United States Sentencing Commission

Public Hearing – "The Sentencing Reform Act of 1984: 25 Years Later"
Testimony from
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I would like to begin by expressing my thanks to the Commission for the opportunity to present testimony on this 25th Anniversary of the Sentencing Reform Act. It is indeed an honor to be here and participate in the Sentencing Commission's continued commitment to evaluate the sentencing guidelines.

In preparing for today I reviewed prior testimony from my colleagues throughout the country. This being the final public hearing on this topic, much has already been said regarding the history and evolution of the Sentencing Reform Act and the Guidelines. My effort today will be to address topics specific to my district and perhaps those who share common characteristics. I will also suggest modifications intended to simplify application of the guidelines for the everyday practitioners, particularly our presentence investigation probation officers.

The Post-*Booker* advisory nature of the guidelines seems to have achieved some balance into the sentencing process by introducing further judicial discretion, which has hopefully occurred without undue compromise to uniformity in sentencing. While no longer mandatory, the guidelines do provide a mechanism for establishing equity for similarly situated defendants, who have committed like offenses. By requiring the probation office to calculate the guidelines, and for the court to consider those calculations, individual cases start with the same benchmark, which establishes some semblance of equity in sentencing. From that point there are certainly regional differences, as well as some differences among sentencing courts within the same district, as judges do possess varying philosophies about sentencing. The absence of such a benchmark, advisory or otherwise, would only lead to further disparity in sentencing, which is contrary to the intent of the guidelines and the factors contained at 18USC §3553(a). It appears that many guideline practitioners, judges and probation officers alike, are pleased with the greater latitude the present advisory guidelines have brought to the sentencing process. Further time and research will determine whether Post-*Booker* sentencing will promote excessive disparity or if the balance will be sustained.

In the sentencing process, it is the role of the probation office to provide accurate guideline calculations and sufficient information regarding the offense and history and characteristics

of the defendant for the court to fashion an appropriate sentence. Post-*Booker*, this role remains equally important, if not more so, for the probation office to investigate a defendant's background and properly evaluate all substantive factors for the court to consider when imposing a sentence that reflects a *totality of circumstances analysis*, and *that is sufficient, but no greater than necessary, to accomplish the statutory goals of sentencing.* While probation officers remain experts at analyzing case information and guideline applications, they know that judges must look well beyond offense level and criminal history calculations in a Post - *Booker* environment when imposing sentence. The work of probation officers is, now more than ever, guided by case law which directs how judges approach sentencing decisions and what factors should be considered, when imposing a sentence that will sustain appellate review.

As a district which borders the Republic of Mexico, a majority of our workload consists of immigration and drug offenses. The most burdensome of these border crimes are Illegal Re-entry cases (1326), which frequently have extensive criminal histories involving prior state prison commitments. I refer you to testimony given by Chief Probation Officer Becky Burks from the Southern District of Texas, who eloquently articulated the "laborious" nature of these cases. The effort required to obtain and analyze court documents from prior convictions can be very time consuming. This task is further complicated by evolving case law in the various Circuits, particularly as it pertains to the determination of what state convictions constitute aggravated felonies and/or crimes of violence, given the potential impact these convictions have on offense level calculations, especially at 2L1.2. The Commission's continued efforts to bring further clarity and definition in this area are much appreciated.

Chapter Three - Role Adjustments, continues to be challenging for our office. We would like to see a more specific definition of an "*average participant*" and guidance on how much information must be known about the scope of an offense before determining the defendant's role. For instance, our district consistently has single defendant cases where drugs or aliens are being brought across the border. These offenders are typically "mules," hired by someone else to transport the cargo from one point to another, and have no information regarding the larger scope of the alien or drug smuggling organization. Typically, in drug cases we have only a defendant's statement of his involvement, while in alien smuggling cases we are sometimes able to corroborate a defendant's statement with material witness testimony. In any event, there are a plethora of variables in these cases and we struggle with a multitude of hypothetical situations before making a determination if a role adjustment is appropriate or not. There are also varying philosophies held by the government, defense and by different judges, adding to even more inconsistency in the application of role adjustments in our district. Additional guidance from the Commission would be welcomed.

Recent changes have been made to 4A1.2(c), Sentences Counted and Excluded, regarding the threshold for a sentence to score criminal history points. Presumably this change was

made to avoid increasing criminal history points for certain minor offenses. While changing the language from "*at least*" one year to "*more than*" one year probation may have made a difference in many jurisdictions, it is not always the case our district. In the state of California it is not uncommon for courts to impose a term of three years probation for a conviction of Driving on a Suspended License. This results in not only the scoring of the conviction, but also additional points for being under a criminal justice sentence, and ultimately renders an unsophisticated defendant ineligible for "*safety valve*," under 5C1.2(a)(1). It is often the case where this is the only prior conviction or criminal contact for a defendant, who then finds himself not only in a Criminal History Category II (which can be remedied via departure), but also ineligible for a two-level reduction under 2D1.1(b)(11) (which cannot be easily remedied; without a gov't initiated departure under 5K1.1). Perhaps 4A1.2(c) should focus more on the custodial portion of a sentence rather than the term of probation as a threshold for scoring. Or, perhaps consider that those offenses listed under 4A1.2(c) are ineligible for subsequent adjustments at 4A1.1(d) and (e).

Finally, many of my colleagues have emphasized their opposition to the American Bar Association's proposed amendment to Rule 32. My office wholeheartedly joins in their opposition for the reasons they have previously stated, particularly as outlined by Chief Probation Officer Chris Hansen from the District of Nevada. Such a change would not only be burdensome on the probation office, but would undermine the credibility that has been established with other court and law enforcement agencies. For years, we have been able to gather useful information regarding a defendant's social background with the understanding that these documents would not be further disseminated. To breach this agreement would jeopardize those relationships, potentially resulting in the loss of valuable information that the court should be considering at sentencing. It would essentially limit the amount and type of information that the court could consider in an era that requires greater analysis of 3553(factors) and where judicial officers may exercise greater discretion at sentencing. We hope the Commission will join us in our opposition to this proposed amendment to Rule 32.

In closing, I would like to thank the Commission for its outreach efforts to further refine the advisory sentencing guidelines. In addition to public hearings such as this one, Commission staff is to be complimented for the excellent training they routinely offer guideline practitioners, and for their work with probation offices throughout the country to improve the accurate and timely collection of sentencing data. Over the last several years our office has worked closely with the Commission's Information Technology staff to stream line the process of electronically submitting required sentencing documents needed for statistical research purposes. This new process automatically extracts sentencing data and documents stored in our "PACTS" database for electronic submission to the Commission's database. This new process eliminates the need to type defendant information into the Commission's server. It also utilizes a "*point, click and drag*" method of moving required documents contained PACTS to electronically transmit them to the Commission. The Commission and our office have benefitted from this system enhancement by greatly reducing data entry

errors, increasing timeliness of submissions, and providing an audit trail. This new document submission process has been successfully piloted in six other districts and will soon be available to all probation offices nationwide. Our office is pleased to have partnered with the Commission on such an important project.

Again, I thank the Commission for this opportunity. This concludes my testimony.