INDEX TO PUBLIC COMMENT

August 15, 2005

TENTATIVE PRIORITIES

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No Comment Received for this Issue

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No Comment Received for this Issue

POSSIBLE PRIORITY ISSUES

4) Staff workshops – Immig. & Steroids
Need to report comprehensively on what was said.

5) Add DOJ's firearms issue ✓

6) Policy Statement in Chap 6 that all victims rights protected.

Review ~~whether care~~ Ch 2 to ensure in compliance w/ law. – add to priority no 1. ✓

Add Compassionate Release. ✓

Rec. mtg — Alan Caswell

1) Redistribute Lisa K's memo re. Rule amends.

2) Plea agmt. training – decon PSR waived

3) 2 issues for a Booker report to address
1) crack-powder
2) ~~205~~ EDP (Court. limit)
how they made a difference to 3553(a) factors – disparity –
Report deals w/ our data
Message – Judges doing what did before.
For the 10% – analysis – why
mand. min
crack/powder
EDP

Add Priority to issue a report on data (Jan 05 – Dec 31, 05) – For May Sent. Conf in Fla.
Regional variations – 1, 2, 3 circuits.
On –

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

August 15, 2005

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
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Dear Judge Hinojosa:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit at least annually to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report pursuant to that provision.

We would first like to note the invaluable work the Commission has done this year in response to the Supreme Court's decision in United States v. Booker, 125 S.Ct. 738 (2005). The hearings held by the Commission and the statistics it has regularly released have greatly contributed to the public dialogue and analysis of the Booker aftermath. The Department looks forward to continuing to work with the Commission on this important matter to ensure that the sentencing system that emerges from Booker preserves, to the extent possible, the protections and principles of the federal sentencing guidelines.

We understand that the Commission will continue to monitor the emerging litigation and to evaluate any legislative proposals which address the deficiencies in sentencing created by Booker. Notwithstanding Booker, as the Commission continues its regular work during this amendment cycle, the Department of Justice has a number of issues which we believe warrant consideration, of which we have identified national security issues, gun trafficking, and steroids as our highest priorities. We are aware that the Commission has its own additional priorities, including its response to a number of legislative directives from the last two Congressional terms.

Terrorism

Guidelines section 3A1.4 provides for an enhancement where a felony promoted a federal crime of terrorism. The Department has encountered a number of problems in the application of this enhancement, which has been interpreted differently by different courts. We urge the Commission to amend the section in order to clarify the scope of cases where the enhancement is applicable and to settle the circuit splits that have arisen in relation to this enhancement.

In United States v. Arnaout, 282 F.Supp.2d 838 (N.D. Ill. 2003), the district court refused to apply § 3A1.4 in a case where a defendant pled guilty to a racketeering offense under 18 U.S.C. § 1962(d) because that offense is not listed in 18 U.S.C. § 2332b(g)(5). The interpretation of the district court in Northern Illinois renders superfluous the words "involved, or was intended to promote," as contained in § 3A1.4(a). Such a construction is disfavored. By contrast, the Sixth Circuit has ruled that § 3A1.4 should not be read so restrictively. United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001) ("Based on our interpretation of the word 'involved' and the phrase 'intended to promote,' as well as our understanding of the relevant conduct provision, we believe that this statement of law is correct: the defendant need not have been convicted of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) for the district court to find that he intended his substantive offensive condition or his relevant conduct to promote such a terrorism crime.") Similarly in United States v. Meskini, 319 F.3d 88 (2d Cir. 2003) and United States v. Lindh, 227 F.Supp.2d 565 (E.D. Va. 2002), the courts applied §3A1.4 even though the defendants were not convicted of an enumerated federal crime of terrorism, although neither court directly addressed that issue. Finally, in United States v. Jordi, ___ F.3d ___, 2005 WL 1798055 (11th Cir. 2005), the Eleventh Circuit court held §3A1.4 does not require the government to prove the offense conduct transcended national borders. While this issue was correctly decided on appeal, the district court decision perhaps indicates a need to clarify that §3A1.4 also applies to domestic terrorism cases to avoid confusion by other circuits.

In light of the above, the Department urges the Commission to amend the language of the enhancement to clarify that a defendant need not have been convicted of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) for the district court to find that he intended his substantive offense of conviction or his relevant conduct to promote such a terrorism crime.

In addition, the Department has also encountered problems applying the terrorism enhancement in the case of an attempted obstruction of a terrorism investigation. In United States v. Biheiri, 356 F. Supp.2d 589 (E.D. Va. 2005), the court noted that where the government has a false statement intended to obstruct a terrorism investigation – but no proof that it *actually* obstructed the investigation – the enhancement will not apply because §3A1.4 (unlike the obstruction statute or its corresponding sentencing guideline) does not mention attempts to obstruct. We urge the Commission to amend the guideline to ensure that the enhancement applies to attempts to obstruct terrorism investigations.

Gun Trafficking

Firearms trafficking, the illegal diversion of firearms out of lawful commerce, is frequently the source of firearms used in violent crimes. Firearms traffickers deliberately circumvent the background check and record keeping requirements of legal commerce in order to supply firearms to convicted felons, drug dealers, juvenile gang members and other prohibited persons. A June 2000, ATF report entitled "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," notes that 50 percent of the investigations classified as trafficking by ATF between July 1996 and December 1998 involved at least one firearm recovered during a crime; seventeen percent of these firearms were associated with a homicide or robbery. The strong tie between trafficked firearms and violent crimes underscores the great harm of firearms trafficking.

However, the Sentencing Guidelines do not currently treat firearms trafficking in a manner that recognizes the harm caused by those who traffic illegally in firearms. As a result, firearms traffickers may often receive sentences that do not match the seriousness of the harm caused by their offenses. To address these issues, the Department recommends that the Commission consider the creation of a new specific offense characteristic in §2K2.1 based on firearms trafficking conduct. Such a guideline could provide for a new scale of enhancements specifically applicable to offenses related to firearms trafficking schemes. The Commission also should consider whether to increase the sentencing enhancement in §2K2.1(b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers, as these offenses are often committed in furtherance of firearms trafficking. By increasing sentences for firearms-trafficking offenses to reflect the serious harm these offenses may cause, the guidelines would provide a stronger deterrent and better reflect the harm of these offenses.

Steroids

As part of the Anabolic Steroids Act, Pub. L. 108–358, Congress directed the Commission to implement appropriate guidelines for steroids. We appreciate the work the Commission has already done on the issue of anabolic steroids, including holding a hearing at which the Department and others testified.

To respond to the directive, the Department believes that the Notes to the Drug Quantity Table should be amended so that anabolic steroids are treated the same as other Schedule III controlled substance pharmaceuticals. Recent congressional hearings and the attention brought to the issue by the passage of the Act have highlighted the dangers associated with illicit anabolic steroid use – including the harm to young people. The current dosage equivalency is clearly inadequate to address the problem.

For all Schedule III drugs other than anabolic steroids, a "unit" is defined as one tablet or pill. Thus, a dosage unit for sentencing purposes equates to a therapeutic dose of the Schedule III drug. Similarly, we believe that a dosage unit under the Guidelines for anabolic steroids should be equal to one tablet, which constitutes a therapeutic dose. The Physician's Desk Reference

dosing information clearly indicates that therapeutic doses of anabolic steroids are consistent with the therapeutic doses of other Schedule III controlled substances. Accordingly, for sentencing purposes, anabolic steroid dosage equivalencies should be made to conform to other Schedule III substances.

We also urge the Commission to include guidance on how to compute dosage unit equivalencies for anabolic steroids in non-pill form. For instance, steroid creams can be packaged and dispensed in a tube and applied directly to the skin, and some designer steroids in liquid form are ingested orally by eye dropper under the tongue. For creams, we suggest that the commentary direct the court to determine the typical number of applications of steroid cream in a tube, and use that as the basis for computing the number of dosage units. For liquids, the court should determine the typical quantity injected or otherwise ingested (e.g., orally) at a single point in time (divide the total volume of liquid by the number of milliliters per dose) to determine the number of doses. This would substitute for the current "unit" measure of 10 cc regardless of the steroid (per Note (G) to the Drug Quantity Table at §2D1.1(c)).

In sum, the Department asks the Sentencing Commission to acknowledge the dangerous effects of anabolic steroids and to amend the guidelines to more accurately reflect the seriousness of offenses involving such substances. For the purposes of the guidelines, there is no principled basis for distinguishing between anabolic steroids and all other Schedule III controlled substances. If anabolic steroids were treated as other Schedule III substances, then a large scale distributor would face a base offense level of 20 based on a drug trafficking scheme involving 40,000 or more dosage units. DEA drug seizure data suggests that modification of the dose equivalencies as advocated by the Department would yield more appropriate sentences for large scale traffickers without capturing those who handle personal use quantities.

Downward Departures in Gun Cases

The Department reiterates our request from last year that the Commission address downward departures for felons who possess guns based upon the court's finding that the defendant would not have done anything illegal with the guns. *See e.g.* United States v. Vanleer, 270 F.Supp. 2d 1318 (D. Utah 2003) (downward departure found appropriate where felon possessed gun only for the purpose of pawning it); United States v. Bayne, 2004 WL 1488548 (4th Cir. July 6, 2004) (departure upheld for possession of a sawed-off shotgun under §5K2.11 under PROTECT Act standard of review). Courts granting these departures generally rely on §5K2.11 and United States v. White Buffalo, 10 F.3d 575, 576-577 (8th Cir. 1993) holding that a departure could be granted under §5K2.11 when a sawed-off rifle was not loaded when police discovered it, the defendant had no criminal record, and it was undisputed that the defendant had shortened the weapon so he could shoot varmints in the confined spaces underneath his shed.

It is our position that §5K2.11 should not apply in cases involving felons who possess a gun. *See* United States v. Guess, 131 F. 3d (4th Cir. 1997) (lack of intent to commit another crime is not a basis for a downward departure in a felon in possession case). Section 5K2.11

allows the court to depart when a defendant commits a crime that did not cause or threaten the harm sought to be prevented by the law at issue. Applying downward departures in felon-in-possession cases goes directly against the original purpose of the prohibition: to prevent persons who have demonstrated an inability to conform their conduct to the law from having control of lethal weapons. As such, §5K2.11 should not be applied to these types of cases. The Department agrees with the Ninth Circuit's reasoning (in the context of a non-felon possessing a sawed-off shotgun) that "[n]either Congress nor the [Sentencing] Commission limited punishment for the offense to those who possess the guns for evil reasons." United States v. Lam, 20 F.3d 999, 1004-1005 (9th Cir. 1994). We ask the Commission to clarify this point this coming term.

In addition, we ask the Commission to consider whether downward departures should be permitted on the basis of injuries sustained by a defendant after he threatens a police officer with deadly force and is subsequently shot by such officer. In United States v. Clough, 360 F.3d 967 (9th Cir. 2004), the defendant assaulted police officers with a sawed-off shotgun and was subsequently shot by those officers. After pleading guilty to both state assault charges and federal gun charges, the defendant asked the federal court at sentencing for a downward departure because of his injuries. The Ninth Circuit held that being shot could possibly be considered punishment, thus making a reduced sentenced potentially acceptable. Because the Sentencing Commission has neither categorically proscribed consideration of the factor nor discouraged consideration of it, the circuit court held a district court has the discretion to consider a defendant's gun shot injuries suffered when attacking police with a sawed-off shotgun in deciding whether to depart downward from the Guidelines sentence. We think this issue warrants Commission consideration.

Legislative Directives and Commission Priorities

The Department is aware that the Commission intends to continue its work regarding immigration offenses. The Department looks forward to working with the Commission to ensure appropriate immigration guidelines. Specifically, we urge the Commission to increase the applicable base offense levels for all passport offenses, so that the penalties more properly reflect the seriousness of these offenses and their potential threat to national security.

In addition, Congress has directed the Commission to implement crime legislation enacted during the 108th Congress and the first session of the 109th Congress, such as the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9; the Intellectual Property Protection and Courts Amendment Act of 2004, Pub. L. 108–482; and the Intelligence Reform and Terrorism Reform Act of 2004, Pub. L. 108–458. In addition, there is an issue pending from the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, that is, creating a guideline for spamming of sexually explicit material. The Department looks forward to working with the Commission to appropriately amend the guidelines as part of the implementation of this important crime legislation.

The Department notes that the Commission's work in response to Booker – including continuing data compilation and analysis and consideration of responsive guideline amendments and legislation – will consume a great deal of the Commission's time and resources. Consequently, we have limited our requests to our highest priorities in order to allow the Commission to address them. At the same time, we take this opportunity to draw the Commission's attention to other important issues that warrant consideration either during this amendment cycle or in the future, such as: (1) creating a guideline for violations of the foreign agent notification offense found at 18 U.S.C. § 951, which has no direct or clearly analogous guideline provision, resulting in a disparity in the sentences received by defendants convicted of the offense; (2) adding an enhancement to §2T1.4 to address violations of 26 U.S.C. § 7206(2) (aiding and assisting in the filing of false returns, statements or other documents) in cases involving high volumes of tax returns, such as in abusive tax shelter programs or fraudulent tax return schemes; and (3) addressing the guidelines for trafficking of British Columbia or "B.C. Bud" marijuana, which is five times more potent than regular marijuana (based on THC levels), has a higher monetary value and, consequently, should not be equated to marijuana for sentencing purposes.

We look forward to working with the Commission during this coming year to improve federal sentencing policy, through specific amendments to the sentencing guidelines, and by ensuring that the sentencing system that emerges from Booker provides protection to the American people and equal justice to defendants.

Sincerely,

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August 3, 2005

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Re: Family Entertainment and Copyright Act of 2005 (Pub. L. 109–9); Intellectual Property Protection and Courts Amendment Act of 2004 (Pub. L. 108–482); CAN SPAM Warning Label Offense (Pub. L. 108-187 section 5(d)(1))

Dear Ms. Grilli:

We write on behalf of the Federal Public and Community Defenders to comment on an appropriate response to the above-referenced intellectual property statutes. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work whenever we believe it would be useful.[1] We thank you for meeting with us and for this opportunity to follow up with more specific information and analysis.

I. Family Entertainment and Copyright Act of 2005

The FECA adds an offense at 18 U.S.C. § 2319B for unauthorized recording of motion pictures in a motion picture exhibition facility, and an offense at 17 U.S.C. § 506(a)(1)(C) for infringing a copyright of a work being prepared for commercial distribution. The conduct described by each provision was already a crime, and was subject to the same or higher statutory maximums under prior law. Thus, the FECA does not target new conduct for criminal prosecution or harsher penalties.

[1] 28 U.S.C. § 994(o).

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The FECA directs the Commission to "review and, if appropriate," amend the guidelines and policy statements applicable to intellectual property offenses,[2] in four ways, each of which we address below.

A. Section 2B5.3 is sufficiently stringent to deter and reflect the nature of intellectual property offenses.

The first directive is a general one to ensure that the intellectual property guideline is "sufficiently stringent" to "deter, and adequately reflect the nature of" such offenses. Based on the history and impact of the NET Act and 2000 amendments, more recent statistical research on the loss attributable to on-line infringement, and Commission statistics on cases sentenced under section 2B5.3, we believe that the current guideline is more than adequate to deter and reflect the nature of intellectual property offenses.

1. History and Impact of the NET Act and 2000 Amendments

Congress enacted the NET Act of 1997 in response to United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), a case in which an MIT student was charged with wire fraud for running an Internet bulletin board where copyrighted computer games could be uploaded then downloaded at no charge. The district court dismissed the Indictment because, absent a commercial motive, the conduct was not punishable as a crime under the copyright laws or the wire fraud statute.

Congress responded by expanding 17 U.S.C. § 506 to include the reproduction or distribution of copyrighted material accomplished by electronic means – i.e., via the Internet – regardless of whether the conduct is motivated by commercial advantage or private financial gain, and broadened the definition of "financial gain" to include the receipt of copyrighted works. It also directed the Commission to ensure that the guideline range for intellectual property offenses was "sufficiently stringent to deter such a crime," and required that the guideline provide for "consideration of the retail value and quantity" of the infringed item.

After extensive study, the Commission substantially increased the potential guideline range for intellectual property offenses in a variety of ways. It increased the base offense level from 6 to 8; added a 2-level enhancement with a minimum offense level of 12 for manufacture, importation or uploading of infringing items; provided that the 2-level enhancement for use of a special skill under section 3B1.3 would apply if the

[2] See 17 U.S.C. §§ 506 (copyright infringement), 1201 (circumvention of copyright protection systems) and 1202 (misuse of copyright management information), and 18 U.S.C. §§ 2318 (trafficking in counterfeit labels, illicit labels or counterfeit documentation or packaging), 2319 (penalties for copyright infringement), 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), 2319B (unauthorized recording of motion pictures in a motion picture exhibition facility), and 2320 (trafficking in counterfeit goods or services).

defendant de-encrypted or circumvented a technological security measure to gain initial access to the infringed item; and encouraged upward departure both for substantial harm to the copyright or trademark owner's reputation, and for commission of the offense in connection with or in furtherance of a national or international organized criminal enterprise. It provided for a 2-level decrease if the offense was not committed for commercial advantage or private financial gain, but excluded from that definition the receipt or expected receipt of anything of value, including other protected works. Thus, the decrease does not apply in most, if not all, cases involving on-line file sharing.

Importantly, the Commission also required that the value of the *infringed* item times the number of infringing items would be used in cases in which the Commission thought it was highly likely that infringing items displaced sales of legitimate items on a one-to-one basis,[3] i.e., where the infringing item is a digital or electronic copy or otherwise appears to be identical or substantially equivalent, or the retail price of the infringing item is at least 75% of the retail price of the infringed item. While the latter may approximate displaced sales, the fact that an infringing item is an electronic or digital copy or otherwise substantially equivalent substantially overstates displaced sales. No matter how perfect the quality of an infringing item, many people simply cannot afford to buy it at its retail price. For example, last month a defendant pled guilty to selling copies of copyright protected software and video games over the Internet. He was paid $192,000 for the infringing items, and the total retail value of the infringed items was $1,154,395.85. That is, he sold the infringing items for 16% of the infringed items' retail value. No one would contend that all or even most of his customers would have paid, or could afford to pay, 84% more. In reality, the majority of those games and software simply would not have been sold. Yet, the defendant's guideline range will be increased based on an infringement amount of over $1 million as well as an uploading enhancement, resulting in a range of 46-57 months.[4] Under the pre-2000 guideline, the range would have been 8-14 months. The 2000 amendments result in a 468% increase from the mid-point of the range.

As noted in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast majority of infringements do not result in a one-to-one displacement of sales, the retail value of the infringed (or even the infringing) item overstates loss to the victim because it fails to account for production costs, and although production costs represent payments that would have been made to suppliers of material and labor (assuming the infringement actually displaced a sale), some economists believe that infringement can benefit trademark and copyright holders, consumers and the economy as a whole.[5] See U.S. Sentencing Commission, No

[3] U.S.S.G. App. C, Amendment 593.

[4] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

[5] Previously, the sentence was increased by the value of the *infringing* item times the number of infringing items. The Commission believed that even that formula would "generally exceed the loss or gain due to the offense," U.S.S.G. § 2B5.3, comment. (backg'd.) (1999), because not

Electronic Theft Act Policy Team Development Report at 5, 15, 16, 22-23 (February 1999). Recent studies lend strong support to these concerns. See below.

We also want to alert the Commission to an issue that may further overstate the loss, as well as create unreliability, unpredictability and disparity, in the sentencing of intellectual property cases. With the NET Act, Congress added an unusual provision to these statutes: Victims are permitted to submit *directly* to the Probation Officer "during the preparation of the pre-sentence report" a statement on "the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact."[6] This seems clearly to invite the Probation Officer to use the victim's estimate of loss in calculating the infringement amount. Normally, victims and other witnesses provide evidence to the prosecutor, who sifts through it and passes on to the Probation Officer what is relevant and accurate. Since the prosecutor has an ethical duty of candor to the court, s/he is likely to weed out false, misleading, unsupported, inflated or irrelevant claims of loss. Corporate victims of intellectual property offenses come from a different place. They do not have an ethical duty to the court, may be motivated by concerns such as obtaining restitution or showing investors that intellectual property crime is the cause of falling profits, and are likely to think of "loss" in terms of civil damages. The prosecutor would be obliged to sort out what was actually provable and relevant under the guideline, but we do not believe that most Probation Officers will have sufficient familiarity with the issues to do so, particularly because these cases are so rare. In some districts, sentencing courts hold hearings and resolve disputes about loss with care, but in many districts, the unfortunate fact is that the Pre-Sentence Report is accorded the status of evidence, and evidentiary hearings are rarely if ever held. We raise this not only as a further reason not to increase the guideline range for intellectual property offenses, but as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

2. Statistical Research on the Impact of File-Sharing on Sales

A well-respected statistical study of the effect of file sharing on music sales published in March 2004 by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill concluded that "the impact of downloads on sales continues to be small and statistically indistinguishable from zero,"[7] which is inconsistent with industry claims that file sharing explains the decline in music sales between 2000 and 2002.[8] Unlike other studies, which rely on surveys, this study directly

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every purchase of a counterfeit item represents a displaced sale, and it overestimated lost profits by failing to account for production costs. See U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 5 (February 1999).

[6] See 18 U.S.C. §§ 2319(e), 2319A(d), 2319B(e), 2320(d).

[7] See Felix Oberholzer and Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis at 24 (March 2004) (hereinafter "Harvard Study"), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

[8] File sharing of music recordings has been going on since 1999. According to the Recording Industry Association of America (RIAA), CD sales continued to rise during 1999 and 2000, then

observed actual file sharing activities for 17 weeks in the Fall of 2002, and compared it to music sales during the same time period.[9]

The researchers used several models, the most conservative of which showed that it would take 5,000 downloads to reduce sales of an album by one copy.[10] For the top 25% of best-selling albums, downloading was found to have a *positive* effect on sales, while the negative effect on sales of less popular albums was still statistically insignificant.[11] This provides strong support for the concern that section 2B5.3 already overstates the loss by assuming a one-to-one correspondence between infringing items and displaced sales.

The authors pointed out that file sharing may promote new sales by allowing people to sample and discuss music to which they otherwise would not be exposed.[12] In addition to their statistical analysis of actual behavior, they conducted a survey that showed that file sharing led the average user to purchase eight additional albums.[13] Another survey of 2,200 music fans released in 2000 showed that Napster users were 45% more likely to have increased their music spending than non-users.[14]

After the Harvard Study was published, the Recording Industry Association of America reported a 2.8% increase in the number of CDs sold from 2003 to 2004.[15]

The researchers noted that their results were consistent with the fact that sales of movies, video games and software, which are also heavily downloaded, have continued to increase since the advent of file-sharing.[16]

They suggested (without attempting to definitively identify) several reasons for the decline in music sales from 2000 to 2002: poor economic conditions, a reduction in the number of album releases, growing competition from other sources of entertainment,

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dropped by 15% between 2000 and 2002. The RIAA claims this is due to file sharing. Id. at 1-2.

[9] Id. at 6, 11.

[10] Id. at 22.

[11] Id. at 23, 25.

[12] Id. at 2.

[13] Id. at 3.

[14] See "Report: File Sharing Boosts Music Sales," E-commerce Times, July 21, 2000, available at http://www.ecommercetimes.com/story/3837.html.

[15] See RIAA 2004 Yearend Statistics (Exhibit A).

[16] Harvard Study at 1, 24.

a reduction in music variety, a consumer backlash against recording industry tactics, and that music sales may have been abnormally high in the 1990s as people replaced records and tapes with CDs.[17]

Finally, the authors suggested that file sharing increases the aggregate social welfare in that it does not reduce the supply of music, and lowers prices overall, which allows more people to buy it.[18]

3. Commission Statistics on Sentencing Under Section 2B5.3

An important factor in evaluating whether the current guideline adequately reflects the nature of intellectual property offenses is how the front-line actors treat these cases. According to Commission statistics, intellectual property cases are few, ranging from a low of 96 in 2000 to a high of 137 in 1998, and 121 in 2003.[19] Since the Commission began keeping track of departures by offender guideline in 1997, there has been only one upward departure in an intellectual property case. That was in 1998, well before the 2000 amendments took effect. The percentage of downward departures has ranged from a low of 22% in 1997, to a high of 41% in 2002 (when sentences under the 2000 amendments were likely to be imposed), then 36% in 2003 (the year of the PROTECT Act).[20] Without knowing the specific departure reasons, it at least appears that judges and prosecutors do not regard sentences under current section 2B5.3 as being too low, and in many cases regard them as too high.

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[17] Id. at 24.

[18] Id. at 2, 25.

[19] See Table 17 of U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996-2003.

[20] Downward Departures in Cases Sentenced under 2B5.3 1997-2003, based on Sourcebooks of Federal Sentencing Statistics:

	1997	1998	1999	2000	2001	2002	2003
# cases analyzed	115	133	107	87	107	123	112
5K1.1	21	27	25	20	19	38	30
Other govt initiated	N/A	N/A	N/A	N/A	N/A	N/A	2
Non-govt initiated	4	6	0	4	6	13	8
% downward departures	22%	25%	23%	28%	23%	41%	36%

No recidivism statistics for intellectual property offenses are publicly available, but one would think that these defendants are relatively easy to deter without excessive sentences. We suspect that most are employed and relatively highly educated. The Commission has identified employment within the year preceding conviction and level of education as factors that indicate reduced recidivism.[21] Those who engage in file sharing on the Internet (with whom Congress and the industry seem most concerned) are not motivated by greed, financial need, or addiction, and therefore are probably more easily deterred. Furthermore, intellectual property prosecutions have a big impact on the relevant population, because they are publicized widely and fast over the Internet.

4. Suggested Basis for Downward Departure

In light of the above, we suggest that the Commission include an encouraged basis for downward departure in the application notes to section 2B5.3:

> Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

B. An Enhancement for Pre-Release Infringement is Not Appropriate.

The second directive tells the Commission to determine whether an "enhancement" is appropriate for the "display, performance, reproduction or distribution of a copyrighted work," in any media format, before it has been authorized by the copyright owner. By its terms, this applies to any copyrighted work in any media format. The impetus, however, was the movie industry's representation that "a significant factor" in its "estimated $3.5 billion in annual losses . . . because of hard-goods piracy" stems from the situation where "an offender attends a pre-opening `screening' or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie," and then sells the recording as DVDs or posts it on the Internet for free downloading.[22]

We do not believe such an enhancement is appropriate. The notion that pre-release DVD sales or Internet postings create losses for the movie industry is highly questionable. The Motion Picture Association of America reports box office sales of $9.5 billion in 2004, a 25% increase over five years ago, and the highest in history.[23] The

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[21] See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 (May 2004).

[22] H.R. Rep. No. 109-033.

[23] See Motion Picture Association Worldwide Market Research, U.S. Entertainment Industry: 2004 MPA Market Statistics at 3-4, selected pages attached as Exhibit B, available from www.MPAA.org.

Recording Industry Association of America reports that the number of DVD videos sold increased 66% between 2003 and 2004.[24]

A pre-release enhancement would apply to anything from a defendant using a camcorder to tape a movie and showing it to his family, to making a software package available on the Internet. A one-size-fits-all enhancement would overstate the harm in the first example. It would be excessive in the second example since the defendant would be sentenced for the retail value of all of the software packages downloaded (whether anyone would have bought them or not), as well as an uploading enhancement.

The Commission considered a pre-release enhancement in 2000. The reasons industry gave for such an enhancement were that when the copy is exact, it displaces sales, and when it is inferior, it causes harm to reputation.[25] The 2000 amendments addressed the first concern by increasing the sentence by the value of the infringed item times the number of infringements. If there is increased demand for pre-release works, this will increase the sentence accordingly. The second reason was addressed with an invited upward departure for substantial harm to the copyright or trademark owner's reputation.

C. The Scope of the "Uploading" Enhancement Adequately Addresses Loss from Broad Distribution of Copyrighted Works Over the Internet.

The third directive tells the Commission to determine whether the scope of "uploading" in U.S.S.G. § 2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants who broadly distribute copyrighted works over the Internet receive an increase for that activity in two ways: a 2-level enhancement for uploading, with a minimum offense level of 12, under section 2B5.3(b)(2), and the retail value of all resulting downloads.

In a case where the retail value of an infringed CD is $20, and there was a single upload with no downloads, the uploading enhancement would increase the sentence for a first offender from 0-6 months in Zone A to 10-16 months in Zone C, an increase of 433% in the mid-point of the range, and the difference between probation and approximately one year in prison, in a case in which the copyright owner suffered no loss. If there were 1,000 downloads of the CD, the sentence would increase from 10-16 months to 15-21 months, a 138% increase in the mid-point of the range. In this example, according to the Harvard Study's most conservative model, not even one sale of the CD would have been displaced.

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[24] See RIAA 2004 Yearend Statistics (Exhibit A).

[25] U.S. Sentencing Commission, No Electronic Theft Act Policy Team Development Report at 34 (February 1999).

Two further increases will be available in the more serious cases involving broad distribution over the Internet. In a recent case, eight members of the so-called "warez scene" were indicted for copyright infringement. According to the press release and indictments, "warez" groups are at the "top of the copyright piracy supply chain" and the original sources for most copyrighted works distributed over the Internet. They are highly-organized, international in scope, and some of them specialize in cracking copyright protection systems.[26] These defendants apparently would be eligible for an upward departure for committing copyright infringement in connection with or in furtherance of a national or international organized criminal enterprise, and for an enhancement for use of a special skill for circumventing technological security measures.

In sum, the scope of the uploading enhancement is more than adequate.

D. There is No Need for an Enhancement to Reflect Harm in Cases, If Any, in Which the Number of Infringing Items Cannot Be Determined.

The final directive tells the Commission to determine whether the existing guidelines and policy statements adequately reflect "any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

We do not believe that any change is appropriate. In a case in which the government fails to prove that any download resulted, the defendant already receives an additional four levels through the uploading enhancement. An enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional.

Moreover, a review of recent cases indicates that the scope of the infringement *can* be determined. When copyrighted works are sold over the Internet, buyers have to pay for it, which is easily tracked.[27] Files are shared for free using file transfer protocol ("FTP") or peer-to-peer ("P2P") networks. FTP involves a server with a computer that keeps detailed logs of all traffic on the server. Until recently, all of the file sharing prosecutions involved FTP servers. "Warez" groups not only typically use FTP servers that keep detailed logs of uploads and downloads, but place their "signature mark" on the infringing items they send out into the world. In the case mentioned above, the government removed "more than 100 million dollars worth of illegally-copied copyrighted software, games, movies, and music from illicit distribution channels," and

[26] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[27] See "Texas man pleads guilty to felony copyright infringement for selling more than $1 million of copyright protected software and video games over the Internet," www.usdoj.gov/criminal/cybercrime/poncedeleonPlea.htm.

identified numerous particular uploads and downloads attributable to each defendant.[28] Many P2P networks, including OpenNap and the former Napster, use central servers that (like FTP servers) generate detailed logs of all traffic.[29] The government can also determine the scope of infringement based on the bandwidth used and/or the size of the files shared, by downloading files in a "sting," and by using cooperators.[30]

II. Intellectual Property Protection and Courts Amendment Act of 2004

Despite the lack of evidence of a widespread problem, Congress, in the Intellectual Property Protection and Courts Amendments Act of 2004, has directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, material false contact information to a domain name registration authority.

Notwithstanding this directive, given the dearth of information on the exact nature of this problem, we believe it is best to proceed with caution. Our anecdotal evidence suggests that this conduct occurs mainly, if not entirely, in fraud related offenses. Accordingly, the most appropriate place for this enhancement would be in Guideline §2B1.1. We propose the following:

> 2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**
>
> Application Notes
>
> (20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -
>
> (A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.

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[28] See "Justice Department Announces Eight Charged in Internet Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/OpSiteDown8Charge.htm; Indictment of Alexander Von Eremeef (attached as Exhibit C).

[29] See Harvard Study at 7-8.

[30] See "First Criminal Defendants Plead Guilty in Peer-to-Peer Copyright Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/trwobridgePlea.htm; Final Guilty Plea in Operation Digital Gridlock, First Federal Peer-to-Peer Copyright and Piracy Crackdown," www.usdoj.gov/criminal/cybercrime/tannerPlea.htm; Government's Memorandum in Aid of Sentencing at 6-7 in United States v. Boel, Cr. No. CR-05-090-01 (attached as Exhibit D).

(B) Non-Applicability of Enhancement.- If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

We believe a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add more than one level would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and, (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples. A one-level enhancement amply addresses the concerns of Congress.

Further, we propose an application note to define "materially false." This definition tracks the exact language in the Act. We believe that this definition is necessary to limit application of this enhancement to only the conduct Congress intended.

Finally, we believe that it would be impermissible double counting to allow for an increase for Use of a Falsely Registered a Domain Name and Obstruction of Justice to apply. The language suggested in the above application note is identical to that of U.S.S.G. §2B1.1, Application Note 8(C), which, similarly, addresses a double counting concern. Specifically, it precludes the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

III. CAN SPAM Act of 2003

Section 5(d)(1) of Pub.L. 108-187 makes it a crime punishable by up to five years imprisonment to transmit a commercial electronic mail that includes "sexually oriented" material without including in the subject heading the marks or notices prescribed by the Federal Trade Commission, or without providing that the message when initially opened includes only those marks or notices, information identifying the message as a commercial advertisement, opt-out provisions, and physical address of the sender, and instructions on how to access the sexually oriented material. "Sexually oriented" has the definition of "sexually explicit" in 18 U.S.C. § 2256.

Our understanding is that the only issue you need to resolve at this point is whether to incorporate this offense into an existing guideline, and if so, which one. We do not think that this offense fits comfortably in any of the existing guidelines in Part G of Chapter 2 because it does not involve a "victim," and does not involve material that is necessarily obscene or child pornography. It is essentially a regulatory offense, and should be treated differently and less seriously than offenses involving victimization and

illegal material. It could be included as an enhancement in the guidelines for other offenses, but Congress has made it a free-standing crime. We suggest that the Commission promulgate a new guideline for it at section 2G4.1.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

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August 10, 2005

The Honorable Ricardo H. Hinojosa
Chair U.S. Sentencing Commission, Suite 2500
One Columbus Circle, NE
Washington, DC 20002-8002

RE: Ad Hoc Advisory Group on Immigration

Dear Judge Hinojosa:

I am writing on behalf of the Federal Public Defenders to support the formation of an Ad Hoc Advisory Group on Immigration. The Commission's proposed formation of this Ad Hoc Study Group is timely and relevant. We believe that such a group will bring expertise to this area, and will be able to provide the Commission and staff valuable insight into how the guidelines should treat immigration sentences, which can cover a wide range of immigration offenses.

The use of Ad Hoc Advisory Groups has been undertaken by the Commission in the past. The Native American Advisory Group, of which I was a member, assisted the Commission in restructuring the manslaughter and assault guidelines. It was also able to address and comment on the fact that Native Americans constitute an overwhelming majority of defendants in certain offenses, such as manslaughter, and a high proportion of other offenses such as assault, murder, and sexual offenses.

Obviously we believe it is critical that such an Ad Hoc Advisory Group be represented by those who have expertise in the area, and that specifically includes federal public defenders. We handle the overwhelming majority of immigration offenses, and have experience in the high volume border states. The participation by federal public defenders would also further your position of involving us, and others from the defense bar, in the work of the Commission. Both Margie Meyers, the Federal Public Defender of the Southern District of Texas, and myself, would welcome the opportunity to work on the Committee. We both handle a large percentage of immigrations cases; Arizona is a "fast-track" district and the Southern District of Texas is not. Both perspectives are essential for a thorough discussion of the issues. We bring the experience of border districts, as well as the knowledge of immigration offenses and sentencing throughout the nation due to our involvement on the Federal Public Defender Guideline Committee.

We have worked closely with the Commission in the past on immigration matters. We are involved in the working group, and have submitted proposals to amend reentry offenses that have been the subject of much debate and criticism. We look forward to working with you in the future.

Sincerely,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Guidelines Committee

JMS:mlb

cc: Lisa Rich, Acting Staff Co-Director
Judy Sheon, Acting Staff Co-Director
Margie Meyers, Federal Public Defender
Anne Blanchard, Sentencing Resource Counsel
Amy Baron-Evans, Sentencing Resource Counsel

Intellectual Property Institute

University of Richmond School of Law

August 2, 2005

Kathleen Grilli, Esq.
Assistant General Counsel
United States Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Dear Ms. Grilli:

I write to offer input on the directives Congress has sent to the Sentencing Commission in the Family Entertainment and Copyright Act of 2005.

About the Author

My background makes me particularly interested in—and, I hope, gives me an unusual perspective on—the intersection of sentencing law and intellectual property. From 1996 until 1999, I served as an Attorney-Adviser at the Commission and was a member of the working group that performed the in-depth analysis of the guidelines' treatment of intellectual property offenses in response to the No Electronic Theft ("NET") Act of 1997. I then joined the firm of Williams & Connolly as a criminal defense lawyer, but over time my practice began to include representation of copyright owners, and I became involved in the *Napster* and *Aimster* file-sharing litigation as counsel for several record labels and movie studios.

I left private practice in 2002 for academia. Today I teach intellectual property and computer law at the University of Richmond School of Law and am Director of the school's Intellectual Property Institute. The focus of my research and writing as a law professor has been the intersection of copyright law and digital technology. I remain involved in file-sharing litigation; for example, I authored an *amicus* brief urging the Supreme Court to rule in favor of the copyright owners in this summer's Supreme Court file-sharing case, *MGM Studios v. Grokster*. I have also remained involved in federal sentencing policy as a member of the Commission's Practitioners Advisory Group, but the views offered in this letter are my own.

The Historical Perspective on Intellectual Property Sentencing

The recent congressional directives pertaining to intellectual property should be evaluated in light of the major amendments to the Chapter Two guideline for intellectual property offenses (section 2B5.3) that took place just five years ago. Before promulgating those amendments, the Commission spent a more than two years studying the adequacy of intellectual property sentencing and the effect of online infringement thereon. It held hearings, surveyed hundreds of individual case files, sent representatives to testify before Congress, met with myriad industry representatives, economists, academics, and other interested parties, and drafted an insightful thirty-eight-page report.

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The impetus for this comprehensive reexamination of intellectual property sentencing was the NET Act and the case that gave rise to the Act, *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). David LaMacchia was an MIT student who made computer games and other valuable software available to the public via the Internet without the consent of the copyright owners. LaMacchia avoided conviction for criminal copyright infringement, however, because he received no benefit, financial or otherwise, from his activities, and the criminal copyright statute (17 U.S.C. § 506) then applied only to those who realized commercial advantage or private financial gain from their infringement.

The *LaMacchia* case was a wake-up call for Congress, in that it showed how the Internet could easily and cheaply be used to illegally distribute the countless copyrighted works that exist in digital form. The NET Act was intended to address this new threat, both by amending section 506 to apply to those who made no money from their online infringement (but who traded in works whose retail value exceeded $1000) and by directing the Commission to examine the severity of the intellectual property guidelines and ensure that they consider the value of the copyrighted items.

After the aforementioned two years of study, the Commission responded to the NET Act's directives by substantially increasing the sentencing exposure for defendants convicted of intellectual property offenses. It increased the Base Offense Level in section 2B5.3 from 6 to 8. It added a 2-level increase in offense level, with a floor of 12, if the offense involved manufacture, importation, or (most significantly) uploading of infringing items, although a 2-level decrease for offenses not committed for financial gain mitigated this effect somewhat. And it added a 2-level increase for risk of serious bodily injury or possession of a dangerous weapon, with a floor of 13.

Most important, the amendment ensured that the value of the *infringed* item—i.e., the copyrighted work—would determine the amount used to increase the offense level under the Loss Table in section 2B1.1 whenever the infringing item was "identical or substantially equivalent to" the infringed item. *See* § 2B5.3, comment. (n.2(A)(I)). Prior to this amendment, the guideline called for using the value of the *infringing* item. Although the new section 2B5.3 still allowed use of the infringing value in some cases, online copyright infringement was not among them, because digital copies of music, films, software, etc. tend to be near-perfect reproductions of the original. (Indeed, that's why online infringement poses such a danger, as Congress and the Commission both recognized after *LaMacchia*.) And although there was a good argument that the value of the infringing item was the same as the value of the infringed item when the former was a near-perfect copy of the latter, and that the amendment would thus make little difference in the loss amount, the Commission was informed that courts used an infringing value of zero, even for a perfect copy of a copyrighted work, whenever it was given away for free. The change to infringed value therefore made a considerable difference.

The use of the infringed item's value to calculate loss, however, rested on some dubious premises. Foremost among them was the assumption that the illegal provision of a copyrighted work was the equivalent, for purposes of calculating loss under section 2B1.1's table, of the theft of tangible property. In other words, the new section 2B5.3 treated someone who illegally distributed software worth $40,000 the same as someone who stole $40,000 in cash from the software company. Yet if the recipients of the free software would never have purchased it at its retail price—a certainty in many, and perhaps most, cases—the true loss was closer to zero than to the software's retail value. And even if an online infringement did truly represent a lost sale, using the retail price would overstate the loss because it would fail to account for the company's costs; it would wrongly assume that the sales revenue represented pure profit. It is presumably for this reason that the original

Commission thought that even the *infringing* amount would "generally exceed the loss or gain due to the offense." *See* § 2B5.3, comment. (backg'd) (pre-2000 version).

In their totality, then, the NET Act and the accompanying changes to section 2B5.3 resulted in dramatically (and, arguably, disproportionately) increased punishment for those engaging in online infringement. Someone who distributed $40,000 worth of music online, free of charge, would have an offense level of 6 under the old guideline (the Base Offense Level, with no loss adjustment for software given away for free). Under the new guideline, the offense level would be 14 (Base Offense Level of 8, plus 6 for the loss, plus 2 for uploading, minus 2 for no commercial motive). For a defendant with no criminal record, that represents a 500% increase in the midpoint sentence—i.e., the difference between a sentencing range of 0 to 6 months (probably probation) and 15 to 21 months (of mandatory imprisonment). A defendant like David LaMacchia, whose indictment averred a loss amount exceeding $1 million, went from having no criminal liability to facing over five years in jail.[1]

In sum, there is no doubt that the 2000 amendments to section 2B5.3 recognized and more than adequately accounted for the newfound threat of online infringement. The guideline's reference to section 2B1.1's loss table and the use of the value of the infringed item in calculating the infringement amount ensure that intellectual property sentencing will be sensitive to the potential for large-scale online infringement, even by those lacking a financial motive. Nothing that has occurred in the last five years calls into question the decisions the Commission made on this subject following the NET Act.

Specifics of the Family Entertainment and Copyright Act of 2005

Viewed in the historical context set forth above, the Family Entertainment and Copyright Act of 2005 ("FECA") is a modest piece of legislation. The NET Act expanded the reach of criminal copyright liability to cover a vast new population of online infringers, a group that, after *LaMacchia*, was understood to threaten the foundations of copyright law. In contrast, FECA simply fills some minor holes in the statutory scheme. For example, the movie bootlegging statute (section 2319B) simply changes the existing statute's *mens rea* from willfulness to knowledge and eliminates certain motive and volume requirements for a category of conduct that was already illegal. The statutory maximums that accompany this new enactment are actually less severe than their preexisting counterparts. The same can be said of the pre-release statute (section 506(a)(1)©)). Modest legislation such as this calls for a modest response by the Commission.

FECA contains four directives for the Commission. The first directive is the general admonition that frequently accompanies more specific directives, namely that the Commission "take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements . . . are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes." Given the Commission's extensive reexamination of intellectual property sentencing just five years ago, the amendments it passed at that time, and the absence of any material change in nature of intellectual property offenses since, this general admonition warrants no new amendments in and of itself.[2]

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[1] This comparison of pre- and post-2000 intellectual property sentencing does not take into account the increase in offense levels occasioned by the 2001 amendments to section 2B1.1's loss table. If those were factored in, the difference between pre- and post-2000 sentences would be even greater.

[2] Incidentally, one would be hard-pressed to accept the notion that criminal prosecution has any deterrent effect on online copyright infringement. There are tens of millions of illegal file-sharers in the

The second directive instructs the Commission to consider an enhancement for infringement of pre-release works. Again, the Commission explicitly studied to this concern following the NET Act, *see* U.S. SENTENCING COMMISSION POLICY DEVELOPMENT TEAM REPORT, NO ELECTRONIC THEFT ACT 34-35 (1999) (discussing draft pre-release enhancement), and responded to it in two ways. First, because pre-release works are likely to be more popular, they will naturally result in more instances of infringement and thus a higher loss amount and a correspondingly higher offense level. Second, because pre-release works may not yet be ready for the market (e.g., beta versions of software may still be "buggy"), their premature distribution can harm the copyright owner's reputation. The Commission accordingly invited an upward departure for "substantial harm" to the victim's reputation.

The third directive questions whether the definition of "uploading" in section 2B5.3 captures the loss attributable to broad online copyright infringement. Because the specter of widespread uploading of copyrighted works was the impetus for the NET Act and 2000 guideline amendments, it should come as no surprise that the current section 2B5.3 adequately accounts for uploading culpability. The broad definition of uploading already draws an appropriate distinction between those who make copyrighted works available to the whole world via the Internet and those smaller-scale infringers who merely download for personal use. The former obviously pose by far the greater threat, and are punished accordingly, with a proportionately severe enhancement—a 2-level (i.e., 25%) increase in sentence (with a floor of 12 that can effectively make the increase 3 or even 4 levels for certain defendants). Add to that the likelihood that the infringement amount for uploaders is likely to be significantly higher than for downloaders,[3] and it becomes clear that uploading is both appropriately defined and punished.

The fourth directive raises the issue of what to do when evidence of the scale of infringement cannot be found. This will often not be an issue. The defendant's Internet service provider likely maintains logs that will show the total bandwidth consumed, which should give the court some idea of the scale of infringement. Some file-sharing software also logs the user's uploading and downloading history. And many file-sharers are motivated not by money, but by the bragging rights that come with being a big-time uploader, which means that they will try not to destroy evidence of their infringement, but to create and preserve it. In any event, convictions under the NET Act require proof that the defendant traded in works totaling more than $1000 in retail value, which means that by the time NET Act cases reach sentencing the prosecution already has some evidence of the scale of infringement.

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country, and the Department of Justice brings fewer than a hundred copyright infringement prosecutions each year. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, INTELLECTUAL PROPERTY THEFT, 2002 (2004). Nor has the incidence of intellectual property prosecution increased since passage of the NET Act; an examination of Table 17 in the Commission's SOURCEBOOK OF FEDERAL SENTENCING STATISTICS from 1998 to today shows that section 2B5.3 has been used as the primary guideline an average of 120.2 times per year in that period, and the most recent statistic is only 121.

[3] A new infringement occurs each time an unauthorized copy is made from the uploader's file. Because such copying is likely to be viewed as an act aided, abetted, induced, or willfully caused by the defendant (or as a harm resulting therefrom), each such copy would be included in the defendant's relevant conduct and would thus constitute a new "infringing item" to be multiplied by the value of the infringed item, with the result added to the infringement amount. Uploaders are therefore much more likely to see high infringement amounts than mere downloaders.

Even when evidence of distribution volume is not available, the mere fact that copyrighted works were uploaded results in the aforementioned 2-level enhancement, with a floor of 12. In other words, *even when the prosecution fails to prove that a single download resulted from the defendant's uploading*, the defendant sees his or her offense level rise from 8 to 12, representing a 300% increase in the midpoint sentence and a shift from probable probation to mandatory jail time for a first-time offender. This adjustment more than adequately addresses the concern about the difficulties the prosecution might face in amassing evidence of the scale of infringement. In short, because section 2B5.3 already significantly increases an uploader's sentence even absent evidence of any harm done, and because this increase was the intended result of the 2000 Commission's attention to the threat of online infringement, no further increase is warranted.

Conclusion

I have no sympathy for copyright infringers. I have written op-eds and *amicus* briefs that lament the popularity of file-sharing and seek to discourage it. I frequently give talks to high-school students regarding ethics in the world of the Internet, and the downsides of file-sharing always feature prominently in those talks. As Director of the Intellectual Property Institute, I have overseen the creation of the National CyberEducation Project, an initiative aimed at promoting improved understanding and discussion on college campuses of the issues, such as file-sharing, that the Internet presents for intellectual property law.

Nevertheless, I see no reason to question the adequacy of the guidelines' current sentences for intellectual property offenses, either online or offline. The Commission's comprehensive assessment in the late 1990s resulted in amendments to section 2B5.3 that more than adequately address the threats that copyright and trademark face in the new millennium.

I would be more than willing to come to Washington to meet with any staff or Commissioners who would like to discuss these issues further. (Indeed, it would be a great pleasure to visit the Commission and catch up with old friends there.) In any event, if I can be of any assistance, please feel free to contact me at 804-287-6398 or jgibson@richmond.edu.

Sincerely,

James Gibson

James Gibson
Director, Intellectual Property Institute
Assistant Professor of Law

United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

June 14, 2005

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Priorities

Dear Judge Hinojosa:

We write on behalf of the Practitioners' Advisory Group to suggest priorities we would like to see the Commission address in the next one or two amendment cycles. This letter also briefly reiterates the approach that the Practitioners' Advisory Group ("PAG") recommended previously to the Commission with respect to Booker. We hope that this letter will be of assistance to the Commission.

I. Booker

In Booker, the Supreme Court declared that the United States Sentencing Guidelines could no longer be applied to mandate increases to defendants' sentences without subjecting the relevant facts to the Sixth Amendment right to jury trial. The Supreme Court made the Guidelines "effectively advisory" by excising two provisions of the Sentencing Reform Act ("SRA") that made the Guidelines mandatory. The Supreme Court left in place a statutory framework that takes into account the Guidelines Manual as well as other statutory considerations with the ultimate goal of ensuring that the final sentence be sufficient but not greater than necessary to achieve the goals of sentencing in the individual case. Sentencing courts must now consider the advisory guidelines, see 18 U.S.C. § 3553(a)(4), together with the sentencing goals and other factors set forth in 18 U.S.C. § 3553(a).

The Supreme Court created a remedy in which courts are required to exercise *guided* discretion within the framework of 18 U.S.C. § 3553(a), subject to review for reasonableness. In doing so, the Supreme Court created a perfect opportunity for the Sentencing Commission to collect information about actual sentencing in a system of guided discretion, and to determine whether that system "continue[s] to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." Booker, 125 S. Ct. at 767. The Court created a remedy that is a reasoned and workable system.

[26]

As we have indicated previously, through letters and testimony before the Commission, we believe that Congress should give the Booker remedy an opportunity to work. No immediate change to the federal statutes is required to clarify sentencing procedures or standards consistent with the Court's decision in Booker. This is an ideal opportunity for the Commission to collect and analyze sentencing data and other relevant information. The Commission is uniquely suited for this task because of its substantial expertise in sentencing policy and the historical data it already has collected and studied on actual sentencing practice.

II. Other Priorities

We urge the Commission to give priority to the following issues during the 2005-2006 amendment cycle.

1) Mandatory Minimums

In 1991, the Sentencing Commission published *Mandatory Minimum Penalties in the Criminal Justice System.* This comprehensive study explored the impact of mandatory minimum sentencing and the interaction of mandatory and guideline sentencing, and provided invaluable data and insights in the years following the advent of the sentencing guidelines.

It is now 14 years since that study, undertaken pursuant to a directive from Congress, was completed by the Commission. On the eve of this 15-year anniversary, PAG believes it is time for the Commission to consider a fresh look at mandatory minimums – just as the Commission recently completed a 15-year study on the Guidelines themselves. The questions the original Commission's report answered are as timeless as when they were first posed in 1990. They include: how mandatory sentencing affects the goal of eliminating unwarranted sentencing disparity; an assessment of the compatibility of mandatory minimums and guideline sentencing; a discussion of the interaction of mandatory sentencing and plea agreements; and means other than mandatory minimums that Congress can use to further sentencing goals. Since the report was released, Congress has adopted new and increased mandatory minimum sentences and instituted the Safety Valve to ameliorate the harsh impacts of mandatory minimum sentencing on low level, first time drug offenders. Indeed, given the many recent bills that have been introduced in the House that would require additional mandatory minimums as a response to Booker, an updated study and report by the Commission is urgently needed to provide relevant empirical information and policy insights. We therefore strongly urge the Commission to conduct another study of mandatory minimum sentencing.

2) Extraordinary and Compelling Circumstances: Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)

For several years, PAG has urged the Commission to develop policy guidance for courts and others considering sentence reduction motions under § 3582(c)(1)(A)(i), as provided in 28 U.S.C. § 994(t). We once again call on the Commission to promulgate a policy statement and urge the Commission to include both medical and non-medical examples of "extraordinary and compelling reasons" potentially justifying a sentence reduction.

It is essential to have some "safety valve" in a determinate sentencing scheme, so that the government may respond to any extraordinary and compelling situations that arise after sentencing that render continued imprisonment unjust or meaningless. The legislative history of § 3582(c)(1)(A)(i) indicates that Congress intended this authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration. See Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rptr. 188 (2001). The potentially broad applicability of this section is further evidenced by the direction to the Commission in the final sentence of § 994(t) that "rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason." (Emphasis added.) This proviso evidences an assumption on the part of Congress that, when considered with other equitable circumstances, a prisoner's rehabilitation would be appropriately considered in a request for sentence reduction. The predecessor authority for sentence reduction, which Congress professed to be continuing unchanged in the 1984 law, was used to reduce sentences in a variety of circumstances, including cases of extreme old age, terminal illness, medical disability, compelling changes in personal or family circumstances, and unjustifiable disparity of sentence among similarly situated co-conspirators.[1]

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A)(i), has interpreted its responsibilities under this statute very narrowly, authorizing sentence reduction motions only in those cases in which a prisoner is near death or profoundly ill or disabled. Lack of policy guidance from the Commission may explain the Bureau's conservative interpretation of its statutory mandate. See John R. Steer and Paula K. Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is in an excellent position to ensure that the statute can be implemented in a broad range of situations, as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in exercising its discretion. In this regard, we hope the Commission will avoid promulgating policy that relies upon rigid categories of eligibility.

3) Chapter 6, Recommendation to the Federal Rules Advisory Committee

PAG continues to believe that the existing Federal Rules of Criminal Procedure should better reflect and improve practice under the sentencing guidelines. Although the Rules are not directly within the Commission's scope of authority, they greatly impact the manner in which the guidelines are applied. Just as the Commission provides input to Congress on pending legislation, PAG believes it is even more appropriate, and vital, for the Commission to provide input within its own Judicial Branch, recommending that the Federal Rules Advisory Committee

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[1] See, e.g., United States v. Diaco, 457 F. Supp. 371 (D.N.J., 1978) (federal prisoner's sentence reduced pursuant to old law analogue of § 3582(c)(1)(A)(i) (18 U.S.C. § 4205(g)) because of unwarranted disparity among codefendants); United States v. Banks, 428 F. Supp. 1088 (E.D. Mich. 1977) (same). One of our members with experience as a Pardon Attorney reports that § 4205(g) was used in an extradition case and in a spy swap case, and that the pardon power was used frequently to reduce sentences in cases involving compelling equitable circumstances.

study and potentially revise rules which directly affect sentencing practice and procedure. In addition, the Commission can and should suggest such practice and procedure matters through an amendment to its policy statements in Chapter 6.

a) Disclosure of Sentencing Facts

PAG believes that sentencing practice and procedure would benefit from greater disclosure of facts affecting guideline calculation between and among the parties. Over 95% of federal criminal cases are disposed of by guilty plea, yet the government is not required to disclose any facts affecting the application of the guidelines to the defense prior to the entry of a guilty plea. Even more troubling is the fact that the government is not required to disclose to defendants any facts affecting the application of the guidelines even *after* the entry of a guilty plea. Instead, at present, both the government and the defense begin the litigation of guidelines application through the presentation of evidence to the court in the person of its agent, the probation officer, and in many districts this is on an *ex parte* basis. Although the court ultimately hears evidence in the presence of both parties at a sentencing hearing, by that time there is a presentence report which is often afforded deference approaching a presumption of correctness.

This process of dueling *ex parte* submissions is not consistent with an appropriate adversarial system. The rules, at a minimum, should require any party wishing to present evidence to the court's probation officer to disclose such evidence to the opposing party prior to issuance of the presentence report, at least absent some protective order or showing of need for non-disclosure by the prosecution. In the experience of our members, it is extremely difficult to explain to clients the fairness of a system that allows routine, *ex parte* disclosures to the probation office in advance of sentencing. This does not promote respect for the process generally. We urge the Commission to consider making formal recommendations to change the Federal Rules of Criminal Procedure in this area.

b) Appeal Waivers

We also ask the Commission to consider revising Chapter 6 to address the issue of waivers of appeal. We believe that Chapter 6 should strongly discourage such waivers and make clear that a sentencing court may reject a plea agreement that contains a waiver of appeal or strike such a waiver from a plea agreement.

In enacting the Sentencing Reform Act of 1984, Congress for the first time adopted a "comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means of correction of erroneous and clearly unreasonable sentences." See S. Rep. No. 225, 98th Cong., 1st Sess. 155 (1983). Congress explained that the right to appeal by the defendant and the government alike was necessary to a fair and rational sentencing system:

> Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law

> development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the sentencing commission in refining the sentencing guidelines as the need arises. . . . It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient. This consideration has led most western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the committee considers it to be a critical part of the foundation for the bill's sentencing structure. The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.

Id. at 151.

The government routinely insists on a provision in the plea agreement stating that the defendant waives his right to appeal his conviction and sentence while the government retains all appellate rights. The defendant is also often pressured to waive the right to file a post conviction motion based on ineffective assistance of counsel, even though defense counsel cannot ethically recommend such a course of action.

The Courts of Appeal have generally upheld appeal waivers if knowing and voluntary. Even if technically knowing and voluntary, however, defendants as a practical matter often have little or no bargaining power before signing a plea agreement. It is easy to imagine cases in which a one-sided appeal waiver results in injustice; for example, the government successfully appeals a downward departure but the defendant cannot obtain relief for an erroneous upward adjustment. Moreover, one-sided appeal waivers damage the system as a whole by skewing the case law in the government's favor, thwarting the rational development of the Guidelines, and promoting unwarranted disparity. A few district court judges, recognizing the individual and systemic injustice and the inability of defendants to prevent it, either reject plea agreements with appeal waivers or strike the waiver from the agreement. Requiring a defendant to forego the right to appeal an error that has not yet occurred, or which has occurred but is undiscovered or unappreciated, guarantees that flawed guideline applications will unjustly lengthen sentences, as well as hinder the development of appellate case law that in turn serves to inform guideline refinement.

Plea agreements with one-sided appeal waivers promote unwarranted disparity, deprive the Commission of the feedback the 1984 Congress intended, and are simply unjust. As such, they should be strongly discouraged as a policy matter.

4) Criminal History

Criminal history continues to be a troubling area of sentencing that deserves the Commission's attention. PAG applauds the Commission for its ongoing review of this important area, and wishes to emphasize certain points.

As we have noted before, we are particularly concerned that criminal history may be overstated through the inclusion of minor matters that do not serve the predictive or punitive functions of criminal history. It also appears that variations in state and local sentencing practices with respect to minor offenses causes ambiguity and uncertainty in the application of the current criminal history guidelines, and creates disparity and unfairness. We therefore believe that the offenses listed in section 4A1.2(c)(1) should be excluded regardless of the sentence imposed, as the Probation Officers' Advisory Group has previously recommended.

Criminal history issues also play an important role in determining the availability of alternatives to incarceration for first-time non-violent offenders. The PAG continues to believe that the availability of alternatives to incarceration for first-time non-violent offenders should be increased, and we are concerned about recent limitations on the ability of the Bureau of Prisons to designate offenders to serve their sentences in a "community corrections" setting. While we have previously suggested accomplishing this through an expansion of Zones B and C, particularly within criminal history category I of the sentencing table, the same goal could be achieved through the creation of a new criminal history category 0.

The Commission also should consider obtaining and reviewing data regarding recidivism by first-time offenders punished by alternatives to incarceration. The PAG believes such data would demonstrate the success of alternative punishments at greatly decreased cost to the criminal justice system. Indeed, we are aware that certain studies have refuted, at least in the white collar context, the notion that long terms of incarceration have a general deterrent effect. Rather, the deterrent effect is best achieved by certainty and swiftness. See Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 35 (Cambridge University Press) (2002). In addition to these positive policy considerations, the creation of a criminal history category 0 would better effectuate the original Congressional intent expressed in 28 U.S.C. § 994(j).

5) Relevant Conduct, Cross References

Reconsideration of the use of uncharged, dismissed, and acquitted conduct through the relevant conduct and cross reference guidelines also remains important notwithstanding Booker. By preserving some flexibility for individualized sentencing through the departure power, Congress sought to avoid the untenable choice between the unwarranted disparity inherent in an entirely discretionary system and the burden on the criminal justice system of providing full constitutional safeguards for all sentencing factors. Justice Rehnquist and others objected to the Feeney Amendment, for example, on the basis that a drastically reduced departure power "would

do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences." See 149 Cong. Rec. S5113-01.

Apparently because of the above considerations, Chief Judge Young of the United States District Court for the District of Massachusetts now requires that all relevant conduct be charged and proved beyond a reasonable doubt. While this may burden Judge Young's docket and the prosecutors with cases before him, the alternative in many cases would be unconstitutional.

As suggested in an article published by the American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001), PAG recommends eliminating consideration of acquitted conduct, limiting the increases for uncharged and dismissed conduct, eliminating the application of certain cross references, clarifying and narrowing the definition of liability for the conduct of others, utilizing at least a clear and convincing standard of proof, but preferably beyond a reasonable doubt, to all relevant conduct sentencing elements, and requiring full notice of all relevant conduct before the entry of a guilty plea. These limited but compelling reforms would honor the due process concerns that informed the Booker opinion, provide needed fairness and safeguard the constitutionality of the Guidelines sentencing system.

Post-Booker, the courts have held that a beyond a reasonable doubt standard must be used at least for acquitted conduct. For example, Judge Gertner adopted a beyond a reasonable doubt standard and rejected the use of acquitted conduct in sentencing. She explained that pre-1984, the jury and judge had specialized roles and rules to match -- juries *found facts* with determinate consequences and their decision-making was thus constrained by the rules of evidence and the highest burden of proof, while judges exercised something like a clinical judgment about the appropriate sentence and thus were not so constrained. With mandatory Guidelines, the roles blurred and judges found facts with determinate consequences but without procedural safeguards, which culminated in the holdings in Apprendi, Blakely and Booker that this violates the Sixth Amendment. Under the Booker remedy, sentencing is a hybrid, neither purely discretionary nor mandatory, but "still profoundly influenced by the rules, namely the Guidelines." United States v. Pimental, 367 F.Supp.2d 143, 152, 2005 WL 958245 (D. Mass. Apr. 15, 2005). For this reason, the consideration of acquitted conduct (particularly acquitted facts that amount to separate crimes) is inconsistent with logic or recent law. Id. ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense – as a matter of law or logic.").[2]

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[2] Judge Marbley in United States v. Coleman, __ F.Supp.2d__, 2005 WL 1226622 (S.D. Ohio May 24, 2005), held that the court must use the beyond a reasonable doubt standard when considering acquitted conduct because to do otherwise disrespects and ignores the jury's verdict. Similarly, but with less discussion, the court in United States v. Carvajal, No. 04-CR-222AKH (S.D.N.Y. Feb. 22, 2005), declined "to accept the government's argument that, notwithstanding the jury's verdict that Carvajal was not guilty of actually distributing crack, I should nevertheless consider that the acts necessary for completing the substantive crime were proved by a preponderance of the evidence. Cf. United States v. Watts, 519 U.S. 148 (1997)."

6) Drug Offenses

We continue to be concerned about the disproportionately long sentences for drug offenders, including those convicted of crimes involving so-called "crack" cocaine, or "cocaine base." The current drug guidelines place undue emphasis on the quantity of the drugs involved to the exclusion of situational and offender characteristics that are better indicators of culpability.

The Commission recently replaced the role cap for drug offenses with adjustments calibrated to the base offense level triggered by the offense of conviction. Now that this amendment has been passed, we urge the Commission to expressly make this amendment retroactive. Retroactivity is the right thing to do. After years of consideration and concern about long sentences for low-level defendants (a role cap was first voted on in 1991), the Commission determined that the reduced guideline sentence "is sufficient to achieve the purposes of sentencing. . . ." U.S.S.G. § 1B1.10, comment. (backg'd.). The reasons that compel this measure of justice for defendants prospectively hold especially true for those already imprisoned. Their lengthy sentences moved the Commission to design the relief in the first place. Retroactivity is justified in light of the factors the Commission takes into account in making a retroactivity determination: the purpose of the amendment; the magnitude of the change; and the difficulty of applying the change retroactively. U.S.S.G. § 1B 1.10, comment. (backg'd.) (2003). A court choosing to adjust the base offense level to an already sentenced defendant can do so easily on the sentencing record, by simply reducing the sentence by the indicated number of levels. Other adjustments and departures were already applied and need not be reconsidered.

We hope that additional steps can be taken to tailor drug sentences more closely to the true severity of offenses and culpability of offenders.

7) Anabolic Steroids

While not a priority that PAG would necessarily select, we recognize the Commission's legislative obligation to soon address issues of sentencing for anabolic steroids convictions. As PAG previously indicated, in a March 25, 2005 letter to the Commission, PAG believes that the Commission should begin that process by surveying and collecting additional data before deciding whether, how, or to what extent these guidelines might be changed. When the distinction between Anabolic Steroids and other Schedule III substances was originally established, the Commission itself noted how a different penalty structure was being used for Anabolic Steroids "[b]ecause of the variety of substances involved." *See* U.S.S.G. Amendment 369. That "variety" has likely only increased and become more complex since 1991.

Although we recognize that the Commission is to consider the possibility of increasing these guidelines, the legislative history also reflects a goal of making sure that the numbers ultimately chosen come out right. *See, e.g.*, H. Rep. 108-461 (Part 1) April 2, 2004, at 31 (noting how issue is sent "to the Sentencing Commission to make sure that the actually imposed penalties are *appropriately proportional*") (Emphasis added); *id.* at 32 ("it is sent to the Sentencing Commission to review and *make the appropriate findings*.") (Emphasis added).

PAG does not know if the Commission currently has data to consider as part of its review of this area. To the extent that data or specific proposals are submitted to the Commission by the Department of Justice or others, however, PAG requests access to this information, so that it may evaluate those proposals and provide more effective recommendations to the Commission. For example, the legislative history notes how Anabolic Steroids are often "prescribed to treat body wasting in patients with AIDS and other diseases that result in the loss of lean muscle mass." *Id.* at 4. The Commission may decide that such circumstances represent a mitigating factor that could support either a guideline adjustment or, in an appropriate case, authorization to depart.

* * *

As always, we appreciate the opportunity to provide input regarding potential Commission priorities, and look forward to working with the Commission through the coming cycle.

Sincerely,

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DC:50333100.1

United States
Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Priorities

Dear Judge Hinojosa:

On June 14 of this year we wrote on behalf of the Practitioners' Advisory Group to suggest priorities that PAG believes the Commission should address in the next amendment cycle. One of the issues we urged upon the Commission was the development of policy guidance for courts considering sentence reduction motions under § 3582(c)(1)(A)(i). This issue has been on the Commission's list of priorities for the past two years, though to our knowledge the Commission has not yet taken action to address it.. We were concerned to see that this issue did not appear on the Commission's proposed list of priorities for 2006, and are writing to ask the Commission to reconsider its apparent decision to omit this admittedly sensitive and difficult issue from the priorities list.

The Commission was directed by Congress to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A)(i), as part of its policy-making responsibility under the 1984 Act, if in its judgment this would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). Section 3582(c)(1)(A)(i) specifically provides that in considering whether "extraordinary and compelling" reasons warrant sentence modification in a particular case, the court is required to "consider[] the factors set forth in § 3553(a), to the extent that they are applicable." This seems to establish Congress' intention that a court should apply the same criteria in considering sentence reduction motions under § 3582(c)(1)(A) ("to the extent that they are applicable") as it applies to determine the sentence in the first instance. Thus, for example, if a sentencing court could have taken into account a defendant's serious health problems and exigent family circumstances in determining the sentence in the first instance, it could also properly consider them as a basis for sentence reduction if they were to develop or become aggravated unexpectedly mid-way through a prison term. As a corollary, it would seem reasonable to suggest that Congress intended to provide a

means of bringing these circumstances to the court's attention. This interpretation of the government's responsibility under § 3582(c)(1)(A)(i) would underscore the importance of having the Commission play a role in developing uniform policy for implementing this statute.

PAG hopes that the Commission has not permanently changed its view as to whether it would further the purposes of § 3553(a)(2) to develop a policy statement to implement § 3582(c)(1)(A)(i). As we pointed out in our June 14 letter, the Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A)(i), has interpreted its responsibilities under this statute very narrowly, authorizing sentence reduction motions only in cases where a prisoner is near death. We believe that Congress intended this statute to be used more broadly, for reasons described in our earlier letter. More important for present purposes, we believe that the Commission is in an excellent position to give guidance, both to courts and to BOP, to ensure that the statute can be implemented in a broad range of situations, as intended by Congress, by providing criteria, content, and examples on which the BOP and the courts may rely in exercising its discretion. We recognize that the Commission has been exceptionally busy over the past year, and that to a certain extent it must be judicious in setting priorities. But PAG believes that this issue is an important one which deserves the Commission's attention, and therefore we urge the Commission to continue to work on this equitable and important "safety valve" statute.

Sincerely,

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

August 11, 2005

Michael Courlander
Public Affairs Officer
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Attention: Public Affairs - Priorities Comment

Dear Mr. Courlander:

As you may recall, I wrote a detailed letter at this time last year setting forth the reasons that the United States Food and Drug Administration (FDA) believes that the current sentencing guidelines are not adequate to address serious criminal violations of the Federal Food, Drug, and Cosmetic Act (FDCA). It is my understanding that the United States Sentencing Commission initially agreed to consider amendments to address FDA's concerns but, as a result of the United States Supreme Court's decision in United States v. Booker, 543 U.S. ___ (2005), the Commission understandably postponed its work on this and other important issues. I am writing again because FDA remains concerned that the sentencing guidelines are too lenient for certain violations of the FDCA and are hampering FDA's efforts to effectively combat this dangerous criminal conduct. Rather than restating FDA's concerns at length, I am attaching a copy of last year's letter, which describes the public health significance of FDA's criminal cases, identifies particular problems with the guidelines, and suggests amendments to address those problems.

FDA's concerns are even more pressing today. During the past year, FDA's Office of Criminal Investigations has seen significant increases in the number of investigations relating to counterfeit drugs, prescription drug diversion, human growth hormone, and other offenses that pose serious threats to the public health. This trend is likely to continue unless the relevant guideline is amended to deter criminal offenders by imposing more significant sentences for these violations. Accordingly, I respectfully request that the Commission add to its list of priorities for the amendment cycle ending May 1, 2006, the review and amendment of the sentencing guidelines for certain FDCA violations, as set forth in the attached letter.

I would like to address briefly what I understand to be one of the Commission's priorities for this amendment cycle: consideration of amendments to increase the penalties for offenses involving anabolic steroids in accordance with the Anabolic Steroid Control Act, Pub. L. 108-358. Although anabolic steroids are now regulated by the Drug Enforcement Administration, FDA believes that increasing the guidelines for anabolic steroid offenses without simultaneously promulgating a guideline to address human growth hormone offenses would significantly undermine Congress' efforts to crack down on the use of dangerous performance-enhancing drugs.

In FDA's experience, illegal use of anabolic steroids to enhance athletic performance is often accompanied by illegal use of human growth hormone. Title 21, United States Code, Section 333(e) prohibits the use of human growth hormone for any use not approved by FDA. As detailed on page 5 of the attached letter, the Commission has not yet promulgated a guideline to address human growth hormone offenses. FDA believes that it is critical that the Commission, as part of its review of the guidelines for anabolic steroid offenses, review and amend the guidelines to address human growth hormone offenses in a manner that reflects the serious nature of these offenses. At the Commission's request, FDA will provide additional information concerning the frequent association of illegal use of human growth hormone and anabolic steroids, the dangers associated with the illegal use of human growth hormone, and any other information that would assist the Commission.

In closing, FDA remains committed to seeking appropriate amendments to the sentencing guidelines and is available to provide assistance and additional information at the Commission's request. Please contact Associate Chief Counsel Sarah Hawkins by telephone at (301) 827-1130 or by email at sarah.hawkins@fda.gov if you have any questions or if there is any assistance that FDA can provide regarding these matters.

Sincerely,

Lester M. Crawford, D.V.M., Ph.D.
Commissioner of Food and Drugs

cc: Margaret O'K. Glavin, Associate Commissioner for Regulatory Affairs, FDA
Terry Vermillion, Director, Office of Criminal Investigations, FDA
Sheldon Bradshaw, Chief Counsel, FDA
Sarah Hawkins, Associate Chief Counsel, FDA
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DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Rockville MD 20857

July 27, 2004

Michael Courlander
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Attention: Public Affairs-Priorities Comment

Dear Mr. Courlander:

I am writing on behalf of the U.S. Food and Drug Administration (FDA) to respectfully request that the United States Sentencing Commission amend its list of proposed priorities to include consideration of amendments to the sentencing guidelines that govern certain violations of the Federal Food, Drug, and Cosmetic Act (FDCA). This letter reiterates many of the points made by Associate Commissioner John Taylor in his letter to the Commission dated July 31, 2003. As explained in more detail below, FDA believes that the current guideline at Section 2N2.1 is too lenient and does not adequately address some serious criminal violations of the FDCA. In this letter, I will discuss the public health significance of FDA's criminal enforcement efforts, identify specific problem areas in the guideline, and suggest amendments.

FDA regulates the manufacture, labeling, and distribution of food, human and animal drugs, medical devices, and biologics. These products, which collectively account for approximately 25 percent of every dollar spent by American consumers, are critical to everyday life in our country. Physicians and consumers rightfully expect that the products they dispense and consume will be safe and effective and will bear adequate and accurate labeling.

In support of its public health mission, FDA presents a wide variety of criminal cases for prosecution. Many of them involve serious offenses with the potential to cause great harm to large segments of our society. These cases include the sale of unapproved, ineffective, and sometimes harmful drugs and devices to treat HIV, cancer, arthritis, and other serious diseases; failure by drug and device manufacturers to report product failures and adverse events; and the distribution of food contaminated with potentially life-threatening bacteria. Several recent investigations have involved the sale of products marketed as "all natural" dietary supplements that contained significant amounts of the active ingredients of prescriptions drugs, such as Viagra and Cialis, or the banned substance ephedrine hydrochloride, without declaring these ingredients on the label. FDA also investigates the illegal sale of dangerous substances as street drug alternatives and "rave" drugs to teenagers for recreational use--which often results in deaths, sexual assaults, and medical complications--and the sale of dangerous designer steroids to enhance athletic performance.

Also, a significant number of FDA's criminal investigations involve unlawful wholesale distribution and diversion of prescription drugs. Frequently, these cases involve the distribution of prescription drugs from unknown sources that are repackaged and relabeled to appear to be genuine, FDA-approved products. Recent cases targeted wholesale distributors of drugs intended to treat schizophrenia and bipolar disorder. Illegal repackaging resulted in the bottles containing different drugs or different strength drugs than stated on the label. Another investigation involved the sale of counterfeit Pergonal and Metrodin (injectable fertility drugs) tainted with active bacteria and endotoxins. Prescription drug diversion offenses can result in the dispensing of misbranded and otherwise substandard prescription drugs to consumers, provide avenues for counterfeit drugs to enter the marketplace, and thwart the ability of the manufacturers and public health authorities to conduct effective recalls.

Such offenses undermine the safety and integrity of the Nation's supply of food, drugs, medical devices, and biologics. In the case of counterfeit, misbranded, unapproved, and adulterated drugs, unsuspecting patients may be harmed by the very medications they are taking to treat their diseases. In these cases, consumers are not getting the health benefits they rightfully expect from their medications. For example, their blood pressure or cholesterol may not be controlled or their depression may not be treated because their medications are counterfeit. Or they may be unwittingly taking unapproved drugs that are not therapeutically equivalent to the U.S.-approved products proven to provide the claimed benefits that consumers have come to expect from their drugs. In other instances, patients facing the hopelessness of a debilitating or terminal illness may forego FDA-approved treatments in favor of unapproved and ineffective treatments. We are fearful that unless the guidelines are amended to treat these types of offenses more seriously than is currently the case, criminal offenders will not be deterred. The high profit margin often outweighs the minimal sentences that may be imposed when an offender is prosecuted.

In general, any violation of the FDCA is a misdemeanor punishable, without the need to show criminal intent, by a maximum prison term of 1 year under 21 U.S.C. § 333(a)(1). A violation of the FDCA committed with the intent to defraud or mislead either consumers or a government agency, or that is a second conviction under the FDCA, is a felony with a maximum prison term of 3 years under 21 U.S.C. § 333(a)(2). Certain FDCA offenses that involve prescription drugs are 10-year felonies under 21 U.S.C. § 333(b)(1). Offenses involving the distribution of human growth hormone are punishable by up to 5 years in prison under 21 U.S.C. § 333(e)(1), or up to 10 years if the offenses involve distribution to a person under 18 years of age under 21 U.S.C. § 333(e)(2).

FDCA offenses are governed by two sections of the guidelines. Section 2N2.1 provides for a base offense level of six, with no enhancements for specific offense characteristics. Section 2B1.1 applies if the offense involves fraud. This section also provides for a base