TESTIMONY OF JON SANDS
CHAIR, FEDERAL DEFENDER SENTENCING GUIDELINES COMMITTEE
BEFORE THE
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING
APRIL 12, 2005

Judge Hinojosa and members of the United States Sentencing Commission, thank you for inviting the Federal Defender Sentencing Guidelines Committee to testify regarding the proposed amendments and issues for comment for the 2005 amendment cycle. Our principal focus will be the proposed amendments and issue for comment relating to Aggravated Identity Theft, though we will comment briefly on the proposed amendment and issues for comment relating to Antitrust Offenses and Anabolic Steroid Offenses.

I. Aggravated Identity Theft

A. Amendment to U.S.S.G. § 2B1.1(b)(10)

The Commission proposes revising § 2B1.1(b)(10) by striking the original language and inserting language that any defendant who is convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or § 1029(a)(4) shall receive this adjustment. The reason for the proposed change is to eliminate confusion and inconsistency in application of the adjustment, not to change or broaden its scope.

However, we believe that the proposed amendment will have the effect of including some defendants who would not have received the adjustment under the current language, and perhaps excluding others who might have received the (b)(10) adjustment under the prior language. While the (b)(10) adjustment probably would have applied to defendants convicted of violating §§ 1028(a)(5) and 1029(a)(4) under the current language, it would not have applied to all defendants convicted of §1028(a)(7). The language of § 1028(a)(7) is very broad, and encompasses criminal conduct that previously was not described in (b)(10).

For example, a defendant convicted under §1028(a)(7) may have committed a minor crime involving less than five immigration documents and yet the proposed adjustment would apply to him. But a defendant convicted of bank fraud, which involved fraudulent use of another's credit card or checking account, would not receive the (b)(10) adjustment under the proposed language, because bank fraud is not a conviction under 18 U.S.C. §§ 1028(a)(5), (a)(7), or 1029(a)(4).

To ensure that any amendment does not apply to conduct to which the adjustment previously was inapplicable or create unintended disparity, we recommend that the Commission continue to study this amendment and ascertain how it is applied to defendants and in what types of cases.

B. Abuse of Position of Trust Enhancement in Cases in Which the Defendant Was Convicted of 18 U.S.C. § 1028A

The proposed amendment to U.S.S.G. § 3B1.3 provides for an abuse of position of trust adjustment for a "defendant who uses his or her position in order to obtain unlawfully, or use without authority, any means of identification." Application note 5 states that the adjustment does not apply to the underlying offense "if the defendant is convicted of 18 U.S.C. § 1028A or the base offense level or specific offense characteristic in Chapter Two incorporates this factor."

We understand that the Department of Justice is taking the position that this adjustment should apply if the defendant is also receiving a consecutive mandatory minimum sentence. We disagree.

Although the language of U.S.S.G. § 3B1.3 and that of 18 U.S.C. § 1028A is not identical, there is substantial overlap. Most importantly, adding a two-level enhancement when the defendant is already receiving a consecutive mandatory minimum sentence of two years is excessive and disproportionate to the seriousness of the offense. For offenders in Criminal History Category I, the two-year consecutive mandatory minimum adds the equivalent of between 9 and 16 levels to sentences for the underlying offense in Zone A, 8 or 9 levels to sentences for the underlying offense in Zone B, 7 levels to sentences for the underlying offense in Zone C, and between 2 and 7 levels to sentences for the underlying offense over 70 months in Zone D. We believe that adding another two levels would result in sentences that are far greater than necessary to achieve just punishment, deterrence or incapacitation in these cases.

An additional two-level adjustment would only magnify the disproportionality and disparity inherent in the mandatory minimum itself. In the words of Justice Breyer:

> Mandatory minimum statutes are fundamentally inconsistent with . . . a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. . . . They rarely reflect an effort to achieve proportionality – a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate.

See Harris, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment) (internal citations omitted).

This is a brand new statute about which the Commission has no data whatsoever. We urge the Commission to promulgate the application note as written, collect data on

the kinds of cases in which the new statute is being used, and decide, based on the data, whether application note 5 should or should not remain. If the Commission removes application note 5 now, it will be difficult is not impossible to insert it later.

C. Multiple Counts of Aggravated Identity Theft under 18 U.S.C. § 1028A

Section 2 of the Identity Theft Penalty Enhancement Act, 18 U.S.C. § 1028A(b)(4), states that a term of imprisonment for a violation of the aggravated identity theft statute may, in the court's discretion, run concurrently with another conviction for § 1028A, "provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission." This language invites the Commission to address this issue in the Guidelines, and we believe that the Commission should do so. By including this language in the statute, Congress plainly believed that concurrent sentences were a matter of the court's discretion, in contrast with convictions for use of a firearm during a crime of violence or drug trafficking offense. See 18 U.S.C. § 924(c).

We believe that the criteria set forth in the grouping rules together with the relevant conduct rules set forth the correct criteria for determining whether convictions for § 1028A should run concurrently. If the conduct that is the subject of multiple convictions for § 1028A involved acts or transactions that were connected by a common criminal objective, constituted part of a common scheme or plan, or would otherwise qualify as "relevant conduct," as that term is defined in U.S.S.G. § 1B1.3, then the sentences for such violations of § 1028A should run concurrently with each other.

In the commission of such offenses, a defendant might use an individual's "means of identification" on multiple occasions. Or, in the course of committing a large scale fraud, a defendant might use the means of identification of several different persons. A defendant who commits fraud by using one person's identification 20 times should not serve 20 consecutive terms of imprisonment for aggravated identity theft. Nor should the individual who uses the identity of 100 persons in the commission of a large scale fraud be facing 100 consecutive terms of imprisonment. If the harm is greater because of either the number of times an identity was used or the number of identities used, then this greater harm will be reflected in the sentence for the underlying offense, which will take into account, under § 2B1.1, the amount of loss and number of victims. Therefore, we strongly urge the Commission to include strong language in new § 2B1.6 indicating that the court should impose concurrent sentences for convictions of § 1028A any time the conduct involved acts or transactions that were connected by a common criminal objective, constituted part of a common scheme or plan, or would otherwise qualify as "relevant conduct," as that term is defined in U.S.S.G. § 1B1.3.

II. Antitrust Offenses

We fully adopt the comments of the Practitioners' Advisory Group regarding Antitrust Offenses.

First, we agree that the appropriate response to the congressional increase in the statutory maximum from three to ten years is to add levels to the volume of commerce table rather than to increase the base offense level in every case. Increasing the base offense level by two or four levels for every antitrust offense is not tailored to Congress's concern that *some* antitrust offenses may not receive punishment commensurate with their social impact, but instead would create sentences in many cases that are greater than necessary to achieve the statutory purposes of sentencing. Likewise, incorporating the bid-rigging adjustment into every sentence for an antitrust offense would result in sentences greater than necessary to reflect the seriousness of the offense, as well as disproportionality by treating unlike offenders alike, in those cases that do not involve bid-rigging. Furthermore, an increase in the base offense level would result in disproportionality between the fraud and antitrust guidelines because the base offense level for antitrust offenses is already four levels higher than that for fraud offenses based on the Commission's express consideration of the proper relationship between antitrust and fraud offenses.

Second, we urge the Commission not to adopt the Department of Justice's proposed volume of commerce table for the reasons cogently stated in PAG's letter at 5-14. We fully agree with the PAG that the Commission should not adopt any change to the volume of commerce table without collecting information about actual district court sentencing decisions in antitrust cases, undertaking pertinent research, receiving comments from representatives of all aspects of the criminal justice system, and then determining, in light of the data, research and comments, that any proposed change results in sentences that are sufficient but not greater than necessary to achieve the statutory purposes of sentencing, while avoiding unwarranted disparity.

III. Anabolic Steroids

We believe that before the Commission takes any action regarding penalties for offenses involving Anabolic Steroids, it should collect and evaluate data and information demonstrating that change is needed, and what that change might be. Any change should be sufficient, but not greater than necessary, to effectuate the statutory purposes of sentencing, and must avoid unwarranted sentence disparities.

We urge the Commission to seriously consider the information submitted by Richard Collins on behalf of the National Association of Criminal Defense Attorneys. Based on Mr. Collins' knowledge of steroids and steroid users through his extensive experience with steroid cases, there are marked distinctions between steroids and steroid users on the one hand, and other controlled substances on the other, that are directly relevant to the purposes of sentencing and the need to avoid treating different offenders uniformly. Moreover, these differences are not well understood at the present time.

We ask to be informed of whatever data and information is submitted to the Commission by the Department of Justice, so that we can provide effective comment and alternatives pursuant to our statutory responsibility under 28 U.S.C. § 994(o).

IV. Conclusion

In closing, we thank the Commission again for giving us the opportunity to comment on the proposed amendments and issues for comment.