Sentencing Commission Testimony of Philip Simon

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Good Morning. Thank you very much for giving me the opportunity to testify at this hearing. My name is Philip Simon and I am a district judge in the Northern District of Indiana. I have roughly 20 years experience working with the sentencing guidelines, first as a federal prosecutor for thirteen years, and more recently for almost seven years as a district judge. I have a great deal of interest in this area of the law and I welcome the chance to testify and am honored to have been asked.

When I first started in the federal system there were still a number of cases that I handled as a prosecutor that were governed by pre-guidelines case law. There were, to say the least, a number of problems with the system. The most obvious being the utter lack of uniformity in sentencing. I recall a tax case where a defendant was convicted of three counts of filing false tax returns. The statutory maximum was three years. By luck of the draw, this defendant drew a particular judge and received a three year sentence on each count to be served consecutive to one another – a nine year total. Other defendants charged with similar tax offenses often would receive probation from another judge in the district. Two defendants who committed the same offense, and were prosecuted in the same district,

received wildly disparate sentences. Quite literally, the happenstance of the judge's name being pulled from the assignment wheel made all the difference in the world to those two defendants. The guidelines were implemented in part to rid the system of this type of disparity, and in large measure they have been successful. To have sentences determined by the random luck of the draw was disquieting and made the processing of federal cases akin to spinning a roulette wheel. So at the outset I want to make clear that I am, in general, a proponent of the guidelines. But with that being said, there are a number of problems with the guidelines and that is what I will focus on today in my brief comments.

The first concern that I have always had with the guidelines is the name itself. Prior to *Booker,* the phrase "United States Sentencing Guidelines" was a misnomer. The title suggests that the guidelines were merely a source of advice, or a starting point in arriving at a reasonable and appropriate sentence. Of course, prior to *Booker*, this was untrue; the guidelines had the force of law and district judges were bound by them with limited ability to depart. In my view, the guidelines always should have been just that – guidelines. In other words, they should have been a starting point to focus the judge's attention and to set a mean average sentence – or narrow sentencing range – given the type of offense and the defendant's criminal history. But since the guidelines had the force of law, judges

rotely followed them even when it may not have been the sensible thing to do. I venture to say that all of us who have been in the system can recount situations where we have computed the guidelines in a case and they simply didn't make any sense given the individual circumstances of the person actually sitting in the courtroom.

With *Booker*, all of this changed. And although *Booker* and its companion case are certainly awkward in how they got there, from my perspective the result that *Booker* achieved is nothing short of a masterstroke. *Booker* struck the right balance between uniformity in sentencing, on the one hand, with flexibility in sentencing, on the other. *Booker* wisely kept the structure of the guidelines in place, and in any federal sentencing they remain the starting point for determining the sentence. But *Booker* has given me the ability to honestly deal with those cases where the guidelines simply do not yield a sensible result.

One of the first cases I had after *Booker* was handed down provides an example. *Booker* was decided January 12, 2005, and two weeks later I had a defendant in front of me named Henry Nellum. Nellum had been caught selling crack to an informant and a search warrant recovered additional crack in his house. Nellum was 57 years old and a profound crack addict. It was perfectly clear that Nellum sold crack merely to support his own habit. Although he was 57 he looked

closer to 70. He'd been addicted to crack for 15 years. He was an army veteran, served in Viet Nam, was honorably discharged, and had a very supportive family. He was also in poor health. He had high blood pressure and suffered a heart attack the year before he was sentenced. Nellum was a criminal history category III by virtue of the fact that he had two prior misdemeanor convictions for crack possession. As required, I computed the guidelines, and given the weight of the crack and his criminal history, Nellum's guideline range was 168 - 210 months or roughly 14 to 18 years.

Now, to be clear about it, I'm no fan of crack dealers. But this was a case where I simply thought that given the various goals of sentencing – punishment, specific and general deterrence, and rehabilitation – that a 14 to 18 year sentence was simply excessive. Prior to *Booker* I would have, in rote fashion, given Mr. Nellum a sentence of 168 months. There really were no legitimate grounds for departure. But *Booker* gave me the ability to give a sentence that I believed was more reasonable given Mr. Nellum's individual characteristics. He will be imprisoned for about 7 years, still a rather lengthy prison term, and not exactly a sentence he can do standing on his head. With *Booker* as a guide, I arrived at this sentence by taking into account Nellum's age, the fact that it was unlikely that a 65 year old man (roughly his age upon release) would be a recidivist, his strong

family background, his poor health, and his status as an Army veteran. Nellum received a sentence of about half of what the guidelines called for, but it's a sentence that is more in line with the goals of sentencing, and it's a sentence that I believe is more reasonable than the one called for by the guidelines. You can read the sentencing memorandum that I drafted in the case at *United States v. Nellum,* 2005 WL 300073 (N.D. Ind. 2005).

So *Booker* has given me the flexibility to adjust sentences when I believe it is appropriate. With that being said, even after *Booker,* I tend to give guidelines sentences, not because I presume that the guidelines are reasonable, but because more often than not, the guideline computation *is* reasonable in my independent judgment. But in about one out of three cases – I'm estimating here – I will give sentences outside the guideline range based on the § 3553(a) factors.

While I think that *Booker* is a welcome change, I must say that it has made my job much more difficult. In almost every case now, I receive comprehensive sentencing memoranda from counsel requesting non-guideline sentences. Sentencing was much easier when all you had to do was calculate the guidelines and give the sentence that was spit out by the computation. I can no longer reflexively do that, and so the emotional toll of sentencing is much greater today. But I, for one, welcome this extra burden.

I will now address some individual concerns that I have with the guidelines. First, some background on my district. I sit in northern Indiana and the major city is Gary, Indiana. Gary is an industrial city that has fallen on extremely hard times in the last 20 years. I read recently that in the 1980s there were close to 30,000 jobs in the steel mills in and around Gary; that number is now around 8,000. Crime is rampant and the crack epidemic hit the City exceedingly hard. Gary has had the dubious distinction of being the murder capital of the country several times in the past fifteen years. Our district handles a large quantity of crack cocaine cases each year. We have five active judges and from fiscal year 1998 through the current year, we have had 789 crack cocaine cases. According to the U.S. Attorney, over the past ten years, nearly 50% of all drug cases prosecuted in our district have been crack cocaine cases. The national average is 14 %. While I do not have the statistics at hand, I would venture a guess that over the past 15 years, we are near the top of the country in crack cases on a per judge basis.

I tell you this to let you know that I am very well aware of the problems that crack has had in the inner city. But notwithstanding the scourge that crack can bring to a neighborhood, in my judgment the disparity in the treatment of crack and powder cocaine is a terrible injustice. Treating crack as if it is 100 times more serious than cocaine is ludicrous. They should be treated the same. Indeed, in my

view, the powder cocaine guidelines should be slightly higher. So for example, the distribution of a quarter of a kilo of powder should yield a base offense level of 20, instead of the current base offense level of 18. The crack guidelines should then be reduced to a 1/1 ratio with these new higher powder cocaine guidelines. I understand that legislation is currently pending in Congress to eliminate the disparity between crack and powder and I would hope that the Commission would support that legislation. I am simply tired of sending street level dealers to prison for ten, fifteen or twenty years, or in some cases for life.

Second, the guidelines' treatment of first time offenders troubles me. It has never made sense to me to treat a third time offender similarly to a first time offender. But that's essentially what the guidelines do. Take a defendant whose offense level is 15 and who is a first time offender. He faces a sentencing range of 18 - 24 months. Yet someone at the same offense level with two prior armed robbery convictions who is criminal history category III faces only six months more, i.e. a 24 – 30 month range. It is incomprehensible to me how these two defendants would have overlapping sentencing ranges. This strikes me as both an injustice and a poor way to use scarce criminal justice resources. As we all know, incarceration is incredibly expensive – approximately $20,000 per year in 2007-08. I believe that people in criminal history category I should more often be given

a chance at probation. I firmly believe – setting aside cases where there is violence – that defendants should be given an opportunity to demonstrate that they simply made a mistake. People can redeem themselves and should be given an opportunity to demonstrate that. I become much less sympathetic to defendants coming through the system for the second, third or fourth time. For those defendants, they no longer are entitled to the benefit of the doubt because they have demonstrated an inability to comport their actions within the confines of the law. So prison is necessary for these defendants because there is no other choice. But for first time offenders, proceeding immediately to incarceration for even relatively minor offenses has always struck me as rash.

Third, the way in which mandatory minimums dovetail with the guidelines sometimes poses problems. I do not believe that this is the appropriate forum to debate the pros and cons of mandatory minimums. While in general I believe they are unwise, in the end, that's for Congress to decide. I do however have a mild criticism for how the Commission responds to changes in mandatary minimums. Let me give you a concrete example. A few years ago the Adam Walsh Act – among other things – increased the mandatory minimum for those convicted under 18 U.S.C. § 2422(b) from five years to ten years. We could debate for a long time whether that was a wise decision by Congress. But let's set that aside for a

minute. Shortly after the change in the statute, the U.S. Attorney's Office in my district conducted a sting operation and arrested a number of people who were using the internet to try and coerce underage girls to meet them for sex. Of course the "girls" were in fact law enforcement officers posing as minors. The problem from my point of view is that it took 16 months for the Guidelines to catch up with the increase in the mandatory minimum. The mandatory minimum went from five years to ten effective July 26, 2006. The guidelines, through Amendment 701, took account of this change 16 months later in November, 2007. I ended up having five trials because there simply was no incentive for the defendants to plead guilty. The guidelines then in existence yielded most defendants a sentence of about six years. But since they were looking at a ten-year mandatory minimum, there was simply no point to pleading guilty. I know that the Commission is extremely busy, and candidly I do not fully understand how emergency amendments get enacted and whether it would have been feasible to do so in this situation. But as I sat through those trials, I wished that the amendments had come sooner. I do know that many of the defense attorneys told me that their clients would have certainly pled guilty had the guidelines been amended earlier.

Fourth, I have often felt that the guidelines score out entirely too low for large scale fraud cases. I taught Federal Criminal Practice and Procedure for a

number of years at Valparaiso University School of Law and about one fourth of the course outline was devoted to the Sentencing Guidelines. I started that portion of the course by positing two hypothetical defendants to my students. Defendant A is convicted of distributing a relatively small amount of crack cocaine – say 25 grams, an amount you can put in the palm of your hand. The defendant is given the crack by her boyfriend and told to bring it across town to his distributor. She knows it's crack but is doing him a favor. She has four kids and maintains a job. She has never been arrested before. She is a minor participant and is safety valve eligible. Defendant B is an investment advisor who steals $2 million – $400,000 from each of five clients. The scheme covers five years. The victims are all elderly; their average age is 75. Some have been rendered penniless by the defendant's actions and their lives ruined. The defendant has preyed on vulnerable victims and has abused his position of trust. He pleads guilty and gets the benefit of acceptance of responsibility. I present these two hypothetical to the law students to begin a discussion on what the appropriate sentence should be for defendants A and B. After discussing it, we actually compute the guidelines. Defendant A's guidelines are about 3 ½ - 4 ½ years. Defendant B's are roughly half of that – 2 - 2 ½ years. Most people are stunned and appalled – I certainly am – that Defendant A is looking at 4 years while defendant B is looking at half that

time. Most people believe it should be the exact opposite. This illustrates the relative ease with which the guidelines treat serious white collar offenders who abuse their position of trust and literally ruin people's lives. So this is an area that I would like to see the Commission address.

With all this being said, I reiterate, that I am a proponent of the guidelines. The criticisms that I have delineated above are on the margin. The guidelines provide me a much needed starting point in arriving at a reasonable sentence. And with the benefit of *Booker* I am now able to adjust the sentence up or down to achieve what I believe to be a reasonable sentence.

Once again, I thank the Commission for giving me the opportunity to present my views, and I welcome any questions that you may have.