Testimony of
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Before the United States Sentencing Commission
Public Hearing regarding
the 25th anniversary of the passage of the Sentencing Reform Act of 1984
"View from Sentencing Practitioners"

"Trial by jury [is] the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." – Thomas Jefferson

I wish to thank the United States Sentencing Commission for holding this hearing and for the opportunity to testify regarding the Sentencing Reform Act.

Since the advent of the Sentencing Reform Act, there are more prosecutors. More probation officers. More prosecutions. More jails. More defendants. More public defenders. More lengthy sentences.

Certainly then, there must be more trials.

No -- in fact, there are far fewer trials now, 25 years after the Sentencing Reform Act became law.

I. *The problem.*

When the guidelines were first enacted, many predicted that the harsh guidelines would cause an explosion in trials. In fact, the harshness of the guidelines has caused an explosion in guilty pleas – even among defendants who would otherwise have been acquitted had they proceeded to trial.[2]

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[2]Wright, Ronald F., "Trial Distortion and the End of Innocence in Federal Criminal Justice, " 154 U. Pa. L Rev. 79-154 (2005) ("The increased guilty plea rates of

When the SRA was passed, there were approximately 30,000 defendants. In 2007, there were about 88,000. When the SRA was passed, there were approximately 6,500 trials – or about 18% of cases proceeded to trial. In 2007, there were 3414 trials – or about 3.7% of cases proceeded to trial.[3]

Although the initial predictions about the effect of the guidelines were wrong, it should come as no surprise now that defendants – even innocent defendants – will do just about anything to avoid trial as the risks of proceeding to trial are simply too great. "Sentences for defendants convicted after trial are 500% longer than sentences received by those who plead guilty and cooperate with the government." *Berthoff v. United States*, 140 F. Supp. 2d 50, 67-68 (D. Mass. 2001).[4]

This trial penalty should cause all criminal law practitioners real concern. Since the Sentencing Reform Act was passed, every part of the criminal justice system has exponentially increased -- every part, except for criminal trials. That trials have almost completely vanished -- which is directly tied to the passage of the federal sentencing guidelines -- is a huge cause of concern for our adversary system of justice. Trials help develop the law. They expose and discourage abusive law enforcement practices. Trials deter the filing of weak cases and "gray area" prosecutions. And trials allow citizens to

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the past 25 years are troubling because they displaced acquittals at a higher rate than ... trial convictions."); Finkelstein, Michael O., A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 Harv. L. Rev. 293 (1975) (concluding after statistical analysis that at least one third of all defendants pleading guilty in districts with high guilty plea rates would ultimately have escaped conviction had they not pled).

[3]These statistics were gleaned from http://www.uscourts.gov.

[4]There are, of course, numerous examples. One of the classics was James Olis, a securities fraud case concerning Dynegy Corporation in Houston, Texas. Olis was sentenced to 24 years in prison after trial, while his boss who testified against him received about a year. One lawyer, David Gerger, was quoted as saying: "If there's a 20-year penalty for going to trial, then innocent as well as guilty people will simply decide they have to give up their right to a trial." The case was ultimately reversed, and Olis was resentenced to 6 years. Until the reversal, prosecutors in Houston expressly mentioned Olis to any fraud defendant who wouldn't plead: "You can plead or risk ending up like Olis." Prosecutors in every district have their own "Olis line."

observe and more directly participate in their democracy.[5] As John Adams said: "It is more important that innocence be protected than it is that guilt be punished. ... If innocence itself is brought to the bar and condemned, then the citizen will say, whether I do good or whether I do evil is immaterial, for innocence itself is no protection. And if such an idea as that were to take hold in the mind of th citizen that would be the end of civilization whatsoever."

Trials have disappeared for a number of different reasons. Some of these reasons include:

- **The Sentencing Guidelines, especially when they were mandatory, shifted power from judges to prosecutors and probation officers**. Before the sentencing guidelines, a defendant was not severely punished for going to trial. The decision regarding how much of a benefit one received for pleading guilty versus going to trial was decided by the trial judge. The guidelines shifted that control from judges to prosecutors. Prosecutors now engage in charge and fact bargaining in plea agreements so that defendants, even innocent defendants, have huge incentives to resolve their cases with a plea. Henry Alford explained this risk in stark terms: "I ain't shot no man, but I just pleaded guilty because they said if I didn't they would gas me for it." *North Carolina v. Alford*, 400 U.S. 25, 28 (1970).

  Although the sentencing guidelines were premised on sentencing defendants based on "real offense" conduct, the "real offense" simply became a bargaining chip. Judicial discretion has been replaced by prosecutorial discretion. Now prosecutors and defense lawyers engage in fact and charge bargaining to resolve cases, which has resulted in disparate results. In addition, there are inconsistent standards around the country for 5K1.1 motions, fast-track departures in immigration cases, minor role reductions for couriers, and so on. Judicial application of the guidelines is also inconsistent around the country. Accordingly, the goal of sentencing based on "real offense" conduct has not been accomplished by the guidelines.

- **The Guidelines are often determined based on "evidence" and "testimony" that is not tested and is at best, merely hearsay, and at worst uncharged or acquitted**

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[5]Srebnick, Scott, "Why Trials Matter." Presentation to National Association of Criminal Defense Lawyers (Tampa, Florida; October 2008); Keker, John W., "The Advent of the 'Vanishing Trial': Why Trials Matter." The Champion (September/October 2005).

conduct. Civil lawyers and non-lawyers, when told that a defendant can be sentenced based on uncharged or acquitted conduct, are in utter disbelief. And rightfully so. Guideline levels are often determined from a presentence investigation report that itself is based on the most unreliable of hearsay. It is possible – indeed, not uncommon – to be charged and convicted of a relatively minor quantity of drugs or low dollar amount of fraud, but face a sentence of many multiples of that, based on hearsay statements concerning uncharged and unproved "relevant conduct" related by a case agent to a probation office. The problem is not merely a lack of confrontation: rather, such procedure leads to unreliable and speculative guideline levels.

Probation officers are simply not equipped to do "offense summaries" or guideline calculations. In practice, the offense summary is just the probation officer parroting back what a prosecutor or agent told the probation officer. For example, a probation officer should not be called upon to determine the market capitalization loss caused by a sophisticated financing transaction at a publicly traded company. The officer has no specific training or expertise in these areas, so it is not surprising that probation officers faced with doing loss calculations often just rely on the prosecutor. But this is not an independent investigation as required by the rules.

- **The Guidelines are far too harsh, especially for first-time non-violent offenders who proceed to trial.** Former President George Bush recognized how severe the guidelines are for first-time non-violent offenders. In commuting Scooter Libby's 30-month sentence and calling it "excessive," he said: "Mr. Libby was a first-time offender with years of exceptional public service and was handed a harsh sentence based in part on allegations never presented to the jury." He continued, "My decision to commute his prison sentence leaves in place a harsh punishment for Mr. Libby. The reputation he gained ... is forever damaged. His wife and young children have also suffered immensely. He will remain on probation. The significant fines imposed by the judge will remain in effect. The consequences of his felony conviction on his formed life as a lawyer, public servant and private citizen will be long-lasting."

  Despite Mr. Bush's sentiment, criminal practitioners see outrageously harsh sentences doled out in federal court every day. A secretary making $40,000 a year, working for a company engaged in a very substantial fraud, recently faced a sentencing guideline sentence of 15 years in prison, while her bosses who pled and cooperated were sentenced to 5 years (the statutory maximum to the 371 conspiracy

count to which they pleaded). She was a first-time, low-level offender with two young children who decided to proceed to trial. She was offered a plea to a five-year maximum count with other sentencing concessions, which likely would have resulted in a sentence of 2 years or less. The reason her sentence was so high was because of the trial penalty discussed above, but also because she was held responsible for the entire amount of loss, which unduly drives sentences in fraud cases.

- **Many district judges still mechanistically follow the Guidelines**. The Supreme Court told us in *Booker*, and repeatedly since then, that sentencing requires individualized attention to each defendant. Not only is this now a matter of constitutional law, but it also makes common sense. So far, though, *Booker* is a lost promise in our district courts. For 25 years, judges felt legally and psychologically that they had to rely on the guidelines. *Booker*, *Gall* and other cases give judges the discretion they need to be fair. More than that, they teach that it is unconstitutional for a district judge to rely on the guidelines as presumptively correct. But change is hard, and since *Booker*, little has changed.

  The Sentencing Commission's website is very impressive. It is a valuable tool for practitioners and judges. The statistics that the Commission publishes are extremely useful, and they demonstrate that sentencing has not really changed since *Booker*. Before Booker, about 64% of cases were sentenced within the guidelines, while after Booker the number has been 61.4%. And most of the cases (more than two-thirds) sentenced below the guidelines are government-sponsored motions based on cooperation.

  Putting aside the statistics, the Supreme Court has recognized, twice this year already, that lower courts are putting too much weight and emphasis on the guidelines. In *Spears v. United States*, 2009 WL 129044 (Jan. 21, 2008), the Court emphasized that lower courts are in no way bound to apply the sentencing guidelines, and can impose a sentence lower than the guidelines even if that sentence is based solely on the district judge's disagreement with them:

  > [E]ven when a particular defendant in a crack cocaine case presents no special mitigating circumstances – no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation – a sentencing court may nonetheless vary downward from the advisory guideline range. The court

> may do so based solely on its view that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates "an unwarranted disparity within the meaning of § 3553(a)" and is "at odds with § 3553(a)." The only fact necessary to justify such a variance is the sentencing court's disagreement with the guidelines – its policy view that the 100-to-1 ratio creates an unwarranted disparity.

The Supreme Court didn't stop there. In another summary reversal, *Nelson v. United States*, 2009 WL 160585 (Jan. 26, 2009), the High Court reversed the Fourth Circuit for affirming a within-guidelines sentence despite the judge's statements at sentencing that "the Guidelines are considered presumptively reasonable" and that "unless there's a good reason in the [3553(a)] factors . . ., the Guideline sentence is the reasonable sentence." The Supreme Court explained, "The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable. We think it plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson's Guidelines range. Under our recent precedents, that constitutes error."

II. *Proposed Changes.*

For some reason, lower courts still feel bound to mechanistically impose the sentencing guidelines, even though the Supreme Court repeatedly is saying to stop. So what can be done? I propose the following:

- **Reduce the harshness of the Guidelines, especially for first-time non-violent offenders.** The Commission should encourage District Courts to issue downward variances if there is a finding that an offender is a first-time non-violent offender. The Commission has conducted recidivism studies which demonstrate that first-time non-violent offenders are not likely to recidivate. Those findings should be incorporated into the Guidelines. Other examples include offenders who are: over the age of 40, married, have a college education, are not drug users, and so on.

- **Incorporate the 3553 factors into the Guidelines.** As explained earlier, the guidelines drive sentencing in our courts. To really breathe life into *Booker's* guarantee that sentencing be tailored to each individual, the word must come from the Sentencing Commission itself. The Commission can do more than any other group now to honor the mandates of *Booker* and *Gall*: namely, the

Commission should issue guidance to District Courts that they may not rely on the guidelines as presumptively correct.

- **Simplify the Guidelines.** Because the Guidelines are no longer mandatory, the Commission should simply the Guidelines and have broader categories of cases. The perfect example is the fraud guideline 2B1.1, which has fifteen different specific offense characteristics, each with numerous sub-parts. That guideline has 16 pages of application notes, attempting to explain how those specific offense characteristics should be applied. That guideline has spawned countless appellate decisions, making contested fraud sentencings an almost impossible morass.

- **Attempt to eliminate the penalty for proceeding to trial.** The United States Supreme Court said in *Booker* that the right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." But as explained earlier, trials are dying, and sadly, many have come to simply accept the trial penalty in federal court. This culture does not exist in state courts. For example, the Florida Supreme Court has held that "the law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional." *Wilson v. State*, 845 So. 2d 142 (Fla. 2003). Defendants who proceed to trial should not receive sentences 500 times higher than those who plead and cooperate. The Commission should address this issue.

- **Inform juries of the minimum and maximum sentences**. The Commission has asked what recommendations it should make regarding the Federal Rules of Criminal Procedure, and this is one of them. Judge Weinstein recently explained the importance and historical underpinnings of informing juries of potential sentences. *See United States v. Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. April 1, 2008) (Weinstein, J.) (granting new trial – in a 288 page opinion – for failing to inform jury of five year minimum mandatory sentence). Information regarding the consequences of a verdict is not irrelevant to the jury's task. Absent such information, jurors cannot maintain a knowledgeable and open dialogue during deliberation, and the jury's

ability to perform its historical function – bringing the voice and values of the community into the courtroom– is undercut. *See*, *e.g.*, *United States v. Gilliam*, 994 F.2d 97, 100-101 (2d Cir. 1993) (jury serves as a mechanism by which accused can be judged according to community's mores). Only a jury that understands the implications of its actions, having obtained "information and knowledge in the affairs and government of the society," can "come forward, in turn, as the sentinels and guardians of each other."11 *Letters of the Federal Farmer IV*, 54, 59. In any event, informing juries about the minimum and maximum penalties associated with a specific offense is not unheard of. In many instances, juries learn of the existence and harsh effects of mandatory minimums in criminal trials through the cross-examination of cooperating witnesses. Courts routinely permit inquiry – as the Confrontation Clause requires they must – into the possible self-interest of cooperating witnesses, including pending indictments, plea agreements, and leniency in sentencing. *See*, *e.g.*, *Unites States v. Rosa*, 11 F.3d 315, 336 (2d Cir. 1993).

- **Continue to use probation officers to do background for the judge on the offender, but not on the offense.** Because probation officers are not lawyers, are not trained on how to calculate complex loss figures, do not have appropriate resources, and spend most of their time with prosecutors, they should not be called on to calculate the guidelines, which end up being arbitrary, biased and speculative. These guideline calculations take on a false degree of credibility because they appear in a PSR format. The offense conduct and guideline calculations ought to be litigated by the lawyers, or if agreed to, can be jointly submitted and included in a PSR. The offender's background is a task that the probation officer is well-equipped to handle and can be supplemented by the parties if necessary.

Alexis de Tocqueville rightly saw juries as the quintessential American quality: "The jury, the most energetic method of asserting the people's rule, is also the most effective method of teaching them how to rule."[6] Without some help – help that can be provided by the United States Sentencing Commission – jury trials may soon completely die out.

[6]Alexis de Tocqueville, Democracy in America (1835).