Public Comment

Proposed Amendments

2004

SUPPLEMENTAL PUBLIC COMMENT SUMMARY
Priorities for 2005 Amendment Cycle
AUGUST 17, 2004

Prior to publication by the Commission of its Notice of Proposed Priorities for the 2004-05 amendment cycle, 69 Fed. Reg. 36148-36149 (June 28, 2004), the Federal and Community Public Defenders ("FPDs") submitted a letter to the Commission in June, 2004 suggesting priorities for the Commission's next amendment cycle. On August 11, 2004, the FPDs submitted a supplemental comment letter. Both letters are summarized below.

I. FPD June 2004 Letter

The FPDs advance a number of priorities for the Commission to consider this amendment cycle and break these priorities into three general areas: (1) big picture issues; (2) Commission process issues; and (3) criminal history, immigration and other critical problems.

A. Big Picture Issues

The FPDs contend that it is incumbent upon the Commission to "make the case to Congress" that mandatory minimum statutory penalties, sentences that are greater than necessary to impose just punishment or protect the public, and congressional directives that undermine the "structural cohesiveness of the guidelines" are practices that are inconsistent with 18 U.S.C. §3553 and 28 U.S.C. §991. The FPDs cite to the Commission's own report entitled "Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System," USSC (1991) at ii, 82 to support the proposition that these practices are applied in a disparate manner on the basis of race and ethnic background. The FPDs also ask the Commission to continue efforts to eliminate the crack/powder ratio disparity and to address the issue of the over representation of blacks and Latinos in the federal prison population.

The FPDs raise the issue of whether the prevalent use of "real offense" elements (the relevant conduct rules that treat acquitted and uncharged conduct as convicted conduct) require that fact-finding at sentencing hearings should be subject to a higher standard of proof. The FPDs cite to both United States v. Rodriguez, 73 F.3d 161, 163 (7th Cir. 1996)(Posner, J., dissenting from a denial of rehearing en banc) and the then still undecided Supreme Court case of Blakely v. State of Washington, No. 02-1632, in support of the proposition that real offense conduct should be subject to a beyond a reasonable doubt standard.

The FPDs ask the Commission to address the issue of overlapping enhancements which result from the "constant ratcheting up of sentences." The PFDs state that overlapping enhancements create unjust differences which do not accurately represent the varying degree of a defendant's culpability and the seriousness of the offense. Further, overlapping enhancements result in

guidelines which appropriately punish the most egregious conduct but which at the same time overstate the seriousness of the less culpable conduct.

B. Commission Process

The FPDs urge the Commission to abandon its "closed-door" policy when considering and adopting new guidelines and adopt new ways to receive, in a timely and meaningful way, comment and input from parties with relevant insight.

C. Criminal History, Immigration and Other Critical Problems

1. Immigration

The PFDs urge the Commission to continue its efforts toward a complete overhaul of the immigration guideline at §2L1.2. This guideline is "plagued" with problems which include (1) disparate sentences in illegal reentry cases resulting from application of the aggravated-felony enhancement at §2L1.2(b)(1); (2) harsh sentences resulting from application of the guideline in "status" offenses where the defendant's motive is not taken into account; (3) a very high enhancement of 16-levels for past conduct that involves a range of behavior unrelated to the instant offense; and (4) the 16-level enhancement because it double counts a measure - past criminal conduct - which is a "questionable measure of culpability in any event" but, in particular, to the instant offense. The FPDs would like to work closely with the Commission and staff during all phases (including participating in staff briefings) of the amendment process on revisions to this guideline.

2. Criminal History

The PFDs state that the Commission's Recidivism Study presents an opportunity for the Commission to educate Congress and the public on the problems and flaws inherent in criminal history scoring and provides a platform to craft much needed revisions to this part of the guidelines. The FPDs argue that the data contained in the Commission's recently published recidivism study raises questions about the current formula used which provides for more severe sentences at the higher criminal history categories. The FPDs assert that the data suggests that while there is an upward curve that provides a direct relationship between recidivism and higher criminal history categories, the data at the same time, ignores the large number of people who did not recidivate at the higher criminal categories. The FPDs point to the example found at p. 21 of the report under "Rates, by Criminal Category for Primary and Re-Conviction Recidivism Definitions" that even at Criminal History Category VI, 85% of the defendants did not recidivate (where violations of probation, supervised release and arrests are excluded and where recidivism is based solely on the offender's reconviction). This interpretation suggests that 85% of the defendants in Criminal Category VI receive sentences that are too severe.

In addition, regardless of whether the Commission should take up criminal history this cycle or put it on a two year track, the PFDs assert that the following issues relating to criminal history demand immediate action by the Commission:

a. **§4A1.2 (c) - Petty offenses** should be eliminated from counting since they raise issues relating to records accuracy and disparate application based on racial and socio-economic differences;

b. **§4A1.1(c) & (d) - Recency and "under-any-criminal-justice-sentence"** enhancements should be amended for the same reasons as petty offenses;

c. **§4A1.2(d) - Juvenile adjudications** similarly raise issues of disparity based on race, socio-economic status and records accuracy. In addition, the FPDs argue that juvenile adjudications raise issues of fairness since juvenile courts do not provide the same level of procedural guarantees. Further, use of term of confinement as the determinant for the number of criminal history points is not a fair measure based on the many alternative reasons juveniles are remanded to the authorities unrelated to the severity of the offense.

d. **Alternatives to imprisonment (as required by 28 U.S.C. §994(j))** should also be considered and made available.

3. Other Structural Changes

The FPDs urge the Commission to review the following structural and procedural rules that apply at sentencing:

a. **§§6A1.1, 6A1.2, 6A1.3 and 6B1.1 - the standard of proof, the timing and scope of discovery of relevant sentencing factors, and the prevalence of waiver of appeals** that "rob the Commission of needed information" to monitor whether and how the guidelines are working;

b. **§1B1.3 -** the parameters of **relevant conduct** should not include acquitted and uncharged conduct;

c. **Offense Level 43** which requires a mandatory sentence of life without parole, should be eliminated. The FPDs assert that unless the statute mandates a life sentence, no guideline calculation should result in one.

The FPDs June 2004 letter contains an attachment with proposed draft language implementing the above suggestions. A copy of both are attached.

II. FPD August 2004 Letter

The FPDs supplemental letter observes that the Commission's list of priorities have likely been impacted by the Blakely decision. Nonetheless, the FPDs urge the Commission to address the immigration guideline and the limited aspects of criminal history identified in their June 2004 letter. Further, although the Commission included some of the due process related proposals in its priorities list, it omitted others which the FPDs strongly feel should be included especially in light of Blakely. These include: (1) limiting the "real offense" aspects of relevant conduct; (2) adopting a "beyond a reasonable doubt" standard of proof and other evidentiary standards; and (3) requiring, under Chapter 6, that the government provide discovery of sentencing facts sufficiently early to allow for a knowing and voluntary consideration by the defendant of constitutional rights, and waivers thereof, and a review of the use of appeal waivers. Lastly, the FPDs attach a proposal for amending guideline §2L1.2 applicable to reentry after deportation offenses. A copy of both the August letter and proposed amendment are attached.

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PROPOSED PRIORITIES FOR

THE 2004-05 AMENDMENT CYCLE

submitted by

Federal Public and Community Defenders

The Federal Public and Community Defenders recommend that the Commission take up the following amendments to the *Guidelines Manual.*

I. Relevant Conduct

A. Acquitted conduct. In our experience, people – not just our clients, but attorneys and the general public as well – find it difficult to understand that a court can base a defendant's sentence on conduct for which the defendant has been acquitted. Despite the differing-burdens-of-persuasion rationale that supports the use of acquitted conduct, people equate an acquittal with vindication and do not perceive the use of acquitted conduct as just or fair. As Justice Stevens has observed, "Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence." *United States v. Watts*, 519 U.S. 148, 169-70, 117 S.Ct. 633, 644 (1997).[1]

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[1]Judge Newman has observed similarly that "A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting from denial of rehearing en banc), *cert. denied*, 510 U.S. 856, 114 S.Ct. 163 (1993). The Supreme Court's post-*Apprendi* cases did not address the issue of acquitted conduct and do not therefore limit the Commission's authority to address the issue of acquitted conduct. *E.g. Harris v. United States*, 122 S. Ct. 2406 (2002) (plurality opinion holds that facts which establish a statutory minimum are not elements of the offense which need to be charged in the indictment or proved beyond a reasonable doubt); *United States v. Cotton*, 122 S.Ct. 1781 (2002) (not plain error to sentence defendants to enhanced penalties despite government's failure to allege quantity in indictment or to prove to jury beyond reasonable doubt where evidence of quantity at trial was overwhelming and uncontroverted and defendants failed to object in district court).

Since the Supreme Court decided *Apprendi*, the problems with using acquitted conduct to increase a person's sentence in the same manner and to the same extent as if he had been convicted of the offense have become particularly pronounced. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). Since *Apprendi*, it is not unusual, for a jury to answer a questionnaire with a specified quantity of drugs, for example, clearly rejecting the uncorroborated testimony of a cooperator, only to have the government seek to sentence the defendant as if that jury trial had not taken place and as if that jury had not passed judgment.

Amendment: Add the following new subsection to §1B1.3:

"(c) Relevant conduct does not include conduct that is part of an offense of which the defendant has been acquitted."

B. Burden of proof. For the overwhelming majority of federal defendants the issue that matters the most is not guilt or innocence, but what sentence will be imposed. Some 95% of federal cases are resolved by plea of guilty, and in a significant proportion of the cases in which the plea is "not guilty," the verdict is "guilty." Despite the significance of the matter, the determination of sentence is based upon the lowest-possible burden of persuasion – preponderance, not of the evidence, because the rules of evidence do not apply to sentencing, but of the information presented to the court. It is one area of sentencing where disparity continues to exist based on the individual preferences and practices of probation officers, prosecutors and judges and the knowledge and expertise of defense counsel. We believe a higher standard is appropriate, especially in light of the principles that animated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). In accord with its general guideline promulgation authority under 28 U.S.C. 994(a)-(f), and its amendment authority under 28 U.S.C. 994(o) and (p), the Commission has authority to make this change.

Amendment: (1) Add the following new subsection to §1B1.3:

"(d) To determine a fact (1) necessary for the application of a guideline provision that increases punishment or (2) that is to be a basis for an upward departure, the standard to be used is proof beyond a reasonable doubt."

(2) Delete the final paragraph of the commentary to §6A1.3, p.s.

II. Drug Offenses

A. Low-level defendants. The drug trafficking guideline, §2D1.1, in our opinion, relies too much on quantity and over punishes low-level defendants. In the parlance of the moment, the drug trafficking guideline punishes the bookkeeper or clerk of a corporation

engaging in deceptive practices to the same extent as the CEO, the CFO and all the other officers. The following proposals seek to make the level of punishment more related to the defendant's culpability.

1. Recalibration of the drug-quantity table. When the Commission decided to use the mandatory-minimum quantities to calibrate the drug-quantity table, the Commission selected offense levels (levels 26 and 32) in which the bottom of the range was greater than the mandatory minimum. Thus, for a criminal history category I defendant with a five-year mandatory-minimum quantity, the guideline range is 63-78 months, and for a criminal history category I defendant with a ten-year mandatory-minimum quantity, the guideline range is 121-151 months. The Commission could just as well have selected offense levels 24 (with a range of 51-63 months for a criminal history category I defendant) and 30 (with a range of 97-121 months for a criminal history category I defendant).

> *Amendment*: Recalibrate the drug quantity table so that offense level 24 corresponds to five-year mandatory-minimum quantities and level 30 corresponds to ten-year mandatory-minimum quantities.

Congress, in establishing mandatory minimums for drug trafficking, indicated that the mandatory minimums were intended for leaders and managers of drug trafficking operations. The legislative history indicates that:

> "the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. After consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain."

H.R. Rep. No. 99-845, at 11-12 (1986). The persons targeted by Congress should receive either a two-level or four-level enhancement for aggravating role, pursuant to §3B1.1. Thus, to avoid double counting, the offense levels for mandatory minimums should be set two to four levels lower than where they are now (or would be if the previous amendment were adopted). Using the current calibration of the drug-quantity table, the offense level for five-year mandatory-minimum quantities should be 22; for ten-year mandatory-minimum quantities the offense level should be 28. Defendants with mandatory-minimum quantities who do not qualify for the safety valve or a substantial assistance motion can have a guideline range of less than the mandatory minimum. In such a case, §5G1.1(b) requires the

court to impose the mandatory minimum. The sentence imposed, therefore, is not a departure.

> *Amendment*: Recalibrate the drug-quantity table so that five-year mandatory minimum quantities correspond to offense level 22 and ten-year mandatory minimum quantities correspond to offense level 28.

B. Crack. Because there is no scientific data to indicate that there is a significant pharmacological difference between crack cocaine and powder cocaine, we believe that the guidelines should treat them the same. We supported the amendment promulgated by the Commission in 1995 that would have accomplished this. Unfortunately, Congress rejected that amendment and directed the Commission to submit a report recommending changes in the drug laws respecting cocaine. Pub. L. No. 104-38, § 2(a)(1), 109 Stat. 334 (1995). Congress directed that the Commission's recommendation "reflect" that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." *Id.* at § 2(a)(1)(A).

The Commission responded in April 1997 and again in May 2002 with special reports to Congress. In each instance, the Commission found that a 100-to-1 quantity ratio cannot be justified. The Commission therefore concluded, "firmly and unanimously," that "the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine." The Commission recommended that Congress revise the five-year mandatory minimum quantity for crack to be 25-75 grams. In its most recent report, the Commission once again found that the current 100-to-1 quantity ratio is not supported by the empirical evidence and therefore not justified. Indeed, if anything, the testimony the Commission heard in 2002 and the data it analyzed show even more clearly that the perceived harms associated with crack cocaine are not accurate.

We believe that the Commission should recalibrate the drug quantity table to use 75 grams, instead of 5 grams, as the quantity of crack at the offense level applicable to five-year mandatory-minimum quantities. Doing so will reduce the crack-powder disparity and will not necessarily lead to a higher departure rate.[2]

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[2]If the top of the guideline range falls below the mandatory minimum, §5G1.1(b) makes the mandatory minimum the guideline sentence. Thus, the imposition of the guideline sentence is not a departure, because the mandatory minimum sentence will be the sentence imposed, absent the application of the safety valve or a departure for substantial assistance.

Amendment: Revise the entries for crack in the drug-quantity table so that 75 grams calls for the same offense level as 500 grams of cocaine powder, and revise the other entries for crack accordingly.

Assuming the current drug quantity table, with level 26 used for five-year mandatory-minimum quantities and level 32 for ten-year mandatory-minimum quantities, the following shows the changes in the drug-quantity table that would be made by the amendment:

Controlled Substances and Quantity*	**Base Offense Level**
• 150 KG or more of Cocaine • ~~1.5~~ 22.5 KG or more of Cocaine Base	**Level 38**
• At least 50 KG but less than 150 KG of Cocaine • At least ~~500 G~~ 7.5 KG but less than ~~1.5~~ 22.5 KG of Cocaine Base	**Level 36**
• At least 15 KG but less than 50 KG of Cocaine • At least ~~150 G~~ 7.5 KG but less than ~~500 G~~ 22.5 KG of Cocaine Base	**Level 34**
• At least 5 KG but less than 15 KG of Cocaine • At least ~~50~~ 750 G but less than ~~150 G~~ 750 KG of Cocaine Base	**Level 32**
• At least 3.5 KG but less than 5 KG of Cocaine • At least ~~35~~ 525 G but less than ~~50~~ 750 G of Cocaine Base	**Level 30**
• At least 2 KG but less than 3.5 KG of Cocaine • At least ~~20~~ 300 G but less than ~~35~~ 525 G of Cocaine Base	**Level 28**
• At least 500 G but less than 2 KG of Cocaine • At least ~~5~~ 75 G but less than ~~20~~ 300 G of Cocaine Base	**Level 26**
• At least 400 G but less than 500 G of Cocaine • At least ~~4~~ 60 G but less than ~~5~~ 75 G of Cocaine Base	**Level 24**

- At least 300 G but less than 400 G of Cocaine — **Level 22**
- At least ~~3~~ 45 G but less than ~~4~~ 60 G of Cocaine Base

- At least 200 G but less than 300 G of Cocaine — **Level 20**
- At least ~~2~~ 30 G but less than ~~3~~ 45 G of Cocaine Base

- At least 100 G but less than 200 G of Cocaine — **Level 18**
- At least ~~1~~ 15 G but less than ~~2~~ 30 G of Cocaine Base

- At least 50 G but less than 100 G of Cocaine — **Level 16**
- At least ~~500 MG~~ 7.5 G but less than ~~1~~ 15 G of Cocaine Base

- At least 25 G but less than 50 G of Cocaine — **Level 14**
- At least ~~250 MG~~ 3.75 G but less than ~~500 MG~~ 7.5 G of Cocaine Base

- Less than 25 G of Cocaine — **Level 12**
- Less than 3.75 G of Cocaine Base

D. Calculating quantity. It is our opinion that drug sentencing is too dependent on quantity. One way to focus less on quantity is, in determining the base offense level, to use the largest transaction within a 30-day period.

Amendment: Add the following to the end of §2D1.1(a)(3): "If the offense involved a number of transactions, the quantity used to determine the offense level is the largest quantity involved in any continuous 30-day period during the course of the offense." As so amended, §2D1.1(a)(3) would read as follows:

"(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below. If the offense involved a number of transactions, the quantity used to determine the offense level is the largest quantity involved in any continuous 30-day period during the course of the offense."

III. Criminal History

A number of relatively inconsequential misdemeanor and petty offenses can run up the criminal history score and are not the sort of offense that should be counted for criminal history purposes.

Amendment: Amend §4A1.2 (c) to read as follows:

"**(c) Sentences Counted and Excluded**

"Sentences for all felony offenses are counted. Sentences for misdemeanors and petty offenses are counted, except that sentences for the following, and offenses similar to them, by whatever name they are known, are never counted:

"careless or reckless driving
"contempt of court
"disorderly conduct or disturbing the peace
"driving without a license or with a revoked or suspended license
"false information to a police officer
"fish and game violations
"gambling
"hindering or failure to obey a police officer
"hitchhiking
"insufficient funds check
"juvenile status offenses and truancy
"leaving the scene of an accident
"local ordinance violation (excluding a local ordinance violation that is also a criminal offense under state law)
"loitering
"minor traffic infractions, such as speeding
"nonsupport
"prostitution
"public intoxication
"resisting arrest
"trespassing
"vagrancy."

IV. Sentencing Options

Congress, in 28 U.S.C. § 994(j), has directed the Commission to "insure that the guidelines 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 or an otherwise serious offense . . . ." The Commission has responded to this directive by including probation as a sentencing option if the guideline range is 0-6 months (for a first offender, this means an offense level of eight or less). We believe the Commission should publish an issues for comment to consider how better to implement § 994(j).

Amendment of Sentencing Table. Also consistent with the congressional directive in 28 U.S.C. § 994(j), in January of 2001, the Commission proposed a change to the Sentencing Table and requested comments on the proposed amendment. *See* 66 Fed. Reg. 7962, 8006 (Jan. 26, 2001). The Commission proposed the following amendment:

> "The Sentencing Table in Chapter Five, Part A, is amended by increasing Zone B by two levels in Criminal History Category I (so that Zone B contains offense levels 9, 10, 11 and 12 in Criminal History Category I); by increasing Zone B by two levels in Criminal History Category II (so that Zone B contains offense levels 6, 7, 8, 9, 10 and 11 in Criminal History Category II); by increasing Zone C by two levels in Criminal History Category I (so that Zone C contains offense levels 13, 14, 15, and 16 in Criminal History Category I); and by increasing Zone C by two levels in Criminal History Category II (so that Zone C contains offense levels 12, 13, 14, 15 in Criminal History Category II)."

66 Fed. Reg. 7962, 8006 (Jan. 26, 2001). It is our opinion that the sentencing table should be amended consistent with the proposed changes which were published in the Federal Register on January 26, 2001.

B. Eliminating Offense Level 43. The Commission should delete offense level 43 as unnecessary because level 42 already establishes a full range of adequate punishment from 360 months in prison, to a sentence of life in prison. If a statute calls for a mandatory life sentence, it is within the guideline range at offense level 42. Also, if a court finds that a life sentence is just punishment for an offense, level 42 provides that option.

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Re: Priorities for 2005

Dear Judge Hinojosa and Commissioners:

I write on behalf of the Federal and Community Public Defenders to supplement our comments concerning the Commission's priorities for the 2004-05 amendment cycle in light of the Supreme Court's opinion in Blakely v. Washington. While the Blakely decision has provoked considerable controversy, it rests on simple, fundamental and salutary constitutional principles: a person cannot be deprived of his liberty except on the basis of facts proved to a jury, by competent evidence, beyond a reasonable doubt. Defenders have long promoted this position and complained that the current sentencing regime that allows enhanced sentences based upon information not provable beyond a reasonable doubt and not subject to the strictures of due process is flawed and has resulted in a system that imprisons too many people for periods of times that are too long. While the Supreme Court will soon explain whether and to what extent Blakely applies to the federal guidelines, we believe that the Commission should, in any event, embrace the constitutional guarantees that Blakely protects.

Defenders expect that the Commission's priorities for this year will necessarily be narrowed by the work entailed in generating Blakely compliant guidelines. In addition, we believe that the Commission must also address any new legislative proposals, unrelated to Blakely. Lastly, we believe the Commission should address the immigration guideline and limited aspects of criminal history that we identified in our earlier letter, both of which are urgently in need of revision.

The letter we sent to the Commission earlier this year concerning Priorities for 2005 includes a number of proposals to address the due process and jury trial guarantees that Blakely resuscitated, including: the standard of proof at sentencing; the use of acquitted, uncharged and dismissed conduct as part of "relevant conduct;" the use of cross-references and overlapping enhancements, which we wrote " foster or at least allow prosecutors to make an end-run around the jury trial guarantee." (June 2004 letter attached). While the Commission included some of our due process related proposals in its priorities list, it omitted others. In light of Blakely, we recommend to the Commission that it include during this amendment cycle proposals for (1) limiting the "real offense"

aspects of relevant conduct; (2) that it adopt a beyond a reasonable doubt standard of proof and other evidentiary standards; and (3) that it require, under Chapter 6, that the government provide discovery of sentencing facts sufficiently early to allow for a knowing and voluntary consideration by the defendant of constitutional rights, and waiver thereof, and that it address the use of appeal waivers.

Lastly, we attach a proposal for amending the Reentry after Deportation Guideline.

More so than usual, the Commission has before it a daunting task, in the midst of intense political forces, to preserve the ideals of the Sentencing Reform Act for a just sentencing system that is transparent, avoids disparity and preserves traditional judicial discretion to impose individualized sentences. Accordingly, Federal and Community Defenders recommend that the Commission act, as it often strives to do, by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act but that it also act to integrate the tempering effects of the protections guaranteed by the Fifth and Sixth Amendment. We also ask the Commission to be mindful of the persons we represent, whose actions prove that they are human and fallible and who, in most cases, also have innocent loved ones who are affected by the sentence.

We appreciate the Commission's consideration of our comments and look forward to working with the Commission.

Very truly yours,

Jon M. Sands
Chair, Federal Sentencing Guidelines Committee of the Federal and Community Public Defenders

Attachments

cc: Carmen Hernandez
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Re: Priorities for 2005

Dear Commissioners:

The Federal and Community Defenders would recommend three major themes for the Commission's work this amendment cycle – address big-picture, fundamental, structural issues; improve the procedures applicable to the Commission's amendment process; and overhaul guidelines that are in critical need of change, refraining from making piecemeal changes.

I. The Big Picture

First, the Commission should get in front of the big issues. Only in this manner, will the Commission fulfill its responsibility as an expert body charged with establishing sentencing policies and practices that "provide certainty and fairness . . .and preserve sufficient flexibility to permit individualized sentences." 28 U.S.C. § 991. Twenty years after passage of the Sentencing Reform Act, the Commission must redouble its efforts to define for Congress and for the country what a fair and just sentence would look like and when it would be smarter to provide an alternative to a lengthy term of imprisonment.

In this respect, mandatory minimum statutory penalties, sentences that are greater than necessary to impose just punishment or protect the public, and congressional directives that undermine the structural cohesiveness of the guidelines are primary problems that are simply inconsistent with 18 U.S.C. § 3553 and 28 U.S.C. § 991. The Commission must be clear in making the case to Congress against these practices particularly as the Commission's review has shown that mandatory minimum sentences are applied disparately on the basis of race and ethnic background. See *Special Report to Congress*: Mandatory Minimum Penalties in the Federal Criminal Justice System, USSC (1991) at ii, 82. The Commission must also continue to make the case for eliminating the crack/powder ratio disparity and must address the over-representation of blacks and Latinos in the federal prison population.

There is also a serious question whether the "brief and casual sentencing hearing" that is the standard under the sentencing guidelines is one that the Commission should sanction in establishing

sentencing policies and practices that assure uniformity, fairness and flexibility as required by § 991. See United States v. Rodriguez, 73 F.3d 161, 163 (7th Cir. 1996) (Posner, J., dissenting from a denial of rehearing en banc) ("there is a serious question whether it is permissible to sentence a person to life in prison, without possibility of parole, at the end of a brief and casual sentencing hearing in which there is no jury, in which the rules of evidence are not enforced, in which the standard of proof is no higher than in an ordinary civil case, and in which the judge's decision will make the difference between a light punishment and a punishment that is the maximum that our system allows short of death.). The prevalence of "real offense" elements – relevant conduct rules that treat acquitted and uncharged conduct exactly as convicted conduct, cross-references, and overlapping enhancements that foster or at least allow prosecutors to make an end-run around the jury trial guarantee – make it more crucial that the fact-finding at sentencing result from a heightened standard of proof and include other due process guarantees. Id. This issue, which continues to be the subject of Supreme Court scrutiny with the pending Apprendi challenge to the Washington guideline scheme, is one that the Commission ought to address. See Blakely v. State of Washington, No. 02-1632.

The constant ratcheting up of sentences also creates overlapping enhancements, which often generate unjustified differences obscuring slight gradations in a defendant's culpability and the seriousness of the offense. See United States v. Laeuersen, 362 F.3d 160, 164 (2d Cir.), cert. denied, 124 S.Ct. 2199 (2004) ("when the addition of *substantially overlapping enhancements* results in a significant increase in the sentencing range minimum . . .at the higher end of the sentencing table . . . a departure may be considered") (emphasis original). Moreover, these methods result in guidelines that are appropriate for the most severe form of an offense but overstate culpability for the majority of defendants and result in a morally perverse upward sentencing spiral that is not tied to protecting the public nor establishing just punishment and that seemingly ignores the human costs of imprisonment. The Commission ought to address these problems also.

II. Process

The time is ripe for the Commission to improve its ability to receive and take into account the most current information on how and whether the guidelines are working. As the Commission found in reviewing "fast track" programs, the testimony and information provided by Federal Defenders in border districts was essential to gaining a full understanding of the diverse practices in immigration cases and their corrupting influence on the uniformity, proportionality and individualized sentencing that are supposed to be the lynchpins of the guidelines. As with the fast-track testimony, Defenders have always taken pains to submit comments that are principled, based on our wide experience in representing the majority of accused persons, and mindful of statutory mandates. The closed-door process that the Commission uses to adopt new guidelines often leaves Defenders' comments tailored to issues no longer under consideration, depriving the Commission of a vital source of information; one, moreover, that provides a unique perspective that is not otherwise represented. Such a change would fully comport with the requirements of 28 U.S.C. § 994(o).

III. Criminal History, Immigration and Other Critical Problems

A. Immigration

No one disputes that the immigration guidelines are in critical need of a complete overhaul despite several attempts at correcting application problems. We believe, and many would agree, that unfair disparity is the hallmark of sentencing in illegal reentry cases in which the aggravated-felony enhancement of § 2L1.2(b)(1) is applicable. We believe it is one reason why the government adopted fast-track policies and Congress sanctioned the "early-disposition" departure for these cases. Section 2L1.2 is plagued with problems for many reasons including that it applies to offenses that are essentially "status" offenses – persons sentenced under this guideline are guilty of being in the United States (or attempting to enter the United States) after having been deported. The majority of these persons return to the United States to be reunited with children and spouses left behind in the United States, to take care of sick relatives, or to earn money to provide food and sustenance for themselves and their dependent families doing work made available to them by American citizens and corporations. Section 2L1.2 will continue to be plagued by problems in its application so long as it fails to take into account the motivation of the offender and so long as it continues to mete out such harsh punishment for an offense that is more difficult to deter and punish justly because it is generally driven by need and other complicated human factors rather than by calculated greed or malevolence. Some of the other problems with this guideline result from the magnitude of the enhancement – up to 16 levels – for past conduct that involves a vast range of behavior basically unrelated to the severity of the instant offense. This enhancement is also problematic because it double counts a measure – past criminal conduct – which is a questionable measure of culpability in any event but particularly with respect to this offense. A single prior, which may or may not reflect actual serious past criminal conduct, may account for a 16-level increase (without providing any mitigation for stale priors) as well as count for 6 criminal history points, when recency enhancements apply.

Defenders are prepared to work closely with the Commission, including the Department of Justice Ex Officio, to amend this guideline. We believe this is one area in particular where involvement of Defenders is essential in all aspects of the Commission's amendment process, including staff briefings, which would ordinarily be closed to us.

B. Criminal History

Criminal History is another critical area where a number of application problems exist in large part because criminal history is an uncertain measure, derived from diverse practices throughout the states and local jurisdictions and which incorporates a number of unfair and disparate application problems based on race, socio-economic status and regional differences. The Commission's Recidivism Study presents an opportunity for the Commission to explain to Congress and the public the flaws in the criminal history scoring and how they should be reformed.

In this respect, the data should be examined with a fresh view. For example, although the guidelines provide for drastically more severe sentences at higher criminal history categories, in fact the data recently published by the Commission calls that formula into question. Although the first reviews appear to suggest a correlation between higher criminal history scores and recidivism, in fact we read the data to also reflect something quite different. While there is an upward curve that provides a direct relationship between recidivism and higher criminal history categories, this ignores the large number of persons who did not recidivate at the higher criminal history categories. For example, even at Criminal History Category VI, 85% of defendants did not recidivate, if violations of probation and supervised release and arrests are excluded and recidivism is based solely on the offender's reconviction. See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, Release 1, at 21 (" Rates, by Criminal History Category for Primary and Re-Conviction Recidivism Definitions").

This finding suggests to us that 85% of defendants in Criminal History Category VI receive sentences that are more severe than necessary. Put another way, Criminal History VI overstates the likelihood of recidivism for 85% of defendants, who fall in that category.[1]

Moreover, whether the Commission undertakes the wholesale revision of the Criminal History category based on the Recidivism study this cycle or whether the changes take place over a two-year period, there are a number of changes that should not be put off because they have such severe consequences and apply to so many cases. Among these:

- **Petty offenses**, which are excluded only under certain circumstances, should not be counted at all because they raise a number of issues with respect to the accuracy of the records, and fairness of the application of these violations across the jurisdictions often driven by racial and socio-economic differences. U.S.S.G. § 4A1.2(c).

- **Recency and "under-any-criminal-justice-sentence"** enhancements also require amendment in part also for some of the same reasons that make petty offenses subject to unfair disparity. U.S.S.G. § 4A1.1(c) & (d).

- **Juvenile adjudications** present similar problems of disparity based on race, socio-economic status, and differences in the availability of records. As well, juvenile adjudications present issues of fairness because juvenile courts do not accord the same level of procedural guarantees. A juvenile may also be remanded to juvenile authorities to provide for rehabilitative services not otherwise available in the community or to the family or to take

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the juvenile out of an unsafe home environment, reasons that may be entirely unrelated to the severity of his delinquency. Using the term of confinement as the determinant for the number of criminal history points is thus not a fair measure. U.S.S.G. § 4A1.2(d).

- **Alternatives to imprisonment** should be made more readily available as required by 28 U.S.C. § 994(j).

C. Other Structural Changes.

In determining priorities for this cycle, the Commission should address the structural and procedural rules that apply at sentencing. In particular, the Commission ought to review:

- The **standard of proof, the timing and scope of discovery of relevant sentencing factors, and the prevalence of waiver of appeals** that rob the Commission of needed information to monitor how the guidelines are working. (U.S.S.G. § 6A1.1, 6A1.2, 6A1.3, and 6B1.1).

- **Relevant Conduct** should not include acquitted and uncharged conduct to the same extent as charged conduct of which the defendant stands convicted (U.S.S.G. § 1B1.3).

- **Offense Level 43**, which requires a mandatory sentence of life without parole, should be eliminated. In the absence of statutorily mandated sentence of life, no guideline calculation should result in a mandatory sentence of life.

Attached are a list of more particularized proposals.

III. Conclusion.

In this, the 20th anniversary of the Sentencing Reform Act, the Commission should take a long look at why Congress established a Sentencing Commission and whether the Commission is carrying out the congressional purpose and fulfilling its duties. In this respect, Defenders believe the Commission should act in the classical tradition. Rather than merely be an actor or the chorus in establishing sentencing policy, the Commission should take on the heroic role assigned to it – making the difficult moral choices that determine the fate of others in a principled fashion and based on facts. As always, the Commission has before it a daunting task to preserve the integrity of the guideline system in the midst of intense political forces. Accordingly, Federal and Community Defenders recommend that the Commission act, as it often strives to do, by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act. We also ask the Commission to be mindful of the persons we represent, whose actions prove that they are human and fallible and who, in most cases, also have innocent loved ones who are affected by the sentence.

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level (Apply the Greatest):

(1) [16] if the defendant committed the instant offense subsequent to sustaining at least two "aggravated felony" convictions of either a crime of violence or a controlled substance offense or one "aggravated felony" conviction of a national security or terrorism offense;

(2) [14] if the defendant committed the instant offense subsequent to sustaining one "aggravated felony" conviction of either (i) a drug trafficking offense for which the sentence served exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a human trafficking offense; or (vi) an alien smuggling offense; or

(3) [12] if the defendant committed the instant offense subsequent to sustaining any other "aggravated felony" conviction;

(4) [10] if the defendant committed the instant offense subsequent to sustaining a conviction for any other felony or three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, or

(5) [8], except as provided below.

(b) Specific Offense Characteristics

(1) If the defendant entered or remained in the United States for the purpose of visiting immediate family lawfully present in the United States under circumstances which mitigate the seriousness of the offense, *e.g.*, (A) to secure medical treatment or humanitarian care for the family member; or if the family member is *in extremis*; or (B) if the defendant entered or remained in the United States because of cultural assimilation decrease the offense level determined above to level [6].

(2) If the defendant committed the instant offense in connection with the commission of a national security or terrorism offense, resulting in a conviction, increase by [8] levels. If the resulting offense level is less than level [24], increase to level [24].

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

<u>*Application Notes*</u>*:*

. . .

7. *For purposes of this guideline:*

   "Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2. "Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (<u>e.g.</u>, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

8. *For purposes of applying subsection (a)(1), (2), (3), or (4), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). <u>see</u> §4A1.2(a)(2); §4A1.2, comment. (n.3).*

MEMORANDUM

TO: Honorable Ricardo Hinojosa, Chair
Commissioners

FROM: Charles R. Tetzlaff

DATE: August 12, 2004

SUBJECT: Retroactivity of May 2004 Amendments

At your public meeting on April 8, 2004, you voted to temporarily suspend Rule 4.1 of the Rules of Practice and Procedure which requires consideration of retroactivity at the time an amendment is promulgated. This was done to give time to reflect on the issue and consider retroactivity in the summer.

Three of the May 2004 amendments have been identified as lowering sentencing ranges and, therefore subject to retroactivity consideration.

The Commission has historically used the three factors suggested in the Background Commentary to §1B1.10 for its retroactivity analysis. These three factors are: the purpose of the amendment, the magnitude of the change in the guideline range, and the difficulty in applying the amendment retroactively.

1. Amendment No. 1 - Homicide and Assault

The base offense level of §2A2.2 (Aggravated Assault) was reduced from level 15 to level 14.

- Purpose of the amendment

The purpose of this amendment was to reduce the severity of punishment in those aggravated assault cases in which no bodily injury occurred. Many of these cases involved Native-American defendants. The Native-American Advisory Group concluded that federal defendants received sentences for aggravated assault which were, on average, longer than comparable cases in state court.

- Magnitude of the change

OPA estimates that only 24 offenders who would still be in prison on November 1, 2004, would be affected by this amendment. The average sentence for FY '01 cases would be reduced from 46 to 42 months for an average reduction of four months.

There is a provision in §1B1.10 that the Commission generally does not make amendments retroactive that reduce the maximum of the guideline range by less than six months. Since it appears that the maximum of the guideline range is reduced by six months by this guideline change, this provision would not preclude the Commission from considering retroactivity.

- Difficulty in applying the amendment retroactively

  Given so few cases, it would not be difficult to apply this guideline change retroactively.

2. Amendment No. 6 - Mitigating Role

It will be recalled that the Commission amended §2D1.1 in 2002 by adding a cap at level 30 for a defendant who received a mitigating role adjustment. That amendment was never made retroactive. This 2004 amendment modifies §2D1.1(a)(3) to provide those defendants who receive a mitigating role adjustment, a graduated reduction of the base offense level of between 2 to 4 levels at base offense level 32 or above. A similar amendment was made to §2D1.11 (Listed Chemicals).

- Purpose of the amendment

Similar to the 2002 amendment, this amendment seeks to limit the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority within the drug trafficking organization and have a lower level of culpability such as "mules" or "couriers." This amendment seeks to more precisely address proportionality concerns by means of graduated reductions.

Similar treatment was given to §2D1.11 since there was no reason to treat defendants sentenced under this guideline differently.

- Magnitude of the change

OPA estimates 4,167 offenders still in prison on November 1, 2004 could be impacted were the amendment to §2D1.1 made retroactive. Only two cases would be affected were

§2D1.11 made retroactive. Approximately 26% of these offenders are within one-year of their release date. It is estimated that sentences for FY '00 cases would be reduced from 68 to 53 months for an average reduction of 15 months.

- Difficulty in applying the amendment retroactively

Such a large number of cases could have a burdensome effect on probation officers in recalculating sentences as well as upon the court system as a whole.

3. Amendment No. 12 - Miscellaneous Amendments Package

An application note was added to §4B1.4 (Armed Career Criminal) to address an apparent "double counting" issue presented when a defendant is convicted of both 18 U.S.C. § 924(g) (Felon in Possession) and an offense such as 18 U.S.C. § 924©) (Use of a Firearm in Relation to Any Crime of Violence or Drug Trafficking Crime) or similar offense carrying a mandatory minimum consecutive penalty.

- Purpose of the amendment

The purpose of the amendment is to avoid counting twice the increased culpability of a defendant who uses or possesses a firearm in connection with a crime of violence or controlled substance offense. Such conduct not only formed the basis for an enhanced guideline offense level 34 and an enhanced Criminal History Category VI, but was also the basis for Congress imposing a mandatory minimum. The Commission felt it was sufficient that only the mandatory minimum took the conduct into account.

- Magnitude of the change

OPA estimates that 156 offenders who will still be in prison on November 1, 2004 could be affected by this amendment. The average sentence of these offenders is 344 months. OPA was unable to estimate the applicable sentence reduction.

- Difficulty in applying the amendment retroactively

It does not appear to be difficult to apply the amendment retroactively given the numbers involved and the nature of the recalculation.

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August 10, 2004

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

Re: Priorities for 2005

Dear Judge Hinojosa and Commissioners:

I write on behalf of the Federal and Community Public Defenders to supplement our comments concerning the Commission's priorities for the 2004-05 amendment cycle in light of the Supreme Court's opinion in Blakely v. Washington. While the Blakely decision has provoked considerable controversy, it rests on simple, fundamental and salutary constitutional principles: a person cannot be deprived of his liberty except on the basis of facts proved to a jury, by competent evidence, beyond a reasonable doubt. Defenders have long promoted this position and complained that the current sentencing regime that allows enhanced sentences based upon information not provable beyond a reasonable doubt and not subject to the strictures of due process is flawed and has resulted in a system that imprisons too many people for periods of times that are too long. While the Supreme Court will soon explain whether and to what extent Blakely applies to the federal guidelines, we believe that the Commission should, in any event, embrace the constitutional guarantees that Blakely protects.

Defenders expect that the Commission's priorities for this year will necessarily be narrowed by the work entailed in generating Blakely compliant guidelines. In addition, we believe that the Commission must also address any new legislative proposals, unrelated to Blakely. Lastly, we believe the Commission should address the immigration guideline and limited aspects of criminal history that we identified in our earlier letter, both of which are urgently in need of revision.

The letter we sent to the Commission earlier this year concerning "Priorities for 2005" includes a number of proposals to address the due process and jury trial guarantees that Blakely resuscitated, including: the standard of proof at sentencing; the use of acquitted, uncharged and dismissed conduct as part of "relevant conduct;" the use of cross-references and overlapping enhancements, which we wrote " foster or at least allow prosecutors to make an end-run around the jury trial guarantee." (June 2004 letter attached). While the Commission included some of our due

process related proposals in its priorities list, it omitted others. In light of Blakely, we recommend to the Commission that it include during this amendment cycle proposals for (1) limiting the "real offense" aspects of relevant conduct; (2) that it adopt a beyond a reasonable doubt standard of proof and other evidentiary standards; and (3) that it require, under Chapter 6, that the government provide discovery of sentencing facts sufficiently early to allow for a knowing and voluntary consideration by the defendant of constitutional rights, and waiver thereof, and that it address the use of appeal waivers.

Lastly, we attach a proposal for amending the Reentry after Deportation Guideline.

More so than usual, the Commission has before it a daunting task, in the midst of intense political forces, to preserve the ideals of the Sentencing Reform Act for a just sentencing system that is transparent, avoids disparity and preserves traditional judicial discretion to impose individualized sentences. Accordingly, Federal and Community Defenders recommend that the Commission act by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act but that it also act to integrate the tempering effects of the protections guaranteed by the Fifth and Sixth Amendments. We also ask the Commission to be mindful of the persons we represent, whose actions prove that they are human and fallible and who, in most cases, also have innocent loved ones who are affected by the sentence.

We appreciate the Commission's consideration of our comments and look forward to working with the Commission.

Very truly yours,

Jon M. Sands
Chair, Federal Sentencing Guidelines Committee of the Federal and Community Public Defenders

Attachments

cc: Carmen Hernandez
Timothy McGrath
Charles Tetzlaff
US Sentencing Commissioners

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June 10, 2004

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

Re: Priorities for 2005

Dear Commissioners:

The Federal and Community Defenders would recommend three major themes for the Commission's work this amendment cycle – address big-picture, fundamental, structural issues; improve the procedures applicable to the Commission's amendment process; and overhaul guidelines that are in critical need of change, refraining from making piecemeal changes.

I. The Big Picture

First, the Commission should get in front of the big issues. Only in this manner, will the Commission fulfill its responsibility as an expert body charged with establishing sentencing policies and practices that "provide certainty and fairness . . .and preserve sufficient flexibility to permit individualized sentences." 28 U.S.C. § 991. Twenty years after passage of the Sentencing Reform Act, the Commission must redouble its efforts to define for Congress and for the country what a fair and just sentence would look like and when it would be smarter to provide an alternative to a lengthy term of imprisonment.

In this respect, mandatory minimum statutory penalties, sentences that are greater than necessary to impose just punishment or protect the public, and congressional directives that undermine the structural cohesiveness of the guidelines are primary problems that are simply inconsistent with 18 U.S.C. § 3553 and 28 U.S.C. § 991. The Commission must be clear in making the case to Congress against these practices particularly as the Commission's review has shown that mandatory minimum sentences are applied disparately on the basis of race and ethnic background. See *Special Report to Congress*: Mandatory Minimum Penalties in the Federal Criminal Justice System, USSC (1991) at ii, 82. The Commission must also continue to make the case for eliminating the crack/powder ratio disparity and must address the over-representation of blacks and Latinos in the federal prison population.

There is also a serious question whether the "brief and casual sentencing hearing" that is the standard under the sentencing guidelines is one that the Commission should sanction in establishing sentencing policies and practices that assure uniformity, fairness and flexibility as required by § 991. See United States v. Rodriguez, 73 F.3d 161, 163 (7th Cir. 1996) (Posner, J., dissenting from a denial of rehearing en banc) ("there is a serious question whether it is permissible to sentence a person to life in prison, without possibility of parole, at the end of a brief and casual sentencing hearing in which there is no jury, in which the rules of evidence are not enforced, in which the standard of proof is no higher than in an ordinary civil case, and in which the judge's decision will make the difference between a light punishment and a punishment that is the maximum that our system allows short of death.). The prevalence of "real offense" elements – relevant conduct rules that treat acquitted and uncharged conduct exactly as convicted conduct, cross-references, and overlapping enhancements that foster or at least allow prosecutors to make an end-run around the jury trial guarantee – make it more crucial that the fact-finding at sentencing result from a heightened standard of proof and include other due process guarantees. Id. This issue, which continues to be the subject of Supreme Court scrutiny with the pending Apprendi challenge to the Washington guideline scheme, is one that the Commission ought to address. See Blakely v. State of Washington, No. 02-1632.

The constant ratcheting up of sentences also creates overlapping enhancements, which often generate unjustified differences obscuring slight gradations in a defendant's culpability and the seriousness of the offense. See United States v. Laeuersen, 362 F.3d 160, 164 (2d Cir.), cert. denied, 124 S.Ct. 2199 (2004) ("when the addition of *substantially overlapping enhancements* results in a significant increase in the sentencing range minimum . . .at the higher end of the sentencing table . . . a departure may be considered") (emphasis original). Moreover, these methods result in guidelines that are appropriate for the most severe form of an offense but overstate culpability for the majority of defendants and result in a morally perverse upward sentencing spiral that is not tied to protecting the public nor establishing just punishment and that seemingly ignores the human costs of imprisonment. The Commission ought to address these problems also.

II. Process

The time is ripe for the Commission to improve its ability to receive and take into account the most current information on how and whether the guidelines are working. As the Commission found in reviewing "fast track" programs, the testimony and information provided by Federal Defenders in border districts was essential to gaining a full understanding of the diverse practices in immigration cases and their corrupting influence on the uniformity, proportionality and individualized sentencing that are supposed to be the lynchpins of the guidelines. As with the fast-track testimony, Defenders have always taken pains to submit comments that are principled, based on our wide experience in representing the majority of accused persons, and mindful of statutory mandates. The closed-door process that the Commission uses to adopt new guidelines often leaves Defenders' comments tailored to issues no longer under consideration, depriving the Commission of a vital source of information; one, moreover, that provides a unique perspective that is not

otherwise represented. Such a change would fully comport with the requirements of 28 U.S.C. § 994(o).

III. Criminal History, Immigration and Other Critical Problems

A. Immigration

No one disputes that the immigration guidelines are in critical need of a complete overhaul despite several attempts at correcting application problems. We believe, and many would agree, that unfair disparity is the hallmark of sentencing in illegal reentry cases in which the aggravated-felony enhancement of § 2L1.2(b)(1) is applicable. We believe it is one reason why the government adopted fast-track policies and Congress sanctioned the "early-disposition" departure for these cases. Section 2L1.2 is plagued with problems for many reasons including that it applies to offenses that are essentially "status" offenses – persons sentenced under this guideline are guilty of being in the United States (or attempting to enter the United States) after having been deported. The majority of these persons return to the United States to be reunited with children and spouses left behind in the United States, to take care of sick relatives, or to earn money to provide food and sustenance for themselves and their dependent families doing work made available to them by American citizens and corporations. Section 2L1.2 will continue to be plagued by problems in its application so long as it fails to take into account the motivation of the offender and so long as it continues to mete out such harsh punishment for an offense that is more difficult to deter and punish justly because it is generally driven by need and other complicated human factors rather than by calculated greed or malevolence. Some of the other problems with this guideline result from the magnitude of the enhancement – up to 16 levels – for past conduct that involves a vast range of behavior basically unrelated to the severity of the instant offense. This enhancement is also problematic because it double counts a measure – past criminal conduct – which is a questionable measure of culpability in any event but particularly with respect to this offense. A single prior, which may or may not reflect actual serious past criminal conduct, may account for a 16-level increase (without providing any mitigation for stale priors) as well as count for 6 criminal history points, when recency enhancements apply.

Defenders are prepared to work closely with the Commission, including the Department of Justice Ex Officio, to amend this guideline. We believe this is one area in particular where involvement of Defenders is essential in all aspects of the Commission's amendment process, including staff briefings, which would ordinarily be closed to us.

B. Criminal History

Criminal History is another critical area where a number of application problems exist in large part because criminal history is an uncertain measure, derived from diverse practices throughout the states and local jurisdictions and which incorporates a number of unfair and disparate application problems based on race, socio-economic status and regional differences. The Commission's Recidivism Study presents an opportunity for the Commission to explain to Congress and the public the flaws in the criminal history scoring and how they should be reformed.

In this respect, the data should be examined with a fresh view. For example, although the guidelines provide for drastically more severe sentences at higher criminal history categories, in fact the data recently published by the Commission calls that formula into question. Although the first reviews appear to suggest a correlation between higher criminal history scores and recidivism, in fact we read the data to also reflect something quite different. While there is an upward curve that provides a direct relationship between recidivism and higher criminal history categories, this ignores the large number of persons who did not recidivate at the higher criminal history categories. For example, even at Criminal History Category VI, 85% of defendants did not recidivate, if violations of probation and supervised release and arrests are excluded and recidivism is based solely on the offender's reconviction. See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, Release 1, at 21 (" Rates, by Criminal History Category for Primary and Re-Conviction Recidivism Definitions").

This finding suggests to us that 85% of defendants in Criminal History Category VI receive sentences that are more severe than necessary. Put another way, Criminal History VI overstates the likelihood of recidivism for 85% of defendants, who fall in that category.[1]

Moreover, whether the Commission undertakes the wholesale revision of the Criminal History category based on the Recidivism study this cycle or whether the changes take place over a two-year period, there are a number of changes that should not be put off because they have such severe consequences and apply to so many cases. Among these:

- **Petty offenses**, which are excluded only under certain circumstances, should not be counted at all because they raise a number of issues with respect to the accuracy of the records, and fairness of the application of these violations across the jurisdictions often driven by racial and socio-economic differences. U.S.S.G. § 4A1.2(c).

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- **Recency and "under-any-criminal-justice-sentence"** enhancements also require amendment in part also for some of the same reasons that make petty offenses subject to unfair disparity. U.S.S.G. § 4A1.1(c) & (d).

- **Juvenile adjudications** present similar problems of disparity based on race, socio-economic status, and differences in the availability of records. As well, juvenile adjudications present issues of fairness because juvenile courts do not accord the same level of procedural guarantees. A juvenile may also be remanded to juvenile authorities to provide for rehabilitative services not otherwise available in the community or to the family or to take the juvenile out of an unsafe home environment, reasons that may be entirely unrelated to the severity of his delinquency. Using the term of confinement as the determinant for the number of criminal history points is thus not a fair measure. U.S.S.G. § 4A1.2(d).

- **Alternatives to imprisonment** should be made more readily available as required by 28 U.S.C. § 994(j).

C. Other Structural Changes.

In determining priorities for this cycle, the Commission should address the structural and procedural rules that apply at sentencing. In particular, the Commission ought to review:

- The **standard of proof, the timing and scope of discovery of relevant sentencing factors, and the prevalence of waiver of appeals** that rob the Commission of needed information to monitor how the guidelines are working. (U.S.S.G. § 6A1.1, 6A1.2, 6A1.3, and 6B1.1).

- **Relevant Conduct** should not include acquitted and uncharged conduct to the same extent as charged conduct of which the defendant stands convicted (U.S.S.G. § 1B1.3).

- **Offense Level 43**, which requires a mandatory sentence of life without parole, should be eliminated. In the absence of statutorily mandated sentence of life, no guideline calculation should result in a mandatory sentence of life.

Attached are a list of more particularized proposals.

III. Conclusion.

In this, the 20th anniversary of the Sentencing Reform Act, the Commission should take a long look at why Congress established a Sentencing Commission and whether the Commission is carrying out the congressional purpose and fulfilling its duties. In this respect, Defenders believe the Commission should act in the classical tradition. Rather than merely be an actor or the chorus in establishing sentencing policy, the Commission should take on the heroic role assigned to it – making the difficult moral choices that determine the fate of others in a principled fashion and based on facts. As always, the Commission has before it a daunting task to preserve the integrity of the guideline system in the midst of intense political forces. Accordingly, Federal and Community Defenders recommend that the Commission act, as it often strives to do, by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act. We also ask the Commission to be mindful of the persons we represent, whose actions prove that they are human and fallible and who, in most cases, also have innocent loved ones who are affected by the sentence.

Thank you for your consideration.

Very truly yours,

Jon M. Sands
Chair, Federal Sentencing Guidelines Committee of the Federal and Community Defenders

cc: Carmen Hernandez
Timothy McGrath
Charles Tetzlaff

PROPOSED PRIORITIES FOR

THE 2004-05 AMENDMENT CYCLE

submitted by

Federal Public and Community Defenders

The Federal Public and Community Defenders recommend that the Commission take up the following amendments to the *Guidelines Manual*.

I. Relevant Conduct

A. Acquitted conduct. In our experience, people – not just our clients, but attorneys and the general public as well – find it difficult to understand that a court can base a defendant's sentence on conduct for which the defendant has been acquitted. Despite the differing-burdens-of-persuasion rationale that supports the use of acquitted conduct, people equate an acquittal with vindication and do not perceive the use of acquitted conduct as just or fair. As Justice Stevens has observed, "Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence." *United States v. Watts*, 519 U.S. 148, 169-70, 117 S.Ct. 633, 644 (1997).[1]

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[1]Judge Newman has observed similarly that "A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting from denial of rehearing en banc), *cert. denied*, 510 U.S. 856, 114 S.Ct. 163 (1993). The Supreme Court's post-*Apprendi* cases did not address the issue of acquitted conduct and do not therefore limit the Commission's authority to address the issue of acquitted conduct. *E.g. Harris v. United States*, 122 S. Ct. 2406 (2002) (plurality opinion holds that facts which establish a statutory minimum are not elements of the offense which need to be charged in the indictment or proved beyond a reasonable doubt); *United States v. Cotton*, 122 S.Ct. 1781 (2002) (not plain error to sentence defendants to enhanced penalties despite government's failure to allege quantity in indictment or to prove to jury beyond reasonable doubt where evidence of quantity at trial

Since the Supreme Court decided *Apprendi*, the problems with using acquitted conduct to increase a person's sentence in the same manner and to the same extent as if he had been convicted of the offense have become particularly pronounced. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). Since *Apprendi*, it is not unusual, for a jury to answer a questionnaire with a specified quantity of drugs, for example, clearly rejecting the uncorroborated testimony of a cooperator, only to have the government seek to sentence the defendant as if that jury trial had not taken place and as if that jury had not passed judgment.

Amendment: Add the following new subsection to §1B1.3:

"(c) Relevant conduct does not include conduct that is part of an offense of which the defendant has been acquitted."

B. Burden of proof. For the overwhelming majority of federal defendants the issue that matters the most is not guilt or innocence, but what sentence will be imposed. Some 95% of federal cases are resolved by plea of guilty, and in a significant proportion of the cases in which the plea is "not guilty," the verdict is "guilty." Despite the significance of the matter, the determination of sentence is based upon the lowest-possible burden of persuasion – preponderance, not of the evidence, because the rules of evidence do not apply to sentencing, but of the information presented to the court. It is one area of sentencing where disparity continues to exist based on the individual preferences and practices of probation officers, prosecutors and judges and the knowledge and expertise of defense counsel. We believe a higher standard is appropriate, especially in light of the principles that animated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). In accord with its general guideline promulgation authority under 28 U.S.C. 994(a)-(f), and its amendment authority under 28 U.S.C. 994(o) and (p), the Commission has authority to make this change.

Amendment: (1) Add the following new subsection to §1B1.3:

"(d) To determine a fact (1) necessary for the application of a guideline provision that increases punishment or (2) that is to be a basis for an upward departure, the standard to be used is proof beyond a reasonable doubt."

(2) Delete the final paragraph of the commentary to §6A1.3, p.s.

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was overwhelming and uncontroverted and defendants failed to object in district court).

II. Drug Offenses

A. Low-level defendants. The drug trafficking guideline, §2D1.1, in our opinion, relies too much on quantity and over punishes low-level defendants. In the parlance of the moment, the drug trafficking guideline punishes the bookkeeper or clerk of a corporation engaging in deceptive practices to the same extent as the CEO, the CFO and all the other officers. The following proposals seek to make the level of punishment more related to the defendant's culpability.

1. Recalibration of the drug-quantity table. When the Commission decided to use the mandatory-minimum quantities to calibrate the drug-quantity table, the Commission selected offense levels (levels 26 and 32) in which the bottom of the range was greater than the mandatory minimum. Thus, for a criminal history category I defendant with a five-year mandatory-minimum quantity, the guideline range is 63-78 months, and for a criminal history category I defendant with a ten-year mandatory-minimum quantity, the guideline range is 121-151 months. The Commission could just as well have selected offense levels 24 (with a range of 51-63 months for a criminal history category I defendant) and 30 (with a range of 97-121 months for a criminal history category I defendant).

> *Amendment*: Recalibrate the drug quantity table so that offense level 24 corresponds to five-year mandatory-minimum quantities and level 30 corresponds to ten-year mandatory-minimum quantities.

Congress, in establishing mandatory minimums for drug trafficking, indicated that the mandatory minimums were intended for leaders and managers of drug trafficking operations. The legislative history indicates that:

> "the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. After consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain."

H.R. Rep. No. 99-845, at 11-12 (1986). The persons targeted by Congress should receive either a two-level or four-level enhancement for aggravating role, pursuant to §3B1.1. Thus, to avoid double counting, the offense levels for mandatory minimums should be set two to four levels lower than where they are now (or would be if the previous amendment were

adopted). Using the current calibration of the drug-quantity table, the offense level for five-year mandatory-minimum quantities should be 22; for ten-year mandatory-minimum quantities the offense level should be 28. Defendants with mandatory-minimum quantities who do not qualify for the safety valve or a substantial assistance motion can have a guideline range of less than the mandatory minimum. In such a case, §5G1.1(b) requires the court to impose the mandatory minimum. The sentence imposed, therefore, is not a departure.

Amendment: Recalibrate the drug-quantity table so that five-year mandatory minimum quantities correspond to offense level 22 and ten-year mandatory minimum quantities correspond to offense level 28.

B. Crack. Because there is no scientific data to indicate that there is a significant pharmacological difference between crack cocaine and powder cocaine, we believe that the guidelines should treat them the same. We supported the amendment promulgated by the Commission in 1995 that would have accomplished this. Unfortunately, Congress rejected that amendment and directed the Commission to submit a report recommending changes in the drug laws respecting cocaine. Pub. L. No. 104-38, § 2(a)(1), 109 Stat. 334 (1995). Congress directed that the Commission's recommendation "reflect" that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." *Id.* at § 2(a)(1)(A).

The Commission responded in April 1997 and again in May 2002 with special reports to Congress. In each instance, the Commission found that a 100-to-1 quantity ratio cannot be justified. The Commission therefore concluded, "firmly and unanimously," that "the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine." The Commission recommended that Congress revise the five-year mandatory minimum quantity for crack to be 25-75 grams. In its most recent report, the Commission once again found that the current 100-to-1 quantity ratio is not supported by the empirical evidence and therefore not justified. Indeed, if anything, the testimony the Commission heard in 2002 and the data it analyzed show even more clearly that the perceived harms associated with crack cocaine are not accurate.

We believe that the Commission should recalibrate the drug quantity table to use 75 grams, instead of 5 grams, as the quantity of crack at the offense level applicable to five-year mandatory-minimum quantities. Doing so will reduce the crack-powder disparity and will

not necessarily lead to a higher departure rate.[2]

> *Amendment*: Revise the entries for crack in the drug-quantity table so that 75 grams calls for the same offense level as 500 grams of cocaine powder, and revise the other entries for crack accordingly.

Assuming the current drug quantity table, with level 26 used for five-year mandatory-minimum quantities and level 32 for ten-year mandatory-minimum quantities, the following shows the changes in the drug-quantity table that would be made by the amendment:

Controlled Substances and Quantity*	**Base Offense Level**
• 150 KG or more of Cocaine • ~~1.5~~ 22.5 KG or more of Cocaine Base	**Level 38**
• At least 50 KG but less than 150 KG of Cocaine • At least ~~500 G~~ 7.5 KG but less than ~~1.5~~ 22.5 KG of Cocaine Base	**Level 36**
• At least 15 KG but less than 50 KG of Cocaine • At least ~~150 G~~ 7.5 KG but less than ~~500 G~~ 22.5 KG of Cocaine Base	**Level 34**
• At least 5 KG but less than 15 KG of Cocaine • At least ~~50~~ 750 G but less than ~~150 G~~ 750 KG of Cocaine Base	**Level 32**
• At least 3.5 KG but less than 5 KG of Cocaine • At least ~~35~~ 525 G but less than ~~50~~ 750 G of Cocaine Base	**Level 30**
• At least 2 KG but less than 3.5 KG of Cocaine • At least ~~20~~ 300 G but less than ~~35~~ 525 G of Cocaine Base	**Level 28**

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[2]If the top of the guideline range falls below the mandatory minimum, §5G1.1(b) makes the mandatory minimum the guideline sentence. Thus, the imposition of the guideline sentence is not a departure, because the mandatory minimum sentence will be the sentence imposed, absent the application of the safety valve or a departure for substantial assistance.

• At least 500 G but less than 2 KG of Cocaine • At least ~~5~~ 75 G but less than ~~20~~ 300 G of Cocaine Base	**Level 26**
• At least 400 G but less than 500 G of Cocaine • At least ~~4~~ 60 G but less than ~~5~~ 75 G of Cocaine Base	**Level 24**
• At least 300 G but less than 400 G of Cocaine • At least ~~3~~ 45 G but less than ~~4~~ 60 G of Cocaine Base	**Level 22**
• At least 200 G but less than 300 G of Cocaine • At least ~~2~~ 30 G but less than ~~3~~ 45 G of Cocaine Base	**Level 20**
• At least 100 G but less than 200 G of Cocaine • At least ~~1~~ 15 G but less than ~~2~~ 30 G of Cocaine Base	**Level 18**
• At least 50 G but less than 100 G of Cocaine • At least ~~500 MG~~ 7.5 G but less than ~~1~~ 15 G of Cocaine Base	**Level 16**
• At least 25 G but less than 50 G of Cocaine • At least ~~250 MG~~ 3.75 G but less than ~~500 MG~~ 7.5 G of Cocaine Base	**Level 14**
• Less than 25 G of Cocaine • Less than 3.75 G of Cocaine Base	**Level 12**

D. Calculating quantity. It is our opinion that drug sentencing is too dependent on quantity. One way to focus less on quantity is, in determining the base offense level, to use the largest transaction within a 30-day period.

Amendment: Add the following to the end of §2D1.1(a)(3): "If the offense involved a number of transactions, the quantity used to determine the offense level is the largest quantity involved in any continuous 30-day period during the course of the offense." As so amended, §2D1.1(a)(3) would read as follows:

"(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below. If the offense involved a number of transactions, the quantity used to determine the offense level is the largest quantity involved in any continuous 30-day period during the course of the offense."

III. Criminal History

A number of relatively inconsequential misdemeanor and petty offenses can run up the criminal history score and are not the sort of offense that should be counted for criminal history purposes.

Amendment: Amend §4A1.2 (c) to read as follows:

"(c) Sentences Counted and Excluded

"Sentences for all felony offenses are counted. Sentences for misdemeanors and petty offenses are counted, except that sentences for the following, and offenses similar to them, by whatever name they are known, are never counted:

"careless or reckless driving
"contempt of court
"disorderly conduct or disturbing the peace
"driving without a license or with a revoked or suspended license
"false information to a police officer
"fish and game violations
"gambling
"hindering or failure to obey a police officer
"hitchhiking
"insufficient funds check
"juvenile status offenses and truancy
"leaving the scene of an accident
"local ordinance violation (excluding a local ordinance violation that is also a criminal offense under state law)
"loitering
"minor traffic infractions, such as speeding
"nonsupport
"prostitution
"public intoxication
"resisting arrest
"trespassing
"vagrancy."

IV. Sentencing Options

Congress, in 28 U.S.C. § 994(j), has directed the Commission to "insure that the guidelines 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 or an otherwise serious offense . . . ." The Commission has responded to this directive by including probation as a sentencing option if the guideline range is 0-6 months (for a first offender, this means an offense level of eight or less). We believe the Commission should publish an issues for comment to consider how better to implement § 994(j).

Amendment of Sentencing Table. Also consistent with the congressional directive in 28 U.S.C. § 994(j), in January of 2001, the Commission proposed a change to the Sentencing Table and requested comments on the proposed amendment. *See* 66 Fed. Reg. 7962, 8006 (Jan. 26, 2001). The Commission proposed the following amendment:

> "The Sentencing Table in Chapter Five, Part A, is amended by increasing Zone B by two levels in Criminal History Category I (so that Zone B contains offense levels 9, 10, 11 and 12 in Criminal History Category I); by increasing Zone B by two levels in Criminal History Category II (so that Zone B contains offense levels 6, 7, 8, 9, 10 and 11 in Criminal History Category II); by increasing Zone C by two levels in Criminal History Category I (so that Zone C contains offense levels 13, 14, 15, and 16 in Criminal History Category I); and by increasing Zone C by two levels in Criminal History Category II (so that Zone C contains offense levels 12, 13, 14, 15 in Criminal History Category II)."

66 Fed. Reg. 7962, 8006 (Jan. 26, 2001). It is our opinion that the sentencing table should be amended consistent with the proposed changes which were published in the Federal Register on January 26, 2001.

B. Eliminating Offense Level 43. The Commission should delete offense level 43 as unnecessary because level 42 already establishes a full range of adequate punishment from 360 months in prison, to a sentence of life in prison. If a statute calls for a mandatory life sentence, it is within the guideline range at offense level 42. Also, if a court finds that a life sentence is just punishment for an offense, level 42 provides that option.

Defending Liberty
Pursuing Justice

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Maura McManmon
Juvenile Justice Project Assistant
Erin Martell

June 4, 2004

The Hon. Ruben Castillo
Vice Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Priority for Amendment Cycle ending May 1, 2005

Dear Judge Castillo:

On behalf of the American Bar Association, I write to you in your capacity as the coordinator of Commission meetings to request that the United States Sentencing Commission issue guidance for courts considering motions for sentence modification for "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), as provided in 28 U.S.C. § 994(t). The Commission had considered setting the resolution of this issue as a priority for the previous amendment cycle, but ultimately did not do so. We have previously urged the Commission to take up this topic, most recently in June of last year.

The need to address the criteria for sentence modification under § 3582(c)(1)(A)(i) has not abated since that time. In the absence of guidance from the Commission, the Bureau of Prisons has interpreted its mandate under this statute narrowly, approving only a handful of petitions each year, and then only in cases where the prisoner is near death. We believe strongly that the statute was meant to be used more frequently and generously than in so narrow a class of cases. We also believe that the Bureau of Prisons is more likely to expand its own range if it can rely upon guidance from the Commission. *See* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001).

The 2004 amendment cycle was, of course, particularly challenging to the Commission in light of numerous congressional directives and substantial policy changes the Commission was required to implement. During the 2005 amendment cycle, however, the Commission now has the opportunity to return

amendment cycle, however, the Commission now has the opportunity to return to addressing what in fact is one of its original congressional directives as set forth at 28 U.S.C. § 994(t), namely, to provide policy guidance as to what factors constitute "extraordinary and compelling reasons" for purposes of sentence modification under 18 U.S.C. § 3582(c)(1)(A)(i).

As the federal prison population continues its rapid growth, the proportion of elderly or infirm inmates increases. Moreover, a recent study from the Sentencing Project indicates that there now are more inmates serving determinate life terms in the federal system than in any single state. *See* Marc Mauer, et al., The Sentencing Project, *The Meaning of "Life": Long Prison Sentences in Context* at 10, tbl. 2 (May 2004) (reporting current life-without-parole federal inmate population to be 5,062; California and Texas, the two state systems closest in size, have 2,984 and 0, respectively).

In addition to illness, disability, and old age, we urge the Commission to consider other factors arising after sentencing, such as changes in the law, extraordinary assistance to the government, compelling changes in personal or family circumstances, or some combination of these. The statute should also prove useful to effect a promised but undelivered consideration for assistance to the government, to correct unjustifiable disparity of sentence among similarly situated co-conspirators, or to cure mistakes in a sentence not discovered in time for the court to correct in the ordinary course. In addition to the above non-exhaustive factors, a prisoner's extraordinary suffering while incarcerated may constitute an extraordinary and compelling reason for modifying a sentence.

Furthermore, while 28 U.S.C. § 994(t) provides that "rehabilitation of the defendant alone will not be considered an extraordinary and compelling reason," this proviso evidently contemplates the possibility that a defendant's rehabilitation might combine with other equitable considerations to constitute extraordinary and compelling reasons to reduce the sentence.

Finally, we hope that the Commission will not consider expanding the applicability of 18 U.S.C. § 3582(c)(1)(A)(ii), in lieu of addressing § 3582(c)(1)(A)(i). Section § 3582(c)(1)(A)(ii) applies a parole-like approach to a narrow population of prisoners, those sentenced to life in prison under the federal "three strikes" provision, 18 U.S.C. § 3559(c). By contrast, § 3582(c)(1)(A)(i) is a tool for addressing extraordinary circumstances that may arise at any time in any prisoner's sentence, and its legislative history indicates that Congress intended it to have a broad applicability. *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).

It has been 20 years since Congress directed the Commission to promulgate policy guidance for the use of courts in considering motions to modify a sentence under §3582(c)(1)(A)(i). By now, it seems to us that there are extraordinary and compelling

reasons for the Commission to finally give this subject its careful and thorough consideration.

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

Sincerely,

Margaret Colgate Love
Chair, Corrections and Sentencing Committee

Enclosures

cc: All Commissioners
Charles Tetzlaff, Esq.
Norman Maleng, Chair, Criminal Justice Section

SENATOR DIANNE FEINSTEIN
Ranking Member
Subcommittee on Terrorism, Technology & Homeland Security
United States Senate Committee on the Judiciary

815 Hart Senate Office Building
Washington, DC 20510-6288
Tel # (202) 224-4933 Fax # (202) 228-2258

Facsimile Cover Sheet

TO: **Public Affairs-Priorities Comment**

FAX #: 502-4699

FROM: Montserrat Miller

SUBJECT: **Letter from Senator Feinstein**

TOTAL NUMBER OF PAGES SENT (<u>including</u> cover sheet):

If you do not receive all pages, please call: (202) 224-4933

COMMENTS:

Attention Public Affairs – Priorities Comment

Kindly accept the attached letter from Senator Dianne Feinstein with comments on possible priority policy issues for the amendment cycle ending May 1, 2005.

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

July 19, 2004

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

Dear Commission:

I understand that one of the United States Sentencing Commission's ("Commission") tentative priorities in the coming year is the continuation of your policy work regarding immigration offenses.

I strongly support this priority and ask that you consider reviewing and amending your guidelines and policy statements to ensure that the base offense levels and enhancements under Part L of the Sentencing Guidelines appropriately punish *foreign* passport and travel document fraud.

I am concerned that the current sentencing guidelines for US Attorneys prosecuting travelers seeking entry into the United States with fraudulent foreign passports and other travel documents are not strong enough. Maintaining the integrity of our borders is paramount to our national security. That integrity is compromised when foreign travelers believe that their illicit actions will not be punished, or will be punished lightly.

Not only do I believe that the base offense levels for violations of sections 2L2.1 and 2L2.2 of the Commission's Sentencing Guidelines should be increased; but I also ask that you consider illicit actions by terrorists as a penalty enhancer.

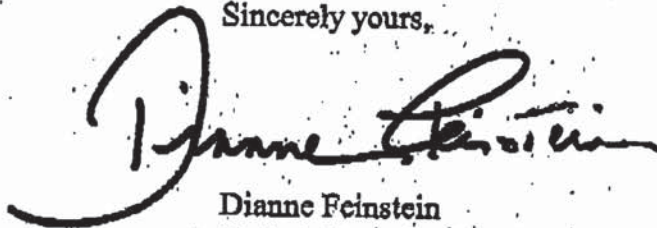
For instance, if a traveler seeking to enter the United States with a fraudulent passport or other travel document is linked to a Foreign Terrorist Organization, as defined by the Department of State, such offense should qualify as a "specific offense characteristic" thereby enhancing the penalties.

The Commission should also give consideration to clarifying in the Sentencing Guidelines that the fraudulent use of foreign passports for entry into the United States will be appropriately sentenced when prosecuted. It is important to punish those who use fraudulent US passports, but it is equally important to aggressively punish those who use fraudulent foreign passports.

I appreciate your consideration of my comments and I look forward to your response. You can contact me directly at 331 Hart Senate Office Building, Washington, DC 20510. In addition, you can contact Montserrat Miller on my staff regarding this issue.

Best regards.

Sincerely yours,



Dianne Feinstein
United States Senator

DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Rockville MD 20857

July 27, 2004

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

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

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[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)

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[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.

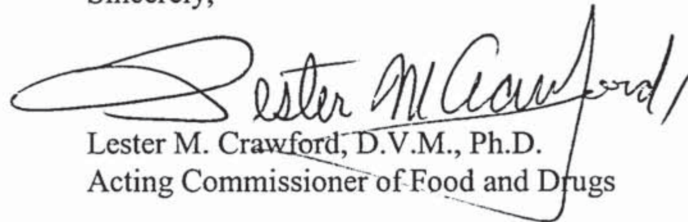
In the foregoing types of cases, the sentence will be governed by Section 2N2.1, with a base offense level of six and no enhancements for specific offense characteristics. FDA believes that Section 2N2.1 should be amended to provide for stiffer sentences for misdemeanor offenses that --while not involving 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
Sarah Hawkins, Associate Chief Counsel, FDA
Jonathan Wroblewski, Office of Policy and Legislation, DOJ
Eugene Thirolf, Office of Consumer Litigation, DOJ

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August 1, 2004

SENT BY EMAIL AND PRIORITY MAIL

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

Michael Courlander, Public Affairs Officer
United States Sentencing Commision
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment

Dear Commission:

The following sets forth our Public Comment for the amendment cycle ending May 1, 2005 as follows:

"With the constitutionality of the Federal Sentencing Guidelines in question even though the United States 'Sentencing Commission stands ready to work with Congress, the Department of Justice, and others on contingency plans in the event the Supreme Court determines that *Blakely* does in fact apply to the federal system',[1] never has an amendment cycle been more important to the continued work of the Commission. The fate of the amendments to the Organizational Sentencing Guidelines, Chapter Eight of the Federal Sentencing Guidelines, recently submitted to Congress with an anticipated effective date of November 1, 2004, hangs in the winds of uncertainty. These amendments *as sentencing rules*, based on the tireless work of the Ad Hoc Advisory Group in conjunction with public comment and the enactment of the Sarbanes-Oxley Act,

[1] Testimony United States Senate Committee on the Judiciary *Blakely v. Washington* and the Future of the Federal Sentencing Guidelines, 13 July 2004, United States Sentencing Commission.

set the necessary and much-needed high ethical standards for every type of business entity. Should these amendments not become effective, certain businesses will continue to ignore compliance standards, as so many have done in the past, at the expense of shareholders, employees and the public. Additionally, those business entities who value ethical day-to-day operations will be left with few guiding principles for corporate governance to adequately educate, train and discipline their officers and employees."

"For these reasons, the Commission should make the amendments to Chapter Eight of the Federal Sentencing Guidelines a top priority for the amendment cycle ending May 1, 2005."

Thank you very much for the opportunity to provide the above Public Comment.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

DIANNE FEINSTEIN
CALIFORNIA

United States Senate

WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

July 19, 2004

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

Dear Commission:

I understand that one of the United States Sentencing Commission's ("Commission") tentative priorities in the coming year is the continuation of your policy work regarding immigration offenses.

I strongly support this priority and ask that you consider reviewing and amending your guidelines and policy statements to ensure that the base offense levels and enhancements under Part L of the Sentencing Guidelines appropriately punish *foreign* passport and travel document fraud.

I am concerned that the current sentencing guidelines for US Attorneys prosecuting travelers seeking entry into the United States with fraudulent foreign passports and other travel documents are not strong enough. Maintaining the integrity of our borders is paramount to our national security. That integrity is compromised when foreign travelers believe that their illicit actions will not be punished, or will be punished lightly.

Not only do I believe that the base offense levels for violations of sections 2L2.1 and 2L2.2 of the Commission's Sentencing Guidelines should be increased; but I also ask that you consider illicit actions by terrorists as a penalty enhancer.

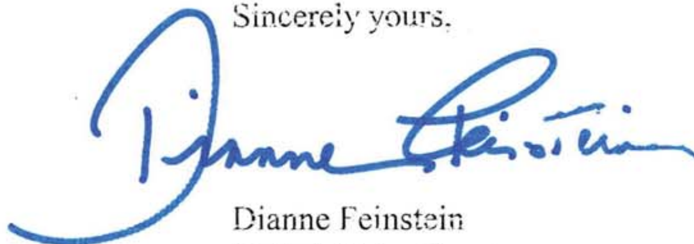
For instance, if a traveler seeking to enter the United States with a fraudulent passport or other travel document is linked to a Foreign Terrorist Organization, as defined by the Department of State, such offense should qualify as a "specific offense characteristic" thereby enhancing the penalties.

The Commission should also give consideration to clarifying in the Sentencing Guidelines that the fraudulent use of foreign passports for entry into the United States will be appropriately sentenced when prosecuted. It is important to punish those who use fraudulent US passports, but it is equally important to aggressively punish those who use fraudulent foreign passports.

I appreciate your consideration of my comments and I look forward to your response. You can contact me directly at 331 Hart Senate Office Building, Washington, DC 20510. In addition, you can contact Montserrat Miller on my staff regarding this issue.

Best regards.

Sincerely yours,



Dianne Feinstein
United States Senator

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND
UNITED STATES COURTHOUSE
ONE EXCHANGE TERRACE
PROVIDENCE, RHODE ISLAND 02903

ERNEST C. TORRES
CHIEF JUDGE

June 28, 2004

United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002

Dear Commission Members:

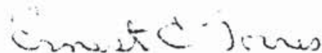
I suggest that the Sentencing Commission consider revising Guideline § 2J1.6 to reflect the following:

1. The difference in level of seriousness between a failure to report for trial and a failure to report for a pretrial proceeding.

2. The difference in level of seriousness between a failure to report for trial in a single-defendant case and a failure to report for trial in a multi-defendant case.

The adverse impact on the judicial process when a defendant fails to report for trial is greater than the impact when the defendant fails to report at some other stage of the proceeding because the trial is delayed thereby disrupting the court's calendar, inconveniencing jurors and witnesses and, perhaps, rendering them unavailable. The adverse consequences are magnified in multi-defendant cases because the court must either delay the trial until the defendant is found or try the remaining defendants and face the prospect of a second trial when the absent defendant is found. In addition, the defendant in a multi-defendant case has a greater incentive to flee in the hope that he may obtain some advantage by assessing the case presented against the remaining defendants.

Sincerely yours,



Ernest C. Torres
Chief Judge

ECT:dms

MEMORANDUM

TO: Honorable Ricardo Hinojosa, Chair
Commissioners

FROM: Charles R. Tetzlaff

DATE: August 12, 2004

SUBJECT: Retroactivity of May 2004 Amendments

At your public meeting on April 8, 2004, you voted to temporarily suspend Rule 4.1 of the Rules of Practice and Procedure which requires consideration of retroactivity at the time an amendment is promulgated. This was done to give time to reflect on the issue and consider retroactivity in the summer.

Three of the May 2004 amendments have been identified as lowering sentencing ranges and, therefore subject to retroactivity consideration.

The Commission has historically used the three factors suggested in the Background Commentary to §1B1.10 for its retroactivity analysis. These three factors are: the purpose of the amendment, the magnitude of the change in the guideline range, and the difficulty in applying the amendment retroactively.

1. Amendment No. 1 - Homicide and Assault

The base offense level of §2A2.2 (Aggravated Assault) was reduced from level 15 to level 14.

- Purpose of the amendment

The purpose of this amendment was to reduce the severity of punishment in those aggravated assault cases in which no bodily injury occurred. Many of these cases involved Native-American defendants. The Native-American Advisory Group concluded that federal defendants received sentences for aggravated assault which were, on average, longer than comparable cases in state court.

- Magnitude of the change

OPA estimates that only 24 offenders who would still be in prison on November 1, 2004, would be affected by this amendment. The average sentence for FY '01 cases would be reduced from 46 to 42 months for an average reduction of four months.

There is a provision in §1B1.10 that the Commission generally does not make amendments retroactive that reduce the maximum of the guideline range by less than six months. Since it appears that the maximum of the guideline range is reduced by six months by this guideline change, this provision would not preclude the Commission from considering retroactivity.

- Difficulty in applying the amendment retroactively

    Given so few cases, it would not be difficult to apply this guideline change retroactively.

2. Amendment No. 6 - Mitigating Role

It will be recalled that the Commission amended §2D1.1 in 2002 by adding a cap at level 30 for a defendant who received a mitigating role adjustment. That amendment was never made retroactive. This 2004 amendment modifies §2D1.1(a)(3) to provide those defendants who receive a mitigating role adjustment, a graduated reduction of the base offense level of between 2 to 4 levels at base offense level 32 or above. A similar amendment was made to §2D1.11 (Listed Chemicals).

- Purpose of the amendment

Similar to the 2002 amendment, this amendment seeks to limit the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority within the drug trafficking organization and have a lower level of culpability such as "mules" or "couriers." This amendment seeks to more precisely address proportionality concerns by means of graduated reductions.

Similar treatment was given to §2D1.11 since there was no reason to treat defendants sentenced under this guideline differently.

- Magnitude of the change

OPA estimates 4,167 offenders still in prison on November 1, 2004 could be impacted were the amendment to §2D1.1 made retroactive. Only two cases would be affected were

§2D1.11 made retroactive. Approximately 26% of these offenders are within one-year of their release date. It is estimated that sentences for FY '00 cases would be reduced from 68 to 53 months for an average reduction of 15 months.

- Difficulty in applying the amendment retroactively

Such a large number of cases could have a burdensome effect on probation officers in recalculating sentences as well as upon the court system as a whole.

3. Amendment No. 12 - Miscellaneous Amendments Package

An application note was added to §4B1.4 (Armed Career Criminal) to address an apparent "double counting" issue presented when a defendant is convicted of both 18 U.S.C. § 924(g) (Felon in Possession) and an offense such as 18 U.S.C. § 924©) (Use of a Firearm in Relation to Any Crime of Violence or Drug Trafficking Crime) or similar offense carrying a mandatory minimum consecutive penalty.

- Purpose of the amendment

The purpose of the amendment is to avoid counting twice the increased culpability of a defendant who uses or possesses a firearm in connection with a crime of violence or controlled substance offense. Such conduct not only formed the basis for an enhanced guideline offense level 34 and an enhanced Criminal History Category VI, but was also the basis for Congress imposing a mandatory minimum. The Commission felt it was sufficient that only the mandatory minimum took the conduct into account.

- Magnitude of the change

OPA estimates that 156 offenders who will still be in prison on November 1, 2004 could be affected by this amendment. The average sentence of these offenders is 344 months. OPA was unable to estimate the applicable sentence reduction.

- Difficulty in applying the amendment retroactively

It does not appear to be difficult to apply the amendment retroactively given the numbers involved and the nature of the recalculation.

Alia Philpott
135 Chestnut Lane #409
Richmond Hts, Ohio 44143

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington DC 2002-8002

Attn: Public Affairs-Priorities Comment

To Whom It May Concern:

I am honored to have the opportunity to express my concerns to the Sentencing Commission regarding the Sentencing Guidelines throughout the U.S. The Sentencing Guidelines to this point has been unconstitutional and have conveyed an astounding uprising cost to taxpayers throughout this Country. My family specifically have further been effected by the sentencing laws when my fiancée was sentenced to almost 12 years in prison for a low-level, non-violent drug offense. The sentence he and the three other young men received were unjust and excessive. The crime committed probably would have yielded a 18 month sentence however due to the current guidelines and Mandatory Minimum Drug Laws, judges are left little discretion to downward depart where they feel is appropriate.

If I understand correctly, the purpose of the guidelines are to uniformly sentence every person fairly in regards to the factors in the crime committed. I understand that this would be done so that each defendant will receive the same punishment for the same crime. The guidelines have served its purpose to an extent, but in some instances, that is not always the case. As in my fiancée's case, a different person may receive a different sentence based on their prior conviction. One of the young men involved in my fiancee's case, received the same charges as my fiancée, however he received almost half the sentence as my fiancée because of the Safety Valve. He was a first time offender. The saddest part is, he was the one who arranged the whole deal. Even the time he received would rule as unfairness because there is no balance between the punishment and the crime. The amount of time issued out to defendants for these low-level crimes, have proven to be unmerited, as they have really served no purpose in stopping the drug problem in the United States. The biggest problem are the big time drug dealers, however they are not the target.

While I'm not writing to discuss our particular case but we serve as prime example of what the sentencing guidelines really do for Americans. The way we are spending taxpayers dollars to build new prisons, not to mention housing these inmates for years at a time is unjust. The average cost to house a prisoner would be more then it would cost to send them to a four year University. I am not implying that instead of sending a prisoner to jail, send him to school, but the implication I am suggesting is that we invest taxpayers money more wisely. I believe felons should be reprimanded for their actions

however, I also believe they should be given an opportunity to enter back into society without the burden of the judicial system weighing on their lives. Rehabilitation and education are two good sources to start with.

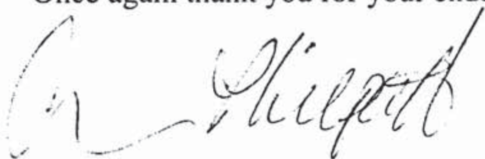
Another issue that should be considered are the families and children that are left behind and effected by such unruly sentencing. My fiancée left behind a 10-year-old son, which could possibly mean that for the next 10 or 11 years, he have no father in his life. He is being raised by a single mother whom turns to the same government system to get support in help raising her son. Myself on the other hand is a tax-paying citizen that is contributing to this mad chaotic system in which my fiancée is a victim. He was also raised by a single mother in the welfare system with no father in his life. Unfortunately it creates a cycle, which means we could see history repeat itself. If judges have the ability to enhance a person based on his prior convictions, they should also be able to downward depart based on the person's current situation and status. Areas of consideration would be: was the defendant working, was he enrolled in school, did he have a support system, was the crime violent, was he involved in any activities that prove he was a sound responsible member of society outside of the litigating factors in his case? All of these factors applied to my fiancée. We flooded the judge with letters of support from people, churches, and community re-entry programs that have extended their resources to help keep young men from becoming a once again victim to such a cruel judicial system. The director of one organization in particular that I became involved with to help my fiancée, is still in contact with me in regards to his case and ensures me that upon his return to society, he will help him to rightfully gain employment. This program also help rehabilitate ex-offenders, help them enroll in school, help them attain employment and even obtain housing. This is another source we can devote tax dollars to.

Since my fiancée have been arrested I have researched and become familiar with the laws, cases, rules, guidelines and stories regarding the Sentencing Guidelines and it's obvious that a reform is long over due. As one justice stated "It's time to get smarter on crime instead of tougher on crime"

The question that authorities, law makers and those responsible for creating these guideline should ask is, what purpose have they really served and how has the guidelines helped the "War On Drugs"

I speak on behalf of all the families effected by these Guidelines and the families that are paying for the effect of the latter. Your attention and action to this issue is greatly appreciated. Hopefully within the near future with cases such as Blakely VS Washington and Bills to "Revive the Federal Parole Board" we will begin to see a more adequate Sentencing System and see our families reuniting again sooner than later.

Once again thank you for your endeavors in making a change.



August 5, 2004

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002
Attn: Public Affairs - Priorities Comment

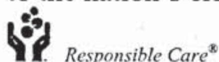
Re: Comments on the Commission's Notice of Proposed Priorities for the Amendment Cycle Ending May 1, 2005

Dear Sir or Madam:

The American Chemistry Council (ACC or the Council) is pleased to submit these comments on the Commission's proposed priorities for the amendment cycle ending May 1, 2005 (69 Fed. Reg. 36148, June 28, 2004). As illustrated by the Council's substantial participation in the Commission's recently-concluded proceedings involving the Organizational Guidelines and hazardous materials offenses, the Council is greatly interested in several areas of the Commission's work.[1]

At the outset, we note that the Commission's proposed priorities notice was filed with the Office of the Federal Register exactly one day after the Supreme Court issued its opinion in *Blakely v. Washington*, No. 02-1632 (U.S. June 24, 2004). We assume that addressing the impact of *Blakely*, and the related cases that the Court will hear on October 4, will be the Commission's top priority for this amendment cycle. This is obviously proper.

[1] ACC represents the leading companies engaged in the business of chemistry, and our members are responsible for about 90% of basic chemical production in the United States. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Our members employ approximately 556,000 employees, with sales of $238 billion and 1,447 facilities. Chemistry companies invest more in research and development than any other business sector. Safety and security have always been primary concerns of ACC members, and they have only intensified their efforts, working closely with government at all levels, to improve security and to defend against any threat to the nation's critical infrastructure.



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http://www.americanchemistry.com

Nevertheless, we also observe that the proposed priorities for this cycle include "[a] general review of, and possible amendments pertaining to, hazardous materials, and possibly other environmental offenses under chapter 2, part Q (Offenses Involving the Environment)."

ACC member companies ship substantial quantities of hazardous materials. This explains the degree of interest shown by ACC in the Commission's consideration, earlier this year, of additional guideline provisions addressing hazardous materials offenses. In those interactions, ACC questioned the need for changes to the guidelines in this area. We believe that the approach to hazardous materials offenses that the Commission subsequently adopted in its 2004 guideline amendments was appropriately narrow and measured. Nor has anything changed, to our knowledge, since the Commission's April 8 vote that would warrant a different approach. We believe the new changes to guideline 2Q1.2 should be allowed to take effect in November, and that the Commission should monitor their operation, before considering any further changes on this topic.

ACC members are also heavily regulated by almost all the major federal environmental statutes -- to a much greater degree than they are under hazardous materials laws. We were closely involved in the Commission's consideration, a decade ago, of a separate guideline focused on environmental offenses. While, again, we perceive no need to modify Part 2Q, we would be very interested in any proposed changes in that regard -- as, we expect, would other organizations representing businesses heavily regulated under environmental laws.

ACC appreciates this opportunity to comment on the instant notice. If you have any questions, please do not hesitate to contact the undersigned at 703-741-5166.

Sincerely,

James W. Conrad, Jr.
Assistant General Counsel

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

August 5, 2004

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

Blakely Decision

On June 24, 2004, in its decision in Blakely v. Washington, 2004 WL 1402697, the Supreme Court applied the rule announced in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), to invalidate, under the Sixth Amendment, an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. The Court held that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Significantly, the Court did not wholly invalidate the Washington state guidelines. Nor did it express any opinion on the federal guidelines. Indeed, the Court explicitly stated, "[t]he Federal Guidelines are not before us, and we express no opinion on them." Ibid. Also significant is the fact that the Court did not overrule Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of the Commission and the federal sentencing guidelines); Edwards v. United States, 523 U.S. 511, 514-15 (1998) (holding that the court rather than the jury can determine facts increasing the guideline range within the statutory maximum) or the matrix of other cases upholding judicial fact-finding at sentencing.

Nevertheless, Blakely has cast a shadow on the federal guidelines and has caused significant uncertainty in the federal criminal justice system. In the weeks since Blakely was decided, some lower courts have affirmed the continued validity of the federal guidelines; others have invalidated the guidelines entirely, while others have applied the guidelines in ways never contemplated by the Congress or the Commission. A number of courts have imposed dramatically inadequate sentences for serious and dangerous offenders, severing parts of the guidelines and then applying the remainder in a manner inconsistent with the clear intent of this Congress and Congresses over the past twenty years.

The Department of Justice is committed to the principles of sentencing reform, and continues to believe that the federal sentencing guidelines system is significantly distinguishable from the Washington state guidelines system at issue in Blakely. We believe the design of Congress and the Commission for arriving at federal sentences – utilized in hundreds of thousands of cases over the past 15 years – meets all constitutional requirements. We therefore sought review of appropriate cases before the Supreme Court and asked the Court to expedite the same. The Supreme Court has already agreed to hear the cases on the first day of the new court term. We are hoping to have a definitive ruling soon thereafter and thus put an end to the uncertainty surrounding the guidelines.

In the meantime, we believe that the Commission's first priority in this upcoming cycle should be to closely monitor the emerging litigation and examine all of the available options pending a definitive ruling from the Supreme Court. At the same time, we believe that the Commission should continue its regular work. Thus, as in any amendment cycle and as required by statute, the Department of Justice has identified a number of issues which we believe warrant consideration this term, including pressing issues such as national security issues and gun trafficking. We also recommend that the Commission address issues that were left unresolved last year, and create guidelines to implement new legislation.

National Security Issues

Immigration

Last year, the Commission recognized the seriousness of passport fraud and its effect on national security, adding a specific offense characteristic that provided an increase of four levels if the defendant fraudulently used or obtained a United States passport, and opening the door for upward departures if a passport was used or obtained to engage in a terrorist activity. In doing so, the Commission responded to Secretary of State Colin Powell's letter noting that "maintaining the integrity of U.S. passports and visas is a critical component of our global effort to fight terrorism" and recognized that such an amendment would be "a clear signal that the United States Government recognizes the severity of passport and visa fraud and the importance of maintaining our border security."

While this was an excellent start, we urge the Commission to continue the work it began by increasing 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 the event that the Commission does examine immigration offenses generally, the Department will continue to work with the Commission to ensure appropriate immigration guidelines.

Counter-Espionage

The Commission should develop a new guideline for violations of the foreign agent notification offense found at 18 U.S.C. § 951. Section 951 prohibits persons not officially affiliated with a foreign government or engaged in a legal commercial transaction from knowingly operating as an agent of a foreign government in the United States without first notifying the Department of Justice. The statute is important because it is directed primarily at persons who are engaged in clandestine activities in the United States on behalf of foreign intelligence services.

Yet this criminal statute has no direct or even fairly analogous guideline provision. As a result, prosecutors, defense counsel and district judges are left with no guidance in determining the appropriate sentence for violations of this offense. For the most part, the court's sentencing decisions appear to be an assessment of the actions undertaken by the defendant as a foreign agent, and a determination that the foreign government for which the agent acts is one for which the U.S. has imposed sanctions for national security and/or international terrorism reasons.

The difficulty in determining an appropriate sentence without a guideline provision or guidance has created a wide disparity in the sentences received by defendants for violations of § 951. For example, in 2004 an Iraqi-American was convicted under § 951 for various activities undertaken on behalf of the Iraqi intelligence service, including producing press identification cards for Iraqi intelligence officers and reporting on individuals in the United States opposed to the former Iraqi government. In 2003, an individual in Los Angeles pled guilty to a violation of § 951 for acting as an agent in the United States of the North Korean intelligence service. In 1998, a number of individuals either pled guilty or were convicted under 951 for engaging in clandestine activities on behalf of the Cuban intelligence service. In all three cases the courts and the Department of Justice struggled to find the appropriate analogous guideline, leading to the imposition of disparate sentences for essentially the same or similar conduct.

Although prosecutions under this statute were somewhat infrequent until recently, the number and frequency of prosecutions of this type are increasing and this trend is expected to continue if not accelerate. We urge the Commission to create a guideline for these offenses that ensures fair and consistent sentences.

Destructive Devices

Last year, the Commission made a strong statement against terrorism by adding a 15-level enhancement for offenses involving a portable rocket, missile or devices for launching a portable rocket or missile. These destructive devices, known as man-portable air defense system (MANPADS), present a tremendous risk to public safety because of their range, accuracy, destructive capacity and concealability.

The Department urges the Commission to continue its work by addressing the threat

caused by other destructive devices Currently, there is a 2-level increase for offenses involving destructive devices, under §2K2.1. This does not nearly address the serious risks that destructive devices present to public safety and our public infrastructure. Offenses involving the presence or use of destructive devices in public areas – such as schools, shopping malls, theaters, sports arenas, trains, cars and every other public place or form of transportation – require penalties equal to the risk of harm. The Commission recognized the need for enhanced penalties when it created the possibility of an upward departure based upon the risk to the public. Given the wide range of both culpability and potential for harm, we propose a sliding scale of punishment for the use or possession of destructive devices. We suggest that a risk table, based upon the risk of public harm, would more adequately address the differing degrees of harm caused by destructive devices.

Gun Trafficking

Gun traffickers put guns in the hands of convicted felons and others who want to use a gun during a crime – often a violent crime – without having the gun traced back to the trafficker. Gun traffickers deliberately circumvent the background check and record keeping requirements of legal commerce in order to supply guns to prohibited persons or persons with illegal intentions. 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; 17 percent of these guns were associated with homicide or robbery. The strong tie between trafficked firearms and violent crimes underscores the great harm of gun 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, gun traffickers may often receive sentences that do not match the seriousness of the harm caused by their offenses. In order to address these issues, the department recommends that the Commission consider the creation of a new offense characteristic in §2K2.1 to define 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 ought to consider whether to increase the sentencing enhancement in §2K2.1(b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers, as such offenses are often committed in furtherance of firearms trafficking. By increasing sentences for firearms-trafficking offenses to reflect the serious harm such offenses may cause, the guidelines would provide a stronger deterrent and better reflect that harm.

New legislation

Antitrust violations

On June 22, 2004, the President signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (6/22/2004). Section

215 of that Act increases criminal penalties for violations of Sherman Act §§ 1-3, 15 U.S.C. §§ 1-3. For persons other than corporations, the maximum term of imprisonment is increased from 3 years to 10 years with maximum fines increased from $350,000 to $1 million. Maximum criminal fines for corporations are increased from $10 million to $100 million. The legislation had three purposes: to acknowledge that criminal antitrust violations are serious white-collar crimes; to provide additional deterrence to large-scale cartel violations involving hundreds of millions, and even billions, of dollars of affected commerce; and to permit the imposition of corporate criminal fines at the levels currently provided under the Sentencing Guidelines for antitrust offenses without the need to prove pecuniary gain or loss at the sentencing stage in order to invoke the alternative maximum fine provision in 18 U.S.C. § 3571(d).

For the first two purposes to be given effect, §2R1.1 needs to be amended. The Department recommends a base offense level for antitrust violations so that any person convicted of an antitrust violation (who does not qualify for a §5K1.1 substantial assistance departure) receives at least a Zone C sentence, even after receiving a 2-level downward adjustment for acceptance of responsibility. We also recommend some increase to the offense levels currently provided for violations affecting up to $100 million in commerce (the current highest volume of commerce offense level adjustment), and new adjustments to provide higher offense levels for larger-scale antitrust violations affecting as much as $1 billion in commerce.

The increase in maximum Sherman Act corporate fines was intended to permit the government to obtain fines at existing Guidelines levels without the need to prove pecuniary gain or loss under 18 U.S.C. § 3571(d) and does not warrant any amendment to the Sentencing Guidelines, as is evidenced by the legislative history for the Act. As such, the Department would oppose any motion to eliminate the special fine instruction in §2R1.1(d)(1) of using 20 percent of the volume of affected commerce in lieu of pecuniary loss under §8C2.4(a)(3), or to lower the 20 percent multiplier, as these would defeat the purpose of the legislation by requiring that we prove gain or loss under §8C2.4(a) or otherwise reduce criminal fines for antitrust violations.

CAN-SPAM Violations

Last year, in response to the passage of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, the Commission approved guideline changes to implement CAN-SPAM offenses, creating a sentence enhancement if a defendant improperly obtains e-mail addresses for the purpose of spamming, an increased sentence for mass marketing, and additional sentencing increases based on the amount of loss and number of victims. The CAN-SPAM legislation also included increased sentences for the spamming of sexually explicit material. However, last year, the Commission did not create a guideline for this offense because the Federal Trade Commission (FTC) had not yet issued its regulations governing the rules for marks and notices that must be included in sexually oriented commercial email. Now that the FTC has issued the regulations, we encourage the Commission to revisit CAN-SPAM and to create an appropriate guideline.

Departures

In recent years, the Department has been engaged in a dialogue with the Commission in an effort to reduce unwarranted sentencing disparity among similarly situated offenders. The Department remains committed to this goal, and thus encourages the Commission to continue to monitor sentencing departures imposed under the guidelines and pursuant to the application of Blakely to the guidelines.

Felon-in-Possession

The Department urges the Commission to 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* 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).

Section 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 Commission should clarify this point this coming term. We agree 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).

Cumulative Enhancements

The Department is also concerned about the Second Circuit's decision in United States v. Lauersen, 362 F.3d 160 (2d Cir. 2004), which held that cumulative effect of upward sentencing

enhancements warranted a downward departure. The court found that "the Commission is unlikely to have considered the combined effect upon sentencing range minimums of every group of enhancements that could be imposed under the Guidelines." The court reasoned that the offense level adjustments and the increased degree of enhancement at the higher levels of the sentencing table resulted in adding more time to the sentence than would have occurred if the adjustments had been applied at the lower levels of the sentencing table. We believe that the reasoning is contrary to the Commission's intent and inconsistent with the guidelines framework. As such, we urge the Commission to examine the issue closely and clarify its intent regarding the cumulative effect of upward sentencing enhancements.

International Parental Kidnapping Violations

Currently, violations of the International Parental Kidnapping Crimes Act, 18 USC 1204, are sentenced under U.S.S.G. § 2J1.2, the obstruction of justice guideline. This guideline has a base offense level of 14 and does include enhancements relevant in these cases. Such enhancements should increase a defendant's sentence if: a child is retained abroad at the time of sentencing; a kidnapping involved violence or the threat of violence; a child was held abroad for a long time; a defendant concealed the child from U.S. or foreign authorities; and the defendant perjured himself or worked a fraud upon a foreign court or authority to obtain a foreign custody order. This new guideline should have a base offense level sufficient to ensure that offenders receive incarceration. More importantly, it should provide an incentive for defendants to return kidnapped children to this country. The lack of such an incentive under the current applicable guideline is a critical problem in international parental kidnapping cases, as return of the kidnapped children is the single most important goal served by the prosecution.

Hazardous Materials

Among the Commission's published priorities for the coming year is a general review and possible amendments of hazardous materials and other environmental offenses under Chapter Two, Part Q. Last year, the Department worked closely with the Sentencing Commission on revisions to the guideline treatment of hazardous materials transportation offenses. While we continue to believe that adoption of a separate guideline specifically tailored to such offenses would have been preferable, we recommend that the Commission defer further revisions to the guideline treatment of hazardous material transportation offenses until the courts, prosecutors, and defense bar have gained experience applying §2Q1.2 as modified. With respect to the possibility of a broader review of Part 2Q, the Department does not believe that it is warranted at this time. The courts, the regulated community and federal law enforcement authorities have developed a settled understanding of how Part 2Q is to be interpreted and applied. Changes now, without a demonstrated need for them, would generate additional litigation, but probably not more effective guidelines.

Compassionate Release

If the Commission considers policy statements pertaining to compassionate release programs, as noticed in its proposed priorities for the coming term, the Department, through the Bureau of Prisons, is interested in working with the Commission on development of policy statements related to sentence reductions under 18 U.S.C. § 3582. We believe that the Bureau of Prisons' substantial experience and expertise regarding compassionate release could greatly benefit the Commission in developing a fair and adequate policy on compassionate release.

We look forward to working with the Commission during this coming year, which promises to present interesting issues and challenges in the wake of Blakely and in the ordinary course of business, to serve the public through our continuing efforts to improve sentencing policy.

Sincerely,

Deborah Rhodes
Counselor to the Assistant Attorney General

BAYLOR

UNIVERSITY

July 9, 2004

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

Enclosed is my public comment to the United States Sentencing Commission.

Sincerely,

Mark Osler
Baylor Law School

BAYLOR LAW SCHOOL
SHEILA AND WALTER UMPHREY LAW CENTER
1114 S. UNIVERSITY PARKS DR. • WACO, TEXAS 76706

Reform and Salvage Of The U.S. Sentencing Guidelines Post-*Blakely*

Mark Osler
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1114 South University Parks Ave.
Waco TX 76706

Background

On June 24, 2004, the United States Supreme Court effectively struck down substantial portions of the United States Sentencing Guidelines by finding analogous parts of the Washington State sentencing guidelines in violation of the Sixth Amendment right to a jury trial. Specifically, Justice Scalia, writing for the majority in Blakely v. Washington (2004 WL 1402697), found that without a specific jury verdict or admission by the defendant at a plea hearing, a judge could not sentence above the top of the guideline range determined by a base offense level.

This ruling makes unconstitutional the general usage of several provisions of the Federal Guidelines, including enhancements based on specific conduct (eg, the enhancement for the amount of loss in a theft under §2B1.1(b)(1)); relevant conduct under § 1B1.3; upward departures (§5K); and upward adjustments for victim status (§§ 3A1.1 & 2), role in the offense (§§ 3B1.1 & 3B1.2) and obstruction of justice (§ 3C1.1).

Left standing after Blakely are the base offense levels, downward adjustments for specific conduct (eg, the drug case "safety valve" provision in § 2D1.1(b)(6)); downward adjustments for mitigating role in the offense (§3B1.2); downward departures (§ 5K); and upward adjustments based on criminal history (eg, §§2K2.1(a)(4)(A) & 4B1.1).

Present Options and the Need for Reform

There are three possible avenues for equitable federal sentencing post-Blakely: (1) To mandate jury sentencing;[1] (2) To abandon the mandatory

[1] This would require amendment of Federal Rule of Criminal Procedure 32(i)(3), which does not allow for jury determination of sentencing issues in non-capital cases, reserving that power to "the court."

Guidelines altogether;[2] or (3) To adjust the Guidelines to retain their basic structure, provide uniformity, and comply with Blakely.

Proposal for Reform

A post-Blakely form of the federal Sentencing Guidelines, absent jury sentencing, would have to drop those current provisions which offend the Sixth Amendment. This remnant, however, would be unfairly asymmetrical, by restricting judicial discretion to raise, but not lower, a sentence. To reform the Guidelines while retaining symmetry, just two steps need to be taken:

1. The guideline ranges should be tripled in size, with the bottom of the range at the previous level. For example, what is now a 6-12 month range would be broadened to 6-24 months.[3] This would allow judges, in their discretion, to consider and include those factors previously included as the basis for upward adjustments and departures, while maintaining some level of uniformity.

2. The portions of the Guidelines presently offensive to Blakely should be stricken from the binding portions of the Guidelines and gathered in an Appendix to the Guidelines or a series of application notes, to guide judges in their discretion within the increased ranges.

Unlike jury sentencing or the complete abandonment of the Guidelines, such a change would offer continuity of procedure, an increased but limited role for judicial discretion, and the maintenance of some measure of uniformity while complying with the demands of Blakely.

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[2] This is currently barred by 18 U.S.C. § 3553(b), which requires the court to use the Guidelines in determining a sentence.

[3] This reform would require that Congress amend 28 U.S.C. § 944(b)(2), which currently restricts guideline ranges to six months or 25% of the bottom of the range.

MEMORANDUM

TO: Honorable Ricardo Hinojosa, Chair
Commissioners

FROM: Charles R. Tetzlaff

DATE: August 12, 2004

SUBJECT: Public Comment

Please find attached:

- Notice of proposed priorities and request for public comment
- List of parties submitting public comment
- Summary of public comment
- Public Comment

Public comment from the Federal and Community Public Defenders was submitted after the August 5, 2004 due date and has been included but not summarized. A summary will be made and forwarded next week.

Attachments

LIST OF PARTIES SUBMITTING PUBLIC COMMENT

1. U.S. Department of Justice
2. Dianne Feinstein, U.S. Senator
3. The American Chemistry Council
4. Workplace Criminalistics and Defense International
5. Mark Osler, Baylor Law School
6. Ernest C. Torres, Chief Judge, United States District Court, District of Rhode Island
7. American Bar Association, Margaret Love, Chair, Corrections and Sentencing Committee
8. Federal Public Defenders

PUBLIC COMMENT SUMMARY
Priorities for 2005 Amendment Cycle
AUGUST 12, 2004

Priority No. 1 - Implementation of crime legislation enacted during the second session of the 108th Congress warranting a Commission response.

U.S. Department of Justice

Antitrust Criminal Penalty Enhancement and Reform Act of 2004

The Department urges the Commission to take action in response to Section 215 of the Act which increases criminal penalties for violation of the Sherman Act §§1-3, 15 U.S.C. §§ 1-3. Specifically, the maximum term of imprisonment for persons other than corporations is increased from 3 years to 10 years with the maximum fines increased from $350,000 to $1 million. Further, maximum criminal fines for corporations are increased from $10 million to $100 million.

Two purposes of the legislation are to emphasize the seriousness of criminal antitrust violations and to provide additional deterrence to large-scale cartel violations involving hundreds of millions of dollars of affected commerce. The Department believes that to give effect to these aspects of the Act, §2R1.1 should be amended to provide a base offense level for antitrust violations. In this way, defendants convicted of antitrust violations who do not qualify for a §5K1.1 substantial assistance departure will receive at least a Zone C sentence (even if they receive a 2-level acceptance of responsibility adjustment). The Department also advocates an increase to offense levels for violations affecting up to $100 million in commerce and new adjustments for violations for antitrust violations affecting as much as $1 billion in commerce.

The third purpose of the legislation is to permit the imposition of corporate criminal fines at levels currently provided in the guidelines without having to prove pecuniary gain or loss at the sentencing stage in order to invoke the alternative maximum fine provision in 18 U.S.C. § 3571(d). While this provision does not mandate any changes or amendments to the guidelines, the Department states its opposition to any initiative to eliminate the special fine instruction in §2R1.1(d)(1) of using 20 percent of the volume of affected commerce in lieu of pecuniary loss under §8C2.4(a)(3), or to lower the 20 percent multiplier. Eliminating these instructions would defeat the purpose of the legislation by requiring proof of gain or loss under §8C2.4(a) or otherwise reducing criminal fines for these violations.

Priority No. 2 - Continuation of policy work regarding immigration offenses, specifically, offenses under §§2L1.1 and 2L1.2, and Chapter Two, Parl L, Subpart 2 (Naturalization and Passports.

Dianne Feinstein, United States Senator, California

Sen. Feinstein urges the Commission to review and amend the guidelines and policy statements to ensure that Part L of the guidelines appropriately punishes *foreign* passport and travel document fraud. She advances the notion that the base offense levels for §§ 2L2.1 and 2L2.2 should be increased to appropriately reflect the seriousness of individuals attempting entry into the United States with fraudulent passports. She also suggests a specific offense characteristic be added for "illicit actions by terrorists," for instances where a traveler linked to a Foreign Terrorist Organization (as defined by the Department of State) attempts entry into the U.S. using a fraudulent passport or other travel document. Finally, Sen. Feinstein urges the Commission to ensure the guidelines reflect appropriate punishment for the use of fraudulent *foreign* passports for entry into the United States.

U.S. Department of Justice

Last year the Commission added a four level SOC for instances where the defendant fraudulently used or obtained a United States passport and provided for an upward departure where passports were used or obtained to engage in a terrorist activity. The Department urges the Commission to continue its work relating to passport fraud by increasing the base offense levels for *all* passport offenses.

Priority No. 3 - Continuation of the "15 Year Study"

No comments were received regarding this priority.

Priority No. 4 - Continuation of multi-year research, policy work, and possible amendments relating to Chapter Four (Criminal History and Criminal Livelihood).

No comments were received regarding this priority.

Priority No. 5 - Continued review of data regarding incidence of downward departures and fast-track programs, in view of the Protect Act.

U.S. Department of Justice

The Department encourages the Commission to continue to monitor sentencing departures in addition to departures resulting from the application of *Blakely* to the guidelines.

Priority No. 6 - Continuation of work on cocaine sentencing policy in view of the Commission's 2002 report to Congress, Cocaine and Federal Sentencing Policy.

No comments were received regarding this priority.

Priority No. 7 - General review of the firearms guidelines in Chapter two, Part K (Offenses Involving Public Safety), including an assessment of non-MANPADS destructive devices.

U.S. Department of Justice

1. MAN-PADS

The Department commends the Commission on its work last cycle concerning the enhancement for offenses involving MANPADS. As a continuation of that work, the Department believes that the Commission should address the issue of appropriate penalties and enhancements for offense involving the use of other destructive devices. Currently, the two level increase under §2K2.1 for offenses involving destructive devices is not adequate. For example, penalties should be considered for offenses involving the use of destructive devices in public areas such as schools, shopping malls, theaters, sports arenas, trains, cars and other public place or form of transportation. The Department proposes the use of a sliding scale of punishment in the form of a risk table to reflect the differing degrees of harm these offenses create.

2. Felon-in-Possession

The Department advises the Commission to address the issue of downward departures for felons who possess guns based on §5K2.11. Specifically, courts have relied on §5K2.11 to depart downward based on a finding that the defendant would not have done anything illegal with the guns. This reasoning contravenes the original purpose of the prohibition: to prevent felons from possessing lethal weapons. The Department urges the Commission to clarify this point during this amendment cycle. (See case law cited in comment.)

3. Gun Trafficking

The Department argues that the harm caused by gun trafficking crimes are not adequately accounted for in the guidelines resulting in sentences that do not reflect the seriousness of the harm. Thus, the Department advocates the creation of a new offense characteristic in §2K2.1 to define firearms trafficking conduct. The new offense characteristic might provide for a scale of enhancements specifically applicable to firearms-trafficking schemes. The Department asks the Commission to also consider whether an increase in the sentencing enhancement in §2K2.1(b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers is warranted as such offenses are commonly committed in the course of firearms trafficking activities.

Priority No. 8 - Consideration of policy statements pertaining to compassionate release programs.

U.S. Department of Justice

The Department, through the Bureau of Prisons, states its interest in working with the Commission on the development of policy statements related to sentence reductions under 18 U.S.C. § 3582.

American Bar Association, Margaret Love, Chair, Corrections and Sentencing Committee

The ABA writes to urge the Commission to issue guidance for courts considering motions for sentence modification for "extraordinary and compelling reasons" pursuant to 18 U.S.C. §3582(c)(1)(A)(I). The ABA believes that the Commission policy statement should set forth what factors constitute "extraordinary and compelling reasons" and that those factors should include things other than instances where a prisoner is near death. For example, the ABA suggests that factors such as changes in the law which occur after sentencing, extraordinary assistance to the government, compelling changes in personal or family circumstances, or some combination of these are appropriate basis for granting reduction in sentence motions.

Priority No. 9 - General review of, and possible amendments to, hazardous materials, and possibly other environmental offenses under Chapter Two, Part Q (Offenses Involving the Environment).

American Chemistry Council ("ACC")

The ACC urges the Commission to permit the amendments to the hazardous materials offenses, which were adopted just this year, to become effective and be monitored before considering any additional changes to that guideline. The ACC asserts that there have been no changed circumstances between when the Commission adopted the amendments to §2Q1.2 and now to warrant additional consideration at this time. Additionally, the ACC indicates a continued interest in any changes to the environmental offenses guidelines considered by the Commission since its members are heavily regulated by many of the major federal environmental statutes.

U.S. Department of Justice

The Department believes that any additional consideration by the Commission on amendments regarding hazardous material transportation offenses should wait until the courts, prosecutors, and the defense bar have gained experience applying §2Q1.2 as modified last year. A broader review of Part 2Q is not warranted at this time as the courts, the regulated community and federal law enforcement authorities have not yet had time to understand and implement this guideline.

Priority No. 10 - Continued monitoring of, and/or possible amendments pertaining to, section 5 of the CAN-SPAM Act, Pub. L. 108-187.

U.S. Department of Justice

The Department urges the Commission to create an appropriate guideline for the increased penalties contained in the CAN-SPAM Act of 2003 for the spamming of sexually explicit material. Last year the Commission deferred action on a guideline for these types of offenses because the Federal Trade Commission (FTC) had not yet issued its regulations governing the rules for marks and notices (which must be included in sexually oriented commercial email). Now that the FTC has issued those regulations, the Department urges Commission action.

Priority No. 11 - Other miscellaneous and limited issues pertaining to the operation of the sentencing guidelines ...

U.S. Department of Justice

International Parental Kidnaping Violations

The Department advocates the creation of a new guideline to punish offenses committed in violation of the International Parental Kidnaping Crimes Act, 18 U.S.C. §1204. These offenses are presently sentenced under the Obstruction of Justice guideline at §2J1.2 which has a base

offense level of 14 and no specific offense characteristics. The Department urges the creation of a new guideline with a base offense level high enough to ensure that defendants receive incarceration. Further, the Department suggests the following enhancements to the guideline: (1) if a child is retained abroad at the time of sentencing; (2) if a kidnaping involved violence or the threat of violence; (3) if a child was held abroad for a long time; (4) if a defendant concealed the child from U.S. or foreign authorities; and (5) if the defendant perjured himself or worked a fraud upon a foreign court or authority to obtain a foreign custody order. The guideline should also provide an incentive for defendants to return kidnaped children to this country.

Counter-Espionage

The Department advocates the creation of a new guideline for violations of the foreign agent notification offense contained in 18 U.S.C. §951. This statute is directed at persons who are engaged in clandestine activities in the United States on behalf of foreign intelligence services. It requires individuals not officially affiliated with a foreign government or engaged in legal commercial transactions from operating as an agent of a foreign government in the U.S. without first notifying the Department of Justice.

This statute has no direct or analogous guideline provision. While prosecutions of these offenses are rare, the most recent three cases resulted in very different and disparate sentences. Courts have appeared to rely on an assessment of the defendants actions as a foreign agent and a determination of the status of the foreign government for which the agent acts (i.e.: whether the U.S. has imposed sanctions for national security and/or international terrorism reasons on the country).

Cumulative Enhancements

The Department voices its concern over the issue of cumulative enhancements which was addressed by the Second Circuit in United States v. Lauersen, 362 F.3d 160 (2nd Cir. 2004). The court held that cumulative effect of upward sentencing enhancements warranted a downward departure. The court found "the Commission is unlikely to have considered the combined effect upon sentencing range minimums of every group of enhancements that could be imposed under the Guidelines." The Department disagrees with the decision and urges the Commission to examine, and if necessary, clarify its intent regarding the issue of the cumulative effect of upward sentencing enhancements.

Priority No. 12 - Amendments to the Commission's Rules of Practice and Procedure regarding retroactivity, public access to Commission materials, and access to nonpublic Commission meetings.

No public comment was received regarding this priority.

Comment Regarding U.S. v. Blakely

Mark Osler, Assoc. Professor of Law, Baylor University

Professor Osler advances two proposals for reforming the Federal Sentencing Guidelines in light of the Supreme Court's *Blakely* decision. First, Prof. Osler states that the guideline ranges need to triple in size with the bottom of the range at the previous level in order to permit judges to consider factors previously included as the basis for upward adjustments and departures. For example, a 6-12 month range would become a 6-24 month range thereby allowing a level of uniformity. Second, Prof. Osler suggests that the portions of the guidelines that offend *Blakely* be deemed not binding and relegated to an Appendix to the guidelines or a series of application notes to be used as a guide by judges in their discretion within the increased ranges. These changes will effect continuity of procedure, maintenance of judicial discretion and uniformity which comply with the demands of *Blakely*.

U.S. Department of Justice

The Department presents a brief recitation of the holding in the Blakely case and the ensuing confusion and uncertainty it has wrought in the federal criminal justice system. The Department continues to believe in the constitutionality of the federal sentencing guidelines system and believes that the Supreme Court will render a decision early in the Court's new term this fall. Meanwhile, the Department believes that the first priority this amendment cycle for the Commission is a continued monitoring of the emerging litigation and examination of all available options pending a definitive ruling from the Supreme Court.

Miscellaneous Comment

ERNEST C. TORRES, Chief Judge, United States District Court, District of Rhode Island

Judge Torres recommends making to revisions to Guideline § 2J1.6 (1) to reflect the difference in level of seriousness between a failure to report for trial and a failure to report for a pretrial proceeding; and (2) to reflect the difference in level of seriousness between a failure to report for trial in a single-defendant case and a failure to report for trial in a multi-defendant case.

WORKPLACE CRIMINALISTICS AND DEFENSE INTERNATIONAL, L. A. Wright, Legal Criminalist/Consulting Expert

Mr. Wright urges the Commission to make the amendments to Chapter Eight a top priority. He expresses his concern that the amendments to the Organizational Sentencing Guidelines from last

amendment cycle may not become effective on November 1, 2004 due to the Supreme Court's ruling in *Blakely*. He urges the Commission to make the implementation of these amendments a priority.

United States Senate

WASHINGTON, D.C. 20510-0504

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