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April 19, 2005

Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
207 Cannon House Office Building
Washington, D.C. 20515-6223

Honorable Robert C. Scott
Ranking Member
Subcommittee on Crime, Terrorism,
and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
B-336 Rayburn House Office Building
Washington, D.C. 20515-6216

SUBJECT: H.R. 1528, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005"

Dear Chairman Coble and Ranking Member Scott:

The voting members of the United States Sentencing Commission write to express our continued desire to assist Congress in combating the serious problems of drug trafficking and abuse. To that end, the Commission has reviewed H.R. 1528, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005", 109th Cong., 1st Sess. (2005)(hereinafter "H.R. 1528") and, as it did with this bill's 2004 predecessor, provides the following data and information for your consideration.

H.R. 1528 primarily concerns the problem of drug distribution involving minors, which the Commission continues to agree is a serious issue. As we indicated last year, with respect to drug distribution specifically involving minors, the Commission believes that the existing statutory penalty structure, when utilized, results in significant penalties for drug trafficking involving such aggravating conduct. In fiscal year 2003, Commission data indicate that prison sentences for defendants convicted under 21 U.S.C. § 859 (Distribution to person under age twenty-one) received an average sentence of 115 months. For those convicted of violations under 21 U.S.C. § 860 (Distribution or manufacturing in or near schools and colleges), the

average sentence was 103 months, and those sentenced for convictions under 21 U.S.C. § 861 (Employment or use of person under 18 years of age in drug operations) had an average sentence of 143 months. These sentences continue to be significantly longer than the average sentence of 80 months imposed for drug trafficking in fiscal year 2003.

The Commission notes, however, that drug defendants still are prosecuted rarely under 21 U.S.C. §§ 859, 860, or 861 and, therefore, seldom subjected to the heightened penalties provided by these statutes. In fiscal year 2002, 240 defendants were sentenced for violations of 21 U.S.C. §§ 859, 860, and 861. In fiscal year 2003, 305 defendants were sentenced under these statutory provisions. These numbers are not reflective, however, of the prevalence of this conduct, which is why the Commission continues to believe that the better way to approach penalties for these offenses is through guideline sentencing enhancements. In 2002, the Commission submitted to Congress a comprehensive package regarding federal cocaine penalties, including the recommendation that the guidelines covering violations of 21 U.S.C. §§ 859, 860, and 861 be consolidated into the general drug trafficking guideline as sentencing enhancements that could be triggered without conviction under these specific statutes, a current concern among some who favor H.R. 1528's mandatory minimum scheme.¹ See Report to Congress: Cocaine and Federal Sentencing Policy, May 2002, at A-2, A-8–A-9.

The Commission notes that H.R. 1528 contains a number of directives to the Commission to promulgate specific sentencing enhancements for drug trafficking offenses involving firearms, drug trafficking offenses resulting in bodily injury, and repeat felony controlled substances violations. These directives are consistent with proposals made by the Commission in 2002. See *id.* at viii, 2, A-8–A-9.

As it has since 2002, the Commission continues to caution that in the absence of a modification to the existing quantity-based penalty structure for crack² cocaine offenses, the enhancements called for by H.R. 1528 will exacerbate the sentencing disparity between crack and powder cocaine. While the conduct covered by the enhancements proposed in H.R. 1528 occur only in a minority of crack cocaine offenses, data suggest that such conduct occurs more frequently in crack cocaine than powder cocaine offenses. The current gap between crack and powder cocaine offenses may be expected to widen under H.R. 1528 because the proposed enhancements would apply more frequently in crack cocaine offenses than powder cocaine offenses unless the quantity-based sentences are modified.

¹In its 2004 submission, the Commission noted that its recommendation for a guideline enhancement relied, in part, on whether the U.S. Supreme Court's decision in *Blakely v. Washington*, __ U.S. __ (2004) invalidating a state sentencing system for Sixth Amendment purposes would be applied to the federal sentencing guidelines system. The Commission does not believe that the Supreme Court's decision in *United States v. Booker*, __ U.S. __ (2005) rendering the federal sentencing guidelines system advisory should change this recommendation.

The Commission remains committed to working with Congress on issues involving 18 U.S.C. § 3553(f) and U.S.S.G. §5C1.2, commonly referred to as the “safety valve” provisions. H.R. 1528 proposes to amend 18 U.S.C. § 3553(f) by requiring that the Government certify that a defendant has “done everything possible to assist substantially in the investigation and prosecution of another person” before a defendant can qualify for safety-valve application. This appears to transform the purpose of the safety-valve provision from the relief mechanism for certain low-level, non-violent drug offenders to another form of substantial assistance motion.² The Commission continues to believe that assessing whether a defendant has provided truthfully all information and evidence turns largely on the credibility of the defendant, an assessment best made by sentencing courts. The proposed transfer of discretion from the sentencing court to the prosecution, therefore, does not seem appropriate.

This amendment also appears to address a split among the federal circuit courts as to the meaning of “not later than the time of the sentencing hearing” requirement set forth at current 18 U.S.C. § 3553(f)(5). Under its authority to review and address splits among the circuit courts, the Commission would welcome the opportunity to provide clarification on this issue and/or develop a guideline mechanism to improve the timeliness of such disclosures.

H.R. 1528 proposes significant changes to the relevant conduct rules of the federal sentencing guidelines. Section 5 of the bill directs the Commission to amend the guidelines to ensure that a drug defendant is held accountable at sentencing for conduct of the members of a conspiracy “before the defendant joined the conspiracy that was known to the defendant before joining the conspiracy”. The relevant conduct rules are a primary concern of the Commission because they form the backbone of the federal sentencing guideline structure. When H.R. 1528's predecessor was introduced last year, the Commission was unaware of any information suggesting that relevant conduct for drug trafficking offenses – or any other offense – were too narrow or otherwise unduly hampering the work of federal prosecutors.⁹ In light of the Supreme Court's ruling in *Booker* and the fact that the Commission still is unaware that existing relevant conduct rules are hampering prosecutions, the Commission urges caution in directly amending the federal sentencing guidelines with regard to the relevant conduct rules.

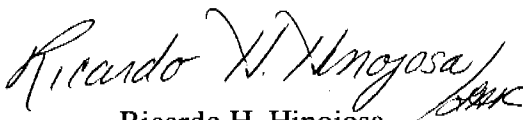
In addition to addressing the significant problems of drug trafficking involving minors, H.R. 1528 appears to address sentencing issues in light of the Supreme Court's *Booker* decision in a hasty, piecemeal fashion. The Commission is concerned that the specific sentencing provisions set forth in H.R. 1528 will hamper the ability of Congress and others to devise a systematic approach to the constitutional concerns raised in *Booker* and the overall purposes of

²See H. Rep. No. 103-460, 103rd Cong., 2nd Sess. (1994)(“the Act permit[s] a narrow class of defendants, those who are the least culpable participants in [federal drug trafficking cases], to receive strictly regulated reductions in prison sentences for mitigating factors . . . recognized under the federal sentencing guidelines.”).

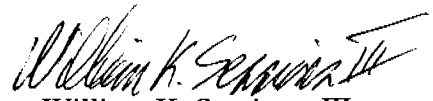
sentencing. If Congress decides at some point to pursue legislation specifically addressing the *Booker* decision, we hope that it will preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid a wholesale rewriting of a system that has operated well for nearly two decades. We believe the Sentencing Reform Act was a landmark piece of legislation and the resulting guidelines have made significant strides in furthering the Act's goals.


As you are aware, the Commission has been actively involved in addressing the uncertainty raised by *Blakely* and the new advisory system created by *Booker*. The Commission has held numerous hearings on the issue of sentencing policy, testified at two congressional hearings regarding the future of federal sentencing, analyzed thousands of cases and hundreds of court opinions to determine current sentencing trends, provided extensive data and other assistance to all three branches of government, and interacted with interested parties within the criminal justice community. We urge Congress to continue its deliberative approach to sentencing reform - including perhaps additional hearings on the specific sentencing provisions of H.R. 1528 and the state of federal sentencing generally - and advocate a bipartisan, bicameral approach. We are committed to obtaining this goal and appreciate the opportunity to continue working with you on matters of national sentencing policy.

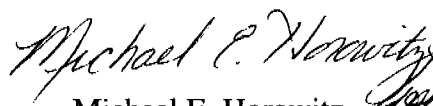
Sincerely,

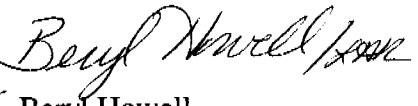

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