

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

Mr. Chairman, thank you for the opportunity to appear before you today and provide information about the impact of *Booker* and its progeny on the prosecution of federal cases in the District of Minnesota.

Allow me to begin by telling you about our District. Minnesota is large geographically, covering almost 80,000 square miles. It takes close to nine hours to drive from its northwest corner to its most southeastern point. The State is scattered with lakes, iron-ore mines, pine forests, and farm fields; yet, it serves as headquarters to 36 of the nation's top 1,000 publically-traded companies, including Target, Best Buy, 3M, General Mills, Medtronic, and U.S. Bancorp. In addition, it is home to the world-renowned Mayo Clinic as well as the University of Minnesota, one of the country's leading research institutions.

Northern Minnesota, with 700 miles of wilderness border shared with Canada, is a regular destination for those who want to "get away from it all," although, in truth, all parts of the State are easily accessible. Travel between Minnesota and Canada is active and relatively unrestrictive. In addition, Minnesota hosts a major airline hub; and Interstate 35W, originating in

Texas, runs right up through the State. Moreover, Minnesota boasts one of the world's busiest inland shipping ports, in Duluth, along the shore of Lake Superior.

Over 5,000,000 people live in Minnesota, but even though the State is comprised of more than 500 communities in 87 different counties, the majority of Minnesotans reside in the seven-county metropolitan area surrounding Minneapolis and St. Paul. Minnesota has strong Scandinavian roots and a minority population of less than twelve percent, but it is growing in diversity. More Somalis now live in Minnesota than in any other place outside the Horn of Africa, and the State's Hmong population is the second highest in the nation, after California. The Latino population is increasing too, with close to 250,000 Latinos now calling Minnesota home, making that community almost as large as the State's African-American community. Finally, the State has eleven Indian reservations, two of which fall under federal jurisdiction.

Minnesota is a progressive-leaning state with an independent population. Minnesotans enjoy a high standard of living, particularly in comparison to residents of many other states. The residents of Minnesota stand among the nation's leaders in education obtained, income, home ownership, health and well being and, in turn, life expectancy.

I am briefing you about the State's borders and air travel, demographics, economics, and quality-of-life expectations in an effort to shed some light on why Minnesota, a medium-size district, handles a number of significant investigations and prosecutions related to terrorism, health-care fraud, mortgage fraud, tax crimes, drug and firearms trafficking, and civil rights abuses.

### **Background**

The U.S. Sentencing Guidelines were created in part to minimize sentencing disparities among similarly situated defendants who appear before different judges in different districts for

similar conduct. In addition, they were developed to address the inappropriately high percentage of offenders given minimal sentences in certain economic-crime cases, such as those involving tax and fraud.

The *Booker* decision, in which the U.S. Supreme Court held that District Court judges are not bound by the Guidelines but only must “take them into consideration” when determining a sentence, has prompted the Commission to revisit those earlier issues. The Commission’s own data indicate that visit is warranted. As of the end of June 2009, about 43 percent of federal sentences imposed nationwide during the first three quarters of Fiscal Year 2009 were outside guideline range, up from 38 percent in 2006 (U.S. Sentencing Commission, Preliminary Quarterly Data Report, Table 1, (2009); U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table N, (2006)). Moreover, outside-range sentences were found in far more than white-collar cases (Tables 7 - 13).

By failing to adhere to the Guidelines in close to half of all sentences, some suggest the courts may be unintentionally jeopardizing the principle of equal justice under the law. They argue that similarly situated defendants may be, in fact, receiving dissimilar sentences, which, ultimately, could weaken the federal justice system. After all, victims, witnesses, jurors, defendants, and even the public at large must see the system as consistent in its treatment. Otherwise, it loses their respect and its credibility.

Furthermore, the federal system has long been viewed as the forum for addressing the most egregious crimes. With stiff and certain sentences and no parole, the federal system historically has been feared by potential offenders. That deterrent affect has never been more important than now, while, as a country, we struggle through serious economic turmoil brought about, at least in part, by those who played fast and loose with federal finance laws. A return to

outside-range sentences, particularly in the economic-crime area, could weaken the deterrent effect in addition to sending a devastating message to the general public. That is especially true if the sentences imposed regularly fall below guideline ranges, which is the case according to the Commission's own data.

### **Impact of *Booker* at the National Level**

Over the past several years, 96 to 98 percent of all sentences imposed outside the guideline ranges have fallen below the guideline minimums (Preliminary Quarterly Data, Table 1, (2009); U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table N, 2008; Table N, 2007). Granted, judges alone are not responsible for the below-guideline sentences. In Fiscal Year 2007, for example, 25.6 percent of all sentences were government-sponsored below-range impositions, while only 12 percent were imposed by the courts over the government's objections (Table N). However, a shift is occurring. During Fiscal Year 2008 and the first three quarters of 2009, the percentage of below-range sentences imposed by the courts over the objections of the government climbed to 15.7 percent of all sentences (Preliminary Quarterly Data Report, Table 1, (2009); Sourcebook, Table N, (2008)). That is a 3.7 percentage point increase in just 21 months. Furthermore, the trend can be seen in far more than economic cases.

Specifically, between October 1, 2008, and June 30, 2009, the government sponsored and the courts approved 838 below-range fraud sentences, 866 below-range firearms sentences, and 172 below-range pornography/prostitution sentences, among others. But, during that same time period – and over the objections of the government – judges imposed an additional 989 below-range fraud sentences, 1,135 below-range firearms sentences, and 546 below-range pornography/prostitution sentences, among others (Tables 7-13). As a result of those actions and

similar actions in other crime categories, the “contested” below-range sentencing rate jumped five percentage points over that nine-month period alone.

Moreover, the contested below-range sentences imposed during that time were significantly below guideline minimums in many subject areas. For example, in fraud cases, the average contested below-range sentence was 5.2 months, an average decrease of 9.5 months from the guideline minimums. In firearms cases, the average contested below-range sentence was 35 months, an average decrease of 13.5 months from the guideline minimums. And, in pornography/prostitution cases, the average contested below-range sentence was 59 months, an average decrease of 26.8 months from guideline minimums (Tables 10 - 13).<sup>1</sup>

### **Impact of Booker at the District Level**

As of June 30, 2009, the District of Minnesota possessed a comparatively high rate of contested below-range sentences, at 34.6 percent of all sentences imposed during the first nine months of Fiscal Year 2009 (Table 2).<sup>2</sup> As stated, the national average was 15.7 percent on that date. At the end of Fiscal Year 2008, the District’s rate was 22.4 percent, compared to the country as a whole at 13.4 percent (Table 26). Thus, while the national rate has risen not quite two and one-half percentage points over the last nine months, the District of Minnesota has seen a spike of over twelve percentage points.

No one knows for sure why Minnesota posts a higher-than-average rate of contested below-range sentences. Is it simply due to the progressive nature of its people? Perhaps.

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<sup>1</sup> While other tables highlight government-sponsored below-range sentences, Tables 10 – 13 focus on below-range contested sentences. The average below-range contested sentence for any particular crime is determined by adding together the Median Sentence in Months for that crime (e.g., fraud) from Tables 10 through 13 and dividing by four. The average decrease from guideline minimums is determined by adding the Median Decrease in Months from Guideline Minimum from Tables 10 through 13 and dividing that total by four.

<sup>2</sup> Total contested sentences in Minnesota between October 1, 2008, and June 30, 2009, is determined by subtracting above-range, within-range, and government-sponsored below-range from total sentences.

However, the significant jump in that rate between October of 2008 and June of 2009 is more likely the result of a growing comfort level among District Court judges relative to imposing outside-range sentences. That comfort is undoubtedly due in large part to the Eighth Circuit becoming increasingly more supportive of the District Court's autonomy in sentencing after being reversed by the United States Supreme Court in *Gall*.

### **Local Below-Range Sentences re Booker**

For example, about six months after the *Booker* decision, the owner and operator of a company in this district pled guilty to cheating on his taxes by logging personal withdrawals from the company as "raw material expenses" and "subcontractor expenses." He also corrupted his bookkeeper by coercing her into making the entries in the company books. In pleading guilty, the defendant, Ture, admitted he mischaracterized the withdrawals, totaling about \$645,000 over three tax years and resulting in lost taxes of about \$240,000. The guideline range was 12 to 18 months, but the defendant received no prison time. Instead, he received a sentence of probation and was required to complete 300 hours of community service. We appealed, and the Eighth Circuit reversed and remanded with a strict injunction to the judge that the sentence include incarceration. The judge waited nearly a year to schedule the resentencing and then, in April of 2008, imposed the exact same sentence (*United States v. Ture*).

Shortly after the remand in the *Ture* case but before the resentencing, the same District Court judge heard another tax case, this time involving the operator of a home-building company who failed to pay the government approximately \$600,000 in income, Social Security, and Medicare taxes withheld from his employees. The Guidelines called for a sentence of between 18 and 24 months, but the defendant was given probation. We appealed, the Eighth Circuit reversed, citing *Ture*, and remanded with strict instructions to impose some term of imprisonment. Prior to

sentencing, however, *Gall* was decided, emboldening the judge to impose a very minimal sentence: three months of work release (*United States v. Carlson*).

### **Local Example of Sentencing Disparity**

Disparity in sentencing also has been an issue on occasion in Minnesota due to *Booker* and its progeny. For example, in early 2008, a male teller was prosecuted for stealing \$250,000 from his employer bank. He was sentenced to 21 months (*United States v. Del LeClair*). In late 2008, a female bank officer was prosecuted for stealing a similar amount of money from a different bank but was sentenced to just three months by the same judge (*United States v. Justesen*). Even though the female bank officer's scheme spanned a longer period of time and was arguably more complex, she received a sentence far below the 24 to 30 months sought by the government. According to the judge, the reason for the variance was the bank officer had children, which would have been a questionable "departure" in the days of guideline adherence but not so now.

### **Local Trend in Below-Range Sentencing**

The impact of *Booker* and its progeny on sentencing is probably felt most keenly in child pornography cases. For example, in a 2008 case where the defendant had more than 23,000 pornographic images he shared through a peer-to-peer online network, the Court ordered him to serve 24 months, even though the guideline range was 78 to 97 months. In imposing the sentence, the judge repeatedly discounted the serious nature of the crime of possession of child pornography, characterizing it as "mere viewing" (*United States v. Kahmann*).

In another recent child pornography case involving possession, the sentencing judge cited *Kimbrough* in ordering the defendant to serve 48 months, even though the Guidelines indicated a sentence of 120 months would be more appropriate. Again, the judge, although a different judge

from the one in the case summarized previously, said he disagreed with the severity of the guidelines in “mere possession” cases (*United States v. Kennedy-Hippchen*).

### **Changes in Practice Due to *Booker***

In response to these sentencing practices, we have altered the way we do business in our office. Now, for example, Assistant United States Attorneys have become greater sentencing experts, conversant in the 3553(a) factors, in addition to becoming greater sentencing advocates. While we have not yet seen a move toward exhaustive sentencing hearings, as is already occurring in some districts due to *Booker*, we fully expect the sentencing stage of federal criminal prosecutions to morph into what I commonly participated in while practicing as a Judge Advocate under the Uniform Code of Military Justice; that is, an equally important, evidence-driven, and time-consuming segment of the courts martial process.

At present, we also employ closer supervisory review of the plea agreements drafted by our AUSAs, but we have not initiated use of binding plea agreements under Rule 11, as some districts have done. Those agreements, with their departure and variance waivers, are not readily accepted by the federal bench in Minnesota. Moreover, since *Booker*, we do not encounter many defendants wishing to enter into binding plea agreements, as there is little motivation for them to do so.

In addition, we now mentor AUSAs as to charging alternatives in cases where below-range sentences are otherwise likely. For example, in firearms cases, we normally charge the defendant as an armed career criminal when possible because of the certainty of sentence under that statute. And, instead of charging a child pornographer with only possession, which carries no mandatory minimum, we encourage AUSAs to work with their investigative agents to establish grounds for a charge of “receipt” too because that offense has a mandatory minimum.

Finally, we have decreased the number of cases we appeal on sentencing grounds. The Eighth Circuit, through its rulings, has made clear its support of the judicial independence practiced by the District Court judges when imposing sentences. Thus, our ability to challenge sentences imposed over our objections has been severely restricted.

### **Need for Balance**

While we are working to anticipate and address the imposition of unsponsored below-range sentences in this district, we must note that the autonomy demonstrated by our judges is not always unwelcome. As a United States Attorney, I would like to believe the government seeks below-range sentences in all warranted cases, but I realize that in some instances, substantive fairness is achieved only because the sentencing judge may sentence below the Guidelines. Furthermore, I cannot help but wonder if the rate of government-sponsored below-range sentences and the increasing rate of contested below-range sentences imposed by the Court, in some instances, are signals that, perhaps, the present guidelines should be reevaluated. True, we want the federal system tough enough to be feared, but it must also be fair.

On the flip side, regular deviations from the Guidelines by the government and the courts may cause Congress to legislate more mandatory minimum sentences. After all, Congress reacts to constituent groups, which often lobby for enhancements to the criminal code following a horrific act, particularly if that act is not redressed with stiff, consistent penalties. In an effort to address those concerns as well as those constituents, who often are grieving or angry, Congress may enact extremely harsh and unforgiving mandatory minimums.

### **Conclusion**

As a result, I contend that we – and by “we,” I mean the government and the courts – must try harder to achieve sentences within the guideline ranges, thereby sending a clear

message across the country and throughout all districts that the federal system is tough and consistent. By doing so, I believe we will see fewer sentencing enactments by Congress.

In addition, I applaud the Commission for taking steps to evaluate the use of the Guidelines, and I support a review of the Guidelines themselves to determine if some need to be adjusted for justice sake.

With these steps, I believe we can further our primary sentencing objective, which is equal justice under the law. Thank you.