



Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 23, 2008

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

RE: PROPOSED 2009 PRIORITIES

Dear Judge Hinojosa:

We write on behalf of the Practitioners' Advisory Group (PAG) to suggest priorities for the United States Sentencing Commission to address in the next amendment cycle. We hope that this letter will be of assistance to the Commission as it develops its issues agenda.

I. UPDATING AND SIMPLIFYING THE MANUAL

The federal sentencing system, like the Guidelines Manual, is evolving and dynamic. Yet, the Manual contains numerous references that are incorrect based on changes in law and policy. In an effort to update and simplify the Manual, the Commission should consider the following.

Chapter 6 cites the correct rule but the wrong standard for determining whether a court should accept a binding plea agreement under Rule 11(c)(1)(C). *See* U.S.S.G. § 6B1.2. Subsections (b) and (c) of § 6B1.2 instruct that the sentencing court should only accept a sentencing recommendation or agreement if the recommended or specific sentence is within the guideline range or departs for justifiable reasons. *Post-Booker*, the sentencing court must now consider the full range of factors set forth in 18 U.S.C. § 3553(a) in deciding whether or not a recommended or specific sentence is appropriate, not just the Guidelines and the recognized Guideline departures. In this same vein, last year's amendment to the Introductory Section to Chapter One does not acknowledge the full import of *Rita v. United States*, 127 S.Ct. 2456 (2007), in which the Supreme Court held that the Guidelines have no presumptive force at sentencing. *Compare Id.* 2465 with Ch. 1, Intro. Commentary 2 (citing to *Rita* for appellate standard as well as requirement that district courts must calculate Guidelines correctly before weighing § 3553(a) factors).

Although more technical in nature, Section 1A1.1(4)(c) also needs correction since the general application principles cite to a prior version of Fed. R. Crim. P. 11. Specifically, that guideline notes that sentencing courts will analyze plea agreements pursuant to Rule 11(e); however, Rule 11 was amended in 2002 so that the applicable provision is now Rule 11(c).

Section 5F1.7 references a court's ability to recommend participation in the "Shock Incarceration Program," which the Bureau of Prisons (BoP) terminated in 2005. While the PAG continues to support

reinstatement of the BoP's Intensive Confinement Center program, as well as any policy statement that the Commission might issue regarding the propriety of the same, at present this provision may confuse practitioners.

Finally, the PAG requests the opportunity to meet and collaborate with staff about broader changes to the Manual that will both promote simplification and better account for courts' discretion post-*Booker*. As but one example, in view of the individualized sentencing determinations to be made pursuant to § 3553(a) as well as the scope of information appropriately before a sentencing court under 18 U.S.C. § 3661, reconsideration and reassessment of 'departure' restrictions and prohibitions appears warranted. Perhaps a working group that includes representatives of the Department of Justice, the PAG, the Public and Community Defenders, the POAG and the VAG would be an appropriate first step in this process.

II. EXPANDING THE SCOPE OF NON-PRISON OPTIONS

We congratulate and thank the Commission for the exceptional Alternatives to Imprisonment Symposium just held in Washington, D.C. The feedback received from the PAG members and others who attended has been uniformly strong in its praise for the program. Particular recognition is given to Deputy General Counsel Kathleen Cooper Grilli, who we understand headed the symposium working group, though we know that she was not alone in the long hours and significant effort that went into organizing two days of highly informative and thought-provoking panels. We commend the entire Commission for bringing the issues presented to the fore of the ongoing federal criminal justice debate.

Having gained tremendous insight into the myriad of community-based sanction, treatment and supervision options that "work" in terms of safely managing offenders in the community and reducing recidivism (as well as those that do not), the obvious question is how best to move forward so as to afford district court judges the greater flexibility they seek to impose individualized sentences within a guidelines framework. USSC, *Summary Report: U.S. Sentencing Commission's Survey of Article III Judges*, p. 2 (Dec. 2002); see USSC, *The Federal Offender: A Program of Intermediate Punishments*, Part I § 1, p. 4 (Dec. 28, 1990) ("a significant national need exists... [to] increase[e] our efforts to develop innovative methods to accomplish the punishment of some offenders in the community"). The PAG proposes an initial multi-prong approach.

For one, the Commission should amend the Manual to expand sentencing courts' options with respect to non-prison sanctions, particularly for low-to-moderate risk offenders facing a recommended range of 30 months' or less. One of the most direct ways to achieve this end is through enlargement of Zone A and of Zone B within the Sentencing Table, and the elimination of Zone C. This would adopt what the Commission's Alternatives to Imprisonment Project proposed nearly two decades ago. *Id.* at Part II § VI, Attch. 2. In the interim, guidelines penalties have only increased for numerous offense categories, lengthening sentences and further restricting courts ability to impose non-confinement sentences.

Another important way in which the Commission can assist sentencing courts, who have often expressed an interest in seeing more offenders eligible for non-prison dispositions, is to promulgate policy statements or issue a report explaining which community-based options have proven to be most successful (e.g., substance abuse treatment, cognitive behavioral therapy, targeted community service, etc.). *Id.* at Part II § I-C, p. 29-30 (40 percent of responding district judges felt policy regarding eligibility for alternative was inappropriate, and of those most felt first-offenders and nonviolent offenders should be

eligible); FJC, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*, p. 15 (1997) (approximately two-thirds of district court judges and chief probation officers asserted that more offenders should be eligible for alternatives to incarceration); *Survey of Article III Judges* at 5. Such elucidation is consistent with the Commission's responsibility to insure that the Guidelines reflect the inappropriateness of prison sentences to rehabilitate defendants, to provide defendants with needed educational or vocational training, or to provide medical care or other correctional treatment. 28 U.S.C. § 994(k); see 18 U.S.C. § 3582(a) ("imprisonment is not an appropriate means of promoting correction and rehabilitation).

A third step in advancing alternatives would be to create a series of roundtable discussions involving relevant stakeholders (*i.e.*, judges, prosecutors, defense counsel, probation and the Bureau of Prisons). The symposium made clear that successful comprehensive community-based models are time- and resource-intensive and affect a large number of individuals and agencies. We encourage the Commission to extend the dialogue started at the symposium so that revisions to the Manual are but a part of larger systemic reform that the Commission is uniquely positioned to help facilitate. For instance, the Bureau of Prisons could explore whether and how Comprehensive Sanctions Centers (CSCs) and Residential Reentry Centers (RRCs (formerly Community Corrections Centers) or halfway houses) — community confinement options that are also places of imprisonment under 18 U.S.C. § 3621(b), see *Reno v. Koray*, 515 U.S. 50 (1990) and *Goldings v. Winn*, 383 F.3d 17, 25-27 (1st Cir. 2004) — could be used to incarcerate nonviolent drug offenders facing mandatory minimums within the community. See USSC and USDOJ-BoP, *Report to Congress on the Maximum Utilization of Prisons Resources*, p. 10 (June 30, 1994) (describing a "full service" concept intended to offer "a range of supervision, accountability, and program options to reach a much broader spectrum of offenders"). Growing the use of federal community confinement facilities would provide an option commensurate with the State of Pennsylvania's regular use of county facilities to house offenders sentenced to five years or less imprisonment, as presented by Mark Bergstrom, the Executive Director of the Pennsylvania Commission on Sentencing.

In conjunction with these efforts, the Commission might survey courts and probation offices to delve more fully into issues previously identified and those that are evolving. For instance, the Commission could investigate why courts sentence offenders eligible for straight probation to periods of confinement; inquire about the high end of recommended Guidelines sentencing ranges with which court feel comfortable imposing community-based sanctions; and gauge judicial opinions regarding whether there are certain offense categories or offense characteristics that should not be eligible for non-prison sentences. Likewise, the Commission should work with the Bureau of Prisons and the Administrative Office of the Courts to study the financial impact of the guidelines and mandatory minimum sentences akin to the analysis undertaken by the State of Washington, as presented by Steve Aos, the Associate Director of the Washington State Institute for Public Policy. In so doing, the Commission would create invaluable information for policy makers in terms of devising a "portfolio" of sanctions to be administrated by federal agencies.

III. BASE OFFENSE FOR IMPURE MIXTURES OF PRECURSOR CHEMICALS

Guideline Section 2D1.11 provides, *inter alia*, the base offense level for ephedrine, pseudoephedrine or phenylpropanolamine (PPA), precursor chemicals used to manufacture methamphetamine and amphetamine. As currently drafted, ambiguity in the Manual permits unwarranted

disparity between the tablet form of these precursors and other impure forms. Accordingly, Sections 2D1.1 and 2D1.11 should be amended to require that the actual weight of ephedrine, pseudoephedrine or PPA is used to establish a defendant's base offense level.

As written, Note C to § 2D1.11 provides: "In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine *tablets*, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level." *Id.* (emphasis added); see U.S.S.G. § 2D1.1-App. Note 10 (same). This directive tracks the rationale of Amendment 519, through which the Commission sought to avoid unwarranted disparity between pure forms of ephedrine and tablets because the latter "contain a substantially lower percentage of ephedrine (about 25 percent)." U.S.S.G.App. C, amen. 519-Reason for Amendment; see U.S.S.G. § 2D1.1-Note (B) (distinguishing "mixture" from "actual"); see also Pub. L. 103-200. However, changes to the Manual made pursuant to Amendment 611 — promulgated in 2001 in response to the Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-310) — leave open the question of how courts should weigh precursor chemicals (*i.e.*, ephedrine, pseudoephedrine or PPA) when found in impure mixtures other than tablets. See U.S.S.G.App. C, amen. 611-Reason for Amendment (use "total quantity" of chemicals involved); see also *United States v. Martin*, 438 F.3d 621, 624-26 (6th Cir. 2006) (history of amendment).

In a case of first impression nationally, the U.S. Court of Appeals for the First Circuit addressed the lack of clear guidance that the Manual provides. *United States v. Goodhue*, 486 F.3d 52 (1st Cir. 2007). The Goodhue court concluded that under § 2D1.11, "the relevant drug weight for sentencing purposes is the weight of the precursor chemicals themselves." *Id.* at 60 (affirming government's burden to isolate and weigh precursor chemicals). Based on the First Circuit's analysis and in an effort to avoid further unintended disparity as well as needless litigation, the PAG urges the Commission to adopt the following amendment to Note C to § 2D1.11, and correspondingly to Application Note 10 to § 2D1.1:

In a case involving an impure mixture(s) of ephedrine, pseudoephedrine, or phenylpropanolamine tablets (e.g., tablet, sludge, powder, etc.), use the actual weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets mixture(s), not the weight of the entire tablets mixture(s), in calculating the base offense level.

IV. 5C1.3—FIRST-TIME, NONVIOLENT OFFENDERS ELIGIBILITY FOR NON-PRISON SENTENCES

Consistent with the mandate under 28 U.S.C. § 994(j) to establish non-prison sentences for first time, nonviolent offenders who do not stand convicted of serious offenses as well as the Commission's finding that "[p]ossible sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates", the PAG recommends that the Commission make a downward adjustment modeled after the criteria set forth in Section 5C1.2 — a product of the statutory relief for low-level, nonviolent drug offenders found in 18 U.S.C. § 3553(f) — available for all federal offenders. See USSC, *Measuring Recidivism: The Criminal History Component of the Federal Sentencing Guidelines*, 15 (May 2004). Specifically, the PAG urges that Chapter Five be amended to include the following provisions:

§ 5C1.3 . Limitation on Applicability of the Guideline Range in Certain Cases

- (a) In any case in which a statutory minimum sentence does not apply, the court should consider a sentence without regard to the guideline range that would otherwise be applicable if the court finds that the defendant meets the criteria set forth below:
- (1) the defendant does not have more than 1 criminal history point, as determined by the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);
 - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
 - (3) the offense did not result in death or serious bodily injury to any person;
 - (4) the defendant was not an organizer or leader of others in the offense, as determined under the sentencing guidelines; and
 - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
- (b) If the defendant fits the criteria set forth in (a)(1)-(5), the court shall, where appropriate under 18 U.S.C. § 3553(a), sentence the defendant to a term of probation.

Application Notes:

1. This guideline is intended to reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence on an otherwise serious offense. *See* 28 U.S.C. § 994(j). Where consistent with the sentencing factors set forth in § 3553(a), the court should sentence a first offender as defined in this guideline to a term of probation under whatever conditions the court deems appropriate. Where a sentence to a term of probation without confinement would be inconsistent with § 3553(a), the court should consider alternative forms of confinement. A straight sentence of imprisonment should be imposed

only if the court finds that no alternative sentence would be sufficient to comply with the purposes of sentencing.

At a minimum, and mirroring the relief afforded similarly situated drug offenders, there should be a several-level reduction for any defendant who meets the criteria. This would be similar to the current specific offense characteristic at § 2D1.1(b)(9), and it could be added to Chapter Three, which includes other adjustments that potentially apply regardless of the defendant's Chapter Two offense guideline.

The proposed provision encourages, but does not require, courts to sentence eligible offenders below an otherwise recommended guideline range in all appropriate cases. It supports imposition of other than straight-prison sentences whenever doing so satisfies § 3553(a) by directing consideration of community-based confinement in cases where some form of incapacitation is deemed necessary. As in § 5C1.2, defendants who use violence or credible threats of violence; possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; and cause death or serious bodily injury to any person; or act as an organizer or leader of others in the offense are ineligible for relief. The proposal also replicates § 5C1.2's requirement that a defendant provide truthful information to the government no later than the time of sentencing, therein affording relief to less culpable defendants amenable to assisting federal authorities but lacking useful information with which to trade — a principle underpinning the relief that Congress provided drug offenders facing statutory mandatory minimums, which the Commission expanded through Section 5C1.2. See *United States v. Cruz*, 156 F.3d 366, 375 (2d Cir.1998); *United States v. Arrington*, 73 F.3d 144, 147-48 (7th Cir. 1996). In sum, the proposal incorporates all of the factors that the Commission has already determined demonstrate reduced culpability and warrant relief. See USSC, *Recidivism and the First Offender*, 9-10 (May 2004) (criteria generally associated with less culpable criminal conduct are no use of violence or weapons, no bodily injury of a victim, a minor role or minimal participation, and acceptance of responsibility).

Through adoption of this proposal, the Commission would advance § 994(j)'s mandate and provide a means for first offenders to obtain relief from recommended guideline ranges — including any limitation on a straight probation sentence or forms of confinement that would otherwise apply under the Sentencing Table's zones — without complicating or disrupting the structure of the Table itself.

V. RELEVANT CONDUCT RULE

The PAG again urges the Commission to review and revise the relevant conduct rule, namely to abandon the use of acquitted and uncharged conduct. In so doing, we acknowledge the Defenders July 16 priorities letter, which accentuates the deficiencies and concerns associated with the continued permissibility of courts' reliance on uncharged and acquitted conduct when establishing a defendant's Guidelines offense level beyond conviction-related adjustments. Absent amendment the relevant conduct rule shall continue to be subject to manipulation and produce unjustified recommended sentences for minor participants in larger, serious conspiracies that mirror those meted out to more involved players. Were the Commission to remove the use of acquitted and uncharged conduct from the calculation of the guideline range, courts could still give weight to such facts, if found and if appropriate, but would no longer be compelled to give them the same weight in every case as if charged in an indictment and affirmed via conviction. See 18 U.S.C. §§ 3353(a) and 3661.

VI. EXPANDING APPLICATION OF THE "CRACK FIX"

In amending the crack cocaine guidelines last year, the Commission noted that the amendment kept faith with statutory mandatory minimum penalties because the crack guidelines had been set above the mandatory minimums for the relevant triggering quantity. In other words, the Commission reduced recommended sentences for crack cocaine offenses within the Guidelines while maintaining what it considers a necessary relationship between the statutory and guideline penalties for those drugs that merit mandatory penalties.

Importantly, the Guidelines still treat all other controlled substance offenses that have mandatory minimum triggers in the same way, meaning that, except for crack cocaine, the bottom of the applicable guideline range for all such offenses is higher than the statutory mandatory minimum. There is no reason in law or policy for this anomaly and many reasons to correct it, including, but not limited to, the widespread view that Guideline-recommended sentences for controlled substance offenses, particularly for those involving first-time, nonviolent and minimal or minor offenders, are altogether too long. We thus urge the Commission to replicate the "crack fix" throughout the Sentencing Table for controlled substance offenses. In an effort to rationalize and equitably reduce drug sentences, we further urge the Commission to undertake a comprehensive review of the drug sentencing Guidelines, which create a patchwork of original and directive-based ranges.

VII. MANDATORY MINIMUM REPORT

The PAG urges the Commission to revisit and update its comprehensive study, *Mandatory Minimum Penalties in the Criminal Justice System*. Mandatory minimums continue to be popular sentencing choices and a number of additional federal mandatory minimums were enacted in the years following the report. As mandatory minimums continue to be proposed and challenged and as sentencing under current mandatory minimums continue, a deeper understanding of the role, usefulness and effect of mandatory minimums remains crucial. The Sentencing Commission is in the best position to revisit the questions and conclusions considered in the 1991 report, gather and analyze new empirical evidence, and reconsider its policy recommendations of 17 years ago. As we have noted in our last two priorities letters, the questions the initial report attempted to answer remain relevant today. They include the impact of mandatory sentencing on disparity, and whether mandatory minimums are compatible with a sentencing guideline system. Answering those questions is critical given the resurgence of interest in mandatory minimums as a potential antidote to the advisory guideline system.

VIII. CONSUMER PRODUCT SAFETY OFFENSES

It is the PAG's understanding that later this month Congress is likely to pass the Consumer Product Safety Commission Reform Act, bipartisan legislation already approved overwhelmingly in the Senate that modifies several provisions of Chapter 47 of Title 15 of the United States Code. See H.R. 4040; S. 2663. Among other things, the Act would create Class D felonies for "knowing and willful" violations of 15 U.S.C. § 2068, therein prohibiting, *inter alia*, importation for resale of "any consumer product which is not in conformity with an applicable consumer product safety standard." No Guideline provision covers violations of 15 U.S.C. § 2068 directly, or the penalty provisions contained within 15 U.S.C. § 2070.

Before promulgating any amendments, the Commission should study import safety offenses, not only to provide guidance to courts and practitioners on appropriate sentences but also to encourage U.S. importers' adoption of robust corporate compliance and ethics programs that include an import safety procedure component. In this regard, we note that regulatory offenses like those contained in the Act are construed generally as public welfare offenses containing no *mens rea* element, that is, they are effectively strict liability offenses. *See, e.g., Staples v. United States*, 511 U.S. 600, 607 (1994); *Id.* at 607, n.3; 21 U.S.C. §§ 331(a) and 333(a)(1). The varying degrees of culpability inherent in the statutory provisions therefore warrant a cautious approach so as to ensure a reasonable degree of uniformity, certainty and proportionality in sentencing.

Over 825,000 U.S. companies imported more than \$2 trillion of product last year. *See* <http://www.hhs.gov/news/facts/productsafety.html>. It was out of recognition that most defective consumer products are imports that the President commissioned the cabinet-level Interagency Working Group on Import Safety to study the issue of import safety and report on strategies for improving the same. *See* <http://www.importsafety.gov>. In this regard, one approach that the Commission may wish to take up is mechanisms by which large corporate entities can promote compliance and ethics programs among U.S. importers. Specifically, Chapter 8 provides that "[a]s appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs." *Id.* App. Note 2(A)(C)(ii). This provision is a potentially powerful tool in furthering compliance because it leverages the commercial power of large retailers and distributors with both domestic and foreign suppliers (*e.g.*, China), such as education programs at major trade shows in the U.S. and abroad.

* * *

We thank the Commission for its consideration of the foregoing and are available should any additional information be required.

Sincerely,

David Debold, Co-Chair
Gibson Dunn & Crutcher, LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036
(202) 955-8551 telephone
(202) 530-9682 facsimile
ddebold@gibsondunn.com

Todd Bussert, Co-Chair
103 Whitney Avenue, Suite 4
New Haven, CT 06510-1229
(203) 495-9790 telephone
(203) 495-9795 facsimile
tbussert@bussertlaw.com

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner Dabney Friedrich
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel