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Good morning, Mr. Chairman and Members of the Sentencing Commission. My name is Daniel F. Wilhelm. I direct the State Sentencing and Corrections Program at the Vera Institute of Justice in New York. Thank you for the opportunity to address state sentencing experience as part of the Commission's consideration of policy options in the aftermath of the Supreme Court's *Booker* decision.[i]

Unlike the state sentencing commissions represented on this panel, which operate within the context of their particular jurisdictions, Vera plays a somewhat different role as a nonpartisan, non-profit organization that has been working with governments since the early 1960s to improve justice systems. Since 1998, we have partnered with officials from both parties and more than half the states on the development and implementation of changes to sentencing and incarceration policies that promote safety, fairness and economy. This has given us an opportunity to examine and assess the construction and operation of sentencing systems across the country.

Before venturing some specific observations about advisory and mandatory guidelines systems in the states, it should first be noted that the Commission's decision to examine state models and experience is admirable. In our travels we have noticed that the federal and state criminal justice systems often operate on parallel tracks, largely uninformed and unconcerned with each other and only occasionally intersecting. This is especially true in the area of sentencing policy where the absence of a robust federal-state conversation is unfortunate given that the states have served as instructive laboratories for policy innovation and have done so in ways, and in pursuit of aims, that are familiar to federal actors.

Since the late 1970s, some twenty states have adopted sentencing guidelines and nearly all retain them in some form today.[ii] Some presumptive state schemes share characteristics with the mandatory requirements of the pre-*Booker* federal system. Others bear a resemblance to the federal system as it now stands after the Supreme Court's recent decision to make the use of federal sentencing guidelines a voluntary exercise. Moreover, states have turned to guidelines for many of the same reasons – such as those related to the elimination of unwarranted disparities and the promotion of proportionality among sentences – that prompted the creation of federal

sentencing guidelines. (Some states have also seen guidelines as a means to regulate and predict the resources necessary to support their large prison systems. States incarcerate 1.22 million of the 1.38 million prison inmates in the United States at a cost of some $40 billion annually.[iii]) State mechanisms and motivations should not be foreign to federal actors. But how should a federal inquiry assess advisory and mandatory guideline systems?

The Role of Advisory Guideline Systems

It is worth saying initially, especially in light of the anxiety that the *Booker* decision has provoked in the lower federal courts and Congress, that the advisory guideline structure created by the Supreme Court is a fully functioning system. By this, I mean that the Court's conversion of a mandatory sentencing guideline system into an advisory one does not somehow render the new system incomplete. Reasonable minds may disagree about the desirability of voluntary versus presumptive systems, but it is clear that some policymakers clearly prefer the former to the latter. Indeed, some ten states have affirmatively chosen to create voluntary systems of one stripe or another and at least two other states are in the process of creating such systems.[iv]

Even though the decision, and its predecessor in *Blakely*[v], leave many important questions unanswered – not the least of which is how an appellate standard of "reasonableness" is to be interpreted and enforced – the Court's advisory-guidelines remedy is ready to wear, though some ongoing alterations will be necessary to make it fit comfortably. Moreover, Congress's potential objection to the content of the system or the manner in which it was created does not mean that the system itself is non-operational. Early calls from some quarters of Capitol Hill and elsewhere in Washington for an immediate legislative response that would reinstate a mandatory federal system appear to be unwarranted by practical need. Political imperatives, however, may compel a different result.

Rash action could be unfortunate and unnecessary and I join the many voices that have urged Congress to take time to study the system that the Court has created in *Booker*. The best way to do this, of course, is to allow the United States Sentencing Commission to continue its historical mandate of study and assessment, already embraced in the post-*Booker* era, to determine how federal courts are applying the new rule.

Given, however, the constant temptation of legislative action, what instruction can state advisory guideline systems offer the Commission as it counsels Congress on its policy options?

As I stated a moment ago, depending on how one defines "advisory guidelines," around ten states have such voluntary sentencing guideline systems in place today. The basic definition of these systems, at least as they traditionally apply to the states, is that they do not require a judge to impose a recommended sentence and they generally do not provide for appellate review. Within that broad definition, however, there are significant variations among the ways in which states structure judicial use of, and interaction with, advisory guidelines. It is these structures that can determine the acceptability, success and ultimate efficacy of advisory systems.

Success may be measured by a number of different criteria, depending on what a jurisdiction is attempting to achieve through its guidelines. One such relevant measure is the rate at which judges adhere to guideline recommendations. The relevance of this measure derives in large part

from the presumption that recommended sentences have been constructed at least in large part to achieve fairness and decrease unwarranted disparities. Such stated or statutorily mandated purposes provide a foundation for guideline systems in most jurisdictions. If officials are successful in creating sentences that meet these goals, then compliance furthers these laudatory aims and is a valid yardstick of success.[vi]

It is interesting that a number of voluntary guideline systems have markedly high compliance rates. Virginia, the jurisdiction whose voluntary system has emerged as perhaps most closely analogous to the new federal system, reports that judges impose sentences recommended by the guidelines in some eighty percent of cases.[vii] Departures above and below the suggested guideline sentence are evenly split at about ten percent of cases each.

Virginia shares one important feature with the new federal system, namely that judges are required (there, by statute) to consider the guidelines recommendation applicable in each case. Moreover, Virginia statutorily requires judges to complete guideline forms that contain written explanation for departures. Given the high rate of compliance, it may be reasonable to conclude that the process of considering applicable guidelines and formulating a written explanation for departures helps build awareness of the guidelines and may help instill a fealty to their application in most cases.

It should be noted, however, that judges have been actively involved in the creation and regular adjustment of guidelines in Virginia and the guidelines themselves were based on a study of actual historical sentences served by defendants for specific offenses. These factors, not present to the same extent in the federal regime, may also help promote judicial compliance. Moreover, because of the way that guidelines have developed and been maintained, judges in Virginia likely comply with the guidelines because they believe that recommended sentences are fair, just and proportionate. That cannot always be said of judges in the federal system. Some observers have posited that Virginia's system, by which the legislature selects and retains judges, may make judicial officers fearful of not following the guidelines. There is intuitive appeal to this assertion. Still, anecdotal evidence from Virginia suggests that very few judges are not returned to the bench and judge-specific sentencing data is not regularly provided to the legislature or the public.

Compliance is also high in other voluntary states which differ in approach from Virginia. In Utah, for example, where sentencing commission policy – not statute – requires judges to complete guidelines forms and provide written justification for departures, recent compliance was eighty-six percent for most felony offenses and seventy-nine percent for sex offenses.[viii] Maryland, whose guidelines require less, has seen compliance rates of seventy-six percent in recent years.[ix]

Not all advisory systems can boast high compliance, however. Some states have historically imposed few or no affirmative requirements on judges to consider sentencing guidelines or to complete any sentencing forms to explain or justify a sentence. In Missouri, for example, where such a system has been in place until recently, compliance with guidelines has been deemed "poor." One knowledgeable estimate indicates that fewer than half of sentences imposed comport with guideline recommendations.[x]

While it is difficult to draw definitive conclusions from these state experiences, several points emerge. First, it appears that some rigor, in the form of procedural requirements that judges must follow, may help promote compliance with advisory guidelines. The Supreme Court's direction that federal judges consider the federal sentencing guidelines in an advisory context may encourage a process by which compliance becomes the norm. Second, it is worth observing that in none of the states discussed above is appellate review of a non-guideline sentence available. The federal system, with its yet-to-be-defined reasonableness standard for appellate review, has the potential to provide greater structure than is available in the states and thus produce high compliance rates. Third, Virginia and others suggest that the presence of an engaged sentencing commission, with the capacity to study and marshal data nimbly as an objective and regularly recurring basis for policy recommendations, is essential to the ultimate substantive credibility and political legitimacy of sentencing policy.

The Commission can serve Congress and the administration of justice well by drawing on its unparalleled ability to understand and assess the operation of federal sentencing through the collection and analysis of data. It should furthermore use that data as the basis of forceful policy recommendations that advance the ends of justice and build the required political and popular support to see that those recommendations are followed.

If Mandatory Guidelines Are Required, the States Still Can Inform

It may be premature to consider a return of the federal system to mandatory sentencing guidelines. If such an event occurs, however, it should be remembered that state models may provide a useful body of knowledge on which to draw. Without delving into specifics here, states have taken a variety of approaches to presumptive guidelines, all of which seek to balance judicial discretion and the ability of judges to meet individual needs of justice with the imperative to secure public safety. It is instructive that no state has adopted a presumptive system that constrains judicial discretion to the same degree that federal guidelines and federal mandatory minimum sentences operating in tandem have historically done.

One big difference between federal and state structures, which may limit the ultimate transferability of state lessons, is that criminal codes play very different respective roles in federal and state realms. The federal criminal code is a less-precise instrument than is found in many state codes. The reason that the federal system was so deeply implicated by the rule articulated in *Blakely* and *Booker* is the heavy lifting assigned to federal sentencing guidelines in fleshing out the severity of an offense and culpability of a defendant. Those tasks are taken up in many states through the provision of more detailed, or differently graded, offenses which can be appropriately considered and included in charging decisions.

If the need arises to examine presumptive options, it may be appropriate for the Commission and Congress to consider whether the aspirations and goals which undergirded the creation of federal sentencing guidelines in the first instance can be met within the context of the current federal criminal code. It may be that consideration of that larger, and admittedly much more ambitious and difficult, question must first be answered before it is appropriate to contemplate any particular mandatory policy response.

Code reform may not be politically possible. If it is not, the experiences of presumptive states may be less directly applicable to federal sentencing. Still important principles of safety, balance, discretion, proportionality and even resource management found in state systems can serve as instructive examples of different well-trod paths to approach the goals of justice and fairness that both the states and the federal system hold in common.

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[i] *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738, No. 04-104 (Jan. 12, 2005).

[ii] For an overview of state systems, see Bureau of Justice Assistance, U.S. Dep't of Justice, *National Assessment of Structured Sentencing* (1996); National Center for State Courts, Sentencing Commission Profiles (1997); National Center for State Courts, Sentencing Digest (1997). By the broadest definition, the states are as follows: Alaska, Arkansas, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington and Wisconsin. Florida, Oklahoma and Tennessee later abolished their guideline regimes.

[iii] *See* Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, Bureau of Justice Statistics, U.S. Dep't of Justice 2 (Nov. 2004) (an additional 691,301 inmates were in the custody of local jails) and James J. Stephan, *State Prison Expenditures, 2001*, Bureau of Justice Statistics, U.S. Dep't of Justice 1 (June 2004) (this is the most recently available figure).

[iv] *See* Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post*-Blakely *Era*, 17 Federal Sentencing Reporter ___ (2005) (forthcoming). The most expansive definition encompasses the following states: Arkansas, Delaware, the District of Columbia, Louisiana, Maryland, Missouri, Rhode Island, Utah, and Virginia and Wisconsin. The two states developing such systems are Alabama and Nebraska.

[v] *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004).

[vi] *See* Hunt & Connelly, *Advisory Guidelines in the Post*-Blakely *Era* at 9.

[vii] Virginia Criminal Sentencing Commission, *2004 Annual Report* 19 (Dec. 2004).

[viii] Utah Department of Corrections, *Report to the Utah Sentencing Commission* (Apr. 2001).

[ix] Maryland State Commission on Criminal Sentencing Policy, *Annual Report 2004* 5 (2003).

[x] *See* Adam Liptak, *Judges' New Leeway in Passing Sentence May Change Little*, New York Times at A14 (Jan. 18, 2005) (quoting Missouri Supreme Court Judge Michael A. Wolff). Missouri recently amended its guidelines in an effort to increase compliance.