STATEMENT OF

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ON BORDER AND IMMIGRATION LAW ENFORCEMENT

BEFORE THE
UNITED STATES SENTENCING COMMISSION

REGIONAL HEARING
ON THE STATE OF FEDERAL SENTENCING

PHOENIX, ARIZONA
JANUARY 20, 2010

Introduction

Chairman Sessions, distinguished members of the Commission, thank you for allowing me the opportunity to appear before you to discuss the practical effects of the Supreme Court's decisions in *Booker* and its progeny on sentencing practices in our district. It is a pleasure to appear before you on behalf of the Department of Justice.

District of Arizona Background

Before discussing the impact of the *Booker* decision, I would like to tell you a little about my district. The District of Arizona encompasses the entire State of Arizona, which has a population of approximately 6.5 million people and approximately 114,000 square miles of land. Approximately 70% of the land in Arizona is federal land, and approximately 40% of the federal land is held by the 21 federally recognized Indian tribes in Arizona. Arizona has the largest Native American population in the U.S.: approximately 394,000. Our largest reservation, the Navajo Indian Reservation in northeastern Arizona, is roughly the size of West Virginia geographically, and has a population of approximately 275,000. Meanwhile, the Tohono O'Odham Nation in southern Arizona resides in an area roughly the size of Connecticut. The Tohono O'Odham lands straddle 75 miles of the Mexican border. The remainder of our federal land consists primarily of National Forests (approximately 11.2 million acres), National Parks (including the Grand Canyon in the north and the Organ Pipe Cactus National Monument in the south), BLM land, and military bases (four active duty military bases–Luke, Davis-Monthan, Ft. Huachuca and MCAS Yuma– as well as Yuma Proving Grounds and two sizable National Guard bases).

Arizona is home to a diverse array of industry, including the Palo Verde Nuclear Generating Station, U.S. Airways, Raytheon, Medicis, and Freeport McMoRan Copper & Gold. Phoenix Sky Harbor International Airport is among the busiest airports in the United States, serving the fifth largest city in the U.S. (Phoenix) and a metropolitan area that is home to 60% of the population in Arizona.

Over the past few years, our office has grown significantly. The increase in resources followed a dramatic increase in the number of Border Patrol and other federal law enforcement agents in Arizona over the past 10-plus years. Presently we have 152 AUSA full-time equivalent positions (FTEs) after having added 8 permanent and 30 term AUSA positions since 2006. This number represents a doubling in the number of AUSAs in the past 10 years. We have 137 support staff FTEs, bringing our office population to nearly 300 full-time employees.

Arizona has slightly over 6,000 federal law enforcement agents, approximately 3,600 of whom are employed by the United States Border Patrol. We share a 389-mile border with Mexico. Naturally, the border is the most significant factor in the size and nature of most of our criminal caseload. Many assume that our numbers are extraordinary solely as a result of our heavy immigration caseload, but statistics

maintained by the Executive Office for U.S. Attorneys show that our district has ranked highly in the number of non-immigration prosecutions as well as immigration prosecutions over the past five fiscal years.

The caseload in our district is as diverse as the many communities we serve. We handle cases ranging from firearms trafficking to fraud relating to tribal gaming, and from bank robberies to theft of artifacts, protected plants, wildlife and cultural resources. As I mentioned before, we serve a the large number of Indian reservations. Sadly, the violent crime rate in Indian Country is six times the national average; consequently, our office prosecutes a large volume of violent crime cases emanating from Indian Country. We filed 185 violent crime cases in the District of Arizona in 2009.

In addition, Arizona also has been a major source of mortgage fraud prosecutions. We filed 26 mortgage fraud-related cases in 2009, and expect a similar number in just the next six months.

As I mentioned earlier, our immigration caseload is indeed heavy. We filed nearly 3,200 felony immigration cases in fiscal year 2009, and over 22,000 misdemeanor cases. Of the 3,200 felony immigration cases, 2,272 were re-entry cases under Title 8 of the United States Code, Section 1326. This represents a substantial increase over fiscal year 2008, largely as a result of the increase in resources we

received in 2008. That said, we prosecuted but a small fraction of the number of people arrested by the Border Patrol in fiscal years 2008 and 2009. As I know you have heard from the Department in the past, we continue to bear a difficult burden in obtaining judicially-noticeable documents to satisfy our burden of proving the applicability of the guideline enhancements in Section 2L1.2 as required by the Supreme Court's decisions in *Taylor* and *Shepard*. As our caseload continues to grow in this area, so does our need to gather those records, litigate the immigration guideline issues in district court, and litigate them again on appeal.

Our office abolished the threshold for drug trafficking cases in 2008. In 2009 we filed 300 drug cases in Tucson and another 90 cases in Phoenix. According to the National Drug Intelligence Center (NDIC) in the 2009 Southwest Region Drug Threat Assessment, in 2008, the following quantities of drugs were seized in Arizona (not necessarily just at the border):

Heroin	142.7 kg = 314 lbs
Cocaine	1,911.3 kg = 4,205 lbs
Marijuana	1,272,313.1 kg = 2,799,089 lbs
Methamphetamine	266.1 kg = 585 lbs.

Just as we are unable to prosecute every viable immigration case, we likewise do not have the resources to prosecute every viable drug case. Every new AUSA added to our Tucson office in the past two years is working at full capacity, and we

still lack sufficient resources to prosecute every viable case. Of course, the other elements of the criminal justice system – the courts, the U.S. Marshals Service, U.S. Probation and Pretrial Services and even the defense bar – operate under the same sort of strain. Consequently, increases in the amount of litigation per case can have a significant impact on the entire justice system in the District of Arizona. This leads to our main topic of discussion, the impact of the *Booker* decision on the District of Arizona.

Impact of *Booker*

The Supreme Court's decision in *Booker* produced a seismic shift in federal sentencing practices. The sentencing guidelines no longer are mandatory, and gone is the rule that a sentence within a properly calculated guideline is unreviewable on appeal. Now, although a district court must continue to calculate properly the guideline range, the sentencing guidelines are only one factor among many to be considered when a district court sentences a defendant under 18 U.S.C. § 3553(a). When *Booker* was decided, judges, prosecutors, and defense attorneys initially wondered how even some of the most mundane and previously predictable procedures should and would be handled in the wake of *Booker*.

Over time, many issues have been resolved. The courts have made clear that sentences are to be reviewed for *procedural* reasonableness, i.e., whether the

guidelines were correctly calculated, and *substantive* reasonableness, i.e., whether the sentence is reasonable overall. Judges are free to disagree with the guidelines as they apply in a given case. Although some circuits have declared a sentence within the guidelines is presumptively reasonable on appeal, our circuit, the Ninth Circuit, has declined to adopt such a bright-line standard. The Supreme Court has made clear, however, that district courts cannot merely presume a sentence within the range provided in the guidelines will be reasonable.

In Arizona, our experience in the wake of *Booker* has been largely positive. Our fast-track plea programs generally provide for downward departures in the context of binding plea agreements under Rule 11(c)(1)©. Variances and departures have occurred outside the ranges provided in our fast-track plea agreements, but such instances have been rare and we do not view them as significant enough to warrant specific attention at this time.

Outside the fast-track context, variances under *Booker* generally have not been extraordinary. In fiscal year 2008, the combined percentage of variances and departures with variances under *Booker* was 4.4%, which was below the national average of 10.2%. However, when the cases involving departures under U.S.S.G. Sections 5K1.1 and 5K3.1 are factored out, the combined percentage of variances and departures with variances under *Booker* was approximately 10.2%.

The Supreme Court stated in *Gall* that "it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should . . . give[] due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." The Supreme Court further stated "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id*. at 51, 128 S. Ct. at 597 (internal quotation marks omitted). "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id*. The Court further has declared that a district court's disagreement with the severity of a particular guideline is a valid basis for variance.

This very deferential standard of review gives wide latitude to a district court judge to impose a sentence based on that individual judge's determination of what is reasonable in light of all the facts and circumstances in a given case. Thus, sentences are generally affirmed on appeal as reasonable. This deferential standard, however,

has made it difficult, if not impossible, in the Ninth Circuit to appeal extreme variances from the guidelines in the relatively few cases in which they occur without agreement by both parties.

In several cases, we believed that a district court's extreme downward variance from the advisory guideline range resulted in an unreasonably low sentence, in light of the guideline range and other factors, but an appeal was not feasible in light of Ninth Circuit appellate decisions. For example, in a child pornography case, although the advisory guideline range called for a sentence of six to seven years of imprisonment, the district court granted a downward variance and imposed a sentence of five years of probation. We filed a notice of appeal but determined that an appeal would not prevail in the wake of the Ninth Circuit's decision in *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009), in which the Ninth Circuit affirmed a large downward variance in another child pornography case. Simply put, government appeals challenging downward variances, even extreme ones, are practically impossible because of the discretion afforded to district courts after *Booker*, particularly in the Ninth Circuit.

This deferential standard also effectively shields from appellate review other less extreme variances and variances based on grounds expressly forbidden as grounds for departure under the Sentencing Guidelines. For instance, some judges

in our district have elected to vary in drug and alien smuggling cases, based on co-defendant sentencing disparity, essentially causing the lowest sentence imposed among conspirators or co-defendants to become the barometer of sorts for sentencing individuals involved in the case. Ninth Circuit law has made it infeasible to pursue appellate review of those sentences.

Notwithstanding this deferential appellate review, the advent of *Booker* has not resulted in less work for our office. Instead, litigation has intensified, not only concerning what the appropriate guideline range should be, but also whether a variance is appropriate in cases without a stipulated sentencing range, and even in some with such a stipulation. Consequently, AUSAs in our office frequently are tied up litigating sentencing issues and then defending against sentencing appeals by defendants seeking review of guideline calculations, departure issues, and denials of (or the extent of) variances granted in their cases.

As you know, the large volume of cases impacts almost everything connected with federal criminal prosecutions along the southwest border, especially in light of the limited resources available at all levels of the criminal justice system. To give you some idea of the volume, our Tucson office alone handled about 3,000 felony cases in calendar year 2009. The sentencing guidelines, by their very nature, consume a large amount of attorney time to calculate and litigate guideline issues,

both at sentencing and on appeal. Even after *Booker*, as I discussed earlier, a district court judge still must properly calculate the guidelines, even if the judge ultimately decides to vary from them. Thus, our office continues to spend extensive time calculating and litigating sentencing guideline issues which, in the end, may be irrelevant to the sentence that the court ultimately selects. Criminal defendants continue to litigate, both at sentencing and on appeal, the district court's guideline determinations, as well as the overall reasonableness of the sentence.

For example, in a recent case, a defendant pled guilty to possession with intent to distribute 12 kilograms of heroin. The presentence report calculated the guideline offense level to be level 31, which resulted in a sentencing range of 108 to 135 months. At sentencing, the parties litigated whether the defendant was entitled to a downward adjustment for his role in the offense. The district judge ruled that the defendant was not entitled to that adjustment, but ultimately granted a downward variance and imposed a sentence of 70 months. Even though the sentence the district judge imposed was substantially below the guideline range that would have applied even if the court had imposed a minor role adjustment, our office is currently spending time responding to the defendant's appeal to the Ninth Circuit challenging

the district court's denial of the minor role adjustment. Thus, criminal defendants continue to litigate, both at sentencing and on appeal, the district court's guideline determinations, even when the judge gives a downward departure or variance.

Moreover, after Booker, defendants also argue that a sentence is not reasonable, so we must now respond to those case-specific claims on appeal. In short, we continue to see sentencing appeals raising guideline issues, like we saw before Booker. After Booker, however, we not only need to address those many guideline issues, but we must address additional arguments concerning 18 U.S.C. § 3553 and reasonableness.

Another unusual aspect of southwest border districts is the large number of Class A misdemeanors and petty offenses that our office prosecutes. In calendar year 2009, our Tucson office prosecuted over 1,200 Class A misdemeanors and over 16,000 petty offenses. Of course, the sentencing guidelines apply to the Class A misdemeanors, but do not apply to the petty offenses. To handle the Class A misdemeanors efficiently, the defendants are offered a plea agreement in which the government agrees to forego a potential felony prosecution and, in exchange, the defendant agrees to a stipulated sentence (which is generally within the guideline range for the Class A misdemeanor), agrees to waive completion of a presentence report, and agrees to an immediate sentencing. We find that this procedure is an

effective way to handle a large volume of these types of cases.

Most of the petty offenses were prosecuted as part of Operation Streamline, a program designed to prosecute a large number of illegal entrants in an expeditious manner. A majority of these defendants plead guilty without any plea agreement with the government. The fact that the sentencing guidelines do not apply to these cases allows for these matters to be handled in an efficient manner.

Conclusion

That concludes my prepared remarks. Let me say again how much I appreciate the Commission's time and attention to these important issues. The Department stands ready to assist the Commission in any way.

I will be glad to answer any questions.