
PUBLIC COMMENT

2006 AMENDMENT CYCLE



United States Sentencing Commission

March 2006



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

March 28, 2006

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, I am pleased to submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2006. Thank you for addressing these important issues. In addition, the Department commends the valuable work the Commission and its staff have done over the course of this amendment cycle to assess the impact of *United States v. Booker*, including the monthly updates and the one-year report. We look forward to continuing to work with you to ensure a fair sentencing system that serves the interests of justice and the American people.

IMMIGRATION

Starting with the immigration roundtable held in September 2005, the Commission has taken an in-depth look at the current immigration guidelines and identified the biggest problems they pose. There was a consensus that the sentencing of re-entry cases needs to be simplified by reducing the number of complex determinations associated with prior convictions. In addition, the guidelines need to recognize the risk factors and aggravating factors that have been increasingly associated with alien smuggling and passport fraud. The Commission's proposals in these areas, particularly those addressing alien smuggling, are an important step toward addressing these issues. We do, however, have some recommendations, noted below, to improve the proposals further.

Amendments to Section 2L1.1

The Department believes the current alien smuggling guidelines under Section 2L1.1 result in sentences that rely too heavily on the number of aliens transported, and do not take into account many of the risk factors and potential dangers posed by these offenses, such as the

growing numbers of children unaccompanied by parents or relatives being smuggled across the borders under extremely dangerous and inhumane conditions. These dangerous conditions have resulted in well-publicized tragedies where those being transported have been seriously injured or killed. Yet often, in sentencing the responsible offenders under the guidelines, only the most serious injury or the death of one person is taken into account while additional deaths or injuries have no impact on the sentencing range. In other cases, aliens being smuggled have been restrained in "safe houses" through fear or intimidation, but the facts do not constitute extortion or other similar offenses. The guidelines have no enhancement for such conduct. The Department supports the Commission's effort to address many of these concerns in the proposed amendments.

With regard to offenders who smuggle aliens into this country whose entry is forbidden because they are aggravated felons or because they pose other security risks, we believe such offenders should receive a higher base offense level even in cases where there is no conviction under 8 U.S.C. § 1327. Rather, as is in Section 2K2.1 when certain dangerous firearms are involved, higher base offense levels should apply regardless of the offense of conviction.

Although Option 1 of the proposal provides a base offense level of 25 for any defendant convicted under 8 U.S.C. § 1327 and Option 2 provides a specific offense characteristic for defendants who smuggle, harbor, or transport inadmissible aliens under 8 U.S.C. § 1182(a)(3), we do not see the two as mutually exclusive and support adoption of both of these options. We would also recommend including aggravated felons in the second option. Moreover, the Department feels very strongly that the standard needs to be "strict liability" in order to provide some incentive for smugglers to identify the people they are helping to move illegally across our border, rather than attempting to benefit from conscious ignorance of the background of the individuals they are bringing into the United States.

The Commission's proposals also include amendments changing the table of number of aliens involved in the offense; adding an offense characteristic for kidnapping, abducting or unlawfully restraining; taking into account deaths and bodily injuries that occur during transport; and addressing the transportation of minors. The Department fully supports these proposed amendments and believes they are necessary responses to the increased violence and danger we have seen in these cases and would result in sentences that serve the purposes of sentencing and reflect the threat alien smuggling poses to the United States.

Passport Fraud

The Department believes the proposed amendments to the guidelines pertaining to passport fraud offenses are a step in the right direction. However, we recommend a number of modifications.

The current document fraud table in Section 2L2.1 has three tiers for the number of documents involved in the offense, the highest of which applies to cases with "100 or more"

documents. Cases involving more than 100 documents are addressed by an invited departure in Application Note 5. This construct is problematic because the Department now regularly prosecutes cases that involve documents numbering in the high hundreds and low thousands. Application Note 5 does not provide sufficient guidance to deal with such large figures. As such, courts have struggled to fashion appropriate departures in these cases. While the proposed amendment to Section 2L2.1 would increase the top level from 100 to 300 documents, we suggest that the Commission add an additional tier or tiers to the table to capture a larger number of cases sentenced under this guideline and to give some sense of an appropriate departure in Application Note 5 for those cases that exceed the highest figure in the table.

In addition, document fraud involving non-immigration documents does not have a table. Rather, the relevant guideline – Section 2B1.1 – is driven by pecuniary loss, which is a largely meaningless calculation in document fraud cases. Accordingly, the Department recommends the sentencing guideline for document fraud cases (which are prosecuted mainly under 18 U.S.C. § 1028) be based on an identical table to the table we propose for Section 2L2.1. As a result, sentences would be based on the number of documents rather than their pecuniary value.

Amendments to Section 2L1.2

With the staggering number of unlawful re-entry cases now being prosecuted, we believe an important goal of this amendment cycle should be to ensure that the guidelines account for the risk factors and aggravating circumstances presented by criminal aliens who return to the United States after being deported. By accounting for such risks and aggravating circumstances, the guidelines will increase deterrence and target those cases where longer sentences and incapacitation are most appropriate. At the same time, we are keenly aware of the burdens the large numbers of these cases place on all elements of the criminal justice system and the need for sensible reform that simplifies application of Section 2L1.2 in a fair manner in order to relieve the litigation burden on participants in the sentencing process.

Under the current Section 2L1.2, the specific offense characteristics require duplicate and sometimes conflicting analysis when first determining the statutory maximum penalty and then determining which, if any, of the specific offense characteristics apply. Indeed, the “categorical” analysis has led to counter-intuitive, if not arbitrary, results in some cases. The result is that truly dangerous aliens avoid appropriate punishment on seemingly technical grounds.

The categorical analysis of qualifying convictions is performed according to the Supreme Court’s decisions in *Taylor v. United States*, 495 U.S. 595 (1990), and *Shepard v. United States*, 125 S. Ct. 1254, 1261 (2005). Under these decisions, a conviction qualifies as an aggravated felony or triggers a specific offense characteristic only (1) if the statute of conviction fits within the definition of the qualifying offense (for instance, the “modern generic” definition of “burglary”), or (2) if the statute of conviction contains offenses that fall within the definition and others that do not, and limited judicial records establish that the conviction was for an offense

that fits within the definition. This analysis is cumbersome, and obtaining the necessary records is a time-consuming process for prosecutors, defense attorneys and probation officers.

In addition, this categorical analysis has sparked a seemingly endless wave of litigation in the trial and appellate courts. Eliminating the need for this analysis would greatly reduce the workload for participants in the sentencing process and improve the efficiency and reliability of sentencing determinations. As such, the Department favors moving towards a system in which the length of the prior sentences is the guiding factor. Such a system could still include enhancements for prior convictions for certain serious offenses such as murder, rape, kidnapping or terrorism. Defendants who believe their sentences were unduly harsh in the underlying case and therefore trigger too stiff an enhancement could move for downward departures and rely on the reports and other records in the underlying case to support their requests, similar to current practice.

Of the options presented by the Commission to address the categorical approach, the Department favors Option 1, with one modification. This option requires an aggravated felony conviction to trigger the enhancements in subsections (b)(1)(A), (B) & (C) of Section 2L1.2. As the *Interim Staff Report* notes, this would result in only one categorical analysis being performed, but would not do away with that analysis entirely.

However, as proposed, this option may create an unduly narrow class of cases subject to the enhancement in subsection (b)(1)(B) through the use of the term "aggravated felony" in that subsection. Many of the crimes included as "aggravated felonies" in 8 U.S.C. § 1101(a)(43), including crimes of violence, and theft and burglary offenses, require an imposed sentence of at least 12 months of imprisonment in order to qualify. As a result, a requirement that a conviction must be an aggravated felony to trigger the enhancement in subsection (b)(1)(B) means only defendants who received a sentence between 12 and 13 months of imprisonment would be subject to that specific offense characteristic. We suggest that this is not a large enough class of repeat criminals to justify a special guideline enhancement. Instead, the Department recommends dropping the word "aggravated" from subsection (b)(1)(B), which would result in enhancements ranging from four levels, for those defendants convicted of three or more misdemeanors or ordinary felonies with a sentence of probation; to 16 levels, for defendants convicted of aggravated felonies with sentences of imprisonment exceeding 13 months.

Federal Defenders' Proposal

The Department is aware that the Commission has received and is considering a proposal drafted by federal defenders to amend Section 2L1.2. We believe this proposal would significantly weaken the guideline by reducing the maximum total offense level for all offenders other than convicted terrorists to level 16. This would be counterproductive in that it would remove the deterrent and incapacitating effect that is present in the existing guideline. Moreover, the proposal would raise the burden on the government to establish multiple aggravated felony convictions, only to trigger a *lower* maximum enhancement for aggravated felonies. In addition,

the proposal would retain the requirement of performing different categorical analyses to determine whether a conviction qualifies both as an aggravated felony and as a qualifying offense under the incorporated guideline definitions. Weakening the guideline in this fashion would be contrary to the intention of Congress, as expressed in its increase to the penalties in § 1326 as part of the Violent Crime Control and Law Enforcement Act of 1994, and in its directive to the Commission in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to increase the base offense level in Section 2L1.2. It is also bad policy.

Subsection (b)(1) of the federal defenders' proposal would entitle a defendant to a reduction in the base offense level if the defendant returned or remained to visit immediate family for such purposes as securing medical treatment or humanitarian care or if the family member is in extremis. Likewise, the proposal would entitle a defendant to a reduced offense level if the defendant returned to or remained in the United States because of "cultural assimilation." These are matters best left to Congress in the first instance. At present, the immigration laws make no provision for aggravated felons to return to the United States under any circumstances. Building a reduction into the Sentencing Guidelines for these purposes would contradict the expressed intent of Congress. Moreover, captioning these reductions in the form of entitlements is inappropriate. In truly extraordinary cases, where the guidelines do not fully take into account the facts and circumstances of a particular defendant's situation, courts have – and always have had – the flexibility to fashion an appropriate departure from the guideline range.

Recognizing that some aliens will re-enter after deportation regardless of the penalty imposed actually militates against the approach supported by the federal defenders. Law enforcement at the border is difficult enough as it is without having to apprehend such aliens more often because they are receiving less time in prison each time they are caught. Similarly, such an amendment will encourage rather than discourage illegal re-entry at a time when such a policy is inconsistent with the policies of the President, laws enacted by Congress and the will of the American people.

Issues for Comment

As for the remaining issues for comment, the Department believes that expressly requiring terms of imprisonment to trigger the enhancements in subsections (b)(1)(A) and (b)(1)(B) would adequately address the issue of drug trafficking offenses resulting in sentences of probation. Likewise, the proposals adequately address the application of Section 2L1.2 to felony simple possession convictions involving large quantities of narcotics that clearly would be intended for distribution. Adopting a separate category for such offenses would be very difficult to apply in practice due to the restrictions imposed in the *Taylor* and *Shepard* decisions. Placing imprisonment thresholds on the enhancements in subsections (b)(1)(A) and (b)(1)(B) provides a fair and objective method for ensuring that less-serious offenders will be much less likely to face those enhancements based purely on a personal-use drug conviction.

With regard to criminal history calculations, we believe the present system of imposing adjustments under Section 2L1.2 for all convictions regardless of date is consistent with the scheme adopted by Congress in 8 U.S.C. § 1326 and expressed elsewhere in the immigration statutes. Simply put, Congress has made it clear that individuals convicted of aggravated felonies are barred from returning without express consent for the remainder of their lives. The penalties in 8 U.S.C. § 1326 are not time-dependent, and neither should the penalties imposed under Section 2L1.2.

The age of a conviction remains a factor in determining whether the conviction adds to a defendant's criminal history score, which ameliorates the effect of so-called "double-counting." Addressing the prior conviction as part of the offense-level calculation as well as the criminal history score is appropriate because the defendant's prior conviction is an element of the offense. This scheme is consistent with the structure of other guidelines, such as the firearms guideline in Section 2K2.1, that provide offense level enhancements for prior convictions without barring consideration of those convictions to add to a defendant's criminal history score. We believe the current structure is appropriate and need not be amended.

FIREARMS TRAFFICKING

Definition of Firearms Trafficking

The Commission's proposal defines firearms "trafficking" as a simple firearm transfer that meets certain conditions. The proposal seeks comment on whether it should apply to a single firearm or to more than one firearm. On this question, the Department favors having the enhancement apply only where the offense and any relevant conduct involve more than one firearm. The unlawful transfer of more than one firearm demonstrates that the defendant knew he or she was participating in a scheme that is part of the unlawful market in guns. Transfer of a single firearm typically will not reflect conscious participation in a scheme and does not justify a significant increase in the length of imprisonment.

The Department is concerned, however, about the proposal being overly broad in some respects and under-inclusive in one respect. The proposal requires only a showing of an ongoing unlawful scheme when nothing of value was exchanged; showing an unlawful scheme, however, is not required when the transfer is for something of value. The proposal also does not require any showing that the defendant knew, had reason to believe, or was wilfully blind to the fact that the transfer would be to a person whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully.

Under the Commission's proposed definition, proving the existence of a "trafficking" offense may be simpler, but the Department notes that the definition leaves the potential for covering conduct that is broader than what is regarded as the genuine gun-trafficking problem. For example, under the Commission's proposed definition, a prohibited person with an old felony conviction who has a gun

collection (itself prohibited by law) and sells two guns to a non-prohibited friend or relative would be considered a gun trafficker. Also, a person regularly selling firearms who is found to be dealing without a license would automatically be considered a gun trafficker, without any showing that he knew he was selling, had reason to believe he was selling, or was wilfully blind to the fact that he was selling the guns to prohibited persons. The Department does not think that the definition should result in all dealing-without-a-license cases being considered "gun trafficking" cases. The Department likewise does not believe that any transfer of firearms by a prohibited person for value should automatically be considered firearms "trafficking."

On the other hand, the Commission's proposed definition is under-inclusive in that it covers only the transfer and not the receipt of a firearm, even when the recipient is part of a gun-trafficking scheme. A person who receives a firearm as part of a trafficking scheme but who has not yet had an opportunity himself to transfer the firearm in furtherance of the scheme should also be covered by the definition ultimately adopted by the Commission.

If the conduct covered by the trafficking definition is better tailored to the core trafficking conduct involving unlawful schemes to divert firearms from lawful commerce to facilitate the acquisition of firearms by prohibited persons or others for unlawful purposes, then the Department believes a substantial increase in the penalty is justified. With respect to the Commission's request for comment on whether pecuniary gain is necessary for a defendant to qualify as a gun trafficker under the proposed enhancement, the Department supports a definition that includes transfers for anything of value, including drugs. The Department also supports the provision proposed by the Commission clarifying that the trafficking enhancement applies to illegal transfers that are part of an unlawful scheme, even if nothing of value was exchanged.

The Department is aware that the federal defenders have proposed a definition of trafficking that requires the defendant to have been "engaged in the business of trafficking" by engaging in "the regular and repetitive acquisition and transport, transfer or disposition of firearms" with the predominant objective in doing so for "livelihood or profit" or criminal purposes or terrorism. We strongly believe that this definition is too narrow, essentially limiting firearms trafficking enhancements to cases where it can be proved that the defendant was unlawfully dealing in firearms without a license, as it borrows the terminology used in defining the latter offense. This ignores the reality that the vast majority of trafficking takes place through transactions involving small numbers of guns. The definition we propose takes this fact into account and more appropriately covers the core trafficking conduct.

The federal defenders have also suggested that there is "a serious double counting problem" with the Commission's proposal. We disagree. The Department notes that the enhancements suggested presuppose that the additional enhancements based on the number of guns involved under subsection (b)(1) would be applicable. Yet we do not oppose having a separate table of enhancements for firearms trafficking. If, however, the Commission decides not to have the (b)(1) enhancement apply to the enhancements for trafficking schemes, then the separate table for trafficking enhancements should be increased to approximate the cumulative enhancement under the Department's current proposal. Because trafficked firearms frequently are recovered from crime scenes, we believe that the

enhancements for unlawful firearms trafficking schemes should be significantly higher than those for comparable numbers of firearms involved in a simple unlawful possession case.

Proposed Firearms Trafficking Enhancements

The Commission's proposed enhancement for firearm trafficking breaks the enhancement into two categories: 2 to 24 firearms and 25 or more firearms. Because most trafficking takes place through transactions involving small numbers of firearms, the Department believes that there should be additional incremental increases between 2 and 25 firearms. For example, increases could be made for cases involving 2 to 7 firearms; 8 to 15 firearms; 16 to 24 firearms; and 25 or more firearms, or for some formulation akin to the existing enhancements in the Guidelines. The Department believes the enhancement should be four levels for the lowest increment, with an additional two-level increase for each additional increment, with the highest increment having a 10-level enhancement. Together with the existing table of enhancements in Section 2K2.1 for the number of firearms involved in the offense, these new enhancements will provide an appropriate increase in punishment for offenses involving a gun-trafficking scheme that meets the criteria set forth in the definition provided above.

In light of the proposed enhancements for firearms trafficking, the Commission should consider whether the application note under Section 2K2.1 regarding upward departures should be amended to provide that an upward departure may be warranted when, in the case of an offense involving firearms trafficking, the number of trafficked firearms substantially exceeded 25.

Stolen and Altered or Obliterated Serial Numbers

The Department strongly supports the Commission's proposal to increase the enhancement from two levels to four levels for offenses involving a firearm that had an altered or obliterated serial number. Because the intentional obliteration or alteration of a serial number can be intended only to make it more difficult for law enforcement to trace the firearm through a licensed seller to the firearm retail buyer, serial number alteration or obliteration is a clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully. We believe the higher enhancement better reflects the culpability of this conduct.

Enhancement for Use of High-Capacity Semiautomatic Firearms

The Department also supports the Commission's proposal to create an upward departure based on an offender's possession of a high-capacity semiautomatic firearm. While the possession of large-capacity ammunition-feeding devices and semiautomatic assault weapons is no longer prohibited, the potential for harm created by the possession of a high-capacity semiautomatic firearm by those who would misuse them or otherwise illegally possess them is significant.

A provision allowing for an upward departure will afford the sentencing judge the opportunity to consider the characteristic of the weapon and the offense on a case-by-case basis without requiring the judge to do so as part of the offense-level calculation. The Department favors this upward-

departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*. We also believe that the Commission's proposed definition adequately covers the types of firearms of greatest concern, specifically those capable of rendering significant harm through the rapid discharge of large numbers of rounds without a need to reload.

"Lesser Harms"

The Department supports the proposed amendment to Section 5K2.11 regarding "Lesser Harms." The amendment would prohibit the use of the section in felon-in-possession cases. The Department believes this proposed change most accurately captures the purpose behind the Lesser Harms provision. Section 5K2.11 allows a sentencing judge 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 Section 5K2.11 in felon-in-possession cases directly contravenes the fundamental purpose for the statutory prohibition, namely to prevent persons who have demonstrated an inability to conform their conduct to the requirements of the law from having control of lethal weapons. The harm is the fact that the felon is in possession of a firearm; it is irrelevant what the felon's intentions are with respect to that firearm. There is no "lesser harm" in a felon-in-possession case. The application of Section 5K2.11 therefore should be prohibited in felon-in-possession cases.

"In Connection With"

The Commission proposes to remedy a split among the Courts of Appeals in applying the "in connection with" requirement for possessing a firearm in burglary and drug cases. The Department supports the objective of remedying the split among the circuits, but questions whether the proposal will accomplish that objective. The Department is still studying the three options outlined by the Commission and has no specific comment to offer with respect to any of them. The Department does note a potential drafting error, because subsequent to redesignation, it appears that the Application Note should be "13" rather than "14."

Clarification of "Brandishing" and "Otherwise Used"

The Department supports the Commission's proposal to elevate the offense level for "brandishing" a firearm during the commission of another offense to the same level currently applied for "otherwise using" a firearm during the offense. The proposal is consistent with the definition of "brandishing" set out in 18 U.S.C. § 924(c) and appropriately elevates the offense level to the same applied for "otherwise used." The higher enhancement for "brandishing" to make it consistent with the enhancement for "otherwise using" better reflects the culpability of the conduct than the present guideline. Indeed, the Department believes that the proposal should be extended to other Guidelines addressing "brandishing" and "otherwise using" a firearm during the commission of an offense.

ATTORNEY-CLIENT PRIVILEGE

Two years ago, after a lengthy, careful, and deliberative process, and based on the recommendation of an *ad hoc* committee which included some of the leading organizational and white collar crime practitioners, the Commission amended Note 12 to Section 8C2.5, which applies to the sentencing of business organizations and provides for a reduction in sentence for cooperation. Specifically, the section as amended states that waivers of privilege are *not* a prerequisite to securing a reduction in sentence for cooperation, except where necessary to provide timely and thorough disclosure of all known pertinent information. The Commission is now being petitioned to eliminate or amend this provision by those who originally sought its inclusion.

Although the Department did not seek or support the provision, we believe the alternatives proposed by the interest groups petitioning the Commission would be counterproductive to legitimate and important law enforcement efforts, and as such, we urge you not to revisit this recent amendment. Chapter 8 of the guidelines is intended to promote greater compliance, self-examination, and cooperation with law enforcement. In some cases, voluntarily sharing privileged material is a necessary part of that regime. It is important to note that the language at issue applies only in cases in which the corporation has already admitted wrongdoing and been convicted of a federal offense. Corporations willing to cooperate, by sharing privileged materials if necessary, should get credit for doing so, just as individual defendants may have their sentences reduced for providing substantial assistance to the government.

The current commentary recognizes that waiver is not necessary for cooperation, except in certain circumstances. The proposed amendments, on the other hand, would provide that non-disclosure may *never* be considered in determining whether a corporation has been cooperative. Hence, a corporation could claim full credit for cooperation with an investigation – a fact it would no doubt tout in the press – without having disclosed proof certain of its guilt. Such conduct would undermine, rather than further, the Commission's efforts to develop greater transparency and ethical conduct by corporate management, and would further undermine the public's trust in our markets and business leaders. Accordingly, the Department respectfully submits that the guidelines should not be amended to sanction such an outcome.

POLICY STATEMENT ON REDUCTION IN SENTENCE

The proposed policy statement deviates from the statutory language in material ways, and the Department urges the Commission to track the statutory language more closely in order to avoid an interpretation of the policy statement that differs from the plain language of the statute. First, the first unnumbered portion of this section omits the following statutory language after the phrase, "the court may reduce a term of imprisonment":

... (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment).

This is important language that gives courts significant discretion to review the previously-imposed conditions of supervised release and, in appropriate cases, extend the term or modify the conditions of release. Additionally, the statutory language "to the extent that they are applicable" is omitted following "set forth in 18 U.S.C. § 3553(a)." This language is useful, instructive, and necessary for completeness. By omitting it in the policy statement, the Commission inadvertently would suggest that the sentencing court must consider *all* of the factors set forth in 3553(a), even those that might not be applicable in a particular case.

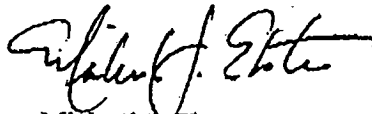
Proposed Section 1B1.13(1)(A) changes the statutory language from "extraordinary and compelling reasons," to "extraordinary and compelling reason." It is not clear why this was changed from plural to singular, and it may be a typographical error. However, this could be a potential source of confusion and should, therefore, track the statutory language precisely.

The Department also notes that the policy statement purports to expand § 3582(c)(1)(A)(ii) – which was expressly intended by Congress to be a safety valve for prisoners sentenced under the 1994 "Three Strikes" law, *see* House Report 103-463 (March 25, 1994) – to convictions for any other offense. It is unclear what authority the Commission relies upon in attempting to expand the coverage of the statute through the guidelines. In any event, in the absence of clear Congressional authority, the Department does not anticipate authorizing a motion for a reduction in sentence in a case that fits within the Commission's expansion of the statute.

In addition to the question of the Commission's authority to expand § 3582(c)(1)(A)(ii), the Department believes that this section of the policy statement will not have any measurable impact, either as Congress drafted it or as the Commission proposes expanding it, because of the extremely small pool of inmates who will (eventually) meet the highly restrictive criteria. Only about 1.2% of the federal inmate population is 66 years of age or older. Furthermore, the majority of inmates in the custody of the Bureau of Prisons who are advanced in age (55 years or older), entered Bureau custody after committing their offenses at an advanced age. For example, generally, inmates in Bureau custody ages 55 to 64 committed their offenses in the year prior to their 55th birthday; inmates 65-69 committed their offenses within the two years prior to their 65th birthday; and inmates 70 or older committed their offenses within the four years prior to their 70th birthday. As a result, few if any elderly inmates will ever satisfy the 30 year service requirement. The Department, therefore, simply questions the utility of this proposal.

Thank you for this opportunity to provide the Commission with the views, comments, and suggestions of the Department of Justice. We look forward to continuing to work with the Commission to improve the federal sentencing guidelines.

Sincerely,



Michael J. Elston

Senior Counsel to the Assistant Attorney General