PREPARED TESTIMONY
of
Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

February 10, 2005

Chairman Coble, Ranking Member Scott, and Distinguished Members of the Committee, thank you for inviting me to testify today on behalf of the United States Sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker*[1] on the Federal Sentencing Guidelines.

After the Court's decision in *Blakely v. Washington*,[2] the federal criminal justice system experienced a period of uncertainty regarding whether the Federal Sentencing Guidelines would remain valid. The Sentencing Commission, in testimony before Congress and in its own *amicus* brief, vigorously asserted that the holding in *Blakely* did not apply to the Federal Sentencing Guidelines. Although the Court ultimately extended *Blakely* to the Federal Sentencing Guidelines, the *Booker* decision resolved the uncertainty in a manner that leaves the Sentencing Reform Act intact with the exception of two excised provisions. The opinion maintains *all* of the Sentencing Commission's statutory obligations under the Act. In fact, the Court noted the Commission's important role in the federal criminal justice system, stating that "the Sentencing Commission remains in place, writing Guidelines, collecting information and actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[3]

There is no doubt, however, that the *Booker* decision is the most significant case affecting the federal guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta*.[4] While it is impossible to evaluate fully the impact of *Booker* after less than one

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[1] *United States v. Booker*, 125 S. Ct. 738 (2005).

[2] *Blakely v. Washington*, 542 U.S. __ (2004) (holding that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt).

[3] *Booker*, 125 S. Ct. at 767 (opinion of BREYER, J.).

[4] *Mistretta v. United States*, 488 U.S. 361 (1989).

month, the Sentencing Commission and its staff are committed to assisting Congress in any way it deems appropriate as you assess and respond to the decision.

The Sentencing Commission is uniquely positioned to assist all three branches of government in ensuring the continued security of the public while providing fair and just sentences. An independent agency housed in the judicial branch, the Sentencing Commission is an expert bipartisan body of federal judges, individuals with varied experience in the federal criminal justice system, and *ex-officio* representatives of the Executive branch whose work on sentencing guidelines must be reviewed by Congress. In short, the Sentencing Commission is at the crossroads where the three branches of government intersect to determine federal sentencing policy.

My testimony today presents some of the Sentencing Commission's initial observations regarding *Booker*, provides early data regarding the impact of the decision, and outlines actions we are taking to ensure that the guidelines continue to be an effective sentencing tool.

Guidelines Still Must Be Calculated and Considered

After *Booker* the Federal Sentencing Guidelines remain an important and essential consideration in the imposition of federal sentences. The decision 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. Under the approach set forth by the Court, "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."[5]

The Sentencing Commission firmly believes that the Court's decision makes clear that the sentencing court *must* consider the guidelines and that such consideration necessarily *requires* the sentencing court to calculate the guideline sentencing range. It is significant that 18 U.S.C. § 3553(a), which was left wholly intact by the decision, still instructs that sentencing courts

> ". . . in determining the particular sentence to be imposed, *shall* consider. . . the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission . . .".[6]

Sentencing courts of course cannot consider the sentencing guideline range if one has not been determined. Therefore, probation officers should continue preparing presentence reports with

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[5] *Booker*, 124 S. Ct. at 767 (opinion of BREYER, J.) (emphasis added).

[6] 18 U.S.C. § 3553(a)(4) (emphasis added).

guideline calculations, pursuant to 18 U.S.C. § 3552 and Rule 32 of the Federal Rules of Criminal Procedure, both of which were unchanged by the decision.

Appellate case law is already developing on this point. The Second Circuit has held that in order to comply with the duty to "consider" the guidelines:

> *A judge cannot satisfy this duty by a general reference to the entirety of the Guidelines Manual*, followed by a decision to impose a 'non-Guidelines sentence.' Subsection 3553(a)(4) contemplates consideration of the Guidelines range applicable to the defendant, and subsection 3553(a)(5) contemplates consideration of policy statements issued by the Sentencing Commission, including departure authority. *The applicable Guidelines range is normally to be determined in the manner as before Booker/Fanfan*.[7]

The Fourth Circuit similarly has held that "[c]onsistent with the remedial scheme set forth in *Booker*, a district court *shall first calculate* (after making the appropriate findings of fact) *the range prescribed by the guidelines.* Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence."[8] Therefore, prior to imposing a sentence sentencing courts must consider the guideline range calculations and departure policy statements, pursuant to *Booker* and 18 U.S.C. § 3553(a).

Sentencing Guidelines Should be Given Substantial Weight

Although the *Booker* decision makes clear that the guidelines must be consulted and taken into account, it does not expressly address the question of how much weight they should be accorded by the sentencing court. There are a number of district court decisions with varying opinions regarding the precise weight that should be given to the guidelines. For example, a case in the District of Utah has held that the Federal Sentencing Guidelines should be given "heavy weight" and deviated from only in "unusual cases for clearly identified and persuasive reasons," while a case in the Eastern District of Wisconsin has held that "courts must treat the guidelines as

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[7] *See, e.g., United States v. Crosby*, __ F.3d __, 2005 WL 240916 (2nd Cir Feb. 2, 2005), at *5 (emphasis added).

[8] *United States v. Hughes*, __ F.3d __, 2005 WL 147059 (4th Cir. Jan. 24, 2005), at *3. (emphasis added).

just one of a number of sentencing factors" enumerated at 18 U.S.C. § 3553(a).[9] The appellate courts ultimately can be expected to address this issue.

The Sentencing Commission firmly believes that sentencing courts should give substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose, and that *Booker* should be read as requiring such weight. The *Booker* sentencing scheme "requires a sentencing court to consider Guidelines ranges, *see* 18 U.S.C.A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* §3553(a) (Supp. 2004)."[10]

During the process of developing the initial set of guidelines and in refining them throughout the ensuing years, the Sentencing Commission has considered the factors listed at section 3553(a) and cited with approval in *Booker*. The Sentencing Reform Act, in fact, mandates such consideration by the Sentencing Commission. Section 991(b) of title 28, United States Code, expressly states that the very purposes of the Sentencing Commission are, among other things: to assure the purposes of sentencing, as set forth in section 3353(a)(2), are met; to provide certainty and fairness in sentencing; to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct; and to maintain sufficient flexibility to permit individualized sentences when warranted. In short, the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.[11] As a result, sentencing courts should give the guidelines substantial weight.

In addition, congressional action throughout the history of the Federal Sentencing Guidelines indicates Congress's belief that they generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guidelines and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and 672 amendments have withstood congressional scrutiny, and many guideline amendments were promulgated in response to congressional directives. Such congressional approval can only be interpreted as a sign that Congress believes the Federal Sentencing Guidelines adequately achieve the statutory purposes of sentencing, providing further support for the Sentencing Commission's position that sentencing courts should give the

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[9] *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan 13, 2005); *United States v. Ranum*, 2005 WL 161223 (E.D. Wis. Jan 19, 2005).

[10] *Booker*, 125 S. Ct. at 757 (opinion of BREYER. J.).

[11] There is considerable pre-*Booker* case law supporting the proposition that the Sentencing Guidelines take into account the factors set forth at 18 U.S.C. § 3553(a)(2). *See, e.g., United States v. Davern*, 970 F.2d 1490 (6th Cir. 1992); *United States v. Mogel*, 956 F.2d 1555 (5th Cir. 1992); *United States v. Hefferman*, 43 F.3d 1144 (7th Cir. 1994); *United States v. Breeding*, 109 F.3d 308 (6th Cir. 1997).

guidelines substantial weight in imposing sentences.

Sentencing Documentation Must be Completed and Submitted

Sentencing courts also continue to be required by 18 U.S.C. § 3553(c) (statement of reasons for imposing a sentence) and 28 U.S.C. § 994(w) to submit to the Commission within 30 days of entry of judgment five specific sentencing documents: the judgment and commitment order, the statement of reasons (including the specific reasons for any departure), any plea agreement, the indictment or other charging document, and the presentence report. *Booker* makes no changes in the document submission requirements imposed by the PROTECT Act, and it is imperative that all districts continue to make these submissions to the Commission in a timely and complete manner.

In order to emphasize this point, on January 21, 2004, Judge Sim Lake, Chair of the Criminal Law Committee of the Judicial Conference of the United States and I issued a joint memorandum to all United States District Judges and other court personnel reminding them of the duty to continue fulfilling this ongoing statutory requirement (Attachment A). I also appeared earlier this week on a television broadcast to the courts sponsored by the Federal Judicial Center and again reiterated this point.

The statutorily required submission of sentencing documents is of utmost importance because without these documents the Sentencing Commission cannot generate the sentencing data that Congress, the Commission, and others need to evaluate the impact of *Booker* on federal sentencing. As a result, we intend to continue coordinating with the Criminal Law Committee, the Administrative Office of the United States Courts, and the Federal Judicial Center to ensure that the courts provide us with the documentation and information we need, and this effort could include either revisions or supplements to forms currently in use.

Sentencing Commission's Actions in Response to *Booker*

The Sentencing Commission conducted a two day hearing on November 16 and 17, 2004, at which it heard testimony from the Department of Justice, defense attorneys, and academics, and the Commission and its staff have attended various conferences and meetings since the *Blakely* decision. Based on these interactions, the Sentencing Commission is aware that a number of proposals to respond to *Booker* are being discussed. These proposals include, among others, a "wait and see" approach, statutory implementation in some form of the *Booker* sentencing scheme, providing a jury trial mechanism for sentencing guideline enhancements, "simplification" of the guidelines either by reducing the number of guideline adjustments and/or by expanding the sentencing guideline ranges, equating the maximum of the guideline sentencing ranges with the statutory maximum for the offense of conviction, and broader reliance on statutory mandatory minimum penalties.

If Congress decides at some point to pursue legislation, we hope that it will preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid a wholesale

rewriting of a system that has operated well for nearly two decades. We believe the Sentencing Reform Act was a landmark piece of legislation and the resulting guidelines have made significant strides in furthering the goals of the Act.

The Sentencing Commission will continue fulfilling its many statutory duties and in furtherance of its ongoing mission already is taking several steps in response to *Booker*. The Sentencing Commission is sensitive to the need for timely and thorough post-*Booker* data on federal sentencing. As stated earlier, the Sentencing Commission already has communicated with the courts regarding their continuing statutory duties regarding completion and submission of sentencing documentation. In addition, the Sentencing Commission has prioritized and reconfigured its data collection modules in order to collect, analyze, and disseminate post-*Booker* data in as close to "real time" as possible.

As of February 4, 2005, the Sentencing Commission has received and analyzed sentencing documents for 733 cases sentenced on or after January 12, 2005, the date of the *Booker* decision. The data we have compiled is preliminary in nature and not necessarily representative of the nation as whole and, therefore, I would urge extreme caution in making firm conclusions based on these figures.

The Sentencing Commission has received sentencing documents from 74 of the 94 federal districts, and these courts have been highly compliant with the documentation submission requirements of 18 U.S.C. § 3553(c) and the PROTECT Act, which remain unchanged by *Booker*. The sentencing documentation for these cases included 99.6% of the Judgment and Commitment Orders, 98.8% of the Presentence Reports, 97.3% of the Indictments or other charging documents, and 95.8% of the Statements of Reasons. These figures indicate that courts are continuing to take their statutorily required documentation and submission requirements seriously.

The percent of cases sentenced within the guideline sentencing range post-*Booker* does not appear to differ noticeably from previous practice. Of the 692 cases for which complete sentencing information was available,[12] 63.9 percent (442) were sentenced within the applicable guideline sentencing range. During the last three fiscal years of published data, the proportion of cases sentenced within the applicable guideline sentencing range remained between 64 and 65 percent.[13]

Also similar to prior sentencing practice, approximately one-third of the cases — 33.4

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[12] Of the 733 cases analyzed, in 41 cases the Commission was unable to determine whether the sentence was within the guideline sentencing range, including for example class A misdemeanors for which there was no applicable guideline range or immigration offenses in which the presentence report was waived and the sentence imposed was "time served."

[13] *See*, Table 26 of the 2002, 2001, and 2000 Sourcebook of Federal Sentencing Statistics.

percent (231) — were sentenced below the applicable guideline sentencing range. Between 33.9 percent and 35.4 percent of the federal caseload in fiscal years 2000-2002 were sentenced below the applicable guideline sentencing range.[14]

The majority of the sentences below the applicable guideline range since *Booker* were based on an agreement with the government. Of the 231 cases sentenced below the applicable guideline sentencing range, 105 (45.5%) were pursuant to a substantial assistance motion made by the government under USSG §5K1.1 (Substantial Assistance), 32 (13.9%) were pursuant to an early disposition or fast track motion made by the government under USSG §5K3.1 (Early Disposition Programs), and 9 (3.9%) were otherwise pursuant to a plea agreement. Therefore, the government initiated or plea bargained for almost two thirds (63.2%) of the sentences below the applicable guideline sentencing range.

Downward departures were granted for other reasons identified in the *Guidelines Manual* in 31 cases, which represents 13.4 percent of the cases sentenced below the applicable sentencing guideline range. The remaining 54 cases sentenced below the applicable guideline sentencing range appear to be based upon sentencing authority established in *Booker*, which represents 23.4 percent of the cases sentenced below the applicable guideline sentencing range.

Also noteworthy is the fact that 19 cases were sentenced above the applicable guideline sentencing range. These sentences were divided almost evenly between sentence increases pursuant to upward departure provisions contained in the *Guidelines Manual* and increases based upon sentencing authority established in *Booker*. Combined they comprise 2.7 percent of the post-*Booker* cases, which represents more than a three-fold increase above the average upward departure rate of 0.7 percent for fiscal years 2000-2002.[15]

This very early preliminary data since *Booker* seems to indicate that courts are sentencing pursuant to the Federal Sentencing Guidelines in the overwhelming majority of cases. Only 7.8 percent of the cases appear to be sentenced below, and only 1.3 percent appeal to be sentenced above, the applicable guideline sentencing range based upon sentencing authority established in *Booker*. Therefore, courts sentenced pursuant to the Federal Sentencing Guidelines system as a whole, including upward and downward departure policy statements contained in the *Guidelines Manual*, in 90.9 percent of the cases analyzed for this period.

In addition to its timely data collection and analysis, the Commission has scheduled another two-day hearing on February 15 and 16, 2005, to gauge the impact of *Booker* and continue building a record of informed discussion. We expect several witnesses representing a broad spectrum of parties interested in the federal criminal justice system to testify.

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[14] *Id.*

[15] *Id.*

As evidenced by our testimony today, the Commission is monitoring closely emerging case law to see how district courts rely on the Federal Sentencing Guidelines in the post-*Booker* era, how appellate courts interpret what is an "unreasonable" sentence,[16] and whether the Sentencing Commission must resolve any new resulting conflicts among the circuit courts.[17]

The Commission also is continuing to train judges, probation officers, prosecutors, and defense attorneys on guideline application and the extensive provisions of the Sentencing Reform Act that remain in full force and effect.

As further evidence of the Sentencing Commission's continued vitality and our belief in the continued relevance and importance of the Sentencing Guidelines, next week the Sentencing Commission is scheduled to vote to publish for comment proposed guideline amendments that would implement congressional directives and other legislation concerning identity theft and antitrust offenses. In short, our core work continues uninterrupted.

Conclusion

In closing, the Sentencing Commission recognizes that the *Booker* decision presents new, potentially significant challenges to federal sentencing. The Sentencing Commission concurs with a recent admonishment to sentencing courts, however, "that *Booker/Fanfan* and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge."[18] The Sentencing Commission firmly believes that *Booker* requires that sentencing courts calculate the applicable guideline sentencing range. We are noticing in some case law that different sentencing courts are giving the Federal Sentencing Guidelines varying weights. In addition, we are unsure of how appellate review for "unreasonableness" will work in practice, or how the courts of appeal will resolve the issue of how much weight sentencing courts should accord the guidelines.

The Sentencing Commission and its staff are closely monitoring these and other issues. We are dedicated to our mission to carry out the goals of sentencing reform and, as the *Booker* decision itself says, "to provide certainty and fairness in meeting the purposes of sentencing

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[16] *See, United States v. Crosby*, __ F.3d. ___, 2005 WL 240916 (2nd Cir.) (recognizing that "reasonableness" is "inherently a concept of flexible meaning, generally lacking precise boundaries" and declining to establish *per se* standards of reasonableness).

[17] *See, Braxton v. United States*, 500 U.S. 344 (1991).

[18] Crosby, 2005 WL 240916, at *7.

[while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted."[19]

As we move forward in the wake of *Booker*, we are ready to assist Congress in any way it deems appropriate. Mr. Chairman, Ranking Member Scott, and Members of the Committee, thank you again for holding this very important hearing. I will be glad to answer any questions you may have.

[19] *Booker*, 125 S. Ct. at 767 (opinion of BREYER, J) (quoting 28 U.S.C. § 991(b)(1)(B)).