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October 11, 2011

The Honorable Jim Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism,
Terrorism and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Bobby Scott
Ranking Member
Subcommittee on Crime,
and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: Hearing on “Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*”

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing concerning the hearing, scheduled for Wednesday, October 12, 2011, on the “Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*,” and to express the views of the criminal defense bar on the state of federal sentencing law. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing.

At the outset, it is important to acknowledge that while our system of federal sentencing and the Sentencing Guidelines are not perfect, and that there is significant room for improvement, the shift to advisory guidelines following *Booker* has further advanced the goals of the Sentencing Reform Act (SRA) and resulted in a more just administration of our federal sentencing system. Advisory guidelines are better suited to minimize both unwarranted disparities *and* unwarranted uniformity because they are grounded in a framework based on research and experience but still afford judges the discretion to sentence similarly or differently when there is justification to do so.¹

Mandatory or binding guidelines, on the other hand, tend to mask arbitrary disparities under the guise of methodological calculations. These calculations fail to account for manipulation through prosecutorial charging decisions and imperfect policy choices. The result is inappropriate uniformity for vastly different defendants and circumstances due to emphasis on a single commonality, typically the charging statute, drug quantity, or loss amount.² As acknowledged by the Commission and the Supreme Court,³ these are precisely the types of “unwarranted” disparities the SRA attempted to eliminate. No guidelines system can fully account for the circumstances that will produce such disparities and, by removing or severely limiting judicial discretion in sentencing, judges cannot adjust and correct accordingly. Such a rigid system, intended to reduce overall disparity, actually ends up creating different, but equally unwarranted, disparities.

In addition, mandatory guidelines tend to erode the Sixth Amendment right to a fair trial by allowing prosecutors to exercise undue influence over sentences and excessive leverage over

¹ When the Senate Judiciary Committee voted to report the Sentencing Reform Act, it emphasized that the key in any discussion about unwarranted disparities is the word “unwarranted.” The Committee further explained that *justifiable* differences are not unwarranted. Rather, sentencing policies and practices should not preclude differentiation between persons convicted of similar offenses who have similar records when there is justification to do so. *See* S. Rep. No. 98-225, at 161.

² This is even more so in the case of mandatory minimums, which reduce all discretion and frequently mandate unjustifiable uniformity for defendants who are vastly different and inexplicable disparity for defendants who are nearly identical. For these reasons, mandatory minimums have been criticized by nearly every actor in the criminal justice system and a broad range of groups and individuals spanning the right-left, liberal-conservative spectrum.

³ In its Fifteen Year Review, the Commission explained that unwarranted disparity means “different treatment of individual offenders who are similar in relevant ways,” and “similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing.” U.S.S.C., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (emphasis omitted) [hereinafter *Fifteen Year Review*]. The Supreme Court has also recognized the need to avoid unwarranted uniformity amongst offenders who are not similarly situated and to consider unwarranted disparities created by a particular guideline itself. *See Gall v. United States*, 552 U.S. 38, 53-56 (2007); *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

defendants. The risk of being sentenced under mandatory guidelines, which inextricably tie sentence length to the prosecutor's charging decisions, effectively precludes defendants from exercising their Sixth Amendment right to a trial. The right to have a neutral, third party review the evidence and facts is fundamental to our criminal justice system.

Even if a defendant has minimal culpability or a strong defense, faced with a mandatory guidelines system that does not accurately account for culpability and, instead, conflates it with arbitrary loss amounts or drug weight, a defendant will almost always forego his right to a trial.⁴ Prosecutors have unlimited discretion over charging decisions and, thus, in a system of mandatory sentencing, unlimited power to deter defendants from exercising their constitutional right to a fair trial. With every step away from judicial discretion and towards a mandatory system, prosecutorial power increases and the Sixth Amendment rights of defendants erode even further.

As previously stated, no sentencing system is perfect, and the guidelines as they now exist have plenty of components deserving of review and improvement. However, the current system undoubtedly achieves a better balance between flexibility and rigidity than the pre-*Booker* guidelines. Guidelines based on empirical research and data, judicial discretion to tailor and individualize sentences, appellate review for reasonableness, and adjustments to the actual guidelines based on judicial trends and experiential study—together, these are the characteristics necessary for a just and fair sentencing system that furthers the values articulated in the SRA. Removing any one characteristic, particularly the judicial discretion afforded by advisory guidelines, inevitably creates systematic imbalance and injustice.

For all these reasons, NACDL strongly opposes any legislation that would fundamentally alter the advisory nature of the guidelines or set in place more mandatory sentences. Contrary to the premise of the Committee's October 12th hearing, as evident in its title, the shift to advisory guidelines has not created uncertainty. Rather, the evidence and data demonstrate that sentences

⁴ This risk is dramatically enhanced where the case involves the problem of deficient *mens rea*. With federal crimes, particularly white collar offenses, frequently the issue at trial is not whether the particular conduct was committed but whether the defendant acted with the required criminal intent or *mens rea*. As documented in a recent study, criminal statutes frequently incorporate weak *mens rea* requirements that do not protect persons trying to abide by the law. See Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers (2010) available at www.nacdl.org/withoutintent). Although the Sixth Amendment affords such defendants the right to raise an intent defense at trial, a weak *mens rea* requirement makes success unlikely, and going to trial virtually guarantees the defendant will be deprived of any credit for cooperation and will receive a harsher sentence. Vague laws should be challenged and insufficient evidence should be confronted. However, practice demonstrates that the greatest disparity in sentencing exists between those who choose to defend themselves and those who do not. Increased judicial discretion is one way to help alleviate this unwarranted disparity and reduce the trial penalty risk.

have remained quite constant and any inconsistencies are merely an expression by judges and prosecutors alike that certain guidelines are problematic and in need of review and revision.

In general, the data shows that sentences have remained constant despite the shift to advisory guidelines—sentence length did *not* undergo much, let alone significant, change following *Booker*. Six years ago, before *Booker*, defendants received on average a 46 month sentence.⁵ Today that average is 43.3 months.⁶ This is hardly a dramatic change worthy of systematic overhaul. Rather, it appears to be a product of the types of crimes charged and not the new, slightly greater, discretion afforded to judges. Whereas unlawful reentry and crack cocaine sentences tend to pull the average sentence length down slightly from the pre-*Booker* average, all other major categories of offenses have remained constant or even increased slightly post-*Booker*.⁷ The notable exception to these statistics is the category of “white collar offenses,” which are significantly *higher* today than pre-*Booker*.⁸ Despite the rhetoric surrounding the impact of *Booker*, the numbers simply do not bear out a need for overhaul; the system has remained intact and constant and the sky has not fallen.

One noteworthy, positive change since the shift to advisory guidelines post-*Booker* is the ability of the actors within the system to call attention to broken guidelines that desperately need review and revision. Judges regularly diverging from a particular guideline, and parties consistently requesting and agreeing to sentences below a particular guideline, sends a strong message that that guideline is not working and needs improvement. The advisory nature of the guidelines affords the actors within the system to provide this sort of practical feedback from the trenches and creates a much-needed mechanism for accumulating realistic experience and applying it to the guidelines framework. Where guidelines are not reflective of the realities of every day defendants and cases, the advisory system affords judges the ability to articulate this and enables the Commission to respond. Reverting to a mandatory or binding sentencing system will muzzle

⁵ U.S.S.C. 2001-2005 Sourcebook of Federal Sentencing Statistics, Table 13 (from 2001 to 2005 the average sentence varied within a three month range, with the lowest at 45 months in 2004 (post-*Blakely*) and the highest at 47.9 months in 2003.

⁶ U.S.S.C. Preliminary Quarterly Data Report, 3rd Quarterly Data Report, 3rd Quarter Release (FY 2011) (“Quarterly Data Report”) at 31, Table 19. The average sentence post-*Booker* has also varied, with a high of 51.8 months in 2007, to its present level of 43.3 months. U.S.S.C. 2005-2007 Sourcebook of Federal Sentencing Statistics, table 13; U.S.S.C. 2007 Final Quarterly Data Report, Figures C-I.

⁷ Quarterly Data Report at 34-38.

⁸ *Id.* at 33, Figure D. The average sentence for the most serious fraud offenders has increased from 89 months pre-*Booker* to 123 months today. U.S.S.C. 2006-2010 Datafiles, U.S.S.C. FY06 – U.S.S.C. FY10, Figure 5 to *Sentencing Trends*, U.S.S.C. Vice Chair William B. Carr, American Bar Association White Collar Crime Conference, San Diego, CA (Mar. 3, 2011) (on file with the author).

the actors who deal with the reality of sentencing every day and diminish the ability to adapt the system to better promote its intended goals.

For example, the Department of Justice has complained that the guidelines for some child pornography offenses and some fraud crimes are being departed from with increasing frequency.⁹ However, criticism of the guidelines for both of these types of offenses has also been increasing, not only from defense attorneys and judges, but even prosecutors.¹⁰ This is not surprising given that the guidelines for both types of offenses have significantly increased in recent years not based on empirical data, but via congressional directives typically passed at the urging of the Department of Justice. Thus, the regularity of judicial departures in these types of cases, where nearly all parties agree the guidelines are seriously flawed, is an excellent example of the benefits of an advisory guidelines system and its ability to be a mechanism for feedback and improvement.

Six years after *Booker*, the federal sentencing system, as a whole, is as sound as it ever was. Average sentence length has remained constant and, where there are regular instances of guidelines departures, it is truly a statement about the substantive quality of that particular guideline and not the system as a whole. The shift from mandatory guidelines has, in a small way, lessened the erosion of the Sixth Amendment right to trial, while advancing the goals of the SRA through more individualized sentencing. Despite the room for improvement within individual guidelines, the change to an advisory guidelines system was a much needed step towards a more just, fair, and rational federal sentencing scheme; all arguments to the contrary are belied by empirical evidence.

For these reasons, NACDL strongly opposes any effort to make the guidelines mandatory in nature and, instead, joins many other organizations and individuals in endorsing the continued use of a research and experience driven advisory guidelines system.

⁹ See Letter from Jonathan Wroblewski to Hon. William K. Sessions III, Chair, U.S. Sent’g Comm’n at 1-2 (June 28, 2010) [hereinafter “Wroblewski Letter”].

¹⁰ Prosecutor requests for downward variances in child pornography cases, not based on §5K1.1 or §5K3.1, have increased significantly. In 2007, the rate was 4.6%. That rate has increased every year since, rising to 6.4% in 2008, 8.1% in 2009, and 14.5% for the first two quarters of 2011. U.S.S.C., 2007-2010 Sourcebook of Federal Sentencing Statistics, tbl. 27. The 2011 rate is nearly 10% higher for these types of cases than the rate for all cases, which is 4.2%. Such an increase is clear evidence that even prosecutors see this guideline as broken. U.S.S.C, Preliminary Quarterly Data Report, 2d Quarter Release, 2011, tbl.3.

On behalf of NACDL, I am grateful for the opportunity to submit this letter and respectfully urge your utmost consideration. Thank you for considering our views on this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Lisa Monet Wayne". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Lisa Monet Wayne
President