CR-222AKH (S.D.N.Y. Feb. 22, 2005), declined “to accept the government’s argument that, notwithstanding the jury’s verdict that Carvajal was not guilty of actually distributing crack, I should nevertheless consider that the acts necessary for completing the substantive crime were proved by a preponderance of the evidence. Cf. United States v. Watts, 519 U.S. 148 (1997).”

6) Drug Offenses

We continue to be concerned about the disproportionately long sentences for drug offenders, including those convicted of crimes involving so-called “crack” cocaine, or “cocaine base.” The current drug guidelines place undue emphasis on the quantity of the drugs involved to the exclusion of situational and offender characteristics that are better indicators of culpability.

The Commission recently replaced the role cap for drug offenses with adjustments calibrated to the base offense level triggered by the offense of conviction. Now that this amendment has been passed, we urge the Commission to expressly make this amendment retroactive. Retroactivity is the right thing to do. After years of consideration and concern about long sentences for low-level defendants (a role cap was first voted on in 1991), the Commission determined that the reduced guideline sentence “is sufficient to achieve the purposes of sentencing. . . .” U.S.S.G. § 1B1.10, comment. (backg’d.). The reasons that compel this measure of justice for defendants prospectively hold especially true for those already imprisoned. Their lengthy sentences moved the Commission to design the relief in the first place. Retroactivity is justified in light of the factors the Commission takes into account in making a retroactivity determination: the purpose of the amendment; the magnitude of the change; and the difficulty of applying the change retroactively. U.S.S.G. § 1B 1.10, comment. (backg’d.) (2003). A court choosing to adjust the base offense level to an already sentenced defendant can do so easily on the sentencing record, by simply reducing the sentence by the indicated number of levels. Other adjustments and departures were already applied and need not be reconsidered.

We hope that additional steps can be taken to tailor drug sentences more closely to the true severity of offenses and culpability of offenders.

7) Anabolic Steroids

While not a priority that PAG would necessarily select, we recognize the Commission’s legislative obligation to soon address issues of sentencing for anabolic steroids convictions. As PAG previously indicated, in a March 25, 2005 letter to the Commission, PAG believes that the Commission should begin that process by surveying and collecting additional data before deciding whether, how, or to what extent these guidelines might be changed. When the distinction between Anabolic Steroids and other Schedule III substances was originally established, the Commission itself noted how a different penalty structure was being used for Anabolic Steroids “[b]ecause of the variety of substances involved.” See U.S.S.G. Amendment 369. That “variety” has likely only increased and become more complex since 1991.

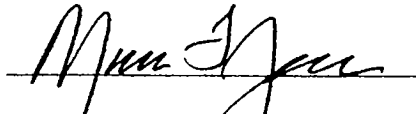
Although we recognize that the Commission is to consider the possibility of increasing these guidelines, the legislative history also reflects a goal of making sure that the numbers ultimately chosen come out right. See, e.g., H. Rep. 108-461 (Part 1) April 2, 2004, at 31 (noting how issue is sent “to the Sentencing Commission to make sure that the actually imposed penalties are *appropriately proportional*”) (Emphasis added); *id.* at 32 (“it is sent to the Sentencing Commission to review and *make the appropriate findings.*”) (Emphasis added).

PAG does not know if the Commission currently has data to consider as part of its review of this area. To the extent that data or specific proposals are submitted to the Commission by the Department of Justice or others, however, PAG requests access to this information, so that it may evaluate those proposals and provide more effective recommendations to the Commission. For example, the legislative history notes how Anabolic Steroids are often "prescribed to treat body wasting in patients with AIDS and other diseases that result in the loss of lean muscle mass." *Id.* at 4. The Commission may decide that such circumstances represent a mitigating factor that could support either a guideline adjustment or, in an appropriate case, authorization to depart.

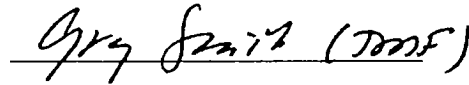
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As always, we appreciate the opportunity to provide input regarding potential Commission priorities, and look forward to working with the Commission through the coming cycle.

Sincerely,



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A Standing Advisory Group of the United States Sentencing Commission

August 15, 2005

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Re: 2006 Priorities

Dear Judge Hinojosa:

On June 14 of this year we wrote on behalf of the Practitioners' Advisory Group to suggest priorities that PAG believes the Commission should address in the next amendment cycle. One of the issues we urged upon the Commission was the development of policy guidance for courts considering sentence reduction motions under § 3582(c)(1)(A)(i). This issue has been on the Commission's list of priorities for the past two years, though to our knowledge the Commission has not yet taken action to address it. We were concerned to see that this issue did not appear on the Commission's proposed list of priorities for 2006, and are writing to ask the Commission to reconsider its apparent decision to omit this admittedly sensitive and difficult issue from the priorities list.

The Commission was directed by Congress to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A)(i), as part of its policy-making responsibility under the 1984 Act, if in its judgment this would "further the purposes set forth in § 3553(a)(2)." See 28 U.S.C. §§ 994(a)(2)(C), 994(t). Section 3582(c)(1)(A)(i) specifically provides that in considering whether "extraordinary and compelling" reasons warrant sentence modification in a particular case, the court is required to "consider[] the factors set forth in § 3553(a), to the extent that they are applicable." This seems to establish Congress' intention that a court should apply the same criteria in considering sentence reduction motions under § 3582(c)(1)(A) ("to the extent that they are applicable") as it applies to determine the sentence in the first instance. Thus, for example, if a sentencing court could have taken into account a defendant's serious health problems and exigent family circumstances in determining the sentence in the first instance, it could also properly consider them as a basis for sentence reduction if they were to develop or become aggravated unexpectedly mid-way through a prison term. As a corollary, it would seem reasonable to suggest that Congress intended to provide a

means of bringing these circumstances to the court's attention. This interpretation of the government's responsibility under § 3582(c)(1)(A)(i) would underscore the importance of having the Commission play a role in developing uniform policy for implementing this statute.

PAG hopes that the Commission has not permanently changed its view as to whether it would further the purposes of § 3553(a)(2) to develop a policy statement to implement § 3582(c)(1)(A)(i). As we pointed out in our June 14 letter, the Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A)(i), has interpreted its responsibilities under this statute very narrowly, authorizing sentence reduction motions only in cases where a prisoner is near death. We believe that Congress intended this statute to be used more broadly, for reasons described in our earlier letter. More important for present purposes, we believe that the Commission is in an excellent position to give guidance, both to courts and to BOP, to ensure that the statute can be implemented in a broad range of situations, as intended by Congress, by providing criteria, content, and examples on which the BOP and the courts may rely in exercising its discretion. We recognize that the Commission has been exceptionally busy over the past year, and that to a certain extent it must be judicious in setting priorities. But PAG believes that this issue is an important one which deserves the Commission's attention, and therefore we urge the Commission to continue to work on this equitable and important "safety valve" statute.

Sincerely,



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