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TESTIMONY PRESENTED TO THE

UNITED STATES SENTENCING COMMISSION

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Chairman Hinojosa, and Members of the United States Sentencing Commission, thank you for giving me the opportunity to appear before you to provide my views on the state of the Sentencing Guidelines and the twenty years of impact they have had on the federal justice system.

I speak to you from my experiences as a federal prosecutor, who every day applied the Sentencing Guidelines to a myriad of cases that I handled including homicides, child sex crimes, white collar offenses and cultural resource crimes. In so doing, I had to explain to victims of these crimes the function of the Sentencing Guidelines and the interplay between the guidelines and the statutory maximum sentences applicable to their cases. I also appear before you as a former Member of the U.S. Sentencing Commission's Ad Hoc Advisory Committee on Native American Issues, for which I and others were involved in researching and reporting on the Sentencing Guidelines' impact on Indians in Indian Country and Indian Country crimes. Finally, I appear before you as a former United States Attorney for the District of Arizona, a District with one of the highest criminal caseloads in the nation, including Indian Country crimes and border crimes involving illegal alien and drug trafficking . My testimony will therefore touch on issues that I have personally confronted in working with the Sentencing Guidelines, and my general observations related to the policy implications that are associated by changes to the sentencing

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guideline scheme. While my testimony reflects all of these experiences, I speak today only for myself.

A. The Sentencing Reform Act and Impact of United States v. Booker

I entered service with the Arizona United States Attorney's Office as a victim advocate at approximately the same time that the federal Sentencing Guidelines were in the infancy stages of implementation in the federal judicial system. As I understood it then, the U.S. Sentencing Commission was created by Congress to develop the Sentencing Guidelines to achieve some level of uniformity in the otherwise wide disparity of federal sentences imposed by federal judges across the United States for the same federal offense[2]. Generally speaking, the goals of the Congress were achieved in that, ultimately one who commits federal bank robbery in Arizona and one who commits federal bank robbery in Florida face a similar range of punishment with slight yet important modifications for prior criminal conduct and offense behavior, and with deference to the statutory penalty. The Sentencing Guidelines evolved into a sentencing system that introduced predictability in what was previously a fairly unpredictable national federal sentencing scheme. Arguably, the predictability that came with the Sentencing Reform Act diminished some of the judicial discretion previously held by judges in handing down sentences.

However, over the last 20 years, the general uniformity goals that the Congress had in mind when it passed the Sentencing Reform Act, evolved, in some circumstances, into a rigid sentencing scheme that provided almost pinpoint predictability in sentencing outcomes such that all parties who walked into a sentencing court knew what the ultimate outcome would be. The need for impassioned argument at sentencing, by both parties, diminished. The further predictability that came with the Commission's implementation of the Sentencing Reform Act arguably diminished the wide judicial discretion previously held by judges in handing down

[2] Sentencing Reform Act of 1984, Pub.L.No 98-473, title 2. ch.2 § 212; 98 Stat.1987.

sentences. Federal prosecutors began using the Sentencing Guidelines' calculation to shape their plea offers and to determine whether to proceed to trial or whether to introduce witness testimony at sentencing. It is important for this Commission to understand the profound impact that it has had on the previous 20 years of federal criminal justice to our nation and to the millions of individual victims and defendants that rely on it for justice. The question now before the Commission is: where do we go from here?

Post ***United States v. Booker***[3], I can attest to my observation that federal judges and the defense bar are only just now beginning to test the limits of discretion in sentencing and the "unreasonableness" appellate review standards imposed by it. I refer only to the defense and the bench because historically, federal prosecutors have had to adhere to and apply strict national policy directives from the Department of Justice in prosecuting cases. These limitations and restrictions, which continue to exist and which the Department continues to insist be implemented, do not apply to the defense bar or bench. Consequently, post ***Booker***, the federal prosecutors remain the only parties who depend on the strict calculation of the Sentencing Guidelines and its predictability in sentencing, while the defense bar and bench will increasingly be able to creatively argue around the "advisory guidelines" to test the new appellate judicial review of "reasonableness" crafted by the Supreme Court.

We have already witnessed this in the area of child pornography cases, where trial courts have handed down probation sentences for possession and distribution of large quantities of child pornography, and appellate courts have upheld such sentences as reasonable. The question that this raises is whether the "unreasonableness" appellate standard of review ultimately will eviscerate the uniformity in sentencing that was the original goal of the Sentencing Reform Act. Again, my experience is that these circumstances will not impact the defense bar or bench, but it

[3] 543 U.S. 220 (2005).

will profoundly impact a federal prosecutor's advocacy so long as the Department of Justice continues to restrict the sentencing advocacy of prosecutors to achieve national policy standards in what is becoming a largely unpredictable federal sentencing era. The challenge for the Commission is to determine whether and how to react to the fact that, under the new post-***Booker*** sentencing scheme, actual sentences increasingly may depart from the previously uniform Sentencing Guidelines. It remains to be seen whether a balanced sentencing approach can be achieved between a sentence that is wholly outside the guidelines, yet determined judicially to be a "reasonable" sentence, and a sentence that is sanctioned by the Commission. Finally, given the tensions that will assuredly continue to arise between the defense bar, the courts and federal prosecutors in this new unpredictable sentencing scheme, we need to consider the question of who should take the lead in reconciling the Sentencing Reform Act and the results of the Booker decision. Should it be the defense bar, federal prosecutors, the Department of Justice, or the Commission?

B. The Impact of the Sentencing Guidelines on Indians and Indian Country

I wish to turn now to the impact that this Commission and the Sentencing Guidelines have had on Indians and Indian Country. As an Assistant U.S. Attorney and Senior Litigation Counsel for the District of Arizona, I prosecuted a large caseload of Major Crimes Act crimes. The District of Arizona includes 22 Indian Nations, among them two of the largest Indian tribes – the Navajo Nation and the Tohono O'odham Nation – in the United States. Like county prosecutors, Assistant U.S. Attorneys in the district are responsible for charging Indians and non-Indians with violations of specific federal crimes committed in Indian Country. The Major Crimes Act was enacted in the 1885, and the Indian Country Crimes Act was enacted shortly

thereafter[4]. Neither statute has dramatically changed in its application to Indian Country since enactment. What has changed and continues to change, however, is the Congress' desire to increase federal penalties, including those applied to Indian Country through the Major Crimes Act. In so doing, Congress usually does not give much consideration to the potential disparity that may occur to Indians in Indian Country. When the Congress acts, the Commission must necessarily implement its directive. The Commission's changes, therefore, have the potential for creating unintentional disparity to Indians. Therefore, I urge the Commission to create an institutional mechanism within it for Indian tribal government consultation when considering changes to the Sentencing Guidelines that involve Indian Country crimes.

Consultation between the federal government and Indian tribes is not a new concept. Indeed, it was created under President Nixon's Indian Self-Determination policy, and has since been reiterated by every United States President by Executive Order. Moreover, formal tribal consultation has been expanded to include various federal government and administrative agencies. Tribal consultation has become the cornerstone of the government-to-government relationships between the Indian tribes and federal and state governments. The Commission would be well served by implementing a permanent mechanism of tribal consultation with the aid of experienced practitioners who can advise the Commission on how its changes in policy and Sentencing Guidelines may impact Indians and Indian Country. This recommendation comes from my experience with the Sentencing Guidelines and my work with Indian tribal governments and Indian Country crime victims, who frequently lack a complete understanding of how this process impacts them.

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[4] See The Major Crimes Act, 23 Stat. 385 (1885) (codified at 18 U.S.C. §.1153; Ex Parte Crow Dog, 109 U.S. 556 (1883).

I was a appointed to the U.S. Sentencing Commission's Ad Hoc Advisory Committee on Native American Issues in 2001. The Committee delivered its findings to the Commission in November, 2003. The charge of the Committee was to "consider any viable methods to improve the operation of the federal Sentencing Guidelines in their application to Native Americans under the Major Crimes Act." To meet that charge, we reviewed and analyzed the impact of the Sentencing Guidelines on Indians, seeking particularly to address whether their was a disproportionately harsher impact on Indians as compared to non-Indians, generally. The general perception was that the federal Sentencing Guidelines treat Indians in Indian Country more harshly than those adjudicated in the State system (regardless of Indian status). The dearth of state sentencing data made it difficult for the Committee to generally confirm this belief. However, the Committee was able to confirm this in specific areas where data was available, for example with regard to drunk driving homicides and sex offenses.

I am pleased that this Committee gave serious consideration to our findings and the experiences of Indian country victims of drunk driving homicides, as evidenced in it recalculation of the sentencing guideline scheme for this crime. The Commission's change resulted in increasing an average sentence of 16 – 24 months in prison to 30 - 37 months for a defendant who kills another because he/she chose to drink and drive. This change, although slight, brings drunk driving homicides charged under the Major Crimes Act more in line with the national state sentences for the same act. Indian Country victims deserve no less.

It is important to note, however, that one roadblock to addressing the disparity that existed in drunk driving homicide between Indian Country and the state sentencing systems is the evolution of the Major Crimes Act and its interplay with the enactment of the federal statutes referred therein and the amendments thereto. For example, one delay to increasing the

manslaughter guideline was the maximum statutory penalty of the manslaughter statute and its relation to the maximum statutory penalty for other homicide statutes. Modification of the manslaughter guideline sentence could not be achieved without increasing the statutory maximum penalty for manslaughter, and the Sentencing Guidelines for other homicide statutes. This result is the consequence of a general unawareness of the practical impact that changes to the federal sentencing scheme and the federal statutes have on Indians in Indian Country. This realization points out the need to establish a permanent mechanism to examine the overall implications that may arise from even the most discrete change to crimes effecting Indian Country.

While the Ad Hoc Committee did not find racially biased sentencing between states and federal courts, we did note that the Major Crimes Act jurisdictional scheme that applies the range of Chapter 109A Offenses to Indian Country promotes sentencing disparity[5]. The Ad Hoc Committee touched on this issue when we discussed our concerns with the category of sex offenses in Indian Country. We noted that the federal sentences for non-Indians are more severe than state sentences because the data on hand revealed that the Chapter 109A Offenses are more likely to be charged in Indian Country than on any other federal enclave. Therefore, we found that the perception that Indians are sentenced more severely than non-Indians, in this area, is accurate.

Because the Committee's report was made to the Commission in 2003, we were unable to examine the newly enacted PROTECT Act of 2003, which imposed increased sentences for specific sex offenses. In particular, Section 106 of the Act imposed a mandatory life sentence on anyone convicted in the federal courts of a second sex crime in which a minor is a victim.

[5] 18 U.S.C. 1153 applies the following statutes to Indian Country: 18 U.S.C. 2241, Aggravated Sexual Abuse; 18 U.S.C. 2242 Sexual Abuse, 18 U.S.C. 2243 Sexual Abuse of a Minor or Ward, 18 U.S.C. 2244 Abusive Sexual Contact, 18 U.S.C. 2245, Sexual Abuse Resulting in Death.

Section 401 amended Application Note 4(b)(1) to U.S.S.G. § 4B1.5 so that any sexual offender who commits "prohibited sexual conduct" with a minor on two or more occasions demonstrates a "pattern of activity" and is subject to a five-level increase in offense level, with a minimum of 22. The Ad Hoc Committee observed generally that the existing average federal sex offense penalties would dramatically increase under the PROTECT Act, resulting in disparity between federal and state sentences for these offenses.

The observations of the Ad Hoc Committee were soon realized, and continue to be in play in U.S. Attorney's Offices with Indian Country crimes jurisdiction. For example, in Arizona, the immediate reaction of defendants charged with a Chapter 109A offense was not to work to resolve the case by plea, but rather to go to trial because the new Sentencing Guidelines restricted any benefit that would occur from admitting guilt. Under the amended Aggravated Sexual Abuse statute, once a defendant is charged, he is bound to a 30-year minimum mandatory sentence. Therefore, we experienced a surge of defendants going to trial. Relatively no consideration was given to the potential that instituting severe sentences, including mandatory minimums, would have on limiting a prosecutor's ability to resolve these sex cases. Yet the discretion to resolve these extremely difficult cases without trial is a necessary tool to balance the need to spare child victims from having to testify to his/her emotional detriment and ensuring that the defendant received just punishment. Prosecutors now find it extremely difficult to exercise discretion to resolve cases based on the facts, the defendant's background, and the impact of testifying at trial to very young and often traumatized children. This challenging set of circumstances is not occurring nationwide, but rather primarily occurring in Indian Country and to Indian defendants and Indian victims. Adequate consultation with Indian tribes, had there

been an institutional mechanism for such consultation, may have prevented this problem from arising.

One area where tribal input was received and acted upon is in the area of Cultural Patrimony crimes. In addition to the commendable work of the U.S. Sentencing Commission in improving the guidelines to reflect the seriousness of drunk driving homicides, the Commission is to be commended for ensuring that the impact of loss or damage to our nation's treasures such as archeological items, Native American cultural resources, and items important to our national heritage are adequately considered. By enacting section 2B1.5, the Commission filled a huge void that previously had made sentencing unpredictable for the parties when a defendant was convicted of damaging items having an ongoing cultural importance to Native Americans and when protected national items of archeological value were damaged or destroyed.

As a federal prosecutor, I had the experience of prosecuting these crimes. From these experiences, I learned that these prosecutions are rare and unique. Consequently, few federal district courts across the nation are experienced in the challenging sentencing issues that accompany these prosecutions. For example, it is not unusual for a witness to testify that damaged or destroyed tribal cultural patrimony is "irreplaceable" and that it has no dollar loss equivalent, or that its loss will result in traditional practices being halted or undermined. The inability to quantify a loss value associated with archeological items or cultural patrimony made it legally impossible for courts to fashion meaningful sentences. Consequently, the courts would rely on the dollar loss calculation. The Commission's recognition of this and its resulting sentencing guideline calculus now requires district courts to impose sentences in keeping with the unique impact of these crimes to tribes and to our nation's citizens. I thank the Commission for this undertaking and for considering the views of tribal governments.

C. The Need to Address Re-Entry After Deportation in the Sentencing Guidelines.

As the United States Attorney for a border district, I was routinely reminded by federal law enforcement officials that half of the nation's illegal immigrant population crosses through Arizona's international border with Mexico. To address the large volume of border crossing activity, the Congress determined to provide additional law enforcement resources and funding for prosecutors along the southwest border. The charge we were given by the Congress was to increase our capacity to prosecute illegal border crossers to keep up with the illegal crossing activity.

You may recall that in March of 2008 I testified that illegal immigration comprised approximately 58% of the District of Arizona's criminal docket. In 2007, each federal district court judge in Arizona sentenced approximately 250 felony defendants, compared to the national average of approximately 75. The volume of immigration cases was so great that the Department of Justice had to implement fast-track programs to address the sheer volume of cases referred by Immigration and Customs Enforcement and the Border Patrol on a daily basis. At the time I left my position as United States Attorney, the Phoenix office was filing the highest volume of immigration cases in the nation.

I reiterate this information because I believe now, as I did then, that if the current course of sentencing for illegal re-entry cases is not addressed, our federal criminal justice system in Arizona will continue to suffer. The sentencing litigation arising from challenges to whether or not a prior conviction qualifies for an enhancement under 2L1.2(b) continues to be a drain on judicial resources at all levels. The Commission has had a daunting task of rewriting and reissuing adjustments to this section based on Congress's modification of the "aggravated felony" definition. In its current form, however, the parties must parse through state and local

criminal records to determine whether a defendant's prior local conviction qualifies him or her for an enhancement. This system has assumed that complete records exist. That is often not the case. It also assumes the prior local or state record contains detailed information about the prior conviction to prove whether or not it qualifies as an "aggravated felony," and that is likewise often not the case. These circumstances ultimately lead to wide disparity of sentences for illegal immigrant defendants. While the impact of this specific issue is not felt by most judicial districts in the United States, for those with international borders, those impacts are felt on an extremely large scale. So, I urge the Commission to continue its work in examining how to address these results.

D. Crime Victims and the Sentencing Guidelines

Finally, I wish to end my remarks by pointing out the stark absence of crime victim participation in the sentencing guideline scheme, and indeed, the nation's federal sentencing system. I will only briefly mention my observations and experiences, because Professor Paul Cassell has provided in-depth analysis of the impact of the Sentencing Guidelines on crime victims.

As mentioned earlier, my first position with the U.S. Department of Justice was as a Victim Advocate in the Arizona United States Attorney's Office. At that time, during the mid-1980s, United States Attorney's Offices were beginning to implement President Ronald Reagan's recommendations to implement procedures and policies to address the lack of involvement of crime victims in the federal justice system. Since then, great policy and statutory changes have brought federal crime victims into the criminal justice system by providing mandatory restitution, confidentiality to child victims, protections for sexual assault victims and resources for HIV testing. Yet, these advances provided only minimal participatory rights that

often were left to the discretion of the particular judge. In 2004, the Crime Victim Rights Act (CVRA) sent a clear Congressional message to the federal bench that these rights had yet to be fully realized[6]. The CVRA provided several important mechanisms to permit victims to have standing to claim a violation of their rights, including the right to be heard at sentencing. This right is generally viewed by the courts as permitting a crime victim to make a statement at sentencing about the impact of the crime.

While the right to be heard at sentencing is an important benchmark, it does not include a victim's right to affect a defendant's sentence while it is being calculated. Compounding this void, the 18 U.S.C.§ 3553 (a) factors to be considered in imposing a sentence[7] do not expressly call for the sentencing court to consider crime victim impact. Therefore, while we have made great strides, generally in bringing crime victims into the federal criminal justice system, victims have yet to be fully integrated into the federal sentencing scheme. I applaud the Commission for taking progressive action to create a committee to ensure that crime victim issues are fully integrated into the sentencing process. Post-***Booker***, the time may be ideal for meaningful inclusion.

E. Conclusion

I thank the Commission for permitting me to share my views and experiences. I have spent the majority of my career working with these issues, and I know that this Commission takes its responsibilities seriously. I have witnessed the deliberate care it has taken in amending the Sentencing Guidelines in the wake of Congressional and court decisions. The road ahead seems uncertain, but the history of this Commission demonstrates that it will not turn away from its important responsibilities. I thank you for this opportunity and for your continuing service.

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[6] Pub. L. No. 108-05, 102(a) Stat. 226 (Oct. 30, 2004)

[7] 18 U.S.C. 3553 (a) includes "the need for the sentence imposed – for the defendant.