UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING
CHICAGO, ILLINOIS
SEPTEMBER 9, 2009

STATEMENT OF
JON P. McCALLA
CHIEF JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Judge Hinojosa and Members of the United States Sentencing Commission:

Thank you for inviting me to testify before the United States Sentencing Commission at this regional hearing marking the 25th anniversary of the passage of the Sentencing Reform Act of 1984. I appreciate being given the opportunity on behalf of both myself and the judges of the Western District of Tennessee, to express the view from the District Court bench regarding how the federal sentencing system is operating and to make a few recommendations for consideration by the Commission.

BACKGROUND

The Western District of Tennessee is one of the busiest trial courts in the United States and is divided into two divisions, one in Memphis, Tennessee and one in Jackson, Tennessee. Four district judges and three magistrate judges are located in Memphis. One district judge, one senior district judge, and one magistrate judge are located in Jackson. Last year judges in our district tried an average of 55 matters and the court ranked as the third most active trial court in the United States. The trials were a mix of criminal trials and civil trials with the larger portion of the trials being criminal trials. Regarding sentencings, for the year 2007, judges in the Western District of

Tennessee sentenced 601 defendants, averaging 120 sentencings per judge. While this is substantially fewer than the number of sentencings in the border states, our district is usually in the top one-third in the United States in terms of sentencings per judge. I am providing these numbers not just to compliment my colleagues on the bench in the Western District of Tennessee, all of whom are very hard working and dedicated, but also to point out that, in light of the heavy workload that we and our colleagues throughout the United States have, the Guidelines provide an invaluable tool for the analysis of a substantial body of data in a systematic way thus facilitating the fair and just determination of issues regarding sentencing for each individual appearing before the court.

POST BOOKER

United States v. Booker has had a profound effect on the court. Post-Booker sentencings, with their detailed analysis under 18 U.S.C. § 3553 (a) and, often, the inclusion of factors not appropriate to consider in the pre-Booker period, consume more court time and address more issues. Booker has returned discretion to the district judge. At the same time, application of 18 U.S.C. § 3553 (a) requires that the Guidelines be considered. Thus, the district court must still properly calculate the guidelines and must consider the guideline range in arriving at an appropriate sentence. This return of discretion has been welcomed by all of the judges in the court but has increased the workload and the time consumed in the sentencing process.

The Commission has already received many thoughtful comments through these public hearings. I particularly point to the excellent testimony that the Honorable Richard J. Arcara, United States District Judge, Western District of New York, provided

in Washington, D.C. on July 9, 2009. His comments discussed many of the points that I, and I believe many other district judges, would make, including the need to examine the possibility of simplifying the sentencing process, the need for better guidance on the parsimony clause of 18 U.S.C. § 3553 (a), the concern about undue prosecutorial influence over sentencing and the need to examine more alternatives to incarceration in some circumstances. Generally, I would endorse the comments of Judge Arcara and commend them for additional study by the Commission.

There are two additional points that I would like to make regarding the sentencing regime. The first point relates to consecutive mandatory minimums and the second point relates to the potential use of the Guidelines to incentivize progress toward rehabilitation. A third much broader point relates to the difficulty in achieving certain sentencing objectives sometimes created by state systems that diverge markedly from general federal sentencing policy.

MANDATORY MINIMUMS

The judges in our district have recently concluded a series of criminal civil rights cases which has been characterized by the Civil Rights Division of the Justice Department as the largest criminal civil rights prosecution ever undertaken by DOJ. As a result of that investigation more than 40 Memphis police officers and reserves were either indicted or disciplined for conduct arising out of a criminal conspiracy to deprive numerous individuals, many of whom were involved in drug transactions, of their civil rights. The defendant police officers engaged in robbing these individuals of both drug proceeds and drugs while acting in their official capacities with the Memphis Police Department.

Because of the nature of these crimes, individual defendants were frequently confronted with the possibility of numerous consecutive 18 U.S.C. § 924 (c) sentences. Needless to say, guideline sentences in these cases are also often substantial. When mandatory § 924 (c) charges are added as a result of a plea or a jury verdict, the sentence can have an appearance of disproportionality. Sentences that appear to be disproportionate run the risk of undermining confidence that the judiciary is acting in a deliberate, disinterested, and impartial way even though the judge is only imposing the consecutive sentence required by statute. While this is an area that the Sentencing Commission cannot directly affect, a review and analysis of these cases may be appropriate for presentation to the Congress for its consideration should Congress choose to address the question of mandatory sentencing. This issue has been covered more extensively by the Honorable Julie E. Carnes, Chair of the Criminal Law Committee on behalf of the Judicial Conference in her testimony before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security on the Subject of Mandatory Minimum Sentences, given on July 14, 2009. I would urge the Commission, when appropriate, to address this issue in the context of the corrosive effect on public confidence when sentences are perceived as unjust or arbitrary. It is the view from the district court that advisory guideline sentencing under 18 U.S.C. § 3553 (a) avoids the problem created by mandatory minimum sentencing.

SIGNIFICANT PROGRESS TOWARD REHABILITATION

While district judges would generally prefer a system that is simplified where possible, I believe the Commission should consider the possibility of creating a

deduction in the sentencing guideline calculation that would reward individuals who demonstrate significant progress toward rehabilitation in the period between indictment and sentencing. This would be similar to, and reflect the strong positive effect on behavior of, motions under § 5K.1.1. In the Western District of Tennessee for fiscal year 2008, 51% of those sentenced were sentenced within the guideline range. Importantly, however, an additional 27.6% received a departure pursuant to § 5K.1.1 for substantial assistance. Additionally, another 3.3% received other government sponsored below guideline support. Thus, in over 80% of the sentencings in the Western District of Tennessee, had there been no motion by the government, the guideline sentence generally would have been imposed. The critical point is that almost 28% of those sentenced in 2008 chose to cooperate with the government and provided substantial assistance because of the availability of a § 5K.1.1 departure.

It is clear that the Guidelines have a great potential for affecting human behavior and yet we have not explored the possibility of affecting other, perhaps even more favorable, human behavior with a guideline incentive.

Recently I had a young man before me for sentencing in connection with his guilty plea to an 18 U.S.C. § 922 (g) violation. He was in his early 20's, had not finished high school, and had some limitations regarding potential for academic achievement. When he first appeared before me for sentencing, his attorney asked for a resetting to the next week. She explained that he was very anxious to complete two certificates on which he was working while he was in detention. I granted the additional time and when he appeared the following week, the attorney advised me that he had completed his certificate in one of the courses, anger management. She explained that he wanted to

complete the certificate and to show me that he had done so. It was, of course, important to me that he was making an effort to deal with some of the problems that had been fully disclosed in the sentencing process.

The creation of a deduction for those who have taken substantial steps toward rehabilitation would incentivize the type of rehabilitative conduct that could reduce recidivism and achieve the goals of our justice system. I am not sure that the single certificate of the young man in my example would have constituted a substantial step – in his case it might have qualified for a partial deduction. For those on bond, rehabilitave conduct might consist of obtaining regular employment and maintaining that employment until sentencing; it could be obtaining a GED, successfully completing various types of counseling, making early contributions to restitution, and so forth. For those incarcerated pending sentencing, it would promote more desirable behavior while being incarcerated such as completing various programs available to deal with both educational needs and addiction and mental health issues. Those sentenced to prison, who had achieved a "substantial rehabilitave steps" reduction, would hopefully serve their sentence attempting to take advantage of those programs available in the BOP which they had already learned could benefit them through their experience in the sentencing process.

STATE PROSECUTION AND SENTENCING VARIANCE

Throughout the United States, state prison systems often suffer from underfunding and overcrowding. State prosecutors face similar resource deficits. These problems have certainly existed in the Western District of Tennessee. This tends to create an undesirable dichotomy in which most individuals in the criminal justice

system are in the state system and have one expectation which is severely restricted by the absence of adequate resources. Therefore, those that appear in the federal system for the first time are confused by their state court and prison experience. An analysis by the Sentencing Commission of the various state experiences versus federal experiences and research determining whether or not variance in experiences create potentially higher rates of criminal activity might be of value to both the Congress and the states as they try to determine the most successful models for our criminal justice system. The Sentencing Commission may be in a unique position to provide that type of analysis if requested to do so.

CONCLUSION

The advisory sentencing guideline regime in the post-Booker era provides more balance between judicial discretion and uniformity in sentencing than existed under the prior mandatory scheme. District judges continue to benefit enormously from the Commission's important work of providing model sentences. The Commission's research and historical data is greatly valued by the district court. Without the Guidelines, we would lack the logical, statistical, and mathematical data that allows district judges to make the difficult decisions required in sentencing on a consistent basis.

Again, thank you for this opportunity to provide my comments and observations.

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