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AMERICAN BAR ASSOCIATION

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January 4, 2005

His Excellency, Dr. Santiago Canton
Executive Secretary
Inter-American Commission on Human Rights
Washington, D.C. 20006

Dear Dr. Canton:

I am writing to urge the Commission pursuant to Article 64 of your Regulations to hold a hearing during its 126th session to examine the issue of the discriminatory impact of mandatory minimum sentencing in the federal criminal system of the United States of America. I write in my capacity as Chair of the Criminal Justice Section of the American Bar Association.

As you may know, the American Bar Association is an organization of over 400,000 lawyers, law students and judges in the United States and its territories. It is the largest voluntary professional association in the world. The American Bar Association continually works to improve the American system of justice and to advance the rule of law in the world. The Criminal Justice Section of the American Bar Association includes prosecutors, defense counsel, judges, law professors, correctional and law enforcement personnel, and other criminal justice professionals and students within its membership. The Criminal Justice Section has primary responsibility for the American Bar Association's work on solutions involving crime, criminal law, and the administration of criminal and juvenile justice.

Mandatory minimum penalties are predetermined by the U.S. Congress and automatically imposed for certain crimes, the great majority for offenses involving drugs or weapons. The U.S. Sentencing Commission has found that federal mandatory minimum penalties are applied in a discriminatory fashion and lead to increased arbitrariness in federal sentencing. We agree with the observation made by the Justice Roundtable that the "most flagrant example of the discriminatory impact of mandatory minimum sentences is the distinction between crack and powder cocaine."

The American Bar Association has had a longstanding concern with mandatory minimum sentencing and its discriminatory impact. ABA policy has been to consistently oppose the use of mandatory minimum sentences. In 1995, the ABA called for the elimination of “current differences in sentencing based upon drug quantity for offenses involving crack versus powder cocaine” which were based on a system of mandatory minimum penalties set forth in the federal sentencing guidelines. (*See* Recommendation 129, Annual 1995 (IR&R; Special Committee on the Drug Crisis; cosponsored by the Standing Committee on the Unmet Legal Needs of Children).)

Recently, the ABA was challenged to help reform the American criminal justice system by Supreme Court Justice Anthony M. Kennedy. Addressing the ABA Annual Meeting held in San Francisco in August of 2003, Justice Kennedy raised fundamental questions about the fairness, wisdom and efficacy of criminal punishment in the United States. In respect to mandatory minimum sentences, Justice Kennedy said, “I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences.” “In too many cases,” he asserted, “mandatory minimum sentences are unwise or unjust.”

In response to Justice Kennedy’s concerns, the ABA established a commission, bearing his name, to investigate the state of sentencing and corrections within the criminal justice system and make recommendations on how to correct the problems Justice Kennedy identified. The Kennedy Commission found that American policy makers embrace of determinate sentencing practices, including mandatory minimum sentences, elimination or reduction of parole, and increases in base penalties “produced a steady, dramatic, and unprecedented increase in the population of the nation’s prisons and jails” and the resulting reduction of judicial discretion drastically increased racial disparities in the criminal justice system.

Following receipt of the Kennedy Commission report, the ABA adopted policy urging the repeal of mandatory minimum sentence statutes and encouraging other steps to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities. (*See* Recommendations 121A and 121B, Annual 2004 (Kennedy Commission).) The ABA reasserted its opposition to mandatory minimum sentences in the policy it adopted in response to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Supreme Court weakened the system of mandatory minimum sentences utilized in federal courts by holding that facts leading to increased sentences under the federal sentencing guidelines must be established by jury verdict. In response to *Booker*, the ABA urged Congress to take several steps to assure fair, effective and just federal sentencing practices, including allowing expanded sentencing ranges to be derived from jury verdicts and permitting downward departures from these ranges. (*See* Recommendation 301, Midyear 2005 (Criminal Justice Section).)

Based on these prior expressions of ABA policy, we urge you to schedule a hearing to examine the discriminatory impact of mandatory minimum sentencing in the federal criminal system of the United States of America. We hope you decide to conduct these hearings, and if you do so decide, we stand ready to provide you with any assistance.

Thank you for your time and consideration of this request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael S. Pasano". The signature is stylized with a large, looped initial "M" and a long, horizontal flourish extending to the right.

Michael S. Pasano
Chair, Criminal Justice Section of the American Bar Association

Enclosure

Recommendation 301, Midyear 2005 (Criminal Justice Section)

RESOLVED, that, in light of the United States Supreme Court's decisions in *United States v. Booker*, 2005 WL 50108 (January 12, 2005), the American Bar Association urges the United States Congress to take the following steps to assure that federal sentencing practices are effective, fair and just and effectuate the goals of sentencing set forth in the Sentencing Reform Act:

1. Permit federal courts to use advisory guidelines while Congress carefully examines sentencing practices under such guidelines;
2. Forthwith direct the United States Sentencing Commission to assemble and analyze all available data regarding sentences imposed under *Booker*, including the information required by 18 U.S.C. § 3553 (c) regarding sentences outside the guidelines, and submit a Report with recommendations to the Congress within 12 months; and
3. While awaiting the Report from the Sentencing Commission on the data, conduct hearings and solicit input from all constituents within the federal criminal justice system regarding the wisdom and efficacy of the post-*Booker* procedure and how it compares to any available legislative options as well as state sentencing guidelines systems; and

FURTHER RESOLVED, that Should Congress determine that use of advisory guidelines results in unwarranted disparities, Congress should consider, as a substitute for advisory guidelines, the following actions:

1. Simplify the guidelines either by adding a limited number of critical culpability factors as elements of each offense to be determined by the jury, or by directing the Commission to identify sentencing factors to be determined by the jury;
2. Revise the 25% rule to allow expanded sentencing ranges derived from the jury verdicts;
3. Permit downward departures from these ranges under the same standard applicable to the existing guidelines; and
4. Leave to the Judicial Conference of the United States and the Rules Enabling Act process the task of identifying and proposing any necessary procedural revisions such as bifurcation of proceedings, rules of discovery regarding sentencing factors, and additional jury instructions.

Recommendation 121A, Annual 2004 (Kennedy Commission)

RESOLVED, That the American Bar Association urges states, territories and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction, based on the following principles:

- (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
- (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.

FURTHER RESOLVED, That the American Bar Association urges that states, territories and the federal government:

- (1) Repeal mandatory minimum sentence statutes;

- (2) Employ sentencing systems consistent with *Blakely v. Washington*, 542 U.S. ____, 72 U.S.L.W. 4546 (June 24, 2004), that guide judicial discretion to avoid unwarranted and inequitable disparities in sentencing among like offenses and offenders, but permit courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence;
- (3) Require a sentencing court to state on the record reasons for increasing or decreasing a presumptive sentence, and permit appellate review of any sentence so imposed.
- (4) Assign responsibility for monitoring the sentencing system to an entity or agency with sufficient authority and resources to:
- (a) Recommend or adopt alternatives to incarceration that have proven successful in other jurisdictions; and
- (b) Gather and analyze data as to criminal activity and sentencing and the financial impact of proposed legislation, and consider whether changes in sentencing practices should be recommended or adopted in light of increases or decreases in crime rates, changes in sentencing patterns, racial disparities in sentencing, correctional resources, and availability of sentencing alternatives.
- (5) Study and fund treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness.
- (6) Adopt diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction.
- (7) Develop graduated sanctions for probation and parole violations that provide for incarceration only when a probation or parole violator has committed a new crime or poses a danger to the community.

FURTHER RESOLVED, That the American Bar Association recommends that the Congress:

- (1) Repeal the 25 percent rule in 28 U.S.C. §994(b)(2) to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing guidelines and consider state guideline systems that have proven successful.
- (2) Reinstate the abuse of discretion standard of appellate review of sentencing departures, in deference to the district court's knowledge of the offender and in the interests of judicial economy.
- (3) Minimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently.
- (4) Repeal the limitation on the number of judges who may serve on the United States Sentencing Commission.

Recommendation 121B, Annual 2004 (Kennedy Commission)

RESOLVED, That the American Bar Association urges states, territories and the federal government to strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by enacting measures that would:

- (1) Establish Criminal Justice Racial and Ethnic Task Forces to:
- (a) include individuals and entities who play important roles in the criminal justice process, and invite community participation from interested groups such as advisory neighborhood commissions and local civil rights organizations; and
- (b) design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition and sentencing; make

periodic public reports on the results of their studies; and make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.

(2) Require law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, including education and training, data collection and analysis and other “best practices” that have been implemented throughout the country through voluntary programs and legislation.

(3) Require legislatures to conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation; review the data gathered and recommendations made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

Recommendation 129, Annual 1995 (IR&R; Special Committee on the Drug Crisis; cosponsored by the Standing Committee on the Unmet Legal Needs of Children)

Resolved, That the American Bar Association endorses in principle the U.S. Sentencing Commission proposal transmitted to Congress on May 1, 1995, to amend the federal sentencing guidelines and manual to a) eliminate current differences in sentences based upon drug quantity for offenses involving crack versus powder cocaine, and b) assign greater weight in drug offense sentencing to other factors that may be involved in the offense, such as weapons use, violence, or injury to another person.