STATEMENT OF

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BEFORE THE
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REGIONAL HEARING ON
THE STATE OF FEDERAL SENTENCING

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Introduction

Thank you for the opportunity to speak with you today about federal sentencing policy and the state of the federal sentencing guidelines. We at the Department of Justice are pleased the Commission has undertaken a comprehensive review of federal sentencing; we believe the review is timely and very important. Your leadership during this period of change in federal sentencing policy is welcome. The Commission has a unique role to play in reviewing federal sentencing policy, with unmatched and valuable data and analytic capacity. As the Attorney General indicated in a letter to the Commission last month, the Department has recently begun a comprehensive review of sentencing and corrections policy and we very much hope to tap into the Commission's capabilities and expertise during that process. I will say more about the Department's

review in a moment, but for now let me say that we look forward to working with you over the coming months on this extremely important project.

It is no secret that the federal sentencing system, which includes both sentencing guidelines and mandatory minimum sentencing statutes, has been the subject of significant criticism over many years and has also recently undergone significant change. The Supreme Court's decision in *United States v. Booker* (2005), in which it rendered the guidelines advisory, has dramatically changed the way business is done in federal courts. Clearly, sentencing courts are no longer bound to follow the guidelines, but merely "must consult those guidelines and take them into account when sentencing." *Booker*, 543 U.S. 220, 264 (2005).

As you well know, sentencing data clearly demonstrate that *Booker* and subsequent cases have had an effect. The percentage of defendants sentenced within the guidelines has dropped from 72% to 60%, and to 45% in the Ninth Circuit. The rate of within guideline sentences differs markedly in different districts and circuits around the country. The total impact of the new jurisprudence and these differing policies is still not entirely clear, but the signs point to increasing sentencing disparity – including disparity based on differing judicial philosophies among judges working in the same courthouse.

At the same time, the number of inmates in federal prisons, state prisons, or local jails has quadrupled since 1980, reaching over 2.2 million today. The burgeoning federal prison population strains our existing resources and limits the numbers of qualified

prisoners who can receive the drug treatment and other services they need while in prison. Ninety-seven percent of all prisoners are eventually released – sending 45,000 individuals back into U.S. communities each year. A 2002 federal Bureau of Justice Statistics (BJS) recidivism study tracked a sample of 272,111 prisoners released in 15 states in 1994. Of this sample, within three years, 67.5% of the offenders were rearrested at least once for a new offense, 46.9% were convicted for a new crime, and 25% were re-sentenced to prison for a new conviction. In total, 51.8% had returned to custody, many for technical violations, but about half were the result of new crimes. The federal recidivism rate is lower than the average rate for state inmates, but nonetheless, recidivism among released federal offenders is a significant problem. All of this – jurisprudential changes, differences in prosecutorial practices, differences in judicial philosophies, a very large federal prison population, and more – lead us to the conclusion that a thorough and comprehensive review of federal sentencing and corrections policies, with an eye toward possible reform, is long overdue.

Our Commitment to an Effective and Fair Sentencing System

The Department of Justice shares the Commission's commitment to a sentencing and corrections system that protects the public, is fair to both victims and defendants, eliminates unwarranted sentencing disparities, and reduces recidivism. We firmly believe that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted disparities. Criminal and sentencing laws must provide practical, effective tools for federal, state, and local law enforcement, prosecutors, and judges to hold criminals accountable and to deter crime. The certainty of our sentencing structure is

critical to disrupting and dismantling the threat posed by drug trafficking organizations and gangs that plague our nation's streets with dangerous illegal drugs and violence; it is vital in the fight against violent crime, child exploitation, and sex trafficking; and it is essential to effectively punishing financial fraud.

Ensuring fairness in the criminal justice system is also critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.

Changing these perceptions will strengthen law enforcement through increased public trust and cooperation, coupled with the availability of legal tools that are both tough and fair. The Department of Justice is committed to reviewing criminal justice issues to ensure that our law enforcement officers and prosecutors have the tools they need to combat crime and ensure public safety, while simultaneously working to root out any unwarranted and unintended disparities in the criminal justice process that may exist. As a first step, last month, the Department announced its intention to seek the elimination of the crack and powder cocaine sentencing disparity.

The Department's commitment to addressing this policy stems from a position that the United States Sentencing Commission first took 15 years ago, when it reported on the differences in sentencing between crack and powder cocaine. Since that time, a consensus has developed that the federal cocaine sentencing laws should be reassessed. Indeed, over the past 15 years, our understanding of crack and powder cocaine has evolved. It is not hyperbole to say that the Commission has played a tremendous role in contributing to our understanding of this issue. That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice, necessitates a change. We think this change must be addressed now, in this Congress, and we will be working with you and Members of Congress over the coming months to address the sentencing disparity between crack and powder cocaine.

Our review of sentencing and corrections policy cannot end with addressing penalties for crack cocaine, though. Last month, the Attorney General asked Deputy Attorney General David Ogden to form and chair a working group to examine federal sentencing and corrections policy. The group's comprehensive review will include possible recommendations to the President and Congress for new sentencing legislation affecting the structure of federal sentencing. In addition to examining federal cocaine sentencing, this review will examine the structure of federal sentencing, including the role of the guidelines and mandatory minimum statutes; racial and ethnic sentencing disparities; alternatives to incarceration and reducing recidivism through effective reentry programming; and the Department of Justice's charging and sentencing policies.

The Sentencing and Corrections Working Group's review will not only include discussions within the Department of Justice; we will reach out beyond the Department, to the Federal Judiciary, law enforcement agencies, the defense bar, victims' groups, civil rights and community organizations, academics, and others as part of our work. We also hope to work closely with you and benefit from your own experience and your extensive collection of data on federal sentencing.

Observations on Federal Sentencing in the Ninth Circuit

I would now like to turn my attention to the regional impact of the Supreme Court's decision in *Booker* – which has led to some significant changes within my district at both the trial and appellate level, and as a result, on our charging and plea practices. Please note that what I am about to discuss is based on my experience as a prosecutor in the District of Oregon, and does not necessarily represent the views of the Department of Justice as a whole.

Within the district of Oregon, as I am sure is the case in most districts around the country, sentencing tendencies have always been somewhat unique to each individual judge, but the differences since *Booker* have become more pronounced. Some of our judges continue to follow the advisory guideline sentence in the majority of cases. Several other judges routinely decline to impose a guideline sentence, and instead impose sentences with variances from modest to significant. With one unusual exception involving a seaman's manslaughter conviction, sentencing variances in Oregon result in lower, not higher, prison terms. These variances are generally made without prior notice

to the government. Since the Supreme Court's decision in *Irizarry*, prior notice is no longer required for variances, as distinct from guideline departures. Nevertheless, we have asked that our district judges provide us with notice so that we are more prepared to provide meaningful input at sentencing.

In surveying my office, the overall number of guideline variances appears to have increased. Moreover, the extent of those variances appears to have risen. When a judge deviates from the guidelines today, he or she does so in a fashion that is more dramatic than what we observed when the judges looked to Chapter 5 of the Guidelines for departure guidance.

For example, in *United States v. Autery*, the defendant was discovered during an Internet sting operation attempting to purchase custom made child pornography videos from two different, independent investigators. Autery also had a computer with hundreds of images of child pornography. He pled guilty to unlawful possession of child pornography, and his advisory guideline range was 41-51 months. At the sentencing hearing, there were no objections to the guideline calculations, and the only dispute between the parties was where, within that range, Autery should be sentenced. The district judge sentenced Autery to probation, relying exclusively upon the statutory factors set forth in 18 U.S.C. § 3553(a), and relying heavily upon the absence of any evidence that Autery had ever actually molested any children and his lack of any prior criminal record. There were no other unique or mitigating circumstances. The court rejected our arguments that proof of child molestation would have resulted in a different

charge and a different guideline calculation. We appealed Autery's sentence and the Ninth Circuit affirmed, citing the highly deferential standard of review envisioned by the Supreme Court in *Gall* and *Rita*. Under a pre-*Booker* mandatory guideline scheme, Autery's sentence would likely have been within the 41-51 month range agreed upon by the parties.

In child sexual exploitation cases, district judges throughout the Ninth Circuit often grant downward variances, particularly in possession cases. Some of these variances are based on claims that the particular defendant has not committed a "hands-on" sex offense against a child ("he was only looking at pictures"). In another case, a defense psychologist opined that the defendant was not a pedophile, or was a low risk for committing a hands-on offense. Some judges have cited the defendant's lack of criminal record, which, of course, would not be a viable ground for *departure* under the guidelines, but which *may* be used as a ground for a variance. These variances have had an impact on our charging decisions. We routinely charge counts carrying mandatory minimum sentences (such as receiving, transporting, or distributing child pornography) in cases where the evidence supports those counts, in addition to possession counts. We routinely allege prior convictions, where applicable, which enhance both the statutory maximum and mandatory minimum penalties. Many AUSAs require the defendant to either plead guilty to a mandatory minimum count, or at the least, to agree under Rule 11(c)(1)(C) to a guideline sentence with no variances or departures.

We also have seen many variances in cases involving crimes of violence, such as bank robbery. One such case involved a bank robber who received a substantial downward variance, despite the fact that he gave the teller a robbery demand note announcing that he had a gun and a gun was *actually found* in his backpack at the time of his arrest, some thirty minutes after the robbery. Another judge granted a 60% variance in a child sex abuse case where the defendant actually abused *three* children, all of whom were under the age of 12 at the time of the abuse. Such a sizeable variance is difficult for victims to understand. Moreover, the lack of predictability in these cases is troubling for crime victims who have genuine concerns about a defendant's future release date.

The scope and content of sentencing hearings has also changed. Sentencing hearings have taken on a far more trial-like appearance following *Booker*. Numerous set-overs are sought and granted to give defendants an opportunity to put together mitigation evidence for the sentencing judge's consideration as relevant background information under 18 U.S.C. § 3553(a). These hearings have prompted AUSAs to take a more active role in gathering victim impact evidence to counter defense mitigation and to ensure that the court's focus is not limited to the nature and circumstances of a particular defendant. Meaningful consideration must also be given to the seriousness of the offense conduct, and the need to deter the defendant and others from similar criminal activity. Asking victims to attend sentencing hearings, and the increased reliance upon victims as witnesses at sentencing hearings, is attributable to the changes brought about by *Booker*. Requiring victims to re-live their victimization at these hearings is an unfortunate consequence for victims who have already been traumatized by the crime itself.

One recent example of an extensive mitigation sentencing presentation took place in a cocaine case involving a career offender who bought and sold kilo quantities of crack. The defendant had been on pretrial release for approximately two years when he came before the court for sentencing, having sought and received numerous extensions of his trial date. While some of that time was spent cooperating with the government, much of the rest of his time was spent re-establishing himself in the community. This particular defendant did make several positive steps forward, securing employment and actively participating in his children's lives in a manner that he had never achieved before his arrest. Because of his cooperation, we filed a motion for a downward departure of 5-levels under 5K1.1. The district court granted a departure for cooperation but granted 12 levels instead of the 5 sought by the government. The court then turned to the statutory factors, varied entirely from the adjusted guideline range, and imposed a sentence of probation, despite the fact that two other cooperating co-defendants with similar criminal histories had received sentences of 70-80 months. This case illustrates how application of the statutory sentencing factors, untethered to the guidelines or to the considerations found in Chapter 5, can lead to results that are anomalous and out of step with sentences imposed upon other, similarly situated defendants.

Drug cases and the significant sentences driven by drug quantity determinations have always been a point of concern for judges in our district. The Chief of my drug unit reports that variances of at least 2-levels are now the norm.

The way in which we charge and negotiate pleas has also changed since the guidelines became advisory. Overall, our reliance upon binding 11(c)(1)(C) plea agreements and charging mandatory statutory minimum sentences (where applicable) has increased since *Booker*. Much of this has been driven by the goal of providing some consistency and assurance in sentencing, particularly in cases that involve crime victims. For example, in child pornography cases, we will use both possession and receipt charges to negotiate – a possession charge for a first offender carries no mandatory minimum term, while a receipt charge for a first offender does. In gun cases involving defendants with violent criminal histories, we charge them under the Armed Career Criminal Act, and find that in many instances, judges impose the 180 month mandatory minimum term, regardless of the guideline range. In illegal reentry prosecutions of criminal aliens, we now use 11(c)(1)(C) agreements routinely, since many of these cases are handled on a fast-track system. Following *Booker*, some of our judges began applying 3553(a) factors to vary downward from negotiated sentences for criminal aliens, even in the absence of a presentence report. To ensure consistency among similarly situated defendants, and to avoid increasing the burden on the U.S. Probation Office, we now use binding pleas.

Since *Booker*, the types of cases that we prosecute have generally not changed, with the exception of cases involving felons who possess firearms. For felon in possession of firearm cases, we are now far less likely to prosecute a defendant federally if a probationary sentence is likely.

In canvassing other districts within the Ninth Circuit, nearly all emphasize the wide variation seen between different judges within their districts. Most districts report similar experiences to those we have seen in Oregon, although many note that they have been relying upon mandatory minimum sentence charges since well prior to *Booker*. The Northern District of California reports increases in their use of 11(c)(1)(C) binding plea agreements. Nevada reports that white collar sentences are experiencing a downward trend, and the District of Idaho believes that judges are using the bottom of the guideline range as a new maximum. One of the starkest examples of the impact of *Booker* is from the Commonweath of the Northern Mariana Islands: there a high-ranking Mexican drug cartel member was originally sentenced to 360 months. Following an *Ameline* remand, his sentence was reduced to 120 months - the mandatory statutory minimum term.

The Ninth Circuit held in *Carty* that district courts must continue to correctly calculate an advisory guideline range, and then use that range as the starting point for determining an appropriate sentence. We have seen that our judges continue to faithfully calculate the advisory guideline range. Once that process is complete, however, the advisory nature of the guidelines under Supreme Court and Ninth Circuit precedent dictate that the advisory range is not presumptively reasonable, and is simply one of many factors that the court should consider. For the most part, there is no seamless flow from guideline computation to the reasonableness analysis undertaken under 3553(a). Instead, in cases in which the judge makes a significant variance, the guidelines are properly calculated and then sidelined during the court's consideration of the statutory factors. When judges consider a sentence under the statute, the proceeding often

becomes one that resembles a pre-guideline sentencing where there was an upper range, sometimes a lower range, and a vast sea of discretion in between.

Several recent decisions from the Ninth Circuit affirming massive downward variances under 3553(a) to probationary sentences – *Whitehead, Ruff,* and *Autery* — have also had an impact. These decisions employ such a deferential standard of review, that sentencing judges now know that any sentence they impose will be affirmed as substantively reasonable, so long as they commit no procedural errors and properly calculate the advisory range.

In addition, we have experienced a sharp increase in the number of sentencing appeals. Prior to *Booker*, a district court's discretionary refusal to depart was unreviewable on appeal; after *Booker* all sentences are subject to review for both procedural and substantive reasonableness. Any defendant who is dissatisfied with his sentence, regardless of whether that sentence is within, above, or below the guideline range, now has a right of appeal and defendants are exercising that right with increased frequency.

While *Booker* has had a significant impact on how we negotiate pleas and litigate sentencing issues, we are still successfully prosecuting a broad range of federal crimes and, for the most part, we are receiving lengthy sentences for the most egregious cases and the most violent, repeat offenders. Regardless of the sentencing structure in place, we remain committed to prosecuting cases that merit punishment and deterrence. We

have used the tools available to us to provide some consistency in sentencing to be fair to defendants sentenced to similar crimes and who share similar criminal backgrounds. We also continue to use the guidelines as a tool to help inform victims about the possible consequences of a particular plea and potential sentencing outcomes. The guidelines continue to serve as a reference point for prosecutors, defense counsel, and judges, and the empirical base helps to inform the justice system about the national experience.

Thank you for the work you are doing on this important issue and for the opportunity to share the experience of my district. I welcome any questions you may have.