United States
Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 10, 2007

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

RE: PROPOSED 2008 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 as it develops its issues agenda.

I. UPDATING THE MANUAL TO CONFORM WITH THE LAW AFTER BOOKER

Last year, the PAG recommended that the Commission make certain technical corrections to the Manual to recognize the changes in federal sentencing after the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005). It has now been over 30 months since the Court's decision. If the amendments we propose are adopted during the 2008 amendment cycle, they would become effective in November of 2008, nearly four years after the Court's decision. Acting now would ensure that the Guideline Manual accurately accounts for the Supreme Court's holding in Booker, which rendered the guidelines advisory and requires 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 The present Manual is out of date and in some instances misleading because it continues to describe a sentencing scheme where the guidelines are mandatory. See Rita v. United States, -- S.Ct. --, 2007 WL 1772146 *9 (June 21, 2007) (no legal presumption that Guidelines sentence should apply).

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 incorrect.

The Manual's discussion of plea agreements provides another illustration of the need for revisions that account for the Booker and Rita decisions. 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]

We are aware of no good reason for further delays in making amendments to the Manual to correct its descriptions of the manner in which the Guidelines operate after Booker. We join the Federal Public and Community Defenders ("Defenders"), in urging the Commission to make these technical corrections in the upcoming amendment cycle.

II. RETROACTIVE APPLICATION OF 2007 AMENDMENTS

One change that need not wait for the 2008 amendment cycle is to make retroactive substantive amendments promulgated during the 2007 amendment cycle, particularly the offense level reduction under § 2D1.1 for cocaine base offenses ("the crack amendment") and those adjustments pertaining to criminal history calculations. The PAG strongly urges the Commission to make this change as soon as possible.

Consistency and justice mandate retroactive application of the crack amendment — "a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio" intended to address the Commission's election to create cocaine base guidelines with threshold quantity levels that exceeded the statutory mandatory minimums. USSC, Report to Congress: Cocaine and Federal Sentencing Policy, 9-10 (May 2007). In those instances where the Commission has previously amended the drug guidelines so as to produce a potential reduction in sentence, it has subsequently designated the amendment as retroactive. U.S.S.G. § 1B1.10(c); see U.S.S.G., app. C., Amends. 488 (LSD), 516 (marijuana) and 657 (oxycodone). Failure to do so now would call into question the fundamental fairness of the federal sentencing system. Reducing the guideline only prospectively will also invite warranted, sharp criticism from the many stakeholders and observers concerned about the racial disparity inherent in the crack cocaine penalty structure.

Recent experience demonstrates courts' ability to handle the temporary caseload increases resulting from the need to re-sentence a large number of defendants. The judiciary adeptly managed the thousands of Booker-pipeline cases. Moreover it appears that re-sentencing here may be more of a ministerial function since quantity attributions were presumably made at the original sentencing and a defendant's presence is not required when the reduction is made. See 18 U.S.C. § 3582(c)(2); Fed. R. Crim. P. 43(b)(4). Additionally, if the amendment is not made retroactive, it is safe to assume that courts will be confronted with an array of post-conviction pleadings, the majority being filed by pro se applicants, seeking relief consistent with what the amendment provides prospectively. The prudent course is a structured approach guided by the Commission's directive.

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[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)).

These principles of consistency, fairness, equality and judicial economy apply with equal force to the need for retroactive application of the pending criminal history amendments. For instance, the PAG submits that an untold number of "career offenders" presently serving lengthy terms of imprisonment would benefit from application of the new "related cases" amendment that treats as a single sentence two sentences that had been imposed on the same day in cases that were not formally consolidated. Retroactive application would allow those inmates whose career offender predicates counted separately to be treated on par with those whose prior cases had been formally consolidated, resulting in sentence reductions in certain cases that are of potentially tremendous magnitude. Such a disposition would promote fairness and more accurately account for the risks of recidivism. See U.S.S.G. § 1B1.10(c). Again, retroactivity would mean a very mechanical review of information readily available to courts in the criminal history sections of defendants' presentence reports.

III. EXPANDING "SAFETY VALVE" ELIGIBILITY

Congress instructed the Commission 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 on an otherwise serious offense." 28 U.S.C. § 994(j). In this vein, the PAG proposes that the Commission amend Chapter 5 to add a "first offender safety valve" that would be modeled after § 5C1.2's "safety valve" provision but modified in the following ways.

First, the proposed provision would encourage courts to sentence eligible offenders below the guideline range that would otherwise be recommended. Second, the safety valve would apply to all offenses, not just drug offenses. Finally, the proposed provision would encourage courts to impose a sentence of straight probation whenever doing so would satisfy § 3553(a). In order to "reflect the general appropriateness of imposing a sentence other than imprisonment," the proposed guideline would, in an Application Note, encourage courts to consider alternative confinement options, as opposed to terms of imprisonment, in cases where some form of confinement is deemed necessary.

Our proposal maintains § 5C1.2's unavailability to defendants who use violence or credible threats of violence; possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; and cause death or serious bodily injury to any person; or act as an organizer, leader, manager or supervisor of others in the offense. It also replicates § 5C1.2's requirement that the defendant provide truthful information to the government no later than the time of sentencing. In this way, the proposal incorporates all of the factors that the Commission has already determined demonstrate reduced culpability and warrant relief.[2] Our proposal also limits application to those defendants whose offenses were not violent and did not have the potential for violence, something that the statutory language does not necessarily require but that appears appropriate from the Commission's past studies.

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[2] See USSC, Recidivism and the First Offender, 9-10 (May 2004) (the four criteria generally associated with less culpable criminal conduct are no use of violence or weapons, no bodily injury of a victim, a minor role or minimal participation, and acceptance of responsibility).

Through adoption of our proposal, the Commission would advance § 994(j)'s mandate and provide a means for first offenders to obtain relief from recommended guideline ranges – including any limitation on a straight probation sentence or alternative forms of confinement that would otherwise apply under the Sentencing Table's zones – without complicating or disrupting the structure of the Table itself.

The PAG urges that Chapter Five be amended to include the following provisions:

§ 5C1.3 Limitation on Applicability of the Guideline Range in Certain Cases

(a) In any case in which a statutory minimum sentence does not apply, the court should consider a sentence without regard to the guideline range that would otherwise be applicable if the court finds that the defendant meets the criteria set forth below:

(1) the defendant does not have more than 1 criminal history point, as determined by the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, as determined under the sentencing guidelines; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to 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, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) If the defendant fits the criteria set forth in (a)(1)-(5), the court shall, where appropriate under 18 U.S.C. § 3553(a), sentence the defendant to a term of probation.

Application Notes:

1. This guideline is intended to 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 on an otherwise serious offense. *See* 28 U.S.C. § 994(j). Where consistent with the sentencing factors set forth in § 3553(a), the court should sentence a first offender as defined in this guideline to a term of probation under whatever conditions the court deems appropriate. Where a sentence to a term of probation without confinement would be inconsistent with § 3553(a), the court should consider alternative forms of confinement. A straight sentence of imprisonment should be imposed only if the court finds that no alternative sentence would be sufficient to comply with the purposes of sentencing.

Additionally, as the Commission has done with drug offenses, there should be a two-offense-level reduction for any defendant who meets the safety valve criteria. This would be similar to the current specific offense characteristic at § 2D1.1(b)(9), and it could be added to Chapter Three, which includes other adjustments that potentially apply regardless of the defendant's Chapter Two offense guideline.

IV. ALTERNATIVES TO IMPRISONMENT

The PAG urges the Commission to make consideration of a wider range of alternatives to imprisonment one of its priorities. Some of the alternatives can be implemented by the Commission itself. For others, the Commission can lend its expertise in the area of punishment and alternatives to punishment. This can take the form of proposing standards (as the Commission already has for the consideration and acceptance of plea agreements). It can also take the form of conducting research and making recommendations to Congress and others as appropriate. We suggest the following four general areas as particularly worthy of consideration by the Commission either substantively within this amendment cycle or as matters meriting further study and review, such as roundtable subjects.

A. Increased Sentencing Options/Alternatives to Incarceration.

Under the current advisory system, the courts' responsibility to select an appropriate disposition pursuant to 18 U.S.C. § 3553(a) brings to the fore the need for a comprehensive range of sanctions, and the Commission is tasked with ensuring that the Guidelines maintain "sufficient flexibility to permit individualized sentences when warranted." 28 U.S.C. § 991(b)(1)(B). Although alternatives to imprisonment is not a new issue, the Guidelines shortcomings are readily apparent:

> In contrast to many state and foreign systems that allow for fines, restitution orders, and community service as stand-alone sanctions, the Federal Guidelines permit them only as part of a probation sentence. The federal criminal justice system only offers limited forms of alternative sanctions. Among the notable omissions are intensive probation with enhanced supervision of offenders and day fines that are based directly on the gravity of the offense and an offender's economic situation.

Nora V. Demleitner, Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions in A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform, 58 Stanford L.R. 1, 344 (2005) (citing, GAO, Intermediate Sanctions in Sentencing Guidelines (NIJ May

1997)).

There is, of course, a substantial body of available scholarship concerning alternatives to imprisonment. Indeed, more than fifteen years ago, then-Commissioner Helen G. Corrothers headed a project that devoted considerable resources to developing a report that set forth recommendations to expand sentencing options within the Guidelines' framework while maintaining offender accountability and protecting public safety. USSC Alternatives to Imprisonment Project, The Federal Offender: A Program of Intermediate Punishments (Dec. 28, 1990) ("The Corrothers White Paper"). The White Paper authors' observed:

> It is believed that a significant national need exists today for the dual effort of increasing the construction of prison facilities to accommodate the dangerous and more serious offenders and at the same time increasing our efforts to develop innovative methods to accomplish the punishment of some offenders in the community.

Id. 4 (emphasis in original).

Benefits to derive from the development and implementation of non-prison sanctions were seen to include a savings of taxpayer dollars, more efficient use of prison space and an increase in fairness. Id. 5-9. These considerations still apply today. In the 20 years since the Guidelines were implemented, the federal prison population has increased four-fold: from 48,300 inmates under BOP custody and control in 1987 to slightly more than 199,000 as of this writing. Concurrently, the annual cost of federal corrections has risen from $994 million in 1987 to in excess of $5 billion today. See USDOJ-BJS, Justice Expenditure and Employment in the United States, 2003, p. 3 Table 2 (NCJ May 2006).

Support for a more comprehensive sentencing scheme also comes from the courts. When surveyed a decade ago, both district court judges and chief probation officers identified alternatives to incarceration as an area requiring substantive change, with almost two-thirds of each group asserting that more offenders should be eligible for alternatives. FJC, The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey, p. 15 (1997). Recent research also shows that judges believe the Guidelines fail to achieve the purpose of maintaining sufficient flexibility to permit individualized sentences. USSC, Summary Report: U.S. Sentencing Commission's Survey of Article III Judges, p. 2 (Dec. 2002). As examples:

> ...in sentencing drug trafficking offenders, more than half of responding district court judges (and a somewhat smaller proportion of responding circuit court judges) would like greater access to straight probation, probation-plus-confinement, or "split" sentencing options. Slightly more than 40 percent of both responding district and circuit court judges also would like greater availability of sentencing options (particularly probation-plus-confinement or "split" sentences) for theft and fraud offenses.

Id. 5.

The PAG has previously advocated expanding Zones B and C of the Sentencing Table in order to increase the number of defendants eligible for existing intermittent sanction options. Alternatives must be weighed anew post-Booker, though. For lower-level and first-time, nonviolent offenders, sentencing judges should have more, not fewer, options under the Guidelines to construct appropriate sentences without having to resort to non-Guidelines sentences or variances. By expanding alternatives to incarceration in the lower ranges, the Commission would promote the individual flexibility required by statute while ensuring compliance with the Guidelines, all against the backdrop of allowing just and appropriate punishment. The Corrothers White Paper is a useful tool to begin the discussion in that it has addressed numerous pertinent considerations within the Guidelines rubric.

Similarly, the Commission should take another, hard look at creating a Criminal History Category below what is currently designed at Category I, for those offenders who have never previously been arrested or who have no convictions.

Finally, the Commission should urge Congress to amend existing law to mandate the Bureau of Prisons' reinstatement of the intensive confinement center ("boot camp") program that, for many years, assisted in rehabilitating non-violent offenders, at significant cost savings to the public. See 18 U.S.C. § 4046. As well, Congress should pass legislation that directs the BOP to grant Good Time Credit reductions as 15 percent of the length of the sentence imposed, rather than only 15 percent of the sentence served. Just as alternatives to incarceration deserve the Commission's and the public's attention, the improper over-incarceration of all offenders is just as worthy of serious discussion and, where proper, corrective action.

B. Pre-Trial Diversion

Pre-trial diversion programs are not new (see http://www.napsa.org/publications/diversionhistory.pdf), and they currently are in place for diversion of potential federal criminal defendants against whom charges have not been filed (see http://usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm). The Commission should encourage the Department of Justice to expand eligibility for federal pre-trial diversion programs (e.g., to remove the bar against diverting "addicts," who would seem among the most appropriate for treatment as opposed to criminal prosecution) and to provide additional guidance to the field to allow more defendants to be slotted into such programs. All who participate in the federal criminal justice system can identify numerous defendants who have no prior criminal record, and whose offense was nonviolent and comparatively minor, who could be appropriately handled through a diversion program. State systems are increasingly relying on community-based programming as a more appropriate and cost-effective way of dealing with such offenders, to steer them permanently out of the criminal justice system.

C. Prejudgment Probation

The Commission should consider recommending to Congress an expansion of the prejudgment probation option, which is currently restricted to persons pleading guilty to misdemeanor narcotics possession (under 21 U.S.C. § 844), as outlined at 18 U.S.C. § 3607. Under this section, certain first offenders that complete the prejudgment probation period imposed at sentencing, in lieu of a probation or incarceration sentence, can have all charges dismissed. If certain further requirements are met, the records of their arrest/charge may be expunged.

While the eligibility provisions for prejudgment probation at 18 U.S.C. § 3607 are narrow, both through its limit to misdemeanor drug cases and the eligibility criteria, it appears that hundreds of federal defendants, if not more, are successfully diverted through this program every year, with high rates of success. The Commission should study the recidivism rates for defendants who receive prejudgment probation and those similarly situated defendants who do not receive such treatment to confirm the value of prejudgment probation in reducing recidivism, reducing costs and protecting the public. As well, our experience is that federal judges appreciate having this additional sentencing option and very carefully consider whether to use it in appropriate cases. Judges believe prejudgment probation is valuable, while at the same time only using it for defendants who meet the appropriate criteria and present good cases for continued, successful rehabilitation. The Commission should undertake study of the expansion of this valuable disposition option.

D. Expungement/Sealing of Records

A striking gap in the efficacy and fairness of the federal criminal justice system is that, with a single narrow exception (see 18 U.S.C. § 3607), there is no possibility for expungement or sealing of a criminal record. Given the relatively infrequent use of the pardon power – especially in recent years – there is no other way that a federal offender to put his criminal record behind him when he has fully satisfied the penalty imposed by law. We urge the Commission to undertake a study of the issues involved in implementing a statutory mechanism for relief from the collateral consequences of conviction, including the possibility of sealing or expungement for 1) records that do not result in a conviction; 2) records of first-time, non-violent offenders who successfully complete a period of prejudgment probation and have the charges against them dismissed; 3) conviction records in the case of first offenders and/or relatively minor offenses.

V. BASE OFFENSE LEVEL FOR IMPURE MIXTURES OF PRECURSOR CHEMICALS

Guideline Section 2D1.11 provides, inter alia, the base offense level for ephedrine, pseudoephedrine or phenylpropanolamine (PPA), precursor chemicals used in the manufacturing of methamphetamine and amphetamine. The PAG is concerned that sufficient ambiguity exists within the Manual, as currently drafted, as to create a substantial possibility for unwarranted disparity between tablets and other impure forms of these precursors. Accordingly, we propose an amendment that makes clear that the actual weight of ephedrine, pseudoephedrine or PPA is to be used when establishing a defendant's base offense level.

Note C to § 2D1.11 provides: "In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level." See U.S.S.G. § 2D1.1-App. Note 10 (same). This directive is consistent with the rationale of Amendment 519, wherein the Commission sought to avoid unwarranted disparity between pure forms of ephedrine and tablets from which ephedrine is extracted to make methamphetamine because it was recognized that the latter "contain a substantially lower percentage of ephedrine (about 25 percent)." U.S.S.G.App. C, amen. 519-Reason for Amendment; see U.S.S.G. § 2D1.1-Note (B) (distinguishing "mixture" from "actual"); see also Pub. L. 103-200. However, changes to the Manual made pursuant to Amendment 611 — promulgated in 2001 in response to the Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-

310) — leave open the question of how courts should weigh other impure forms of ephedrine, pseudoephedrine and PPA, that is, when not contained in tablets. See U.S.S.G.App. C, amen. 611-Reason for Amendment (use "total quantity" of chemicals involved); see also United States v. Martin, 438 F.3d 621, 624-26 (6th Cir. 2006) (history of amendment). Earlier this year in a case of first impression nationally, the U.S. Court of Appeals for the First Circuit addressed the lack of clear guidance that the Manual currently provides. United States v. Goodhue, 486 F.3d 52 (1st Cir. 2007). There, the Court properly found that under § 2D1.11, "the relevant drug weight for sentencing purposes is the weight of the precursor chemicals themselves." Id. at 60 (affirming government's burden to isolate and weigh chemicals).

The PAG respectfully submits that the Commission adopt the following amendment to Note C to § 2D1.11 (and correspondingly to Application Note 10 to § 2D1.1):

> In a case involving an impure mixture(s) of ephedrine, pseudoephedrine, or phenylpropanolamine ~~tablets~~ (*e.g.*, tablet, sludge, powder, etc.), use the actual weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the ~~tablets~~ mixture(s), not the weight of the entire ~~tablets~~ mixture(s), in calculating the base offense level.

VI. MISCELLANEOUS

A. Uncharged and Acquitted Conduct.

The Defenders' priorities letter does an excellent job accentuating the deficiencies and concerns associated with the continued permissibility of courts' reliance on uncharged and acquitted conduct when establishing a defendant's Guidelines offense level beyond conviction-related adjustments. In joining in the Defenders' call for substantive change, the PAG notes the Guidelines Manual has never been, nor should be, seen as a static document. Rather, there was an appreciation by the original Commissioners, as there is today, that constant vigilance must be exercised to ensure that the Guidelines maintain conformance with the legislative intentions that precipitated passage of the Sentencing Reform Act of 1984.

In this regard, the Commission must acknowledge the disparity and procedural unreliability engendered by the relevant conduct provisions and take steps to correct them. The post-Booker protocol for imposing sentence supports the ends of reform urged in that courts remain able to consider uncharged and acquitted conduct in the context of looking at the whole of an offender pursuant to 18 U.S.C. §§ 3353(a) and 3661. In other words, uncharged or acquitted conduct may serve as a basis for an upward departure from a defendant's recommended guideline range, provided that adequate notice is provided. However, judges should no longer be compelled to factor such considerations into a defendant's Guidelines calculations.

B. Cocaine Policy

The PAG joins with the Defenders both in commending the Commission for its promulgation of the crack amendment and in urging the Commission to go further by adopting a 1:1 crack-to-powder ratio. We recognize that the Commission comprehends fully the gravity and import of this issue. See Cocaine

and Federal Sentencing Policy, ante. Concurrently, given the understood deficiencies that persist within the cocaine base guidelines, the PAG submits that the Commission must act expeditiously to ameliorate the ongoing harms by rejecting conclusively the statutorily devised 100:1 ratio and implementing the more equitable and rationale 1:1 ratio. Respectfully, the Commission must act irrespective of Congressional deliberations.

C. Criminal History

We join the Defenders in recommending that the Commission address particular aspects of criminal history as a continuation of the amendment process begun this past year. For example, the definitions of crimes of violence and drug trafficking offenses in the Career Offender guideline, and the nature of the prior sentences triggering that provision, should be more narrowly circumscribed to ensure that career offender sentences are reserved for those to whom the guideline was intended to apply. The Commission made important changes in the last cycle to the scope of minor offenses that count under the criminal history chapter. Further changes should be considered to exclude the counting of other minor offenses that also may not be good predictors of recidivism. Finally, the provisions adding points for otherwise uncounted crimes of violence, the scope of what were formerly referred to as "related cases," and the counting of stayed sentences should be included in the Commission's requests for comments in the upcoming amendment cycle.

D. Immigration

We agree with the Defenders that the guideline applicable to illegal entry, § 2L1.2, continues to result in sentences disproportionate to those applied to offenses of comparable seriousness. We support inclusion of this guideline in the Commission's priorities.

E. Mandatory Minimum Penalties

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.

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We thank the Commission for its consideration of the foregoing and are available should any additional information be required.

Sincerely,

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