STATEMENT OF

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ON THE STATE OF FEDERAL SENTENCING

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Mr. Chairman and Members of the Commission:

Thank you for the opportunity to speak to you about criminal sentencing in the federal courts, and especially the impact of *United States v. Booker*. I am a career federal prosecutor and the relatively new United States Attorney for the Northern District of Alabama.

The Commission has had the opportunity at this point to hear from a number of my colleagues. I am here to offer a perspective from the Deep South. My District includes the 31 northernmost of Alabama's 67 counties, with a population of over two and one-half million or 59% of the total state population. Our main office is in Birmingham, where the metropolitan area has a population of just over one million. Birmingham is often viewed as the cradle of the civil rights

movement. Today, it has transformed itself into a community that actively celebrates its diversity and has a great deal of potential. It has developed a medical research, banking, and service-based economy.

Yet we still have many problems as a community. My office has prosecuted an extraordinary amount of public corruption – most recently convicting the mayor of the city of Birmingham on 60 counts of fraud. Mayor Langford's conviction brought the total of Jefferson County Commissioners convicted by my office in the past few years to five, as he had previously served in that capacity. We also saw the prosecution of HealthSouth Corporation, one of Alabama's largest Fortune 500 companies, for a massive fraud that left the corporation in difficult straits and saw the conviction of virtually all high-ranking officials in the corporation except for its chairman and CEO, who was acquitted at trial but subsequently convicted on unrelated charges in our Middle District.

That context has caused us to consider repeatedly the impact of Booker on Guideline sentencing, specifically in the area of white collar crime. I believe *Booker* has made sentencing less uniform and thus less predictable for prosecutors and defendants alike, particularly in this context. Whatever deficiencies the Guidelines may have, they promote uniformity by treating like cases alike, without regard to the particular jurisdiction or the randomly-selected sentencing judge.

The Intent of Guidelines Sentencing

The Sentencing Guidelines were created to reform a system in which sentencing reflected the judge's experience, common sense, and discretion, limited only by the statutory maximum prescribed by Congress. While that system arguably succeeded in treating each defendant as an individual, it failed to treat like cases alike throughout the federal system. Two defendants with similar backgrounds who committed roughly similar offenses could be treated very differently based on geography or the judge assigned to the case. The Guidelines aimed to correct that significant problem based on the belief that it was important for defendants who committed similar crimes and had similar characteristics to receive similar sentences. By and large, I believe the Guidelines were successful in achieving the goal of uniformity.

Appellate review was important in making the Guidelines effective, because a court of appeals could provide a single interpretation of the Guidelines for cases brought in multiple district courts and thus promote uniformity within a circuit. After *Booker* and *Gall*, the role of the courts of appeals has been significantly diminished, so that sentencing once again is a matter for the district court primarily and, in most cases, ultimately.

The Effect of *Booker* on Sentencing in the Eleventh Circuit

Like other courts of appeals, the Eleventh Circuit has applied a highly deferential standard of review to district court sentencing determinations since *Booker*. The court reviews a sentence for procedural and substantive reasonableness, applying an abuse-of-discretion standard.[1] At the outset, the court will ensure that the district court correctly calculated the Guidelines, considered the Section 3553(a) factors, and adequately explained the reasons for the sentence. Most cases do not involve any significant procedural problem, so the focus shifts to substantive reasonableness. And the Eleventh Circuit has made clear that it will not vacate a sentence for substantive unreasonableness unless it is "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case."[2] The court recently explained that "a district court has 'considerable discretion' in deciding whether the § 3553(a) factors justify a variance and the extent of one that is appropriate," and the court of appeals will give that decision "due deference."[3]

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[1] *United States v. Hunt*, 459 F.3d 1180, 1182 n.3 (11th Cir. 2006).
[2] *United States v. McBride*, 511 F.3d 1293, 1297-98 (11th Cir. 2007) (*per curiam*).
[3] *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009).

Deference is not abdication, however, and the Eleventh Circuit has not forsaken reasonableness review. It has noted that "the district court's choice of sentence is not unfettered" and has held that while reasonableness is a range and not a point, a sentence outside the reasonable range is subject to being vacated.[4] For example, the Circuit Court has vacated below-Guidelines sentences in child pornography and white-collar fraud cases where it concluded the district court varied downward from the Guidelines to such an extent that the sentence failed to achieve the objectives of Section 3553(a).[5] But those exceptions are exceedingly rare. The bottom line is that a procedurally sound sentence almost certainly will be affirmed on appeal.

The Effect of *Booker* on Sentencing in the Northern District of Alabama

Given the limited role of appellate review after *Booker*, a district court has significant authority to impose a sentence outside the Guidelines range. The data suggests that district courts nationwide still impose Guidelines sentences more often than not, but they have imposed more non-Guidelines sentences since *Booker*. And we have seen the same result in the Northern District of Alabama. The Eleventh Circuit has made clear that it ordinarily expects a Guidelines

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[4] *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008).

[5] *See e.g., Pugh*, 515 F.3d 1179; *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006); *United States v. Crisp*, 454 F.3d 1285 (11th Cir. 2006); *United States v. McVay*, 294 Fed. Appx. 488 (11th Cir. 2008) (unpublished) (*per curiam*).

sentence to be substantively reasonable,[6] and the judges in our District ordinarily impose Guidelines sentences. In Fiscal Year 2008, almost 64% of the sentences imposed in our District were Guidelines sentences—five percent higher than the rate nationwide.[7]

But that is not to say that *Booker* has not affected the sentencing landscape in our District. While Guidelines issues are still litigated, sentencing hearings now focus on the Section 3553(a) factors, with appeals to the judge's discretion. In Fiscal Year 2008, the judges in our District used their *Booker* discretion to impose above-Guidelines sentences in 2.7 percent of cases, and below-Guidelines sentences in 10.9% of cases.[8] (Another 19.9% of cases involved Section 5K1.1 departures for substantial assistance.[9])

It is noteworthy that in cases where sentencing judges exercised *Booker* discretion to vary from the Guidelines range (absent a Section 5K1.1 departure), the judges varied *down* four times more often than they varied *up.* Perhaps that is because defendants request downward variances much more often than prosecutors request upward variances; indeed, it is the rare case in which the defendant does not request a downward variance based on the Section 3553(a) factors. As a practical matter, federal prosecutors continue to treat the Guidelines as the

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[6] *United States v. Talley*, 431 F.3d 784,788 (11th Cir. 2005) (*per curiam*).
[7] U.S. Sentencing Commission, 2008 Datafile, USSCFY08.
[8] *Id.*
[9] *Id.*

appropriate measure for sentencing; defendants treat the Guidelines as the ceiling (regardless of the statutory maximum); and each judge has his or her own view of the wisdom of the applicable Guidelines. While it is difficult to generalize the reasons for the variances we have seen in recent years, it is clear that a downward variance is much more likely than an upward variance.

Concerns about Sentencing Trends in White-Collar Cases

Although we generally believe that judges in our district carefully exercise their sentencing discretion – we like and respect our bench – we have noticed an increasing number of below-Guidelines sentences in white-collar cases. Of the affirmative sentencing appeals our office has taken since *Booker*, the majority have been appeals from below-Guidelines sentences in such cases.

For example, our office prosecuted Michael Crisp, the comptroller for a construction company based in Birmingham. Crisp prepared false financial statements overstating the company's accounts receivable and provided them to a bank. The bank relied on the false reports in continuing to extend credit to the construction company. When the company did not repay the credit line, the bank lost over $480,000. Crisp's scheme extended over an eight-month period. His crime was a class B felony. His victim was a small, family-owned bank.

Crisp pleaded guilty, and his Guidelines range was 24-30 months. The Government filed a motion for a downward departure under U.S.S.G. Section

5K1.1, based on substantial assistance, and recommended a 50% downward departure to the low end of a range of 12-15 months. After *Booker*, the district court sentenced Crisp to serve five hours in the custody of the United States Marshal, at Crisp's convenience, plus five years of supervised release. The Government appealed, and the Eleventh Circuit vacated the sentence.[10] The Court held that the below-Guidelines sentence was substantively unreasonable in light of the Section 3553(a) factors, stating:

> For such a serious offense, however, Crisp did not receive so much as a slap on the wrist – it was more like a soft pat. The sentence essentially converts a theft by fraud into a loan that is unlikely to ever be repaid. The court gave Crisp five hours for a crime that caused $484,137.38 in harm. That equates to $96,827.48 per hour or $1,613.79 per minute served in custody. The sentence does not reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense, as § 3553(a)(2)(A) requires, nor does it afford adequate deterrence to criminal conduct, as § 3553(a)(2)(B) requires.[11]

On resentencing, the district court sentenced Crisp to 100 days in custody—still significantly below the Guidelines range.

Below-Guidelines sentences are especially troubling in white-collar cases, where deterrence is critically important. In vacating another below-Guidelines sentence in a white-collar case from our District, the Eleventh Circuit explained that "[b]ecause economic and fraud-based crimes are 'more rational, cool, and

[10] *United States v. Crisp*, 454 F.3d 1285 (11th Cir. 2006).
[11] *Id.* at 1291.

calculated than sudden crimes of passion or opportunity,' these crimes are 'prime candidates for general deterrence.' Defendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crime therefore can be affected and reduced with serious punishment."[12] Congress, in adopting the Section 3553(a) sentencing factors, "emphasized the critical deterrent value of imprisoning serious white collar criminals, even where those criminals might themselves be unlikely to commit another offense."[13]

Given the amount of the fraud and the *de minimis* sentence in *Crisp*, a potential white-collar thief could reasonably conclude that fraudulent conduct in the Northern District of Alabama is actually cost-effective.[14] In the HealthSouth context, my office argued to the Court of Appeals that a defendant who received a sentence of probation in exchange for several million dollars in profit might feel he had come out ahead. Certainly, little deterrent effect resulted. Although the Eleventh Circuit corrected the sentence in *Crisp* and has corrected sentences in other egregious cases, there remains a real risk that below-Guidelines sentences in white-collar cases will undermine the effectiveness of white-collar criminal statutes. Indeed, now that sentencing reflects even more the particular judge's

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[12] *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (citation omitted).
[13] *Id.*
[14] *See id.* (stating that lenient sentences in white-collar cases "create [] the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.").

view of the charged offense and the characteristics of the defendant, the result likely will be less uniformity and less predictability in sentencing, not just in white-collar cases but in other cases as well.

How We Should Approach Post-*Booker* Sentencing

Prosecutors have to continue to adjust to our role in this new sentencing paradigm, which in many regards has brought us full circle to the role we played in pre-Guidelines sentencing. Prosecutors have to be prepared to litigate fully the sentencing phase of a case, providing the judge with the facts and analysis that inform the assessment of the Section 3553(a) factors so that a reasonable sentence can be imposed. Similarly, judges have to exercise their discretion carefully. We all seek the same thing in sentencing – fair, certain sentences that impose appropriate punishment for a particular defendant while providing meaningful deterrence for would-be criminals.

One thing I have learned in my years as a prosecutor is that we have more in common in the justice system nationwide than we have that differentiates us. My instinct is that the best results we achieve come about when we work together – judges, prosecutors, defenders, and probation – as we did in my district to effect speedy resentencings after the amendments to the crack guidelines. I have many of the same concerns as my colleagues, most notably that in expanding district judges' sentencing discretion, the *Booker* decision has created increasing

disparities in sentencing to the detriment of our system. My experiences have led me to believe that the best way to balance the often competing goals of individualized sentencing and uniform sentencing is for the Commission to encourage communication by all of the stakeholders in the justice system, much as we did with the nationwide conferences following the change in the crack guidelines, to promote understanding of the importance of the Guidelines in determining a sentence that achieves the goals of Section 3553(a).

The developments we see in white-collar cases, where sentences are often far lower than the Guidelines advise, undermine effective deterrence and may feed victims' perceptions that their very real problems are not taken seriously by sentencing judges. While judicial discretion is important in sentencing, the risks of disparity and uncertainty are significant as well.

In closing, I want to thank the Commission for the guidance that has served us well for many years and for its willingness to reevaluate the rules of sentencing to insure both fairness and consistency. I appreciate your ongoing work and thank you for giving me this opportunity to share the view from my district with you.