United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

August 18, 2010

Honorable William K. Sessions, III, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Priority Policy Issues for Amendment Cycle ending May 2011

Dear Judge Sessions:

On behalf of the Practitioners Advisory Group, we submit the following comments on the Commission's possible priority policy issues for the amendment cycle ending May 1, 2011. We look forward to working with the Commission on these issues and potential amendments.

FAIR SENTENCING ACT OF 2010

Shortly after the Commission published notice for comment on its proposed priorities for the current amendment cycle, President Obama signed into law The Fair Sentencing Act of 2010 (FSA). Pub. L. 111-220. The FSA decreases the unwarranted disparity between crack and powder cocaine with respect to quantity amounts triggering statutory mandatory minimums, from a ratio of 100-to-1. to 18-to-1. The law raises the triggering amount of crack cocaine for mandatory minimums by over 500 percent while leaving untouched the triggering amounts for powder cocaine. As the President's Press Secretary stated shortly after the FSA was signed into law, the changes brought about by the Act "demonstrate() … the glaring nature of what these penalties had … done to people and how unfair they were. And I think the President was proud to sign [the FSA] into law."

While the PAG believes the FSA changes to statutory penalties are an important step toward resolving what the Commission has long recognized to be an irrational and unjust sentencing policy, we believe the Act does not go far enough. Specifically, we submit that amendments to the Guidelines that result from the FSA must eliminate all disparity between these forms of the same unlawful drug. In a memorandum to federal prosecutors May 1, 2009, Deputy Attorney General David Ogden instructed that "[t]he President and Attorney General believe Congress should eliminate the sentencing disparity between crack cocaine and powder cocaine." Mr. Ogden went on to instruct: "Prosecutors should inform courts that the Administration believes Congress and the Commission should eliminate the crack/powder disparity," and that "courts must exercise their discretion under existing case law to fashion a sentence consistent with the objectives of 18 U.S.C. § 3553(a) (setting forth the principles of parsimony such that courts are not to impose sentences greater than necessary to meet the statutory purposes of sentencing). *See also* Testimony of Lanny

A. Breuer, Assistant Attorney General, Criminal Division, United States Department of Justice Hearing on *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity* before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. (April 29, 2009) ("…we cannot ignore the mounting evidence that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including evidence that crack is not an inherently more addictive substance than powder cocaine. We know of no other controlled substance where the penalty structure differs so dramatically because of the drug's form.")

Well before *Booker*, the federal judiciary echoed the Commission's concerns over and disagreement with the crack/powder disparity. To the extent that the Guidelines base offense level for these drugs have been marked to the statutory mandatory minimum, courts have, with the Supreme Court's blessing, increasingly imposed below guideline sentences to reflect legitimate policy disagreements and to eliminate continuing, indefensible disparities that disproportionately impact minority defendants. *See Spears v. United States*, -- U.S. --, 129 S.Ct. 840, 843 (2009) ("crack cocaine Guidelines […] do not exemplify the Commission's exercise of its characteristic institutional role. *Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect"); *United States v. Lewis*, 623 F. Supp. 2d 42, 43 (D.D.C. 2009) (Judge Paul Friedman announced he will "[h]enceforth … apply a 1-to-1 crack-to-powder [ratio]"); *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009)(adopting a 1-to-1 ratio); *United States v. Greer*, 699 F. Supp. 2d 876, 880 (E.D. Tex. 2010)(same); *Henderson v. United States*, 660 F. Supp. 2d 751, 753 (E.D. La. 2009)(same); *United States v. Russell*, 2009 WL 2785734 (W.D. Pa. 2009)(unpub.)(same). For these reasons and those the PAG has expressed previously, we urge that the Guidelines be amended to once and for all end the crack/powder disparity.

The Commission's emergency amendment authority affords the opportunity to fix promptly an entrenched injustice in federal sentencing policy that has resulted in too many young men—primarily African-Americans—spending far too much of their lives in overcrowded federal prisons for what are often first-time or nonviolent offenses. Or, as Justice Kennedy observed: "The Federal Sentencing Guidelines should be revised downward…. Our resources are misspent, our punishments too severe, our sentences too long." Similarly, the PAG believes it appropriate and necessary to make retroactive any amendments arising from the Fair Sentencing Act. *See* 28 U.S.C. § 994(u). The equities that supporting Amendment 706's retroactivity, as well as that of prior drug-related amendments, apply with equal if not greater force now. Indeed, the relatively recent processing of retroactive Amendment 706-related cases leaves all parties (courts, counsel, Probation, the BOP) prepared and equipped to handle a retroactive amendment now, guided by a newly established body of case law and accepted district court practices. In short, there is no sustainable reason why the anticipated crack amendments should not provide retroactive relief.

CONTINUATION OF WORK REGARDING COCAINE SENTENCING POLICY ESPECIALLY WITH RESPECT TO MANDATORY MINIMUMS

On May 27, 2010, the Commission conducted a public hearing on mandatory minimum sentencing provisions under federal law. PAG members were among those who testified. The following is intended to emphasize a number of the more salient considerations we advanced in opposition to mandatory minimum penalties in the federal criminal justice system.

For nearly two decades, since its August 1991 report, the Commission has been unanimous in its consistent endorsement of the repeal of mandatory minimum sentences.

There is a long and distinguished list of criminal justice professionals, from both politically and ideologically diverse backgrounds who have strongly decried the unjustifiably harsh impact of such sentences. Among those who have been outspoken against mandatory minimum sentences are Senator Orrin Hatch, the late Chief Justice Rehnquist, Justice Stephen Breyer, and Justice Anthony Kennedy. While all of those outspoken against these sentencing statues have been compelling, the testimony of Justice Kennedy provided to the ABA in August of 2003, perhaps, provides the most succinct and direct appraisal: "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences."

Here is a brief review of a number of the more oft-repeated criticisms:

- Mandatory minimums effectively shift discretion from judges, whose decisions are transparent, to prosecutors, whose decisions are not subject to public scrutiny;
- Mandatory minimums do not take into account any number of important differences between offenses and among offenders;
- Mandatory minimums often times create sentencing inversions, sometimes referred to as the cooperation paradox, where drug kingpins are treated far more leniently than minor players only peripherally involved, thereby creating significant unwarranted disparity;
- Mandatory minimums create a gravitational pull towards cooperation to such an extent that a defendant with little knowledge may actually be motivated to exaggerate his or her own involvement so as to fall within the auspices of § 3553(e);
- Near-identical defenders, held accountable for just slightly more, or just slightly less drug quantity can receive drastically variant sentences, sometimes called the Cliff Effect;
- Numerous offenders who are not similarly situated, as, for example, the drug king pin and a lowly courier or "mule" can each receive virtually the same, very severe sentence, creating what is sometimes referred to as "excessive uniformity" or "misplaced equality;" and
- Mandatory minimums substantially interfere with the Commission's development of fair and rational guidelines.

Despite the avalanche of well-taken criticism from such a wide spectrum of criminal justice professionals, and the Commission's own long record of firm opposition to mandatory minimum

sentences, Congress has thus far not been moved to act in any meaningful fashion, with one single exception: Congress has enacted a "safety valve" that, in limited circumstances, permits a court to impose a sentence outside or below the mandatory minimum. *See* 18 U.S.C. § 3553(f). Nonetheless, we take some solace in Congress's recent directive to the Commission, instructing the Commission to submit an updated report on mandatory minimums. To the extent that this may signal Congress's recognition that the time has come for legislative reconsideration of this issue, we strongly urge the following reforms:

First and foremost, we urge the Commission to reiterate its continued opposition to mandatory minimums, provide Congress with both the statistics and specific instances in which unjustifiable abuses and disparities have emerged from their application, and finally to counsel their repeal across the board.

Second, in the absence of complete repeal, we urge the commission to recommend repeal of those provisions that are most subject to abuse. In this regard, the Commission has heard much testimony concerning the egregiously severe sentences which have emerged from the stacking of § 924(c) counts. We are largely here dealing with the interpretation of the phrase "second or subsequent conviction." Allowing this to include convictions in the same proceeding has led to extreme abuses. Accordingly, we urge the Commission to recommend to Congress to revise the statute to provide that "second or subsequent conviction" be limited to a conviction for an offense after the defendant was previously convicted, imprisoned, and released; that is, the statute should be a true recidivist statute.

We also urge to Commission to recommend to Congress the repeal of 18U.S.C. § 924(e). To summarize much of the testimony concerning this provision, the "ACCA casts too wide a net and overrides the otherwise applicable criminal history score." (*See* statement of Michael Nachmanoff, federal public defender for the Eastern District of Virginia).

Further, we urge the Commission to recommend that Congress repeal the statutory increases for "prior conviction for a felony drug offense" under 21 U.S.C. §§ 841 and 851. From the illustration provided in our written testimony to the Commission, these statutory increases are inconsistently pursued by the government and too often work to create huge, unwarranted sentencing disparities. In some districts, the government does not employ these statutory increases while in others they are uniformly utilized with the deleterious effect of doubling the mandatory minimum, sometimes requiring mandatory life sentences and generally overriding the criminal history score in a way that is both unreviewable and unjustifiably harsh.

Third, we again urge the Commission to recommend to Congress to expand the contours of the safety valve. By limiting the "safety valve" relief to offenders with no more than one criminal history point, far too many low level offenders who richly deserve relief are excluded. As long as there are mandatory minimums, the Commission should urge Congress to expand the safety valve to extend to defendants in all Criminal History Categories, or at the very least to a Criminal History Category III. Otherwise, very peripheral participants with only one prior conviction, finding themselves in a Criminal History Category III, are left without relief.

Further, we urge the Commission to recommend to Congress to expand the safety valve to apply to all mandatory minimums. Currently, there are only a handful of offenses to which this provision applies. There is no rational basis to exclude offense not presently on the list. Moreover, this would obviate the prospect of the inconsistent exercise of discretion by the government or the conscious utilization of certain violations for the sole purpose of ending safety valve relief for a defendant who would otherwise clearly qualify.

Fourth, we urge the Commission to, at a minimum, reduce the drug guidelines by two levels across the board. As frequently pointed out in the testimony presented at the May hearing, the guidelines are set two levels higher than necessary to capture the mandatory minimum in a Criminal History Category I. As such, the Commission may reduce all of the drug guidelines by two levels without seeking special permission from Congress.

There are many other worthwhile proposals to provide short-term relief from mandatory minimum, absent repeal. However, none of them provide a complete solution to the harsh, too often unwarranted and unjustifiable impact of mandatory minimums. In an atmosphere where individual considerations are important and judges must seek to impose sentences "sufficient but not greater than necessary" to comport with all the sentencing criteria, federal mandatory minimums serve as an impediment to judges in imposing sentences that are reasonable, proportional and just.

CONTINUATION OF STUDY AS TO BOOKER AND ITS PROGENY AFFECT FEDERAL SENTENCING PRACTICE

The PAG believes that as part of the Commission's continuing study of the impact of *Booker* and its progeny on federal sentencing law, policy and practice, the Commission should incorporate the following issues:

a. Assess the continuing validity of the policy statement at USSG § 6A1.3 wherein the Commission long ago adopted a mere preponderance of the evidentiary standard for purposes of resolving factual disputes regarding the application of the guidelines. Given the enormity of the change wrought by *Booker* as well as the evolution of the Guidelines over the past quarter century, the PAG believes that a mere preponderance does not comport with a fair and just sentencing scheme. Higher standards of proof should be required, including beyond a reasonable doubt. Indeed, several federal courts already have adopted beyond a reasonable doubt standard when applying the guidelines. As Justice Thomas in his concurrence in *Booker* recognized, "[t]he Court's holding today corrects [the Commission's] mistaken belief [that a preponderance of the evidence standard is appropriate to meet due process requirements]. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant." *Booker*, 543 U.S. at 319 n.6 (Thomas, J., concurrence in part, dissent in part); *see also United States v. Staten*, 466 F.3d 708, 718 (9th Cir. 2006) ("*Booker* … does not discuss the role that

standards of proof play in criminal sentencing, nor does it discuss at all the due process concerns that such standards are intended to satisfy. Instead, the constitutional ruling in *Booker* … focused solely on the need to conform comprehensive sentencing schemes to the jury trial requirement of the Sixth Amendment."); *United States v. Pimental*, 367 F.Supp.2d 143, 154 (D. Mass. 2005) ("We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important. If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt.").

b. Re-evaluate the scope of relevant conduct, especially with regard to its continued incorporation of uncharged and acquitted conduct. In this regard, we find informative the comments and observations of former Vice Chair John Steer:

> I think some changes to [relevant conduct] are in order. The first change I would make … is to exclude "acquitted conduct" from [relevant conduct], and move it to 5K2.21 (Dismissed and Uncharged Conduct) as a judge-discretionary factor. There are two reasons I now recommend this change. First, the inclusion of acquitted conduct in determining the guideline range under 1B1.3 is relatively rare and, in practice, entirely judge-discretionary. The Justice Department will defend (and successfully has defended, even post-*Booker*) a judge's decision to include acquitted conduct, but to the best of my knowledge, DOJ never appeals a judicial decision to exclude it. The relevant conduct guideline is supposed to produce a mandatory, relatively consistent application of guideline factors to the facts, rather than an application that varies from judge to judge according to the jurist's thinking regarding use of acquitted conduct. After all, 18 U.S.C. § 3742 and post-*Booker* case law say that both parties continue to have an enforceable right to a correct application of the sentencing guidelines, before the curtain opens on the enlarged stage of judicial discretion. I would move the consideration of acquitted conduct to that second stage, where I believe it more properly belongs.
>
> The second reason I would exclude acquitted conduct from 1B1.3 relates to the whole gamut of policy objections to its mandatory inclusion. The federal guideline system is alone among sentencing reform efforts in using acquitted conduct to construct the guideline range. No state guideline system uses it. Let's lose it from 1B1.3 …
>
> The second, and more important, change to relevant conduct I would recommend is to decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.3(a)(2) and (3), relative to conduct included within the count of conviction. That is the aspect of the guideline that I find most difficult to defend.

An Interview with John Steer, THE CHAMPION at 40 (2008).

c. Evaluate the impact of the U.S. Supreme Court's decision in *United States v. Skilling*, 561 U.S. --, 2010 WL 2518587 (June 24, 2010) on loss. The Court held there that only bribery and kick-backs constitute criminal offenses under a theft of honest services theory of mail or wire fraud. Presumably the same holds true in securities fraud cases. Accordingly, any "loss" not directly attributable to a bribe or kick-back when a theory of theft of honest services should not count as loss for purposes of sentencing. PAG urges the Commission to provide clarifying language on this point.

CONTINUATION OF REVIEW OF CHILD PORNOGRAPHY OFFENSES

Appreciating that the Commission has acknowledged that the Guidelines applicable to child pornography offenses have been driven in large part by congressional directives, the PAG believes that these guidelines, including in particular the myriad enhancements found in § 2G2.2, are unduly severe and far "greater than necessary" to achieve the statutory purposes of sentencing set out in 18 U.S.C. § 3553(a). We therefore urge the Commission, in both its review of applicable data and in any report to Congress, to re-examine and re-visit the appropriateness of the child pornography Guidelines, including the base offense levels for possession, receipt and distribution, and the § 2G2.2 enhancements.

The Second Circuit's recent decision, *United States v. Dorvee*, -- F.3d --, 2010 WL 3023799 (2d Cir., amended Aug. 4, 2010), underscores the urgency of renewed attention to the child pornography guidelines. In that case, the Court of Appeals found that the § 2G2.2 enhancements, rather than establishing meaningful sentencing distinctions among defendants, were "all but inherent to the crime of conviction." *Id.* at *10. Relying on statistics collected by the Commission, the Court noted that of all the sentences under § 2G2.2 in 2009:

- 94.8% involved an image of a prepubescent minor (qualifying for a two-level increase pursuant to §2G2.2(b)(2));
- 97.2% involved a computer (qualifying for a two-level increase pursuant to §2G2.2(b)(6));
- 73.4% involved an image depicting sadistic or masochistic conduct or other forms of violence (qualifying for a four-level enhancement pursuant to §2G2.2(b)(6)); and
- 63.1% involved 600 or more images (qualifying for a five-level enhancement pursuant to §2G2.2(b)(7)(D)).

Id. (citing United States Sentencing Commission, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS FOR FISCAL YEAR 2009). Adhering to the Guidelines means that "an ordinary first-time offender is therefore likely to qualify for a sentence … approaching the statutory maximum," a result that is "fundamentally incompatible with §3553(a)." *Id.* As the Commission's recent survey confirms, the judiciary widely shares the view that the child pornography Guidelines,

"unless applied with great care, can lead to unreasonable sentences." *Id.* at *9; *see* USSC, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (June 2010).

Asked whether the mandatory minimum for child pornography offenses was appropriate, 71% of 585 responding judges said it was "too high." Similarly, 69% of 570 responding judges responding offered that the guideline range for receipt of child pornography was "too high" while 70% feel that the range for possession is "too high". Not surprisingly then, the Commission latest SOURCEBOOK OF FEDERAL SENTENCING STATISTICS establishes that more than half of all defendants whose principle guideline was § 2G2.2 received below Guidelines sentences with no 5K motion filed.

It thus seems clear that the Commission should address the growing, correct concern that § 2G2.2 "eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider the 'nature and circumstances of the offense and the history and characteristics of the defendant' and violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct." *Dorvee*, 2010 WL 3023799 at *10. It is important for the Commission re-assert to Congress its role in crafting Guidelines using a well reasoned, empirical approach. Specifically, the Commission should consider either eliminating or revising the current § 2G2.2 enhancements and design a sentencing scheme that provides sentencing courts with meaningful distinctions among defendants.

CONCLUSION

On behalf of our members, who work with the guidelines on a daily basis, we appreciate the opportunity to offer our input on possible priority policy issues. We look forward to working with the Commission these important topics and hope that our perspective is useful as the Commission continues to carry out its responsibilities under the Sentencing Reform Act.

Sincerely,

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

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

cc: Hon. Ruben Castillo, Vice Chair
William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Beryl A. Howell, Commissioner
Dabney Friedrich, Commissioner
Isaac Fulwood, Jr., Commissioner
Jonathan J. Wroblewski, Commissioner
Kenneth Cohen, General Counsel
Judy Sheon, Chief of Staff