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U.S. Sentencing Commission
Regional Hearings on the 25th Anniversary of the Sentence Reform Act of 1984

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View from the Probation Office

Good morning, and thank you for the opportunity to testify before the Commission on this milestone anniversary of the Sentencing Reform Act. Welcome to the District of Arizona. The probation office is honored the Commission chose Phoenix for regional public hearings. Testifying before the Commission after many of my colleagues have provided testimony in their regions affords me the advantage to reflect on their statements, many of which echo my sentiments. However, I should first illustrate some of the reasons the District of Arizona and the other border districts present unique circumstances to federal sentencing.

In her April 2002 Federal Sentencing Reporter article, *Reflections of a Southwest Border Probation Chief*, our district's former Chief Probation Officer, Magdeline E. Jensen, noted something that proves the past remains relevant today. In reflecting upon the impact of Congress' 1994 Southwest Border Initiative on our probation office, Chief Jensen noted,

> ...in meeting the challenges created by the initiative, the word that comes to mind is *siege*, as in a prolonged period of adversity during which we were undermanned and underfunded. The story of the impact on our operations is one of encompassing a crushing workload, rapid growth in organizational requirements, working with less while trying to do more, stress, compromised processes,

organizational change, and innovation.

Today, nearly eight years after her article, our probation office finds itself again trying to keep pace with an increasing workload. We are coping with the effects of an increase of almost 50 prosecutors since the beginning of 2009. Despite our situation, our probation officers and staff remain dedicated to conducting objective investigations and submitting presentence reports with verified information. Our district experiences a variety of criminal cases, but the majority are drug trafficking and immigration cases. For example, in fiscal year 2008, our district handled 3,869 cases, of which 838 were drug trafficking cases and 2,239 were immigration cases (alien smuggling and re-entry). Drug-trafficking and immigration cases represented 79 percent of our overall work product. Immigration cases accounted for 58 percent and drug-trafficking represented 21 percent of the workload.

In preparing for this hearing, I offer some observations:

- Sentences for drug offenders were 47 percent higher in 2008 than in 1998;
- sentences for immigration offenders were 25 percent higher in 2008 than in 1998;
- the District of Arizona's use of variances has been negligible;
- variances have filled a nominal gap between the 1998 and 2008 departure rates;
- the 1998 departure rate for "other" departures authorized by U.S.S.G. §5K2.0 was replaced by U.S.S.G. §5K3.1 fast-track departures; and
- case disposition by plea agreements accounted for 99 percent in 1998 and 98.5 percent in 2008.

Regarding the listed topics of interest to the Commission, the Supreme Court's 2005 decision in *United States v. Booker* has reinforced the importance of a comprehensive sentencing system and

a need for the sentencing commission to continue to promote the statutory goals of sentencing by analyzing empirical data, amending guidelines, and resolving circuit conflicts. In theory, the federal sentencing system has evolved from the carving out of a ***guideline offense heartland*** of typical cases for departure to a carving out of a ***guideline system heartland*** of typical cases for variance. However, in practice, the advisory guideline system has remained intact. As I mentioned, the U.S.S.G. §5K2.0 departure rate in the District of Arizona, which then became departures under U.S.S.G. §5K3.1, Early Disposition Programs, has continued to establish uniformity in a large percentage of our cases. Furthermore, it is anticipated that because the guidelines have a solid statutory foundation, *departure from the advisory range* will be made in most cases while *variance from the guideline system* will be rare and associated with offenders who are convicted at trial or who plead guilty without a plea agreement. In short, the *United States v. Booker* decision validated that departures are vital to an evolving federal sentencing system.

The year before the *United States v. Booker* decision and as a result of *Blakely v. Washington*, the probation office in the District Court of Arizona computed two sets of guidelines in every case. The first set displayed the conventional guideline computations using the principles of relevant conduct established by a preponderance of evidence standard. The second set of guidelines – referred to as the *Blakely guidelines* – omitted specific offense characteristics and Chapter 3 enhancements related to facts neither found by a jury nor admitted to by the defendant in the factual basis of the plea agreement. Because it imported the *beyond a reasonable doubt standard* to federal sentencing, the probation office also incorporated the factual basis of the plea agreement into the presentence report to establish a defendant's guideline-relevant admissions and to assist the district court in making the appropriate guideline-relevant determinations. Yet,

although *Blakely v. Washington* added considerations, there was minimal impact on sentences and minimal impact on the process. When the government and defendant inadvertently omitted admissions to relevant conduct in the plea agreement's factual basis, the matter was ordinarily resolved at sentencing.

In summary, although the *United States v. Booker* decision made the guidelines advisory, it revived the relevant conduct principle, returned guideline-relevant fact finding to the district courts, re-affirmed that guideline-controverted issues should ordinarily be resolved by a preponderance of evidence standard at sentencing, and it relieved the probation office in the District Court of Arizona from computing two sets of guidelines in each case.

After *United States v. Booker*, all sentencing proceedings still begin by computing the guidelines, determining the advisory guideline imprisonment range, and identifying factors that may warrant either an upward or downward departure. Although a section was immediately added to the presentence report to identify any other 18 U.S.C. § 3553(a) factors that may warrant either an upward or downward variance from the advisory guideline system, several questions remained until the U.S. Supreme Court rulings in *Rita, Kimbrough* and *Gall*, provided answers which have resulted in the establishment of a standard of review for sentencing procedures in the 9th Circuit. The progeny of cases made it clear that the district courts should correctly compute the guidelines and make no presumption of reasonableness regarding the advisory guideline range.

Also after *United States v. Booker*, the probation office has continued to focus on the nature and circumstances of the offense and characteristics of the defendant to provide the court with a report that represents a totality of circumstances analysis that will provide a sentence sufficient, but not greater than necessary, to accomplish the statutory and guideline goals of sentencing. A totality

of the circumstances inquiry assures the sentence is based on no single deciding factor, all guideline-relevant facts, factors warranting departure, factors warranting variance, the context between the plea agreement and offense, all offender characteristics, and a conclusion based on the whole picture.

In the District of Arizona, the federal sentencing system strikes the appropriate balance between judicial discretion and uniformity and certainty in punishment mainly because the district court processes a high percentage of cases which involve standardized offense-specific plea agreements with a waiver of appeal rights and a stipulation to an imprisonment range that is usually a departure from the advisory imprisonment range. The standardized plea agreement provides an institutional advantage for the district court because any plea agreement that deviates from the standardized method is rather obvious and receives higher scrutiny to assure there is no unwarranted disparity. Judicial discretion is preserved in that the district court determines if a plea agreement reasonably addresses or does not reasonably address the advisory guideline range, departs from the guideline range for justifiable reasons, or varies from the guideline range for justifiable 18 U.S.C. § 3553(a) reasons. In a small percentage of cases involving no plea agreement, judicial discretion is accentuated for purposes of establishing a reasonable sentence supported by correct guideline computations, 18 U.S.C. § 3553(a) considerations, and a comprehensive statement of reasons.

Because 18 U.S.C. § 3553(a) requires that *the court shall consider the nature and circumstances of the offense and characteristics of the defendant and impose a sentence sufficient, but not greater than necessary* to promote the goals of sentencing, offense and offender characteristics continue to be determined at federal sentencing on a case-by-case basis. Because the specific offense characteristics, the commentary notes, the various guideline amendments, and the

published reasons for the amendments to all federal offenses are supported by empirical data gathered by the commission, the specific offense characteristics continue to reflect well-researched information that provide the district court with the leverage, discretion, and flexibility to make appropriate guideline-relevant findings and to resolve guideline-controverted matters.

A more complex task exists with offender characteristics because of the apparent tension between the guideline language that certain offender characteristics *are not ordinarily relevant* at sentencing and the 18 U.S.C. § 3553(a) language that the court shall consider the nature and circumstances of the offense and *characteristics of the defendant*. The probation office is required to provide information that will assist the court in determining if the offender characteristic is present to an exceptional degree or different from the ordinary case to warrant a departure, and if not, a variance. In practice, the district court achieves balance and relieves the apparent tension between the statute and guideline because the offense guidelines and criminal history category ordinarily account for a *reasonable* advisory imprisonment range and other factors that may warrant departure while the offender characteristics ordinarily account for the sentence within the advisory imprisonment range or adjusted imprisonment range pursuant to the plea agreement.

In the 9th Circuit, neither the guidelines nor 18 U.S.C. § 3553 factors standing alone meet the reasonableness standard of review. The procedure requires an accurate guideline analysis and separate analysis of the factors at 18 U.S.C. § 3553. In *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), the guidelines may not be presumed reasonable and should be evaluated in light of the factors listed at 18 U.S.C. § 3553(a).

Regarding presentence investigation procedures, a proposal to amend the Federal Rules of Criminal Procedure, specifically Rule 32(h), has been offered which would have the effect of

providing parties with disclosure of written summaries of information provided to probation officers and disclosure of documentary information obtained by probation officers during the presentence investigation. I join with my colleagues in disfavoring the amendment. The aim of the presentence investigation report is to provide a timely, accurate, objective, and comprehensive report to the court to assist the judge in making a fair sentencing decision. In my view, the adoption of the proposed amendment has potential to restrict information provided to the probation officer which may be relevant to the court in making a fair sentencing decision. Some documentary information relating to prior arrests is provided by law enforcement agencies to the probation officer under an assurance of confidentiality. Also, the administrative burden of providing written summaries and documentary information to parties would certainly cause significant delay in the probation officer's ability to disclose a presentence report in a timely manner.

In closing, we commend the Commission's continuing studies and efforts toward imparting a predicate-conviction common-sense approach to the guideline enhancements, specifically at U.S.S.G. §2L1.2. We also commend the Commission's endurance by continuing to list the *crime of violence* definition among its list of priorities in the current amendment cycle. The continued compilation of data and research regarding the sentencing of 8 U.S.C. § 1326 offenders is likely to eventually create a more efficient and effective sentencing of the largest population of offenders in the federal sentencing system.

Again, thank you for the opportunity to testify at this hearing.