Testimony of

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on behalf of

THE AMERICAN BAR ASSOCIATION

before the

UNITED STATES SENTENCING COMMISSION

on
Proposed Amendments to the Sentencing Guidelines
and Issues for Comment published in the Federal Register at
66 Fed. Reg. 59330-59340 (11/27/01)
and 67 Fed. Reg. 2456-2475 (1/17/02)

February 26, 2002

Judge Murphy and Members of the Commission: My name is Ronald Weich and I am a partner in the law firm of Zuckerman Spaeder LLP. I appreciate the opportunity to offer comments on proposed amendments to the federal sentencing guidelines on behalf of the American Bar Association. I serve as Vice-Chair for Government Relations of the ABA Criminal Justice Section, and am a member of the ABA Individual Rights and Responsibilities Section. Both Sections have a strong interest in the subject of this hearing.

While I appear today on behalf of the ABA, I bring several other relevant professional perspectives to this hearing. I began my legal career as an Assistant District Attorney in New York County. From 1987 to 1989 I served as Special Counsel to this Commission. I then held several staff positions in the U.S. Senate and was Chief Counsel to Senator Kennedy at the time that Congress considered the Commission's 1995 recommendations on cocaine penalties. Now in private practice, I serve as an advisor to several organizations interested in sentencing issues, including the Leadership Conference on Civil Rights whose Executive Director you heard from yesterday. I want to emphasize, however, that the views expressed in this testimony are solely those of the American Bar Association.

The 400,000 members of the ABA comprise a broad spectrum of the profession. Our membership includes judges, prosecutors, defense attorneys, law professors, corrections administrators and other justice system professionals. The principal source of the ABA's views on this topic is the Sentencing Chapter of the ABA Standards for Criminal Justice, 3d edition. In addition, the Association has adopted specific policy resolutions against mandatory minimum sentencing laws and in support of the Commission's 1995 recommendations to Congress regarding cocaine sentences.

These ABA policies speak directly to the principal subject of this hearing, Amendment 8 of the Proposed Amendments to the Sentencing Guidelines. In my testimony today I will explain why the current system for sentencing federal drug

offenders is inconsistent with key principles of the ABA Sentencing Standards and why Proposed Amendment 8 would, on balance, bring federal drug sentencing somewhat closer to the principles embodied in our Standards. I will then address several of the Issues for Comment that accompany Amendment 8 and will strongly urge that the Commission once again seek to remedy the intolerable disparity between crack and powder cocaine sentences. Finally, I will address a small number of other proposed amendments and one related issue.

CURRENT FEDERAL DRUG SENTENCING RULES DEVIATE SUBSTANTIALLY FROM THE ABA SENTENCING STANDARDS.

The ABA Standards

Judge Frankel famously labeled a system of unfettered judicial discretion as "lawless." But at the other end of the continuum, a system of legislatively mandated penalties is lawless in its own way because it is arbitrary and can be easily manipulated by prosecutors. In between these two extremes is a flexible sentencing guidelines system in which an expert body develops general rules to govern ordinary cases, but in which judges may depart from the rules in cases that vary from the norm, subject to appellate review. This is the system endorsed in the third edition of the ABA Sentencing Standards.

The Standards acknowledge the inevitable tension between the twin goals of standardized sentencing and individualized sentencing, and advocate a balanced system that guides judicial discretion but does not eliminate it. Thus, the ABA flatly opposes mandatory sentencing laws. Instead, the Standards encourage legislatures to establish permanent agencies or commissions to "transform legislative policy choices into more particularized sentencing provisions that guide sentencing courts."

Judicial discretion remains indispensable under the Standards. Notwithstanding the existence of rules to guide judicial discretion, "[t]he legislature should authorize sentencing courts to exercise substantial discretion to determine sentences in accordance

with the gravity of offenses and the degree of culpability of particular offenders." The Commission might identify aggravating or mitigating circumstances for the sentencing court to consider, but the court retains ultimate authority to weigh those factors in imposing a just sentence, subject to appellate review.

Of special significance to today's hearing, the Standards endorse the normative principle, also found in 18 U.S.C. § 3553(a), that sentences "should be no more severe than necessary to achieve the societal purposes for which they are authorized." And the Standards require that "unwarranted and inequitable disparities in sentences [be] avoided."

By the time the third edition of the Standards was adopted in 1994, there was sufficient experience under the federal sentencing guideline system for the authors of the Standards to contrast their ideal system with the federal system. Notably, they found the federal guidelines to be too mechanical and faulted the federal system for allowing "significantly less room for the role of judicial discretion" than called for in the Standards. In fairness to the Commission, the rigidity of the federal sentencing system is partly attributable to choices imposed on the Commission by Congress in the Sentencing Reform Act of 1984 and subsequently enacted laws.

Even so, we believe there are steps this Commission can take to enhance the flexibility and fairness of the system, both by amending the guidelines and by recommending statutory changes to Congress. We understand that the current members of the Commission are committed to improving the operation of the guidelines and the ABA looks forward to working with you to this end.

Measuring Federal Drug Sentencing Rules Against the Standards

One of the promises of the model guideline system endorsed in the ABA Standards is that the legislatively created commission will be empowered to simplify and rationalize sentencing policy in the guidelines it develops and by recommending statutory

changes to the legislature. Plainly that has not happened in the federal system, at least not with respect to drug sentences.

Largely as a result of mandatory minimum sentencing laws and other congressional directives, federal drug sentencing today is far more confusing and arbitrary today than it was on the day Congress established this Commission.

Most glaring are the complex and idiosyncratic provisions of 21 U.S.C. §§ 841 - 843 which prohibit the manufacture and distribution of controlled substances. Occupying some 15 columns of single-spaced text in the West compilation, studded by a dizzying array of mandatory penalties, enhancements and fines, these laws dictate highly specific punishments based almost exclusively on the type and quantity of drug for which the defendant is found legally accountable. The statutes, in turn, correspond to a seven-and-a-half page drug quantity table that determines a defendant's base offense level and then dozens of cross references and specific offense characteristics that generally serve to increase sentence length.

For some defendants the mandatory minimum statute dictates the sentence and for others the guidelines apply, depending solely on the quantity of drugs. Sometimes the statute trumps the guidelines; sometimes the guideline sentence exceeds the statutory penalty. Meanwhile, in a well-intentioned effort to moderate penalties, Congress enacted an additional layer of complexity in 1994: a safety valve provision with its own finely nuanced criteria that allows some defendants to avoid the statutory minimum penalty and instead be sentenced under the guidelines. And of course the entire hydra-headed beast can be circumvented if an Assistant United States Attorney attests that the defendant has substantially assisted authorities.

The complexity of federal drug sentencing laws and guidelines is only one of at least five other ways in which the current rules deviate from the ABA Standards.

First, Congress' extensive reliance on mandatory minimum sentencing provisions

in the drug laws is contrary to three decades of ABA policy. Mandatory sentencing laws are obsolete in an age of guideline sentencing; both mandatories and guidelines seek to limit judicial discretion, but guidelines do so in a more balanced, less blunt fashion. Guidelines preserve some needed judicial discretion, while mandatory minimums transfer the power to sentence from judge to prosecutor. Mandatory minimums are especially unjustified in federal law ten years after this Commission reported to Congress that these laws cause unwarranted racial disparity.

Second, federal drug sentences are determined to a considerable extent by a single factor: drug quantity. The mandatory minimums are triggered by drug quantity, and even when the statutes do not apply, the guideline sentence is driven by drug quantity. Federal sentencing rules do not authorize judges "to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders" as the Standards urge.

Third, federal drug sentencing today is not the product of empirical, scientific evidence as the Standards envision. The legislative process that produced the mandatory minimum threshold levels in 1986 was notoriously devoid of scientific analysis. The Commission, in contrast, undertook a rigorous empirical analysis of cocaine penalties in its 1995 report to Congress, taking into account pharmacological, sociological, economic and other scientific evidence. The guideline amendments that resulted from that review were promptly rejected by Congress.

Fourth, there is widespread evidence that federal drug sentences are, contrary to the Standards, "more severe than necessary to achieve the societal purposes for which they are authorized." Bureau of Prisons Director Kathy Hawk Sawyer has testified before Congress that "70-some percent of our female population are low-level, nonviolent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums." In an extraordinary letter to Congress, 27 federal judges who previously served as United States Attorneys complained that crack cocaine sentences are

unjust and do not serve society's interest. And at the end of his term President Clinton commuted the sentences of about 20 low-level, non-violent federal drug offenders, but thousands of similarly situated defendants remain incarcerated.

Fifth, mandatory sentencing laws and quantity-driven guidelines, exacerbated by the particularly harsh treatment of crack cocaine in both the statutes and the guidelines, result in the "unwarranted and inequitable disparities" that the Standards said must be avoided. This Commission found as much in its 1991 report to Congress on mandatory sentencing laws and its 1995 study of cocaine penalties. At the time of the latter report, a unanimous Sentencing Commission, virtually the entire membership of the House and Senate Judiciary Committees and the Attorney General of the United States all acknowledged that the federal cocaine penalty structure is unfair and unjustified, but even so these rules have remained impervious to improvement - until perhaps now.

PROPOSED AMENDMENT 8 WOULD IMPROVE FEDERAL DRUG SENTENCING.

In Amendment 8, the Commission proposes to amend the drug guideline to limit the sentences imposed on minor or minimal participants but enhance sentences based on violence and other aggravating factors. We read the Amendment in conjunction with the first Issue for Comment and assume that the Commission will not add enhancements to the guideline until it also raises the threshold quantities for crack cocaine, which now reflect overbroad assumptions about violence and harmfulness.

Proposed Amendment 8 revives the moribund effort to make federal drug sentencing rules more fair and rational. The ABA applauds the Commission for doing so. We do not agree with every aspect of proposed Amendment 8, and there are many aspects of the proposal on which we have no institutional position. But in broad strokes, we support the Commission's efforts to reduce the dominant role that drug quantity plays in federal drug sentencing and permit sentencing judges to take greater account of the relative culpability of different defendants.

Drug quantity is a particularly unsatisfying sentencing factor because it is a variable subject to manipulation by law enforcement officers, especially in undercover drug cases and in observation cases where the police may consciously wait to arrest the defendant, permitting drug sales to accumulate until a triggering quantity of drugs has been sold. Drug quantity is also a poor proxy for culpability in conspiracy cases and under the Relevant Conduct guideline, because a defendant with relatively lower culpability may be legally accountable for a large quantity of drugs.

The Commission's proposal to restrain the sentences of defendants who qualify for a mitigating role adjustment seems like a sensible effort to restore a measure of proportionality to drug sentencing and reduce sentences that are currently more severe than is necessary to carry out the purposes of punishment. These goals are consistent with the ABA Standards, and we therefore see no reason to limit the scope of this mechanism to defendants who qualify for only some mitigating role adjustments. In general, only defendants found to be organizers, managers or leaders of a drug enterprise should receive the extremely lengthy sentences that await defendants at the upper levels of the Sentencing Table.

The enhancements proposed for violence and for the location and related circumstances of the offense make sense only if adopted in conjunction with a substantial increase in the threshold quantities for crack cocaine as the Commission contemplates in the first "Issue for Comment." The primary explanation offered for the current threshold levels is that the crack market is inherently more violent than other drug markets. The Commission did not find that explanation persuasive in 1995 and the ABA endorsed your conclusions; current Commission data also calls it into question. But to the extent that the current thresholds are based on that (invalid) assumption, it would constitute unwarranted "double-counting" to add violence-related enhancements to the guideline without a corresponding adjustment in the base offense levels in crack cases. We address this subject further in the following section.

We have practical concerns about the proposals to incorporate in the drug

guideline aggravating and mitigating factors relating to the defendant's criminal history. As the Commission notes in the explanatory material accompanying the proposal, Chapter Four of the guidelines operates generally to provide increased punishment for past criminal conduct and includes a number of particular provisions often applicable in drug trafficking cases. To add criminal history-related adjustments to the Chapter Two guideline seems to inject unnecessary complexity into the structure of the guidelines and once again constitutes unwarranted double-counting. The idea of a no-prior-record adjustment may have merit, but it should be incorporated in Chapter 4 so that it applies to drug and non-drug cases alike.

Adoption of certain elements of proposed Amendment 8 would move the drug guidelines somewhat close to the principles articulated in the ABA Sentencing Standards. There would still be major differences between the relatively rigid guidelines and the more flexible discretionary system envisioned by the Standards. But Amendment 8 is, on balance, a step in the right direction.

THE DISPARITY BETWEEN CRACK AND POWDER COCAINE SENTENCES SHOULD BE ELIMINATED OR SUBSTANTIALLY REDUCED.

In 1995 the ABA squarely endorsed the Commission's proposal to equalize the quantity thresholds for crack and powder cocaine. The report accompanying that resolution, while not formal ABA policy, suggests two grounds for our position.

First, we observed that the different treatment of crack and powder cocaine offenses has "a clearly discriminatory effect on minority defendants convicted of crack offenses." The report cited studies showing that minorities are disproportionately charged in federal court for crack-related offenses, and that a disproportionate number of crack defendants are street-level dealers from minority communities. The report declared these disparities to be "a major instance of the appearance of race discrimination in the administration of justice" and urged that it be remedied.

Second, the report placed great weight on the fact that the equalization proposal

was based on the empirical conclusions of the expert body established by Congress to rationalize sentencing policy. The ABA Standards envision that a sentencing agency, in carrying out its intermediate function, will base its policies on precisely the kind of rigorous, empirical, apolitical analysis that this Commission undertook in its 1995 Special Report to Congress.

We know of no empirical evidence that has developed since 1995 to call into question the Commission's conclusions. Were the Commission to repromulgate its 1995 recommendations to Congress, the ABA would again endorse that proposal.

But we are mindful of Public Law 104-38, by which Congress rejected the Commission's 1995 proposal. Essentially that Act directs the Commission to try again. In section 2(a)(2) of the Act, Congress instructed the Commission to propose a "revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines…." Section 2(a)(1) lists the considerations that are to govern the revision, one of which is 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." A fair reading of the law is that the Commission should return to Congress with a ratio between the discredited 100-to-1 in current law and the rejected 1-to-1 in the earlier proposal.

Consistent with the reasoning that informed our 1995 resolution, we urge that the Commission now review the empirical and scientific evidence regarding the different types of cocaine. If, as we suspect, there remains a strong empirical basis for substantially reducing the disparity between the threshold quantities thereby redressing the resulting racial disparities, we urge the Commission to propose a ratio as close as possible to the previous 1-to-1 proposal.

In proposing statutory and guideline revisions, the Commission should not propose to lower the threshold quantity that triggers longer powder cocaine penalties. First, there is no empirical or scientific evidence of which we are aware to justify such

increased penalties. Second, lowering the threshold would necessarily bring more defendants within the reach of mandatory minimum sentencing laws, which the ABA opposes. Third, lowering the quantity threshold would necessarily increase sentences for defendants with lesser culpability in that they are legally responsible for a lower quantity of drugs. As Judge Martin and his colleagues wrote in 1997, "[t]he penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased…[t]he disparity should be remedied only by raising the amount of crack cocaine that would trigger the application of the mandatory minimum."

In fact, the time seems right for the Commission to make a fairly ambitious proposal on this subject to Congress. In the years since Congress rejected the equalization proposal, there has been growing awareness of the unfairness of the current structure and growing statistical evidence that crack distribution is not as inherently violent as previously thought. In addition, there is movement away from mandatory sentencing laws in a number of states in the face of budget constraints. The introduction of S. 1874 by Senators Sessions and Hatch is an important signal that even members of Congress who were hostile to the Commission's 1995 proposal are willing to entertain positive changes to the crack / powder ratio and to take other steps that reduce the federal system's overreliance on the single sentencing factor of drug quantity.

We understand that questions have been raised about (1) the Commission's legal authority to propose guideline amendments in this area in light of Public Law 104-38; and (2) the wisdom of the Commission proposing guideline amendments before Congress amends the thresholds in the mandatory sentencing laws.

The first concern is easily overcome. While Public Law 104-38 directed the Commission to propose "recommendations" with respect to cocaine sentencing, it in no way limited the Commission's organic authority under 28 U.S.C. § 994 to promulgate guideline amendments on this subject. In contrast to subsection 2(b) of the Act, which requested a "study" of money laundering, subsection 2(a) contemplates that the Commission will take action in light of congressionally enumerated factors. Guideline

amendments can be characterized as “recommendations” since Congress retains authority to block them within six months of submission. Finally, there are numerous non-statutory indications that Congress is ready to address this subject again, and concrete amendments from the Commission will frame the matter for congressional resolution in this session.

The question of whether the Commission *should* move forward or continue to defer to Congress is a straightforward proposition for the ABA, which strongly favors change. It is now seven years since Congress blocked the Commission’s proposed solution to the crack / powder conundrum amid widespread acknowledgment that the cocaine penalty structure is facially unfair, especially to minorities who comprise over 93% of all crack defendants. The Sentencing Reform Act establishes an independent Commission in the judicial branch to establish sentencing policies that, *inter alia*, “provide certainty and fairness,” avoid “unwarranted sentencing disparities,” and reflect “advancement in knowledge of human behavior as it relates to the criminal justice process." Ultimately the Commission has an obligation to act, and should do so after appropriate consultation with all stakeholders.

Even were the Commission to make a very bold proposal with respect to the crack threshold and if it were to adopt aspects of Amendment 8, the system by which drug offenders are sentenced in the federal courts would remain far from the ideal guideline system expressed in the ABA Standards. But such changes would be an important foundation on which to build comprehensive improvements.

OTHER ISSUES.

While we have been asked to focus primarily on proposed Amendment 8, there are two other proposed amendments that warrant comment.

Proposed Amendment 9 would increase sentencing alternatives in Zone C of the Sentencing Table. Consistent with the Standards previously cited, the ABA supports

efforts to increase judicial discretion at sentencing. The Standards specifically encourage the availability of non-incarcerative sentences in appropriate cases. Of the three options set forth in Amendment 9, Option One appears to provide the most discretion by combining Zones B and C in the current Table. Indeed, it would be preferable for the Commission to consider expanding the zones in the Sentencing Table in order to maximize the court's authority to impose non-incarcerative sentences in appropriate cases.

The ABA opposes Amendment 5, which proposes to delete section 3E1.1(b)(1) of the guidelines. This change would further limit a sentencing court's already cramped authority to recognize and reward a defendant's cooperation with the government. Deletion of the first subsection leaves the guideline as a explicit reward for a defendant to plead guilty. ABA policy on this question is clear: "The fact that a defendant has entered a plea of guilty or nolo contendre should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence." Rather the guilty plea should be treated as one indication of a defendant's contrition and acceptance of responsibility. (Of course a defendant may not be penalized for asserting his right to trial and a not-guilty plea should never preclude a finding of acceptance of responsibility.)

Finally, on a subject not addressed in the Proposed Amendments, I note that on several recent occasions the ABA has urged that the Commission promulgate a policy statement to guide the reduction of a sentence when there is an extraordinary and compelling reason for such reduction. Under 18 USC § 3582(c)(1)(A), the Bureau of Prisons is authorized to move for such sentence reductions "consistent with applicable policy statements issued by the Sentencing Commission." 28 U.S.C. § 994(t) directs the Commission to issue such policy statements, but it has never done so. The absence of such policy statements appears to have discouraged the Bureau from making use of its statutory authority. We again urge the Commission to take action in this regard.

Appendix: 21 USCS § 844 (2001) *[see footnote 9]*

§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title or section 1008 of title III if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $ 1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $ 2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $ 5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) [Repealed]

(c) "Drug or narcotic offense" defined. As used in this section, the term " drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution,

manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.