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Before The
United States Sentencing Commission
February 15-16, 2005

I. Introduction[1]

Judge Hinojosa and members of the Sentencing Commission, thank you for inviting the Practitioners' Advisory Group to testify on the present and future impact of the Supreme Court's decision in United States v. Booker, 543 U.S. __, 125 S. Ct. 738 (2005) on federal sentencing.

In Booker, the Supreme Court declared that the United States Sentencing Guidelines could no longer be applied to mandatorily increase defendants' sentences without subjecting the facts to the Sixth Amendment right to jury trial. While most of us expected a remedy from the Court that would provoke a swift and drastic congressional response, the Court surprised us by creating a remedy that is a workable solution, at least on an interim basis. It is not a return to the unfettered discretion of the pre-Guidelines era, or that would have resulted if the Court had declared the Guidelines inapplicable as a whole. Instead, the remedy left in place a statutory framework that has been interpreted to start with the Guidelines Manual and proceed to other statutory considerations with the final sentence sufficient but not greater than necessary to achieve the goals of sentencing in the individual case. According to the Commission's data thus far, the courts are exercising their discretion responsibly.

Booker thus provides a respite during which the Commission can collect and analyze information about actual sentencing decisions and consider the views of frontline participants in the sentencing process as well as academic experts. It also provides a unique opportunity to study and potentially correct serious problems in federal sentencing, some of which ultimately led to the Booker decision.

What any new system will be depends not only on what the Commission's study indicates is appropriate as a policy matter, but on what the Constitution requires. The Booker Court drew careful lines in defining the standards for sentencing and appellate review beyond which, we must assume, Congress cannot constitutionally go.

We urge the Commission to continue with its expert work, and not to propose or support any legislative change unless and until it is demonstrated that change is necessary, what that change should be, and that such change is constitutional.

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[1] The Co-Chairs wish to thank James Felman, Mary Price, Greg Smith, David Debold and Diana Parker for contributing to the preparation of this testimony.

II. Sentencing in the District Courts After Booker

A. Procedures and Standards

The Practitioners' Advisory Group does not believe that any change to the federal statutes is required to clarify sentencing procedures or standards, because they are sufficiently clear. By excising two provisions of the Sentencing Reform Act that made the Guidelines mandatory, the Supreme Court made the Guidelines "effectively advisory." Booker, 125 S. Ct. at 757. Sentencing courts must now consider the guidelines range, see 18 U.S.C. 3553(a)(4), together with the sentencing goals and other factors set forth in 18 U.S.C. § 3553(a). Booker, 125 S. Ct. at 757, 764-65, 766, 767.

Based on our experience, conversations with judges and prosecutors, analysis of the statute, and simple logic, we believe that sentencing courts will proceed in four basic steps in imposing sentence under this framework. The court will first find the facts and calculate the guidelines range based on those facts. See 18 U.S.C. § 3553(a)(4). If a ground for departure from that range is raised, the court will find the relevant facts and consider whether departure is warranted. See 18 U.S.C. § 3553(a)(5). The court will then consider whether the sentence thus indicated by the Guidelines Manual is "sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, and achieve just punishment, general and specific deterrence, and needed training and medical care. See 18 U.S.C. § 3553(a)(2). In doing so, the court must consider the defendant's history and characteristics, the kinds of sentences available, the need to avoid unwarranted disparities, and the need to provide restitution. See 18 U.S.C. § 3553(a)(1), (3), (6), (7). The court must then state in open court the reasons for imposition of the particular sentence, and, if the sentence is outside the guidelines range, the specific reasons for that sentence in the judgment and commitment. See 18 U.S.C. § 3553(c).

There is no need to enact legislation requiring courts to find the facts and calculate the guidelines range before proceeding to departures and the other statutory considerations listed in section 3553(a) because that is what the courts of appeal have directed, see United States v. Hughes, 2005 WL 147059, at *3, __ F.3d __ (4th Cir. Jan. 24, 2005), United States v. Crosby, 2005 WL 240916, at **5-7, __ F.3d __ (2d Cir. Feb. 2, 2005), United States v. Ameline, No. 02-30326, at 17-19 (Feb. 9, 2005), and what the district courts are doing. E.g., United States v. Wilson, __ F.Supp.2d __, 2005 WL 273168, at *2 (Feb. 2, 2005); United States v. Ranum, __ F. Supp.2d __, 2005 WL 161223, at *2 (Jan. 19, 2005).

B. Extent to Which Courts are to "Consider" or "Take Account of" the Guidelines

There is no need to legislatively clarify the extent to which the guideline range must be considered or taken into account, and such legislation would run a serious risk of unconstitutionality.

It is clear that courts "must consult the Guidelines and take them into account when sentencing," Booker, 125 S. Ct. at 745, and obvious that, in order to do that, they must find the facts and calculate the guidelines range based on those facts. See Crosby, 2005 WL 240916, at *5; Hughes, 2005 WL 147059, at *3; United States v. Ranum, __ F. Supp.2d __, 2005 WL 161223, at *4 n.8 (Jan. 19, 2005). While the guideline range does not necessarily *have* to be calculated and considered *first*, the sentencing court needs to know what the guideline range is before deciding whether a departure from that range is warranted, and whether the sentence produced by following the Guidelines Manual is sufficient but not greater than necessary to achieve the purposes of sentencing in light of all of the factors listed in section 3553(a).[2]

To legislate that the guidelines range be given heavier weight than other factors in this analysis would run a serious risk of unconstitutionality. We should assume, as Justice Scalia did, that the remedial majority went as far as it was constitutionally able to go in saying that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." Booker, 125 S. Ct. at 745, 791 n.4. The Supreme Court found that Washington state's system with its strongly presumptive guideline ranges was unconstitutional in Blakely v. Washington, 124 S. Ct. 2531, 2535 (2004). If a statute were to declare that the guidelines range had presumptive or even substantial weight, this would tack too close to the constitutional wind.

C. Analysis for Imposing Sentences Outside the Guidelines Range

A sentence outside the guidelines range can occur either because the standards for departure set forth in the Guidelines Manual are met, or because the sentence resulting from application of the Guidelines Manual produces a sentence that is greater than necessary or insufficient to achieve the purposes of sentencing for a reason rooted in § 3553(a) and the facts of the case. After Booker, courts have begun to categorize the former as a "Guidelines sentence" or an "advisory Guidelines sentence," and the latter as a "non-Guidelines sentence" or a "variance" from a Guidelines sentence. See, e.g., Crosby, 2005 WL 240916 at *7; Wilson, 2005 273168 at *2.

The analysis for imposing an advisory Guidelines sentence, including departure, is the same as before Booker was decided.[3] The analysis for imposing a non-Guidelines

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[2] In testimony before Congress last week, Assistant Attorney General Wray pointed to the decisions of two district court judges requiring sentencing facts to be charged and proved beyond a reasonable doubt, and suggested that this might mean that judges will ignore the Guidelines. Notably, Mr. Wray did not contend that even these two judges ignored the Guidelines. One found the relevant facts, calculated the guideline range, and considered it along with the other factors listed in section 3553(a). United States v. Huerta-Rodriguez, __ F. Supp.2d __, 2005 WL 318640 (D. Neb. Feb. 1, 2005). The other found the facts beyond a reasonable doubt and applied the Guidelines as mandatory. United States v. Barkley, No. 04-CR-119 (N.D. Okl. Jan. 24, 2005). There is no evidence that the Guidelines are being ignored.

[3] Judge Adelman's decision in Ranum, as we read it, is not to the contrary. Judge Adelman said that "courts should not follow the old 'departure' methodology," and "need not justify a sentence outside of [the guidelines range] by citing factors that take the case outside of the 'heartland.'"

sentence would proceed by considering the factors listed in section 3553(a) other than the guidelines range and departures to determine whether the advisory Guidelines sentence is sufficient but not greater than necessary to achieve the purposes of sentencing. We expect that in most cases, the advisory Guidelines sentence will be sufficient but not greater than necessary to achieve the statutory purposes. In some cases, it will not.

An opinion by Judge Cassell provides an example of an analysis leading to the conclusion that the Guidelines sentence was too high. In United States v. Croxford, 324 F.Supp.2d 1230 (D. Utah 2004), he ruled that advisory Guidelines allowed him to consider "facts the Guidelines would make irrelevant," and therefore relied on the defendant's sexual abuse as a child and a wish to avoid an appeal for the victim's sake to reduce the Guidelines sentence by three months. Id. at 1247-29.

As another example, prior to Booker, receiving medical treatment in even a minimally effective manner was an insufficient reason for a sentence outside the guidelines range, making it difficult for courts to craft a medically safe solution even when the Bureau of Prisons did not provide appropriate treatment for serious medical conditions. See United States v. Derbes, 369 F.3d 579, 580 n.1, 582 (1st Cir. 2004). Today, under 3553(a)(2)(D), the court must consider the provision of medical care in the most effective manner.

The courts may also take a more critical look at Guidelines sentences resulting from certain congressional directives, the 100 to 1 crack/powder ratio, the drug quantity guidelines, the career offender provision, and the Guidelines' inability to ameliorate unwarranted disparity resulting from prosecutorial policies and practices. These types of sentences were not necessarily developed with the purposes of sentencing in mind or are not working as intended, are in many cases greater than necessary to achieve those purposes, and result in unwarranted disparity, including disparate racial impact. See United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 49, 73, 92, 103-06, 112, 131-34, 143-46 (2004) (hereinafter "Fifteen Year Study").

D. Changes to the Federal Rules of Criminal Procedure to Ensure Notice and Reliable Factfinding

We ask the Commission to recommend to the Federal Rules Advisory Committee certain changes to the Federal Rules of Criminal Procedure.

1. To ensure notice of grounds for a sentence outside the guidelines range other than a ground for departure, Fed. R. Crim. P. 32(d)(1)(E) should be changed to require the presentence report to "identify any basis for a sentence outside the applicable sentencing range."

See 2005 WL 161223 at *2. We take this to mean that a departure is not the *only* basis for a sentence outside the guideline range.

Fed. R. Crim. P. 32(h) also should be amended to state: "Before the court may impose a sentence outside the applicable sentencing range on a ground not identified either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating a sentence outside the applicable sentencing range. The notice must specify any ground on which the court is contemplating a sentence outside the applicable sentencing range."

2. As before Booker, the Practitioners' Advisory Group continues to believe that the rules must be modified to provide notice and improve the reliability of factfinding. Given the continuing centrality of the guidelines range in the post-Booker regime, as well as factfinding regarding the other factors relevant to sentencing, "basic procedural fairness, including the need for reliable information, remains critically important." Ameline, No. 02-30326, slip op. at 4, 19-23.

It is truly unfortunate that in many districts, controverted facts are "found" by a probation officer based on submissions from the parties that are not shown to each other, and often consist of no more than a narrative written by a lawyer with no factual support whatsoever or a law enforcement report recounting multi-level hearsay. In many courts, the presentence report resulting from this non-adversarial process is accorded the status of evidence with a presumption of accuracy, which the defendant has the burden of overcoming. This is what occurred in Mr. Ameline's case in the District of Montana, see Ameline, slip op. at 6, and what routinely occurs, according to our members, in district courts in the District of Columbia, Pennsylvania, Louisiana, Tennessee, Mississippi, Alabama and Florida. In other districts, such as Massachusetts and New Hampshire, notice, discovery and judicial resolution of disputed facts, through hearings if appropriate, is the norm. Whether guidelines are mandatory or one of several factors that judges must consider after finding the relevant facts, it is undeniable that the length and type of federal sentences depend on facts. If this were not so, it would be a return to the pre-Guidelines era. In our system as it is, procedures that invite unreliability are unjustifiable, and differences in fact finding procedures among districts creates unwarranted disparity.

Rule 32 therefore should be amended to require that any party who wishes the court to consider information in sentencing must provide that information to the other party no later than the time at which it provides the information to the probation officer or directly to the court, absent a showing of good cause.

Rule 16 should be amended to require the government to produce to the defendant, upon request, all documents and tangible objects material to or which it intends to use regarding application of the sentencing guidelines or other factors enumerated in 18 U.S.C. § 3553(a). Such a request by the defendant would trigger a reciprocal obligation.

III. Appellate Review After Booker

A. Review for Unreasonableness

The Supreme Court provided two basic directions as to how appellate review for "unreasonableness" will work – sentences within and outside the guidelines range are subject to appeal, Booker, 125 S. Ct. at 765, and the "numerous factors" set forth in section 3553(a) "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." Id. at 766.

The Second Circuit has identified several ways in which a sentence may be found on appeal to have been unreasonable, without foreclosing others not yet anticipated. A sentence may be unreasonable in length with reference to section 3553(a). A sentence, regardless of length, will be unreasonable if the judge committed an error of law or made a clearly erroneous finding of fact. And a sentence, regardless of length, will be unreasonable if the judge used an unlawful method to select the sentence, such as mandatorily applying the Guidelines, or failing to consider all relevant factors under section 3553(a). Crosby, 2005 WL 240916 at **8-9. This seems like a sensible approach.

A sentence within the guideline range should not be labeled "presumptively reasonable." First, there is a constitutional risk in attaching presumptive legal significance to guidelines ranges that result from factual determinations made by judges rather than juries. See Booker, 125 S. Ct. at 794 ("any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory system that the Court today holds unconstitutional.") (Scalia, J., dissenting); Crosby, 2005 WL 240916 at *9 ("*per se* rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline . . . would effectively re-institute mandatory adherence to the Guidelines."). We can infer that the remedial majority recognized this and went no further than it could constitutionally go.

Second, strictly as a policy matter, we do not believe that any change should be made unless and until a particular problem is shown to exist. The courts of appeal may apply unreasonableness review to preserve *de facto* mandatory Guidelines (which would be unconstitutional), or to approve any sentence imposed after consideration of the section 3553(a) factors no matter how high or how low (which would create unwarranted disparity), or, one would hope, take a sensible approach like the Second Circuit's. We do expect that when the data is collected, the number of instances in which an appellate court finds a sentence within a properly calculated guideline range to be unreasonable will be few or none.

Sentences outside the guideline range must be reviewed "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)," whether based on a departure ground specifically identified in the Guidelines Manual or pursuant to the goals and other factors listed in section 3553(a). Booker, 125 S. Ct. at 765-66. The only difference

would be that the reasonableness of a "departure" would also be assessed by reference to the Commission's policy statements regarding departures. See § 3553(a)(4).

B. Modification is Not Necessary or Prudent at this Time.

The appellate review provisions of 18 U.S.C. § 3742 should not be amended unless some specific problem becomes apparent that the courts of appeal are unable to resolve. We recognize that while the Supreme Court excised 18 U.S.C. § 3742(e), it did not excise § 3742(f)(2) which provides that one basis for setting aside a sentence outside the guideline range is that it is "based on an impermissible factor," or § 3742(j)(1), which states that a factor is "permissible" only if it "(A) advances the objectives set forth in section 3553(a)(2); and (B) is authorized under section 3553(b); and (C) is justified by the facts of the case." We expect that the courts of appeal will recognize that subsection (B) is one of the "statutory cross-references to" excised section 3553(b) that is "consequently invalidated," Booker, 125 S. Ct. at 764, and that neither subsection (B) nor subsection (C) can be applied based on the Court's explicit excision of the *de novo* standard and its holding that courts are to review sentences "'outside the applicable Guideline range' . . . to determine whether the sentence 'is unreasonable' with regard to § 3553(a)." Id. at 765-66.

Congress should not change the "reasonableness" standard of review. A problem cannot be assumed, much less identified or corrected, absent some data showing a change is needed. The existing data suggests that a reasonableness standard is workable; as Justice Breyer noted in Booker, appellate courts previously used a "reasonableness" standard in reviewing both departures and sentences for which no guideline applied – some 16.7 percent of all sentencing appeals in 2002.

We do not think that *de novo* review of sentences outside the recommended guideline range could be re-established consistent with Booker. The remedial majority could have struck down only 18 U.S.C. § 3553(b), but it also found it necessary to strike 18 U.S.C. § 3742(e), stating that *de novo* review made "Guidelines sentencing even more mandatory than it had been." Booker, 125 S. Ct. at 765. In striking *de novo* review from the new advisory system, the Court implicitly recognized that *de novo* review of a sentence outside an advisory range would effectively make that range mandatory. The conclusion seems inescapable that re-establishing *de novo* review would be unconstitutional.

We also believe the *de novo* standard of review reflects a poor policy choice. We reject the proposition that determining the appropriate and just sentence for an individual human being under the peculiar circumstances of his or her crime is best analogized to a legal determination rather than a factual one or at least a mixed question of fact and law. *De novo* review of sentences essentially establishes as policy that the opportunity to actually see and hear the person being punished is of absolutely no value to our system of justice. We urge the Commission not to subscribe to that view.

IV. Substantial Assistance, Fast Track, Acceptance of Responsibility

We do not believe that the Booker decision will adversely affect the ability of prosecutors to reach plea agreements or obtain a defendant's cooperation. First, Booker does not invalidate mandatory minimum sentences, nor did it excise 18 U.S.C. § 3553(e), which requires a government motion before the court imposes a sentence below a mandatory minimum to reflect a defendant's substantial assistance. This retains for the prosecution a powerful tool for encouraging cooperation in the drug cases that now comprise nearly half of all federal criminal prosecutions.

In cases where the government seeks cooperation from a defendant who is not facing a mandatory minimum sentence, the guidelines currently require a motion from the government before the court departs based on substantial assistance. The courts must calculate the guidelines as written before considering them. Furthermore, judges have routinely looked to the government to evaluate substantial assistance, and there is no reason to believe that will change after Booker.

It is true that under an advisory guidelines system, the courts will have more flexibility than before to impose a sentence outside the applicable guideline range for reasons other than substantial assistance. While a defendant might believe that his odds of obtaining a lower sentence have improved, a prosecutor can also now more credibly threaten the prospect of a sentence above them. Thus, defendants will still have a strong incentive to satisfy the government that they are providing substantial assistance.

The same is true for the third level for acceptance of responsibility, which requires a government motion. In calculating the guideline range, the court will need to follow the language of the U.S.S.G. § 3E1.1(b). Defendants will retain the incentive to satisfy those requirements in order to have the judge consider a lower guideline range when determining the appropriate sentence.

Booker will have no effect on the government motion requirement under U.S.S.G. § 5K3.1 in districts where the Attorney General has authorized an early disposition program. Defendants in those districts will be motivated to enter plea agreements to ensure the government's motion for downward departure up to four levels. In those districts where no early disposition program has been authorized, courts may consider a non-Guidelines sentence for a similarly situated defendant in order to "avoid unwarranted disparities" under 18 U.S.C. § 3553(a)(6), with or without a government motion. This should be unobjectionable since it will reduce regional disparity. See Fifteen Year Study at 106, 112.

V. Prohibited Factors

Booker does not on its face prevent Congress from prohibiting the consideration of particular factors at sentencing. Congress and the Commission have identified certain factors (race, gender, national origin, creed, religion and socio-economic status) that, without more, should never affect a sentence. See 28 U.S.C. § 994(d); U.S.S.G. §

5H1.10. We believe that such flat prohibitions should be limited to this select set of constitutionally invidious factors.

Congress could not, under Booker, effectively make the Guidelines mandatory by prohibiting consideration of the defendant's history and characteristics, or accomplish the same thing by prohibiting consideration of all of the offender characteristics that are now discouraged, or by simply declaring that the Guidelines already reflect all of the considerations in 18 U.S.C. § 3553(a). Any of these measures would prohibit consideration of anything but the Guidelines, thus making them mandatory and in violation of the Sixth Amendment if based on judge-found facts.

Section 3553(a)(1) requires a sentencing court to consider certain factors, including "the history and circumstances of the defendant." To the extent that the Guidelines flatly prohibit consideration, in any way, of those or other section 3553(a) factors, the courts may conclude that the Guidelines provision must give way to the statutory language. But the prohibitions in the Guidelines other than race, gender and the like are not flat prohibitions for all purposes in sentencing. See U.S.S.G. § 5H1.4 (prohibiting drug, alcohol and gambling addiction as reasons for downward departure); U.S.S.G. § 5H1.12 (prohibiting lack of guidance as a youth and similar circumstances indicating a disadvantaged background as grounds for a sentence outside the applicable guideline range); U.S.S.G. § 5K2.19 (prohibiting post-offense rehabilitation on re-sentencing as a basis for downward departure). We believe that the courts are free to consider such factors, to the extent they bear on the sentencing considerations found in section 3553(a), but that the Commission's reasons for prohibiting their consideration will be carefully examined and considered in light of section 3553(a) and the facts of the case.

VI. Advisory Guidelines in the States

We are not experts on state guidelines systems, but understand that the rate of within-guidelines sentences in states with advisory guidelines, even those with no appellate review, is higher than that in state and federal mandatory guidelines systems. While we do not know the reasons for this, wider ranges and less severity come to mind.

Pennsylvania's standard of appellate review in an advisory guidelines system resembles what Booker's remedial majority had in mind – sentences within and outside the range are appealable for unreasonableness, and there is no *de novo* review.[4]

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[4] 42 Pa. C.S.A. § 9781 provides in relevant part:

(c) Determination on appeal.--The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

(1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;

(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or

VII. Recommendations for the Short and Long Term

The Booker remedy has created a system much like the Guidelines at their inception, when it was acknowledged that the rules produced an approximate solution that did not advance sentencing goals in every case and thus continuing study was necessary. See Stephen J. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 14, 28 (Fall 1988); U.S.S.G. § 1A1.1, Editorial Note 4(b). It is also a workable solution, at least in the interim while the Commission collects and analyzes sentencing data and receives input from the field. We urge the Commission not to propose or support any legislation unless and until change is shown to be necessary, what precise change is necessary, and that such change is constitutional.

If it becomes clear that more rigor is necessary, we continue to believe, based on what we know now, that what has become known as simplified partially Blakelyized guidelines is the sensible solution. To that end, we suggest that the Commission study how to revise the number and widths of the sentencing ranges, and which facts should be subject to charge and proof and which facts should be left to the judge.[5] This is also an opportunity for the Commission to address the problems identified in its Fifteen Year Study.

We look forward to working with the Commission in the months ahead to improve the federal sentencing system.

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(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

(d) Review of record.--In reviewing the record the appellate court shall have regard for:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.

[5] It is clear after Booker that there is no separation of powers bar to the Commission promulgating facts that affect a sentence, whether they are called elements or sentencing factors, and whether they are found by judges or juries. Booker, 125 S. Ct. at 754-55.