

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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STEROIDS SENTENCING

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

Members of the Commission-

Good morning. My name is Jodi Avergun and I am the Chief of Staff of the Drug Enforcement Administration (DEA). For the 15 years before I joined the DEA, I was a federal prosecutor with the Justice Department. It is a pleasure to join you today to present the views of the Department of Justice on an issue of great importance – the appropriate sentencing guidelines for steroids. The Department strongly urges the Commission to change the sentencing scheme for steroids to one that is consistent with the way in which all other Schedule III substances are sentenced – that is, to define a unit of steroids as one pill or .5 milliliters of liquid, as set forth by Option II of the Commission’s proposed amendments. This change will insure that the intent of Congress in enacting the Anabolic Steroids Act of 2004 is met in a manner that is fair to litigants, yet also accomplishes important deterrent effects in a manner consistent with the rest of the Controlled Substances Act and the drug sentencing provisions of the U.S. Sentencing Guidelines. The option favored by the staff for determining base offense level achieves practically identical sentencing levels, yet at a far greater cost in terms of man hours and delay in analysis, and, according to the FDA, poses a significant health risk if enacted. Accordingly, there seems to be little good reason to adopt Option I.

Effects and Abuse

Anabolic steroids are synthetic forms of the male hormone, testosterone, that can be taken orally, injected, or less often, rubbed into the skin. Under U.S. law, a prescription is required to dispense these drugs. Used licitly, steroids can treat conditions associated with low testosterone levels, such as delayed puberty or body wasting associated with AIDS. When used in combination with exercise, training and a high protein diet, anabolic steroids can improve endurance and enhance muscle size and strength. As such, they are often illicitly used as performance-enhancing drugs.

Anabolic steroids are available in tablets, capsules, liquid injectables, patches, and implants. All contain varying doses of anabolic steroids. Those that abuse anabolic steroids take the substances over a period of weeks which is commonly referred to as a "cycle." A "cycle" can be from six to twelve weeks in length. This usually involves increasing the dosages up to a peak level in the middle of the "cycle" and then decreasing the amounts. In addition the abuser often "stacks" the substances taken, meaning taking several different anabolic steroids at one time. Amounts used depend on the type of steroid and the level of the abuser.

The dangers of illicit steroid abuse cannot be overstated. The long-term health risks associated with steroid abuse can be very serious and potentially life threatening. Younger steroid abusers, both male and female, are at risk of permanently halting their bone growth, which could result in short stature. Males may experience changes to sexual organs, reduced

sperm count, infertility, baldness, development of breasts, and an increased risk for prostate cancer. In females, anabolic steroids have been associated with a number of adverse effects, some of which appear to be permanent even when drug use is stopped, including menstrual abnormalities, deepening of voice, shrinkage of breasts and male-pattern baldness. For both genders, abuse often elevates cholesterol levels and causes cardiovascular weakening, combined with hypertension. Steroid use can also cause uncontrollable outbursts of anger, frustration or combativeness, resulting in wanton acts of violence. These outbursts are commonly referred to as “roid rage.” The sharing of needles to inject these substances may also expose users to HIV. Some steroid abusers become psychologically addicted to the drugs and often experience withdrawal symptoms when they stop. The most dangerous of the withdrawal symptoms is depression, because it sometimes leads to suicide attempts. Untreated, some depressive symptoms associated with anabolic steroid withdrawal have been known to persist for a year or more after the abuser stops taking the drugs. We have only to hear about the sad case of Taylor Hooton, a bright, young athlete who was told to use steroids to improve his performance on the baseball team, to know how deadly steroid use can be.

Taylor Hooton was a star pitcher on his high school team, a handsome teenager who had everything going for him – that is, until steroids caught up with him and he took his own life. It took a while for his parents to connect Taylor's weight and muscle increases with his uncharacteristic mood swings and violent, angry behavior. Like most parents, they didn't know that these and other symptoms, like the acne he had developed on his back, were signs of steroids

use. Taylor had always been a great son, a terrific athlete and had his act together. Taylor just wanted to make the varsity baseball team, and steroids had been recommended to him as a way to get bigger faster. Things deteriorated quickly from there. As Taylor's muscles became bigger, his emotions became more conflicted and he often became angry and irrational. Taylor's parents got him help, but the damage had been done. After an argument with his parents during which Taylor was punished for shoplifting, he went to his room and hung himself. The police and Taylor's dad found the steroids and syringes in his room, and the medical examiner found them in his body---long after Taylor had stopped using. What Taylor's parents and Taylor himself did not fully understand was the deep depression that steroids users can experience when they suddenly stop taking the drug.

There are hopeful signs that information about the dangers of steroids is reaching our young people. The recently-released *Monitoring the Future* study shows that between 2004 and 2005, current use (defined as use within the last 30 days) decreased 25 per cent among 10th graders and current use decreased 44 per cent among 12th graders. However, despite these hopeful signs, *Monitoring the Future* shows that, in the period of time measured by the 2005 Survey, an estimated 37,000 high school seniors used steroids within the 30 days prior to the survey. The idolization of sports heroes and the enticement of improved athletic performance still provide powerful incentives to use these dangerous and illegal drugs, and one that we all have a responsibility to deter. In fact, 43.2 percent of high school seniors responded in the 2005 survey that they did not believe taking steroids posed a great risk.

Trafficking Information

Although some steroids are diverted from the legitimate U.S. market, including the veterinary market, most abused steroids come from foreign sources. Anabolic steroids can be obtained over the internet and are smuggled across the borders by individuals or through the mail or commercial delivery services. Both the internet purchases and smuggling usually occur through the use of an intermediary between the purchaser and seller. Pharmaceutical steroids are fairly easy to obtain in many foreign countries where they are not as stringently controlled as they are in the United States. Anabolic steroids are not controlled under any of the major drug control treaties.

Distribution using the internet is often accomplished by the use of a "remailer." A customer first places an order to a foreign website. The website operator/supplier obtains the anabolic steroids for one or several customers and mails a package, usually in some type of concealed manner, to an individual in the United States, who gets a fee or a quantity of steroids for his service. The remailer then sends the package through domestic mail to the customer. The customer pays the website/supplier using Western Union, Paypal, or via money order.

A smuggler often takes orders from several U.S. customers and then travels to the source country (usually Mexico) to acquire the steroids, or pays someone else to do this. After obtaining the substances, a smuggler will either attempt to bring the steroids across the border or mail them back. The two most significant steroids cases investigated by

DEA in the last two years targeted organizations which were obtaining steroids overseas and smuggling them into the U.S. Both groups were distributing approximately 20,000 dosage units of anabolic steroids a month to between 50 and 100 U.S. customers.

Seizures of steroids in the United States occur primarily at the Southwest border between Mexico and the U.S. Of the ten largest caches of steroids seized in the United States in the past several years, Mexican firms manufactured eight of them.

The vast majority of diverted steroids that are purchased illegally are in pill or liquid vial form. Gels, creams, and patches are usually provided by rogue medical doctors, and make up a very small percentage of the diverted steroids.

How the Issue Comes Before the Commission

The Anabolic Steroid Control Act of 2004, Pub. L. 108-358, became law on October 22, 2004. This law added 36 anabolic steroids to the list of specific steroids controlled in Schedule III of the Controlled Substances Act (CSA); other substances may be deemed steroids through the “catchall” part of the definition at 21 U.S.C. § 802(41)(A). This addition brings to 59 the total number of steroids specifically controlled under the CSA. Included in the law was a provision that directed the United States Sentencing Commission to “consider amending the Federal sentencing guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use.” Pub. L. 108-358, § 3(2). The maximum statutory

penalty for trafficking in any Schedule III controlled substance is five years. The maximum base offense level under the guidelines for trafficking in Schedule III controlled substances is level 20.

Since 1990 when anabolic steroids first became controlled, steroids have been subject to lower base offense levels than other Schedule III controlled substances under the guidelines. Namely, a unit of steroids was defined to be equivalent to 50 tablets or 10 milliliters of liquid. Although initially based on a weight calculation, the November 1, 1995, amendments to the guidelines changed the calculation based on weight for all Schedule III, IV, and V controlled substances and Schedule I and II depressants in the Drug Quantity Table of § 2D1.1(c) and replaced it with a unit based system. While the definition of “unit” for anabolic steroids remained the same, a unit of a Schedule III controlled substance or a Schedule I or II depressant was calculated to be “one pill, capsule, or tablet . . .” If in liquid, one unit “means .5ml.” (Note (F) to USSG § 2D1.1(c)) There was no explanation offered for the disparity between the definition of a unit of anabolic steroids and other Schedule III controlled substances.

As an example of the resulting disparity between steroids and other Schedule III controlled substances, 40,000 units (tablets) or more of any Schedule III controlled substance, except steroids, would be an offense level 20 under current guidelines. Forty thousand tablets of anabolic steroids would be a base offense level 8. Reaching an offense level 20 for anabolic steroids would thus require 2,000,000 tablets.

DEA's Enforcement Efforts Against Steroids

DEA has been steadily increasing its steroid cases in the past decade, both because of better laws clearly criminalizing steroid use and because of increased perception and understanding of the risk of steroids. Many of these cases reveal that serious traffickers, who are using the internet to sell both finished product steroids and raw materials for home made steroids, are the primary group selling steroids.

For example, in Operation Posedown, which began in December 2002, DEA's office in Moscow, Russia, initiated an international steroid investigation targeting a Russian internet company that shipped anabolic steroids to customers in the United States and Canada who placed orders via the company website. Through the investigation, the DEA discovered that the Russian internet company had shipped at least 44 packages of anabolic steroids to the U.S. and Canada in a one-year time frame. The investigation resulted in several related cases that ultimately resulted in the seizure of over 20,000 dosage units of anabolic steroids and the arrest of eight defendants.

More recently, DEA concluded Operation Gear Grinder. On December 14, 2005, agents of the DEA arrested Mexican veterinarian Alberto Saltiel-Cohen, owner of three of the world's largest anabolic steroid manufacturing companies, for his role in distributing tens of millions of dollars worth of steroids to U.S. customers over a period of approximately two years. Along with Saltiel, DEA agents arrested five other steroid distributors. Federal prosecutors in the Southern District of California unsealed six separate indictments charging 18 other individuals and a total of eight manufacturing companies with distribution of steroids. The eight targeted

Mexican manufacturing companies and their distributors all operated relatively similarly to one another. Internet communications and parcel distributions were at the core of their operations. Each manufacturer utilized a business website to place their products in the hands of American customers. The websites showcased their steroid products (most often in English) and provided contact information for obtaining the drugs. Illicit U.S. distributors, some of whom worked for the organizations, promoted their brands on steroid discussion boards and discredited the brands of competitors. Bodybuilders and athletes often learned of these products from these discussion boards with many being led to the manufacturer's website to find more information or a supplier for the drugs. Via email, Mexican distributors forwarded price lists of their available anabolic steroids to their U.S. customers along with instructions for ordering. Payments were made through overnight parcels shipped to U.S. postal mail boxes along the border and through electronic means, such as Western Union wire transfers, bank transfers and credit cards. The manufacturers transported mass quantities of anabolic steroids from Mexico City to Tijuana, Nuevo Laredo, Reynosa, and other Mexican border cities on a monthly basis. The controlled substances were smuggled into the U.S. through hidden compartments in vehicles operated by couriers working on behalf of the distributors. The drugs were either picked up by the U.S. distributors in storage lockers or shipped nationwide via Federal Express, UPS and the U.S. Postal Service.

Finally, the General Accounting Office undertook an investigation during 2005 that showed that anabolic steroids were easily obtained over the internet without a prescription.

Researchers found hundreds of websites offering anabolic steroids commonly used by athletes and bodybuilders. Undercover investigators purchased steroids 22 times over the internet and received 14 shipments – all from foreign countries. Many of the shipments received were fraudulently labeled.

All of these cases demonstrate that enforcement efforts are directed largely at the dangerous and high level traffickers that operate over the internet and in foreign countries – not on individual users. The sentencing guidelines should maintain the same focus.

Problems with the Proposed Purity-Based Scheme

A purity-based requirement for steroids sentencing runs counter to the current sentencing system, both statutory and guideline based, to sentence drugs based on weight and quantity as opposed to purity. Since its passage in 1970, the CSA has established trafficking penalties based on weight of a mixture or substance containing a controlled substance.

The Supreme Court has affirmed this approach, noting in Chapman v. United States, 500 U.S. 453, 461 (1991) that: “Congress adopted a ‘market-oriented’ approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence...[Congress] intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found—cut or uncut,

pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going.”

There are only four controlled substances which are currently sentenced by purity. They are methamphetamine, amphetamines, PCP and oxycodone. The sentencing for methamphetamine and PCP originated with statutory amendments to the CSA which allow for a sentence based on either pure drug or a mixture or substance containing the drug. The oxycodone and amphetamine sentencing schemes were accomplished by amendment to the Sentencing Guidelines.

Whereas the amendment to the amphetamine guideline simply mirrored the methamphetamine guidelines, the change to the oxycodone addressed a unique situation. The Department of Justice supported the Commission's proposal to change oxycodone sentences to make them based on "actual" oxycodone because of the tremendous difference in total tablet weight versus active controlled substance ingredient in various formulations, once OxyContin came onto the market. For example, a Percocet tablet containing 5-mg of oxycodone and 500 grams of an analgesic (e.g., acetaminophen) and weighs about 600 mgs; whereas a 40-mg OxyContin tablet weighs only 140 mg. In plain words, they pack a much stronger punch per gram. In that unique situation, a sentencing scheme based on total weight was not appropriate. Moreover, all of these four drugs are Schedule II controlled substances for which the maximum penalty for trafficking under

the CSA is at least 20 years, and under methamphetamine and PCP, can be as high as life, so it was particularly crucial to ensure that the resulting sentences are justified by the offense conduct.

Using a purity-based system for anabolic steroids, however, would run counter to the intent and structure of the statute and the guidelines, making them subject to a different standard than all other Schedule III controlled substances, and almost all other controlled substances regardless of schedule. In addition, the burdens of a purity-based sentencing scheme on the DEA laboratories and consequently on all federal drug cases, cannot be overstated.

DEA uses information regarding the purity of drugs mostly as an intelligence tool. Knowing the purity of a drug sample being analyzed tells DEA much about from where the drug may have come, how many different hands it might have passed through and information of that sort. The quantitation (or determining purity) of steroid samples for sentencing purposes would require DEA laboratories to shift resources away from supporting current intelligence programs and field enforcement efforts in order to support this change in the guidelines. Authentic steroid material suitable for use as quantitative standards would have to be obtained or synthesized by DEA laboratories in order to accurately perform the quantitation. Methodology for the separation and quantitation of all potential commercial mixtures that comprise the class of 50 plus scheduled steroids would have to be developed and validated.

DEA laboratories are currently accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board under international standards. These standards require that drug purity results, when required by the courts for any purpose, have an “estimate of uncertainty” related to the quantitative results, available for consideration by all parties. The only controlled substances which are currently affected by this quantitation issue are methamphetamine, PCP, and oxycodone. It took DEA almost a year to develop an “estimate of uncertainty” for methamphetamine and it would take a far greater time to develop quantitative uncertainty estimates for 59 separate steroids.

In order to support the staff’s recommended change, DEA laboratories would have to initiate a comprehensive study project to validate methods used to quantitate samples of all expected combinations of steroids. This major shift in priorities would negatively impact the DEA laboratory system’s ability to continue support of intelligence programs such as methamphetamine profiling, heroin signature and cocaine signature and would likely affect the speed at which DEA labs process evidence for use in criminal prosecutions. DEA forensic scientists estimate that 79,000 hours, the equivalent of 38 man-years, could be required to develop validated methodology and complete estimation of uncertainty studies for 59 steroids. A unit base system equivalent to the other Schedule III controlled substances would not have any impact on the DEA laboratory

system and would be consistent with how sentences are calculated for the vast majority of controlled substances.

While the process of using the calculated weight of the actual steroid present in any sample may seem to be an equitable method of measuring a unit, the standard currently utilized for all other Schedule III controlled substances would still provide a good measure for a unit of anabolic steroid. More importantly, in most cases studied by the staff before formulating its recommendation, the resulting sentence was the same or separated by at most a two-level difference regardless of whether Option I (at the proposed 50 mg level) or Option II was used to calculate the sentence. I commend to the Commissioners the staff's own charts, calculating the sentencing results using both a unit based and a purity based system. While there is little to no impact on the base offense level, there is a significant and heavy impact on DEA. Moreover, the addition of a quantitative "estimate of uncertainty", would by necessity lead to complex litigation about the accuracy of the purity tests and might require defense-requested tests as a result. It would not be unexpected to see delays in laboratory results, delays in sentencing, and of course, the additional costs to the court system as a result of the additional litigation and delays.

Even though other controlled substances in Schedule III are available in widely diverse classes of substances in varying dosage forms and strengths, they are all subject to the same guideline of one unit equals one tablet, capsule or .5ml of liquid. Anabolic

steroids come in various dosage forms and strengths. The therapeutic dose of those anabolic steroids which are available as pharmaceutical products is closely related to the one tablet, capsule or .5ml of liquid. For example, Oxandrin®, which contains oxandrolone, comes in 2.5mg. and 10 mg. tablets. A therapeutic dose ranges from 2.5mg. to 20 mg. a day, or one to two tablets, depending on dose. A therapeutic dose of an anabolic steroid is substantially less than the 50 tablets or 10ml of liquid which currently equal one unit. It is therefore inconsistent with the pharmaceutical use of steroids to apply anything other than a one unit = one pill measure.

Finally, the FDA has raised significant safety concerns about the proposed rebuttable presumption of label accuracy and has noted, correctly, a likely incentive on the part of illicit steroids manufacturers, to falsely label the quantity of pure steroids – thus creating an unacceptable health risk.

CONCLUSION

To what end would Option I be selected? Essentially a two point difference in the base offense level for most steroids. There is little or no difference in base offense level between Option I at the 50mg level and Option II. The charts that your staff has prepared demonstrating the lack of substantial difference in results, which I would like to make a part of the record, are powerful and compelling, as are the other reasons for choosing Option II – consistency with the rest of a Schedule III sentencing scheme, consistency

with the CSA, ease of application, and a just resulting sentence.

The Department of Justice and the Commission Staff agree that steroids pose significant dangers, and that, in the words of your staff, the dichotomy between steroid sentencing and other Schedule III substances is “unwarranted.” The staff also indicates that it is sympathetic to the increased time and cost that will result from its recommended option. Since there is no principled reason for imposing the additional costs and delays that will result from Option One, and the difference in resulting sentences is minor, the Commissioners are urged to select Option II as the method by which the steroids guidelines are calculated.

Thank you for the opportunity to appear before you representing the Department of Justice. I am happy to answer any questions that you may have.