

FEDERAL PUBLIC DEFENDER

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August 16, 2005

Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
Suite 2500
One Columbus Circle NE
Washington, DC 20002-8002

RE: Commission's Proposed Priority Policy Issues for Cycle Ending May 1, 2006

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the Commission's proposed priorities for the upcoming 2005-2006 cycle. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work. As always, we look forward to working with the Commission and the opportunity to provide specific information and analysis on these issues in the months ahead.

I. Implementation of Crime Legislation

While we provided substantial input earlier this month on the intellectual property directives contained in recent legislation, a number of other legislative matters, specifically, steroids and intelligence and terrorism reform, still await Commission action.

Our chief concern with the treatment of anabolic steroids under the Guidelines is the dosage unit. The Department of Justice is recommending uniformity of treatment of anabolic steroids with other Schedule III drugs, so that one tablet, or 0.5 milliliters of liquid, would be a dosage unit. We think this is wholly misguided. This proposal does not reflect the numerous differences between steroids and other controlled substances: 1) steroids are the only hormone, a substance naturally occurring in every human being, on the Schedule III list of controlled substances; 2) unlike stimulants, depressants and hallucinogens, steroids are not taken for any psychoactive effect; 3) studies by FDA and other groups indicate that steroids are not addictive and lack potential for abuse and dependency; 4) the major societal harms from unfair professional sports competition and the risk of teenagers emulating professional athletes, constitute a negligible

fraction of the criminal prosecutions for steroid use; 5) the potential for overdose toxicity from steroids is virtually non-existent, much less than aspirin; 6) unlike typical drug users who often have other law enforcement contacts such as theft to support their habits, average steroid users are health conscious males between 25 and 45 years of age with no other criminal connection; and 7) unlike typical drug users who tend to purchase in single doses, patterns of steroid purchase by users tend to be in bulk, giving a false impression of an intent to distribute. Careful analyses of studies performed on dosage units and the differentiation between various types of steroids is required before any amendment to the Guidelines should be considered on equivalency.

II. Consultation on Appropriate Responses to *United States v. Booker*

We reiterate our position that a legislative response is not only unnecessary but would actually serve to further complicate and frustrate the underlying goals of fair and just sentencing. We urge the Commission to take a reform-minded approach which involves adopting more rigorous sentencing procedures. Setting forth a particular set of procedures which sets the bar higher than some "indicia of reliability" when accepting evidence which increases a defendant's sentence is but one example. Such reforms would create a more accurate sentencing process.

III. Policy Work Regarding Immigration Offenses

Our Committee worked with the Commission's Immigration Working Group last cycle and submitted a specific proposal for amendments. We look forward to continuing our work on this issue.

IV. Resolution of Circuit Conflicts

We understand the Commission has not decided what, if any, guideline amendments will be proposed for the purpose of resolving conflicts among the circuit courts. Should the Commission identify circuit conflicts it wishes to address this amendment cycle, the Federal Defenders request notice of the Commission's intent so that we may evaluate those proposals and provide effective commentary to the Commission.

V. Addressing "Cliff-like" Effect and Related Structural Issues

This is an important structural defect in the Guidelines as it sweeps in unintended defendants into a mandatory life sentence. One example is the young first offender who gets caught up in a large drug conspiracy with a high drug amount. Again, we have ideas on different options for addressing this problem and look forward to exploring them with you.

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Thank you for considering our comments and please let us know to whom we can address our specific input and analyses.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jon M. Sands", written over the typed name.

JON M. SANDS

Federal Public Defender

Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS

ANNE BLANCHARD

Sentencing Resource Counsel