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United States Sentencing Commission
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ATTN: Public Affairs-Priorities Comment

To The Commission:

The recent report, *Fifteen Years of Guidelines Sentencing* ("15-year report"), released in November 2004 by the United States Sentencing Commission ("the Commission"), provided an evaluative analysis of the effectiveness of the sentencing guidelines in meeting the goals set forth in the Sentencing Reform Act of 1984 ("SRA"). This is an important report and one which merits further attention. We appreciate the opportunity to comment upon some of the findings in the report and to contribute to the Commission's review of agency priorities.

One of the core objectives of the SRA was to implement uniform sentencing practices across jurisdictions which would eliminate extralegal disparities, notably those based upon the race of the defendant. The 15-year evaluation of the performance of the guidelines in reducing racial disparity was informative, concluding that the remaining disparity in sentencing was not attributable to the proclivities of individual judges; rather, it was more likely a result of "sentencing rules" and charging practices that have "institutionalized" disparity.¹ Despite the relative effectiveness of the guidelines in regulating inter-jurisdictional sentencing, other factors, such as mandatory minimums, plea bargaining, and substantial assistance departures have re-introduced and formalized disparity. The 15-year report concludes that these variables "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system . . . prior to guidelines implementation."²

This is an alarming conclusion, and one that warrants inclusion by the Commission in the priority list during the forthcoming amendment cycle. If racial disparity continues to exist at sentencing despite the implementation of the federal guidelines, then the current sentencing system is running afoul of the mandate set forth in the SRA. Moreover, widely held perceptions of unfairness in sentencing undermine the legitimacy of the federal system and threaten its ability to achieve the purposes defined in the SRA. The Sentencing Project urges the Commission to

¹ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Washington, DC, 2004, at 127.

² *Id.* at 135.

explore this issue in depth, with a focused analysis of the factors outside of the guidelines that may be causing racially disparate outcomes in the federal system. We also suggest that the Commission develop a process of analyzing the future racial and ethnic impact of all proposed changes and to include a "Racial/Ethnic Impact Statement" ("RIS") with all sentencing policy amendment recommendations to Congress.

Below are some potential avenues for investigation:

Revisit the Impact of Mandatory Minimums

The 15-year report notes that mandatory minimums, such as those associated with powder and crack cocaine, are likely to be responsible for some degree of the variation in sentencing between races.³ Despite efforts to institute uniformity through the guidelines, statutory mandatory minimums trump the guidelines and can result in situations in which the mandatory minimum exceeds the prescribed guideline range for that particular offense. The inflexibility of mandatory minimums has had a particularly harsh impact on drug offenses, where factors such as individual criminal history and role in the offense, which would be considered under the guidelines, are ignored in determining sentence.

In addition to frequently mandating longer sentences than called for under the guidelines, mandatory minimums also have been shown to have a disproportionate impact on African Americans. For example, due to the 100:1 powder to crack cocaine sentencing ratio in weight thresholds triggering a mandatory minimum sentence, the average length of sentence for a crack cocaine conviction in 2003 was 123 months, more than 50% higher than the average sentence for powder cocaine.⁴ Because 81% of persons convicted of a crack cocaine offense in 2003 were African American, the high mandatory sentences which judges are required to impose in these cases have a racially disproportionate impact on sentencing.⁵

Crack cocaine defendants are also far less likely to be offered "safety valve" relief. In 2003, 65% of crack cocaine sentences resulted in a mandatory minimum with no safety valve (compared to 41% for powder cocaine), while only 12% were safety valve eligible (compared to 36% for powder cocaine).⁶ Crack cocaine defendants are less likely to receive mitigating role adjustments (6%) than powder cocaine defendants (23%).⁷ As we will discuss later, much of this disproportionality in sentencing is the result of disparate law enforcement techniques. The Sentencing Project joins Julie Stewart of Families Against Mandatory Minimums in urging Congress to undertake a new, comprehensive study of the effect of mandatory minimums, updating the work completed for the 1991 report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*. The results of an updated analysis will not only serve to shed light on racial disparity in federal sentencing, but will also be an informative resource for Congressional staff as they continue to consider the adoption of an ever increasing number of statutory

³ *Id.* at 83, 131.

⁴ United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Washington, DC, 2004, at 91.

⁵ *Id.* at 79.

⁶ *Id.* at 89.

⁷ *Id.* at 85.

mandatory minimums. A comprehensive study of mandatory minimums would be timely because a number of policymakers and legal authorities have suggested expanding the range of available mandatory minimums as a statutory response to the *Booker* decision. As long as mandatory minimum sentences are being advocated as a “fix” to the advisory guidelines created in the *Booker* decision, then it is imperative that as much as possible be made known about the short- and long-term consequences of such an expansion.

Plea Bargaining

Between 1999 and 2003, the number of cases that resulted in a guilty plea in the federal system fluctuated between 94.6% and 97% (2002).⁸ In short, the federal sentencing system depends upon guilty pleas in order to process the 70,000 cases that come before it on an annual basis. With such a significant proportion of adjudications resulting from guilty pleas, it is incumbent upon the Commission to have an intimate familiarity with the plea bargain process and to be able to identify and document the means by which the proceedings operate.

Despite high rates of guilty pleas across all jurisdictions, there is some variation by region and offense type. The range of guilty pleas extends from a low of 88.2% (District of Montana)⁹ to a high of 99% (District of Arizona).¹⁰ In addition, there is variance in the number of guilty pleas based on the type of offense, with drug offenses representing the conviction category most likely to have been resolved with a plea bargain.¹¹

In reference to disparity in sentence length (not specifically regarding race), the 15-year report noted that “plea bargaining is re-introducing disparity into the system.”¹² Thus, bargaining by the prosecutor may represent a substantial source of disparity. The 15-year report notes a paucity of studies on plea bargaining practices, primarily due to limited available data; however, the work that has been conducted describes a system in which the discretion afforded the prosecutor to charge or fact bargain significantly skews power in their favor and hampers the ability of the guidelines to deliver uniform sentences.¹³

The limited available information regarding the use of plea bargains paints a picture of near certainty of guilty pleas; however, we do not have adequate information about the use of pleas by race of the defendant. Past research by the Federal Judicial Center¹⁴ and the Commission have found racial disparity in the probability of receiving a mandatory minimum sentence and the likelihood of being offered a plea bargain below a mandatory minimum, respectively. African Americans were more likely to receive a mandatory minimum and less likely to be offered a plea below a mandatory minimum. It would be valuable for the Commission to collect and analyze the use of guilty pleas by race. Are certain offenders more likely to plead guilty? How does the likelihood of pleading guilty interact with the race of defendant, charged offense, and criminal history score? What is the intersectionality between race, plea bargains, criminal history, and

⁸ *Id.* at 22.

⁹ This does not include the Northern Mariana Islands.

¹⁰ *Supra* note 4, at 23-25.

¹¹ *Id.* at 26.

¹² *Supra* note 1, at xii.

¹³ *Id.* at xii-xiii.

¹⁴ Barbara, S. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms*, Washington, DC, 1992, p. 20.

mandatory minimum sentencing? Due to the near uniform use of plea bargains across the board, it is not likely that there will be substantial racial variation, but the interaction of factors listed above may offer some explanatory power for sentencing disparity by race, and its very ubiquity indicates the critical nature of the need for this type of analysis.

Use of Substantial Assistance Departures

The government retains substantial discretion in determining the outcome of a case by offering sentence reductions for defendants who offer substantial assistance to an ongoing governmental investigation, commonly referred to as §5K1.1 departures. These §5K1.1 departures are related to the use of plea bargains, as an agreement struck between a defendant and the state is frequently the result of an individual offering assistance to the state regarding other investigations. Sentence departures for government assistance accounted for more than half of all downward departures in 2003.¹⁵ Not unexpectedly, the number of substantial assistance departures varies among federal circuits, representing nearly 80% of all downward departures in the Third Circuit, while only accounting for approximately one-quarter of downward departures in the Ninth Circuit.¹⁶ There is substantial inter-district variation as well, indicating that a prosecutor's decision to recommend a substantial assistance departure, as well as a judge's discretion to consider it at sentencing, introduces ample opportunity for disparity to impede SRA goals of achieving uniformity in sentencing.

In addition to variance in the use of substantial assistance departures, the 15-year report noted that "the *extent* of departure" is more significant than other avenues in varying sentences.¹⁷ Thus, the use of substantial assistance is another potential entry point of disparity. As with the use of plea bargains, we do not have an understanding of the interaction, if any, between race and substantial assistance departures. Are there differential rates in which prosecutors recommend substantial assistance based on the race of the defendant? If so, what are the reasons? Do African Americans have "less" assistance to offer?

These are complex questions that are difficult to address based on available information, but we believe that the Commission should develop a data collection protocol that will allow analysts to address these questions.

Criminal History and Career Offender Enhancements

The 15-year report notes that more than half the persons sentenced under the "career offender" sentencing enhancement (§4B1.1) were African American, despite the fact that they represented only one-quarter of all adjudications.¹⁸ The evidence suggests that §4B1.1 is having a disproportionate impact on Black defendants, primarily through policy decisions regarding law enforcement and arrest patterns, thereby creating variability in the racial distribution of sentencing. The 15-year report notes that the majority of the impact of career offender

¹⁵ *Supra* note 4, at 64.

¹⁶ *Id.* at 60-62.

¹⁷ *Supra* note 1, at xiii.

¹⁸ *Id.* at 133.

sentencing enhancements comes as the result of drug offenses, which research has suggested are not accurately reflective of use and sale rates in the general community.¹⁹

There are a number of informative studies that suggest the decision of local law enforcement agents on where to pursue the "war on drugs" is a far better predictor of arrest and incarceration patterns than general use. As an example, National Survey on Drug Use and Health results report that African Americans represent approximately 14% of regular, illicit drug users, nearly the same proportion they represent in the general population.²⁰ Although there is reason to question the relevance of use rates because the majority of persons sentenced in the federal system for drug offenses have been convicted of trafficking, research of drug markets suggests people are more likely to purchase drugs from persons of the same racial background.²¹ Thus, there should be correlation between rates of use and sale by race. However, arrest and incarceration figures are higher for African Americans, with the rate of Black drug defendants in the federal system more than double their representation in the general population.²²

Such law enforcement patterns will have profound effects on racial disparity in sentencing, particularly when criminal history and career offender enhancements are taken into consideration. This was noted by Judge Nancy Gertner in *US v. Leviner*, in which she wrote that the use of criminal history scores and enhancements institutionalizes racial disparities present in law enforcement patterns into the guidelines of the federal sentencing system.²³ The Sentencing Project recommends that the Commission evaluate the impact of law enforcement policies on criminal history scores and analyze the degree to which §4B1.1 has exacerbated racial disparity in the federal system. The more accurately that the Commission can quantify the issues raised in *Leviner*, the better our ability to evaluate the efficacy of §4B1.1 enhancements. The outcome of this research may be to make recommendations in which the guidelines will consider the racially disparate impact of career offender enhancements due to law enforcement techniques and seek to compensate for these factors in the calculation of a sentencing score. Under this system, if either party can identify factors that have been prescribed as "racially disparate," then that party can ask for a departure based on that criteria. Judge Gertner's decision in *Leviner* is an example of the way in which this system would function. This is one approach in which the federal sentencing structure can avoid institutionalizing disparities that originate from outside its scope.

Other Adjustments and Enhancements

The federal sentencing system is exceedingly complex, due in large part to the manner in which cumulative sentencing scores are modified based on broad-ranging criteria. Although not intended, the use of certain factors may exert racially disproportionate effects on sentencing. In addition to criminal history and career offender enhancements, the Commission should

¹⁹ See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 University of Colorado Law Review 743, 753 (1993).

²⁰ See Substance Abuse and Mental Health Services Administration, *Overview of Findings from the 2002 National Survey on Drug Use and Health*. (Office of Applied Studies, HHDSA Series H-21, DHHS Publication No. SMA 03-3774, 2003). Rockville, MD. Table 1.31A.

²¹ K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities*, National Institute of Justice, 1997, p. 1.

²² *Supra* note 4, at 79.

²³ *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (1998).

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investigate the use of mitigating and aggravating factors that are eligible for judicial consideration during sentencing and document any racially disparate effects.

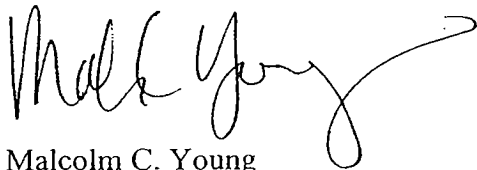
Establishment of Racial/Ethnic Impact Statements

The Sentencing Project is calling upon the Commission to do more than conduct a comprehensive analysis of race and the federal sentencing system. We urge the Commission to develop standardized protocol in which regular "Racial/Ethnic Impact Statements" will be produced to evaluate the future impact of proposed modifications to sentencing law. This will likely entail reaching out to outside organizations and developing partnerships which will help the Commission identify, measure, and report the impact of guideline amendments and sentencing law changes upon racial and ethnic populations. The Commission would best fulfill its role in reducing unwarranted disparity by creating a process in which all recommendations for policy change would be accompanied by a prospective statement documenting the likely impact of these amendments on persons of color.

The RIS would function in the same fashion as a fiscal impact statement which is appended to state and federal legislation. These documents assist legislators in deciding the potential short- and long-term costs of a potential law. This same principle is embodied in an RIS. For example, had the Commission prepared an RIS prior to the passage of the drug sentencing bills in 1986 and 1988, Congress would have been informed of the disproportionate effect of the powder/crack cocaine sentencing disparity and could have considered this impact in its deliberations. Congress might well have been prompted to engage in a closer review of sentencing alternatives that would not have produced the same degree of racial disparity. As it stands, the Commission has spent the better part of two decades advocating reform of this 100:1 ratio, but despite consistent pressure from inside and outside of government, the law remains.

Thank you for the opportunity to comment on the Commission's challenging agenda. We would be happy to discuss this letter or any related information at your earliest convenience. Please feel free to contact myself, or, after October 3, 2005, Marc Mauer, with any questions that you may have.

Sincerely,



Malcolm C. Young