WRITTEN TESTIMONY: LYLE J. YURKO*

It was a great honor to have been asked to provide testimony to the United States Sentencing Commission regarding the Twenty-Fifth Anniversary of Sentencing Reform in the United States. I consider my involvement in Sentencing Reform both in Washington and North Carolina as one of the highlights of my career as a practitioner because of the profound impact that both Commissions have had on public policy in America.

It is my sincere opinion that the 1984 Sentencing Reform Act has led to vast improvements in the quality of sentencing justice in America. However, just as the revolution which gave birth to America in 1776 created a more perfect union that continues as a noble experiment which is still being perfected, so too did the Reform Act create a more perfect system of sentencing justice which is still being perfected. What follows are my beliefs regarding the strengths and weakness of sentencing reform in the federal system of justice.

Truth in Sentencing

By far the most important provision of the Reform Act was the abolition of the flawed system of parole that existed prior to its passage. That system was disparate, troublesomely complex, and misleading. It was my privilege to personally work with one of the giant thinkers in America on the federal system of sentencing, Dr. Martin Groder. Dr. Groder was the Chief of the Forensic Psychiatric

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Unit at Marion; planned and initially executed the Forensic Unit at Butner; then was a Professor of Psychiatry at Duke University Medical School. I used Dr. Groder as an expert witness in 1979 and thus became more familiar with his published writings pertaining to Federal Sentencing.

Dr. Groder's analysis of the then existing parole system was in his frank words, "a tripartite con game". The system was conning the inmates into believing that if they behaved they would attain early release; the inmates were conning the system that they had been truly reformed; and both were conning the public that rehabilitation was occurring despite significant recidivism. Dr. Groder again frankly wrote that "it you put a sign in front of every federal prison that proclaimed "we rehabilitate" "it would be fraud".

Now, with truth in sentencing, the judge, the defendant, the prosecutor, the defense attorney, the probation officer, the victim, and most importantly the public knows exactly what a five year sentence means. This is a more honest and transparent system which promotes the purposes of punishment articulated in 3553(a). However, the harshness which sometimes accompanies truth in sentencing is at times, unnecessary, wasteful of precious resources, and in the extreme cases, violates due process in my opinion. More reform is needed.

Rational Sentencing

The creation of a rationally based system of punishment, theoretically designed to increase severity as conduct which brings a defendant into the federal system is more severe is also a vast improvement over the prior totally discretionary system limited only by the statutory maximums. That system was disproportionate, irrational, and biased.

However, the "relevant conduct" segment of the guidelines still has significant flaws in my opinion. It is complex, unevenly applied, and the effort to punish uncharged, and even acquitted conduct, in my opinion, violates due process. I believe the Commission should conduct a comprehensive review of relevant conduct in an effort to simplify its provisions and applications, clarify its scope and completely abolish the practice of punishment of uncharged or acquitted conduct. Less disparity, a goal of reform, can be accomplished but will be a daunting task which will increase the complexity and cost of criminal justice in the federal system but such a price is consistent with principles of fairness and decency.

Economic Offenses

One of the major post-reform act improvements in just sentencing were the changes to the guidelines regarding economic crimes completed by 2001. These were, in my opinion, necessary and proper.

These dramatic changes, put into effect before many of the spectacular frauds were detected in the early 21st century, went largely unnoticed by the press and the public. The serious increases in punishment for truly egregious behavior are, in my opinion, in furtherance of the goals of sentencing articulated in 3553(a). Perhaps if these changes had been more closely scrutinized by the public and press they would have had a more significant deterrence effect. The Commission is to be lauded for these reforms. However, the economic guidelines, in my opinion, should be continuously monitored by the Commission, with an eye toward simplification when possible to promote less disparity in their application. There are times when specific offense characteristics and adjustments work in tandom to cummulatively result in over punishment. Some mechanism should be in place to limit such results.

Likewise, the press should be informed of the serious penalties applicable to truly egregious economic offenses so as to promote deterrence and public respect for the federal justice system.

Preliminary Conclusions

Truth in sentencing, rational sentencing and a more comprehensive systematic scheme of punishment for economic offenses, including money laundering, in my opinion, are the strengths of sentencing reform to date. What follows are what I consider to be the weaknesses.

Mandatory Minimums

The duality of a guidelines system of punishment which exists along with congressionally created statutory mandatory minimums is the chief flaw of sentencing reform, in my opinion.

In the early 1990's, the Commission issued a comprehensive report to Congress regarding the conflict between the guidelines system and mandatory minimums. Thereafter, testimony was given by then Chairman Wilkens and others before the Judiciary Committee of the United States Senate. The report and the hearings should have caused the Congress to eliminate all the mandatory minimums which exist in the federal system. Unfortunately it did not. Congress's inaction on such a critical reform did not make it subject to a postlogue in President Kennedy's book "Profiles in Courage". Abolition of mandatories might not prove politically popular but is a necessary requirement if the goal of punishment is true justice.

Statutory mandatory minimums, co-existent with the guidelines, are flawed because mandatories usually rely on a single factor to achieve punishment while the guidelines are multifaceted and rationally based.

The mandatories have significantly skewed the punishment regime regarding controlled substance violations because of these isolated factor principles and because the Commission felt obligated to ground the anti-drug punishment regime in the mandatories. This results in both under punishment and over punishment of drug offenders.

A comprehensive system of punishment for drug perpetrators could be created if the mandatories were abolished so that rationality dictates sentencing results.

A graduated systematic regime which factors both aggravating and mitigating circumstances would be more consistent with 3553(a). The mandatories rely on only two factors, drug quantity and criminal history. While these factors are significant, a system which also properly considers violence, weapons, international narcotics trafficking, distributions to users who are minors, pregnant, or challenged, criminal organization and other aggravaters, while at the same time, also properly considers mitigation would be a vast improvement over the current regime.

Now, a significant perpetrator who has two prior felony convictions for substance violation, is encouraged by the system to engage in violence or other activities which may avoid detection because he must receive a life sentence even if his conduct is not otherwise aggravated. Such a system is, in my opinion, irrational. Also, a life sentence is totally inappropriate for a more minor offender who has two prior drug felonies which may be even more minor than the federal conduct being prosecuted. Such a

result wastes tax dollars, is unjust and in my opinion violates due process.

The soundest public policy change for the Commission to advocate would be Congressional elimination of mandatory minimums, after a carefully designed restructuring of the drug guidelines is effectuated. This would demonstrate to the Congress the alternative that would be in place if they abolished the mandatory minimums so as to make abolition more politically practicable. Addressing this issue is neither a liberal or conservative agenda issue but simply is in the interest of justice.

Judge Wilkens, a true judicial giant and a true conservative, is to be commended for his early warning regarding the flaws in the duality of mandatories coupled with the guidelines. The time is long overdue to follow his leadership on this critical issue, in my opinion.

Crack

Attached hereto is an article, soon to be published, which I have authored that I believe provides a comprehensive analysis of the unconscionable disparity which exists because of the 100 to 1 crack-powder ratio. The Commission is to be commended for its multiple reports to Congress which comprehensively outlined the crack/powder dilemma. The only just remedy is for Congress to immediately eliminate the crack/powder disparity.

5k1.1

The most disparity still existent in the federal justice system occurs because of the current practices associated with the 5k process. I believe 5k should be completely reformed after a

comprehensive review is conducted by the Commission with full input from all participants in the federal system.

Fast Track

Eliminate this program or make it applicable to all Judicial Districts. Its uneven applicability, while expedient, promotes disparity particularly towards Hispanic offenders which I believe thwarts equal protection.

Transparency

It is profoundly trying to accept an appointment to this Commission while at the same time pursuing public service as a member of the bench, bar or other profession. I know first hand this difficulty because I served as a State Sentencing Commissioner while practicing law and while being an active member of PAG.

However, during my tenure on the 28-member North Carolina Commission we only had one private meeting over the course of thirteen years. This was held to choose a new executive director.

There are certainly times when, for reasons of national security or otherwise, private meetings are in the public interest. But I believe transparency is a necessary element of public policy. This former Commissioner understands why some meetings must be conducted in private, but as President Obama has made transparency a priority of his administration, surely more of the Commission's business could and should be subject to public scrutiny when practicable.

An Ex-Officio Commissioner Who is a Practitioner

I believe it was a flaw of sentencing reform to include a Representative of the Department of Justice as an ex-officio member of the Commission without the counterbalance of having a Practitioner also as an ex-officio member. Balanced guidance by true professionals who prosecute and defend would promote sentencing reform.

Secondary Conclusions

Mandatory minimums, 5k, crack/powder, fast track, transparency, and a practitioner as a Commission member are all areas where more perfection could be achieved in the sentencing reform process.

Booker

As I testified on February 16, 2005, "I truly believe that the new advisory system fashioned by Justice Breyer preserves this Commission's dedicated 17 (now 22) year odyssey towards the creation of just and fair sentencing reform. This new system, I believe, if allowed to flourish, will promote uniformity, while at the same time, diminish the occasional irrational results required by any mandatory guidelines system."

A comprehensive review of the post-Booker era, I believe, fully supports my testimony.

The bench imposes sentences at variance with the guidelines in only a small minority of cases. Most variances are carefully grounded in the principles set forth in 3553(a). To allow the tiny number of variances which are not adequately so grounded to foster any recreation of a mandatory guidelines system would, I believe, be a travesty. Booker was the Maubury v. Madison, of sentencing reform. My opinion is that its wisdom should be preserved and appellate reversals should occur with appropriate restraint.

Conclusion

While maintaining its place as this "shining city on a hill", America has also endured slavery, a civil war, prohibition, racial segregation, McCarthy, and other less illuminated experiences. So it is with sentencing reform. Continued professional diligence which has been the hallmark of this Commission can lead to a more perfect union. May that journey endure.

EXHIBIT

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PUNISHMENT FOR CRACK AND POWDER COCAINE: WILFULL BLINDNESS TO RACISM AND CRIMINAL JUSTICE

In 1984, the Congress passed and the President signed the United States Sentencing Reform Act which established the Sentencing Commission granting it broad but guided authority over sentencing policy in the Federal Courts. The purposes of the Act were to establish truth in sentencing by abolishing parole and limiting "good time" credit to 52 days per year; to create a rational modified real offense system of sentencing where punishment was largely based on the seriousness of the offense and the criminal history of the offenders and to eliminate unwarranted sentencing disparity so that similarly situated offenders will receive sentences that are not disproportionate. The act tasked the commission it established with promulgating sentencing guidelines based on these objectives and on November 1, 1987 these guidelines became effective. The Commission decided that offense seriousness would largely be gauged by violence, the degree of monetary loss or the amount of controlled substances, seriousness also proportionately calculated in relationship to the addictive qualities of a given substance.

In 1986, CBS-TV anchor Dan Rather produced and narrated a documentary entitled 48 Hours on Crack Street (the precursor to the series "48 Hours"). This documentary was almost exclusively based on anecdotal reports of users of cocaine base, a form of cocaine ingested by smoking the substance. "Crack" is converted from powdered cocaine by mixing it with baking soda and heating the mixture. The end product - crack is a smokable form of the significantly addictive Schedule II Controlled Substance, cocaine.

Rather's documentary alleged that crack was far more addictive than powder cocaine, was

responsible for producing "crack babies," brain injured infants whose mothers had used crack during pregnancy, and among other claims, that crack use and distribution was associated with violent behavior.

Almost immediately after the airing of this documentary, members of Congress began to introduce bills designed to significantly increase the federal penalties for cocaine possession and distribution. On the floor of the House, members engaged in a biding war attempting to "out tough on crime" each other to the point that Representative Rangel (D) of New York proposed that the mandatory minimum for crack be 100 times greater than the minimum penalty for powder cocaine. Thus this measure, which won both Congressional approval and was signed into law by the President, created a 5 year mandatory minimum for 5 grams of crack and for 500 grams of powder and set a 10 year mandatory minimum for 50 grams of crack and 5000 grams of powder cocaine (5 kilograms). The absurdity of this legislation was that cocaine base cannot be produced without powder cocaine and thus major dealers in powder receive lower sentences than street crack dealers.

The mandatory minimum 100 to 1 ratio was compounded by the Sentencing Commission who promulgated the drug guidelines by tying the penalties to the mandatory minimum so that the guidelines for 50 grams of crack was the same level 32 as 5000 grams of powder. A powder dealer who sells 160 kilograms of cocaine actually receives a lower sentence than a crack dealer who sells 2 kilos even though 100 kilos of powder will be manufactured into about 120 kilos of crack potentially. Rational sentencing policy was not promoted by these decisions of Congress and the Commission.

But as the Commission began compiling statistics on the effect of a national guidelines system, a truly troubling aspect of the crack/powder distinction emerged. By 1995, 88% of those in federal prison for crack distribution were African Americans. 75% of the powder inmates were not African

Americans. As a result of this disparity, the Commission, pursuant to their statutory mandates, began a public study of crack and powder sentencing. At public hearings, scientific experts and other policy makers including this author presented startling evidence. The evidence conclusively established that Dan Rather's crack street documentary was totally fallacious. Crack and powder are equally addictive, crack babies do not exist, the violence associated with the distribution of cocaine of either type is not as significant as thought and crack distributors possess firearms in 25% of the cases prosecuted while powder defendants possess guns in 15% of the cases. The conclusion by overwhelming evidence was that the 100 to 1 ratio was fostering racial disparity and that there was no rational basis for this disparity. Thus, the Commission amended the guidelines to a 1 to 1 ratio and recommended to Congress that the mandatory minimum be likewise equated.

The authors of the sentencing reform act skillfully and largely successfully have removed politics from federal sentencing policy. Unlike other matters, the Sentencing Commission proposes changes in the guidelines and unless Congress nullifies the change the Amendment becomes law in six months. History has shown that absent a declaration of war it is rare for any bill to pass both Houses of Congress in six months and many political scientist believe this built-in delay is one of the geniuses of our constitutional democracy. Laws that are debated in slow and rational deliberation tend to be laws that are passed with wisdom. The de-politicization of sentencing policy has resulted in more than 700 amendments to the guidelines being enacted. Only two amendments have been rejected. One of them was the one to one crack ratio.

In 2002, the Sentencing Commission again, deeply troubled by this continuing sentencing disparity, held public hearings on the crack/powder dichotomy. The government had tentatively agreed to a 20 to 1 ratio and the year long process of study appeared to be headed for unanimous Commission

approval without Congressional nullification. Then on the last day of the public hearings, the Government voiced their rejection of the compromise. The manner in which this rejection was presented was truly embarrassing. The Attorney General sent his deputy from the Civil Division. Mr. Thompson is a brilliant legal scholar but his testimony and answers to Commission questioning showed that he knew very little about the crack/powder issue. Some of us present believed that the only reason he was presenting this paper authored by the Criminal Division of Main Justice was because he was an African-American.

The Sentencing Commission was outraged by the last-minute rug pulling by Main Justice but realized that without the full support of the Executive, the amendment would be rejected by Congress. However, in no mood to placate a Justice Department which had betrayed the Commission, the Commission refused to pass a Justice initiated modification to §3E1.1(b).

Not content with the Commission's action, the Justice Department found a friend in Congressman Feeney who attached an Amendment to the Amber Alert legislation during a late evening session of the House. The so-called "Feeney Amendment" not only required the Commission to modify 3E1.1(b), but contained multiple limiting provisions to the guidelines restricting judicial discretion. The coup de gras was a provision requiring Chief District Court Federal Judges to file annual reports with Congress detailing the departure rates of all of the Judges in the District. This version of McCarthy type "black-listing" was greeted with significant ranker by members of the federal bench and by members of the United States Supreme Court. Several legal scholars have concluded that the "Feeney" controversy played a significant role in the Booker decision which determined that the mandatory guidelines violated the United States Constitution.

In 2007, the Commission, which was still significantly concerned about the sentencing disparity between crack and powder cocaine, again produced a study, held public hearings and proposed a modest 2-level reduction in sentencing for defendants who distribute cocaine base. On November 1, 2007, this Amendment became law and in December, the Commission decided to make this change retroactive, over the strong objection of the Government. A significant factor in the rarely used retroactivity section of the guidelines was the historical context of the crack powder disparity and Congresses repeated willful blindness to multiple reports calling on Congress to remedy this disparity based on race.

The Department of Justice fought hard to get congress to reject the retroactive effect of the "crack" Amendment, They were not successful.

As many as 200,000 inmates now can ask the Courts to reduce their sentences. Some Judicial Districts are reducing sentences whenever asked but others have continued to engage in foot dragging and obfuscation. Equal justice has suffered recreating the disparity that the guidelines were designed to eliminate. Progress proceeds slowly up to today.

The only sure cure to racial disparity would be to make crack and powder cocaine sentencing equal and to make such a change retroactive.

The congress should abolish the inane mandatory minimums so that all defendants, the corporate criminal and the street drug dealer would be sentenced only by the guidelines and a fair and impartial judge. Justice would then be truly color blind.

Perhaps the Obama Presidency can urge these changes. But the road to change is not sure and

swift. The forces of tyranny are tough but in the end, we the American people will reach the promise land.