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Public Hearing Before the
United States Sentencing Commission

"The Sentencing Reform Act of 1984: 25 Years Later"
Austin, Texas
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I thank the Commission for holding this hearing and for inviting me to testify. I am the Criminal Justice Act Panel Representative for the Eastern District of Louisiana, and I am in private practice in New Orleans.

I have worked with the Guidelines as a law clerk in federal district court and on the Fifth Circuit, as a prosecutor in the U.S. Attorney's Office in New Orleans, and now as a defense attorney. Like many people who have testified previously before the Commission, I believe the post-Booker guideline system has greatly improved sentencing by making everyone involved in the process think more about the rationale for each individual sentence and whether the sentence is appropriate for each particular defendant.

In my experience, before Booker there was limited discussion of defendants as individuals or of mitigating factors because most departures were discouraged or prohibited. Sentencing was, in many cases, very clinical and focused on technical Guideline arguments. Now, we still pay great attention to the Guidelines and continue to make those technical arguments, but we also have the opportunity to discuss in a meaningful way all of the relevant characteristics of both the defendant and the offense. Federal sentencing has become more fair and transparent, in large part because there is greater emphasis on the individual. The ability to put everything on the table at sentencing allows defense lawyers to speak for our clients in ways that make sense to them, and it lets us discuss practical issues that will make a real difference in

their sentences and their lives. Prosecutors must justify the sentences they seek in terms of each individual defendant, rather than mechanically apply the guidelines; and sometimes they make better decisions as a result. Judges now explain their sentences, not only in terms of the Guidelines, but also in light of the statutory sentencing purposes of 18 U.S.C. § 3553, which leads to more reasoned, and often better, judgments. All of these factors contribute to a greater understanding of the federal sentencing process by defendants, their families, and victims; and I believe that leads to a greater respect for the results. Finally, I think the current system allows for the possibility of creating better Guidelines because the Sentencing Commission can respond to the increased discussion and feedback from everyone involved in the sentencing process.

However, I believe there is room for continued improvement. In particular, I would urge the Commission to relax or remove the limitations on downward departures in Section 5 of the Guidelines, to encourage alternative sentences to imprisonment, to set forth more explanations in the commentary to the Guidelines, and to reform several particular sentencing Guidelines that have proven to be troublesome in practice.

I. The Commission Should Remove the Limitations on Departures in Chapter 5 of the Guidelines.

First, I believe the restrictions on departures in Sections 5H and 5K impede sentencing courts from fully exercising their discretion to vary from the advisory Guidelines. In my experience, which has been echoed by many other defense lawyers in my district, downward variances are rarely granted unless there are also grounds for a Guideline departure, and Section 5H of the Guidelines prohibits consideration of many important factors. Also, Section 5K1.1 creates inequity by placing great sentencing authority solely in the hands of the Government.

A. The Commission Should Remove the Restrictions on Downward Departures in Section 5H.

In the past, Section 5H of the Guidelines prohibited sentencing judges from basing downward departures on offender characteristics such as age, employment, education, family ties and responsibilities, and addiction and need for treatment. Courts are now permitted to vary from the Guidelines based on these and other factors; and sentences that vary from the Guidelines and from defendant to defendant should be expected if courts are properly considering the history and characteristics of a defendant pursuant to 18 U.S.C. § 3553(a)(1). The independent consideration of each defendant's individual characteristics necessarily involves taking into account many of the factors that were previously prohibited.

Eliminating the restrictions for departures in Section 5H would encourage sentencing courts to evaluate the factors that differentiate one person from another and would help courts exercise their discretion more fully, without the risk of being criticized for straying outside of the Guidelines.

B. The Commission Should Broaden Section 5K1.1 to Allow Defense Motions.

In addition, leaving "substantial assistance" departures solely in the hands of the Government has led to widely varying sentences that are not based on Congress's sentencing directives in § 3553. Section 5K1.1, along with other Guideline provisions such as Section 3E1.1(b), allows the prosecutor to control the Guideline range long before a sentencing court considers the case. In reality, this leads to vastly differing sentences for similarly situated defendants, depending on how a particular prosecutor views a defendant's assistance.

As currently written, Section 5K1.1 allows prosecutors to exercise sentencing judgment that would be more appropriate in the hands of neutral judges. One way to remedy this situation

would be to allow defendants to initiate Section 5K1.1 motions, which of course the Government could contest. By allowing more opportunities for departures, judges' sentencing options would not be limited by prosecutors' decisions.

On a related note, since Government motions under § 5K1.1 and § 3553(e) are often the only way a defendant can avoid a mandatory minimum sentence, I appreciate that the Commission has made it a priority to study mandatory minimums. Mandatory minimums are another way that vast sentencing authority has been placed in the hands of prosecutors rather than judges, and I think it is important for the Commission to report on the impact of mandatory minimums and urge Congress to repeal or reduce them.

Similarly, the Commission should urge Congress to expand the safety valve to all mandatory minimums and include defendants at least in Criminal History Category II, if not higher. By allowing no more than one criminal history point, many non-violent offenders with minor roles in an offense are excluded from the safety valve.

II. The Commission Should Encourage Alternatives to Imprisonment.

Although the Guidelines permit probation in some instances, the Guidelines do not recommend probation. I think that has led to the notion that imprisonment is always presumptively appropriate and that probation is an exception. However, probation is punishment, and in my experience leads to more positive outcomes than prison, especially in situations where imprisonment causes unnecessary suffering for defendants' families and children.

As other individuals who have testified before the Commission have suggested, I would also suggest that a new Guideline be added to Chapter Five, urging sentencing courts to address, when appropriate under the statute of conviction, whether prison is actually necessary to satisfy any purpose set forth in § 3553.

III. The Commission Should Expand the Guidelines' Commentary to Set Forth Rationales.

Because the Guidelines are now advisory, sentencing advocacy is shifting towards persuading the court whether or not to follow particular Guidelines. Many previous witnesses have asked for explanations and supporting statistics for particular Guidelines, because that is what lawyers need to make their sentencing arguments and what judges need to decide whether to follow the advisory Guidelines.

The Commission should justify the Guidelines by explaining the purpose each Guideline is meant to accomplish and by providing empirical evidence in support. With such explanations, sentencing courts and attorneys on both sides could better apply the Guidelines to particular cases, and could also respond to or build on the Commission's commentary.

IV. The Commission Should Address Several Guidelines that have Generated Complex Litigation.

A. The Commission Should Narrow the Definition of "Crime of Violence" for the Career Offender Enhancement in Section 4B1.2.

As a practical matter, it is exceedingly difficult to determine whether a defendant's prior conviction is a "crime of violence" or a "controlled substance offense," and this provision is constantly litigated. The "crime of violence" definition could be narrowed and simplified by deleting Section 4B1.2(a)(2); and the "controlled substance offense" definition could be limited to federal offenses only or could adopt the definition of 18 U.S.C. § 924(e).

B. The Commission Should Clarify the Burden of Proof for Disputed Factual Assertions.

Section 6A1.3(b) and its commentary recommends that sentencing courts use the preponderance of the evidence standard to resolve disputed factual issues in the pre-sentence investigation report. There is a split within the circuits as to how a defendant must properly raise a factual objection. The Eighth Circuit permits a defendant simply to object to a fact, and then the Government must present evidence supporting its position. *United States v. Jenners*, 473 F.3d 894, 897 (8th Cir. 2007) (stating that "[i]f the defendant objects to any of the factual allegations contained [in the PSR] on an issue on which the government has the burden of proof, such as . . . any enhancing factors, the government must present evidence at the sentencing hearing to prove the existence of the disputed facts"). By contrast, the Fifth Circuit requires the defendant to present evidence to rebut the pre-sentence report before the Government's burden of proof accrues. *United States v. Caldwell*, 448 F.3d 287, 290 (5th Cir. 2006) (stating that "[a] district court may adopt facts contained in a PSR without inquiry, so long as the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence").

I would urge the Commission to look at this issue and make a recommendation that an objection to a factual allegation places the burden of proof on the party relying on that allegation.