United States Sentencing Commission
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Statement of
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Judge Hinojosa and members of the Commission, thank you for this opportunity to share my thoughts with you, and welcome to New York City.

Last week I presided over one of the most anticipated and closely watched sentencings in recent years, in the case of United States v. Bernard L. Madoff. The sentencing was scheduled for a Monday, and news trucks started jockeying for parking spots outside the Courthouse over the weekend. By Sunday afternoon there were already fifteen news trucks on Worth Street waiting for the sentencing. By 6 a.m. Monday, the street was filled with victims and members of the media waiting to get into Courthouse for the proceedings scheduled for 10:00.

In the days since, the sentence has been dissected and debated, both in the popular press and the academic media. The discussion has been healthy: What are the goals of punishment? Did the sentence further those goals? Should helping victims heal be a goal of punishment? Is a financial crime such as securities fraud really "evil?" Is there any point to a sentence of years far longer than a defendant is expected to live? Is such a sentence merely pandering to the public?

We are here today, of course, not to take on these questions, but to discuss the Sentencing Guidelines. But the Madoff case underscores how difficult sentencing can be. And in many of our cases, the challenge is not just to decide the appropriate sentence to impose, but to preside over the proceedings in an efficient manner, in a way that will give parties and victims a fair opportunity to be heard, while maintaining the dignity and decorum that the public should expect from proceedings in our courts.

I was appointed in 1994, and thus I have not had the challenge of sentencing under pre-Guidelines law. It must have been extremely difficult, and I have heard my more senior colleagues refer to it as a free-for-all.

From the time I started, I found the Guidelines to be enormously helpful. They provided a useful starting point for me. And in the vast majority of cases, I felt I had sufficient flexibility to depart if the circumstances warranted, including departing based on the combination of circumstances. On some occasions I did find the mandatory minimums to be unduly restrictive, and I join my colleagues who have expressed the view that mandatory minimums sometimes result in unjust sentences, as they often require judges to ignore sentencing factors that usually are an important part of the mix. On the other hand, some important flexibility is provided by the safety valve and 5K1 departures.

It was a real challenge as sentencing law evolved so dramatically with Apprendi, Blakely, and Booker and the other

decisions that followed. It was much fun to be there on the cutting edge, applying these cases as they were decided, trying to determine what they meant and how to proceed. It seemed as if the law were changing on a near-daily basis.

As the law in this area has continued to develop, we district judges have gained even greater discretion and flexibility. Moreover, the Supreme Court has now held that the Guidelines are not even presumptively reasonable,[1] and that district judges are free to reject a particular Guideline based even on personal policy disagreements.[2] One could argue, under these circumstances, that the Guidelines have lost their significance. In my view, however, the 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 addition, the required analysis frames the issues in a way that makes it more likely that we will reach a fair and just result. Finally, the goals of the Guidelines --

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[1] See Nelson v. United States, 129 S. Ct. 890, 892 (2009) (per curiam) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.").

[2] See Kimbrough v. United States, 128 S. Ct. 558, 569-70 (2007) (holding that sentencing judge may consider, inter alia, policy disagreement with crack/cocaine disparity in Guidelines when imposing sentence); see also United States v. Spears, 129 S. Ct. 840, 843 (2009) (observing that Kimbrough recognized that district courts have authority to vary from crack cocaine Guidelines based on policy disagreement with them).

honesty in sentencing, reasonable uniformity in sentencing, and proportionality in sentencing -- are still laudable, and the Guidelines continue to advance these goals.

The Guidelines are now as they should be -- true Guidelines, advisory in nature, rather than mandatory rules. They are something to which we should give, appropriately, fair and respectful consideration.[3]

I do believe that post-Booker is much better than pre-Booker, and I am confident that most if not all of my colleagues in the Southern District of New York would agree. We have more flexibility to do what we are supposed to do -- to judge -- and we are not limited to merely applying mechanical rules and doing mathematical calculations. Notably, sentencing is more difficult post-Booker, for before, when the Guidelines were still mandatory, a judge could hide behind the Guidelines and say "sorry, my hands are tied -- there is nothing I can do." Now we can't say that, and instead we must actually make the hard decisions.

By the same token, one by-product of Booker is that defense lawyers are now talking longer. But that's a good thing, because it means that defense lawyers are trying harder, as they now have a greater chance of getting a below-Guidelines sentence for their clients.

One of my colleagues has expressed the view that he would like to see more information in pre-sentence reports so

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[3] See United States v. Jones, 531 F.3d 163, 174 (2d Cir. 2008) (statutory mandate of § 3553 "includes the requirement for respectful consideration of the Guidelines").

that judges can be in a better position to exercise this greater discretion that we have.

There are several specific areas that I'd like to discuss briefly.

First, the question of departures versus variances. I wonder whether there is still a need for both. Very few lawyers even seek departures anymore, and when they do, they pair the request with a request for a variance and do not distinguish between the two. I know the Commission has encouraged district judges to rely more on departures and less on variances, but to me it seems inefficient to do a departure analysis first, under the stricter standards for departures, and then to do the analysis again in the more flexible context of a variance. I also think it is more intellectually honest, in most cases, to consider the mitigating factors in the context of a request for a variance, rather than to force the issue in the narrower confines of departures. Although departures and variances clearly are distinct, the courts have recognized that at times the same analysis must be applied to both.[4]

Second, there is a technical issue I want to mention, in part because it arose in the Madoff case. What happens when

[4] See, e.g., United States v. Grams, 566 F.3d 683, 687 (6th Cir. 2009) ("While the same facts and analyses can, at times, be used to justify both a Guidelines departure and a variance, the concepts are distinct."); United States v. Martinez-Barragan, 545 F.3d 894, 901 (10th Cir. 2008) ("Because many of the same considerations are part of both the departure and variance analyses, there will, necessarily, be some overlap between the two, when a defendant seeks, and the courts consequently are called upon to consider, both forms of relief.").

there are multiple counts of conviction, the Guideline calculation calls for a sentence of life imprisonment or a fixed term to life, and no count carries a possible sentence of life? The relevant Guidelines section is section 5G1.2(d), but there is some ambiguity in the language. Section 5G1.2(d) tells us to impose consecutive terms of imprisonment to the extent necessary to achieve the "total punishment." But what is the "total punishment" when the Guideline calculation calls for life?

The Second Circuit has commented on the lack of precision in the language.[5] The Second Circuit has provided some guidance, as it has held that where the Guideline calculation calls for life imprisonment but no count carries a term of life, the maximum sentences for all the counts are to be stacked so that the "total punishment" -- and therefore the Guideline range -- is the maximum sentence for all the counts added together.[6] In that case, the total was 240 years and the Guideline range was thus 240 years. In the Madoff case, the total of all the counts was 150 years, and thus that became the Guideline sentence.

I sentenced someone the other day whose Guideline calculation called for a range of 360 months to life, but the two counts in question had statutory maximums of 30 years and 20 years, respectively, and thus life imprisonment was not a

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[5] See United States v. Reis, 369 F.3d 143, 149 (2d Cir. 2003) (acknowledging that the "Guidelines concept of 'total punishment' is not well-defined").

[6] United States v. Evans, 352 F.3d 65, 70-72 (2d Cir. 2003).

possibility. Under the language of 5G1.2, I had to determine the "total punishment," but we could find no guidance as to how I was to do so in the situation where there was a range that included life imprisonment. It seems that instead of a range, I was supposed to pick a single number as the "total punishment," but it was unclear whether that number should be 30 years or 50 years or something in between, and it was unclear how I was to make that determination. We could not find Second Circuit law to help us, and I think this section should be clarified.

Third, the early disposition program under section 5K3.1 of the Guidelines. Under this section, a court may depart downward up to four levels on motion of the government if there is an early disposition (or "fast-track") program in the district. We do not have a fast-track program in our District, although we do have many illegal re-entry cases, the type of case where I understand this departure is often applied in other parts of the country. Some defendants have argued in our cases that we should impose a below-Guidelines sentence to account for the disparity that results because of the unavailability of an early disposition program in our District.[7] In reviewing the

[7] The Second Circuit has held that a district court is not required to adjust a sentence to compensate for the absence of a fast-track program in the district. See United States v. Mejia, 461 F.3d 158, 164 (2d Cir. 2006) ("[A] district court's refusal to adjust a sentence to compensate for the absence of a fast-track program does not make a sentence unreasonable."). It has left open the possibility that a district court may do so. See United States v. Liriano-Blanco, 510 F.3d 168, 172 (2d Cir. 2007) ("Although we concluded in United States v. Mejia that a sentencing court is not required to account for the fast-track disparity by imposing a non-Guidelines sentence, . . . we did not

statistics, I noticed that there were 17,648 such government sponsored below range sentences nationwide (for 2005 through the third quarter of 2008). This is a significant number, as these government-sponsored below-Guideline sentences occurred in 7.2% cent of all sentencings nationwide. And yet it is not available to defendants in our District. This is a significant disparity that is inconsistent with the goals of the Guidelines, and it should be addressed.

Thank you for giving me this chance to share my thoughts with you, and thanks to the Commission for its continuing efforts to help make the difficult task of sentencing a little bit easier.

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foreclose the possibility that a court has the legal authority to impose, in its discretion, a non-Guidelines sentence on that basis. Perhaps it does not, under an extension of the Mejia rationale or otherwise. But the answer to that question is not a foregone conclusion.").