STATEMENT OF

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Introduction

Good afternoon Chairman Hinojosa, Vice-Chairmen Sessions, Castillo and Carr, Commissioners Howell and Friedrich, and Ex-Officio Commissioners Fulwood and Wroblewski, members of the staff of the United States Sentencing Commission, and colleagues and members of the public. I would like to thank you for the opportunity to appear before you today, in this 25th year of the Sentencing Reform Act, to discuss the state of the federal sentencing guidelines and, in particular how the Eastern District of New York has been affected by the Supreme Court's *Booker* line of decisions.

As you are all aware, the federal sentencing scheme is currently in a state of flux. In this time of significant change, the Commission is poised to continue the important leadership role it has had since the Sentencing Reform Act was passed in 1984. And I know, on a personal level from my work with the Commission in 2006 and 2007, that its contributions to this national

discussion are immensely valuable. I found my time with the Commission to be very rewarding, and it gave me a profound respect for the commitment, professionalism, and thoroughness with which the Commission and its staff approach their important tasks.

Before I turn to a discussion of the impact of *Booker* and related cases in our district, I would like to take a moment to give you a flavor of the Eastern District of New York. For some of you, such as Commissioner Howell – who once served as an Assistant United States Attorney in our office – this will be familiar territory. For others, I hope to provide you with a sense of why our district is special and unique, and why I feel very fortunate to have had the privilege to serve its citizens as a member of the office since 1994.

The Eastern District of New York includes the boroughs of Brooklyn, Queens and Staten Island, as well as Nassau and Suffolk Counties on Long Island. It is the fifth most populous judicial district in the country, home to approximately 8 million people. Our district has an incredibly diverse population that includes people who came to the United States from nearly every country in the world. If you take a walk around Brooklyn or Queens on any given day, odds are high that you will hear several different languages and have the chance to sample the food and culture of many different nations. We have some of the most densely populated urban areas in the country, as well as suburbs and, in some parts of Long Island, farms and rural land.

As you might expect, the crime problems we face are similarly diverse. Being in New York, we are ever mindful of the threat of terrorism. Indeed, as we sit here in this hearing, we are only blocks away from the site of the former World Trade Center. New York City has been

living with the specter of terrorism for nearly 40 years, and it's no mistake that this was the home of one of the first FBI Joint Terrorism Task Forces. Counter-terrorism has long been a top priority for our office and the Department of Justice, and we have brought a number of significant prosecutions against members and supporters of many terrorist organizations. We fully expect that our work in this important area will continue.

Our geographic location also figures prominently in our office's prosecution of some of the most complex, intricate and sophisticated corporate and securities fraud cases in the country, a caseload we share with our colleagues in the Southern District of New York. These cases often involve millions, if not billions, of dollars in losses, thousands of victims and investors, and millions of pages of documents. Our work in this area has been particularly acute given the economic downturn that currently is gripping our country, which first began in early 2007. As a result, we have continued to expand our white collar criminal practice, working in close cooperation with our colleagues in the Securities and Exchange Commission, numerous federal, state and local regulatory and law enforcement agencies, the Fraud Section of the Criminal Division of the Department of Justice, the New York State Attorney General's Office, and the District Attorney's Offices that operate in our district. One of the first steps we took in this area was to create a Mortgage Fraud Task Force in the spring of 2008 to bring together all of the various local, state and federal agencies that work in this important area. That Task Force has generated dozens of cases and investigations involving hundreds of millions of dollars in losses. As you all know, because of the need to conduct a thorough and careful factual investigation, law enforcement actions often lag behind economic developments, so I anticipate that we will be dealing with the fallout of the current downturn for some time to come.

In addition to our work in the areas of terrorism and white collar crime, our office also has a long and storied tradition of investigating and prosecuting organized crime and gangs. In many ways, our office is synonymous with the efforts of the Department of Justice and the Federal Bureau of Investigation to eradicate organized crime; after all, this is where John Gotti, the iconic symbol of organized crime in the 1980s and early 1990s, was convicted. Over the years, we have prosecuted hundreds of organized crime members, including the leadership of all five families of *La Cosa Nostra*. Our efforts in this area continue unabated, and in the past two years we have convicted senior leaders, including in some cases the current or acting Bosses, of the Gambino, Bonnano and Genovese families, and numerous other defendants from all five families, for a wide range of crimes including racketeering, homicide, extortion, narcotics trafficking and labor violations, among others. These efforts have had a significant effect, but make no mistake, organized crime remains a serious issue in the New York City area. We and our law enforcement partners are pledged to continue our efforts to combat the threat of organized crime.

Equally important to our efforts to serve the citizens of our district is our anti-gang program. Numerous gangs operate in the Eastern District of New York, including MS-13, the Latin Kings, dozens of Bloods "sets," and many other street-level gangs. These gangs have a significant impact on the neighborhoods where they operate, adversely affecting the quality of life for citizens who live in those areas. Equally important, they are active in all areas of our district, including suburban communities on Long Island. These gangs are often tied to narcotics trafficking, which is a source of revenue for the gang and its members, and they zealously protect

their drug "turf" through violent crimes, extortion, intimidation, assault and murder. For years, our office, together with the FBI, ATF, DEA and the New York City, Nassau County and Suffolk County Police Departments, have targeted gang activity with the objective of arresting and convicting gang leaders and those who commit violent acts in furtherance of gang activities. While overall violent crime has seen substantial reductions since the 1980s and 1990s, gang violence and narcotics trafficking remain a source of significant concern. We remain committed to our anti-gang enforcement efforts to ensure that we continue to serve those citizens who live in the neighborhoods where gangs operate.

Our office is also active in a number of other important areas, particularly with regard to public corruption, civil rights, and wholesale narcotics trafficking and distribution. Our public integrity unit prosecutes corrupt elected and appointed public officials, government fraud, tax evaders and corrupt police and law enforcement officers. We also have a storied history in civil rights investigations and prosecutions, having brought a number of excessive use of force and hate crimes cases. We anticipate that we will be even more active in this important area in the years to come. Similarly, our district also serves as a major importation and trans-shipment point for narcotics traffickers from around the world. Our enforcement efforts have been focused on identifying and prosecuting the most significant drug traffickers, including members of the Colombian Cartels, heroin distribution rings from Southeast Asia, and, most recently, Mexican drug trafficking activity. Significantly, we have not yet seen the emergence of methamphetamine in our district; heroin, cocaine, and crack cocaine, which is the most common retail level manifestation of cocaine, are most prevalent.

Observations on Federal Sentencing in the Second Circuit

With this background, let me turn to the issue of sentencing and the impact of the Supreme Court's decisions in *Booker*, *Gall* and *Kimbrough*. Please note that I have focused my testimony on our experiences in the Eastern District of New York, which do not necessarily represent the views or experiences of the Department of Justice as a whole.

As you may well expect, the prosecutors in our office tend to like the Guidelines, although you may be surprised about why that is so. The reason is not, as is commonly ascribed, because our prosecutors reflexively believe that the Guidelines result in lengthy sentences. Rather, it is because the Guidelines provide a significant degree of predictability and certainty, coupled with a well-established and supported framework in which to discuss and resolve sentencing issues. The Guidelines are very effective at framing the sentencing debate and provide everyone involved, including the court, the defendant and his or her counsel, prosecutors, victims, and probation officers, with an accepted and commonly understood sentencing vocabulary and procedures. This goes a long way towards promoting transparency and understanding of the sentencing process for all participants. It also serves as a very effective way to set the expectations of the litigants – government and defendant alike – that, in turn, helps generate a higher degree of acceptance and comfort in the ultimate outcome, whatever that may be. This is particularly true in the context of cooperation, where the pre-*Booker* Guidelines framework for 5K1.1 substantial assistance departures made the rewards of cooperation obvious and predictable to all participants. In the post-*Booker* environment, the benefits of cooperation are not as clear to defendants, and defense counsel now have a larger range of arguments that

may prove effective at reducing their client's sentence. The net effect of these changes remains to be seen.

Within our district, in many ways *Booker* only accelerated trends that began long before the Supreme Court handed down its decision. Historically, our district has had among the lowest percentages of sentences within the calculated Guidelines range. With the exception of 1996, from 1995 until *Booker* was decided, the percentage of Guidelines sentences in our district hovered between 43 and 55 percent, well below the national average. That percentage has been steadily decreasing since *Booker*, reaching 41.6 percent in FY 2007 and 38.6 percent for FY 2008; through the second quarter of this year it stood at 34 percent. Meanwhile, the rate for non-government sponsored departures and variances was also well above the national average during that same period, fluctuating, again with the exception of 1996, between 20 and 30 percent. Since *Booker*, that rate has hewed the higher end of the historical numbers, reaching 30.3 percent in FY 2007, 29.8 percent in FY 2008, and 32.1 percent in the first half of this year. Thus, the net effect of *Booker* has been largely to confirm the practice of deviation from the Guidelines that has been present in our district for several years. As one of our district court judges recently said, tongue in cheek, during a panel discussion on sentencing, *Booker's* largest effect may not have been to change sentencing in the Eastern District of New York, but instead induce the rest of the country to "catch up" to the way things are done in our district.

While we are discussing departure and variance rates, there are a couple of non-statistical observations that are worth mentioning. One observation is the sense among prosecutors in our office that, while the number of times that judges depart or vary from the Guidelines range has

not changed significantly, the *size* of those departures or variances has increased. I caution that we have not kept statistics on this question, so a more complete analysis may reveal that our instincts on this issue are incorrect, but it appears that the magnitude of a sentencing reduction for a successful departure motion or variance argument in our district has grown since *Booker*. When you think about it, this really comes as no surprise since the Supreme Court gave judges a larger degree of discretion and directed them to take into account a number of other factors beyond those contained in the Sentencing Guidelines manual.

The second anecdotal observation is that – and again we have not tracked the statistics on this issue – the range of variation *between* judges in our courthouse has grown, as well. As is probably the case in courts around the country, our judges have always had an individualistic approach to sentencing; each of them takes that weighty responsibility very seriously, and their personal practices, tendencies and views have always varied to a degree. Nonetheless, it appears that after *Booker*, those variations between judges have increased. Some of the judges in our district continue to impose the advisory guidelines sentence in the majority of cases, while many others choose not to follow the advice of the guidelines and grant a variance or departure that ranges from modest to substantial. Further statistical review in this area would be helpful to determine whether our sense of this trend is accurate and the extent to which post-*Booker* practices have decreased the levels of sentencing uniformity in our district, as well as across the country. In this 25th anniversary year of the Sentencing Reform Act, it is worth recalling that eliminating unwarranted disparity between defendants sentenced in the same courthouse was one of the goals behind the creation of the Guidelines.

Perhaps the greatest change after *Booker* has been to the procedural aspects of sentencing. Sentencing litigation is now more elaborate and drawn out than ever before, and sentencing proceedings are beginning to resemble pre-trial litigation, with the associated motion practice, legal argument and factual hearings. It is also not uncommon for defendants to seek to adjourn sentencings in order to develop additional mitigation evidence, and defense counsel now make lengthier submissions of background information to the court. In the past, the defense and the government clashed largely on the calculation of the Guidelines; today the two sides join issue on a much broader range of topics including the initial Guidelines calculation, the application of enhancements or reductions, departure motions, variance requests, and statutory factors. As a result, there are strong incentives for AUSAs to conduct more thorough investigations into the individual characteristics of the defendant and his or her background, as well as a more complete examination of the seriousness of the offense for which the defendant was convicted, the defendant's criminal history, and the applicability of specific and general deterrence, a factor of particular significance in white collar cases where one prosecution can effect industry-wide systemic change.

In addition to these procedural changes, the role of victims has also become increasingly important. While much of this may be due both to a more sophisticated victims' bar and the passage of legislation such as the Crime Victims' Rights Act, there is no doubt that the changes in the sentencing landscape since *Booker* have caused prosecutors to turn more and more frequently to victims to ensure that their voices are heard as a way to rebut defense arguments for leniency. In some cases, this practice can have unfortunate consequences, as it requires victims to recall events that they have tried to move past and to relive the trauma of the original crime.

Nevertheless, we anticipate that the role of victims in the sentencing debate will continue to expand, particularly in light of the economic downturn we are currently experiencing.

Since sentencing is an important factor in charging and plea decisions, it is worth taking a moment to discuss whether *Booker* has changed those practices in our office. In general, our approach in both areas has remained relatively constant. As before, we continue to seek to charge those crimes that most accurately encompass what the defendant did. In many cases, those changes involve crimes, such as narcotics offenses or using or carrying a firearm in violation of 18 U.S.C. § 924(c), that call for a mandatory minimum sentence or a consecutive term of imprisonment. In general, however, we have not begun to charge more mandatory minimum offenses than we did before *Booker* was handed down. As before, those decisions are driven by the facts and the law. Nor have we chosen to file more prior felony informations under 21 U.S.C. § 851 or to increase the number of guilty pleas conducted under Rule 11(c)(1)(c) of the Federal Rules of Criminal Procedure in response to *Booker*. As a general matter, our office practice is to use Rule 11(c)(1)(c) sparingly for special circumstances or global dispositions of complex multi-defendant matters.

Perhaps the area that has seen the most significant change since *Booker* is appellate litigation. In *Booker*, the Supreme Court substantially increased the deference accorded to the district courts by holding that Courts of Appeals should apply a "reasonableness standard" in reviewing the sentencing decisions of the district courts. *United States v. Booker*, 543 U.S. 220, 262 (2005). The Court further clarified in *Rita* and later *Gall* that "reasonableness review merely asks whether the trial court abused its discretion." *Rita v. United States*, 127 S.Ct. 2456, 2465

(2007); *Gall v. United States*, 128 S.Ct. 586, 594 (2007) ("Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions"). As a result, under abuse of discretion review, fewer district court decisions are overturned on appeal, and the district courts are accorded substantial latitude by the reviewing court. Indeed, as the Second Circuit has noted, "After *Gall* and *Kimbrough*, appellate courts play an important but clearly secondary role in the process of determining an appropriate sentence." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc).

This does not mean, of course, that district courts are free to do whatever they like. The Second Circuit has made clear that it will continue to review district court decisions for procedural and substantive reasonableness, but it will reverse only in a comparatively narrow set of circumstances. As the court said, in addressing a district court's substantive determination of a sentence it would set aside the lower court's decision "only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* at 189 (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). With regard to substantive review, the Second Circuit will "not consider what weight" it "would have given a particular factor," but rather will "consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *Id.* at 191. However, unlike some other circuits around the country, the Second Circuit will "not presume that a Guidelines-range sentence is reasonable," *Id.* at 190 (citing *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *Rita*, 127 S.Ct. at 2462; *Gall*, 128 S.Ct. at 597), nor will it "presume that a non-Guidelines sentence is unreasonable, or require 'extraordinary' circumstances to justify a

deviation from the Guidelines range." *Cavera*, 550 F.3d at 190 (citing *Gall*, 128 S.Ct. at 595). This deferential standard of review is a familiar one to all participants in the sentencing process, and, as the Second Circuit itself has noted, codifies the dictates of the Supreme Court, which send "a renewed message that responsibility for sentencing is placed largely in the precincts of the district courts." *Cavera*, 550 F.3d at 191.

In framing the parameters of appellate review, the Second Circuit recently addressed the degree to which district courts can fashion sentences based on, among other things, policy disagreements with the Guidelines in *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008), a rare *en banc* opinion coming out of a case that originated in our district. In *Cavera*, the defendant, a "septuagenarian army veteran with residences in New York and Florida," 550 F.3d at 185, supplied 16 firearms to his co-conspirators that were, in turn, sold to an FBI confidential informant. Cavera was convicted after a guilty plea of conspiracy to deal and transport firearms in violation of 18 U.S.C. § 371. At sentencing, Cavera faced a potential sentence of 12 to 18 months of imprisonment under the Guidelines. The district court judge, however, decided to upwardly depart and sentence Cavera to 24 months in prison. The court based its upward departure on a policy disagreement with the Guidelines, which it felt failed to give appropriate weight to the severity of a firearms trafficking offense in a densely-populated urban area, such as the Eastern District of New York. The district court pointed to the increased likelihood that guns would illegally end up in the hands of prohibited possessors, could be used for improper purposes, or could cause disproportionate harm. *Id.* at 185-86. The court also offered a separate deterrence basis for an upward departure because the stricter gun laws in New York state make it

"one of the 'unusual areas' to which running guns is a profitable enterprise." *Id.* at 186 (citations omitted).

The defendant appealed his sentence. Initially, in an opinion written before *Gall* and *Kimbrough* were decided, the Second Circuit reversed, holding that the district court had erred in crafting a sentence based on a policy disagreement with the Guidelines rather than the particularized circumstances of the individual defendant. *United States v. Cavera*, 505 F.3d 216, 222 (2d Cir. 2007) (citations omitted). We agreed that the sentencing court impermissibly based its decision on a policy disagreement with the Guidelines. Shortly thereafter, however, the Second Circuit elected to rehear the case *en banc* and set a briefing and argument schedule. During that interim period, our office reviewed the case and concluded that, after *Kimbrough*, we had to reverse our position and concede that the original 24 month sentence was reasonable. The Second Circuit reached the same conclusion, holding that "as the Supreme Court strongly suggested in *Kimbrough*, a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses." *Cavera*, 550 F.3d at 191. The Second Circuit did not extend unqualified deference to the district courts, however, and noted "closer review may be in order" in cases where "the sentencing judge varies from the Guidelines 'based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." *Id.* at 192 (citing *Kimbrough*, 128 S.Ct. at 575). While the exact parameters of this closer level of scrutiny remain to be defined, the Second Circuit cautioned that a district court must, in imposing a non-Guidelines sentence, give his or her reasons for the departure, "bearing in mind,

once again, that 'a major departure from the Guidelines should be supported by a more significant justification than a minor one,'" *Id.* at 193 (quoting *Gall*, 128 S.Ct. at 597).

The *Cavera* decision serves as a guidepost for sentencing practices in our circuit. The district courts are now given much deference in crafting the appropriate sentence, provided that they adhere to the procedural requirements as laid out by the Supreme Court and the Second Circuit. Those sentences can be based not only on the particularized facts pertaining to the individual defendant, such as his or her background and criminal history, but also on broader concepts such as general deterrence or policy disagreements with the Guidelines. District courts are required to state their reasons and to support their positions with facts and analysis. But as long as they do so, chances are high that their decisions will be affirmed on review.

There can be little doubt that these are interesting times in the sentencing arena. The last few years have seen many changes, and I suspect that we have not seen the last of those evolutions. Nonetheless, in the Eastern District of New York, we continue to successfully prosecute hundreds of cases involving over a thousand defendants per year in virtually every area of federal criminal law. Many of those cases are among the most sophisticated criminal prosecutions in the country involving extremely serious defendants who have committed the most egregious federal crimes. In cases involving the most violent, repeat offenders, we are obtaining lengthy sentences. But no matter what sentencing structure is in place, we remain committed to serving the citizens of the Eastern District of New York by prosecuting the most significant federal offenders in a wide spectrum of areas including counter-terrorism, corporate and securities fraud, mortgage fraud, violent crime, racketeering, homicide, narcotics trafficking,

civil rights violations, and public corruption. In doing so, we will continue to turn to the Guidelines to frame the sentencing debate, and we are deeply appreciative of the work that the Commission, and its staff, continues to do in this important area. To that end, we look forward to the Commission's continuing efforts to provide the statistical research and history that underlies the sentencing discussion and, in particular, the policy analysis and data that support its advised Guidelines ranges. Such analysis is an effective tool in persuading courts that they should heed the advice that the Guidelines provide.

Thank you for the chance to testify today, and for the opportunity to give you a sense of practice in the Eastern District of New York. I am happy to answer any questions that you may have.