STATEMENT OF
HON. RICHARD J. ARCARA
UNITED STATES DISTRICT COURT JUDGE
WESTERN DISTRICT OF NEW YORK
BEFORE THE
UNITED STATES SENTENCING COMMISSION

Washington, DC
July 9, 2009

Judge Hinojosa and Members of the Sentencing Commission:

Thank you for inviting me here today to mark the 25th anniversary of the passage of the Sentencing Reform Act of 1984 (SRA). I am honored to appear before you to offer my "View from the Bench" on the state of sentencing jurisprudence post-*Booker*.

Overall Impressions Post-*Booker*

I would like to begin by commenting on how the advisory nature of the Guidelines after *United States v. Booker* has changed sentencing. Perhaps the greatest benefit from the *Booker* decision has been the return of sentencing discretion to judges. I know that some of my colleagues - other district court judges - have already testified before you as to the benefits of the advisory scheme. I am in agreement with many of those comments. Permitting judges to consider all of the § 3553(a) factors and to impose a sentence that is just and fair

under all of the circumstances is tremendously beneficial to the parties and the public.

I also believe that the Sentencing Guidelines, in their advisory state, continue to serve an important function. The systematic approach provided by the Guidelines provides judges with an understanding as to what a reasonable sentence might be for the criminal conduct at issue in a particular case. The task of imposing sentence is by far the most difficult duty that I perform as a district judge. It is a task that all federal judges take very seriously and to perform it well, we need information from a variety of different sources.

First, we need a complete and accurate picture of the criminal conduct at issue, which is information ordinarily provided by the government and the probation office. Second, we need a complete picture of the defendant to be sentenced - the nature and characteristics of that person, his or her family history, the extent of remorse, and any other mitigating circumstances surrounding the criminal conduct at issue. That information is ordinarily provided by the defense attorney. But another crucial piece of information that is needed is what is provided by the Sentencing Commission – specifically, information about how the sentence that we are considering compares overall with sentences recommended for this type of conduct. For me, this provides context. It helps me assess whether the sentence that I am considering is “in step” with sentences recommended for the conduct at issue, and, where it is not, it causes me to

pause and to consider whether the circumstances that I believe warrant a different sentence are sufficient to justify a deviation from the norm.

All of this is to say that, in my view, *Booker* has improved the quality of sentencing jurisprudence. On the one hand, it has provided judges with the authority necessary to impose a sentence outside the Guidelines range when the circumstances so warrant, without being limited to the more strict departure regime that existed pre-*Booke*r. On the other hand, *Booker*'s mandate that judges continue to consult the advisory range before imposing sentence serves as an important check, reminding judges that uniformity and unwarranted disparity are also important sentencing goals. In my opinion, these two elements together have led to the imposition of more reasoned and just sentences.

Simplifying the Sentencing Process

Nevertheless, there are some ways in which the sentencing process could be improved. One way is by simplifying the sentencing process. As I said, imposing sentence is a task that I take very seriously. It is also a task that I perform 2, 3 or sometimes even 4 times per day. As of last week, I have over 230 criminal cases, consisting of 340 defendants. This is in addition to my civil case assignments. The reality is that preparing for and imposing each sentence is a time-consuming task. And post-*Booker*, the task has become even more time consuming.

Before *Booker*, judges were required to perform Guidelines calculations, resolve objections and address any applicable departure motions. Now, in addition to that, judges must address motions for a non-Guidelines sentence under *Booker* to determine whether a sentence outside the advisory range is appropriate. In my experience, a motion for a sentence outside the advisory range is made in almost every case, unless it is precluded by the plea agreement. I mention this only because I think that it is important for the Commission and for appellate courts to be mindful of this reality in determining how extensive of an explanation will be required for any given sentence. Regardless of whether a sentence is within or outside of the advisory Guidelines range, judges should not be required to render a treatise justifying the reasons for the particular sentence imposed. A brief explanation as to the basis for the sentence should suffice, particularly where the sentence being imposed has been agreed to by the defendant and the government in the plea agreement.

This ties into another comment that I have regarding the highly detailed findings that need to be made before arriving at the advisory Guidelines range. The number of specific offense characteristics applicable to each type of crime seems ever increasing. When the Guidelines were mandatory, the Commission undertook considerable efforts to address all of the different circumstances that might warrant an increase or decrease in the base offense level, so as to ensure uniformity in sentencing. But now that the Guidelines are advisory, I question

whether so many sentencing enhancement determinations need to be made before arriving at the advisory Guidelines range. Take, for example, a bank robbery case. Before sentencing, the Court is required to determine whether the taking of property was the object of the offense; whether a gun was brandished, discharged or otherwise used; whether any other dangerous weapon was possessed; whether a death threat was made; whether anyone was injured and if so, the extent of the injury; and whether a person was abducted or physically restrained. The Court is also required to determine the amount of loss with some degree of certainty. Where a weapon was used, the Court is required to apply 3 levels if a dangerous weapon was possessed or brandished, 4 levels if a dangerous weapon was otherwise used, 5 levels if a firearm was brandished, 6 levels if a firearm was otherwise used, and 7 levels if the firearm was discharged. Each of these specific enhancements requires the Court to look not only to the facts, but also to the applicable case law to see how courts define the terms "used," "brandished" and "discharged." The incorrect application of any enhancement is reversible error- at least in the Second Circuit - because the failure to correctly determine the advisory Guidelines range is a procedural error requiring remand. *See United States v. Salim*, 549 F.3d 67, 72 (2d Cir. 2008).

Certainly, the existence of numerous specific offense characteristics made sense when the Guidelines were mandatory as it served to reduce unwarranted disparity. But now that they are advisory, I question the utility of requiring

sentencing courts to make so many factual determinations before imposing sentence. In my view, requiring a sentencing court to determine whether a gun was "brandished," so that a 5 level enhancement should apply, or whether it was "otherwise used" so that a 6 level enhancement would apply, unnecessarily complicates the sentencing process. What is important is the entire context surrounding the use, brandishing or possession of the weapon and whether such conduct warrants a 4 or 7 level enhancement should be left to the sound discretion of the sentencing judge.

I offer this as one illustration of how restructuring the Guidelines might make sentencing proceedings more efficient post-*Booker*, without compromising the overall goal of eliminating unwarranted disparity. As the Commission itself noted sometime ago in its Introduction to the Sentencing Guidelines:

> A sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. . . .
>
> The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforseen ways to unforseen situations, thus failing to cure the unfairness of a simple, broad category system.

See U.S.S.G. Ch. 1, Pt. A, § 3.

Perhaps in light of *Booker*, the Commission should revisit the issue of creating broader subcategories. Although the Commission initially rejected arguments for a broad category system out of concern that it "would have risked

correspondingly broad disparity in sentencing," it might be wise to reconsider that issue. A system that creates broader categories of enhancements and permits judges to exercise their discretion within those broad categories may lead to more informed and reasoned sentences. It will also streamline sentencing proceedings because judges will be freed from having to parse every nuance and subcategory of a highly-tailored system. Instead, judges should be given directives as to which particular circumstances are relevant to increased or decreased punishment, while leaving intact their discretion to determine to what extent the presence of any one or more of those factors requires an enhanced penalty. No doubt some disparity will occur, but that has always been the case. This streamlined process will require judges to look more closely at the overall conduct and the aggravating or mitigating factors, without focusing on the minutia of considering whether each of the numerous subcategories applies.

Better Guidance

There are some areas where the Commission could provide sentencing courts with better guidance. One of those areas relates to the "parsimony clause" of 18 U.S.C. § 3553(a), which instructs a sentencing court to impose a sentence that is "sufficient but not greater than necessary" to meet the objectives of sentencing. This provision is repeatedly quoted to me as a reason why I should impose a sentence below the advisory Guidelines range. Many defense

attorneys take the position that a sentence within the Guidelines is greater than necessary to achieve the purposes of sentencing, and cite the parsimony clause as a reason why I should go below the Guidelines. I think it would be helpful for the Sentencing Commission to provide guidance as to how the parsimony clause interacts with the Guidelines and the other § 3553(a) factors.

Another area where I believe there can be better guidance is in the area of child pornography sentences. No one disagrees that the creation of child pornography is a heinous crime and that those who contribute to its creation and dissemination should be held accountable. The difficulty lies in determining how much prison is enough, particularly for cases involving only possession, but not distribution, of child pornography. Sadly, we are seeing more and more of these cases. And while imprisonment may be necessary to deter this kind of activity, the question of how much prison is not easily answered.

In my experience, it should depend upon whether the person to be sentenced poses a real danger to the community and a risk to children. I'm not sure the current Guidelines provide a vehicle for distinguishing between the more serious offender. For example, the Guidelines recommend increasing the offense level based upon the number of images possessed. However, I'm not sure whether there is any correlation between the number of images and the offender's threat to the community. It is my understanding that thousands of images can be downloaded with just one click of the mouse. Is the person who

downloads hundreds of images indiscriminately more dangerous than one who downloads 50 or 60 specific kinds of images? I don't know. It also seems to be the case that numerous enhancements apply to every child pornography offender. In virtually every case, the defendant receives enhancements for the use of a computer, possession of material involving a prepubescent minor, possession of sadistic or masochistic images, and a substantial increase based upon the number of images possessed. If the defendant subscribes to a file sharing service such as "Limewire," he also receives a 5 level-enhancement for distribution with the expectation of receipt of a thing of value. Once all of these enhancements are applied, a first time offender is often facing the statutory maximum. I question whether Congress intended for so many defendants to receive at or near the statutory maximum. Yet that is frequently the case. I'm not sure that the Guidelines, as they are currently written, assist the Court in identifying factors that distinguish a defendant who is a threat to the community and likely to reoffend from one who is not. In this area in particular - where so many of us simply don't understand what motivates a person to commit this crime - the Commission can serve as an invaluable resource to judges, providing them with the empirical data needed to identify those offenders who pose a greater danger to the community from those who do not.

Prosecutorial Influence over Sentencing

Another area of concern I have relates to prosecutorial influence over sentencing, particularly in the area of drug crimes. The Sentencing Guidelines place a great deal of emphasis on the amount of drugs involved in a particular case. An unfortunate consequence has been to cause the government and the defendant to engage in a sort of "fact bargaining" regarding the amount of drugs to be included as relevant conduct. Notwithstanding the Department of Justice's policy statement against fact-bargaining, the simple truth is that it does occur. I believe that this is a byproduct of the emphasis that the Guidelines place on quantity of drugs, over other equally important factors such as the defendant's role in the offense. This allows the prosecutor to manipulate the Guidelines and create disparity. In other words, some prosecutors use fact bargaining as a tool to obtain a plea, even if it means agreeing to a more lenient sentence than what is called for under the Guidelines. This undermines uniformity and gives prosecutors, not judges, the ability to determine when a disparity will occur.

This is also true with regard to motions for substantial assistance. Some prosecutors are simply more generous than others with respect to § 5K1.1 motions. Likewise, some criminal defense attorneys seem more adept at negotiating greater § 5K1.1 reductions than others. Yet judges are required to accord "substantial weight" to the government's evaluation of the extent of the defendant's assistance. Again, this creates disparity in sentencing and gives prosecutors discretion to manipulate sentencing determinations. I am not sure

what can be done about this problem, but it is important to recognize that it exists and to explore ways in which the fact-bargaining process might be reduced or eliminated.

Alternatives to Incarceration

Finally, I would like to see more alternatives to incarceration. Incarceration is often necessary to address the goals of deterrence and punishment. But that is not always the case. There are some situations where a person's debt to society would be better repaid in alternative ways. It would be helpful for judges to have more tools at their disposal in crafting alternatives to incarceration. Perhaps drug treatment with the threat of incarceration absent successful completion, or community service appearances by young adults who have personally experienced the devastating effects of drug addiction. Not all criminal defendants deserve a second chance, but some do. Judges need options to craft the best sentence necessary under the circumstances. If alternatives are already out there, there needs to be more information conveyed to judges about their availability.

Conclusion

To summarize, I believe that the advisory sentencing regime strikes a more appropriate balance between judicial discretion on the one hand, and the goal of

uniformity on the other, than under the prior mandatory scheme. Sentencing judges continue to benefit from the Commission's important work of providing model sentences for various federal crimes, supported by empirical research and historical data. Doing so not only provides judges with informed guidance, but it also provides context within which judges can assess where their contemplated sentence falls in relation to the sentence recommended by the Guidelines. However, the Commission might consider revisiting the issue of creating broader, more flexible categories that identify a host of aggravating or mitigating factors to be considered by a sentencing judge in arriving at a just sentence.

Thank you again for this opportunity to provide you with my comments and observations.