D. INEFFECTIVE SENTENCES NOT WORTH THE FINANCIAL AND HUMAN COST

Contrary to congressional intent to reach high-level drug offenders by enacting the ADAA, the FPD believes that prosecutors have used the severe sentences offered by the guidelines to focus on low-level drug offenders. The FPD cites to reports by the DOJ, Bureau of Prisons (BOP), the RAND Corporation, and the Commission as support of its position that the drug guidelines place too great an emphasis on quantity and too little emphasis on the severity of the offense, thus resulting in long prison sentences for low level drug distributers.

E. CRACK SENTENCES

The FPD believes that, while it has long recognized that the punishment recommended by the guidelines for crack cocaine offenses is grossly disproportionate in comparison to recommended sentences for other drugs, the Commission has remained silent for nearly five years as the prison population has continued to "explode with low-level drug offenders who have fallen victim to the inequity in the guidelines." Reporting the efforts of others to re-examine this issue, the FPD notes that such advocacy was "noticeably absent" from the Commission's Booker Report.

F. THE PUBLIC DISAPPROVES

The FPD cites a study reporting that the public disagrees with the harshness of drug sentences generally and with the harsher treatment of crack cases, which states in part:

> The strongest sentencing disagreements occur over drug trafficking crimes: The guidelines call for drug trafficking sentences that vary according to the type of drug sold, roles played in the crime and the amount of drugs involved. In contrast, respondents did not make such distinctions nor did they weigh these crime elements the same way as do the guidelines. . . . . [R]espondents did not treat trafficking in heroin, powder cocaine or crack cocaine very differently from each other. . . . Median sentences for trafficking in crack cocaine, powder cocaine, and heroin all topped out at about 12 years, even for defendants with four prior prison terms. . . . For possession of crack cocaine, powder cocaine, and heroin, average sentences were about a year.

G. SOLUTIONS

The FPD recommends the following:

- It joins PAG and the Constitution Project in urging the Commission both to (1) recommend that Congress revisit the mandatory minimum sentence for crack cocaine, and to 2) propose a new crack cocaine guideline to Congress that better reflects the Commission's evaluation of an appropriate sentencing structure.

- Separate offense relevant conduct should be abandoned as recommended in Part III, *supra*.

- Quantity should be de-emphasized in the drug guideline itself. One way to do this is to set guideline sentences without regard to mandatory minimum sentences; mandatory minimum sentences would still apply at the kingpin and manager levels Congress specified.

  Another approach is to (a) eliminate extrapolation of drug quantities above the ten-year mandatory minimum threshold, which is "unnecessary, unjust and counterproductive for effective law enforcement," (b) reduce the number of drug quantity levels between the five and ten-year mandatory minimum thresholds, and (c) ensure that sentences above the two mandatory minimum thresholds are driven not by quantity but by differences in responsibility (aggravating role in the offense) and risk to society (*e.g.*, the use of violence).

- The number of points for mitigating role in the offense should be expanded, especially at higher levels.

- Restrictions on consideration of offender characteristics should be removed generally, As recommended in Part II, *supra*.

IV. MANDATORY MINIMUMS

Asserting that mandatory minimum drug and gun statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory, the FPD suggests that the Commission produce an updated report on mandatory minimum sentences. It reminds the Commission that its Fifteen Year Report detailed many of these problems. The FPD notes specifically that mandatory minimums for firearms offenses require a closer look at this time, citing *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004), in which a twenty-four-year-old first offender was sentenced under § 924(c) to a consecutive mandatory minimum term of 55 years based on his three convictions in the same trial for possessing a firearm in connection with small marijuana deals. It calls on the Commission to reassert its leadership in this area by issuing an updated report detailing the irrationality of mandatory minimum sentencing and calling on Congress to abandon this aspect of sentencing law. It asks the Commission to revisit its own decisions that result in guideline sentences in excess of the ineffective and inefficient mandatory minimum statutes.

V. NON-PRISON ALTERNATIVES

The FPD asks the Commission to explore and develop the use of non-prison sentencing alternatives, asserting that such measures could reduce costs, alleviate prison overcrowding, and provide more beneficial options for low risk offenders. According to the FPD, the Commission initiated a project focusing on intermediate punishments in 1989, but has not made any substantive guideline modifications in this area for over 14 years, despite related recommendations by the GAO and survey results showing interest among a majority of judges.

U.S. Food and Drug Administration
Margaret O'K. Glavin, Associate Commissioner for Regulatory Affairs
August 29, 2006

The United States Food and Drug Administration (FDA) requests that the Commission review sentencing guidelines applicable to certain offenses under the Federal Food, Drug, and Cosmetic Act (FDCA). Specifically, the FDA believes that guideline amendments are necessary to address Prescription Drug Marketing Act (PDMA) violations and human growth hormone offenses (HGH). The FDA notes that it has requested the same guideline amendments consistently since 2003, and has included a copy of the FDA's July 27, 2004 submission to the Commission.

The FDA believes the current guidelines do not adequately address the statutory penalties for certain PDMA violations. According to the FDA, the PDMA (which amended the FDCA) was enacted to provide stricter control over the distribution of prescription drugs and drug samples. The FDA comments that strengthening the applicable guidelines would significantly help the FDA's efforts to protect the integrity of the country's prescription drug supply. The FDA offers the following as examples of the conduct prohibited by the PDMA: unlicensed wholesale distribution of prescription drugs; the acts of selling, purchasing, or trading prescription drug samples and coupons; and the reimportation of prescription drugs manufactured in the United States by anyone other than the manufacturer. 21 U.S.C. §§ 331(t), 353(c), 353(e)(2)(A), and 381(d).

The FDA also maintains that the current guidelines are inadequate to properly address HGH offenses. The FDA points out that with increasing frequency, offenders who illegally distribute or possess with intent to distribute HGH in violation of 21 U.S.C. § 333(e) also illegally distribute anabolic steroids. Accordingly, the FDA now recommends that the Commission amend guideline §2D1.1 to address the HGH offenses, which would allow the quantities of anabolic steroids and HGH to have a cumulative effect for sentencing purposes.

U.S. Food and Drug Administration
Lester M. Crawford, Acting Commissioner of Food and Drugs
July 27, 2004 - Included for Reference

The FDA requests that the Commission consider amending the guidelines that govern FDCA violations. The FDA believes that the guidelines do not treat criminal violations of the FDCA as significant threats to the public's health; in the FDA's view, the guidelines are ineffectual to deter criminal conduct. According to the FDA, convictions under the FDCA typically result in little, if any, prison time.

Under §2N2.1, which applies to FDCA violations that do not involve fraud, the base offense level is 6, and there are no enhancements for specific offense characteristics. Accordingly, the FDA believes that most sentences calculated under §2N2.1 are very low.

In FDCA violations that do include fraud, §2N2.1 cross reference §2B1.1. Like §2N2.1, §2B1.1 provides for a base offense level of 6 and includes various enhancements for specific offense characteristics. However, the FDA argues that FDCA cases frequently arise where prosecutors

cannot prove intent to defraud or mislead, so they cannot establish felony liability. In these cases, the sentence will be governed by §2N2.1. In such cases, the FDA reports prosecutors are likely to decline these cases because of the low base offense level of 6 and absence of enhancements for specific offense characteristics.

The FDA also states that the cross-reference in §2N2.1 to §2B1.1 is not satisfactory in all cases because the latter section was intended to address economic fraud crimes. The FDA believes that applying §2B1.1 is sufficient for crimes where the major offense conduct involves only pecuniary harm. However, the FDA goes on to note that although FDCA offenses often cause pecuniary harm, the major factor in determining the sentencing range should be the degree of risk to the public health involved in the offense, not the pecuniary harm.

PARTICULAR CONCERNS WITH THE EXISTING GUIDELINES AND SUGGESTED AMENDMENTS

A. OFFENSES WITH HIGHER STATUTORY PENALTIES

Some violations of the FDCA are felonies whether or not the offense involves fraudulent intent, but the current guideline at §2N2.1 fails to account for these offenses's higher penalties without requiring a showing of fraud.

1. CERTAIN PDMA OFFENSES

The PDMA prohibits the unlicenced wholesale distribution of prescription drugs; the sale, purchase, or trading of prescription drug samples; and the reimportation of into the U.S. of prescription drugs by anyone but the manufacturer. In the PDMA, Congress establishes a maximum term of imprisonment of 10 years for these violations. The FDA states that §2N2.1 does not account for these higher penalties and §2B1.1 requires a showing of fraudulent intent and significant pecuniary losses. Such a showing cannot always be established because the buyers and sellers are often complicit. The FDA recommends a higher base offense level in §2N2.1 to account for these increased penalties.

2. SECOND OFFENSE FELONIES

Under 21 U.S.C. § 333(a)(2), a second conviction for violating the FDCA is punishable by a three year term of imprisonment. Section 2N2.1 does not provide an enhancement for a second conviction, rendering the statutory provision ineffective. The FDA recommends adding a specific offense characteristic to account for repeat FDCA offenders.

3. HUMAN GROWTH HORMONE OFFENSES

The FDA recommends a higher base offense level at §2N2.1 and incremental enhancements based on the quantity or dollar value of HGH involved in the offense.

B. OFFENSES THAT DO NOT INVOLVE FRAUD

Misdemeanor violations of the FDCA encompass a wide range of conduct. The FDA asserts that §2N2.1 is inadequate to account for this wide range of offenses as some of these offenses do not require a showing of fraud. The FDA recommends an increase in the base offense level of §2N2.1 and the addition of enhancements for misdemeanor conduct which includes reckless, knowing, and, willful conduct.

The FDA concludes by offering its assistance to the Commission to address these issues.

U.S. Small Business Administration
Glenn P. Harris, Counsel to the Inspector General

§2B1.1 Loss Definition
The U.S. Small Business Administration (SBA) requests that the Commission modify the term "loss" under the Special Rules for determining loss under §2B1.1(b)(1), Application Note 3(F). Historically, the SBA reports that it has had difficulty prosecuting businesses that fraudulently obtain government contracts and requests the guideline modification to facilitate these fraud prosecutions. The SBA notes that while its Inspector General has "vigorously" investigated this type of fraud and referred a number of cases for federal prosecution, "many [f]ederal prosecutors are reluctant to accept these cases because of the perception that the [g]overnment has not experienced any financial loss."

The SBA Office of Inspector General states that it has discussed the problems associated with prosecuting these fraud cases with a federal prosecutor specializing in procurement fraud and the prosecutor advised that prosecution-related difficulties could be alleviated by modifying the guidelines under the Special Rules for determining loss under §2B1.1, Application Note 3(F). The SBA notes that many of the Special Rules under Note 3(F) define loss in connection with fraudulent schemes for which it may be difficult to quantify the victim's actual financial loss, but from which societal harm results. Similarly, the SBA believes that while small business contracting fraud's resultant losses may be difficult to quantify, the fraud undermines the national priorities identified in the Small Business Act. The SBA asserts that the fraud necessitates a special rule in the Guidelines to enhance prosecution of fraud. The SBA requests that Application Note 3(F) be revised to create a special rule that includes the following language, at a newly created Application Note 3(F)(viii):

> (viii) Small and Disadvantaged Business Procurement. In a case involving a contract with the Federal Government for the procurement of goods or services that is obtained through a fraudulent representation that the defendant was a "small business concern," a "qualified HUBZone small business concern", a "socially and economically disadvantaged small business concern", a "small business concern owned and controlled by women", or a "small business concern owned and controlled by service disabled veterans", as those terms are defined in sections 3 and 8 of the Small Business Act, loss shall include the amount paid for the goods or services, with no credit provided for the value of those goods or services.

The SBA believes that when ineligible contractors fraudulently divert government contracts intended to benefit small or disadvantaged businesses, both the legitimate businesses are harmed and national economic policy goals are thwarted. The SBA asserts that its proposed addition to Application Note 3(F) would "give more appropriate weight to the true harm caused by this type of contract fraud and improve the opportunities for prosecution of this fraud." Finally, the SBA offers that [e]ffective prosecution will serve as a deterrent of future small business contract fraud."

U. S. Probation Office, Los Angeles
John B. Dean, U.S. Probation Officer

§2X3.1 Accessory After the Fact
Mr. Dean would like the Commission to consider creating a special category to account for underlying offense conduct that involves the murder of a police officer in relation to gang related violence under §2X3.1.

In Mr. Dean's opinion, because §2X3.1 has a special section to account for terrorist offenders and their activities, i.e., Section (a)(3)(C), a similar provision for street gangs that kill a law enforcement officer should be included. By limiting the upper offense level to 30 as this guideline calls for, the seriousness of the offense and the accessory-after-the-fact-conduct of a gang member in support of the gang member who killed the police officer is diminished. Mr. Dean argues that in many respects, organized street gangs are nothing more than local terrorists who not only pose significant, ongoing threats against the community, but especially against law enforcement personnel who attempt to stop the organized street gangs' drug, weapons, intimidation, assault, and murderous activities.

Roman C. Mesina
Federal Prisoner-Loretto FCI

18 U.S.C. § 3581 (Sentence of imprisonment)
Mr. Mesina asserts that any guideline sentence for a federal offense which exceeds the maximum term authorized for the offense under 18 U.S.C. § 3581 (Sentence of imprisonment) is unconstitutional and respectfully suggests that the Commission add this issue to its list of priorities. Based on his review of "countless sentencing transcripts," Mr. Mesina suggests that "there has been no consideration" given to this section of the Sentencing Reform Act and that a "good portion of the sentences reviewed have exceeded section 3581(b)[,] which may be in violation of the Law." Mr. Mesina believes that the statute's legislative history, which is attached to his submission as "Exhibit A," and the case of *United States v. R.L.C.*, 915 F.2d 320 (8th Cir. 1990), *aff'd*, 503 U.S. 291 (1992), supports his assertion.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 1, 2006

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

Dear Judge Hinojosa:

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

United States v. Booker

We note first the continuing and valuable work the Commission has done in response to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The *Final Report on the Impact of* United States v. Booker *On Federal Sentencing*, released last March, was an important contribution to the work of Congress, the Executive Branch, the Federal Judiciary, and all of those concerned about the impact of *Booker* on federal sentencing policy and practice. The *Report*, along with the regular release of federal sentencing statistics, has stimulated public dialogue over federal sentencing policy and ensured that such dialogue is based on the facts and meaningful analysis of the *Booker* aftermath.

The *Report* revealed that since *Booker*, many district courts have imposed dramatically inadequate sentences for serious and dangerous offenders. Moreover, the *Report* confirmed broad, systemic, and troubling trends we have seen emerging for many months, where certain districts are experiencing substantially higher departure and variance rates – and other districts substantially lower rates – than the national average. These disparities in sentencing are one key reason underlying the Department's legislative proposal to reestablish the mandatory nature of the federal sentencing guidelines through a minimum guidelines system. We think it is critical to prevent further degradation of the federal sentencing system. We look forward to working with the Commission in the coming year to further monitor and analyze federal sentencing practices and to take the necessary steps to ensure that federal sentencing policy and practice embody the fundamental values of uniformity and fairness established by the Sentencing Reform Act.

[1]

Amendments to the Guidelines

As you know, under existing law, the Sentencing Guidelines are advisory and considered by federal district courts along with other statutory factors in determining sentences for convicted federal defendants. In light of advisory nature of the Guidelines, we believe the Sentencing Guidelines Manual is sufficiently calibrated to guide judicial decision making, and the Commission need not make widespread amendments to the Guidelines at this time. For most crime types, the Guidelines identify and incorporate an appropriate number of aggravating and mitigating factors. Moreover, until the courts and Congress make clearer the long term direction and legal parameters of federal sentencing policy, the Commission ought not make fundamental changes to the Guidelines Manual.

However, we do think it appropriate – and we are committed to working with the Commission – to finish the work the Commission has already begun on revisions to the immigration guidelines. Immigration is a critical national security issue and an important priority for the American people. We hope in the coming months Congress will complete its work on comprehensive immigration legislation that will in turn provide a clear framework for amendments to the immigration guidelines the Commission has been considering for some time.

In addition, Congress has already passed, and the President has signed into law, several critical pieces of crime legislation that require Commission consideration and action. For example, the Adam Walsh Child Protection and Safety Act of 2006, signed into law by the President on July 27, 2006, makes important changes to federal criminal law and includes many provisions that require Commission review and action. We urge the Commission to treat implementation of this and other criminal law legislation as a priority for the coming amendment year.

Finally, we urge the Commission to make the resolution of circuit conflicts a priority for this guideline amendment year and for future years. In *Braxton v. United States*, 500 U.S. 344, 347-49 (1991), a unanimous Supreme Court recognized that the Sentencing Commission has the principle responsibility for resolving circuit conflicts over guideline provisions. There are many important pending conflicts in appellate court decisions involving the sentencing guidelines, and we hope to work with the Commission and the Commission staff to identify a number of these conflicts for resolution in the current amendment year.

Guideline Simplification

Many commentators have suggested to the Commission that it "simplify" the Federal Sentencing Guidelines. While the arguments for "simplification" are genuine and considerable, the Commission is well aware of a number of obstacles to simplification, including the many congressional directives passed into law since 1984. Moreover, as we note above, we do not believe this is the appropriate time for the Commission to make fundamental changes to the Guidelines Manual. Nonetheless, we support the study of simplification to determine, over the next several

years, the potential benefits of simplification, the statutory and technical barriers to simplification, as well as any negative ramifications of simplification. We also believe various statistical analyses of sentencing practices – including analyses of the application of individual aggravating and mitigating factors – should be a part of this study. Such a deliberate study will help determine the feasibility of undertaking a simplification project in future amendment years and the possible scope of such a project.

Conclusion

Thank you for the opportunity to provide our views on federal sentencing policy and the Commission's priorities for the upcoming year. The Department of Justice looks forward to continuing our work together to improve federal sentencing policy and practice in order to reduce crime and serve the American people.

Sincerely,

Michael J. Elston
Senior Counsel to the
Assistant Attorney General

cc: U.S. Sentencing Commissioners
Judy Sheon, Staff Director, U.S. Sentencing Commission

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

July 14, 2006

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

This letter provides the comments of the Department of Justice in relation to the policy statement submitted to Congress by the Sentencing Commission on May 1, 2006, § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The Commission has requested such comments for its development of further criteria and a list of specific examples of extraordinary and compelling reasons for sentence reduction, as provided in 28 U.S.C. 994(t), as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release.

In brief, the recommendations of the Department of Justice are as follows:

- The specific criteria should be to grant a motion for reduction of sentence under 18 U.S.C. 3582(c)(1)(A)(i) upon the filing of such a motion by the Department of Justice based on a determination by the Bureau of Prisons that:
  - the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;
  - a reduction in sentence is appropriate after assessing public safety concerns and the totality of the circumstances; and
  - a satisfactory release plan has been provided including information about where the inmate will live and receive medical treatment, and the inmate's means of support and payment for medical care.

[4]

- Specific examples of cases warranting a reduction of sentence should be consistent with the foregoing criteria.

- The amount of sentence reduction and modifications to a term of supervised release should be as requested in the government's motion.

I will address each of these recommendations in greater detail below.

THRESHOLD REQUIREMENT OF QUALIFYING MEDICAL CONDITION

The Department of Justice and its correctional component, the Bureau of Prisons, have used 18 U.S.C. 3582(c)(1)(A)(i) primarily to seek reductions of sentence for terminally ill inmates with a prognosis (to reasonable medical certainty) of death within a year. The legislative history of 18 U.S.C. 3582(c)(1)(A) supports this specific ground – that of a terminally ill inmate – as an "extraordinary and compelling" circumstance that may warrant a reduction in sentence:

> The first "safety valve" [i.e., current 18 U.S.C. 3582(c)(1)(A)(i)] applies, regardless of the length of sentence, to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner. In such a case, under subsection (c)(1)(A), the Director of the Bureau of Prisons could petition the court for a reduction in sentence, and the court could grant a reduction if it found that the reduction was justified by "extraordinary and compelling reasons" and was consistent with applicable policy statements issued by the Sentencing Commission.

S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983).[1]

---

[1] The cited report elsewhere noted as changed circumstances which the committee believed may warrant a sentence reduction "severe illness" and "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence," *id.* at 55, and stated that subsection (t) [originally subsection (s)] of 28 U.S.C. 994 "requires the [Sentencing] Commission to describe the 'extraordinary and compelling reasons' that would justify a reduction of a particularly long sentence imposed pursuant to proposed 18 U.S.C. 3582(c)(1)(A)," *id.* at 179. However, in the portion of the report quoted in the accompanying text, the report stated that the "safety valve" of 18 U.S.C. 3582(c)(1)(A)(i) applies "regardless of the length of sentence." The Department has never utilized 18 U.S.C. 3582(c)(1)(A)(i) as a means of second-guessing the judgments of the Sentencing Commission or sentencing courts concerning the appropriate length of sentences, and does not believe that the policy statements issued by the Commission should make the propriety of a reduction turn on whether the sentence is "unusually" or "particularly" long, notwithstanding the scattered and not particularly consistent statements about this which appeared in the committee report.

In addition, in a small number of cases, the Department has sought reductions in sentence for inmates suffering from a profoundly debilitating (physical or cognitive) medical condition that is irreversible and cannot be remedied through medication or other measures, and that has eliminated or severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others (including personal hygiene and toilet functions, basic nutrition, medical care, and physical safety). *Cf. id.* at 55 (noting belief of committee that there may be unusual cases in which eventual reduction of prison term is justified by changed circumstances including "cases of severe illness"); H.R. Rep. No. 685, 107th Cong., 2d Sess. 189 (2002) ("limited authority" of court to reduce prison term under 18 U.S.C. 3582(c)(1)(A) on motion of the Bureau of Prisons "has been generally utilized when a defendant sentenced to imprisonment becomes terminally ill or develops a permanently incapacitating illness not present at the time of sentencing"). In the absence of these medical conditions as described, requests from inmates to seek reductions of their sentences under 18 U.S.C. 3582(c)(1)(A)(i) are not entertained.

This limitation is necessary to avoid undermining the abolition of parole and the system of determinate sentencing pursuant to sentencing guidelines established by the Sentencing Reform Act of 1984. The authority of the Bureau of Prisons under the Sentencing Reform Act to seek reductions of sentence for extraordinary and compelling reasons obviously was not intended by Congress as a back door for the reintroduction of a parole-like early release mechanism, but as an element of a system whose fundamental premise is that prisoners should serve an actual term of imprisonment close to that imposed by the court in sentencing, subject only to very limited qualifications and exceptions.

Prisoners frequently seek reduction in their sentences. The grounds they offer include, for example, subsequent good works, rehabilitation and good conduct in prison, hardship to themselves and their families if their incarceration continues, alleged unfairness of their sentences in comparison with those received by other offenders, alleged unsoundness or injustice of the statutory penalties and sentencing guidelines that put them where they are, purported changes in societal attitudes towards the criminal conduct in which they engaged, and so on.

To the extent that such considerations may warrant a departure from the sentence originally imposed by the court, they are already addressed through carefully controlled and defined exceptions. For example, the "good conduct" credit of 18 U.S.C. 3624(b)(1) allows progress towards rehabilitation and good behavior in prison to be rewarded with a reduction of time served – but such a reduction must be earned through "exemplary compliance" with institutional rules, and it is capped at a maximum reduction of 54 days per year. The provisions of 18 U.S.C. 3621(e)(2)(B) similarly authorize some reduction of time served for inmates who successfully complete drug treatment – but the reduction cannot exceed a year, and it is not available to violent offenders. 18 U.S.C. 3582(c)(2) effectively allows sentence reduction based on changes in the seriousness with which an offense is viewed – but only if the change is confirmed by the Sentencing Commission's lowering of the applicable sentencing range.

An overly broad reading of the statutory authority to seek reductions of sentence for "extraordinary and compelling" reasons would potentially nullify all of these carefully considered limitations in existing law on departing from the sentence originally imposed by the court, and the general system of truth-in-sentencing they protect. The Department of Justice has accordingly not taken 18 U.S.C. 3582(c)(1)(A)(i) as an open-ended invitation to second guess the legislative decision to abolish parole, to undermine the guidelines/determinate sentencing system created to replace it, and to revisit the decisions of courts in imposing sentence, but rather has limited the use of this authority to cases of impending mortality and profound incapacitation as described above.

So limited, the Department's use of this authority has not conflicted significantly with the principles of certainty and consistency in criminal sanctions which underlie the federal sentencing system, and the objectives of those sanctions as set forth in 18 U.S.C. 3553(a)(2). Under the usual mortality in a year standard, the inmate's imprisonment would be terminated by death within a year or less in any event, so the practical reduction of imprisonment under this standard cannot be more than a year. Nor are the sentencing system and its underlying objectives undermined by seeking reductions of sentence in rare cases for prisoners with irreversible, profoundly debilitating medical conditions, as described above. Such an offender carries his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense if released from a correctional hospital facility to be cared for in some other setting.

The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department's standards for filing such motions. In contrast to 18 U.S.C. 3582(c)(2), which allows sentence reductions based on guidelines changes on motion of the defendant, the Bureau of Prisons, or the court, 18 U.S.C. 3582(c)(1)(A) expressly provides that the court may reduce a sentence on the grounds set forth in that provision only on motion of the Bureau of Prisons. As the concluding language in section 3582(c)(1)(A) indicates, the policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(t) function as a further constraint on the court's discretion to reduce the sentence, following an antecedent decision by the Bureau of Prisons to exercise its discretion to seek such a reduction. Given the legislative decision to control the reduction of sentences for "extraordinary and compelling" reasons by allowing such reductions to be considered only on the initiative of the agency responsible for the inmate's custody, it would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them.

At best, such an excess of permissiveness in the policy statement would be a dead letter, because the Department will not file motions under 18 U.S.C. 3582(c)(1)(A)(i) outside of the circumstances allowed by its own policies. At worst, it would be an incitement to prisoners to file more suits seeking to compel the Department to exercise its authority under section 3582(c)(1)(A)(i) – in contravention of its own policies, judgment, and discretion – in order to get them out of prison before they have served their sentences as imposed by the court. At a minimum, this would waste the time and resources of the courts and the Department in dealing with meritless suits of this type, concerning an issue which simply should not be open to litigation. The risk also must be considered that some courts might be misled by such a discrepancy between the policy statement and the

Department's standards and practices into misconstruing the assignment of responsibility under the statute for seeking reductions of sentence, and might then enjoin the Department to seek such reductions under more permissive standards. If this occurred, the result would be exactly the evil – the undermining of the abolition of parole and determinate sentencing – that Congress sought to avoid by vesting exclusive authority to seek reductions of sentence for prisoners under section 3582(c)(1)(A)(i) in the executive agency responsible for their custody.

We also reject the argument that the Commission should adopt more permissive standards for reduction of sentence based on certain factors mentioned in the United States Attorneys Manual (USAM § 1-2.113) – "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government" – which may be considered in deciding whether to recommend that the President commute a sentence. The Manual does not state that any of these factors in isolation is a sufficient basis for recommending commutation. Rather, it simply notes that appropriate grounds for considering commutation have traditionally included those mentioned, and states that "a combination of these [factors] and/or other equitable factors" may provide a basis for recommending commutation in the context of a particular case. Since commutation is purely a matter of executive grace, referring to a range of factors that may be considered in the Department's internal guidance regarding executive clemency entails no risk that prisoners will have any measure of success in attempting to turn these references into litigable issues, in an effort to persuade courts to compel the Department to seek their release against its judgment, as may occur if the Commission's policy statements relating to judicial reduction of sentence are more permissive than the policies the Department has adopted for seeking such reductions. More basically, the decision to show mercy and commute a prisoner's sentence is a power reserved by the Constitution to the President, which by its nature is boundless in its legal scope and in the factors that may be considered in its exercise, but also extremely limited in its practical operation given the need for a personal decision by the Chief Executive. The Department has not regarded 18 U.S.C. 3582(c)(1)(A)(i) as a backdoor method to obtain clemency without having to seek it from the President through the established process, and it should not be so regarded in the Commission's formulation of policy statements relating to judicial granting of the Department's motions under that provision.

CONSIDERATION OF PUBLIC SAFETY AND OTHER RELEVANT CIRCUMSTANCES

The medical criteria described above are a threshold requirement for the Department's consideration of seeking a reduction of sentence. If this threshold requirement is satisfied, the Bureau of Prisons carefully assesses the public safety concerns and the totality of the circumstances (including the impact of a reduction of sentence on any victims). The Bureau may find that the inmate is not likely to pose a danger to the public or the community if released, and that the other objectives of criminal sanctions – such as confinement, punishment, and rehabilitation – are no longer principal considerations. Viewing the totality of the circumstances, it may be concluded that extraordinary and compelling circumstances exist that warrant a reduction of sentence.

In this connection, it should be noted that the policy statement submitted to Congress by the Sentencing Commission is at odds in one respect with the statute, in that it refers to 18 U.S.C.

3142(g) – a statute providing criteria for assessing dangerousness and flight risk in the context of pretrial release – as the basis for assessing dangerousness in relation to reductions of sentence. In the statute itself, this reference applies only to section 3582(c)(1)(A)(ii), a provision incorporating various specific limitations, including requirements that the defendant must be at least 70 years old, must have served at least 30 years in prison, and must be doing time under a sentence imposed under 18 U.S.C. 3559(c). In contrast, the policy statement makes the same provision regarding the determination of non-dangerousness apply as well to reductions of sentence sought for extraordinary and compelling reasons under section 3582(c)(1)(A)(i).

The application of 18 U.S.C. 3142(g) to determinations relating to dangerousness in the post-conviction reduction-in-sentence context will present difficulties because it includes features which presuppose the pretrial release context, and because it mixes together factors relevant to dangerousness with factors relevant to risk of flight or nonappearance. As a practical matter, these issues will not have to be addressed for decades in relation to section 3582(c)(1)(A)(ii), given its requirement that the inmate must have served at least 30 years of a sentence under the statutory "three strikes" provision. But there is no reason to bring them into play in relation to reductions of sentence under section 3582(c)(1)(A)(i). As noted, public safety concerns and potential dangerousness of an inmate are fully considered by the Bureau of Prisons before such a reduction is sought, and there is no benefit in stipulating that the standards of 18 U.S.C. 3142(g) apply to such assessments, where the statute itself does not make them applicable. It would certainly be wrong to equate the inquiries concerning these matters in relation to reductions of sentence for extraordinary and compelling reasons with the corresponding inquiry concerning dangerousness in relation to pretrial release. A defendant before trial has not been proven guilty of the charged offense, and is subject to detention only upon clear proof that no release conditions will adequately protect the public. In contrast, a defendant for whom a reduction of sentence is sought has been convicted, and the strong presumption must be that he is to serve the sentence imposed by the court. In these circumstances, early release should not be considered unless there is a high degree of confidence that there will be no resulting danger to the public.

Hence, in finalizing or modifying the policy statement in the future, the cross reference to determining non-dangerousness on the basis of the standards of 18 U.S.C. 3142(g) should be confined to section 3582(c)(1)(A)(ii), as the statute provides.

PLAN FOR RELEASE

The final element in the Department's assessment of an inmate for the appropriateness of a reduction in sentence is ensuring that adequate provision has been made for the inmate following his release. The inmate, or those seeking release on his behalf, are accordingly required to provide a proposed release plan, including information about where the inmate will live and receive medical treatment, and about his means of support and payment for medical care.

EXTENT OF REDUCTION AND SUPERVISED RELEASE

The Commission's solicitation of comments referred specifically to "guidance regarding the extent of any such reduction and modifications to a term of supervised release." As discussed above, before seeking a reduction of sentence, the Bureau of Prisons will have determined with reasonable medical certainty that the inmate is terminally ill with a prognosis of death within a year, or suffers from a profoundly debilitating medical condition as described. The Bureau of Prisons will also have carefully considered public safety concerns and all other relevant circumstances in determining whether such a reduction is appropriate. A release plan will have been submitted relating to the inmate's means of support and care following his release, and the Bureau of Prisons will be aware of any timing or logistical considerations relating to transferring the inmate from correctional confinement to care and treatment in some other setting. In light of the foregoing, it would be appropriate for the court to accept the Department's recommendation in its motion regarding the extent of the reduction of sentence – i.e., the timing of the inmate's release.

Similar considerations apply to "modifications to a term of supervised release." The authority of the court to "impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment" as part of a reduction of sentence under 18 U.S.C. 3582(c)(1)(A)(i) was added in 2002 by § 3006 of Pub. L. 107-273. The conference committee report explained:

> This section would confer express authority on courts under section 3582(c)(1)(A), when exercising the power to reduce a term of imprisonment for extraordinary and compelling reasons, to impose a sentence of probation or supervised release with or without conditions. Such added flexibility is consistent with the purposes for which the statute was designed and will likely facilitate its use in appropriate cases.
>
> Under 18 U.S.C. 3582(c)(1)(A), a court is authorized, on motion of the Bureau of Prisons and consistent with the purposes of sentencing in 18 U.S.C. 3553, to "reduce the term of imprisonment" upon a finding that "extraordinary and compelling reasons" warrant such a reduction. This limited authority has been generally utilized when a defendant sentenced to imprisonment becomes terminally ill or develops a permanently incapacitating illness not present at the time of sentencing. In such circumstances, the situation of a prisoner (e.g., one suffering from a contagious debilitating disease), may make a court reluctant simply to release the prisoner back into society unless another sentencing option such as home confinement as a condition of supervised release or probation can be imposed. Presently, however, it is doubtful whether a court can order such a sentence since section 3582(c)(1)(A) speaks only in terms of reducing "the term of imprisonment," not imposing in its stead a lesser type of sentence. Cf. Fed. R. Crim. P. 35(b), which gives a court the power to "reduce a sentence" to reflect substantial assistance. The proposed language also makes it clear that any new term of supervised release or probation cannot be longer than the unserved portion of the original prison term, as it is not intended that this provision be used to increase the total amount of time that a person's liberty is restricted.

H.R. Rep. No. 685, 107th Cong., 2d Sess. 189-90 (2002).

As the committee report indicates, the authority to impose a period of supervision and terms of supervision under 18 U.S.C. 3582(c)(1)(A)(i) provides a means of responding to new concerns, and particularly public safety concerns, raised by the release of the inmate from a correctional facility, such as controlling the risk to others from an offender with a contagious condition. As discussed above, the Bureau of Prisons will have assessed the inmate's medical condition and any public safety concerns related to the inmate's release before the decision is made to seek a reduction of sentence. If concerns of this type cannot be adequately addressed, then the Department will not seek a reduction of sentence. If such concerns can be adequately addressed through an appropriate term of supervision and conditions of supervision, the Department will propose such conditions in its motion. As with the timing of release, it would be appropriate for the court to accept the Department's recommendation in its motion concerning these matters.

SPECIFIC EXAMPLES

Any specific examples provided concerning extraordinary and compelling reasons for sentence reduction should be consistent with the principles described above. We would suggest specifically the following:

Example 1: An offender is sentenced to three years of imprisonment for income tax evasion. After serving two years of the term, he is diagnosed with metastatic cancer, with a life expectancy (to reasonable medical certainty) of less than a year. The Bureau of Prisons' review of the case indicates that there is no realistic concern that the inmate will be a danger to others, or that the purposes of criminal sanctions will otherwise be seriously disserved, if the inmate is released, considering his personal history, the nature of the offense, his current condition, and all other relevant circumstances. Victim impact concerns are not deemed to countervail because the offense lacks an individual victim and the inmate has satisfied the tax liability to the best of his ability. The inmate has made arrangements for hospice care to commence immediately following his release and to continue until his death, and has submitted a satisfactory release plan to that effect. A reduction in sentence to time served could appropriately be allowed under the circumstances.

Example 2: An offender is sentenced to five years of imprisonment for a drug offense. After serving three years of the term, the inmate attempts to kill himself. The suicide attempt is unsuccessful, but it results in severe brain damage. This reduces the inmate's mentality to that of a three-year-old, irreversibly and irremediably, which largely eliminates his ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others. The facts relating to the inmate's medical condition, its consequences, and its permanent character are confirmed with reasonable medical certainty by Bureau of Prisons medical personnel or a Bureau-selected consulting physician. The Bureau of Prisons determines that the inmate is no potential danger to anyone and incapable of further criminality considering his condition and all relevant circumstances, and that a reduction of sentence is warranted. Victim impact concerns are not deemed to countervail because there is no identifiable victim of the offense who would be endangered or aggrieved by the

inmate's release. A satisfactory release plan is submitted which shows that the inmate's family is willing and able to assume responsibility for his care on a permanent basis. Allowing a reduction of the sentence to time served would be appropriate under the circumstances.

In sum, the authority to seek reductions of sentence for extraordinary and compelling reasons is vested by law in the Bureau of Prisons. Properly exercised, this authority allows an appropriate measure of compassion to be shown to offenders who are mortally ill or profoundly debilitated, without undermining the objectives of criminal sanctions and the integrity of the federal determinate sentencing system. Policy statements adopted for the courts' granting of such motions will similarly be sound, productive, and free of offsetting costs if formulated in a manner consistent with the Justice Department's statutory role and the policies it has adopted for this purpose, as described in this letter.

Thank you for this opportunity to provide the Commission with the views, comments, and suggestions of the Department of Justice. We look forward to continuing to work with the Commission to improve the federal sentencing guidelines.

Sincerely,

Michael J. Elston
Senior Counsel to the
Assistant Attorney General

United States
Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 17, 2006

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: Proposed 2007 Priorities

Dear Judge Hinojosa:

We write on behalf of the Practitioners' Advisory Group ("PAG") to suggest priorities for the United States Sentencing Commission to address in the next amendment cycle. We hope that this letter will be of assistance to the Commission.

1. Revisions based on the *Booker* Decision

The PAG believes that during the 2007 amendment cycle the Commission should carry out a comprehensive update of the Manual to reflect the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). It has now been 18 months since the Court's decision. If the amendments we propose are adopted during the 2007 amendment cycle, they would become effective in November of 2007, nearly three years after the Court's decision. Acting now would ensure that the Guideline Manual accurately accounts for the Supreme Court's holding in *Booker*, rendering the guidelines advisory and requiring sentencing courts to consider the full panoply of factors under 18 U.S.C. § 3553(a). The present Manual is out of date and in some instances misleading because it continues to describe a sentencing scheme where the guidelines are mandatory.

Attorneys, regardless of their level of experience, rely on the Manual to describe the federal sentencing process and provide accurate guidance on the method by which sentences should be imposed. Attorneys who regularly handle criminal cases are likely aware of the implications of *Booker*. But a less experienced attorney who reads the Manual would think that a sentence must be imposed within the guideline range unless the sentencing court finds a basis to depart pursuant to 18 U.S.C. § 3553(b). *See* U.S.S.G. § 1A1.1(4)(b). That, of course, is not correct.

The Manual's discussion of plea agreements provides another illustration of the need for revisions that account for the *Booker* decision. In Chapter 6, the Manual cites the correct rule – but the wrong standard – for determining whether a court should accept a binding plea agreement under Rule 11(c)(1)(C). *See* U.S.S.G. § 6B1.2. In subsections (b) and (c) of § 6B1.2 the Manual instructs that the sentencing court should only accept a sentencing recommendation or agreement if the recommended or specific sentence is within the guideline range or departs for justifiable reasons. Post-*Booker*, the sentencing court must now consider the full range of § 3553(a) factors in deciding whether or not a recommended or specific sentence is appropriate, not just the guidelines and the recognized guideline departures.[1]

Many other passages in the Manual reflect the pre-*Booker* world of federal sentencing and therefore should be revised. They include discussions of the reliability of the fact-finding process, the due process implications of a preponderance standard of proof, and the continued force of the Supreme Court's decisions in *Witte v. United States*, 515 U.S. 389 (1995), and *United States v. Watts*, 519 U.S. 148 (1997). *See Booker*, 543 U.S. at 240 & n.4. The PAG believes that the time has come for the Commission to incorporate into the Manual those changes wrought by the Supreme Court's decision.

If the Commission takes this recommended step, we also strongly discourage adding language directing that the guidelines be given "substantial weight." There is a split in the circuits on whether a guidelines sentence is presumptively reasonable,[2] and a regime that gives such a sentence substantial weight is uncomfortably close to the system that the Supreme Court held unconstitutional in *Booker*.

---

1 Although not a product of the *Booker* decision, the Commission should also take this opportunity to correct U.S.S.G. § 1A1.1(4)(c). When it comes to plea agreements, the general application principles cite to a prior version of Fed. R. Crim. P. 11. *See* U.S.S.G. § 1A1.1(4)(c) (noting that the sentencing court will analyze plea agreements pursuant to Rule 11(e), but Rule 11 was amended in 2002 so that the applicable provision is now Rule 11(c)).

2 *Compare United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) (holding guideline sentences are presumptively reasonable); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (same); *United States v. Alonzo*, 435 F.3d 551, 555 (5th Cir. 2006) (same); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (same); *United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005) (same); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005); *with United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (rejecting that the guidelines are "presumptive" or "per se reasonable," but noting that they are "an important consideration in sentencing"); *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (same); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006); *United States v. Cantrell*, 433 F.3d 1269 (9th Cir. 2006) (same).

2. Relevant Conduct

The PAG continues to urge the elimination of acquitted, uncharged or dismissed conduct as sentencing considerations, or, alternatively, implementation of a beyond a reasonable doubt standard as to all uncharged and dismissed conduct, as well as full notice of all relevant conduct before the entry of a guilty plea.

As noted by Judge Michael W. McConnell in *The Booker Mess*, 83 Denv. U.L.Rev. 665 (2006), despite *Booker*'s Sixth Amendment underpinning, little has been done so far to change the manner in which acquitted conduct is being addressed by the courts.

Booker has created a different imperative. Use of acquitted conduct at sentencing was previously justified by the difference between the standards of proof at a criminal trial and those at sentencing. But *Booker*, with its emphasis on the fundamental reservation of power in the people through the jury, discourages the use of acquitted conduct in sentencing. In fact, the majority in *Booker* emphasized that in the case upholding consideration of acquitted conduct – *United States v. Watts*, 519 U.S. 148 (1997) – the Court had not considered whether such a result could be squared with the right to a jury finding. *Booker*, 543 U.S. at 240. Moreover, nothing in *Watts requires* that acquitted conduct be considered in sentencing, and it is well within the Sentencing Commission's authority to eliminate its use in sentencing. It is also the right thing to do. The use of acquitted and uncharged conduct is roundly criticized and rightly so. *See, e.g., Blakely v. Washington*, 542 U.S. 296, 306 (noting it would be an "absurd result" if "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene"). Therefore, we urge the Commission to eliminate use of such conduct as a consideration at sentencing.

The Circuit courts uniformly continue to sentence, using a mere preponderance of evidence standard, based on conduct which is neither charged in an indictment nor proven to a jury. In the recently decided *United States v. Banda*, 168 Fed. Appx. 284 (2006), for example, the Tenth Circuit noted that the preponderance evidentiary standard has continued to be employed in the Post-*Booker* era. We submit that under the Due Process Clause of the Fifth Amendment it is inappropriate to permit punishment based on unconvicted conduct, especially in those circuits where the factual findings at issue result in a sentence range that is given a presumption of reasonableness. In *Apprendi* and the cases that followed the Court has strongly indicated that such a scheme is unconstitutional. *See, e.g., Blakely*, 542 U.S. at 307 ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.")

The protection of defendants' rights truly requires a more rigorous standard if uncharged or dismissed conduct is allowed to affect the guideline range. For example, in *United States v. Gonzalez*, 2006 U.S. App. LEXIS 10403 (April 26, 2006), the defendant pled guilty to two substantive drug counts. The probation officer calculated drug quantity based on the

prosecutor's proffer of allegations by an informant of drug distribution conduct by the defendant and others, *i.e.*, triple hearsay. The district court sentenced the defendant based on that amount, but under the prosecutor's alternative theory that the number of bundles admitted by the defendant in the offenses of conviction added up to the same amount. However, the prosecutor supplied no evidence of what quantity was contained in a bundle. At oral argument, the government conceded that the prosecutor's analysis was incorrect, and the Third Circuit reversed. Fortunately, the wrong was righted in this case, but it is a rare case in which the government concedes that the information it supplied was wrong. The problem would not exist if the guidelines did not require the inclusion of separate crimes based on a preponderance (if that) of the "probably accurate" "information."

Finally, in order for a defendant to make an intelligent decision as to whether to accept a plea offer or proceed with his constitutionally protected right to trial, he must know whether the government intends to offer any relevant conduct evidence at his sentencing hearing. We recommend that the government be required to provide all such material by the time of plea.

3. Mandatory Minimums

In the fifteen years since the Sentencing Commission released its comprehensive study, Mandatory Minimum Penalties in the Criminal Justice System, three important trends have emerged. First, mandatory minimums continued to be popular sentencing choices and new federal mandatory minimums were enacted in the years following the report. Second, spurred by the *Booker* opinion, a rash of crime bills featured new or increased mandatory minimums in a reinvigorated effort to limit judicial discretion. Third, new voices, many citing the Commission's study, have been raised over the years against mandatory minimums. As Congress considers whether and how to further legislate federal sentencing as a result of *Booker*, a deeper understanding of the role, usefulness and effects of mandatory minimums will be crucial. The Sentencing Commission is in the best position to revisit the questions and conclusions considered in the 1991 report, gather and analyze new empirical evidence, and reconsider its policy recommendations of fifteen years ago. As we wrote last year, the questions the initial report posed remain relevant today. They include what is the impact of mandatory sentencing on disparity, and are mandatory minimums compatible with a sentencing guideline system. Answering those questions is critical given the resurgence of interest in mandatory minimums as a potential antidote to the advisory guideline system. We strongly urge the Commission to revisit and update this critical study.

4. Crack Cocaine Sentencing

This year marks the 20-year anniversary of the death of Len Bias, the basketball star whose overdose on cocaine triggered the modern era of mandatory minimum sentencing for drug offenses. Shortly after Bias's death, Congress passed the Anti-Drug Abuse Act of 1986, which included harsh mandatory minimums for powder cocaine and even more severe penalties for crack cocaine, including five-year mandatory minimums for simple possession of five grams of the drug. The Commission used those minimums as reference points in the drug guideline, so that the base offense levels and triggering quantities mirrored the crack cocaine penalty structure.

The five- and ten-year mandatory minimum sentences were to have targeted serious and high-level drug traffickers.

In practice, the crack-to-powder ratio has had a far different impact. Crack cocaine sentencing routinely overstates the defendants' culpability. As the Commission pointed out in 2002, fully two-thirds of all crack cocaine convictions are of mere street-level dealers. The 2004 Sourcebook reports that half of all crack defendants were sentenced to the ten-year mandatory and nearly 30 percent more to the five-year mandatory minimum sentence that year. In the meantime, since the release of the *Booker* report, a number of courts have explored sentencing options. Citing the Commission's recommendation to Congress in 2002 that it recalibrate the relationship between powder and crack sentencing, some judges in crack cases have imposed sentences below the guideline range. These variances validate the Commission's perception that the offense levels for crack fail to fairly measure culpability. It is precisely this feedback that should inform the Commission's work in this area.

We encourage the Commission to take this opportunity both to urge Congress to revisit the mandatory minimum sentence for crack cocaine and to propose a new crack cocaine guideline to Congress that better reflects the Commission's evaluation of an appropriate sentencing structure.

5. Retroactive Application of the "Role in Offense" Adjustment to the Base Offense Level in Drug Cases

In 2004, the Commission replaced the "role in offense" cap for drug offenses with adjustments calibrated to the base offense level for the offense of conviction. We urge the Commission to make this amendment retroactive. Retroactivity is the right thing to do. After years of consideration and concern about long sentences for low-level drug defendants (a role cap was first voted on in 1991), the Commission effectively determined that the reduced guideline sentence achieved by a "role in offense" adjustment to the base offense level "is sufficient to achieve the purposes of sentencing. . . ." U.S.S.G. § 1B1.10, cmt., background. The reasons that compelled this measure of justice for defendants prospectively hold especially true for those already imprisoned. Their lengthy sentences moved the Commission to design the relief in the first place. Retroactivity is justified in light of the factors the Commission takes into account in making a retroactivity determination: the purpose of the amendment; the magnitude of the change; and the level of difficulty in applying the change retroactively. U.S.S.G. § 1B1.10, cmt., background (2003). A court choosing to adjust the base offense level to an already sentenced defendant can do so easily on the sentencing record, by simply reducing the sentence by the indicated number of levels. No further findings are needed, and other adjustments and departures that were already applied need not be reconsidered.

We hope that additional steps can be taken to tailor drug sentences more closely to the true severity of offenses and culpability of offenders. Making this provision retroactive would be a good start.

6. Criminal History

Criminal history continues to be an important aspect of sentencing that deserves the Commission's attention. As explained below, we believe the Commission's own extensive research on criminal history and recidivism, coupled with lessons learned from the field, warrant changes in the guideline provisions that relate to criminal history. A thorough review of the Criminal History Chapter and related provisions is warranted so that the Manual better accounts for offender characteristics that truly measure the risk of recidivism as well as the culpability of the defendant. In the meantime, we urge the Commission to include the following two revisions in its next round of proposed amendments.

a. Certain non-criminal or violation offenses should not be counted. We are particularly concerned that criminal history may be overstated through the inclusion of minor matters that do not serve the predictive or punitive functions of criminal history. It also appears that variations in state and local sentencing practices with respect to minor offenses causes ambiguity and uncertainty in the application of the current criminal history guidelines. Further, the counting of non-criminal and violation/minor offenses varies across federal judicial districts, creating more disparity in ways that were *not* intended by the Commission when it drafted § 4A1.2(c)(1). Even if this guideline as originally drafted seemed prudent, courts are misinterpreting and misapplying it in ways that create disparity and increase sentences for non-criminal acts that should be presumptively *excluded* from criminal history computations. As a result, we endorse the earlier recommendation of the Probation Officers' Advisory Group that the offenses listed in § 4A1.2(c)(1) should be excluded regardless of the sentence imposed.

One recent federal case exemplifies these concerns. In *United States v. Ramirez*, 421 F.3d 159 (2d Cir. 2005), the United States Court of Appeals for the Second Circuit held that a New York one-year "conditional discharge" disposition counted for one criminal history point under U.S.S.G. § 4A1.2(c)(1)(A), because it was equivalent to a "term of probation of at least one year . . . ." The Court reached this holding even though the listed petty/violation offenses (including Ramirez's) at U.S.S.G. § 4A1.2(c)(1) are mostly noncriminal, that a conditional discharge is not, in fact, a term of probation under New York law, that a conditional discharge does not involve supervision, and that such dispositions had never been counted in the Second Circuit from 1987 to approximately 2002. The effect is that such conditional discharge dispositions will now count for criminal history purposes, even though they were imposed, without supervision, for noncriminal violations, and despite the presumption that such offenses would not be included in the criminal history computation for Guideline purposes.

This issue affects thousands of federal offenders every year and – although not as prominent as many other Guideline issues – nevertheless deserves the Commission's attention. Offenses at U.S.S.G. § 4A1.2(c)(1) should not be counted for criminal history purposes.

b. Adjustments to the Manual for first-time/non-violent offenders. Criminal history also plays an important role in determining the sentence, including the availability of alternatives to incarceration, for first-time non-violent offenders. The PAG believes that the availability of

alternatives to incarceration for first-time non-violent offenders should be increased; and this is a matter of even greater priority now that the Bureau of Prisons no longer designates offenders to serve their sentences in a "community corrections" setting. While we have previously suggested accomplishing this through an expansion of Zones B and C, particularly within criminal history category I of the sentencing table, the same goal could be achieved through other means, such as the creation of a new criminal history category 0.

The Commission has engaged in extensive research of these issues over the years, and the resulting data strongly support changes in the treatment of first-time offenders. The offenses committed by such defendants tend to be less serious and with fewer aggravating factors; their roles tend to be more peripheral; and they are more likely to demonstrate contrition. *See* Recidivism and the "First Offender" (May 2004) ("Release No. 2") at 9-10. Whether recidivism is measured narrowly (*e.g.*, reconvictions alone) or broadly (*e.g.*, by including rearrests and revocations), the rate for first offenders is about half that of offenders with a single criminal history point and one-third of the rate for those with two or more points. *Id.* at 13-14. Other studies have also supported the notion that, particularly in the white collar context, deterrence is more a function of certainty and swiftness of punishment rather than length of sentence. *See* Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 36 (Cambridge University Press) (2002).

The Commission's mandate from the outset has been to ensure that the guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." The data the Commission has compiled support additional revisions to the Manual in order to carry out this important statutory mandate.

7. Career Offender Guideline

The Commission promulgated the Career Offender Guideline in response to the directive in 28 U.S.C. § 994(h) to provide for a sentence at or near the statutory maximum for certain offenses where the defendant has two or more prior felonies that were "crimes of violence" or qualifying controlled substance offenses. The PAG believes that the Commission should adjust the operation of this guideline to reduce the disproportionality it creates in federal sentences and to ensure that the most severe sanctions are reserved for those defendants who have the greatest degree of culpability and who pose the greatest danger to the community. To achieve these goals, we recommend the following changes.

a. Modify the definition of "crime of violence".

Over the years, the courts have applied the career offender guideline in circumstances far afield from those Congress had in mind when it mandated a career offender provision. Much of this is a result of the overly broad definition of "crime of violence" as a predicate for career offender status. Section 4B1.2(a)(2) includes within the definition any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." As a result, many courts have sentenced defendants at or near the statutory maximum under the Career

Offender Guideline where one or both of the predicate offenses was burglary of a garage, a "walkaway escape" from a halfway house, child neglect, pick pocketing or some other crime that does not have as an element the use or threatened use of physical force. When a prior conviction for pick pocketing triggers the same penalty as a prior conviction for murder or rape, the inevitable result is disproportionality and unwarranted disparity. The Commission should modify the definition of "crime of violence" to reserve it for offenses that in fact involve physical force or the threat of physical force against the person or property of another.

b. Modify definition of "controlled substance offense".

The definition of "controlled substance offense" under the Career Offender Guideline also fails to achieve proportional treatment of persons with prior drug convictions. It includes within its sweep any defendant who was convicted of distributing, or possessing with intent to distribute, *any* quantity of a controlled substance under a statute that carries a maximum *potential* penalty of more than one year. Thus, the guideline treats equally two defendants, one with two prior sentences of probation for selling marijuana cigarettes and the other with multiple predicate convictions for distributing planeloads of cocaine. The guideline does not take into account the vast differences in the seriousness of the prior conduct for these two defendants because it assigns them the same offense level and the same criminal history category.

This problem is further aggravated by the fact that the current definition of "controlled substance offense" reaches state *misdemeanor* offenses. Some states define misdemeanors to include offenses punishable by up to two years in prison. Because the Career Offender Guideline is triggered by the maximum prison term for the prior offense (*i.e.*, a statutory maximum of more than one year) without regard for whether that offense is classified as a misdemeanor or a felony in the enacting jurisdiction, a defendant with a prior misdemeanor conviction is treated the same as one with a much more serious prior felony conviction. Not only does this fail to differentiate between dissimilar defendants, it is inconsistent with the approach taken under other federal laws, such as the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e) (only counting prior drug offenses if the statutory maximum was at least 10 years). This causes different treatment of like cases based solely on the government's charging decision.

More troubling is the fact that this failure to account for the seriousness of the drug offense (either as a predicate or an instant offense) aggravates racial disparity in federal sentencing. The Commission has already noted that more than half of those sentenced under the Career Offender Guideline are Black, even though Blacks account for only a fourth of those sentenced under the guidelines. *Fifteen Years of Guideline Sentencing* 133-34 (Nov. 2004). There is no statutory impediment to tightening the definition of "controlled substance offense" to ensure that the Career Offender Guideline truly reaches the serious offender and does so in a race-neutral manner.

c. Account for the seriousness of the instant offense.

The Career Offender Guideline generates an offense level and criminal history category calibrated solely to the statutory maximum for the instant offense and – in some cases – the type

of prior conviction. There is no variation based on the circumstances, good or bad, of the instant offense at conviction. Thus, defendants who engage in dissimilar conduct, generally fall within the same guideline range. Just as the Sentencing Commission should amend the career offender guideline to achieve proportionality based upon the offender's criminal history (see above), it should also ensure that differences in *offense* characteristics lead to appropriately different guidelines ranges.

Initially, it must be remembered that provisions other than the Career Offender Guideline serve the role of imposing the maximum possible punishment on the most serious and dangerous offenders. For example, 18 U.S.C. § 3559(c)(1) imposes a mandatory life sentence on anyone convicted of a serious violent felony who has prior convictions for two or more serious violent felonies or one serious violent felony and one serious drug offense. And 21 U.S.C. § 841(b)(1)(A) imposes a mandatory life sentence if the defendant commits the crime after two prior convictions for felony drug offenses have become final. Finally, 18 U.S.C. § 3559(e)(1) mandates a life sentence for the conviction of a second sex offense if the prior sex conviction involved a minor. Thus, society's interest in punishing the worst offenders to the fullest extent of the law is amply served without needing to have the Career Offender Guideline impose the same guideline range on every defendant convicted of a particular offense. Instead, that provision can and should reasonably account for differences in the seriousness of each defendant's instant offense.

As noted, the Career Offender Guideline fails to achieve the proportionality in punishment required by 18 U.S.C. § 3553(a)(2)(A). For example, a defendant who commits an aggravated assault with a knife and inflicts permanent injuries, receives the same offense level and criminal history category as a defendant who brandishes a knife during an altercation but inflicts no injury. Likewise, a drug courier with a prior conviction for trafficking and a prior conviction for pick pocketing receives the same base offense level of 37 for possessing 500 grams of cocaine as another defendant with two aggravated assault convictions who leads an organization that distributes more than 100 kilograms of cocaine.

One solution to this lack of proportionality is to revise the table in § 4B1.1(b) to provide for changes in the offense level based on Specific Offense Characteristics for the instant offense. Thus, defendants with significantly different offense characteristics would not end up in the same guideline range. A bank robber who was a career offender and committed the robbery by using and brandishing a dangerous weapon and making an express threat of death to a teller would no longer be eligible for the same guideline sentence as one who committed the robbery without displaying or threatening to use a weapon.

Changes such as those proposed above would likely lower the rate and extent of variances from the guidelines that the Commission's data have reported for career offender sentences. *See* Final Report on the Impact of *United States v. Booker* on Federal Sentencing (Mar. 2006) at 137-40. We urge the Commission to include changes to the Career Offender Guideline in its proposed amendments for 2007.

8. Crediting Undischarged Terms of Imprisonment

An anomaly in Section 5G1.3 recently came to the PAG's attention, and we believe it warrants the Commission's attention and action. Specifically, the provision currently reads:

> (b) If ... a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:
>
> > (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
> >
> > (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

As currently drafted, the provision creates a potential for inequity that is underscored in Hutchinson, *et al.*'s *Federal Sentencing Law and Practice*:

> Assume that (1) A and Z were part of a fraudulent scheme and are being sentenced under § 2B1.1 for one count of fraud; (2) both A and Z are serving determinate state prison terms of 60 months, and have served 10 months at the time of federal sentencing; (3) each is in criminal history category II; (3) (sic) the sentencing court will impose a sentence at the top of the applicable range; (4) the only difference between the offense levels for A and Z is due to the enhancement for loss; (5) without the loss enhancement, A and Z have an offense level of eight; (6) A is accountable for $30,200 worth of loss, $15,000 from the offense of conviction and $15,200 from the offense for which he is serving an undischarged prison term; and (7) Z is accountable for $16,000 worth of loss, $15,000 from the offense of conviction and $1,000 from the offense for which she is serving an undischarged term of imprisonment.
>
> A's enhancement for loss is six levels, yielding a total offense level of 14. The top of his guideline range is 24 months. Z's enhancement for loss is four levels, yielding a total offense level of 12. The top of her guideline range is 18 months. Because the loss from the state offense increased A's enhancement for loss from four to six levels, the sentencing court must (A) deduct 10 months (the time served on the state sentence) from the 24-months that would otherwise be imposed and (B) impose the resulting prison term (14 months) to run concurrently with the state sentence. Because the loss from the state offense did not increase

> Z's offense level, the sentencing court must impose an 18-month prison term to run consecutively to the state term.
>
> The result is that A, who is responsible for the greater loss, not only gets a shorter sentence on paper (14 months versus 18 months) but will serve his federal time while serving his state term. A will serve a total of 60 months. Z, on the other hand, will serve a total of 78 months because her 18-month federal term will be served when she finishes her state term.

Federal Sentencing Law and Practice, Ch. 5, p. 1762 n. 162 (2005 ed.).

The only mechanism within the Guidelines for avoiding this inequitable result is for the court to impose a concurrent, or partially concurrent, sentence to "achieve a reasonable punishment." Such a determination is wholly discretionary and, therefore, an inadequate safeguard against the disparity stemming from § 5G1.3(b)'s mandatory language. The PAG submits that the appropriate course is to delete the enhancement language as follows:

> If ... a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) ~~and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)~~, the sentence for the instant offense shall be imposed as follows....

So constructed, § 5G1.3 is more consistent with Congress's directives regarding concurrent and consecutive sentences in 28 U.S.C. §§ 994(l)(1)(A), (l)(2), and (v).

* * *

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

Sincerely,

Mark Flanagan, Co-Chair
McKenna, Long & Aldridge, LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7553 telephone
(202) 496-7756 facsimile
mflanagan@mckennalong.com

David Debold, Co-Chair
Gibson Dunn & Crutcher, LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036
(202) 955-8551 telephone
(202) 530-9682 facsimile
ddebold@gibsondunn.com

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl Howell
Commissioner Edward F. Reilly, Jr.
Commissioner Michael J. Elston
Judith Sheon

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 13, 2006

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: Sentencing Commission Request for Comments on
Sentence Reduction Motions under 18 U.S.C. § 3582 (c)(1)(A)(i).

Dear Judge Hinojosa:

This letter is written by the Practitioners' Advisory Group to the United States Sentencing Commission ("PAG") in response to the Commission's request for comments on suggested modifications to the proposed policy statement, submitted to Congress on May 1, 2006 for reduction of a term of imprisonment in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582 (c)(1)(A)(i) and USSG § 1B1.13.

The PAG has previously submitted letters to the Commission on this provision and has offered testimony on the matter, most recently in March of this year. The Commission's current request is for specific suggestions regarding appropriate criteria for, and examples of, extraordinary and compelling reasons for the reduction of a term of imprisonment as well as guidance regarding the extent of any reduction and modifications to a term of supervised release.

The American Bar Association (ABA) prepared and submitted a response to the Commission's request on July 12, 2006. The ABA incorporated in that response the testimony presented by the ABA on March 15, 2006 before the Commission as well as the ABA submission of March 28, 2006 with proposed language for a policy statement describing specific criteria for determining when a prisoner's situation warrants reduction under the statute and providing specific examples of when the criteria might apply.

The PAG has reviewed and provided comments to the ABA on the proposed policy statement dated July 12, 2006. This document (attached) is the product of a joint effort by a number of interested practitioner groups to develop a consensus position that we could commend to the Commission for its consideration. The July 12, 2006, policy statement is fully endorsed by the PAG with respect to its specific suggestions for appropriate criteria as well as its examples

of extraordinary and compelling reasons for a reduction of a term of imprisonment. We also concur in the views expressed in the ABA's letter of July 12, 2006, regarding the extent of any such reduction and possible substitution of a term of supervised release.

We commend the Commission for taking this important step toward specifying the criteria for sentence reductions under Section 1B1.13. By statute, that responsibility lies with the Commission. *See* 28 U.S.C. § 994(t). By elaborating on the appropriate criteria and providing examples, the Commission will help to ensure the fair and consistent application of this important provision.

The Practitioner's Advisory Group respectfully requests that the proposal submitted by the ABA be adopted.

Sincerely,

Mark Flanagan, Co-Chair
McKenna, Long & Aldridge, LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7553 telephone
(202) 496-7756 facsimile
mflanagan@mckennalong.com

David Debold, Co-Chair
Gibson Dunn & Crutcher, LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036
(202) 955-8551 telephone
(202) 530-9682 facsimile
ddebold@gibsondunn.com

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl Howell
Commissioner Edward F. Reilly, Jr.
Commissioner Michael J. Elston
Judith Sheon

Enclosure

Revised 7/12/06

American Bar Association

Proposed Policy Statement

§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –

(1) either –

(A) extraordinary and compelling reasons warrant such a reduction; or

(B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and

(3) the reduction is consistent with this policy statement.

(b) "Extraordinary and compelling reasons" may be found where

(1) the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement; or

(2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.

(c) When a term of imprisonment is reduced by the court pursuant to the authority

in 18 U.S.C. § 3582(c)(1)(A), the court may reduce the term of imprisonment to one it deems appropriate in light of the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner, including to time served. In its discretion, the court may but is not required to impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment, provided that any new term of supervision shall be in addition to the term of supervision imposed by the court in connection with the original sentencing.

Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

1) The term "extraordinary and compelling reasons" includes, for example, that –

(a) the defendant is suffering from a terminal illness;

(b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;

(c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(d) the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence;

(e) the defendant would have received a lower sentence under a subsequent change in applicable law that has not been made retroactive;

(f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;

(g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or

(h) the defendant's rehabilitation while in prison has been extraordinary.

2) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

3) "Extraordinary and compelling reasons" may warrant sentence reduction without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).

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

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

July 19, 2006

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

Re: Proposed Priorities for 2006-2007

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders and pursuant to 28 U.S.C. § 994(o), we write to recommend priorities for the Commission to address in the next amendment cycle, or, in the case of illegal re-entry, at the next opportune time.[1] Attached to this letter is a Memorandum Regarding Priorities detailing the reasons for and ways to address each proposed priority, and an Appendix of Sample Cases which demonstrate the unfairness and unreliability of the guidelines' recommended factfinding procedures and relevant conduct rules.

First, the Commission should revise its policy statement in § 6A1.3, which currently advises courts to use hearsay and other inadmissible information if "probably accurate," and to resolve disputed facts by a preponderance of the evidence. This advice is routinely used to impose sentences based on nothing more than uncorroborated multi-level hearsay and speculative estimates, which the defendant bears the burden of disproving by virtue of their appearance in a presentence report. This calls into question outcomes in individual cases, taints the perceived legitimacy of the system, creates unwarranted disparity. It also raises serious questions under the Due Process and Confrontation Clauses, particularly in those courts where the guidelines are given heightened deference on the theory that the guidelines incorporate all sentencing considerations, as the Commission has urged. The Commission should either recommend the beyond a reasonable doubt standard, the right to cross-examination, and

[1] Thanks to Louis Allen, Alan DuBois, Lisa Freeland, Tom Hillier, Steve Jacobson, Marianne Mariano, Jane McClellan, Julia O'Connell, John Rhodes and Kristen Rogers for contributing to the preparation of this letter.

the right to be sentenced on the basis of accurate information, or refrain from advising courts in this area of evolving constitutional law.

Second, the Commission should reform the criminal history provisions in several respects to reflect the Commission's current knowledge regarding recidivism, deterrence and incapacitation, and the clear message being conveyed by the courts. Most importantly, the career offender guideline must be repaired. It results in wasteful, irrationally severe, and racially disparate sentences for non-violent offenders and minor drug offenders, well in excess of congressional intent. On the other end of the scale, the Commission has never implemented the congressional directive to provide for non-imprisonment of first offenders not convicted of a crime of violence or otherwise serious offense. Current data strongly supports acting on this directive and, in addition, lowering prison sentences for first offenders. Finally, the Commission needs to fix provisions that, according to its own research, exclude considerations that predict a reduced risk of recidivism or an increased likelihood of rehabilitation and include factors that increase the criminal history score but have no predictive value, overstate the risk of recidivism, or otherwise fail to advance sentencing purposes.

Third, the Commission should abolish uncharged, dismissed and acquitted offenses in calculating the guideline range. By transferring power *to* prosecutors, this type of relevant conduct has accomplished the opposite of the theory used to justify it. It results in unfairness, unwarranted disparity and unwarranted uniformity, and the guidelines are constitutionally vulnerable as long as it exists. At the very least, the Commission should abolish the use of acquitted conduct, recommend the beyond a reasonable doubt standard for uncharged and dismissed conduct, and recommend notice of all relevant conduct before entry of a guilty plea.

Fourth, the Commission should rationalize and reduce sentences in drug cases. Increased sentence length for drug offenses has been the major cause of federal prison population growth since the guidelines' inception, and a primary cause of racial disparity in sentencing. The Commission rightfully has condemned mandatory minimum penalties for creating disproportionate severity, unwarranted uniformity, and unwarranted disparity, but has unnecessarily exacerbated these problems in the guidelines. Since the early 1990s, the Commission has received a stream of evidence from its own research staff, other experts, judges, and even the Department of Justice and the Bureau of Prisons that the guidelines produce sentences in drug cases that are far greater than necessary to achieve sentencing purposes, result in unwarranted disparity, and require excessive uniformity. The Commission should remedy these problems by proposing a crack guideline to Congress, limiting the impact of quantity in the drug guidelines, increasing the number of points for mitigating role in the offense (for all cases), and removing restrictions on offender characteristics relevant to sentencing purposes (for all cases).

Fifth, the Commission should produce an updated report on mandatory minimum sentencing. Mandatory minimum drug and gun statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory. Since it issued its mandatory minimum report in 1991, a solid

consensus has formed in opposition to mandatory minimum sentencing among an ideologically diverse range of judges, governmental bodies and organizations dedicated to sentencing policy reform. The Commission should reassert leadership in this area, calling on Congress to abandon this aspect of sentencing law, while revisiting its own decisions in the drug guidelines and relevant conduct rules that result in guideline sentences in excess of those required by mandatory minimum laws.

Sixth, the Commission should expand the availability of non-prison alternatives, as recommended by the Commission's Alternatives to Imprisonment Project in 1990, the General Accounting Office in 1994, and a majority of federal judges surveyed in 2002. With the federal prisons at 40% overcapacity, filled with low-risk offenders with a high potential for rehabilitation, at great financial and human cost, it is time for the Commission to act. *See* Nora Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (2005).

Seventh, the Commission should reduce and rationalize sentences under the illegal re-entry guideline, § 2L1.2. As demonstrated by the use of fast track dispositions in the vast majority of these cases, sentences produced by the guideline are greater than necessary to satisfy sentencing purposes. Further, as the Commission has recognized, this creates unwarranted disparity with respect to those unlucky enough to be arrested in a district without a fast track program. The Commission's actions that produced unduly severe sentences under this guideline were not based on data or research, were not adequately explained, and were not required by Congress. This should be addressed at the next opportune moment, though, given pending legislation, not necessarily in this amendment cycle.

It is time for the Commission to move forward and fix what is broken. Justice Breyer previously called upon the Commission to act forcefully to reduce the false precision, unfairness, and inefficiency increasingly reflected in the guidelines over time, and to move in the direction of greater judicial discretion, fairness and equity.[2] While the Commission has amended the guidelines nearly 700 times, only a handful of these amendments sought to reduce sentences.[3] This cannot be explained away by placing the blame on Congress.

---

[2] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 (Jan./Feb. 1999).

[3] In 2001, the Commission reduced the enhancement for some aggravated felonies in § 2L1.2 from 16 to 12 or 8 levels, *see* U.S.S.G. App. C., amend. 632, and revised the money laundering guidelines by calibrating sentences to the seriousness of underlying criminal conduct, *see* U.S.S.G. App. C., amend. 634. In 1995, at Congress' direction, the Commission provided a two-level reduction for some offenders who meet safety valve criteria, expanded it to all qualified offenders in 2001, capped the quantity-based offense level at 30 for those who receive a mitigating role adjustment in 2002, but then *increased* the cap to 30, 31, 33, or 34 depending on the offense level, based on "concerns" about "proportionality" in 2004. *See* U.S.S.G., App. C, Amend. 515, 624, 640, 668. In 1991, the Commission lessened the impact of quantity in cases involving marijuana plants, *see* U.S.S.G., App. C, Amend. 396, and in 1993, did so with respect

In *United States v. Booker*, 543 U.S. 220 (2005), Justice Breyer invited the Commission to "modify its Guidelines in light of what it learns, thereby encouraging what it finds to be *better* sentencing practices." *Id.* at 263 (emphasis supplied). The Commission's response to *Booker* thus far has been to promote a fiction that the guidelines "embody" the purposes and factors set forth in 18 U.S.C. § 3553(a) and to denigrate the exercise of judicial discretion as "non-conforming."[4] This course is not productive. It stands in the way of reform, promotes disrespect for law, and may very well result in another Supreme Court ruling of unconstitutionality.[5] We urge the Commission to take advantage of *Booker* to learn, to modify the guidelines accordingly, and to teach Congress what it learns.

We appreciate your consideration of our input regarding priorities and look forward to working with the Commission in the coming year.

Very truly yours,

Jon M. Sands by ABE

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee
AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

---

to LSD, *see* U.S.S.G., App. C, Amend. 488. The Commission has also recommended reducing the 100:1 powder to crack ratio on three occasions, offering an amendment once.

[4] *See* Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005); Prepared Testimony of Judge Ricardo H. Hinojosa before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (March 16, 2006); U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006); U.S. Sentencing Commission, Post-*Booker* Guidelines Training 2006.

[5] The circuits are split as to whether the guidelines must be applied as "advisory" in order to comply with the Sixth Amendment, *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (en banc); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006); *United States v. Lisbon*, slip op., 2006 WL 306343 *2 (11th Cir. Feb. 10, 2006), or instead may be accorded "substantial weight" or a "presumption of reasonableness" based on the notion, promoted by the Commission, that the guidelines incorporate section 3553(a). *United States v. Cage*, __ F.3d __, 2006 WL 1554674 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006); *United States v. Mykitiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005).

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Michael J. Elston
Judith Sheon, Staff Director
Pam Barron, Deputy Counsel
Paula Desio, Deputy Counsel