Statement of Elizabeth A. Kerwood, Deputy Chief U.S. Probation Officer

District of Hawaii
"View from the Probation Office"
United States Sentencing Commission
Regional Hearings on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act

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Good afternoon esteemed members of the U.S. Sentencing Commission and members of the audience. Thank you for inviting the District of Hawaii to share our thoughts and experience with the federal sentencing system.

The District of Hawaii is an island community rich in diverse cultures, beliefs, and socioeconomic backgrounds. Because of this diversity and the relatively close proximity in which we reside, the underlying values of living in harmony; tolerance for individual differences; treating each other with compassion and dignity; and role modeling or teaching the skill sets which support these values to those who have gone astray, permeates how we conduct business in the Probation Office. Additionally, when conduct has the imminent potential of resulting in harm, either to our community, to a specific person or to the offender himself and all efforts toward rehabilitation have failed, the Probation Office pursues action for timely and appropriate consequences.

It is with this backdrop that I share our experience of how the U.S. Sentencing Guidelines and the Supreme Court decision of U.S. v. Booker have affected federal sentencing in the District of Hawaii. It is also from this island perspective that I respectfully share our thoughts on how devoting resources to crime prevention, rehabilitation, and incorporating collaborative efforts of the offender, probation officer, and various stakeholders in the community to which the offender will ultimately return, is an essential component of reducing recidivism, thereby, safeguarding public safety.

As you know, the U.S. Sentencing Commission was established as an independent agency in the judicial branch of government with the express purpose of establishing sentencing policies and practices for the federal criminal justice system. The sentencing guidelines were specifically designed to incorporate the purposes of sentencing enumerated by 18 U.S.C. § 3553a and to reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

In the District of Hawaii, the advancement in the knowledge of human behavior relating to the criminal justice system is guided by the meta-analysis of research on criminal behavior and evidence based practices that focus on the outcomes of various treatment and intervention modalities in reducing recidivism. It is notable that even before the passage of the Second Chance Act, due primarily to our underlying island community values, the District of Hawaii embarked on creating a collaborative alliance with the offender and other support systems to ensure a more meaningful transition and integration into the community. As succinctly stated by Assistant Deputy Chief Probation Officer Burton Maroney from the Southern District of Iowa, "In the end, our goal is to have offenders see themselves as being *a part of the community* and not see themselves as being *apart from the community*."

In this testimonial statement, I bring a message from the District of Hawaii that the Supreme Court decision in Booker acknowledges the unique circumstances of each offender's background and the contributing factors culminating in criminal conduct, and maintains the integrity of the sentencing guideline system, albeit, advisory in nature. Additionally, revisions to the advisory sentencing guidelines which incorporate principles of the current research on criminal behavior are a necessary component of addressing the purposes of sentencing, specifically, just punishment, deterrence, incapacitation, and rehabilitation.

The Impact of Booker in the District of Hawaii

In the 2005 pre-Booker fiscal year, 69.9% of offenders received sentences within the then mandatory sentencing guideline system; 26.1% received a downward departure based on substantial assistance; 2.2% received an "upward" departure and 2.2% received a "downward" departure.

In the 2006 post-Booker fiscal year, 51.8% of offenders received sentences within the advisory sentencing guideline system; 31.3% received a downward departure based on substantial assistance; 0.4% received an "upward" departure; 0.4% received a "variant" sentence above the advisory guideline system; and 11.2% received a "variant" sentence below the advisory guideline range based on 18 U.S.C. § 3553a factors or a combination of a guideline supported departure and 18 U.S.C. § 3553a factors.

In the 2008 post-Booker fiscal year, 42.8% of offenders received sentences within the advisory guideline range; 30.9% received a departure based on substantial assistance; and approximately 21.9% received a "variant" sentence below the advisory guideline range based on 18 U.S.C. § 3553a factors or a combination of a guideline supported departure and 18 U.S.C. § 3553a factors.

A comparison of the pre-Booker 2005 and post-Booker 2006 and 2008 statistics, depict an appreciable progression and movement toward individualized sentences.

Following Booker, the District of Hawaii made a philosophical shift and implemented evidence based practices (EBP) in the presentence process and in the supervision of offenders. Briefly, EBP entails the objective, balanced, and responsible use of current research and the best available data to guide practice decisions, such that outcomes are improved.

The District of Hawaii is very fortunate and is one of the grant recipients from the Office of Probation and Pretrial Services of the Administrative Office for the United States Courts to implement EBP. As such, in preparing Presentence Reports, probation officers conduct the presentence interviews in the spirit of Motivational Interviewing. This style of interviewing enables the defendant to share information in a collaborative, non-authoritative atmosphere which then triggers "change talk" or the identification of areas in the defendant's lifestyle of desired change. The incorporation of MI in the presentence interview has also resulted in better identification of criminogenic needs and 18 U.S.C. § 3553a factors to assist the Court in fashioning an individualized assessment and sentence.

In the supervision of offenders, the District of Hawaii utilizes assessment tools to identify risk factors and re-entry needs to create a collaborative alliance to promote offender success. In addition, the District of Hawaii incorporates various modalities, including cognitive behavioral techniques, interactive journaling, offender workplace development, and re-entry programs to facilitate offender success.

The passage of the Second Chance Act of 2007, affirms the need for the collaborative efforts of all components of the correctional system to work toward the common goal of reducing recidivism. In his concurring opinion, 8th Circuit Court of Appeals Judge Myron H. Bright noted that, it is clear that the spirit of the Second Chance Act of 2007 intends for the entire correctional system to work towards the rehabilitation of prisoners for the purpose of reducing recidivism [U.S. v. Wessels, 539 F.3d 319 (8th Circuit, 2008)]. In this regard, the U.S. Sentencing Commission can play a significant role in a comprehensive re-entry model and make a substantial impact on the rehabilitation of offenders and reducing recidivism.

The Role of the Federal Sentencing Guidelines

The Supreme Court decisions in Gall and Rita, direct the District Courts to treat the advisory guidelines as the "starting point and the initial benchmark" in fashioning an individualized, appropriate or reasonable sentence for an offender. In considering the statistical data on federal sentencing across the nation, it appears that the tenets of Booker have been slow to materialize. Therefore, the U.S. Sentencing Commission should continue to play an important role in promulgating guidelines that balances

Congressional views of the "crime du joir" with what the research is saying about punishment, deterrence, and rehabilitative efforts that result in better outcomes for the reduction of recidivism. The idealized hallmark process of objective, research driven deliberation by the U.S. Sentencing Commission must continue, despite Congressional action and a prevailing attitude of public punitivism that may cause harm, or make matters worse, in areas that had nothing to do with the original problem.

The Role of the Sentencing Commission

As Congress continues to amend and create federal statutes which provide for excessively punitive sentences, in particular, mandatory minimum terms, the "starting point and initial benchmark" of the sentencing guidelines become more crucial in balancing the needs for punishment and rehabilitation. Consistent with its historical role as an independent policy maker and its reliance on empirical, objective data, the U.S. Sentencing Commission needs to consider what current criminal justice research is saying about the re-entry of offenders, recidivism, and public safety.

We recognize there are heinous offenses and offenders who have proven impervious to the deterrent efforts of long imprisonment terms and rehabilitation, warranting harsh punishment. For these types of offenders, public safety outweighs any re-entry interests. However, the economic climate of limited resources and dwindling prison space necessitates a reconsideration of alternative sentences or sanctions for the first-time, low severity, or nonviolent offender. For appropriate offenders, alternatives to incarceration provide the opportunity to participate in community based programs that teach life skills and treatment necessary to become law-abiding and productive members of society.

Lingering Guideline Application Issues

For the most part, the sentencing guidelines take into account most of the relevant facts and circumstances of a crime. However, with respect to U.S.S.G. § 2B1.1, there continue to be ambiguities which result in complex and time consuming efforts to seek clarification, both through consultation with the U.S. Sentencing Commission and case law research, and prolonged fact findings at sentencing.

In particular, in Application Note 3, loss is defined as the greater of "actual" or "intended" loss. In applying this definition, it would appear that there would be two different values. However, according to representatives from the U.S. Sentencing Commission during a training session in Hawaii, "intended" loss would always be the greater value since it includes "actual" loss. This position is neither supported by the definitions of loss in the application notes nor by the various circuit opinions. To remedy this situation, if it is truly the U.S. Sentencing Commission's position that

intended loss will always be the greater of losses, it should amend the application note to make the intention clearer.

Additionally, during a recent sentencing involving the determination of the base offense level under U.S.S.G. § 2B1.1, the sentencing judge found that U.S.S.G. § 2B1.1 is sufficiently ambiguous in syntax to mitigate against applying the higher alternative base offense level.

It is our District's belief that the U.S. Sentencing Commission is an independent entity that should stand behind its opinions when providing a position pertaining to the interpretation of a particular guideline or application note. In this regard, the "non-binding waiver" that automatically accompanies an opinion rendered through the U.S. Sentencing Commission Hotline staff undermines the validity of the Sentencing Commission's interpretation.

Conclusion

In conclusion, we applaud the ongoing efforts of the U.S. Sentencing Commission in meeting its statutory obligation and keeping the guidelines evolutionary. We respectfully encourage the Commission to consider the evolving research driven policies and practices of our correctional system when contemplating amendments to the sentencing guidelines. If future policy and guideline amendments keep in step with the criminal justice and social research concerning recidivism, the re-entry of offenders, public safety, and the need for sentencing reform to reduce excessive and unnecessarily lengthy periods of incarceration, we can be assured of a progressive, collaborative model to address the statutory purposes of sentencing.

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