THE SENTENCING PROJECT

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Federal Sentencing Options After *Booker*

United States Sentencing Commission

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Thank you for the opportunity to testify today on issues of federal sentencing in the post-*Booker* era. I am Marc Mauer, Executive Director of The Sentencing Project, and I have been pleased to have previously been invited to testify both before the Commission and Congress on a variety of sentencing issues.

In recent years we have seen significant reforms in federal sentencing policy at various levels of government. Most notably, actions taken by the Commission and Congress on crack cocaine sentencing mark a significant step toward greater fairness and effectiveness in federal sentencing, along with reducing excessive incarceration for a substantial number of people. In addition, a series of decisions by the U.S. Supreme Court has clarified and enhanced the discretion afforded to federal judges at sentencing.

The combined impact of these reforms will help to limit some of the problematic policies that have plagued federal sentencing for more than two decades. These have included most prominently the broad-ranging mandatory minimum penalties adopted by Congress over a period of time, whose impact has been comprehensively documented by the Commission in its recent report.

The federal sentencing guidelines implemented in 1987 had been perceived by many as overly restricting judicial discretion by not permitting full consideration of many factors that have historically been considered relevant in sentencing systems at both the state and federal levels. In comparison to sentencing guidelines systems that operate in about two dozen states, the federal system was universally acknowledged as the most restrictive such system, leading sentencing scholars such as Michael Tonry to describe the guidelines as "the most controversial and disliked sentencing reform initiative in U.S. history."[1] Whether or not one agrees with this broad critique, it is indicative of the scale of the change brought about in the federal courts.

As a result of the *Booker* decision, judicial discretion has now been enhanced. This has produced an increased rate of departures from the guidelines, but to a lesser

[1] Michael Tonry, *Sentencing Matters,* New York: Oxford University Press, 1996, p. 72.

extent than many had either hoped or feared. Some critics of the *Booker* decision have called for a return to a more mandatory structure, albeit not precisely the one struck down by the Supreme Court. I believe such a move would be unwise, and would risk recreating many of the problems long identified with such overly restrictive structures.

Racial Disparity in the Post-*Booker* Era: The Research Evidence

While there are a host of issues to be considered in the post-*Booker* era, I will address my comments today to the goal of reducing racial disparity in sentencing. In this regard, it is important that we develop an understanding of what is actually known about changes in federal sentencing practice since the *Booker* decision in order to develop appropriate remedies for any identified problems.

As the Commission well knows, there are two major analyses of race and sentencing post-*Booker*, one by the Commission and a second by researchers at Penn State University. While these reports have sometimes been portrayed as competing studies, in fact they are more appropriately treated as complementary analyses which address different aspects of sentencing outcomes.

The Commission's report analyzed racial differences in sentencing outcomes since *Booker*, and found increased disparity in sentence length for black males during this period. In contrast, the Penn State assessment concluded that by separating out the "in/out" decision – whether to impose a term of imprisonment or a non-prison sentence -- from the sentence length determination and by eliminating immigration cases from the assessment, there was no enhanced racial disparity in sentence length for black males. Thus, the Penn State study clarified that the sentence length disparity found in the Commission's study was actually attributable to disparity in the in/out decision.

Understanding the Dynamics of Racial Disparity in the Courts

While some observers may look at recent studies and find fault with federal judges, it is important to be cognizant of the fact that any identified racial disparities at the sentencing stage represent the end product of a number of prior decisions. These

include allocation of law enforcement resources, prosecutorial charging and negotiating decisions, and sentencing policies established by legislative bodies.

To take just one example of the ways in which criminal justice practice can produce ripple effects at sentencing, consider the 1998 case of *U.S. v. Leviner,*[2] in which an African American man had been convicted of possession of a firearm in Boston. Given his prior record he fell into a sentencing range of four to six years in prison. But as his sentencing judge examined that prior record, she noted that a number of his previous convictions had resulted from traffic stops by Boston police. While she did not question the validity of those convictions, she concluded that given the documented history of racial profiling by law enforcement, an African American male defendant faced a greater risk of acquiring a more substantial criminal record. The judge therefore departed downward from the guideline range and sentenced Leviner to 2.5 years instead.

It has been well documented that dramatic increases in federal drug law prosecutions, along with the imposition of mandatory sentencing penalties, have contributed to growing rates of minority imprisonment. As the Commission noted in its *Fifteen Years of Guidelines Sentencing,* "Today's sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse effect on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[3] Thus, while it is important to address unwarranted disparities at any stage of the system, one should also not lose sight of the variety of decisionmaking points that contribute to these outcomes.

A new working paper published by the University of Michigan Law and Economics Center sheds light on how post-*Booker* racial disparities identified in both the Commission's and Penn State studies may be produced.[4] These scholars conclude that black male arrestees "face significantly more severe charges conditional on arrest

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[2] *U.S. v. Leviner,* 31 F.Supp 2d 23 (D. Mass. 1998).

[3] United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing,* November 2004, p. 135.

[4] M. Marit Rehavi and Sonja B. Starr, "Racial Disparity in Federal Criminal Charging and its Sentencing Consequences," University of Michigan Law & Economics Working Paper, January 15, 2012.

offense and other observed characteristics," and attribute this primarily to prosecutorial charging decisions. In particular, they find that "the otherwise-unexplained racial disparities … can be almost entirely explained by disparities in a single prosecutorial decision: whether to file a charge carrying a mandatory minimum sentence."

Prosecutorial discretion has always been an element of sentencing outcomes, of course, but these authors describe why such decisionmaking may be particularly influential in the post-*Booker* period. Since a series of Supreme Court decisions in recent years have granted federal judges leeway in departing from the Guidelines but not from the mandatory minimum penalties, the mandatory minimums have now become even more influential than previously. Therefore, to the extent that African American defendants are more likely to be charged with an offense that carries a mandatory penalty, racial disparities may be increasing in line with those patterns.

Further evidence of the influence of such decisionmaking comes from recent research on substantial assistance departures as well. Criminologists Cassia Spohn and Pauline K. Brennan examined the effects of offender race/ethnicity and gender in regard to the likelihood of receiving and the magnitude of such departures in federal drug cases.[5] They found that "Black and Hispanic male offenders were treated more harshly than all other offenders." The researchers suggest that downward departures are used "to mitigate the sentences of 'salvageable' or 'sympathetic' offenders,"[6] and that in practice the mix of harsh mandatory penalties for drug crimes along with highly discretionary departure decisionmaking in effect permits prosecutors to take into consideration "characteristics of the offender that they would be precluded from considering without the substantial assistance departure."[7]

[5] Cassia Spohn and Pauline K. Brennan, "The Joint Effects of Offender Race/Ethnicity and Gender on Substantial Assistance Departures in Federal Courts," *Race and Justice,* Vol. 1, No. 1, 49-78.

[6] Ibid., 68.

[7] Ibid., 70.

Developing Remedies for Racial Disparity

As these several studies make clear, ascribing the presence or change in degree of racial disparity to a single factor is problematic. Therefore, while we should continue to refine our understanding of these dynamics, it would be unwise to assume that enacting any single change to the Guidelines or other structures would be sufficient to reduce disparities. In a worst case scenario, certain changes might appear to reduce disparity by sentencing more white male offenders to prison or for longer prison terms, in order to match outcomes for black males. Such a shift would only exacerbate existing problems of prison overcrowding and excessive punishment.

An approach that would be more fruitful is to address the disparity identified in the "in/out" decision, whereby black male defendants are more likely than other groups to receive a prison term upon conviction. In this regard it would be productive to assess whether there are structural mechanisms within the guidelines process that provide white defendants with advantages, or conversely, serve to disadvantage black male defendants.

As one example, consider that to the extent that a good employment history is viewed as a mitigating factor at sentencing, then the relatively privileged position of white defendants in this area will advantage them at sentencing as well. Thus, what might appear at first to be a race factor in fact may be a systemic socioeconomic difference.

I would therefore propose a two-pronged approach to such issues. First, we should engage in ongoing review of the factors that go into sentencing outcomes, and particularly the decision to imprison, to determine the structural and practitioner decisionmaking factors that may contribute to these outcomes. And second, consider ways to "level the playing field" so that minority defendants are not disadvantaged in accessing non-prison terms because of structural impediments. Such initiatives would contribute to better outcomes for minority defendants as well as produces decisionmaking that better meets the goals of sentencing generally.

For example, the dramatic expansion of drug courts in state sentencing systems since 1990 has created non-prison sentencing options for substantial numbers of indigent

defendants who would not otherwise have had access to treatment programs. While there is no guarantee that these developments will disproportionately benefit African Americans, they do at least create the possibility of doing so, given the disproportionate share of African Americans among drug offense prosecutions.

Structural changes to federal sentencing policy and practice that hold the potential to ensure that all defendants have an equal likelihood of receiving non-prison sentences when appropriate regardless of race include:

Expand the safety valve provision for mandatory sentencing offenses – Since its authorization in 1994 the safety valve has been used in substantial numbers of drug cases to reduce lengthy mandatory minimum terms. As the Commission and others have recommended, it is now time to consider expansion of the criteria used for eligibility of this measure. In particular, consideration of modest increases in the criminal history score would be appropriate and would aid in rectifying the systemic disadvantages African Americans face due to patterns of policing and socioeconomic circumstances.

Reconsider the scale of criminal history enhancements – While it is not unusual in most sentencing structures to impose enhanced penalties based on criminal histories, the degree to which this is established is often enacted in an arbitrary manner. Judges may also have varying rationales, such as incapacitation or deterrence, for these enhancements in particular cases. But whether imposed in determinate or indeterminate systems, such enhancements are rarely established with any reference to research-based evidence regarding their utility for public safety outcomes. Given that this variable disproportionately affects African Americans, it would be beneficial to reexamine these racial effects and potential public safety benefits at varying levels of sentencing severity.

Enhance probation options – Because the current research demonstrates that black males are less likely than other groups to receive non-prison sentences, it would be useful to explore ways to strengthen community-based supervision options so as to create more options for judges to take advantage of. State policymakers have developed a plethora of such alternatives in recent decades, including drug and

mental health courts, community service programs, intensive probation supervision, and many others. Some of these have been more successful than others in diverting offenders from terms of incarceration, but overall they suggest that structural reforms that create a broader range of options can shift sentencing outcomes in ways that are cost-effective and hold the potential of reducing racial disparities.

In recent years federal probation has increasingly explored development of evidence-based approaches to providing supervision and services, and the Commission's 2008 symposium on alternatives to incarceration brought together a broad range of expertise to examine the potential for non-incarcerative sentencing options. Yet the proportion of federal defendants receiving non-prison sentences has remained steady at below 15% since the inception of the guidelines. Given our knowledge of the value of community sentencing options, along with the fiscal realities of corrections, it would be very timely to explore significant expansion of such options in the coming years.

Conclusion

While it is clearly important to examine the existence of racial disparities at any stage of the system, doing so only at sentencing or any other single stage risks overlooking the systemic disadvantages that often accrue to minority defendants, as well as the cumulative effects of decisionmaking in the justice system that contribute to disproportionate rates of incarceration. While unwarranted disparities at any stage of the system should be cause for concern, we should not lose sight of the complex interaction within the system that contributes to such outcomes.

To move forward at this moment, we should continue to refine our understanding of the sources of any identified disparities, both within and outside the criminal justice system. But it is equally important to consider ways to develop structures of supervision and services that can provide appropriate sentences that further the goals of public safety while also ameliorating the particularly punitive impact of current policies on defendants of color.

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