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March 29, 2007

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: Follow-Up on March 20 Hearing

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to follow up on some of the issues that arose at the March 20th hearing relating to the Guideline Manual, Immigration, Criminal History, Mandatory Minimums, and Sentence Reduction.

I. The Guideline Manual

The Guideline Manual should correctly represent current sentencing law. As the Commission has said, *United States v. Booker*, 543 U.S. 220 (2005) is “the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta*.” Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006. When we again urged the Commission to amend the Manual to take the *Booker* decision into account, the response was that judges and practitioners know the law and so, apparently, there is no need for the Commission to change the Manual.

The Supreme Court announced over two years ago that the mandatory guideline system established by 18 U.S.C. § 3553(b), and echoed throughout the Guideline Manual, violated the Constitution. The Manual has yet to mention the case. This is not a matter of formality – it goes to the integrity of the Manual itself. A new practitioner reading the Manual has no way of discerning that the Guidelines no longer represent the final word on the appropriate sentence, and that 18 U.S.C. § 3553(a) is now the governing sentencing law. The Manual offers no understanding of this framework or of the advisory role of the Guidelines within it, as constitutionally mandated. To the contrary, the mandatory language of the Manual would lead one to believe, wrongly, that the

Guidelines continue to represent the sum total of appropriate considerations in any sentencing.

The Manual is not only silent about *Booker*, but in numerous instances recommends a course of action that is in direct conflict with the *Booker* decision and the Constitution. As one example, § 5K2.0 continues to rely explicitly on 18 U.S.C. § 3553(b)(1), which was excised as unconstitutional over two years ago. See U.S.S.G. § 5K2.0(a)(1), (c). As another, the Manual states that numerous aspects of the defendant's history and characteristics are never or not ordinarily relevant, though such matters "shall" be considered under § 3553(a)(1).

We would be happy to work with Commission staff on how to harmonize these and other guideline provisions with the state of the law post-*Booker*, as well as how and where to insert *Booker*'s holding and citation as is done with other cases in the Manual, even those the Supreme Court has since questioned, such as *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.

We would also welcome the opportunity to work with staff on improving the procedural advice set forth in U.S.S.G. § 6A1.3. *Watts*, for example, is cited for the proposition that a court may consider any information with "sufficient indicia of reliability to support its probable accuracy," U.S.S.G. § 6A1.3, comment., but the Court said no such thing. See 519 U.S. at 157. It said that a preponderance of the evidence standard is generally permissible, though a clear and convincing standard may be required under some circumstances, and said nothing to denigrate the quality of the evidence required at sentencing.

II. Immigration

Since our last communication with the Commission, we have studied the immigration legislation that is currently under consideration by Congress. Unlike the Department, which has urged the Commission to amend § 2L1.2 without waiting to hear from Congress, we urge the Commission to proceed with caution and with respect for congressional intent.

If the Commission amends § 2L1.2 this year, it must avoid promulgating a guideline that conflicts with legislation the 110th Congress is likely to enact. H.R. 1645, introduced in the House on March 22, 2007, and S. 2611, passed by the Senate last term, have identical penalty structures. The Commission must not promulgate a guideline that is more severe, more complex, or creates more unwarranted disparity than this penalty structure.

The Department suggests that its proposal is consistent with what Congress is considering, and maintains that it merely seeks simplicity and not increased severity. See 3/20/07 Testimony of John C. Richter at 5. This is not accurate. Option 7 is more complex, more severe, and would create more unwarranted disparity than the penalty

structure set forth in H.R. 1645 and S. 2611, and in some respects is more severe than current § 2L1.2.

H.R. 1645 and S. 2611 set forth statutory maxima of 20, 15, 10 and 2 years for illegal re-entry. Predicates for the 20-year maximum are (1) a “felony” for which the defendant was sentenced to not less than 60 months, (2) three “felonies,” or (3) murder, rape, kidnapping, a “felony” described in chapter 77 (relating to peonage or slavery), or a “felony” described in chapter 113B (relating to terrorism). *See* H.R. 1645, § 236; S. 2611, § 207. In contrast, Option 7:

- would not require the prior offense to be a felony;
- would set a lower threshold of 48 months for the length of sentence imposed;
- would treat two prior convictions sentenced to as little as 12 months the same as one prior conviction sentenced to 48 months (in contrast with H.R. 1645 and S. 2611, which treat three “felonies” the same as one prior “felony” sentenced to at least 60 months)
- would add numerous specific *and* categorical offenses in the areas of child pornography and child sexual abuse;¹
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for “terrorism offenses” than for any other kind of offense (except “national security”), and would use a definition of “terrorism offense” that requires a complex factual inquiry far afield of the offense of conviction;²
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for “national security offenses” than for any other kind of offense (except “terrorism”), and would define “national security offense” as any offense “covered” in Chapter 2, Part M, which includes offenses that bear no resemblance to terrorism with offense levels as low as 6, 13, 14 and 18.

¹ Those are (1) an offense described in 18 USC 2251, 2251A, 2252, 2252A, or 2260, (2) any offense under state or local law consisting of “conduct” that would have been such an offense had it been committed within the special maritime or territorial jurisdiction, (3) an offense in which the victim had not attained the age of 18 and is “an offense described in 18 USC 2242,” (4) an offense in which the victim had not attained the age of 18 and is a “forcible sex offense,” (5) an offense in which the victim had not attained the age of 18 and is “statutory rape,” (6) an offense in which the victim had not attained the age of 18 and is “sexual abuse of a minor.”

² Under the case law interpreting the same definition in § 3A1.4, the inquiry is: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant can be held accountable involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? *See United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003).

The predicate for the 15-year maximum in H.R. 1645 and S. 2611 is a “felony” sentenced to not less than 30 months. *See* H.R. 1645, § 236; S. 2611, § 207. For a 12-level increase, Option 7 would not require the prior offense to be a felony, and would set a lower threshold – of 24 months – for the length of sentence imposed.

Predicates for the 10-year maximum in H.R. 1645 and S. 2611 are (1) three or more misdemeanors, or (2) a “felony.” *See* H.R. 1645, § 236; S. 2611, § 207. Current § 2L1.2 requires an 8-level increase for an aggravated felony not covered by previous subsections, and a 4-level increase for any other felony or three or more misdemeanor crimes of violence or drug trafficking offenses. Option 7 would require an 8-level increase for any offense sentenced to as little as 12 months (even if a misdemeanor) or any three offenses sentenced to at least 90 days, and a 4-level increase for a felony not covered by previous subsections or any one offense sentenced to at least 90 days. As explained in our letter of March 16, Option 7 would result in an 8- or 4-level increase in some instances where currently there would be no increase.

Again, we urge the Commission to provide us with the data runs for Options 7 and 8. If we receive the data in sufficient time before the April 18 meeting at which the Commission plans to vote, we will submit further comments, and probably an Option 9 that more closely mirrors congressional intent than any of the options proposed thus far.

III. Criminal History

During the hearing, the Department asserted that the criminal history score is already “a very good indicator of the risk of recidivism,” and that “excluding more offenses will not improve the ability of criminal history score to identify those offenders who provide a greater risk of recidivism.” *See* Tr. 3/20/07, Testimony of Jonathan Wroblewski at 9, 11.

These assertions are not statistically supportable. For example, according to the Commission’s statistics, defendants with two criminal history points have a *lower* risk of recidivism of any kind – including being rearrested or violating the terms of supervised release or probation – than defendants with one criminal history point, yet they are lumped into Criminal History Category II irrespective of the reason for those two points. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 23; U.S.S.G., Ch. 5, Pt. A, Sentencing Table. Thus, a defendant with two prior convictions for driving without insurance could receive two criminal history points, be placed into Criminal History Category II, and denied safety valve under the current rules.

There is no data of which we are aware that shows that minor offenses are a good predictor of recidivism. The Fifteen Year Report states that including minor traffic offenses in the criminal history calculation may have an “unwarranted adverse impact” on minorities “without clearly advancing a purpose of sentencing,” and that there are many other such possibilities. *See Fifteen Years of Guideline Sentencing: An Assessment*

of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform at 134 (“*Fifteen Year Report*”). Here, the Fifteen Year Report cites a 2003 paper by Blackwell, which would shed further light on the subject, but we are told it is not available to the public. And though a study on the relationship between recidivism risk and minor offenses is mentioned in one of the recidivism reports, that study either has not been completed or has not been published. See U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004).

Assigning only half a point for countable minor offenses would not alleviate the current problems with U.S.S.G. § 4A1.2(c). In our experience, convictions for the minor offenses listed in subsection (c)(1) reflect conduct that does not indicate either a need to protect the public or a likelihood of recidivism. For this reason, counting such offenses in the criminal history score – even by a fraction of a point – results in an unwarranted inflation of the criminal history score of many defendants. The addition of even a half point for such offenses would likely have a disparate impact on minorities, in some cases making them ineligible for safety valve treatment. As we noted in our previous letter and at the hearing, motor vehicle offenses frequently reflect the limited financial circumstances of the defendant. Adding even a half point for such offenses would result in harsher treatment, under the guidelines, for economically strained defendants.

Assigning even a half a point to these offenses will also perpetuate the unwarranted disparity caused by the current version of § 4A1.2(c), which depends upon the various state statutory schemes. Our earlier letter provided some examples of states in which some of the minor offenses are always counted because they carry a maximum sentence of more than one year. Set forth below is a more comprehensive account of misdemeanor offenses that would be excluded under subsection (c)(1) but for the fact that the state authorizes punishment of imprisonment for more than one year. We also note that, in addition to those states mentioned in our previous letter, Colorado permits sentences of more than one year for some of the minor offenses.

Colorado: Each of the following offenses is a misdemeanor under state law punishable by a maximum of eighteen months of imprisonment, *see* Colo. Rev. Stat. § 18-1.3-501:

- Driving after revocation of license, Colo. Rev. Stat. § 42-2-206;
- Professional gambling, Colo. Rev. Stat. § 18-10-103;
- Fish and game violations – e.g., illegal taking of black bears, Colo. Rev. Stat. § 33-4-101.3.

Iowa: Each of the following offenses is a misdemeanor under state law punishable by a maximum of two years imprisonment:

- Gambling, Iowa Code § 725.7 (if the amount involved exceeds \$100);
- Prostitution, Iowa Code § 725.1.

Maryland: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Gambling: playing “thimbles,” “Little Joker,” “Craps,” etc. for money, Md. Code Ann., Crim. Law § 12-103(a) (up to 2 years);
- Insufficient funds check (“Misdemeanor Bad Check”), less than \$500, Md. Code Ann., Crim. Law §§ 8-103, 8-106(b) (up to 18 months);
- Non-support, Md. Code Ann., Fam. Law § 10-203 (up to 3 years);
- Resisting or interfering with arrest, Md. Code Ann., Crim. Law § 9-408 (up to 3 years).

Massachusetts: Each of the following offenses is a misdemeanor under state law and is punishable by up to two-and-a-half years in the house of correction:

- Reckless driving, Mass. Gen. Laws ch. 90 § 24(2)(a);
- Leaving the scene of an accident (with or without injury or property damage), Mass. Gen. Laws ch. 90 § 24(2)(a), (a1/2)(1);
- Resisting arrest, Mass. Gen. Laws ch. 268 § 32B.

Pennsylvania: The following are misdemeanors under state law and punishable by up to five years:

- Misdemeanor offenses relating to gambling and pool selling, 18 Pa. Cons. Stat. Ann. §§ 5513, 5514.

South Carolina: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Failure to obey a police officer by failing to stop for siren or flashing light, S.C. Code § 56-750(B)(1) (up to three years);
- Fishing or trespassing in private fish or oyster breeding ponds, S.C. Code Ann. § 50-13-350 (up to three years);
- Insufficient funds check over \$1000, S.C. Code Ann. § 34-11-90(b) (up to two years);
- Hunting bears out of season or in violation of the law, S.C. Code Ann. 50-11-430 (up to two years);
- Trespass upon state park property, S.C. Code Ann. § 51-3-150 (up to two years).

In contrast to these states where the current version of U.S.S.G. § 4A1.2(c) requires that certain minor offenses are always counted, other jurisdictions have statutory schemes that insure that the offenses listed in § 4A1.2(c)(1) are never counted because the state does not authorize a term of probation or imprisonment for 30 days or more.

Thus, under the current version of the guidelines, a defendant convicted of reckless driving in Massachusetts will always have that conviction counted (because it carries a possible sentence of more than one year imprisonment), while a defendant

convicted of *the exact same conduct* across the state line in New Hampshire will *never* see that conviction counted because the maximum sentence in New Hampshire for reckless driving (unless injury or death result) is a fine and loss of license, N.H. Rev. Stat. Ann. § 265:79.

In Texas, the maximum punishment for gambling offenses and fish and game violations is a fine. *See* Tex. Penal Code §§ 12.23 & 47.02 (gambling offense punishable up to a maximum fine of \$500); Tex. Parks & Wild. Code § 66.019 (offense relating to fishing reports punishable by a maximum fine of \$500); Tex. Parks & Wild Code § 90.011 (maximum fine of \$ 500 for offenses relating to access to protected freshwater areas).

In New Hampshire, the maximum sentence for disorderly conduct (unless committed after a request to desist) is a fine of \$1,000, N.H. Rev. Stat. Ann. §651:2III-a. Driving without a license (first offense) carries a fine of \$1,000; N.H. Rev. Stat. Ann. § 263:1; and fish and game violations (where no human injury or death result) are punished by a fine and/or loss of hunting or fishing license, N.H. Rev. Stat. Ann. § 207:46.

In Pennsylvania, certain fish and game violations can only be punished by a fine. For example, a violation of 30 Pa. Cons. Stat. § 2703 (fish license violation) carries a fine of up to \$50. *See* 30 Pa. Cons. Stat. § 923(a)(3). A violation of 34 Pa. Cons. Stat. § 2711 (unlawful acts concerning licenses) carries a fine of up to \$200. *See* 34 Pa. Cons. Stat. § 925.

In Alabama, driving without a license is a misdemeanor punishable by a maximum fine of \$100. Ala. Code Ann. § 32-6-18.

In South Carolina, a first offense of driving with a license that has been suspended for failure to pay a motor carrier property tax is punishable by a maximum fine of \$50, and a second offense carries a maximum punishment of a fine of \$250. S.C. Code Ann. § 12-37-2890.

To resolve these and other problems inherent in the current guideline structure, U.S.S.G. § 4A1.2(c) should be amended as we proposed in our March 13th letter.

IV. Mandatory Minimums

Mandatory minimums create unwarranted uniformity and interfere with proportionality by treating different offenses and offenders the same. *See* Brief Amicus Curiae of Senators Kennedy, Hatch and Feinstein, *United States v. Claiborne*, 2007 WL 197103 **13, 28-29 (Jan. 22, 2007). When the Commission reflexively builds mandatory minimums into offense guidelines, the resulting sentences are not based on the purposes of sentencing but on politics. The Commission's choice to build mandatory minimums into the drug guidelines without independent study has resulted in disproportionately severe sentences and unwarranted uniformity, contrary to the goals of the Sentencing Reform Act. *Id.* at ** 21, 29. We fully agree with the Judicial

Conference that the Commission should not repeat this mistake with other offenses, but should develop guidelines irrespective of the mandatory minimum and allow § 5G1.1(b) to operate when necessary.

Exacerbating the lack of a sound policy basis, the guidelines spawned by mandatory minimums do not just meet mandatory minimum levels, but exceed them. As we noted in our testimony, the Commission has acknowledged that “[o]ver 25 percent of the average prison time for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels.” *Fifteen Year Report* at 54. This is true for all drug offenders, not just crack offenders. *Id.* It was suggested that this may no longer be accurate because of the effect of the safety valve and the mitigating role cap since 2001. However, the analysis done for the Fifteen Year Report controlled for safety valve by excluding cases in which it was applied. *Id.* at D-9. Moreover, the safety valve does not successfully apply to all low-level offenders as Congress intended. See Jane L. Froyd, *Safety Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-1500 (2000). We expect that the mitigating role cap has had little effect in ameliorating the excess, since the extent of the reduction was sharply cut back only two years after it was promulgated. See App. C, amend. 640 (Nov. 1, 2002), amend. 668 (Nov. 1, 2004).

The proposed sex offense amendments would continue on the same misguided course. Examining the facts of all of the reported cases involving a conviction under the four statutes with new mandatory minimums under the Adam Walsh Act (18 U.S.C. §§ 2241(c), 1591, 2422(b), and 2423(a)), we found that the guideline range under the published proposals for offenders in Criminal History Category I would exceed the mandatory minimum in every case, not in an aggravated case or an unusual case, but the standard case, because of specific offense characteristics that are inherent in the basic unadorned offense. See 3/6/07 Comments on Proposed Amendments Relating to Adam Walsh Act at 15-16, 18-24.

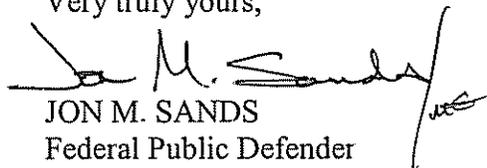
We urge the Commission to publish a current report on mandatory minimums, including data on the extent to which guideline sentences exceed mandatory minimum levels. The Commission’s report is sixteen years old. Congress is seriously questioning the wisdom of both the crack/powder disparity and mandatory minimums generally. A current report would be of particular interest to Congress, the criminal justice community, and the public at this time.

V. Sentence Reduction

We join in the letter of the American Bar Association responding to the Commission’s questions at the hearing on the topic of standards and examples for a motion for sentence reduction under § 3582(c)(1).

As always, we hope that our comments and testimony have been helpful.

Very truly yours,



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