Testimony of

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Before the
United States Sentencing Commission

Public Hearing on Proposed Amendments
Washington, D.C.
March 15, 2006

I appreciate the opportunity to speak to the Commission today on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the Sentencing Guidelines.

Our position on the particulars of the proposed amendments has been addressed with eloquence and scholarship by my colleagues here and at other public hearings around the country. My task today is to endeavor to place the proposed amendments and the Commission's deliberations in some broader context. For the Defender community, the most important context for the Commission's work is the Supreme Court's decision in *United States v. Booker* and its recognition that sentences should be "sufficient but not greater than necessary to comply with the purposes [of sentencing]," including just punishment and rehabilitation.

Like many of you, I've been working in our sentencing system for some time. I have more than twenty years of experience as a federal criminal law practitioner on both sides of the aisle in both the public and private sector. I spent four years as an Assistant United States Attorney in the Southern District of Florida, and I have been the Federal Public Defender for the Southern District of Florida for the past eleven years. My experience tells me that federal sentences are too often unjust, ineffective, and not consonant with the "ideals [of] our constitutional tradition" that the Supreme Court emphasized in *Booker*.

I am in good company in this belief. As the Commission undoubtedly is aware, the bipartisan Constitution Project, the nonpartisan American Bar Association, and Supreme Court Justice Anthony Kennedy all concur that federal Guideline sentences are too high and are exacting too high a cost, both in human and financial terms.

The facts bear this out. The federal prison population has skyrocketed, rising from 24,000 in 1980 to over 188,000 today, at a cost of over $4 billion per year. The Federal Bureau of Prisons is now 40% over capacity, has eliminated or restricted many treatment and rehabilitation programs in recent years, and increasingly fails to provide adequate medical care. Approximately 65% of these defendants – these fathers, mothers, husbands, wives, sons, and daughters–whom we have incarcerated are Black or Hispanic.

In the wake of *Booker*, the Commission must re-examine its role and responsibility in this unprecedented social and juridical tragedy. For eighteen years, and through 680 amendments, the Commission has approved a steady increase in Guidelines sentences. It has added and increased the impact of aggravating factors year after year, but only rarely added mitigating factors. Worse, many mitigating factors that were present in early versions of the Guidelines have been removed. Although Congress mandated some of these changes, most were initiated by the Commission itself. For example, independent of mandatory minimum laws, by 2002, the Guidelines accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and a doubling of sentences for firearms possession and trafficking.

The Commission has candidly acknowledged some of these problems with the Guidelines in its Fifteen Year Report. But now it is time for the Commission to act upon its own researchn and that which the indigent defense community has time and again presented. The criminal justice system can and must do better. To this end, we have three recommendations, all of which are rooted in the Supreme Court's decision in *Booker*:

First, the Commission must control the escalation in the Guidelines. Although many of the proposed changes to the Guidelines may have seemed minor in isolation, the reality is that sentences today are double what they were in 1986, and your statistics show that the average sentence length for the most frequently applied guidelines has steadily increased from 2000 to 2006. And every slight increase in base offense level or addition of specific offense characteristic contributes to this juggernaut.

I ask that you consider this dramatic and virtually unchecked trend in evaluating the amendments before you today. When given proposals offer purported alternatives between a base offense level of 22, 24, or 26, don't choose 24 because it seems to strike a politically palatable balance, to be the middle ground. There is no middle ground any more. The middle ground disappeared when sentences doubled some time ago. In light of the practical and fiscal realities I've cited and the legal reality of current constitutional law, consider decreasing sentence severity. Not every increase is necessary, and any increase should be as modest as possible so that the sentences produced under the Guidelines are–to borrow a term from *Booker*–as reasonable as possible and, as 18 U.S.C. § 3553(a) mandates, "sufficient but not greater than necessary" to achieve sentencing goals.

Second, the Commission must acknowledge that *Booker* did not merely recast the nomenclature of the Guidelines from mandatory to advisory, but realigned the focus and substance of the sentencing process: "It is an answer not motivated by Sixth Amendment formalism but by the need to preserve Sixth Amendment substance." In the current guidelines manual, reference to *Booker* appears exactly twice (in Appendix B), the word advisory appears nowhere at all, and no mention is made of either in any of the proposed amendments. We appreciate that the Commission has worked to collect data on sentences after *Booker*, but *Booker* can and should have a more substantive role in shaping the Commission's direction and mission now. Assuming a leadership role in applying *Booker* principles to current sentencing would underscore the Commission's objective expertise about, and relevance to, the post-*Booker* world

where sentencing is governed by all of the factors set forth in section 3553 and not merely a mandatory guideline scheme.

Acknowledging *Booker* is also a way to address some of the extreme differences of opinion evident in the testimony that the Commission has received on these amendments. Although we think there are few such cases, section 3553(a) variances are now available to address those circumstances in which the Guidelines sentence is perceived to be too low. Encouraging courts to make such adjustments on a case-by-case basis, and with the measured and appropriate guidance of section 3553(a) in mind, makes far more sense than increasing already unreasonably high guidelines across the board.

Third and finally, the Commission should aggressively pursue improved procedural fairness at sentencing, beginning with deleting or revising its policy statement concerning the standard of proof. In the wake of *Blakely* and *Booker*, the viability of the preponderance standard in guidelines sentencing has been called into question, and rightly so. It is unconscionable that sentencing decisions affecting our clients' liberty are being made according to the same standard as civil verdicts involving corporate pocketbooks. It remains to be seen how far the Supreme Court will take its critique of guidelines fact-finding. At the very least, to be consistent–and more importantly, to be fair–the Commission should recommend that the courts apply a standard of proof commensurate with the importance of the factual determinations being made.

Deletion or revision of the policy statement on standard of proof should be accompanied by strong advocacy in favor of notice and discovery requirements to assure full and fair litigation of sentencing factors. It should go without saying that parties should disclose to each other prior to sentencing all information that will be presented in support of a sentencing recommendation. Unfortunately, neither the Guidelines nor the current Rules of Criminal Procedure require this, and the parties–usually defendants–often find themselves surprised and unprepared to meaningfully confront facts that may substantially affect the end result. The Commission should add guidelines provisions, and recommend changes to the Federal Rules of Criminal Procedure, to prevent this.

The Sentencing Reform Act charged this body with weighty responsibilities, including providing certainty and fairness in sentencing; promoting goals of sentencing such as just punishment and rehabilitation; and reflecting our best understanding of human behavior in the criminal justice context. In acting on the proposed amendments–and in its future business–we urge the Commission to fully integrate the principles of *Booker* into its work in a manner that demonstrates its commitment to fulfilling that charge.

We believe that our proposals comport with the underpinnings of both the Sentencing Reform Act and of *Booker*, and we hope that the Commission will adopt them. As always, we are available to provide further information or assistance as needed.