

Senator Jeff Sessions
Questions for the Record
Judge Patti B. Saris

1. At your hearing, I asked you about the United States Sentencing Commission's Fiscal Year 2009 report. That report states that 56.8% of all cases nationwide resulted in sentences within the guidelines range, but only 34.9% of cases in Massachusetts resulted in a within-guideline-range sentence. Nationwide, only 11.8% of all cases ended with below-range sentences and cited *Booker* to justify the decision. In Massachusetts, that same category accounted for 33.5% of all cases. You stated that, considering all five years since *Booker*, your sentences have been consistent with the national average; however, you said your own percentage of out-of-guideline-range sentences may have been above or below that of the District of Massachusetts as a whole. I appreciated your candor as to that fact, and I also appreciated the fact that you expressed your willingness to provide the Committee with a list of your out-of-guideline sentences.
 - a. Please provide a list of those cases in which you imposed an out-of-guideline-range sentence (excluding cases in which the prosecution sought an out-of-guideline-range sentence) and include a description of the nature of the case, the sentence you imposed, the sentence called for by the guidelines, and the reasons for your departure.

See Attachment A.

- b. Please provide the statistics regarding what percentage of your sentencing decisions have been within the guideline range for the past five years, as well as the percentage of your sentencing decisions that were below-range based on your discretion post-*Booker* rather than, for example, a motion by the prosecution or a guideline-sanctioned departure.

According to statistics from the United States Sentencing Commission, the percentage of defendants I sentenced within the Guideline range over this period was 56.4 percent. Nationally, the statistic was 59.4 percent. According to the Commission, the percentage of cases where I imposed a non-government sponsored below range sentence and "cited Booker/18 U.S.C. § 3553" was 13.6 percent. In contrast, nationally judges imposed non-government sponsored below guideline range sentences based on Booker/18 U.S.C. § 3553 in 8.7 percent of cases, and my colleagues in Massachusetts did so in 21.6 percent of cases.

According to my own calculations, excluding the cases where the government moved for a below-guideline sentence, I downwardly varied in 33 out of 271 cases. In other words I varied downward based on 18 U.S.C. § 3553 without government motion in 12.2 percent of cases during the relevant period. Once again, these figures (13.6 percent and 12.2 percent) do not include cases where I imposed a below-range sentence based on a guideline sponsored departure, including motions pursuant to U.S.S.G. § 5K1.1.

2. At your hearing, you stated that a major reason the percentage of within-guideline-range sentences imposed in the District of Massachusetts was far lower than the national percentage was due to the law regarding sentences for crack-cocaine possession. You made it clear that, after the Supreme Court's decisions allowing courts to deviate from the guidelines, you and other judges deviated from the guidelines in cases involving crack-cocaine possession. It seemed you were saying that judges deviated from the guidelines based on the severity of sentences imposed under the guidelines and statutory minimums for crack-cocaine possession, as opposed to the sentences imposed for powder cocaine possession.

- a. Do you acknowledge that the mandatory minimums and guideline sentences for crack-cocaine possession offenses were uniform as to similarly-situated offenders convicted of crack-cocaine possession?

Yes, the mandatory minimums and guideline sentences for crack-cocaine possession offenses were uniform as to similarly-situated offenders.

- b. Do you agree that there must be uniformity among sentences in drug possession cases, regardless of the controlled substance in question?

Yes, the offense levels should be uniform among all drug offenders who violate the same laws. Sentences may vary, however, depending on all the other factors a court must consider.

- c. Do you believe it is proper for judges to deviate from the sentencing guidelines based on their own determination that a mandatory minimum sentence is unjustified or has a disproportionate impact on one racial group?

No. Judges should not deviate on these grounds.

- d. The statistics we discussed at the hearing that informed your answers were from Fiscal Year 2009. The United States Sentencing Guidelines were amended effective November 1, 2007, to substantially reduce the guideline sentencing disparity between powder and crack-cocaine. Despite this change in the guideline sentencing levels for crack-cocaine, the *Booker*-based below guideline sentencing rate for the District of Massachusetts *increased* significantly from 18.9% in Fiscal Year 2007 (before the Guidelines were changed) to 33.5% in Fiscal Year 2009. How do you explain this increase in *Booker*-based below range sentences within your District given that the crack-cocaine sentencing guideline were lower in 2009 than 2007?

In FY 2009, according to Commission statistics, 22.1 percent of drug sentences nationally were related to crack. By contrast, 39.6 percent of drug sentences in the District of Massachusetts were related to crack. According to the Probation Department in the District of Massachusetts, and in my own experience, many judges varied below the Guidelines in crack cases in particular, especially after

the Supreme Court's pronouncements in Kimbrough v. United States, 552 U.S. 85 (2007).

- e. To the extent that your *Booker*-based below range sentencing rate in crack-cocaine cases was higher in 2009 than it was in 2007 when the guidelines were higher, please reconcile your increased sentencing rate with your testimony regarding concerns with crack-cocaine sentencing levels within the guidelines.

Although the amendments made a two level reduction in the offense levels, many of the people who appeared before me sold small amounts of crack, sometimes even less than a gram. In many crack cases the government recommended a below Guideline range, or did not object to a below Guideline sentence. In these cases, I typically only varied to a modest degree and often substituted community confinement in a half-way house or in-patient drug treatment after the term of incarceration.

- 3. According to the United States Sentencing Commission's 2009 Annual Report, the offense type with the highest within-guideline sentencing range was simple drug possession, with 90% of such cases resulting in a within-guidelines sentence. Manslaughter had the highest rate of above-range sentences based on *Booker*, at 11.9%. Conversely, child pornography and prostitution offenses had the highest rate of below-range sentences, at 32.5%.
 - a. I understand that many of these cases may have involved a government-sponsored departure, but do you think it is possible that the beliefs of judges about the nature and seriousness of particular offenses might be playing a role in the rates of above and below range sentencing, post-*Booker*?

Yes, it is possible that some judges believe that the Guidelines are too high in certain areas and too low in areas; therefore they vary. The Sentencing Commission must study those areas where there are high rates of variances and, where appropriate, address those concerns by amendments, which are, of course, reviewable by Congress. The role of the Chair must be to ensure that Guidelines are evidence-based and credible so that variances are minimized.

- b. If not, what do you think explains this variance by offense?

See above.

- 4. A May 26, 2008 editorial in the *Worcester Telegram & Gazette* reported that you made a disturbing statement during a sentencing hearing. The case involved a man who sent a threatening email to a teenager that contained ethnic slurs. According to the editorial, you

“properly declined to make community service part of the sentence. At the same time, she revealed a troubling bias that raises doubts about her ability to treat

some defendants fairly. Noting his military discharge, she mused, ‘I mean, I thought you couldn’t be too violent for the military. I thought that’s what they did.’”¹

The newspaper’s editors believed your statement displayed bias against members of the Military.

- a. Did that article accurately report your comments at that sentencing hearing?

The remark was taken out of context. The defendant was charged with making false statements to a government agent in violation of 18 USC § 1001, but the underlying factual charges involved assaulting and making anti-Semitic comments to a man who was dating the defendant’s girlfriend. Defendant had been discharged from the Marine boot camp because he had failed to disclose his anger management problems. I was deeply concerned that his violent background made him ineligible for the recommended community service. By the statement, I meant that if defendant was so violent that the military, which trains people to engage in combat, discharged him, he shouldn’t be permitted/required to work in the community because he was inappropriately violent. I accepted the plea agreement, which was consistent with the Guidelines, and imposed a term of six months of home confinement, anger management classes, a stay-away order from the victim, an apology to the victim and a requirement that defendant visit the Holocaust Museum and write a three page report. I deeply regret any misunderstanding about the comment, and did not mean to imply that members of the military are violent people, except when required to be so in war.

- b. If yes, do you think your feelings about members of the military will impact any policy judgments you make as a member of the sentencing commission?

I am strongly supportive of the men and women who serve in our military. My father and father-in-law both served in the military. My friends’ children serve. I have only the most positive and respectful feelings toward the men and women who serve in the military.

5. Legal scholars generally recognize four purposes for imposing criminal sentences: retribution, incapacitation, rehabilitation and deterrence. Sometimes, these purposes may contradict one another. When such situations arise, the different purposes must be prioritized.
- a. If the two were in conflict such that both could not be emphasized equally, would you emphasize deterrence or rehabilitation in determining an appropriate sentencing range?

¹ *Injudicious Slap: Judge’s Remark Defames Servicemen and Women*, WORCESTER TELEGRAM & GAZETTE, May 26, 2008, at A8.

I would never emphasize defendants' interests in rehabilitation over the need to deter future criminal conduct, whether by the defendant or others. That said, once the deterrence function has been factored into a sentence, the court should consider rehabilitation when determining the conditions of supervised release after incarceration. However, rehabilitation must never be a substitute for deterrence. The most important purpose of the criminal justice system, including sentencing, is to deter criminal activity and protect public safety.

- b. If you would emphasize rehabilitation, what effect do you think that emphasis might have on potential future offenders?

As noted above, I would not emphasize rehabilitation over deterrence. Nonetheless, rehabilitative tools often can serve a deterrence function. Courts should strive to prevent recidivism after a sentence of incarceration is complete by imposing strict conditions of supervised release and treatment through programs like drug courts and reentry programs. If a defendant fails to comply, he must be revoked.

6. Do you believe that mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing?

Yes, mandatory minimums are more likely to deter certain kinds of crime than discretionary sentencing. However, Sentencing Guidelines are preferable to both indeterminate sentencing regimes and mandatory minimums because they anchor the sentence in a range that will typically be followed, but provide the court with needed flexibility for the extraordinary case.

7. Please describe with particularity the process by which these questions were answered.

With the help of my law clerks and staff, I reviewed all the criminal cases for the last five years, prepared the attached chart, and relied on statistics from the Sentencing Commission and my Probation Department.

8. Do these answers reflect your true and personal views?

Yes.