United States Sentencing Commission
Anniversary of the Passage of the Sentencing Reform Act of 1984 ("SRA")
"View from the District Court Bench"
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One Federal Plaza, New York, NY 10278-0001

Testimony of Judge Nancy Gertner
U.S. District Court of Massachusetts
Friday, July 10, 2009

I want to thank you for giving me the opportunity to address the Commission at this very creative time in American federal sentencing. Since I understand that the time allotted for oral presentations is quite limited, I would like to submit written remarks as well.

Let me say at the outset that I have great faith in the Commission and in what I hope will be a substantially revised advisory guideline system. I have been a critic, to be sure, but I recognize the contribution that the Commission has made to sentencing, the work of the Commissioners and especially the work of the Commission's extraordinary staff. My criticisms stem from my heartfelt desire to maximize the Commission's work, to make it more relevant to what I do as a judge and to what I teach as a professor in my sentencing class.

I have three general points I would like to make about 1) judges in the post-*Booker* era, 2) the Commission, and 3) Congress.

I. First, about judges:

I want to address the fear that I saw at the United States Sentencing Commission's sentencing conference in New Orleans a month ago -- the fear that, with the Guidelines now advisory, we would see a return to the kind of sentencing disparity that existed before the Sentencing Reform Act. That fear seems to wholly define how the Commission sees its role and to a degree, how it anticipates what Congress' response to post-*Booker* sentencing will be. I saw this fear in the presentations on the plenary panels, for example, and it was terribly disappointing. The panels were not about how to address a creative moment in sentencing; they were mainly about sounding the alarm that unless judicial discretion were controlled, all hell would break loose.

The fear of a return to indeterminate sentencing is vastly overstated. There is every reason to believe that judicial discretion in the post-*Booker* era will be considerably different from the discretion exercised before the Guidelines. Indeed, the greatest danger is not that judges will exercise their new discretion, but that they will not when they should, when the Guideline sentence is unfair and ineffective.

There are four reasons why post-*Booker* discretion will not look remotely like judicial discretion in the indeterminate sentencing era.

A. *Persistence of the Guidelines:* The existence of the Guideline framework, however flawed, frames the sentencing debate and gives judges a common set of standards by which they can measure their sentencing choices. Judges were not trained in sentencing at all before the SRA. It is no surprise then that there was disparity in sentencing outcomes. But for the past two decades, judges have been trained in the Guidelines. The vast majority of judges have been appointed since the passage of the SRA and know only Guideline sentencing. It is also no surprise that the Guidelines will provide the dominant sentencing framework, even post-*Booker*.

B. *Sentencing Commission's Data:* Before the SRA, sentencing statistics were inaccurate, if they existed at all. Since the SRA, the Sentencing Commission has maintained a sophisticated database of sentencing statistics. With this tool, the Commission can monitor trends and identify racial or geographical differences in sentencing, akin to the kind of statistics that are used by police departments to monitor racial profiling. If problematic patterns appear in the sentencing data, they can be dealt with in the courts -- not by trying to eliminate all discretion, which is what has happened for the past two decades, but by channeling it, circulating the statistics, training judges, identifying problematic patterns, etc.

C. *Evidence Based Practices:* There is no reason to assume today that judicial discretion will be exercised willy-nilly because, as Justice Michael A. Wolff described in the 14th Annual Justice Brennan lecture, there is a growing body of literature about "what works"- new evidence-based sentencing practices.[1] The challenge is how to make that body of work available to judges, defense attorneys, and probation officers who can encourage their adoption in individual cases.

D. *Appellate Review of Sentencing:* Unlike the pre-SRA era, there is now appellate review of sentencing to monitor sentences at the very least at the margins -- the outlier sentences implemented wholly without support or without an adequate explanation. It is not just about procedural reasonableness, which I like to describe as asking the question: "Have you done as good a job in explaining your sentence as you do in your summary judgment decisions in a patent case?" It is about substantive reasonableness. Does the sentence make sense? Is it a rule or standard that has been consistently applied? Can it serve as precedent?

[1] *See* Justice Michael A. Wolff, Justice William J. Brennan Lecture at New York University School of Law: Evidence Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform, 83 NYU L.Rev., 1389, 1397-99 (2008).

When I make a distinction between the man who is selling drugs out of his car,[2] and the man selling the same quantity of drugs out of a "McMansion," I am exercising my discretion in a way that is reasonable, that the public can understand, and that can serve as a precedent for other judges. When I make a distinction between the school teacher convicted of tax evasion, who contributes to the community with his time and energy after school, and the Enron executive convicted of fraud, who is buying his legitimacy by supporting the symphony, I am likewise exercising my discretion in a reasoned way that is transparent, and, hopefully persuasive.[3]

Post *Booker* sentencing, as I see it, asks three questions:

Question 1: Do the Guidelines apply? As part of this question, I will ask whether there is a legitimate critique of the Guidelines following the example of *Nelson*,[4] *Gall*[5] and *Kimbrough*.[6] There is nothing unusual about this kind of judicial reasoning. It involves precisely the kind of analysis federal judges typically engage in whenever they are reviewing administrative regulations: What is the purpose the regulation is fulfilling? What is the data on which it is based? For too long the Federal Sentencing Guidelines were accepted without criticism. Slowly, courts are recognizing that some of the guideline ranges were set without meaningful analysis of their relationship to the purposes of sentencing, without empirical review, solely as a result of political expediency. These are guidelines which, in the language of *Kimbrough,* were not promulgated consistent with the Commission's "characteristic institutional role."[7]

Question 2: If the Guidelines do not apply, what should the court do? What alternative frameworks are relevant here -- by that I mean <u>non Guideline</u> frameworks dealing with such issues as reentry problems, drug addiction, recidivism etc. What is the source of those standards?

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[2] *See United States v. Cabrera*, 567 F. Supp. 2d 271 (D.Mass.2008)(defendant who was homeless, living out of his car, was a deliveryman in a government sting).

[3] *United States v. Germosen*, 473 F. Supp. 2d 221, 224 (D.Mass. 2007) ("This case is not about the well-heeled banker who commits a substantial fraud, all the while supporting the local symphony and countless community groups. It is not about the white-collar offenders who try to buy their way out of trouble by pointing to their charitable contributions. This case involves a man who struggled all his life, supported his community at great personal risk, and then made a mistake. *It is not about Enron. It is about a drug mule."*) (Italics supplied.)

[4] *Nelson v. United States*, 129 S.Ct. 890 (2000).

[5] *Gall v. United States*, 552 U.S. 38 (2007).

[6] *Kimbrough v. United States*, 552 U.S. at 85.

[7] 552 U.S. at 575.

Question 3: If it is clear that incarceration and retribution are the only alternatives -- punishment of the crime trumps all other purposes -- what have other judges done in like situations?

Again -- these are not remotely like the kinds of questions that were asked pre-SRA. Rather, they are questions that enable a judge to exercise his or her discretion in a reasoned and careful way. I daresay that Judge Frankel, whose work Criminal Sentences: Law Without Order, started the latest sentencing revolution, would agree completely with this approach.

One more point about judicial discretion: It is time to recognize that judicial discretion in sentencing is not a spigot to be turned on or off. The alternatives are not binary; total discretion or none at all. In response to racial profiling in arrests, for example, we seek to identify the cause of the bias and to better train officers to minimize or eliminate it. *Likewise, our goal here should be to help federal judges make better discretionary decisions -- decisions that are more reasoned, more transparent, more persuasive, more effective, more just. This is what I believe the Commission should do.*

II. Second, the Commission:

A. Let me first say what the Commission *should not* do:

1. It should not hold a conference about the sentencing guidelines, and barely mention *Booker* except by reassuring the judges that everyone is complying with the Guidelines notwithstanding that decision.

2. It should not present the statistics on "compliance" at every single opportunity, as if that is the only relevant question.

3. It should not continue to recite how lawless judges were before the Guidelines and imply that the same thing will happen post *Booker*, as if only the Commission stands between judges and the void.

4. It should stop envisioning its role as the guideline police, and begin to address all of the other sentencing issues which it has largely ignored for the past two decades.

B. What the Commission *should* do:

1. *Better Guidelines*: Today, the Commission should be focused on *why* judges depart: Did the case involve a nonviolent crack offender or an immigrant? On what grounds did the judge determine that the Guidelines did not apply? Was the sentence imposed based on new studies about recidivism, drug treatment, or some other framework? In so doing, the Commission will uncover patterns about departures and be able to better

guide judges in the use of their *Booker* discretion. We know the areas in which the departures are occurring now, which speak volumes about problems with the Guidelines -- career offender, pornography, drugs and fraud and, to some degree, guns.

2. *Better Promulgated Guidelines*: With the emerging administrative procedure act critique of the Guidelines, the Commission is obliged to justify what it has done in setting sentencing guidelines and assigning "scores" to sentencing factors -- with legislative history, and a description of the data on which it is based. The time is passed when the legitimacy of the Guidelines is assumed. Judges should not and will not follow the Guidelines unless they know why. The Commission should no longer be charged exclusively with "policing" district court sentencing decisions; it should be charged with producing persuasive and defensible guidelines that stand on their own merits.

3. *Non Guideline frameworks*: The post-*Booker* era demands more than passive data collection. In order to remain relevant in today's advisory system, the Commission should actively participate in the search for alternative sentencing frameworks -- by that I mean studies on how best to deal with such things as recidivism, or such offenders as drug addicts, gang members, and child pornographers. For the Guidelines to be truly advisory -- if *Spears*, *Kimbrough*, and *Nelson* are to have meaning -- the Guidelines cannot be the only sentencing framework applied in federal court. Indeed, if the Commission is worried about a re-emergence of the problems of unwarranted disparities that supposedly pervaded the indeterminate era, it will do no good to simply ignore the fact that judges are looking beyond the Guidelines. *The Commission should help give judges other places to look.*

4. The Commission could use its website to cull reports that could inform the new judicial discretion. It could function as a clearinghouse for the best studies on a wide variety of topics, such as the effect of particular sentences on recidivism rates and reentry,[8] and racial and gender disparities in sentencing or evidence-based sentencing practices. Although the Commission has not taken on such an active role in the past, it does have experience serving as a moderator in the debate on sentencing

[8] Wolff, *supr*a n. 1 at 1395. For example, Justice Wolff notes that Missouri data suggests that recidivism rates are higher when states incarcerate large numbers of non-violent "marginal" offenders. "The higher recidivism rates for prison sentences may not prove that prison causes increased recidivism (because the more dangerous offenders are probably more likely to be sentenced to prison), but they are cause for concern. If prison is criminogenic-that is, if it encourages or teaches offenders to commit further offenses, then we need to find effective punishments that do not make the problem worse." *Id.* at 1394.

issues, just as it did with its most recent conference on alternatives to incarceration.

The Commission captures judicial discretion not by ipse dixit decrees, but by being the best source of information on sentencing.

5. *Better Information about sentencing practices and lengths*: And if there are no meaningful alternatives to incarceration, no evidence-based practices that match and incarceration is indicated, the Commission can help judges when the Guideline ranges are inappropriate.

   I can envision a web site in which the judge inputs the kind of offense, criminal record, whatever offense or offender facts are identified in the Guidelines, and can readily determine what other judges have done in like cases and on what grounds. (The District of Massachusetts has something like this). That means that a judge's incarceration decision can be framed by what others have done, so that a judge is not picking a non guideline number out of thin air but has in mind the practices of his peers.

6. *Better information about judicial practices*: A common law of sentencing is evolving slowly and in my view, none too soon. The First Circuit, for example, has a sentencing practices guide that includes not simply the opinions of the Court of Appeals, but also the opinions of the district court. The Commission should do the same. Again, the way to shape what I do is to make what other judges have done readily accessible to me in a searchable form. Since few judges write opinions, Westlaw and Lexis searches are not sufficient. We need the Commission to keep track of the evolving common law through the statements of reasons and sentencing transcripts it receives and a searchable database.[9]

C. *A few specific guideline recommendations:* For the past two decades, the Sentencing Commission has invariably made decisions about guidelines whose

[9] See *United States v. Garrison*, 560 F. Supp. 2d 83, 85 (D.Mass. 2008).("The Guidelines define 'similarly situated' only with reference to the particular guideline categories. If a defendant had an offense level of 14 and a criminal history of I, the Guidelines assumed that the defendant was similarly situated to other 14s and Is. But in this case -- and perhaps many others -- that is a false assumption. Similarly situated with respect to the Guideline categories does not necessarily mean similarly situated with respect to the defendant's actual role in the criminal endeavor or his real culpability. The individual supplying the drugs, for example, could have been a first offender, with a criminal history I, not because he had been crime-free all of his life but because he did not 'do' street drug deals and thus rarely encountered government agents. And the reverse, an offender with a high criminal history score, could have been caught in the drug sweep even when his drug dealing was episodic, when he had tried to change the direction of his life. It is especially important, now that the Guidelines are advisory, that judges are charged with looking beyond the Guidelines categories and that they know what their colleagues have done in comparable cases. The new discretion will be influenced, as it should be, by the precedents of the court: a true common law of sentencing.")

principle rationale was to restrict judicial discretion -- when there was no need to. Now is the time to change that.

1. *Acquitted conduct:* In *Watts* the Court upheld the constitutionality of the mandatory use of acquitted conduct,[10] a holding which the Commission enforced in the Guidelines: "Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses." USSG § 1B1.3, comment. (backg'd). "Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales." USSG § 1B1.3, comment. (n.2). *See also* § 6A1.3. To be sure, Justice Breyer in *Watts* explicitly invited the Sentencing Commission to prohibit the use of acquitted conduct based on policy considerations concerning "the role that juries and acquittals play in our system." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). While Justice Scalia disagreed, asserting that the Commission could not exclude acquitted conduct from relevant conduct consideration, citing the requirement in a pre-Guideline statute, 18 U.S.C. § 3661, that "no limitation be placed" on information considered in sentencing, *id.* at 158 (Scalia, J. concurring), in my judgment, Justice Breyer had the better argument.

   In fact, the Commission has put all sorts of information entirely or partially off limits for any purpose. *See* U.S.S.G. § 5H1.1-6, 10-12 (1998) (prohibiting or discouraging consideration of various offender characteristics); U.S.S.G. § 4A1.2(c), (e) (1998) (excluding certain types of offenses, and stale offenses, from criminal history computation). Moreover, nothing in § 3661 required the consideration of acquitted conduct. Past practice, which the statute embodied, permitted consideration of acquitted conduct on a case by case basis not as a blanket rule.

The language of § 3661 has to be understood in the context of the legislation in which it was promulgated. Section 3661 was first passed as 18 U.S.C. § 3577, part of the Organized Crime Control Act of 1970 , legislation that created the offense of racketeering, among other provisions. The legislative history suggests that Congress was concerned with a narrow set of

[10] *United States v. Watts*, 519 U.S. 148 (1997)(per curiam).

cases where prior acquittal clearly did not mean innocence, namely racketeering cases where evidence had been suppressed. As the author of a recent paper on the subject noted: "By directing judges to mechanistically consider several factors – and designating prior acquitted conduct among the permissible factors – the Guidelines changed prior acquitted conduct from a sentencing factor to be used only when called for by the totality of rare circumstances to one among a number of factors routinely considered in sentencing."[11]

2. *First offender:* The Sentencing Reform Act, 28 U.S.C. § 994(j) directed the Sentencing Commission to deal specifically with first offenders. It ordered the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . " *Id.*

   The Commission, however, implemented that statutory directive by redefining "serious offense" in a way that was entirely inconsistent with prior practice, and not at all based on any real data or analysis. First offender status was folded into criminal history category I. Category I included those who had never had any encounters with the criminal justice system, never been arrested, as well as individuals who had been arrested and convicted but received short sentences. There is a demonstrable difference in the recidivism rates of real first offenders as compared to other defendants in Criminal History Category I.[12] Minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism.[13] The Commission's decision needlessly increased the incarceration rate for non-violent first offenders than had been the pattern pre-Guidelines.[14]

3. *Aberrant conduct:* Discontent with the Commission's approach to first offenders was apparent from the beginning. Courts took a line in the Introduction to the Guidelines to carve out a new category, judicially-

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[11] Clare M. McCusker, In Defense of Common Law Judging (paper on file with author).

[12] See Michael Edmund O'Neill, Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System, 42 B.C. L. Rev. 291 (2001).

[13] See Recidivism and the "First Offender" (May 2004), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf. see also A Comparison. of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score, 15 (Jan. 4, 2005), http//www.ussc.gov/publicat/RecidivismSalient FactorCom.pdf.

[14] "While before the Guidelines nearly 50% of federal defendants were sentenced to probation, see Bureau of Justice Statistics Sourcebook 1994, table 5.27, USSC Annual Report, table B-7 (providing rates of imprisonment from 1984-1989), afterwards it was only 15%. U.S.S.C.1996 Sourcebook of Federal Sentencing Statistics, 20.

defined and enforced. In the Introduction, the Commission specifically acknowledged that it had not dealt with "single acts of aberrant behavior, which may still justify probation at higher offense levels through departures." U.S.S.G. Ch. 1, Pt. A, intro comment 4(d).

The First Circuit defined the aberrant behavior departure as involving consideration of the "totality of the circumstances," *see United States v. Grandmaison*, 77 F.3d 555, 563 (1st Cir. 1996), a definition which it adopted from the Ninth and Tenth Circuits, and which was then followed by the Second Circuit. Other courts offered more narrow definitions.

After the PROTECT Act,[15] the Sentencing Commission apparently excluded "serious drug offenses" from consideration in connection with an "aberrant behavior" departure. "Serious drug offenses" were defined so broadly that carrying drugs in one's body for piecework wages -- the classic "mule" -- was treated the same for "aberrant behavior" purposes as carrying drugs in a briefcase for massive profits.[16] Nothing in the Guideline text, the application notes, or the commentary, indicated why this group was excluded or even how the exclusion was related to the statutory purposes of sentencing. Rather than allow judges to make meaningful distinctions, the Commission carved out a far broader exclusion. See § 5K2.20.[17]

4. *Quantity and role*: As many have noted, the Guidelines emphasize quantity (or, in the case of fraud, amount) over virtually any other factor including the offender's role in the offense. Again, the Guidelines fail to

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[15] Pub.L.No. 108-21, § 401(b)(3)-(5), (g), (I), 117 Stat. 650, 668 (2003).

[16] See also *United States v. Germosen*, 473 F. Supp. 2d 221, 227-228 (D. Mass. 2007).

[17] § 5K2.20. Aberrant Behavior (Policy Statement) (a) In General. Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of Title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c). (b)Requirements. The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.(c) Prohibitions Based on the Presence of Certain Circumstances. The court may not depart downward pursuant to this policy statement if any of the following circumstances are present: (1) The offense involved serious bodily injury or death.(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.(3) The instant offense of conviction is a serious drug trafficking offense.(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four. 18 USC Appx § 5K2.20

distinguish between offenders whose culpability is wholly different, the drug delivery man or the man dealing out of his car, and the dealer in the McMansion. Advocates and judges have stopped asking the questions that had always been relevant in the sentencing narrative -- is the offender dealing drugs to support a habit, or is the offender profiting substantially from the enterprise? Does the drug income support a lavish lifestyle or is the offender just subsisting? While the Court can make adjustments based on role, the downward role adjustment is minimal compared to the quantity enhancement.[18]

The Commission must revamp the quantity approach: Quantity is only one measure of culpability among others. Moreover, role in the offense must be defined functionally, across offense categories not depending upon the offenders' role in the indicted offense. For example, if the government chooses to indict two "drug mules," they both should get a substantial role reduction beyond Guideline scores, because they are without a doubt at the bottom of the hierarchy.[19]

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[18] See *United States v. Matos*, 589 F. Supp. 2d 121, 140 (D.Mass. 2008) ([T]he drug quantity tables in the Guidelines have been widely criticized. Drug quantities were assigned to the various levels without any indication of how those levels related to the purposes of sentencing. As a result, all too often the Guidelines' over-emphasis on the quantity of drugs involved in the offense fails as a reliable measure of the defendant's culpability. At the same time, the available role reductions are rarely sufficient to offset the extent to which drug quantity controls the recommended sentencing range."). See also United *States v. Germosen*, 473 F. Supp. 2d 221, 227 (D. Mass. 2007); *United States v. Jurado-Lopez*, 338 F. Supp. 2d 246 (D. Mass. 2004); *United States v. Cabrera*, 567 F.Supp. 2d 271, 273 (D. Mass. 2009); *United States v. Haynes*, 557 F. Supp. 2d 200 (D. Mass. 2008); *United States v. Maisonet*, 493 F. Supp. 2d 255 (D.P.R. 2007); *United States v. Garrison*, 560 F. Supp. 2d 83 (D.Mass. 2008); *United States v. Ennis*, 468 F. Supp. 2d 228 (D. Mass. 2006); *United States v. Jaber*, 362 F. Supp. 2d 365 (D.Mass. 2005). .

[19] U.S.S.G. § 3B1.2 gives the court the authority to reduce a defendant's score if her role can be characterized as "minimal" or "minor." With respect to this factor, the defendant bears the burden of proof. The Guidelines do not carefully define "minimal" or "minor," appropriately leaving the interpretation to the courts. The courts have carved out two referents: First, one must look to other participants in the offense of conviction. *See United States v. Martinez-Vargas*, 321 F.3d 245, 250 (1st Cir. 2003). Second, one must look to whether the defendant is "less culpable than most other persons convicted of comparable crimes." *United States v. Martinez-Vargas*, 321 F.3d at 250. Under the first approach, the relevant comparisons are with those involved in this case, whether indicted or not. The Court must evaluate everyone who is "criminally responsible for the commission of the offense," whether or not convicted. U.S.S.G. § 3B1.1, cmt. n. 1. The Commission should make it clear that means considering the entire drug hierarchy in which the offender was involved, whether or not charged. Under the second approach, comparing defendant to others convicted of comparable crimes, the courts should also look beyond the offense of conviction. In the case of a drug mule, for example: "Individuals willing to swallow pellets of heroin, or to insert them into their rectum, could not be any lower. These people are not just general couriers, they are body couriers. If the heroin were to leak out of the pellets, their lives could be in danger." *United States v. Jurado-Lopez*, 338 F. Supp. 2d at 252. In J*urado-Lopez*, the government argued that the court should not compare the defendant to others convicted of drug conspiracy; but rather to other "mules," because otherwise there would be, in effect, an automatic "mule" reduction for role. I rejected the argument. Without a consideration of the extraordinarily minimal role of "drug mules," there is an automatic -- and unjustified -- increase because of the significance of drug quantity under the Guidelines.

III. Finally, I want to turn to what Congress can do.

A. In a time of advisory guidelines, various statutory provisions are so rigorously applied as to create real "cliffs," and unfair distinctions as between similarly situated individuals.

1. *Clearly Congress and the Commission should address the relationship between the safety valve and the mandatory minimums in 18 U.S.C. 3553 (f).* Either the statute should not refer to "criminal history I," thereby keying the safety valve to the formal categories of the now advisory Guidelines or the Guidelines should redefine criminal history I. For example, in a recent case a defendant was disqualified from the safety valve only because he had an unpaid fine levied in connection with a traffic offense, which then lead to a probation violation offense, which then lead to a probation violation offense that was pending at the time of the sentencing. That very minor infraction destroyed his entitlement to criminal history I and forced the Court to sentence the defendant to the mandatory minimum.

2. *Substantial assistance departures:* While in the ordinary Guideline case, the Court has discretion to depart downward when the government files a substantial assistance motion, in the case of a mandatory minimum, the statute, 18 U.S.C. 3553 (e) states that "the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence *so as to reflect a defendant's substantial assistance.*" The First Circuit has interpreted this provision as barring the Court's consideration of any sentencing factor other than substantial assistance, an interpretation which completely and utterly cedes discretion to the prosecutor.[20]

3. *Armed Career Criminal Statute:* The enforcement of the ACCA varies widely from state to state, often depending upon the vagaries in the criminal code of the respective states. (Resisting arrest -- which could include "stiffening the arm" or violence, for example, is arguably included.)[21] The Commission should recommend language that would narrow the ACCA's application to the kind of offenders that the statute's legislative history identifies.

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[20] *United States v. Ahlers*, 305 F. 3d 54, 60 (1st Cir. 2002)(holding that district court may consider only a defendant's substantial assistance when imposing a sentence below the statutory minimum pursuant to the government's section 3553(e) appeal.)

[21] See United States v. Gauthier, 590 F. Supp 2d 214 (2008).

4. *Mandatory minimums:* Obviously, Congress should repeal the mandatory minimums and if it does not, the Commission should change the tables so that a Guideline sentence does not exacerbate the injustices of the mandatory minimum statutes.

Let me return to my first point.

This is a time of maximum creativity. The period is creative because the Supreme Court, by declaring the Federal Sentencing Guidelines advisory, has unleashed a broad discussion about sentencing -- what works, what is fair, what makes a difference in terms of crime control, what is cost-effective. Mandatory guidelines effectively drowned out all other voices in the sentencing debate. And they focused almost exclusively on two of the purposes of sentencing, disparity and retribution, to the exclusion of all others. It is as if, as one judge told me, all that matters is that we are doing the same thing even if none of our sentences makes any sense. And now, in retrospect, many of our sentences, like the sentences for crack cocaine, did not.

The Supreme Court has made it quite clear that it really meant it when it said that the United States Sentencing Guidelines were advisory. But unless the Courts and the Commission work to create sentencing frameworks apart from the Guidelines, there will be no meaningful change in federal sentencing practices. Judges will intone the *Booker* line -- that the Guidelines are advisory -- but in fact apply them.

The question again is not about compliance with flawed guidelines, about being the sentencing police. It is about what I said at the outset: What can the Commission do to help federal judges make better discretionary decisions, that are more reasoned, more transparent, more persuasive, more effective and more just?