Congress of the United States

Washington, DC 20515

March 22, 2010

The Honorable William K. Sessions III
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Sessions,

As Members of the House and Senate Committees on the Judiciary, we write to express our strong opposition to the adoption of the Sentencing Commission's proposed amendments to the Sentencing Guidelines, specifically the proposed addition to § 5C1.3 (Substance Abuse Treatment Program as Alternative to Incarceration for Certain Drug Offenders) (and related proposed amendments) and the proposed amendment to § 5H (Specific Offender Characteristics).

As a general proposition, these proposed amendments are inconsistent with the congressional intent in passing the Sentencing Reform Act of 1984, namely, to eliminate unwarranted disparity in sentences as between two defendants convicted of similar offenses. We believe these proposed amendments will do little more than further exacerbate existing sentencing disparity trends under post-*Booker*[1] Guidelines.

The Sentencing Commission's own data demonstrate the increasing rate of sentencing disparity in the federal system. According to your recently released report "Demographic Differences in Federal Sentencing Practices: An Update of the *Booker Report's* Multivariate Regression Analysis," in the years immediately preceding the *Booker* decision, no statistically significant difference was observed in the sentences imposed on black male offenders compared to white male offenders. In fact, no statistically significant difference between the sentences imposed on these two groups was observed until after the *Booker* decision in January 2005. These differences appear to have been increasing steadily since that decision.

This report confirms what we feared would result from *Booker* – a slow, steady devolution to inconsistent, *ad hoc* sentencing as in the pre-Guidelines era. The Guidelines are intended to provide generally consistent and reasonably predictable sentences for similarly situated defendants brought before different judges. Although the Guidelines are currently advisory, we strongly oppose amending them in such a way as to invite even greater sentencing inconsistencies.

[1] *U.S. v. Booker*, 543 U.S. 220 (2005).

The Commission's Multivariate data report underscores our belief that additional factors for consideration at sentencing, such as those the Commission has proposed, would only result in a greater variety of (and disparity in) outcomes, less certainty in punishment, and a significantly diminished deterrent effect.

The proposed amendment to § 5C1.3 directly contradicts Congress' intent to impose serious penalties for federal drug offenses, particularly drug trafficking. Congress explicitly prohibits probation (or parole) for certain drug trafficking offenses under the Controlled Substances Act. "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein."[2] The amendment to § 5C1.3 runs directly counter to the letter and intent of this congressional mandate.

Although we support effective treatment programs for drug offenders, we do not support eliminating any penalty in the name of treatment. The Guidelines already provide appropriate instruction for those cases that warrant a significant downward departure. Section 5C1.2, the so-called "safety valve," authorizes the court to depart below a statutory minimum for those defendants who meet the five criteria.

We believe it is counter to congressional intent in establishing these penalties to take the further step proposed in this amendment of *rewarding* "safety valve" defendants with probation. Although a reduced sentence may be appropriate for these defendants, the amendment to § 5C1.3 goes too far in eliminating any culpability for criminal conduct.

To be sure, the handful of states that have recently established drug treatment programs as an alternative to incarceration for state defendants have limited such programs' availability to criminals convicted only of simple possession. If this amendment were adopted, the Guidelines would extend the availability of this softened sentencing beyond defendants guilty of simple possession to those convicted of drug trafficking offenses (21 U.S.C. § 841 (criminalizing manufacture and distribution of controlled substances)), including importation and exportation of harmful narcotics and other controlled substances (21 U.S.C. § 960). Such a drastic departure from current sentencing practices will seriously diminish any deterrent effect that the possibility, or the certainty, of receiving a sentence that would require a period of incarceration might otherwise have.

Many policy and potential funding questions arise from the prospective imposition of this amendment and the criteria that a defendant would have to meet to be eligible. For example: Who would not want to participate in a treatment program if the alternative is incarceration? Are there enough treatment programs to accommodate all of the drug offenders that would want to be rehabilitated in lieu of being incarcerated?

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[2] 21 U.S.C. § 841(b)(A), (B), & (C).

What if the offender has previously participated in a treatment program? Would such prior treatment be a disqualifier for any kind of alternative sentence since the previous treatment clearly failed?

To be eligible for treatment as an alternative to incarceration under the proposals, the offender must have committed the offense while addicted to a controlled substance and the addiction must have contributed substantially to the commission of the offense. What does "addicted" mean? Does the defendant have to show that he or she was "under the influence" of a controlled substance at the time of the offense or simply a habitual user of a substance? Does the defendant have to show that he or she was "addicted" to the drug that forms the basis for the charge, or simply any drug?

We think that these policy and funding questions that arise from the proposed amendment are beyond the full competence of the Commission itself to address. The amendment may be an appropriate suggestion to Congress and the administration to pursue, but it is not something that the Commission itself should unilaterally determine to apply to federal criminal offenders.

In addition, the Guidelines already contain language to address defendants who are drug-or alcohol-dependent: § 5H1.4 strongly recommends a period of supervised release with a requirement that the defendant participate in a substance abuse program after his or her prison sentence. Importantly, the same section states that "drug or alcohol dependence is not a reason for a downward departure." The proposed amendment would have the effect of writing § 5H1.4 out of the Guidelines by departing from a sentence of prison and supervised release and replacing it with a much softer sentence of probation and drug treatment for drug traffickers and other defendants who happen to be—or choose to be—"addicted" to a controlled substance.

This amendment goes even further by proposing to expand the zones of offenses that are eligible for probation. As proposed, this amendment would increase the number of federal defendants who are eligible for probation, regardless of the offense. The Commission provides no justification for why it believes this broader class of defendants should be eligible for probation, other than its desire to pursue an "alternatives to incarceration" policy.

We are equally troubled by the Commission's proposed amendment to § 5H regarding changes to certain specific offender characteristics (SOCs). The SOCs about which the Commission currently seeks comment—age; mental and emotional conditions; physical condition (including drug or alcohol dependence or abuse and gambling addiction); military, civic, charitable, or public service; employment-related contributions; record of prior good works; and lack of guidance as a youth "and similar circumstances"—are rightly excluded from the sentencing calculus.

As a practical matter, behavioral science shows that many of the most notorious as well as some of the most heinous crimes were committed by civic minded, community

active, offenders. Similarly, a drug-addicted defendant, whom studies show, is more likely to reoffend than a sober defendant, should not be given greater leniency at sentencing because his decision to commit the crime for which he was convicted was influenced by drug use.

None of the proposed factors are relevant either in making the "in/out" decision or in determining the length of incarceration. Age (old or young) and mental condition might be factors in *where* to incarcerate an offender, but not *whether* an offender should be incarcerated. Unlike these other highly subjective characteristics, age is the one characteristic that *everyone* that stands before the court possesses – it is not unique, it is universal. And as a SOC, it invites rampant disparity. One sentencing judge may sympathize with a middle-aged defendant because he has a career and a family to support, while another sentencing judge believes he should have known better. The result? Different sentences imposed at the whim of the court, as in the pre-1987 system.

The amendment also proposes authorizing sentencing departures for a defendant's "military, civic, charitable, or public service, employment-related contributions, [or] record of prior good works." We support the notion that a court may consider the absence of a criminal record or a defendant's status as an upstanding member of the community in sentencing. But to affirmatively instruct federal courts to weigh these factors at sentencing places too great an emphasis on largely non-relevant conduct. Using this SOC, sentencing judges could mitigate a sentence for aggravated sexual abuse of a minor simply because the defendant at one time served in the military. Yet, the amendment makes no distinction about the defendant's military record. Was he honorably discharged? Was he disciplined or reprimanded while in the military?

Moreover, if an elected official is convicted of public corruption charges, this SOC would have the absurd result of allowing the judge to mitigate the defendant's sentence for the public service that formed the basis for the offense in the first place.

Of equal concern is the proposed "lack of guidance as a youth" characteristic. While factors such as physical and emotional abuse or neglect as a child may be relevant in limited circumstances, arguably every person who commits a criminal violation of the law at some point or another experienced a "lack of guidance" as a child. And to what degree should this factor be weighed in determining the culpability of an adult? A SOC such as this one is so overly-broad that it will, in effect, be rendered unspecific and generally applicable.

In the post-*Booker* world, these proposed SOCs are not necessary as sentencing judges have considerable discretion and, in many instances, already consider the essence of some of the factors that these proposals seek to advance. The Commission's 2008 sentencing data cite a host of factors currently considered by the courts under the

advisory system in support of guideline departures.[3] For instance, despite the Guidelines admonishment in § 5H1.11 that "military, civic, charitable, or public service; employment-related contributions; and similar prior good works are *not* ordinarily relevant in determining whether a departure is warranted,"[4] this factor was relied upon by sentencing judges in support of a downward departure in 2008.[5]

The proposed amendment to § 5H seeks to codify a practice within the courts that already produces disparate sentences. Likewise, we strongly object to the Commission's proposal that, if the amendment to § 5H is adopted, conforming changes also be made to Part K of Chapter Five of the Guidelines. This amendment will encourage even greater downward departures for crimes against children, including kidnapping, sex trafficking, aggravated sexual abuse of a minor, and sexual exploitation and child pornography offenses.

We continue to be troubled by any attempt to expand or modify the Guidelines in ways that detract from our federal criminal justice system's ability to punish felons for criminal behavior and deter would-be offenders from committing crimes in the first place.

Even after *Booker*, many courts continue to be guided by the Guidelines; any amendments to the Guidelines should therefore be taken only after careful consideration of the purpose of the Guidelines and the detrimental, although perhaps unintended, effects on sentencing uniformity. Offering drug addicted criminals a literal "get out of jail free" card so they may seek drug treatment rewards them for their criminal use of controlled substances, and increasing the subjectivity of SOCs would weaken our criminal justice system and lead to the very result the Guidelines were intended to avoid—disparate sentencing of similarly situated defendants.

We therefore urge you not to pursue these amendments to the Guidelines.

Sincerely,

LAMAR SMITH
Ranking Member
House Committee on the Judiciary

JEFF SESSIONS
Ranking Member
Senate Committee on the Judiciary

[3] *See generally 2008 Sourcebook of Federal Sentencing Statistics*, U.S. SENTENCING COMMISSION, tables 24-25, at 64-69.
[4] *2009 U.S. Sentencing Commission Guideline Manual,* U.S. SENTENCING COMMISSION, § 5H.1.11, at 453 (emphasis added).
[5] *See supra* note 2.

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cc: The Hon. John Conyers, Jr.
The Hon. Patrick J. Leahy