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July 9, 2007

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed 2008 Priorities

Dear Judge Hinojosa:

I write on behalf of the American Bar Association (“ABA”) regarding the Commission’s priorities for the 2008 amendment cycle. Our recommendations were developed after careful study of the ABA’s Criminal Justice Section Sentencing Committee, co-chaired by James Felman and Barry Boss. We concur with the Practitioners’ Advisory Group (PAG) that the Commission should once again prioritize the development of additional alternatives to incarceration, consider an expansion of the “safety-valve” to non-drug cases, and we also urge you to take action to encourage probationary sentences under specified circumstances.

I. Alternatives to Incarceration

Virtually every state criminal justice system makes use of a wide variety of forms of punishment short of incarceration, such as probation, home detention, intermittent confinement, and community service. In the federal criminal justice system, these alternatives have been greatly curtailed since the advent of the guidelines. In 1984, more than 30% of defendants were sentenced to probation without any term of imprisonment.¹ By 2006 that figure had dwindled to a mere 7.5%.² The data reflects a marked and consistent trend away from the use of alternatives to incarceration that appears to be growing each and every year.³

1 United States Sentencing Commission, Fifteen Years of Guideline Sentencing, Fig.2.2, p.43 (Nov. 2004).

2 2006 Sourcebook of Federal Sentencing Statistics, Fig. D & Table 12.

3 The percentage of defendants sentenced to imprisonment has increased nearly every year for which data is available on the Commission’s website:

2006:	92.5%
2005 post-Booker:	92.1%
2005 pre-Booker:	91.9%
2004 post-Blakely:	91.0%
2004 pre-Blakely:	91.3%

At the same time, utilization of community confinement has been curtailed and shock incarceration (“boot camp”) programs have been eliminated.

The abandonment of alternatives to incarceration was not dictated by the Sentencing Reform Act of 1984. Indeed, 28 U.S.C. §994(j) provides that “[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”

The restoration of alternatives to incarceration under the guidelines has been the subject of considerable study. In 1990, the Judicial Conference of the United States as well as an esteemed of experts under the direction of Commissioner Helen Corrothers recommended expansion of a wide array of alternatives to incarceration. Ten years later, in 2000, the PAG proposed specific amendments to implement the congressional directive in Section 994(j) through an expansion of Zones B and C within Criminal History Category I. The Commission drafted several similar options and published them for comment in 2002. 67 Fed. Reg. 2456-75 (Jan. 17, 2002). The reasoning underlying the 1990 recommendations of the Judicial Conference and the Corrothers working group remains persuasive, and the 2000-02 options studied to implement these recommendations remain viable. The data regarding sentencing trends makes implementation of these recommendations more compelling with each passing year. Furthermore, surveys of the judiciary confirm the widespread view of sentencing judges that greater flexibility to utilize alternatives to incarceration is essential to achieve the purposes of sentencing.

We believe it is of vital importance to give district judges the flexibility needed to accomplish sentences that are sufficient but not greater than necessary to achieve all of the goals of punishment as reflected in Section 3553(a). In view of those goals, it is not necessary to impose a sentence of imprisonment in fully 92.5% of cases. In addition to the direct costs associated with these sentences, the negative impact on defendants’ prospects for rehabilitation is likely significant. Even a brief period of incarceration often causes the defendant to suffer loss of employment and family support, the two factors most likely to promote rehabilitation and prevent recidivism. Indeed, the Commission’s recidivism data confirms that those able to benefit from increased alternatives to incarceration under the 2000-02 proposals are the least likely to recidivate. We hope the Commission will return to this important topic and add it to its list of

2003:	91.0%
2002:	90.9%
2001:	91.2%
2000:	90.6%
1999:	89.6%
1998:	89.0%
1997:	87.0%
1996:	88.1%
1995:	86.4%

Source: For 1998-2006, Annual Sourcebooks of Federal Sentencing Statistics; for 1995-1998, www.ussc.gov/linktojp.htm.

priorities for the 2008 amendment cycle.

II. Pre-Trial Diversion and Prejudgment Probation

The ABA strongly supports the development of diversion and deferred adjudication options for offenders who qualify for community supervision. We therefore agree with the PAG that the Commission should encourage the Department of Justice to expand eligibility for federal pre-trial diversion programs (e.g., to remove the bar against diverting “addicts,” who would seem among the most appropriate for treatment as opposed to criminal prosecution) and provide additional guidance to the field to allow more defendants to be slotted into such programs.

We also agree with the PAG that the Commission should consider recommending to Congress an expansion of the prejudgment probation option, which is currently restricted to persons pleading guilty to misdemeanor narcotics possession (under 21 U.S.C. § 844), as outlined at 18 U.S.C. § 3607.

Finally, in considering expansion of these programs, we recommend that the Commission take into account the fact that a criminal record can be permanently disabling for individuals attempting to reintegrate into society. There are numerous defendants who could profitably be steered permanently out of the criminal justice system if such diversion and deferred adjudication programs offered the possibility of avoiding a criminal record altogether upon successful completion of a period of probation.

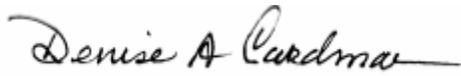
III. Expansion of “safety-valve”

Our agreement with the PAG’s proposed expansion of the “safety-valve” is rooted in our long-standing opposition to mandatory minimum sentencing. Mandatory minimum sentences have resulted in excessively severe sentences without regard to whether or not an individual offender actually deserves such a sentence and without regard to the individualized sentencing factors set forth in 18 U.S.C. § 3553(a). In your recent testimony before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, you reiterated the Commission’s “firm[] belie[f]” that the guideline system, rather than statutory minimum sentences, “remains the best mechanism” for achieving the statutory purposes of sentencing. Statement of Ricardo H. Hinojosa, June 26, 2007 at 18.

Even though we realize that the Commission’s ability to mitigate the impact of statutory mandatory minimum sentencing is necessarily limited, we nonetheless urge the Commission to do everything within its limited authority to ameliorate the harsh effect of these sentences. Obviously, the expansion of the “safety-valve” in the manner proposed by the PAG provides a greater opportunity for district court judges to impose a guideline sentence or a sentence otherwise appropriate under Section 3553(a) while still being subject to whatever statutory floor is set by the applicable mandatory minimum sentence.

We appreciate the Commission’s consideration of the ABA’s perspective on these important issues and are happy to provide any additional information or input that you might require.

Sincerely,

A handwritten signature in black ink that reads "Denise A. Cardman". The signature is written in a cursive style with a long horizontal flourish at the end.

Denise A. Cardman

cc: Hon. William K. Sessions, III
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Hon. Rubin Castillo
Hon. Michael E. Horowitz
Hon. Beryl A. Howell
Hon. Dabney Friedrich
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