United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

August 31, 2011

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Comments on Proposed 2012 Priorities

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments on the Commission's proposed priorities for the amendment cycle ending May 1, 2012. We look forward to working with the Commission on these priorities and the resulting proposed amendments.

MANDATORY MINIMUMS AND SAFETY VALUE

The PAG has testified consistently in its opposition to mandatory minimums and looks forward to the Commission's upcoming report on that topic.

One important aspect of mandatory minimums is the availability of a safety valve, as both Congress and the Commission have long recognized. The PAG continues to support broadening the availability of that tool beyond the drug context. Moreover, in conjunction with the Commission's review of safety values, an important proposed change is offered for consideration.

The Manual should be amended to ensure that defendants receive the protection provided under Section 1B1.8 when they endeavor to comply with the safety valve's requirement that "not later than the time of the sentencing hearing, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." § 5C1.2(a)(5).

As currently drafted, the Manual leaves to the government the power to invoke Section 1B1.8's protection against the adverse use of information that a defendant discloses in his or her effort to provide the government, in a truthful

manner, all information and evidence that was part of relevant conduct. That is, the safety valve provision creates the default that information disclosed in an effort to qualify for the safety valve "may be considered in determining the applicable guideline range," with an exception "where the use of such information is restricted under the provisions of §1B1.8 (use of certain information)." Because "subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant," the defendant is unprotected from adverse use of the information provided unless the defendant has "agree[d] to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant."

In the experience of private practitioners, there are many instances where a defendant is willing to tell everything he or she knows about the offense and all relevant conduct, yet the government is uninterested in offering a cooperation agreement. Among other things, the government may learn through an attorney proffer that the defendant knows too little to be in a position to provide what would qualify as substantial assistance in the investigation or prosecution of another. Thus, the government may have no motivation to offer the protections of a cooperation agreement in the very same cases where a safety valve was intended: cases in which defendants are willing and able to tell all that they know but will be able to qualify for a substantial assistance departure. This problem could be avoided by amending the safety valve commentary to include the protections of Section 1B1.8 in any case where the defendant attempts to satisfy the requirement of Section 5C1.2(a)(5).

DODD-FRANK AND THE FRAUD AND THEFT GUIDELINES

The PAG strongly urges the Commission, in the course of the ongoing work to implement the Dodd-Frank Act directives regarding fraud and related offenses, to maintain as a priority for the upcoming amendment cycle the "more comprehensive review of Section 2B1.1 and related guidelines" that the Commission signaled earlier this year it was ready to undertake. As the PAG testified at the Commission's February 16, 2011 hearing, the current complexity and severity of the fraud Guidelines—particularly in high loss cases—cries out for a comprehensive review and revamping of the degree to which various characteristics of fraud crimes are weighted as aggravating and mitigating factors in determining the Guidelines range.

Fraud sentencing is one area in which key stakeholders appear to agree that the Guidelines simply are not working properly. The Commission has heard

criticisms from the defense bar, the Department of Justice, and many members of the judiciary. At the Commission's February 2011 hearing, the PAG, the ABA and the Justice Department all supported, in the words of the U.S. Attorney for the Southern District of New York, "a thorough review of the federal sentencing guidelines that relate to fraud offenses." Both the PAG and the ABA commented on how, for example, amendments to the loss table from 1989 through 2003 effectively tripled sentences for large-scale fraud offenses, and each group noted that the large number of non-government sponsored, below-range sentences in such cases strongly suggests that many judges share the view that the fraud Guidelines calculations, if followed, would often produce excessively long prison terms.

Both the PAG and the ABA have urged the Commission, as part of its comprehensive review, to reduce the current overriding emphasis on loss amount, to consider eliminating overlapping enhancements that often lead to a "piling on" effect, and to incorporate into the Guidelines consideration of additional factors that we believe are highly relevant to achieving the purposes of sentencing. These factors include the offender's motivations for committing the crime, the extent to which the offender personally profited or intended to gain from the crime, whether factors beyond the defendant's control contributed to the amount of loss, and the nature and extent of the impact on the actual victims. Without these changes, we will continue to see unwarranted increases in sentences, variances aimed at avoiding the effects of those increases, or both.

In this connection we urge the Commission to explore possible amendments to the Guidelines that would cap the offense level for those who receive a mitigating role reduction in fraud cases. In the most recent amendment cycle, the Commission made clear that a mitigating role adjustment could be applied when the loss amount under Section 2B1.1 "greatly exceeds" defendant's personal gain. *See* U.S.S.G. § 3B1.2, comment. 3(A) (2011). A tiered offense level "cap" for defendants with mitigating role adjustments already exists in the drug Guidelines, *see* U.S.S.G.§ 2D1.1(a)(5), and thus could serve a useful model for crafting a parallel provision in the fraud context. Indeed, at the February 2011 hearing, while the Justice Department commented on what it described as "not consistently tough and fair outcomes" in fraud cases, it nevertheless conceded that the Guidelines "sometimes do not offer . . . meaningful guidance for differentiating between and among financial criminals and accurately gauging their relative culpability."

We appreciate that the Commission has an ambitious list of proposed priorities. But for some of the areas identified—such as Human Rights Offenses—the very small number of defendants affected by the work that the Commission proposes to undertake is good reason to rethink those priorities. The PAG therefore urges the Commission to include as a priority in the upcoming amendment cycle a

comprehensive review of the fraud Guidelines to begin to address the many issues that have evoked such wide-ranging criticism and urgent calls for revisions.

REVIEW OF *BOOKER*

To the extent the Commission makes it a priority to consider the effects of *Booker* on federal sentencing, the PAG believes the proper focus is on how the Guidelines might be adjusted to better account for characteristics that prompt judges to depart and vary from the Guidelines.

The original vision for the Guidelines was that departures would serve as an important guide to the Commission in the ongoing process of recalibrating the Guidelines to produce ranges that, while sufficient, would not be greater than necessary to serve the purposes of sentencing. That iterative process is just as important under an advisory regime. When certain offenses routinely generate a disproportionate number of below-Guidelines sentences, there may be changes the Commission can put in place to reduce the impact of an offense characteristic that has turned out to overstates the seriousness of many offenses.

To be sure, some below-Guidelines sentences are based on factors that a Guidelines system cannot easily account for. Some of the offender characteristics fall into this category. For them, the Commission could provide access to studies and research data that assist judges in assessing the importance of those factors and thereby improve consistency and proportionality. Each of these suggestions recognizes that sentences outside of the Guidelines are frequently an opportunity for the Commission to bring Guidelines provisions more in line with what has, with experience, become recognized as sound sentencing practice. Such sentences should not automatically be viewed as "problems" that need to be fixed by making them harder to impose.

CHILD PORNOGRAPHY GUIDELINES

Much has been said and written about the ways in which the child pornography Guidelines produce recommended sentences well above the level necessary to serve the purposes of sentencing. Those of our members who have represented defendants in child pornography cases can certainly attest to the fact that certain aspects of the Guidelines are particularly in need of reform. To the extent the Commission's hands are tied by Congress, we encourage the Commission to recommend appropriate legislative reform.

Rather than repeat what others have already said about problems with these Guidelines provisions, we commend to the Commission careful consideration of ABA

Resolution 105A, adopted in August 2011 by the House of Delegates, along with the accompanying report by the ABA's Criminal Justice Section. Among other things, the report notes that: (1) The broad definition of "sadistic or masochistic" images results in the application of a 4-level enhancement under § 2G2.2(b)(4) for a great many defendants; (2) the 2-level enhancement for a use of a computer in § 2G2.2(b)(6) has become another increase that applies in almost every case and fails, in the Commission's own words, to account for the fact that not all computer use is equal. USSC Report to Congress, Sex Offenses Against Children, 1996 at 29; and (3) the 5-level enhancement under § 2G2.2(b)(7) for more than 600 images is excessive and unreasonable in light of today's electronic media, and the difficulties in differentiating between what a defendant received and what he in fact sought.

CHAPTERS 5H AND 5K

The PAG suggests two particular areas of attention as the Commission continues its review of Parts H and K of Chapter 5 of the Manual.

In 2010, the Commission voted to loosen the restrictions on consideration of a defendant's age, mental and emotional conditions, physical condition, and military service, in determining whether a downward departure is warranted. *See* U.S.S.G. §§ 5H1.1, 5H1.3, 5H1.4, and 5H1.11. The decision came "after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges." Supplement to Appendix C of the Guidelines Manual, Amendment 739 (2010).

The Commission has identified as a priority continuation of its review of the provisions in Parts H and K. The PAG believes that this review should include two defendant characteristics currently listed as not relevant for downward departure purposes. They are: (1) a defendant's "record of prior good works," §5H1.11, and (2) a defendant's "[l]ack of guidance as a youth and similar circumstances," § 5H1.12. The Sentencing Reform Act, at 28 U.S.C. §994(e), speaks to the "inappropriateness" of fashioning a Guidelines provision that considers certain characteristics of a defendant "in recommending a term of imprisonment or length of a term of imprisonment," including education, vocational skills, employment record, family ties, and community ties. The statute is silent as to what the Commission has labeled a defendant's record of good works or lack of guidance as a youth.

We submit that an evaluation of both factors, through a review process comparable to that used in 2010, would lead to changes that "provide certainty and fairness in meeting the purposes of sentencing," 28 U.S.C. § 991(b)(1)(B), as well as further develop a criminal justice system that "reflect[s], to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

POST-SENTENCING REHABILITATION

The policy statement at § 5K2.19 prohibits consideration of post-sentencing rehabilitation in the imposition of sentence. The Supreme Court held, however, in *Pepper v. United States*, 131 S. Ct. 1229 (2011), that it is error to forbid a district court from considering post-sentencing rehabilitation and further noted that the factor is highly relevant in the imposition of a fair and just sentence. Consistent with the Supreme Court's authoritative pronouncement on the issue, the Commission should revise the policy statement to encourage consideration of post-sentencing rehabilitation as a basis to depart downward.

ADDITIONAL PRIORITY: STANDARDS OF PROOF AT SENTENCING

The greater the impact of aggravating factors under the Guidelines, the more the stakes rise when it comes to resolving controverted matters. Yet the Sentencing Reform Act does not state a burden of proof for finding Guidelines facts. In the absence of legislative directives, the Commission has resorted to the preponderance of evidence standard.

The PAG strongly urges the Commission to re-examine the Commentary to U.S.S.G. § 6A1.3. Experience over two decades has shown that the preponderance of evidence standard is insufficient to ensure the reliability of material facts disputed by the defense.

The resolution of contested sentencing factors continues to have a significant effect on the Guidelines range. As recently noted:

> [*If*] the guidelines are followed by a district court at sentencing, then any facts found that increase the guideline sentence must be proved by the government beyond a reasonable doubt. Merely because a district court has a choice whether to follow the guidelines is a separate issue. . . . If a district court fails to use the beyond a reasonable doubt standard, it has miscalculated the guidelines resulting in legal, reversible error and a remand for resentencing under this higher and arguably constitutionally required standard of proof.[1]

The PAG agrees with Justice Thomas's partial concurrence in *Booker*:

> [T]he Court's holding today corrects the [Commission's] mistaken belief [that a preponderance of evidence standard is appropriate to meet due process requirements]. The Fifth Amendment requires proof

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1 Alan Ellis and Mark H. Allenbaugh, *Standards of Proof at Sentencing,* 24 CRIMINAL JUSTICE, American Bar Association (Fall 2009) (original emphasis).

> beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence on the basis of what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.[2]

The preponderance of the evidence standard is not a creature of statute;[3] nor was it included in the Guideline Commentary until 1991.[4] Under that standard, "[t]he government bears the burden of proving by a preponderance of the evidence any facts that would enhance a defendant's sentence."[5]

"Although the burden of persuasion remains with the Government, once the Government makes out a prima facie case. . . , the burden of production shifts to the defendant to provide evidence that the Government's evidence is incomplete or inaccurate."[6]

The rule governing allocation of burdens among the parties should reflect the nature of the interest at stake. Punishment, as much as trial on issues of liability, implicates core due process concerns warranting an appreciably higher standard of evidence at sentencing. *See, e.g., United States v. Restrepo,* 946 F.2d 654, 659-60 (9th Cir.1991) (en banc) (suggesting that a clear and convincing standard be applied to facts that will dramatically increase a sentence).

Due process demands application of the reasonable doubt standard at sentencing in the same manner that it is employed at trial. Too much of a liberty interest is at stake to permit Guidelines-driven sentences to be determined on the basis of the preponderance standard.

> [W]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden … of

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2 *Booker,* 543 US at 319 n.6.

3 In contrast, the Mandatory Victims and Restitution Act legislatively prescribes the preponderance standard for restitution purposes.18 U.S.C. § 3664(e). There is no statutory standard of proof at sentencing.

4 *See* U.S.S.G. App. C, amendment 387.

5 *United States v. McCants,* 554 F.3d 155, 162 (D.C. Cir. 2009).

6 *United States v. Jimenez*, 513 F.3d 62, 86 (3d Cir. 2008).

> persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.[7]

Without question, the sentencing hearing puts in play whether and to what extent a defendant's liberty will be restricted.

The Guidelines and case law already impose a higher standard in various circumstances. For example, the Commission has determined that the reasonable doubt standard applies in assessing the existence of multi-object conspiracies for relevant conduct purposes.[8]

So too, "[t]he admonition in Application Note 1 [to U.S.S.G. §3C1.1] to evaluate the defendant's testimony 'in a light most favorable to the defendant' apparently raises the standard of proof above the 'preponderance of the evidence' standard that applies to most other sentencing determinations. *"United States v. Montague*, 40 F.3d 1251, 1253-54 (D.C. Cir. 1994).[9]

The PAG urges the Commission to review Chapter Six with a focus on the burden of proof at sentencing as well as the use of uncharged or acquitted conduct at sentencing. The Commission should adopt an appreciably higher standard of proof, especially if it continues to permit uncharged and acquitted conduct to increase the severity of a sentence.

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7 *Speiser v. Randall*, 357 U.S. 513, 525–526 (1958). *See also In re Winship*, 397 U.S. 358, 369–372 (1970) (concurring opinion by Harlan, J.).

8 U.S.S.G. § 1B1.2, comment. (n. 4) ("Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense…").

9 The Court added: "And we cannot imagine why the Sentencing Commission would have written the Application Note as it did had it intended nothing more than the usual standard of proof." *Montague*, 40 F.3d at The preponderance of evidence standard generally puts evidence on an evenly balanced scale. *See* MCCORMICK ON EVIDENCE § 339 (John W. Strong ed., 4th ed. 1992) (suggesting that proof by a preponderance means the greater weight of the evidence); JONES ON EVIDENCE: CIVIL AND CRIMINAL § 3:9 (Clifford S. Fishman ed., 7th ed. 1992). Viewing the evidence "in a light most favorable to the defendant," however, means putting a thumb on the scale, or resolving all doubts, in favor of the defendant . . ."

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input on the proposed priorities. We look forward to an opportunity to discuss them further in the coming months.

Sincerely,

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

Eric A. Tirschwell, Vice Chair
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-8404 telephone
(212) 715-8394 facsimile
etirschwell@kramerlevin.com

cc: Hon. William B. Carr, Jr., Vice Chair
Hon. Ketanji Brown Jackson, Vice Chair
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