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United States Sentencing Commission
Thurgood Marshall Federal Judiciary Bldg
One Columbus Circle, N.E.
Washington, DC 20002

Re: Proposed Amendment to One-Book Rule to Avoid Ex Post Facto Violations

Dear Commissioners:

You may be aware of the split among the circuits regarding the application of the Commission's One-Book Rule. I am writing to express my concern that the One-Book Rule (established by USSG §1B1.11) violates the Ex Post Facto Clause of the Constitution in certain "straddle cases" and to propose an amendment to the Rule that would eliminate this constitutional violation, as well as bring uniformity to application of the Guidelines throughout the country.

The One-Book Rule provides that a district court should apply the same Guidelines Manual or "Book" to all crimes for which it is imposing a sentence. USSG §1B1.11(b)(2). This One-Book Rule pertains even where the defendant is convicted of two offenses, the first committed before and the second after a revised edition of the Guidelines Manual became effective, so-called "straddle cases." USSG §1B1.11(b)(3). Moreover, in straddle cases, "the revised edition of the Guidelines Manual is to be applied to both offenses." *Id.*

The *ex post facto* problem arises in these "straddle" cases when application of the revised edition results in an increased penalty for the first offense. While the issue has divided appellate courts, the better reasoned appellate court decisions have recognized a clear constitutional violation in the current One-Book Rule. These cases look to *Miller v. Florida,* 482 U.S. 423 (1987), which held that a criminal law violates the Ex Post Facto Clause if it (i) applies to events occurring before its enactment, and (ii) disadvantages the offender affected by it. *Id.* at 430. Thus, "central to the *ex post facto* prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment

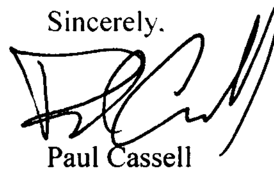
beyond what was prescribed when the crime was consummated." *Id.* at 430 (*quoting Weaver v. Graham,* 450 U.S. 24, 30 (1981)). *Miller* is particularly instructive on this issue because it considered an *ex post facto* challenge to application of sentencing guidelines (there Florida's) in effect at the time of sentencing that provided for a stiffer sentence than the guidelines in effect at the time the offense was committed. The State of Florida argued against finding an *ex post facto* violation because the sentencing law in effect at the time of the crimes' commission "on its face provides for continuous review and recommendation of changes to the guidelines", thus giving defendants "fair warning" that he would be sentenced under the guidelines in effect on his sentencing date. *Id.* The Court rebuffed this "fair warning" argument, stating that "Petitioner simply was warned of the obvious fact that the sentencing guidelines law - like any other law - was subject to revision. The constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed." *Id.* at 431.

As the Third and Ninth Circuits (and several judges in dissent in other circuits) have explained, the One-Book Rule simply fails to give anything like the "fair warning" the Ex Post Facto Clause requires. *See United States v. Ortland,* 109 F.3d 539, 547 (9th Cir. 1997); *United States v. Bertoli*, 40 F.3d 1384, 1404 n. 17 (3d Cir. 1994); *United States v. Sullivan,* 255 F.3d 1256, 1266 (10th Cir. 2001)(Kelly, J., dissenting)("[T]he only notice . . . provide[d to the defendants] at the time of commission of the . . . pre-amendment offenses is that the sentence could be determined in accordance with guideline provisions that may or may not be amended. Even if the notice is sufficient to inform the defendant that the last offense could determine the sentence, only a defendant with the prescience of a clairvoyant could anticipate an actual sentence based upon a yet-to-be amended guideline."). These courts reason correctly that what the Ex Post Facto Clause requires is not fair warning at the time the crime is committed that the punishment for that crime might later increase in the future if a defendant continues to commit crimes, but fair warning of the actual punishment for the crime at the time it is committed. These courts point to the *Miller* Court's observation that "[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed." *Miller v. Florida*, 482 U.S. 423, 431 (1987). *See also Note, Revised Sentencing Guidelines and the Ex Post Facto Clause*, 70 U. CHI. L. REV.

1011, 1030 (2003)("[i]t is difficult to see how [the notice supplied by §1B1.11(b)(3)] is any different from the brand of notice rejected in *Miller*").

To remedy this problem, the Commission should amend section 1B1.11 to require courts in this problematic subset of straddle cases to apply the Guidelines Book in effect when each of the crimes was committed. I am attaching a memorandum giving a more detailed analysis of the One-Book Rule and the *ex post facto* problem that arises in this subset of straddle cases, as well as a proposed amendment to the Guidelines to correct the problem. I would be pleased to address the Commission on this issue or to answer any questions the Commission has.

Sincerely.



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Attachment

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MEMORANDUM REGARDING EX POST FACTO VIOLATIONS CAUSED BY THE ONE-BOOK RULE AND SOLUTIONS TO THE PROBLEM

This memorandum describes the Sentencing Guidelines' One-Book Rule, its application to "straddle" cases, and the circuit split over challenges to the Rule as a violation of the Ex Post Facto Clause of the Constitution in certain cases. It explains that the Third and Ninth Circuits, along with several judges in other circuits who have filed dissents, are correct in ruling that the One-Book Rule violates the Ex Post Facto Clause where it requires a court in "straddle cases" (i.e., cases in which a defendant is convicted of multiple crimes, some committed before and some committed after an amendment to the Guidelines) to apply the single Sentencing Guideline Book in effect when the last crime was committed to *all* the crimes, even those committed before the stiffer Guidelines went into effect. The One-Book Rule directly increases the sentence a defendant receives for a crime he committed before the new Guidelines were in effect, conflicting with the Ex Post Facto Clause. To remedy this constitutional violation and ensure uniform application of sentencing law throughout the country, one of the primary goals of the Guidelines' regime, Congress or the Sentencing Commission should revise the One-Book Rule to require application of multiple Books in straddle cases where these *ex post facto* concerns

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arise. The memorandum proposes amendments to 18 U.S.C. §3553 and to §1B1.11 of the Guidelines Manual.

I. The Guidelines' One-Book Rule and Its Application to Straddle Cases

Pursuant to law, every November 1, the United States Sentencing Commission publishes a "new" Federal Sentencing Guidelines Manual, which contains amendments adopted by the Commission (and not rescinded by Congress) over the past year. At sentencing, courts must determine which of the annually revised Sentencing Guidelines Manuals or "Books" to apply -- the Book in effect (i) when the defendant is sentenced, or (ii) when the crime(s) were committed. And, of particular focus here, the courts must also decide what to do when some of the crimes of conviction occurred before and some after an amendment, that is, to "straddle cases." Section 1B1.11 of the Guidelines purports to resolve these issues with a presumptive rule and several exceptions. The section can be traced back to October 1984, when Congress passed the law establishing the Guidelines regime. At that time, Congress directed courts to the use the guidelines (i.e., Book) in effect at sentencing. 18 U.S.C. §3553(a)(4)(A)(ii). Following this congressional directive, USSG §1B1.11(a) sets forth the general rule that a sentencing "court shall use the Book in effect on the date that the defendant is sentenced."

As the Sentencing Commission points out in the Commentary, when Congress enacted this directive in 1984, it "did not believe that the *ex post facto* clause would apply to amended sentencing guidelines." USSG §1B1.11, comment. (backg'd)(citing S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983)). However, the Commission continues, "While the Commission concurs in the policy expressed by Congress [to apply the Guidelines in effect at the time of sentencing], courts to date generally have held that the *ex post facto* clause does apply to sentencing guideline

amendments that subject the defendant to increased punishment." USSG §1B1.11, comment. (backg'd). It appears that the Sentencing Commission's reference here was to the Supreme Court's 1987 decision in *Miller v. Florida*, 482 U.S. 423, which was decided *after* Congress's enactment of this policy directive. As discussed in detail below, *Miller* held that applying the State of Florida's sentencing guidelines in effect at the time of sentencing violated the *ex post facto* prohibition if those guidelines are stiffer than the guidelines in effect at the time of the crime's commission.

To deal with this *ex post facto* problem, section 1B1.11(b)(1) carves out an exception to the rule requiring application of the Book in effect at sentencing, providing that, where applying the rule would raise *ex post facto* concerns, the court shall apply the law in effect when the crime was committed:

> If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

But which Book should the court apply if there is more than one crime of conviction, some of which were committed before and some of which after a Guidelines amendment? Section 1B11.1(b)(2) and (3) direct courts to apply the Book in effect when the last crime was committed to both crimes, the so called "One-book Rule":

> (2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

> (3) If the defendant is convicted of two offenses, the first committed before and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

Moreover, the Commission directs that the court must adhere to this One-Book rule even when it increases the penalty for a crime committed before the revision: "Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, *even if the revised edition results in an increased penalty for the first offense*." USSG §1B1.11, comment. (backg'd.)(emphasis added). The Commentary opines that "the *ex post facto* clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense." (USSG §11.11, comment. (backg'd.). But this assumes that "[a] contrary conclusion" (that is, that there is an *ex post facto* problem) would mean applying the earlier and more lenient Book to *both* the pre and post-amendment crimes. In fact, another alternative, which we set forth in detail below, is to apply the Book in effect at the time each crime was committed to those respective crimes. Because the defendant would be sentenced for the post-amendment crime in accordance with the stricter guidelines (and to additional time for his pre-amendment crime per the pre-amendment guideline), there is no chance that he would be "subject to a lower guideline range than if convicted only of the second offense." In short, under our proposal, the defendant will not receive a windfall for committing a crime before the Guidelines amendment.

II. The Ex Post Facto Problem Arising from Application of the One-Book Rule to Certain Straddle Cases

Applying the One-Book Rule to "straddle cases" in which the Guidelines revision increases the penalty for crimes committed before the revision cannot be squared with the Ex Post Facto Clause, as Supreme Court jurisprudence and the better reasoned court of appeals decisions clearly demonstrate.

A. Supreme Court Precedent

The prohibition against *ex post facto* criminal penalties is well established. Article I of the United States Constitution provides that "no . . . ex post facto Law shall be passed." *See* Art. I, § 9, cl. 3. The Supreme Court's seminal *ex post facto* decision expounding the principles underlying the provision is *Calder v. Bull*, 3 U.S. 386, 390 (1798), where Justice Chase observed that "[e]very [criminal] law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed," violates the *ex post facto* clause. More recently, in *Miller v. Florida*, 482 U.S. 423, 430 (1987)(quoting *Weaver v. Graham,* 450 U.S. 24, 30 (1981)), the Supreme Court has "recognized that central to the *ex post facto* prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." A criminal law violates the Ex Post Facto Clause if it (i) applies to events occurring before its enactment, and (ii) disadvantages the offender affected by it. *Miller,* 482 U.S. at 430.

Miller is particularly important here because it considered an *ex post facto* challenge to application of sentencing guidelines (there Florida's) in effect at the time of sentencing that provided for a stiffer sentence than the guidelines in effect at the time the offense was

committed. The State of Florida argued against finding an *ex post facto* violation because the sentencing law in effect at the time of the crimes' commission "on its face provides for continuous review and recommendation of changes to the guidelines", thus giving defendants "fair warning" that he would be sentenced under the guidelines in effect on his sentencing date. *Id.* The Court rebuffed this "fair warning" argument, stating that "Petitioner simply was warned of the obvious fact that the sentencing guidelines law - like any other law - was subject to revision. The constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed." *Id.* at 431.

As discussed above, it appears that *Miller* caused the Sentencing Commission to carve out an exception to the general rule that courts should use the Guidelines in effect at sentencing where using those Guidelines would punish a defendant more severely. USSG §1B1.11(b)(1). But the Commission did not follow the full force of *Miller* when it allowed the One-Book Rule to trump *ex post facto* concerns where the Guidelines in effect at sentencing provides for stiffer sentence, and the dates of multiple crimes straddle a Guidelines amendment that also increased the penalties. USSG §1B1.11(b)(3).

B. The Circuit Split

While the issue has divided appellate courts, the better reasoned appellate court decisions have recognized a clear constitutional violation in the current One-Book Rule. These courts properly recognize that the One-Book rule retroactively increases a defendant's punishment for a crime.

The Second Circuit in a split decision, *United States v. Kumar,* 617 F.3d 612, 623-631 (2nd Cir. 2010), as well as the Fourth Circuit, *United States v. Lewis*, 235 F.3d 215, 218 (4th Cir.

2000), and the Eighth Circuit, *United States v. Anderson*, 570 F.3d 1025, 1033-1034 (8th Cir. 2009), has held that the One-Book rule does not contravene the Ex Post Facto Clause, reasoning that section 1B1.11(b)(3) gives a defendant the "fair notice" the Ex Post Facto Clause requires by constructively forewarning him that if he commits another crime after a more stringent Guidelines amendment has become effective, he will be subject to a stiffer penalty for the pre-amendment crimes as well. For these courts, the One-Book Rule satisfies the fair notice requirement regardless of whether the pre- and post-amendment crimes are related or grouped. On the other hand, the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have conditioned their holding that the One-Book Rule does not contravene the Ex Post Facto Clause in straddle cases on the pre- and post amendment crimes being grouped or otherwise related. *United States v. Kimler*, 167 F.3d 889, 893-95 (5th Cir. 1999); *United States v. Duane*, 553 F.3d 441 (6th Cir. 2008); *United States v. Vivit*, 166 F.3d 908, 917-919 (7th Cir. 2000); *United States v. Sullivan*, 255 F.3d 1256, 1262-63 (10th Cir. 2001); *United States v. Bailey*, 123 F.3d 1381, 1404-05 (11th Cir. 1997).

The problem with the analysis of these circuits, as the Third and Ninth Circuits, as well as several judges in dissent in above-listed circuits, have explained, is that the One-Book Rule and grouping rules simply fail to give anything like the "fair warning" the Ex Post Facto Clause requires. *See United States v. Ortland,* 109 F.3d 539, 547 (9th Cir. 1997); *United States v. Bertoli*, 40 F.3d 1384, 1404 n. 17 (3d Cir. 1994); *United States v. Sullivan*, 255 F.3d 1256, 1266 (10th Cir. 2001)(Kelly, J., dissenting)("[T]he only notice . . . provide[d to the defendants] at the time of commission of the . . . pre-amendment offenses is that the sentence could be determined in accordance with guideline provisions that may or may not be amended. Even if the notice is

sufficient to inform the defendant that the last offense could determine the sentence, only a defendant with the prescience of a clairvoyant could anticipate an actual sentence based upon a yet-to-be amended guideline."); *United States v. Kumar*, 617 F.3d at 638-650 (Sack, J. dissenting);

These courts and judges reason correctly that what the Ex Post Facto Clause requires is not fair warning at the time the crime is committed that the punishment for that crime might later increase in the future if a defendant continues to commit crimes, but fair warning of the actual punishment for the crime at the time it is committed. Pointing to the *Miller* Court's observation that "[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed", *Id. at* 431,, these courts and judges reject the argument that the One-Book rule separately or in combination with the grouping rules give the fair notice required by the Ex Post Facto Clause. *See also Note, Revised Sentencing Guidelines and the Ex Post Facto Clause*, 70 U. CHI. L. REV. 1011, 1030 (2003)("[i]t is difficult to see how [the notice supplied by USSG §1B1.11(b)(3)] is any different from the brand of notice rejected in *Miller*").

The rationale of decisions upholding the One-Book Rule is contrary to the Supreme Court decision in *Johnson v. United States*, 529 U.S. 694 (2000). In that case, the Court considered application of a mandatory minimum sentence law for violations of supervised release, 18 U.S.C. §3583(g), which was enacted after the defendant had committed his underlying offense. The *Johnson* Court held that the new mandatory minimum law did not violate the Ex Post Facto Clause because *by its terms* it had no retroactive application. Thus the Court did not have to reach the constitutional question. However, as Judge Sack points out in his

dissent in the Second Circuit's *Kumar* case, the *Johnson* Court also suggested in dictum that had the issue been properly presented to the Court, it would have ruled that there was a violation. *Kumar*, 617 F.3d at 644 n.8. The *Johnson* Court noted that the government had "disavow[ed]" the argument that there is no *ex post facto* violation because "revocation of supervised release imposes punishment for defendants' new offenses for violating the conditions of their supervised release." *Johnson*, 529 U.S. at 699-700 (internal quotation marks omitted). The *Johnson* Court called such a disavowal "wise[] in view of the serious constitutional question that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Id.* at 700. The Supreme Court then expressly noted that "[s]ince postrevocation penalties relate to the original offense, to sentence Johnson to a further term of supervised release under § 3583(h) would be to apply this section retroactively (and to raise the remaining *ex post* facto question, whether that application makes him worse off)." *Id.* at 701.

As Judge Sack concluded in his *Kumar* dissent:

> It would therefore appear that so long as the punishment for an act taken subsequently to a new law that increases the penalty for an offense relates to the punishment for an earlier offense, and not to the new act, the law is being applied retroactively and creates *ex post facto* concerns.

Kumar, 617 F.3d at 644 n.8 (Sack, J, dissenting).

The decisions upholding the One-Book Rule are also inconsistent with *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 713 (1968), which Justice Blackmun has described as one of "[t]he [Supreme] Court's precedents", *Weaver v. Graham*, 450 U.S. 24, 37 (1981). *Greenfield* held that a statute enhancing penalties for parole

violations operated as an *ex post facto* law when applied to a parolee whose original offense predated the parole statute, even if his parole violation occurred afterwards. Because the statute "extend[ed] his punishment" beyond the amount he had notice of when he committed his underlying crime, its application violated the Clause. 277 F. Supp. at 645. *See also* Zenga, *The Ex Post Facto Implications of Amending the Statutory Provisions Governing Violations of Supervised Release*, 19 W. NEW ENG. L. REV. 499, 540 (1997)("the majority of courts of appeals have accurately compared supervised release to parole for *ex post facto* analysis and followed the reasoning used in . . . . *Greenfield*").

Several of the cases upholding the One-Book Rule have relied erroneously on *Gryger v. Burke*, 334 U.S. 728 (1948). *See, e.g., Kumar*, 617 F.3d at 629. In *Gryger*, the Court considered a recidivist statute which increased a defendant's punishment because he had been convicted previously of certain specified crimes. While *Gryger* rejected an *ex post facto* challenge, it was careful to distinguish between imposing a stiffer penalty for a subsequent crime (which recidivist statutes do) versus a stiffer penalty for a previously committed crime (which the One-Book rule does): "The sentence as a . . . habitual criminal is not . . . [an] additional penalty *for the earlier crimes*. It is a stiffened penalty *for the latest crime*, which is considered to be an aggravated offense because a repetitive one." *Id.* at 732 (emphasis added). The current One-Book Rule undeniably permits a defendant's punishment for the earlier crime to increase. Indeed, there can be no uncertainty about this fact, given the Guidelines precise attribution of penalties to particular crimes. Accordingly, the One-Book Rule violates the Ex Post Facto Clause.

III. Proposed Amendments

To bring the Guidelines into compliance with the Ex Post Facto Clause – and to bring uniformity to the application of the Guidelines across the country -- we propose the following changes to 18 U.S.C. §3553 and USSG §1B1.11(B) and its Commentary.

1. Amend 18 U.S.C. § 3553 in two respects:

   A. Add the following bold faced language to (a)(4)(A)(ii):

"(ii) that, except as provided in section 3742(g) **and section 3553 (f),** are in effect on the date the defendant is sentenced;"

   B. Add new paragraph (f):

"If the defendant is convicted of two offenses, the first committed before and the second after a revised edition of the Guidelines Manual became effective, and if the revised edition were applied to both offenses the resulting adjusted offense level would be higher than if the Guidelines Manual in effect at the time each offense was committed were applied to those offenses respectively, then apply the pre-revision Guidelines Manual to the pre-revision offense and the revised Guidelines Manual to the post-revision offense.

"In applying the pre-revision Guidelines Manual to the pre-revision offense(s) and the revised Guidelines Manual to the post-amendment offense(s), apply the Adjustments relating primarily to the offense conduct (§§3A-3C), the Grouping Rules (§§3D1.2 and 3D1.3), and Combined Offense Rules (§3D1.4) applicable when each crime(s) was committed to determine the offense level applicable to all crimes committed before the amendment on the one hand and to all crimes committed after the amendment on the other.

"To obtain a total combined offense level for these pre- and post-amendment groups of crimes, apply the Combined Offense Level Rule (§3D1.4) and the Adjustments not relating primarily to the offense conduct (Acceptance of Responsibility (§3E) and Career Offenders and Criminal Livelihood §4B)) from the Book most favorable to the defendant.

"Finally, apply the Book most favorable to the defendant in determining his criminal history (§4(A)).

2. Replace current Guidelines §1B1.11(B)(3) with:

"If the defendant is convicted of more than one offenses, one or more committed before and one or more after a revised edition of the Guidelines Manual became effective, and if the revised edition were applied to all offenses the resulting adjusted offense level would be higher than if the Guidelines Manual in effect at the time each offense was committed were applied to those offenses respectively, then apply the pre-revision Guidelines Manual to the pre-revision offense and the revised Guidelines Manual to the post-revision offense.

"In applying the pre-revision Guidelines Manual to the pre-revision offense(s) and the revised Guidelines Manual to the post-amendment offense(s), apply the Adjustments relating primarily to the offense conduct (§§3A-3C), the Grouping Rules (§§3D1.2 and 3D1.3), and Combined Offense Rule (§3D1.4) applicable when each crime(s) was committed to determine the offense level applicable to all crimes committed before the amendment on the one hand and to all crimes committed after the amendment on the other.

"To obtain a total combined offense level for these pre- and post-amendment groups of crimes, apply the Combined Offense Level Rule (§3D1.4) and the Adjustments not relating primarily to the offense conduct (Acceptance of Responsibility (§3E) and Career Offenders and Criminal Livelihood §4B)) from the Book most favorable to the defendant.

"Finally, apply the Book most favorable to the defendant in determining his criminal history (§4(A))."

3. Strike the last three paragraphs of Commentary (Background) to Section 1B1.11 and add the following paragraph:

"Subsection (3) is amended pursuant to congressional legislation to resolve a split in the circuits over whether application of the One-Book Rule in cases where (i) the Guidelines in effect at sentencing imposes a stiffer sentence than those in effect when the crime(s) where committed, and (ii) a defendant is convicted of crimes which occurred both before and after a Guidelines amendment which increases the sentence for the earlier crime. Subsection (3) now requires the sentencing court in such cases to apply the Book in effect when each crime was committed (including Adjustments relating primarily to the offense conduct (§§3A-3C), the Grouping Rules (§§3D1.2 and 3D1.3), and Combined Offense Rule (§3D1.4) to those respective pre- and post- amendment crimes, and to then use the Combine Offense Level Rule (§3D1.4), Adjustments not relating primarily to offense conduct (§3E and §4B) and the rules for determining

Criminal History (§4A) from that Book which treats defendants most favorably to obtain an overall offense level."

CONCLUSION

The current One-Book Rule in the Sentencing Guidelines violates the *ex post facto* clause and has caused a split among the circuits. When applied to certain straddle cases, the Guidelines' One-Book Rule results in longer terms of imprisonment for defendants who have committed two crimes – one that precedes a Guidelines amendment and one that follows a Guidelines amendment – retroactively and unconstitutionally increasing the penalty imposed on the earlier crime. This violates core principles of the Ex Post Facto clause. The constitutional violation should be eliminated through a change to the Guidelines.