process by which sentence reduction requests based on medical reasons are reviewed by BOP's Medical Director, and non-medical cases are reviewed by the Assistant Director for Correctional Programs).

As a matter of what may only be historical interest, BOP has not always followed such a restrictive policy in seeking judicial sentence reduction. Following the original enactment of judicial sentence reduction authority in 1976, BOP filed motions in a broad range of equitably compelling circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced to minimum term because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(sentence reduced because of exceptional adjustment in prison). In the *Banks* case, the Director of the Bureau of Prisons noted:

> Prior to the passage of the Parole Commission and Reorganization Act [in 1976], applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result.

428 F. Supp. at 1089. *See also U.S. v. Diaco*, 457 F. Supp. at 372 (same). Until 1994, BOP's regulations on sentence reduction motions for both old and new law prisoners provided that "The section may be used, for example, if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."[4]

[4] 28 C.F.R. § 572.40, 45 Fed. Reg. 23366 (April 4, 1980). In 1994, BOP promulgated a rule specifically applicable to sentence reduction for new law prisoners, 28 C.F.R. § 571.60, but applied the same standards and procedures to sentence reduction motions for both old and new law sentences. No examples were given in the regulations, but the Federal Register notice stated that "Releases have been most often applied where the inmate is terminally ill." 59 Fed. Reg. 1238-01 (January 7, 1994).

In summary, we recommend that the criteria for filing sentence reduction motions be: 1) that the circumstances under which sentence was originally imposed must have fundamentally changed; and 2) the grounds for reducing the sentence could have been properly considered in imposing sentence in the first instance. Changes in the law as well as changes in a prisoner's personal circumstances may be considered, and several changes may be considered in combination. It should not matter whether or not the changes could have been foreseen by the court, and it is not necessary that the changed circumstances relate to the prisoner's medical condition.

B. Specific examples:

We turn now to examples of extraordinary and compelling circumstances arising after imposition of sentence. In addition to terminal illness, sentence reduction might be warranted by an incapacitating injury or illness that diminishes a prisoner's quality of life and public safety risk; by old age coupled with infirmity; by the death or incapacitation of the only family members capable of caring for the prisoner's minor children; by unwarranted disparity of sentence among codefendants; by changes in applicable law that are not made retroactive; and by unrewarded service to the government. Any of these circumstances, as well as rehabilitation, may justify sentence reduction when considered in combination, as long as they could have been properly considered in imposing the sentence in the first instance.[5] Whether or not they will in fact justify sentence reduction depends in the first instance upon the government's opinion of the equities of the case overall.

[5] We find much to commend in the formulation of these and other specific examples given in the proposal for policy guidance from Families Against Mandatory Minimums, note 3 supra.

For example, if a prisoner becomes permanently and substantially disabled while in prison, whether as the result of an accident or illness or intentional injury, this could constitute an "extraordinary and compelling reason" justifying release. Or, if a prisoner has served a substantial portion of the sentence imposed, and has become infirm as a result of aging, these reasons might in combination be considered "extraordinary and compelling" so as to warrant a reduction of sentence and early release. A third scenario might involve a prisoner with an exemplary record of rehabilitation who is near the end of her sentence, who becomes the sole source of care for minor children upon the death of her spouse and/or parents.

Lest the universe of possible equitable grounds for sentence reduction begin to seem vast and unmanageable, so that the statute could undercut the core values of certainty and finality in sentencing, it may be comforting to remember that the court's jurisdiction in these cases is entirely dependent upon the government's decision to file a motion. We believe that the government can be counted upon to take a conservative course and recommend sentence reduction to the court only where a prisoner's circumstances are truly extraordinary and compelling. By the same token, the government may find it useful to have the option of making a mid-course correction if the penalty originally imposed appears unduly harsh or unjust.[6] In this regard, BOP's

[6] David Zlotnick has analyzed a group of five commutations granted by President Clinton six months before the end of his term, pointing out that in four of the five cases the prosecutor either supported or had no objection to the grant. David M. Zlotnick, "Federal Prosecutors and the Clemency Power," 13 Fed Sent. R. 168 (2001). Professor Zlotnick argues that "there are sound reasons for federal prosecutors to support clemency petitions in a variety of circumstances," including to reward cooperation, to compensate for unwarranted disparity, for changes in the law, and to recognize rehabilitation.

decision to move the court will necessarily be informed not just by its perspective as jailer, but also by the broader law enforcement perspective of the Justice Department of which it is a part.

Because motions under § 3582(c)(1)(A)(i) necessarily reflect the government's priorities and serve the government's interest, we would commend to the Commission the criteria for equitable reduction in sentence that the Department of Justice itself has identified in the United States Attorneys Manual as grounds for commutation of sentence. Section 1-2.113 of the USAM states that commutation may be recommended in cases involving "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action." The USAM section goes on to say that "a combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case." Particularly in light of the original clemency-related rationale for giving the court sentence reduction authority in 1976, as explained by the Director of BOP in the *Banks* and *Diaco* cases, *supra* p. 10, it seems appropriate that the circumstances identified as sufficient for the government to support presidential commutation of sentence should be deemed sufficient for the government to support judicial sentence reduction well.

Conclusion

On a personal note, let me say that when I served as Pardon Attorney I frequently had cases brought to my attention where fundamental changes in a prisoner's situation made continued imprisonment seem both inappropriate and unjust. In the early 1990's, it became Justice Department policy to refer such cases to BOP for handling under § 3582(c)(1)(A)(i), rather than commend them to the president for commutation of sentence, as such cases had historically been handled. But BOP was hesitant to exercise its authority, even where the United States Attorney did not object, and even where the sentencing judge indicated an interest in reducing the sentence. (Indeed, I have seen cases in which a judge affirmatively asked BOP to file a motion, to no avail.) In the years since I left the Department, BOP's reluctance to file sentence reduction motions has become institutionalized.[7] If steps are not taken to encourage BOP to view its responsibilities more broadly, the courts' sentence reduction authority may atrophy just as the president's pardon power has atrophied.[8]

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[7] Since 1990 BOP has filed an average of 22 sentence reduction motions each year under § 3582(c)(1)(A)(i), almost all in terminal illness cases, and it is our understanding that no court has ever denied such a motion. The highest number of motions filed in any year was 31 in 2000, and since then the number of sentence reduction motions has been decreasing despite a continuing increase in BOP's population, and in 2005 only 18 motions were filed. While in the mid-1990s some motions were filed in non-terminal cases involving significant and permanent physical disability or mental impairment (including Alzheimers Disease) in the past five years almost all of those for whom BOP filed a motion have been within weeks of death. No statistics are available on the number of petitions denied at the institutional or regional level, but prisoners are generally advised by their case managers that it is pointless to file a petition unless they are imminently terminal, and then only if their offense is nonviolent. A situation was recently brought to my attention in which a prisoner had fallen from his top bunk at a medium security institution, and sustained such severe spinal cord injuries that he was permanently paralyzed and quadriplegic. Although this man had served eight years of a ten-year sentence, and although his family had made provision for his care at home, he was told by his case manager that he had no chance of being approved for sentence reduction because he was not in imminent danger of death.

[8] In his five years in office, President Bush has commuted just two prison sentences. Both grants were issued in May 2003, to individuals who were elderly and infirm, and within six months of release in the ordinary course.

It is likely, as Vice Chairman Steer suggested in a 2001 law review article, that BOP's reluctance to invoke the court's sentence reduction authority more frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from BOP's modest view of its own role as that of turnkey.[9] We therefore urge the Commission to give explicit policy guidance in this area, to spell out the statutory criteria and to give "specific examples" of situations warranting sentence reduction, so that the statute can begin to function as the "safety valve" that Congress intended it to be.

[9] *See* John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences," 13 Fed. Sent. R. 154 (2001).

National Association of Criminal Defense Lawyers

July 14, 2006

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: Request for Sentence Reduction Under 18 U.S.C. §3582(c)(1)(A).

Dear Judge Hinojosa:

The Sentencing Commission has requested comment on sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A). The National Association of Criminal Defense Lawyers fully supports the ABA's proposed language for a policy statement, dated July 12, providing detailed guidance regarding "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). The criteria and examples set forth by the ABA capture a broad range of changed circumstances that well justify modifications to otherwise final sentences. This guidance for the courts would advance the goals of consistency and fairness, and fulfill the Commission's statutory responsibility. Though the exercise of such authority remains subject to the government's approval, we hope a more detailed policy statement will encourage greater reliance on this valuable authority to achieve justice, avoid undue punishment, and dispense mercy in appropriate cases.

Sincerely,

Carmen D. Hernandez
Vice President & Chair, Federal Sentencing Guidelines Committee

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Families Against Mandatory Minimums

July 14, 2006

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Sentencing Commission Request for Comments on Sentence Reduction Motions under 18 U.S.C. § 3582 (c)(1)(A)(i).

Dear Judge Hinojosa:

We write on behalf of the board and members of Families Against Mandatory Minimums (FAMM) to encourage you to adopt the attached policy statement proposed by the American Bar Association (ABA). It would guide judicial consideration of motions pursuant to 18 U.S.C. § 3582(1)(A)(i). We welcome the Commission's continued interest in this area and commend the ABA's proposal, which responds to the Commission's request for specific criteria and examples.

FAMM has long urged the Commission to adopt such a comprehensive policy statement. In 2001 we proposed specific language to further Congress's intent that there be a way to take account of extraordinary and compelling circumstances that were not or could not be addressed at sentencing. *See* Letter to Honorable Diana J. Murphy and Commissioners (June 25, 2001). Our concern was motivated by, among other things, the many stories we had heard from or about prisoners whose circumstances had changed so dramatically that continued service of their sentences would be unjust or meaningless. We began to assist prisoners in their petitions and were stunned to learn how seldom the Director of the Bureau of Prisons exercised the authority to seek sentence reductions.

The Bureau takes a very narrow view of its mandate. Although 18 U.S.C. § 3582 (c)(1)(A) speaks of "extraordinary and compelling reasons," in practice, the Director has moved for a reduction in a mere handful of cases each year and only on behalf of terminally ill prisoners, or more recently, on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life." *See*, Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. R. 191, Exhibit II (Vera Inst. Just.). Legislative history reveals Congress's more robust view of what constitutes extraordinary and compelling circumstances. The Senate Judiciary Committee's Report on the Sentencing Reform Act states:

[134]

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, at 55, (1984), *reprinted in* 1984 U.S.C.C.A.N. 3132, 3238-39.

The ABA proposed program statement captures Congress's intent. If adopted, it may have the added benefit of encouraging the Bureau to expand the criteria it currently employs when evaluating whether to bring § 3582(1)(A) motions. We are mindful that the courts may not act absent a motion by the Bureau, but once that motion is made, as the Judiciary Committee pointed out, this and other "safety valves" designed by Congress "keep[] the sentencing power in the judiciary, where it belongs, yet permit[] later review of sentences in particularly compelling situations." S. Rep. No. 98-225, at 121, *reprinted in* 1984 U.S.C.C.A.N. 3132, 3304.

We have reviewed and commented on the ABA's proposal and believe it captures appropriately the breadth intended by Congress.

Thank you for considering our views.

Sincerely,

Julie Stewart /mp

Julie Stewart
President

Mary Price
General Counsel

Enclosure
cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Michael J. Elston
Judith Sheon, Staff Director
Pam Barron, Deputy Counsel
Paula Desio, Deputy Counsel

Revised 7/12/06

American Bar Association

Proposed Policy Statement

§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –

(1) either –

(A) extraordinary and compelling reasons warrant such a reduction; or

(B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and

(3) the reduction is consistent with this policy statement.

(b) "Extraordinary and compelling reasons" may be found where:

(1) the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement; or

(2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.

(c) When a term of imprisonment is reduced by the court pursuant to the authority in 18 U.S.C. § 3582(c)(1)(A), the court may reduce the term of imprisonment to one it deems appropriate in light of the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner, including to time served. In its discretion, the court may but is not required to impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment, provided that any new term of supervision shall be in addition to the term of supervision imposed by the court in connection with the original sentencing.

Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

1) The term "extraordinary and compelling reasons" includes, for example, that –

(a) the defendant is suffering from a terminal illness;

(b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;

(c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(d) the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence;

(e) the defendant would have received a lower sentence under a subsequent change in applicable law that has not been made retroactive;

(f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;

(g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or

(h) the defendant's rehabilitation while in prison has been extraordinary.

2) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason; or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

3) "Extraordinary and compelling reasons" may warrant sentence reduction without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).

TO: United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, D.C. 20002-8002
Attn: Public Affairs-Priorities Comment

FROM: Nkechi Taifa
Senior Policy Analyst
Open Society Policy Center

RE: Public Comment regarding notice of proposed priorities

DATE: September 1, 2006

The following Comment is submitted in support of the Commission's Tentative Priority #4 for the amendment cycle ending May 1, 2007. Tentative Priority #4 states:

> "Continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy, to possibly include a hearing on this issue and a reevaluation of the Commission's 2002 report to Congress, Cocaine and Federal Sentencing Policy."

It is critical that review of cocaine and federal sentencing policy remain a priority area of this Commission's work. In particular, during this amendment cycle, a hearing should be held with a view towards reinstating this Commission's original recommendation transmitted to Congress May 1, 1995 amending the sentencing guidelines by equalizing the penalty triggers between crack and powder cocaine possession and distribution, and harmonizing the mandatory minimum crack statutes with the proposed guideline amendments.

This year marks the twentieth anniversary of the passage of the law mandating disparate punishment for crack and powder cocaine offenders. In 1986 Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine – powder and crack – and singled out crack cocaine for dramatically harsher punishment. In 1988 Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five

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grams of crack cocaine. In what has come to be known as the 100:1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five and ten year mandatory minimum sentences, which have been anchored to the Sentencing Guidelines. This sentencing scheme has had an enormous racially discriminatory impact, resulting in Blacks being disproportionately impacted by the facially neutral, yet unreasonably harsh, mandatory minimum crack penalties and corresponding guidelines.

For twenty years the 100:1 ratio has punished low-level crack cocaine offenders, many with no previous criminal history, far more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment, as well as the longest average period of incarceration. This Commission has reported that local street-level crack offenders receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and- interstate crack sellers receive average sentences longer than international powder cocaine traffickers.[1] Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade. Results such as these are surely not what Congress intended to stem the tide of crack cocaine abuse.

It is recognized that two decades ago, little was known about crack, other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analysis by this Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect.

In 1995 this Commission transmitted to Congress recommendations that would equalize the penalty triggers between crack and powder cocaine possession and distribution.[2] It is instructive to stress that the Commissioners unanimously agreed that the penalty triggers for simple possession of crack and powder cocaine should be equal. A majority of the Commissioners supported no differentiation in the triggers for distribution as well. Indeed, the only dissenting Commissioner to provide an alternative ratio for distribution stated that a five-to-one ratio "may be a good starting point for analysis."[3] Although the

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[1] U.S. SENTENCING COMM'N, 104TH Cong., 2nd SESS., SPECIAL REPORT TO CONGRESS; COCAINE AND FED. SENTENCING POL'Y (1995) AT 175-77 (Figures 10 & 11).

[2] 60 Fed. Reg. 25074, amend. No. 5 (proposed May 1, 1995).

[3] (This was the view of Commissioner Goldsmith, dissenting in part from the Commission's proposed amendment.) See Letter from Richard A. Conaboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995), in U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses, 57:0 CRIM L. RP. 2127 (1995); See also Powder Cocaine and Crack Cocaine Sentences, 1995: Hearings Before the Subcommittee on Crime of the House of Representatives' Committee on the Judiciary, 104th Cong., 1st Sess. 1 (1995) (statement of J. Deanell Reece Tacha, U.S. Sentencing Commission), "the similarities between the majority and the dissent on this issue are much greater than our differences." Id. Also, in the words of then Commission Chair Conaboy: "We have all worked very hard on this issue, and I want to stress first the Commission's unanimity. We all agreed on the conclusions contained in our report to Congress as well as the facts that form the bases of the conclusions. And while we certainly differ on parts of our final specific recommendations, our differences

Commission exhaustively researched and analyzed the issue of cocaine and federal sentencing policy "from every conceivable angle and for many, many, many months,"[4] making "every effort to consider this critical matter in a thorough and professional manner,"[5] the recommendations were summarily rejected by Congress.[6] Congress rebuffed the wisdom of the body of experts it had directed to advise it on this issue by voting to "disapprove" of the Commission's recommendations, sending the issue back to this Commission for further study.[7] Indeed, out of over 500 recommendations submitted by this Commission to Congress since its inception in 1984, this represented the first time Congress overrode its advice. Even more egregiously, Congress demanded that this Commission revise its recommendations so as to maintain sentences for crack cocaine trafficking that exceeded those for powder cocaine trafficking.[8]

In April 1997, this Commission, pursuant to that Congressional mandate, modified its 1995 call for complete elimination of the crack/powder disparity, recommending instead increasing from 5 grams the amount of crack (25-75 grams) needed to trigger a five year mandatory sentence, and lowering from 500 grams the amount of powder cocaine (125-375 grams) needed to generate the same penalty. In a concurring opinion, then Vice Chairman Michael Gelacak chided the modification, stating that "political compromise is a function best left to the Legislature."[9] It is noted, however, that the Commission unanimously reiterated its core 1995 finding that the 100-to-1 drug quantity ratio was not justified.

Although the Sentencing Commission was designed to insulate criminal sentencing from the exigencies of politics, this Commission was restrained from accomplishing its given task – the consideration of sentencing policies free from pressure. Then Commissioner Wayne Budd, in testimony before the House of Representatives, illustrated this tension as follows:

> We have found that almost everybody in a position of political authority is reluctant to take a position on the issue. The reluctance is understandable. Even though almost everyone believes, in the carefully crafted words of the Justice Department, 'that an adjustment in the current penalty structure may be appropriate,' there is a pervasive fear that if you call for change that lowers a criminal sentence for anybody, let alone for a drug criminal, you will be excoriated about being 'soft on crime' or 'sending the wrong

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are relatively small ... the Commissioners who dissented from our recommendations did not seriously discuss any ratio greater than 5-to-1." Id. Statement of Richard P. Conaboy.

[4] Conaboy Testimony, at 2.

[5] Conaboy Letter

[6] CONG. REC. H10255-56 (daily ed. Oct. 18, 1995), H. Res. 237, 104th Cong.; CONG. REC. sec.14645-56 (daily ed. Sept. 29, 1995), S. 1254, 104th Cong.

[7] Se 141 CONG. REC. H10, 255-02, 281 (daily ed. Oct. 18, 1995). The House of Representatives voted 316-98 to disapprove of the Sentencing Commission's recommendations. Although the Senate earlier voted to disapprove of the recommendations, there was no roll call vote in that chamber. See 141 CONG. REC. S14, 645-06, 782 (daily ed. Sept. 29, 1995).

[8] See Pub.L.No. 104-38, 109 Stat. 334 (Oct. 30, 1995)

[9] Concurring Opinion of Vice Chairman Michael S. Gelacak at 1 in U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS; COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997).

> message on crime.' *But every once in a while, the proper public policy demands an adjustment and demands the leadership to push for change, because irrational and unfair sentencing policies also send a message.* [10]

This Commission again revisited the crack/powder issue with recommendations in its 2002 Report to Congress on Cocaine and Federal Sentencing Policy. At that time this Commission advocated increasing the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten year threshold quantity to at least 250 grams, while maintaining the current mandatory minimum threshold quantities for powder cocaine offenses. This Commission also recommended that Congress provide direction for enhancements within the guideline structure that targets the most serious drug offenders.

Despite its 15 year review of guidelines sentencing where this Commission reported that revising this one sentencing rule would do more to reduce the sentencing gap between Blacks and Whites "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system,"[11] and despite this Commission adhering to Congress's mandate to maintain a difference in the penalty triggers, Congress has yet to address any of the Commission's recommendations since 1995.

In a letter earlier this year to the chairs of the House and Senate Judiciary Committees, over fifty organizations cited their agreement with this Commission's 1995 careful analysis that the present 100:1 quantity ratio is too great and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce insupportable racial disparity in sentencing. These groups stressed that justice necessitates that crack cocaine sentences have the same quantity triggers as those currently required for powder cocaine, concluding that aligning crack cocaine sentences with current powder cocaine sentences is the sound way to eliminate this unfair disparity.[12]

The twentieth anniversary of statutory and guideline cocaine penalties is the perfect time to revisit and finally correct the gross unfairness that has been the legacy of the 100:1 ratio. There must be hearings without delay, and the enactment of legislation consistent with this Commission's 1995 original recommendation, submitted absent Congressional pressure, that equalizes the quantity triggers between crack and powder cocaine and

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[10] Powder Cocaine and Crack Cocaine Sentences, 1995; Hearings Before the Subcommittee on Crime of the House of Representatives, Committee on the Judiciary, 104th Cong., 2d Sess. 1-2 (1995) (statement of Wayne A. Budd, U.S. Sentencing Commission) (emphasis added).

[11] United States Sentencing Commission [USSC], Fifteen Years of Guidelines Sentencing (Nov. 2003), p. 132.

[12] See Open Letter to Congress "Time to Mend the 'Crack' in Justice," February 16, 2006. This letter is appended to this Public Comment. The Open Letter to Congress also stressed that reducing the quantity threshold for powder cocaine to that of crack cocaine is an option that was unanimously rejected by this Commission in 2002 as likely to exacerbate, rather than ameliorate, the problems with cocaine sentencing. Such an approach would not cause a shift in focus from bit players to drug "kingpins," but would lead to dramatically increased levels of federal incarceration, furthering burdening the federal system at a great cost to taxpayers.

places the focus of federal cocaine drug enforcement on major traffickers, where it should be. This must be a priority for this Commission's amendment cycle; another anniversary must not pass without this injustice being rectified.

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August 29, 2006

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Attention: Public Affairs - Priorities Comment

Dear Sentencing Commissioners:

We are members of the CJA panel in the District of Massachusetts. We understand that the Sentencing Commission intends to consider improving the operation of the criminal history rules in Chapter Four. We urge the Commission to address the unwarranted disparity in sentences that have been and continue to be imposed pursuant to the "Career Offender" guideline. There are many problems with the career offender guideline; this letter addresses only the gross disparity between similarly situated defendants based on geographic residency. Sentences imposed for an offender in one state may well be ten or even twenty years higher than the sentence imposed on a similarly situated offender with a similar background in an adjacent state.

In Massachusetts, because of its unique common law tradition of punishing persons convicted of misdemeanors by up to two and a half years in a "house of correction," nearly all misdemeanors are "felonies" under the Guidelines. See U.S.S.G. § 4A1.2(o) ("sentences *punishable* by death or a term of imprisonment exceeding one year, regardless of the sentenced imposed" are considered felonies). If such "felonies" meet the career offender guideline's definition of "crime of violence" or "controlled substance offense," the person's offense level is drastically increased according to a table pegged to the statutory maximum for the offense of conviction, and the criminal history category is automatically VI, the highest on the chart. See U.S.S.G. §§ 4B1.1, 4B1.2.

In Massachusetts, traditional misdemeanors such as resisting arrest and simple assault and battery are counted under the career

offender guideline as "crimes of violence" because the statutes contain elements relating to the use or attempted use of force, although, under Massachusetts common law, neither offense requires any harmful touching or use of force. See Commonwealth v. Moore, 36 Mass. App. Ct. 455, 459 (1994)(assault and battery involves an unwanted touching, "however slight"); Commonwealth v. Katykhin, 59 Mass. App. 261 (2003) (resisting placement into police cruiser after being handcuffed met the criteria for resisting arrest).

Citizens of Massachusetts are found to be career offenders and are subject to the resulting astronomical penalties for that status when others are not. Take the example of a person convicted of distributing 5 grams of crack cocaine with two prior convictions, one for simple assault and battery and one for resisting arrest(both considered "felonies" that are "crimes of violence" for career offender purposes even if the sentenced imposed was probation). In Massachusetts, that defendant would receive a Guideline sentence of Level 34, Category VI, 262-327 months following trial and 188-235 months following a plea with credit for acceptance of responsibility. On the other hand, a similar offender with the same criminal history background in virtually every other state would be considered a Level 26 Criminal History category II with a resulting sentence of 70-87 months after trial and 51-63 months after plea (subject to the relevant mandatory five year minimum). See attached Tables of Punishments for Assault and Battery, Resisting Arrest.

The background note to the regular criminal history guideline, U.S.S.G. § 4A1.1, states that the Commission has attempted to deal with jurisdictional variation of past crime seriousness by "basing criminal history categories on the maximum sentence *imposed* on previous sentences . . . rather than on other measures, such as whether the offense was designated a felony or misdemeanor." The Commission also authorized departures under U.S.S.G. § 4A1.3 "[i]n recognition of the imperfection of this measure." However, career offender status is determined solely by whether the underlying offense is *punishable* by more than one year. See U.S.S.G. § 4B1.2, Application Note 1. Any attempt to minimize problems with imperfect measures in the regular criminal history guideline was abandoned in the career offender guideline. The problem was worsened by the October 2003 revision of U.S.S.G. § 4A1.3 where the Commission limited the extent of a departure for criminal history score overstating the risk of recidivism of a career offender to one level. Such limitation further eliminates any ability to correct jurisdictional variation and correct disparity in sentences other than by the court imposing a sentence that varies from that produced by the career offender guideline. The government objects to and may appeal such sentences, according to its post-*Booker* policy that "in any case in which the sentence imposed is below what the United States believes is the appropriate Sentencing Guideline range..., federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best position possible on appeal." Memorandum to all Federal Prosecutors, Deputy Attorney General James B. Comey, dated January 28, 2005.

28 U.S.C. § 991(b)(1)(B) requires the Sentencing Commission to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. As set forth above, it is clear that the career offender guideline, and the common application thereof, create an unwarranted and unjust disparity between similar defendants with similar records.

A possible remedy to the unwarranted disparity is to redefine career offender predicates to require that the sentence *imposed* at the time of original sentencing was greater than one year. (If state law provides for a statutory maximum of more than one year for misdemeanors, probation violations -- which may occur for a variety of minor reasons -- can cause the sentence to exceed one year. Therefore, a one year term of *original* imprisonment would distinguish the predicate offense from the vast majority of states that have a one year cap on misdemeanors).

The term "crime of violence" should also be redefined to include only those offenses where the defendant used actual violence against another, or where the crime, by its nature, involved a substantial risk that force against another would be used and created the likely risk of serious injury to the other. Cf. U.S.S.G. § 4B1.2, Application note 1. Far too many crimes categorized as "violent" under the career offender guideline, such as those listed above, do not involve violence or injury to another.

We ask you to take steps to correct the unwarranted breadth of the career offender guideline and the unjust disparate sentences caused by the imposition of its provisions based solely on where a person resides.

Sincerely,

MICHAEL C. BOURBEAU VICTORIA BONILLA JAMES CIPOLETTA

Cc: Honorable Edward M. Kennedy, United States Senate
Honorable William D. Delahunt, United States House of Representatives

TABLE OF PUNISHMENTS FOR ASSAULT AND BATTERY

State	Punishment
ALABAMA ALA. CODE § 13A-6-22, 13A-5-7	Not more than one year
ALASKA ALASKA STAT.§ 11.41.230, 12.55.135	Not more than one year
ARIZONA ARIZ. REV. STAT. §§ 13-1203, 13-707	Not more than six months
ARKANSAS ARK. STAT. ANN. §§ 5-13-203,5-4-401	Not more than one year
CALIFORNIA CAL. PEN. CODE. §§ 242, 243	Not more than six months
COLORADO COLO. REV. STAT. §§ 18-3-204, 18-3-206, 18-1.3-501	Not more than six months
CONNECTICUT CONN. GEN. STAT. §§ 53a-61, 53a-26	Not more than one year
DELAWARE DEL. CODE ANN. Tit. 11 §§ 601, 602, 4206	Not more than one year
FLORIDA FLA. STAT. §§ 784.011, 784.03,	Not more than one year
GEORGIA GA. CODE ANN. §§ 16-5-23, 17-10-3	Not more than one year
HAWAII HAW. REV. STAT. §§ 707-712, 701-107	Not more than one year
IDAHO IDAHO CODE §§ 18-901,18-903-04	Not more than six months
ILLINOIS 720 ILCS 5/12-1, 730 ILCS, 5/5-8-3	Not more than one year
INDIANA IND. CODE §§ 35-42-2-1, 35-50-3-3.	Not more than six months

IOWA Not more than 30 days
IOWA CODE §§ 708.1, 903.1

KANSAS Not more than six months
KAN. CRIM. CODE ANN. §§ 21-3412, 21-4502

KENTUCKY Not more than one year
KY. REV. STAT. ANN. §§ 508.030, 532.090

LOUISIANA Not more than six months
LA. CODE CRIM. PROC. ANN. art. 14:§ 35

MAINE Not more than one year
ME. REV. STAT. ANN. Tit. 17A §§ 207, 1252

MARYLAND Not more than ten years
MD. CRIM. LAW. § 3-203

MASSACHUSETTS Not more than 2½ years
M.G.L. Ch. 265 § 13A

MICHIGAN Not more than 93 days
MICH. COMP. LAWS § 750.81

MINNESOTA Not more than one year
MINN. STAT. § 609.224

MISSOURI Not more than 15 days
MO. REV. STAT. §§ 565.070, 558.011

MISSISIPPI Not more than six months
MISS. CODE. ANN. § 97-3-7

MONTANA Not more than six months
MONT. CODE. ANN. § 45-5-201

NEBRASKA Not more than one year

NEB. REV. STATS. §§ 28-310, 28-106

NEVADA Not more than six months

NEV. REV. STATS. §§ 200.481, 193.150

NEW HAMPSHIRE Not more than one year

N.H. REV. STAT. ANN. § 631:2

NEW JERSEY Not more than six months

N.J. REV. STAT. ANN. § 2C:12-1

NEW MEXICO Not more than six months

N.M. STAT. ANN. §§ 30-3-4, 30-1-6

NEW YORK Not more than one year

N.Y. PEN. CODE §§ 120.00, 10.00

NORTH CAROLINA Not more than six months

N.C. GEN. STAT. § 14-33, 14-3

NORTH DAKOTA Not more than 30 days

N.D. CENT. CODE §§ 12.1-17-01, 12.1-32-01

OHIO Not more than six months

OHIO REV. CODE ANN. §§ 2903.13, 2929.24

OKLAHOMA Not more than 90 days

OKLA. STAT. Tit. 21 § 644

OREGON Not more than one year.

OR. REV. STAT. §§ 163.160., 161.615

PENNSYLVANIA Not more than two years

18 PENN. CONS. STAT. §§ 2701, 1104

RHODE ISLAND Not more than one year
R.I. GEN. LAWS § 11-5-3

SOUTH CAROLINA Not more than 30 days
State v. Fennell, 340 S.C. 266 fn1 (2000)

TENNESSEE Not more than six months
TENN. CODE ANN. §§ 39-13-101, 40-35-111

TEXAS Not more than one year
TEXAS PENAL CODE §§ 22.01, 12.21

UTAH Not more than six months
UTAH CODE ANN. §§ 76-5-102, 76-3-204

VERMONT Not more than one year
VT. STAT. ANN. Tit. 13 § 1023

VIRGINIA Not more than one year
VA. CODE ANN. § 18.2-57

WASHINGTON Not more than one year
WASH. REV. CODE § 9A.36.041

WEST VIRGINIA Not more than one year
W. Va. CODE § 61-2-9

WISCONSIN Not to exceed nine months
WIS. STAT. §§ 940.19, 939.51

WYOMING Not more than six months
WYO. STAT. § 6-2-501

TABLE OF PUNISHMENTS FOR RESISTING ARREST

State	Punishment
ALABAMA ALA. CODE § 13A-10-41, 13A-5-7	Not more than six months
ALASKA ALASKA STAT.§ 11.56.700, 12.55.135	Not more than one year
ARIZONA ARIZ. REV. STAT. §§ 13-2508, 13-701	Not more than one year
ARKANSAS ARK. STAT. ANN. §§ 5-54-103,5-4-401	Not more than one year
CALIFORNIA CAL. PEN. CODE. § 148	Not more than one year
COLORADO COLO. REV. STAT. §§ 18-8-103, 18-1.3-501	Not more than one year
CONNECTICUT CONN. GEN. STAT. §§ 53a-167a, 53a-36	Not more than one year
DELAWARE DEL. CODE ANN. Tit. 11 § 1257, 4206	Not more than one year
FLORIDA FLA. STAT. §§ 843.02, 775.082,	Not more than one year
GEORGIA GA. CODE ANN. §§ 16-10-24, 17-10-3	Not more than one year
HAWAII HAW. REV. STAT. §§ 710-1026, 701-107	Not more than one year
IDAHO IDAHO CODE § 18-705	Not more than one year
ILLINOIS 720 ILCS 5/31-1, 730 ILCS 5/5-8-3	Not more than one year
INDIANA IND. CODE §§ 35-44-3-3, 35-50-3-2.	Not more than one year

IOWA Not more than 30 days

IOWA CODE §§ 719.1, 903.1

KANSAS Not more than one year

KAN. CRIM. CODE ANN. §§ 21-3828, 21-4502

KENTUCKY Not more than one year

KY. REV. STAT. ANN. §§ 520.090, 532.090

LOUISIANA Not more than six months

LA. CODE CRIM. PROC. ANN. art. § 14:108

MAINE Not more than one year

ME. REV. STAT. ANN. Tit. 17A §§ 751, 1252

MARYLAND Not more than one year

MD. CRIM. LAW. § 9-402

MASSACHUSETTS Not more than 2½ years

M.G.L. Ch. 265 § 32B

MICHIGAN Not more than two years[1]

MICH. COMP. LAWS § 750.479

MINNESOTA Not more than ninety days

MINN. STAT. § 609.50

MISSOURI Not more than one year

MO. REV. STAT. §§ 575.150, 558.011

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[1] Counsel contacted the Federal Defenders office in Detroit, MI and was informed by Assistant Federal Defender John O'Neil that they had never seen resisting arrest used a career offender predicate.

MISSISIPPI Not more than six months

MISS. CODE. ANN. § 97-9-73

MONTANA Not more than six months

MONT. CODE. ANN. § 45-7-301

NEBRASKA Not more than one year

NEB. REV. STATS. §§ 28-904, 28-106

NEVADA Not more than six months

NEV. REV. STATS. §§ 199.280, 193.150

NEW HAMPSHIRE Not more than one year

N.H. REV. STAT. ANN. §§ 625:9, 642:2

NEW JERSEY Not more than six months

N.J. REV. STAT. ANN. § 2C:29-2, 2C:43-8

NEW MEXICO Not more than six months

N.M. STAT. ANN. §§ 30-22-1, 30-1-6

NEW YORK Not more than one year

N.Y. PEN. CODE §§ 205.30, 10.00

NORTH CAROLINA Not more than six months

N.C. GEN. STAT. § 14-223, 14-3

NORTH DAKOTA Not more than one year

N.D. CENT. CODE §§ 12.1-08-02, 12.1-32-01

OHIO Not more than 90 days

OHIO REV. CODE ANN. §§ 2921.33, 2929.24

OKLAHOMA Not more than one year

OKLA. STAT. Tit. 21 § 268, § 10

OREGON Not more than one year

OR. REV. STAT. §§ 162.315, 161.615

PENNSYLVANIA Not more than two years[2]

18 PENN. CONS. STAT. §§ 5104, 1104

PUERTO RICO Not more than six months

P.R. PENAL CODE § 4493

RHODE ISLAND Not more than one year

R.I. GEN. LAWS § 12-7-10

SOUTH CAROLINA Not more than one year

S.C. CODE ANN. § 16-9-320

SOUTH DAKOTA Not more than one year

S.D, CODIFIED LAWS §§ 22-11-4, 22-6-2

TENNESSEE Not more than six months

TENN. CODE ANN. §§ 39-16-602, 40-35-111

TEXAS Not more than one year

TEXAS PENAL CODE §§ 38.03, 12.21

UTAH Not more than six months

UTAH CODE ANN. §§ 76-8-305, 76-3-204

VERMONT Not more than one year

VT. STAT. ANN. Tit. 13 § 3017

VIRGINIA Not more than one year

VA. CODE ANN. §§ 18.2-479, 18.2-11

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[2] This offense is an unlikely career offender predicate because force is not necessarily an element.

WASHINGTON Not more than ninety days

WASH. REV. CODE §§ 9A.76.040, 9A.20.021

WEST VIRGINIA Not more than one year

W. Va. CODE § 61-5-17

WISCONSIN Not to exceed nine months

WIS. STAT. §§ 946.41, 939.51

WYOMING Not more than one year

WYO. STAT. § 6-5-204(a)

August 22, 2006

Attention: Public Affairs-Priorities Comment
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby,
Washington, DC 20002-8002

re: Comment in response to Federal Register,
Vol. 71, No. 150 44344-44345, 8/4/2006,
Sentencing Guidelines for U.S. Courts

STATEMENT OF THE ISSUE

As part of the Sentencing Reform Act of 1984, Title 18 U.S.C. § 3581 was enacted thereto, however, the current United States Sentencing Guidelines do not take into consideration the maximum terms of imprisonment according to the strictures of section 3581. Therefore, it could be debatable by jurists of reason, that sentences that exceed section 3581(b) violates the Congressional mandate of the statute.

SCOPE AND MANNER OF STUDY

The commentator has spent several years of study with respect to Title 18 U.S.C.A. § 3581 and retrieved the Senate reports annexed hereto, as exhibit A,with this report. The undersigned researcher has also conducted a comprehensive search using Shepard's Federal Citations from 1995 to present and has found the most convincing material to support the study is supported by the affirmance of a United States Court of Appeals opinion by the United States Supreme Court in United States v. R.L.C., 503 U.S. 291 (1992) aff'g United States v. R.L.C., 915 F.2d 320 (8th Cir. 1990).

PROBLEM AREAS AND POSSIBLE SOLUTIONS

After reviewing countless sentencing transcripts of federal inmates who have been sentenced ranging from 1991 to present, including a review of their Pre sentence investigation report, there has been no consideration for this

section enacted as part of the Sentencing Reform Act of 1984. A good portion of the sentences reviewed have exceeded section 3581(b) which may be in violation of the Law. The undersigned suggests that section 3581(b) be included in the upcoming Federal Sentencing Guidelines and for United States Probation Officers who conduct the Pre Sentence Investigation Reports be made aware of the limitations imposed by the section. Section 3581(b) dictates the authorized terms of imprisonment for federal prisoners and a major portion of sentences meted today by Courts have exceeded the purview of section 3581(b). This section to Title 18 has not been abrogated.

APPLICABLE SENTENCING GUIDELINES

Title 18 U.S.C.S. Appx § 5G1.1. Sentencing on a Single Count of Conviction;

Title 18 U.S.C.S. Appx § 5G1.2. Sentencing on Multiple Counts of Conviction;

Title 18 U.S.C.S. Appx § 1B1.1. Application Instructions;

Title 18 U.S.C.S. Appx § 5C1.1. Imposition of a Term of Imprisonment;

Title 18 U.S.C.S. Appx § 6A1.1. Presentence Report (Policy Statement);

Title 18 U.S.C.S. Appx § 6A1.3. Resolution of Disputed Factors (Policy Statement);

Title 18 U.S.C.S. Appx § 6B1.1. Plea Agreement Procedure (Policy Statement)

The undersigned posits that the above sections to the United States Sentencing Guidelines should indicate the limitations imposed by section 3581(b) of Title 18 critical to the operation of the Sentencing Reform Act of 1984.

STATUTES

18 U.S.C.A. § 3581. Sentence of imprisonment. See also § 235 of Act October 12, 1984, Pub.L. 98-473, which appears as 18 USCS § 3551 note; Exhibit 'A' annexed hereto.

CASE LAW

United States v. R.L.C., 915 F.2d 320, 324 (8th Cir. 1990)("Once the sentencing guidelines took effect, Congress intended the statutory maximum sentences prescribed in 18 U.S.C. § 3581(b),...to represent "the greatest period the Congress should

allow a judge to impose for an offense committed under the most egregious of circumstances." "). The judgment of the Eight Circuit Court of Appeals was affirmed by the United States Supreme Court and resolved the conflict between the Eighth Circuit's holding in R.L.C. and the Ninth Circuit's position, adopted in United States v. Marco, 868 F.2d 1121, cert. denied, 493 U.S. 956 (1989). United States v. R.L.C., 503 U.S. 291, 296-97 (1992).

CONSTITUTIONAL PROVISIONS

United States Constitution Fifth Amendment

United States Constitution Sixth Amendment

A Federal Court that imposes a sentence in excess of the purview of Title 18 U.S.C.S. § 3581(b) would be imposing an unlawful sentence violative of Due Process Rights of the criminal defendant.

THE COMMISSION SHOULD MAKE THIS ISSUE A PRIORITY

Countless due process rights of criminal defendants are violated each and every day when a court imposes a sentence that exceeds the purview of 18 U.S.C. § 3581(b). The 2006 edition of the Sentencing Guidelines and the editions previous to it do not include any commentaries as to section 3581(b). According to S.Rep 98-225, Exhibit 'A' annexed hereto, section 3581(b) of the Sentencing Reform Act of 1984 limits the sentences of imprisonment that a judge may impose especially since parole was abolished by the Act itself. This issue should be considered urgent and a top priority by the commission.

Respectfully Submitted,

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FCI-Loretto
Post Office Box 1000
Loretto, PA 15940-1000

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EXHIBIT A

Rep. 98-225, s. Rep. No. 225, 98th cong., 1st sess. 1983, 1984 u.s.c.c.a.n. 3182, 1983 wl 25404 (leg.hist.)

Page 3182 p.l. 98-473, continuing appropriations, 1985-- comprehensive
Crime control act of 1984
See page 98 stat. 1837
House report (appropriations committee) no. 98-1030,
Sept. 17, 1984 (to accompany h.j.res. 648)
Senate report (appropriations committee) no. 98-634,
Sept. 25, 1984 (to accompany s.j.res. 356)
house conference report no. 98-1159, oct. 10, 1984 (to
Accompany h.j.res. 648)
Cong. Record vol. 130 (1984)
Dates of consideration and passage
House september 25, october 10, 1984
Senate october 4, 11, 1984

(consult note following text for information about omitted material. Each committee report is a separate document on westlaw.)

Senate report no. 98-225
Aug. 4, 1983

Much of title ii, chapters i-v, chapter vi, division i, and chapters vii-xii, was derived from s. 1762, a proposed comprehensive crime control act of 1984, as passed by the senate on february 2, 1984. The report to accompany s. 1762 (senate committee on the judiciary, s. Rep. No. 98-225, aug. 4, 1983) is set out:

S. Rep. 98-225: Pp. 3221-23

section 3150. Applicability to a case removed from a state court

this section specifies that the release provisions of new chapter 207 of title 18, united states code, are to apply to a case removed to a federal court from a state court. Current 18 u.s.c. 3144, relating to detention of a state prisoner whose case is before the united states supreme court, is deleted. It is expected that decisions on release in such cases will ordinarily be made by the state courts under state law.

*37 **3220 title-- sentencing reform

General statement

title ii of s. 1762 and s. 668, a separate bill identical in language except for technical changes also reported to the senate on august 4, 1983, represent the first comprehensive sentencing law for the federal system. They are the culmination of a reform effort begun more than a decade ago by the national commission on reform of federal criminal laws [fn123] and championed in recent years by former united states district judges marvin e. Frankel and harold r. Tyler, dean norval morris of the university of chicago law school, professor alan dershowitz of harvard law school, and numerous others, including senators john l. Mcclellan, roman l. Hruska, edward m. Kennedy, strom thurmond, and joseph biden. After extensive hearings on the national commission's final report and other proposals, which resulted in further refinement of the proposals, comprehensive sentencing reform provisions were included in s. 1437, as

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reported in the 95th congress by this committee (s. Rept. No. 95- 605) and overwhelmingly passed by the senate on january 30, 1978. These comprehensive sentencing provisions were carried forward in s. 1722 (s. Rept. No. 96-553) in the 96th congress and in s. 1630 (s. Rept. No. 97- 307) in the 97th congress, both of which were reported with nearly unanimous votes by the committee, with further refinements resulting from additional research and suggestions received by the committee since s. 1437 was passed. The proposals received the strong endorsement of the attorney general's task force on violent crime [fn124] and were included in s. 2572 as passed by the senate on september 30, 1982, by a vote of 95 to 1, and added to h.r. 3963.

On march 3, 1983, senator kennedy introduced s. 668-- the 'sentencing reform act of 1983.' [fn125] on march 16, 1983, senators thurmond and laxalt introduced s. 829 on behalf of the administration, a sixteen-title bill that proposed in title ii substantially identical sentencing provisions to those in s. 668. Five days of hearings by the subcommittee on criminal law were held on a number of crime proposals, including s. 668 and s. 829. [fn126] one of the days, chaired by senator kennedy, focused exclusively on sentencing reform and the reaction of victims of violent crime to sentences imposed under current practices.

*38 **3221 attorney general william french smith in his first appearance before the senate committee on the judiciary concerning major crime legislation noted the importance of, and committed the support of the current administration to, major sentencing reform: [fn127]

of the improvements (under consideration by the committee) * * * perhaps the most important are those related to sentencing criminal offenders. These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.

In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the parole commission is to determine when to release the prisoner because he is 'rehabilitated.' yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another-- convicted of the very same crime and possessing a comparable criminal history-- may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely. [fn128]

these disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look. [fn129] these problems are compounded by the fact that the sentencing judges and parole officials are constantly second-guessing *39 **3222 each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.

In order to alleviate these problems, the committee set several goals that it believes any sentencing reform legislation should meet.

First, sentencing legislation should contain a comprehensive and consistent statement of the federal law of sentencing, setting forth the purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for federal offenders.

Second, it should assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all federal criminal cases.

Third, it should assure that the offender, the federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.
Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.
Fifth, it should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society.
Unfortunately, current federal law fails to achieve any of these goals. Each participant in the process, from the courts through the probation and parole systems, does the best it can with the legislative tools at hand, but none is able to reach these goals without substantial sentencing reform legislation.
Following is a brief description of current sentencing law and the attempts of the federal criminal justice system to ameliorate the problems caused by that law. That description is followed by a summary of the sentencing reform proposals in the bill, as reported, and a discussion of how those proposals will achieve the goals set by the committee. More detailed descriptions of current law and the sentencing provisions are contained in the section-by-section analysis.

Current federal sentencing law

1. Lack of comprehensiveness and consistency
current federal law contains no general sentencing provision. Instead, current law specifies the maximum term of imprisonment and the maximum fine for each federal offense in the section that describes the offense. [fn130] these maximums are usually prescribed with little regard for the relative seriousness of the offense as compared to similar offenses. [fn131]
*40 **3223 current law also contains several specialized sentencing statutes that are each applicable to narrow classes of offenders-- offenders between the ages of 18 and 22, [fn132] offenders between 22 and 26, [fn133] nonviolent offenders who are drug addicts, [fn134] offenders who are 'dangerous special offenders,' [fn135] and offenders who are 'dangerous special drug offenders.' [fn136] other categories of offenders that might just as logically be covered by specialized statutes are left undifferentiated.
The sentencing provisions of current law were originally based on a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment. The defendant was eligible for release on parole after serving one-third of his term. The parole commission was charged with setting his release date if it concluded that he was sufficiently rehabilitated. [fn137] at present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of 'coercive' rehabilitation-- the theory of correction that ties prison release dates to the successful completion of certain vocational, edu ational, and counseling programs within the prisons.
Recent studies suggest that this approach has failed, [fn138] and most sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. [fn139] we know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated. Until the present sentencing statutes are changed, however, judges and the parole commission are left to exercise their discretion to carry out what each believes to be the purposes of sentencing.

S. Rep. 98-225: Pp. 3270

Section 3557. Review of a sentence

this section, which has no counterpart in current law, refers to the provisions in proposed 18 u.s.c. 3742, which define the circumstances and procedures for review of sentences imposed pursuant to proposed 18 u.s.c. 3551. The systematized guideline sentencing procedures introduced by this bill are designed to

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eliminate from federal criminal law the plainly disproportionate sentence. The provisions for appellate judicial review of sentences in section 3742 are designed to reduce materially any remaining unwarranted disparities by giving the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application of the guidelines.

Section 3558. Implementation of a sentence

this section simply calls attention to the provisions of proposed chapter 229 of title 18, which govern the implementation of sentences imposed pursuant to section 3551.

section 3559. Sentencing classification of offenses

1. In general

proposed 18 u.s.c. 3559 describes what letter grade in proposed 18 u.s.c. 3581 will apply to an offense for which no letter grade is otherwise specified. It also provides that the maximum fine is the fine authorized by proposed 18 u.s.c. 3571(b) or by the statute describing the offense, whichever is greater.

2. Present federal law

there is no counterpart for this provision, since current law contains no systematic grading scheme for sentences.

*87 **3270 3. Provisions of the bill, as reported

proposed 18 u.s.c. 3559 did not appear in s. 1437 as passed by the senate in the 95th congress. That bill instead specified the applicable grade for each offense defined in title 18 and amended each section outside title 18 that described an offense to indicate the sentence grade that applied to the offense. In general those amendments specified that an offense outside title 18 had the grade for which the proposed criminal code specified a maximum term of imprisonment closest to that for the offense in current law. The committee has reexamined the desirability of amending current law in an attempt to conform sentencing provisions to the grading scheme of the bill, and has decided that a general provision such as section 3559 is preferable at this time. To amend each individual section implies that the committee has given careful consideration to grading all existing offenses, when, in fact, this has not been the c se. Instead, the committee has postponed the restructuring of federal offenses according to their relative seriousness. The sentencing commission will undoubtedly have recommendations concerning the appropriate grades for offenses as it develops sentencing guidelines. Current maximum penalties are set at very uneven levels, and some are so inconsistent with the relative seriousness of the offense that the sentencing commission will probably find it necessary to recommend some amendments before sentencing guidelines are in place. The committee will welcome the commission's suggestions.
Two primary goals are achieved by this section. The first clarifies the applicability of the various sentencing provisions in title 18 by indicating how the new grading scheme will apply to existing offenses until they are graded by legislation. The second substantially increases maximum fine levels for most offenses. Section 3559 achieves these goals in a simple fashion without implying that sentences have been rationalized-- a step which the committee believes should be undertaken with the assistance of the department of justice, the united states sentencing commission, and other interested agencies, after passage of this bill. Not only are there too many criminal offenses, and little rationality in the sentences provided for those offenses, but there is also no clear line between the use of civil and criminal sanctions for essentially regulatory offenses.
Section 3559(a) grades offenses for which no letter grade is provided according to the maximum term of

imprisonment applicable to the offense.
Section 3559(b) states that the sentence for an offense graded according to subsection (a) has the attributes of any other sentence with that grade under the bill with one exception: the fine may not exceed the maximum fine authorized by the bill or the statute that describes the offense, whichever is higher. Thus, section 3559 will often have the effect of increasing the maximum fine provided in current law, but never of lowering it.
The committee intends that future legislation creating new federal offenses specify the grade for the offense. It encourages the committees with other substantive jurisdiction to consult with this committee and the department of justice in determining the appropriate *88 **3271

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3. Provisions of the bill, as reported

proposed 18 u.s.c. 3581(a) states the general rule that all individual offenders, regardless of the type of offense committed, may be sentenced to a term of imprisonment. [fn387] this differs slightly from the approach taken by the national commission in that the commission's sentencing provisions did not provide for imprisoning persons committing the lowest class of offenses. [fn388] the committee is of the belief that a very short term (five days) of imprisonment is appropriate for some offenders who are found to have committed *114 **3297 infractions since, inter alia, the shock value of a brief period in prison may have significant special deterrent effect.
Subsection (b) sets forth nine classes of offenses. [fn389] there are five felony classes with authorized terms of imprisonment ranging from life imprisonment to three years; three misdemeanor classes with maximum terms ranging from one year to thirty days; and the aforementioned infraction category carrying a maximum of five days. This categorization of offenses accords fairly closely with the range and number of categories adopted in several recent state codifications, and, except for the addition of a three-year felony and a six-month misdemeanor, accords closely with the recommendation of the national commission. [fn390]
it must be remembered that the terms set forth are the maximum periods for which a judge is authorized to sentence an offender in each such category; they represent the committee's judgment as to the greatest period the congress should allow a judge to impose for an offense committed under the most agregious of circumstances. It should also be remembered that the sentencing commission will be promulgating guidelines that will recommend and appropriate sentence for a particular category of offender who is convicted of a particular category of offense and that the guidelines would reserve the upper range of the maximum sentence for offenders who repeatedly commit offenses or those who commit an offense under particularly egregious circumstances. [fn391] it is expected, for example, that the ordinary sentence imposed for a class c felony will be considerably less than the twelve-year maximum authorized. This subsection is designed simply to provide a maximum limit on the broad range within which the sentencing commission and the judges are to operate. The subsection is no more intended to indicate the actual sentence a judge is expected to impose in each case than are the analogous provisions of current federal statutes that also customarily set forth only the maximum limit on the judge's discretion. Further, for the first time in federal criminal law, the sentencing judge will be sentencing within the maximum permissible term of imprisonment after consideration of sentencing guidelines that will recommend the top of the possible sentencing *115 **3298 range only for the most egregious cases, and the defendant will be able to obtain

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section 3583. Inclusion of a sentence of supervised release after
Imprisonment

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1. In general

Proposed 18 u.s.c. 3583 is a new section that permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to impose as part of the sentence a requirement that the defendant be placed on a term of supervised release to be served after imprisonment.

2. Present federal law

under current law, both the length of time that a defendant may be supervised on parole following a term of imprisonment and the length of time for which a parolee may be reimprisoned following parole revocation are dependent on the length of the original term of imprisonment.
Under 18 u.s.c. 4210(a), a parolee remains in the legal custody and under the control of the attorney general until the expiration of the maximum term or terms of imprisonment to which he was sentenced. Thus, the smaller percentage of his term of imprisonment a prisoner spends in prison, the longer his period of parole supervision. The jurisdiction of the parole commission may be terminated by operation of law at an earlier date under 18 u.s.c. 4210(b) if the defendant was released as if on parole at the end of his term of imprisonment less credit toward good time [fn420] and *123 **3306 there are less than 180 days of the term of imprisonment remaining. Supervision may be discontinued before the termination of jurisdiction if, upon its own motion or motion of the parolee, the parole commission determines to terminate it before the statutory time. [fn421] the parole commission is required to review periodically the need for continued supervision, [fn422] and may not continue supervision for more than five years after the parolee's release on parole unless it makes a finding after a hearing 'that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law. [fn423]
under current law, the question whether a defendant sentenced to a term of imprisonment in excess of one year will be supervised on parole following release is dependent on whether or not the defendant is released on good time or on parole with more than 180 days remaining of his prison term. [fn424] it is not dependent on whether the defendant needs supervision following release; a defendant who needs supervision may have had such a poor disciplinary record in prison that he has less than 180 days of good time; a defendant who needs no supervision may have served only one-third of an unusually long sentence.
Under present law, if a parolee violates a condition of parole that results in a determination to revoke parole, the revocation has the effect of requiring the parolee to serve the remainder of his original term of imprisonment, subject to periodic consideration for release as required for any prisoner who is eligible for parole. [fn425]
current law also contains two provisions that result in street supervision following confinement of a person sentenced to a period of confinement of less than a year. Under 18 u.s.c. 3651, a defendant who is convicted of an offense for which the maximum term of imprisonment is more than six months may be sentenced to a split sentence with no more than six months' imprisonment followed by probation. Under 18 u.s.c. 4205(f), the sentencing judge may specify that a defendant sentenced to between six months and one year in prison will be released as if on parole (i.e., subject to street supervision) after serving one-third of the term.

3. Provisions of the bill, as reported

this section permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant serve a term of supervised release after he has served the term of imprisonment. Unlike current parole law, the question whether the defendant will be supervised following his term of imprisonment is dependent on whether the judge concludes that he needs supervision, rather than on the question whether a particular amount of his term of imprisonment

remains. The term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment. If the term of supervised release is longer than *124 **3307 recommended in the applicable sentencing guidelines, the defendant may appeal it under proposed section 3742; if it is shorter, the government may appeal on behalf of the public.

Subsection (b) specifies the authorized maximum terms of supervised release, with the terms ranging from a maximum of one year for a defendant sentenced for a class e felony or for a misdemeanor, to a term of not more than three years for a defendant released after serving a term of imprisonment for a class a or b felony. The length of the term of supervised release will be dependent on the needs of the defendant for supervision rather than, as in current law, on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released.

Subsection (c) specifies the factors that the judge is required to consider in determining whether to include a term of supervised release as a part of the defendant's sentence, and, if a term of supervised release is included, the length of the term. The judge is required to consider the history and characteristics of the defendant, the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the applicable sentencing guidelines and policy statements, and the need to avoid unwarranted sentencing disparity. The committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release-- that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

Subsection (d) describes the conditions that the judge may impose on a person who is placed on supervised release. The court is required to order, as a condition of supervised release, that the defendant not commit another crime during the period of supervision. It may also order any of the conditions set forth as conditions of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers appropriate, if the condition is reasonably related to the history and characteristics of the offender and the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant, and the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. Whatever conditions are imposed may not involve a greater deprivation of liberty than is necessary to protect the public and to provide needed rehabilitation or corrections programs, and must be consistent with any pertinent policy statement issued by the sentencing commission pursuant to 28 u.s.c. 994(a).

Subsection (e) permits the court, after considering the same factors considered in the original imposition of a term of supervised release, to terminate a term of supervised release previously ordered at any time after one year of supervised release; or, after a hearing, to extend the term of supervised release (if less than the

hc128 *125 **3308 maximum term was originally imposed); or modify, reduce, or enlarge the conditions of supervised release; or to treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of title 18. The court is also empowered by subsection (e)(3) to treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(e) of this title and to carry out the appropriate contempt proceedings and sanctions as specified in 18 u.s.c. 401. It is intended that contempt of court proceedings will only be used after repeated or serious violations of the conditions of supervised release.

In past congresses, the legislative history of the sentencing reform proposal has contemplated use of criminal contempt as a sanction for violation of conditions of post-release supervision. The probation committee of the judicial conference urged the committee to expressly state the availability of this sanction in the legislation to avoid confusion, and the committee has done so.

Subsection (f) requires the court to direct the probation officer to provide the defendant with a clear and specific statement of the conditions of supervised release.

In effect, the term of supervised release provided by the bill, takes the place of parole supervision under current law. Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it. [fn426] the term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment. Unlike a term of probation, however, the term of supervised release is not subject to revocation for a violation. Instead, for the usual violations, the term or conditions of supervised release may be amended pursuant to subsection (e). If the violation is a new offense, the defendant may, of course, be prosecuted for the offense or held in contempt of court for violations of the court order setting the conditions of supervised release. The committee did not provide for revocation proceedings for violation of a condition of supervised release because it does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation of course, the fact that a defendant is charged with a new offense committed while he was on release will be pertinent to the questions whether there is a risk of flight or danger to the community pending trial and what conditions might be imposed on his release.

Section 3584. Multiple sentences of imprisonment

1. In general

this section provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense.**3309 *126 it specifies the factors to be considered in determining whether to impose concurrent or consecutive sentences. It further provides that consecutive sentences, and any portions thereof during which the defendant is subject to early release, shall be treated as a single sentence for administrative purposes.

2. Present federal law

there are no provisions of current law covering the contents of this section. [fn427] existing law permits the imposition of either concurrent or consecutive sentences, but provides the courts with no statutory guidance in making the choice. [fn428] terms of imprisonment imposed at the same time are deemed to run concurrently rather than consecutively if the sentencing court has not specified otherwise. [fn429] exceedingly long consecutive terms commonly are avoided through the exercise of judicial restraint. A term of imprisonment imposed on a person already serving a prison term is deemed to be concurrent with the first sentence if the first sentence is for a federal offense, [fn430] but is usually served after the first sentence if that sentence involves imprisonment for a state or local offense. [fn431]

3. Provisions of the bill, as reported

proposed 18 u.s.c. 3584(a) provides that sentences to multiple terms of imprisonment may, with one exception, be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed while the defendant is serving another one. The exception is that consecutive terms of imprisonment may not, contrary to current law, be imposed for an offense described in section 1001 (criminal attempt) and for an offense that was the sole objective of the attempt. This limitation on consecutive sentences follows the recommendation of the national commission. [fn432] of course, if the attempt involved plans for a complex pattern of criminal activity and the defendant was convicted of attempting, conspiring, or soliciting such a pattern of activity, the fact that he was also convicted of completing one or more, but not all, the planned offenses would not *127 **3310 preclude, under the provisions of section 3584(a), the imposition of consecutive terms of

imprisonment.
The national commission also specified that terms should not be consecutive in two other situations: that in which one offense is a lesser included offense of the other; and that in which one offense prohibits the same conduct as the other, where one statute describes the conduct generally and another statute describes the conduct specifically. [fn433] the committee has not included the first of these provisions since it generally does not favor conviction for an offense and a lesser included offense. The second situation is covered in new 28 u.s.c. 994(u) in the form of guidance to the sentencing commission in promulgating policy statements for sentencing.
Proposed 18 u.s.c. 3584(a) also codifies the rule that, if the court is silent as to whether sentences to terms of imprisonment imposed at the same time are concurrent or consecutive, the terms run concurrently unless a statute, requires that they be consecutive. [fn434] if, on the other hand, multiple terms of imprisonment are imposed at different times without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively unless the statute specifies otherwise. This carries forward current law where both sentences are for federal offenses, but changes the law that now applies to a person sentenced for a federal offense who is already serving a term of imprisonment for a state offense. [fn435]
subsection (a) is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject. However, the committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively. Ordinarily, under the guidelines system, if the court is sentencing for multiple offenses at the same time, the guidelines will specify an incremental penalty by which some portion of the sentence for the first offense is added to the sentence for each similar offense. [fn436] thus, for example, if the term of imprisonment recommended in the guidelines for one offense is two years, the guidelines might recommend a sentence of two and a half or three years if the defendant was convicted of three or four such offenses. On the other hand, if the defendant was being sentenced at one time for two entirely different offenses committed at different times, the judge might think that adding the guidelines sentences for the offenses together was appropriate, and specify fully consecutive sentences rather than overlapping ones. Similarly, if the defendant was convicted of one offense that was committed in the course of another offense (for example, murder committed in the course of a civil rights violation), the judge might wish to assure that there was at least some additional sentence over what the sentence would have been for only one of the offenses-- or the sentencing guidelines or policy statements *128 **3311 might recommend adding the two

(110)

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September 13, 2006

TO: Chair Hinojosa
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Judith W. Sheon

FROM: Drug Team (Bobby Evans, Vanessa Hall, Lou Reedt, Chair)

RE: Potential Commission priority on penalties for illegal distribution of Human Growth Hormone

This memorandum addresses whether the Commission wishes to add to its final notice of priorities establishing guideline penalties for illegal distribution of human growth hormone (hGH). The Food and Drug Administration (FDA), in its August 29, 2006, response to the Commission's request for public comment on priorities, has requested, as it has for the past several years, Commission action on two issues: 1) amending penalties for certain violations of the Prescription Drug Marketing Act (PDMA); and 2) promulgating a guideline for violations of 21 U.S.C. § 333(e) (Prohibited distribution of human growth hormone).

Section 333(e) currently is not referenced in Appendix A of the Guidelines Manual. Guideline 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, of Agricultural Product), however, specifically states in Application Note 4 that:

> The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs).

During the prior amendment cycle, Commission staff worked to incorporate offenses under 21 U.S.C. § 333(e) into the guidelines but did not find a satisfactory solution. After the Commission promulgated its emergency amendment for steroid penalties on March 27, 2006, the Commission expressed interest in continuing work to develop of a guideline penalty for offenses involving hGH during the 2006-2007 amendment cycle but the Commission's recent notice of tentative priorities did not list such offenses.[1]

The FDA letter of August 29, 2006, requests that 21 U.S.C. § 333(e) offenses be referenced to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

A complication associated with placing hGH within the existing framework for computation of sentences is the fact that hGH is not identified as a "controlled substance" as that term is defined by statute. *See* 21 U.S.C. § 802(6). In order to assess the viability of the FDA's position, it is useful to compare the statute criminalizing hGH with the statute criminalizing the distribution of Schedule III controlled substances.

Penalties for distribution of hGH parallel the penalties for distribution of Schedule III controlled substances in certain key respects. Both provide a five year statutory maximum term of imprisonment for a first offense.[2] However, § 841 increases the statutory maximum to ten years for a second offense of distributing Schedule III controlled substances, while § 333(e) has no similar provision.

Both statutory schemes provide enhanced penalties for distribution to "protected persons" but the age thresholds that trigger the enhanced penalties differ. Distribution of hGH to anyone under 18 years of age triggers an enhanced penalty under 21 U.S.C. § 333(e)(2) that increases the statutory maximum from five years to ten years. Similarly, under 21 U.S.C. § 859(a), distributing any Schedule III controlled substance to anyone under 21 years of age doubles the statutory maximum from five to ten years for a first offense.[3]

In contrast to the penalty structure for hGH offenses, distribution offenses involving Schedule III controlled substances are subject to a further enhancement of three times the statutory maximum punishment authorized by § 841(b) for committing a second or subsequent offense under § 859(a).[4] (*See* attached copies of relevant statutes).

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[1] 71 Fed. Reg. 44344-44345 (August 7, 2006).

[2] Compare 21 U.S.C. § 333(e)(1)(Prohibited distribution of human growth hormone) with 21 U.S.C. § 841(b)(1)(D)(Prohibited acts A for [controlled substance offenses]).

[3] The statutory maximum term of supervised release may also be doubled.

[4] The statutory maximum term of supervised release may also be tripled.

The Commission may wish to include this issue in its priorities for this cycle for several reasons:

1) hGH and steroids are used for similar purposes, in similar populations, and may share similar distribution methods. At the Commission Roundtable on steroids on September 27, 2005, representatives of the FDA indicated that hGH is used illegally by bodybuilders to promote muscle growth and as an anti-aging agent. Also at the roundtable, Mr. Rick Collins, a defense attorney specializing in working with clients accused of illicit steroid use and distribution, reported that hGH is sometimes used by bodybuilders as a bridge between steroid cycles. Supporting this connection of the use of hGH to performance enhancement is the recent sentencing of a physician providing steroids and hGH to several professional football players on the Carolina Panthers football team.

2) The FDA indicates that illegal distribution of hGH (both actual and clandestine) is a growing problem - although currently there are very few cases. The utility of use coupled with the absence of a good test to determine illegal use for performance enhancing purposes may make abuse of hGH attractive to athletes as a substitute for, or in addition to, steroid misuse. A search of the Commission data for cases sentenced between January 12, 2005, and June 30, 2006, found only four cases convicted of 21 U.S.C. § 333(e) (for three cases, no drug type was recorded and in the remaining case the drug recorded was a steroid).

3) A simple and satisfactory solution to incorporate hGH offenses into §2D1.1 may exist. This solution would provide for a simple definition of a "unit" that would be related to the number of vials of hGH involved in the offense.[5] Likewise, because of its similarities to steroid use and distribution, FDA has requested that the Commission amend §2D1.1 to include hGH in the provisions that address steroid trafficking, specifically, §2D1.1(b)(6) (the mass marketing enhancement), §2D1.1(b)(7) (the enhancement for distribution to an athlete), and Application Note 8 (referencing an enhancement under §3B1.3 if a coach used his/her position to influence an athlete to use steroids). FDA also requests that a conviction under 21 U.S.C. § 333(e)(2), involving distribution of hGH to an individual under 18 years of age, be referenced to §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy).

In sum, the team believes that if the Commission decides to address hGH this amendment cycle, a satisfactory solution may be at hand. Staff however have not had sufficient briefings with respect to PDMA offenses to make a similar representation on this issue.

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[5]Human growth hormone is distributed in vials of powder which must be mixed with solution to produce an injectable form of the drug. The drug is always injected. For performance enhancement purposes, use occurs for a limited time period (not unlike steroid cycling) while if the purpose is for its anti-aging effects, the use is indefinite.

RELEVANT STATUTES

21 U.S.C.A. § 333 Penalties

(e) Prohibited distribution of human growth hormone

(1) Except as provided in paragraph (2), whoever knowingly distributes, or possesses with intent to distribute, human growth hormone for any use in humans other than the treatment of a disease or other recognized medical condition, where such use has been authorized by the Secretary of Health and Human Services under section 355 of this title and pursuant to the order of a physician, is guilty of an offense punishable by not more than 5 years in prison, such fines as are authorized by Title 18, or both.

(2) Whoever commits any offense set forth in paragraph (1) and such offense involves an individual under 18 years of age is punishable by not more than 10 years imprisonment, such fines as are authorized by Title 18, or both.

(3) Any conviction for a violation of paragraphs (1) and (2) of this subsection shall be considered a felony violation of the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] for the purposes of forfeiture under section 413 of such Act [21 U.S.C.A. § 853].

(4) As used in this subsection the term "human growth hormone" means somatrem, somatropin, or an analogue of either of them.

(5) The Drug Enforcement Administration is authorized to investigate offenses punishable by this subsection.

21 U.S.C.A. § 802 Definitions

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

21 U.S.C.A. § 841(b)(1)(D) Prohibited Acts A

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

21 U.S.C.A. § 859 Distribution to persons under age twenty-one

(a) First offense

Except as provided in section 860 of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title, and (2) at least twice any term of supervised release authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this subsection shall not apply to offenses involving 5 grams or less of marihuana.

(b) Second offense

Except as provided in section 860 of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction under subsection (a) of this section (or under section 333(b) of this title as in effect prior to May 1, 1971) has become final, is subject to (1) three times the maximum punishment authorized by section 841(b) of this title, and (2) at least three times any term of supervised release authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title.