Summary of Testimony, U.S. Sentencing Commission, February 16, 2012

Public Hearing on Federal Sentencing Options after Booker

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> "Feedback the Commission has received suggests that district court judges generally view the appeals process as functioning well … District court judges generally consider proper the discretion afforded to them under the *Booker* standard of review. Indeed, 75 percent of federal district judges believe that the current advisory guidelines system best achieves the purposes of sentencing."
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> "In fiscal year 2010, the courts imposed sentences within the applicable advisory guideline range or below the range at the request of the government in 80.4 percent of all cases: 55.0 percent of all cases were sentenced within the applicable guideline range, 25.4 percent received a government -sponsored below range sentence. In fiscal year 2010, the non-government sponsored below-range rate was 17.8 percent, and the rate of sentences imposed above the guidelines range was 1.8 percent." (**Prepared testimony Judge Patti B. Saris, Chair, United States Sentencing Commission before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives, October 12, 2011**)

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"Solutions in Search of Problems"

The two passages I've taken from Judge Saris's testimony for use as epigraphs tell the tale. Despite the tortured process through which it has been created, the American federal courts now have about as sensible, workable, and just a sentencing system as they are likely to get in our time. Eighty percent of sentences fall within the applicable guidelines or with government approval below; that's about the same as under the most admired state guidelines systems. Most district court judges believe the system is working well; they are the people who are most likely to know.

Of the three proposals set out in Judge Saris's testimony, the first—a more robust appellate review standard—is unnecessary. There is no evidence that the current system is working badly. Discontent among court of appeals judges is not evidence; that just shows that they liked to micro-manage the decisions of trial judges. The second—clarification of arguably inconsistent statutory language—is dangerous since it would risk reducing judicial authority to individualize sentences in ways most sentencing judges believe is just and appropriate. The third—codifying the three-step process—is unnecessary.

Other people will no doubt give their views on the three recommendations in detail, so I see no value in elaborating on mine here. Instead, in three steps I explain why the current federal sentencing system for all its imperfections is about as good as is obtainable. First, I offer a few salient reminders about the history of the federal guidelines. Second, I explain why—architecturally—Booker inadvertently produced a sentencing system at least as well placed as any other in the U.S. to prevent gross injustices (at judges' hands, that is; Congress in general

and individual federal prosecutors in particular bear responsibility for unconscionably lengthy mandatory minimum sentences). Third, I explain why the existing 80 percent compliance rate is about as high as can be expected.

I. The History

The early US Sentencing Commission during Judge Wilkins's chairmanship was basically a rogue agency, aspiring to be "a junior varsity Congress" as Justice Scalia put it. Rather than attempt to insulate the sentencing system from emotion and political partisanship as Judge Marvin Frankel first proposed in *Criminal Sentences—Law without Order*, that initial commission attempted to set substantive, and tougher, sentencing policies. Along the way, it ignored the statutory language calling for a presumption against imprisonment for most first offenders, attempted to nullify 18 U.S.C. § 3553(a), radically reduced the use of community penalties except as part of a split sentence involving prison time, attempted to rewrite the 1984 Act by referring to the presumptive guideline system it authorized as "mandatory" guidelines, and ignored the by-then-extensive state experience with successful guidelines.

The first three points are self-evident. The last two may benefit from explanation.

a. **"Mandatory" Federal Guidelines**. The Sentencing Reform Act of 1984 was a successor to a continuous series of Senate bills, beginning with S.B. 181, introduced by Senator Edward Kennedy in 1974, all of which called for establishment of "presumptive" sentencing guidelines, as any plain reading of the text of the '84 Act reveals. The conventional language then distinguished between "voluntary" (or advisory) guidelines and presumptive guidelines. Many states experimented with voluntary guidelines in the1970s and by the mid-'80s a near-consensus view emerged that presumptive guidelines, backed up by appellate sentence review, were a more effective means to reduce sentencing disparities.

The 1984 Act does not mention "mandatory" guidelines. No such system existed (and none has since been created except in a loose sense in North Carolina's state prison admission guidelines). "Mandatory" then as now in relation to sentencing refers to laws in which the legislation requires the judge to impose at least a designated sentence on every person convicted of a particular offense. That was never the legal status of the federal guidelines.

In the late 1980s and early 1990s, however, Commission members, publications, and staff began to refer to the guidelines as mandatory. This they never were, as statutory provisions on sentence appeals and even the Commission's rules on valid and invalid bases for departures made clear. Use of that term, however, may have reified the statutorily presumptive guidelines system in the minds of commission members and appellate judges into something they were not—mandatory.

b. **State Experience**. By 1985 when the federal commission began its work, there were 15 years of experience with state guidelines. Presumptive guidelines systems in Minnesota, Washington, and Oregon had been convincingly shown to have reduced unwarranted disparities, especially in

relation to race and ethnicity, and to have made correctional populations predictable, which greatly aided rational planning by corrections departments and legislatures.

Through trial and error, states had learned what does and does not work. The U.S. Sentencing Commission ignored that learning. Lots of examples could be given, starting with the "relevant conduct" rule which called for sentencers to take account of uncharged and acquitted behavior (every state commission before and after rejected that out of hand). Here are two especially important examples. First is the problem of what came to be known as the "sentencing machine." Washington's commission for a time considered adopting a grid with 30 levels of offense severity, but quickly abandoned the proposal when the commission recognized that sentencing judges believe themselves to be in the business of imposing just punishments and would be fundamentally alienated from a mechanical system that was not intuitively plausible on its face. A "just" sentence that could be determined only after plugging a series of variables into an algorithm (effectively what the federal guidelines do) is not only not intuitively plausible. It is alienating. The mechanical, non-intuitive, arbitrary character of the commission's "mandatory" guidelines is a principal reason why pre-**Booker** trial judges hated them.

The second important lesson not learned from the states is that judges and other courtroom participants generally believe that within specified bounds just sentences should be individualized to take account of the offender's situation and circumstances. A vast literature on mandatory minimum sentences, going back centuries, shows that judges, lawyers, and juries often circumvent their imposition if they require punishments more severe than courtroom actors believe to be just. Some legislators may fume about "frustration of the legislative will," but that's how it always has been and always likely will be. As anyone familiar with the federal guidelines system knows, it was not only judges and defense counsel who wanted to—and did—avoid imposing unduly severe punishments called for by mandatory minimums and "mandatory" sentencing guidelines. Prosecutors were willing accomplices.

If the U.S. Sentencing Commission had paid attention to the state experience on these two crucial points, and many lesser ones, the guidelines would have looked very different, been resisted less vigorously, and been circumvented less often.

II. **A Better Mousetrap**

For mostly ill, the initial members of the U.S. Sentencing Commission adopted "mandatory" guidelines. Fixing them eventually required a series of sometimes tortured U.S. Supreme Court decisions. In the end, the system is not so bad, for two reasons.

First, it addresses the greatest injustices in sentences imposed by individual judges—aberrantly harsh, disproportionately severe punishments. From the beginning in the eighteenth and early nineteenth centuries of sustained efforts to think about just punishment, nearly all normative theorists have agreed that disproportionately severe punishments are unjust. Jeremy Bentham, the prototypical utilitarian (now we say "consequentialist") punishment theorist, believed that punishment can be justified only by its good effects. Immanuel Kant, the prototypical retributive theorist, believed that punishments must be closely proportioned to the

offender's blameworthiness. Each, however, believed that punishments more severe than his calculus would permit were fundamentally unjust.

Similar ideas are expressed and supported in our time. The second edition of the **Model Penal Code**, for example, endorses "limiting retributivism," the idea that offenders may sometimes, perhaps often be punished less than they deserve but never more. In much of Northern Europe, the prevailing theory is "Asymmetric proportionality," which expresses much the same ideas. Most civil law countries in Europe have tight doctrinal limits on the maximum severity and proportionality of sentences in individual cases

Booker simply treats the upper limit of a guideline range as the severest allowable punishment, and forbids judges to punish more severely unless the defendant has been charged and convicted for a more serious offense. That's not exactly the same as limiting retributivism or asymmetric proportionality, but it comes pretty close. And it creates a bar to aberrantly severe punishments capriciously or idiosyncratically imposed by individual judges.

Second, within the upper limit that *Booker* prescribes, judges by themselves and in concert usually—in a world in which negotiated pleas are the norm—with prosecutors and defense lawyers, can take account of offenders' situations and circumstances that they believe just and appropriate. In the pre-1987 federal indeterminate sentencing system, the absence of upper limits short of statutory maxima invited idiosyncratically and at least occasionally aberrantly severe punishments. In the post-*Booker* federal sentencing system, upper limits are constrained and the risks of disproportionately severe punishments are much reduced.

III. The Limits of the Possible

It is unrealistic verging on naïve to imagine than any sentencing system can substantially eliminate disparities between sentences imposed in different courts in a country a continent wide. It is equally unrealistic to imagine eliminating or dramatically reducing disparities within a single state. Every state sentencing commission which surveyed state sentencing patterns as part of its work learned that there are significant differences in rural, suburban, and urban sentencing patterns and often learned that communities of the same size in different parts of a state have distinctive sentencing patterns. There is nothing surprising about that. Local judges, prosecutors, defense counsel, and probation officers inevitably more or less strongly reflect the cultural norms and moral beliefs prevalent in their communities. These differ widely within a state and it would be astonishing if they did not influence sentencing patterns. They do—markedly.

What's true of a single state in the nature of things is true in a country well-known to be characterized by major regional differences in cultural traditions and political beliefs. The U.S. Sentencing Commission, like every other sentencing commission, learned that there were major differences in sentencing patterns in the United States and either naively or in willful denial pretended that guidelines can substantially alleviate them.

It's not true, as figures 1-3 (and the accompanying tables presenting data numerically) show. The figures show within-range sentences, substantial assistance departures, aggravated

departures, and mitigated departures in six federal district courts in 1991, 2000, and 2010. Two of the districts were selected because they had especially low departure rates in 1991, two because they had especially high departure rates, and two because their departure rates reflected national means.

There were dramatic differences in formal guidelines compliance in 1991in terms of percentages of cases falling within guidelines ranges—above 95 percent in two districts, around 80 percent in two districts, and just above 50 percent in two districts. Among the districts with lower compliance rates there were major differences in the roles played by substantial assistance motions and other mitigated departures.

Those patterns repeat in 2000 and 2010—both in which districts have distinctive levels of within-range sentences (especially when within range and substantial assistance are combined) and between districts in which substantial assistance motions are common and those in which mitigated departures are common. Each of the six states relative to the others is in recognizably the same place in 1991, 2000, and 2010 and carries on its own distinctive practices throughout (though Arizona patterns show the distorting influence of a huge increase in immigration offenses). No system of federal guidelines is going to produce similar sentencing patterns in Arizona, Maine, Louisiana, and Philadelphia.

From that perspective, that 80 percent of federal sentences nationally fall within ranges or result from substantial assistance motions is little short of remarkable. If revised guidelines achieve seemingly higher levels of compliance, it will only because new methods of circumvention have developed.

U.S. Sentencing Commission, 1991 Annual Report[1]

Figure 1:

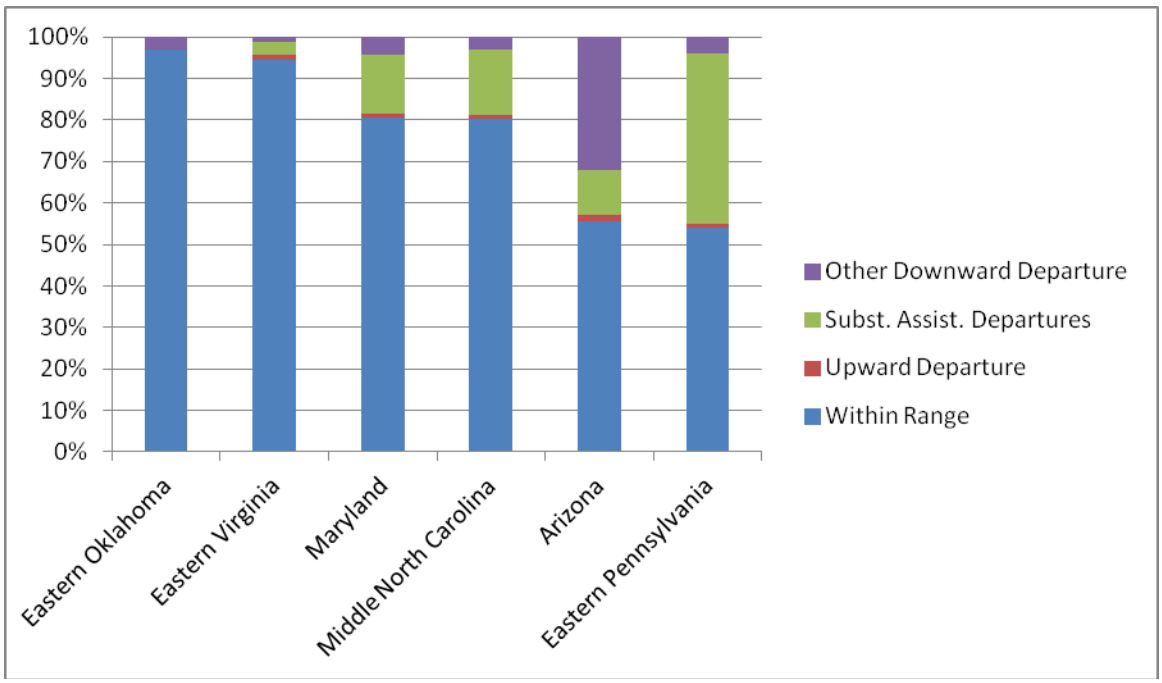

Table 1:

1991	Within Range	Upward Departure	Subst. Assist. Departure	Other Downward Departure
East. Oklahoma	96.8	0	0	3.2
East. Virginia	94.5	1.1	3.1	1.3
Maryland	80.6	0.8	14.3	4.2
Middle North Carolina	80.3	1	15.8	2.9
Arizona	55.7	1.4	10.9	32
East. Pennsylvania	54	1	41	4

[1] I was forced to use the 1991 report because the 1990 report randomly selected only 10 districts as opposed to giving data on all districts.

U.S. Sentencing Commission, Office of Policy Analysis, 2000 Datafile, OPAFY00[2]

Figure 2:

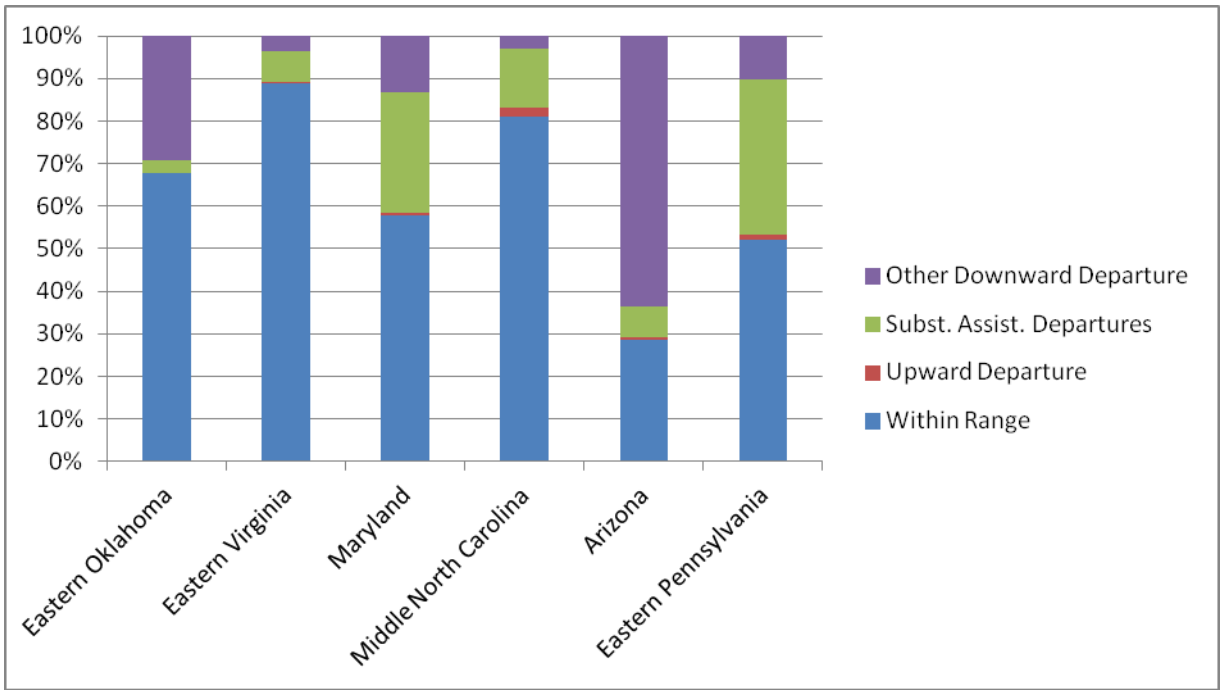

Table 2:

2000	Within Range	Upward Departure	Subst. Assist. Departure	Other Downward Departure
East. Oklahoma	67.7	0	3.1	29.2
East. Virginia	89	0.1	7.4	3.5
Maryland	57.7	0.8	28.2	13.3
Mid. North Carolina	81.2	2	13.9	3
Arizona	28.6	0.6	7.2	63.5
East. Pennsylvania	52.2	1.1	36.6	10.2

U.S. Sentencing Commission, 2010 Datafile, OPAFY10.

[2] http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/

Figure 3:

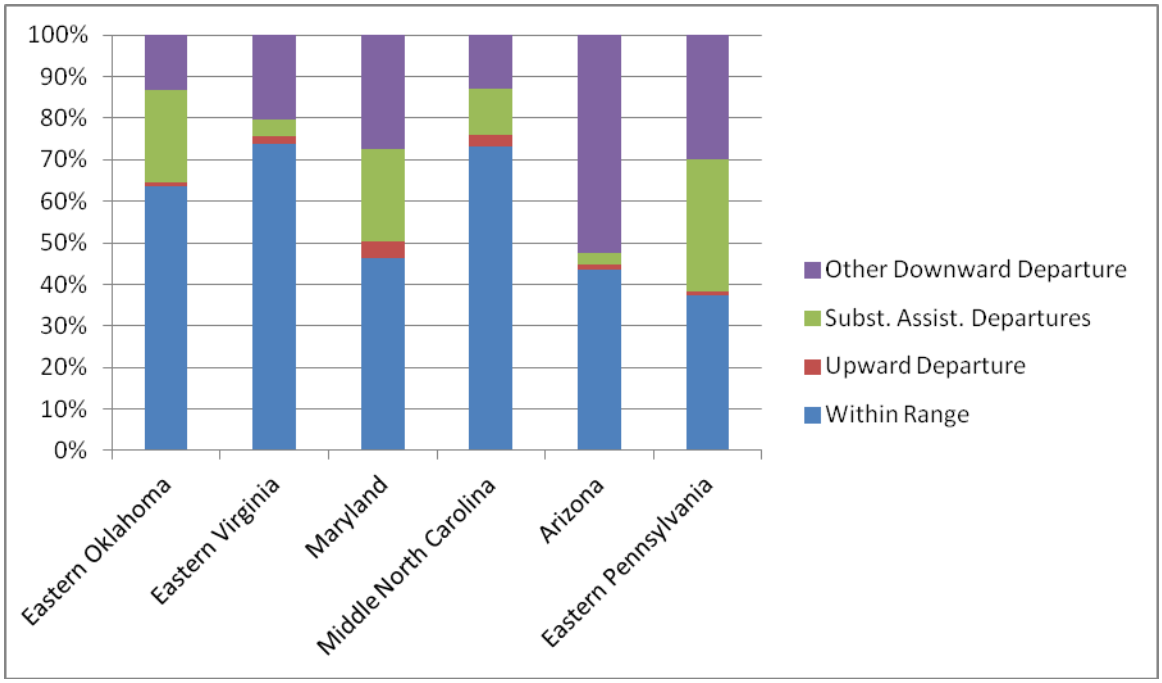

Table 3:

2010	Within Range	Upward Departure	Subst. Assist. Departure	Other Downward Departure
East. Oklahoma	63.7	0.9	22.1	13.3
East. Virginia	73.7	1.9	4.1	20.3
Maryland	46.2	4	22.3	27.3
Mid. North Carolina	73.2	2.9	10.9	13
Arizona	43.5	1.3	2.8	52.3
East. Pennsylvania	37.3	0.8	32	29.8