

**Testimony of
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**Public Hearing Before the
United States Sentencing Commission**

**“The Sentencing Reform Act of 1984: 25 Years Later”
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I appreciate the opportunity to appear before the United States Sentencing Commission to discuss the Sentencing Reform Act of 1984. In particular, I am grateful for the opportunity to suggest some basic ways the Sentencing Guidelines can be enhanced to further improve the quality of sentencing decisions in federal courts.

From my perspective, the Sentencing Guidelines seek to attain three worthwhile objectives. They attempt to promote sentencing uniformity among similarly situated defendants. They seek to foster greater predictability about potential sentences to facilitate important decision making processes in criminal proceedings. And, they also try to cultivate a degree of proportionality in sentencing, both in the context of variations within the spectrum of conduct applicable to a criminal offense and also in the context of different statutory offenses that address similar types of conduct.

As with any effort to create a comprehensive set of rules, the Sentencing Guidelines have made more progress in some areas than in others. My colleagues at this and other hearings have identified many specific, well-reasoned suggestions for improving the Sentencing Guidelines. Of the many proposed changes, refinements, and amendments that the Commission has already heard, and will yet hear as it continues its hearings, two interrelated considerations should predominate. First, the Commission should refashion the Sentencing Guidelines

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to help judges apply all of the sentencing factors contained in 18 U.S.C. § 3553. Second, the Commission should simplify the Sentencing Guidelines to make the sentencing guidance contained in them more straightforward and to avoid undesirable disparities that can arise when detailed, sophisticated sentencing factors are formulaically applied to individual behavior and circumstances.

The Sentencing Guidelines Should Be Amended to Expressly Encourage Judges to Consider and Apply All of the Sentencing Factors in 18 U.S.C. § 3553(a). In the wake of *Booker* and its progeny, the Sentencing Guidelines should be amended in two general respects to accomplish this objective. First, the Commission should refashion the Guidelines to enhance their usefulness as an advisory -- rather than mandatory -- tool to help federal judges make sound sentencing decisions. Centralizing the decision making process in a mandatory set of comprehensive rules is enticing for many well-intended reasons. However, notwithstanding any perceived efficiencies, centralized, rule-based decision making is not effective and instead impedes the judiciary from fulfilling its obligations under 18 U.S.C. § 3553. Effective sentencing within the parameters of 18 U.S.C. § 3553 is predicated on judicial discretion across the full range of statutory punishment authorized for a particular criminal offense. The necessity for judicial discretion is evident in the Congressional mandate that judges consider “the history and characteristics of the defendant” and its related instruction that sentencing judges “impose a sentence [that is] sufficient, but not greater than necessary.”

Second, the Sentencing Guidelines should be amended to more expressly recognize the role of extenuating and mitigating circumstances in sentencing decision making. To meaningfully discharge their duties under 18 U.S.C. § 3553(a), judges must consider, weigh, and balance a variety of interrelated factors. For instance, they must weigh general societal influences by considering, among other things, basic standards applicable to the behavior of society’s members; society’s sense of, and need for, justice, which embodies a balancing of punishment with notions of procedural and substantive fairness; and deterrence, which requires consideration of punishment’s potential for promoting respect for society’s rules of law not only in the individual defendant before the court but all members of society in general. Judges must also assess factors relating to the specific criminal conduct being addressed, including statutes defining rules by which the criminal conduct is identified and measured; the minimum and maximum punishments imposed by Congress for the criminal offense; and the specific circumstances of the defendant’s conduct. Furthermore, § 3553(a) requires judges to consider characteristics individual to the defendant.

Although they currently provide an analytical framework for weighing societal factors and offense characteristics, the Sentencing Guidelines do not

include a statutorily adequate decision making role for the personal characteristics of an individual defendant. Indeed, as set forth on pages 31 through 36 of my colleagues' testimony today, the Sentencing Guidelines as currently drafted prohibit, discourage or limit consideration of many relevant factors relating to personal characteristics. The Guidelines should, therefore, be amended to provide guidance that will help judges weigh, and exercise their discretion in relation to, extenuating factors and mitigating circumstances. By extenuating factors, I refer to facts or characteristics relating to the offense which tend to indicate its commission was not as serious as might normally be the case. By mitigating circumstances, I mean evidence of good character and achievement suggesting that the defendant is deserving of a more lenient punishment because the criminal act tended to be inconsistent with his true character.

The variations in kind and degree of human behavior, individual character, and personal experience are limitless. Refashioning the Sentencing Guidelines to facilitate the reasoned exercise of judicial discretion within the parameters of 18 U.S.C. 3553(a) and encouraging a statutorily adequate role for extenuating factors and mitigating circumstances will greatly improve the quality of sentencing decisions and make significant progress toward greater uniformity, more predictability, and added proportionality. It will also tend to cultivate sentencing decision making practices and policies that more often result in sentences that are "sufficient, but not greater than necessary."

The Sentencing Guidelines Should Be Simplified. For the past thirteen years, I have served as a mentor in a program that trains young lawyers seeking to practice criminal law in the United States District Court for the District of Nevada. The complexity of many sentencing guidelines is a common concern that arises almost every year. New lawyers often have difficulty adequately assessing the possible sentencing range applicable to their client because of nuances created by such things as application notes or inconsistent appellate or district court decisions interpreting the guidelines. The problems engendered by these complexities can be significant. In fact, the complexities have now reached a point where, in some cases, an attorney's skill and understanding of the Guidelines can have a disproportionate and undesirable impact on the length of a defendant's sentence.

While attorney skill has long been a differentiating factor, the mechanistic application of complex, comprehensive rules artificially exaggerates the disparity. Indeed, over time, disparity often becomes an unfortunate by-product of most efforts to centralize decision-making in mandatory rules that are designed to quantify individualized human behavior. Another often unintended by-product of complicated and detailed, rule-based decision models is a shift in power and control. The Sentencing Guidelines have effected such a shift. Because of the manner in which they are applied, the Guidelines have shifted most of the

sentencing discretion from judges to prosecutors. By virtue of their ability to define the characteristics alleged in relation to an offense, the Guidelines give prosecutors the opportunity to pre-determine the range of punishment to which a defendant will be subjected. This shift in power is even more pronounced in light of the Guidelines limitations and restrictions on a judge's authority to consider personal characteristics of the individual defendant.

Now that the Sentencing Guidelines are advisory, the Commission should simplify them and recommend broader sentencing ranges within which judges can use their discretion to weigh both the specific characteristics of the offense and the individual characteristics of the defendant. Doing so would return the balance of sentencing power to the federal judge. It would also promote uniformity, predictability, and proportionality in the sentencing process, and help judges more consistently reach what § 3553(a)(2)(A) calls a "just punishment for the offense."