COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

April 25, 2005

Honorable Donetta W. Ambrose
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable Jose Antonio Fuste
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable William T. Moore, Jr.
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable Thomas J. Rueter
Honorable Emmet G. Sullivan

Honorable Sim Lake, Chair

TELEPHONE
(713) 250-5177

FACSIMILE
(713) 250-5010

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to express the views of the Judicial Conference of the United States with regard to H.R. 1528, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005," as approved by the Subcommittee on Crime, Terrorism and Homeland Security on April 12, 2005. The first eleven sections of this legislation are similar to H.R. 4547, a bill introduced in the 108th Congress that the Judicial Conference opposed. The most significant difference between H.R. 1528 and H.R. 4547, however, is the addition of a new Section 12, "Sentencing Protections," which appears to be a response to *United States v. Booker*, 125 S. Ct. 738 (2005).

The judiciary is firmly committed to a sentencing guideline system that ensures adequate deterrence of criminal conduct and protects the public from further crimes by convicted criminals, but is also fair, workable, transparent, predictable, and flexible. We believe that an advisory guideline system can achieve all of these goals, and the sentencing data since *Booker* supports this belief.

According to the Sentencing Commission's most recent data, the number of sentences within the guideline range has remained fairly constant since *Booker* was decided and corresponds to historical sentencing practices. This is consistent with the experience of state court advisory guideline systems where most sentences fall within guideline ranges. Moreover, in the reported post-*Booker* decisions in which courts have imposed sentences outside the advisory guideline range, judges have explained why such sentences were appropriate.

Since *Booker* was decided, appellate courts have reviewed the reasonableness of district court sentences, and when they have determined that district court sentences were not reasonable, they have remanded the cases for resentencing. For example, appellate courts have concluded that a downward departure was unreasonable when it exceeded the government's downward departure recommendations based on a U.S.S.G. § 5K1.1 substantial assistance motion[1] and when the district court granted a defense motion for a substantial downward departure due to extraordinary rehabilitation.[2]

Although the sentencing guidelines are now advisory, *Booker* nevertheless requires district judges to consider the sentencing guidelines, *i.e.*, to determine the applicable guideline range and whether any departure, either up or down, is warranted under the guidelines. If a judge concludes that the guidelines as a whole do not adequately address a factor mentioned in 18 U.S.C. § 3553(a), a non-guideline sentence may be imposed. *Booker* requires appellate courts to review the reasonableness of these decisions. Sentencing data since *Booker* reflects that both district and appellate courts are accepting these responsibilities in a serious and thoughtful manner and supports the Judicial Conference's position that Congress should take no immediate legislative action in response to *Booker* but instead should allow the advisory guideline system to remain in place.

The judiciary is very concerned that the sentencing provisions of Section 12 of H.R. 1528 were included without supporting data or consultation with the judiciary. Because there is no demonstrable need to consider possible legislative responses to *Booker* at this time, and because, as explained below, Section 12 does not represent a sound alternative to the present advisory guideline system, the Judicial Conference strongly opposes this proposal.

Sentencing Guideline Range Floors Become Mandatory Minimum Sentences

Section 12(a) of H.R. 1528 would have the effect of converting the floors of the now-advisory sentencing guideline ranges into mandatory minimum sentences. Section 12(a)(1) and (3) of the bill would preclude judges from considering 36 factors concerning the history and characteristics of defendants that judges have historically regarded as appropriate in making sentencing decisions. Among the 36 excluded factors are departure grounds that the present sentencing guidelines either authorize or do not prohibit. For example, the sentencing guidelines manual states that certain factors not ordinarily relevant in determining whether a departure is warranted – such as vocational skills, mental and emotional conditions, employment record, and family ties and responsibilities – may be considered as grounds for departure in exceptional cases. If a judge unreasonably grants a downward departure based on one of these considerations, the government can appeal, and in appropriate cases, the appellate courts will reverse the departure.[3]

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[1] *United States v. Dalton*, No. 04-1361, 2005 WL 840107 (8th Cir. April 13, 2005).

[2] *United States v. Rogers*, 400 F.3d 640, 641-42 (8th Cir. 2005).

[3] See, *e.g., United States v. Rogers*, 400 F.3d 640, 641-42 (8th Cir. 2005).

Section 12(a)(1) and (3) would only allow consideration of these factors as a basis for increasing a sentence from the bottom of a guideline range to a point within, or above, the range. As a practical matter, a sentence below an advisory sentencing guideline range would be available only if the government filed a substantial assistance motion, or pursuant to an Attorney General-approved early disposition (or "fast-track") program.

This proposal is similar to the earlier "topless guidelines" proposal that was formulated by Professor Frank Bowman soon after *Blakely v. Washington*, 124 S.Ct. 2531 (2004), was decided. The validity of both proposals depends on the continuing viability of *Harris v. United States,* 536 U.S. 545 (2002) (plurality opinion), which allows judicial fact-finding in applying minimum sentencing requirements. Many observers have opined that because a majority of the Supreme Court has applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the Washington State guidelines in *Blakely* and to the federal guidelines in *Booker*, a majority of the Supreme Court would now vote to overrule *Harris*. In addition, some observers believe that converting the floors of the now-advisory sentencing guideline ranges to mandatory minimum sentences could be challenged as an unconstitutional evasion of *Blakely* and *Booker*.[4]

New Workload Requirements for Downward Departures

Judges who might identify a basis for downward departure notwithstanding the limitations imposed by Section 12(a)(3) would be subject to new, time-consuming procedural obstacles. Judges would be required to provide the parties with twenty days' written notice of the proposed below-range sentence identifying (1) specific factors supporting the sentence, (2) the reasonableness of the proposed sentence, and (3) how the sentence would avoid disparity among federal defendants with similar records or conduct. In addition, judges would be obliged to allow the parties to submit briefs and conduct an evidentiary hearing to consider the reasonableness of the proposed sentence and any unwarranted disparity that might result. These new procedures could significantly increase the judiciary's workload, requiring protracted sentencing hearings and additional written opinions explaining court findings.

Rehabilitation of Offenders

Section 12(a)(2) eliminates 18 U.S.C. § 3553(a)(2)(D), one of the cornerstone provisions of the Sentencing Reform Act, by removing any consideration of the need for a sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Prohibiting judges from considering these factors in sentencing decisions appears to be inconsistent with the interest that some in Congress have

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[4] *See Apprendi v. New Jersey*, 530 U.S. 466, 490-91 at n.16 (noting that "if such an extensive revision of the State's entire criminal code were enacted for the purpose...[of evasion], we would be required to question whether the revision was constitutional under this Court's prior decisions").

expressed in expanding reentry initiatives to provide better transition for offenders released from prison to return to the community.[5]

Mandatory Minimums

The Judicial Conference has long opposed mandatory minimum sentences.[6] Since passage of the Sentencing Reform Act, the Conference has expressed concern that mandatory minimum sentences subvert the sentencing scheme of the Sentencing Reform Act.[7]

The Sentencing Commission has adopted a similar position.[8] The Sentencing Commission has determined that mandatory minimum sentences skew the "finely calibrated smooth continuum" of the sentencing guidelines, preventing the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[9] This negative effect stems from the fact that mandatory minimum sentences create dramatic discrepancies in sentences between defendants who fall just below the threshold of a mandatory minimum and defendants whose criminal conduct meets the statutory criteria.

Sections 2, 4, and 10 of H.R. 1528 would expand the application of mandatory minimum sentences by creating new penalties, increasing existing penalties, expanding the scope of offenses that expose defendants to such sentences, and creating new offenses with mandatory minimum sentences. We therefore urge the Judiciary Committee to delete these provisions from the bill.

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[5] *See, e.g.,* H.R. 1704, which was introduced on April 19, 2005, by Representative Rob Portman (R-OH) along with 28 co-sponsors.

[6] *See* JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p.16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; and JCUS-MAR 93, p. 13.

[7] JCUS-MAR 90, p. 16.

[8] *See Special Report to Congress: Mandatory Minimums in the Federal Criminal Justice System*, United States Sentencing Commission, August 1991.

[9] U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory Minimum Sentencing*: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

Sentencing Guidelines

The Judicial Conference has also historically opposed direct congressional amendment of the sentencing guidelines because such amendments undermine the basic premise underlying the establishment of the Sentencing Commission – that an independent body of experts appointed by the President and confirmed by the Senate, operating with the benefit of the views of interested members of the public, is best suited to develop and refine such guidelines.

Sections 2(n), 3, 5, 7, and 8 of this proposed legislation would either directly amend the sentencing guidelines or impose specific directions upon the Sentencing Commission so as to be tantamount to direct amendment of the guidelines. We recommend that provisions in the bill that directly amend the guidelines, or that dictate how the Commission must amend the guidelines, be revised to direct the Sentencing Commission to study the amendment of specified guidelines.

Safety Valve

Sections 2(n)(1) and (2), 3(a), and 6 would diminish the availability of the statutory safety valve provision[10] and the corresponding sentencing guidelines.[11] Congress enacted the safety valve provision in 1994 with the support of the Judicial Conference to ameliorate some of the harshest results of mandatory minimums by permitting judges to apply the sentencing guidelines instead of the statutory minimum sentences in cases of certain first-time, non-violent drug offenders. These provisions would greatly diminish the availability of the safety valve. For example, Sections 2(n) and 6 would disqualify defendants from safety-valve eligibility if they exercised their constitutional right to a trial. Even if a defendant pleaded guilty, the bill would foreclose a district judge from considering safety valve relief unless the government certified that the defendant pleaded guilty to the most serious, readily provable offense. Such a provision would allow the government to withhold the necessary certification on the grounds that the defendant did not plead guilty "to the most serious readily provable offense," despite the fact that the government had opted to bargain away that offense.

We appreciate this opportunity to provide the views of the Judicial Conference on this significant legislation. The Committee on Criminal Law looks forward to working with the Judiciary Committee as it carefully examines whether a response to *Booker* will be needed.

The Committee, along with the Federal Judicial Center and the Sentencing Commission, is sponsoring a National Sentencing Policy Institute in Washington, D.C., on July 11-12, 2005. The purpose of the institute is to bring together over 100 judges, congressional staff, and Department of Justice officials with the members of the Committee and the Sentencing Commission (1) to discuss potential policy and practical issues arising from the *Booker* decision and (2) to provide feedback

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[10] 18 U.S.C. § 3553(f).

[11] U.S.S.G. §§ 2D1.1(b)(7) and 5C1.2.

on these issues to the Committee and the Commission. We intend to invite the leadership of both the House and Senate Judiciary Committees and their staffs to attend the institute and actively participate. We hope you will be able to join us.

If you have any questions, please contact me or have your staff contact Acting Assistant Director Dan Cunningham, Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Very truly yours,

Sim Lake

cc: Honorable John Conyers, Jr.
Ranking Minority Member

Members, House Judiciary Committee