United States Sentencing Commission
Public Hearing
Austin, Texas
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Statement of
United States District Judge Jay C. Zainey
Eastern District of Louisiana

Like my colleagues who have previously testified before the U.S. Sentencing Commission, I sincerely appreciate the opportunity to express my views. Prior to my appointment to the federal bench, I had extensive criminal defense experience representing criminal defendants in both the state and federal systems. Having now served on the federal bench for nearly eight years, I have been called upon to sentence hundreds of criminal defendants in the federal system. Today, I would like to share my thoughts on a number of issues that I have encountered as a federal district judge.

Initially, I would like to applaud the United States Supreme Court's decision in the Booker case. I strongly support the notion that the sentencing court not be bound by the Sentencing Guidelines, but rather be allowed to impose a sentence that it considers to be reasonable, after considering the Guidelines, and consistent with the Title 18 U.S.C. § 3553 factors.

STATUTORY MINIMUM SENTENCES:

I recognize the need for sentences to be as uniform as possible across the country, and not be based on the "philosophy" of the particular sentencing judge. This is fundamentally fair. The sentencing judge has the authority and the responsibility to impose a sentence that complies with the law.

Congress, of course, makes the law and the Court must impose a sentence that is consistent with the law. However, in making laws that are necessarily national in scope, it is impossible for Congress to propose sentences which must be applied to individual defendants. The Court, on the other hand, is in the best position to impose a sentence so that the "punishment fits the crime," after evaluating the facts and circumstances of the particular offense to which the defendant is charged, the background of the individual defendant, and the impact to the victim.

The Court is bound to follow the restrictions placed on it by Congress via the laws it enacts. Even though Congress enacts laws with statutory minimum sentences, the Government nevertheless can control the Court's ability to disregard the statutory minimum. The Government can do this because it is completely in the discretion of the Government to file a motion for

downward departure or a recommendation to the Court to impose a sentence below the statutory minimum in cases where the safety valve applies. And even though the Court can impose a sentence below the mandatory statutory minimum when the safety valve applies, this too is contingent on the Government's input as to whether the defendant has provided truthful information. See 18 U.S.C. § 3553(f)(5).

The risk of unfairness associated with mandatory minimum sentences has been recognized by the Supreme Court. Almendarez-Torres v. United States, 523 U.S. 224, 245 (1998). Justice Breyer has been particularly critical of statutes that include mandatory minimum sentences, see, e.g., Harris v. United States, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring); Blakely v. Washington, 542 U.S. 296, 331 (2004) (Breyer, J., dissenting), noting that such statutes generally deny the sentencing judge the discretion to depart downward regardless of any special circumstances that call for leniency. Harris, 536 U.S. at 570. Justice Breyer also opines that mandatory minimum sentences rarely reflect an effort to achieve sentencing proportionality which is crucial to fairness in sentencing. Id. at 570-71. And they transfer sentencing power to prosecutors while also encouraging subterfuge, thereby making them a comparatively ineffective means of guaranteeing tough sentences. Id. at 571.

Given that Congress authorizes the courts to impose a sentence below the statutory minimum in certain instances, Congress should have enough confidence in the courts to forego a statutory minimum in any case, and certainly not leave it to the discretion of the Government.

My comments should in no way be interpreted to suggest that the United States Attorney's Office in the Eastern District of Louisiana is less than admirable. Quite to the contrary, the United States Attorney and his assistants in the Eastern District of Louisiana have done an outstanding job in representing the Government's interest in all matters--criminal and civil--in which the Government has been a party. Nonetheless, I feel that a sentencing court's hands should not be bound, and should not be subject to the motion or the position of the Government in cases in which a statutory minimum sentence applies.

Let's take, for example, criminal sentencing in drug and child pornography cases.

DRUGS

There has been extensive debate relative to the different ratios applied in crack versus powder cocaine cases. The Court can choose to impose a sentence using the 1:1 ratio instead of the 100:1 ratio, after taking the 18 U.S.C. § 3553 factors into consideration. However, the Court has no such authority to apply this same ratio when there is a statutory minimum.

CHILD PORNOGRAPHY

There are persuasive arguments to the proposition that if lengthy prison sentences are imposed on the viewer of child pornography, the market will dry up, and children will no longer be exploited in this way. As such, Congress has enacted severe minimum statutory sentences of imprisonment on the viewer. This is appropriate in many, if not most of the cases. However, the

statutory minimum sentences, although well intentioned, can be too harsh in certain circumstances. For example, it could result in a sentence that in effect is one of life imprisonment to an otherwise law abiding elderly first offender.

Even though there is a similar argument which supports the imposition of lengthy prison sentences on drug users in an attempt to "dry up" the market of drug distributors, I am nonetheless unaware of any mandatory minimum statutory sentences that apply to first time drug users.

In sum, the courts should be given the discretion to impose a reasonable sentence, taking into consideration the age and health of the defendant, his lack of criminal history, whether or not he has derived a profit, or otherwise attempted to exploit children, or if he was simply a sick person who viewed child pornography. In this regard, I feel that the minimum guidelines should be used as a baseline, and the Court would hope that Congress would refrain from enacting statutes that contain mandatory minimum sentences.

VICTIM IMPACT:

The Sentencing Guidelines do take victim impact into consideration. See U.S.S.G. § 3A. However, this Court believes that evidence of victim impact is of such significant importance that a specific provision of § 3553 should be enacted to address the impact that a crime has on a particular victim. Further, the sentencing court should state on the record the extent that a victim was impacted by the commission of an offense, and to what extent the impact to the victim was taken into consideration by the court in imposing a reasonable sentence on the defendant.

ALTERNATIVES TO INCARCERATION:

In the post-Booker era, I feel that the Court has greater latitude in making the "punishment fit the crime." In this vein, and of course within the framework of the law, the Court has greater flexibility in imposing sentences that include alternatives to incarceration. Some examples of community service that I have ordered include a sentence in which a CPA, who was convicted of embezzling from a non-profit organization that assisted first time home buyers, served a term of imprisonment, followed by court-ordered community service at Habitat for Humanity. I have also sentenced female professionals to perform community service at shelters housing runaway girls.

The Bureau of Prisons does a remarkable job offering programs to inmates who require drug treatment, as well as providing educational opportunities and vocational training. These programs, in addition to the various re-entry programs provided by some courts, will hopefully have a positive impact on reducing recidivism.

Besides early release based on good time, I am aware of only one instance in which an inmate can be released from his sentence prior to the completion of his full term of imprisonment. Although I do not know statistics on the recidivism rate of inmates who are released from confinement early based on their successful completion of the 500 hour intensive drug treatment program, it would be a good idea for the Commission to explore other incentives for inmates to be able to earn "early release."

RELEVANT CONDUCT:

With the exception of the 11(c)(1)(C) plea agreement between the Government and the defendant, often times a defendant will hesitate to plead guilty because, unlike the system in many state courts, the defendant does not know the sentence that the Court will impose on him. This is especially true when a defendant is concerned about being "blind sided" in the event that his offense level is substantially increased based on the "relevant conduct" assessment of the probation officer who is in charge of writing the pre-sentence report.

In an effort to minimize surprise to the defendant, the parties at times engage in "fact bargaining." There are two schools of thought on this issue.

One argument is that the parties closest to the case--the Government and the defense attorneys--are in the best position to outline for the Court in their factual basis those allegations that the parties agree can be proven by the Government.

On the other hand, the parties can mislead the Court by agreeing to inaccurate facts in the factual basis so that the Guidelines are affected.

To avoid "fact bargaining" and likewise to avoid "surprise" to the defendant at the time of sentencing, perhaps the best way to approach this issue would be to include this type of "bargaining" as part of an 11(c)(1)(C) plea agreement.

SENTENCING DISPARITY:

I mentioned earlier that the Sentencing Guidelines were created in large part to avoid disparity in sentences by the various federal courts across the country. Although I candidly admit that I have no solution, there is also a great disparity between federal and state sentencing that I believe should be addressed.

The following are some examples:

1. **Felon in Possession of a Firearm**. 18 U.S.C. § 922, provides a maximum statutory sentence of 10 years. The Guidelines could result in a sentence as low as 18 to 24 months. On the other hand, pursuant to Louisiana Revised Statute § 14:95.1, the minimum statutory sentence that could be imposed is 10 years at hard labor and the maximum under the statute is 15 years at hard labor. There is no benefit of parole, probation or suspension of sentence.

2. **Armed Bank Robbery**. 18 U.S.C. § 2113 provides a maximum possible sentence of 25 years for a bank robbery in which the defendant was armed. The Guidelines could be substantially less. Under Louisiana Revised Statute § 14:64 (first offense), armed robbery provides a minimum sentence of 10 years at hard labor, and a maximum sentence of 99 years

at hard labor, without benefit of parole, probation or suspension of sentence.

3. **Distribution of Heroin.** Although Louisiana law has recently been changed, the offense of distribution of a small amount of heroin previously carried with it the sentence of life imprisonment, without the benefit of parole, probation, or suspension of sentence. During the same time period that this law was in effect, I was appointed to represent a defendant charged in federal court with the same offense. My client received a sentence of 18 months.

CONCLUSION

It is apparent that my position paper might present more questions than answers, but I appreciate the opportunity to express myself, and assure this Honorable Commission that I will be more than happy to work with it in providing Congress recommendations to amend existing laws and to implement new laws that will insure equal justice to all.