Testimony of Stephen A. Saltzburg
Before the United States Sentencing Commission
February 16, 2005

I. Introduction

Mr. Chairman and Members of the Commission, it is an honor for me to accept your invitation to testify before you for second time on the issues arising under the federal sentencing guidelines in light of the United States Supreme Court's decision in *Blakely v. Washington* (June 24, 2004). I provided my earlier testimony when the Commission was anticipating what the Supreme Court might do in the two federal cases before it: *United States v. Booker*, and *United States v. Fan-Fan*. Now that the Supreme Court has decided both those cases in its January 12, 2005 opinion, the Commission has asked witnesses at these hearings to address several questions.

I appear here in two capacities. The President of the American Bar Association, Robert . Grey, Jr., has appointed me to represent the ABA. In doing so, I can only testify on issues as to which the ABA has adopted policy and must confine my remarks so that I do not exceed the extent of those policies. I also appear as someone who as served as an Ex Officio Commissioner and a law professor and criminal justice practitioner with a long history of being interested in sentencing matters. As I proceed, I shall try my best to indicate whether I am speaking for the ABA or only for myself.

All of the issues that the Commission has raised result from the *Booker* decision. It excised from the Sentencing Reform Act the provision making the Federal Sentencing Guidelines mandatory in nature and directed sentencing courts to "take them [the guidelines] into account" when sentencing. It also excised another provision which provided a "de novo" standard for appellate review, and directed the courts of appeal to apply a "reasonableness" standard instead.

II. The Commission's Issues

(A) What changes, if any, to the federal statutes, the Federal Sentencing Guidelines, or the Federal Rules of Criminal Procedure are needed to clarify sentencing procedures and standards in the wake of the Booker decision?

The American Bar Association has taken no position on this issue. The ABA Criminal Justice Section Task Force, which I chaired and was responsible for the recommendation approved by the ABA House of Delegates on Monday of this week, made certain recommendations as to the guidelines but those recommendations did not address changes in procedures and standards that might be needed. Instead, the ABA recommended that the advisory guidelines be used for 12 months while the Commission, the Congress, and the bar study their effects.

Speaking for myself, I do not believe that any changes in the Federal Rules of Criminal Procedure are needed at this time. Nor do I believe that any major changes in the guidelines are required. There is, however, a fundamental question which the Commission must answer for itself and answer immediately: i.e., does it have the power to recommend to judges how they might exercise their discretion in an advisory guideline system. My answer to this is "yes," although I suggest that careful consideration must be given to the type of guidance to be afforded.

Let me give you an example of the guidance that the Commission might consider. Federal prosecutors are justifiably concerned that the power given to them to recommend downward departures for substantial assistance could be weakened if judges were to make their own individual determinations as to whether a defendant provided assistance justifying a departure or a variance from the guidelines where the government did not support giving the defendant any credit for assistance. The Commission could decide to issue a policy statement emphasizing that judges should not depart or vary for this reason absent a government motion, or it could give guidance as to when such a departure or variance would be in order. Regardless of my personal preferences as to when a substantial assistance departure is warranted, I believe that both the Commission and Congress have expressed a strong preference for the government to be the sole decision-maker as to when assistance is sufficient. If the Commission agrees and so indicates to judges, the need for Congress to take action in response to *Booker* might well diminish, as one of the government's principal concerns would be addressed. The same is true for the third level for acceptance of responsibility, which requires a government motion. In calculating the guideline range, the court may decide that it must follow the language of the U.S.S.G. § 3E1.1(b), but if there is any doubt about the discretion of the court to award a third level adjustment for acceptance of responsibility, the Commission could issue a policy statement discouraging the practice.

Judges could still take a different tack under an advisory guideline system, but it would likely be met with skepticism under the still vague "reasonableness" standard of appellate review. Should Congress reenact the de novo review standard, the policy guidance might well have more teeth.

Otherwise, no changes in the law are needed. Courts are required by the statutory provisions left in place by the Supreme Court in *Booker* to do much of the sentencing work they were required to do before the decision. The sentencing court must find facts and calculate a guidelines range, 18 U.S.C. § 3553(a)(4), and it must consider, when a departure issue is raised, whether departure is warranted, *id.* In this regard, the court is also required to consider whether the guideline sentence 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. 18 U.S.C. § 3553(a)(2). Finally, 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, state the specific reasons for that sentence in the judgment and commitment order. 18 U.S.C. § 3553(c).

Arguments can be made for amendments to Fed. R. Crim. P. 32 to assure notice to defendants of non-guideline sentencing facts that judges may consider and an opportunity to be heard. But, even without such amendments, the basic right to notice and an opportunity to be heard should guarantee fair sentencing procedures.

(B) To what extent are courts required to "consider" or "take into account" the Federal Sentencing Guidelines in imposing a sentence? Should this be clarified through legislation and, if so, how?

The American Bar Association resolved that the advisory guidelines should be given 12 months before any major legislation to change the system is proposed. Implicit in this judgment is that we need to give judges the opportunity to consider how much weight to give the guidelines. Thus, the ABA did not recommend corrective or clarifying legislation at this time.

The "reasonableness" standard of review adopted by the Supreme Court will enable federal circuits to articulate standards for district courts, and the Supreme Court itself might have occasion to address the subject. It is early for Congress to weigh in to dictate exactly how federal judges should approach the guidelines. Not only has there been little time for careful thought, but a congressional enactment could be seen as interfering with the voluntary nature of the guidelines and of reinstating a mandatory system that is constitutionally suspect.

Speaking for myself, I can say that it will not be surprising if appellate courts deem guideline sentences to be presumptively valid to some extent and demonstrate some skepticism at non-guideline sentences (or those varying from the guidelines). The power of the presumption and the degree of skepticism remain to be worked out, always in full recognition of the *Booker* holding that facts may not automatically increase a sentence if the defendant does not admit them or they are not proved to a jury.

(C) What type of analysis should courts use for imposing sentences outside of the guideline sentencing range?

The answer here turns on the extent to which judges should "take into account" the guidelines in deciding whether a particular sentence is "sufficient, but not greater than necessary" as required by § 3553(a). A jurisprudence is beginning to emerge already, as some courts have declared categorically that the guidelines should be given "great weight" in the §3553(a) determination, while others have taken the position that the other considerations set forth in § 3553(a) should also be considered. It is too early to say which approach is correct, though as noted in the immediately prior answer it is likely that the courts of appeal, in applying a reasonableness standard of review, will deem guideline sentences to be the beginning of the analysis and take a closer look at variances from the guideline range.

(D) How will review by appellate courts for "unreasonableness" work in practice? Should a sentence within the guideline sentencing range be considered "presumptively reasonable"? How should sentences outside of the guideline range be reviewed, and should appellate review vary depending on whether the sentence outside of the guideline sentencing range was based on a departure basis specifically identified in the Guidelines Manual or pursuant to Booker?

The American Bar Association did not attempt to define "unreasonableness" or to provide guidance to appellate courts engaged in appellate review of sentences in an advisory guideline system.

My own view is that it is vital for district judges to state clearly whether they are departing for a reason identified in the guidelines or for a non-identified reason. If the judges are departing for an identified reason, they are imposing a guideline sentence, and the sentence should be viewed as such. If they are departing for a reason not identified in the guidelines, the departure might be one of two types: a departure that was available pre-*Booker* for a factor considered in the guidelines but present to an unusual extent or way in a particular case. Such a sentence is a departure but still a guideline sentence. A sentence that reflects a district judge's determination that a sentence which varies from the guidelines better serves the goals of the Sentencing Reform Act should be identified as a variance or a non-guideline sentence so that the Commission, the Congress, and the public can distinguish the exercises of discretion that occur post-*Booker* that would not have been available pre-*Booker*.

(E) Do the appellate review provisions of 18 U.S.C. ' 3742 need to be amended in light of Booker and, if so, how? Might Congress, consistent with Booker, establish standards for appellate review of sentences different from the "reasonableness" standard discussed by the remedial majority? Might de novo review of sentences outside the recommended guideline range be re-established?

The American Bar Association approved a recommendation of the ABA Justice Kennedy Commission in August 2004 that Congress should repeal the de novo standard of review and reinstate the abuse of discretion standard of review. At the time the ABA acted, *Booker* had not been decided, and it is demonstrably clear that no one anticipated the "reasonableness" standard of review created by Justice Breyer in his 5-4 opinion in *Booker*. The ABA has not changed its position, which remains a preference for abuse of discretion review for two reasons: the standard reflects the trial judge's greater unique familiarity with the case, the offender and sometimes the victim; and the standard is less burdensome on appellate courts.

The ABA has not addressed the question whether Congress could adopt a different standard from that set forth in *Booker*. My own answer is a clear "yes," since *Booker* itself recognizes that Congress could reinstate the de novo review standard. It appears that Congress may adopt any standard of review that does not tie trial judges' hands to such an extent that it makes an advisory system mandatory (without other necessary changes). Arguments will be made to you that a de novo standard reinstates a mandatory guideline system, but this is illogical.

Unless appellate courts declare that guideline sentences will be imposed in all cases, the system is not mandatory. Indeed, appellate review under any standard raises the possibility that appellate courts will approve variances from guidelines and could even expand variances. States with guidelines and effective appellate review have found that appellate courts may contribute greatly to a fair and equitable sentencing system.

I do not advocate de novo review. I believe the ABA abuse of discretion standard is preferable to both de novo review and reasonableness review (whatever it means). My preference does not inhibit me from concluding that de novo review may be reinstated by Congress.

The hardest question regarding appellate review in an advisory system is when appeals are permitted. Is a sentence within a guideline range appealable if the defendant or prosecutor believes it is "unreasonable" as opposed to erroneous as a matter of law? Such an appeal was not possible pre-*Booker*: i.e., neither side could appeal a guideline sentence claiming it was an abuse of discretion. Has this changed after *Booker*? The Supreme Court did not change the appeal language other than excising the de novo review provision. So, arguably the answer is no, but some clarification might be needed.

(F) Will Booker adversely affect the ability of prosecutors to reach plea agreements or obtain other forms of defendant cooperation? How is USSG '5K1.1 (Substantial Assistance) affected? How are "fast track" programs and USSG '5K3.1 (Early Disposition Programs) affected? Is there any impact on USSG '3E1.1 (Acceptance of Responsibility), particularly with respect to the third offense level reduction?

The American Bar Association has taken no position on these issues.

I have addressed above the importance of the substantial assistance issue. It appears to me that that "fast track" programs and "early disposition" programs should continue to operate as they have in the past. There is no readily apparent reason that making guidelines advisory should adversely affect these programs.

(G) Under the principles of Booker, may Congress prohibit judges from considering certain factors at sentencing? What factors, if any, would be appropriate to prohibit from consideration? After Booker, may courts consider factors that are currently prohibited from consideration under the Federal Sentencing Guidelines?

The American Bar Association has taken no position on these issues.

My view is that Congress clearly may prohibit judges from considering certain factors at sentencing. The Supreme Court did not hold that advisory guidelines are constitutionally mandated; its holding is that the maximum sentence may not be mandatorily increased on the basis of facts not admitted by the defendant or found by a jury. Thus, Congress could bar judges from considering any of the factors that they are barred from considering now by the guidelines.

Having said this, I don't believe that Congress needs to act, since appellate courts are very likely to take a hard, skeptical look at sentences that rely upon factors that may not be considered under the guidelines.

My opinion is that Congress could bar judges from considering substantial assistance absent a government motion. Such a bar would not enhance a maximum sentence; it would be going below a sentencing range. The same is true for the third level for acceptance of responsibility, which has required a government motion. Congress could bar judges from awarding a downward adjustment without a government motion pursuant to U.S.S.G. § 3E1.1(b).

(H) Under what conditions, if any, have advisory sentencing guidelines proven effective in the States? What commendations or criticisms have been voiced about the operation of advisory guideline systems?

The American Bar Association has supported for more than a decade guideline systems that provide for some base sentence, but that permit the base sentence to be increased or decreased based upon specific circumstances regarding an offense or offender. It also supports appellate review of sentences outside the base range. The ABA has not taken a position as to what advisory sentencing guideline systems have proven effective.

I claim little expertise on the comparative effectiveness of voluntary guideline systems. The data seem to show that the states have had a mixed experience with them. Virginia is an example of a successful state, and the Commission is well situated to study why that is so. I suspect the role of judges in formulating the guidelines and working with the Sentencing Commission has played a large part in the success.

One caution I would offer is that few states, if any, have had the experience of beginning with a mandatory system, only to find that after almost 20 years the mandatory system became advisory. Many federal judges have known no other sentencing system other than guidelines. So, it is possible – maybe probable – that a federal advisory guideline system will be effective because of the discipline that has been imposed on federal sentencing for two decades. This is not to say that no judges will act as though "advisory" guidelines were of little importance; it is only to say that most federal judges are unlikely to act that way.

(I) How do States with advisory guidelines ensure that their guidelines are adequately considered? Do the States provide for appellate review and, if so, what is the standard of review and how does such review work in practice? Are sentences within the guideline sentencing range considered presumptively reasonable? Does compliance with State advisory guidelines vary depending on the width of the guideline sentencing ranges? How, if at all, does the accountability of judges to the legislature, the public, or their peers affect compliance with State advisory guidelines?

The American Bar Association has not sought to answer these questions.

One problem with any effort to answer them is that states may have presumptive guidelines, which may or may not be the same as advisory guidelines. States like Ohio and California, for example, may have several sentencing levels and begin with a presumption that a defendant should be sentenced to a middle level. Judges may go up or down, however. Are these advisory guidelines? Is there a difference between presumptive guidelines and advisory guidelines? The answers are not clear, and they may be affected when one considers what it means for federal judges to "take into account" the guidelines.

In states like Ohio and Minnesota, appellate review has created a dialectic between appellate courts and trial judges and has created a common law of sentencing in which the appellate courts have played an important role.

(J) What recommendations, if any, do you have for changes to the federal sentencing system in either the short term or long term in light of Booker?

In approving the ABA Justice Kennedy Commission recommendations, the American Bar Association strongly urged repeal of the 25% rule that has contributed heavily to the creation of 43 offense levels and the most cumbersome guideline system in the United States. The ABA also recommended lifting the restriction on judges who can serve on the U.S. Sentencing Commission. The ABA stands by these recommendations, and by its recommendation that, if the 25% rule were lifted, the Sentencing Commission should look to successful state guideline systems and consider simplifying the federal sentencing system. These recommendations remain ABA policy in an advisory guideline system.