STATEMENT OF

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I am grateful for the opportunity to speak before the Commission on the important topic of federal sentencing policy and the sentencing guidelines in particular. As you know, while the Commission continues its critical work studying and seeking to improve the sentencing guidelines, the Department of Justice is undertaking its own fairly comprehensive review of federal sentencing policy. (Indeed, I know the Commission has been an invaluable resource for data and analysis to assist the Department's effort and for that, we are grateful.) As a result of the ongoing DOJ efforts, I will note up front that I am not in a position to suggest particular changes to the federal sentencing guidelines while I am currently participating – with many, many others in the Department of Justice – in the Sentencing and Corrections Working Group studying the matter and preparing a report to the Deputy Attorney General and, through him, the Attorney General. The participants in that effort are looking at empirical data and those of us in the field are trying to get a better sense of how practices may be different in districts outside of our

own. Given that, I do not want to jump to any conclusions ahead of the full review of the relevant facts and arguments. Nor do I wish to give the false impression that my preliminary thoughts would reflect anything approaching a consensus among prosecutors, much less a proxy for where the working group will come out. Thus, my remarks today (and any answers I offer to questions you pose) should not be viewed as anything approaching an official view of the Department. What I can provide is a view from the field of how sentencing has changed on the ground in the Northern District of Illinois in the wake of the Supreme Court ruling in *Booker* and its progeny. I will also comment about a few aspects of sentencing that I think merit special attention, which I will discuss in a moment.

First, I will discuss sentencing in the district court in Chicago in the post-*Booker* world. *Booker* has required our prosecutors to re-focus their sentencing advocacy on the factors described in Title 18, United States Code, § 3553(a), which often require them to include a justification, in the context of particular cases, of the reasoning behind many of the specific offense characteristics, as well as favored and disfavored departures, covered by the Guidelines. That substantial change has resulted in both advantages and disadvantages. On the positive side, the government is required to make a fuller record of why a particular recommendation of incarceration is warranted, beyond proving the separate facts that support the proffered guidelines range calculation. And there are no doubt cases where it appears that substantive fairness is easier to achieve because the sentencing judge is not constrained by sentencing guidelines. Moreover, as a matter of perception, both defendants and victims may well be more likely to perceive that the

sentencing process is fair if there is greater emphasis on facts specific to an individual defendant and the specific offense.

Having said that, there is a flip side to the *Booker* decision. The benefits of advisory (rather than mandatory) guidelines come at the serious expense of other fundamental sentencing principles: specifically, similar treatment for similarly-situated defendants and certainty in punishment. I venture to say that *Booker* has re-introduced into federal sentencing both substantial district-to-district variations and substantial judge-to-judge variations. In many ways, we are experiencing sentencing variations on a district-level similar to what occurred post-*Booker* on a nationwide-basis. (Indeed, the statistics would indicate that the effects in our District are even more pronounced. For example, the Commission's statistics show that in the Northern District, between the issuance of *Gall v. United States*[1] in December 2007 and the end of FY2008, around 42% of contested sentencings resulted in below-range sentences.[2] In comparison, nationwide, only 19% of contested sentences were below-range.[3] The most recent statistics show similar rates of below-range sentences.[4] (I hasten to add that I am not, of course, labeling these below-range sentences as unreasonable, but instead I am pointing out that significant disparity between districts appears to be emerging.)

[1] 128 S. Ct. 586 (2007).
[2] See U.S. SENTENCING COMMISSION, POST-*KIMBROUGH/GALL* DATA REPORT, tbl. 2 (2008). The data show that, in NDIL, there were 743 total sentences in that time period. Omitting the 163 government-sponsored below-range sentences (148 based on Guideline § 5K1.1 and 15 others) from the total results in 580 contested sentencings. Of those 580 sentences, 244 were below the advisory range.
[3] *See id.* at tbl. 1. The data show that, nationwide, there were 60,317 total sentences in the relevant time period. Omitting the 15,254 government-sponsored below-range sentences from the total results in 45,063 contested sentencings. Of those, 8350 were below the advisory range.
[4] *See* U.S. Sentencing Comm'n, Preliminary Quarterly Data Report, tbls. 1, 2 (June 1, 2009). The data show that 40% of the contested sentencings (117 out of 293) in NDIL were below-range; 20% (5721 out of 28,127) were below-range nationwide.

Moreover, there are anecdotal reports of substantial variation in sentences from judge-to-judge. That is not at all surprising as discretion is a two-edged sword. The more freedom any given judge is provided to impose a sentence, the more likely it is that judges with different perspectives will impose dissimilar sentences in similar situations. Any perception that punishment heavily depends on where one is prosecuted or which judge is assigned to the case undermines the fairness – and perceived fairness – of the judicial system.

Booker has also undercut the "certainty of punishment." By that I mean not only the length of imprisonment, but also whether *any* amount of imprisonment is part of the sentence. One of the Commission's initial findings under the Sentencing Reform Act was that "courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement."[5] There is reason to believe that *Booker* has started a trend returning to that type of leniency in some economic-crime cases. In FY2003, the Commission's statistics show that 26.7% of offenders in the "Fraud" category received entirely non-prison sentences, whereas in FY2008, that percentage increased to 32.4%. In other words, non-prison sentences in the "Fraud" category have increased by 20% from the last full year before *Blakely/Booke*r versus the last fiscal year. Again, leniency may have been well-deserved in particular cases, but the enforcement of a uniform sentencing policy is more difficult in the post-*Booker* era.

Two points about the effect of *Booker* on our practice. First, as discussed, our prosecutors must pay close attention to the § 3553(a) factors in each individual case, rather than reflexively object to a non-guidelines sentence. To be sure, the advisory

[5] U.S. Sentencing Commission, *Guidelines Manual*, Ch.1, Pt.A(d).

guidelines continue to be extremely important. They remain the one uniform reference point in a sentencing regime that is subject to geographic and judicial variation. For that reason, we generally seek a within-range sentence rather than introduce yet another point of disparity, namely, the subjective sentencing philosophies of individual AUSAs. In particular cases, however, we have authorized prosecutors to advocate for a deviation from the advisory range, both upward and downward. We have a centralized approval process in place for such requests so that, as an Office, we maintain some uniformity in how we treat defendants across cases, while at the same time making allowances where case-specific circumstances warrant sentences outside the advisory guidelines range.

Second, our practice of entering into cooperation agreements has changed to some extent. It has been our office practice to have supervisory review of cooperation agreements to ensure that similar defendants receive similar deals within the district. After *Booker*, more defense counsel are resistant to entering into such agreements with us on behalf of their clients in the hope that they can receive more of a break at sentencing by making a direct pitch to the sentencing judge.

The bottom line is that there is an inevitable tradeoff between the discretion afforded individual judges to render justice as they see fit in an individual case and the ability of the judicial system to minimize disparities in the sentencing of similarly situated defendants who appear before different judges in different districts for similar conduct. Rightly or wrongly, *Booker* has swung the balance more heavily in favor of judicial discretion, at the expense of consistency in sentencing and certainty of punishment.

Let me turn for a moment to our appellate practice. In the Seventh Circuit, appellate review is extremely deferential. That is not surprising in light of the Supreme Court's emphasis on the discretion that district judges now enjoy in applying the § 3553(a) factors in each particular case. Although the government has successfully appealed non-custodial sentences or exceedingly-short prison sentences in certain serious cases,[6] appellate review is light. Indeed, recognizing the deferential standard of review, very few of the below range sentences are appealed in the Northern District of Illinois (or elsewhere). In light of that substantive discretion, however, the Seventh Circuit has imposed on district court judges a corresponding procedural responsibility to explain adequately the reasons for selecting the sentence in each case. The duty to explain a sentencing decision promotes better decision-making and gives defendants, law enforcement, and victims more confidence in the fairness of the sentencing process, even if a particular party disagrees with the sentence itself. (Of course, if the reasoning for the sentence imposed in a particular case is not compelling, the confidence of the public and parties is undermined.) That said, there are also appropriate limits on how much explanation is required. So long as the record shows that the district judge gave meaningful consideration to the § 3553(a) factors (bearing in mind the broad discretion that judges now enjoy), the explanation should be deemed adequate.

[6] *See, e.g.*, *United States v. Bey*, 289 Fed. Appx. 954, 2008 WL 3891848 (7th Cir. Aug. 28, 2008) (vacating 3-month prison sentence in $132,000 bankruptcy fraud case where defendant went to trial and advisory range was 33-41 months); *United States v. Goldberg*, 491 F.3d 668 (7th Cir. 2007) (vacating 1-day prison sentence in child pornography possession case with advisory range of 63-78 months); *United States v. Roberson*, 474 F.3d 432 (7th Cir. 2007) (vacating 1-month prison sentence in bank robbery case with advisory range of 46-57 months); *United States v. Repking*, 467 F.3d 1091 (7th Cir. 2006) (per curiam) (vacating 1-day prison sentence in $1 million bank fraud case with advisory range of 41-51 months); *United States v. Wallace*, 458 F.3d 606 (7th Cir. 2006) (vacating probation sentence in $400,000 wire fraud case with advisory range of 24-30 months).

Finally, let me comment on two types of cases that are brought with increasing frequency in our district court as in so many others: (i) cases involving drugs, guns and gangs; and (ii) cases involving child pornography and/or child exploitation. In the drug and gun context, the guidelines (and mandatory minimum sentences) have often been criticized as being too harsh. In that regard, I would offer the following comments. Mandatory minimum sentences have been a very effective tool in prosecuting particularly violent offenders. The threat of mandatory minimum sentences has caused many persons charged with these offenses to become cooperating witnesses, often testifying against persons with greater responsibility in the drug or gang organization. And the threat of mandatory minimum sentences also has caused some people not to commit such offenses and thus not go to jail at all. (A scholarly study has shown that released offenders who attend a one hour forum where they are advised of such penalties are 30% less likely to reoffend.[7] In each case where recidivism is deterred, we have the benefit of both less crime and less incarceration.)

On the other hand, in recognition of the fact that some offenders who get involved in drug and gun offenses may not have a lot of information to offer and may not pose the same threat as more hardened offenders, Congress enacted the "safety valve" provision (18 U.S.C. § 3553(f)) in 1994. We have not seen the "safety valve" provision as a serious impediment to law enforcement in Chicago. We actually think that it is a good relief valve that ameliorates the harshness of mandatory minimum sentences where the offender does not have an extensive criminal history.

[7] *See* Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program (2009) (summary of research), *available at* http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf.

In the area of child pornography and child exploitation, there seems to be a striking dissonance between the perspectives of some district judges on the one hand and prosecutors who handle those cases on the other. Stated as neutrally as possible, this subject area is one where district judges seem to vary the most and seem to get most frustrated with the government seeking a sentence within the guidelines range. It is also the same area where the AUSAs handling these cases privately express the most frustration with the views of the sentencing judges. One could posit that perhaps the judges are more lenient because they have less personal contact with the victims and see things more through the lens of the defendant standing before the judge for sentencing. Alternatively, one could posit that AUSAs may seek harsh sentences because they see the case most heavily through the lens of the victims, who have suffered much and to whom they often become very close. Along the same lines, the prosecutors have little or no interaction with the defendant. Without taking an advocate's view on why it is so, it is plain as day that there is a deep disconnect. I respectfully suggest that this is an area of sentencing that warrants further study and further education of all involved.

On a practical level, the *Booker* decision has aggravated the situation concerning child pornography. The mandatory minimum sentences imposed for certain child pornography offenses are certainly strict. However, a prosecutor has some discretion not to charge a mandatory minimum sentence (or to charge a lesser mandatory minimum sentence) where the guidelines range is below the otherwise applicable mandatory minimum sentence. (Indeed, the line between possession and receipt of child pornography – which impose different penalties – is exceptionally thin.) Yet, anecdotal experience suggests that, when given discretion in this area, district judges often vary

quite substantially from the guidelines range. And this Commission's statistics seem to support those anecdotal observations.[8] Put in simple terms, a prosecutor is far less willing to forego charging a 15-year mandatory minimum where prior experience suggests that the defendant will ultimately be sentenced to a mere fraction of an 8-10 year guidelines range.

I will close by again thanking the Commission for undertaking work that is as important as it is difficult. The tension between providing a sentencing judge the ability to impose a sentence he or she believes to be just based upon the facts concerning the particular offense and the particular offender before him or her, and the need at the same time to eliminate unwarranted disparity between sentences imposed upon people for similar offenses before different judges in different areas does not lend itself to an easy solution. The Commission's insights can be enormously helpful to the process going forward.

[8] According to Table 16 of the Sentencing Commission's Post-*Booker* analysis, when you combine the percentages relating to "downward departures" and "*Booker* Authority," the number of cases that were sentenced below the guidelines range in child pornography trafficking and possession cases increased from 12.2% and 12.3% respectively in the "Post-PROTECT Act" period (2003-2004) to 19.1% and 26.3% in the immediate "Post-*Booker*" period (2005 – 2006). *See* U.S. SENTENCING COMMISSION, REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 119 (2006). In FY 2008, the number increased to 37.6% and 35.7% respectively. *See* POST-*KIMBROUGH/GALL* DATA REPORT, *supra* note 2, at tbl. 4. Those are startling increases in below guidelines sentences in a relatively short time.