STATEMENT OF
UNITED STATES DISTRICT JUDGE PAUL J. BARBADORO
DISTRICT OF NEW HAMPSHIRE

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES COMMITTEE ON CRIMINAL LAW

BEFORE

THE UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
FEDERAL SENTENCING OPTIONS AFTER *BOOKER*

WASHINGTON, DC
FEBRUARY 16, 2012

Judge Saris and members of the Sentencing Commission, on behalf of the Judicial Conference Committee on Criminal Law, I appreciate the opportunity to provide our views on the state of sentencing since the Supreme Court's decision in *United States v. Booker*. Among other things, the Committee is directed in its jurisdictional statement to "[p]rovide oversight of the implementation of sentencing guidelines and make recommendations to the Judicial Conference with regard to proposed amendments to the guidelines, including proposals that would increase their flexibility," and "[a]ssure that working relationships are maintained and developed with the Department of Justice, Bureau of Prisons, United States Parole Commission, and United States Sentencing Commission, with respect to issues falling within the Committee's jurisdiction."

Although I am fairly new to this Committee, I am aware of our close collaboration with the Commission on several important issues – such as reducing cocaine sentencing disparity and managing the retroactive application of those amendments. The topic of today's hearing is critically important to the Judicial Conference of the United States and judges throughout the nation and, as we have in the past, the members of the Criminal Law Committee pledge to work with the Commission and others to ensure that our sentencing system is fair, flexible, and consistent with the goals of the Sentencing Reform Act.

Judicial Conference's Support for Flexibility in Pre-*Booker* Guidelines Sentencing

The Judicial Conference has consistently supported flexibility in guidelines sentencing. In 1990, the Criminal Law Committee and the Judicial Conference comprehensively considered the sentencing guideline system in response to proposals from the Federal Courts

Study Committee (FCSC).[1] The FCSC identified as a central problem of guidelines sentencing the "undue rigidity in fashioning the sentence"[2] and recommended "immediate study of proposals to amend the Sentencing Reform Act to bring greater flexibility to the system while adhering to the central tenets of the Act."[3]

At its January 1990 meeting, the Criminal Law Committee agreed with the underlying premise that more sentencing flexibility was needed and determined that it should develop recommendations to the Sentencing Commission aimed at giving judges more sentencing flexibility within the constraints imposed by the Sentencing Reform Act. At its September 1990 session, the Judicial Conference authorized the Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the guidelines.[4] This approach was later reflected in the judiciary's 1995 Long Range Plan, which recommended that the Sentencing Commission afford sentencing judges the ability to impose more alternatives to imprisonment, encourage judges to depart from guideline levels where appropriate in light of factual circumstances, and enable them to consider a greater number of offender characteristics.[5]

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[1]*Report of the Federal Courts Study Committee*, April 1990. The FCSC was appointed by the Chief Justice at the direction of Congress and conducted a fifteen-month comprehensive study of the federal court system.

[2]*Id*. at p. 137.

[3]*Id*. at p. 139

[4]JCUS-SEP 90, p.69.

[5]Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, Recommendation 30 (Dec. 1995).

Perhaps the primary method to assure flexibility within the sentencing guidelines framework is through guided departures from the guideline ranges. In August 2003, Judge David Hamilton testified before the Sentencing Commission on behalf of the Criminal Law Committee. He stressed that departures "provide the flexibility needed to assure adequate consideration of circumstances that the guidelines cannot adequately capture" and urged the Commission "to preserve, to the fullest extent possible, the ability of judges to exercise individualized judgment and to do justice in each case before them."

Judicial Conference Position on Advisory Sentencing Guidelines

Shortly after the Supreme Court's decision in *United States v. Booker*, the Judicial Conference resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible." It also urged Congress "to take no immediate legislative action and instead to maintain an advisory sentencing guideline system."[6] Finally, it agreed to "[o]ppose legislation that would respond to the Supreme Court's decision by (1) raising directly the upper limits of each guideline range or (2) expanding the use of mandatory minimum sentences."[7]

These positions were based in part on the Criminal Law Committee's conclusion that there were no readily available superior alternatives to an advisory system. The Committee specifically rejected the proposal to raise the top of sentencing guideline ranges to be coterminous with the statutory maximum out of concern over constitutional validity and the litigation and confusion that would result. The Committee also rejected the expanded use of mandatory minimums based on the Judicial Conference's well known and longstanding

[6]JCUS-MAR 05, p. 15.

[7]JCUS MAR 05, p. 16.

opposition to mandatory minimum penalties.[8] An advisory sentencing guideline system is consistent with Judicial Conference positions such as its support for the concept of sentencing guidelines generally and for judicial flexibility.[9]

Evaluating the Success of the Voluntary Guidelines System

Although the Judicial Conference has not revisited its position on advisory guidelines recently, the Committee is aware of a survey sponsored by the Commission in which 75 percent of the federal district judges who responded believe that the current advisory guidelines system best achieves the purposes of sentencing.[10] A review of transcripts from the Commission's regional hearings in 2009 and 2010 also indicate that the majority of judges believe that the advisory guidelines strike the correct balance between uniformity and individualized sentencing.[11] To be sure, some judges have expressed a concern that unwarranted disparity may

[8]See JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 7 1, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 8 1, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 9 1, pp. 45,56; and JCUS-MAR 93, p.13.

[9]Shortly before the Sentencing Reform Act was enacted, the Committee on the Administration of the Probation System (the predecessor to the Committee on Criminal Law) recommended, and the Conference endorsed, a draft sentencing reform bill that included proposed guidelines to be promulgated by the Judicial Conference. The stated purposes of the Conference's proposed guidelines were to (a) promote fairness and certainty in sentencing, (b) eliminate unwarranted disparity in sentencing, and (c) improve the administration of justice. *See Report of the Committee on the Administration of the Probation System*, March 1983, Ex. B. p. 7, § 3801.

[10]U.S. Sentencing Commission, *Results of Survey of the United States District Judges January 2010 Through march 2010* (2010) (response to Question 19). According to the survey, 8 percent of judges believe that "no guidelines" best achieves the purposes of sentencing, 3 percent believe that mandatory guidelines best achieve the purposes of sentencing, and 14 percent favor a system of mandatory guidelines with jury factfinding and "broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimum sentencing provisions."

[11]District Judge Richard J. Arcara (Western District of New York) testified: "*Booker* has improved the quality of sentencing jurisprudence. On the one hand, it has provided judges with the authority necessary to impose a sentence outside the Guidelines range when the circumstances so warrant, without being limited to the more strict departure regime that existed pre-*Booke*r. On the other hand, *Booker*'s mandate that judges continue to consult the advisory range before imposing sentence serves as an important check, reminding judges that uniformity and unwarranted disparity are also important sentencing goals. In my opinion, these two elements together have led to the imposition of more reasoned and just sentences...I believe that the advisory sentencing regime strikes a more appropriate balance between judicial discretion on the one hand, and the goal of uniformity on the other, than under the prior mandatory scheme." Chief District Judge Jon P. McCalla (Western Tennessee)

result when judges do not follow the guidelines.[12] However, based on survey and anecdotal data, it seems clear that the majority of judges believe that the advantages of the advisory system outweigh the possible disadvantages, particularly when compared with available alternatives.

In its recent testimony to Congress, the Commission provided an empirical overview of key federal sentencing practices across time.[13] One of the most important conclusions expressed in that testimony was that the sentencing guidelines "continue to have a significant impact on the sentences courts impose" with the average sentence imposed for the offense increasing or decreasing, "usually in like proportion," to the minimum of the applicable guideline range.[14] This finding led the Commission to conclude that "[t]he clear linkage of the sentencing guidelines and the sentences imposed demonstrates that the guidelines have guided and continue to work to guide the sentencing decisions of federal judges."[15] It is remarkable

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stated: "The advisory sentencing guideline regime in the post-*Booker* provides more balance between judicial discretion and uniformity in sentencing than existed under the prior mandatory scheme." Chief District Judge Philip Simon (Northern Indiana) asserted: "I am, in general, a proponent of the guidelines...from my perspective the result that *Booker* achieved is nothing short of a masterstroke. *Booker* wisely kept the structure of the guidelines in place, and in any federal sentencing they remain the starting point for determining the sentence. But *Booker* has given me the ability to honestly deal with those cases where the guidelines simply do not yield a sensible match." Finally, District Judge Robin J. Cauthron (Western Oklahoma) testified: "We now have the ability to vary from those Guidelines in the appropriate case, while still having a baseline, or national average, against which to compare the sentence. This results in the best of both worlds – consistency in sentencing and a clear outline of the facts and circumstances to consider, coupled with the discretion to find additional facts and circumstances suggesting a different sentence. The present system enhances the sense of fairness in sentencing from the viewpoint of all participants."

[12]Circuit Judge Richard C. Tallman (Ninth Circuit) stated: "Defendants who look the same on paper receive inconsistent sentences for similar crimes. Some judges fail to consider a particular factor a defendant believes is important. Others give greater weight to a prosecutor's concerns. Sometimes, the sentence surprises both sides. In short, perhaps judges now have too much discretion. "

[13]*Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris).

[14]*Id*. at p. 22.

[15]*Id*.

that, regardless of time period (post-*Koon*, post-PROTECT Act, post-*Booker*, or post-*Gall*), the distance between the average guideline minimum and the average sentence length appears constant.[16]

In its testimony to Congress, the Commission also noted that "the rate at which the sentences imposed are within the applicable guidelines has decreased significantly over the last five years. "[17] The significance of the decrease is less apparent, however, when the rate of within guideline range sentences and government sponsored sentences are considered together. For instance, in fiscal year 2010, the courts imposed sentences within the applicable advisory guideline range or below the range at the request of the government in 80.4 percent of all cases.[18] Because the statistics do not adequately explain all of the complex factors that are considered at sentencing, it is important to carefully study the meaning behind the rate of departures and variances when evaluating the effectiveness of the current sentencing system.

Downward departures and variances may not reveal a problem with the advisory guidelines system but may in fact reduce undue rigidity in individual cases. As stated in a recent letter to the Commission from the Department of Justice, a within-guideline sentence rate is not the only performance measure of a successful system, and "not every disparity is an unwelcome one."[19] As Judge Cassell observed in testimony he provided to Congress in 2006, "[d]rawing inferences about the success of a sentencing system from the frequency of sentences

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[16]*Id*. at Appendix B.

[17]*Id*. at p. 22 (noting that the rate at which courts imposed sentences that were within the applicable guideline range in fiscal year 2010 was 55 percent.)

[18]*Id*. at p. 20.

[19]September 2, 2011 letter from Department of Justice to Hon. Patti B. Saris. ("We do not mean to suggest from this data...that the only performance measure of successful sentencing policy is the within-guideline sentencing rate...as the Attorney General has stated, 'we must also be prepared to accept the fact that not every disparity is an unwelcome one.'")

below the guideline range can be problematic because each individual sentence "has to be judged by the facts of the particular case,"[20] and the "possibility that conscientious sentencing judges reached the right result in most of these cases should not be hastily dismissed."[21]

When examining whether the voluntary guidelines system is successful, it is also important to examine the decisions, not just of sentencing judges, but of other actors within the criminal justice system such as prosecutors. As the Commission noted in its 2004 report evaluating fifteen years of guidelines sentencing, while the Sentencing Reform Act focused primarily on sentencing, Congress, the Commission, and other observers recognized that "sentencing could not be considered in isolation," and that "[d]ecisions regarding what charges to bring, decline, or dismiss, or what plea agreements to reach can all affect the fairness and uniformity of sentencing."[22] Congress has previously directed the Commission to study plea bargaining and its effects on disparity, but because fewer statistical data are available to investigate decisions made by prosecutors, "their effects are difficult for the Commission to monitor and precisely quantify."[23] However, according to the Commission's 2004 study, a variety of evidence developed throughout the mandatory guidelines era suggested that the "mechanisms and procedures designed to control disparity arising at presentencing stages

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[20]*United States v. Booker: One Year Later. Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress (2006) (statement of Hon. Paul Cassell).

[21]*Id*. at p. 9.

[22]United States Sentencing Commission. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. xii. *See also* Hon. Patti B. Saris. *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*. 30 Suffolk U. L. Rev. 1027, 1062 (1997)("One major source of unwarranted sentencing disparity that needs attention by both the Department of Justice and the Sentencing Commission is the substantial assistance motion, which is the essence of lawlessness from the vantage of a sentencing judge because it is unprincipled, undocumented, unreviewable, and secret. In addition, further attention should be paid to studying the claims that plea bargains have introduced an additional hidden disparity into sentencing.")

[23]Id. at xii.

[were] not all working as intended and have not been adequate to fully achieve uniformity of sentencing." The Commission concluded that "[c]harging decisions that limit the normal operation of the guidelines result in sentences that are disproportionate to the seriousness of the offense and disparate among offenders who engage in similar conduct."[24]

The Commission has also noted before the Supreme Court's decision in *Booker* that "[d]isparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced." Scholars and other observers have argued that a possible disadvantage of more structured guidelines systems (such as mandatory guidelines) is the displacement of discretion and disparity from the judge to the prosecutor. Conversely, a possible advantage of less structured systems (such as voluntary guidelines) is to reduce prosecutorial disparity through a more balanced apportionment of sentencing discretion between judges and prosecutors.[25] It may be helpful if the Commission

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[24]Id. The Federal Judicial Center conducted a survey of chief probation officers as well as Article III judges in 1996, and found that"respondents believe much of the discretion that resided with judges before the guidelines has been shifted to prosecutors and that prosecutors [then had] an inappropriate degree of influence in the sentencing process." Federal Judicial Center. *The U.S. Sentencing Guidelines Results of the Federal Judicial Center's 1996 Survey: Report to the Committee on Criminal Law of the Judicial Conference of the United States*, 1997, p. 6.

[25]In an 1993 law review article, United States Senator Orrin G. Hatch wrote: "Congress should carefully study and monitor the effects of the guidelines' compulsory nature... Many of the guidelines' problems, including their perceived rigidity and their facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature. Congress must review whether these problems can be appropriately remedied within a compulsory guidelines system...Congress may need to examine whether the most effective way of addressing these problem is to return a greater degree of flexibility to the judiciary." Hon. Orrin G. Hatch. *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*. 28 Wake Forest L. Rev, 185, 197 (1993). The Sentencing Commission has also written:

> [C]oncern that charge selection and plea bargaining could limit or thwart the goals of sentencing reform surfaced early in scholarly writings (Twentieth Century Fund, 1976; Zimring, 1976) and in congressional debates (*see* Schulhofer & Nagel, 1989). Reform skeptics pointed out that prosecutors had considerable discretion to select charges and structure plea agreements, but that in the preguidelines era judges and the Parole Commission, in setting sentences and release dates, could temper the effects of prior prosecutorial decisions. Binding sentencing guidelines, without parole, could eliminate these checks, and prosecutors could conceivably exercise

renews its efforts to study prosecutorial discretion and disparity, particularly in the advisory guidelines era, in order to understand the level of disparity not just at sentencing but also at the presentencing stage. We urge the Commission to work with Congress and the Department of Justice to improve data collection to enable this type of study. As the Commission has written, Congress recognized in passing the Sentencing Reform Act that "disparity is not monolithic; it arises from multiple and discrete sources. Different components of the reformed sentencing system were designed to help control disparity arising from different sources. Evaluating the current system requires evaluating how well each source of disparity has been controlled."[26]

Prior Judicial Conference Position on Sentencing Data Accuracy

Judges are grateful for guidance provided by the guidelines and the legal and empirical research of the Commission. The Commission plays a valuable role in increasing the knowledge base of judges. Judges also appreciate knowing whether their sentences are in step with other sentences by other judges for similar cases.[27] This role is as relevant today – perhaps

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considerable control over sentences through the charges they bring and the facts they prove at sentencing. The result would be a shift of discretion toward prosecutors, which could perpetuate disparity and reduce the certainty of punishment. United States Sentencing Commission. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform,* 2004, p. 10.

[26]United States Sentencing Commission. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. 140.

[27]At the regional hearings commemorating the twenty fifth anniversary of the Sentencing Reform Act, Chief District Judge Susan Oki Mollway (Hawaii) testified: "Over the years, I have been grateful for the guidance provided by the guidelines, augmented by the Application Notes that often clarify guideline language. I am also grateful for how responsive the Commission has been to developments in case law, especially when the Commission reacts with guideline amendments that resolve circuit splits in guidelines interpretation. My district's Probation Officers have also benefitted from the assistance provided by the Sentencing commission's knowledgeable staff." District Judge Richard J. Arcara (Western District of New York) stated: "[A]nother crucial piece of information that is needed [for sentencing] is what is provided by the Sentencing Commission – specifically, information about how the sentence that we are considering compares overall with sentences recommended for this type of conduct. For me, this provides context. It helps me assess whether the sentence that I am considering is "in step" with sentences recommended for the conduct at issue." Circuit Judge Denny Chin (Second Circuit Court of Appeals) stated: "[T]he Guidelines still play a critical role. They still provide an enormously helpful starting point, for it is comforting to be able to begin with an empirically-based 'heartland' range that is drawn from the collective wisdom and experiences of colleagues from all around the country. In

more so – as it was before Booker. We realize that the Commission's effectiveness in this area is, in part, dependent upon the quality of the data supplied by the courts.

The Sentencing Commission has substantial responsibilities for data collection, analysis, and reporting of information on federal sentencing practices. In carrying out these responsibilities, it collects large volumes of records from the courts on each sentence imposed. At its June 2003 meeting, however, the Committee learned of problems with accurate and complete data collection. It then worked with the Commission and others to revise the Statement of Reasons form so that it would fully record sentencing determinations. The revised form was approved by the Conference at its September 2003 session for publication and distribution to the courts.

Accurate and complete data will ensure that judicial decisions such as departures and variances from the guidelines are clearly defined and the reasons for them are accurately explained. The Committee believes that such data will assist the Commission in its ongoing efforts to study the operation of the guidelines and improve them as necessary. The Committee looks forward to working closely with the Commission to improve data collection and record keeping procedures.

Commission's Legislative Proposals

As you know, my colleague, Chief Judge Theodore McKee, has provided a prepared statement on behalf of the Criminal Law Committee in connection with another panel exploring the different options to restore mandatory sentencing guidelines. We are aware that

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addition, the required analysis frames the issues in a way that makes it more likely that we will reach a fair and just result." Chief District Judge Jon P. McCalla (Western District of Tennessee) testified: "The Commission's research and historical data is greatly valued by the district court. Without the Guidelines, we would lack the logical, statistical, and mathematical data that allows district judges to make the difficult decisions required in sentencing on a consistent basis."

other panels will consider the merits of the legislative proposals that the Commission submitted to the House Judiciary Committee on October 12, 2011. Because the Judicial Conference has not yet had the opportunity to formally consider these proposals, the Criminal Law Committee will not be providing testimony on those proposals; however, the Committee has reviewed the proposals and stands ready to discuss them with the Commission and the Congress. It is worth noting that the Committee began considering two of the proposals shortly after the *Booker* decision was issued: standardizing the three-step sentencing process and clarifying the reasonableness standard of appellate review.

In February 2006, Judge Paul Cassell, the Committee's chair, wrote to Attorney General Alberto Gonzalez to express concerns with the Department of Justice's pursuit of legislation that would restore mandatory guidelines. In his letter, Judge Cassell urged the Department to allow the courts to work through the novel issues presented by *Booker*, and even encouraged the Department to help promote uniformity in the system by asking for appellate review in appropriate cases. Judge Cassell reiterated these points in his March 2006 testimony before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security, and asked the Congress to consult with the Judicial Conference before enacting any change to the standard of appellate review.

Also during this testimony, Judge Cassell raised the possibility of developing "a standardized approach to the procedural issue of how judges should go about determining sentences."[28] Judge Cassell noted that after *Booker*, the Sentencing Commission generally recommended that sentencing judges employ a three-step method in determining an appropriate sentence: (1) determine the specific Guideline applicable, including resolving any disputed and

[28]*United States v. Booker: One Year Later*: *Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H.Comm. on the Judiciary*, 109th Congress (2006) (statement of Hon. Paul Cassell).

relevant Guidelines issues; (2) determine whether any departures under the Guidelines are proper; and only then (3) determine whether some sort of variance from the Guidelines is appropriate in light of all the sentencing factors spelled out in 18 U.S.C. § 3553(a).[29] According to Judge Cassell, standardization of this method was a matter worthy of further consideration.

At its June 2006 meeting, the Criminal Law Committee had an opportunity to review an array of proposals for the Judicial Conference's consideration. Upon further discussion and careful consideration, the Committee determined that it was not necessary to recommend that the Conference or the Sentencing Commission issue policy statements or other guidance on a standard sentencing methodology and felt that developments in case law would provide adequate guidance. The Committee also determined that it was not necessary for the Conference to seek legislation clarifying or modifying the "reasonableness" standard for appellate review of sentences articulated in the *Booker* decision. It concluded that appropriate guidance on this matter would be provided when the Supreme Court ultimately considers the circuits' interpretation of reasonableness.

In light of the Commission's recent decision to include both proposals in its legislative recommendations, the Committee will give the proposals renewed consideration at its next meeting.

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[29] See *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 14-15 (2005) (statement of Hon. Ricardo Hinojosa).

Conclusion

These hearings create an opportunity for a thoughtful, deliberate, and research-based refinement of the federal sentencing system. The Criminal Law Committee appreciates the opportunity to share our views, and we stand ready to work with the Commission.