

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA
U.S. POST OFFICE & COURTHOUSE
700 GRANT STREET
PITTSBURGH PA 15219-1906

**CHAMBERS OF
DONETTA W. AMBROSE, CHIEF JUDGE**

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June 25, 2008

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VIA E-MAIL

RE: Draft of written Statement to the Commission

STATEMENT

Thank you for the opportunity to appear today and to speak about the most important function a trial judge performs - sentencing.

I became a federal judge in 1993, so my entire federal sentencing experience, prior to *Booker*, was under the mandatory United States Sentencing Guidelines. Coming to federal court from my position as a state trial judge for twelve years, I was familiar with sentencing guidelines. But, state sentencing guidelines under the law of the Commonwealth of Pennsylvania were very different from federal sentencing guidelines. In fact, it was difficult, at first, to believe that defendants would enter guilty pleas without knowing exactly what their sentences would be. I was amazed to discover that more than 90% of all individuals facing federal criminal charges enter guilty pleas, without fully understanding what their actual sentences will be.

Unlike some of my colleagues, I never felt completely hamstrung by the Guidelines. The Sentencing Commission in implementing the Guidelines had certainly achieved predictability consistency and transparency in sentencing outcomes. Quite frankly, the Guidelines did create a more just system yielding fairness along with consistency. Furthermore, I believed that I still had a crucial role - making findings on disputed issues pertaining to important sentencing facts and

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applying Guideline provisions to those facts.

Nevertheless, the rigidity of the Sentencing Guidelines did result in the imposition of some sentences that were too harsh and perceived as unfair and unjust because they were based on a formulaic procedure that would sometimes result in sentences disproportionately severe to the harms suffered by society.

Post - *Booker*, the Sentencing Guidelines are advisory. A judge's sentence is no longer driven and controlled by the rigidity of the Sentencing Guidelines. Rather, a judge must now impose a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing set forth in 18 U.S.C. §3553(a)(2). This provision directs the judge to consider the need for the sentence imposed:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

A judge must also consider the nature and circumstances of the offense, and the history and characteristics of the defendant, the kinds of sentences available, the sentence recommended by the advisory Guidelines, the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims of the offense.

As the Supreme Court stated in *Gall v. United States*, 128 S.Ct. 586 (2007), "extraordinary circumstances" are no longer required to justify a sentence outside of the guideline range, as long as the record demonstrates that the judge considered the §3553(a) factors and supported the

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sentence by facts of record applied to those factors.

In many ways, sentencing is now a more difficult task for a judge because she must now exercise her own judgment to fulfill the ultimate responsibility for imposing a sentence sufficient but not greater than necessary to achieve the sentencing objectives.

I find myself now engaging in the framework of the three step sentencing process. Without exception, I begin with a consideration of the applicable advisory guideline sentencing range, ruling on every objection filed by the government and by the defendant citing to the record evidence for my rulings. I then move to any requests for departures under the Guidelines and finally consider requests for variances which generally are based on arguments that the case is outside of the "heartland," that the specific offense and/or particular defendant's history and characteristics warrant a sentence different from that recommended by the Guidelines or that the Guideline range is not based on any sound data or scientific research.

After determining the advisory Guideline range that I find applies to the case, I hear evidence and argument on the sentence which is appropriate and sufficient but not greater than necessary to satisfy the §3553(a) factors. This is where the real work begins. If judges blindly follow the sentencing Guidelines or give them the presumption of reasonableness and only sentence outside them in extraordinary cases, the judge will not be doing her job. In many important ways, the Guidelines conflict with the directives of §3553(a). For example, §3553(a)(1) instructs judges to consider the history and characteristics of the defendant. The Guidelines instruct judges not to consider the defendant's age, educational and vocational skills, his mental and emotional condition, his physical condition, including drug and alcohol dependence, his employment record his family ties and responsibilities, his socio-economic status, his civic and military contributions and his lack of guidance as a youth.

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These prohibitions in the Guidelines conflict with §3553(a)'s requirement to consider the history and characteristics of the defendant. This conflict was resolved by the Supreme Court in *Gall, supra*, where the Court upheld a non-Guideline sentence of a probation which the judge imposed based, in part, on characteristics of the defendant which the Guidelines prohibited or deemed "ordinarily not relevant."

All of my colleagues on the District Court of the Western District of Pennsylvania believe that sentencing post-*Booker* is working well by providing a framework of advisory Guidelines that acknowledges the goals of uniformity, transparency and predictability, but also by giving judges another framework that acknowledges sentencing as an individual exercise. Former United States District Judge John Martin of the Southern District of New York, who was my colleague on the Criminal Law Committee, wisely said that the Guidelines give judges the means to sentence similar defendants similarly, but took away the opportunity to sentence different defendants differently. We now have that opportunity. In many situations the Guidelines represent sound sentencing policy. In others, they do not.

Many judges, including myself, believe unquestionably that offense and offender characteristics should be taken into account in sentencing. We must look at the whole story of the offense and of the offender. There are many facts concerned with the offender's history and characteristics that should instruct the judge on what sentence is sufficient but not greater than necessary to deter this defendant, to protect the public from this defendant, and to rehabilitate this defendant. Even though defendants may commit similar crimes, considerations of individual factors may result in disparities - but, disparities which are warranted.

All of my colleagues agree that a certain amount of discretion exercised by federal judges in the sentencing process is necessary. Sentencing cannot and should not be reduced to numbers

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predetermined by charging decisions made by prosecutors, mandatory Guidelines and calculations made by probation officers. Post - *Booker* sentencing gives judges the right and the opportunity to impose sentences that are not only consistent but also fair.

My colleagues have asked me to inform you of those sentencing issues which they perceive as unfair and arbitrary. Number one is, of course, the crack / powder cocaine disparity. While no empirical or scientific data supports this disparity, we do now know that it does negatively impact the poor and the African - American population. While Amendment 706 has alleviated this disparity to a degree, it has not solved the problem. The unfairness of this disparity is not lost on the community and it affects those willing to serve on a jury and those willing to testify in criminal cases. The community will not support a system which supports one of the greatest sources of injustice in our criminal justice system. The United States Sentencing Commission must continue to press Congress to adopt a one to one ratio. Five year penalties should be imposed on serious drug traffickers and ten year sentences should be imposed on major drug traffickers. We have all experienced low level offenders, who sell to pay for their addiction and who suffer the consequences of a sentence that will not be reduced because they do not have enough information to give to the prosecutor. This injustice must and should be corrected.

Number two concerns the implication of career offender status. A defendant can and often does face a sentence three times longer under the career offender provision. One is designated a "career offender" if he was at least eighteen years old at the time he committed the instant offense of conviction; if the instant offense is a felony that is either a "crime of violence" or a controlled substance offense and the offender has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The Guidelines instruct that a prior felony conviction is, in part, a state or federal conviction

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for an offense punishable by imprisonment for a term exceeding one year. Because judges are instructed to look to the elements of the offense which resulted in the prior conviction, rather than the facts of that conviction, some defendants have been sentenced as repeat violent offenders when, in fact, they are not.

The Commission should narrow the statutory definition of "crime of violence." For example, the Commission's definition includes, in Pennsylvania, a state simple assault misdemeanor. The definition of career offender should be applied to a narrower class of offenders.

Thirdly, many judges are concerned with sentencing in cases involving possession and distribution of child photography. Despite the fact that judges increasingly grant requests for downward departure and variance in these cases, the advisory guideline sentence range has continued to increase. The reason for the longer and more severe sentencing ranges is clear - there is a great deal of pressure put on the legislative branch to "throw away the key" for child pornography offenders. While the judiciary as a whole, I believe, does not consider this to be a victimless crime, I do believe we recognize our responsibility to act as necessary check on political pressure concerning such a "hot-button" topic. Many of us have concluded that in many cases, especially those where the defendant has never solicited or touched a child, and who frequently has no prior criminal record, strict application of the Sentencing Guidelines would create an injustice. This is not to say, however, that judges do not recognize the damage caused by child pornography and by the market for the exploitation of children.

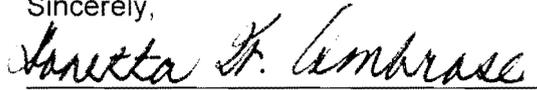
As to changes to the Federal Rules of Criminal Procedure, judges are frequently faced with issues relating to the disclosure of *Brady* material. I support those who have proposed amendments to Federal Rules of Criminal Procedure 11 and 16 that would codify the rule propounded in *Brady*, clarify the nature and scope of "favorable information," require the

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government attorney to exercise due diligence in locating favorable information and establish deadlines for disclosure of *Brady* material which provide sufficient time for the defendant to receive due process.

Thank you again for this opportunity. While we, as trial judges, understand the importance to the public of consistency and uniformity in sentencing, we must never lose sight of our ultimate goals - fairness and justice.

Sincerely,

A handwritten signature in black ink, reading "Donetta W. Ambrose". The signature is written in a cursive style and is positioned above a horizontal line.

Donetta W. Ambrose
Chief United States District Judge
for the Western District of Pennsylvania