Statement of Chris Hansen, Chief United States Probation Officer
District of Nevada

United States Sentencing Commission
Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984.

May 27, 2009

View from the Probation Office

Thank you for allowing me to appear before you today. I have had the opportunity to review the testimony of my colleague, Greg Forest, Chief Probation Officer for the Western District of North Carolina. I agree with many of Chief Forest's comments so I will not spend much time reiterating what he so eloquently laid out in his February 10, 2009, statement.

As you are no doubt aware, the United States incarcerates more of its citizens than any other country in the world. A recent article in the New York Times (Liptak, April 23, 2008) noted, "The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners." One in 100 individuals in the United States are incarcerated in prisons or jails and one in 31 are under some form of correctional control (Pew Center on the States, One in 31: The Long Reach of American Corrections, 2009). David Keene, Chairman American Conservation Union (Pew, 2009) noted, "The fact that so many Americans including hundreds of thousands who are a threat to no one, are incarcerated, means that something is wrong with our criminal justice system and the way we deal with both dangerous criminals and those whose behavior we simply don't like." At mid-year 2007, the federal prison population grew by 3.1% (Bureau of Justice Statistics, Prison Inmates Midyear 2007). I mention these facts and figures to bring attention to the fact that we can't keep building federal prisons to deal with our criminal justice population. To deal with the systemic political issues goes far beyond the control of the Commission. I can, however, compliment the commission on its unwavering efforts to end the disparity between crack cocaine and powder cocaine, even when it is politically unappealing to do so.

SENTENCING POST BOOKER:

Booker has opened the door for judges to look at the whole person in accordance with 18 U.S.C. § 3553(a). The Court now has greater discretion in determining a *reasonable* and just sentence. The Court now has the ability to more freely consider the unique characteristics of each case, each defendant, than previously. The advisory nature of the sentencing guidelines allows the Court to consider other imposed sentences of similarly situated defendants. In the post *Booker* world, the Probation Office plays a critical role in providing the court with a true and accurate picture of the defendant. This role prior to *Booker* had become rote, with accurate calculations of the Guideline range paramount, the defendant's characteristics had become benign. Probation Officers in the post *Booker* world must be trained to analyze the unique characteristics of each defendant. This will provide the court with the rationale and justification to provide a variance, if warranted.

ROLE OF THE SENTENCING GUIDELINES:

Perhaps there was no more important motivator for the creation of the sentencing guidelines than the desire to eliminate sentencing disparity. Based upon the comments of the judges in the District of Nevada, it would seem that the sentencing guidelines are viewed as inherently reasonable. This is further supported by the high number of sentences which continue to be imposed within the calculated guideline range (between 81.3% and 92.5%) post *Booker*.

The sentencing guidelines were designed to capture the specific acts committed by a defendant during the commission of the primary offense category, not simply qualify the statute which has been violated. The sentencing guidelines also attempt to assign a specific value to criminal history behavior and provide incremental punishment for repeat offenders.

Potential changes to the guidelines could include a revision to allow the Court to depart from the applicable guideline range based upon the history and characteristics of a defendant, which 18 U.S.C. § 3553(a) directs the Court to consider upon the imposition of sentence. The guidelines currently discourage such consideration.

The guidelines could include a uniform reduction available to defendants being sentenced as to immigration offenses, who enter a timely guilty plea. Currently, a few Districts offer "fast track" reductions which are otherwise unavailable in most Districts. This would serve to further diminish sentencing disparities between Districts.

Based upon my opening comments, the Commission should increase the availability of probation for low risk, non-violent offenders. Probation is a low cost and effective alternative to imprisonment.

FEDERAL SENTENCING SYSTEM BALANCED BETWEEN JUDICIAL DISCRETION, UNIFORMITY, AND CERTAINTY

The system appears to balance the objectives of judicial discretion, uniformity, and certainty. This is due to a continued reliance upon the guidelines to set an advisory sentencing range based upon specific factors related to the offense and the defendant's criminal history, which are uniformly calculated. The sentencing guidelines offer the Court a starting point for the determination of an appropriate sentence, which is then utilized in combination with those considerations contained in 18 U.S.C. § 3553(a) when formulating the final sentence imposed.

HOW SHOULD OFFENSE AND OFFENDER CHARACTERISTICS BE ACCOUNTED FOR IN FEDERAL SENTENCING? WHAT CHANGES COULD BE MADE TO ACCOUNT FOR THESE CHARACTERISTICS:

Experience has shown the guidelines focused on the details of the offense. Increases or decreases to the guideline calculations are based on the unique characteristics of the offense and address specific overt acts. It would seem, however, that the guidelines provide a lesser consideration for

the characteristics of the defendant. Most of the guideline applications which address the defendant's characteristics (Chapter 5) are universally labeled as "not ordinarily relevant," and are thus deemed discouraged factors to be considered at sentencing. This appears to be in conflict with the directives of 18 U.S.C. § 3553(a)(1), which begins with: The first factor the Court is directed to consider in imposing a sentence is: the nature and circumstances of the offense and characteristics of the defendant. Certain characteristics of the defendant are indicative for the risk of recidivism and are captured by the provisions of Career Offender, Armed Career Offender, and Safety Valve, which focus almost entirely on criminal history and not on other characteristics of the defendant. Other personal characteristics which may also aid in the assessment of risk/recidivism are not encouraged as factors warranting significant weight in the imposition of sentence, i.e. a defendant who is terminally ill may pose a much less significant risk of recidivism.

WHAT KIND OF ANALYSIS SHOULD THE COURT USE WHEN IMPOSING A SENTENCE WITHIN OR OUTSIDE THE GUIDELINE SENTENCING RANGE:

The Court should rely upon both the analysis of the offense and defendant pursuant to all guideline applications and then utilize a comprehensive review of the factors of 18 U.S.C. § 3553(a). The combination of both the guidelines calculations and 18 U.S.C. § 3553(a) factors provide the basis for analysis and result in a thoughtful, reasonable, and just sentence. This area is where the Probation Office plays a critical role and must break free of the pre-*Booker* rote presentence reports as I have previously noted.

HOW HAVE BOOKER AND SUBSEQUENT SUPREME COURT DECISIONS AFFECTED APPELLATE REVIEW:

In *Booker*, the Supreme Court ruled that the sentencing guidelines were advisory in order to comport with the Constitution, and that the federal courts of appeals should review criminal sentences for reasonableness. Immediately thereafter, there appeared to be wide dissent as to what the standard for reasonableness was and what the review would thus incorporate. The vagueness led to a split in the circuits in their determinations of what constituted a reasonable sentence. The circuits split and obvious ambiguity led to the Supreme Court's subsequent ruling in United States v. Rita, 127 S. Ct. 5456 (2007). The Supreme Court attempted to resolve the ambiguity as to reasonableness and stated that a sentence within the (advisory) guideline range was presumptively reasonable. The Supreme Court also noted that a Statement of Reasons [pursuant to 18 U.S.C. § 3553(c)] on the record by the Judge was legally sufficient. However, the appellate courts then differentiated themselves from each other again with decisions made as to what constituted a specific enough Statement of Reasons. Since then, District Court Judges have responded by making additional efforts to satisfy the appellate courts by stating on the record that they have thoroughly considered the parties' arguments and other reasons for imposing what is a reasonable sentence.

ANY RECOMMENDATIONS THE COMMISSION MAY MAKE REGARDING A CHANGE TO FEDERAL RULES OF CRIMINAL PROCEDURE (RULE 32):

There was a recent request by the American Bar Association to amend Rule 32. The Probation Office recommends that no changes occur. More specifically, as to the proposed changes

proffered by the American Bar Association. The following are reasons to not consider the suggested changes:

The dissemination of information to other parties would remove the Court's ability to control any future dissemination beyond the scope of the presentence investigation; essentially nullifying the Court's role as the custodian of such information.

The probation office regularly receives information from local, state, and federal law enforcement agencies, which is, by their respective policies, precluded from further dissemination;

The probation office often cultivates personal relationships with collateral sources, who, in turn, disclose information which they request remain confidential with the officer. This information is often utilized for the purposes of officer safety and/or that of the collateral source and may never appear in the presentence report;

The dissemination of information expressly related to issues of officer and community safety could ultimately jeopardize the effective supervision of the defendant. The probation office's mission to protect the community and the officer greatly outweighs the proposed requirement to disclose such information to the parties;

Due to the requirements proscribed by Fed. R. Crim. P. 32, the proposed information sharing would infringe upon the officer's allotted time for the individual investigation;

The compilation of duplicate files for the parties would be unduly burdensome and expensive for the probation office;

To comply with the proposed changes, the probation office would be required to disclose to prospective collateral sources that the information provided would be disclosed to other parties, likely inhibiting the flow and candor of the source of information;

Some information which is received from collateral sources may serve no foundation to the substantive nature of the matter;

Such requirements, as proposed, could unnecessarily complicate the presentence investigation process and further result in excessive hearings and continuances. The Court would likely be inundated with requests from the probation office concerning the disclosure of sensitive information, thus resulting in a toll taken on the resources of the Court;

The proposed sharing of such information could adversely impact multi-defendant cases in which the investigation is ongoing and unindicted co-conspirators remain under investigation;

The proposed dissemination of information would allow for undue scrutiny with respect to the neutral interpretation of the documents received by the probation office;

Case agent information received with respect to other co-defendants and/or unindicted co-conspirators would be subject to disclosure to the parties;

The Release of Information Forms utilized during the presentence investigation specifically note that the information requested is for the probation officer only. The notification of disclosure requirements to other parties, as proposed, would require the Release of Information Forms to be revised; and

The proposed disclosure requirements could potentially affect the defendant's decision to participate, if at all, in a presentence interview.

RECOMMENDATIONS THE COMMISSION MAY MAKE TO CONGRESS WITH RESPECT TO STATUTORY CHANGES REGARDING FEDERAL SENTENCING:

The mandatory minimum sentences may be revisited for certain defendants who have committed a non-violent offense and pose a relatively low risk of recidivism (i.e. as seen in our District, a Mexican National who is acting as a mule, with no known prior record and no established ties to the United States). A sentence imposed below the mandatory minimum may well be adequate and not greater than necessary to meet each of the goals of sentencing. I would also urge the Commission to review the research literature to determine the types of defendants who would do well on community supervision without the need for imprisonment. We cannot continue to build prisons as a way out of this complicated problem.