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April 6, 2010

Honorable William K. Sessions III
Chairman
United States Sentencing Commission
One Columbus Circle NE
Washington, D.C. 20002-8002

Dear Chairman Sessions:

We write to express our strong support for the Sentencing Commission's proposed addition of U.S.S.G. § 5C1.3 (Substance Abuse Treatment Program as Alternative to Incarceration), the proposed one-level expansion of Zones B and C of the Sentencing Table, and removal of restrictions on the offender characteristics listed in the issues for comment as grounds for departure. These proposals represent a move in the right direction, toward a system that is fair and just to people of all colors and at all socioeconomic levels.

As you know, judges follow the advisory guidelines in most cases, and the majority of sentences below the guidelines are requested by the government. Giving judges more flexibility within the Guidelines Manual to address the needs of a small number of offenders for drug treatment would increase compliance with the advisory guidelines. Compliance would also be increased by giving judges the ability to impose alternatives to incarceration for some additional relatively low-level offenders, and by allowing judges to take into account offender characteristics. This flexibility would also permit the use of programs that have been proven to reduce recidivism, which better protects public safety at less cost, and reduces prison overcrowding. We support the Commission's proposals as significant steps toward carrying out important directives in the Sentencing Reform Act (SRA). These directives include the responsibility to ensure that the guidelines reflect "advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C). Also included is the responsibility to ensure that the guidelines provide "sufficient flexibility to permit individualized sentences when warranted" by factors not reflected in the guidelines, 28 U.S.C. § 991(b)(1)(B), to avoid inappropriate incarceration for first time non-violent offenders, 28 U.S.C. § 994(j), to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g), and to "review and revise" the guidelines "in consideration of comments and data coming to its attention." 28 U.S.C. § 994(o).

Offender Characteristics

We encourage amendments that would permit judges to consider as grounds for departure age; mental and emotional conditions; physical condition; military, civic, charitable, public service, and employment-related contributions and record of prior good works; and lack of guidance as a youth and circumstances indicating a disadvantaged upbringing. Such amendments would “permit individualized sentencing when warranted” by factors not included in the guidelines themselves, and would appropriately recognize “that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.” S. Rep. No. 98-225 at 52 (1983). Not every difference in sentences between defendants convicted of similar crimes with similar criminal histories is unwarranted, and aggravating factors are not the only relevant consideration. Rather, as the Senate Judiciary Committee said twenty-seven years ago: “The key word in discussing unwarranted sentence disparities is ‘unwarranted.’ The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.” *Id.* at 161.

We understand that the Commission has received extensive information in support of lifting restrictions on departures based on offender characteristics during the seven regional hearings it held across the country over the past year. In addition, as the result of *Booker v. United States*, 543 U.S. 220 (2005), judges have taken into account a wider range of legitimate considerations, including the offender characteristics listed in the Commission’s issue for comment. In doing so, judges have provided the Commission with feedback that these characteristics are relevant. Finally, the Commission’s own empirical research and that of other government agencies and renowned experts has advanced our knowledge of the relationship between the characteristics of criminal defendants and the purposes of sentencing.

We encourage the Commission to now revise its policy statements based on these data, comments, and research. 28 U.S.C. § 994(o). Judges should be permitted to depart when they find, under the circumstances of the particular case, that departure is warranted because one or more characteristics of the defendant mitigates his or her culpability, indicates a reduced risk of recidivism, means that the defendant will suffer greater punishment than is necessary, or requires treatment or training that can most effectively be provided in the community.

Finally, we note that consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor

occurs more or less frequently in some racial or socioeconomic groups than others.¹ The Commission might help to reduce any demographic differences in sentencing by permitting departures based on offender characteristics that would benefit members of all groups, including youth, drug or alcohol dependence, the need for treatment, military service, disadvantaged upbringing, the need for education and job training, and family and community ties.

U.S.S.G. § 5C1.3

We support this amendment, which would encourage a sentence of probation with a condition of substance abuse treatment for low-level, non-violent drug offenders with no more than one criminal history point and a guideline range of no more than 21-27 months. This is a modest step toward ensuring “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.” 28 U.S.C. § 994(j). As Congress suggested in enacting the SRA, the Commission might “recommend that [a drug dependent] defendant be placed on probation in order to participate in a community drug treatment program.” S. Rep. No. 98-225 at 173.

The proposal would increase public safety and decrease costs by reducing recidivism for a small number of offenders. According to the Commission’s research, a non-violent drug offender with 0-1 criminal history points who is sentenced to probation and abstains from illegal drugs has a very low risk of recidivism.² As numerous government health organizations and law enforcement agencies recognize, drug addiction is a treatable medical disease.³ While

¹ U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 113-14 (Nov. 2004).

² See U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 & Exhs. 10-12 (May 2004); *Recidivism and the First Offender* (May 2004); *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, at 14-15 (Jan. 2005).

³ Nat’l Institute on Abuse, Nat’l Institutes of Health, U.S. Dep’t of Health & Human Services, *Drugs, Brains, and Behavior: The Science of Addiction*, at ii (2007) (addiction is “a brain disease that can be treated”); Centers for Disease Control and Prevention, *Persons Who Use Drugs* (same); Drug Enforcement Administration, *Your Brain Changes Because of Drugs* (“addiction is a chronic, relapsing disease characterized by compulsive drug-seeking and abuse and by long-lasting chemical changes in the brain,” and “is a treatable disease”); U.S. Department of Justice, National Institute of Justice Journal, Alan I. Leshner, *Addiction is a Brain Disease--- And It Matters* (“Treatment is required to deal with the altered brain function and the concomitant behavioral and social functioning components of the illness.”); SAMSHA, Center for Substance Abuse Treatment, *Alcohol and*

“[i]ncapacitating a low-level drug seller prevents little, if any, drug selling,”⁴ and “[a]ttempts to deter drug use through punishment fail because they do not address the complex causes of drug abuse,”⁵ drug treatment reduces crime, increases public safety, and results in net cost savings to the criminal justice system and fewer potential victims.⁶

We are disappointed that the amendment would affect only a small number of offenders (at most, less than 1,000) per year. Although 52% of drug trafficking offenders have 0-1 criminal history points, 82.8% did not use or possess a weapon, 94.3% played a minimal or minor role or no aggravated role in the offense, and 92.6% accepted responsibility,⁷ very few

Drug Abuse Hurts Everyone in the Family (“Drug or alcohol dependence disorders are medical conditions that can be effectively treated. Millions of Americans and their families are in healthy recovery from this disease.”).

⁴ U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 134 (Nov. 2004).

⁵ U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, *Drugs and Crime, What Research Has Found* (Jan. 2, 2008).

⁶ See, e.g., Elizabeth Drake et al., Washington State Institute of Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, at 184 (2009) (drug treatment in prison reduces recidivism by 6.4% and results in \$12,715 in net benefits per participant, while treatment-oriented supervision reduces recidivism by 17.96% and results in \$19,118 in net benefits per participant); Missouri Sentencing Advisory Commission, *Smart Sentencing*, Vol. I, Issue 4 (July 20, 2009) (recidivism for offenders on probation in community drug treatment was reduced by 11% overall and 16% for those with serious substance abuse); GAO Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* at 45-46, 73-74 (Feb. 2005) (recidivism rates were 10-30% lower for drug court participants and saved \$1000 to \$15,000 per participant); C. West Huddleston, III, et al., Nat’l Drug Court Institute, Bureau of Justice Assistance, Office of Justice Programs, U.S. Dep’t of Justice, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States*, at 6-8 (2008) (offenders who participate in drug court programs have a significantly lower rate of recidivism (ranging from 7% to 29%) and save substantial costs (ranging from \$4700 to \$12,000 per participant)).

⁷ U.S. Sentencing Commission, 2008 Sourcebook of Federal Sentencing Statistics, Table 37, 39, 40, 41.

of these low-level non-violent offenders can benefit from the proposed amendment because most of them are subject to a statutory maximum of 25 years or more, making them statutorily ineligible for probation,⁸ or their offense level is greater than 16. However, those who are eligible would receive treatment that they could not receive in prison. These offenders, with an offense level of 16 and a criminal history category of I, would have a guideline range of 21 to 27 months. The Bureau of Prisons requires that an inmate have at least 24 months remaining to serve to be eligible for residential drug abuse treatment.⁹ Even those with 24 months or more to serve often do not receive treatment in federal prison because of long waiting lists.¹⁰ Section 5C1.3 is a step in the right direction.

Zone Expansion

We support the Commission's proposed one-level expansion of Zones B and C of the Sentencing Table. Under the amendment, defendants with guideline ranges of 8-14 or 9-15 months would fall within Zone B and be eligible for a guideline sentence of probation plus intermittent or community confinement or home detention, while defendants with guideline ranges of 12-18 months would fall within Zone C and be eligible for a guideline sentence of half imprisonment and half community confinement or home detention. A small additional number of relatively low-level offenders could receive a guideline sentence less than full imprisonment, if a judge finds that such a sentence best complies with the goals of sentencing.

The Commission has asked whether public corruption, tax, or other white collar offenses should be excepted from this expansion. We do not believe that it is necessary or prudent to carve out exceptions for particular offenses, since the Commission recommends straight prison as an option for all offenders in all zones. Serious and high profile white collar offenders would not be affected by this change, as they are subject to much higher guideline ranges. The amendment would slightly expand alternatives to prison for relatively low-level offenders for whom straight prison may not be necessary. Judges would continue to have the

⁸ See 18 U.S.C. § 3559(a), § 3561(a). This includes those disqualified from probation under 21 U.S.C. § 841(b)(1)(A), (B) and (C), even if they would qualify for the safety valve.

⁹ U.S. Department of Justice, Federal Bureau of Prisons, Program Statement P5330.11, § 2.5.8.

¹⁰ See Statement of Harley G. Lappin at 2-3, 6-7, Director, Federal Bureau of Prisons, Before the Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, U.S. House of Representatives, Mar. 10, 2009 (40% of inmates need substance abuse treatment, wait list exceeds 7,000).

Honorable William K. Sessions III

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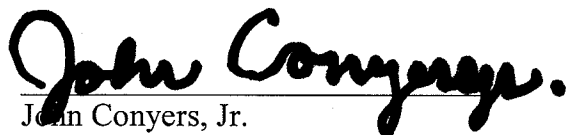
discretion to assess the individual defendant and offense and impose straight prison, irrespective of the zone. The proposal is a cautious step toward eliminating unnecessary imprisonment for which there are cost-effective alternatives that enhance public safety and reduce prison overcrowding.

Conclusion

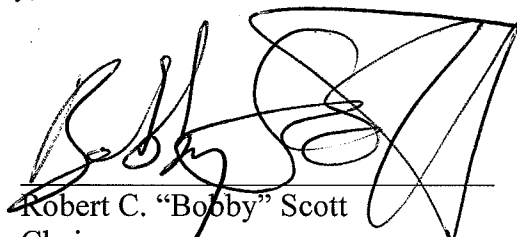
In closing, we commend the Commission for proposing changes that demonstrate a commitment to fair and just sentencing policies for all people subject to punishment in the federal criminal justice system. The proposals are well supported by data and research, and reflect a careful approach to fulfilling challenging statutory directives. We are confident that these amendments will not result in unwarranted disparities, but instead will advance the purposes of sentencing. They allow judges commonsense flexibility to better achieve the ends of sentencing as set forth in the SRA in ways that have been proven to reduce cost, as well as enhance public safety in the short and long term.

Thank you for your consideration of our thoughts, and for your continuing work toward a more fair and just sentencing system.

Sincerely,



John Conyers, Jr.
Chairman
Committee on the Judiciary



Robert C. "Bobby" Scott
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security

cc: The Hon. Lamar Smith
The Hon. Patrick Leahy
The Hon. Jeff Sessions