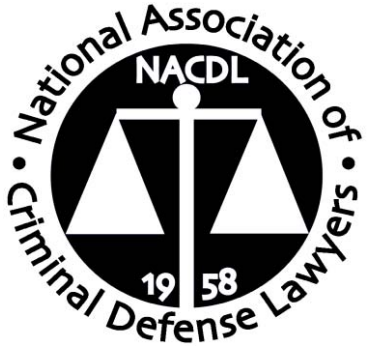

Written Statement of
Lisa Wayne
President

on behalf of the

National Association of Criminal Defense Lawyers

before the

United States Sentencing Commission

Re: "Public Hearing on Federal Sentencing Options After *Booker*"

February 16, 2012

Judge Saris and Distinguished Members of the Commission:

Thank you for inviting me to testify today on behalf of the National Association of Criminal Defense Lawyers concerning the impact of *Booker* and subsequent U.S. Supreme Court decisions on the federal sentencing guideline system, the various recommendations for legislation regarding federal sentencing, the appellate standard of review applicable to post-*Booker* federal sentencing decisions, and possible related guideline amendments.

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000-plus direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

Introduction

At the outset, it is important to acknowledge that while our system of federal sentencing and the Sentencing Guidelines are not perfect, and that there is significant room for improvement, the shift to advisory guidelines following *Booker* has further advanced the goals of the Sentencing Reform Act (SRA) and resulted in a more just administration of our federal sentencing system. Advisory guidelines are better suited to minimize both unwarranted disparities *and* unwarranted uniformity because they are grounded in a framework based on research and experience but still afford judges the discretion to sentence similarly or differently when there is justification to do so.[1] It is true that the federal sentencing system *needed* a fix, but it is also true that the fix came through the *Booker* decision.

In the years following *Booker*, some have called for a return to a system of mandatory, or at least more binding, guidelines. These calls are not coming from those actors operating within the system on a daily basis—the federal judges, prosecutors and defense attorneys—because they

[1] When the Senate Judiciary Committee voted to report the Sentencing Reform Act, it emphasized that the key in any discussion about unwarranted disparities is the word "unwarranted." The Committee further explained that justifiable differences are not unwarranted. Rather, sentencing policies and practices should not preclude differentiation between persons convicted of similar offenses who have similar records when there is justification to do so. *See* S. Rep. No. 98-225, at 161.

overwhelmingly agree that the impact of *Booker* has been positive.[2] Rather, the calls have come from the Commission itself, seeking to impose stricter adherence to their dictates,[3] and a variety of political actors who are attempting to appear "tough on crime" by calling for inflexible and harsher sentencing practices. The proposals set forth for consideration by the witnesses called to participate in today's discussion all evidence these motives. Each proposal would move us away from an advisory system and back towards the ineffective and unconstitutional mandatory system. *Booker* finally returned moral legitimacy to sentencing through actual judging and meaningful advocacy. All the proposals would undo all this progress. For all these reasons, NACDL strongly opposes any attempt to enact a so-called *Booker*-fix.

NACDL Supports the Advisory System

Whereas advisory guidelines result in fairer, individualized sentences, mandatory or binding guidelines, on the other hand, tend to mask arbitrary disparities under the guise of methodological calculations. These calculations fail to account for manipulation through prosecutorial charging decisions and imperfect policy choices. The result is inappropriate uniformity for vastly different defendants and circumstances due to emphasis on a single commonality, typically the charging statute, drug quantity, or loss amount.[4] As acknowledged by the Commission and the Supreme Court,[5] these are precisely the types of "unwarranted"

[2] *See* U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl. 19 (75% of judges believe that the current advisory guidelines system best achieves the purposes of sentencing; 8% believe that no guidelines would best achieve the purposes of sentencing; 3% believe that the former mandatory guidelines would best achieve the purposes of sentencing; and 14% believe that mandatory guidelines with broader ranges and jury factfinding, if coupled with fewer mandatory minimums, would best achieve the purposes of sentencing); Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010); and Stephen Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 Cardozo L. Rev. 775, 793-96 (2008) (noting that some line prosecutors welcome *Booker*, as "a fair number chafe" at the Department's "insistence on draconian penalties").

[3] Despite the shift to advisory guidelines, the Commission remains an incredibly relevant and integral component of our federal sentencing system. It is the Commission that sets and amends the guidelines, which remain the starting point and context of every federal sentencing, and it is the Commission that serves the critical function of collecting sentencing data and feedback from sentencing judges, in order to effect a more just and efficient system overall.

[4] This is even more so in the case of mandatory minimums, which reduce all discretion and frequently mandate unjustifiable uniformity for defendants who are vastly different and inexplicable disparity for defendants who are nearly identical. For these reasons, mandatory minimums have been criticized by nearly every actor in the criminal justice system and a broad range of groups and individuals spanning the right-left, liberal-conservative spectrum.

[5] In its Fifteen Year Review, the Commission explained that unwarranted disparity means "different treatment of individual offenders who are similar in relevant ways," and "similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing." U.S.S.C., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113

disparities the SRA attempted to eliminate. No guidelines system can fully account for the circumstances that will produce such disparities and, by removing or severely limiting judicial discretion in sentencing, judges cannot adjust and correct accordingly. Such a rigid system, intended to reduce overall disparity, actually ends up creating different, but equally unwarranted, disparities.

In addition, mandatory guidelines tend to erode the Sixth Amendment right to a fair trial by allowing prosecutors to exercise undue influence over sentences and excessive leverage over defendants. The risk of being sentenced under mandatory guidelines, which inextricably tie sentence length to the prosecutor's charging decisions, effectively precludes defendants from exercising their Sixth Amendment right to a trial. The right to have a neutral, third party review the evidence and facts is fundamental to the foundation of our criminal justice system.

However, even if a defendant has minimal culpability or a strong defense, faced with a mandatory guidelines system that does not accurately account for culpability and, instead, conflates it with arbitrary loss amounts or drug weight, a defendant will almost always forego his right to a trial.[6] Prosecutors have unlimited discretion over charging decisions and, thus, in a system of mandatory sentencing, unlimited power to deter defendants from exercising their constitutional right to a fair trial. With every step away from judicial discretion and towards a mandatory system, prosecutorial power increases and the Sixth Amendment rights of defendants erode even further.

(2004) (emphasis omitted) [hereinafter *Fifteen Year Review*]. The Supreme Court has also recognized the need to avoid unwarranted uniformity amongst offenders who are not similarly situated and to consider unwarranted disparities created by a particular guideline itself. *See Gall v. United States*, 552 U.S. 38, 53-56 (2007); *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

[6] This risk is dramatically enhanced where the case involves the problem of deficient *mens rea*. With federal crimes, particularly white collar offenses, frequently the issue at trial is not whether the particular conduct was committed but whether the defendant acted with the required criminal intent or *mens rea*. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers (2010) *available at* www.nacdl.org/withoutintent. Although the Sixth Amendment affords such defendants the right to challenge the government's proof of *mens rea* and to raise an intent defense at trial, the risks inherent in exercising that right are real and significant. This is because the chances of success are generally slim and going to trial virtually guarantees the defendant will be deprived of any credit for cooperation and will receive a harsher sentence. Vague laws should be challenged and insufficient evidence should be confronted. However, practice demonstrates that the greatest disparity in sentencing exists between those who do defend themselves and those who do not. Increased judicial discretion is one way to help alleviate this unwarranted disparity.

It warrants repeating that no sentencing system is perfect and the guidelines as they now exist have plenty of components deserving of review and improvement. However, the current evolving system undoubtedly achieves a better balance between flexibility and rigidity than the pre-*Booker* guidelines. Guidelines based on empirical research and data, judicial discretion to tailor and individualize sentences, appellate review for reasonableness, and adjustments to the actual guidelines based on judicial trends and experiential study—together, these are the characteristics necessary for a just and fair sentencing system that furthers the values articulated in the SRA. Removing any one characteristic, particularly the judicial discretion afforded by advisory guidelines, inevitably creates systematic imbalance and injustice.

NACDL Opposes the Commission's Proposals

NACDL strongly opposes any *Booker*-fix. However, even assuming such a fix is necessary, each proposal set forth for consideration by the Commission raises serious concerns and is unlikely to result in a more fair and workable system satisfying constitutional scrutiny.

The Commission has requested feedback on a proposal created by former Chair of the Commission, Judge William K. Sessions III. In essence, his proposal seeks: (1) to streamline individual guidelines by reducing the number of aggravating factors and providing fewer and broader guideline ranges; (2) to reduce disparities by making the guidelines presumptive at the sentencing and appellate stages; and (3) to require juries to find aggravating factors that raise sentence ceilings in order to comply with the Supreme Court's decisions in *Blakely* and *Booker*.[7] Judge Sessions claims his proposal would decrease disparities and better account for individual offender characteristics, without requiring substantial use of jury fact-finding, and while still comporting with constitutional dictates.

Contrary to his claims, Judge Sessions' proposal would exacerbate disparities and strain resources, and would likely result in another round of litigation challenging the system's constitutionality.[8] Curtailing judicial discretion through the imposition of stricter mandatory sentences will create additional disparities by failing to account for individual offender characteristics and by setting in place even more extreme sentencing cliffs. In fact, under Judge Sessions' proposal, nearly all judicial discretion will be relocated primarily to prosecutors

[7] *See generally* William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305 (2011).

[8] *See* Amy Baron-Evans & Kate Stith, *Booker Rules* 45-62 (Jan. 16, 2012), U. Pa. L. Rev., forthcoming, *available at* http://ssrn.com/abstract=1987041 (setting forth an extensive analysis of Judge Sessions' proposal and articulating its numerous flaws and potential constitutional defects).

through their charging decisions and plea offers, with the balance going to juries tasked with fact-finding. Rather than ameliorate any alleged disparities in the current system, it will move disparities underground by hiding them away in plea bargain negotiations. This will undoubtedly result in increased, not decreased, disparities and an uptick in judicially unreviewable horse trading by the parties.

As a result, Judge Sessions' proposal eviscerates one of the most important functions of the federal guidelines system: the ability of judges to provide feedback to the Commission in order to advance the Guidelines constructively. Further, taken in its entirety, his proposal raises serious separation of powers issues and is constitutionally suspect.[9] Each flaw, on its own, demonstrates that this proposal is unworkable and dangerously ineffective, but taken together, and in light of the constitutional concerns, it is crystal clear that the proposal would be a serious step in the wrong direction.

The Commission has also proposed and requested feedback on a variety of legislative changes. Although the Commission has not set forth specific legislative language, its proposals can be characterized generally as: (1) requiring sentencing courts to give the guidelines substantial weight; (2) codifying the three-step process of calculating the guidelines' sentence before considering and justifying departures and variances; and (3) establishing presumptions of reasonableness for guidelines sentences and heightened standards of review for non-guidelines sentences. In sum, the Commission's proposals attempt to undercut the Supreme Court's holding in *Booker* and its progeny in order to restore the Commission and the Guidelines as the dominant force in all sentencing decisions.

The changes the Commission proposes contrast directly with several Supreme Court decisions.[10] The Court has explicitly stated that the guidelines are only one factor to consider when imposing a sentence, that there is no legal presumption for their application, and that the guidelines "are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."[11] Further, the Court has declared that sentencing courts need not consider or give weight to policy statements by the Commission that conflict with 18 U.S.C. § 3552(a).[12] And yet, the Commission's proposals, if enacted, would not only *require* sentencing courts to consider the

[9] *See id.* at 60-62.

[10] *See id.* at 62-69.

[11] *Nelson v. United States*, 555 U.S. 350, 353 (2009); *see also Gall v. United States*, 552 U.S. 38, 59 (2007); *Rita v. United States*, 551 U.S. 338, 352 (2007).

[12] *See Gall*, 552 U.S. at 53-60; *Pepper v. United States*, 131 S. Ct. 1229, 1242-43, 1249-50 (2011).

guidelines in their entirety, but also establish a mandatory procedure for considering the guidelines, a mandatory presumption of reasonableness and a heightened appellate standard of review.

Although these requirements would not explicitly forbid all non-guidelines sentences in all circumstances, if enacted, they would effectively reinstate mandatory sentencing in practice. Further, each of these changes is constitutionally suspect and, if enacted together, would certainly be declared unconstitutional.[13] Supporters of these proposals may disagree with this characterization and could surely mount a constitutional defense to the changes, but subjecting the entire judicial system and each and every criminal defendant to this uncertainty—as challenges to these proposals would undoubtedly arise—simply to reassert the Commission's authority is not only a costly endeavor, but an irresponsible and unnecessary one.

Finally, NACDL disagrees with the Commission's position that there is a "tension" between 18 U.S.C. § 3553(a) and 28 U.S.C. §§ 991, *et seq*, and opposes any statutory change that would limit the discretion of judges to impose an alternative to incarceration or a shorter prison term based on the factors set forth in 28 U.S.C. § 994(e). The interaction between these two statutes is not one of tension; rather is a symbiotic relationship recognizing certain factors may, in some circumstances, justify a lesser sentence but are a generally inappropriate basis for depriving an individual of their freedom. The "general inappropriateness" part of § 994(e) states a most obvious truth: increasing a defendant's prison sentence because he has a poor academic transcript or lacks family support is unjust. On the other hand, providing a judge with the discretion to take into account each defendant's individual circumstances when deciding whether to lessen a length of prison or forego incarceration for a rehabilitative program in the community is both smart and fair sentencing policy.

The Senate Report to the SRA made this quite clear, noting that for defendants in need of education and vocational training, "the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training," unless some other purpose of sentencing warranted a prison term.[14] Confronting any perceptions of tension, the Report goes on to state:

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[13] NACDL agrees with and refers the Commission to the analysis and critiques set forth in the testimony of the Federal Public and Community Defenders, as well as the Practitioner's Advisory Group, regarding the constitutionality (or lack thereof) of the Commission's proposals. *See* Testimony of Henry Bemporad, Fed. Pub. Defender, W.D.Tex., Before the U.S. Sent'g Comm'n (Feb. 16, 2012); Testimony of David Debold, Chair, Practitioner's Advisory Group, Before the U.S. Sent'g Comm'n (Feb. 16, 2012); *see also supra* n.7 at 63-69.

[14] *See* S. Rep. No. 98-225 at 171 & n.531.

> [E]ach of these factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community. The purpose of the subsection is, of course, to guard against inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties.[15]

The Commission's assertion that these two statutes are in tension is simply incorrect and cannot serve as the basis for any statutory change.

For all these reasons, NACDL opposes each of the Commission's proposals and any resulting legislation that would fundamentally alter the advisory nature of the guidelines, and thereby reduce judicial discretion even further, or set in place more mandatory sentences.

The Post-*Booker* Federal Sentencing System Is an Improvement

Contrary to the underlying premise of the Commission's hearings today, the shift to advisory guidelines has had a positive impact on our federal sentencing system and there is simply no need to set in place a *Booker*-fix. Rather, the evidence and data demonstrate that sentences have remained quite constant and any inconsistencies are merely an expression by judges and prosecutors alike that certain guidelines are problematic and in need of review and revision.

In general, the data shows that sentences have remained constant despite the shift to advisory guidelines—sentence length did *not* undergo much, let alone significant, change following *Booker*. Six years ago, before *Booker*, defendants received on average a 46 month sentence.[16] Today that average is 43.3 months.[17] This is hardly a dramatic change worthy of systematic overhaul.[18] Rather, it appears to be a product of the types of crimes charged and not the new

[15] *Id.* at 174-75.

[16] U.S.S.C. 2001-2005 *Sourcebook of Federal Sentencing Statistics*, Table 13 (from 2001 to 2005 the average sentence varied within a three month range, with the lowest at 45 months in 2004 (post-*Blakely*) and the highest at 47.9 months in 2003).

[17] U.S.S.C. Preliminary Quarterly Data Report, 3rd Quarterly Data Report, 3rd Quarter Release (FY 2011) ("Quarterly Data Report)" at 31, Table 19. The average sentence post-*Booker* has also varied, with a high of 51.8 months in 2007, to its present level of 43.3 months. U.S.S.C. 2005-2007 *Sourcebook of Federal Sentencing Statistics*, table 13; U.S.S.C. 2007 Final Quarterly Data Report, Figures C-I.

[18] That the average sentence length is over 40 months is, however, a fact demonstrating the need for systematic reform. The severity of federal sentences is a direct cause of federal prison overcrowding and helps explain why the

discretion afforded to judges. Whereas unlawful reentry and crack cocaine sentences tend to pull the average sentence length down slightly from the pre-*Booker* average, all other major categories of offenses have remained constant or increased slightly post-*Booker*.[19] The notable exception is the category of "white collar offenses," which are significantly higher today than pre-*Booker*.[20] Despite the rhetoric surrounding the impact of *Booker*, the numbers simply do not bear out a need for overhaul; the system has remained intact and constant and the sky has not fallen.

Claims that racial disparities have increased as a result of *Booker* are belied by the data and evidence—the numbers simply do not bear these claims out. Rather, the evidence shows that racial disparities are rooted in the harsh mandatory minimum sentences and the integration of mandatory minimum sentences into the guidelines system.[21] In fact, new research demonstrates that "racial disparities in federal sentencing can be traced back to the higher likelihood that prosecutors will charge blacks with offenses that carry mandatory minimum sentences."[22] It is the charging decisions that frequently determine the sentencing fate of the defendant, with the judge ultimately forced to dole out higher sentences due to mandatory minimums. In fact, the researchers found "significant black-white disparities in the overall severity of initial charges along all of [the measured] scales, but the most dramatic differences emerged when [the researchers] looked specifically at charges carrying mandatory minimum sentences."[23] The data demonstrates that "[b]lack men were on average more than twice as likely to face a mandatory

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federal prison population continues to grow despite a significant downward trend in the state prison population. The federal prison population has grown over 500% since the SRA, and the shift to an advisory system has not stanched this growth. Kathleen Maguire, ed. *Sourcebook of Criminal Justice Statistics* [ONLINE], Bureau of Justice Statistics, Table 6.13.2009, *available at* http://www.albany.edu/sourcebook/pdf/t6132009.pdf (last accessed Feb. 13, 2012) (in 1985, the year following the SRA's enactment, the federal prison population was 36,042, and by 2009, that number had to over 194,000 inmates),

[19] Quarterly Data Report at 34-38.

[20] *Id.* at 33, Figure D. The average sentence for the most serious fraud offenders has increased from 89 months pre-*Booker* to 123 months today. U.S.S.C. 2006-2010 Datafiles, U.S.S.C. FY06 – U.S.S.C. FY10, Figure 5 to *Sentencing Trends*, U.S.S.C. Vice Chair William B. Carr, American Bar Association White Collar Crime Conference, San Diego, CA (Mar. 3, 2011) (on file with the author).

[21] *See supra* n.7 at 35-37.

[22] Sonja Starr, *A good reason to do away with mandatory minimums?*, Nieman Watchdog (Jan. 27, 2012) *available at* http://www.niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=00550 (citing M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* (Jan. 15, 2012), U. of Mich. L. & Econ., Empirical Legal Studies Center Paper, *available at* http://ssrn.com/abstract=1985377.

[23] *Id.*

minimum charge as white men were . . . ."[24] Federal sentences reflect a racial disparity, but that disparity is created prior to any actual sentencing taking place—judges are simply working with the cards dealt by the prosecutors.

This new research certainly undercuts the claims that the shift to advisory guidelines following *Booker* is responsible for increased racial disparities. However, the accuracy of that claim is also called into question by the sentencing statistics themselves: the gap in time served between black and white offenders has consistently declined following *Booker* and, in 2010, reached its lowest point since 1992.[25] This decrease can be directly attributed to the increased judicial discretion provided by *Booker*, as judges can now mitigate the unduly harsh guidelines that disproportionately affect black defendants through below-guideline sentences. The numbers speak for themselves: from 2006 to 2010 below-guidelines sentences spared 2,500 black defendants about 8,222 years of unnecessary incarceration.[26] This would not be the case under a mandatory guidelines system. To the contrary, any shift back to mandatory guidelines will most certainly eviscerate this progress and increase racial disparity.

Another noteworthy, positive change since the shift to advisory guidelines post-*Booker* is the ability of the actors within the system to call attention to broken guidelines that desperately need review and revision. Judges regularly differing with a particular guideline, and parties consistently requesting and agreeing to sentences below a particular guideline, sends a strong message that that guideline is not working and needs improvement. The advisory nature of the guidelines affords the actors within the system the ability to provide this sort of practical feedback from the trenches and creates a much-needed mechanism for accumulating realistic experience and applying it to the guidelines framework. Where guidelines are not reflective of the realities of everyday defendants and cases, the advisory system affords judges the ability to articulate this and enables the Commission to respond. Reverting to a mandatory or binding sentencing system will muzzle the actors who deal with the reality of sentencing every day and diminish the ability to adapt the system to better promote its intended goals.

This is certainly true for drug offenses, as discussed above, but it has also affected other categories of offenses. For example, the Department of Justice has complained that the guidelines for some child pornography offenses and some fraud crimes are being departed from

[24] *Id.*

[25] *Supra* n.7 at 37 (the black-white gap in time served was greatest in 1994, at 37.7 months, and has decreased to just 25.4 months in 2010).

[26] *Id.*

with increasing frequency.[27] However, criticism of the guidelines for both of these types of offenses has also been increasing, not only from defense attorneys and judges, but even prosecutors.[28] This is not surprising given that the guidelines for both types of offenses have significantly increased in recent years not based on empirical data, but via congressional directives typically passed at the urging of the Department of Justice. Thus, the regularity of judicial departures in these types of cases, where nearly all parties agree the guidelines are seriously flawed, is an excellent example of the benefits of an advisory guidelines system and its ability to be a mechanism for feedback and improvement. Any shift back to a mandatory or more binding system of sentencing will undoubtedly stifle this progress, increase disparities and exacerbate prison overcrowding.

Conclusion

Six years after *Booker*, the data indicates that far from reverting to an era of lawlessness, federal sentencing is progressively arriving at an equilibrium, in which each sentence is guided by the research and expertise of the Sentencing Commission, but also fully embraces the particular gravity of the offense and the individual humanity of the defendant. Average sentence length has remained constant and, where there are regular instances of guidelines departures, it is truly a statement about the substantive quality of that particular guideline and not the system as a whole. The shift from mandatory guidelines has, in a small way, lessened the erosion of the Sixth Amendment right to trial,[29] while advancing the goals of the SRA through more individualized sentencing. Despite the room for improvement within individual guidelines, the change to an

[27] *See* Letter from Jonathan Wroblewski to Hon. William K. Sessions III, Chair, U.S. Sent'g Comm'n at 1-2 (June 28, 2010) [hereinafter "Wroblewski Letter"].

[28] Prosecutor requests for downward variances, not based on §5K1.1 or §5K3.1, in child pornography cases have increased significantly. In 2007 the rate was 4.6%. That rate has increased every year since, rising to 6.4% in 2008, 8.1% in 2009, and 14.5% for the first two quarters of 2011. U.S.S.C., 2007-2010 *Sourcebook of Federal Sentencing Statistics*, tbl. 27. The 2011 rate is nearly 10% higher for these types of cases than the rate for all cases, which is 4.2%; such an increase is nothing less than a statement that even the prosecutors see this guideline as broken. U.S.S.C, Preliminary Quarterly Data Report, 2d Quarter Release, 2011, tbl.3.

[29] Sixth Amendment rights remain discounted, however, through the weak standard of evidence and use of acquitted conduct at sentencing. NACDL respectfully urges the Commission to re-examine the Commentary to § 6A1.3, to adopt an appreciably higher standard of proof for application of enhancements under the Guidelines, and to exclude acquitted conduct from the sentence determination. NACDL's concerns and recommendations on these points are discussed in more detail in our comments to the Commission for the 2011 amendment cycle. *See* Letter from Jim E. Lavine, President, Nat'l Ass'n of Crim. Def. Lawyers, to U.S. Sent'g Comm'n, Comments on Proposed Permanent Amendments at 19-22 (Mar. 21, 2011) *available at* http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=18367.

advisory guidelines system was a much needed step towards a more just, fair, and rational federal sentencing scheme; all arguments to the contrary are belied by the evidence.

For these reasons, NACDL strongly opposes any effort to make the guidelines mandatory or binding in nature and, instead, joins many other organizations and individuals in endorsing the continued use of a research—and experience—driven advisory guidelines system. If enacted, the proposals before the Commission would have a severely detrimental impact on our federal sentencing system by regressing back to a mandatory sentencing scheme. Accordingly, NACDL opposes each of these proposals and encourages the Commission to reject them as well.

On behalf of NACDL, I am grateful for the opportunity to testify and respectfully urge your utmost consideration. Thank you for considering our views on this matter.