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United States Sentencing Commission
Regional Hearing on the Twenty-Fifth Anniversary
of the Passage of the Sentencing Reform Act of 1984

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Thank you esteemed members of the U.S. Sentencing Commission for allowing me to appear before you today. At the onset I'd like to thank Senior U.S. Probation Officer Ray Lopez for his assistance in helping me prepare my statement. I have read the testimony of other chief and deputy chief U.S. probation officers and will try not to reiterate their well articulated points.

How has the advisory nature of the federal sentencing guidelines after the Supreme Court's decision in *United States v. Booker*, 543, U.S. 220 (2003) affected federal sentencing?

My observations relate primarily to the District of Connecticut, which has a reputation for having a high departure rate. For example, over the past ten years, both pre- and post-*Booker*, the number of cases in Connecticut sentenced within the guideline range compared to the national percentage ranged from 50% sentenced within the range in 1998, compared with 66.3% nationally; 58% within the range in 2004, compared to 71.8% nationally; and 41.8% in 2008, compared to 59.4% nationally.

As the statistics reflect, in our district the guidelines have always been viewed as more flexible than most other districts, given that we've embraced the fact that departures are a part of guideline sentencing and authorized by the guidelines. In addition to offense conduct, criminal history, and victim information, our presentence reports tend to have robust social history sections. It's in the social histories where mitigating circumstances are often uncovered, and often relied on at sentencing. Our courts have always calculated the guidelines honestly, and by this I mean that if special offense characteristics or criminal history points were applicable, they were factored into the calculations, not jettisoned or ignored or plea bargained away. In short, our judges, who are passionately committed to justice, have tried not to let the math take precedence over the people, situations, and circumstances that make some cases genuinely unique. If the guideline range appeared too high and mitigating circumstances were present that justified a departure, our courts departed. Shortly after *Booker*, there was concern that Congress might enact a radical legislative response. This was a season of wait and see. We have come a long way since then, and case law has provided sound direction for the court. The advisory nature of the

guidelines since *Booker* has allowed further flexibility in this regard.

What should be the role of federal sentencing guidelines in federal sentencing? What, if any, changes should be made to the sentencing guidelines?

The federal sentencing guidelines should be just what they finally are – guidelines. In terms of what changes should be made, I have one observation that may lend itself to changes in the future -- one of the greatest impacts of the Sentencing Reform Act of 1984 was that it transferred jurisdictional authority for revocations from the U.S. Parole Commission to the district courts as parole was abolished and replaced by supervised release. Perhaps because Chapter Seven has always been advisory, the Commission has not promulgated much sentencing data regarding revocation sentencing. The Commission should study whether disparity exists around the country in terms of revocations. I would be very interested to know how judges feel about this added responsibility, and whether they think that jurisdictional authority over violation conduct is the most efficient use of judicial resources. I wonder whether a hybrid approach might lend more consistency to violations nationwide. For example, with statutory modifications, district courts could retain the authority to handle modifications of conditions and technical violations including drug use, while the Parole Commission or another like organization could handle all Grade A violations, and perhaps Grade B violations, as well as warrant requests. Such an approach might alleviate some of the workload courts are under, while at the same time allow district courts to participate in evidence-based practices that work, such as drug courts.

Does the federal sentencing system strike the appropriate balance between judicial discretion and uniformity and certainty in sentencing?

Keeping in mind that the guidelines, as we now know them, are the result of over 20 years of sentencing practice, judicial review and legislative reform, I believe that they lend to uniformity and some certainty that similarly situated defendants will receive relatively the same sentence. However, research regarding incarceration, its benefits and detriments, must be conducted to determine what to do about mandatory minimum sentencing as some guidelines are set by the statutory minimums. Sentencing length in mandatory minimums seems to have been chosen arbitrarily without much regard to research in what is most effective in deterring crime and reducing recidivism. Maybe five years in prison is appropriate for most offenders dealing a certain amount of a certain drug, but what's the justification? Judges are required under 18 U.S.C. § 3553(c) to state their reasons for imposing sentence. Perhaps something similar should be required of Congress when setting the minimum number. We need to ask ourselves the tough questions – does the gender and racial make-up of a legislative body significantly impact the law in ways that may be unfair? Despite the best of intentions, might one racial group legislate harsher penalties for another racial group? Is the Sentencing Commission, under its legislative duty to reduce disparity, able to research whether such issues exist? Are there other, more creative ways to increase

uniformity than tying the hands of district court judges? What percentage of disparity among sentences should be expected and is appropriate?

How should offense and offender characteristics be taken into account in federal sentencing? What, if any, changes should be made with respect to accounting for offense and offender characteristics?

There should be a logical balance between the offense and offender. Again, the guidelines provide a starting framework, which is enlarged by the existing case law. The goal of simplification regarding offense characteristics should still be a priority. There remains a theme of complexity that is burdensome on the system. This includes redundancy in Specific Offense Characteristics, Cross References to Cross References and commentary that offers examples that at times add more questions than answers.

Regarding offender characteristics, I think that Chapter 5 is fairly adequate and complete. However, I would recommend the following change to Guideline Section 5H1.12 which reads: "Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted." I think it might allow courts the ability to fully appreciate defendants' characteristics if the guideline did not prohibit the departure, but rather discouraged it by noting that lack of guidance as a youth and similar circumstances are not *ordinarily* relevant in determining whether a departure is warranted.

Finally, there may be disparity across the country in the application and interpretation of 18:3553(e) and USSG 5K1.1 that perhaps can be addressed. In some districts, like Connecticut, defendants typically only receive 5K1.1 motions if they assisted in the "prosecution" of a defendant. The assistance had to have led to a conviction, while in other districts a motion can be simply based on assistance in an "investigation." This is a problem, not to mention the varying degrees or percentage of a departure that may cause "unwarranted sentence disparity." It would be a daunting task to try to create more uniformity in this process, but one that would be worthwhile.

What type of analysis should courts use for imposing sentences within or outside the guideline sentencing range?

I believe that the Second Circuit's decision in U.S. v. Crosby, 397 F.3d 103 (2d Cir. 2005) outlined a solid analysis of *Booker* and provided a sound approach, which has been followed by other circuits and framed in the most recent decisions of note, such as *Kimbrough*. Considering that the guidelines embrace all the 3553(a) factors and purposes of sentencing (this was the goal at the beginning), establishing the guideline range, or possible ranges, is a proper place to start. Thereafter, the courts look at the applicable range and make an assessment of whether it is sufficient, but not greater than necessary to comply with the

statutory purposes of sentencing. If not, the courts look to see if a departure is warranted. Finally, if there is still not an adequate range, the courts should consider a variance from the guidelines under 18:3553(a) that is specific to the individual defendant and his/her circumstances, rather than a rote recitation of the statutory language.

What, if any, recommendations should the Commission make regarding the Federal Rules of Criminal Procedure?

There was a recent request by the American Bar Association to amend Rule 32. The Probation Office respectfully recommends that this request be denied for the reasons that Chris Hansen, Chief U.S. Probation Officer from the District of Nevada articulated in his testimony before the Commission in May.

What, if any, recommendations should the Commission make to Congress with respect to statutory changes regarding federal sentencing?

Our nation's "all or nothing" approach to punishment has created a penal system that warehouses large numbers of men and women in huge prisons located outside our inner cities for lengthy periods of time. What we really need is a more enlightened approach to punishment. The Sentencing Commission recently hosted a conference on alternatives to incarceration. This is a step in the right direction. I think we also need a new criminal justice paradigm. I wonder whether departures or variances and alternatives to incarceration would be so topical if prisons themselves were different. If instead of warehouses in the country, we had smaller prisons located in the inner cities. In these modern prisons certain nonviolent offenders, after serving a percentage of their sentences, could be allowed out into the community for good reasons such as employment and other purposes that further the goals of rehabilitation and protection of the community. These would not be halfway houses, but prisons where inmates would remain locked up in a cell for half the day and large portions of the weekends. Currently, all at once, we drop liberty like a rock on inmates. A few months in a halfway house does not begin to reintegrate inmates who have been imprisoned in highly structured environments for many years. It is no wonder that most violations occur during the first six months of release. Would it make better sense if liberty was something that nonviolent inmates earned a little at a time? These new prisons would allow prisoners the opportunity to still be, in some small way, contributors to the community and parents to their children. Inmates could pay victims restitution, provide child support for their offspring, and contribute to Social Security so that they don't further burden the public later down the line. If the inmate fails, we'll always have the warehouse prisons to send them back to. Perhaps the birth place of such modern "come and go" prisons is in the guidelines themselves, through the expansion of Zones B and C of the Sentencing Table.

I note that the seeds of what I describe here are already in the guidelines in Section 5C1.1(c), which talks about "intermittent confinement." This is a great idea, but is unworkable in most

districts because our prisons are rarely located in highly populated areas that would allow for such an idea to actualize. In the District of Connecticut, there are no centrally located male federal facilities in which offenders could be intermittently confined. Nor does the current system of warehouse prisons, whose main duty is to keep people locked in, support the notion of inmates coming and going.

Additionally, the disparity between crack and powder cocaine should be eliminated, and the mandatory minimum penalties in drug cases should be amended to apply only to defendants who possess firearms.

Finally, Senator Jim Webb has introduced legislation to create a National Criminal Justice Commission tasked to conduct a top to bottom review of our nation's criminal justice system and provide recommendations for reform. My hope is that any final recommendations will include expanding the U.S. Sentencing Commission's role to look beyond sentencing, to use its data, expertise, and connections to play an active role in bringing the criminal justice stakeholders together to help recreate how we punish and rehabilitate criminal offenders. Booker has not only provided more discretion to district courts, but it can also free the Commission to create a new vision for itself, to take another look at what it does and how. The Sentencing Commission, as the nation's experts in this area, should request that Congress consider expanding its role beyond sentencing to leverage its expertise in the coming years as we begin to redefine crime and punishment.