LAW OFFICE
MARGARET COLGATE LOVE
15 Seventh Street, N.E.
Washington, D.C. 20002

(202) 547-0453 ~ (fax) (202) 547-6520
margaretlove@pardonlaw.com

July 28, 2005

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

Re: Priorities for 2006 Amendment Cycle

Dear Judge Hinojosa:

I am writing in my personal capacity to urge the Commission to add to its list of priorities for the coming year the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A)(i). Since 2001, I have written annually to the Commission in my capacity as chair of the ABA Corrections & Sentencing Committee, to make this same request. I was truly gratified when the Commission decided to add this issue to its list of priorities in 2004 and again in 2005, and correspondingly disappointed to see that it does not appear on the list for 2006 – particularly since I know of no reason why the work that was commenced two years ago could not have been continued.

Without direction about what situations might warrant revisiting a sentence, corrections officials are reluctant to expand the reach of "extraordinary and compelling reasons" much beyond the clearly identifiable case of imminent death. This may reflect a lack of guidance to BOP, rather than a lack of political will or failure of compassion. *See* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT. RPTR. 154, 157 (2001)("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section."). In fact, in the twenty years since the Sentencing Reform Act was passed, BOP appears to have grown less rather than more comfortable in using its authority under this statute. This administrative record demonstrates the need for Commission guidance as to what circumstances may be sufficiently "extraordinary and compelling" as to warrant sentence reduction.

I appreciate that the Commission has important and difficult guidelines work ahead of it. I also appreciate that there are some, perhaps even at the Commission, who regard this issue as one involving prison administration as opposed to sentencing. While I think there is a strong argument to be made that the issues raised by this statute do implicate many of the concerns raised under 18 U.S.C. § 3553, and that they are thus very much within the Commission's expertise, perhaps all that really needs to be said in this regard is that Congress plainly thought so too. The mandate it gave to the Commission under 28 U.S.C. § 994t is the only one under the original 1984 Act that remains unfulfilled. It seems that this is another reason why Commission should not turn away from what is admittedly an unusual and sensitive task.

If the decision to drop this issue from the Commission's list of priorities was simply a matter of resources, I would like to volunteer my own services to assist the Commission in whatever manner it feels appropriate. I am confident that there are other practitioners, including some with experience in corrections administration, who would be happy to offer their services to the Commission to work on this matter in an advisory capacity.

Sincerely,

Margaret Colgate Love

From: <MARGYLOVE@aol.com>
To: <mprice@famm.org>, <jsteer@ussc.gov>, <tbussert@bussertlaw.com>, <jsheon@ussc.gov>, <BBoss@cozen.com>, <Greg.Smith@sablaw.com>, <mflanagan@mckennalong.com>
Date: 8/10/2005 12:59:33 PM
Subject: BOP does the right thing - reluctantly

This case demonstrates dramatically the need for USSC leadership in this area -

Dying inmate being released
By MAUREEN HAYDEN
Courier & Press staff writer
_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html_
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html)

Following a weekend spent shackled and chained to a bed in the intensive care unit at a Texas hospital, a Tell City, Ind., woman has been ordered released from the custody of the federal Bureau of Prisons.
On Tuesday, U.S. District Judge Richard L. Young signed an order instructing federal prison officials to release Darlene Fortwendel, 48, so she could return home to Indiana to die. Fortwendel, who was diagnosed with cancer in January but was left untreated by prison staff for six months, could arrive home this week. Bureau of Prisons officials told Fortwendel's family she'd be flown home on a medical flight, accompanied by a nurse, once the judge's order is received by federal prison officials.
Over the weekend, Fortwendel was taken from the Carswell Federal Prison to the intensive care unit at the Huguley Memorial Medical Center in Fort Worth, Texas, to be treated for complications from the cancer. Prison security ordered she be shackled and chained to the bed. Young's order cuts short by eight months the 37-month prison sentence he handed down in March 2003 after Fortwendel pleaded guilty to embezzling more than $750,000 from a Tell City bank.
On Monday, the director of the Bureau of Prisons formally acknowledged that Fortwendel is in the end stages of cancer. That acknowledgment triggered the U.S. attorney to file a motion late Monday seeking a reduction in Fortwendel's three-year prison sentence, which then cleared the way for Young's order.
Fortwendel's attorney, Jeff Lantz, hailed the judge's order as an act of justice and mercy. "This ruling is just fantastic ..." said Lantz. "She'll be able to spend her last days in peace with her family." Fortwendel's condition has deteriorated rapidly in recent weeks, according to her family. Any hope for treatment, experimental or otherwise, now appears dim. Getting Fortwendel out of prison has been a bureaucratic nightmare for her lawyers and family.
The Bureau of Prisons spent more than a month considering Fortwendel's request for a compassionate release and told her that it could take up to 90 days to process the paperwork.
But Fortwendel's case was apparently expedited after a host of influential parties got involved.
Among those bringing behind-the-scenes pressure on the Bureau of Prisons to act quickly were the U.S. attorney's office and Republican Sen. Richard Lugar's staff. Also hanging over the head of federal prison officials was the potential that Young would bypass the Bureau of Prison's protocol and issue a release order on his own, despite the fact that he might lack jurisdiction to do so. In recent weeks, Lantz and Evansville attorney John Goodridge scrambled to craft legal arguments to give Young the legs to stand on to order Fortwendel's release. Those actions, combined with intense media pressure, finally

forced the Bureau of Prisons to act, Lantz said Tuesday. Fortwendel's family, meanwhile, won't rest easy until she gets home. Her sister, Angie Garrett, was at Huguley Memorial Medical Center when she and her sister got news of Young's order Tuesday morning. By then, Fortwendel had stabilized and had been transferred out of the intensive care unit and onto the hospital's oncology unit. Garrett left her sister's room to call family members with the good news, and was gone for about 20 minutes, she said. In that time, security staff from Carswell arrived at the hospital and transported Fortwendel back to the prison. Garrett said Fortwendel was taken back to the prison over the objections of medical staff and the prison's social worker. "I came back to her room and she was gone," said Garrett. "The prison knew I was there and they didn't even tell me or let me say goodbye. I don't understand why, if the judge ordered her released, and as sick as she was, did they take her back to the prison?"
Garrett said she couldn't get an answer to that question Tuesday. Federal officials have repeatedly refused to answer questions about Fortwendel, citing "privacy" concerns.

Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, D.C. 20002
202-547-0453
202-236-0484 (cell)

From: <MARGYLOVE@aol.com>
To: <CORRECTIONS@MAIL.ABANET.ORG>, <mflanagan@mckennalong.com>, <gsmith@sablaw.com>, <amy_baronevans@fd.org>
Date: 8/4/2005 12:38:32 PM
Subject: (no subject)

Dying inmate's options diminish
By MAUREEN HAYDEN Courier & Press
August 4, 2005
_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html_
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html)

When Darlene Fortwendel was told by prison doctors she was in the late stages of a rare form of cancer, she was given two options to try to save her life.
She could stay in prison in Texas and try the standard treatment that had less than a 20 percent chance of working, or she could ask for a "compassionate release" so she could go to one of the nation's major cancer centers for experimental treatment. That was more than a month ago. The first option is no longer on the table because her cancer has advanced too far. The second option soon may be gone. The federal Bureau of Prisons has yet to process the paperwork for the Tell City, Ind., woman to be released, and won't say when or if it will. So on Wednesday, Fortwendel's attorneys again asked a federal judge to intervene. In a motion filed in federal court in Evansville, attorney John Goodridge asks U.S. Judge Richard Young to do, in essence, an end-run around the federal prison system by modifying Fortwendel's three-year prison term for bank embezzlement and ordering her immediate release. In the motion, Goodridge acknowledges Young would be moving into uncharted legal territory. But he argues that a recent U.S. Supreme Court ruling liberates federal judges from the "Dark Age" of restrictive sentencing guidelines that robbed judges of their ability to make the kind of discretionary decision required to get Fortwendel out of prison before she dies.

Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, D.C. 20002
202-547-0453
202-236-0484 (cell)

From: <MARGYLOVE@aol.com>
To: <CORRECTIONS@MAIL.ABANET.ORG>
Date: 7/15/2005 1:05:24 PM
Subject: Federal Prisoner Asks Court to Let Her Die at Home

Leniency for inmate a complex issue
By MAUREEN HAYDEN
Courier & Press

July 15, 2005
_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html_
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html)

In an "extraordinary" legal move, the attorney for a federal prison inmate dying of cancer has asked a federal judge to order her "immediate release" from a prison hospital in Texas. The motion, if granted, could lead to a showdown with U.S. Bureau of Prisons' officials who could refuse to follow the judge's order, citing his lack of jurisdiction in the matter.

On Wednesday, Evansville attorney Jeff Lantz filed a motion asking U.S. District Judge Richard L. Young to order the "immediate release" of convicted felon Darlene Fortwendel, 48, of Tell City, Ind., who was diagnosed six months ago with cancer but went untreated by prison medical staff. Her condition is now terminal.

Young could rule on the motion within days, depending, in part, on the response of the U.S. Attorney who prosecuted Fortwendel on embezzlement charges.

Lantz is asking Young to grant Fortwendel "extraordinary relief" by cutting short her three-year prison term for bank embezzlement and ordering her to be released "due to a medical emergency," according to the motion. "We're throwing ourselves on the mercy of the court," Lantz said.

Lantz acknowledged the motion is extraordinary for another reason as well. The veteran lawyer has never filed one like it because there is no statutory provision under federal law for Young to grant it. But if the letter of the law isn't there for Lantz, the spirit of the justice is, says legal expert Jack King, head of public affairs for the National Association of Criminal Defense Lawyers. "What (Lantz) is arguing is that while there is no statutory relief under the law, ... he's asking the judge to compel the Bureau of Prisons to do the fair and decent thing and let this woman go home to die," King said.

Fortwendel has been in prison since March 2003, after pleading guilty to charges she embezzled $750,000 from the Old National Bank branch in Tell City, Ind. The former bank teller spent the money gambling on the Casino Aztar riverboat.

Fortwendel has six months left on her prison term. She's already applied to the Bureau of Prisons for a "compassionate release," but Lantz contends she may be dead before prison staff processes the paperwork. Lantz cites in his motion the lack of medical care given to Fortwendel in the last six months, since she was first diagnosed with cancer at the Greenville (Ill.) Regional Hospital. At the time, she was housed at the minimum-security federal prison near Greenville. After she was diagnosed with cancer, she was transferred to the Carswell Federal Medical Center near Fort Worth, Texas. It's the only federal prison hospital for women. According to medical records obtained by Lantz, the Texas prison staff started a new round of tests in mid-February, but didn't consult an oncologist about the results until mid-March. According to the records, an oncologist ordered a biopsy of Fortwendel's liver, but that biopsy didn't occur until mid-April. It wasn't until late June when prison staff consulted an oncologist about results of the biopsy and other test results. It

was early July before chemotherapy treatment was ordered for Fortwendel. But the first chemotherapy treatment, scheduled for July 8, was canceled after Fortwendel was told she was in the advanced stage of a rare form of liver cancer in which chemotherapy was successful in less than 20 percent of the cases. Also in the medical records are revelations that Fortwendel at one point was told that she didn't have cancer, but that diagnosis by prison medical staff was wrong. The records also show Fortwendel sought help from a prison psychologist who encouraged her to keep pressing prison officials to treat her cancer.

The U.S. Bureau of Prisons has refused to answer questions about Fortwendel's case, citing privacy issues. The bureau was asked by Sen. Richard Lugar to expedite Fortwendel's request for compassionate release, but bureau officials won't say whether the request has been fast-tracked.

As part of the process, the Bureau must move the request through a layer of approvals and must seek the approval of Fortwendel's victim, Old National Bank. Bank spokeswoman Kathy Schoettlin said bank officials won't oppose Fortwendel's request. "She betrayed a lot of her associates, and she betrayed our customers and really a whole community," said Schoettlin. "But in light of her medical condition and the length left on her prison term, we would not oppose a compassionate release if granted. That in no way justifies her crime, but it recognizes the pain and agony her children and family are going through right now."

Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, D.C. 20002
202-547-0453
410-226-5153 (alt.)
410-226-5119 (fax)
202-236-0484 (cell)
margaretlove@pardonlaw.com

From: <MARGYLOVE@aol.com>
To: <mprice@famm.org>, <jsteer@ussc.gov>, <tbussert@bussertlaw.com>, <jsheon@ussc.gov>, <BBoss@cozen.com>, <Greg.Smith@sablaw.com>, <mflanagan@mckennalong.com>
Date: 8/10/2005 12:59:33 PM
Subject: BOP does the right thing - reluctantly

This case demonstrates dramatically the need for USSC leadership in this area -

Dying inmate being released
By MAUREEN HAYDEN
Courier & Press staff writer
_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html_
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3990898,00.html)

Following a weekend spent shackled and chained to a bed in the intensive care unit at a Texas hospital, a Tell City, Ind., woman has been ordered released from the custody of the federal Bureau of Prisons.
On Tuesday, U.S. District Judge Richard L. Young signed an order instructing federal prison officials to release Darlene Fortwendel, 48, so she could return home to Indiana to die. Fortwendel, who was diagnosed with cancer in January but was left untreated by prison staff for six months, could arrive home this week. Bureau of Prisons officials told Fortwendel's family she'd be flown home on a medical flight, accompanied by a nurse, once the judge's order is received by federal prison officials.
Over the weekend, Fortwendel was taken from the Carswell Federal Prison to the intensive care unit at the Huguley Memorial Medical Center in Fort Worth, Texas, to be treated for complications from the cancer. Prison security ordered she be shackled and chained to the bed. Young's order cuts short by eight months the 37-month prison sentence he handed down in March 2003 after Fortwendel pleaded guilty to embezzling more than $750,000 from a Tell City bank.
On Monday, the director of the Bureau of Prisons formally acknowledged that Fortwendel is in the end stages of cancer. That acknowledgment triggered the U.S. attorney to file a motion late Monday seeking a reduction in Fortwendel's three-year prison sentence, which then cleared the way for Young's order.
Fortwendel's attorney, Jeff Lantz, hailed the judge's order as an act of justice and mercy. "This ruling is just fantastic ..." said Lantz. "She'll be able to spend her last days in peace with her family." Fortwendel's condition has deteriorated rapidly in recent weeks, according to her family. Any hope for treatment, experimental or otherwise, now appears dim. Getting Fortwendel out of prison has been a bureaucratic nightmare for her lawyers and family.
The Bureau of Prisons spent more than a month considering Fortwendel's request for a compassionate release and told her that it could take up to 90 days to process the paperwork.
But Fortwendel's case was apparently expedited after a host of influential parties got involved.
Among those bringing behind-the-scenes pressure on the Bureau of Prisons to act quickly were the U.S. attorney's office and Republican Sen. Richard Lugar's staff. Also hanging over the head of federal prison officials was the potential that Young would bypass the Bureau of Prison's protocol and issue a release order on his own, despite the fact that he might lack jurisdiction to do so. In recent weeks, Lantz and Evansville attorney John Goodridge scrambled to craft legal arguments to give Young the legs to stand on to order Fortwendel's release. Those actions, combined with intense media pressure, finally

forced the Bureau of Prisons to act, Lantz said Tuesday. Fortwendel's family, meanwhile, won't rest easy until she gets home. Her sister, Angie Garrett, was at Huguley Memorial Medical Center when she and her sister got news of Young's order Tuesday morning. By then, Fortwendel had stabilized and had been transferred out of the intensive care unit and onto the hospital's oncology unit. Garrett left her sister's room to call family members with the good news, and was gone for about 20 minutes, she said. In that time, security staff from Carswell arrived at the hospital and transported Fortwendel back to the prison. Garrett said Fortwendel was taken back to the prison over the objections of medical staff and the prison's social worker. "I came back to her room and she was gone," said Garrett. "The prison knew I was there and they didn't even tell me or let me say goodbye. I don't understand why, if the judge ordered her released, and as sick as she was, did they take her back to the prison?"
Garrett said she couldn't get an answer to that question Tuesday. Federal officials have repeatedly refused to answer questions about Fortwendel, citing "privacy" concerns.

Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, D.C. 20002
202-547-0453
202-236-0484 (cell)

From: <MARGYLOVE@aol.com>
To: <CORRECTIONS@MAIL.ABANET.ORG>, <mflanagan@mckennalong.com>, <gsmith@sablaw.com>, <amy_baronevans@fd.org>
Date: 8/4/2005 12:38:32 PM
Subject: (no subject)

Dying inmate's options diminish
By MAUREEN HAYDEN Courier & Press
August 4, 2005
_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html_
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3976691,00.html)

When Darlene Fortwendel was told by prison doctors she was in the late stages of a rare form of cancer, she was given two options to try to save her life.
She could stay in prison in Texas and try the standard treatment that had less than a 20 percent chance of working, or she could ask for a "compassionate release" so she could go to one of the nation's major cancer centers for experimental treatment. That was more than a month ago. The first option is no longer on the table because her cancer has advanced too far. The second option soon may be gone. The federal Bureau of Prisons has yet to process the paperwork for the Tell City, Ind., woman to be released, and won't say when or if it will. So on Wednesday, Fortwendel's attorneys again asked a federal judge to intervene. In a motion filed in federal court in Evansville, attorney John Goodridge asks U.S. Judge Richard Young to do, in essence, an end-run around the federal prison system by modifying Fortwendel's three-year prison term for bank embezzlement and ordering her immediate release. In the motion, Goodridge acknowledges Young would be moving into uncharted legal territory. But he argues that a recent U.S. Supreme Court ruling liberates federal judges from the "Dark Age" of restrictive sentencing guidelines that robbed judges of their ability to make the kind of discretionary decision required to get Fortwendel out of prison before she dies.

Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, D.C. 20002
202-547-0453
202-236-0484 (cell)

From: <MARGYLOVE@aol.com>
To: <CORRECTIONS@MAIL.ABANET.ORG>
Date: 7/15/2005 1:05:24 PM
Subject: Federal Prisoner Asks Court to Let Her Die at Home

Leniency for inmate a complex issue
By MAUREEN HAYDEN
Courier & Press

July 15, 2005
_http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html_
(http://www.courierpress.com/ecp/news/article/0,1626,ECP_734_3928667,00.html)

In an "extraordinary" legal move, the attorney for a federal prison inmate dying of cancer has asked a federal judge to order her "immediate release" from a prison hospital in Texas. The motion, if granted, could lead to a showdown with U.S. Bureau of Prisons' officials who could refuse to follow the judge's order, citing his lack of jurisdiction in the matter.

On Wednesday, Evansville attorney Jeff Lantz filed a motion asking U.S. District Judge Richard L. Young to order the "immediate release" of convicted felon Darlene Fortwendel, 48, of Tell City, Ind., who was diagnosed six months ago with cancer but went untreated by prison medical staff. Her condition is now terminal.

Young could rule on the motion within days, depending, in part, on the response of the U.S. Attorney who prosecuted Fortwendel on embezzlement charges.

Lantz is asking Young to grant Fortwendel "extraordinary relief" by cutting short her three-year prison term for bank embezzlement and ordering her to be released "due to a medical emergency," according to the motion. "We're throwing ourselves on the mercy of the court," Lantz said.

Lantz acknowledged the motion is extraordinary for another reason as well. The veteran lawyer has never filed one like it because there is no statutory provision under federal law for Young to grant it. But if the letter of the law isn't there for Lantz, the spirit of the justice is, says legal expert Jack King, head of public affairs for the National Association of Criminal Defense Lawyers. "What (Lantz) is arguing is that while there is no statutory relief under the law, ... he's asking the judge to compel the Bureau of Prisons to do the fair and decent thing and let this woman go home to die," King said.

Fortwendel has been in prison since March 2003, after pleading guilty to charges she embezzled $750,000 from the Old National Bank branch in Tell City, Ind. The former bank teller spent the money gambling on the Casino Aztar riverboat.

Fortwendel has six months left on her prison term. She's already applied to the Bureau of Prisons for a "compassionate release," but Lantz contends she may be dead before prison staff processes the paperwork. Lantz cites in his motion the lack of medical care given to Fortwendel in the last six months, since she was first diagnosed with cancer at the Greenville (Ill.) Regional Hospital. At the time, she was housed at the minimum-security federal prison near Greenville. After she was diagnosed with cancer, she was transferred to the Carswell Federal Medical Center near Fort Worth, Texas. It's the only federal prison hospital for women. According to medical records obtained by Lantz, the Texas prison staff started a new round of tests in mid-February, but didn't consult an oncologist about the results until mid-March. According to the records, an oncologist ordered a biopsy of Fortwendel's liver, but that biopsy didn't occur until mid-April. It wasn't until late June when prison staff consulted an oncologist about results of the biopsy and other test results. It

was early July before chemotherapy treatment was ordered for Fortwendel. But the first chemotherapy treatment, scheduled for July 8, was canceled after Fortwendel was told she was in the advanced stage of a rare form of liver cancer in which chemotherapy was successful in less than 20 percent of the cases. Also in the medical records are revelations that Fortwendel at one point was told that she didn't have cancer, but that diagnosis by prison medical staff was wrong. The records also show Fortwendel sought help from a prison psychologist who encouraged her to keep pressing prison officials to treat her cancer.

The U.S. Bureau of Prisons has refused to answer questions about Fortwendel's case, citing privacy issues. The bureau was asked by Sen. Richard Lugar to expedite Fortwendel's request for compassionate release, but bureau officials won't say whether the request has been fast-tracked.

As part of the process, the Bureau must move the request through a layer of approvals and must seek the approval of Fortwendel's victim, Old National Bank. Bank spokeswoman Kathy Schoettlin said bank officials won't oppose Fortwendel's request. "She betrayed a lot of her associates, and she betrayed our customers and really a whole community," said Schoettlin. "But in light of her medical condition and the length left on her prison term, we would not oppose a compassionate release if granted. That in no way justifies her crime, but it recognizes the pain and agony her children and family are going through right now."

Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, D.C. 20002
202-547-0453
410-226-5153 (alt.)
410-226-5119 (fax)
202-236-0484 (cell)
margaretlove@pardonlaw.com

August 2, 2005

United States Sentencing Commission
One Columbus Circle, Northeast Suite 2-500
South Lobby
Washington D.C. 20002-8002
Attention: Public Affairs-Priorities Comment

Re: Public Comment on the continuation of work on cocaine sentencing.

Honorable Chairman Hinojosa and Distinguished Members of the Commission:

My name is Stephanie Thomas. I serve the public as a Municipal Clerk in South Florida. The purpose of this correspondence is to provide public comment under the Public Hearing for the continuation of work on cocaine sentencing policy as it pertains to Drug Sentencing for first time offenders.

In addressing my opinion of sentencing guidelines, I hope Judges countrywide have all imposed adequate sentences that fall within the guidelines set forth by The Honorable United States Sentencing Commission. It is my strong opinion that Judges are the voice of the people; therefore should be the epitome of justice. Judges should take into consideration the recommendation of the people by way of the United States Sentencing Commission.

In the 2004 Federal Sentencing Guidelines Manual, under Chapter Five, Determining the Sentence; the introductory commentary states the following *"for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a)"* When we talk about all of the *statutory purposes of sentencing*, how much is really considered during sentencing? How can the Senate as well as the Sentencing Commission assure the public that although the social debt to society is being repaid, the defendant will receive all of the above, which is his/her own justice. All too often defendants are "railroaded" for life because all of the above components do not weigh out. It is possible to say that the Judge may concentrate on one of the statutory purposed, more than any other. That then defeats the purpose of the sentencing guidelines. If concentrating on *"just punishment"* a person can receive unfair sentencing. My point is, all purposes listed above should balance out, therefore justice will be served to both sided of the law.

Although the aforementioned manual mentions first time offenders, it is closely similar to the repeat offenders referred to in Zone A. (See attachment one (1))How do we sentence these individuals? What is fair and reasonable for first time offender(s) when it is stated that the courts are to impose a sentence sufficient, but not greater than necessary, (the Commission should determine what constitutes a "greater than necessary" sentence) to comply with the purpose set forth in the Sentencing Reform Act which are to reflect the seriousness of the offense, to promote respect for the law, and to provide punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. All of the above are listed and are expected to be considered upon sentencing. I believe in the guidelines set forth; however, I also believe and recommend that the sentencing for first time cocaine offenders be less stringent and should concentrate more on rehabilitation. Perhaps a first time offender is sentenced to ten (10) consecutive or concurrent life sentences, when will they be allowed to exemplify their rehabilitation?

Frankel (1972) argued proportionality (severity of sentence and the seriousness of the crime should be linked), equity (ensures that we live in a country committed to equal justice under the law- with sentencing statute that mandates similar outcomes for similar crimes committed by similar offenders), and social debt (the principle that the greater the offenders prior criminal history, the more stringent the sentencing should be). Where does the first time offender fit in? Are they to be categorized with similar offenders when they do not share similar backgrounds or criminal history and yet today, they are facing the same terms as a repeated offender? Why?

When Judges impose harsh sentences on first time offenders, I feel they should explain at the time of sentencing, the purpose of the stringent sentence and if it is within the sentencing guidelines, and if not, why they are sentencing outside of the guidelines. Like I stated in the opening of my Public Comment, Judges serve as the voice of the people. Constituencies did not support the guidelines for distribution of crack as opposed to powder so why do the guidelines continue to support the differential treatment? Instead of accepting the recommendation of the people; the courts appeared to have displaced the discretion with prosecutors which often results in longer sentences.

Although I am but one person writing to address this issue; I am wholly the voice of many who may not be aware of this public hearing. I am speaking for the rehabilitated, first time offenders who feel victimized by unfair sentencing, their families, and also free people who believe in what I have stated. I hope you will consider my statements and request to lessen first time offender sentencing as you finalize your work on the cocaine sentencing policy.

Thank you,

Stephanie Thomas

Stephanie Thomas,
Municipal Clerk; Concerned Citizen

Attachments(2)

CHAPTER FIVE - DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note: **Effective November 1, 1987.**

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B 10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C 11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
Zone D 21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175

29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Commentary to Sentencing Table

Application Notes :

1. The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270); November 1, 1991 (see Appendix C, amendment 418); November 1, 1992 (see Appendix C, amendment 462).

PART B - PROBATION

Introductory Commentary

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

Historical Note: Effective November 1, 1987.

§5B1.1. Imposition of a Term of Probation

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); April 30, 2003 (see Appendix C, amendment 649); October 27, 2003 (see Appendix C, amendment 651).

§5H1.7. Role in the Offense (Policy Statement)

~~A defendant's role in the offense is relevant in determining the applicable guideline range (see Chapter Three, Part B (Role in the Offense)), but is not a basis for departing from that range (see subsection (d) of §5K2.0 (Grounds for Departures)).~~

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. See Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, see §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Historical Note: Effective November 1, 1987. Amended effective October 27, 2003 (see Appendix C, amendment 651).

§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Historical Note: Effective November 1, 1987.

FAMM
Families Against Mandatory Minimums
FOUNDATION

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:

I write on behalf of the board and members of Families Against Mandatory Minimums to ask that you consider adding two projects to the Commission's proposed priorities for the 2006 amendment cycle: an updated report on mandatory minimum sentencing and guidance for judges considering early release for extraordinary and compelling circumstances under 18 U.S.C. § 3582(c)(1)(A).

The Commission's report on mandatory minimums will be fifteen years old in 2006. It remains simply the best and most comprehensive treatment of the subject. Despite the report's age, we and others routinely rely on its analyses and conclusions to help us understand the effect of mandatory minimums on federal sentencing law and policy. While the report's 15-year anniversary strongly suggests an update is in order, so does the current state of sentencing.

Since the report's release, many new mandatory sentences have been adopted as has the Safety Valve. Their interaction and the simple accumulation of mandatory sentences are important new developments that warrant study. Even more compelling in our opinion is the renewed allure of mandatory sentencing to some on Capitol Hill.

Since the release of the *Booker* opinion, some members of Congress have used mandatory sentencing as a proxy for a "*Booker* fix." For example, every crime bill introduced by Republican members of the House Judiciary Committee includes new or stiffened mandatory minimums. Rep. Randy Forbes (R-VA) introduced H.R. 1279, the Gang Deterrence and Community Protection Act of 2005, which contains numerous new and enhanced mandatory minimums, while Rep. Sensenbrenner's H.R. 1528, Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, is riddled with them as well. On the Senate side, S. 155, the Gang Prevention and Effective Deterrence Act of 2005, introduced by Sen. Dianne Feinstein (D-CA), includes

1612 K Street, NW • Suite 700 • Washington, D.C. 20006 • (202) 822-6700 • fax (202) 822-6704 • FAMM@famm.org • http://www.famm.org

a provision that will add simple conspiracy to conduct covered by 18 U.S.C. § 924 (c),[1] raise the minimum sentence to seven years for possession of a gun in furtherance of a drug or violent offense, and penalize every "instance" a gun is possessed or used with a minimum consecutive penalty. It is widely understood that these mandatory penalties are considered by many as necessary in light of the relaxed requirements on judges following *Booker*. Even the Patriot Act was amended on the floor of the House to include a new mandatory minimum penalty of twenty years for "narco-terrorism."

At the same time, new voices are being raised in Congress questioning mandatory minimum sentencing. Rep. Bob Inglis (R-SC) spoke forcefully on the floor of the House during the debate on H.R. 1279 to explain that he would vote against the bill in part because it contains mandatory minimums. Recently, Howard Coble (R-NC), chair of the Subcommittee on Crime, Terrorism and Homeland Security, spoke of his discomfort with mandatory minimums during a Judiciary Committee markup.

These important developments call out for a fresh look by the Commission at the issue of mandatory sentencing. We urge you to do so as we have no doubt that a new Commission report will add considerably to the debate on their use at a critical time.

We also ask once again that you begin the work on a policy statement for judges considering early release for extraordinary and compelling circumstances under 18 U.S.C. § 3582(c)(1)(A). We have written to you repeatedly in the past about the need for help from the Commission on this subject. Putting aside that Congress directed the Commission in the Sentencing Reform Act to do this, it is needed, now, more than ever. The prison population is growing and aging. We believe that your contribution could have a significant impact on how the federal Bureau of Prisons (BOP) treats petitions for compassionate release.

Your failure to speak on this matter of simple compassion is baffling and particularly disturbing because we believe it sends a message that the practice is unimportant. In our experience, so-called compassionate release requests are routinely handled very slowly by the BOP, even in cases where BOP doctors have determined that death is imminent. Your contribution can raise the profile of the issue. Policy guidance would have the collateral benefit of giving background guidance to the BOP which operates in something of a policy vacuum without it.

Finally, we applaud your commitment to continue work on cocaine sentencing policy. The 2002 hearings and report were outstanding and we rely on them in our work

[1] Thus, in light of the common practice of charging conspiracy in addition to the underlying offense, it is possible for a person to be convicted of conspiracy to possess a weapon and possession of a weapon in furtherance of a qualifying crime and receive sentences for the two convictions totaling 32 years (seven years (raised from five) for the conspiracy, which would be the first section 924 (c) conviction and 25 years mandatory consecutive sentence for the possession, because it would be the second conviction under the statute, even though the conduct itself is not separated in time or by a conviction and sentence.

all the time. You have kept a bright light shining into a dark corner with your determination to address this issue.

Thank you for considering our views. As always, we stand ready to assist you.

Sincerely,

Julie Stewart, PC

Julie Stewart
President

Mary Price, PC

Mary Price
General Counsel

THE SENTENCING PROJECT
RESEARCH & ADVOCACY FOR REFORM

514 TENTH STREET, NW SUITE 1000
WASHINGTON, DC 20004
TEL:202.628.0871 • FAX:202.628.1091
STAFF@SENTENCINGPROJECT.ORG
WWW.SENTENCINGPROJECT.ORG

MALCOLM C. YOUNG, EXECUTIVE DIRECTOR
MARC MAUER, ASSISTANT DIRECTOR

August 15, 2005

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

ATTN: Public Affairs-Priorities Comment

To The Commission:

The recent report, *Fifteen Years of Guidelines Sentencing* ("15-year report"), released in November 2004 by the United States Sentencing Commission ("the Commission"), provided an evaluative analysis of the effectiveness of the sentencing guidelines in meeting the goals set forth in the Sentencing Reform Act of 1984 ("SRA"). This is an important report and one which merits further attention. We appreciate the opportunity to comment upon some of the findings in the report and to contribute to the Commission's review of agency priorities.

One of the core objectives of the SRA was to implement uniform sentencing practices across jurisdictions which would eliminate extralegal disparities, notably those based upon the race of the defendant. The 15-year evaluation of the performance of the guidelines in reducing racial disparity was informative, concluding that the remaining disparity in sentencing was not attributable to the proclivities of individual judges; rather, it was more likely a result of "sentencing rules" and charging practices that have "institutionalized" disparity.[1] Despite the relative effectiveness of the guidelines in regulating inter-jurisdictional sentencing, other factors, such as mandatory minimums, plea bargaining, and substantial assistance departures have re-introduced and formalized disparity. The 15-year report concludes that these variables "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system . . . prior to guidelines implementation."[2]

This is an alarming conclusion, and one that warrants inclusion by the Commission in the priority list during the forthcoming amendment cycle. If racial disparity continues to exist at sentencing despite the implementation of the federal guidelines, then the current sentencing system is running afoul of the mandate set forth in the SRA. Moreover, widely held perceptions of unfairness in sentencing undermine the legitimacy of the federal system and threaten its ability to achieve the purposes defined in the SRA. The Sentencing Project urges the Commission to

[1] United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Washington, DC, 2004, at 127.
[2] *Id.* at 135.

explore this issue in depth, with a focused analysis of the factors outside of the guidelines that may be causing racially disparate outcomes in the federal system. We also suggest that the Commission develop a process of analyzing the future racial and ethnic impact of all proposed changes and to include a "Racial/Ethnic Impact Statement" ("RIS") with all sentencing policy amendment recommendations to Congress.

Below are some potential avenues for investigation:

Revisit the Impact of Mandatory Minimums

The 15-year report notes that mandatory minimums, such as those associated with powder and crack cocaine, are likely to be responsible for some degree of the variation in sentencing between races.[3] Despite efforts to institute uniformity through the guidelines, statutory mandatory minimums trump the guidelines and can result in situations in which the mandatory minimum exceeds the prescribed guideline range for that particular offense. The inflexibility of mandatory minimums has had a particularly harsh impact on drug offenses, where factors such as individual criminal history and role in the offense, which would be considered under the guidelines, are ignored in determining sentence.

In addition to frequently mandating longer sentences than called for under the guidelines, mandatory minimums also have been shown to have a disproportionate impact on African Americans. For example, due to the 100:1 powder to crack cocaine sentencing ratio in weight thresholds triggering a mandatory minimum sentence, the average length of sentence for a crack cocaine conviction in 2003 was 123 months, more than 50% higher than the average sentence for powder cocaine.[4] Because 81% of persons convicted of a crack cocaine offense in 2003 were African American, the high mandatory sentences which judges are required to impose in these cases have a racially disproportionate impact on sentencing.[5]

Crack cocaine defendants are also far less likely to be offered "safety valve" relief. In 2003, 65% of crack cocaine sentences resulted in a mandatory minimum with no safety valve (compared to 41% for powder cocaine), while only 12% were safety valve eligible (compared to 36% for powder cocaine).[6] Crack cocaine defendants are less likely to receive mitigating role adjustments (6%) than powder cocaine defendants (23%).[7] As we will discuss later, much of this disproportionality in sentencing is the result of disparate law enforcement techniques. The Sentencing Project joins Julie Stewart of Families Against Mandatory Minimums in urging Congress to undertake a new, comprehensive study of the effect of mandatory minimums, updating the work completed for the 1991 report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*. The results of an updated analysis will not only serve to shed light on racial disparity in federal sentencing, but will also be an informative resource for Congressional staff as they continue to consider the adoption of an ever increasing number of statutory

[3] *Id.* at 83, 131.
[4] United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Washington, DC, 2004, at 91.
[5] *Id.* at 79.
[6] *Id.* at 89.
[7] *Id.* at 85.

mandatory minimums. A comprehensive study of mandatory minimums would be timely because a number of policymakers and legal authorities have suggested expanding the range of available mandatory minimums as a statutory response to the *Booker* decision. As long as mandatory minimum sentences are being advocated as a "fix" to the advisory guidelines created in the *Booker* decision, then it is imperative that as much as possible be made known about the short- and long-term consequences of such an expansion.

Plea Bargaining

Between 1999 and 2003, the number of cases that resulted in a guilty plea in the federal system fluctuated between 94.6% and 97% (2002).[8] In short, the federal sentencing system depends upon guilty pleas in order to process the 70,000 cases that come before it on an annual basis. With such a significant proportion of adjudications resulting from guilty pleas, it is incumbent upon the Commission to have an intimate familiarity with the plea bargain process and to be able to identify and document the means by which the proceedings operate.

Despite high rates of guilty pleas across all jurisdictions, there is some variation by region and offense type. The range of guilty pleas extends from a low of 88.2% (District of Montana)[9] to a high of 99% (District of Arizona).[10] In addition, there is variance in the number of guilty pleas based on the type of offense, with drug offenses representing the conviction category most likely to have been resolved with a plea bargain.[11]

In reference to disparity in sentence length (not specifically regarding race), the 15-year report noted that "plea bargaining is re-introducing disparity into the system."[12] Thus, bargaining by the prosecutor may represent a substantial source of disparity. The 15-year report notes a paucity of studies on plea bargaining practices, primarily due to limited available data; however, the work that has been conducted describes a system in which the discretion afforded the prosecutor to charge or fact bargain significantly skews power in their favor and hampers the ability of the guidelines to deliver uniform sentences.[13]

The limited available information regarding the use of plea bargains paints a picture of near certainty of guilty pleas; however, we do not have adequate information about the use of pleas by race of the defendant. Past research by the Federal Judicial Center[14] and the Commission have found racial disparity in the probability of receiving a mandatory minimum sentence and the likelihood of being offered a plea bargain below a mandatory minimum, respectively. African Americans were more likely to receive a mandatory minimum and less likely to be offered a plea below a mandatory minimum. It would be valuable for the Commission to collect and analyze the use of guilty pleas by race. Are certain offenders more likely to plead guilty? How does the likelihood of pleading guilty interact with the race of defendant, charged offense, and criminal history score? What is the intersectionality between race, plea bargains, criminal history, and

[8] *Id.* at 22.
[9] This does not include the Northern Mariana Islands.
[10] *Supra* note 4, at 23-25.
[11] *Id.* at 26.
[12] *Supra* note 1, at xii.
[13] *Id.* at xii-xiii.
[14] Barbara, S. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms*, Washington, DC, 1992, p. 20.

mandatory minimum sentencing? Due to the near uniform use of plea bargains across the board, it is not likely that there will be substantial racial variation, but the interaction of factors listed above may offer some explanatory power for sentencing disparity by race, and its very ubiquity indicates the critical nature of the need for this type of analysis.

Use of Substantial Assistance Departures

The government retains substantial discretion in determining the outcome of a case by offering sentence reductions for defendants who offer substantial assistance to an ongoing governmental investigation, commonly referred to as §5K1.1 departures. These §5K1.1 departures are related to the use of plea bargains, as an agreement struck between a defendant and the state is frequently the result of an individual offering assistance to the state regarding other investigations. Sentence departures for government assistance accounted for more than half of all downward departures in 2003.[15] Not unexpectedly, the number of substantial assistance departures varies among federal circuits, representing nearly 80% of all downward departures in the Third Circuit, while only accounting for approximately one-quarter of downward departures in the Ninth Circuit.[16] There is substantial inter-district variation as well, indicating that a prosecutor's decision to recommend a substantial assistance departure, as well as a judge's discretion to consider it at sentencing, introduces ample opportunity for disparity to impede SRA goals of achieving uniformity in sentencing.

In addition to variance in the use of substantial assistance departures, the 15-year report noted that "the *extent* of departure" is more significant than other avenues in varying sentences.[17] Thus, the use of substantial assistance is another potential entry point of disparity. As with the use of plea bargains, we do not have an understanding of the interaction, if any, between race and substantial assistance departures. Are there differential rates in which prosecutors recommend substantial assistance based on the race of the defendant? If so, what are the reasons? Do African Americans have "less" assistance to offer?

These are complex questions that are difficult to address based on available information, but we believe that the Commission should develop a data collection protocol that will allow analysts to address these questions.

Criminal History and Career Offender Enhancements

The 15-year report notes that more than half the persons sentenced under the "career offender" sentencing enhancement (§4B1.1) were African American, despite the fact that they represented only one-quarter of all adjudications.[18] The evidence suggests that §4B1.1 is having a disproportionate impact on Black defendants, primarily through policy decisions regarding law enforcement and arrest patterns, thereby creating variability in the racial distribution of sentencing. The 15-year report notes that the majority of the impact of career offender

[15] *Supra* note 4, at 64.
[16] *Id.* at 60-62.
[17] *Supra* note 1, at xiii.
[18] *Id.* at 133.

sentencing enhancements comes as the result of drug offenses, which research has suggested are not accurately reflective of use and sale rates in the general community.[19]

There are a number of informative studies that suggest the decision of local law enforcement agents on where to pursue the "war on drugs" is a far better predictor of arrest and incarceration patterns than general use. As an example, National Survey on Drug Use and Health results report that African Americans represent approximately 14% of regular, illicit drug users, nearly the same proportion they represent in the general population.[20] Although there is reason to question the relevance of use rates because the majority of persons sentenced in the federal system for drug offenses have been convicted of trafficking, research of drug markets suggests people are more likely to purchase drugs from persons of the same racial background.[21] Thus, there should be correlation between rates of use and sale by race. However, arrest and incarceration figures are higher for African Americans, with the rate of Black drug defendants in the federal system more than double their representation in the general population.[22]

Such law enforcement patterns will have profound effects on racial disparity in sentencing, particularly when criminal history and career offender enhancements are taken into consideration. This was noted by Judge Nancy Gertner in *US v. Leviner*, in which she wrote that the use of criminal history scores and enhancements institutionalizes racial disparities present in law enforcement patterns into the guidelines of the federal sentencing system.[23] The Sentencing Project recommends that the Commission evaluate the impact of law enforcement policies on criminal history scores and analyze the degree to which §4B1.1 has exacerbated racial disparity in the federal system. The more accurately that the Commission can quantify the issues raised in *Leviner*, the better our ability to evaluate the efficacy of §4B1.1 enhancements. The outcome of this research may be to make recommendations in which the guidelines will consider the racially disparate impact of career offender enhancements due to law enforcement techniques and seek to compensate for these factors in the calculation of a sentencing score. Under this system, if either party can identify factors that have been prescribed as "racially disparate," then that party can ask for a departure based on that criteria. Judge Gertner's decision in *Leviner* is an example of the way in which this system would function. This is one approach in which the federal sentencing structure can avoid institutionalizing disparities that originate from outside its scope.

Other Adjustments and Enhancements

The federal sentencing system is exceedingly complex, due in large part to the manner in which cumulative sentencing scores are modified based on broad-ranging criteria. Although not intended, the use of certain factors may exert racially disproportionate effects on sentencing. In addition to criminal history and career offender enhancements, the Commission should

---

[19] *See* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 University of Colorado Law Review 743, 753 (1993).

[20] *See* Substance Abuse and Mental Health Services Administration, *Overview of Findings from the 2002 National Survey on Drug Use and Health*. (Office of Applied Studies, HHDSA Series H-21, DHHS Publication No. SMA 03-3774, 2003). Rockville, MD. Table 1.31A.

[21] K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities*, National Institute of Justice, 1997, p. 1.

[22] *Supra* note 4, at 79.

[23] *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (1998).

investigate the use of mitigating and aggravating factors that are eligible for judicial consideration during sentencing and document any racially disparate effects.

Establishment of Racial/Ethnic Impact Statements

The Sentencing Project is calling upon the Commission to do more than conduct a comprehensive analysis of race and the federal sentencing system. We urge the Commission to develop standardized protocol in which regular "Racial/Ethnic Impact Statements" will be produced to evaluate the future impact of proposed modifications to sentencing law. This will likely entail reaching out to outside organizations and developing partnerships which will help the Commission identify, measure, and report the impact of guideline amendments and sentencing law changes upon racial and ethnic populations. The Commission would best fulfill its role in reducing unwarranted disparity by creating a process in which all recommendations for policy change would be accompanied by a prospective statement documenting the likely impact of these amendments on persons of color.

The RIS would function in the same fashion as a fiscal impact statement which is appended to state and federal legislation. These documents assist legislators in deciding the potential short- and long-term costs of a potential law. This same principle is embodied in an RIS. For example, had the Commission prepared an RIS prior to the passage of the drug sentencing bills in 1986 and 1988, Congress would have been informed of the disproportionate effect of the powder/crack cocaine sentencing disparity and could have considered this impact in its deliberations. Congress might well have been prompted to engage in a closer review of sentencing alternatives that would not have produced the same degree of racial disparity. As it stands, the Commission has spent the better part of two decades advocating reform of this 100:1 ratio, but despite consistent pressure from inside and outside of government, the law remains.

Thank you for the opportunity to comment on the Commission's challenging agenda. We would be happy to discuss this letter or any related information at your earliest convenience. Please fell free to contact myself, or, after October 3, 2005, Marc Mauer, with any questions that you may have.

Sincerely,

Malcolm C. Young

CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

MICHAEL H. MARCUS
JUDGE

PHONE (503) 988-3250
FAX (503) 276-0961
Michael.H.Marcus@ojd.state.or.us

Department 34

Public Affairs-Priorities Comment
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-800

July 25, 2005

Re: Public Comment on Proposed Priorities

Dear Commissioners:

I write to urge that those of us responding to *Booker* and *Blakely* seize this opportunity to revise sentencing guidelines so that they promote sentences that best serve public safety within the available range of just and available sanctions. Virginia is unique in having made substantial strides in this direction; Oregon has begun officially to consider the mere possibility of doing so; but state and federal guidelines otherwise have nothing intentionally to do with crime reduction. We invest the resources of public agencies and private "think tanks" across the spectrum of penal philosophy, yet exclude their accumulated data from any role in sentencing. We need to fix that, because the result is irresponsible cruelty to victims whose crimes smarter sentencing would have prevented. Avoiding accountability for crime reduction is also irresponsible to the taxpayers who pay for a criminal justice system that yields unacceptable recidivism while squandering correctional resources.

Most state and federal statutes proclaiming the purposes of sentencing date from the mid-century fallacy that merely proclaiming those purposes would accomplish their achievement. The 1962 Model Penal Code was an effective articulation of the assumption that sentences served public safety by a combination of deterrence, reformation, and incapacitation, with substantial deference to proportionality and what became known as the medical model of punishment: that most offenders would respond to diagnosis and treatment by reducing their criminal behavior. Those skeptical of rehabilitation eventually gained substantial vindication in growing scientific evidence that treatment success was limited and rare -- and in growing frustration with the recidivism easily attributed to parole boards laboring with blunt predictive tools under indeterminate sentencing laws.

By the late 20th century, the skirmish lines shifted. "Truth in sentencing" and, soon, guideline schemes achieved an equilibrium among competing sentencing ideologies. Those who resisted long prison sentences hoped guidelines would moderate what they deemed "punitivism." They celebrated guidelines' function of limiting sentencing disparity as a sufficient accomplishment, even when those who favor incapacitation elevated guideline ranges with ballot measures and legislation. Initially suspicious of what they saw as the structural leniency of guidelines, the latter now generally support guidelines but struggle to raise sentencing floors and minimize judicial discretion to depart downward.

The resulting *de facto* coalition supporting guidelines enables their consistent failure to improve the crime reduction impact of sentencing. While it surely has social value to determine some metric by which to spread just deserts appropriately among offenders based on their present and past crimes, we must not rest on such puny laurels. The actual range of "just punishment" is quite broad by any popular, historical, or analytical model. While crimes that rightly cause outrage or cause great harm or reflect brutality clearly call for severe punishment, the most common crimes don't evoke a consensus for any but the broadest range of appropriate punishment. Yet we construct intricate matrices that create the illusion of precision but have nothing whatever to do with public safety except by accident -- while achieving consistency in large part by ignoring variables we should not ignore.

I submit that merely ordering just deserts is a woefully insufficient talisman [and a pitiful performance measure] for the exercise of sentencing functions, and that our public responsibility requires that we stop avoiding the mission the public properly expects and prizes above all others: crime reduction.

Of course it is much more challenging to insist on best efforts to achieve crime reduction within the limits of proportionality than to punish within the typically wide range of "appropriate" dispositions. But until we undertake that challenge, we are essentially exploiting just deserts to avoid accountability for the outcomes of our sentencing decisions -- and outcomes are inevitable whether or not we accept responsibility for achieving better rather than worse results. At present, our outcomes amount to unacceptable recidivism, avoidable victimizations, wasted resources, and deflated public confidence in criminal justice.

I am not suggesting that we must be more severe or more lenient. I submit that we must be far smarter in our approach to sentencing -- we must accept the challenge that science posed by finding so much treatment ineffective. Medicine did not abandon empiricism for empty ritual when it found itself powerless against the plague -- it struggled to learn more, piece by piece, and to improve its ability to solve the mysteries of disease. Sentencing, in contrast, essentially retreated to ceremony instead of learning more about the limits and the promise of treatment. Criminologists have learned a great deal, and can now identify program characteristics that correlate with substantial reductions in recidivism, but we generally ignore such matters in sentencing.

But this is not just a struggle between treatment or "rehabilitation" on the one hand and incarceration on the other. Not just programs, but everything we do (and the way we do it) works better on some than on other offenders. "Rehabilitation" proponents must understand that incarceration works tremendously well for almost all offenders during the period of incarceration. "Incarcerationists" must understand that for some offenders, incarceration may increase their criminality to the point that their recidivism after release makes up for lost time several fold when they return to their communities. We have a wide range of responses to crime -- from treatment (outpatient, inpatient and secure custodial), alternative sanctions, and various forms and lengths of supervision, to jail and prison of varying duration. A responsible criminal justice system goes far beyond merely accepting a just deserts calculus for using these resources to reduce the risk of harm at the hands of offenders. A responsible criminal justice system does its best to learn which responses are most likely to reduce the total risk of harm posed by an

offender over the course of a potential criminal career-- and to apply that learning within the limits of proportionality and resources. A responsible criminal justice system understands that what works on one offender may not work on another -- and that on some offenders, nothing but incapacitation works.

I submit that the highest calling of sentencing commissions is to promote sentencing laws and practices that pursue best efforts at crime reduction with at least the same vigor that they pursue adherence to a matrix of expected severity. Few have taken that route -- after all, merely publishing a matrix and monitoring how well judges adhere to it is far, far less challenging than the task I propose. It is also far, far less valuable for public safety or even fiscal responsibility -- recidivism is not just cruel; it is also inefficient, as recidivists repeatedly tax our resources as they victimize our citizens.

Virginia has provided a worthy example of how sentencing law and guidelines can promote public safety and smarter sentencing. Its sentencing commission studied, refined, and validated risk assessment, then incorporated risk assessment into its guidelines. The first result was far longer sentences for sex offenders who posed a greater risk of recidivism than others. Later, Virginia extended risk assessment to ensure that prison beds were available for a wide range of offenders who represented an elevated risk of harm while relegating lower risk offenders to alternative sanctions. The history and results of this effort are available on the Virginia Criminal Sentencing Commission's web site, http://www.vcsc.state.va.us/reports.htm.

Oregon's guidelines, like those of other states and the federal system, have virtually nothing intentionally to do with crime reduction. They serve public safety only by the accident that worse crimes and records generally result in longer sentences. In spite of repeated legislative proclamations that crime reduction is our mission, our guidelines (which govern felony sentencing) ignore that mission, and essentially erect our calculus solely around crime seriousness, criminal history, and prison resources. Our current effort to get beyond the woefully ineffective status quo is embedded in 2005 Oregon Laws, chapter 474 (SB 919):

> The Oregon Criminal Justice Commission shall conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines and, if it is possible, the means of doing so.

Of course, this is a most modest first step. But I submit that the path is one that all of us should take if we are adequately to pursue the public safety component of sentencing.

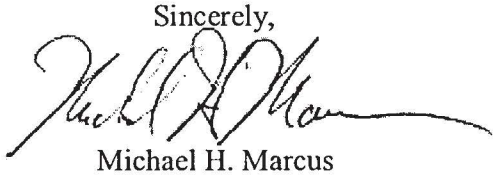
In short, until and unless we become responsible about making guidelines and other sentencing laws and practices reflect best efforts at crime reduction, we will have accomplished little of substantial value. Meanwhile, we are responsible, at some level, for the victimizations we could and should have prevented.

I have expanded on these points in *Blakely, Booker and the Future of Sentencing*, 17 Fed. Sent. Rptr. 243 (2005), of which I will send a copy as soon as I receive the final version (unless you indicate that you do not wish to receive it); *Justitia's Bandage: Blind Sentencing*, 1 International Journal of Punishment and Sentencing 1 (2005); *Sentencing in the Temple of*

Denunciation: Criminal Justice's Weakest Link,1 Ohio State Journal of Criminal Law 671 (2004) [Available on Lexis at 1 Ohio St. J. Crim. L. 671]; *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 American Journal of Criminal Law 135 (2003) [Available on WestLaw at 30 AMJCRL 135]; *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It,* 16 Fed. Sent. Rptr. 76 (2003). *See also, LR - Limiting Retributivism or Lamentable Retreat? - The Third Draft of Revisions to the Model Penal Code,* (August 2004) [a paper presented at a panel of a conference of the National Association of Sentencing Commissions in Santa Fe, NM], available at http://www.smartsentencing.com, along with other articles, legislative and judicial materials, and a description of our local sentencing decision support technology.

I would welcome the opportunity to provide further information or assistance on these issues, including Oregon's statutory response to *Blakely* in which I participated. I would also greatly value any information about other attempts to bring responsible crime reduction practices into the function of guidelines.

Sincerely,



Michael H. Marcus
Judge

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Cathy A. Battistelli
Chair, 1st Circuit

U.S. Probation Office
Warren Rudman Courthouse
55 Pleasant St.
Concord, NH 03301

Phone # 603-225-1428
Fax # 603-225-1482

August 15, 2005

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

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on August 10 and 11, 2005 to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. We are submitting comments relating to three issues which appear on the Commissioner's list of priorities, as well as other issues which POAG believes should be addressed.

Implementation of Crime Legislation regarding the Family Entertainment and Copyright Act of 2005 and the Intellectual Property Protection and Courts Amendment Act of 2004

POAG recognizes there is a broad category of offenses which could be captured in USSG §2B5.3. The group believes a separate prerelease specific office characteristic should be added to this guideline as it is viewed as a distinct harm to the victim. POAG realizes conduct involving the prerelease of movies varies. An individual could digitally record the movie while watching it in a theater and then release it, or obtain a pirated copy of the movie and release it prior to the premier. This problem is similar to "zero-day release" of protected copyrighted video games where the harm to the industry is not ordinarily covered in the existing guideline. POAG also noted that computer technology involved in these types of offenses changes very quickly which makes it almost impossible to capture the correct terminology to be used in the guidelines. For example, would peer-to-peer sharing of information via networked computers be considered under the current definition of uploading? Another problematic area in this guideline is determining the dollar amount associated with the crime. If an individual is found with 100

Calvin Klein labels, how is the dollar amount to be determined as the Calvin Klein label can be found on underwear or jeans? Or, in the case of an individual who has pirated copyrighted materials, including multiple high end items of computer software, should the dollar amount be based on what is found on the defendant's computer during a search or should it be determined on the number of times the items were uploaded or downloaded? Depending on how the dollar amount is determined, sentencing disparity can result throughout the system with some individuals receiving probationary sentences and others receiving significant prison sentences.

Immigration

Regarding the immigration guidelines, POAG urges the Commission to continue its work in this area. It is believed that the Commission should continue to simplify the guidelines by clarifying definitions, such as the crime of violence definition, for ease of application. The definition in this guideline differs from the definition contained in 8 U.S.C. § 1101. Moreover, the group suggests the Commission address whether a sentence of 13 months or less as noted in USSG §2L1.2(b)(1)(B), includes a sentence of probation. The definition for "sentence imposed" as included in this particular guideline, conflicts with the definition contained in USSG §4A1.2(b)(1). When the user refers to §4A1.2(b)(1) as the application note suggests, this guideline notes a "sentence of incarceration," and to many users, probation does not qualify under the provision for a twelve-level increase. Another issue associated with this guideline is whether it is appropriate to impose a threshold quantity for a defendant who is convicted of possession of a large quantity of drugs which are clearly intended for distribution purposes; however, under the various state laws, the defendant is charged with (and convicted of) a straight possession offense. In other districts, if a defendant had the same quantity of drugs, it would be a distribution offense. This clarification would hold defendants accountable for possession of large amounts of drugs, regardless of where they are convicted. This issue appears to be very problematic among the "border states." Lastly, the group would like the Commission to clarify the commentary contained in USSG §2L1.2, comment. (n.1[A][i] and [ii]) as to the timing of when the defendant incurs the predicate conviction and his immigration status at the time the conviction occurs.

Circuit Conflicts

POAG encourages the Commission to resolve circuit conflicts whenever possible which gives greater guidance to the field and ensures consistency in the application process.

Other Issues

Issues Relating to USSG § 2B1.1

There are four particular areas noted by Commission Staff regarding this guideline which POAG wishes to address: the number of victims, the intended loss determination in a blank check case, the definition of "means of identification," and the cross references.

Regarding the determination of the number of victims, the group agrees that at times, determination of the number of victims is problematic. For example, how do you count the number of victims in a theft from twelve different stores with the same parent company? Are there twelve victims as twelve stores were victimized or only one victim that being the parent company?

The determination of intended loss in a blank check case is also problematic, and perhaps some clarification in the commentary notes would be of assistance.

The group also finds that use of the statutory definition "means of identification" has caused problems with application, especially if the identification involves a deceased individual.

Lastly, USSG §2B1.1 contains a number of cross references in subsection (c) which present challenging application problems. The provisions found in §§2B1.1(c)(2) and (c)(4) specify that the cross reference application is to be applied only if the resulting offense level is greater, however, this direction is lacking in (c)(1) and (c)(3). Is this the intent of the Commission?

Drug Issues

POAG agrees with Commission staff regarding suggested technical and conforming changes in USSG §2D1.1 with respect to the parenthetical statement "or the equivalent amount" which is found in the Drug Quantity Table. The group discussed this parenthetical statement and discovered that application errors have occurred due to misinterpretation of the phrase. Application Note 10 clearly outlines the procedure for drug conversion/equivalency when a specific controlled substance is not included in the Drug Quantity Table. POAG believes the elimination of the confusing phrase would ensure proper application of Note 10.

Commission of Offense While on Release - USSG § 2J1.7 and 18 U.S.C. § 3147

POAG recommends reconsideration of guideline application of the statutory enhancement set forth in 18 U.S.C. § 3147. This statute requires a sentence of imprisonment be imposed in addition to the sentence for the underlying offense; furthermore, the sentence of imprisonment under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment.

Currently, in calculating an offense level for an offense committed while on federal release, §2J1.7 provides for a three-level enhancement as a specific offense characteristic. POAG observes this enhancement could easily be missed because users are not accustomed to accessing enhancements through Chapter Two sections. POAG supports converting §2J1.7 into a Chapter Three adjustment.

POAG requests clarification as to whether the government must actually file an enhancement pursuant to 18 U.S.C. § 3147. Also, POAG recommends that a circuit split be resolved regarding whether the three-level increase can be imposed on a defendant who was not notified of the specific enhancement at the time of his release.

Clarification in two other areas is suggested to avoid possible confusion. Currently, *Background* notes remind the user that this enhancement only applies in the case of a conviction for a federal offense committed while on release for another federal charge. Perhaps that important caveat could be highlighted. Additionally, guidance is requested regarding the interplay between this enhancement and acceptance of responsibility and/or obstruction of justice. Confusion could arise, especially in cases where both offenses (i.e., the offense for which the defendant was on pretrial release and the offense committed by the defendant while he was on pretrial release) are consolidated for sentencing. POAG recommends adding language in one or more of these sections (i.e., §2J1.7 or its successor; §3E1.1; or §3C1.1) to address any confusion that could arise. There is also concern about double counting. For example, if the two cases were consolidated

for sentencing, the defendant could lose the reduction for acceptance of responsibility because the conduct, which has been charged as the second offense, is inconsistent with acceptance of responsibility. Furthermore, such conduct could, in some cases, constitute obstruction of justice.

Firearms

Felon in possession of firearm prosecutions have been a priority in all districts, while at the same time the guideline applications in this section have become problematic. POAG strongly encourages the Commission to resolve several circuit conflicts found at USSG §2K2.1(b)(5).

With respect to "Possession of a Firearm In Connection With Another Felony Offense," POAG has concluded that applying this four-level increase has become problematic due to the circuit conflicts involving the "in connection with" standard. POAG suggests the Commission provide better definitions for the "in connection with" standard and also recommends that the Commission resolve the circuit conflicts in the cross reference section under USSG §2K2.1.

The expiration of the Firearms Sunset Provision with respect to the type of firearms defined in 18 U.S.C. § 921(a)(30) has resulted in numerous application problems for the field. POAG urges the Commission to make a determination as to whether the types of firearms identified in this statute are more dangerous than other types of weapons and should still be considered in determining the higher guideline offense level or, because they are now legally allowed to be possessed by nonfelons, this requirement should be deleted from the guideline.

POAG is cognizant that there have been cases where the definition of a destructive device has excluded a sawed-off shotgun, while in other districts this type of weapon is considered to be a destructive device. A clearer definition would be helpful and avoid inconsistent application.

Chapter Four

There are a number of Chapter Four issues which concern POAG that parallel help line phone calls frequently received by Commission staff.

Crime of Violence

There are a plethora of definitions for crimes of violence found in different criminal statutes, as well as within the Sentencing Guidelines, for example §2L1.2 and §4B1.2. It would simplify the guideline application process and eliminate current inconsistencies to adopt one guideline definition. POAG recognizes adopting one guideline definition for crime of violence will not rectify the problem between statutory and guideline differences for crime of violence; however, one definition can begin to develop better uniformity and consistency of guideline application and reduce confusion.

Simplification

POAG recognizes "Guideline Simplification" has been an ongoing debate throughout the last several years and believes it is an issue that the Commission consider placing on it's long term agenda. While there are several problematic areas in the guidelines, many on the group believe that through ongoing training and

daily use of the guidelines, practitioners are able to master the vast majority of the manual. However, the application of cross references is problematic to the experienced user of the guidelines and is worthy of the Commission's review. As noted in an earlier POAG position paper, cross reference provisions in the guidelines are generally thought to be confusing and appear to result in numerous objections by counsel, especially, if the application results in "jumping" from guideline to guideline. The Accessory After the Fact and Misprision of a Felony guidelines are especially problematic in the determination of relevant conduct provisions and Chapter Three adjustments.

Addressing the "Career Fraudster"

Finally, POAG believes there is a need to address the white collar defendant who is not always at the high end of the fraud table and repeatedly engages in a pattern of fraudulent behavior. This topic has been an ongoing concern of POAG and was discussed during the Probation Officers' session at the recent national training in San Francisco. POAG believes there is a distinction between the career confidence man/"career fraudster" and other white collar offenders which should be specifically addressed in the guidelines. During our discussions, it was recognized that state prosecutors have limited access to criminal history information in other states; therefore, the defendant's multiple arrests and/or convictions for similar misconduct may not be available to the state courts when imposing sentence. As a result, this individual may receive a number of lenient sentences. While an upward departure pursuant to USSG §4A1.3 may be part of the answer, POAG believes an enhancement should be determined based on the defendant's pattern of behavior rather than prior convictions alone. POAG has submitted additional information relative to this issue to Commission staff for their review.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli /RDM

Cathy A. Battistelli
Chair

FEDERAL PUBLIC DEFENDER

District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2743
1-800-758-7053
(FAX) 602-382-2800

August 16, 2005

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

RE: Commission's Proposed Priority Policy Issues for Cycle Ending May 1, 2006

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the Commission's proposed priorities for the upcoming 2005-2006 cycle. 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. As always, we look forward to working with the Commission and the opportunity to provide specific information and analysis one these issues in the months ahead.

I. Implementation of Crime Legislation

While we provided substantial input earlier this month on the intellectual property directives contained in recent legislation, a number of other legislative matters, specifically, steroids and intelligence and terrorism reform, still await Commission action.

Our chief concern with the treatment of anabolic steroids under the Guidelines is the dosage unit. The Department of Justice is recommending uniformity of treatment of anabolic steroids with other Schedule III drugs, so that one tablet, or 0.5 milliliters of liquid, would be a dosage unit. We think this is wholly misguided. This proposal does not reflect the numerous differences between steroids and other controlled substances: 1) steroids are the only hormone, a substance naturally occurring in every human being, on the Schedule III list of controlled substances; 2) unlike stimulants, depressants and hallucinogens, steroids are not taken for any psychoactive effect; 3) studies by FDA and other groups indicate that steroids are not addictive and lack potential for abuse and dependency; 4) the major societal harms from unfair professional sports competition and the risk of teenagers emulating professional athletes, constitute a negligible

fraction of the criminal prosecutions for steroid use; 5) the potential for overdose toxicity from steroids is virtually non-existent, much less than aspirin; 6) unlike typical drug users who often have other law enforcement contacts such as theft to support their habits, average steroid users are health conscious males between 25 and 45 years of age with no other criminal connection; and 7) unlike typical drug users who tend to purchase in single doses, patterns of steroid purchase by users tend to be in bulk, giving a false impression of an intent to distribute. Careful analyses of studies performed on dosage units and the differentiation between various types of steroids is required before any amendment to the Guidelines should be considered on equivalency.

II. Consultation on Appropriate Responses to *United States v. Booker*

We reiterate our position that a legislative response is not only unnecessary but would actually serve to further complicate and frustrate the underlying goals of fair and just sentencing. We urge the Commission to take a reform-minded approach which involves adopting more rigorous sentencing procedures. Setting forth a particular set of procedures which sets the bar higher than some "indicia of reliability" when accepting evidence which increases a defendant's sentence is but one example. Such reforms would create a more accurate sentencing process.

III. Policy Work Regarding Immigration Offenses

Our Committee worked with the Commission's Immigration Working Group last cycle and submitted a specific proposal for amendments. We look forward to continuing our work on this issue.

IV. Resolution of Circuit Conflicts

We understand the Commission has not decided what, if any, guideline amendments will be proposed for the purpose of resolving conflicts among the circuit courts. Should the Commission identify circuit conflicts it wishes to address this amendment cycle, the Federal Defenders request notice of the Commission's intent so that we may evaluate those proposals and provide effective commentary to the Commission.

V. Addressing "Cliff-like" Effect and Related Structural Issues

This is an important structural defect in the Guidelines as it sweeps in unintended defendants into a mandatory life sentence. One example is the young first offender who gets caught up in a large drug conspiracy with a high drug amount. Again, we have ideas on different options for addressing this problem and look forward to exploring them with you.

Thank you for considering our comments and please let us know to whom we can address our specific input and analyses.

Very truly yours,

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

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

August 18, 2005

MEMORANDUM

TO: Chair Hinojosa
Commissioners

FROM: Judy Sheon

SUBJECT: Public Comment and Additional Information on Proposed Priorities

Enclosed please find a binder containing all public comment received to date pursuant to the Commission's request for comment on its proposed priorities for 2005-2006. The deadline for comment was Monday, August 15th. You should also find within the binder summaries of the public comment prepared by the legal staff.

Additionally enclosed are two items you also may want to consider in determining your final priorities for the coming amendment year: (1) a letter to Judge Stadtmueller from Commission staff in regard to an issue the judge brought to commissioner attention at the most recent Sentencing Institute, and (2) materials on the Crime Victims Act related to Judge Cassel's suggestions last February as to how the Commission might implement that Act.

If you have any questions, please call me at (202) 502-4524.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

July 18, 2005

Hon. Joseph P. Stadtmueller
United States District Court
471 United States Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Dear Judge Stadtmueller,

It was good seeing you at the Sentencing Institute in D.C. and conversing with you on the phone last week. Thanks for sending me the Washington Post article on the Border Patrol's release policy. I gave copies to the co-chairs of the Commission's staff working group on immigration issues.

I have thought further about the concerns you raised regarding §5K1.1 substantial assistance motions in cases that do not meet the criteria, and your suggestion that §3E1.1 (Acceptance of Responsibility) might be expanded to a maximum of 5 levels as a remedy. I recall a few previous guideline amendments that warrant consideration regarding this issue, specifically the amendment to §3E1.1 in November 1992 (Amendment #459), the amendment to §5K1.1 in November 1989 (Amendment #290), and the PROTECT Act amendment to §3E1.1 in April 2003 (Amendment #649).

The §3E1.1 amendment of 1992 expanded the acceptance of responsibility adjustment to add the possibility of a third level off if the defendant either timely gave complete information to the government concerning his own involvement in the offense or timely notified authorities of his intention to plead guilty. The Reasons for Amendment states, "This amendment provides an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation or prosecution of their own misconduct." This seems to have been intended to cover one of the issues that you are now suggesting be addressed by additional levels for acceptance of responsibility.

Note, however, that the PROTECT Act amendment to §3E1.1 on April 30, 2003, struck "timely providing complete information to the government concerning his own involvement in

the offense" and restricted the third level to a defendant timely notifying authorities of his intention to plead guilty. This seems to have removed a consideration that you think should be available for the additional levels.

The §5K1.1 amendment of 1989 removed the previous language of §5K1.1, which stated, "[u]pon motion of the government that the defendant has made a GOOD FAITH EFFORT to provide substantial assistance in the investigation or prosecution of another person...", and replaced it with "[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person..."

The Reason for Amendment for #290 states, "The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance."

As you can see, both the Commission and the Congress have previously made amendments in the areas in which you have concern.

The Commissioners have a planning session scheduled for their August meeting. To ensure that they have your issue for consideration, I will note your concern and route this letter to their attention.

I will be "on the road" doing training programs for the next week and a half, but should you need to contact me, I generally check my voicemail (202-502-4542) on a daily basis and can return a call.

All the best to you,

Rusty Burress/jmw

L. Russell Burress
Principal Training Advisor

August 17, 2005

TO: All Commissioners
Judy Sheon

FROM: Lisa Rich

RE: Crime Victims' Rights Act

On July 28, 2005, Professor Sara Beale, the new reporter for the Judicial Conference Criminal Rules Committee sent an email to Pam Montgomery inquiring about when the Commission might act on Judge Paul Cassell's proposal for implementing the Crime Victims' Rights Act ("CVRA") into the Federal sentencing guidelines. According to Professor Beale, Judge Cassell has prepared detailed proposals regarding implementation of the CVRA into the Criminal Rules, which reference his guidelines-related proposals therefore it would be helpful to the Rules Committee to work with the Commission on this issue. A copy of Professor Beale's email is attached.

The CVRA was enacted on October 30, 2004 as part of the Justice for All Act of 2004. On February 15, 2005, Judge Cassell testified before the Commission recommending that the Commission amend Chapter Six of the *Guidelines Manual* to incorporate certain provisions of the CVRA. An excerpt of Judge Cassell's written submission discussing his proposal is attached for your reference. In follow-up to questions he received during the hearing, Judge Cassell submitted a letter to Tim McGrath further explaining his proposal. An "email" copy of that letter is attached. You will see in the attachment that one of the questions posed was whether victims should be given access to the PSR and Judge Cassell sets forth several options in response. Judge Cassell also provides his opinion on how "victim" should be defined in the guidelines, in response to a posting Professor Doug Berman put on his website following the hearing.

If you have questions about this material, please do not hesitate to contact me or Judy.

Cassell Testified on 2.15.05 that we should amend Chtr 6 - he then sent follow-up letter

From: "Sara Beale" <SUN@law.duke.edu>
To: <PAMM@ussc.gov>
Date: 7/28/2005 3:59:19 PM
Subject: Implementing the Crime Victims Rights Act

Hi Pam,

I am transitioning into the position of reporter for the Judicial Conference Criminal Rules Committee, and we are working on implementing the CVRA. I noticed that there is a letter from Judge Cassell to Tim McGrath (attached) about implementing the CVRA into the guidelines, and I wondered if you (or someone else) could give me some background on when the Commission might act on this proposal, etc. Judge Cassell has also prepared detailed proposals regarding the implementation of the CVRA in the Criminal Rules, which references his guidelines-related proposals. So it would be very helpful to know more about the proposals now before the Commission.

Who do you think is the best person for me to speak to?

Thanks.
Sara Beale

Sara Sun Beale
Charles L.B. Lowndes Professor
Duke University School of Law
Box 90360
Science Drive and Towerview Road
Durham, N.C. 27708-0360
tel: 919-613-7091
fax: 919-668-0996

August 1, 2005

Tim McGrath
Staff Director
United States Sentencing Commission
Washington, DC
Via Email – tmcgrath@ussc.gov

Re: Additional Information About Crime Victims

Dear Mr. McGrath:

Thanks again very much to the Commission for inviting me to testify yesterday. I appreciated the opportunity to share with the Commission my thoughts for improving the Guidelines in the wake of *Booker*.

I wanted to send a short note to the Commission regarding crime victims issues raised by questions during the hearings or afterward.

Victim Access to Pre-Sentence Reports

Commissioner Steer asked whether victims should receive access to pre-sentence reports. I propose giving victims access to the pre-sentence report via the prosecutor.

First the background law – As I understand the law, there would be nothing in statute precluding release of pre-sentence reports to victims. Title 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, but does not forbid further dissemination. Some court's local rules, however, do forbid further dissemination. *See, e.g.*, D. Utah Crim. Local R. 32-1(c) (pre-sentence reports not released without order of the court).

In view of that landscape, the options for disclosure appear to be:

(1) No Disclosure.

The Commission could opt not to direct disclosure of any type to a victim. In my view, this approach would be inconsistent with the victim's right to be "reasonably heard." As explained at greater length in my prepared testimony (pp. 41-42), the right to be heard must be granted in a meaningful manner. It is not meaningful to let the victim make a sentencing recommendation when that recommendation might be made meaningless if the court chooses to follow the Guidelines. Being "reasonably" heard must mean being able to comment on what could be central to the judge's determination.

(2) Complete Disclosure.

The Commission could direct full disclosure of the pre-sentence report to the victim. I do not see any statutory barriers to this approach, but legitimate concerns might be raised. Portions of the report may contain sensitive private information about the defendant (reports of psychiatric examinations, prior history of drug use or sexual abuse, and the like). The report may also

disclose confidential law enforcement information that should not be widely circulated. In light of these concerns, total disclosure might not be ideal.

(3) Selective Disclosure.

The Commission could direct that the probation office redact any pre-sentence report to remove confidential information, with the redacted report then provided to the victim. This, too, seems problematic, in that it would require considerable work on the part of busy probation officers to prepare two separate documents (presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential).

(4) Disclosure through an intermediary.

In my view, the simplest solution remains the one I proposed in my prepared testimony (p. 43) of disclosure through an intermediary, specifically the prosecutor. The prosecutor would serve as the filter for confidential information, and at the same time could assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors, who are no less busy than probation officers. But the new law already gives victims the right to "confer" with prosecutors – and presumably they will be conferring regarding sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements.

I would like to make one change from my earlier prepared testimony. Requiring prosecutors to disclose pre-sentence reports to victims in all cases, even when they are not interested in such disclosure, might be burdensome. Accordingly, I would now like to proposed adding a new section (§ 6A1.2(d)) regarding disclosure of pre-sentence reports that would read as follows (change from my previous testimony underlined):

> Upon request from the victim, the attorney for the government shall communicate the relevant contents of the pre-sentence report, including information about the impact of the offense on the victim and about restitution to the victim in the case.

This would narrow down the obligations of the prosecutor considerably to situations where the victim was genuinely interested in the contents of the report. Presumably such situations are those in which the victim will already be conferring with the government.

Defining the Victim

Following the hearing, Professor Berman's blog wondered about who might qualify as a "victim" under the Crime Victims Rights Act (CVRA). Because several members of the Commission are professed readers of his blog, an answer to the questions he raised may be appropriate.

Professor Berman is curious who might qualify as a "victim" under the new law. The CRVA's definition of "victim" (*see* 18 U.S.C. § 3771(e)) is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (*see* 18 U.S.C. § 3663A(a)(2)); in turn, the MVRA drew on the 1982 Victim Witness Protection Act, a 1982 statute (*see* 18 U.S.C. § 3663(a)(2).)

As a result, the CVRA uses a definition of "victim" that is 22-years-old and has not produced major administrative or definitional problems.

Under this definition, answers to hypothetical situations raised by Professor Berman are straightforward. As to drug cases: no victim; as to felon-in-possession-of-a-firearm cases: no victim; as to immigration cases: no victim (except, possibly, victim smuggling). On the other hand, in a large securities fraud case (e.g., manipulation of the stock market), many victims would result. Under the CVRA, such situations can be handled flexibly, because the Act permits the court to "fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2). The courts are, of course, familiar with such situations. Class action securities fraud cases are already handled with mail or website notice and the like, and such procedures could be used here.

Professor Berman also wonders whether the victim of an uncharged offense could be heard at a plea hearing. In my view, that issue has already essentially been litigated. In *Hughey v. United States*, 495 U.S. 411 (1990), the Supreme Court held that the VWPA authorizes restitution only for loss caused by the specific conduct which forms the basis for the offense of conviction. Seemingly, the Court's analysis would extend to the CVRA so that victims of uncharged offenses would appear not to have formal rights. Even if victims lack formal rights, however, courts presumably possess discretion to hear from anyone regarding whether to accept a plea, as that decision involves an open-ended interests-of-justice kind of determination. Moreover, the *Hughey* analysis is not free from doubt. Senator Jon Kyl, co-sponsor of the CVRA, explained that the definition of "victim" in the CVRA is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." *See* 150 CONG. REC. S10910-01 (Oct. 2004) (statement of Sen. Kyl).

All of these victims issues may be new terrain for the Commission, as victims are frequently "off the radar" for prosecutors, defense attorneys, and (I have to admit) even judges. As a result, victims sometimes get short shrift in the system. The CVRA appears to be Congress' attempt to guarantee victims a role in the federal criminal justice process, including the Sentencing Guidelines process. If you would like more information on the general subject of victims, Professor Douglas Beloof, Stephen Twist, and I have a new law school casebook coming out next month (*Victims in Criminal Procedure* (North Carolina Academic Press 2d ed. 2005)) which explores this general subject. I would be happy to provide a copy to the Commission if it would be helpful in exploring victims issues.

Once again, I hope I have not been too long winded in offering these ideas. Please feel free to contact me if I can provide any other assistance.

Sincerely,

Paul G. Cassell
United States District Judge

both the Sentencing Commission and the Congress to monitor how the new system is working. It was for this very reason, among others, that the PROTECT Act required courts to specifically state in writing their reasons for issuing a sentence outside the Guidelines range.[205] Congress will understandably still be quite interested in learning how often sentences under the post-*Booker* regime fall within or outside of the Guidelines, and for what reason.[206] In the wake of *Booker*, some commentators have urged Congress to act quickly to prevent judicial leniency and disparity from developing under the now-advisory Guidelines system.[207] Determining whether such concerns are valid requires a hard-headed look at the data on judicial reaction to *Booker*. Unless a district court is clear about how it arrived at a sentence – "showing its work" as one respected commentator colorfully put it[208] – that data collection process will be aborted.

For all these reasons, the Commission should require courts to always consider whether a departure is appropriate before considering a possible variance from the Guidelines. Courts should also be required to indicate when they are following the Guidelines, when they are departing from the Guidelines, and when they are varying from the Guidelines.

IV. THE COMMISSION SHOULD REVISE THE GUIDELINES TO ALLOW VICTIM PARTICIPATION IN GUIDELINES DETERMINATIONS AS REQUIRED BY RECENT CRIME VICTIMS LEGISLATION.

The Commission should change the procedural provisions of the Guidelines to allow participation by crime victims. Currently those provisions allow only "the parties" (i.e., the prosecution and the defense) to dispute sentencing factors contained in the pre-sentence report. Last year, Congress passed a new law guaranteeing victims participation in all aspects of the criminal justice system. In light of that law, the Guidelines provisions should be expanded to include victims.

Last October, Congress passed the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act," as codified in Title 18 U.S.C. § 3771.[209] I understand that Scott Campbell's mother – Collene (Thompson) Campbell – will testify later this afternoon before the Commission. One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. (Also, because the new legislation is not widely known, a full copy of the Act is included as an attachment to this

---

[205] 18 U.S.C. § 3553(c)(2).

[206] *See* Memorandum from Richardo H. Hinojosa, Chair, U.S. Sentencing Comm'n, and Sim Lake, Chair, Criminal Law Committee of the Judicial Conference of the U.S., Regarding Documentation Required to be Sent to the Sentencing Comm'n (Jan. 21, 2005).

[207] *See, e.g.,* Testimony of Daniel P. Collins before the House Judiciary comm. Subcomm. On Crime (Feb. 10, 2005).

[208] http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/always_remember.html.

[209] PUB.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 226.

testimony.)

Among its comprehensive list of rights, the Crime Victims' Rights Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[210] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court.[211] However, the right is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" appears to include a right for the victim to speak to disputed Guidelines issues. As Senator (and co-sponsor) Jon Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and *sentencing recommendations*.[212]

A "sentencing recommendation" may well implicate Guidelines issues, particulary where a court gives heavy weight (as I do) to the Guidelines calculation. Moreover, the Congress intended the right to be construed broadly. Again, as Senator Kyl explained:

> In short, the victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused.[213]

Finally, the natural reading of a right to be "reasonably heard" is a right to be heard at a time when that statement might make a difference. "As long ago as 1914, the [Supreme] Court emphasized that' the fundamental requisite of due process of law is the opportunity to be heard.'"[214] "It is equally fundamental that the right to . . . an opportunity to be heard 'must be

---

[210] 18 U.S.C. § 3771(a)(4).

[211] *See generally* DOUGLAS BELOOF, PAUL CASSELL & STEPHEN TWIST, VICTIMS IN CRIMINAL PROCEDURE chapt. 10 (2d ed. 2005 forthcoming) (discussing victim impact statmeents); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (same).

[212] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (discussing three types of victim impact information).

[213] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

[214] *Davis v. Scherer*, 468 U.S. 183, 200 (1984) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).