
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.
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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,


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August 3, 2005

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Re: Family Entertainment and Copyright Act of 2005 (Pub. L. 109-9);
Intellectual Property Protection and Courts Amendment Act of 2004 (Pub.
L. 108-482); CAN SPAM Warning Label Offense (Pub. L. 108-187
section 5(d)(1))

Dear Ms. Grilli:

We write on behalf of the Federal Public and Community Defenders to comment on an appropriate response to the above-referenced intellectual property statutes. 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 whenever we believe it would be useful.¹ We thank you for meeting with us and for this opportunity to follow up with more specific information and analysis.

I. Family Entertainment and Copyright Act of 2005

The FECA adds an offense at 18 U.S.C. § 2319B for unauthorized recording of motion pictures in a motion picture exhibition facility, and an offense at 17 U.S.C. § 506(a)(1)(C) for infringing a copyright of a work being prepared for commercial distribution. The conduct described by each provision was already a crime, and was subject to the same or higher statutory maximums under prior law. Thus, the FECA does not target new conduct for criminal prosecution or harsher penalties.

¹ 28 U.S.C. § 994(o).

The FECA directs the Commission to “review and, if appropriate,” amend the guidelines and policy statements applicable to intellectual property offenses,² in four ways, each of which we address below.

A. Section 2B5.3 is sufficiently stringent to deter and reflect the nature of intellectual property offenses.

The first directive is a general one to ensure that the intellectual property guideline is “sufficiently stringent” to “deter, and adequately reflect the nature of” such offenses. Based on the history and impact of the NET Act and 2000 amendments, more recent statistical research on the loss attributable to on-line infringement, and Commission statistics on cases sentenced under section 2B5.3, we believe that the current guideline is more than adequate to deter and reflect the nature of intellectual property offenses.

1. History and Impact of the NET Act and 2000 Amendments

Congress enacted the NET Act of 1997 in response to United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), a case in which an MIT student was charged with wire fraud for running an Internet bulletin board where copyrighted computer games could be uploaded then downloaded at no charge. The district court dismissed the Indictment because, absent a commercial motive, the conduct was not punishable as a crime under the copyright laws or the wire fraud statute.

Congress responded by expanding 17 U.S.C. § 506 to include the reproduction or distribution of copyrighted material accomplished by electronic means – i.e., via the Internet – regardless of whether the conduct is motivated by commercial advantage or private financial gain, and broadened the definition of “financial gain” to include the receipt of copyrighted works. It also directed the Commission to ensure that the guideline range for intellectual property offenses was “sufficiently stringent to deter such a crime,” and required that the guideline provide for “consideration of the retail value and quantity” of the infringed item.

After extensive study, the Commission substantially increased the potential guideline range for intellectual property offenses in a variety of ways. It increased the base offense level from 6 to 8; added a 2-level enhancement with a minimum offense level of 12 for manufacture, importation or uploading of infringing items; provided that the 2-level enhancement for use of a special skill under section 3B1.3 would apply if the

² See 17 U.S.C. §§ 506 (copyright infringement), 1201 (circumvention of copyright protection systems) and 1202 (misuse of copyright management information), and 18 U.S.C. §§ 2318 (trafficking in counterfeit labels, illicit labels or counterfeit documentation or packaging), 2319 (penalties for copyright infringement), 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), 2319B (unauthorized recording of motion pictures in a motion picture exhibition facility), and 2320 (trafficking in counterfeit goods or services).

defendant de-encrypted or circumvented a technological security measure to gain initial access to the infringed item; and encouraged upward departure both for substantial harm to the copyright or trademark owner's reputation, and for commission of the offense in connection with or in furtherance of a national or international organized criminal enterprise. It provided for a 2-level decrease if the offense was not committed for commercial advantage or private financial gain, but excluded from that definition the receipt or expected receipt of anything of value, including other protected works. Thus, the decrease does not apply in most, if not all, cases involving on-line file sharing.

Importantly, the Commission also required that the value of the *infringed* item times the number of infringing items would be used in cases in which the Commission thought it was highly likely that infringing items displaced sales of legitimate items on a one-to-one basis,³ i.e., where the infringing item is a digital or electronic copy or otherwise appears to be identical or substantially equivalent, or the retail price of the infringing item is at least 75% of the retail price of the infringed item. While the latter may approximate displaced sales, the fact that an infringing item is an electronic or digital copy or otherwise substantially equivalent substantially overstates displaced sales. No matter how perfect the quality of an infringing item, many people simply cannot afford to buy it at its retail price. For example, last month a defendant pled guilty to selling copies of copyright protected software and video games over the Internet. He was paid \$192,000 for the infringing items, and the total retail value of the infringed items was \$1,154,395.85. That is, he sold the infringing items for 16% of the infringed items' retail value. No one would contend that all or even most of his customers would have paid, or could afford to pay, 84% more. In reality, the majority of those games and software simply would not have been sold. Yet, the defendant's guideline range will be increased based on an infringement amount of over \$1 million as well as an uploading enhancement, resulting in a range of 46-57 months.⁴ Under the pre-2000 guideline, the range would have been 8-14 months. The 2000 amendments result in a 468% increase from the mid-point of the range.

As noted in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast majority of infringements do not result in a one-to-one displacement of sales, the retail value of the infringed (or even the infringing) item overstates loss to the victim because it fails to account for production costs, and although production costs represent payments that would have been made to suppliers of material and labor (assuming the infringement actually displaced a sale), some economists believe that infringement can benefit trademark and copyright holders, consumers and the economy as a whole.⁵ See U.S. Sentencing Commission, No

³ U.S.S.G. App. C, Amendment 593.

⁴ See "Texas man pleads guilty to felony copyright infringement for selling more than \$1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

⁵ Previously, the sentence was increased by the value of the *infringing* item times the number of infringing items. The Commission believed that even that formula would "generally exceed the loss or gain due to the offense," U.S.S.G. § 2B5.3, comment. (backg'd.) (1999), because not

Electronic Theft Act Policy Team Development Report at 5, 15, 16, 22-23 (February 1999). Recent studies lend strong support to these concerns. See below.

We also want to alert the Commission to an issue that may further overstate the loss, as well as create unreliability, unpredictability and disparity, in the sentencing of intellectual property cases. With the NET Act, Congress added an unusual provision to these statutes: Victims are permitted to submit *directly* to the Probation Officer "during the preparation of the pre-sentence report" a statement on "the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact."⁶ This seems clearly to invite the Probation Officer to use the victim's estimate of loss in calculating the infringement amount. Normally, victims and other witnesses provide evidence to the prosecutor, who sifts through it and passes on to the Probation Officer what is relevant and accurate. Since the prosecutor has an ethical duty of candor to the court, s/he is likely to weed out false, misleading, unsupported, inflated or irrelevant claims of loss. Corporate victims of intellectual property offenses come from a different place. They do not have an ethical duty to the court, may be motivated by concerns such as obtaining restitution or showing investors that intellectual property crime is the cause of falling profits, and are likely to think of "loss" in terms of civil damages. The prosecutor would be obliged to sort out what was actually provable and relevant under the guideline, but we do not believe that most Probation Officers will have sufficient familiarity with the issues to do so, particularly because these cases are so rare. In some districts, sentencing courts hold hearings and resolve disputes about loss with care, but in many districts, the unfortunate fact is that the Pre-Sentence Report is accorded the status of evidence, and evidentiary hearings are rarely if ever held. We raise this not only as a further reason not to increase the guideline range for intellectual property offenses, but as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

2. Statistical Research on the Impact of File-Sharing on Sales

A well-respected statistical study of the effect of file sharing on music sales published in March 2004 by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill concluded that "the impact of downloads on sales continues to be small and statistically indistinguishable from zero,"⁷ which is inconsistent with industry claims that file sharing explains the decline in music sales between 2000 and 2002.⁸ Unlike other studies, which rely on surveys, this study directly

every purchase of a counterfeit item represents a displaced sale, and it overestimated lost profits by failing to account for production costs. See U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 5 (February 1999).

⁶ See 18 U.S.C. §§ 2319(e), 2319A(d), 2319B(e), 2320(d).

⁷ See Felix Oberholzer and Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis at 24 (March 2004) (hereinafter "Harvard Study"), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

⁸ File sharing of music recordings has been going on since 1999. According to the Recording Industry Association of America (RIAA), CD sales continued to rise during 1999 and 2000, then

observed actual file sharing activities for 17 weeks in the Fall of 2002, and compared it to music sales during the same time period.⁹

The researchers used several models, the most conservative of which showed that it would take 5,000 downloads to reduce sales of an album by one copy.¹⁰ For the top 25% of best-selling albums, downloading was found to have a *positive* effect on sales, while the negative effect on sales of less popular albums was still statistically insignificant.¹¹ This provides strong support for the concern that section 2B5.3 already overstates the loss by assuming a one-to-one correspondence between infringing items and displaced sales.

The authors pointed out that file sharing may promote new sales by allowing people to sample and discuss music to which they otherwise would not be exposed.¹² In addition to their statistical analysis of actual behavior, they conducted a survey that showed that file sharing led the average user to purchase eight additional albums.¹³ Another survey of 2,200 music fans released in 2000 showed that Napster users were 45% more likely to have increased their music spending than non-users.¹⁴

After the Harvard Study was published, the Recording Industry Association of America reported a 2.8% increase in the number of CDs sold from 2003 to 2004.¹⁵

The researchers noted that their results were consistent with the fact that sales of movies, video games and software, which are also heavily downloaded, have continued to increase since the advent of file-sharing.¹⁶

They suggested (without attempting to definitively identify) several reasons for the decline in music sales from 2000 to 2002: poor economic conditions, a reduction in the number of album releases, growing competition from other sources of entertainment, dropped by 15% between 2000 and 2002. The RIAA claims this is due to file sharing. Id. at 1-2.

⁹ Id. at 6, 11.

¹⁰ Id. at 22.

¹¹ Id. at 23, 25.

¹² Id. at 2.

¹³ Id. at 3.

¹⁴ See "Report: File Sharing Boosts Music Sales," E-commerce Times, July 21, 2000, available at <http://www.ecommercetimes.com/story/3837.html>.

¹⁵ See RIAA 2004 Yearend Statistics (Exhibit A).

¹⁶ Harvard Study at 1, 24.

a reduction in music variety, a consumer backlash against recording industry tactics, and that music sales may have been abnormally high in the 1990s as people replaced records and tapes with CDs.¹⁷

Finally, the authors suggested that file sharing increases the aggregate social welfare in that it does not reduce the supply of music, and lowers prices overall, which allows more people to buy it.¹⁸

3. Commission Statistics on Sentencing Under Section 2B5.3

An important factor in evaluating whether the current guideline adequately reflects the nature of intellectual property offenses is how the front-line actors treat these cases. According to Commission statistics, intellectual property cases are few, ranging from a low of 96 in 2000 to a high of 137 in 1998, and 121 in 2003.¹⁹ Since the Commission began keeping track of departures by offender guideline in 1997, there has been only one upward departure in an intellectual property case. That was in 1998, well before the 2000 amendments took effect. The percentage of downward departures has ranged from a low of 22% in 1997, to a high of 41% in 2002 (when sentences under the 2000 amendments were likely to be imposed), then 36% in 2003 (the year of the PROTECT Act).²⁰ Without knowing the specific departure reasons, it at least appears that judges and prosecutors do not regard sentences under current section 2B5.3 as being too low, and in many cases regard them as too high.

¹⁷ Id. at 24.

¹⁸ Id. at 2, 25.

¹⁹ See Table 17 of U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996-2003.

²⁰ Downward Departures in Cases Sentenced under 2B5.3 1997-2003, based on Sourcebooks of Federal Sentencing Statistics:

	1997	1998	1999	2000	2001	2002	2003
# cases analyzed	115	133	107	87	107	123	112
5K1.1	21	27	25	20	19	38	30
Other govt initiated	N/A	N/A	N/A	N/A	N/A	N/A	2
Non-govt initiated	4	6	0	4	6	13	8
% downward departures	22%	25%	23%	28%	23%	41%	36%

No recidivism statistics for intellectual property offenses are publicly available, but one would think that these defendants are relatively easy to deter without excessive sentences. We suspect that most are employed and relatively highly educated. The Commission has identified employment within the year preceding conviction and level of education as factors that indicate reduced recidivism.²¹ Those who engage in file sharing on the Internet (with whom Congress and the industry seem most concerned) are not motivated by greed, financial need, or addiction, and therefore are probably more easily deterred. Furthermore, intellectual property prosecutions have a big impact on the relevant population, because they are publicized widely and fast over the Internet.

4. Suggested Basis for Downward Departure

In light of the above, we suggest that the Commission include an encouraged basis for downward departure in the application notes to section 2B5.3:

Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

B. An Enhancement for Pre-Release Infringement is Not Appropriate.

The second directive tells the Commission to determine whether an “enhancement” is appropriate for the “display, performance, reproduction or distribution of a copyrighted work,” in any media format, before it has been authorized by the copyright owner. By its terms, this applies to any copyrighted work in any media format. The impetus, however, was the movie industry’s representation that “a significant factor” in its “estimated \$3.5 billion in annual losses . . . because of hard-goods piracy” stems from the situation where “an offender attends a pre-opening ‘screening’ or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie,” and then sells the recording as DVDs or posts it on the Internet for free downloading.²²

We do not believe such an enhancement is appropriate. The notion that pre-release DVD sales or Internet postings create losses for the movie industry is highly questionable. The Motion Picture Association of America reports box office sales of \$9.5 billion in 2004, a 25% increase over five years ago, and the highest in history.²³ The

²¹ See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 (May 2004).

²² H.R. Rep. No. 109-033.

²³ See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, selected pages attached as Exhibit B, available from www.MPAA.org.

Recording Industry Association of America reports that the number of DVD videos sold increased 66% between 2003 and 2004.²⁴

A pre-release enhancement would apply to anything from a defendant using a camcorder to tape a movie and showing it to his family, to making a software package available on the Internet. A one-size-fits-all enhancement would overstate the harm in the first example. It would be excessive in the second example since the defendant would be sentenced for the retail value of all of the software packages downloaded (whether anyone would have bought them or not), as well as an uploading enhancement.

The Commission considered a pre-release enhancement in 2000. The reasons industry gave for such an enhancement were that when the copy is exact, it displaces sales, and when it is inferior, it causes harm to reputation.²⁵ The 2000 amendments addressed the first concern by increasing the sentence by the value of the infringed item times the number of infringements. If there is increased demand for pre-release works, this will increase the sentence accordingly. The second reason was addressed with an invited upward departure for substantial harm to the copyright or trademark owner's reputation.

C. The Scope of the "Uploading" Enhancement Adequately Addresses Loss from Broad Distribution of Copyrighted Works Over the Internet.

The third directive tells the Commission to determine whether the scope of "uploading" in U.S.S.G. § 2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants who broadly distribute copyrighted works over the Internet receive an increase for that activity in two ways: a 2-level enhancement for uploading, with a minimum offense level of 12, under section 2B5.3(b)(2), and the retail value of all resulting downloads.

In a case where the retail value of an infringed CD is \$20, and there was a single upload with no downloads, the uploading enhancement would increase the sentence for a first offender from 0-6 months in Zone A to 10-16 months in Zone C, an increase of 433% in the mid-point of the range, and the difference between probation and approximately one year in prison, in a case in which the copyright owner suffered no loss. If there were 1,000 downloads of the CD, the sentence would increase from 10-16 months to 15-21 months, a 138% increase in the mid-point of the range. In this example, according to the Harvard Study's most conservative model, not even one sale of the CD would have been displaced.

²⁴ See RIAA 2004 Yearend Statistics (Exhibit A).

²⁵ U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 34 (February 1999).

Two further increases will be available in the more serious cases involving broad distribution over the Internet. In a recent case, eight members of the so-called "warez scene" were indicted for copyright infringement. According to the press release and indictments, "warez" groups are at the "top of the copyright piracy supply chain" and the original sources for most copyrighted works distributed over the Internet. They are highly-organized, international in scope, and some of them specialize in cracking copyright protection systems.²⁶ These defendants apparently would be eligible for an upward departure for committing copyright infringement in connection with or in furtherance of a national or international organized criminal enterprise, and for an enhancement for use of a special skill for circumventing technological security measures.

In sum, the scope of the uploading enhancement is more than adequate.

D. There is No Need for an Enhancement to Reflect Harm in Cases, If Any, in Which the Number of Infringing Items Cannot Be Determined.

The final directive tells the Commission to determine whether the existing guidelines and policy statements adequately reflect "any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

We do not believe that any change is appropriate. In a case in which the government fails to prove that any download resulted, the defendant already receives an additional four levels through the uploading enhancement. An enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.

Moreover, a review of recent cases indicates that the scope of the infringement *can* be determined. When copyrighted works are sold over the Internet, buyers have to pay for it, which is easily tracked.²⁷ Files are shared for free using file transfer protocol ("FTP") or peer-to-peer ("P2P") networks. FTP involves a server with a computer that keeps detailed logs of all traffic on the server. Until recently, all of the file sharing prosecutions involved FTP servers. "Warez" groups not only typically use FTP servers that keep detailed logs of uploads and downloads, but place their "signature mark" on the infringing items they send out into the world. In the case mentioned above, the government removed "more than 100 million dollars worth of illegally-copied copyrighted software, games, movies, and music from illicit distribution channels," and

²⁶ See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeeff (attached as Exhibit C).

²⁷ See "Texas man pleads guilty to felony copyright infringement for selling more than \$1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

identified numerous particular uploads and downloads attributable to each defendant.²⁸ Many P2P networks, including OpenNap and the former Napster, use central servers that (like FTP servers) generate detailed logs of all traffic.²⁹ The government can also determine the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a "sting," and by using cooperators.³⁰

II. Intellectual Property Protection and Courts Amendment Act of 2004

Despite the lack of evidence of a widespread problem, Congress, in the Intellectual Property Protection and Courts Amendments Act of 2004, has directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, material false contact information to a domain name registration authority.

Notwithstanding this directive, given the dearth of information on the exact nature of this problem, we believe it is best to proceed with caution. Our anecdotal evidence suggests that this conduct occurs mainly, if not entirely, in fraud related offenses. Accordingly, the most appropriate place for this enhancement would be in Guideline §2B1.1. We propose the following:

2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**

Application Notes

(20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -

- (A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

²⁸ See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Ermeef (attached as Exhibit C).

²⁹ See Harvard Study at 7-8.

³⁰ See "First Criminal Defendants Plead Guilty in Peer-to-Peer Copyright Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/trwobridgePlea.htm; Final Guilty Plea in Operation Digital Gridlock, First Federal Peer-to-Peer Copyright and Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/tannerPlea.htm; Government's Memorandum in Aid of Sentencing at 6-7 in United States v. Boel, Cr. No. CR-05-090-01 (attached as Exhibit D).

(B) Non-Applicability of Enhancement. - If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

We believe a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add more than one level would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and, (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples. A one-level enhancement amply addresses the concerns of Congress.

Further, we propose an application note to define "materially false." This definition tracks the exact language in the Act. We believe that this definition is necessary to limit application of this enhancement to only the conduct Congress intended.

Finally, we believe that it would be impermissible double counting to allow for an increase for Use of a Falsely Registered a Domain Name and Obstruction of Justice to apply. The language suggested in the above application note is identical to that of U.S.S.G. §2B1.1, Application Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

III. CAN SPAM Act of 2003

Section 5(d)(1) of Pub.L. 108-187 makes it a crime punishable by up to five years imprisonment to transmit a commercial electronic mail that includes "sexually oriented" material without including in the subject heading the marks or notices prescribed by the Federal Trade Commission, or without providing that the message when initially opened includes only those marks or notices, information identifying the message as a commercial advertisement, opt-out provisions, and physical address of the sender, and instructions on how to access the sexually oriented material. "Sexually oriented" has the definition of "sexually explicit" in 18 U.S.C. § 2256.

Our understanding is that the only issue you need to resolve at this point is whether to incorporate this offense into an existing guideline, and if so, which one. We do not think that this offense fits comfortably in any of the existing guidelines in Part G of Chapter 2 because it does not involve a "victim," and does not involve material that is necessarily obscene or child pornography. It is essentially a regulatory offense, and should be treated differently and less seriously than offenses involving victimization and

illegal material. It could be included as an enhancement in the guidelines for other offenses, but Congress has made it a free-standing crime. We suggest that the Commission promulgate a new guideline for it at section 2G4.1.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

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August 10, 2005

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

RE: Ad Hoc Advisory Group on Immigration

Dear Judge Hinojosa:

I am writing on behalf of the Federal Public Defenders to support the formation of an Ad Hoc Advisory Group on Immigration. The Commission's proposed formation of this Ad Hoc Study Group is timely and relevant. We believe that such a group will bring expertise to this area, and will be able to provide the Commission and staff valuable insight into how the guidelines should treat immigration sentences, which can cover a wide range of immigration offenses.

The use of Ad Hoc Advisory Groups has been undertaken by the Commission in the past. The Native American Advisory Group, of which I was a member, assisted the Commission in restructuring the manslaughter and assault guidelines. It was also able to address and comment on the fact that Native Americans constitute an overwhelming majority of defendants in certain offenses, such as manslaughter, and a high proportion of other offenses such as assault, murder, and sexual offenses.

Obviously we believe it is critical that such an Ad Hoc Advisory Group be represented by those who have expertise in the area, and that specifically includes federal public defenders. We handle the overwhelming majority of immigration offenses, and have experience in the high volume border states. The participation by federal public defenders would also further your position of involving us, and others from the defense bar, in the work of the Commission. Both Margie Meyers, the Federal Public Defender of the Southern District of Texas, and myself, would welcome the opportunity to work on the Committee. We both handle a large percentage of immigrations cases; Arizona is a "fast-track" district and the Southern District of Texas is not. Both perspectives are essential for a thorough discussion of the issues. We bring the experience of border districts, as well as the knowledge of immigration offenses and sentencing throughout the nation due to our involvement on the Federal Public Defender Guideline Committee.

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The Honorable Ricardo H. Hinojosa
August 10, 2005
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We have worked closely with the Commission in the past on immigration matters. We are involved in the working group, and have submitted proposals to amend reentry offenses that have been the subject of much debate and criticism. We look forward to working with you in the future.

Sincerely,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Guidelines Committee

JMS:mlb

cc: Lisa Rich, Acting Staff Co-Director
Judy Sheon, Acting Staff Co-Director
Margie Meyers, Federal Public Defender
Anne Blanchard, Sentencing Resource Counsel
Amy Baron-Evans, Sentencing Resource Counsel

Intellectual Property Institute

University of Richmond School of Law

August 2, 2005

Kathleen Grilli, Esq.
Assistant General Counsel
United States Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Dear Ms. Grilli:

I write to offer input on the directives Congress has sent to the Sentencing Commission in the Family Entertainment and Copyright Act of 2005.

About the Author

My background makes me particularly interested in—and, I hope, gives me an unusual perspective on—the intersection of sentencing law and intellectual property. From 1996 until 1999, I served as an Attorney-Adviser at the Commission and was a member of the working group that performed the in-depth analysis of the guidelines' treatment of intellectual property offenses in response to the No Electronic Theft ("NET") Act of 1997. I then joined the firm of Williams & Connolly as a criminal defense lawyer, but over time my practice began to include representation of copyright owners, and I became involved in the *Napster* and *Aimster* file-sharing litigation as counsel for several record labels and movie studios.

I left private practice in 2002 for academia. Today I teach intellectual property and computer law at the University of Richmond School of Law and am Director of the school's Intellectual Property Institute. The focus of my research and writing as a law professor has been the intersection of copyright law and digital technology. I remain involved in file-sharing litigation; for example, I authored an *amicus* brief urging the Supreme Court to rule in favor of the copyright owners in this summer's Supreme Court file-sharing case, *MGM Studios v. Grokster*. I have also remained involved in federal sentencing policy as a member of the Commission's Practitioners Advisory Group, but the views offered in this letter are my own.

The Historical Perspective on Intellectual Property Sentencing

The recent congressional directives pertaining to intellectual property should be evaluated in light of the major amendments to the Chapter Two guideline for intellectual property offenses (section 2B5.3) that took place just five years ago. Before promulgating those amendments, the Commission spent a more than two years studying the adequacy of intellectual property sentencing and the effect of online infringement thereon. It held hearings, surveyed hundreds of individual case files, sent representatives to testify before Congress, met with myriad industry representatives, economists, academics, and other interested parties, and drafted an insightful thirty-eight-page report.

The impetus for this comprehensive reexamination of intellectual property sentencing was the NET Act and the case that gave rise to the Act, *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). David LaMacchia was an MIT student who made computer games and other valuable software available to the public via the Internet without the consent of the copyright owners. LaMacchia avoided conviction for criminal copyright infringement, however, because he received no benefit, financial or otherwise, from his activities, and the criminal copyright statute (17 U.S.C. § 506) then applied only to those who realized commercial advantage or private financial gain from their infringement.

The *LaMacchia* case was a wake-up call for Congress, in that it showed how the Internet could easily and cheaply be used to illegally distribute the countless copyrighted works that exist in digital form. The NET Act was intended to address this new threat, both by amending section 506 to apply to those who made no money from their online infringement (but who traded in works whose retail value exceeded \$1000) and by directing the Commission to examine the severity of the intellectual property guidelines and ensure that they consider the value of the copyrighted items.

After the aforementioned two years of study, the Commission responded to the NET Act's directives by substantially increasing the sentencing exposure for defendants convicted of intellectual property offenses. It increased the Base Offense Level in section 2B5.3 from 6 to 8. It added a 2-level increase in offense level, with a floor of 12, if the offense involved manufacture, importation, or (most significantly) uploading of infringing items, although a 2-level decrease for offenses not committed for financial gain mitigated this effect somewhat. And it added a 2-level increase for risk of serious bodily injury or possession of a dangerous weapon, with a floor of 13.

Most important, the amendment ensured that the value of the *infringed* item—i.e., the copyrighted work—would determine the amount used to increase the offense level under the Loss Table in section 2B1.1 whenever the infringing item was “identical or substantially equivalent to” the infringed item. See § 2B5.3, comment. (n.2(A)(I)). Prior to this amendment, the guideline called for using the value of the *infringing* item. Although the new section 2B5.3 still allowed use of the infringing value in some cases, online copyright infringement was not among them, because digital copies of music, films, software, etc. tend to be near-perfect reproductions of the original. (Indeed, that's why online infringement poses such a danger, as Congress and the Commission both recognized after *LaMacchia*.) And although there was a good argument that the value of the infringing item was the same as the value of the infringed item when the former was a near-perfect copy of the latter, and that the amendment would thus make little difference in the loss amount, the Commission was informed that courts used an infringing value of zero, even for a perfect copy of a copyrighted work, whenever it was given away for free. The change to infringed value therefore made a considerable difference.

The use of the infringed item's value to calculate loss, however, rested on some dubious premises. Foremost among them was the assumption that the illegal provision of a copyrighted work was the equivalent, for purposes of calculating loss under section 2B1.1's table, of the theft of tangible property. In other words, the new section 2B5.3 treated someone who illegally distributed software worth \$40,000 the same as someone who stole \$40,000 in cash from the software company. Yet if the recipients of the free software would never have purchased it at its retail price—a certainty in many, and perhaps most, cases—the true loss was closer to zero than to the software's retail value. And even if an online infringement did truly represent a lost sale, using the retail price would overstate the loss because it would fail to account for the company's costs; it would wrongly assume that the sales revenue represented pure profit. It is presumably for this reason that the original

Commission thought that even the *infringing* amount would “generally exceed the loss or gain due to the offense.” See § 2B5.3, comment. (backg’d) (pre-2000 version).

In their totality, then, the NET Act and the accompanying changes to section 2B5.3 resulted in dramatically (and, arguably, disproportionately) increased punishment for those engaging in online infringement. Someone who distributed \$40,000 worth of music online, free of charge, would have an offense level of 6 under the old guideline (the Base Offense Level, with no loss adjustment for software given away for free). Under the new guideline, the offense level would be 14 (Base Offense Level of 8, plus 6 for the loss, plus 2 for uploading, minus 2 for no commercial motive). For a defendant with no criminal record, that represents a 500% increase in the midpoint sentence—i.e., the difference between a sentencing range of 0 to 6 months (probably probation) and 15 to 21 months (of mandatory imprisonment). A defendant like David LaMacchia, whose indictment averred a loss amount exceeding \$1 million, went from having no criminal liability to facing over five years in jail.¹

In sum, there is no doubt that the 2000 amendments to section 2B5.3 recognized and more than adequately accounted for the newfound threat of online infringement. The guideline’s reference to section 2B1.1’s loss table and the use of the value of the infringed item in calculating the infringement amount ensure that intellectual property sentencing will be sensitive to the potential for large-scale online infringement, even by those lacking a financial motive. Nothing that has occurred in the last five years calls into question the decisions the Commission made on this subject following the NET Act.

Specifics of the Family Entertainment and Copyright Act of 2005

Viewed in the historical context set forth above, the Family Entertainment and Copyright Act of 2005 (“FECA”) is a modest piece of legislation. The NET Act expanded the reach of criminal copyright liability to cover a vast new population of online infringers, a group that, after *LaMacchia*, was understood to threaten the foundations of copyright law. In contrast, FECA simply fills some minor holes in the statutory scheme. For example, the movie bootlegging statute (section 2319B) simply changes the existing statute’s *mens rea* from willfulness to knowledge and eliminates certain motive and volume requirements for a category of conduct that was already illegal. The statutory maximums that accompany this new enactment are actually less severe than their preexisting counterparts. The same can be said of the pre-release statute (section 506(a)(1)©)). Modest legislation such as this calls for a modest response by the Commission.

FECA contains four directives for the Commission. The first directive is the general admonition that frequently accompanies more specific directives, namely that the Commission “take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements . . . are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes.” Given the Commission’s extensive reexamination of intellectual property sentencing just five years ago, the amendments it passed at that time, and the absence of any material change in nature of intellectual property offenses since, this general admonition warrants no new amendments in and of itself.²

¹ This comparison of pre- and post-2000 intellectual property sentencing does not take into account the increase in offense levels occasioned by the 2001 amendments to section 2B1.1’s loss table. If those were factored in, the difference between pre- and post-2000 sentences would be even greater.

² Incidentally, one would be hard-pressed to accept the notion that criminal prosecution has any deterrent effect on online copyright infringement. There are tens of millions of illegal file-sharers in the

The second directive instructs the Commission to consider an enhancement for infringement of pre-release works. Again, the Commission explicitly studied to this concern following the NET Act, *see* U.S. SENTENCING COMMISSION POLICY DEVELOPMENT TEAM REPORT, NO ELECTRONIC THEFT ACT 34-35 (1999) (discussing draft pre-release enhancement), and responded to it in two ways. First, because pre-release works are likely to be more popular, they will naturally result in more instances of infringement and thus a higher loss amount and a correspondingly higher offense level. Second, because pre-release works may not yet be ready for the market (e.g., beta versions of software may still be “buggy”), their premature distribution can harm the copyright owner’s reputation. The Commission accordingly invited an upward departure for “substantial harm” to the victim’s reputation.

The third directive questions whether the definition of “uploading” in section 2B5.3 captures the loss attributable to broad online copyright infringement. Because the specter of widespread uploading of copyrighted works was the impetus for the NET Act and 2000 guideline amendments, it should come as no surprise that the current section 2B5.3 adequately accounts for uploading culpability. The broad definition of uploading already draws an appropriate distinction between those who make copyrighted works available to the whole world via the Internet and those smaller-scale infringers who merely download for personal use. The former obviously pose by far the greater threat, and are punished accordingly, with a proportionately severe enhancement—a 2-level (i.e., 25%) increase in sentence (with a floor of 12 that can effectively make the increase 3 or even 4 levels for certain defendants). Add to that the likelihood that the infringement amount for uploaders is likely to be significantly higher than for downloaders,³ and it becomes clear that uploading is both appropriately defined and punished.

The fourth directive raises the issue of what to do when evidence of the scale of infringement cannot be found. This will often not be an issue. The defendant’s Internet service provider likely maintains logs that will show the total bandwidth consumed, which should give the court some idea of the scale of infringement. Some file-sharing software also logs the user’s uploading and downloading history. And many file-sharers are motivated not by money, but by the bragging rights that come with being a big-time uploader, which means that they will try not to destroy evidence of their infringement, but to create and preserve it. In any event, convictions under the NET Act require proof that the defendant traded in works totaling more than \$1000 in retail value, which means that by the time NET Act cases reach sentencing the prosecution already has some evidence of the scale of infringement.

country, and the Department of Justice brings fewer than a hundred copyright infringement prosecutions each year. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, INTELLECTUAL PROPERTY THEFT, 2002 (2004). Nor has the incidence of intellectual property prosecution increased since passage of the NET Act; an examination of Table 17 in the Commission’s SOURCEBOOK OF FEDERAL SENTENCING STATISTICS from 1998 to today shows that section 2B5.3 has been used as the primary guideline an average of 120.2 times per year in that period, and the most recent statistic is only 121.

³ A new infringement occurs each time an unauthorized copy is made from the uploader’s file. Because such copying is likely to be viewed as an act aided, abetted, induced, or willfully caused by the defendant (or as a harm resulting therefrom), each such copy would be included in the defendant’s relevant conduct and would thus constitute a new “infringing item” to be multiplied by the value of the infringed item, with the result added to the infringement amount. Uploaders are therefore much more likely to see high infringement amounts than mere downloaders.

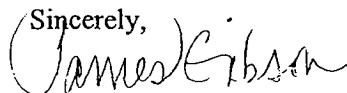
Even when evidence of distribution volume is not available, the mere fact that copyrighted works were uploaded results in the aforementioned 2-level enhancement, with a floor of 12. In other words, *even when the prosecution fails to prove that a single download resulted from the defendant's uploading*, the defendant sees his or her offense level rise from 8 to 12, representing a 300% increase in the midpoint sentence and a shift from probable probation to mandatory jail time for a first-time offender. This adjustment more than adequately addresses the concern about the difficulties the prosecution might face in amassing evidence of the scale of infringement. In short, because section 2B5.3 already significantly increases an uploader's sentence even absent evidence of any harm done, and because this increase was the intended result of the 2000 Commission's attention to the threat of online infringement, no further increase is warranted.

Conclusion

I have no sympathy for copyright infringers. I have written op-eds and *amicus* briefs that lament the popularity of file-sharing and seek to discourage it. I frequently give talks to high-school students regarding ethics in the world of the Internet, and the downsides of file-sharing always feature prominently in those talks. As Director of the Intellectual Property Institute, I have overseen the creation of the National CyberEducation Project, an initiative aimed at promoting improved understanding and discussion on college campuses of the issues, such as file-sharing, that the Internet presents for intellectual property law.

Nevertheless, I see no reason to question the adequacy of the guidelines' current sentences for intellectual property offenses, either online or offline. The Commission's comprehensive assessment in the late 1990s resulted in amendments to section 2B5.3 that more than adequately address the threats that copyright and trademark face in the new millennium.

I would be more than willing to come to Washington to meet with any staff or Commissioners who would like to discuss these issues further. (Indeed, it would be a great pleasure to visit the Commission and catch up with old friends there.) In any event, if I can be of any assistance, please feel free to contact me at 804-287-6398 or jgibson@richmond.edu.

Sincerely,


James Gibson
Director, Intellectual Property Institute
Assistant Professor of Law



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.

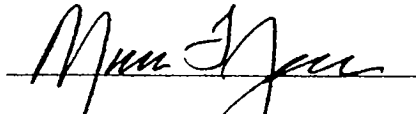
Although we recognize that the Commission is to consider the possibility of increasing these guidelines, the legislative history also reflects a goal of making sure that the numbers ultimately chosen come out right. See, e.g., H. Rep. 108-461 (Part 1) April 2, 2004, at 31 (noting how issue is sent “to 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.

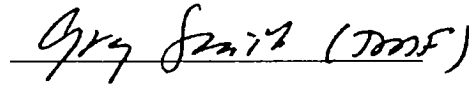
* * *

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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DC:50333100.1



Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
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:

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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Commission Beryl Howell
Commissioner Edward F. Reilly, Jr.
Commissioner Deborah J. Rhodes
Charles R. Tetzlaff, Esq.
Judith Sheon



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

August 11, 2005

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs - Priorities Comment

Dear Mr. Courlander:

As you may recall, I wrote a detailed letter at this time last year setting forth the reasons that the United States Food and Drug Administration (FDA) believes that the current sentencing guidelines are not adequate to address serious criminal violations of the Federal Food, Drug, and Cosmetic Act (FDCA). It is my understanding that the United States Sentencing Commission initially agreed to consider amendments to address FDA's concerns but, as a result of the United States Supreme Court's decision in United States v. Booker, 543 U.S. ____ (2005), the Commission understandably postponed its work on this and other important issues. I am writing again because FDA remains concerned that the sentencing guidelines are too lenient for certain violations of the FDCA and are hampering FDA's efforts to effectively combat this dangerous criminal conduct. Rather than restating FDA's concerns at length, I am attaching a copy of last year's letter, which describes the public health significance of FDA's criminal cases, identifies particular problems with the guidelines, and suggests amendments to address those problems.

FDA's concerns are even more pressing today. During the past year, FDA's Office of Criminal Investigations has seen significant increases in the number of investigations relating to counterfeit drugs, prescription drug diversion, human growth hormone, and other offenses that pose serious threats to the public health. This trend is likely to continue unless the relevant guideline is amended to deter criminal offenders by imposing more significant sentences for these violations. Accordingly, I respectfully request that the Commission add to its list of priorities for the amendment cycle ending May 1, 2006, the review and amendment of the sentencing guidelines for certain FDCA violations, as set forth in the attached letter.

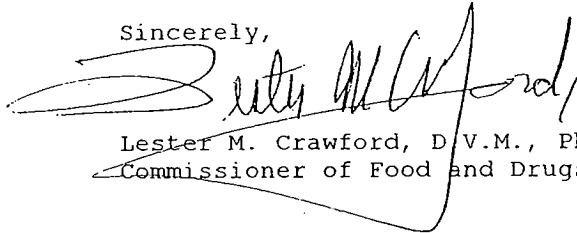
I would like to address briefly what I understand to be one of the Commission's priorities for this amendment cycle: consideration of amendments to increase the penalties for offenses involving anabolic steroids in accordance with the Anabolic Steroid Control Act, Pub. L. 108-358. Although anabolic steroids are now regulated by the Drug Enforcement Administration, FDA believes that increasing the guidelines for anabolic steroid offenses without simultaneously promulgating a guideline to address human growth hormone offenses would significantly undermine Congress' efforts to crack down on the use of dangerous performance-enhancing drugs.

Michael Courlander
August 11, 2005
Page 2

In FDA's experience, illegal use of anabolic steroids to enhance athletic performance is often accompanied by illegal use of human growth hormone. Title 21, United States Code, Section 333(e) prohibits the use of human growth hormone for any use not approved by FDA. As detailed on page 5 of the attached letter, the Commission has not yet promulgated a guideline to address human growth hormone offenses. FDA believes that it is critical that the Commission, as part of its review of the guidelines for anabolic steroid offenses, review and amend the guidelines to address human growth hormone offenses in a manner that reflects the serious nature of these offenses. At the Commission's request, FDA will provide additional information concerning the frequent association of illegal use of human growth hormone and anabolic steroids, the dangers associated with the illegal use of human growth hormone, and any other information that would assist the Commission.

In closing, FDA remains committed to seeking appropriate amendments to the sentencing guidelines and is available to provide assistance and additional information at the Commission's request. Please contact Associate Chief Counsel Sarah Hawkins by telephone at (301) 827-1130 or by email at sarah.hawkins@fda.gov if you have any questions or if there is any assistance that FDA can provide regarding these matters.

Sincerely,



Lester M. Crawford, D.V.M., Ph.D.
Commissioner of Food and Drugs

cc: Margaret O'K. Glavin, Associate Commissioner for Regulatory Affairs, FDA
Terry Vermillion, Director, Office of Criminal Investigations, FDA
Sheldon Bradshaw, Chief Counsel, FDA
Sarah Hawkins, Associate Chief Counsel, FDA
Michelle Morales, Office of Policy and Legislation, USDOJ
Eugene Thirolf, Office of Consumer Litigation, USODJ



DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Rockville MD 20857

July 27, 2004

Michael Courlander
Public Affairs Officer
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Attention: Public Affairs-Priorities Comment

Dear Mr. Courlander:

I am writing on behalf of the U.S. Food and Drug Administration (FDA) to respectfully request that the United States Sentencing Commission amend its list of proposed priorities to include consideration of amendments to the sentencing guidelines that govern certain violations of the Federal Food, Drug, and Cosmetic Act (FDCA). This letter reiterates many of the points made by Associate Commissioner John Taylor in his letter to the Commission dated July 31, 2003. As explained in more detail below, FDA believes that the current guideline at Section 2N2.1 is too lenient and does not adequately address some serious criminal violations of the FDCA. In this letter, I will discuss the public health significance of FDA's criminal enforcement efforts, identify specific problem areas in the guideline, and suggest amendments.

FDA regulates the manufacture, labeling, and distribution of food, human and animal drugs, medical devices, and biologics. These products, which collectively account for approximately 25 percent of every dollar spent by American consumers, are critical to everyday life in our country. Physicians and consumers rightfully expect that the products they dispense and consume will be safe and effective and will bear adequate and accurate labeling.

In support of its public health mission, FDA presents a wide variety of criminal cases for prosecution. Many of them involve serious offenses with the potential to cause great harm to large segments of our society. These cases include the sale of unapproved, ineffective, and sometimes harmful drugs and devices to treat HIV, cancer, arthritis, and other serious diseases; failure by drug and device manufacturers to report product failures and adverse events; and the distribution of food contaminated with potentially life-threatening bacteria. Several recent investigations have involved the sale of products marketed as "all natural" dietary supplements that contained significant amounts of the active ingredients of prescriptions drugs, such as Viagra and Cialis, or the banned substance ephedrine hydrochloride, without declaring these ingredients on the label. FDA also investigates the illegal sale of dangerous substances as street drug alternatives and "rave" drugs to teenagers for recreational use--which often results in deaths, sexual assaults, and medical complications--and the sale of dangerous designer steroids to enhance athletic performance.

Also, a significant number of FDA's criminal investigations involve unlawful wholesale distribution and diversion of prescription drugs. Frequently, these cases involve the distribution of prescription drugs from unknown sources that are repackaged and relabeled to appear to be genuine, FDA-approved products. Recent cases targeted wholesale distributors of drugs intended to treat schizophrenia and bipolar disorder. Illegal repackaging resulted in the bottles containing different drugs or different strength drugs than stated on the label. Another investigation involved the sale of counterfeit Pergonal and Metrodin (injectable fertility drugs) tainted with active bacteria and endotoxins. Prescription drug diversion offenses can result in the dispensing of misbranded and otherwise substandard prescription drugs to consumers, provide avenues for counterfeit drugs to enter the marketplace, and thwart the ability of the manufacturers and public health authorities to conduct effective recalls.

Such offenses undermine the safety and integrity of the Nation's supply of food, drugs, medical devices, and biologics. In the case of counterfeit, misbranded, unapproved, and adulterated drugs, unsuspecting patients may be harmed by the very medications they are taking to treat their diseases. In these cases, consumers are not getting the health benefits they rightfully expect from their medications. For example, their blood pressure or cholesterol may not be controlled or their depression may not be treated because their medications are counterfeit. Or they may be unwittingly taking unapproved drugs that are not therapeutically equivalent to the U.S.-approved products proven to provide the claimed benefits that consumers have come to expect from their drugs. In other instances, patients facing the hopelessness of a debilitating or terminal illness may forego FDA-approved treatments in favor of unapproved and ineffective treatments. We are fearful that unless the guidelines are amended to treat these types of offenses more seriously than is currently the case, criminal offenders will not be deterred. The high profit margin often outweighs the minimal sentences that may be imposed when an offender is prosecuted.

In general, any violation of the FDCA is a misdemeanor punishable, without the need to show criminal intent, by a maximum prison term of 1 year under 21 U.S.C. § 333(a)(1). A violation of the FDCA committed with the intent to defraud or mislead either consumers or a government agency, or that is a second conviction under the FDCA, is a felony with a maximum prison term of 3 years under 21 U.S.C. § 333(a)(2). Certain FDCA offenses that involve prescription drugs are 10-year felonies under 21 U.S.C. § 333(b)(1). Offenses involving the distribution of human growth hormone are punishable by up to 5 years in prison under 21 U.S.C. § 333(e)(1), or up to 10 years if the offenses involve distribution to a person under 18 years of age under 21 U.S.C. § 333(e)(2).

FDCA offenses are governed by two sections of the guidelines. Section 2N2.1 provides for a base offense level of six, with no enhancements for specific offense characteristics. Section 2B1.1 applies if the offense involves fraud. This section also provides for a base

offense level of six but includes enhancements for specific offense characteristics, most notably incremental increases of the base level for crimes involving losses that exceed \$5,000.

FDA believes that the primary guideline, Section 2N2.1, inappropriately treats some FDCA violations as minor regulatory offenses. This guideline applies to offenses with statutory maximum sentences ranging from 1 to 10 years. However, as noted, Section 2N2.1 does not include enhancements for specific offense characteristics to account for the wide range of offenses that it addresses. In addition, Section 2N2.1 does not provide for any enhancements to address the public health purposes of the FDCA. Therefore, FDA believes Section 2N2.1 should be amended to ensure that all criminals who endanger the public health by violating the FDCA receive appropriate punishment.

Particular Concerns with the Existing Guidelines and Suggested Amendments

I. Offenses with Higher Statutory Penalties

Most violations of the FDCA are felonies with a 3-year maximum sentence if the offense is committed with an "intent to defraud or mislead." However, certain FDCA offenses are felonies whether or not the offense involves fraudulent intent, and some of these offenses have statutory maximum sentences that exceed 3 years. The current guideline at Section 2N2.1 fails to account for these offenses that warrant more significant penalties without requiring a showing of fraud.

A. Certain Prescription Drug Marketing Act Offenses

The Prescription Drug Marketing Act of 1987 (PDMA) prohibits, among other things, the unlicensed wholesale distribution of prescription drugs; the sale, purchase, or trading of prescription drug samples and coupons; and the reimportation by anyone other than the manufacturer of prescription drugs manufactured in the United States [see 21 U.S.C. §§ 331(t), 353(c), 353(e)(2)(A), and 381(d)]. Congress enacted these prohibitions because it found that such conduct created, as stated in H. Rep. No. 100-76 at 2 (1987), "an unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs will be sold to American consumers."

These PDMA prohibitions are an important tool to combat the large-scale distribution of counterfeit or substandard prescription drugs. Unlicensed wholesale distributors of prescription drugs are less likely than legitimate licensed wholesalers to store and handle prescription drugs properly and are more likely to purchase prescription drugs from disreputable sources that sell counterfeit, misbranded, adulterated, or expired drugs. Sellers of prescription drug samples typically repackage the drugs to remove any indication that the drugs are not intended for sale and, in the process, mislabel the drugs with inaccurate lot numbers, expiration dates, and, in some cases, the wrong drug name or strength.

Because of the public health risk posed by these PDMA offenses and the importance of protecting the integrity of the Nation's prescription drug supply, Congress made these offenses felonies without requiring proof that the defendants acted with intent to defraud or mislead, as is required for most other FDCA felonies. And, unlike other FDCA violations that have a maximum penalty of 3 years in prison, Congress provided for a maximum prison sentence of 10 years for these PDMA offenses [21 U.S.C. § 333(b)(1)].

The guidelines, however, do not distinguish between these PDMA offenses and other FDCA violations under Section 2N2.1. The guidelines treat all FDCA offenses the same and provide for a base offense level of six. The higher maximum penalties for these PDMA offenses generally come into play *only* when there is evidence of fraud *and* significant pecuniary loss under Section 2B1.1(b)(1). It is difficult to prove fraud because buyers and sellers are often complicit in the offense, and, even when the government can prove fraud, it is difficult to demonstrate substantial pecuniary loss, because the buyers and sellers involved in the fraud often do not retain records pertaining to the illegal drug distributions.

In FDA's view, the current guidelines do not carry out the intention of Congress: to provide significant penalties for these PDMA offenses without requiring a showing of fraud. FDA believes that an amendment to Section 2N2.1 to provide for a higher base offense level (e.g., 12-14) for these PDMA offenses, with incremental increases based on the quantity or dollar value of the drugs involved in the offense, would better reflect congressional intent and significantly increase the effectiveness of the PDMA as a means to protect the integrity of the Nation's prescription drug supply.¹

B. Second Offense Felonies

Under 21 U.S.C. § 333(a)(2), a second conviction for violating the FDCA is a felony punishable by up to 3 years imprisonment, even absent a showing of intent to defraud or mislead. Without a showing of fraud, however, the prior FDCA conviction will likely have no effect under the current guidelines because it will not have resulted in a sentence of imprisonment (see U.S.S.G. § 4A1.1). The prior FDCA conviction probably would not increase a defendant's criminal history category, and Section 2N2.1 does not provide for any increase of the base offense level for a second FDCA conviction, even though Congress made a second FDCA offense a felony.

The guidelines should be amended to include a specific offense characteristic under Section 2N2.1 for repeat FDCA offenders. FDA believes that an increase of six levels for a prior FDCA

¹ To give greater effect to this and the other suggested amendments, we believe that Section 2N2.1(b)(1) also should be amended to provide that Section 2B1.1 would apply only if the resulting offense level would be greater than the offense level under Section 2N2.1.

conviction, with an increase of two levels for each additional unrelated prior FDCA conviction, would be appropriate.

C. Human Growth Hormone Offenses

Under 21 U.S.C. § 333(e), it is unlawful knowingly to distribute, or to possess with intent to distribute, human growth hormone for any use not approved by FDA. The statutory maximum penalty for violating this provision is 5 years in prison under 21 U.S.C. § 333(e)(1). When the offense involves distribution to a person under age 18, the statutory maximum increases to 10 years in prison under 21 U.S.C. § 333(e)(2). The Commission has not yet promulgated a guideline to cover these human growth hormone offenses (see U.S.S.G. § 2N2.1, comment (n.4)). As a result, it is unclear how the offenses will be treated under the guidelines. This lack of clarity undermines the goals of uniformity, transparency, and deterrence. In recent years, FDA has investigated an increasing number of cases involving the distribution of human growth hormone for unapproved uses. We request that the Commission promulgate a guideline to address such offenses. An amendment to Section 2N2.1 that provides for a higher base offense level [e.g., 12-14, for violations of 21 U.S.C. § 333(e)] with incremental enhancements based on the quantity or dollar value of human growth hormone involved in the offense, and a separate enhancement for offenses that involve a person under 18 years of age, would adequately address the conduct.

II. Offenses that Do Not Involve Fraud

FDCA cases frequently arise in which prosecutors cannot prove intent to defraud or mislead to establish felony liability. Misdemeanor violations of the FDCA encompass a wide range of conduct, from record-keeping offenses to the willful distribution of dangerous products that could seriously injure or kill consumers. Section 2N2.1, which provides for a base offense level of six with no enhancements, is inadequate to address the wide-ranging degrees of culpability that may occur in FDCA misdemeanors. Despite the lack of provable fraud, the conduct addressed in most FDCA misdemeanor prosecutions warrants more significant punishment than is available under the current guidelines, either because of the defendant's state of mind or a significant risk to the public health, or both.

An example is a wholesale distributor who sells counterfeit or diverted prescription drugs but claims not to have known that the drugs were counterfeit or diverted. In such cases, it is often difficult to prove that the distributor acted with intent to defraud and mislead, even though such distributors often deliberately choose not to verify the legitimacy of the drugs under circumstances where the source is highly suspicious.² This lack of fraud (or difficulty proving it)

² If the distributor acted in good faith and had no reason to believe that the drugs were counterfeit, he would not be subject to criminal penalties under the FDCA [see 21 U.S.C. § 333(c)(5)].

in no way undercuts the potentially serious public health consequences caused by a wholesale distributor who recklessly distributes drugs of unknown origin to an unsuspecting public. The distributor's willful blindness endangers the public by ignoring the risk that counterfeit or otherwise substandard prescription drugs may enter the retail market.

Another type of misdemeanor offense that we believe warrants more significant punishment than is available under the current guideline is the distribution of dangerous or ineffective drugs for the treatment of disease. Even when these offenses do not involve fraud, they often involve substantial risk to the public health, take advantage of patients who are desperate for a cure, and are perpetrated by defendants who are aware that their conduct is unlawful. For example, FDA's Office of Criminal Investigations has investigated the illegal sale of DNP (a notoriously deadly product commonly used as a pesticide) as a weight-loss drug and cancer treatment. If a defendant sells DNP openly, it may be difficult to prove fraud sufficient to establish felony liability, even in those cases where the defendant is aware of the illegality of his conduct.

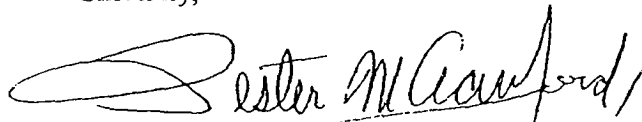
In the foregoing types of cases, the sentence will be governed by Section 2N2.1, with a base offense level of six and no enhancements for specific offense characteristics. FDA believes that Section 2N2.1 should be amended to provide for stiffer sentences for misdemeanor offenses that --while not involving demonstrable fraud--involve reckless, knowing, or willful conduct, a significant risk to the public health, or both. The amendments should enhance the offense level based on the defendant's level of criminal intent by, for example, enhancing the offense level for reckless, knowing, and willful conduct. These enhancements would serve to distinguish knowing, reckless, and willful offenses from those involving mere negligence or no criminal intent whatsoever.

In addition, enhancements based on the risk of harm created by the offense conduct, similar to the enhancements for likelihood of serious bodily injury used in the guidelines for environmental offenses, would be appropriate in certain cases [see, e.g., U.S.S.G. § 2Q1.3(b)(2)]. Enhancements for risk of harm or serious bodily injury would serve to distinguish mere technical, regulatory offenses from those with the potential to cause significant harm to the American public. Appropriate amendments would ensure that misdemeanor offenses involving, for example, the distribution of counterfeit drugs that lack active ingredients or the sale of ineffective or toxic drugs for the treatment of cancer would be treated more seriously than offenses involving mere record-keeping or regulatory violations that pose no cognizable risk to the public health. The amendments could provide for different levels of enhancement depending on the nature of the risk and the number of people placed at risk. Such enhancements, together with enhancements based on the defendant's culpable state of mind, would help provide an appropriate range of punishment for the wide range of conduct that falls under the misdemeanor provisions of the FDCA.

Conclusion

For the above reasons, FDA believes that the guidelines applicable to FDCA offenses should be amended to establish offense levels that reflect the serious nature of the conduct, promote deterrence, and address offenses with differing levels of culpability and disregard for the public health. At the Commission's request, FDA will provide any assistance and input to help draft appropriate amendments. If you have any questions regarding this matter, please contact Associate Chief Counsel Sarah Hawkins by telephone at (301) 827-1130 or by e-mail at sarah.hawkins@fda.gov.

Sincerely,



Lester M. Crawford, D.V.M., Ph.D.
Acting Commissioner of Food and Drugs

cc: John M. Taylor, III, Associate Commissioner for Regulatory Affairs, FDA
Terry Vermillion, Director, Office of Criminal Investigations, FDA
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July 26, 2005

Sentencing Commission
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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.

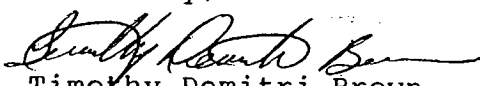
My personal opinion is that the ruling is in error: the guidelines themselves are not unconstitutional, the point of the matter is that it is against our constitution for a Judge to decide the facts of a case. The Court chose to protect itself from the backlash of its previous unauthorized conduct, allowing 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
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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
Kelby R. Franklin

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August 15, 2005

United States Sentencing Commission
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Attention: Public Affairs—Priorities Comment

Re: Comments on Notice of Proposed Priorities -- Chapter 8 Organizational
Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write in response to the Commission's request for comments on the above Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.¹ In particular, although this letter does not address the issue of broad Sentencing Guidelines reform, we would like to express our views regarding the Commission's tentative priority number (5), described in the Notice as "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." Towards that end, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and at the end of that process, amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The ABA has long supported the use of sentencing guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* (the "*Booker/Fanfan* decision"). At the conclusion of that process, the ABA adopted new policy recommending that Congress

¹ 70 Fed. Reg. 37145 (June 28, 2005)

take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

In the meantime, however, the ABA continues to have serious concerns regarding several narrow amendments to the Sentencing Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Although the ABA has serious concerns regarding several of these recent amendments², our greatest concern involves a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the "privilege waiver amendment"). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact of the amendment on the business and legal communities³. As a result, the ABA has concluded that the new privilege waiver amendment, though perhaps well intentioned, will have a number of profoundly negative consequences. Therefore, we respectfully urge that the Commission retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and remedy the previous amendment, for the following reasons.

The ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be forced to waive their attorney-client and work product protections on a routine basis. The Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of

² In August 2004, the ABA House of Delegates adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and the related background reports, are available at <http://www.abanet.org/poladv/acprivilege.htm>.

³ For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys of in-house and outside counsel in order to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. Executive summaries of these surveys are available online at [www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf) and www.acca.com/Surveys/attyclient.pdf, respectively. In addition, the American Bar Association's Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects. Materials relating to the work of the ABA Task Force are available on the entity's website at www.abanet.org/buslaw/attorneyclient/.

work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” But the exception is likely to swallow the rule; prosecutors will make routine requests for waivers and organizations will be forced routinely to grant them.

Now that this amendment has become effective, the Justice Department—which has followed a general policy of requiring companies to waive privileges in many cases as a sign of cooperation since the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum”—is likely to pressure companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Congressional ratification of the Department’s policy of routinely requiring privilege waivers. From a practical standpoint, companies will have no choice but to waive these privileges whenever the government demands it because the government’s threat to label them as “uncooperative” in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

We also believe that the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity’s best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent the entity. By authorizing routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers’ ability to effectively counsel compliance with the law.

In addition, while the privilege waiver amendment was intended to aid government prosecution of corporate criminals, its actual effect is to make detection of corporate misconduct more difficult by undermining companies’ internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company’s in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

The ABA also believes that the privilege waiver amendment unfairly harms employees. The amendment places the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and run the risk that statements made to the company’s or organization’s lawyers will be turned over to the government by

the entity or they can decline to cooperate and risk their employment. In our view, it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many other organizations have expressed similar concerns regarding the new privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005, when an informal coalition of nine prominent business, legal, and public policy organizations⁴ submitted a joint letter urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal, and public policy communities.

The ABA shares these concerns and believes that the privilege waiver amendment is counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship. Because of the serious and immediate nature of this harm, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle. In addition, at the end of that process, we urge the Commission to amend the applicable language in the Commentary to clarify that the waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below. If our recommendations were adopted, the relevant portion of the Commentary would read as follows⁵:

"12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-

⁴ The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation. The ABA also expressed similar concerns to the Commission in its separate letter dated May 17, 2005. In addition, several other influential groups, including the National Association of Criminal Defense Lawyers and the Financial Services Roundtable, have also publicly voiced similar concerns regarding the privilege waiver amendment.

⁵ Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not a factor in determining whether a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) is warranted unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."*

Thank you for your consideration of our comments. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

August 15, 2005

VIA ELECTRONIC FILING

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Comments on Notice of Proposed Priorities -- Chapter 8 Organizational Guidelines,
Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the undersigned organizations, please accept this letter as our response to the Commission's request for comments on the above Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.¹ In particular, we would like to express our views regarding the Commission's tentative priority number (5), described in the Notice as "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." Towards that end, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and at the end of that process, amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government. These comments are presented on behalf of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, the U.S. Chamber of Commerce, and the Washington Legal Foundation.

On April 30, 2004, the U.S. Sentencing Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Included in these amendments was a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to demonstrate cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Guidelines. All of these amendments became effective on November 1, 2004.

¹ 70 Fed. Reg. 37145 (June 28, 2005)

Before the adoption of the privilege waiver amendment, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be required, even though the Justice Department has increasingly requested that companies waive their privileges as a condition for certifying their cooperation during investigations. Privilege waiver was the subject of substantial consideration by the Commission's Ad Hoc Advisory Group on the Organizational Guidelines, which proposed the changes after considering information from the Department of Justice, some bar associations, and regulated entities.

During the Advisory Group's deliberations, numerous representatives of the business community and various legal groups expressed concerns about the Group's proposal regarding the waiver issue, which was not dramatically different than the version ultimately adopted by the Commission. Since the adoption of the final version, a broader cross-section of organizations, including many of the undersigned entities, has evaluated the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and has identified profoundly negative unintended consequences². As a result, we respectfully urge the Commission retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and remedy the previous amendment, for the following reasons.

The attorney-client privilege is the bedrock of a defendant's rights to effective counsel and confidentiality in seeking legal advice. It also serves a key practical role in the process of corporate self-investigation and reporting by allowing corporate officials and staff to talk with lawyers without concern that their admissions, questions or requests for legal guidance will be required to be shared with government investigators.

The privilege also encourages clients to place lawyers on mission-critical teams so that legal advice can be regularly integrated into the company's day-to-day and strategic business decisions. Removing the protections of the privilege from the corporate or other organizational contexts makes it far more difficult for companies, associations, unions, and other entities to detect employee wrongdoing when it occurs and correct it early.

While the Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government] ...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization," the exception is likely to swallow the rule. Now that the amendment has become effective, the Justice Department—which has followed a

² For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys of in-house and outside counsel in order to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. Executive summaries of these surveys are available online at [www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf) and www.acca.com/Surveys/attyclient.pdf, respectively. In addition, the American Bar Association's Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects. Materials relating to the work of the ABA Task Force are available on the entity's website at www.abanet.org/buslaw/attorneyclient/.

general policy of requiring companies to waive privilege in many cases as a sign of cooperation since the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum"—is likely to pressure companies to waive privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Congressional ratification of the Department's policy of routinely requiring privilege waivers. From a practical standpoint, organizations will have no choice but to waive these privileges whenever the government demands it, as the threat to label them as "uncooperative" in combating corporate crime—even if the charge is unfounded—could have a profound effect on their public image, stock price and credit worthiness.

These changes to the Section 8C2.5 Commentary—resulting in the routine compelled waiver of attorney-client privilege and work product protections—unfairly harms companies, associations, unions and other entities in the following ways:

- The amendment weakens the attorney-client privilege between companies and their lawyers.** Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent that entity. By authorizing routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law.
- The privilege waiver amendment undermines internal compliance programs.** Instead of aiding in the prosecution of corporate criminals, the privilege waiver amendment makes detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. However, because the effectiveness of these internal investigations depends on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.
- The privilege waiver amendment unfairly harms employees.** The privilege waiver amendment also places the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity or they can decline to cooperate and risk their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

Unfortunately, the Supreme Court's recent decision in *United States v. Booker/Fanfan* did not alleviate the problems caused by the privilege waiver amendment. Although the Supreme Court struck down as unconstitutional those provisions of the Sentencing Guidelines that made them mandatory and binding on the courts, it preserved the overall Guidelines as non-binding standards that the courts must consider when crafting sentences. Therefore, the privilege waiver amendment will continue to cause adverse consequences as long as it remains in place.

For all these reasons, we believe that the privilege waiver amendment is flawed and uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship. Therefore, we urge the U.S. Sentencing Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle. In addition, at the end of that process, we urge the Commission to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows³:

"12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not a factor in determining whether a prerequisite to a reduction in culpability*

³ Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

score under subdivisions (1) and (2) of subsection (g) is warranted ~~unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.~~"

Thank you for the opportunity to present our views on this important matter.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL

AMERICAN CIVIL LIBERTIES UNION

ASSOCIATION OF CORPORATE COUNSEL
(formerly the American Corporate Counsel Association)

BUSINESS CIVIL LIBERTIES, INC.

BUSINESS ROUNDTABLE

THE FINANCIAL SERVICES ROUNDTABLE

FRONTIERS OF FREEDOM

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

RETAIL INDUSTRY LEADERS ASSOCIATION

THE U.S. CHAMBER OF COMMERCE

WASHINGTON LEGAL FOUNDATION

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

We, the undersigned former Justice Department officials, are pleased that the Commission has included, on its list of tentative priorities for the upcoming amendment cycle, the recent amendment to the Commentary to the Organizational Guidelines involving waiver of attorney-client privilege and work product protection in the context of cooperation.¹ We believe that this new amendment is eroding and weakening the attorney-client and work product protections afforded by the American system of justice, and we urge the Commission to address and remedy this amendment as soon as possible.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Among these amendments— all of which became effective on November 1, 2004— was a change in the Commentary to Section 8C2.5 which authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to demonstrate cooperation with the government and thereby qualify for a more lenient sentence under the Guidelines.

Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required. Although it is true that the Justice Department has followed a general policy of commonly requiring companies to waive privileges as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," this was merely the Department's internal policy for its prosecutors. Now that the privilege waiver amendment has been incorporated into the official Commentary to the Sentencing Guidelines, the Justice Department, as well as other enforcement agencies, are contending that this amendment provides Congressional ratification of the Department's policy of routinely asking that privilege be waived.² In practice, companies are

¹ 70 Fed. Reg. 37145 (June 28, 2005).

² See, e.g., Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 WAKE FOREST L. REV. 587, 589 (Fall 2004) ("This Article seeks to demonstrate that the [Justice] Department's consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines.").

The Honorable Ricardo H. Hinojosa
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finding that they have no choice but to waive these privileges whenever the government demands it. The threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Even if the charge is unfounded, the charge of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As former Justice Department officials, we appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Unfortunately, however, we believe that the privilege waiver amendment, though well-intentioned, is undermining rather than strengthening compliance with the law in a number of ways.

In our view, the privilege waiver amendment seriously erodes and weakens the attorney-client privilege between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management and line operating personnel so they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By enabling routine demands for waiver of the attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, will harm not only the corporate client, but the investing public and society as well.

The privilege waiver amendment will also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees and other individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

Finally, we are concerned that the privilege waiver amendment will encourage excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client or work product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities to routinely waive their privileges during criminal investigations provides plaintiff lawyers with a great deal of sensitive—and sometimes confidential—information that can be used against the entities in class action, derivative and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and

The Honorable Ricardo H. Hinojosa
August 15, 2005
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all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so—in order to preserve their defenses for subsequent actions that appear to involve a far greater financial risk-- instead face the government's wrath.

In sum, we believe that the new privilege waiver amendment is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Commission to retain this issue on its list of priorities for the upcoming amendment cycle, and to address and remedy the issue as soon as possible. In particular, we recommend that the Commission revise the amendment to state affirmatively that waiver of attorney-client and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government during an investigation.

Respectfully submitted,

Griffin B. Bell
Attorney General
(1977-1979)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

Theodore B. Olson
Solicitor General
(2001-2004)

Stuart M. Gerson
Acting Attorney General (1993)
Assistant Attorney General,
Civil Division (1989-1993)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Kenneth W. Starr
Solicitor General
(1989-1993)

Edwin Meese, III
Attorney General
(1985-1988)

Seth P. Waxman
Solicitor General
(1997-2001)

Dick Thornburgh
Attorney General
(1988-1991)

The Honorable Ricardo H. Hinojosa
August 15, 2005
Page 4

cc: United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Sentencing Guidelines Commentary Involving Waiver of Attorney-Client
Privilege and Work Product Doctrine -- Comments on Notice of Proposed
Priorities

Dear Judge Hinojosa:

As a member of the House Judiciary Committee and its Subcommittee on Crime, Terrorism and Homeland Security, I have been following with great interest the debate over the recent amendment to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines, which I believe threatens to erode the long-standing attorney-client and work product protections afforded under our system of justice. As one who played an active role in the adoption of the Sentencing Guidelines statute, this causes me great concern. Although I am pleased that the Commission has announced plans to reconsider this issue during its regular 2005-2006 amendment cycle—and urge the Commission to follow through on this process—I remain concerned that the amendment process does not provide a more timely remedy for the problem. Therefore, I would appreciate hearing your thoughts about possible ways to address this problem more urgently.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to “organizations”—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities—which became effective on November 1, 2004. One of these amendments involved a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections as a condition of showing cooperation with the government during investigations. Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required.

Although the Justice Department has followed a general internal policy—with the adoption of the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum”—of requiring companies to waive privileges in certain cases as a sign of cooperation, I am concerned that the privilege waiver amendment might erroneously be seen as Congressional ratification of this policy, resulting in even more routine demands for waiver. I am informed that, in practice, companies are finding that they have no choice but to waive these privileges whenever the government demands it, as the threat to label them as “uncooperative” in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Such an

unbalanced dynamic simply goes too far. Even if the charge is unfounded, an allegation of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As both a former California Attorney General and a current Member of Congress, I appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Creating incentives to increase the practice of corporate ethics and legal compliance is imperative. Unfortunately, I believe the privilege waiver amendment is likely to undermine rather than strengthen compliance with the law in several ways.

First of all, the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers and undermines their internal corporate compliance programs, resulting in great harm to the public. Lawyers can play a key role in helping companies and other organizations to understand and comply with complex laws, but to fulfill this role, lawyers must enjoy the trust and confidence of the entity's leaders and must be provided with all relevant information necessary to represent the entity effectively, ensure compliance with the law, and quickly remedy any violations. By authorizing the government to demand waiver of attorney-client and work product protections *on a routine basis*, the amendment discourages entities from consulting with their lawyers. This, in turn, impedes the lawyers' ability to effectively counsel compliance with the law and discourages them from conducting internal investigations designed to quickly detect and remedy misconduct. As a result, companies and the investing public will be harmed.

I am also concerned that the privilege waiver amendment will encourage excessive civil litigation. In California and most other jurisdictions in the nation, waiver of attorney-client or work product protections in one case waives the protections for all future cases, including subsequent civil litigation matters. Thus, forcing companies and other entities to routinely waive their privileges during criminal investigations results in the waiver of those privileges in subsequent civil litigation as well. As a result, companies are unfairly forced to choose between waiving their privileges, thereby placing their employees and shareholders at an increased risk of costly civil litigation, or retaining their privileges and then facing the wrath of government prosecutors.

For these reasons, I believe that the recent privilege waiver amendment to the Sentencing Guidelines is likely to undermine, rather than strengthen, compliance with the law. In addition, I believe that it will undermine the many other societal benefits that arise from the essential role that the confidential attorney-client relationship plays in our adversarial system of justice. My concerns are also shared by many former senior Justice Department officials—including former Attorneys General Ed Meese and Dick Thornburgh, former Deputy Attorneys General George Terwilliger and Carol Dinkins, former Solicitors General Ted Olson, Seth Waxman and Ken Starr, and many others—who I understand are preparing to submit their own joint letter to the Commission in the near future. Therefore, I urge the Commission to follow through on its initial plan to address and remedy the privilege waiver issue as part of the 2005-2006 amendment cycle.

The new amendment should state affirmatively that waiver of attorney-client and work product protections should not be a mandatory factor for determining whether a sentencing reduction is warranted for cooperation with the government during investigations.

While I believe that such an amendment is appropriate and desirable, it is my understanding that changes made during the upcoming 2005-2006 amendment cycle will not become effective until November 1, 2006. Because the current privilege waiver language in the Commentary to the Guidelines will continue to cause the problems described above until it is removed, I would appreciate your thoughts regarding any additional remedies—legislative or otherwise—that could resolve this problem more promptly.

Thank you for your consideration, and I look forward to hearing from you at your earliest convenience.

Sincerely,

Daniel E. Lungren
Member of Congress

cc: United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Members of the U.S. Sentencing Commission

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee

New York State Bar Association
One Elk Street
Albany, N.Y. 12207
518-463-3200

Business Law Section
Committee on Securities Regulation

August 15, 2005

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs-Priorities Comment

Re: Amendment Cycle Ending May 1, 2006
Waiver of Attorney-Client Privilege and Work Product Protections

Commissioners:

The Committee on Securities Regulation of the Business Law Section of the New York State Bar Association appreciates the request by the United States Sentencing Commission (the "Commission") for comments on possible priority policy issues for the amendment cycle ending May 1, 2006, and possibly continuing into the amendment cycle ending May 1, 2007 (the "Amendment Cycle") in accordance with Rule 5.2 of its Rules of Practice and Procedure, as noticed at 70 FR 37145-46 (the "Notice").

The Committee on Securities Regulation is comprised of members of the New York Bar whose practices focus, in principal part, in the field of securities regulation. The Section includes lawyers in private practice and in-house counsel of corporate legal departments. A draft of this letter was circulated for comment among members of the Committee, and the views expressed in this letter are generally consistent with those of a majority of its members who reviewed and commented on this letter in draft form. Also, the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association has approved a draft form of this letter circulated to Executive Committee members. In addition, a draft of this letter was circulated to members of the Executive Committee of the Corporate Counsel Section of the Association, and the views expressed in this letter are generally consistent with those of a majority of the Executive Committee members who reviewed and responded to the draft letter.

The views set forth in this letter, however, are those of the Committee and those two Sections' Executive Committees, and do not necessarily reflect the views of the

organizations with which its members are associated or the New York State Bar Association.

The Notice identifies seven priorities for the Amendment Cycle. This letter addresses item 5 which specifies the "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding the waiver of the attorney-client and work product protections[.]"

In 2004, the commentary to USSG § 8C2.5 was amended to include the following language:

"Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

As discussed below, we respectfully submit that the requirement that a company waive the attorney-client privilege in order to obtain a reduction of points under the guidelines should be eliminated on the grounds that such a waiver requirement undermines the purpose and value of the privilege. Furthermore, although couched in terms of waiver being required only if necessary to provide pertinent information, we believe that the commentary provides no protection for companies as prosecutors may feel obligated to press for waiver in order to assure that they find out as much as possible. Accordingly, we urge the Commission to eliminate the commentary and instead include an express statement that waiver of the attorney-client privilege and of the work product protections is not required for a reduction in culpability score.

Introduction

The requirement that a company¹ waive the attorney-client privilege for a reduction of points under the sentencing guidelines is a mistake, as previously and repeatedly warned in the form of the strong opposition to such requirement as voiced by the American Bar Association, the American Chemistry Council, the Association of Corporate Counsel, Business Civil Liberties, Inc., Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the U.S. Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, and the American Civil Liberties Union.

The nature of this concern may be summarized as follows:

¹ The term "company" or "companies" includes all forms of business entities including without limitation corporations, partnerships, limited liability companies and limited liability partnerships.

- The attorney-client privilege between companies and their lawyers will become weakened by prosecutors typically requesting the waiver.
- Companies may feel coerced into waiving the privilege because those who do not run the risk that the government will label them as “uncooperative,” which, in turn, will affect their public image, stock price, and credit worthiness.
- Companies may be reluctant to consult with their lawyers for fear that confidential information will be divulged through a waiver of the privilege thereby impeding the lawyers’ ability to effectively counsel clients and avoid wrongdoing that causes harm to companies and the investing public.

Analysis and Comment

A company being investigated for committing, or alleged to have committed, a crime must consider waiving the privilege under USSG § 8C2.5 to obtain favorable treatment by the government under the guidelines. This daunting decision cannot be made lightly under any circumstances, especially considering that the waiver to a governmental authority could act as a waiver in other civil litigation.²

In any event, a provision that could cause companies to waive the attorney-client privilege would undermine the purpose and value of this ancient privilege. Historically, the attorney-client privilege possibly dates back to the Roman Empire. *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577), *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580), and *Kelway v. Kelway*, 21 Eng. Rep. 47 (Ch. 1580) decided during the reign of Elizabeth I, are the earliest written opinions known to have recognized the privilege. The attorney-client privilege is said to be the most ancient of evidentiary privileges. In the words of Dean John Wigmore, “the privilege appears as unquestioned It is therefore the oldest of the privileges for confidential communications.”³

The attorney-client privilege is a rule of evidence. It is embodied in Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides, “Parties may obtain discovery regarding any matter, not privileged”

Attorneys support the attorney-client privilege because it encourages clients to make full disclosure of information to their attorneys, making it more likely that an attorney will obtain the information needed to provide good legal advice. Clients value the privilege because it makes them feel comfortable disclosing information to their

² See, e.g., *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002); *In Re Syncor Erisa Litigation*, No. CV03-2446-RGKRCX, 2005 WL 1661875 (C.D. Cal. July 6, 2005); *In re Natural Gas Commodity Litigation*, No. 03 Civ. 6186VMAJP, 2005 WL 1457666 (S.D.N.Y. June 21, 2005).

³ J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW at 542 (McNaughton rev. 1961).

attorneys. The judicial process supports the privilege because it recognizes a social good as being "derived from the proper performance of the functions of lawyers acting for their clients (which) is believed to outweigh the harm that may come from the suppression of the evidence in specific cases"⁴

The privilege benefits society because it helps create the trust that must exist between a client and attorney in order to encourage open and full discussion with counsel. Not only is this necessary in order to promote the development of an informed defense, but the reliance on the privilege encourages open communication with counsel that can lead to advice to avoid conduct that the client might have otherwise undertaken in possible violation of the law. We do not believe that the purpose of requiring waiver in this context outweighs the purpose and value of the privilege.

We recognize that the commentary is worded to say that the waiver is not required unless "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." However, any protection apparently provided companies by that formulation is illusory. A prosecutor will not know whether he or she will learn pertinent information only through waiver of the privilege until after the waiver is demanded and the privileged information is revealed. Therefore, we would expect prosecutors in good faith to frequently request waiver in order to expand discovery to assure that they find out as much as possible.

Conclusion

The attorney-client privilege has served the legal process as we know it today in the United States from its inception by protecting confidentiality and thus promoting the candor that results in accurate fact-finding and effective legal advice. The commentary would operate to abrogate this ancient privilege to the detriment of the legal system and the society it serves. For this and the reasons cited herein, we urge the Commission to eliminate the commentary that could cause a company to waive the attorney-client privilege and work product protections to obtain a reduction of points under the guidelines. In addition, we urge the Commission to include in the guidelines an express statement that waiver of the attorney-client privilege and of the work product protections is not required for a reduction in culpability score.

* * * * *

⁴ Wyzansky, J., in *United States v. United Shoe Machinery Corporation*, 80 F. Supp. 357, 358 (D.Mass. 1950).

United States Sentencing Commission

August 15, 2002

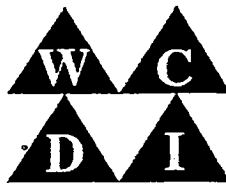
Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By Michael J. Holliday
MICHAEL J. HOLLIDAY
Chair of the Committee

Drafting Committee:

Robert J.A. Zito, Chair
Richard E. Gutman
Micalyn S. Harris



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August 14, 2005

SENT BY EMAIL AND UNITED STATES MAIL

United States Sentencing Commission
Attention: Public Affairs-Priorities Comment
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Request for Public Comment for the Amendment Cycle
Ending May 1, 2006

Dear Commission:

In my Public Comment to the Commission dated February 27, 2004 and in my letter to the Committee on the Judiciary on August 6, 2004, I expressed my firm belief that INTERNAL DETECTION AND APPROPRIATE REMEDIAL ACTION must be KEY components in any compliance program. However, both of these components cannot function properly in the workplace when *attorney-client privilege* and *work product* protections are compromised at the expense of seeking a criminal conviction. Since the *attorney-client privilege* "exists to protect not only the giving of professional advice to those who act on it but also the *giving of information to the lawyer* to enable him to give sound and informed advice."¹ and the *work product privilege* "applies only to materials prepared in anticipation of litigation,"² until such time as it is determined through an internal investigation that a reportable criminal offense has been committed, these civil law privileges must not be waived for any reason. An internal investigation as a component of appropriate remedial action "sets the tone: (1) to officers, directors and employees of the conduct permitted in the workplace; (2) to the public and consumers about ethical, safe and community-oriented business practices; (3) that the goal of any type of appropriate remedial action is intended to cure ONLY and NOT as punitive measures; and (4) to PROTECT and DEFEND the workplace."³

¹ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

² *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993).

³ Wright, L.A. (2005). *The Triangle Workplace*. Austin: The Wright Word Publishing.
*Protecting the Workplace for All Employers
and EmployeesSM*

August 12, 2005

While truly applauding the efforts of the Commission to elicit the corporate responsibility of organizations by promulgating more stringent guidelines, without INTERNAL DETECTION and APPROPRIATE REMEDIAL ACTION utilizing attorney-client privilege and the work product privilege, the Commission injects criminal law into an otherwise civil law workplace that pits employees against management, law enforcement against corporations and in-house/outside counsel against the officers of the corporations it represents. *Arthur Andersen* brought to light the importance of such privileges, "Nor is it necessarily corrupt for an attorney to 'persuad[e]' a client 'with intent to ... cause' that client to 'withhold' documents from the Government. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). See *id.* at 395. No one would suggest that an attorney who 'persuade[d]' Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS' hands."⁴ For these reasons, the Commission should make the review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections a priority.

Many opportunities exist within Chapter Eight to foster INTERNAL DETECTION and APPROPRIATE REMEDIAL ACTION, examples of which are as follows:

Insert Section 8B2.1(5)(D) as follows:

"(D) to implement internal detection and appropriate remedial action measures that protect attorney-client and work product privileges until such time as it is determined that reportable criminal conduct has occurred."

Insert at the end of Section 8C2.5(f)(1) as follows:

"... ONLY if the organization conducted an internal investigation as a component of appropriate remedial action once the criminal offense was discovered."

Introductory Commentary

Amend the end of the THIRD general principle as follows:

"Culpability generally will be determined by seven factors ... The three factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; (ii) the completion of an internal investigation as a component of appropriate

⁴ *Arthur Andersen LLP v. United States*, 544 U.S. ____ (2005).
*Protecting the Workplace for All Employers
and Employees*SM

UNITED STATES SENTENCING COMMISSION

Page Three

August 14, 2005

remedial action once possible criminal conduct is detected; and (iii) self-reporting, cooperation, or acceptance of responsibility."

Section 8C2.5 Commentary / Application Notes as follows:

Insert within Commentary 12 as follows:

"A prime test ... is whether the organization conducted an internal investigation as a component of appropriate remedial action that detected reportable criminal conduct and the"

Amendment to the end of Commentary 12 as follows:

"Waiver of attorney-client privilege and of work product protections SHALL NOT be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) when the organization conducted an internal investigation as a component of appropriate remedial action."

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

08/09/2005 11:34 FAX 12025021644

OPPS Assistant Dir.

002/003



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Honorable Sim Lake, Chair

August 9, 2005

Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
United States District Court
Texas Commerce Center
1701 West Highway 83
McAllen, TX 78501

Dear Ricardo:

I write on behalf of the Judicial Conference Committee on Criminal Law in response to the Sentencing Commission's request for public comment on its proposed priorities for the amendment cycle ending May 1, 2006, and beyond. The Committee has reviewed the proposed Commission priorities and has voted unanimously to reiterate our request that the sentencing guidelines be simplified.

In our testimony before the Commission in November of 2004, recognizing the increasing complexity of the sentencing guideline system and in anticipation of the *Booker* decision, we asked the Commission to renew its efforts to simplify the guidelines. In 1995, at the Committee's urging, then-Commission Chair Judge John Conaboy determined a need for the Commission to take a hiatus from the amendment process in order to allow the Commission to focus on an extensive assessment of the sentencing guidelines. The Commission began its assessment of the sentencing guidelines to determine how they could be streamlined or simplified. Hearings were held in Washington, DC, and Denver, Colorado, and Commission staff prepared a series of working papers to examine relevant conduct, the level of detail in specific offense guidelines, sentencing options, departures, and the Sentencing Reform Act itself. Due to turnover in Sentencing Commissioners, this review effort was not completed.

Honorable Ricardo H. Hinojosa
Page 2

While the sentencing guidelines are now advisory in nature, courts will continue to calculate the guidelines and rely on them in their sentencing decisions. Simplification of the guidelines will greatly assist judges in complying with *Booker*. We hope that the Commission will designate simplification of the sentencing guidelines as a priority for the next amendment cycle. We stand ready to provide whatever assistance the Commission may need for this initiative.

Very truly yours,



Sim Lake

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August 9, 2005

The Honorable Ricardo H. Hinojosa, Chair
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

RE: 2006 Amendment Cycle

Dear Judge Hinojosa:

On behalf of the American Bar Association Criminal Justice Section's Corrections and Sentencing Committee, we are writing in regard to the U.S. Sentencing Commission's priorities for the amendment cycle ending May 1, 2006. Specifically, the purpose of this letter is to urge the Commission to return the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A)(i) to its list of priorities.

As seen in the enclosed letters from our predecessors, the Commission's responsibility for developing policy guidance for motions under § 3582(c)(1)(A)(i) is a matter of longstanding concern to this Committee, and reflects the ABA's larger interest in the issue of post-conviction mechanisms for sentence reduction. Since we last wrote, in August 2004, the ABA House of Delegates adopted a recommendation from the Justice Kennedy Commission supporting expanded use of sentence reductions pursuant to § 3582(c)(1)(A), and urging the Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." ABA Justice Kennedy Commission, Reports with Recommendations to the House of Delegates 64 (August 2004) (enclosed). Significantly, that recommendation recognizes that "exceptional circumstances" may arise following the imposition of sentence that warrant relief, "including but not limited to old age, disability, changes in

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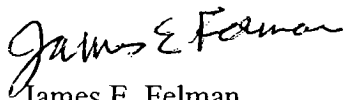
the last, exigent family circumstances, heroic acts, or extraordinary suffering.”

Where the Commission made sentence modification under 18 U.S.C. § 3582(c)(1)(A) a priority for both the 2004 and 2005 amendment cycles, we are discouraged by its removal from this year’s list. Recognizing the tumult wrought by Booker, that decision does not obviate the need for continued attention to § 3582(c)(1)(A) and the delineation of what constitutes “extraordinary and compelling” circumstances that may warrant early release from federal custody. The federal prison population has experienced sustained growth dating back to the inception of the Guidelines, with more and more aged and infirm inmates vying for limited beds in chronically overcrowded institutions. Concurrently, the Bureau of Prisons, like many federal agencies, is faced with mounting budget problems; its appropriations frozen in the face of perpetual expansion. Despite these difficulties, the BOP remains relatively reluctant to employ its § 3582(c) authority. See, e.g., Maureen Hayden, Dying Inmate’s Options Diminish, Courier & Press (Evansville, IN August 4, 2005) (BOP yet to release nonviolent, female prisoner serving three-year sentence despite being in advanced stages of cancer). As this Committee has previously submitted, lack of policy guidance from the Commission may account, in part, for the Bureau’s conservative tack. See also, John R. Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences, 13 Fed. Sent. Rptr. 154, 157 (2001).

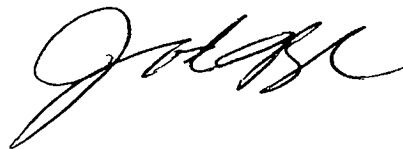
In sum, we respectfully submit that the U.S. Sentencing Commission act as contemplated by 28 U.S.C. § 994(t) and provide the Bureau of Prisons necessary criteria, content and examples on which it may rely in assessing cases that warrant presentation to sentencing courts.

Thank you for your time and consideration. We stand ready to assist the Commission in any way we can.

Sincerely,



James E. Felman
Co-Chair
Corrections & Sentencing Committee



Todd A. Bussert
Co-Chair
Corrections & Sentencing Committee

Enclosures

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June 15, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

I enjoyed visiting with you briefly at the recent PLI conference on corporate compliance programs. As you may know, I serve as Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section. The Committee recently voted to urge that the U.S. Sentencing Commission give high priority in the next amendment cycle to the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A), as required by 28 U.S.C. § 994(t).

In 18 U.S.C. § 3582(c)(1)(A), Congress recognized that "extraordinary and compelling" circumstances may warrant a prisoner's early release. Upon motion of the Director of the Bureau of Prisons, the court may reduce a sentence if the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." In 28 U.S.C. § 994(t), Congress directed the Commission to "describe what shall be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Commission has not yet responded to this directive.

In an article to be published in a forthcoming issue of the Federal Sentencing Reporter, Commissioner John Steer notes that, without benefit of guidance from the Commission, the Bureau of Prisons has interpreted § 3582(c)(1)(A) narrowly and implemented it cautiously:

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Although the Bureau has no formal criteria, the few motions filed each year have been on behalf of inmates who are terminally ill, with a prognosis of having less than a year to live. The Bureau takes into account the nature of the defendant's criminal activity and a proposed written release plan. Before the Director of the Bureau considers whether to file a motion, a request for compassionate release is subject to multiple levels of review; the warden, the regional director, the General Counsel, and then a Bureau medical professional must approve the request.

Because the statute grants absolute discretion to the Director, the decision to file a motion is not subject to review. If a motion is filed, there is no meaningful review of a court's refusal to grant the motion, because, at least at this time, there are no policy statements applicable to modification of a sentence under 18 U.S.C. § 3582(c)(1).

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Commutation Power," 13 Fed. Sent. Rptr. ____ (2001)(forthcoming).

Commissioner Steer's observations are consistent with the legislative history to this provision. In pertinent part, the accompanying Senate Report states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.A.A.N. 2338-39 (emphasis added).

The issue of what constitutes "extraordinary and compelling" grounds for sentence reduction is an important and timely one, in light of (a) the growing number of aged and ill inmates in the federal system, (b) the economic costs of incarceration, and (c) the Congressionally recognized need to respond appropriately to equitable considerations arising after the imposition of sentence. Accordingly, the Committee respectfully urges

the Commission to make the development of standards for the implementation of § 3582(c)(1)(A) a priority matter during the coming year.

Sincerely,

Michael Goldsmith
Chair and Professor of Law

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October 10, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

As co-chairs of the Committee on Corrections and Sentencing of the American Bar Association's Criminal Justice Section, we have been authorized to write to reiterate an earlier request from this Committee that the Commission adopt a policy statement regarding sentence reduction motions pursuant to 18 U.S.C. § 3582(c)(1)(A) in the upcoming amendment cycle.

ABA policy provides that procedures relating to compassionate release should be "fully integrated into the law of sentencing, especially with respect to issues such as eligibility for such release." ABA House of Delegates, February 1996, Report 113B. We are concerned that in the absence of guidance from the Commission it has been difficult to identify substantive bases for sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), and develop appropriate procedures for obtaining judicial consideration of deserving cases.

For your convenience, we enclose a copy of a letter sent to you last June by Professor Michael Goldsmith, our immediate predecessor as chair of this Committee. As Professor Goldsmith's letter points out, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. § 994(t), specifically directed the Commission to describe and give examples of "extraordinary and compelling circumstances" warranting early release under 18 U.S.C. § 3582(c)(1)(A). However,

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The Honorable Diana E. Murphy

October 10, 2001

Page 2

the Commission has not yet responded to this directive. We urge that the Commission develop policy to implement 18 U.S.C. § 3582(c)(1)(A) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

We have reviewed the Commission's current list of priorities, and we recognize that the development of policy for compassionate release motions could be undertaken in conjunction with the 15 Year Study the Commission plans to begin this year, as Professor Goldsmith notes in his letter. Alternatively, it could be made a goal for the upcoming amendment cycle, and we believe this would be preferable for the need is urgent. We therefore hope that the Commission will consider this request at its upcoming meeting.

Thank you very much for your consideration.

Sincerely,

Margaret C. Love, Co-Chair
Corrections & Sentencing Committee

Jeffrey G. Shorba, Co-Chair
Corrections & Sentencing Committee

cc: The Honorable John R. Steer
Professor Michael Goldsmith

AMERICAN BAR ASSOCIATION

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August 9, 2002

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

Re: Notice of Proposed Priorities for cycle ending May 1, 2003

Dear Judge Murphy:

We respond on behalf of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section to your publication of proposed priorities for the amendment cycle that will end on May 1, 2003. We are particularly pleased to see that the Commission plans to consider drafting policy guidance for courts considering motions filed pursuant to 18 U.S.C. § 3582(c)(1)(A), the provision that authorizes sentence reduction in cases presenting extraordinary and compelling circumstances.

You may recall that the Committee has previously encouraged the Commission to promulgate such a policy statement. And, in [June] of 2001, former Committee Chair (and former Commissioner) Michael Goldsmith referred to the legislative history as indicative of the breadth of the statute's applicability:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

[86]

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This passage seems to indicate Congress' intent that the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A) should, in some cases, be used for prisoners whose circumstances, while not medical in nature, nonetheless present extraordinary and compelling reasons for reduction. Accordingly, the Committee encourages the Commission to take a broad view of the matter in constructing guidance for courts considering sentence reduction motions.

In coming months the Corrections and Sentencing Committee expects to be taking a closer look at appropriate bases for early release for extraordinary equitable reasons, and we expect to be able to communicate further with the Commission on these important issues. In the meantime, let us reiterate our appreciation for your willingness to consider of them.

Sincerely,

Jeffrey G. Shorba, Co-Chair
Corrections and Sentencing Committee

Margaret C. Love, Co-Chair
Corrections and Sentencing Committee

cc: Michael Courlander

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August 1, 2003

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Notice of Proposed Priorities for Cycle ending May 1, 2004

Dear Judge Murphy:

I am writing in my capacity as chair of the ABA Criminal Justice Section's Corrections and Sentencing Committee, to commend the Commission for proposing the issue of sentence modification under 18 U.S.C. § 3582(c)(1)(A) as a priority during the coming amendment cycle. This issue has long been of particular concern to this Committee, and we have written twice in recent years to urge the Commission to take up this important piece of unfinished business. We are gratified that it has now apparently decided to do so. (Copies of our letters of October 10, 2001, and June 15, 2002, are attached.)

Since we last wrote to the Commission on this subject in the spring of 2002, the ABA House of Delegates adopted in February 2003 new ABA policy on sentence modification mechanisms. This new ABA policy speaks directly to the issues implicated by § 3582(c)(1)(A) and the Commission's mandate under 28 U.S.C. § 994(t), and provides further support for the argument that the Commission should give a generous construction to the open-ended language of § 3582(c)(1)(A). We attach that resolution and accompanying report for your consideration.

The report speaks to the importance of having some "safety valve" in a determinate sentencing scheme to permit the government to address "extraordinary and compelling" situations that arise after sentencing:

If a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing, today it is

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even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

Report at 3.

As to what may constitute an "extraordinary and compelling" situation, the report takes the position that government should not "restrict use of a 'safety valve' mechanism to cases involving medical or health-related concerns." Report at 5. Rather, "[w]e hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies." Report at 5.

The ABA report specifically discusses the federal "safety valve" mechanism in § 3582(c)(1)(A), noting the breadth and flexibility of the statutory language. Moreover, "the legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration." Report at 4, citing Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. Rptr. 188 (2001). For example, the Senate Report accompanying the statute states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was

convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

That Congress intended § 3582(c)(1)(A) to be used in a variety of non-medical circumstances is further evidenced by the admonition to the Commission in the final sentence of § 994(t) that “rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reasons.” This sentence shows that Congress expected rehabilitation to be a relevant if not determinative criterion in some cases, and thus that terminal illness and medical disability would not be the only circumstances in which sentence modification might be appropriate under this section. In fact, the predecessor “old law” analogue to § 3582(c)(1)(A), 18 U.S.C. § 4205(g), whose authority Congress professed to be continuing unchanged, was used to reduce sentences in a variety of non-health-related circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner’s sentence reduced on motion under § 4205(g) because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A), has interpreted its mandate under this statute very narrowly, reserving it for cases of terminal illness and profound disability. In the ten years between 1990 and 2000, only 226 prisoners had their sentences reduced pursuant to this authority, almost exclusively on grounds that they were near death. *See Price, supra*, at 189. Lack of policy guidance from the Commission may in part account for the Bureau’s conservative interpretation of its statutory mandate. *See, e.g., John R. Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is thus in an excellent position to ensure that the statutory authority can be utilized as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in bringing cases to the attention of courts.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in this very important matter.

Sincerely,

Margaret Colgate Love
Chair, Corrections and
Sentencing Committee

Enclosures

cc: All Commissioners

Charles Tetzlaff, Esq.

Timothy McGrath, Esq.

Albert J. Krieger, Chair, Criminal Justice Section

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July 28, 2005

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Priorities for 2006 Amendment Cycle

Dear Judge Hinojosa:

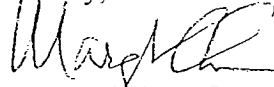
I am writing in my personal capacity to urge the Commission to add to its list of priorities for the coming year the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A)(i). Since 2001, I have written annually to the Commission in my capacity as chair of the ABA Corrections & Sentencing Committee, to make this same request. I was truly gratified when the Commission decided to add this issue to its list of priorities in 2004 and again in 2005, and correspondingly disappointed to see that it does not appear on the list for 2006 – particularly since I know of no reason why the work that was commenced two years ago could not have been continued.

Without direction about what situations might warrant revisiting a sentence, corrections officials are reluctant to expand the reach of “extraordinary and compelling reasons” much beyond the clearly identifiable case of imminent death. This may reflect a lack of guidance to BOP, rather than a lack of political will or failure of compassion. See John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT. RPTR. 154, 157 (2001) (“Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section.”). In fact, in the twenty years since the Sentencing Reform Act was passed, BOP appears to have grown less rather than more comfortable in using its authority under this statute. This administrative record demonstrates the need for Commission guidance as to what circumstances may be sufficiently “extraordinary and compelling” as to warrant sentence reduction.

I appreciate that the Commission has important and difficult guidelines work ahead of it. I also appreciate that there are some, perhaps even at the Commission, who regard this issue as one involving prison administration as opposed to sentencing. While I think there is a strong argument to be made that the issues raised by this statute do implicate many of the concerns raised under 18 U.S.C. § 3553, and that they are thus very much within the Commission's expertise, perhaps all that really needs to be said in this regard is that Congress plainly thought so too. The mandate it gave to the Commission under 28 U.S.C. § 994t is the only one under the original 1984 Act that remains unfulfilled. It seems that this is another reason why Commission should not turn away from what is admittedly an unusual and sensitive task.

If the decision to drop this issue from the Commission's list of priorities was simply a matter of resources, I would like to volunteer my own services to assist the Commission in whatever manner it feels appropriate. I am confident that there are other practitioners, including some with experience in corrections administration, who would be happy to offer their services to the Commission to work on this matter in an advisory capacity.

Sincerely,

A handwritten signature in dark ink, appearing to read "Margaret Love", with a stylized flourish at the end.

Margaret Colgate Love

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Date: 8/10/2005 12:59:33 PM
Subject: BOP does the right thing - reluctantly

This case demonstrates dramatically the need for USSC leadership in this area -

Dying inmate being released

By MAUREEN HAYDEN

Courier & Press staff writer

[_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html](http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html)

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Following a weekend spent shackled and chained to a bed in the intensive care unit at a Texas hospital, a Tell City, Ind., woman has been ordered released from the custody of the federal Bureau of Prisons.

On Tuesday, U.S. District Judge Richard L. Young signed an order instructing federal prison officials to release Darlene Fortwendel, 48, so she could return home to Indiana to die. Fortwendel, who was diagnosed with cancer in January but was left untreated by prison staff for six months, could arrive home this week. Bureau of Prisons officials told Fortwendel's family she'd be flown home on a medical flight, accompanied by a nurse, once the judge's order is received by federal prison officials.

Over the weekend, Fortwendel was taken from the Carswell Federal Prison to the intensive care unit at the Huguley Memorial Medical Center in Fort Worth, Texas, to be treated for complications from the cancer. Prison security ordered she be shackled and chained to the bed. Young's order cuts short by eight months the 37-month prison sentence he handed down in March 2003 after Fortwendel pleaded guilty to embezzling more than \$750,000 from a Tell City bank. On Monday, the director of the Bureau of Prisons formally acknowledged that Fortwendel is in the end stages of cancer. That acknowledgment triggered the U.S. attorney to file a motion late Monday seeking a reduction in Fortwendel's three-year prison sentence, which then cleared the way for Young's order. Fortwendel's attorney, Jeff Lantz, hailed the judge's order as an act of justice and mercy. "This ruling is just fantastic ..." said Lantz. "She'll be able to spend her last days in peace with her family." Fortwendel's condition has deteriorated rapidly in recent weeks, according to her family. Any hope for treatment, experimental or otherwise, now appears dim. Getting Fortwendel out of prison has been a bureaucratic nightmare for her lawyers and family. The Bureau of Prisons spent more than a month considering Fortwendel's request for a compassionate release and told her that it could take up to 90 days to process the paperwork.

But Fortwendel's case was apparently expedited after a host of influential parties got involved.

Among those bringing behind-the-scenes pressure on the Bureau of Prisons to act quickly were the U.S. attorney's office and Republican Sen. Richard Lugar's staff. Also hanging over the head of federal prison officials was the potential that Young would bypass the Bureau of Prison's protocol and issue a release order on his own, despite the fact that he might lack jurisdiction to do so. In recent weeks, Lantz and Evansville attorney John Goodridge scrambled to craft legal arguments to give Young the legs to stand on to order Fortwendel's release. Those actions, combined with intense media pressure, finally

forced the Bureau of Prisons to act, Lantz said Tuesday. Fortwendel's family, meanwhile, won't rest easy until she gets home. Her sister, Angie Garrett, was at Huguley Memorial Medical Center when she and her sister got news of Young's order Tuesday morning. By then, Fortwendel had stabilized and had been transferred out of the intensive care unit and onto the hospital's oncology unit. Garrett left her sister's room to call family members with the good news, and was gone for about 20 minutes, she said. In that time, security staff from Carswell arrived at the hospital and transported Fortwendel back to the prison. Garrett said Fortwendel was taken back to the prison over the objections of medical staff and the prison's social worker. "I came back to her room and she was gone," said Garrett. "The prison knew I was there and they didn't even tell me or let me say goodbye. I don't understand why, if the judge ordered her released, and as sick as she was, did they take her back to the prison?"

Garrett said she couldn't get an answer to that question Tuesday. Federal officials have repeatedly refused to answer questions about Fortwendel, citing "privacy" concerns.

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Dying inmate's options diminish
By MAUREEN HAYDEN Courier & Press
August 4, 2005

http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html)

When Darlene Fortwendel was told by prison doctors she was in the late stages of a rare form of cancer, she was given two options to try to save her life.

She could stay in prison in Texas and try the standard treatment that had less than a 20 percent chance of working, or she could ask for a "compassionate release" so she could go to one of the nation's major cancer centers for experimental treatment. That was more than a month ago. The first option is no longer on the table because her cancer has advanced too far. The second option soon may be gone. The federal Bureau of Prisons has yet to process the paperwork for the Tell City, Ind., woman to be released, and won't say when or if it will. So on Wednesday, Fortwendel's attorneys again asked a federal judge to intervene. In a motion filed in federal court in Evansville, attorney John Goodridge asks U.S. Judge Richard Young to do, in essence, an end-run around the federal prison system by modifying Fortwendel's three-year prison term for bank embezzlement and ordering her immediate release. In the motion, Goodridge acknowledges Young would be moving into uncharted legal territory. But he argues that a recent U.S. Supreme Court ruling liberates federal judges from the "Dark Age" of restrictive sentencing guidelines that robbed judges of their ability to make the kind of discretionary decision required to get Fortwendel out of prison before she dies.

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Date: 7/15/2005 1:05:24 PM
Subject: Federal Prisoner Asks Court to Let Her Die at Home

Leniency for inmate a complex issue
By MAUREEN HAYDEN
Courier & Press

July 15, 2005

[_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html](http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html)
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In an "extraordinary" legal move, the attorney for a federal prison inmate dying of cancer has asked a federal judge to order her "immediate release" from a prison hospital in Texas. The motion, if granted, could lead to a showdown with U.S. Bureau of Prisons' officials who could refuse to follow the judge's order, citing his lack of jurisdiction in the matter.

On Wednesday, Evansville attorney Jeff Lantz filed a motion asking U.S. District Judge Richard L. Young to order the "immediate release" of convicted felon Darlene Fortwendel, 48, of Tell City, Ind., who was diagnosed six months ago with cancer but went untreated by prison medical staff. Her condition is now terminal.

Young could rule on the motion within days, depending, in part, on the response of the U.S. Attorney who prosecuted Fortwendel on embezzlement charges. Lantz is asking Young to grant Fortwendel "extraordinary relief" by cutting short her three-year prison term for bank embezzlement and ordering her to be released "due to a medical emergency," according to the motion. "We're throwing ourselves on the mercy of the court," Lantz said.

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As part of the process, the Bureau must move the request through a layer of approvals and must seek the approval of Fortwendel's victim, Old National Bank. Bank spokeswoman Kathy Schoettlin said bank officials won't oppose Fortwendel's request. "She betrayed a lot of her associates, and she betrayed our customers and really a whole community," said Schoettlin. "But in light of her medical condition and the length left on her prison term, we would not oppose a compassionate release if granted. That in no way justifies her crime, but it recognizes the pain and agony her children and family are going through right now."

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Date: 8/10/2005 12:59:33 PM
Subject: BOP does the right thing - reluctantly

This case demonstrates dramatically the need for USSC leadership in this area -

Dying inmate being released

By MAUREEN HAYDEN

Courier & Press staff writer

[_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html](http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html)
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html)

Following a weekend spent shackled and chained to a bed in the intensive care unit at a Texas hospital, a Tell City, Ind., woman has been ordered released from the custody of the federal Bureau of Prisons.

On Tuesday, U.S. District Judge Richard L. Young signed an order instructing federal prison officials to release Darlene Fortwendel, 48, so she could return home to Indiana to die. Fortwendel, who was diagnosed with cancer in January but was left untreated by prison staff for six months, could arrive home this week. Bureau of Prisons officials told Fortwendel's family she'd be flown home on a medical flight, accompanied by a nurse, once the judge's order is received by federal prison officials.

Over the weekend, Fortwendel was taken from the Carswell Federal Prison to the intensive care unit at the Huguley Memorial Medical Center in Fort Worth, Texas, to be treated for complications from the cancer. Prison security ordered she be shackled and chained to the bed. Young's order cuts short by eight months the 37-month prison sentence he handed down in March 2003 after Fortwendel pleaded guilty to embezzling more than \$750,000 from a Tell City bank. On Monday, the director of the Bureau of Prisons formally acknowledged that Fortwendel is in the end stages of cancer. That acknowledgment triggered the U.S. attorney to file a motion late Monday seeking a reduction in Fortwendel's three-year prison sentence, which then cleared the way for Young's order. Fortwendel's attorney, Jeff Lantz, hailed the judge's order as an act of justice and mercy. "This ruling is just fantastic ..." said Lantz. "She'll be able to spend her last days in peace with her family." Fortwendel's condition has deteriorated rapidly in recent weeks, according to her family. Any hope for treatment, experimental or otherwise, now appears dim. Getting Fortwendel out of prison has been a bureaucratic nightmare for her lawyers and family. The Bureau of Prisons spent more than a month considering Fortwendel's request for a compassionate release and told her that it could take up to 90 days to process the paperwork.

But Fortwendel's case was apparently expedited after a host of influential parties got involved.

Among those bringing behind-the-scenes pressure on the Bureau of Prisons to act quickly were the U.S. attorney's office and Republican Sen. Richard Lugar's staff. Also hanging over the head of federal prison officials was the potential that Young would bypass the Bureau of Prison's protocol and issue a release order on his own, despite the fact that he might lack jurisdiction to do so. In recent weeks, Lantz and Evansville attorney John Goodridge scrambled to craft legal arguments to give Young the legs to stand on to order Fortwendel's release. Those actions, combined with intense media pressure, finally

forced the Bureau of Prisons to act, Lantz said Tuesday. Fortwendel's family, meanwhile, won't rest easy until she gets home. Her sister, Angie Garrett, was at Huguley Memorial Medical Center when she and her sister got news of Young's order Tuesday morning. By then, Fortwendel had stabilized and had been transferred out of the intensive care unit and onto the hospital's oncology unit. Garrett left her sister's room to call family members with the good news, and was gone for about 20 minutes, she said. In that time, security staff from Carswell arrived at the hospital and transported Fortwendel back to the prison. Garrett said Fortwendel was taken back to the prison over the objections of medical staff and the prison's social worker. "I came back to her room and she was gone," said Garrett. "The prison knew I was there and they didn't even tell me or let me say goodbye. I don't understand why, if the judge ordered her released, and as sick as she was, did they take her back to the prison?"

Garrett said she couldn't get an answer to that question Tuesday. Federal officials have repeatedly refused to answer questions about Fortwendel, citing "privacy" concerns.

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BOPWatch-unsubscribe@yahoogroups.com

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Dying inmate's options diminish
By MAUREEN HAYDEN Courier & Press
August 4, 2005
[_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html](http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html)
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html)

When Darlene Fortwendel was told by prison doctors she was in the late stages of a rare form of cancer, she was given two options to try to save her life.

She could stay in prison in Texas and try the standard treatment that had less than a 20 percent chance of working, or she could ask for a "compassionate release" so she could go to one of the nation's major cancer centers for experimental treatment. That was more than a month ago. The first option is no longer on the table because her cancer has advanced too far. The second option soon may be gone. The federal Bureau of Prisons has yet to process the paperwork for the Tell City, Ind., woman to be released, and won't say when or if it will. So on Wednesday, Fortwendel's attorneys again asked a federal judge to intervene. In a motion filed in federal court in Evansville, attorney John Goodridge asks U.S. Judge Richard Young to do, in essence, an end-run around the federal prison system by modifying Fortwendel's three-year prison term for bank embezzlement and ordering her immediate release. In the motion, Goodridge acknowledges Young would be moving into uncharted legal territory. But he argues that a recent U.S. Supreme Court ruling liberates federal judges from the "Dark Age" of restrictive sentencing guidelines that robbed judges of their ability to make the kind of discretionary decision required to get Fortwendel out of prison before she dies.

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Date: 7/15/2005 1:05:24 PM
Subject: Federal Prisoner Asks Court to Let Her Die at Home

Leniency for inmate a complex issue
By MAUREEN HAYDEN
Courier & Press

July 15, 2005

http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html)

In an "extraordinary" legal move, the attorney for a federal prison inmate dying of cancer has asked a federal judge to order her "immediate release" from a prison hospital in Texas. The motion, if granted, could lead to a showdown with U.S. Bureau of Prisons' officials who could refuse to follow the judge's order, citing his lack of jurisdiction in the matter.

On Wednesday, Evansville attorney Jeff Lantz filed a motion asking U.S. District Judge Richard L. Young to order the "immediate release" of convicted felon Darlene Fortwendel, 48, of Tell City, Ind., who was diagnosed six months ago with cancer but went untreated by prison medical staff. Her condition is now terminal.

Young could rule on the motion within days, depending, in part, on the response of the U.S. Attorney who prosecuted Fortwendel on embezzlement charges. Lantz is asking Young to grant Fortwendel "extraordinary relief" by cutting short her three-year prison term for bank embezzlement and ordering her to be released "due to a medical emergency," according to the motion. "We're throwing ourselves on the mercy of the court," Lantz said.

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August 2, 2005

United States Sentencing Commission
One Columbus Circle, Northeast Suite 2-500
South Lobby
Washington D.C. 20002-8002
Attention: Public Affairs-Priorities Comment

Re: Public Comment on the continuation of work on cocaine sentencing.

Honorable Chairman Hinojosa and Distinguished Members of the Commission:

My name is Stephanie Thomas. I serve the public as a Municipal Clerk in South Florida. The purpose of this correspondence is to provide public comment under the Public Hearing for the continuation of work on cocaine sentencing policy as it pertains to Drug Sentencing for first time offenders.

In addressing my opinion of sentencing guidelines, I hope Judges countrywide have all imposed adequate sentences that fall within the guidelines set forth by The Honorable United States Sentencing Commission. It is my strong opinion that Judges are the voice of the people; therefore should be the epitome of justice. Judges should take into consideration the recommendation of the people by way of the United States Sentencing Commission.

In the 2004 Federal Sentencing Guidelines Manual, under Chapter Five, Determining the Sentence; the introductory commentary states the following *"for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a)"* When we talk about all of the *statutory purposes of sentencing*, how much is really considered during sentencing? How can the Senate as well as the Sentencing Commission assure the public that although the social debt to society is being repaid, the defendant will receive all of the above, which is his/her own justice. All too often defendants are "railroaded" for life because all of the above components do not weigh out. It is possible to say that the Judge may concentrate on one of the statutory purposed, more than any other. That then defeats the purpose of the sentencing guidelines. If concentrating on *"just punishment"* a person can receive unfair sentencing. My point is, all purposes listed above should balance out, therefore justice will be served to both sides of the law.

Although the aforementioned manual mentions first time offenders, it is closely similar to the repeat offenders referred to in Zone A. (See attachment one (1))How do we sentence these individuals? What is fair and reasonable for first time offender(s) when it is stated that the courts are to impose a sentence sufficient, but not greater than necessary, (the Commission should determine what constitutes a "greater than necessary" sentence) to comply with the purpose set forth in the Sentencing Reform Act which are to reflect the seriousness of the offense, to promote respect for the law, and to provide punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. All of the above are listed and are expected to be considered upon sentencing. I believe in the guidelines set forth; however, I also believe and recommend that the sentencing for first time cocaine offenders be less stringent and should concentrate more on rehabilitation. Perhaps a first time offender is sentenced to ten (10) consecutive or concurrent life sentences, when will they be allowed to exemplify their rehabilitation?

Frankel (1972) argued proportionality (severity of sentence and the seriousness of the crime should be linked), equity (ensures that we live in a country committed to equal justice under the law- with sentencing statute that mandates similar outcomes for similar crimes committed by similar offenders), and social debt (the principle that the greater the offenders prior criminal history, the more stringent the sentencing should be). Where does the first time offender fit in? Are they to be categorized with similar offenders when they do not share similar backgrounds or criminal history and yet today, they are facing the same terms as a repeated offender? Why?

When Judges impose harsh sentences on first time offenders, I feel they should explain at the time of sentencing, the purpose of the stringent sentence and if it is within the sentencing guidelines, and if not, why they are sentencing outside of the guidelines. Like I stated in the opening of my Public Comment, Judges serve as the voice of the people. Constituencies did not support the guidelines for distribution of crack as opposed to powder so why do the guidelines continue to support the differential treatment? Instead of accepting the recommendation of the people; the courts appeared to have displaced the discretion with prosecutors which often results in longer sentences.

Although I am but one person writing to address this issue; I am wholly the voice of many who may not be aware of this public hearing. I am speaking for the rehabilitated, first time offenders who feel victimized by unfair sentencing, their families, and also free people who believe in what I have stated. I hope you will consider my statements and request to lessen first time offender sentencing as you finalize your work on the cocaine sentencing policy.

Thank you,

Stephanie Thomas
Stephanie Thomas,
Municipal Clerk; Concerned Citizen

Attachments(2)

CHAPTER FIVE - DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1987.

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

		Criminal History Category (Criminal History Points)					
Offense Level		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175

29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270); November 1, 1991 (see Appendix C, amendment 418); November 1, 1992 (see Appendix C, amendment 462).

PART B - PROBATION

Introductory Commentary

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

Historical Note: Effective November 1, 1987.

§5B1.1. Imposition of a Term of Probation

(ii) *The involvement in the offense, if any, of members of the defendant's family.*

(iii) *The danger, if any, to members of the defendant's family as a result of the offense.*

(B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) *The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.*

(ii) *The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.*

(iii) *The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.*

(iv) *The departure effectively will address the loss of caretaking or financial support.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); April 30, 2003 (see Appendix C, amendment 649); October 27, 2003 (see Appendix C, amendment 651).

§5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the applicable guideline range (see Chapter Three, Part B (Role in the Offense)). It is not a basis for departing from that range (see subsection (d) of §5K2.0 (Grounds for Departures)).

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. See Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, see §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Historical Note: Effective November 1, 1987.



August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
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:

I write on behalf of the board and members of Families Against Mandatory Minimums to ask that you consider adding two projects to the Commission's proposed priorities for the 2006 amendment cycle: an updated report on mandatory minimum sentencing and guidance for judges considering early release for extraordinary and compelling circumstances under 18 U.S.C. § 3582(c)(1)(A).

The Commission's report on mandatory minimums will be fifteen years old in 2006. It remains simply the best and most comprehensive treatment of the subject. Despite the report's age, we and others routinely rely on its analyses and conclusions to help us understand the effect of mandatory minimums on federal sentencing law and policy. While the report's 15-year anniversary strongly suggests an update is in order, so does the current state of sentencing.

Since the report's release, many new mandatory sentences have been adopted as has the Safety Valve. Their interaction and the simple accumulation of mandatory sentences are important new developments that warrant study. Even more compelling in our opinion is the renewed allure of mandatory sentencing to some on Capitol Hill.

Since the release of the *Booker* opinion, some members of Congress have used mandatory sentencing as a proxy for a "*Booker* fix." For example, every crime bill introduced by Republican members of the House Judiciary Committee includes new or stiffened mandatory minimums. Rep. Randy Forbes (R-VA) introduced H.R. 1279, the Gang Deterrence and Community Protection Act of 2005, which contains numerous new and enhanced mandatory minimums, while Rep. Sensenbrenner's H.R. 1528, Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, is riddled with them as well. On the Senate side, S. 155, the Gang Prevention and Effective Deterrence Act of 2005, introduced by Sen. Dianne Feinstein (D-CA), includes

a provision that will add simple conspiracy to conduct covered by 18 U.S.C. § 924 (c).¹ raise the minimum sentence to seven years for possession of a gun in furtherance of a drug or violent offense, and penalize every "instance" a gun is possessed or used with a minimum consecutive penalty. It is widely understood that these mandatory penalties are considered by many as necessary in light of the relaxed requirements on judges following *Booker*. Even the Patriot Act was amended on the floor of the House to include a new mandatory minimum penalty of twenty years for "narco-terrorism."

At the same time, new voices are being raised in Congress questioning mandatory minimum sentencing. Rep. Bob Inglis (R-SC) spoke forcefully on the floor of the House during the debate on H.R. 1279 to explain that he would vote against the bill in part because it contains mandatory minimums. Recently, Howard Coble (R-NC), chair of the Subcommittee on Crime, Terrorism and Homeland Security, spoke of his discomfort with mandatory minimums during a Judiciary Committee markup.

These important developments call out for a fresh look by the Commission at the issue of mandatory sentencing. We urge you to do so as we have no doubt that a new Commission report will add considerably to the debate on their use at a critical time.

We also ask once again that you begin the work on a policy statement for judges considering early release for extraordinary and compelling circumstances under 18 U.S.C. § 3582(c)(1)(A). We have written to you repeatedly in the past about the need for help from the Commission on this subject. Putting aside that Congress directed the Commission in the Sentencing Reform Act to do this, it is needed, now, more than ever. The prison population is growing and aging. We believe that your contribution could have a significant impact on how the federal Bureau of Prisons (BOP) treats petitions for compassionate release.

Your failure to speak on this matter of simple compassion is baffling and particularly disturbing because we believe it sends a message that the practice is unimportant. In our experience, so-called compassionate release requests are routinely handled very slowly by the BOP, even in cases where BOP doctors have determined that death is imminent. Your contribution can raise the profile of the issue. Policy guidance would have the collateral benefit of giving background guidance to the BOP which operates in something of a policy vacuum without it.

Finally, we applaud your commitment to continue work on cocaine sentencing policy. The 2002 hearings and report were outstanding and we rely on them in our work

¹ Thus, in light of the common practice of charging conspiracy in addition to the underlying offense, it is possible for a person to be convicted of conspiracy to possess a weapon and possession of a weapon in furtherance of a qualifying crime and receive sentences for the two convictions totaling 32 years (seven years (raised from five) for the conspiracy, which would be the first section 924 (c) conviction and 25 years mandatory consecutive sentence for the possession, because it would be the second conviction under the statute, even though the conduct itself is not separated in time or by a conviction and sentence.

The Honorable Ricardo H. Hinojosa, Chair
August 15, 2005
Page 3

all the time. You have kept a bright light shining into a dark corner with your determination to address this issue.

Thank you for considering our views. As always, we stand ready to assist you.

Sincerely,


Julie Stewart
President


Mary Price
General Counsel



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MALCOLM C. YOUNG, EXECUTIVE DIRECTOR

MARC MAUER, ASSISTANT DIRECTOR

August 15, 2005

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

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).

THE SENTENCING PROJECT

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

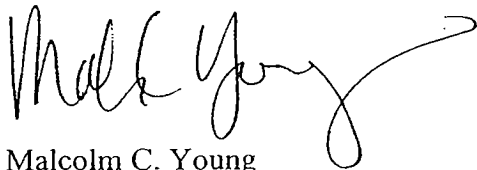
Establishment of Racial/Ethnic Impact Statements

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



CIRCUIT COURT OF THE STATE OF OREGON

MICHAEL H. MARCUS
JUDGE

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Department 34

Public Affairs-Priorities Comment
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-800

July 25, 2005

Re: Public Comment on Proposed Priorities

Dear Commissioners:

I write to urge that those of us responding to *Booker* and *Blakely* seize this opportunity to revise sentencing guidelines so that they promote sentences that best serve public safety within the available range of just and available sanctions. Virginia is unique in having made substantial strides in this direction; Oregon has begun officially to consider the mere possibility of doing so; but state and federal guidelines otherwise have nothing intentionally to do with crime reduction. We invest the resources of public agencies and private "think tanks" across the spectrum of penal philosophy, yet exclude their accumulated data from any role in sentencing. We need to fix that, because the result is irresponsible cruelty to victims whose crimes smarter sentencing would have prevented. Avoiding accountability for crime reduction is also irresponsible to the taxpayers who pay for a criminal justice system that yields unacceptable recidivism while squandering correctional resources.

Most state and federal statutes proclaiming the purposes of sentencing date from the mid-century fallacy that merely proclaiming those purposes would accomplish their achievement. The 1962 Model Penal Code was an effective articulation of the assumption that sentences served public safety by a combination of deterrence, reformation, and incapacitation, with substantial deference to proportionality and what became known as the medical model of punishment: that most offenders would respond to diagnosis and treatment by reducing their criminal behavior. Those skeptical of rehabilitation eventually gained substantial vindication in growing scientific evidence that treatment success was limited and rare -- and in growing frustration with the recidivism easily attributed to parole boards laboring with blunt predictive tools under indeterminate sentencing laws.

By the late 20th century, the skirmish lines shifted. "Truth in sentencing" and, soon, guideline schemes achieved an equilibrium among competing sentencing ideologies. Those who resisted long prison sentences hoped guidelines would moderate what they deemed "punitivism." They celebrated guidelines' function of limiting sentencing disparity as a sufficient accomplishment, even when those who favor incapacitation elevated guideline ranges with ballot measures and legislation. Initially suspicious of what they saw as the structural leniency of guidelines, the latter now generally support guidelines but struggle to raise sentencing floors and minimize judicial discretion to depart downward.

The resulting *de facto* coalition supporting guidelines enables their consistent failure to improve the crime reduction impact of sentencing. While it surely has social value to determine some metric by which to spread just deserts appropriately among offenders based on their present and past crimes, we must not rest on such puny laurels. The actual range of "just punishment" is quite broad by any popular, historical, or analytical model. While crimes that rightly cause outrage or cause great harm or reflect brutality clearly call for severe punishment, the most common crimes don't evoke a consensus for any but the broadest range of appropriate punishment. Yet we construct intricate matrices that create the illusion of precision but have nothing whatever to do with public safety except by accident -- while achieving consistency in large part by ignoring variables we should not ignore.

I submit that merely ordering just deserts is a woefully insufficient talisman [and a pitiful performance measure] for the exercise of sentencing functions, and that our public responsibility requires that we stop avoiding the mission the public properly expects and prizes above all others: crime reduction.

Of course it is much more challenging to insist on best efforts to achieve crime reduction within the limits of proportionality than to punish within the typically wide range of "appropriate" dispositions. But until we undertake that challenge, we are essentially exploiting just deserts to avoid accountability for the outcomes of our sentencing decisions -- and outcomes are inevitable whether or not we accept responsibility for achieving better rather than worse results. At present, our outcomes amount to unacceptable recidivism, avoidable victimizations, wasted resources, and deflated public confidence in criminal justice.

I am not suggesting that we must be more severe or more lenient. I submit that we must be far smarter in our approach to sentencing -- we must accept the challenge that science posed by finding so much treatment ineffective. Medicine did not abandon empiricism for empty ritual when it found itself powerless against the plague -- it struggled to learn more, piece by piece, and to improve its ability to solve the mysteries of disease. Sentencing, in contrast, essentially retreated to ceremony instead of learning more about the limits and the promise of treatment. Criminologists have learned a great deal, and can now identify program characteristics that correlate with substantial reductions in recidivism, but we generally ignore such matters in sentencing.

But this is not just a struggle between treatment or "rehabilitation" on the one hand and incarceration on the other. Not just programs, but everything we do (and the way we do it) works better on some than on other offenders. "Rehabilitation" proponents must understand that incarceration works tremendously well for almost all offenders during the period of incarceration. "Incarcerationists" must understand that for some offenders, incarceration may increase their criminality to the point that their recidivism after release makes up for lost time several fold when they return to their communities. We have a wide range of responses to crime -- from treatment (outpatient, inpatient and secure custodial), alternative sanctions, and various forms and lengths of supervision, to jail and prison of varying duration. A responsible criminal justice system goes far beyond merely accepting a just deserts calculus for using these resources to reduce the risk of harm at the hands of offenders. A responsible criminal justice system does its best to learn which responses are most likely to reduce the total risk of harm posed by an

offender over the course of a potential criminal career-- and to apply that learning within the limits of proportionality and resources. A responsible criminal justice system understands that what works on one offender may not work on another -- and that on some offenders, nothing but incapacitation works.

I submit that the highest calling of sentencing commissions is to promote sentencing laws and practices that pursue best efforts at crime reduction with at least the same vigor that they pursue adherence to a matrix of expected severity. Few have taken that route -- after all, merely publishing a matrix and monitoring how well judges adhere to it is far, far less challenging than the task I propose. It is also far, far less valuable for public safety or even fiscal responsibility -- recidivism is not just cruel; it is also inefficient, as recidivists repeatedly tax our resources as they victimize our citizens.

Virginia has provided a worthy example of how sentencing law and guidelines can promote public safety and smarter sentencing. Its sentencing commission studied, refined, and validated risk assessment, then incorporated risk assessment into its guidelines. The first result was far longer sentences for sex offenders who posed a greater risk of recidivism than others. Later, Virginia extended risk assessment to ensure that prison beds were available for a wide range of offenders who represented an elevated risk of harm while relegating lower risk offenders to alternative sanctions. The history and results of this effort are available on the Virginia Criminal Sentencing Commission's web site, <http://www.vcsc.state.va.us/reports.htm>.

Oregon's guidelines, like those of other states and the federal system, have virtually nothing intentionally to do with crime reduction. They serve public safety only by the accident that worse crimes and records generally result in longer sentences. In spite of repeated legislative proclamations that crime reduction is our mission, our guidelines (which govern felony sentencing) ignore that mission, and essentially erect our calculus solely around crime seriousness, criminal history, and prison resources. Our current effort to get beyond the woefully ineffective status quo is embedded in 2005 Oregon Laws, chapter 474 (SB 919):

The Oregon Criminal Justice Commission shall conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines and, if it is possible, the means of doing so.

Of course, this is a most modest first step. But I submit that the path is one that all of us should take if we are adequately to pursue the public safety component of sentencing.

In short, until and unless we become responsible about making guidelines and other sentencing laws and practices reflect best efforts at crime reduction, we will have accomplished little of substantial value. Meanwhile, we are responsible, at some level, for the victimizations we could and should have prevented.

I have expanded on these points in *Blakely, Booker and the Future of Sentencing*, 17 Fed. Sent. Rptr. 243 (2005), of which I will send a copy as soon as I receive the final version (unless you indicate that you do not wish to receive it); *Justitia's Bandage: Blind Sentencing*, 1 International Journal of Punishment and Sentencing 1 (2005); *Sentencing in the Temple of*

Denunciation: Criminal Justice's Weakest Link, 1 Ohio State Journal of Criminal Law 671 (2004) [Available on Lexis at 1 Ohio St. J. Crim. L. 671]; *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 American Journal of Criminal Law 135 (2003) [Available on WestLaw at 30 AMJCL 135]; *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed. Sent. Rptr. 76 (2003). See also, *LR - Limiting Retributivism or Lamentable Retreat? - The Third Draft of Revisions to the Model Penal Code*, (August 2004) [a paper presented at a panel of a conference of the National Association of Sentencing Commissions in Santa Fe, NM], available at <http://www.smartsentencing.com>, along with other articles, legislative and judicial materials, and a description of our local sentencing decision support technology.

I would welcome the opportunity to provide further information or assistance on these issues, including Oregon's statutory response to *Blakely* in which I participated. I would also greatly value any information about other attempts to bring responsible crime reduction practices into the function of guidelines.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael H. Marcus", with a long horizontal flourish extending to the right.

Michael H. Marcus
Judge

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.

Honorable Ricardo H. Hinojosa

August 16, 2005

Page 3

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

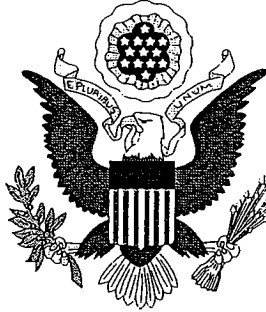
Sentencing Resource Counsel

PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

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August 15, 2005

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

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on August 10 and 11, 2005 to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. We are submitting comments relating to three issues which appear on the Commissioner's list of priorities, as well as other issues which POAG believes should be addressed.

Implementation of Crime Legislation regarding the Family Entertainment and Copyright Act of 2005 and the Intellectual Property Protection and Courts Amendment Act of 2004

POAG recognizes there is a broad category of offenses which could be captured in USSG §2B5.3. The group believes a separate prerelease specific offense characteristic should be added to this guideline as it is viewed as a distinct harm to the victim. POAG realizes conduct involving the prerelease of movies varies. An individual could digitally record the movie while watching it in a theater and then release it, or obtain a pirated copy of the movie and release it prior to the premier. This problem is similar to "zero-day release" of protected copyrighted video games where the harm to the industry is not ordinarily covered in the existing guideline. POAG also noted that computer technology involved in these types of offenses changes very quickly which makes it almost impossible to capture the correct terminology to be used in the guidelines. For example, would peer-to-peer sharing of information via networked computers be considered under the current definition of uploading? Another problematic area in this guideline is determining the dollar amount associated with the crime. If an individual is found with 100

Calvin Klein labels, how is the dollar amount to be determined as the Calvin Klein label can be found on underwear or jeans? Or, in the case of an individual who has pirated copyrighted materials, including multiple high end items of computer software, should the dollar amount be based on what is found on the defendant's computer during a search or should it be determined on the number of times the items were uploaded or downloaded? Depending on how the dollar amount is determined, sentencing disparity can result throughout the system with some individuals receiving probationary sentences and others receiving significant prison sentences.

Immigration

Regarding the immigration guidelines, POAG urges the Commission to continue its work in this area. It is believed that the Commission should continue to simplify the guidelines by clarifying definitions, such as the crime of violence definition, for ease of application. The definition in this guideline differs from the definition contained in 8 U.S.C. § 1101. Moreover, the group suggests the Commission address whether a sentence of 13 months or less as noted in USSG §2L1.2(b)(1)(B), includes a sentence of probation. The definition for "sentence imposed" as included in this particular guideline, conflicts with the definition contained in USSG §4A1.2(b)(1). When the user refers to §4A1.2(b)(1) as the application note suggests, this guideline notes a "sentence of incarceration," and to many users, probation does not qualify under the provision for a twelve-level increase. Another issue associated with this guideline is whether it is appropriate to impose a threshold quantity for a defendant who is convicted of possession of a large quantity of drugs which are clearly intended for distribution purposes; however, under the various state laws, the defendant is charged with (and convicted of) a straight possession offense. In other districts, if a defendant had the same quantity of drugs, it would be a distribution offense. This clarification would hold defendants accountable for possession of large amounts of drugs, regardless of where they are convicted. This issue appears to be very problematic among the "border states." Lastly, the group would like the Commission to clarify the commentary contained in USSG §2L1.2, comment. (n.1[A][i] and [ii]) as to the timing of when the defendant incurs the predicate conviction and his immigration status at the time the conviction occurs.

Circuit Conflicts

POAG encourages the Commission to resolve circuit conflicts whenever possible which gives greater guidance to the field and ensures consistency in the application process.

Other Issues

Issues Relating to USSG § 2B1.1

There are four particular areas noted by Commission Staff regarding this guideline which POAG wishes to address: the number of victims, the intended loss determination in a blank check case, the definition of "means of identification," and the cross references.

Regarding the determination of the number of victims, the group agrees that at times, determination of the number of victims is problematic. For example, how do you count the number of victims in a theft from twelve different stores with the same parent company? Are there twelve victims as twelve stores were victimized or only one victim that being the parent company?

The determination of intended loss in a blank check case is also problematic, and perhaps some clarification in the commentary notes would be of assistance.

The group also finds that use of the statutory definition "means of identification" has caused problems with application, especially if the identification involves a deceased individual.

Lastly, USSG §2B1.1 contains a number of cross references in subsection (c) which present challenging application problems. The provisions found in §§2B1.1(c)(2) and (c)(4) specify that the cross reference application is to be applied only if the resulting offense level is greater, however, this direction is lacking in (c)(1) and (c)(3). Is this the intent of the Commission?

Drug Issues

POAG agrees with Commission staff regarding suggested technical and conforming changes in USSG §2D1.1 with respect to the parenthetical statement "or the equivalent amount" which is found in the Drug Quantity Table. The group discussed this parenthetical statement and discovered that application errors have occurred due to misinterpretation of the phrase. Application Note 10 clearly outlines the procedure for drug conversion/equivalency when a specific controlled substance is not included in the Drug Quantity Table. POAG believes the elimination of the confusing phrase would ensure proper application of Note 10.

Commission of Offense While on Release - USSG § 2J1.7 and 18 U.S.C. § 3147

POAG recommends reconsideration of guideline application of the statutory enhancement set forth in 18 U.S.C. § 3147. This statute requires a sentence of imprisonment be imposed in addition to the sentence for the underlying offense; furthermore, the sentence of imprisonment under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment.

Currently, in calculating an offense level for an offense committed while on federal release, §2J1.7 provides for a three-level enhancement as a specific offense characteristic. POAG observes this enhancement could easily be missed because users are not accustomed to accessing enhancements through Chapter Two sections. POAG supports converting §2J1.7 into a Chapter Three adjustment.

POAG requests clarification as to whether the government must actually file an enhancement pursuant to 18 U.S.C. § 3147. Also, POAG recommends that a circuit split be resolved regarding whether the three-level increase can be imposed on a defendant who was not notified of the specific enhancement at the time of his release.

Clarification in two other areas is suggested to avoid possible confusion. Currently, *Background* notes remind the user that this enhancement only applies in the case of a conviction for a federal offense committed while on release for another federal charge. Perhaps that important caveat could be highlighted. Additionally, guidance is requested regarding the interplay between this enhancement and acceptance of responsibility and/or obstruction of justice. Confusion could arise, especially in cases where both offenses (i.e., the offense for which the defendant was on pretrial release and the offense committed by the defendant while he was on pretrial release) are consolidated for sentencing. POAG recommends adding language in one or more of these sections (i.e., §2J1.7 or its successor; §3E1.1; or §3C1.1) to address any confusion that could arise. There is also concern about double counting. For example, if the two cases were consolidated

for sentencing, the defendant could lose the reduction for acceptance of responsibility because the conduct, which has been charged as the second offense, is inconsistent with acceptance of responsibility. Furthermore, such conduct could, in some cases, constitute obstruction of justice.

Firearms

Felon in possession of firearm prosecutions have been a priority in all districts, while at the same time the guideline applications in this section have become problematic. POAG strongly encourages the Commission to resolve several circuit conflicts found at USSG §2K2.1(b)(5).

With respect to "Possession of a Firearm In Connection With Another Felony Offense," POAG has concluded that applying this four-level increase has become problematic due to the circuit conflicts involving the "in connection with" standard. POAG suggests the Commission provide better definitions for the "in connection with" standard and also recommends that the Commission resolve the circuit conflicts in the cross reference section under USSG §2K2.1.

The expiration of the Firearms Sunset Provision with respect to the type of firearms defined in 18 U.S.C. § 921(a)(30) has resulted in numerous application problems for the field. POAG urges the Commission to make a determination as to whether the types of firearms identified in this statute are more dangerous than other types of weapons and should still be considered in determining the higher guideline offense level or, because they are now legally allowed to be possessed by nonfelons, this requirement should be deleted from the guideline.

POAG is cognizant that there have been cases where the definition of a destructive device has excluded a sawed-off shotgun, while in other districts this type of weapon is considered to be a destructive device. A clearer definition would be helpful and avoid inconsistent application.

Chapter Four

There are a number of Chapter Four issues which concern POAG that parallel help line phone calls frequently received by Commission staff.

Crime of Violence

There are a plethora of definitions for crimes of violence found in different criminal statutes, as well as within the Sentencing Guidelines, for example §2L1.2 and §4B1.2. It would simplify the guideline application process and eliminate current inconsistencies to adopt one guideline definition. POAG recognizes adopting one guideline definition for crime of violence will not rectify the problem between statutory and guideline differences for crime of violence; however, one definition can begin to develop better uniformity and consistency of guideline application and reduce confusion.

Simplification

POAG recognizes "Guideline Simplification" has been an ongoing debate throughout the last several years and believes it is an issue that the Commission consider placing on it's long term agenda. While there are several problematic areas in the guidelines, many on the group believe that through ongoing training and

daily use of the guidelines, practitioners are able to master the vast majority of the manual. However, the application of cross references is problematic to the experienced user of the guidelines and is worthy of the Commission's review. As noted in an earlier POAG position paper, cross reference provisions in the guidelines are generally thought to be confusing and appear to result in numerous objections by counsel, especially, if the application results in "jumping" from guideline to guideline. The Accessory After the Fact and Misprision of a Felony guidelines are especially problematic in the determination of relevant conduct provisions and Chapter Three adjustments.

Addressing the "Career Fraudster"

Finally, POAG believes there is a need to address the white collar defendant who is not always at the high end of the fraud table and repeatedly engages in a pattern of fraudulent behavior. This topic has been an ongoing concern of POAG and was discussed during the Probation Officers' session at the recent national training in San Francisco. POAG believes there is a distinction between the career confidence man/"career fraudster" and other white collar offenders which should be specifically addressed in the guidelines. During our discussions, it was recognized that state prosecutors have limited access to criminal history information in other states; therefore, the defendant's multiple arrests and/or convictions for similar misconduct may not be available to the state courts when imposing sentence. As a result, this individual may receive a number of lenient sentences. While an upward departure pursuant to USSG §4A1.3 may be part of the answer, POAG believes an enhancement should be determined based on the defendant's pattern of behavior rather than prior convictions alone. POAG has submitted additional information relative to this issue to Commission staff for their review.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

A handwritten signature in cursive script that reads "Cathy A. Battistelli / Nom".

Cathy A. Battistelli
Chair



Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
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:

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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cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
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July 18, 2005

Hon. Joseph P. Stadtmueller
United States District Court
471 United States Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Dear Judge Stadtmueller,

It was good seeing you at the Sentencing Institute in D.C. and conversing with you on the phone last week. Thanks for sending me the Washington Post article on the Border Patrol's release policy. I gave copies to the co-chairs of the Commission's staff working group on immigration issues.

I have thought further about the concerns you raised regarding §5K1.1 substantial assistance motions in cases that do not meet the criteria, and your suggestion that §3E1.1 (Acceptance of Responsibility) might be expanded to a maximum of 5 levels as a remedy. I recall a few previous guideline amendments that warrant consideration regarding this issue, specifically the amendment to §3E1.1 in November 1992 (Amendment #459), the amendment to §5K1.1 in November 1989 (Amendment #290), and the PROTECT Act amendment to §3E1.1 in April 2003 (Amendment #649).

The §3E1.1 amendment of 1992 expanded the acceptance of responsibility adjustment to add the possibility of a third level off if the defendant either timely gave complete information to the government concerning his own involvement in the offense or timely notified authorities of his intention to plead guilty. The Reasons for Amendment states, "This amendment provides an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation or prosecution of their own misconduct." This seems to have been intended to cover one of the issues that you are now suggesting be addressed by additional levels for acceptance of responsibility.

Note, however, that the PROTECT Act amendment to §3E1.1 on April 30, 2003, struck "timely providing complete information to the government concerning his own involvement in

the offense" and restricted the third level to a defendant timely notifying authorities of his intention to plead guilty. This seems to have removed a consideration that you think should be available for the additional levels.

The §5K1.1 amendment of 1989 removed the previous language of §5K1.1, which stated, "[u]pon motion of the government that the defendant has made a GOOD FAITH EFFORT to provide substantial assistance in the investigation or prosecution of another person...", and replaced it with "[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person..."

The Reason for Amendment for #290 states, "The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance."

As you can see, both the Commission and the Congress have previously made amendments in the areas in which you have concern.

The Commissioners have a planning session scheduled for their August meeting. To ensure that they have your issue for consideration, I will note your concern and route this letter to their attention.

I will be "on the road" doing training programs for the next week and a half, but should you need to contact me, I generally check my voicemail (202-502-4542) on a daily basis and can return a call.

All the best to you,

A handwritten signature in black ink, appearing to read "L. Russell Burress / jws". The signature is fluid and cursive, with the last name "Burress" being the most prominent part.

L. Russell Burress
Principal Training Advisor

August 17, 2005

TO: All Commissioners
Judy Sheon

FROM: Lisa Rich

RE: Crime Victims' Rights Act

On July 28, 2005, Professor Sara Beale, the new reporter for the Judicial Conference Criminal Rules Committee sent an email to Pam Montgomery inquiring about when the Commission might act on Judge Paul Cassell's proposal for implementing the Crime Victims' Rights Act ("CVRA") into the Federal sentencing guidelines. According to Professor Beale, Judge Cassell has prepared detailed proposals regarding implementation of the CVRA into the Criminal Rules, which reference his guidelines-related proposals therefore it would be helpful to the Rules Committee to work with the Commission on this issue. A copy of Professor Beale's email is attached.

The CVRA was enacted on October 30, 2004 as part of the Justice for All Act of 2004. On February 15, 2005, Judge Cassell testified before the Commission recommending that the Commission amend Chapter Six of the *Guidelines Manual* to incorporate certain provisions of the CVRA. An excerpt of Judge Cassell's written submission discussing his proposal is attached for your reference. In follow-up to questions he received during the hearing, Judge Cassell submitted a letter to Tim McGrath further explaining his proposal. An "email" copy of that letter is attached. You will see in the attachment that one of the questions posed was whether victims should be given access to the PSR and Judge Cassell sets forth several options in response. Judge Cassell also provides his opinion on how "victim" should be defined in the guidelines, in response to a posting Professor Doug Berman put on his website following the hearing.

If you have questions about this material, please do not hesitate to contact me or Judy.

From: "Sara Beale" <SUN@law.duke.edu>
To: <PAMM@ussc.gov>
Date: 7/28/2005 3:59:19 PM
Subject: Implementing the Crime Victims Rights Act

*Cassell
Testified on
2.15.05 that
we should amend
Chtr 6 - be then
sent follow-up
letter*

Hi Pam,

I am transitioning into the position of reporter for the Judicial Conference Criminal Rules Committee, and we are working on implementing the CVRA. I noticed that there is a letter from Judge Cassell to Tim McGrath (attached) about implementing the CVRA into the guidelines, and I wondered if you (or someone else) could give me some background on when the Commission might act on this proposal, etc. Judge Cassell has also prepared detailed proposals regarding the implementation of the CVRA in the Criminal Rules, which references his guidelines-related proposals. So it would be very helpful to know more about the proposals now before the Commission.

Who do you think is the best person for me to speak to?

Thanks.
Sara Beale

Sara Sun Beale
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August 1, 2005

Tim McGrath
Staff Director
United States Sentencing Commission
Washington, DC
Via Email – tmcgrath@ussc.gov

Re: Additional Information About Crime Victims

Dear Mr. McGrath:

Thanks again very much to the Commission for inviting me to testify yesterday. I appreciated the opportunity to share with the Commission my thoughts for improving the Guidelines in the wake of *Booker*.

I wanted to send a short note to the Commission regarding crime victims issues raised by questions during the hearings or afterward.

Victim Access to Pre-Sentence Reports

Commissioner Steer asked whether victims should receive access to pre-sentence reports. I propose giving victims access to the pre-sentence report via the prosecutor.

First the background law – As I understand the law, there would be nothing in statute precluding release of pre-sentence reports to victims. Title 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, but does not forbid further dissemination. Some court's local rules, however, do forbid further dissemination. *See, e.g., D. Utah Crim. Local R. 32-1(c)* (pre-sentence reports not released without order of the court).

In view of that landscape, the options for disclosure appear to be:

(1) No Disclosure.

The Commission could opt not to direct disclosure of any type to a victim. In my view, this approach would be inconsistent with the victim's right to be "reasonably heard." As explained at greater length in my prepared testimony (pp. 41-42), the right to be heard must be granted in a meaningful manner. It is not meaningful to let the victim make a sentencing recommendation when that recommendation might be made meaningless if the court chooses to follow the Guidelines. Being "reasonably" heard must mean being able to comment on what could be central to the judge's determination.

(2) Complete Disclosure.

The Commission could direct full disclosure of the pre-sentence report to the victim. I do not see any statutory barriers to this approach, but legitimate concerns might be raised. Portions of the report may contain sensitive private information about the defendant (reports of psychiatric examinations, prior history of drug use or sexual abuse, and the like). The report may also

disclose confidential law enforcement information that should not be widely circulated. In light of these concerns, total disclosure might not be ideal.

(3) Selective Disclosure.

The Commission could direct that the probation office redact any pre-sentence report to remove confidential information, with the redacted report then provided to the victim. This, too, seems problematic, in that it would require considerable work on the part of busy probation officers to prepare two separate documents (presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential).

(4) Disclosure through an intermediary.

In my view, the simplest solution remains the one I proposed in my prepared testimony (p. 43) of disclosure through an intermediary; specifically the prosecutor. The prosecutor would serve as the filter for confidential information, and at the same time could assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors, who are no less busy than probation officers. But the new law already gives victims the right to “confer” with prosecutors – and presumably they will be conferring regarding sentencing. Moreover, many U.S. Attorney’s Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements.

I would like to make one change from my earlier prepared testimony. Requiring prosecutors to disclose pre-sentence reports to victims in all cases, even when they are not interested in such disclosure, might be burdensome. Accordingly, I would now like to propose adding a new section (§ 6A1.2(d)) regarding disclosure of pre-sentence reports that would read as follows (change from my previous testimony underlined):

Upon request from the victim, the attorney for the government shall communicate the relevant contents of the pre-sentence report, including information about the impact of the offense on the victim and about restitution to the victim in the case.

This would narrow down the obligations of the prosecutor considerably to situations where the victim was genuinely interested in the contents of the report. Presumably such situations are those in which the victim will already be conferring with the government.

Defining the Victim

Following the hearing, Professor Berman’s blog wondered about who might qualify as a “victim” under the Crime Victims Rights Act (CVRA). Because several members of the Commission are professed readers of his blog, an answer to the questions he raised may be appropriate.

Professor Berman is curious who might qualify as a “victim” under the new law. The CRVA’s definition of “victim” (*see* 18 U.S.C. § 3771(e)) is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (*see* 18 U.S.C. § 3663A(a)(2)); in turn, the MVRA drew on the 1982 Victim Witness Protection Act, a 1982 statute (*see* 18 U.S.C. § 3663(a)(2).)

As a result, the CVRA uses a definition of "victim" that is 22-years-old and has not produced major administrative or definitional problems.

Under this definition, answers to hypothetical situations raised by Professor Berman are straightforward. As to drug cases: no victim; as to felon-in-possession-of-a-firearm cases: no victim; as to immigration cases: no victim (except, possibly, victim smuggling). On the other hand, in a large securities fraud case (e.g., manipulation of the stock market), many victims would result. Under the CVRA, such situations can be handled flexibly, because the Act permits the court to "fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2). The courts are, of course, familiar with such situations. Class action securities fraud cases are already handled with mail or website notice and the like, and such procedures could be used here.

Professor Berman also wonders whether the victim of an uncharged offense could be heard at a plea hearing. In my view, that issue has already essentially been litigated. In *Hughey v. United States*, 495 U.S. 411 (1990), the Supreme Court held that the VWPA authorizes restitution only for loss caused by the specific conduct which forms the basis for the offense of conviction. Seemingly, the Court's analysis would extend to the CVRA so that victims of uncharged offenses would appear not to have formal rights. Even if victims lack formal rights, however, courts presumably possess discretion to hear from anyone regarding whether to accept a plea, as that decision involves an open-ended interests-of-justice kind of determination. Moreover, the *Hughey* analysis is not free from doubt. Senator Jon Kyl, co-sponsor of the CVRA, explained that the definition of "victim" in the CVRA is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." See 150 CONG. REC. S10910-01 (Oct. 2004) (statement of Sen. Kyl).

All of these victims issues may be new terrain for the Commission, as victims are frequently "off the radar" for prosecutors, defense attorneys, and (I have to admit) even judges. As a result, victims sometimes get short shrift in the system. The CVRA appears to be Congress' attempt to guarantee victims a role in the federal criminal justice process, including the Sentencing Guidelines process. If you would like more information on the general subject of victims, Professor Douglas Beloof, Stephen Twist, and I have a new law school casebook coming out next month (*Victims in Criminal Procedure* (North Carolina Academic Press 2d ed. 2005)) which explores this general subject. I would be happy to provide a copy to the Commission if it would be helpful in exploring victims issues.

Once again, I hope I have not been too long winded in offering these ideas. Please feel free to contact me if I can provide any other assistance.

Sincerely,

Paul G. Cassell
United States District Judge

both the Sentencing Commission and the Congress to monitor how the new system is working. It was for this very reason, among others, that the PROTECT Act required courts to specifically state in writing their reasons for issuing a sentence outside the Guidelines range.²⁰⁵ Congress will understandably still be quite interested in learning how often sentences under the post-*Booker* regime fall within or outside of the Guidelines, and for what reason.²⁰⁶ In the wake of *Booker*, some commentators have urged Congress to act quickly to prevent judicial leniency and disparity from developing under the now-advisory Guidelines system.²⁰⁷ Determining whether such concerns are valid requires a hard-headed look at the data on judicial reaction to *Booker*. Unless a district court is clear about how it arrived at a sentence – “showing its work” as one respected commentator colorfully put it²⁰⁸ – that data collection process will be aborted.

For all these reasons, the Commission should require courts to always consider whether a departure is appropriate before considering a possible variance from the Guidelines. Courts should also be required to indicate when they are following the Guidelines, when they are departing from the Guidelines, and when they are varying from the Guidelines.

IV. THE COMMISSION SHOULD REVISE THE GUIDELINES TO ALLOW VICTIM PARTICIPATION IN GUIDELINES DETERMINATIONS AS REQUIRED BY RECENT CRIME VICTIMS LEGISLATION.

The Commission should change the procedural provisions of the Guidelines to allow participation by crime victims. Currently those provisions allow only “the parties” (i.e., the prosecution and the defense) to dispute sentencing factors contained in the pre-sentence report. Last year, Congress passed a new law guaranteeing victims participation in all aspects of the criminal justice system. In light of that law, the Guidelines provisions should be expanded to include victims.

Last October, Congress passed the “Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act,” as codified in Title 18 U.S.C. § 3771.²⁰⁹ I understand that Scott Campbell’s mother – Collene (Thompson) Campbell – will testify later this afternoon before the Commission. One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. (Also, because the new legislation is not widely known, a full copy of the Act is included as an attachment to this

²⁰⁵ 18 U.S.C. § 3553(c)(2).

²⁰⁶ See Memorandum from Richardo H. Hinojosa, Chair, U.S. Sentencing Comm’n, and Sim Lake, Chair, Criminal Law Committee of the Judicial Conference of the U.S., Regarding Documentation Required to be Sent to the Sentencing Comm’n (Jan. 21, 2005).

²⁰⁷ See, e.g., Testimony of Daniel P. Collins before the House Judiciary comm. Subcomm. On Crime (Feb. 10, 2005).

²⁰⁸ http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/always_remember.html.

²⁰⁹ PUB.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 226.

testimony.)

Among its comprehensive list of rights, the Crime Victims' Rights Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . ." ²¹⁰ This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court. ²¹¹ However, the right is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" appears to include a right for the victim to speak to disputed Guidelines issues. As Senator (and co-sponsor) Jon Kyl explained, the right includes sentencing recommendations:

When a victim invokes this right during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and *sentencing recommendations*. ²¹²

A "sentencing recommendation" may well implicate Guidelines issues, particularly where a court gives heavy weight (as I do) to the Guidelines calculation. Moreover, the Congress intended the right to be construed broadly. Again, as Senator Kyl explained:

In short, the victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused. ²¹³

Finally, the natural reading of a right to be "reasonably heard" is a right to be heard at a time when that statement might make a difference. "As long ago as 1914, the [Supreme] Court emphasized that' the fundamental requisite of due process of law is the opportunity to be heard." ²¹⁴ "It is equally fundamental that the right to . . . an opportunity to be heard 'must be

²¹⁰ 18 U.S.C. § 3771(a)(4).

²¹¹ See generally DOUGLAS BELOOF, PAUL CASSELL & STEPHEN TWIST, VICTIMS IN CRIMINAL PROCEDURE chapt. 10 (2d ed. 2005 forthcoming) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (same).

²¹² 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added). See generally BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (discussing three types of victim impact information).

²¹³ 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

²¹⁴ *Davis v. Scherer*, 468 U.S. 183, 200 (1984) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

granted at a meaningful time and in a meaningful manner.”²¹⁵

A victim’s right to be heard regarding sentencing issues is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.²¹⁶ Reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have “[t]he right to full and timely restitution as provided in law.”²¹⁷ As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the pre-sentence report. While the restitution statutes have their own detailed procedural provisions,²¹⁸ it is unclear how those provisions are integrated with the Guidelines procedural provisions. For all these reasons, the Rights of Crime Victims’ Act should be understood as giving victims the right to be heard *before* a court makes any final conclusions about Guidelines calculations and other sentencing matters.

Because the Act gives victims a right to be heard on Guidelines issues, the Commission should revise the Chapter 6 sentencing procedures. Currently, those procedures fail to leave any room for victim participation – permitting only the parties (the government and the defense) to be involved in the process. For example, section § 6A1.3 provides: “When any factor important to the sentencing determination is reasonably in dispute, *the parties* shall be given an adequate opportunity to present information to the court regarding that factor.”²¹⁹ In light of the new Act, victims should likewise be given an opportunity to present information on a disputed sentencing factor.

Victims may often possess information quite relevant to the district court’s assessment of the Guidelines range. The Guidelines themselves contain an entire part devoted to “victim-related adjustments.”²²⁰ This part requires the court to make such determinations as whether a defendant selected his victim because of race, whether a defendant should have known that a victim was vulnerable, and whether a victim was physically restrained during the course of an offense. In addition, other Guidelines look to victim-related characteristics. The kidnaping provision, for example, looks to such things as the degree of injury suffered by the victim.²²¹ The fraud provision looks to loss to the victim.²²²

To be sure, in many cases a prosecutor may bring some of these relevant facts to the

²¹⁵*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²¹⁶ See 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); see also 18 U.S.C. § 3663 (Victim Witness Protection Act).

²¹⁷ 18 U.S.C. § 3771(a)(6).

²¹⁸ 18 U.S.C. § 3664.

²¹⁹ U.S.S.G. § 6A1.3(a) (emphasis added).

²²⁰ U.S.S.G. § 3A.1.1 *et seq.*

²²¹ U.S.S.G. § 2A4.1(b)(2).

²²² U.S.S.G. § 2B1.1(b).

court's attention. Indeed, under the new Act prosecutors are required to "use their best efforts" to insure that victims' rights are protected.²²³ But the Act clearly indicates that the prosecutor's representations are not a substitute for the victim's personal right to be reasonably heard. Thus, the Act begins: "A *crime victim* has the following rights . . ."²²⁴ Moreover, the Act specifically provides that victims can "assert the rights" provided in the statute both before the district court and on appeal by way of expedited mandamus relief.²²⁵ This demonstrates that Congress intended victims to be involved in sentencing proceedings as the functional equivalent of parties, that is, as equal participants in the process.²²⁶ As Senator Kyl explained about the right-to-be-heard provision:

This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an *independent participant in the proceedings*.²²⁷

In light of the new Act, the Commission should revise its Guidelines to clarify that both the parties *and* any victim have the right to be heard on Guidelines issues, including issues relating to restitution. These changes can be easily accomplished with only three modest changes to the Guidelines:

First, a new section (6A1.2(d)) should be added regarding disclosure of pre-sentence reports:

The attorney for the government shall communicate the relevant contents of the pre-sentence report, including information about the impact of the offense on the victim and about restitution to the victim in the case.

Second, a new section (6A1.3(c)) should be added regarding opportunity for victims to dispute sentencing:

The attorney for the government shall advise the court of any relevant sentencing factors that are disputed by the victim in the case, including facts about the impact of the offense on the victims and about restitution. The court

²²³ 18 U.S.C. § 3771(c).

²²⁴ 18 U.S.C. § 3771(a).

²²⁵ 18 U.S.C. § 3771(d).

²²⁶ See generally Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289 (explaining victim participation model of criminal justice).

²²⁷ 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

shall give the victim an opportunity to be heard on these subjects before resolving any such disputed sentencing factors.

Third, section 6A1.4 should be amended by adding the following underlined language:

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's rehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The prosecutor shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

With these changes, the Guidelines will implement Congress' intent that victims have an opportunity to be reasonably heard in sentencing proceedings. It is also appropriate to have prosecutors assist victims on these issues. The Crime Victims Rights Act requires government attorneys to "make their best efforts to see that crime victims are notified of, and accorded, the[ir] rights" ²²⁸ More important, the Act gives victims "[t]he reasonable right to confer with the attorney for the Government in the case." ²²⁹ This means that victims will be regularly conferring with prosecutors about sentencing matters. As Senator Kyl explained:

[T]he victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. . . . Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging. ²³⁰

For all these reasons, the Guidelines should be changed to guarantee crime victims participation as required by the Crime Victims Rights Act. Other bodies of law may also need modification to reflect the new Act. For example, it seems likely that the Act will require significant changes in the Federal Rules of Criminal Procedure. I am currently in the process of preparing suggestions for the Advisory Committee on Rules of Criminal Procedure as to how this might be accomplished. But the need for changes elsewhere in the system provides no justification for delaying appropriate changes to the Guidelines. The Guidelines should be changed to give victims their right to participate in the Guidelines process.

²²⁸ 18 U.S.C. § 3771(c)(1).

²²⁹ 18 U.S.C. § 3771(a)(5).

²³⁰ 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

CONCLUSION

In concluding my (perhaps too lengthy) testimony, one last point may deserve brief mention. Most of the changes I propose may act to solidify the Guidelines and caution against more lenient punishments. This is entirely appropriate. The Guidelines have the backing of the public. According to sophisticated public opinion polling, "there is a fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the [public]."²³¹ Convergence between the Guidelines and the public is not surprising. For nearly two decades, in an on-going dialogue with the Sentencing Commission, Congress has repeatedly reaffirmed its view that the Guidelines are not overly severe. Indeed, as demonstrated by the PROTECT Act's recent significant restrictions on downward departures, Congress, if anything, takes the opposite view.

The decision about how harshly to punish crime in this country is a matter of legislative prerogative. As *Booker* plainly held: "The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."²³² However unhappy some may be with that allocation of power, that is the allocation our democratic system has created.

Yet paradoxically, *Booker* presents the judiciary with an opportunity to assume a greater role in sentencing decisions. For many years, judges have sought greater freedom from the Guidelines strictures.²³³ Those judicial pleas were accompanied by assurances that judges would use any newly-granted freedom responsibly. Now, as a result of shifting majorities in the *Booker* decision, a less rigid system of advisory Guidelines has been put in place – at least temporarily. The judiciary thus has the chance to demonstrate to Congress that it can be trusted with greater freedom – that it will responsibly exercise any discretion not to thwart congressional objectives, but to implement them discriminatingly in particular cases.

Should the courts fail to carry out congressional will, there should be little doubt what will follow. Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences. It is far better, then, for courts to exercise their discretion to insure that Congress' intention is implemented through close adherence to the congressionally-approved Guidelines system, with only rare exceptions for unusual situations. I encourage the Commission to do whatever it can to

²³¹ *Wilson*, 2005 WL 78552 at *5 (citing PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997)). Mandatory minimum sentences are, at least in some situations, out of step with public views. See *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004) (55-year mandatory minimum sentence called for by federal law, more than recommended by the jury or by any other state).

²³² *Booker*, 125 S.Ct. at 768.

²³³ See, e.g., Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).