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of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
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Clarksburg, WV 26301

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Honorable Raymond W. Gruender
Honorable Jeffrey R. Howard
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Honorable Irene M. Keeley, Chair

March 11, 2014

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

Re: Proposed Amendments to the Drug Quantity Table in §2D1.1

Dear Chair Saris,

The Criminal Law Committee of the Judicial Conference is pleased to respond to the U.S. Sentencing Commission's request for public comment regarding its proposed amendments to the Sentencing Guidelines. While the Committee recognizes that the Commission is considering several important revisions to the guidelines, we would like to focus on one issue that we believe impacts the fair administration of justice. As discussed below, we believe that the base offense levels in the Drug Quantity Table should be set irrespective of the statutory mandatory minimum penalties. We also support amending the Drug Quantity Table so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32.

Establishing Base Offense Levels Irrespective of Mandatory Minimums

For decades, the Criminal Law Committee has expressed its belief that setting the Sentencing Guidelines' base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing two competing approaches to criminal sentencing. According to a recent survey sponsored by the Commission, the majority of district judges "strongly agree" or "somewhat agree" that the guidelines should be "de-linked" from mandatory minimum sentences.¹ While the Committee has made this argument numerous times,² we highlight two recent instances below. In a March 16, 2007 letter from former Committee Chair Paul Cassell to former Commission Chair Ricardo Hinojosa, Judge Cassell expressed the Committee's belief that the Commission should set base offense levels without regard to the mandatory minimum and that the Commission should review all base offense levels to ensure that, in the Commission's own expert opinion, the levels adequately address the seriousness of the offenses. In addition to arguing that mandatory minimums

¹ U.S. Sentencing Commission, *Results of Survey of United States District Judges: January 2010 Through March 2010* (June 2010), at Question 3.

² See e.g., March 8, 2004 Letter from former Criminal Law Committee Chair Sim Lake to Sentencing Commission ("The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes. The Committee continues to believe that the honesty and truth in sentencing intended by the guidelines is compromised by mandatory minimum sentences"); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66, 108 (July 28, 1993) (statement of Criminal Law Committee Chair Vincent L. Broderick) ("This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward ... As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well."). Current and former members of the Sentencing Commission have also expressed concern about the effect of mandatory minimums on guideline sentencing. See e.g., Stephen Breyer, Associate Justice, Supreme Court of the United States, *Federal Sentencing Guidelines Revisited*, Address to the University of Nebraska College of Law, Roman L. Hruska Institute (Nov. 18, 1998) in 11 FED. SENT'G REP. 180, 184-85 (1999) ("[S]tatutory mandatory sentences prevent the [C]ommission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments...Congress, in simultaneously requiring guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions."); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1614 (2012) ("[T]he best approach for a commission – unless the legislative body explicitly orders otherwise – is to accept legislative judgments based on political factors but not to extend them further than the legislature commands if doing so would conflict with the commission's expert judgment . . . [because if] the mandatory minimum is not the product of careful study or research, then keying all guidelines to that minimum exacerbates the harms of a failure to reflect on the consequences and goes against an agency's mission to base its decisions on empirical information and studies.").

are inconsistent with a coherent and just sentencing guidelines system,³ Judge Cassell reasoned that base offense levels should be established without being keyed to mandatory minimums to provide meaningful guideposts for cases in which mandatory minimum penalties do not apply. He explained:

Setting the base offense level at or near the guideline range that includes the mandatory minimum, as is often seen in drug cases, often leaves the court without guidance on what the appropriate guideline range should be in cases where the mandatory minimum term does not apply. For example, for mandatory minimum offenses covered by §2D1.1, the Commission has set the base offense level, as determined by the drug quantity table, so that the resulting offense level meets or exceeds the mandatory minimum; however, in cases where either §§5K1.1 or 5C1.2 apply, the courts are left with little guidance on what the appropriate sentence should be. If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply.

In a September 17, 2013 letter to the Chair of the Senate Judiciary Committee in support of legislation to ameliorate the effects of mandatory minimums, former Committee Chair Robert Holmes Bell stated:

Mandatory minimum statutes are incompatible with guideline sentencing and impair the efforts of the Sentencing Commission to fashion Sentencing Guidelines in accordance with the principles of the Sentencing Reform Act...They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy...Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses.⁴

³Judge Cassell wrote: "Where mandatory minimum sentences are applicable, they must be imposed, of course, thereby trumping the guideline system. But it is the view of the Judicial Conference that mandatory minimum sentences are less prudent and less efficient than guideline sentencing, and that a system of sentencing guidelines, developed and promulgated by the expert Commission, should remain the foundation of punishment in the federal system... [Such an approach] appears to best preserve the primacy of the guidelines as a coherent system, and to avoid injustices that may stem from efforts to engraft meaningful guidelines upon a framework of mandatory minimum sentences."

⁴ See also U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), at 57 ("The guidelines are designed to be flexible and therefore assign varying weight to aggravating and mitigating factors in the context of the offense and the guidelines as a whole...The application of a mandatory minimum depends solely on whether the statutorily enumerated factors are

Reduction of Base Offense Levels

In 1993, Judge William W. Wilkins, then Chair of the U.S. Sentencing Commission, proposed legislation titled the “Controlled Substances Minimum Penalty - Sentencing Guideline Reconciliation Act of 1993,” which would have directed the Commission to set base offense levels that incorporate mandatory minimum sentences within the guideline range. This would have led to a 2-level reduction in the base offense level for drug trafficking offenses with a penalty structure based on levels 24 and 30, rather than based on levels 26 and 32. At its June 1993 meeting, the Criminal Law Committee determined that Judge Wilkins’s proposed legislation would be a significant improvement over current law. In September 1993, upon recommendation of the Committee, the Judicial Conference “endorsed the concept contained in the proposed legislation as being consistent with its previous position opposing mandatory minimum penalties.”⁵

On February 24, 2011, former Criminal Law Committee Chair Robert Holmes Bell wrote to you as Chair to “recommend[] that in re-promulgating the temporary emergency amendments authorized by the Fair Sentencing Act of 2010, the penalty structure in the Drug Quantity Table for crack cocaine should be set so that the statutory mandatory minimum penalties correspond to base offense levels 24 and 30.” Judge Bell reasoned that such a change from base offense levels 26 and 32 “would keep the mandatory minimums within the guideline ranges, but would allow judges to consider a within guideline sentence if relief from the mandatory minimum was authorized.”

Conclusion

The Committee recommends that the Commission make an assessment of the adequacy of the existing Drug Quantity Table independent of any potentially applicable mandatory minimums and adjust the base offense levels as the Commission deems appropriate. If the resulting guideline is less than any potentially applicable mandatory minimum sentence, §5G1.1(b) should be utilized to allow for imposition of that statutorily-required sentence. As an interim measure, the Committee supports amending the Drug Quantity Table so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels 24 and 30, rather than 26 and 32.

proven or agreed to, without regard to other aggravating or mitigating facts. The structural differences between the guidelines and mandatory minimum penalties result in different outcomes in terms of both uniformity and proportionality.”).

⁵ JCUS-SEP 93, p. 46.

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We appreciate the opportunity to present our views. If you need additional information, please feel free to contact me at (304) 624-5850.

Sincerely,

A handwritten signature in black ink that reads "Irene M. Keeley". The signature is written in a cursive style with a large, stylized initial "I".

Irene M. Keeley

cc: Members of the Criminal Law Committee
Members of the U.S. Sentencing Commission
Mr. Matthew Rowland
Mr. Kenneth Cohen