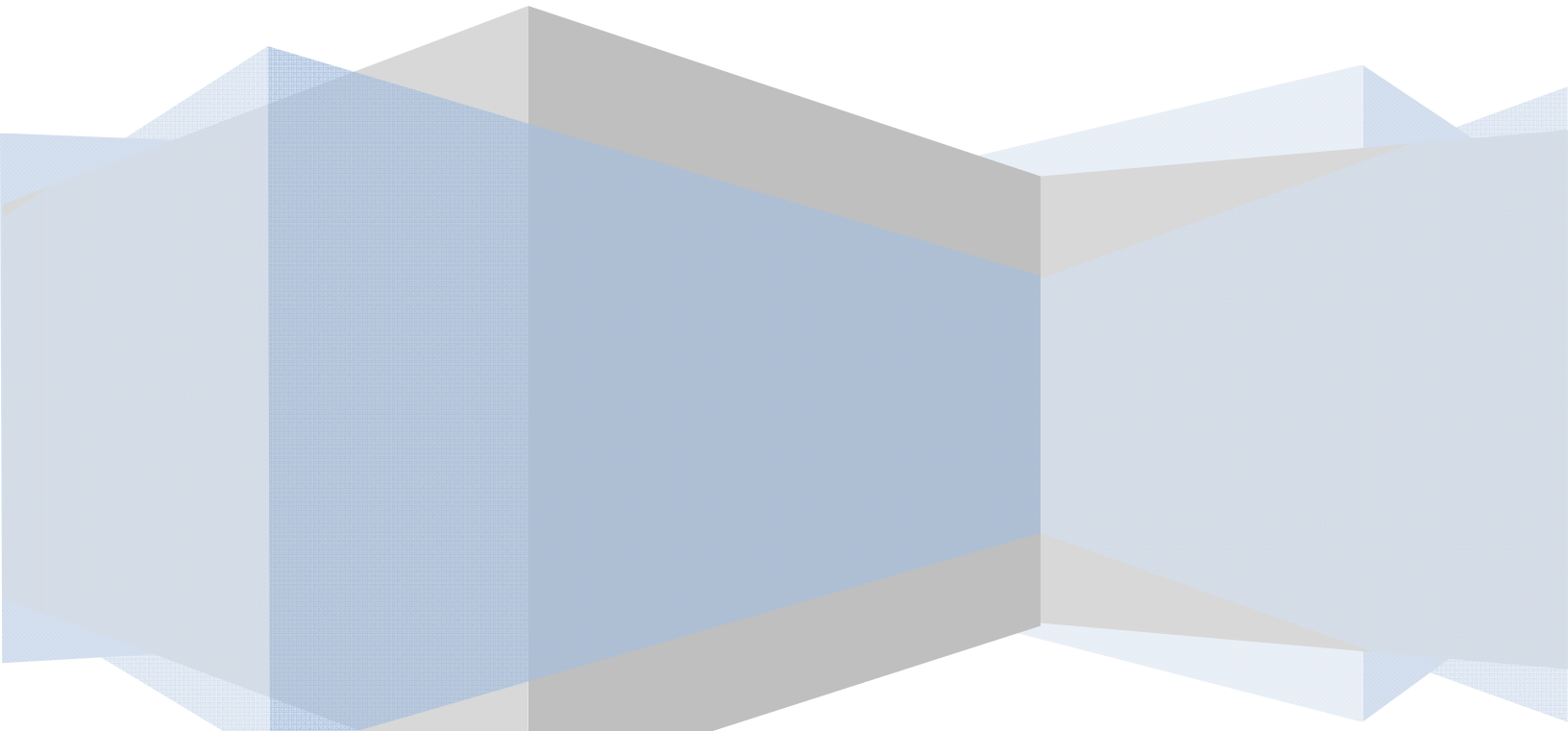
Testimony of Michael Volkov

US Sentencing Commission Public Hearing

"Restoring Mandatory Guidelines"



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February 16, 2012

"Injustice anywhere is a threat to justice everywhere." Martin Luther King, Jr.

Madam Chair and distinguished Members.

Thank you for inviting me to testify. It is a honor to appear before the Commission, and especially to see several colleagues from my career now serving as Commissioners.

I have the combined perspective from my career as a former federal prosecutor, Senate and House Judiciary staff counsel, and presently a defense counsel representing companies and individuals who are being investigated and prosecuted in the criminal justice system.

While serving on the House and Senate Judiciary committees, I worked extensively on the PROTECT Act and federal sentencing reform issues, especially in the aftermath of the Supreme Court's *Booker* decision.[1]

We are now on the unmistakable path to reform. It took Congress ten years from beginning proposals in 1974 to enactment of the Sentencing Reform Act in 1984. Hopefully, it will not take ten years for a new reform proposal to be enacted. Time is slipping away -- it is nearly seven years since the Supreme Court's

[1] *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the Sixth Amendment applies to the federal sentencing guidelines. This effectively required a factual determination by a jury, or by a defendant's admission, of the aggravating factors upon which a sentence would be determined. The Court also severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the federal guidelines mandatory, and 18 U.S.C. § 3742(e), an appeals provision. The Court made the Guidelines advisory, but tried to keep them relevant by ordering that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," subject to review by the courts of appeal for "unreasonableness." The Court also reaffirmed the constitutionality of the Commission and maintained all of the Sentencing Commission's statutory obligations under the Sentencing Reform Act.

decision in *Booker* eliminated the mandatory sentencing guidelines system. In its place, we have a defective system, which has been patched together by judicial decisions, and which fundamentally undermines the very principles of the Sentencing Reform Act of 1984.

The Supreme Court in *Booker* urged Congress to act and Justice Breyer's words are as relevant today as they were in 2005:

> Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.[2]

In my view, the federal sentencing system is broken and needs to be fixed. While the Commission's legislative proposals all make sense, they assume the continuation of an "advisory" sentencing system, which has been shown to be inconsistent with the very purposes of the Sentencing Reform Act of 1984.

Unfortunately, the Commission's ability to enact real reform is limited by its charter. The ball is in Congress' court, not the Sentencing Commission's court.

Congress has to act and should start the reform process. The Commission can – and should – play a lead role in helping to develop real sentencing reform consistent with the purposes of the Sentencing Reform Act -- to restore fairness, certainty and equal treatment in our federal sentencing system.

The sentencing reform effort should be guided by the purposes of the Sentencing Reform Act and the work of the Commission. [3] Among its many purposes, the Act was intended to address unwarranted disparities in sentencing in the federal system, concerns about undue leniency and the need to abolish parole in

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[2] *Booker*, *supra*, at 265.

[3] The Commission has been guided by three policy goals: (1) promoting the sentencing purposes of just punishment, deterrence, incapacitation, and rehabilitation; (2) providing certainty and fairness by avoiding unwarranted sentencing disparity among similar cases while ensuring individualized consideration of unique aggravating or mitigating factors, and (3) reflecting, insofar as practicable, "advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(A)-(C).

the federal system.[4] The guidelines were intended to provide certainty and fairness by avoiding unwarranted sentencing disparity among similar cases while ensuring individualized consideration of unique aggravating or mitigating factors.

I. Fairness, Certainty and Unwarranted Disparities

The debate over federal sentencing is nothing new – indeed, the Sentencing Reform Act of 1984 was the result of nearly ten years debate, proposals and counter-proposals, eventually resulting in the mandatory sentencing guideline system. The Senate was the primary driver of the reform movement and eventually it was the Senate version of the Act which was enacted by Congress and signed into law by President Reagan.

There is no shortage of advocates who now argue that the mandatory sentencing system was too harsh, the penalties for child pornography, drug, fraud and other categories of offense were too severe, and the importance of promoting judicial discretion to impose "fair" sentences for individual offenders.

Over the last forty years, there has been a constant tension between judges and Congress over sentencing practices. Congress has the authority and the responsibility to set criminal penalties for federal crimes. Federal judges are supposed to exercise their discretion within those parameters defined by Congress.

The pendulum swings back and forth. Unfortunately, history has shown that when left to exercise their discretion, judges have different views of what appropriate sentences are and even cite their own disagreements with Congressional policy as a justification for a below-guideline sentence.

The Sentencing Reform Act transformed the federal criminal justice system. The Act was premised on Congress' determination that judges had too much discretion and imposed lenient and disparate sentences to similarly situated offenders. After the guidelines were enacted, judges exercised less discretion but

[4] The principal purposes of the SRA were: (1) to establish comprehensive and coordinated statutory authority for sentencing , (2) to address the seemingly intractable problem of unwarranted sentencing disparity and enhance crime control by creating an independent, expert sentencing commission to devise and update periodically a system of mandatory sentencing guidelines, and (3) principally through the sentencing commission, to create a means of assembling and distributing sentencing data, coordinating sentencing research and education, and generally advancing the state of knowledge about criminal behavior. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-39, 65, 161-62 (1983).

nonetheless found ways, sometimes with the assistance of prosecutors, to circumvent the mandatory guidelines in order to impose their own view of justice. This eventually lead to an increase in mandatory minimum sentences and legislative efforts, culminating in the PROTECT Act of 2003, to restrict judicial discretion.[5]

The tension between Congress and the judiciary continued until the *Booker* decision upended the work of Congress, the Sentencing Commission and the judiciary, and placed the control of sentencing back into the laps of federal judges.

It is no surprise that we are here now scratching our heads to try and figure out new solutions to the old problem of unwarranted disparities, lenient sentencing, and unjustified variances. The solutions however are limited by newly-articulated Constitutional constraints in *Booker* and related cases.

II The Federal Criminal Sentencing System is Broken

In the aftermath of *Booker*, and its progeny, it is clear that the federal criminal sentencing system is broken. The sentencing system, as currently crafted, is far too complex for an "advisory" system, has re-created unwarranted sentencing disparities and variances, and undermines fairness and certainty.

Congress needs to act. The US Sentencing Commission can help to lead the way, in the same manner in which it acted on the crack cocaine debate. The Commission has access to important information, and credibility as a quasi-judicial agency to help frame and promote the debate.

There is no question that the federal sentencing system needs to be fixed.

Let's start with some indisputable observations:

[5] The Act required Courts of Appeal, when reviewing a sentence, to consider whether the sentence: (1) was imposed in violation of the law; (2) resulted from the incorrect application of the guidelines; (3) was outside the guideline range, and the sentencing court did not provide an adequate statement of reasons; (4) departed from the guideline range based on a factor that does not advance the objectives in § 3553(a)(2), was not authorized under § 3553(b)(1), or is not justified by the facts in the case; (5) departed to an unreasonable degree, in view of the factors set forth in § 3553(b); or (6) was imposed for an offense for which there was no applicable guideline and was plainly unreasonable. The PROTECT Act also required district courts to state with specificity the reasons for a sentence outside the otherwise applicable guideline range. 18 U.S.C. Sec. 3742(e).

1. The federal sentencing system suffers from unwarranted sentencing disparities and variances based on the geographic location.

The percentage of sentences that are lower than the guidelines vary greatly by region. The top-10 districts for securing variances range from 49 percent (Southern District of New York) to 35.7 percent (District of Massachusetts) of sentences below the guideline range. The bottom-10 districts range from 10.9 percent (District of Kansas) to 6.7 percent (District of New Mexico). These disparities are unjustified and alarming.[6]

2. The percentage of sentences that follow the Guidelines has declined noticeably by type of crime.[7] The percentage increase in the sentences below the Guidelines has increased the most in child pornography possession and production crimes (29.9 percent and 17 percent, respectively), fraud (16 percent) and firearms offenses (14.2 percent).

This data is not surprising. Many federal judges believe that the guidelines for child pornography, firearms and fraud offenses are unduly harsh. That does not justify such sentencing practices. If judges feel that the penalties should be changed they should advise the Commission and Congress. Justice is not for judges alone to determine and dispense.

3. There is no meaningful appellate standard for reviewing district court sentencing decisions, and there is a current split among the circuits on how to conduct such review.[8] The Commission's proposal to enact a "presumption of reasonableness" for within guideline sentences is a welcome proposal.

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[6] SOURCE: U.S. Sentencing Commission, 2010 Data file, USSCFY10.

[7] Prepared Testimony of Judge Patti Saris before the Subcommittee of Crime, Terrorism and Homeland Security, October 12, 2011, pgs. 25-53.

[8] The Supreme Court decision in *Rita v. United States*, 551 U.S. 338 (2007), held that courts of appeal may apply a presumption of reasonableness when reviewing a sentence imposed within the guideline sentencing range. The First, Second, Third, Ninth, and Eleventh circuits have declined to adopt the presumption. *See* United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006); United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006), *abrogated on other grounds as recognized in United States v. Wells*, 279 F. App'x 100 (3d Cir. 2008); United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (en banc); United States v. Hunt, 459 F.3d 1180, 1184-85 (11th Cir. 2006).

In *Gall v. United States*, 552 U.S. 38 (2007) and *Kimbrough v. United States*, 552 U.S. 85 (2007), the Court provided additional clarification to both sentencing and appellate courts as to crafting and reviewing sentences in a

4. The Commission has identified a significant and troubling trend which needs to be studied further – federal sentences for African-American defendants are significantly higher than those for white defendants.

In the period before the PROTECT Act was passed, an African-American male in the U.S. received a sentence, on average, 11.2% greater than that of a white male. After the PROTECT Act, that number dropped to 5.5%. Now, however, since the recent Supreme Court decisions, the Sentencing Commission had determined that an African-American man receives, on average, a sentence 20% higher than that of a white male.[9]

III. A Reform Proposal: Mandatory, Simplified Guidelines

There is a significant need for the Commission and Congress to work together to reform and simplify the Guidelines. The current multi-volume set of Guidelines is too complex and too cumbersome, especially for an advisory system. It is a waste of resources. Good government principles demand that something be done to address this issue.

A new framework is needed for federal sentencing based on the following practical principles:

1. Creation of a new set of sentencing guidelines which is dramatically less complex and easier to use. There is no rational justification for maintaining the set of current guidelines for an advisory system, especially when judges are increasingly ignoring the guidelines and imposing sentences below the applicable guideline range.

2. The sentencing guideline factors should be simplified and divided into two categories:

(a) mandatory guidelines which are based on jury fact finding; and

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post-*Booker* regime. In *Gall*, the Court ruled that the acceptable method of appellate review for all sentences, whether inside, just outside, or significantly outside the guidelines range, was a deferential abuse-of-discretion standard. The Court rejected a presumption of unreasonableness for sentences outside the guidelines range. As such, the appellate court must first ensure that the sentencing court followed proper procedure to include correctly calculating the guidelines range and considering the general §3553(a) factors with appropriate explanation.

[9] *Demographic Differences in Federal Sentencing Practices: An Update of the Booker's Report Multivariate Regression Analysis*, United States Sentencing Commission (March 2010).

(b) advisory guidelines which are based on judicial determination (e.g. acceptance of responsibility).

3. Applying these two principles, a new sentencing table should be developed which includes a much smaller number of broader mandatory guideline ranges.[10] The current sentencing table includes six criminal history categories and 43 separate base offense levels, resulting in a total of 258 separate guideline ranges. That number could easily be cut in half, broader ranges could be adopted, and judges would retain discretion to impose a sentence within a broader range.[11]

Most judges will find a mandatory simplified sentencing system much easier to work within. Discretion will be preserved and sentences within the broader range will give judges the ability to give proper weight to individual factors.

Of course, all of this is easier said then done. Even assuming the political will is there to tackle such a task, there are many complicating factors:

How should criminal history calculations be simplified?

How can a new guideline system be built around mandatory minimums, or should part of the reform proposal be to eliminate some mandatory minimums?

What mechanisms, if any, should remain for departures outside the mandatory range, to account for substantial assistance, fast track departures, and "extraordinary" factors which are not already taken into account in the guideline system?

A guideline reform proposal would also need to address the proper role of appellate review. Sentences within the applicable guideline range should be given deference on appellate review, and will be rarely reversed.

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[10] Congress was clear in the Sentencing Reform Act that it intended the sentencing guidelines to be mandatory. The legislative history documents that Congress carefully studied the issue and came to this conclusion. *See* 18 U.S.C. 3553(b).

[11] This proposal would require Congress to eliminate the "25 percent rule" governing sentencing guideline construction. See 28 U.S.C.994(b). Under the rule, the maximum permissible sentence in a guideline range of imprisonment may not exceed the minimum by more than 25 percent or six months, whichever is greater. Under the mandatory simplified guidelines proposal, guideline ranges would include minimum and maximum ranges with a difference greater than six months.

IV: Fair and Equitable Policies

The Commission continues to play an important role in our criminal justice system. I commend the Commission for its leadership role, its professionalism and its integrity when addressing these difficult policy issues.

Congress, on the other hand, has abdicated its leadership role. The Sentencing Reform Act of 1984 was a bi-partisan effort. Both sides need to put aside their respective politics and work collaboratively to address the need for reform. The Commission deserves a seat at that table and can provide valuable expert assistance, data and guidance on how to reform the sentencing system.

Reform is eventually going to be enacted. The system, limping along as it is right now, will eventually run out of fuel. Congress should act sooner rather than later, and I am optimistic that whatever reform is developed, our system of justice will be preserved and promoted.