STATEMENT OF

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Mr. Chairman, and distinguished members of the U.S. Sentencing Commission – thank you for inviting me today to discuss the impact of *Booker* and other related court cases in the Eastern District of Virginia.

As many of you know, the District of Virginia was one of the original 13 judicial districts created by the Judiciary Act of 1789. In 1871, Virginia was divided into two districts: the Eastern and Western Districts of Virginia. Today, the Eastern District of Virginia has offices in Alexandria, Newport News, Norfolk, and Richmond, the capital of the Commonwealth.

According to the Commission's Fiscal Year 2008 statistics, the Eastern District of Virginia has the busiest criminal docket outside of the districts lining the Southwest border and the Southern District of Florida. At more than 2,000 cases, it nearly doubles the caseload of the next-highest docket in the Fourth Circuit. Cases are also more likely to go to trial in the Eastern District of Virginia; again, at nearly twice the rate of the second-busiest trial calendar in the

Fourth Circuit. The Eastern District of Virginia falls behind only the Eastern District of Pennsylvania and the Southern District of Florida in the total number of trials per year. Drug cases make up nearly one-third of our criminal court docket, followed by violent crime, white collar and an increasing number of immigration cases.

The sentencing guidelines are an important tool in helping judges in our district provide comparable sentences for comparable defendants committing comparable criminal conduct. As you know, Congress sought to instill certainty and fairness in the sentencing process to avoid what it perceived to be unwarranted disparity. Prior to *Booker*, statistics show that the judges in the Eastern District of Virginia adhered very strictly to the guidelines. In fact, in the months before *Booker*, in Fiscal Year 2005, courts in our district sentenced 93.3 percent of the cases within the guideline range – a vast difference from the Fourth Circuit rate of 77 percent and the national rate of nearly 70 percent.

As a caveat, I must note that one explanation for the higher percentage of within guideline sentences in our district may be the way our sentencings are conducted. In most other districts, sentencings involving cooperating defendants are postponed until the defendant's cooperation is complete. In those districts, at sentencing, the government submits a 5K1.1 motion for substantial assistance and the court imposes its final sentence. In the Eastern District of Virginia, however, most sentencings occur close to conviction and are not postponed as a result of cooperation. In our district, once a defendant has completed any cooperation, the government then files a motion to reduce the sentence, pursuant to Rule 35(b) of the Federal

Rules of Criminal Procedure. These motions are not regularly captured by Sentencing Commission data.

Following *Booker*, however, the rate of within guideline sentences dropped in our district to nearly 77 percent in the remaining months of Fiscal Year 2005. It has remained in the mid-to-high seventies since. The "within-guidelines" figure is still relatively high compared to the national average of near 60 percent, which may suggest that even after *Booker*, a majority of judges in the Eastern District of Virginia rely on the guidelines and are seeking to ensure that they do not promote unwarranted disparity.

In any event, the statistics seem to show that judges within the Eastern District of Virginia, by and large, follow the guidelines notwithstanding *Booker*. But, as with every district, we have our exceptions, and a straight-forward reading of the statistics often masks those exceptions, since the majority of judges who adhere closely to the guidelines compensate for the variances imposed by judges who are more inclined to use the freedom granted by *Booker* and its progeny.

The inconsistencies imposed by variances – above or below – can be viewed as unfair to the majority of defendants who are sentenced within the advisory guidelines when these variances are unrelated to significant offense characteristics. While we fully appreciate the need for variances to meet unique circumstances inherent in some cases, Congress sought to create the guideline ranges to ensure that the heartland of offense conduct would fit within that range.

With that said, let me amplify my discussion of the statistics with some cases that provide context and illustrate issues that our prosecutors are facing regarding sentencing.

Similar to the rest of the nation, we have very few sentences that are above the guideline range due to *Booker*. With regard to non-government sponsored below range sentences, since *Booker* was decided by the Supreme Court, the below-range sentence rate within the Eastern District of Virginia has remained near 16 percent. Nationally, non-government sponsored below-range sentences have risen from around 5 percent in Fiscal Year 2004 to around 15 percent.

Our largest caseload in the Eastern District of Virginia is drug trafficking. Before *Booker*, 94 percent of our drug trafficking cases were sentenced within the guideline range; that rate now stands at around 80 percent. We had a relatively large number of below-range variances in the months after *Booker*, and since that time it has remained at or near the national level.

Our office prosecutes a high number of crack cocaine cases – which, with all of your research on this issue, should not come as a surprise to any of you. In Fiscal Year 2008, for example, nearly 54 percent of our drug cases involved crack cocaine, compared with 24 percent nationally. We've used federal crack cocaine charges – along with federal gun charges – to attack violent crime in Richmond, using programs that target dangerous individuals in some of the most violent areas of the city and remove them from the streets for a long time. We are also targeting individuals with previous drug trafficking histories who are again caught selling drugs;

these defendants regularly receive substantially higher sentences as career offenders under the sentencing guidelines.

These programs have led to impressive results. Homicides in Richmond have decreased from 86 in 2005 to 32 in 2008. Aggravated assaults are also down, from 1062 to 733 in the same time period. We recognize that changes in crime rates cannot be attributable to any one strategy, but we believe our collaborative work with state and local law enforcement have significantly contributed to the reduction in serious violent crime in Richmond.

But in a significant number of our cases, especially with regard to the crack cocaine cases, judges have been sentencing below the guidelines since *Booker*. For example, in one case, we charged a member of a violent drug-trafficking gang in Richmond who was personally responsible for distributing nearly 775 grams of crack. In that case, the defendant was given a guideline range of 262 to 327 months; however, the court imposed the mandatory minimum sentence of 120 months. We appealed to the Fourth Circuit, which reversed solely on the ground that the District Court failed to give an adequate explanation for the degree of the variance. On remand, the District Court reimposed the same sentence without further explaining the variance.

While the previous case may be a more egregious example, a more recent case is indicative of the below-range variances we see on a regular basis in our drug trafficking cases. The defendant was convicted by a jury of conspiring to traffic 500 grams or more of cocaine and using a firearm during his drug trades. A typical sentence for a similar offense with his criminal history would have been within a range of 121 to 151 months for the drug conspiracy, along with

the mandatory minimum of 60 months on the firearm charge. However, the judge in this case sentenced the defendant to less than half the expected low-end of the range – only 60 months – for the drug conspiracy, largely because the handguns were used as barter in the drug trade rather than for violence.

For practical purposes, however, we have deliberately chosen to investigate and bring cases – in drugs and in other areas, such as child pornography – that qualify for mandatory minimums to avoid significant downward sentencing variances. For example, we recently prosecuted a heroin distribution ring in Northern Virginia that resulted in at least four overdose deaths. Defendants in that operation were sentenced to at least the mandatory minimum of 20 years in prison for distributing heroin that resulted in death.

We are also bringing more child pornography cases where we have proven receipt, rather than possession, because of the mandatory minimum five year sentence. We have seen a tendency among judges to give reduced sentences in these cases because of the difficulty in providing evidence of contact offenses.

In fraud cases, *Booker*-related below-range variances in the Eastern District of Virginia track the national statistics, which show an increasing tendency toward variances, rising nationally from 8 percent right after *Booker* to nearly 14 percent in Fiscal Year 2008.

A particularly compelling example comes from a case one of my prosecutors tried in the District of Connecticut. The case involved defendants from AIG and a Berkshire Hathaway

subsidiary, General Reinsurance, who promoted a scheme to manipulate AIG's financial statements, resulting in what the court determined was at least a $544 million loss. A jury found the five defendants guilty on conspiracy, securities fraud, making false statements to regulators, and mail fraud charges, and the sentencing guidelines called for life sentences for each defendant. The court, however, sentenced the leader of the scheme to two years in prison and the others to prison sentences ranging from four years to twelve months and a day. The dramatic sentence reduction was attributed to a number of factors, primarily due to the absence of direct, personal financial gain.

Compare the result in the AIG case with a similar case in the Eastern District of Virginia involving the co-founder of PurchasePro, a company designed to provide efficient business-to-business sales over the Internet. The defendant was convicted of conspiracy and securities fraud, among other charges, in a scheme to manipulate PurchasePro's quarterly revenues to meet revenue projections. The court determined the loss in the case to be $9.7 million. While the Probation Officer calculated a guideline range of 168 to 210 months with the 2007 Guidelines, the court used the lower 2001 guideline range and sentenced the defendant to 108 months in prison.

The vast discrepancy between the two sentences is difficult to reconcile or understand. Both cases involved manipulating financial documents to mask troubling revenues; however, the amount lost and the applicable guideline ranges clearly showed two schemes very different in scope. Yet the sentences brought results opposite of what might have been expected.

Aside from the *Booker*-related variances, let me add one additional point before I conclude. We are increasingly concerned about judicial fact-finding and sentencing in fraud cases in particular. One example is a recent case involving the chief financial officer of a management firm for approximately 400 homeowners associations in Northern Virginia. Homeowners would pay their dues to an escrow account, and the defendant would distribute the funds to the respective homeowner association accounts. From 2003 to 2006, however, the defendant distributed more than $3 million to his personal bank account and then created paperwork to conceal the transfers. As you know, the fraud and theft guideline, §2B1.1, provides for up to a six-level enhancement beyond the base offense level based upon the number of victims. In this case, the court reduced the number of victims from 400 to 1, despite the fact that the parties had agreed the number of victims was more than 250 – a number that would have merited a six-level increase. The agreed-upon guideline range with the enhancement was 78 to 97 months. Using the low number of victims, the court calculated a new – and much lower – guideline range of 51 to 63 months. The court then slightly departed upward from the new guideline range, resulting in what – on paper – appears to be an upward departure at 66 months, when in reality, it was a below-range variance. The manipulation of the facts in this and other cases masks the true criminal conduct at issue, making it difficult – if not impossible – for the Commission to meaningfully compare the sentences of similarly situated defendants.

In conclusion, let me again thank the Commission for inviting me to speak with you today. I appreciate everything the Commission does to help promote a just sentence for every defendant who comes within the judicial system. I hope my comments, along with those you have gathered from across the country, will help you to further your mission.

Thank you.