

STATEMENT OF
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BEFORE THE
UNITED STATES SENTENCING COMMISSION
REGIONAL HEARING ON
THE STATE OF FEDERAL SENTENCING
DENVER, COLORADO

October 20, 2009

Mr. Chairman, members of the Sentencing Commission, let me thank you for the opportunity to speak to you today about federal sentencing policy and the state of the federal sentencing guidelines, specifically as they relate to the District of Colorado.

First, if I may, a little background on our district. The District of Colorado encompasses the entire State and consists of both urban and rural areas. Our crime problem runs the full spectrum from petty offenses occurring on federally-owned land to fraud, bank robberies, immigration, drug trafficking organizations and violent criminal street gangs. We also have the distinction of hosting five Bureau of Prisons facilities, including the Administrative Maximum Facility (ADX, also know as “Supermax”) in Florence, Colorado, which houses the worst of the worst convicts in the federal prison system.

As a result of this statewide crime problem, our federal law enforcement agencies have teamed up with their state and local colleagues in numerous joint task forces throughout the State. Some of the most effective task forces include the Metro Gang Task Force, the Safe Streets Task Force, North and West Metro Task Forces, and the Front Range Task Force, just to mention a few.

The Supreme Court's decision in *Booker* has dramatically changed the way we here in Colorado approach our sentencing hearings. Our Assistant U.S. Attorneys (AUSAs) must now focus their advocacy on the factors outlined in Title 18 U.S.C. § 3553(a). Despite such advocacy, the advisory nature of the sentencing guidelines, post-*Booker*, has resulted in greater inconsistencies in sentences among our judges. Of the six federal judges in our district, three follow the guidelines, one sometimes does, and two do not use the guidelines. One judge has told one of my AUSAs that the sentencing guidelines are arbitrary and would not be followed.

It is certainly my belief, and I'm sure that of many others, that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted disparities. Such a system not only protects the public, but is fair to both victims and defendants alike.

Without such certainty of sentencing, our office's participation in the many task forces I mentioned a few moments ago would be minimized. Our partnership with these various task forces has flourished, at least in part, due to the existence of tough and predictable federal sentences associated with the sentencing guidelines. It is important to note, and I can say this with certainty from the not-so-distant past when I personally handled drug trafficking cases as an Organized Crime and Drug Enforcement Task Force (OCDETF) AUSA, that many would-be criminals were fearful of the strict sentencing guidelines used by the "feds." These drug dealers or gang members did not want to end up in federal court, because they knew they would be going to jail rather than receiving a probationary sentence, which was a likely sentence from a state court judge operating without such mandatory sentencing guidelines. In fact, some defendants actually admitted that they consciously decided not to bring a gun to a drug deal, fearing the federal sentencing enhancements.

I should note that some judges are making it clear what they believe an appropriate sentence should be with little or no consideration of the advisory guideline range. Child pornography cases are especially becoming troublesome in this district, and I know the Commission has heard the same from some of my fellow U.S. Attorneys across the country. Here in this district, a defendant convicted of child pornography who possessed an extensive collection of such pornography and whose advisory guideline range was calculated at 97 to 121 months, was sentenced to one (1) day of imprisonment, credit for time served and lifetime supervision. Cases like this suggest that the current state of federal sentencing system increasingly favors judicial discretion over uniformity, consistency and certainty.

Recent appellate cases suggest that there is little meaningful appellate review of sentences. For example, in a recent concurring opinion, a Tenth Circuit judge opined that the court's present approach appears to be that a sentence is substantively reasonable if the sentencing judge provides reasons for the length of the sentence. The result, the judge continued, will be a great inequity in sentencing. Reasonable people, as district court judges are, can differ on how lenient or harsh sentences should be, both in general and for particular crimes and particular types of offenders. The resulting inequalities will have the imprimatur of the courts. Under such an approach, the court may go through the motions of a substantive reasonableness review, but it will be an empty gesture. This same judge suggests a different approach which not only requires sentencing judges to consider all of the factors set forth in 18 U.S.C. § 3553(a), but to focus on two factors in particular. These two factors are the sentencing range in the guidelines and the need to avoid unwarranted sentence disparities among defendants with similar records found guilty of similar conduct. This approach would allow an appellate court to find a particular sentence unreasonable if solely based on the sentencing judge's idiosyncratic view of

the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of incarceration in the criminal justice system.

As it now stands, the government has little chance of successfully appealing a sentence, unless the judge fails to make any record of a § 3553(a) analysis, or uses a prohibited reason, such as race or gender, as the basis for the sentence.

While it is not particularly productive to wish for the return of a presumptive sentencing guideline system, that system did incorporate many of the goals of a fair and predictable sentencing system. We should take it as our goal to try to achieve as fair and as equitable sentencing system as possible. This could be done in many different ways. I recognize that fashioning a post-*Booker* sentencing system is a difficult task, and does not lend itself to an easy solution.

I thank the Commission for the willingness to take on such a task and for inviting me to meet with you today.