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# **PUBLIC COMMENT**

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## **PROPOSED PRIORITIES 2009 AMENDMENT CYCLE**



**September 8, 2008**

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U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

August 26, 2008

The Honorable Ricardo H. Hinojosa  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Hinojosa:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit to the United States Sentencing Commission, at least annually, 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 as well as in response to the Commission's recently published notice of proposed policy priorities for the 2008-09 Guideline amendment year. 73 Fed. Reg. 46,341 (Aug. 8, 2008).

**Impact of Recent Court Decisions**

The Sentencing Reform Act of 1984 ushered in a new determinate sentencing system that has been stronger, more effective and uniform, and more honest than the sentencing system it replaced. The core values and goals of the Act and the new sentencing system have been embraced by every Administration since the Act was first signed into law. The recent Supreme Court decisions relating to federal sentencing, however, have dramatically changed the sentencing structure established by the Act and have introduced greater uncertainty into the sentencing process.

As a result, we are very pleased with the Commission's decision to continue its evaluation of the impact of *United States v. Booker*, 543 U.S. 220 (2005), and other recent Supreme Court decisions on the federal sentencing landscape. As you well know, the full impact of these decisions remains unclear. The Sentencing Commission is in the unique position of documenting and analyzing how these cases – particularly *Kimbrough v. United States*, 552 U.S. \_\_\_, 128 S.Ct. 558 (2007), and *Gall v. United States*, 552 U.S. \_\_\_, 128 S.Ct. 586 (2007) – are changing the way in which federal defendants are sentenced in the United States.

As we have iterated in the past, the Department of Justice believes in the need for new sentencing reform, in light of the Supreme Court's decision in *Booker*. The Commission's first report on the impact of *Booker* went a long way toward documenting the initial reaction of sentencing courts to this historic decision. We anticipate that the Commission's expanded study and report will lay the foundation for meaningful reform in this more uncertain climate.

To this end, we urge the Commission to focus its study on both the micro and macro impact of these cases. Unlike any other body, the Commission is exceptionally well suited to paint a national picture of current sentencing practices. Similarly, the Commission is uniquely positioned to break down the national statistics. To provide meaningful insight into the system, we believe the Commission should isolate sentencing practices based on individual crime types. Likewise, we urge the Commission to look at sentencing practices within individual districts and Circuits. We recommend the Commission isolate the impact of drug and immigration crime in the southwest border districts both to determine whether unique factors create sentencing outliers there and also to isolate the impact of *Booker* outside the border region. Finally, the Commission may also want to isolate other factors to better determine how sentencing decisions are now being made.

#### Alternatives to Incarceration Symposium

We commend the Commission for holding its July 2008 symposium on alternatives to incarceration. The symposium raised important questions the criminal justice community must consider as it moves forward to develop more effective sentencing policy. The symposium highlighted several re-entry programs that show significant promise. We are especially interested in the potential that global positioning systems and other monitoring technologies may offer to help successfully reintegrate offenders, significantly reduce recidivism, and improve public safety.

Clearly, further rigorous study is warranted to determine the extent to which these programs will help reduce recidivism and how such success might translate to broader sentencing practice and procedure. We look forward to the Commission's research and analysis of these alternatives to incarceration. The Commission's work will provide important evidence as well as the rigorous evaluation needed to determine how alternatives fit into federal sentencing to achieve a more just sentencing system.

#### Resolving Circuit Court Conflicts

We are pleased the Commission has made resolution of circuit conflicts a priority for this Guideline amendment year, pursuant to its responsibility outlined in *Braxton v. United States*, 500 U.S. 344, 347-49 (1991). There are two circuit conflicts we bring to the Commission's attention as examples of issues that should be addressed.

#### Influencing a minor to engage in prohibited sexual conduct

The first relates to §§2A3.2(b)(2)(B) and 2G1.3(b)(2)(B) of the Sentencing Guidelines, which provide for a sentencing enhancement where a defendant influenced a minor to engage in

prohibited sexual conduct. The Circuits have disagreed whether the enhancement applies when an undercover law enforcement officer poses as a minor. In *United States v. Root*, 296 F.3d 1222 (2002), the Eleventh Circuit recognized that the Sentencing Commission had expressly defined the term “victim” to include “an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years,” *Id.* at 1232 (quoting USSG §2A3.2, comment. (n. 1)), and that it had done so “to ensure that offenders who are apprehended in an undercover operation are appropriately punished.” *Id.* (quoting USSG Appendix C (2002 Supp.) 48 (Amend. 592, Reasons for Amendment)).

The Seventh and Sixth Circuits have disagreed with the reasoning of the Eleventh Circuit in *Root*. In *United States v. Mitchell*, 353 F.3d 552 (2003), a divided panel of the Seventh Circuit concluded that because §2A3.2(b)(2)(B) uses the phrase “unduly influenced” in the past tense, the enhancement cannot “apply where the participant had either failed in his attempt to influence the victim or where the two otherwise had not engaged in prohibited sexual conduct.” *Id.* at 556 (quoting USSG §2A3.2(b)(2)(B)). That court also decided that because the Guideline provision focused upon the effect of a defendant’s conduct on the victim, rather than the defendant’s own actions and intent, it could not apply where the victim was unaffected. *Id.* at 557-559.

In *United States v. Chriswell*, 401 F.3d 459 (2005), the Sixth Circuit criticized both *Root* and *Mitchell*. It disagreed with the *Mitchell* court’s emphasis on verb tense, which suggested that the Guideline would never apply in any case of attempt, but also disagreed with *Root* that the undue influence enhancement could sensibly be applied to the circumstance of an undercover agent posing as a minor. *Id.* at 468. Construing §2A3.2(b)(2)(B) as requiring a victim-focused inquiry, the Sixth Circuit held that the undue influence enhancement does not apply when a government agent poses as a minor. *Id.* at 469-470. Because this question turns exclusively on the proper construction of a sentencing guideline, it warrants review by the Sentencing Commission, rather than the Supreme Court.

#### Victims who have not sustained actual monetary loss

The courts of appeals have also disagreed on the applicability of the “multiple victim enhancement” provision of §2B1.1(b)(2) of the Guidelines, and we believe the Commission should address this issue as well. There is currently a split in the Circuits as to whether the sentencing enhancement applies when the victims have not sustained actual monetary loss resulting from the offense.

The Fifth, Sixth, and Eighth Circuits have held that individuals who have been reimbursed in a fraud conspiracy are not “victims” within the meaning of §2B1.1, because the court could not point to any evidence establishing their pecuniary loss. See *United States v. Conner*, No. 06-50218, 2008 WL 2876564 (5th Cir. July 28, 2008); *United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007); *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005).

The Second and Eleventh Circuit disagree, ruling that individuals who are reimbursed by banks or credit card companies in the aftermath of a fraud scheme may qualify as “victims” for purposes of §2B1.1 if there is evidence that they incurred a measurable monetary harm. See

*United States v. Abiodun*, No. 06-5335-CR, 2008 WL 2924341 (2d Cir. July 30, 2008); *United States v. Lee*, 427 F.3d 881, 884 (11th Cir. 2005). The Eleventh Circuit pointed out that the Guidelines take into account an eventual recovery or return of lost money, property, or services to the victim by allowing the defendant to take credit against the total loss for the value of any recovery. The Court reasoned that the Guidelines, therefore, inherently acknowledge that there was an initial loss to such victims, even when that loss is subsequently remedied. *Lee*, 427 F.3d at 895.

Again, resolving the divergent approaches taken by the courts of appeals falls squarely into the Sentencing Commission's bailiwick. Further, this second circuit split raises one of the many victim/harm issues that we touch on below.

### **Immigration Offenses and "Crime of Violence"**

We are pleased the Commission has recognized the importance of conducting a multi-year study of the definition of "crime of violence" as used in both statutes and the guidelines. As you know, the Department has maintained a long-standing interest in how this term is defined, particularly in §2L1.2, in light of the ever increasing immigration case load. As we have noted in the past, the current guidelines system imposes unnecessary litigation costs because of conflicting definitions and varying case law. We are hopeful that the Commission's study will result in a resolution of this problem that will ultimately reduce the resources needed to litigate these cases – an important goal given the tremendous impact of the illegal immigration docket on the courts.

### **Victim/Harm Issues**

The Department welcomes the creation of the new Victims Advisory Group (VAG) and looks forward to its recommendations to the Commission. As we have stressed before, we strongly believe sentencing courts should weigh the non-pecuniary and non-physical harms now suffered by victims, and this group is well suited to explore how the Guidelines can best redress those harms.

In particular, we are hopeful the VAG can provide insight into the victim impact of new crimes resulting from rapidly changing technology in an increasingly global world. For example, in this day and age, defendants are able to defraud hundreds of victims using sophisticated phishing and other computer techniques. As noted above, defendants in some Circuits are not held fully accountable for the harm caused to these individuals if the victims are ultimately reimbursed by their banks or credit cards. The reasoning of these courts fails to recognize the many ways that individuals can be victimized that do not lend themselves to ready calculation – including permanent impairment of an individual's credit record, loss of privacy, or psychological trauma.

Along the same lines, we urge the Sentencing Commission to address the concern raised by others that Guideline §2B1.1 does not now accurately reflect the potential economic harm a company might suffer should its trade secrets be sold to a competitor. Using the intended gain to

the defendant is an insufficient measure of the significant harm a company might suffer should this proprietary information be compromised.

Finally, as the Small Business Administration has pointed out to the Commission, the current Guidelines do not reflect the potential harm to competitors who lose government contracts as a result of fraud in inducement cases. Although the extent of this harm remains unclear, the Sentencing Commission is best suited to study the impact of this particular crime and whether the guidelines could better account for the harm to these small businesses.

#### Technical and Miscellaneous Suggestions

In addition to the technical guidelines application issues the Commission has identified in its notice of proposed priorities, the Department would like the Commission to consider two additional technical suggestions.

#### Proposed cross-references for threats under 18 U.S.C. §§ 2280, 2332a

As we recommended last year, we urge the Commission to add additional cross-references to two threat offenses in §2A6.1 (threatening or harassing communications; hoaxes).

Although 18 U.S.C. § 2280 (violence against maritime navigation) has a threat provision (18 U.S.C. § 2280(a)(2)), the statute's many cross-references in the Sentencing Guidelines do not include a cross-reference to the threat guideline at §2A6.1. Also, threats under 18 U.S.C. § 2332a (use of weapons of mass destruction) involving conventional weapons are not currently cross-referenced to a sentencing guideline. (Threats under 18 U.S.C. § 2332a involving biological, chemical, or nuclear weapons are referred to the weapons of mass destruction guideline, §2M6.1). Explicit cross-references of both threat provisions to the threat guideline at §2A6.1 would clarify sentencing under these statutes.

#### Extra-territorial environmental pollution

Additionally, we ask the Commission to clarify several application notes to the environmental crimes guidelines.

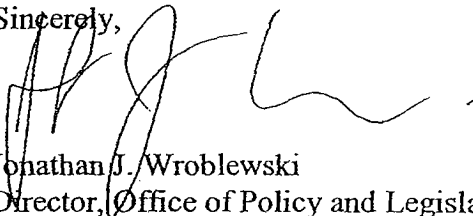
Under §§2Q1.2 and 2Q1.3 of the Guidelines, sentencing enhancements are appropriate if an environmental offense results in a discharge of a pollutant, a hazardous or toxic substance, or a pesticide to the environment. The Guidelines currently do not define the terms "environment" or "substantive environmental offense." The result is that at least one court has held that a sentencing enhancement was not warranted when the discharge of environmental pollutants or wastes occurred outside U.S. territorial waters, even though the defendant was convicted for concealing that pollution when confronted by the U.S. Coast Guard. This decision conflicts with U.S. obligations under the MARPOL treaty and the Act to Prevent Pollution from Ships, 33 U.S.C. § 1901 *et seq.*, which are aimed specifically at stemming oil pollution from international shipping.

We recommend two clarifications to these Guidelines. First, we suggest adding to Application Notes 5 and 4 of §§2Q1.2 and 2Q1.3, respectively, the following: "For purposes of subsection (b)(1), a discharge, release, or emission into the environment includes an event that occurred outside the territorial jurisdiction of the United States." Second, we suggest adding to the end of Application Note 1 for both §§2Q1.2 and 2Q1.3 this final sentence: "Solely for purposes of determining an offense level under subsection (b)(5) when a recordkeeping offense reflects an effort to conceal a discharge, release, or emission into the environment outside the territorial jurisdiction of the United States, the term 'substantive environmental offense' and the term 'offense', as it is used in subsection (b)(1), shall include any conduct constituting a violation under an international treaty to which the United States is a party."

### Conclusion

As always, we are grateful for the opportunity to provide our views on federal sentencing policy and the upcoming amendment year to you and the Commission. We look forward to continuing our work together to improve federal sentencing policy and practice to help reduce crime and serve the American people.

Sincerely,



Jonathan J. Wroblewski  
Director, Office of Policy and Legislation  
Criminal Division

cc: U.S. Sentencing Commissioners  
Judy Sheon, Staff Director