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I am pleased to have the chance to testify once again on behalf of the Sentencing Commission's Practitioners Advisory Group. As members of one of the Commission's three standing advisory groups, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

As private practitioners who deal with sentencing issues day in and day out, our members start from the premise that any system of sentencing will be significantly imperfect. That is an unavoidable result of the inherent tension between the various goals embodied in the Sentencing Reform Act. These goals include the avoidance of unwarranted disparity, the avoidance of unwarranted uniformity, the promotion of proportional punishment, the need to take into account relevant characteristics of the offense as well as the offender, and efforts to further the multiple purposes of punishment set forth in 18 U.S.C. § 3553(a)(2). Once proper balance has been achieved, the promotion of any one of these goals often will be to the detriment of one or more of the others. The challenge, we submit, is figuring out which mix of imperfections is the optimal one.

In the testimony that follows, we offer the PAG's perspective on how the advisory Guidelines system is operating, followed by our assessment of certain legislative proposals that might augment the advisory regime. We believe that the proposed legislative changes are unnecessary, and there is a very good chance they would be counterproductive.

Experience under the advisory Guidelines

As practitioners, we see much to be said for the system we have now: an advisory regime in which courts start with a Guidelines calculation, then take account of possible grounds to depart where applicable in that case, and then broaden the inquiry to the various considerations set forth in the statute, including various factors and circumstances peculiar to that case. For practitioners on both sides of the courtroom, the advent of *Booker* has fostered (indeed, compelled) great improvements in sentencing advocacy.

For many practitioners, the universe prior to *Booker*[1] was the Manual and little else. The opportunity for a court to take proper account of factors showing how a lower sentence would be sufficient, yet no greater than necessary, was confined mainly to arguments for a downward departure. (The same was true for government attorneys seeking an above-Guidelines sentence.) Those opportunities for defense attorneys were relatively rare, because the Guidelines specifically prohibited many grounds for leniency and placed many others at discouragingly high eligibility thresholds. Facts emphasized at sentencing typically were arcane details given prominence only by a coincidental aspect of a particular Guideline's structure, such as a long fight over a loss calculation because, under the circumstances, a few dollars one way or the other could change the defendant's sentence in a meaningful way.

Contested sentencing hearings were dispiriting exercises, even when we happened to prevail on one or more of the disputed factors. To truly understand the disconnect between a

[1] *United States v. Booker*, 543 U.S. 220 (2005).

careful balancing of the purposes of sentencing, on the one hand, and what often transpired during a federal sentencing hearing, on the other, all one needed to do was sit in on a meeting with a defendant – or with a defendant's parent or spouse or child – while one of us tried to explain to them how the sentencing hearing would likely unfold.

Booker, of course, did not do away with the Guidelines. Instead, *Booker* reinvigorated several long-overlooked dimensions to the sentencing process. A judge's greater ability after *Booker* to consider a wide variety of information produced a corresponding mandate for practitioners to provide more information. We find that our colleagues now pay even more attention to our clients as people: they take a more penetrating look at their personal attributes, their social contributions, and their precise conduct in the offense – among other factors – because all of these now can make a greater difference in the sentencing outcome.

We pay significant attention to the fundamental purposes of sentencing: we give thought to concepts like deterrence, recidivism, and retribution, as we always have. But the focus has shifted from the abstract to how these things apply to our particular clients. And, as a group, we pay more attention to advocacy: we invest significant thought and effort in our written work and in our factual presentations, both in the courtroom and in our communications with probation officers, because this attention can make more of a difference in the final analysis. We provide probation officers and judges with more information to consider because, post-*Booker*, more information is now more important. And in our experience, more information makes sentencing more informed.

This is not to say that we pay any *less* attention to the Sentencing Guidelines. Advisory Guidelines remain an integral component of the sentencing process. Courts still routinely begin the sentencing process by calculating the Guidelines and determining the advisory range for the defendant's punishment. It is our collective experience that the courts discharge this obligation every bit as seriously and carefully now as they did before *Booker*. Given our experience (confirmed by the available data) that judges vary from the advisory range over the objection of the government in only a small percentage of cases, every participant in the sentencing process recognizes the gravity of the Guidelines calculation.[2] All understand that the calculation is not just the starting point, but – rather frequently – also the ending point in determining the range of potential punishment. An appellate court's presumption that sentences within the correct Guidelines range are reasonable adds that much more significance to the calculation process at the district court level. We fully understand – as does every judge – that a "Guidelines sentence" will be easier to defend on appeal than even a modest variance.

[2] The Commission reports how often a below-Guidelines sentence is "sponsored" by the government. Those data do not include, however, the large number of cases where the government acquiesces in a particular result, usually by taking no position or affirmatively stating that the government does not object. When the government does not oppose a sentence, it is a reliable sign that the outcome is sufficient to serve the purposes of the Act.

Possible statutory changes

It is with that perspective in mind that we comment on some of the possible avenues for legislative change, as set forth in the Chair's congressional testimony on October 12, 2011. Our reaction is threefold:

(i) The system is working well, as I have just explained. To the extent changes might be needed, the Commission should target particular Guidelines or offenses, rather than sponsor across-the-board legislative measures.

(ii) If the proposed changes are meant as substantive revisions to the results of the Supreme Court's effort to sever the unconstitutional parts of the Sentencing Reform Act, those changes are themselves likely to be unconstitutional. At a minimum, it will take substantial litigation – with potentially inconsistent results among the circuits over a number of years – to get to a final answer that applies evenly across the country. The confusion and uncertainty during the intervening years will produce unwarranted disparity.

(iii) If the proposed changes are meant simply to codify what the Supreme Court has already held, they are unnecessary. Enacting a law that does not change the law is a recipe for confusion and an invitation for more wasteful litigation.

What follows is our brief assessment of the proposals.

1. More robust appellate review

A. A presumption of reasonableness at the appellate level

As the Chair's testimony noted, the Supreme Court's *Rita* decision[3] permits – but does not require – appellate courts to apply a presumption of reasonableness to a sentence that is imposed within the applicable Guidelines range. As a matter of how the law is expressed, some circuits have not adopted the presumption of reasonableness. But, as a practical matter, the lack of such a presumption means nothing, because we are not aware of any case where the absence of an appellate presumption of reasonableness affected the outcome.

There are multiple kinds of presumptions in the law. When it comes to asking what effect a presumption of reasonableness will have on the ultimate sentence, it surely is the weakest presumption of them of all. As the Supreme Court has explained, a rebuttable presumption of reasonableness on appeal "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."[4] In those courts where the presumption operates, then, it is nothing more than a reminder. More specifically, it is a reminder that a particular statement of fact usually – but not always – is true. Here, the presumption of reasonableness simply reminds appellate judges that if a district judge

[3] *Rita v. United States*, 551 U.S. 338, 350 (2007).

[4] 551 U.S. 338, 350-51 (2007).

gets to a result that is in agreement with the range recommended under the Guidelines – *and* if the district judge gets there *without* giving a presumption of reasonableness to the Guidelines[5] – then chances are good that the result will be a reasonable one.

Because this presumption is just a prediction about the truth of a particular fact, though, an appellant is free to demonstrate why it does not hold true in a given case. It is no different from a law that reads: "It is presumed that the sky will be blue on summer days in Washington D.C." As long as the parties are allowed to present evidence of what the weather was like on the summer day in question, the presumption has no effect on where the court ultimately comes out.

It is hardly surprising, then, that *Rita* did not require all appellate courts to adopt a presumption of reasonableness. In a case where the presumption and reality are in accord, the court of appeals will find the sentence reasonable. In a case where the appellant offers legitimate bases for rejecting the presumption, the court will put the presumption aside and more closely explore the facts and circumstances to decide whether the sentence was reasonable. In either event, the presumption will not have affected the outcome. If such a presumption could affect the outcome in some cases, there would have been no basis for the Supreme Court to make it optional.

In short, the only result of any consequence from legislating an appellate presumption of reasonableness for within-Guidelines sentences would be litigation fueled by the natural reluctance to believe that Congress passed a law knowing it would have no practical effect.

B. Greater justification required for greater variances

As with the appellate presumption of reasonableness, a requirement that larger variances be accompanied by proportionately greater justifications would require the courts to choose between invalidating the law as unconstitutional or interpreting it to do no more than the Supreme Court has already required. Neither result would be beneficial.

Context here is important. When the Supreme Court in *Booker* held it unconstitutional to use mandatory Guidelines without the benefit of jury findings for sentence-enhancing facts, the remedy was to excise enough of the Act to allow it to operate in a constitutional manner. The Court had no authority – nor did it purport to exercise a non-existent authority – to make any changes to the Act that were not compelled by the Sixth Amendment or another constitutional provision.

In *Gall*, the issue was "whether a court of appeals may apply a 'proportionality test,' and require that a sentence that contains a substantial variance from the Guidelines be justified by extraordinary circumstances."[6] The Court held it "clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with

[5] The Sixth Amendment does not allow *district courts* to give the Guidelines a presumption of reasonableness. *Rita*, 551 U.S. at 351.

[6] *Gall v. United States*, 552 U.S. 38, 40-41 (2007).

sufficient justifications."[7] The Court also held, consistent with reasonableness review, that "appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines."[8] The Court found it "uncontroversial that a major departure should be supported by a more significant justification than a minor one."[9] If that is what a new law would tell courts to do, there is no need for a new law.

If, however, the intent here is to impose a more exacting requirement of proportionality, or to reduce the deference owed by appellate courts, it would likely "come too close to creating an impermissible presumption of unreasonableness for sentence outside the Guidelines range."[10]

Admittedly, this is an area where the lines between permissible and impermissible are far from bright. But the underlying Sixth Amendment concern here is a serious one, and fiddling with the formulation set forth in *Gall* is sure to sow confusion and inconsistency in approaches.

Here is one way to look at the problem. Suppose a defendant is looking at (a) 63 – 78 months if a contested enhancement applies (such as drug amount or loss amount), (b) 97 – 121 months if an additional (and also contested) 4-level enhancement applies, or (c) 24 – 30 months with neither enhancement. Under a strong proportionality requirement, if the judge finds only the first enhancement, the defendant would need to present a certain degree of mitigating evidence to get back to the point where the judge could sentence in the unenhanced range (*i.e.*, between 24 and 30 months). And if the judge were to find that both enhancements applied, the defendant would need to come up with an even greater quantum of compelling mitigating-factor evidence to be eligible for a sentence of 24 – 30 months. In a world in which the defendant lacks sufficient mitigating evidence to justify a variance from 97 months to 30 months, the judge's factual findings will have meant the difference between a sentence in the lower range and a sentence much higher. In other words, the only way the higher sentence could be imposed is if the judge makes certain findings of fact, and the only way the lower sentence could be imposed is if the judge does not make those findings. Allowing the judge, instead of a jury, to "find the existence of any particular fact that the law makes essential to his punishment," is a Sixth Amendment violation under *Booker*.[11]

The question, then, is whether the marginal benefit of a test that tries to go beyond what *Gall* has said to district judges – that "a major departure should be supported by a more significant justification than a minor one" – is worth the inconsistency that the courts will create with different interpretations of the new test as well as different rulings as to its constitutionality. We do not see how a law could be written that is worth that cost.

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[7] 552 U.S. at 46.

[8] 552 U.S. at 47.

[9] 552 U.S. at 50.

[10] 552 U.S. at 47.

[11] 543 U.S. at 232 (internal quotation marks and citations omitted).

C. Heightened standard of review for sentences imposed as a result of a "policy disagreement"

We oppose efforts to create a separate standard of review for particular types of variances. It would be unwieldy and add little to what the law already provides.

The first problem is telling the difference between a "policy disagreement" and a determination that a particular defendant's circumstances (either based on the nature and seriousness of the offense or offender characteristics) warrant a sentence other than one the Guidelines call for. Take, for example, a familiar scenario: the disparate treatment of crack and powder cocaine sentences before the penalties were recently modified. Some judges explicitly stated that they would sentence using a ratio other than 100:1 (*e.g.*, 20:1 or even 1:1). Other judges considered what prompted the higher ratio – such things as a greater risk of violence or greater perceived harm from the drug itself – and varied downward because those factors did not manifest themselves in a particular case. Would the latter sentence be based on a "policy disagreement," or would it be a defendant-specific determination that the purposes of punishment could be served by a shorter sentence?

And what about a case where the judge includes a "policy disagreement" as one of several factors? Would this heightened review be applied in some proportionate manner to only part of the variance, and how would that work if the judge did not say how much weight was given to that factor? Would heightened review apply at all if the judge suggested he would have reached the same result even without a policy disagreement? Can this heightened review survive the Sixth Amendment challenges mentioned above, especially when heightened review means that a judge's factual findings necessary to reach a higher range under the Guidelines would make the difference between a higher sentence and a lower one?

Beyond the practical difficulties of implementing such a rule, we see no reason to discourage an examination of the efficacy and wisdom of particular Guidelines as judges apply those Guidelines on a case-by-case basis. District judges have a unique perspective – they sentence hundreds of defendants every year. They are better positioned than appellate judges to assess whether a particular Guideline does what it is supposed to do in the real world. Far from undermining the work of the Commission, judges who express "policy disagreements" with the Guidelines enrich, rather than detract from, the ongoing dialogue of how to design Guidelines that best serve the goals of sentencing. Moreover, as the experience with the crack cocaine and child pornography Guidelines illustrates, disagreements expressed by the courts can serve as the impetus for important debates over changes in the sentencing of categories of cases. Nothing more is needed to police against "unreasonable" policy disagreements than a reasonableness review standard.

The Supreme Court will no doubt be asked to resolve the role of policy disagreements under the current appellate framework, where the test is whether and when heightened review would be constitutional. Attempting to superimpose a statutory gloss in the middle of this process would only postpone that resolution and complicate the nature of the inquiry.

2. Resolving the supposed tension between 28 U.S.C. § 994(e) and 18 U.S.C. § 3553(a)

We do not believe there is irreconcilable tension between (1) the statutory direction to the Commission to assure that the Guidelines reflect "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in "recommending a term of imprisonment or length of a term of imprisonment," 28 U.S.C. § 994(e); and (2) the directive to judges to consider the "history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). The decision to impose a prison term or to lengthen that term cannot properly hinge on the fact that a defendant has a lackluster employment record, needs education or vocational skills, has no meaningful family ties or responsibilities, or lacks community ties. That is all encompassed within the "general inappropriateness" part of Section 994(e).

That directive to the Commission should not – and does not – prevent a judge from considering these same factors in deciding whether to lessen the length of imprisonment. For example, family responsibilities might justify a downward variance for an otherwise appropriate candidate. The Senate Report to the Act specifically noted that for defendants in need of education and vocational training, "the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training," unless some other purpose of sentencing warranted a prison term. *See* S. Rep. No. 98-225 at 171 & n.531 (1983). The Report also stated that "each of these factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community. The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties." *Id.* at 174-75.

If any change is made in this area, it should preserve the power of judges to take account of such defendant characteristics in this manner.[12]

[12] We note that as part of its institutional role, the Commission regularly collects and publishes data concerning sentences imposed. *See* 28 U.S.C. § 994(w). The federal sentencing system relies on important feedback loops. When judges impose sentence, they often include in their statement of reasons comments on the adequacies and inadequacies of existing Guidelines, which gives the Commission an opportunity to consider amendments to improve those Guidelines. Chapter 5H was recently amended in response to such feedback.

In addition, when a court imposes sentence, the materials it may choose to consider include statistical data regarding sentences previously imposed. These data give parties to a sentencing hearing the opportunity to understand more fully national, regional and local trends with respect to sentences imposed for certain offenses or offenders, and likewise to measure a proposed sentence against such trends in an effort to, among other things, avoid unwarranted disparities. We understand that the Commission often responds to particular requests by judges for data that would assist in formulating an appropriate sentence. The PAG is willing and available to work with Commission staff on identifying ways to improve the availability of various categories of data, with the hope that the Commission would ultimately encourage judges, through a policy statement or otherwise, to consider these pertinent sentencing data when imposing sentence.

3. Codifying a three-step approach to imposing sentence

As the Chair testified, judges still include consideration of departures as part of a three-step process for arriving at a sentence. That is, they calculate the advisory Guidelines; they look to possible ground for departure raised by the parties; and, finally, they consider all other relevant factors and purposes under Section 3553(a) to arrive at a sentence sufficient, but not greater than necessary. One circuit – the Seventh – has declared departures obsolete.[13]

We do not believe that this isolated difference in approaches warrants an Act of Congress. Those of us who practice in the Seventh Circuit still invoke departure provisions where relevant to a particular case. And judges still rely on departure language to sentence below the Guidelines in the Seventh Circuit. In fact, they do so at a rate *greater* than the national average: in 5.3% of cases compared to the national rate of 3.1%.[14] We do not believe it is necessary to codify an approach, already contemplated in the case law, in which judges consider the possibility of departing in addition to looking at factors outside the Guidelines or policy statements. And we worry about giving the mistaken impressions either that judges should launch *ex parte* missions to find ways to depart when the parties have focused on Section 3553(a) factors, or that Guidelines Manual language (including policy statements) restricting departures could somehow limit the grounds for outside-the-Guidelines sentences.

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None of what we say here is meant to discourage the Commission from undertaking continued improvements in particular areas. We welcome, for example, the Commission's willingness to consider the possibility of changes in the theft and fraud Guideline to avoid an overemphasis on loss amount or the number of victims. We believe that one significant factor in differing rates of within-Guidelines sentences across districts is that the government and the courts have different ways, in different parts of the country, of addressing overly severe penalties various offenses, including fact-bargaining and charge-bargaining.

Apart from these offense-specific areas of potential improvement, our overall experience as practitioners in the field is that the post-*Booker* sentencing process is working well. Recognizing that no system is perfect, the imperfections that we see do not warrant the proposed across-the-board changes.

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[13] *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2006).

[14] FY2010 Sourcebook, Table N-7 (identifying below-Guidelines sentences based in whole or in part on a departure rationale).