JOHN C. RICHTER
UNITED STATES ATTORNEY
WESTERN DISTRICT OF OKLAHOMA
CHAIR, ATTORNEY GENERAL'S ADVISORY SUBCOMMITTEE
ON SENTENCING

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INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. It is a pleasure to appear before so many of you with whom I worked. Today I will address just a couple of the issues raised in the "Proposed Amendments" that you issued for comment on January 23rd. As is customary, the Department of Justice will be sending to the Commission, in a few days, a far more comprehensive response to all of the proposals.

I have a team of experienced prosecutors with me today. I ask the Commission's indulgence if I call upon one of them to respond to a particular question that you may have.

I would like to express the Department's appreciation for all of the hard work that your staff has done over the past year - from collecting and analyzing the data contained in the Booker Report and the Supplemental Quarterly Data Reports, to conducting the roundtables on Criminal History and Simplification,

and perhaps most significantly, working with all of the interested parties in developing guideline proposals for your consideration in response to the myriad of new and amended statutes. I believe that this informal but open dialogue has helped everyone in understanding and narrowing the issues. Their expertise has assisted us in being able to frame our suggestions into viable alternatives.

But before I address a specific topics, I would like to note that we are at a unique place in the history of the guidelines. At least for the time-being, the guidelines are advisory and while the Department has suggested some possible legislative responses, it is clear that everyone is waiting for the Supreme Court's decisions in *Rita* and *Claiborne*. In the meantime, the data that the Commission has collected has helped inform the discussions about the impact of *Booker* and its progeny.

The Department believes that in establishing the priorities for this year, the Commission correctly focused on some of the larger, systemic questions that are constantly raised, and decided, except as to immigration, to address only those guidelines that have been impacted by newly enacted or amended statutes.

In recognition of these Commission priorities, the Department is not seeking increases to the guidelines except in response to specific, newly-enacted, mandatory minimums or where the maximum sentence has been raised - i.e., where it is clear that Congress intended that sentences should be increased. In those instances we have been guided by the principle of proportionality with other existing guidelines.

I would now like to highlight some of our positions regarding the proposals that you have under consideration.

I. IMMIGRATION

First let me address immigration and particularly the proposed amendments to 2L1.2. We believe that in contrast to the other guidelines, this one is in dire need of change. The Courts, the probation offices, defense attorneys and prosecutors are unnecessarily expending significant time and effort parsing over words and statutory construction of state and local laws without any real benefit to the ultimate outcome, namely, a fair, predictable and appropriate sentence. In FY 2006, the Courts handled over 17,000 immigration cases (24.2% of it cases). We must do more, however, to ensure that we are fully utilizing the resources that have been given to us by Congress to enforce our immigration laws. The simple reality is that the current immigration guidelines provide a significant barrier to doing more. As you are aware, the Department favors a variation of either Option 6 or Option 7.

We do not favor either of these options as a means to increase the overall sentences for illegal re-entry cases. Rather, we favor these as a means to achieving fair sentences more efficiently, thereby allowing us to prosecute more cases. We originally offered the potential triggers in Option 6 as examples only, and recognize that the Commission may need to employ different triggers to develop a balanced Guideline. We have reviewed the changes included in Option 7, and the accompanying data, circulated by your staff last week, and believe that it achieves these goals of increased simplicity and net neutrality in terms of the total number of defendants who would receive the particular adjustments to their base offense level.

In its current form, § 2L1.2 encourages endless litigation over whether

convictions qualify for enhancement under the "categorical approach" outlined in the Supreme Court's *Taylor* decision. This litigation has become a major impediment to efficient sentencing and places a significant strain on the courts, the probation office, the prosecution, and the defense. As you know Chairman Hinojosa, this burden falls disproportionately on the five Southwest Border judicial districts, who prosecute the overwhelming majority of immigration related cases.

Making the Guidelines simpler will in turn make the system stronger and allow these cases to be handled more efficiently. Prosecutors, agents and probation officers spend an inordinate amount of time identifying, documenting, and researching prior convictions to determine whether they qualify as aggravated felonies or trigger specific offense characteristics under § 2L1.2. Defense attorneys must perform the same analysis, and eventually judges must do so as well. Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results in some cases, allowing bad actors to avoid appropriate punishment on seemingly technical grounds.

Options 6 and 7 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases – an extremely important consideration given the increasing volume of cases. It is important to emphasize also that the benefit will not be felt in just the cases prosecuted but also in the cases that we review and decline to prosecute criminally because it will make it far easier for prosecutors to ascertain the possible sentence and, therefore, whether the case merits the expenditure of federal resources. The Guideline calculation would be driven primarily by the length of sentence imposed

for prior convictions. Although state sentencing regimes are not entirely uniform, we believe the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under 2L1.2 than does the current categorical approach which is governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. After all, the present criminal history categories in the Guidelines are largely based on sentence length, and extensive study by the Commission has shown that there is a direct relationship between recidivism and these same criminal history categories. We also note that present Guideline 4A1.3, (Criminal History) provides judges with the flexibility to address prior sentences that overstate the seriousness of an underlying offense.

Finally, let me address one question that has been asked - should the Commission wait to amend 2L1.2 until Congress considers again this year possible amendments to the Immigration and Nationalization Act? We would answer emphatically - no. We need relief now. First, as the media has repeatedly reported there is a good chance that nothing will happen and we will be in the same position we were last year at the end of the Commission cycle. Second, even if legislation is passed, it would most likely have little, if any, impact on the changes proposed in option 6 or 7. The compromise Senate bill, S 2611, which was passed by the Senate last year and is the basis for discussions this year, amends the sentencing scheme for illegal entry and re-entry violations so that they are based in most part on the length of sentence imposed for prior convictions rather than the type of offense. We would submit that delaying change to 2L1.2 for another year only prolongs the expenditure of unnecessary resources and continues time consuming litigation.

Let me also address briefly the proposed amendments to the tables in §§ 2L1.1 and 2L2.1, respectively. These tables provide for increases in sentence based on the number of aliens or the number of documents involved in a given offense. As I believe you heard at your hearing last month, the Department strongly supports the idea of amending both tables to cover a broader numerical range. Our experience reveals that the tables do not adequately address the scale of the more serious alien smuggling and immigration fraud offenses we now encounter. The challenges we face in enforcement in this area have grown dramatically since these guidelines went into effect. Offenses involving hundreds of fraudulent immigration documents have become common, and offenses involving a thousand or more documents are not unique. Reform is needed in order to provide a uniform mechanism for handling cases of this size in place of the current undefined upward departure process. This, in our view, serves the twin purpose of proportionality and uniformity.

We think both of the options under consideration are an improvement over the existing Guidelines. We favor option two because it offers a more discriminating approach to the escalating seriousness of offenses involving 6 to 99 aliens or documents. Our experience reveals that the degrees of misconduct between the extremes of 6 and 99 aliens or documents are more significant than the present tables acknowledge. For instance, a smuggling offense involving 23 aliens generally is indicative of greater culpability than one involving 8 aliens, but the current table treats the offenses identically.

Option 2 similarly is superior because it provides greater offense-level increases for smuggling and fraud offenses involving larger numbers of aliens or documents. We welcome such increases because organized alien smuggling and

immigration fraud are two of the most serious enforcement problems we face today.

Finally, let me respond to your request for comment regarding whether the Department believes the base offense levels for §§ 2L1.1, 2L2.1, and 2L2.2 should be increased. With respect to § 2L1.1, we do not believe the Commission should increase the current base offense level of 12, assuming the Commission adopts either option 1 or 2 to amend the table governing the number of aliens involved in the offense. Regarding § 2L2.1, last year we recommended that the Commission raise the current base offense level from 11 to 12 to match the base offense level in 2L1.1, and we stand by that recommendation here. As for § 2L2.2, we believe the base offense level of 8 should be increased, especially for offenses involving immigration or naturalization documents. Under the present Guideline, most offenders face a zone A sentence of 0 to 6 months upon conviction for an offense involving a green card, naturalization certificate, or asylum claim – this is insufficient punishment in light of the seriousness of the offense.

SEX OFFENSES

With regard to sex offenses there are a number of proposed amendments, almost all of which are in response to amendments to various statutes contained in the Adam Walsh Act. I do not intend to discuss all of them in these opening remarks. I will leave those details for our discussions and our letter. I would like to address one issue, however, that was raised at the hearing last month - the issue of failure to register.

In the federal system the Bureau of Prisons and federal probation offices are

required to notify federal sex offenders that they must register as required by the Sex Offender Registration and Notification Act (SORNA) pursuant to 18 U.S.C. § 4042(c). Besides having to register while incarcerated, SORNA requires federal sex offenders to register as a mandatory condition of probation, supervised release, and parole, as provided in 18 U.S.C. §§ 3563(a)(8), 3583(d), 4209(a), so federal sex offenders become aware of their registration obligations by that route as well. With respect to non-federal sex offenders, all of the states should be informing sex offenders concerning registration obligations when they are released or sentenced. This was already a requirement under the old Jacob Wetterling Act sex offender registration and notification standards, found at 42 U.S.C. § 14071(b)(1)(A), and it is equally a part of the SORNA standards, found in § 117.

Liability under 18 U.S.C. § 2250 is limited to cases in which a person "knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act." Consistent with *Lambert v. California*, 355 U.S. 225 (1957), we understand this to require a violation by the offender of a known obligation to register or update a registration. Hence, convictions can occur under 18 U.S.C. § 2250 only where the government has proven beyond a reasonable doubt that the defendant violated a known registration obligation, or he admitted as much through a guilty plea.

Looking forward, we will be providing guidance to the states about notifying sex offenders concerning registration requirements which are new or different from those to which they were previously subject because of the SORNA reforms. This will be part of the general proposed guidance for state implementation of SORNA which we hope to get out for public comment within the next few weeks. But again, this is getting a bit far from sentencing. Suffice it

to say that if a sex offender has not been notified about a registration requirement, and it is not otherwise provable that he is aware of that requirement, then he cannot be convicted under 18 U.S.C. § 2250 for the reasons explained above.

With regard to the specific proposal to create new guideline 2A3.5 "Failure to Register as a Sex Offender," we believe, that it is appropriate to amend the specific offense characteristic for an offense against a minor to track the Congressional directive, and not be limited to sex offenses against a minor. Accordingly, "committed a sex offense against a minor" should be changed to, "committed an offense against a minor" - such offenses could include non sexual assaults, kidnaping, drug distribution and manufacturing, and alien smuggling.

Additionally, we believe that this guideline should reflect the ten year maximum penalty for this offense by providing a guideline sentence that would encompass ten years' imprisonment for an aggravated offense. For example, assuming an offender was in criminal history category III, was required to register for a Tier III offense, and committed an offense against a minor while not registered, that offender should face a guideline range encompassing 120 months before acceptance of responsibility. We believe this can be accomplished by increasing proposed SOC (1)(A) to 12 levels. This result in those whose registration was for a Tier III offense to be at level 28 before acceptance, or a sentencing range of 97 to 121 months.

Moreover, we recommend that the specific offense characteristic for an offender who committed a sex offense while not registered should be 8 levels, not 6. If this change were made, a criminal history category III offender whose registration was for a Tier III offense and who committed a sex offense while not registered would be at level 24 before acceptance, with a range of 63-78 months.

This punishment would be more consistent with the intent of Congress in passing the Act.

With regard to the proposed reduction for a voluntary attempt to correct the failure to register, the revised proposal has two options, in response to the Congressional directive in § 141(b)(3) of the Walsh Act. We recommend that the reduction for voluntary attempts to comply with registration requirements should not apply in cases where offenders actually commit qualifying offenses. Simply put, unregistered offenders who commit these offenses are precisely the reason that the registration requirements are in place, and it would be extraordinarily unjust to provide these offenders – who victimized others yet again – a reduction in their sentences.

In considering these options, the Commission should first recognize the affirmative defense at 18 U.S.C. § 2250(b), which in our opinion would prevent many if not most cases where offenders voluntarily attempted to comply with registration requirements from ever reaching the sentencing phase. The Commission should also recognize that the underlying purpose of this legislation is to provide an incentive for sex offenders to register as required by establishing a meaningful consequence for their failure to do so. Finally, the Commission should recognize that whether an offender voluntarily attempted to correct a failure to register offense is an issue only in cases where the offender knowingly committed that offense. Accordingly, as a completed offense has already occurred, arguably the base offense level would be an appropriate range for a case where, having committed the offense, the offender later attempts to correct his failure to register.

That said, of the two options under consideration we recommend Option 1 with a two level decrease. Option 2, which would allow for a downward

departure, is not limited to cases where the offender does not commit a specified offense while unregistered. Accordingly, it would potentially provide a windfall reduction to offenders who commit specified offenses while unregistered, which is nonsensical as those are the offenders least meriting a sentence reduction. In contrast, Option 1 rightly would deny this reduction to offenders who committed specified offenses while unregistered.

Under our suggestion, an aggravated offender such as one whose registration was for a Tier III offense and who committed an offense against a minor while unregistered would face a guidelines sentence encompassing the maximum statutory penalty, assuming criminal history category III. At the other extreme, a criminal history category III offender whose registration was for a Tier I offense, who did not commit a qualifying offense while unregistered, and who voluntarily attempted to correct his failure to register would be at level 8 (6-12 months) or 10 (10-16 months). In the middle, still assuming the offender is in criminal history category III, an offender who did not commit a qualifying offense while unregistered and whose registration was for a Tier II offense would be at level 14 before acceptance, or 21-27 months. We believe our suggestion appropriately creates a sentencing scheme where aggravated offenders will face sentences encompassing the statutory maximum while also taking into account the relative severity of different types of violations and the mitigating factor of an offender's voluntarily attempting to correct the failure to register before being informed of the violation by law enforcement.

With regard to proposed § 2A3.6 "Aggravated Offenses Relating to Registration as a Sex Offender," the current proposal would simply state that the guideline sentence is that required by statute. This is an appropriate guideline for

§ 2260A, as the sentence for that offense is set at 10 years in addition and consecutive to the penalty for the underlying offense. However, it is not appropriate for § 2250(c), because the statutory sentence has such a broad range – between 5 and 30 years in addition and consecutive to the underlying § 2250(a) offense. In essence, the current proposal would discount Congress's decision to set a minimum and maximum term for § 2250(c) offenses by specifying that the guideline range is the minimum term.

In order to account for the significantly dissimilar penalties under the two statutes, we recommend that the proposed guideline be revised so that it preserves the current formulation for § 2260A offenses and creates a framework for § 2250(c) offenses that would appropriately provide for sentences other than the mandatory minimum term. Our recommended approach would start with a base offense level of 25, the first offense level exceeding the mandatory minimum for category II offenders. We would then suggest having specific offense characteristics that would provide for up to level 41, encompassing 30 years for these offenders, in aggravated cases. In order to have appropriate gradations accounting for injuries to minors in cases where the offender committed a crime of violence against a minor while unregistered, we have considered the enhancements at § 2A2.2(b)(3) in developing this proposal and have incorporated similar enhancements here. While the specific offense characteristics would be similar to those under § 2A3.5, we believe that any possible double-counting concerns would be minimized since Congress specified that the penalty for a § 2250(c) offense is in addition and consecutive to the underlying penalty for the § 2250(a) offense.

II. DRUGS

The Adam Walsh Act created a new offense in 21 U.S.C. § 841(g), which provides a penalty of not more than 20 years for distributing a date rape drug over the internet knowing or with reasonable cause to believe it would be either 1) used to commit criminal sexual conduct or 2) that it was being distributed to any unauthorized purchaser. The Department supports Option Three of the Proposed Amendments. That option provides a six level enhancement with a floor of 29 if the person knew the drug would be used to commit criminal sexual conduct, a three level increase with a floor of 26 if the person had reasonable cause to believe the drug would be used to commit criminal sexual conduct, and a two level increase if the drug were sold to an unauthorized purchaser.

We believe that Option Three is preferable because it establishes a significant sentencing floor (29), whereas Options One and Two do not. The Department believes that situations involving knowing distribution of a drug over the internet to commit a criminal sexual assault require a significant sentencing floor. A mere two or four level increase to what will generally be an extremely low level offense is not sufficient to adequately reflect the severity of the act, namely knowingly facilitating a criminal sexual assault. It also provides for a more appropriate enhancement (six levels) than the smaller enhancements in Options One and Two (two or four levels). A two level increase, which is now used when a defendant distributes an anabolic steroid to an athlete, would not result in a proportionally appropriate sentence. A conviction under 21 U.S.C. § 841(g) requires proof that the defendant distributed the drug knowing or having reasonable cause to believe that it will be used to commit a serious sex offense and

should, thus, be punished more severely than the distribution of steroids.

We also prefer Option Three because it provides a tiered approach that punishes less severe conduct – knowing distribution with reasonable cause to believe the date rape drug would be used for illicit purposes – less severely than distribution knowing the date rape drug would be used for illicit purposes. In general, the Department favors tiered approaches that establish more stringent guidelines for the most culpable, and allow lesser sentences for less culpable individuals.

Finally, Option Three provides the appropriate two level enhancement for illegal distribution to an unauthorized purchaser. This enhancement is similar to the enhancement applicable to those who use the internet for mass marketing.

With regard to the new offense in 21 U.S.C. §860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing (or possession with intent to distribute) methamphetamine on premises in which a minor is present or resides, the Department strongly supports Option Two, which provides a six level increase with a floor of 29 for a manufacturing offense and a three level increase with a floor of 15 in distribution cases.

Option Two establishes a tiered, measured response which properly punishes at a significant level offenders who manufacture methamphetamine in the presence of minors, while imposing a lesser offense level for defendants who distribute methamphetamine on premises. In our view, Option Two appropriately reflects the severity of the offense, while protecting the public from further crimes of the defendant.

As recognized by Congress and as I can attest to first-hand given the

experience of Oklahoma with methamphetamine, the manufacture of methamphetamine in a home where a child is present involves inherently a awful risk of harm to that child. These children are exposed to toxic chemicals and vapors and left with not only their parents but all kinds of strangers whose behavior is corrosive to children. Option One only provides a two level increase with no floor in situations in which the Government proved the manufacture of methamphetamine where a child was presented or resided. This minimal enhancement fails to reflect the severity of the offense, e.g., the actual or potential harm caused by manufacturing methamphetamine where children are present, and the intent of Congress that such activity be punished severely.

We also believe that Option One is inadequate in that all distribution convictions under § 860a would only be subject to the two level increase, as opposed to a three level increase with a 15 floor as provide in Option Two. Again, the meager two level enhancement fails to adequately reflect the harm caused by distribution on premises where a child is present and Congressional intent to differentiate between offenses.

In the event the Commission adopts Option One, then at a minimum, the Department respectfully requests that the six level enhancement with a 30 floor be applicable to distribution, and possession with intent to distribute and manufacture cases which would allow the Government to obtain meaningful sentences for § 860a offenses involving distribution and possession with intent to distribute and manufacture cases.

CRACK

Finally let me briefly address the issue of Cocaine Sentencing Policy. In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine offenses. The existing policy – including statutory mandatory minimum penalties and sentencing guidelines – has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. The problems that crack brought to our community have not gone away. As the United States Attorney I have a duty to not only prosecute the large organizations but to protect our neighborhoods from the low level traffickers whose activities prevent law abiding residents from enjoying the full benefits and quality of life they deserve. In my District, therefore, our Oklahoma City Metropolitan Gang Task Force is aggressively pursuing local traffickers and gangs who use violence to protect and expand their sale of crack cocaine and thereby turn neighborhoods into shooting galleries.

That said, the Administration recognizes that the Commission and many others have been especially concerned that the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. We believe it may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum and guidelines sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission,

the Administration, and the Congress will continue its work together to determine whether any changes are indeed warranted. We think this collective work is especially critical, and should continue in consideration of larger, systemic changes taking place in federal sentencing. We are committed to continuing our participation in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

We continue to stress that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. The Commission, however, has a critical role to play. We think the Commission should continue to provide Congress, the Department of Justice, and the general public updated information on the current overall sentencing environment, crack and powder cocaine sentences being imposed in district courts around the country, and other research and data that will assist in the consideration of federal cocaine sentencing policy. We think all of this information will help ensure that federal policy will be crafted in a way that best achieves the purposes of sentencing. While we look forward to continuing all of this work with the Commission, we reiterate here that we would oppose any sentencing guideline amendments that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

CONCLUSION

That concludes my prepared remarks. The Department will be submitting within a few days a letter responding to many of the other issues raised in the Commission's *Proposed Amendments*. Let me say again how much I appreciate the Commission's time and attention on these important issues. The Department stands ready to assist the Commission in any way.

I will be glad to answer any questions.