UNITED STATES SENTENCING COMMISSION
Public Hearing – February 15-16, 2005

Testimony of Judge Lynn Adelman

Honorable Commissioners:

I. INTRODUCTION

Thank you for the opportunity to share with you my views on sentencing in the post-Booker world.

I believe that Booker establishes a framework for a more fair and just sentencing system than the one that federal courts have been operating under. By making the sentencing guidelines advisory instead of mandatory and directing sentencing courts to consider all of the factors in 18 U.S.C. § 3553(a), Booker does two things that will lead to a more just system: (1) it restores federal judges to a meaningful role in the sentencing process; and (2) it makes clear that fairness in sentencing requires consideration of factors other than reducing sentencing disparities. Let me expand briefly on these points.

Many of the flaws in our present system flow from the mistaken view that the main problem in sentencing is judges, and that the solution to the problem is to remove them from the decision-making process as much as possible. I strongly disagree with this view. Based on my experience, federal judges are by and large conscientious and thoughtful. In fact, it would not be an exaggeration to say that many of them have acquired a modicum of wisdom along the way.

Thus, even without the constraints on judicial discretion that remain after Booker, judges would not abuse the authority that Booker confers on them. However, constraints on discretion exist, and they ensure that the post-Booker regime will not be a return to the

pre-guidelines world where a sentencing judge's discretion was virtually total. First, judges have operated under the guidelines for a long time and to a considerable extent have internalized guideline thinking. They will not give up this way of thinking because the guidelines are advisory. Second, Booker directs judges to consider the guidelines. Judges will most assuredly do so. Third, the fact that sentences are reviewable for reasonableness will cause judges to think carefully about the sentences they impose and to explain in detail any sentence that they believe the government or the defendant will seriously question.

As I stated in Ranum,[1] an advisory guideline regime will make sentencing more difficult for judges. Lawyers will be able to present a broader range of arguments, and judges will be forced to think about them. But that is what judges should do – that is why they were chosen to be judges. Judges will still be able to use the guidelines as a point of reference, but their sentences will be their own. The result will be that sentencing will be less mechanical, and the sentencing process and the outcomes will more closely comport with the public's intuitive understanding of what just sentencing involves.

Booker also promotes greater fairness in sentencing by directing sentencing courts to consider a broad range of relevant factors, not just reducing sentencing disparity. While reducing disparity is important, the focus on that issue has been excessive and has made our system less just. The notion that disparity can be eliminated is an illusion. Even under the old mandatory guideline regime, substantial disparities existed due to factors such as charge and fact bargaining, large variations in the number of substantial assistance motions between districts, and the use of fast-track programs in some districts but not others.

---

[1]United States v. Ranum, No. 04-CR-31, 2005 U.S. Dist. LEXIS 1338 (E.D. Wis. Jan. 19, 2005).

By directing judges to consider a broad range of factors other than reducing disparity, Booker enables judges to treat the people being sentenced as they should be treated – as individuals – and to craft sentences appropriate to such individuals. Insofar as possible, a sentencing system should not force judges to impose sentences that they believe are unjust. Booker moves us away from such a system. It might be said that Booker constitutes a recognition of the irreducible need for individualized judgment and humanity in sentencing.

II. SENTENCING AFTER BOOKER

A. Role of Guidelines

In Booker, the Supreme Court held that the federal sentencing guidelines violated the Sixth Amendment. As a remedy, the Court excised the provision of the Sentencing Reform Act that made the guidelines mandatory, 18 U.S.C. § 3553(b). The remedial majority held that district courts must still consider the guideline range, as required by 18 U.S.C. § 3553(a)(4), but must also consider the other factors set forth in § 3553(a).

One issue that has arisen since Booker is the proper weight to be accorded the guidelines. Based on the statutory scheme that remains after Booker's excision of § 3553(b), I believe that the guidelines should be given the same weight as the other factors set forth in § 3553(a). The statute lists seven factors that the court "shall consider," which factors include the guideline range and the Sentencing Commission's policy statements. As modified by Booker, the statute contains no suggestion that any one factor is, as a general principle, entitled to greater weight than the others.

Some have argued that the guidelines already take into account the other factors in § 3553(a) and that, therefore, they are entitled to more weight. I believe this argument

is flawed for several reasons. First, when it directed sentencing courts to consider the guidelines, but allowed them "to tailor the sentence in light of other statutory concerns," Booker recognized that the guidelines do not take into consideration all of the § 3553(a) factors. If the Court believed that the guidelines took all of the statutory factors into account, it would not have used this language. Second, as I discussed in Ranum, the guidelines do not take into consideration all of the § 3553(a) factors and, in fact, advise courts not to consider them. For example, § 3553(a) directs courts to consider "the history and characteristics of the defendant." However, the guidelines largely reject consideration of numerous factors that relate to the defendant's history and characteristics including the defendant's age, education, mental condition, drug or alcohol dependence, employment record, family ties and responsibilities, and civic and military ties. The only aspect of the defendant's history that the guidelines consider is criminal history. In the face of the disparity between the directive in the statute and the guidelines' treatment of various aspects of the defendant's background, the argument that the guidelines take into account the history and characteristics of the defendant is unpersuasive.[2]

However, even if the Commission did take some or all of the statutory factors into account, the argument that courts should accord the guidelines heavier weight than the other § 3553(a) factors does not withstand scrutiny. As stated, § 3553(a) contains no suggestion that any factor should be accorded more weight than any other. Moreover, §

---

[2]*See* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1716-17 (June 1992) (stating that the "5H policy statements . . . are inconsistent with §§ 3553(a) and 3661 of title 18," which require the judge to consider, without limitation, information on the offender's background and character; and that "[i]n the end, the Commission chose to acknowledge the relevance only of a person's criminal characteristics").

3553(a) states that "in determining the particular sentence to be imposed," courts "shall consider" the factors listed in the statute. Section 3553(a)'s use of the word "shall" requires courts to consider these factors and prohibits them from turning that responsibility over to some other entity. Other parts of § 3553(a) reinforce the conclusion that the sentencing judge, not any other person or entity, is responsible for weighing the statutory factors. Under the statute, it is the judge who must consider the nature and circumstances of the offense and the history and characteristics of the defendant, not someone else. Finally, § 3553(a) requires the judge to "determine the particular sentence to be imposed" on individuals, and to impose a sentence "sufficient but not greater than necessary to comply with the purposes" of sentencing. Thus, whether or not the Commission considered certain factors in crafting the guidelines, to comply with Booker and with § 3553(a), the judge must independently consider them. Similarly, whether or not Congress, through its inaction, expressed a view that the Commission performed well in incorporating the purposes of sentencing into the guidelines, the clear statutory command of § 3553(a) is that the court consider them.

This is as it should be. Section 3553(a) creates a process by which individual judges sentence individual defendants. The statute further requires judges to consider a number of factors specific to the defendant who is before them. The Sentencing Commission can do many good things, but it cannot perform this function. This is so because the Commission has no knowledge of the individual who is being sentenced or of the particulars of the offense that he or she committed. The Commission "operates from an ex ante system-wide perspective; it has created guidelines by examining sentencing outcomes in the aggregate without directly considering any of the individual human beings

who have violated federal law."[3]

Finally, I believe that the guidelines will continue to play an important role in sentencing, albeit a slightly different one. Courts will consider the guidelines in all cases and impose guideline sentences in many. In addition, as I explained in United States v. Galvez-Barrios,[4] even when a court sentences outside the guidelines, the guidelines will be of great assistance in determining the specific sentence to impose. One advantage of advisory guidelines is that judges can use guideline terminology as a way of translating their findings under § 3553(a) into a specific sentence. As I stressed in Ranum, courts need not strictly justify sentences by reference to the guidelines or identify non-heartland factors to justify sentences above or below the guideline range. However, in exercising discretion, courts can use the guidelines, recognizing their comprehensive nature and quantification of many relevant factors. I believe that this is what Justice Breyer had in mind when he instructed judges to consider the guidelines but tailor sentences in light of the other factors set forth in § 3553(a).

B. The Law of Sentencing After Revocation of Supervised Release – A Guide to the Future

To date, it has been little noted that an existing body of law exists that can provide guidance both to district and appellate courts in carrying out their post-Booker duties. District courts imposing sentences following revocation of probation or supervised release

---

[3]Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Guidelines*, 76 NOTRE DAME L. REV. 21, 101-02 (2000).

[4]United States v. Galvez-Barrios, No. 04-CR-14 (E.D. Wis. Feb. 2, 2005).

have long used advisory guidelines,[5] and appellate courts have reviewed such sentences to determine whether they were "plainly unreasonable."[6] In reviewing sentences after revocation, appellate courts have required district courts to "consider" the range designated by the guidelines, however, district courts were "thereafter free to impose a sentence outside the designated range, subject to the maximum sentence allowable under 18 U.S.C. § 3583(e)(3)."[7] This type of sentencing is precisely what Booker envisions.

In deciding what sentence to impose after revocation, courts have been guided by the factors set forth in 18 U.S.C. § 3553(a),[8] as they now should be in all cases. Although § 3553(a) states that these factors "shall" be considered, appellate courts have not required district courts to make specific findings as to each one in imposing a sentence after revocation; instead, they required district courts to make "comments reflecting that the appropriate factors were considered."[9] Finally, because the guidelines in revocation (and now all) cases are advisory only, appellate courts have not considered a sentence outside

---

[5]See U.S.S.G. ch. 7, pt. A.

[6]See, e.g., United States v. Kelley, 359 F.3d 1302, 1304 (10th Cir. 2004); United States v. Marvin, 135 F.3d 1129, 1143 (7th Cir. 1998).

[7]United States v. Hale, 107 F.3d 526, 529 (7th Cir. 1997).

[8]See Hale, 107 F.3d at 530 ("Section 3583(e)(3) provides that in revoking a term of supervised release and imposing a prison sentence, the court should consider certain of the factors set forth in section 3553(a), including the nature of the offense and of the defendant's history and characteristics, the need to afford adequate deterrence and protection to the public, applicable policy statements in the Sentencing Guidelines, and the need to avoid unwarranted sentencing disparities among similarly situated defendants.").

[9]Hale, 107 F.3d at 530; see also Kelley, 359 F.3d at 1305 (stating that while sentencing courts must consider § 3553(a), they are "not required to consider individually each factor listed in § 3553(a) before issuing a sentence").

the range a "departure."[10] Thus, courts imposing sentences higher or lower than the guideline range need not cite factors that take the case outside the heartland, but must only explain why the sentence imposed was necessary and reasonable in light of all of the relevant factors under § 3553(a).[11] This body of law is now applicable in the general sentencing context.

In reviewing sentences after revocation, appellate courts have not considered sentences outside the guidelines to be presumptively unreasonable. Nor have they considered whether such sentences were supported by policy statements adopted by the Commission. Rather, they have asked whether sentences were "reasoned and reasonable." Just so now.

III. OTHER ISSUES

---

[10] See, e.g., Marvin, 135 F.3d at 1143 (holding that a deviation from § 7B1.4 is not a "departure," a conclusion "consistent with each and every circuit that has heretofore conclusively addressed this very issue").

[11] See, e.g., United States v. White Face, 383 F.3d 733, 738, 740 (8th Cir. 2004) (8th Cir. 2004) (holding that a sentence outside the § 7B1.4 range is not a departure, and rejecting defense argument that such sentence is proper only "when unusual factual circumstances are present"); United States v. Cook, 291 F.3d 1297, 1302 (11th Cir. 2002) (affirming sentence outside advisory range where district court found that § 3553(a) factors called for a different sentence); United States v. Tadeo, 222 F.3d 623, 626 (9th Cir. 2000) (stating that while § 7B1.4 ranges must be considered, "unlike a sentencing guideline adopted by the United States Sentencing Commission, a policy statement setting forth a suggested sentencing range may be freely rejected by a district court without abusing its discretion, if the sentence actually imposed is within the statutory maximum"); United States v. Shaw, 180 F.3d 920, 922 (8th Cir. 1999) (per curiam) (stating that because Chapter 7 serves a non-binding, advisory role, "a revocation sentence exceeding the suggested range is . . . not an 'upward departure' because there is no binding guideline from which to depart"); United States v. McClanahan, 136 F.3d 1146, 1152 (7th Cir. 1998) (holding that because "there is no sentencing 'departure'" when a court sentences outside the advisory range "the sentencing court is not required to provide notice that the sentence it contemplates may exceed the Table's range").

I discuss in this section some of the questions concerning which the Commission requested comment. With respect to appellate review, it will likely be difficult, at least as a practical matter, for an appellate court to find a sentence within the guideline range unreasonable. However, there may be cases where a district court unreasonably fails to account for § 3553(a) factors that plainly make the sentence called for by the guidelines inappropriate. As to the standard of appellate review, any changes to § 3742 to alter the standard adopted by the Booker remedial majority may run afoul of the Booker merits majority. A stricter standard of review for sentences outside the guidelines, for example, runs the risk of making the guidelines presumptive, much as they were before Blakely and Booker.

With respect to guilty pleas, I believe that for the most part Booker will not alter plea bargaining practices. Virtually all defendants will continue to plead guilty because it is in their best interest to do so. Neither do I believe that the government will experience a decrease in the number of cooperators. Defendants will still want the government to recommend a lighter sentence. Further, in drug cases, where in my experience cooperation is most extensive, the government still has mandatory minimum sentences to hold over a defendant's head.

Concerning fast-track programs, they undoubtedly will continue to operate in designated districts and reduce the advisory guideline range. However, courts in non-fast track districts now have the discretion to impose a lower sentence to reduce the unwarranted disparity created by such programs.[12]

---

[12]See United States v. Galvez-Barrios, No. 04-CR-14, slip op. at 8-10 (E.D. Wis. Feb. 2, 2005).

With respect to acceptance of responsibility, § 3E1.1 should operate as it has in the past. Booker does not suggest a change. Thus, a government motion is still needed to obtain the third level reduction. However, courts are now free, in the exercise of discretion, to recognize different degrees of acceptance of responsibility. A defendant who only grudgingly pleads and shows no real remorse may receive a sentence consistent with a lesser reduction. Conversely, courts may reward a defendant who has taken concrete steps in turning his life around, making it less likely that he or she will re-offend. In the past, courts departed when the defendant displayed extraordinary post-offense rehabilitation.[13] Courts may now consider this important factor in the exercise of discretion. In sum, Booker provides an opportunity to recognize different gradations of "reductions" for acceptance.

IV. CONCLUSION

With respect to whether any action is required, I recommend that Congress and the Commission take a cautious wait-and-see approach. It may be that the § 3553(c) requirement that courts provide written reasons for any sentences outside the guidelines will have to be revisited at some point. The Commission apparently continues to believe that departures must similarly be noted in the Judgment. While I believe that judges should provide written reasons for their sentences, and I do so myself in many cases, this particular requirement seems out of place in an advisory guideline regime.

Finally, I believe that in the post-Booker world, the Commission will continue to play an important although slightly different role. I see the Commission as assisting courts in

[13]See, e.g., United States v. Smith, 311 F. Supp.2d 801 (E.D. Wis. 2004); United States v. Jones, 233 F. Supp. 2d 1067 (E.D. Wis. 2002).

exercising their new discretion in a measured and wise way. After all, the Commission is a judicial branch agency, and I would like it to form a true partnership with judges, helping rather than dictating to them. One of the Commission's important functions will be to take note of the factors that courts rely on to impose non-guideline sentences, to analyze and disseminate them and participate with judges in the creation of a true common law of sentencing.

For their part, judges must write thoughtful decisions explaining their sentences, whether those sentences are within or outside the advisory guidelines. This will assist the Commission in understanding sentencing practices and make it clear to legislators and others that judges are not exercising discretion arbitrarily. Operating under the guidelines, district courts "created a disappointing legacy."[14] Too often, they failed to share their experience and capitulated to following the guidelines in cases where they should not have. We must do better now.

Thank you for your attention.

[14]Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 726 (1999)