

United States District Court
for the
District of Puerto Rico
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Hon. Gustavo A. Gelpi
U.S. District Judge

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STATEMENT OF
UNITED STATES DISTRICT JUDGE GUSTAVO A. GELPI
BEFORE THE UNITED STATES SENTENCING COMMISSION

NEW YORK, NEW YORK
JULY 10, 2009

Mr. Chairman and members of the Commission. Thank you for inviting me to testify before you on occasion of the twenty-fifth anniversary of the passage of the Sentencing Reform Act of 1984.

My involvement with the Federal Sentencing Guidelines dates back to 1993 when I commenced working as an Assistant Federal Public Defender. During those days the Guidelines were mandatory, the safety valve was just about to be implemented, and defendants in drug cases could not obtain a mitigating role cap to their base offense level. Those were certainly very tough days for a criminal defense attorney.

Sixteen years later, federal sentencing has evolved drastically — the result of the combination of guideline amendments, legislative enactments and, more recently, the Supreme Court's holdings in Booker, Gall and Kimbrough (hereinafter Booker, collectively). Those changes, in my view, today afford many deserving defendants the opportunity of a much fairer sentence than they would have received in the past.

I will illustrate this point with two common examples. Under U.S.S.G. § 2L1.2, an alien convicted of illegal reentry following deportation for an aggravated felony receives a base offense level of 8 to which between 4 and 16 levels will be added, based on a gradation of his earlier conviction which triggered the removal. When I was in practice, almost any prior felony offense would result in the 16-level enhancement. In many cases this resulted in drastic unfairness. For example, a defendant convicted of trafficking a small amount of cocaine was treated exactly like a defendant convicted of trafficking multi kilo drug amounts or first degree murder. This no longer occurs. Additionally, Booker provides a further avenue for relief, when and if appropriate.

The second scenario involves a minor or minimal participant in a drug trafficking offense. Under U.S.S.G. § 2D1.1 (a)(3), that defendant will have the base offense level capped between levels 30 and 34, absent a death or serious bodily injury. Fifteen years ago, my former clients did not have this benefit. If one adds the safety valve statute and guideline, 18 U.S.C. § 3553(e) and U.S.S.G. § 5C1.2, a qualifying defendant may obtain a further 2-level reduction, and a sentence below any applicable five or ten year statutory minimum. Also, a defendant may ultimately invoke Booker for further relief, where meritorious.

In the aftermath of Booker most defendants in all types of cases benefit from guideline plea offers which defense counsel would have never seen in the past. Furthermore, in today's sentencing landscape, many more defendants opt to enter straight pleas, something that was not so common before.

As the Commission's statistics evidence, the judges in the District of Puerto Rico for the most part continue to sentence defendants within the appropriate sentencing guideline range. *See 2008 Sourcebook of Sentencing Statistics* at 245. For fiscal year 2008, my colleagues and I (seven district judges and one senior district judge) who preside over criminal cases sentenced within the guideline range in 75.3 percent of all cases. *Id.* This is certainly well above the national average of 59.4 percent. Additionally, in my district an additional 12 percent of cases accounted for substantial assistance or early disposition departures, as well as other government-sponsored below-range sentences. *Id.* Booker - type variances (up and down) only accounted for 8.2 percent of all cases, and guideline departures accounted for 1.7 percent of all cases. *Id.* In sum, judges in my District applied the Sentencing Guidelines, including encouraged departures, in nearly 83 percent of all cases.

Approximately 95 percent of all sentences in the District of Puerto Rico are the result of pleas. In my experience, prosecution and defense counsel, whether

pursuant to a plea agreement or a straight plea, continue to consider the Sentencing Guidelines as a fairly accurate prediction of what the ultimate sentence will be. Federal Sentencing Guidelines are, thus, of the utmost importance in criminal cases.

During fiscal year 2008, the District of Puerto Rico ranked 36th out of 94 districts in the nation in the number of annual criminal cases. See 2008 Sourcebook of Federal Sentencing Statistics at 174-267. To compound matters, the District of Puerto Rico has fewer district judges than do many districts, such as Massachusetts, that have a lower criminal caseload. The District of Puerto Rico also tops the nation in multi-defendant cases, involving drug and firearms related offenses. It is not uncommon to see any one of my colleagues sentence over one hundred defendants in a single case charging distribution and/or importation of several hundred kilos of marijuana, cocaine and/or heroin. In this respect, the sentencing guidelines are an excellent uniform starting point for plea negotiations between the government and defense counsel. The guidelines provide to everyone, early on in the process, a reliable yardstick of where a particular defendant likely stands sentence-wise. And, as stated previously, in the majority of cases, the guidelines will dictate the final outcome.

Following Booker, sentencing guidelines have become more important in plea negotiations. Because Booker opens the door for unique defense sentencing

arguments that otherwise could not have been brought previously, the parties will now necessarily sit down and attempt to agree to a result under the guidelines, which will then be presented to the sentencing judge. In the past, though not intended for that purpose, the Sentencing Guidelines operated as a powerful weapon for the prosecution. The guidelines now provide a fairly leveled playing field, however, to both prosecution and defense, yielding a predictable and uniform advisory sentencing scheme.

Throughout the years, the Commission has amended guidelines so as to promote greater fairness in sentencing. Although punishment is always harsh on a defendant — it is intended to be — the guidelines, following statistical studies and input from all those involved in the sentencing process, have appropriately been modified throughout the years. Guidelines 2L1.2 and 2D1.1, which I discussed earlier, are just two such examples, as is the retroactive crack cocaine amendment. In my view, as time passes, the Commission will continue to amend the guidelines in ways that will more fairly account for specific offense and offender characteristics. This is an evolving process which cannot and will not culminate overnight.

Sentencing data, along with caselaw, has historically prompted the Commission to amend its policy statements concerning departure grounds. See, e.g., U.S.S.G. § 5K3.1 (Early Disposition Programs) (downward departure policy statement effective

October 27, 2003); U.S.S.G. § 5K2.24 (commission of offense while wearing or displaying unauthorized or counterfeit insignia or uniform) (upward departure policy statement effective November 1, 2007). In the post - Booker era, variances to Guideline sentences under 28 U.S.C. § 3553(a), will also yield valuable nationwide data for the Commission to amend certain guidelines and continue issuing departure policy statements to account for matters which the guidelines may not have originally contemplated, or for scenarios that may arise in the future. In other words, what now or in the future are common variances may ultimately become departure policy statements.

While Booker has certainly opened the door for much wider judicial discretion in sentencing, the guidelines continue to play an essential role in the process. In tailoring specific sentences under section 3553 (a) that are “sufficient, but not greater than necessary,” judges continue to rely on the principle of nationwide uniformity and fairness in sentencing promoted by the Commission. While Booker allows judges to sentence outside the guidelines in those particular scenarios that warrant it, this is not carte blanche, however, for a particular judge to have his personal sentencing guidelines manual. Rather, Booker provides the necessary judicial discretion mechanism for tailoring fair sentences in instances where under a mandatory guidelines scheme, the sentence would be patently unfair for that particular

defendant. Without this discretion, the only remedy would be a guideline amendment, which usually comes a little too late, and may not always be retroactive.

In sum, I am of the opinion that the present sentencing scheme to a great extent provides an adequate balance between the Sentencing Reform Act of 1984 and section 3553(a). The Commission should continue to perform its ongoing mission of promulgating guidelines that will further the basic purposes of criminal punishment and to monitor sentencing practices in the federal courts throughout the nation.

The Commission is also in the best position to make recommendations to Congress regarding statutory changes regarding federal sentencing. In this respect, I echo my colleagues who have previously testified in these Commission hearings in that particular sentencing areas that need to be revisited and evaluated by Congress are mandatory minimums and the crack-cocaine disparity. While Congress certainly has the final word, these statutory norms and section 3553(a) many times profusely clash, producing quite unfair results mostly in cases involving defendants with minor roles. In the past, Congress has provided exceptions to mandatory minimums to foster greater fairness in sentencing, for example, the safety valve. Congress in the future may contemplate amending statutory sentencing policy in such areas.

Hon. Gustavo A. Gelpí
U. S. District Judge

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As always, I highly commend the Commission for holding these regional hearings, as well as for its numerous other excellent initiatives throughout the years.

Cordially,

A handwritten signature in black ink, consisting of a stylized 'G' followed by a long horizontal stroke that tapers to the right.

Gustavo A. Gelpí
United States District Judge