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United States Sentencing Commission
Regional Hearings on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984
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Thank you for your invitation to participate in this regional hearing marking the 25th anniversary of the Sentencing Reform Act. In preparing my comments today, I reflected upon the impact of the sentencing guidelines on federal probation officers. As you no doubt would expect, the sentencing guidelines were a major change for probation officers. Before the sentencing guidelines, our work writing presentence reports had traditionally focused on developing and providing information about the character and personal history of the defendant. Probation officers were charged with discovering those underlying factors that may have had some impact on the specific offense and conduct of the defendant. Officers tried to get to know the defendant and develop some insight into their lives. Early presentence reports were actually referred to as “the social investigation” or “social diagnosis.”

The Sentencing Guidelines brought dramatic change to our work. The dimensionality of the Guidelines redefined how work was viewed and conducted. The focus changed from the offender to the offense and the criminal history. The Guidelines Manual became our bible, it’s dog-eared pages showed our reliance and determination. Our language even changed. We began talking in

code with terms such as Groupings, Aggregate, Base Offense Level, Specific Offense Characteristics, 5K1.1, 4A1.3, 2D.1.1, Enhancements, Departures, Safety Valves. And then there were the Loss Tables, the Drug Equivalency Tables and Conversion Tables. A degree in law or mathematics would have been more helpful than our social work degrees. The focus of these reports required hard study, analysis and application of a complex set of guidelines and notes.

The Sentencing Reform Act created a major swing of the criminal justice pendulum. Probation offices followed that pendulum swing. We trained and studied under the tutelage of Sentencing Commission staff. Commission staff have helped us develop our expertise and accept our critically central role in calculating the guidelines. So where are we today? How has the advisory nature of the guidelines after the Supreme Court's decision in *U.S. vs. Booker* affected federal sentencing?

Federal Sentencing statistics indicate that in FY 2008 in the District of Maryland:

- ❑ Nearly 50% of the offenders are sentenced within the guideline range, which is below the national average (59%).
- ❑ Government-sponsored departures (primarily §5K1.1 Substantial Assistance Departures) were slightly above the national average, at nearly 28%.
- ❑ Approximately 21% of offenders received a sentence below the advisory guideline range based on either 18 U.S.C. § 3553(a) factors or a combination of a guideline supported departure and 18 U.S.C. § 3553(a) factors. (The national average is approximately 13%)

So what can we conclude from these numbers? Booker appears to be having some impact in sentencing practices in Maryland and throughout the country. But that impact is slight - at this point the pendulum seems only to be in a slight swaying motion, not the huge swing it experienced 25 years ago. The sentencing guidelines are standing the test of time. Not surprising, given that they have strong empirical underpinnings and the Sentencing Commission's commitment to the dynamic and evolutionary nature of sentencing reform.

When Congress enacted the Sentencing Reform Act of 1984 it was seeking honesty, reasonable uniformity, and proportionality in sentencing. Although the Sentencing Reform Act has and will continue to have its critics, I believe most could agree the sentencing guidelines have made federal sentencing more rational, more certain and more transparent than it was two decades ago. There can be no doubt that punishment is far more predictable.

The development of the guidelines were intended to further the basic purposes of criminal punishment - to deter, incapacitate, provide just punishment and rehabilitate. The deterrence aspect is complicated given the multi variant factors. It is not apparent that crime has been deterred to the extent that was anticipated or hoped. What is clear, however is since the implementation of the guidelines, more defendants who enter the federal system have been incapacitated.

The question now being posed by some critics of the guidelines is whether the punishment is "just" or is it too severe? Justice Anthony Kennedy expressed that sentiment in 2007 when he stated "Our resources are misspent, our punishments too severe, our sentences too long." So what is the "right amount" of "just punishment." This is an ongoing analysis I recommend be made by the

Commission in collaboration with the legal community and those of us in the criminal justice profession. There are many factors to consider, including the cost of incarceration and many viable and effective alternatives to incarceration. Collaborating on these topics, to include sharing data, will improve decision-making and continue to help the evolutionary process of sentencing reform. What recommendations should the Commission consider? Practices that will keep the pendulum in a sway toward the center to achieve the “right “ balance. As a system, we are learning more about what motivates and controls criminal behavior. We have better data collection systems today than we did 25 years ago. In probation we are looking more closely at evidence-based practices that focus on the outcomes of various treatment and intervention modalities in reducing recidivism. The Second Chance Act is yet another sign that the pendulum is in a sway - toward that middle, recognizing that reintegrating offenders back into our communities is critical to their success and the safety of our communities.

What probation offices can do - refocus and recommit. In a sense, go back to our roots. We must look more closely at the 18 U.S.C. § 3553 factors in preparing our presentence reports. The advisory nature of the guidelines makes this matter. Over the years, we have disproportionately spent less time evaluating those factors than calculating the guidelines. We must help officers refocus and again look more closely at the characteristics of the defendant and the rational and justification for variances.

What might the Sentencing Commission consider? Well, any work the Commission can do to simplify the guidelines and remedy the seemingly conflicting intent between the various policy statements in the guidelines and the sentencing factors enumerated at 18 U.S.C. §3553 would be helpful.

As for the big picture in sentencing reform - two important areas to address are eliminating the sentencing disparity between crack and powder cocaine and revisiting the role of mandatory minimums. The pendulum is in motion - the slow, deliberate, and balanced sway toward center, toward purpose, will help achieve the goals envisioned by the Sentencing Reform Act. In the words of Oliver Wendell Holmes, “the great thing in this world is not so much where you stand, as in what direction you are moving.” I think the evolutionary direction of federal sentencing reform shows the character and value of our system. The direction is important to every defendant before our courts and every citizen of our country.

Thank you again for this opportunity.