Sentencing Commission Testimony
from Honorable Robert W. Pratt - Chief District Judge (Southern District of Iowa)

Thank you for the invitation to testify regarding the work of the Sentencing Commission. Like almost every district judge with whom I have discussed the matter, I believe that sentencing is the single most important task performed by district court judges. According to the Sentencing Commission, federal district judges sentenced 72,865 criminal defendants in 2007. I would be remiss in my testimony if I did not remark upon the difficult emotional toll that sentencing places on a judge. Even when sentences are fair and appropriate, and even when a defendant "deserves" the particular term of imprisonment, it is not a pleasant task to pronounce the judgment of the law. I am not complaining about the job. Rather, I am just stating my personal belief, shared by many judges, that it is impossible for any human being to be confident that he or she has imposed the "correct" sentence. It is important to state this fact from the outset of my testimony because we too often lapse into a recounting of judicial statistics that fail to capture the enormity of the single act of pronouncing a sentence.

I want to begin by remarking that these hearings are very much in keeping with the Sentencing Reform Act of 1984, which advised that one of the purposes of the Sentencing Commission was to "establish sentencing policies and practices for the federal criminal justice system that" assure that the purposes of sentencing set forth in Title 18, United States Code, § 3553(a)(2) are met. Section 991 of Title 28, which established the Sentencing Commission, goes on to state that the Commission was also intended to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices" and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." The Commission is further charged with "develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code."

I will try and follow the questions that were posed to me when I was asked to come and testify, so as to properly limit the scope of my presentation. The federal sentencing system is not working well. Sentences are routinely more harsh and punitive than they need to be, especially in run-of-the-mill narcotics and pornography cases. The starting point for this result, of course, is with the United States Attorneys and their general charging authority. "Prosecutors decide whether and how to charge an individual. They decide whether to offer a plea to a lesser charge, set the terms of the plea, and assess whether the conditions have been met." Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 408 (2001); *see also* Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 188 (1969) ("Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all

others is the power to prosecute or not to prosecute."). While "disparities," both warranted and unwarranted, are often discussed in the context of sentencing, the reality of federal sentencing today is that federal sentences are dramatically longer than state sentences for similar offenses. As well, the time that offenders actually serve is substantially longer in the federal system than in the state system. While federal sentences are categorically harsher, the unanswered question that remains is: What legitimate penological reasons exist that can account for the difference? With few exceptions, the Sentencing Guidelines advise sentences that are simply too punitive. The very first thing the Sentencing Commission should do is to advise Congress to eliminate all mandatory sentences. Mandatory sentences come in two types—the mandatory minimum, which requires a sentence of "x years" upon a plea of guilty or a conviction, and the sentencing enhancement, where a plea or conviction will trigger a specific sentence. The overly punitive Sentencing Guidelines and the mandatory minimum sentences (which include the enhancement statutes) all have their origins in the mistrust of judges. This mistrust of life-tenured judges does not find a similar mistrust of executive branch actions by politically appointed United States Attorneys serving at the pleasure of the President. Mandatory minimum sentences have the effect of letting the prosecutor determine the sentence. This is simply untenable in a sentencing regime that advises judges to render sentences that are "sufficient but not greater than necessary." For the very first time in our legal history, we now have a regime under the *Booker* advisory guideline system where the United States Attorney will be involved in sentencing justice. Under the pre-mandatory guideline system, the United States Attorney played virtually no part in the determination of the appropriate sentence. Indeed, in the indeterminate sentencing system, judges had almost unfettered discretion to individualize sentences for particular defendants. While prosecutors cared about what the ultimate sentence was, questions of sentencing justice could be left to the judge and to the parole board. With the advent of the Sentencing Reform Act and the mandatory Sentencing Guidelines, prosecutors merely needed to "prove up" sentencing facts and argue Guideline law in order to effectively restrain judicial discretion. The prosecutors, however, still were not concerned with the justice of the sentence—a matter left to the Sentencing Commission and, to a much lesser extent, to the judge. To quote from Professor Simons' article:

> Superficially, this limiting of the prosecutor's involvement at sentencing made sense and was consistent with traditional institutional roles: the prosecutor decided the charge, the jury decided guilt or innocence, and the judge decided the sentence. This division of roles, however, had one major exception: mandatory sentences. At the same time it created the Sentencing Guidelines, Congress also began creating a variety of crimes that carried mandatory minimum sentences, typically for offenses involving drugs and guns. Because these mandatory sentences "trump" the Sentencing Guidelines, the charge often determined the sentence. In other words, by charging (or not charging) an offense with a mandatory minimum sentence, the prosecutor effectively became the sentencer. In a system in which sentencing is viewed as a judicial function and in which prosecutors are typically not asked to engage with questions of sentencing justice, this "sentencing by charge" increases the risk of unjust sentences.

Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 Geo. Mason L. Rev. 303, 305-06 (Winter 2009).

As a result of *Booker*, the Supreme Court has created a third system that merges some of the elements of the pre-Guidelines and post-Guidelines systems. The Supreme Court has decided that sentences should be decided based not only on the "advice" a judge receives from the Sentencing Commission, but also on the traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. The Court also announced that a trial judge's decision would be reviewed based upon a concept of "reasonableness." Now, prosecutors not only prove up sentencing facts and argue guidelines law, but also are in the unfamiliar role of arguing both at sentencing and on appeal that a particular sentence is or is not reasonable. Within this framework, the Government and the Court, as well as defense counsel, should remember what the Supreme Court said about the role of the United States Attorney in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

If prosecutors thought and acted this way about sentencing, it would animate their charging decisions with respect to mandatory minimums, sentencing enhancements, and arguments about sentences that are considered to be "sufficient but not greater than necessary." The end result of a prosecution—"substantive justice" regarding the sentence—should be considered an integral part of the United States Attorney's job. This is the indirect result of *Booker* and its progeny. An oft-quoted inscription on the walls of the Department of Justice states: "The United States wins its point whenever justice is done its citizens." (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Simply asking these questions before charging decisions are made can truly improve the sentencing system under the post-*Booker* advisory regime.

There is no question in my view that the now-advisory system of guideline sentencing has improved the quality of sentences that I have rendered. The entitlement that the defendant has at sentencing is to an "individualized assessment" based upon the facts presented has improved the ability of judges to consider factors that were not permitted to be taken into account pre-*Booker*. *See Gall v. United States*, 522 U.S. 38 (2007). This rationale, of course, built upon what the Supreme Court has called "the uniqueness of the individual case," as well as the following practice of the federal courts that Justice Kennedy referred to in *Koon*: "'It has been uniform and

constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" *Gall*, 552 U.S. at 598 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Prior to *Booker*, federal district court judges were almost always prevented from considering the defendant's age, *see* U.S.S.G. 5H1.1, education and vocational skills, *id*. 5H1.2, mental and emotional condition, *id*. 5H1.3, physical condition, including drug or alcohol dependence, *id*. 5H1.4, employment record, *id*. 5H1.5, family ties and responsibilities, *id*. 5H1.6, socio-economic status, *id*. 5H1.10, civic and military contributions, *id*. 5H1.11, or lack of guidance as a youth, *id*. 5H1.12. These guideline prohibitions are directly at odds with many of the sentencing statute's directives contained in 18 U.S.C. § 3553(a). While sentencing is now more complex and demanding than it was when courts merely had to plug in the numbers that Rule 32 required and impose the mandatory provisions of the Sentencing Guidelines severed in *Booker,* it now leads more frequently to a sentence that is "sufficient but not greater than necessary." Post-*Booker* sentencing has also led to more innovative and imaginative advocacy on the part of many defense lawyers. Courts are now presented with sentencing alternatives that can better suit offenders' needs and that will lead to more community based solutions. Such alternatives in sentencing are sometimes far more appropriate than imposing sentences of incarceration, where offenders are commonly deprived of familial and other support mechanisms. Breaking the cycle of parentless children, many of whom will fail in the same way as their parents, must be inculcated into sentencing practices.

The Sentencing Guidelines should continue to be advisory and should play a role in helping judges achieve the goals of sentencing. The preference of the Guidelines, however, for custodial sentences as opposed to non-custodial sentences should be eliminated by promulgating guidelines that encourage non-custodial sentences—particularly for first time and non-violent offenders. These new guidelines should be based upon empirical research into such emerging topics as the effects of brain maturity and should encourage analyzing the "whole person," which would include psychological and vocational evaluations, intelligence tests, and risk factor identification. This would require judges to look at the sentencing goal of rehabilitation, rather than mere retribution. The current preference in the Guidelines for custodial sentences also does not appropriately permit the sentencing judge to employ the "institutional advantages" that Justice Stevens referred to in *Gall*. Many times, a judge can "feel" or sense the sincerity of a defendant during allocution, and such a factor can never be properly "conveyed by the record" of the proceedings. Some acknowledgment should be made in an advisory guideline or in a policy statement regarding the importance of a defendant's right of allocution, as well as to the right of allocution of any victims of the offense. Such an acknowledgment will add to the record available to counsel, to the sentencing judge, and to any reviewing court that must determine the reasonableness of a sentence. Indeed, it seems to me that offering this type of advice to sentencing judges would keep with the initial Congressional intent in passing the Sentencing Reform Act of 1984, which delegated to the Commission the responsibility of developing sentencing policies and practices that achieve certainty and assure fairness.

Another suggested advisory guideline or policy statement that could be added to the

sentencing practices is one that I have used in my post-sentencing work. The opportunity to talk with ex-offenders about their incarceration experience, rehabilitative efforts, educational programs, and attitudes about their upcoming supervised release term is an "institutional advantage" that can only add to a judge's sentencing expertise. Seeing what a probationary sentence or a short or long sentence does to a defendant is a useful tool in knowing what sentence to give in a similar case. At a minimum, it provides insight to the sentencing judge that no one else has. These changes with respect to sentencing, while not mandatory, could certainly be useful to judges on some level. The Sentencing Commission currently issues reports that relate a statistical approach to sentencing and that continues to center judges' attentions on the Sentencing Guidelines, as if a certain percentage of "within Guidelines" sentences can be determinative of the quality of those sentences. While I do believe that these reports are helpful to judges in that they tell us something about sentencing, I also believe that these reports tend to erroneously "anchor" a judge into thinking that a guideline sentence is preferred or even that an unwritten presumption for the guideline sentence exists.

A final set of suggestions for the Sentencing Commission would be, first, to reconsider aforementioned Guideline provisions that all but dismiss an offender's family and community contributions. Our law should recognize and value those rare offenders who consistently provide financial support for their children, participate positively in their children's lives, and benefit the community through consistent charitable or public service. These traits speak not only to an offender's overall character but also to their ability to reintegrate into society. Moreover, the Sentencing Commission should reconsider the sheer number of enhancements that are applicable in many drug, firearm, and pornography cases, as they place many offenders' guideline ranges near the statutory maximum, despite the dramatic differences in culpability among the offenders. Perhaps, the Sentencing Commission should also reconsider utilizing a higher standard of proof, more in tune with other criminal law principles, for all enhancements. Indeed, the use of acquitted conduct, for example, proven only by a preponderance of the evidence, to dramatically increase an offender's guideline range serves to functionally undercut the jury system and discredit the Sentencing Commission and the larger criminal justice system in the eyes of the public.

With respect to the balance between uniformity and discretion, I believe that any system that allows judges to individually assess a defendant within the broad parameters of the sentencing statute will necessarily sometimes appear to be "non-uniform or disparate" in terms of the ultimate sentence. This "unwarranted disparity" is a price worth paying because sentencing is inherently fact based and because human beings (including judges) are unique. Thus, any appearance of disparity, and indeed, any actual disparity, should be viewed as a necessary consequence of an appropriately individualized process. As in many arenas of the law where "discretion" is the rule, there will always be different results in different cases. While we should attempt to limit unequal results where all other factors are equal, no system can ever truly and adequately account for the disparate acts of police, prosecutors, probation officers, and judges—all players that interact in a system that will eventually result in an offender's conviction. The current perception in working-class and poor-America is that society has one set

of rules that apply to well-to-do people, and another set of rules that impacts on them. Certainly, any statistical analysis of the impact of the Sentencing Reform Act on the federal prison population would show that incarceration rates have doubled or even tripled for poor people and minorities, but have remained steady for well-to-do people and non-minorities. The Supreme Court in *Gall* made reference to my own comment in the underlying sentencing of Mr. Gall that "respect for the law" has to mean something more than long sentences. Indeed, in sentencing Mr. Gall to 36 months of probation, I specifically found that "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall*, 552 U.S. at 599 (quoting the district court decision). The current law overlooks, or at least gives less weight to, the collateral consequences of conviction in our country and in the majority of our states. The offender is deprived of the right to vote in most states, the right to serve on a jury, the right to run for elective office, and the right to possess firearms (whatever the eventual Supreme Court view of that right entails). Moreover, a conviction will inevitably forever harm an offender's employment opportunities, and in turn, the chances the offender's children will have to get an education and succeed on their own merits. The fact is that, unlike most, if not all, democracies, we condemn more than the conduct of the offender. We also condemn the convicted individual personally, telling them, in effect, that society no longer wants their contributions or values their existence. Limiting the stigma of conviction after a sentence is completed should be one of the primary goals of the sentencing commission.

With respect to analyzing a sentence within or outside the Sentencing Guideline range, I think determining a sentence with the Guideline as the "norm" gives too much weight to the Sentencing Guidelines which, after all, are just one of the § 3553(a) factors to be considered. The Supreme Court has instructed us that the "overarching" provision of the Sentencing Reform Act that must be given effect is the "parsimony provision"—that is, the Court is charged with arriving at a sentence that is "sufficient but not greater than necessary." This provision has a long pedigree. As early as 1748, Baron Charles de Montesquieu wrote in *The Spirit of the Laws*, Bk. XIX. 14 (G. Bell & Sons 1914): "All punishment which is not derived from necessity is tyrannical." I think a better approach is the sentencing statute itself, which allows the sentencing judge to gather evidence on each of the § 3553(a) factors and to determine what, if any, incarceration is necessary, and then to determine, if the circumstances warrant, the length of confinement that would best serve the purposes set forth in the statute. While the *Gall* Court properly instructed sentencing judges to start with correctly calculating the advisory Sentencing Guideline range, it employed this starting point to aid in "secur[ing] nationwide consistency" in sentencing, not because Guideline calculations are entitled to greater weight than any other sentencing factor. While the Sentencing Guidelines attempt to render a "wholesale" overview to the sentencing considerations outlined in § 3553(a), the *Rita* Court explained that guidelines certainly cannot routinely provide a "sufficient but not greater than necessary" sentence if the district court is engaged in an individualized assessment of the offender and the offense. *See Rita v. United States*, 551 U.S. 338 (2007). Accordingly, a sentencing judge must use his or her experience and common sense when determining what value the "starting point" should have in

the final analysis. As Judge Cabranes and Professor Stith point out in their book, "the explosion of case law on federal sentencing contains almost no discussion of the purposes of sentencing generally or in the specific case—almost no articulated concern as to whether a particular defendant should be sentenced in the interest of general deterrence, rehabilitation, retribution, and/or incapacitation." Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Univ. of Chicago Press 1998). Now that judges are free to discuss these purposes of sentencing within the context of the individualized facts of the offender and the case, an exchange among the courts, defenders, prosecutors, probation officers, victims, and the Sentencing Commission can take place and a "common law" of sentencing can and should emerge. A great example of this "common law" of sentencing that actually addresses the purposes of sentencing can be found in *United States v. Cole*, 622 F. Supp. 2d 632 (N.D. Ohio 2008), where the trial court discussed the purposes of sentencing in the following manner:

> We have long understood that sentencing serves the purposes of retribution, deterrence, incapacitation, and rehabilitation. Deterrence, incapacitation, and rehabilitation are prospective and societal—each looks forwards and asks: What amount and kind of punishment will help make society safe? In contrast, retribution imposes punishment based upon moral culpability and asks: What penalty is needed to restore the offender to moral standing within the community?

The *Cole* court went on to describe how each of these purposes was consistent with the sentencing statute found at § 3553, and how the law and the facts (which involved a financial crime) should be analyzed given these sentencing concerns.

With respect to appellate review, I believe that the "abuse of discretion" standard has worked well and will continue to do so. District court judges "live with a case" for a substantial period of time and have face-to-face interactions with the offender. Appellate courts do not have these advantages available to district judges in formulating an appropriate sentence, making a less deferential, "de novo" standard of review inappropriate. While district judges can and do get it wrong from time to time, I believe the current "abuse of discretion" standard adequately allows appellate courts to determine the point at which the latitude afforded district court judges has been transgressed. If a Court of Appeals canvasses the entire record and is left with a "firm and abiding" conviction that the sentence is not "reasonable," then the Court of Appeals can and should intervene and reverse the district judge. I am not certain that this is a test which "shocks the judicial conscience," but I am confident that Court of Appeals judges will be able to identify an unreasonable sentence when they see it and articulate the reasons why the sentence is unreasonable in the context of the particular facts of a case.

Lastly, with respect to changes in either the sentencing statutes or the Federal Rules of Criminal Procedure, I would emphasize the necessity of eliminating all mandatory minimum statutes and sentencing enhancement statutes. These statutes unfairly and improperly shift the

sentencing function of government from the judicial branch to the executive branch. With respect to Federal Rule of Criminal Procedure 32, it should be expanded to permit a broader exchange of information in advance of the actual sentencing proceedings. Additional authority should be provided within the Rules to allow medical, psychological, or vocational testing when such testing would aid the sentencing judge in formulating an appropriate sentence.

Thank you for the invitation to submit testimony before the commission. I look forward to the opportunity to verbally address any concerns or questions you may have about my testimony.