Department of Justice

STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"FEDERAL SENTENCING AFTER *UNITED STATES v. BOOKER*"

PRESENTED ON

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I.

INTRODUCTION

Chairman Coble, Congressman Scott, members of the Subcommittee, thank you for the opportunity to appear before you today, and for inviting the Department of Justice to testify about this important issue. The Attorney General regards today's hearing as an important step – but certainly not the last step – in the serious, frank and ongoing dialogue that the Supreme Court's decision in *United States v. Booker*[1] has generated. Since the *Booker* decision, Department of Justice representatives have been in discussion with Members of Congress, the bench, the defense bar, and other interested groups, such as victims' rights advocates. We hope and expect that this fruitful exchange will continue after today's hearing.

In the early 1980s, with crime rates at near record highs, Congressmen and Senators from both political parties, working together, reformed federal sentencing policy. Members spoke passionately about the need to replace a broken and weak system of indeterminate sentencing with a strong and honest determinate sentencing system that would more effectively fight crime and address the gnawing problem of inequities in sentencing. The Sentencing Reform Act of 1984 was enacted

[1] 542 U.S. 296 (2004).

overwhelmingly and was signed into law by President Reagan. The Act brought about comprehensive reform; it created the U.S. Sentencing Commission and, in turn, the federal sentencing guidelines. The fundamental principles underlying the Act, and the mandatory sentencing guidelines it forged, were consistency, fairness, and accountability in sentencing: defendants who commit similar crimes and have similar criminal records receive similar sentences.

For more than 15 years, the guidelines mandated tough sentences, minimized unwarranted disparity and the impact on crime was spectacular. As a result of the Sentencing Reform Act[2] and the Protect Act,[3] along with steps taken by state legislatures to reform sentencing practices, and together with improvements to policing and other important criminal justice reforms, crime has been reduced steadily and, over time, dramatically. Today, serious crime is the lowest it has been in more than a generation. We believe that increased sentencing levels and more consistent sentencing practices have been responsible for much of this achievement. Yet, beginning with the Supreme Court's decision in *Blakely v. Washington*,[4] the

[2] Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[3] Pub. L. No. 108-21, 117 Stat 650, codified at 28 U.S.C. § 994(w) and 18 U.S.C. § 3553(c).

[4] 542 U.S. 296 (2004).

principles and practice of determinate sentences have been in jeopardy, putting at risk the progress we have made.

These developments culminated on January 12, 2005, when the U.S. Supreme Court, in *United States v. Booker*, by the narrowest of majorities, held that the federal sentencing guidelines violated the Sixth Amendment right to a jury trial. As a remedy, the Court severed two provisions of the Act, thereby rendering the guidelines advisory only, and weakening the standard of review for Government appeals of sentences below the applicable guidelines range. In the fourteen months since *Booker*, a clear picture has emerged as to *Booker*'s impact. While the federal sentencing guidelines are still calculated by district courts post-*Booker*, and remain a legally relevant factor in determining federal sentences, there has been an undeniable erosion in the rate of compliance with the guidelines and an appreciable and troubling increase in sentencing disparities across the nation. In short, both consistency and accountability are eroding.

Given the great complexity of this issue, the Attorney General wanted to make sure that the Department did not act precipitously. In the fourteen months since the *Booker* decision, we have viewed federal sentencing decisions with measured concern. Because of our belief that tough and consistent sentences have enhanced the safety of Americans and the fairness of our judicial process, federal prosecutors were instructed to take all available steps to promote continued

adherence to the sentencing guidelines. At the same time, we have been careful not to draw premature conclusions. However, it is becoming increasingly clear that, despite the Department's efforts, both anecdotal and statistical evidence demonstrate two very troubling trends: the first is a marked decrease in within-guidelines sentences, and the second is increased inter-circuit and inter-district sentencing disparity.

Some have suggested that there has been little change in federal sentencing practices because the average length of federal sentences has remained nearly constant at 56 to 58 months. While this is correct, the Department remains very concerned about the decline in compliance with the federal sentencing guidelines because it is evidence of increasing disparity in federal sentences. After passage of the PROTECT Act in 2003, there was an increase in the percentage of sentences imposed within the ranges set forth by the Federal Sentencing Guidelines, from 65% in FY 2002 to 72.2% in FY 2004. However, in the year since *Booker* was decided, we have seen a 10% decline in the number of sentences within the federal sentencing guidelines.

In addition, as shown in the U.S. Sentencing Commission's most recent statistics, "other downward departures" and sentences "otherwise below the range" jumped from 5.2% in FY 2004 (pre-*Blakely*) to 12.5% in FY 2005-2006 (post-

Booker). This is a significant increase, especially since it occurred over a relatively short period of time. Moreover, we believe that the rise in sentences below the range is contrary to what Congress intended when it passed the PROTECT Act in 2003.

The statistics also point to significant disparities between the Circuits, and within the Circuits, as the courts exercise their new authority. As just one example, judges in the District of Massachusetts, in the First Circuit, have relied on *Booker* to sentence 25.7% of defendants to sentences below the guidelines range. In the neighboring Northern District of New York, in the Second Circuit, only 8.9% of defendants have received such generous treatment. Differing jurisprudence among the Circuits will only serve to exacerbate disparities among similarly situated defendants. The risks to fair and consistent treatment are not simply geographic – the Sentencing Commission's data just released similarly shows that black and Native American defendants are now receiving longer sentences than their white counterparts. That same data also shows that, despite Congress' repeatedly expressed concerns about sexually-related offenses, *Booker* has resulted in judges increasingly sentencing defendants to below-guidelines sentences for these serious crimes.

Two examples illustrate the point. According to the Commission's data, in 9.2% of all cases involving criminal sexual abuse of a minor, judges rely on their

new discretion to sentence below what the guidelines advise. Similarly, judges are using *Booker* authority to give below-guidelines sentences in 20.9% of cases involving possession of child pornography. This state of affairs is of serious concern to us and is, we believe, contrary to the purposes of the Sentencing Reform Act and the PROTECT Act.

We welcome this hearing and are grateful to you, Mr. Chairman, for examining this important public safety issue and for shining light onto the impact of *Booker* on federal sentencing practice. We believe there is a clear danger that the gains we, as a country, have made in reducing crime and achieving fair and consistent sentencing will be significantly compromised if mandatory sentencing laws are not reinstituted in the federal criminal justice system. A majority of the Supreme Court contemplated that advisory guidelines would not be a permanent solution and anticipated that Congress would consider legislation in the wake of *Booker*. Indeed, Justice Breyer stated in his majority opinion that the "the ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[5]

[5] *Booker*, 543 U.S. at 265.

We urge this Subcommittee, the full Committee, and the Congress as a whole, to fully examine current sentencing practice as well as the short- and likely long-term impact of *Booker* and then to act to reinstitute mandatory sentencing in the federal criminal justice system. We believe reinstituting mandatory sentencing can be done best by creating a minimum guidelines system. Under such a system, the sentencing guidelines' minimum would return to being mandatory and again have the force of law, while the guidelines' maximum sentence would remain advisory. This would comport with the constitutional requirements of *Booker*, because defendants, upon conviction, would always be subject to the maximum statutory penalty set by Congress, rather than being subject only to the maximum set in the guidelines. Moreover, such a system would embody the time-tested values of the Sentencing Reform Act. The sentencing guidelines would work in the same manner they have since their inception; with judges identifying aggravating and mitigating factors in individual cases, with carefully circumscribed judicial discretion, and with results that are certain, consistent and just.

In the remainder of my testimony, I will first discuss briefly the advent of sentencing reform and the benefits that it swept in for our country. Next, I will lay out the federal sentencing experience since *Booker*, based on Sentencing Commission data, as well as specific case examples. We believe that, from this information, the Subcommittee can clearly see that the short- and long-term

implications of *Booker* are serious and that the need for legislative action is acute. And finally, I will discuss in greater detail our proposal for a minimum guidelines system. The Department of Justice is committed to working with Congress, the Judiciary, and other interested parties, to ensure that a new sentencing regime is put in place; that it is just and lasting, and that it carries out the fundamental purposes of sentencing for the American people.

II.

THE SENTENCING REFORM ACT OF 1984

Prior to the passage of the Sentencing Reform Act, the federal Government – and every state in the Union – embraced a sentencing policy focused largely on rehabilitating convicted offenders. The main components of the policy were unfettered judicial discretion and early release on parole, and the main products of the policy were uncertainty in sentencing, limited use of incarceration, and unjustifiable sentencing disparities. This weak sentencing policy contributed both to the high crime rates in the 1960s, 1970s, and 1980s and to unacceptable levels of unwarranted sentencing disparity. Senators Hatch, Kennedy and Feinstein have characterized the disparity and inconsistency that existed before the Sentencing

Reform Act as "shameful."[6] And in recent Senate hearings, Senator Patrick Leahy referred to the time before the Sentencing Reform Act as "the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect [a defendant's] sentence."[7]

In the years leading up to the passage of the Act, various studies documented widespread and unwarranted sentencing disparity. Moreover, Congress, the Department of Justice, and independent analysts recognized and documented that such weakness, inconsistency, and uncertainty in sentencing practices had far-reaching public safety consequences. Simply put, these characteristics of sentencing were incompatible both with effective crime control and with a fair system of justice. As a result, policymakers sought change.

After many years of reviewing various options for reform, Congress, together with the Executive Branch and many members of the Judiciary, came to a consensus that these problems could be addressed by a determinate sentencing system using mandatory sentencing guidelines created by an expert sentencing commission.

[6] Appellate Brief filed in *United States v. Booker* for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as Amici Curiae in Support of Petitioner, 2004 WL 1950640 **4, 6 (Sep. 01, 2004).

[7] *Blakely v. Washington and the Future of Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary,* 108th Cong. 8573 (2004), available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit id=2629.

Leaders of both parties drafted and then passed the landmark Sentencing Reform Act. Its guiding principle was consistency in sentencing, so that defendants who committed similar crimes and had similar criminal records would receive similar sentences. Another underlying principle was transparency, so that the parties, crime victims, and the public would know the factual and legal basis for a sentence. Together with appellate review of sentences, this provided real accountability in sentencing for the first time in American history.

Under the mandate of the Act, the Sentencing Commission was created and directed to establish a system of guidelines, structured to provide proportionality, with the force of law to provide predictability, and with appellate review to provide consistency. At the same time, the guidelines were to require each sentence to be appropriately individualized to fit the offender and the offense, and to require the court to state the reasons for the imposition of each sentence. Congress also directed the Commission to create the guidelines so that longer sentences would be mandated for especially dangerous or recidivist criminals. Finally, Congress made the Commission a permanent body, so that the guidelines could be amended as experience and circumstances dictated.

Over the last 15 years, the guidelines have been amended and refined on numerous occasions, as a result of input from Congress, judges, the Department of

Justice, defense attorneys, and others. They are a product of commissioners of both political parties, embody a careful balance of public interests and goals, and have been blessed through oversight of Congresses controlled by Republicans and Democrats.

As U.S. District Judge Paul Cassell of the District of Utah noted in a post-*Booker* opinion:

> "It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate the Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes."[8]

Specifically, the Sentencing Commission has incorporated in the Guidelines Manual those factors relevant to calibrating the appropriate punishment, given the particulars of the defendant's conduct and his criminal history. By creating a system to account for factors distinguishing the conduct of one defendant from another based upon considerations like the financial loss intended by the defendant, the number of victims, the use of violence, the seriousness of the physical injuries incurred by the victim, the criminal history of the defendant, and the drug quantity

[8] *United States v. Wilson,* 350 F. Supp. 2d 910, 915 (D. Utah 2005).

attributable to the defendant, the Commission created a scheme to achieve the statutory purposes of punishment stated in 18 U.S.C. § 3553(a).

Unsurprisingly, because the guidelines reflect the cumulative wisdom and policy judgment of two decades of policymakers, they have also contributed to a historic reduction in crime and significantly reduced unwarranted sentencing disparities – the very objectives Congress sought to achieve in adopting the Sentencing Reform Act.

III.

THE IMPACT OF SENTENCING REFORM AND THE SENTENCING GUIDELINES

The guidelines' success in achieving Congress' goal of producing tough, consistent, and fair sentences, and reducing crime has been repeatedly documented. As to consistency, the Sentencing Commission's Fifteen Year Report, completed about a year ago, found that "[r]igorous statistical study both inside and outside the Commission confirm that the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences

among judges."[9] According to the 15 Year Report and the studies it cites, the guidelines have reduced unwarranted judicial disparity by at least one third.[10]

As to the rate of crime, there is little doubt that sentencing reform during the guidelines era has had a significant impact on the steep decline in crime in the United States. Crime rates are currently at a 30-year low, and studies confirm that changes in sentencing policy, both at the state and federal levels, are significantly responsible.[11] Over the last 20 years and following Congress' lead, many states have adopted guidelines systems and other related sentencing reforms. Congress also instituted mandatory minimum sentences, such as those contained in the Anti-Drug Abuse Act of 1986, to incarcerate drug dealers and reduce the violence associated with the drug trade; and once again, many states followed suit. Further, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act which provided significant financial incentives to states to pass truth in sentencing

[9] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing*, p. 140 (2004).

[10] *See id.* at 97-98.

[11] *See, e.g.*, Joanna Shepherd, *Police, Prosecutors, Criminals and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002); Peter W. Greenwood, *et al.*, *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law, in* Three Strikes and You're Out: Vengeance as Public Policy 543 (David Schichor & Dale K. Sechrest eds., 1996).

laws – requiring violent offenders to serve at least 85% of their sentences – and that led to prison expansion nationwide.

The new sentencing systems adopted by Congress and many of the states recognized the need to place public safety first. These systems sought to further that end through adequate deterrence, incapacitation of violent offenders, and just punishment. The result of these changes – as well as changes to policing levels and various other criminal justice reforms – has been a 26% drop in the overall violent crime rate during the last decade.

A few critics incorrectly claim that our sentencing system has been a failure and that our prisons are filled with non-violent first-time offenders. But the facts show otherwise. For example, approximately 66% of all federal prisoners are in prison for violent crimes or had a prior criminal record before being incarcerated.[12] Seventy nine percent of federal inmates classified as non-violent offenders had a prior arrest. The rap sheets of federal prisoners incarcerated for non-violent offenses indicate an average of 6.4 prior arrests with an average of at least two prior convictions.[13] Given the active criminal careers and the propensity for recidivism of most prisoners, we strongly believe that incapacitation works.

[12] Bureau of Justice Statistics, *Correctional Populations of the United States* (Nov. 1997).

[13] Bureau of Prisons, Office of Research and Evaluation (Nov. 2004).

As noted by Judge Cassell and others, "an expanding body of literature suggests that incarceration of dangerous persons in recent years has demonstrably reduced crime, through both incapacitation and deterrence."[14] These incapacitative and deterrent effects arise from a sentencing guidelines system which is tough, fair, and predictable. We believe that the evidence is clear: the Sentencing Reform Act and the 15 years of mandatory federal sentencing guidelines have been very successful. Unfortunately, the *Blakely* and *Booker* decisions have put this success at risk.

IV.

THE *BLAKELY* AND *BOOKER* DECISIONS AND THEIR AFTERMATH

About 21 months ago, at the end of its 2004 term, the Supreme Court in *Blakely v. Washington* held that the procedures of the Washington state sentencing guidelines were unconstitutional, and thereby cast doubt on the sentencing practices used in other states and in federal sentencing. That decision, and the subsequent decision in *Booker*, caused an upheaval in the federal criminal justice system and disruptions in state criminal justice systems across the country. The Court in *Booker* found the method by which the federal sentencing guidelines were applied

[14] *Wilson*, 350 F. Supp. 2d at 919.

for over 15 years violated the Sixth Amendment of the Constitution. As a remedy, the Court decreed the guidelines advisory only.

Since these two landmark decisions, lower federal courts have struggled to make sense of the decisions and the sentencing system left in their wake. Over these 20-some months, there has been an extraordinary number of published district and appellate court sentencing cases. At the same time, there has been an explosive burst of academic writings and symposia on sentencing. And the Sentencing Commission has been releasing nearly real-time data on federal sentencing practice for well over a year. From all of this, a fairly clear picture has emerged about how the post-*Booker* federal sentencing system is working.

First, the federal sentencing guidelines survived *Booker*. The guidelines do still exist, and they remain a legally relevant factor in determining federal sentences, because Rule 32 of the Federal Rules of Criminal Procedure requires that they be calculated. The *Booker* decision itself, and most of the Circuit Courts that have spoken on the issue, have said sentencing courts still ought to calculate the guidelines before imposing sentence. However, the precise role the guidelines play, the continuing validity of many of the finer points of the guidelines – such as the concept of departures – and the contours of appellate review of district court sentencing decisions all remain quite murky, as appellate courts issue widely

varying opinions on these subjects. As one Circuit Judge noted, "[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow."[15]

Second, it is undeniable that compliance with the guidelines – the percentage of cases sentenced within the guidelines range as calculated by the sentencing judge him or herself – has fallen significantly. In the nine months of fiscal year 2004 before the *Blakely* decision, 72.2% of all convicted federal criminal defendants were sentenced within the applicable guidelines range. Since *Booker*, only 62.2% of cases have been sentenced within the guidelines range. Every circuit and nearly every district court has seen a decline in guidelines compliance. In some circuits and districts, the rate of guidelines compliance is now astonishingly low. For example, in the Second Circuit, the guidelines compliance rate is at 50%. In the Eastern District of New York, guideline compliance has fallen to about 37%; in the Eastern District of Pennsylvania, it has fallen to 41%, and in the Southern District of Iowa it is 48%. Moreover, regional and other disparities in guideline compliance and sentencing have only worsened since *Booker*.

We know how hard federal judges work to faithfully execute their duties every day. It is inevitable, however, that given broad discretion, well-intentioned

[15] *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006).

judges will come to inconsistent and competing conclusions about what factors matter most heavily in sentencing. Ultimately, a system that produces such results is neither desirable nor capable of sustaining long-term public confidence.

Third, while judges are not solely responsible for the rate of guidelines compliance – as the compliance rate is also dependant on the use of substantial assistance departures and early disposition programs – the decrease in guidelines compliance after *Booker* is due almost entirely to judicial decisions. As Professor Frank Bowman recently pointed out, "[j]udges are using their new authority to reduce sentences below the range in almost 10% of all cases, and it is their exercise of this authority that is driving the decline in overall compliance rate."[16] This failure to comply with the guidelines has already meant reduced sentences in cases throughout the country, and if not addressed, will mean a steady erosion in the deterrent value of federal sentencing policy and, ultimately, in reduced public safety.

While data in the aggregate can be very instructive, it is also useful to look at outcomes in particular cases. I have identified a subset which suggests the problems in sentencing post-*Booker*. The cases demonstrate two things. First, the new discretion given to district judges under Booker is undermining our ability to

achieve the firmness, fairness, and consistency necessary to accomplish Congress' purposes in establishing sentencing policies. Second, allowing appellate courts to review below-guidelines sentences under a reasonableness standard cannot also ensure the statutory purposes of punishment.

1. ***United States v. Menyweather:***

The defendant, an administrative employee in the U.S. Attorney's Office in Los Angeles, pleaded guilty to mail fraud and admitted making unauthorized purchases on her Government credit card of between $350,000 and $500,000. The guidelines range called for a sentence of 21-27 months. The district court made an eight level downward departure and imposed a sentence of 40 days in a jail-like facility on consecutive weekends. The Government appealed, arguing that the district court abused its discretion by failing to provide reasons for the departure. The Ninth Circuit vacated the sentence and remanded the case for resentencing. *United States v. Menyweather*, 36 Fed. Appx. 262 (9th Cir. 2002) (*Menyweather I*).

On remand, the court re-imposed the same sentence. The Government appealed. The Ninth Circuit reversed and remanded the case for re-sentencing. *United States v. Menyweather*, 69 Fed. Appx. 874 (9th Cir. 2003) (*Menyweather II*).

[16] Frank O. Bowman III and Douglas Berman, *What's The Future of Federal Sentencing Policy?*, from the Debate Club in Legal Affairs, The Magazine at the Intersection of Law and Life, http://legalaffairs.org/webexclusive/debateclub_sentencing0106.msp.

On the second remand, the court reimposed the same sentence by granting an eight-level downward departure for mental and emotional conditions, diminished capacity, and extraordinary family circumstances. The Government appealed.

During the pendency of the appeal, the Supreme Court issued its opinion in *Booker*. In its first published opinion construing the reasonableness standard, the Ninth Circuit affirmed the sentence. *United States v. Menyweather*, 431 F.3d 692 (9th Cir. 2005) (*Menyweather III*). The appellate court found that the district court did not abuse its discretion in making the departure. In addition, applying the reasonableness standard, the court found that the length of the sentence was reasonable considering a combination of factors. In his dissent, Judge Kleinfeld disagreed with the factual and legal basis for the departure and the determination that a 40-day sentence can be a legal sentence under the reasonableness standard, given the facts of *Menyweather*. The matter is now pending on the Government's request for *en banc* review.

2. ***United States v. Leyva-Franco:***

This defendant, a resident alien at the time of the crime, entered his guilty plea for importing five kilograms or more of cocaine from Mexico. In 2001, he was sentenced to 48 months of incarceration. The court reduced his sentence on a number of grounds, including a downward departure of four levels for aberrant

behavior pursuant to U.S.S.G. § 5K2.20. To qualify for an aberrant behavior departure based upon the mandatory sentencing guidelines in effect in 2001, the district court needed to make four findings. First, as a threshold consideration, the court had to find that the case was an "extraordinary case." If it made such a finding, before making an aberrant behavior departure, it had to find that the behavior involved a "single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life."

The Government appealed the aberrant behavior departure and, in *United States v. Leyva-Franco*, 311 F.3d 1194, 1196 (9th Cir. 2002) (*Levya-Franco I*), the Ninth Circuit reversed and remanded the case to the district court upon a finding that "there was an important unresolved objection to the presentence report." Although the Government had attempted to show that Leyva-Franco had admitted to a customs inspector that he had crossed the border numerous times with cocaine in the week prior to his arrest in order to preclude an aberrant behavior departure, the court refused to resolve this objection.

On remand, the district court imposed the same sentence after making a four-level departure for aberrant behavior. The Government appealed. The Ninth Circuit reversed and remanded the case to the district court because the court did not make

the threshold finding of extraordinariness. *United States v. Leyva-Franco*, 89 Fed. Appx. 50 (9th Cir. 2004) (*Levya-Franco II*). The Government also argued that Leyva-Franco did not commit a single criminal transaction given that he had transported cocaine across the border the week before the crime for which he was convicted. The Ninth Circuit did not reach this issue; instead it remanded the case for a failure to resolve the threshold question. The court directed that both prongs of § 5K2.20 must be met based upon findings for the court to depart at re-sentencing.

On the second remand, the district court once again sentenced the defendant to 48 months and the Government appealed a third time. The Government lost the third appeal. *United States v. Leyva-Franco*, 2006 WL 64422 (9th Cir. 2006) (*Levya-Franco III*). Citing *Menyweather*, the Ninth Circuit found the resulting sentence was "not unreasonable." In dissent, Judge Kleinfeld noted, "This defendant smuggled five kilograms or more of cocaine across the border. His sentence is around half of what similarly situated defendants ordinarily get." He added, "We held in a published opinion that the district court had to make a finding of fact as to whether it was true or false that the defendant had admitted smuggling drugs across the border before. The district court has still not made the finding. In its most recent iteration, the district court has said in substance that it would not

matter."

3. ***United States v. Rivas-Gonzalez*:**

The defendant entered a guilty plea to the charge of illegal re-entry after deportation. He was convicted of a drug distribution offense in Washington State in 1992 and, after serving his sentence, was deported to Mexico in July 1993. He illegally re-entered the United States soon thereafter and went undetected by federal authorities until his arrest in 2002. In the interim, he married and fathered two children. His sentencing guideline range was 27-33 months. The district court made an 8-level departure based upon the cultural assimilation of Rivas-Gonzalez. The departure was based upon a number of statements, including:

- Rivas-Gonzalez had not "simply popped across the border."[17]
- "[i]t seems to me that this is the kind of person that we want to have living in this country. He's a good citizen. Even though he isn't a citizen, he contributes far more to the community. And his connections with that and his cultural assimilation into the

[17] *United States v. Rivas-Gonzalez*, 384 F.3d 1034, 1042 (9th Cir. 2004).

community is far greater than many of the people who live here simply by birth."[18]

The Government appealed. We submitted:

"It defies logic and undercuts the underpinnings of our criminal justice system and the administration of justice to reward a defendant for having eluded law enforcement and the Immigration and Naturalization Service long enough to assimilate in the society and establish a family. It would be both ironic and counterproductive to allow preferential dispensation for defendants who have managed to break the law for a longer period of time. The court considered some of the factors in 18 U.S.C. § 3553(a) that it is required to weigh, but the sentence failed to afford adequate deterrence, reflect the seriousness of the offense, or promote respect for the law because the court did not consider these factors. These three interests advance the purposes of punishment established by the Congress in 18 U.S.C. § 3553(a)(2). A sentence of less than twenty-five percent of the bottom end of the applicable guideline range does not reflect the Sentencing Commission's considered judgments about optimal penalties for illegal reentry cases involving felons with a history of drug trafficking. It would not have been possible for the court to find that a sentence of six months effectively deters others (general deterrence) from committing the crime of illegal reentry. It would not have been possible for the court to have found that a six month sentence for the crime of conviction promotes respect for the law or reflects the seriousness of the offense. Congress has concluded that illegal reentry following deportation is a significant crime. The Sentencing Commission has concluded that illegal reentry by those with drug trafficking convictions is particularly deserving of additional incarceration -- even more so than those convicted of illegal reentry with prior convictions for other aggravated felonies."[19]

[18] *Id.*

[19] United States' Appeal Brief in *United States v. Rivas-Gonzalez*, 2003 WL 22723756.

The Ninth Circuit reversed the judgment and remanded the case to the district court.[20] In reversing, the Court noted:

> "Rivas's motivation for the illegal reentry was not a prior assimilation to our culture; instead, his motive in returning appears to have mirrored that of most immigrants who enter our country without inspection, *i.e.*, a desire to secure and enjoy a higher standard of living. Like other undocumented immigrants who may evade our law enforcement for years, Rivas, after his illegal reentry, may have developed social, economic, and cultural ties to the United States."21

Because the defendant sought further review before the Supreme Court, the case was pending at the time of the *Booker* decision. It was therefore returned to the district court after *Booke*r was decided. Late last month, the district court imposed the same six-month (time served) sentence handed down at the time of the initial sentencing.

4. ***United States v. Edwards:***

Defendant was charged with four counts of bankruptcy fraud (violations of 18 U.S.C. § 152) and six counts of bank fraud involving multiple banks (violations of 18 U.S.C. § 1014) in two indictments. Edwards pleaded guilty to bankruptcy fraud (18 U.S.C. § 152(9)) and making a false statement to a bank (U.S.S.G. §2F1.1(b)(1)(K) (1998) and U.S.S.G. §2F1.1(b)(2) (1998).

[20] *United States v. Rivas-Gonzalez*, 384 F.3d 1034 (9th Cir. 2004).

[21] *Id.* at 1045.

The presentence report assigned Edwards a prison range of 27 to 33 months. Edwards had been convicted of bank fraud in the early 1990s for which he still owed a restitution judgment to the FDIC of nearly $1 million. Edwards' total offense level was based in part on a 10-level enhancement because the loss was between $500,000 and $800,000 (U.S.S.G. §2F1.1(b)(1)(K) (1998)), and two levels for more than minimal planning or more than one victim (U.S.S.G. §2F1.1(b)(2) (1998)). On the belief that it was limited by the holding in *United States v. Ameline,*[22] the court sentenced Edwards to probation for five years, including seven months of home detention with electronic monitoring.

The Government appealed, arguing that the district court failed to properly apply the sentencing guidelines and that the sentence was unreasonable. The Ninth Circuit reversed the judgment and remanded for resentencing.[23] In his dissent, Judge Kleinfeld wrote:

> "I would vacate the sentence because I cannot see how a sentence anything like the one imposed could be reasonable under 18 U.S.C. § 3553(a)(2)[fn omitted]. 18 U.S.C. § 3553(a)(2)(A) requires a sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. Edwards is a big time thief. He was convicted of bank fraud in Arizona and ordered to pay $3 million in restitution. Then he did it again, while on probation. He lied to a bank and tried to hide more than $600,000 from his creditors. The district court

[22] 376 F.3d 967 (9th Cir. 2004).

[23] *United States v. Edwards*, 158 Fed. Appx. 930 (9th Cir. 2005).

> spared him from prison on the theory that he had made 'life-changing determinations.' His victims deserve better, even if he has made 'life-changing determinations.' The majority holds that because we do not know if the sentence, after the *Ameline*[24] remand, will be different from the sentence imposed that we should not determine if this sentence is unreasonable. Our post-*Ameline* decisions have focused on the fact that "[b]ecause we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines," we should remand for resentencing in accordance with *Booker*. [fn omitted] In this case, I think we can safely conclude that the lenience did not result from the view that the Guidelines were mandatory."

On remand, the district court reimposed the same sentence of no incarceration.

5. ***United States v. Montgomery:***

In the Northern District of Alabama, Angela Montgomery was convicted of bank fraud. The fraud she was responsible for amounted to $1.5 million. After a perfunctory and boilerplate recitation of the statutory sentencing factors, the trial judge chose not to follow the sentencing guidelines, but rather to sentence Ms. Montgomery to 8 months' imprisonment. The government appealed, and under a reasonableness review, the Eleventh Circuit affirmed the sentence, focusing mainly on the fact that Ms.

[24] *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*).

Montgomery was a first offender and that the trial court believed that she would not commit a new crime.[25]

6. ***United States v. Medearis:***

In the Western District of Missouri, Mark Medearis committed a series of firearms offenses. The sentencing guidelines called for Mr. Medearis to be sentenced between 46 and 57 months in prison. However, because his family members and friends wrote to the judge claiming that Mr. Medearis had undergone a religious conversion since his crimes, the trial judge sentenced him to probation. That case is currently being appealed to the Eighth Circuit Court of Appeals.[26]

There are hundreds and hundreds more examples of judges reducing sentences below the guidelines that we could set out here, including drug trafficking cases, sex abuse cases, and even terrorism cases. These decisions not only undermine the deterrent and incapacitative effects of the sentencing guidelines but also create unwarranted disparities in sentencing.

When the guidelines are not followed consistently, each judge brings his or her own evaluation of sentencing factors to bear with the result that a defendant's

[25] *United States v. Montgomery*, 2006 WL 284205 (11th Cir. 2006).

[26] *United States v. Medearis*, No. 04-05031-CR-SW-ODS (W.D. Missouri, 2006).

sentence will be determined as much by the judge before whom he appears as the criminal conduct that he committed. This is bad public policy and dangerous for those who, historically, have been most disfavored in criminal sentencing.

Interestingly, experts of all political and ideological stripes predicted, before *Booker* was decided, that a purely advisory system would undoubtedly lead to greater disparity and further that, over time, this disparity is likely to increase.[27] At a hearing before the Sentencing Commission in November 2004, there was widespread agreement among all of the panelists, from law professors to public defenders, that advisory guidelines were not appropriate for the federal criminal justice system. For example, the Practitioners Advisory Group – a panel of defense lawyers brought together to advise the Sentencing Commission – stated that "rules that are mandatory are valuable in controlling unwarranted disparity, and in providing certainty so that defendants can make rational decisions in negotiating plea agreements and in trial strategy."[28] Similarly, a law professor testified that "[g]iven the fact that Congress has repeatedly expressed its commitment to uniformity (most recently in the Feeney Amendment), these solutions [advisory

[27] *See, e.g.*, Felman, James, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?* 17 FED. SENT'G REP. 97 (Dec. 2004).

[28] Letter from the Practitioners' Advisory Group to the United States Sentencing Commission 12 (Nov. 4, 2004), available at http://www.usscpag.com/index.asp.

guidelines] ignore the will of the ultimate decision-maker in this area."[29] We agree and believe that mandatory guidelines not only were successful but must be reinstituted.

V.

NEW SENTENCING REFORM LEGISLATION

Despite *Booker* and its aftermath, we are confident that working together with this Committee, the Senate, the Judiciary, the Sentencing Commission, and others, we can reinstitute a sentencing system that upholds the principles of sentencing reform: truth-in-sentencing, certainty, proportionality, and consistency in treatment of defendants. In formulating our position and our legislative proposal, we have consulted within the Department of Justice and with other branches of government, including the Judiciary, in order to consider and to evaluate carefully all of the various options which have been proposed to date.

After this review and evaluation process, we believe the simplest, most efficient, and most effective way of reinstituting mandatory sentencing is through a minimum guidelines system. Under this proposal, the guidelines minimum would once again be given the force of law. The maximum sentence allowable under law,

[29] Professor Stephanos Bibas, Submitted Testimony before the Sentencing Commission 5 (Nov. 17, 2004), available at http://www ussc gov/hearings/11_16_04/Bibas.pdf.

though, would be the statutory maximum as set by Congress. This would make clear that, based upon the jury verdict or a defendant's guilty plea, a defendant is always subject to the maximum statutory penalty defined by Congress. The guidelines maximum, however, would remain as an advisory benchmark for the sentencing judge. Under this system, the sentencing guidelines would once again work in the manner they have for nearly 20 years – identifying aggravating and mitigating factors to be determined by a judge – and controlling judicial discretion to bring a more certain, consistent and just result.

There are many advantages to the proposal. This system would preserve the traditional roles of judges and juries in criminal cases. It would retain the role of the Sentencing Commission. It would be relatively easy to legislate, would be easy in practice, the guidelines used would replicate the current guidelines, and it would fulfill the important sentencing policies embodied in the Sentencing Reform Act.

Further, we do not believe that a new enlarged sentencing range will result in an increase in the most severe sentences. Data from the Sentencing Commission shows that, under the current sentencing system with advisory guidelines, between 98% and 99% of sentences imposed are within or below the sentencing range. Only a tiny fraction of sentences imposed are above the sentencing range. In short, contrary to the frequent sentences below the guidelines, judges rarely sentence

above the guidelines range. Thus, a system that makes the upper end of the range advisory appears to provide appropriate protection against excessive sentences. Accordingly, under this proposal, advisory maximum sentences would be issued as part of the guidelines manual, which would give district and circuit courts across the country the benefit of the Commission's collective wisdom and statistical analysis regarding sentencing and would provide a suggested, though not legally mandated, maximum sentence similar to the current maximum. In addition, the Department would be free to issue an internal policy to require prosecutors to seek a sentence within the recommended range in the ordinary case.[30]

Some, including the Practitioner's Advisory Group, have expressed concerns about the constitutionality of this proposal, as it can survive only as long as the Supreme Court declines to extend the rule in *Blakely* to findings necessary to enhance a mandatory minimum sentence. We acknowledge that the proposal relies on the Supreme Court's holdings in *McMillan v. Pennsylvania*[31] and *Harris v. United States*,[32] which held that judges can sentence defendants based upon facts

[30] This is precisely what the Department did after the Supreme Court decided *Booker*. Deputy Attorney General Comey directed prosecutors to seek sentences within the applicable guidelines range.

[31] 477 U.S. 79 (1986).

[32] 536 U.S. 545 (2002).

found by the judge, rather than a jury, as long as these facts are not used to increase the maximum sentence a defendant faces. Thus, courts may impose mandatory minimum sentences based on their own fact-finding. There is no reason to believe that these cases have been weakened that allow judges to impose such mandatory minimums. Although *Harris* was a plurality opinion, it was issued only a few years ago, following *Apprendi v. New Jersey,*[33] which the Court explicitly found did not apply. And while *Blakely* has redefined what the "maximum sentence" faced by a defendant is, it has not undermined the concept that courts can find facts that determine mandatory minimum sentences *within* the maximum sentence. Thus, the Department's proposal appears to address the Court's concern and complies with *Blakely* and *Booker* by allowing only judicial fact finding within the maximum authorized by the jury's finding of guilt or the defendant's plea.

The suggestion that *Harris* and *Edwards* cannot be relied upon ignores the important doctrine of *stare decisis.* Unless the Supreme Court states otherwise, *stare decisis* should be our guiding principle, especially when "overruling [a] decision would dislodge settled rights and expectations or require an extensive legislative response."[34]

[33] 530 U.S. 466 (2000).

[34] *See Hubbard v. United States*, 514 U.S. 695, 716 (1995).

VI.

CONCLUSION

In sum, of all possible legislative solutions, the Department's proposal adheres most closely to the principles of sentencing reform, such as truth-in-sentencing, firmness, certainty, and fairness and consistency in sentencing. The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that serve the policies embodied in the Sentencing Reform Act. As we have for the last twenty years, we look forward to working with the Congress, the Commission, and others to ensure that federal sentencing policy continues to play its vital role in bringing justice and public safety to the communities of this country.

Thank you again for the opportunity to testify. I look forward to your questions.