

STATEMENT OF

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UNITED STATES DEPARTMENT OF JUSTICE

- - -

BEFORE THE

UNITED STATES SENTENCING COMMISSION

- - -

HEARING ON

FEDERAL SENTENCING OPTIONS AFTER *BOOKER*:

CURRENT STATE OF FEDERAL SENTENCING

- - -

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## Introduction

Madam Chair and Members of the Commission:

Thank you for giving us the opportunity to appear before you today to discuss the state of federal sentencing and the impact the Supreme Court's decision in *United States v. Booker* has had on federal sentencing policy and practice.

The Administration has been clear and consistent about its goals for federal sentencing and corrections policy over the last three years. We believe the federal sentencing and corrections system must protect the public, first and foremost. At the same time, though, it must also be fair to both victims and defendants, minimize unwarranted sentencing disparities, minimize reoffending by released offenders, and do it all within the limits of available resources. With these goals as our guide, we believe federal sentencing and corrections policy today faces serious challenges and has room for significant improvement.

The nation's sentencing and correction policy underwent a dramatic change in the 1970s and 80s. For almost two hundred years beginning in the 18<sup>th</sup> Century, indeterminate sentencing – where offenders sentenced to imprisonment are not sentenced to specific terms, but rather serve an indeterminate period, earning their release when a parole authority believes he or she is ready to return to the

community – was the policy in most states and the federal criminal justice system. In the 1970s and 80s, indeterminate sentencing was replaced in many jurisdictions and in the federal system with determinate sentencing, where offenders sentenced to prison serve a set term. In the federal system, prior to *Booker*, this set term was based primarily on the offense committed and the offender’s criminal history.

Determinate sentencing has been part of a successful national strategy to reduce crime over the last several decades. Since the early 1990s, the U.S. has seen the national murder rate cut in half and the violent and property crime rates cut dramatically. And while sentencing and corrections policies are responsible for only a portion of the crime decline, we believe the research is clear that a strong and certain sentencing system contributes to greater public safety. At the same time, though, with the challenges we now have before us and in the face of the Court’s decision in *Booker*, we believe we must adjust federal sentencing law and policy again in order to keep moving on a path of lower crime and to achieve greater fairness and justice.

## *Controlling the Federal Prison Population*

We begin with an obvious but critical truth: the American government is confronting unprecedented budget challenges. Our fiscal reality demands a more exacting accounting and deployment of federal criminal justice resources. Federal outlays directed towards law enforcement and public safety are constrained, and the federal prison system, which is in size and scope a product of federal sentencing, makes up a significant and increasing share of these outlays.

The Department of Justice's FY 2012 overall budget of approximately \$27 billion is virtually unchanged from FY 2011, despite increasing costs. This total budget number masks, however, important changes just below the surface. In part because the federal prison population grew by more than 7,500 prisoners in 2011, the portion of the Department's FY 2012 budget directed towards incarceration and detention grew by several hundred million dollars. To pay for this within the overall budget limits meant that aid to state and local law enforcement, grants for prevention and intervention programs, and resources for prisoner reentry all had to be cut by millions of dollars. At the same time, funding has remained relatively constant at most of the Department's investigative and prosecutorial components. Given the need to continue to pay certain inflationary costs, such as those

associated with employee benefits and office rents, the Department will have fewer federal investigators and prosecutors.

We are now on a funding trajectory that will result in more federal money spent on imprisonment and less on police, investigators, prosecutors, reentry, and crime prevention. At the same time, state and local enforcement and corrections budgets are under severe strain. Taken together, and given the scale of current federal imprisonment penalties, we do not think this trajectory is a good one for continued improvements in public safety.

Prisons are essential for public safety. But maximizing public safety can be achieved without maximizing prison spending. And in these budget times, maximizing public safety can only be achieved if we control prison spending. A proper balance of outlays must be found that allows, on the one hand, for sufficient numbers of investigative agents, prosecutors and judicial personnel to investigate, apprehend, prosecute and adjudicate those who commit federal crimes, and on the other hand, a sentencing policy that achieves public safety correctional goals and justice for victims, the community, and the offender.

This is all relevant to federal sentencing, because the federal prison population remains on an upward path. Given the budgetary environment, this path will lead to further imbalances in the deployment of justice resources. While this is a long term problem that requires a long term and systemic solution, there are also immediate concerns. The Bureau of Prisons is currently operating at 38% over rated capacity. This is of special concern at the prisons housing the most serious offenders, with 53% crowding at high security facilities and 49% at medium security facilities. This level of crowding puts correctional officers and inmates alike at greater risk of harm and makes far more difficult the delivery of effective recidivism-reducing programming, which has a negative impact on public safety. Even more troubling, the Bureau of Prisons estimates that its inmate population will continue to grow by more than 5,000 prisoners a year for the foreseeable future.

In the face of these challenges, the Bureau has streamlined operations, improved program efficiencies, and reduced costs to function more economically. One way to reduce prison expenditures is to reduce the total number of prison-years that inmates serve in the Federal Bureau of Prisons. To that end, the Department has proposed limited new prison credits for those offenders who behave well in prison and participate in evidence-based programs with proven

records of reducing recidivism. We believe this is one example of a responsible way to control prison spending while also reducing reoffending. Absent changes of this nature, we anticipate a continued increase in the total number of prison-years served in the Bureau of Prisons, resulting in increased costs to provide safe and secure incarceration and to protect public safety – key elements of the Department’s mission.

### *Growing Sentencing Disparities*

While the federal prison population and prison spending have been rising over the last several years, federal sentencing practice has trended away from guideline sentencing and towards more visible, widespread, and unwarranted sentencing disparities. Our concern about these unwarranted disparities is not an indictment of the Judiciary; nor is it a denial of the role that prosecutorial decisions play in sentencing outcomes. It is simply a recognition of the obvious: that *Booker* ushered in an era of greater discretion in sentencing, and this era has resulted in greater variation of sentencing outcomes and increased unwarranted disparities.

The Commission’s data show that the percentage of defendants sentenced within the guidelines has decreased significantly since the Supreme Court’s decision in *United States v. Booker*. The national rate of within-guideline

sentences has fallen more than 16 percentage points since the *Booker* decision, from 71% in 2004, to less than 55% in 2011.

Moreover, the data show that federal sentencing practice continues to fragment. Disaggregating the national numbers illustrates the trend. For certain crimes, like child pornography and high-loss fraud offenses, the fragmentation and disparities are stark. In addition, the data – and the experience of practitioners – show that some judges, some districts, and some circuits are much more likely to hew closely to the sentencing guidelines than others. There are many districts that sentence around three-fourths of convicted offenders within the guidelines, including the Middle District of Georgia (79.9%), the Eastern District of Oklahoma (76.7%), the Southern District of Mississippi (80.1%), and the Southern District of Illinois (76.3%). At the same time, there are districts that sentence less than one in three offenders within the guidelines, including the District of Vermont (31.4%), the Eastern District of New York (31.1%), the District of Minnesota (31%), and the Eastern District of Wisconsin (24.8%). While differences in caseload and charging practices explain some of the differences, the data nonetheless reflect troubling disparities and trends.

We have also seen recently some differences in the way circuit courts view the sentencing guidelines and their role in overseeing sentencing practice and policy. The most vivid difference has been around the guidelines for child pornography sentencing. In *United States v. Dorvee*, 616 F.3d 174 (2<sup>nd</sup> Cir. 2010), and *United States v. Grober*, 624 F.3d 592 (3<sup>rd</sup> Cir. 2010), the Second and Third Circuits were both highly critical of the sentencing guidelines for child pornography guidelines, while in *United States v. Miller*, \_ F.3d \_, No. 10-50500 (5<sup>th</sup> Cir. Dec. 13, 2011), and *United States v. Overmyer*, \_ F.3d \_, No. 10-1716 (6<sup>th</sup> Cir. Dec. 20, 2011), the Fifth and the Sixth Circuits were much more accepting of the same guidelines. *See also, United States v. Bistline*, \_ F.3d \_, No. 10-3106 (6<sup>th</sup> Cir., Jan. 09, 2012) (rejecting a challenge to the child pornography guidelines' provisions, mandated by the PROTECT Act, based on their congressional mandate and other alleged flaws in the way they were promulgated). Many appellate courts have taken a "hands-off" approach to their review of district court sentencing decisions and the guidelines; others are scrutinizing the guidelines more closely.

But perhaps of greatest import to us in analyzing federal sentencing practice and growing disparities today is the candid assessment of prosecutors, defense attorneys, judges and probation officers alike concerning sentencing practice. Their view is similar and clear: that in post-*Booker* sentencing, the selection of the

judge in a federal criminal case is becoming an increasingly important – and a very significant – determinant of the outcome of criminal cases. We think this new reality will increasingly erode confidence in the criminal justice system, and we believe it is not good public policy.

We do not mean to suggest that the pre-*Booker* SRA scheme was the perfect sentencing system, that the only performance measure of successful sentencing policy is the within-guideline sentencing rate, or that we are advocating a return to pre-*Booker* sentencing system. The sentencing system in place from 1987 through the Supreme Court’s decision in *Booker* was without doubt imperfect. Moreover, as the Attorney General has stated, “we must also be prepared to accept the fact that not every disparity is an unwelcome one.”

But the data and the Commission’s own research are concerning, for they suggest that unwarranted sentencing disparities are, in fact, increasing. Last year, the Commission published a report on demographic differences in federal sentencing practice. In the report, the Commission found that after controlling for offense type and other relevant legal factors, demographic factors – including race and ethnicity – were “associated with sentence length to a statistically significant extent” in the post-*Booker* time period. The Commission found that in the period

just prior to the *Booker* decision, controlling for relevant factors, “black male offenders received sentences that were 5.5 percent longer than those for white males.” In the period immediately following *Booker*, “black male offenders received sentences that were 15.2 percent longer.” And more recently, following the Supreme Court’s decision in *Gall v. United States*, the Commission found that “black male offenders received sentences that were 23.3 percent longer than those imposed on white males.” This is very troubling.

#### Offender Characteristics

We are also concerned because we see growing doctrinal tension within federal sentencing. The Supreme Court’s 2011 decisions in *Tapia v. United States*, 564 U.S. \_\_\_, No. 10-5400 (2011), and *Pepper v. United States*, 562 U.S. \_\_\_, No. 09-6822 (2011), are illustrative of this trend. In *Tapia*, a unanimous Supreme Court recognized that the SRA was a landmark piece of legislation in part because it defined a new doctrinal framework for federal sentencing. The SRA rejected indeterminate sentencing – a model of sentencing “premised on a faith in rehabilitation” – that predominated across the country for most of our history, the Court noted. *Tapia*, slip opinion at p. 3. This pre-SRA model, in place at both the state and federal level, fell into disfavor in the 1970s and 1980s and was replaced by a determinate sentencing system, where terms of imprisonment are based

primarily on the crime committed by the offender and the offender's criminal history.

For purposes of imprisonment, the SRA system discounted the offender's socio-economic status, educational achievement, and family and community ties, aiming to mete out the imprisonment component of the sentence based primarily on the criminal act. *See, e.g.*, 28 U.S.C. § 994(e). A set period of supervised release would follow nearly all prison sentences and would be the focal point for rehabilitation and the delivery of needed assistance to offenders to effectively reenter the community. The goals of the system were greater certainty and consistency in sentencing and the reduction of unwarranted sentencing disparities based on race, gender, socio-economic status and other suspect factors.

While we firmly believe that inmate rehabilitation and improving the rate of successful prisoner reentry are critical obligations for any correctional system, the *Tapia* court made clear that the prohibition on selecting a term of imprisonment based on rehabilitative considerations – a prohibition put in place as part of the overall vision and structure of sentencing under the SRA that discounts offender characteristics – must remain a hallmark of federal sentencing post-*Booker*. At the same time, however, in *Pepper*, decided earlier in the term, the Court endorsed the

notion that post-*Booker* sentencing must focus as much on the offender, his individual background, and his need for services and rehabilitation as on the offense committed. Citing pre-SRA sentencing doctrine, principles and case law, the Court in *Pepper* emphasized that individual offender characteristics are “[h]ighly relevant – if not essential – to [the] selection of an appropriate sentence . . . .” *Pepper*, slip opinion at pp. 9-10. This line of post-*Booker* jurisprudence suggests that it is proper to place an offender’s personal history – including socio-economic status, educational achievement and family and community ties – on equal footing as sentencing factors with the offense committed.

We believe these two lines of thought and doctrine – one that insists that the length of federal imprisonment terms be based primarily on the offense and criminal history, and one that suggests that offender characteristics and rehabilitation should join those factors as co-equal determinants – ought to be examined more closely and reconciled to the extent possible in order to create a more coherent, national system. We believe the post-*Booker* sentencing regime, which gives sentencing courts an unbounded menu of sentencing principles from which to devise the ultimate sentence, will continue to lead, if not reformed, to unwarranted disparities in sentencing outcomes. Together with the Commission’s study exposing an increase in unwarranted racial and ethnic disparities in post-

*Booker* federal sentencing practice, we have real concerns that current policy is not meeting the long term goals of the federal criminal justice system, including the goals of fostering trust and confidence in the criminal justice system and eliminating unwarranted disparities in sentencing.

*Mandatory Minimum Sentencing Statutes*

The Sentencing Commission's recent report on mandatory minimum sentencing statutes well catalogues the history and data of federal mandatory minimum laws and their use in federal courts around the country. As we testified last year before the Commission, the Administration supports the continued but judicious use of mandatory minimum sentencing statutes in the post-*Booker* landscape of advisory guidelines. We believe mandatory minimums in certain areas are not only reasonable, but are an essential law enforcement tool to increase public safety and provide predictability, certainty and uniformity in sentencing. At the same time, we recognize that when the severity of mandatory minimum penalties is set inappropriately, consistent application is often lost and just punishment may not be achieved. The Commission's report reached the same conclusion.

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The passage of the Sentencing Reform Act of 1984 was a unique bipartisan moment; Senators Kennedy, Thurmond, Biden, Hatch, and many others came together to address acute crime and justice problems that existed at that time. Crime rates had skyrocketed and unwarranted sentencing disparities were a genuine concern. The solution these leaders devised was not perfect, but it did contribute to reductions in both crime and unwarranted sentencing disparities.

There can be little doubt that the sentencing reforms of the 1970s and 1980s – including the SRA – in combination with other criminal justice reforms and investments, achieved remarkable results over the last two decades. Dramatically lower crime rates have meant tens of millions fewer victims of crime, a fact that is too often overlooked in the discussion about sentencing and corrections policy. However, this achievement came at a high economic and human price, including the incarceration of over two million Americans. Today, we face real criminal justice challenges, including constrained law enforcement budgets. We must work together to find systemic solutions to these challenges and forge policies that will continue to increase public safety while reducing the costs to our country and our citizens.

A strong federal sentencing system is critical to keeping national crime rates low, moving them still lower, and addressing our acute crime problems. Given new and emerging crime challenges, limited federal resources, the need to deploy investigative and prosecutorial resources more efficiently and effectively, the critical need – identified and discussed many times by the President and the Attorney General – to focus on reducing reoffending by those released from custody, and the growing fragmentation and doctrinal tension of the post-*Booker* sentencing system, we think reforms are needed to meet today’s criminal justice challenges and to achieve agreed-upon goals, understanding the limitations of the Constitution and resources.

We are prepared to work with the Commission and Congress to address the areas of sentencing and corrections policy we discuss above: (1) controlling prison spending by reducing the total number of prison-years served in the federal Bureau of Prisons; (2) reducing unwarranted sentencing disparities and increasing consistency in sentencing policy and practice; and (3) reconciling sentencing doctrine around the use of offender characteristics in sentencing decision-making. We have already put forward specific proposals to provide a limited expansion of prison credits to encourage both good behavior in prison and participation in prison programs with a proven record of reducing recidivism, which enhances public

safety and saves money. As to other possible reforms, there are serious constitutional and policy questions around some of the proposals that have been put forward. We are studying these proposals and exploring other ways to improve federal sentencing policy. We look forward to further discussions with you about these in the coming weeks and months.

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In closing, I would like to thank the Commission, again, for this opportunity to share the views of the Department of Justice and for its continued commitment to the development of fair sentencing policy.