



AMERICAN BAR ASSOCIATION

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Testimony of
JAMES E. FELMAN
on behalf of the
AMERICAN BAR ASSOCIATION
before the
UNITED STATES SENTENCING COMMISSION
for the hearing on
PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES
regarding
ALTERNATIVES TO INCARCERATION

Washington, D.C.

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Chair Sessions, and distinguished members of the United States Sentencing Commission:

Good morning. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am a former Co-Chair of your Practitioners' Advisory Group and am appearing today on behalf of the American Bar Association for which I serve as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The American Bar Association is the world's largest voluntary professional organization, with a membership of almost 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Carolyn Lamm to present to the Sentencing Commission the ABA's position on expanding alternatives to incarceration.

The ABA strongly supports the Commission's proposals to expand the use of alternatives to incarceration. We are all familiar with the recent statistic that for the first time in our nation's history, more than one in one-hundred of us are imprisoned. The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States. The Federal Sentencing scheme has contributed to these statistics. In the last 25 years since the advent of the Sentencing Guidelines and the mandatory minimum sentences for drug offenses, the average federal sentence has roughly tripled in length.

We know that incarceration does not always rehabilitate – and sometimes has the opposite effect. The time has come to reverse the course of over-incarceration, and the proposals set forth by the Commission represent positive, if modest, steps in this direction.

1. Expansion of the Zones in the Sentencing Table

The ABA strongly supports the expansion of alternative sentences under the Guidelines and commends the Commission for revisiting this critical issue. Virtually every state criminal justice system makes use of a wide variety of forms of punishment short of pure 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 addition to average sentence lengths tripling, imprisonment rates have increased dramatically in the Guidelines era. In 1984, more than 30% of defendants received sentences of probation without any term of incarceration. This reflected the considered judgment of the judiciary as a whole that in nearly one-third of cases the purposes of sentencing could be fully achieved without a period of imprisonment. By fiscal year 2008, only 7.4% percent of federal defendants received probationary sentences, 6.2% received “split” sentences of both imprisonment and home or community confinement, and the remaining 86.4% of defendants received sentences of straight incarceration. At the same time, utilization of community confinement has been curtailed and shock incarceration (“boot camp”) programs have been eliminated.

The current federal criminal justice system, in which a prison sentence is the default sentence and alternative sentences remain the relatively rare exception, is not what Congress envisioned in 1984 when it instructed the Commission to “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.” 18 U.S.C. § 994(j). The current Guidelines treat nearly every case as “otherwise serious” – in fiscal year 2008, 92.6% of offenders were sentenced to imprisonment.

The legislative history of the Sentencing Reform Act confirms Congress' intention to treat probation as a distinct type of sentence, and to treat sentences of probation and fines as clear forms of punishment and deterrence. We believe it is critical for the Guidelines to provide District Judges with the flexibility to consider alternatives to incarceration when imposing individualized sentences that are "sufficient, but not greater than necessary" to satisfy the statutory purposes of sentencing. As currently constituted, the zones within the Sentencing Table fail to provide judges with sufficient discretion when imposing sentences under a Guidelines analysis. All 258 ranges on the Sentencing Table include prison as a sentencing option, and only 42 ranges – or 16% of the ranges on the table – fall within Zones A or B, the two zones in which a non-prison sentence is possible under a Guidelines analysis. A system that instructs judges in the vast majority of cases to bypass the initial assessment of whether a defendant should be sentenced to prison is inconsistent with Congress' instruction that in every case sentencing judges should "determine whether to impose a term of imprisonment." Indeed, the present Guidelines operate as though 18 U.S.C. § 994(j) *required* a period of imprisonment for all but the most minor offenses.

Proposals to increase alternative sentencing options in the Guidelines date back nearly as far as the Guidelines themselves and have been the subject of considerable study. In 1990, the Judicial Conference of the United States, as well as an esteemed group of experts under the leadership of Commissioner Helen Corrothers, recommended expansion of a wide array of alternatives to incarceration. Ten years later, in 2000, the Practitioners' Advisory Group proposed the 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).

At its August 2003 annual meeting in San Francisco, United States Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing and corrections in the United States and to make recommendations on how to ameliorate or correct the problems of over-incarceration Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121A, approved August 9, 2004, urged all jurisdictions, including the federal government, to expand alternatives to incarceration and to "[s]tudy and fund treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness." This work was followed in 2007 by the ABA's Commission on Effective Criminal Sanctions, which conducted an exhaustive review of existing alternatives to incarceration in state criminal justice systems. With the support of the National District Attorney's Association, the ABA Commission on Effective Criminal Sanctions recommended expanded uses of diversion and deferred adjudication and community-based treatment alternatives to incarceration.

The reasoning underlying the recommendations of the Judicial Conference, Corrothers Working Group, Practitioners' Advisory Group, two ABA Commissions and the ABA House of Delegates has only grown stronger, and the need to expand alternative sentencing options within the Guidelines more compelling, with each passing year. The size of the federal prison population – and the cost of maintaining this population – continues to increase: there are now approximately 200,000 inmates in federal prisons, further evidence that our federal sentencing system has failed to take into

account the capacity of penal and correctional facilities, as Congress instructed. Even before *Booker*, surveys of the judiciary confirmed the widespread view of sentencing judges that greater flexibility to utilize alternatives to incarceration was essential to achieve the purposes of sentencing. Under the post-*Booker* advisory regime, the Guidelines should better reflect the added discretion that judges now exercise by making it even less likely that a judge will need either depart or “vary” from the Guidelines to impose a sentence that does not include a prison term. As the Supreme Court stated in *Gall*, the Guidelines are “the starting point and the initial benchmark” of the sentencing determination. The zones in the Sentencing Table too often set the benchmark as a term of imprisonment and do not adequately reflect the judicial discretion to determine not just the duration, but also the disposition, of a sentence under the advisory Guidelines.

In light of these considerations, we believe that the Commission's proposed amendments to the Sentencing Table, while providing judges with greater discretion to impose non-prison sentences under the Guidelines, simply do not go far enough. Specifically, we would urge the Commission to consider three expansions of its pending proposal: (1) expand the zones by two offense levels rather than one; (2) eliminate the distinction between Zones B and C, and (3) create a new Criminal History Category 0 for true first offenders. The first two of these steps were recommended by the Judicial Conference, Corrothers Working Group, and the PAG. The third recommendation grows out of the Sentencing Commission’s extensive study of criminal history and recidivism over the past decade.

First, expanding the zones by only one level is simply too modest a step to achieve compliance with the congressional directive to ensure sentences other than imprisonment for non-violent first offenders. If the zones were expanded by only one level, this would have virtually no

practical effect in the vast majority of cases – those involving economic crimes, tax offenses, drug offenses, and many others – because the quantity adjustments driving the offense levels for those offenses increase in *two*-level increments. Thus, it would appear that even after a one-level expansion of the zones, imprisonment would still be required in virtually all cases in which imprisonment is required by the existing Guidelines. The ABA is not aware of whether the Commission has data regarding the anticipated impact of its published proposal, but it would appear likely that the impact would be quite small.

Second, the proposed amendment continues the requirement that defendants in Zone C must be sentenced to a term of imprisonment of at least half the minimum term of the guideline range. This restriction on the types of sentences available for certain defendants seems more reflective of the former mandatory Guidelines regime in which the zones were initially created and fails adequately to capture the added discretion that district judges exercise post-*Booker*. Thus, in addition to expanding what is currently Zone C by more than one level, we recommend that the Commission simplify the Sentencing Table by merging Zone C into Zone B. The Judicial Conference and Corrothers Working Group made precisely this proposal to the Commission two decades ago; the underlying rationale of affording judges the discretion to impose non-prison sentences in more cases applies with even greater force under an advisory Guidelines system. By expanding what is currently Zone C, and then merging the newly formed Zone C into Zone B, the Sentencing Table would include more ranges in which a non-prison sentence is an option. This would more accurately capture the individualized sentencing processes in which judges must first determine whether any term of imprisonment is necessary to satisfy the purposes of sentencing.

Third, the Commission should create a new Criminal History Category 0 for true first offenders. As presently constructed, Criminal History Category I includes both first offenders and offenders who have criminal records. The Commission's extensive study of criminal history and recidivism demonstrated that true first offenders are simply different – they have significantly lower risk of recidivism than those with prior criminal experience. This reflects Congress' intuitively correct determination in the enabling legislation that first time offenders are *peculiarly* suited for non-imprisonment sentences. This difference between first offenders and those with prior criminal history should be reflected in the Guidelines.

The Commission has requested comment on whether the zone changes should apply only to certain categories of offenses and whether certain offenses should be exempted from these zone changes. We urge the Commission not to limit the applicability of the zone changes by category of offense for several reasons. First, such an exemption would do unneeded violence to the historical structure and framework of the guidelines manual. From its inception the manual has stood as an effort to provide proportional punishment across the entire spectrum of federal offenses. The relative severity of each offense category is considered and addressed within each offense guideline and then channeled into the sentencing table as a product of all pertinent considerations. Never before has the Commission attempted to identify certain categories of offenses for differential treatment within the sentencing table. Such a structure would suggest that the careful calibration of proportionality across all offenses previously underlying the manual no longer obtains. Indeed, it would suggest for the first time in the history of the Guidelines that one set of considerations should govern the appropriate length of sentence and yet some other and different set of considerations should inform the “in/out” question of whether to impose a sentence of imprisonment at all. The

ABA is unaware of any justification for such a radical departure from past practices of guideline structure.

Second, grafting exemptions onto the expanded zones will add considerable and unnecessary complexity to the Guidelines. The application of each offense guideline and the determination of various alternatives under the various zones is sufficiently complex as it is. To then add a new step at the end of this process to limit the availability of alternatives under the new zones to an array of particular offenses would appear unduly burdensome. This complexity would be compounded by the fact that the proposal reflects only a partial expansion of the existing zones. Thus, unless the Commission proposes actually to *reduce* the existing availability of alternative sentences in such cases – a proposition for which there would appear to be neither empirical nor practical need – the possible offense-specific restrictions would apply only to a *portion* of the new zones. Even within the same zone there would not be uniformity of application; there would, in effect, be “sub-zones” within the expanded zones. This degree of additional complexity would appear unnecessary, particularly in the context of an advisory guidelines regime.

Third, the issue for comment does not specify whether the possible new exception would be based on the offense of conviction or based on relevant conduct. If the former, it would invite charge manipulation that runs contrary to the purposes of the guidelines. If the latter, defendants would face uncertainty at the time of a guilty plea regarding whether the expanded zones would apply in their cases, and this would further complicate the sentencing process.

Finally, we see little reason to believe that any particular class of offender at the same total offense level would be more or less deserving of an alternative to incarceration. For example, we see no basis for the suggestion that tax offenders should be treated any more harshly than a child

pornographer, an arsonist, an extortionist, a burglar, a money launderer, or an environmental criminal. We fear that political considerations will lead to constant “tinkering” with the eligibility for alternatives based on whatever “crime de jour” is making headlines at the time. We urge the Commission to expand the use of alternatives to incarceration, and to do so equally for all offenses deemed of equal severity for all other purposes in the Guidelines.

II. Drug Treatment Alternatives

The ABA applauds the Commission’s leadership in recognizing that in many cases the purposes of sentencing are best furthered by providing treatment for certain drug addicted offenders as an alternative to incarceration. As noted above, the ABA has long supported the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness and who pose no substantial threat to the community. The ABA’s analysis of alternative sentencing programs in other jurisdictions indicates that such programs are often associated with reduced recidivism rates. We encourage the Commission to make the greatest use of such treatment possible because we believe this will maximize the opportunities for better outcomes, reduced recidivism, and the avoidance of unnecessary incarceration. We thus would favor the use of all drug treatment programs that are effective without regard to whether they are wholly residential, partially residential, or outpatient. Our understanding is that residential treatment is much more expensive than outpatient treatment and is not available in many areas. Moreover, for some offenders, outpatient treatment may be more beneficial under the totality of the circumstances. We believe the combination of drug treatment professionals and local district court judges assisted by federal probation officers are best situated to determine the course of treatment options that are best suited to each individual defendant.

We would also favor permitting the courts to sentence appropriate drug addicted defendants to treatment as an alternative to imprisonment without regard to whether the addiction contributed substantially to the commission of the offense. The driving rationales for the use of drug treatment as an alternative to imprisonment are to rehabilitate the offender, enable the offender's reintegration as a productive member of society, and reduce recidivism. These goals are not reduced or impacted by the degree to which the offender's addiction caused the prior offense.

We would also urge the Commission either to set no offense level ceiling on drug treatment alternatives or, at a minimum, to set offense level 16 rather than offense level 11 as the ceiling for eligible offenders. Particularly if the Commission goes forward with the expansion of the sentencing zones discussed above, permitting alternatives for drug treatment for offenders at offense level 16 reflects a very modest expansion of the existing authority to impose alternatives for non-drug treatment reasons. An offender can score an offense level 16 for fairly small amounts of drugs, and given the requirement that the offender also meet the "safety valve" criteria in § 5C1.2, these offenders could well include viable candidates for treatment as an alternative to imprisonment. Indeed, the ABA is concerned that many offenders who would benefit from a treatment alternative to incarceration are excluded by tying eligibility to the "safety valve" criteria, and would urge the Commission to consider whether less restrictive conditions could be used to determine eligibility for drug treatment alternatives.

Although the ABA is strongly supportive of the proposed alternatives to incarceration for drug treatment, that support is accompanied by one caveat. Because the proposal as currently formulated may have an impact on an exceedingly small number of offenders, it is essential that the Commission couple its amendment with a policy statement explaining that the drug treatment

alternatives in the amendment are *not* intended to be exclusive or to “occupy the field.” If the amendment were written or construed by courts to mean that alternatives to imprisonment for drug treatment are *only* appropriate in the narrow class of cases subject to the amendment, then the amendment may well have the unintended effect of actually being a step backward in the expansion of drug treatment alternatives to incarceration.

The Commission has requested comment on whether defendants with a condition other than drug addiction, such as a mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration. The ABA would answer this in the affirmative. The Guidelines should allow for the possibility of treatment programs for defendants with mental or emotional conditions. District Judges should be afforded the discretion to apply the range of sentencing options that proposed §5C1.3 provides when sentencing defendants with mental or emotional conditions, for whom a treatment program may be the best way to satisfy the §3553(a) factors. At the very least, the potential alternative sentences based on drug treatment should not be limited to only those individuals convicted of drug offenses. In many cases, someone addicted to or abusing controlled substances or alcohol will commit other crimes in order to purchase drugs or may commit crimes under the influence of drugs. Both the offender and the community are often better served by ensuring that the underlying addiction and abuse issues are addressed rather than resorting to costly and often counter-productive periods of imprisonment.

In closing, we appreciate the Sentencing Commission's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Commission might find helpful. Thank you for the opportunity to address you this morning.