TESTIMONY BEFORE UNITED STATES SENTENCING COMMISSION

Hon. D. Michael Fisher, Circuit Judge - Third Circuit Court of Appeals

Thank you for providing me with the opportunity to give you my current thoughts on the U.S. Sentencing Guidelines. My tenure on our Court began in December 2003 after thirty years of legal practice primarily in the Pennsylvania state courts and public service, which included seven years as the Attorney General of Pennsylvania before joining our Court. In addition, during the early 1980s, I served in the Pennsylvania State Senate and was involved with legislation that created the Pennsylvania Commission on Sentencing and the Pennsylvania Sentencing Guidelines. Those guidelines were presumptive guidelines and somewhat less rigid than the federal sentencing guidelines.

I quickly gained an appreciation for the thoroughness of the federal sentencing guidelines and the enormous work done by the United States Sentencing Commission. Under the framework in place at that time, adherence to the guidelines by sentencing courts, coupled with the appellate standard of review, brought about uniformity and eliminated much of the unwarranted sentencing disparity that prompted Congress to pass the Sentencing Reform Act. That said, this did not stop defendants from challenging various guideline calculations. Indeed, even after close to twenty years since the federal guidelines were issued, the Courts of Appeals were still interpreting various guidelines sections.

Storm warnings came from the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), and the tornado touched down in January 2005 with the Court's decision in *United States v. Booker*, 543

U.S. 220 (2005). *Booker* ushered in a new era of sentencing law by making the federal guidelines advisory and directing the Courts of Appeals to review sentences for reasonableness. Following *Booker* and its progeny, our Court, like the other Courts of Appeals, grappled with many challenges in this new era of federal sentencing. For example, during the past four years, our Court has said:

- The district court should adhere to a three-step process in imposing a sentence: First, the district court should start by calculating a defendant's Guidelines sentence as it would have prior to *Booker*; second, in doing so, the district court must formally rule on any departure motions before it, taking into account this Court's pre-*Booker* case law, and explain on the record whether it is granting that departure and how that departure affects the Guidelines calculation; and third, the district court must give meaningful consideration to the 18 U.S.C. § 3553(a) factors. *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006).

- Under Federal Rule of Criminal Procedure 32(h), the district court is not required to provide advance notice to a defendant of its intention to exercise its discretion under *Booker* and § 3553(a) and vary the sentence from the advisory Guidelines range; however, where the district court "is contemplating a departure, it should continue to give notice as it did before *Booker*." *United States v. Vampire Nation*, 451 F.3d 189, 197-98 (3d Cir. 2006).

- Following *Gall*'s instructions, this Court's appellate role is "two-fold." More specifically, this Court "must first ensure that the district court committed no significant procedural error in arriving at its decision" and, where the district court committed no procedural error, will "then review the substantive reasonableness of the sentence under an abuse-of-discretion standard, regardless of whether it falls within the Guidelines range." *United States v. Wise*, 515 F.3d 207, 217-18 (3d Cir. 2008).

- "The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007) (en banc).

- The Due Process Clause affords no right to have facts that are relevant to enhancements or departures under the Guidelines proved beyond a reasonable

doubt; rather, the district court "should continue to make factual findings by a preponderance of the evidence" and "this Court will continue to review factual findings relevant to the Guidelines for clear error and to exercise plenary review over a district court's interpretation of the Guidelines." *United States v. Grier*, 475 F.3d 556, 561, 566, 570 (3d Cir. 2007) (en banc).

- Although the Guidelines are advisory, the district court must still calculate the applicable sentencing range "using the Guidelines extant at the time of sentencing, and we will continue to review the propriety of a sentence based on those same Guidelines" unless applying the version in effect on the date of sentencing creates an ex post facto problem or any later amendment clarifies, as opposed to substantively changing, the law as it exists at the time of sentencing. *United States v. Wise*, 515 F.3d 207, 220 (3d Cir. 2008).

- Where a district court miscalculates the advisory Guidelines range, this Court will hold such procedural error harmless only if it is "clear that the error did not affect the district court's selection of the sentence imposed." *United States v. Langford*, 516 F.3d 205, 215 (3d Cir. 2008).

- A defendant is not required to object at sentencing to a district court's explanation for imposing the particular sentence in order to preserve his or her challenge on appeal to the district court's consideration of his or her arguments raised during the sentencing process. *United States v. Sevilla*, 541 F.3d 226, 231 (3d Cir. 2008).

- To survive this Court's review for procedural reasonableness, a district court must "plainly state the reasoning behind each sentence" and, "in deciding on appeal whether the reasons provided by a district court are adequate, the degree that a sentence varies from the recommendation given in the Guidelines matters. Hence, while [this Court] eschew[s] any requirement of direct proportionality," the district court is expected to provide "a more complete explanation to support a sentence that varies from the Guidelines than . . . a sentence that falls within a properly calculated Guidelines range." *United States v. Levinson*, 543 F.3d 190, 197 (3d Cir. 2008) (internal citation omitted).

- This Court will not apply a presumption of reasonableness on appellate review to a within-Guidelines sentence, although a within-Guidelines sentence "is more likely to be reasonable than one that lies outside the advisory guidelines range," given that the Guidelines "remain an essential tool in creating a fair and uniform sentencing regime across the country." *United States v. Cooper*, 437 F.3d 324, 330-32 (3d Cir. 2006) (internal quotation marks omitted).

Most recently, our Court, sitting en banc, decided *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009), in which we explored the contours of substantive reasonableness under *Gall v. United States*, 128 S. Ct. 586 (2007). In *Tomko*, the defendant pleaded guilty to tax evasion and his advisory-Guidelines range was twelve to eighteen months of imprisonment. However, the district court chose to impose a downward variance and sentenced him to 250 hours of community service, three years of probation with one year of home confinement, and ordered a fine of $250,000. Our Court, in vacating the prior panel decision, affirmed the district court's sentence. More specifically, the eight-person majority, applying the abuse-of-discretion standard from *Gall*, concluded that, although they might not have imposed such a sentence had they been the sentencing judge, the sentence was nonetheless substantively reasonable under *Gall*. I, along with four of my colleagues, disagreed with the majority's characterization of substantive reasonableness. We argued that if appellate reasonableness review means anything, then this particular sentence had to be substantively unreasonable.

For our Court, the *Tomko* decision is significant because of the closeness of the vote (8 to 5), the aggravated facts of the case, and the unsympathetic defendant. But *Tomko* has further implications. Around the same time *Tomko* was decided, our Court decided *United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009), which vacated the defendant's six-year prison sentence for possessing child pornography on a computer, concluding that such a sentence was substantively unreasonable. What the *Tomko* and

Olhovsky decisions indicate is that, at least in our Court, where a district court adheres to the correct processes for imposing a sentence and fully explains its reasoning, it is unlikely that the resulting sentence will be found substantively unreasonable. It should not take long for sentencing judges to realize that this is, in large part, what our Court expects of them.

Thus, under our current sentencing system, the Sentencing Commission is responsible for providing its expertise in this field to the district courts by compiling data to provide ranges within which a particular sentence should fall, but the ultimate decision of tailoring the sentence to fit the individual rests in the hands of the district court, which is responsible for fully explaining any reasons for departures or variances. Absent significant sentencing disparity, this kind of advisory guideline system may be the best we can expect at this time in history. That said, such a system may not be what Congress intended when it implemented the federal guidelines twenty-five years ago and if we begin to see wide disparity, particularly in those areas where Congress believes the American public expects incarceration, Congress might be prompted to impose a more rigid sentencing system than the one the Supreme Court reviewed in *Booker*. The law review article which I authored in the Duquesne University Law Review in September 2007, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 Duq. L. Rev. 65 (2007), more fully sets out some of my thinking. A copy of that is attached to my written material.

Thank you for giving me the opportunity to appear before the Commission and I would be glad to answer any questions you may have.