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July 26, 2005

Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
ATTN: Public Affaris-Prioritics Comment (BOOKER)

RE: Comments on Booker Ruling

Dear Commission:

Thank you for opening the door for these comments on the recent United States Supreme Court Ruling in: United States v. Booker.

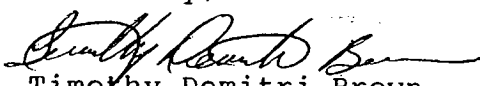
My personal opinion is that the ruling is in error: the guidelines themselves are not unconstitutional, the point of the matter is that it is against our constitution for a Judge to decide the facts of a case. The Court chose to protect itself from the backlash of its previous unauthorized conduct, allowing Judges to determine facts by a preponderance of the evidence, this practice has been wrong, unconstitutional, from its inception.

I would urge the Commission to reinstate the guidelines as mandatory, but remove any rules that allows a Judge to find facts by any standard of evidence. Plus, I would urge the Commission to promulgate an Amendment that would allow those who are unable to pursue this new rule, due to it not being ruled retroactive by the Court, to have their sentence corrected under 18 U.S.C. 3582.

On a separate note, why is there no publication that list the elements to each federal statutory and regulatory offense and the element of federal jurisdiction for each of those offenses? I believe this would resolve the majority of the confusion in appeals and relieve the court of 70% of the motions filed.

I respectfully request that these comments be presented before the Commission in full assembly.

Sincerely,


Timothy Dimitri Brown

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July 26, 2005

United States Sentencing Commission
One Columbus Circle, N.E.,
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Washington, D.C. 20002-8002

RE: Priorities Comments-United States Guidelines
Amendment Cycle-May 1, 2006

Dear Sentencing Commission:

Thank you for taking the time to read this letter. At the outstart, I would like to commend the Sentencing Commission on its continuation of its work on cocaine sentencing policy and on appropriate responses to United States v. Booker, 125 S.Ct. 738 (2005). I have been imprisoned for almost ten years for federal drug crimes. Consequently, at the request of the Sentencing Commission, I would like to share my comments and personal experience with the Sentencing Guidelines.

At sentencing, I stood in shock and disbelief as I watched my guideline sentence increase from 12-16 months imprisonment to life imprisonment. The trial jury did not determine any of the facts used to increase my guideline range. Rather, the sentencing judge determined the disputed facts under the preponderance of the evidence standard. The sentencing judge also "approximated" and "aggregated" the drug amounts used to set my base offense level. The sentencing judge's approximation and factual findings were based exclusively on the information and testimony of cooperating witnesses who had huge incentives to exaggerate and shift blame. The sentencing judge simply ignored the fact that the

cooperating witnesses kept no record of the alleged drug transactions or that most of the cooperating witnesses were high on drugs and alcohol during the relevant time period. Moreover, the sentencing judge disregarded the fact that no police testimony corroborated the aggregated drug amount or that my lifestyle did not indicate I was responsible for the aggregated drug amount.

I strongly urge the Sentencing Commission to address the Guidelines' relevant conduct/aggregation rule. A sentencing procedure that permits a sentencing judge to "approximate" and "aggregate" uncharged drug amounts based solely on information provided by cooperating witnesses "is a procedure that can be subject to much error." See, *United States v. Hiveley*, 61 F.3d 1358, 1362 n.2 (8th Cir. 1995). Most disturbingly, it is not uncommon for the Guidelines' relevant conduct/aggregation rule to increase a hundred-fold a defendant's guideline sentence based on facts uncharged and unproven beyond a reasonable doubt. See, *Booker*, 125 S.Ct. at 752 (collecting case). In fact, the Supreme Court has noted the unfairness when a defendant see his maximum potential sentence "balloon" from 5 years to life imprisonment based on facts "extracted after trial from a report compiled by a probation officer who judge thinks more likely got it right than got it wrong." See, *Blakely v. Washington*, 124 S.Ct. 2531, 2542 (2004).

Today, there is a heightened concern for procedural fairness in the finding of facts. Sentencing judges across the country are now requiring the government to prove beyond a reasonable doubt all disputed facts used to increase a defendant's guideline range. See, e.g., *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019,

1025 (D. Neb. 2005)(Bataillon, J.); United States v. Barkley, 369 F.Supp.2d 1309, 1319 (N.D. Okla. 2005)(Holmes, C.J.); United States v. Gray, 362 F.Supp.2d 714, 723 (S.D.W Va. 2005)(Goodwin, J.); United States v. Malouf, Crim. No. 03-CR-10298-NG (D. Mass. June 15, 2005)(Gertner, J.). It is now accepted in courts across the country that a heightened standard of proof is necessary to ensure an accurate determination of the defendant's degree of culpability. I encourage the Sentencing Commission to make this new and enhanced fact-finding procedure universal throughout the Federal System and to make it retroactive.

For too long, the Guidelines have permitted sentencing judges to increase (sometimes a hundred-fold) a defendant's guideline sentence based on facts uncharged and unproven beyond a reasonable doubt. The Guidelines, in particular, for too long have permitted sentencing judges to "approximate" uncharged drug amounts under the preponderance of the evidence standard. This method is arbitrary and unreliable and raises serious questions about the accuracy of fact-findings in past cases. True, a misallocation of fact-finding responsibility (judge versus jury) does not necessarily improve the accuracy of the fact-finding and thus does not warrant retroactive application. *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523 (2004). But, the same cannot be said for an heightened standard of proof. See, *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977). Therefore, if the Sentencing Commission adopts a heightened standard of proof, it should be made retroactive.

In short, the contention that Booker signals a return to pre-Guidelines' discretion is an overstatement. In truth and in fact, Booker has created a hybrid (not totally discretionary and

not totally mandatory) sentencing system controlled by reasonableness. See, *Booker*, 125 S.Ct. at 765-766 (a sentencing judge's discretion is constrained by the notion of "reasonableness.") Interestingly, courts are declining to define "reasonableness." See, *United States v. Haack*, 403 F.3d 997 (8th Cir. 2005); *United States v. Mykytiuk*, 7th Cir. No. 04-1196 (7th Cir. July 7, 2005). Therefore, if not properly restricted, the Guidelines' relevant conduct/aggregation rule still has the potential of circumventing *Booker*'s substantive holding. I urge the Sentencing Commission to implement a procedure that would prohibit the Guidelines' relevant conduct/aggregation rule from becoming "a tail which wags the dog of the substantive offense." See, *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986) (due process will be violated when the finding of a sentencing factor becomes "a tail which wags the dog of the substantive offense.") In other words, a sentencing judge may still use the Guidelines' relevant conduct/aggregation rule. But, a single enhancement or upward departure should not overwhelm or be extremely disproportionate to the punishment that would otherwise be imposed based on facts proven beyond a reasonable doubt or admitted by the defendant.

Lastly, I encourage the Sentencing Commission to address the Guidelines' quantity-driven, "market-oriented" approach and 100:1 sentencing ratio between crack cocaine and powder cocaine. Under the new sentencing system, judges are again questioning the justification of the 100:1 ratio between crack cocaine and powder cocaine. See, *United States v. Nellum*, 2005 WL 300073 at *4 (N.D. Ind. Feb. 3, 2005). One district judge has already imposed a lower sentence than called for by the Guidelines to

avoid an "unwarranted disparity between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine." See, *United States v. Smith*, 359 F.Supp.2d 771, 781 (E.D. Wis. 2005)(Adelman, J.). Judge Adelman reasoned that "[c]ourts, commentators, and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological and scientific justification and creates a racially disparate impact in federal sentencing." *Id.* at 777 (citations ommitted).

It is also worth noting that the Guidelines' 100:1 ratio can lead to anomalous results in which retail crack dealers receive longer prison terms than the wholesale drug distributor who supply the powder cocaine from which the crack is produced. Indeed, my case illustrates this point very well. At age 23, I was sentenced to life imprisonment while those the government claimed supplied the powder cocaine are now free.

The Guidelines' quantity-driven, "market-oriented" approach also contributes to disparity and unreliability in drug sentencing. The quantity system was developed to punish bigger distributors more harshly, but practices of charging conspiracies over a long period of time has the result of aggregating many small distributions so as to make a long-term small quantity street vendor look like a large-quantity "kingpin." Consequently, because the Guidelines quantity-driven, "market-oriented" approach often overstates the seriousness of the defendant's crime, a small quantity street vendor often receives the same type sentence as a large quantity kingpin. See, *Huerta-Rodriquez*, 355 F.Supp.2d at 1025-26 n.6; see also, *United States v. Lacy*, 99 F.Supp.2d 108, 116 (D.Mass. 2000)(Gertner, J.); *United States v.*

Perez, 321 F.Supp.2d 574, 581-82 (S.D.N.Y. 2003)(Lynch, J.). Many legal commentators have also urged that the Sentencing Commission to reduce the impact drug amount has on setting a defendant's base offense level under §2D1.1 Drug Table. See, e.g., Marc Miller & Daniel J. Freed, The Disproportionate Imprisonment of Low-Level Drug Offenders, 7 Fed.Sent.Rep. 3 (1994); Jon O. Newman, Five Guideline Improvements, 5 Fed.Sent.Rep. 190 (1993); Douglas A. Berman, The Second Circuit: Attributing Drug Quantities to Narcotics Offenders, 6 Fed.Sent.Rep. 217 (1994). Simply put, there are other enhancements such as offense role, gun possession, and career offender that are adequate to address more serious drug offenses and repeated offenders.

In conclusion, no one suggest courts should go easy on drug offenders. But, its impossible to believe that the public would say that justice is served when first-time, non-violent drug offenders receive prison terms greater than many convicted murders and sex offenders. Numerous judges and commentators have publicly stated that most federal drug sentences are too long. See, e.g., Rhonda McMillion, "ABA Supports Push to Restore Judicial Discretion in Sentencing," 90 A.B.A.J. 62 (Jan.2004)(noting speech by Justice Anthony M. Kennedy stating that "prison sentences are too long, mandatory minimum sentences should be repealed, and sentencing guidelines should be reconsidered.") In short, a society can be tough on crime without being cruel and unjust.

Sincerely,

Kelby R. Franklin
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