I would like to begin by thanking the Commission for their invitation to me to present testimony regarding the Simplication of the Three Step process. I was privileged to have previously testified at a hearing in Denver on the 25th Anniversary of the Sentencing Reform Act in 2009. I was reluctant to accept the invitation given my status. As of September 1, 2023, I have been an "inactive senior judge." I was an active district and senior district judge for 26 plus years and felt at a minimum I owed it to the Commission to try and provide the Commission with information and feedback regarding the proposed amendment.

Additionally, as the Code of Conduct and its commentary state that as a judicial officer specially trained a judge is in a unique position to contribute to the law and the administration of justice.

I don't know how many sentencing proceedings I conducted during my time as an active Judge. In a case cited by the Supreme Court in Gall v. United States Judge Myron Bright in writing a dissent in the Eighth Circuit said that as of sometime in 2005 or 2206 I had sentenced 990 offenders. My sense is that by the time I left the district court in September of 2023 the number of sentences is entered judgments on were well more than 1500. I have also worked with the Federal Judicial Center, the Sentencing Commission on education in many venues especially in the area of advocacy in sentencing.

The Sentencing Reform act of 1984 "cabined" the district judge's discretion. Booker did away with that and now the only limitation on a judge's discretion comes in the form mandatory minimum statutes that the Congress and the President have agreed upon. We tend to forget that the SRA has been described as the biggest change in the law since the country's beginnings. I believe this is found in Stith and Cabranes book "Fear of Judging." So, until very recently (November 1, 1987) as the Supreme Court noted in Koon v. United States prior to that time "sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated." Absent giving a sentence that violated the maximum period of prison time there was no appellate review.

As the Commission knows well the revolution in criminal sentencing that was set off by Booker in early 2005 continues through today as evidenced by the Commission's hearing today and the proposed Simplification amendment. This is a good thing. It is important for we Judges remember the establishment of the Sentencing Commission was to be a continuing and ongoing process to attempt to continue to put into practices and policies that would help achieve the twin goals of sentencing which were to assure certainty and fairness in sentencing. The Commission recognized these goals by stating in their first manual "The Commission emphasizes, however, that it views the guideline writing process as evolutionary. It expects and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress." And so, I look at this hearing and my testimony as fulfilling the intent of the SRA of 1984.

It appears to me that this Simplification proposed amendment holds some possibilities for increasing both the fairness and certainty in sentences given by district judges. The elimination of "departure language or step in the process" can bring more rigorous analysis to both the first step of accurate guideline calculation as well as a more focused view of how the 3553 (a) factors can make the judges fact-finding produce a trial court record that demonstrates how the Court reached it's "sufficient but not greater than necessary" result. In turn this will allow the parties, the public, including victims to observe how and why the Court reached the result in the case.

I have several experiences that demonstrate to me the evolution that the sentencing process has undergone change since I started as a district judge in 1997. At my orientation session (baby judges' school) in Fort Worth we had wonderful trainers from the Commission (Pamela Montgomery and Rusty Burress) and we spent hours on guideline calculation and a relatively small amount of time on the facts involving the 3553(a) factors and the ultimate sentence in the case. To me this was probably the most important session of the orientation as many of the new judges had never been involved in the criminal justice system especially in the federal courts prior to their confirmation. It seemed the baby judges' school was guideline centric which of course it should had been given the role

that mandatory guideline played in arriving at the ultimate sentence. The next involvement I had in this process involved a series of programs that the Commission and the Federal Judicial Center put on post *Gall* and *Kimbrough*. And while the mandatory nature of the guidelines had changed nonetheless guideline calculation remained a large part of the programming for lawyers and judges and the departure process step remained as well as the policy statements of the Commission. I participated in a program for CJA lawyers and federal defenders with Professor Siegler at regional program in various parts of the country. And I distinctly recall at Commission education programs Judge Castillo, then a commissioner, urged that district judges used the departure step to reduce or increase sentences as this would permit the judge to state in his or her "Statement of Reasons" that the sentence was "within the structure" of the Guidelines. Again, I don't know that this was a bad thing it did however detract somewhat from the 3553 (a) focus on the presentation of the important facts of the defendant and the relevant conduct in the case. And then I was a mentor judge in both 2010 and 2014 for the FJC and their staff and while we did still focus on the departures of the Commission but also discussed *Kimbrough*, *Gall*, *Pepper* and *Peugh*. These cases helped district Judges concentrate on the special place in the sentencing process that we had. The "institutional advantage" that district judges have and the many sentences we give each day helped us appreciate why the guidelines were and are an important 3553 (a) factor, using some other method (advisory) to help us get to the ultimate sentence was much better. Judges sometimes get so wrapped up in guideline calculation that they forget how "the facts are really everything." These were the years when the entire Sentencing Guidelines did not contain the work "variance."

So, I believe the simplification amendment continues this effort to concentrate the sentencing process more directly on the facts of the defendant and the crime before the judge but in a manner that lets the judge exercise her discretion more freely than the current guidelines system does. It is an effort to let the Judges "judge" without doing so much math as given to us by the current advisory Guideline system. The Congress and the Guidelines attempt to quantify human behavior may bring a level of certainty and fairness by treating every case and defendant the same as the enhancements do. But neither the Congress nor the Commission has ever interacted with the actual factual record before the court.

This result was the lessening of those considerations captured by 3553 (a) and the role of the parties in helping the Judge gain insight into the trial record that cannot be gleaned from a cold dry transcript. The proposed amendment helps bring to light considerations of the statute but without an attempt to quantify them.

I believe the proposal also has the possibility of the district judges no longer being "anchored" by the guideline calculation as done at step one. This is especially so in Circuits like my own which has an appellate presumption of reasonableness. By way of example in my Circuit post *Booker* and post *Gall* reasonableness review requires something akin to the phrase "conscience shocking" in analyzing substantive reasonableness. Many studies have strongly suggested or implied that the anchoring effect at step one has the unconscious way of leading to a guideline sentence, the thought being the guidelines reflect years of study and research and have already considered the 3553 (a) factors. District judges give many sentences each day while court of appeals judges only review a very small percentage of those cases and a defendant's attempt to explain to a court of appeals why his or her sentence is procedurally or substantively unreasonable by virtue of the district judge's acceptance of the guidelines sentence being influenced by this effect in my view is next to impossible.

Perhaps my story is anecdotal and not accurate, but I have heard frustrated district judges say, "well I don't care if I get reversed." When I hear that I know it is not true. Everyone seeks approval of their work and I believe this is especially true of judges who realize the enormous power they have to deprive defendants of their liberty. I also know that in appellate presumption circuits to get affirmed all a district Judge needs to do is say I am selecting a guideline sentence as one that is sufficient but not greater than necessary and there is nothing in the case that is outside the heartland of the offense conduct and I have also considered the 3553 (a) factors in deciding this sentence.

My Circuit reversed me 9 times between *Booker* and *Gall* from January of 2005 to December of 2007 when the Supreme Court decided *Gall*. When I started my district court judgeship on July 1, 1997, someone gave me Judge Edward Devitt's "Ten Commandments for the New Judge. I like to think that I took suggestion number 6 into mind in each the sentences that I gave whether I was affirmed or reversal. Judge Devitt wrote:

Don't fear reversal.

If you are appointed to the trial bench, the most shocking experience that awaits. you is the opening of your morning mail to find the slip opinion of the appellate court in one of your cases, at the bottom of which you see the ominous word "Reversed". First you are shocked, later dismayed, then disappointed. Surely those judges could not have made such a mistake!

But after you slowly read the opinion of your superiors, containing logic and good reasoning, together with a tactfully included reference to the "learned trial judge's" proper handling of some aspects of the whole case, the experience loses its shock. And when it has happened a few times, you even come to the honest realization that in most instances the appellate court is justified in reversing you.

Reversal by a superior court now and then keeps us on our toes. It teaches us to be careful and industrious; it curbs our impetuosity 'and nurtures judicial-mindedness. Every so often, however, even these august appellate judges make mistakes. Thinking they possess a superior wisdom, rather than just a superior commission, they sometimes exceed their error-finding responsibilities and substitute their judgment and findings for those of the trial court. The law says they cannot do this. But they do! We should view their folly with tolerance. Really, there is nothing else we can do.

Here is a word of advice about reversals. Do not keep track of them. The judge who charts a batting average is likely to become hesitant and timid. Record keeping may make you too cautious - so sensitive to committing an error that it deprives you of the intellectual courage that should be the hallmark. of a good trial judge.

While reasonableness review is the responsibility of the courts of appeal, I do think that this amendment will help district judges understand more clearly this word that our reviewing courts with a higher commission use called “discretion.” As a district judge colleague of mine put it to me to define discretion is to destroy it. I wrote a piece about this word for the Sentencing Law Reporter. I traced the actual use of that word by the Supreme Court. I won’t repeat what I wrote there but I did cite what Chief Justice Hughes said in *Burns v. United States*. He in concluding that “abuse of discretion” was the standard applicable to reviewing a revocation of probation wrote that discretion “implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result.”

I think this amendment will help us to arrive at conscientious judgments. I urge the proposed amendment’s adoption.

Judge Robert W. Pratt

February 21,2024