Statement of Carlos A. Williams
On Behalf of The Federal and Community Defenders
Public Hearing Before the CJA Ad Hoc Committee
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My name is Carlos A. Williams. I am the Federal Defender for The Southern District of Alabama. I would like to thank the CJA Ad Hoc Committee for the opportunity to testify regarding training on behalf of the Federal Public and Community Defenders.

As the Federal Defender for the Southern District of Alabama I have the responsibility of organizing CJA panel training events on an annual basis in my District. This is accomplished in partnership with the Defender Services Training Division. Our annual seminar consists of a day and a half program aimed at updating and addressing current issues in Federal Criminal Law with emphasis on issues and cases arising in my district. The training is mandatory to members of the CJA panel, and for lawyers and investigators on my staff. My office also acts as a clearinghouse for opinions, articles, and posts from a variety of listservs affecting federal criminal law which are sent to the CJA panel by e-mail throughout the year.

Like all Defenders I attend annual substantive training organized by the Defender Services Training Division. In the past, approximately eight years, I have acted as faculty on an annual basis at both The Bryan Shechmeister Death Penalty College, at Santa Clara, and with The Andrea Taylor Sentencing Advocacy Workshop. The latter training is organized by the Defender Services Training Division. I mention these programs because of their focus on sentencing, and because I believe they are highly effective.

When I joined the Federal Defender Office in 1995, the mandatory Guidelines were in effect. That mandatory system in many ways dictated how the defense approached the resolution of cases and, to a great extent, it influenced the type of training and preparation lawyers received in federal criminal cases. Generally speaking, federal substantive law, the Sentencing Guidelines and the interplay of its numerous provisions dominated the focus of lawyers to the detriment of other factors essential to a determination of a fair sentence. Then, and now, the individual circumstances of the defendant are generally deemed not relevant. The Sentencing Commission cites authority for this position in 28 U.S.C. 994 et. seq. For most (the prosecution, the defense, and yes, the District courts) the Guidelines are still presumptively correct.

In an article *Rita Needs Gall – How to make the Guidelines Advisory,* 85 DENULR 63, (2007), Judge Nancy Gertner recognized the intractability of moving from a mandatory guideline sentence scheme to an advisory one.

> I have tried to understand why federal sentencing has proved to be so resistant to change. — There are several reasons: First, the Sentencing Guidelines brought with them something like the ideology that surrounds continental civil codes: The Guidelines were comprehensive; the work of "experts"; if there were gaps, the "experts" from the Sentencing Commission would fill them in. The judges

> became clerks looking through the voluminous Guidelines for sentencing answers. Second, the pernicious anti-judge climate of the past two decades provided every incentive for judges to follow the Guidelines--"I had *no choice* but to sentence you to 150 months under the Guidelines" was a familiar refrain. Third, the judiciary had changed in fundamental ways over the past twenty years, leaving many judges without any criminal justice experience apart from guideline sentencing. Fourth, the psychological phenomenon of 'anchoring' when standards are linked to numerical ranges had a substantial impact. Fifth, there was no competing philosophy of sentencing among trial judges; the sentencing Guidelines effectively preempted the field. And this was particularly so in the appellate courts, which had never addressed sentencing at all before the Guidelines. (Citations omitted.)

In light of the above circumstances, Gertner posed the question: "What does it take to restore judicial sentencing authority after nearly twenty years of passivity, after the judicial culture has fundamentally changed...?"

Gertner concluded that the psychological phenomenon of "anchoring" when standards are linked to numerical ranges had a substantial impact on all litigants in involved in sentencing.

> The "gravitational pull" of the Guidelines, particularly in a circuit that is amenable to the "guidelines as presumptive" approach, limits sentencing arguments, stops meaningful critique of the Guidelines, and encourages cursory treatment of the sentence on all levels, at trial and on appeal

Id at p. 6.

Judge Gertner's primary argument for resolving the issue rested primarily on the restoration of judicial discretion. She hoped that the Supreme Court in *Gall* would reaffirm the imprecision of sentencing, that the Guidelines are flawed, as the Guidelines introduction concedes, at § 1A1.1 (Historical Note 4(b)), that they could not possibly account for the full range of sentencing situations. But, the problems with Guidelines run much deeper.[1]

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[1] See Marc L. Miller, Sentencing Equality Pathology, 54 Emory L.J. 271, 276 77 (2005)

The two decades since the enactment of the SRA have not produced nuanced conceptions of disparity and equality in the federal system. The sentencing guidelines promulgated by the Commission pushed for a relatively high degree of outcome uniformity. More troubling still--and in conflict with the principles of the SRA--Congress since 1984 has again and again magnified the trend towards excessive uniformity with the enactment of mandatory minimum penalties. Mandatory penalties obscure differences between offenders and move uncomfortably toward a rough version of the absurd system that would be produced by a single flat sentence for every crime.

The problem of excessive uniformity in sentencing outcomes has been recognized by scholars and even by the Commission with regard to mandatory minimum penalties. Early in the life of the federal guidelines system Professor Albert Alschuler wrote:

The anchoring effect of the Guidelines gravitational pull is still with us today. The primary metric driving the Guidelines numerical ranges (the offense charged and criminal history) has the effect of flattening and removing the humanity of the individual from the process.[2] The person is ultimately represented and punished in accordance with numerical abstractions. The hope was that this would create a single objective standard and minimize sentencing disparities. The effect has been devastating for defendants in general and defendants of color in particular.

Very recently, social scientists documented the fact that implicit racial bias affects most Americans and likely plays a role on all of the litigants in the criminal justice process. (See *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumption* by Jonathan Rapping 16 N.Y.U. J. Legis. & Pub. Pol'y 999 (2013). Both of these problems raise great challenges for the effective training of defense lawyers, and require a substantial shift in the culture and training objectives.

I raise this here because continued influence of the Sentencing Guidelines in federal criminal litigation poses broad and complex challenges for training and equipping lawyers to effectively counter the flattening or one-dimensional effect of the guidelines. I agree with Judge Gertner that it "limits sentencing arguments, stops meaningful critique of the Guidelines, and encourages cursory treatment of the sentence."

> Some things are worse than sentencing disparity, and we have found them . . . . Aggregation--the treatment of many cases all at once--is often appropriate. Indeed, all legal rules aggregate. Treating unlike cases alike sometimes can promote economy and simplicity of administration. The federal sentencing guidelines, however, do not save work or money . . . .
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> The principal argument for the sentencing guidelines has not been simplicity or ease of administration. It has been that, although aggregated sentences may prove unjust in many cases, guidelines limit the play of judicial personality and inhibit discrimination on invidious grounds. The injustice produced by grouping unlike cases, in other words, has been justified as a means of promoting equality and preventing greater injustice.
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> Yet aggregation is likely to produce equality of a delusive sort . . . . Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle or mix of principles to different cases . . . . One need not look far in fact to observe troubling inequalities produced in the name of equality by the federal sentencing guidelines . . . .

Striving for equality, the reform movement often has produced its antithesis. Despite the observations of a scholar as prominent as Alschuler, the language of formal equality continues to dominate the federal discussion of sentencing. The focus on apparent outcome equality in sentencing for the past twenty years has become a pathology of federal sentencing reform.

[2] Note, the primary use of criminal history and the offense charged, in evaluating risk has been criticized for its discriminatory effect. See. *Risk as a Proxy for Race,* Criminology and Public Policy, University of Chicago Law & Economics Olin Working Paper No. 535 University of Chicago Public Law Working Paper No. 323 (September 16, 2010.)

Defense lawyers are not immune to the gravitational pull of the Guidelines. This is particularly so when they are convinced that the trial court views them as presumptively correct, and that the court has little patience for other considerations. In the Sentencing workshop training for CJA and Federal Defenders we noticed that most lawyers continue to view resolution of their cases almost entirely through the prism of the mandatory guidelines. This has the unintended effect of inhibiting interaction with the client. The client's life-story, which could prove significant, is rarely considered or explored.

In sharp contrast with the Guidelines, The Sentencing Advocacy Training emphasizes a client centered approach where the client's story, the circumstances deemed not relevant by the Guidelines, becomes the centerpiece around which sentencing themes, and theory, are developed. This approach to sentencing requires a substantial shift in the current culture on the part of all those involved in the sentencing process. This approach is supported both by statute (18 U.S.C. § 3661 (1984)) and case law See *Pepper vs. United States*, 131 S.Ct. 1229, 1235 (2011) (In particular, we have emphasized that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." citing *Williams v. New York.*, 337 U.S.241 at 247, (1949)).

In *Lafler v. Cooper* 132 S.Ct. 1376, (2012), Justice Kennedy observed that: "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." I learned that truism twenty years ago and learned further that our preparation and training in criminal cases must account for that fact. I also learned that almost half of our clients will likely have mental health problems. That too continues to be true today. At that time many State Public Defender offices organized in response to that reality by adopting a client centered approach to criminal defense, a 'holistic' approach to criminal defense.

Federal Defender offices are not staffed for the holistic model, but we are nevertheless obliged ethically and by law to investigate and present the social histories of our clients in mitigation. Thanks to the Adverse Childhood Experience Study (ACE), we now know that a substantial number of our clients are exposed to a variety of childhood traumas which are likely to develop into multiple health risk factors later in life. Some of these traumas lead to problems with law enforcement. Presenting our client's story requires a more in depth examination of the lives of our clients. It is not only essential for effective advocacy, it can aid in reducing long sentences and recidivism. Since almost half of our clients have mental health, and/or intellectual disability issues, we must shift our priorities to hire, train and staff qualified personnel to identify, investigate, and properly present those issues at sentencing. I anticipate that additional training and resources will be necessary to meet this need for both the CJA panel and Federal Defenders.