TESTIMONY OF

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PUBLIC HEARING ON

FEDERAL SENTENCING OPTIONS AFTER *BOOKER*

IMPROVING THE ADVISORY GUIDELINES SYSTEM

FEBRUARY 16, 2012

Testimony of Matthew S. Miner, White & Case LLP[1]
Before the U.S. Sentencing Commission
Public Hearing on "Federal Sentencing Options After *Booker*: Improving the Advisory Guidelines System"
February 16, 2012

Chairman Saris and Members of the Commission, thank you for holding this important public hearing to examine the need for sentencing reform in light of *United States v. Booker*. Additionally, thank you for inviting me to testify.

Last September, I published an op-ed in the *National Law Journal* that called upon this Commission to propose reforms to address the problems and inconsistencies that have arisen in federal sentencing law in the aftermath of *Booker*. You can imagine how pleased I was when, one month later, at a hearing before the U.S. House of Representatives, Judge Saris, on behalf of the Commission, proposed a number of such reforms. Although I am certain that my editorial had little impact on the Commission's decision to put forward a set of proposed reforms – another op-ed appeared in the *National Law Journal* shortly after mine to predict that no meaningful sentencing reforms were likely in the near future – I am nonetheless gratified that the Commission has taken the significant step of engaging on *Booker* reform.

As I stated in my testimony at the same House hearing last fall, criminal sentencing is, in my view, at the very core of our system of ordered liberty. The Framers who crafted our Constitution and Bill of Rights ensured that deprivations of liberty required due process of law – and clearly incarceration is among the greatest restraints on liberty. They also provided a guaranteed mechanism to challenge the basis for governmental detention through the writ of habeas corpus. These basic constitutional controls signal that detention through incarceration was never meant to be arbitrary. The U.S. Sentencing Guidelines ("the Guidelines") and the Sentencing Reform Act of 1984 ("SRA"), as amended, provide – or at least provided prior to *United States v. Booker* – a check against arbitrariness, favoritism, racial bias, and other pernicious influences that can taint rulings within our federal sentencing system.

[1] The views expressed in this testimony are entirely my own and do not necessarily represent the views of White & Case LLP or any other attorney at the firm.

Those who have followed federal sentencing law policy over the last decade have likely heard Congressman James Sensenbrenner say, "[a] criminal committing a federal crime should receive a similar punishment regardless of whether the crime was committed in Richmond, Virginia or Richmond, California."[2] I agree with this goal, and I believe most policymakers, judges, prosecutors, and defense counsel also support the same goal.

Nonetheless, I believe our federal sentencing system is falling short of this goal. A review of the district-by-district data from the U.S. Sentencing Commission reveals just how far we've strayed from the goal of similar punishment for similar crime, regardless of jurisdiction. To cite just one example from recent quarterly data from the Commission: A defendant is more than twice as likely to receive a below guideline sentence based solely on the judge's discretion if he is arrested in the Southern District of New York (41.9%) rather than the Northern District of New York (18.8%). These two Districts are clearly not on opposite sides of the country or even across state lines. All that separates these two Districts are county lines – and apparently the very different sentencing views of the federal judges who preside there.

By all objective measures, the federal sentencing system is drifting from a guideline-based system to one driven more by luck than by law. To sum up the current state of federal sentencing, let me read a short quote from a congressional report:

> [E]very day, Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another – convicted of the very same crime and possessing a comparable criminal history – may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive wildly different prison release dates[.][3]

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[2] Statement of F. James Sensenbrenner, Jr., on Chief Justice Rehnquist's Year-End Report on the Federal Judiciary, Jan. 1, 2004, *available at* http://judiciary.house.gov/legacy/news010104.htm (last visited February 8, 2012).

[3] H. R. Rep. No. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

Although this description applies very well to current federal sentencing practices under the advisory guidelines system, it comes from the 1984 Conference Report on the SRA and describes the dysfunctional system that existed at that time – a system that Congress, in a very bipartisan effort, sought to and did repair.

The fact that a 1984 description of the pre-guideline system can be applied to current sentencing practice speaks volumes about just how much the federal system falls short of the goals of the SRA. It also speaks to how another strong legislative and policy effort is needed to restore greater order and consistency to this generation of variable discretionary sentencing. Finally, it shows how much the current system is failing to honor the statutory requirement in 18 U.S.C. § 3553(a)(6) that courts consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct" when imposing a sentence. When neighboring districts and individual judges have markedly different approaches to applying guideline sentences, one has to wonder whether our courts are considering the risk of disparity at all.

I recognize that there is a wide range of views on the structure and form that our federal sentencing laws should take. I also realize that some who favor sentencing reform disagree that our current system is broken, but rather view it as merely in need of repair. I think disagreements about whether the system is broken or merely damaged are not helpful. Much like an unreliable car, an unreliable sentencing system needs to be fixed – and that need for reform needs to be the focus.

After all, I do not believe the current system is capable of a serious defense. Who could defend a system that has had its statutory foundation stripped away from it for over the past half-decade? Who could defend a system without a statutory appellate standard? Who could defend a system with varying approaches to the Guidelines – and the gaps in the law created by *United States v. Booker* – depending on the federal circuit in which the case is heard? Or with wildly varying departure and variance rates depending on the individual district or judge involved? Under our federal system, a defendant's sentence should not be determined by the circuit, district, or corridor of the

courthouse in which the defendant is sentenced. Finally, who could defend a system in which statistics prove that racial and educational disparities are on the rise as judges drift from guideline-based sentences to a discretionary system?

I do not believe there is or should be a question about whether reform is needed. It is needed. The question should, therefore, be: What reforms should be undertaken to repair and revise the SRA? I applaud the Commission for embracing this question and focusing on the types of reforms that should be considered and implemented.

At the outset, let me state that I am in favor of the Guidelines and determinate and semi-determinate sentencing. I believe the Commission and Congress should work toward a system wherein the Guidelines are once again presumptively applicable in all cases. In the aftermath of the line of case law following *Apprendi v. New Jersey*, wherein the U.S. Supreme Court found that a maximum term of imprisonment cannot be increased at sentencing through a judge's fact-finding – a line of cases that for better or worse culminated in *Booker* and its successors – one of the only ways such presumptive effect can be achieved is through a greater reliance upon charging aggravating factors and having those factors put to a jury via a special verdict form or, in the case of a guilty plea, having the facts admitted by the defendant.

Although some naturally question whether or how well such a system would work, including whether juries could make such complex determinations, I do not share their concerns. As for a jury's capability to, for example, assess the size and degree of fraud in a criminal case, it is worth noting that juries make such findings every day in civil fraud cases through both special verdict findings and general verdicts on damages. As for the finding of aggravating factors, juries in capital cases already do so. If we are willing to trust juries to find aggravators that can determine a life or death question, we can surely trust them to find aggravators that would ultimately increase a guideline range by two or three levels.

That is not to say that all aggravators and all offense characteristics would need to be built into a presumptive system with requirements for charging and submitting the factors to a jury. Some factors should remain advisory considerations subject to the

court's discretion. Indeed, I think some factors, such as acceptance of responsibility, would need to remain advisory because it makes little sense to have such questions put to a jury in an adversarial proceeding.

There is another good reason not to give presumptive effect to every current offense characteristic and aggravator in the Guidelines: simply put, there are a lot of them. For certain crimes where a range of offense characteristics and aggravators could apply, a special verdict form would resemble a lengthy flow chart. In addition to creating jury confusion and highly complicated jury instructions, such a lengthy set of interrogatories to the jury could result in partially hung juries and inconsistent verdicts.

To avoid this risk, the factors given presumptive effect and submitted to a jury should be streamlined, and Congress and the Commission should give careful study to how best to achieve a balance between streamlined presumptive factors and those to be left to advisory guidelines and judicial discretion at sentencing. If such a system were implemented, it would also make sense for the Commission to work with the Judicial Conference to craft pattern special verdict forms for key guideline sections and chapters.

If such a reform were implemented and juries were given a greater role in sentencing to protect the Sixth Amendment rights recognized by the Supreme Court in *Apprendi* and *Booker*, Congress could once again restore a heightened appellate standard akin to what was in effect when *Booker* was decided – that is *de novo* review of the sentencing judge's findings. This appellate standard would be appropriate where key sentencing facts would have been either been found by a jury or admitted to by the defendant. Under this reformed system, the questions left for the judge at sentencing, outside of advisory considerations, would be more-or-less legal ones that facilitate the exercise of discretion historically allowed by the Guidelines – for example, where within the prescribed range the sentence would fall or whether probation or an alternative to incarceration, if allowed, would be more appropriate. These discretionary determinations, along with advisory considerations, could be made subject to a lower standard of review.

Although this is the reform I prefer – and to be clear, such a reform would require more components than I just described – I think Congress should consider a more modest

reform in the near term. Just as the SRA was not achieved within a decade of Judge Marvin Frankel's proposal of a guideline system, it could be a while before comprehensive and meaningful sentencing reform could be studied, assessed, enacted, and implemented. Many thousands of defendants would be sentenced, imprisoned, and released in that period of time under the current flawed system. Accordingly, there are some things that can and should be done now, and I believe this Commission, through Judge Saris's aforementioned testimony before the U.S. House of Representatives, has identified many of them.

When the Supreme Court decided *Booker* and struck down two provisions in the SRA, the Court made clear that the ball was in Congress's court. Those two provisions remain as nullities on the statute books, and the federal judiciary must function without a statutory appellate standard or congressional guidance on how to apply the Guidelines. This is unacceptable and should be addressed immediately.

Given all that needs fixing, to use a football analogy, our policymakers should probably aim for a first down, rather than a touchdown, here. If nothing else happens this Congress other than the passage of an appellate standard with a presumption of reasonableness for within Guidelines sentences, as allowed by *United States v. Rita*, greater uniformity would find its way into the federal system. If Congress could agree to go farther and, consistent with *Gall v. United States,* require a heightened showing for major departures from the Guidelines – with increased scrutiny on appeal – even greater uniformity would likely follow. At this point, six years after *Booker* struck down portions of the federal sentencing statute, even modest reforms would go a long way toward restoring order to the system. Such modest reforms, which are supported by this Commission, could then hold the tide to allow for more meaningful study and debate between the branches and the two houses of Congress. In fact, I would hope that, if only a modest reform could be accomplished, Congress would mandate a Sentencing Commission study of the larger, longer-term solutions that should be considered.

The Commission has proposed additional modest reforms that I think should be considered by Congress as it contemplates more comprehensive changes to the system.

One common sense reform that Congress must address is the discord between the treatment of offender characteristics in the statutes that govern individual sentencing (18 U.S.C. § 3553(a)) and the Commission's promulgation of the Guidelines (28 U.S.C. § 994(e)). These two statutes appear to be in conflict insofar as one requires judges to consider "the characteristics of the defendant" in imposing a sentence, yet the other directs the Commission to regard many offender characteristics as inappropriate considerations under the Guidelines. These two statutes must be reconciled to provide clear guidance to the Commission and the courts.

I also support the Commission's proposal for heightened appellate scrutiny for sentencing decisions that are based upon policy disagreements with the Guidelines. At the outset, let me confess that I have a very negative view of courts wading into policy matters when adjudicating issues in individual cases. The Commission has a well-defined role that is guided by sentencing data, staff analysis, public comment, and hearing testimony like that provided today. Moreover, the Commission's role and individual guidelines are responsive to statutory obligations and directives that were enacted by the two political branches. Accordingly, heightened appellate scrutiny is needed for variances and departures that are based upon policy disagreements, especially where the guideline provision at issue was informed by statute.

The Commission's proposal to afford "substantial weight" to the Guidelines is also worthy of consideration as a short term remedy. I believe a longer term solution should, however, consider how much weight courts should give individual sentencing factors and offense characteristics across the broad range of criminal statutes encompassed by the Guidelines. Unlike some who favor sentencing reform, including some of the reforms I propose and support, I also see the merit of mandatory minimum sentences in appropriate contexts. Because our system currently has a mix of mandatory minimum sentences and advisory guidelines – and because I would like to incorporate into that mix another set of presumptively applicable guidelines that would be subject to the Sixth Amendment protections afforded by *Apprendi* – I think it is worthwhile for policymakers to take a step back when developing comprehensive reform and carefully consider where to place offenses and offense characteristics along the spectrum from

mandatory minimum sentences to advisory considerations. Some crimes and offense conduct deserve to have a hard floor to establish sentencing expectations, deter particularly repugnant conduct, and safeguard the public and victims from early release and recidivism. Other crimes and offense conduct, while not meriting an absolute hard sentencing floor, nonetheless call for the mandatory consideration of important sentencing factors to ensure consistent application of reasoned policy judgments, while still allowing for case-specific application of approved factors, such as a defendant's role in the offense or acceptance of responsibility. The placement of particular offenses and offense characteristics across this spectrum is, in my view, a necessary component to any long-term comprehensive sentencing reform. I also believe that the existence of a presumptive Guideline category could reduce the need for, and expansion of, mandatory minimum sentences. A careful study of the options along the spectrum could, therefore, reduce the number of statutory mandatory minimum penalties.

In addition to the above reforms, I believe other reforms should be considered by Congress and evaluated by the Commission while sentencing reform is under debate and consideration. As I mentioned in my testimony before the House Judiciary Committee last fall, Senator Tom Coburn has proposed significant budget-based reforms to the Commission, including the reduction of the Commission from seven to three members. Given that the Securities and Exchange Commission, with a much broader portfolio and an adjudicatory role, functions with five members, it makes sense to consider reducing the Commission's size to achieve greater efficiency.

It also makes sense to create a mechanism to publish written dissents to Commission rulemakings, which could inform congressional decision-making on whether to approve or disapprove new amendments. Whereas commissions subject to the Administrative Procedure Act frequently publish written dissents that inform public and congressional debate, the U.S. Sentencing Commission does not currently do so. Insofar as Congress is called upon to evaluate all Commission amendments before they become final, it makes sense to provide Congress with the opposing arguments to controversial amendments.

To alleviate the tension that sometimes develops between the Commission and Congress on major reforms, it is worth considering a ratification procedure akin to that proposed in the REINS Act for Commission amendments that significantly impact sentencing levels or factors. Under such an approach, any amendment that would have a major impact on the sentencing level prescribed for an offense (e.g., by more than 15%) would require affirmative congressional approval, unless the Guidelines amendment was itself prompted by a congressional directive.

Finally, I think changes within the Guidelines can go a long way to improving the perception and application of the Guidelines in individual cases. Such changes might include adjusting the fraud guidelines to account more accurately for relative culpability, eliminating the Guidelines' sometimes bizarre and inconsistent treatment of misdemeanor offenses, and updating Specific Offense Characteristics in the child pornography guidelines to better address modern technology and the means by which sophisticated offenders seek to build networks and evade detection.

Conclusion

As I told the House Judiciary Committee last fall, something clearly needs to be done to repair the gaps left by the Supreme Court's remedial holding in *Booker* and to provide greater clarity and consistency to our federal sentencing system. The then-recent appellate decision and related news stories surrounding convicted terrorist Jose Padilla's sentencing illustrate the flaws and uncertainty in our federal sentencing system. The trial court sentenced Jose Padilla to 17 years in prison – little more than half of the minimum term prescribed by the Guidelines. That sentence would have stood had two of the three judges on appeal not found it to be substantively unreasonable and reversed the lower court's ruling. The third judge sharply dissented, arguing that the majority was intruding on the lower court's broad sentencing discretion post-*Booker*. Although some fault the district court for imposing an overly lenient sentence and others fault the appellate court for second-guessing the district judge's discretion, what happened in Padilla is merely a symptom of the current sentencing system that is only loosely moored to the federal sentencing Guidelines and divorced from any well-defined standard of appellate review.

Given that this is how the federal government determines how and whether to incarcerate its citizens, it should be clear that we can and must create a better system. At a minimum, we need to repair the system that was rendered incomplete by the *Booker* decision. To that end, I commend the Commission for holding this hearing and proposing specific reforms.

Again, I thank Chairman Saris and the Members of the Commission, and I look forward to answering any questions that the Commission may have.