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

March 16, 1006 Oversight Hearing
United States v. Booker: One Year Later – Chaos or Status Quo

Mr. Chairman and the Distinguished Members of the Committee:

I wish to thank the members of the Committee for allowing me to testify at the March 16, 2006, hearing. The following submission is intended to supplement my testimony.

I. Rates of downward departure

In my written testimony at page 4, I indicated that the post-Protect Act rate of sentencing within or outside the guidelines range at the request of the government was 91.9%. The data in my written testimony was based on the Sentencing Commission's 277-page "Booker Report,"¹ released the same day I submitted my written testimony. The 91.9% figure was based on Appendix E-1 of the Report. The Sentencing Commission has since updated that figure to 93.7%.²

I would also observe that the Commission's data through all three time periods covered by its Report understates the rate of government-sponsored sentences below the otherwise applicable guideline range in several ways. First, prosecutors in some districts rely heavily on post-sentence

¹UNITED STATES SENTENCING COMMISSION, *Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006) ("Booker Report").

²See UNITED STATES SENTENCING COMMISSION, "Explanation of Revisions to Version Released March 13, 2006," available at http://www.ussc.gov/booker_report/BookerReptErrata.pdf. ("Explanation of Revisions").

Rule 35(b) motions to reward cooperation.³ Second, the government uses charge bargains as both a substantial assistance reward and as a form of an early disposition program.⁴ No information regarding either of these categories of “hidden departures” is mentioned in the Sentencing Commission's Report.

Third, as Judge Hinojosa testified, the Commission received more than five different Statement of Reasons forms, some of which did not indicate whether the government agreed to the sentence imposed. It appears some districts only began using forms that indicate whether the government agreed to or did not oppose a below-guideline sentence toward the very end of the post-*Booker* coding period, while other districts never used such forms during the post-*Booker* period.⁵

³UNITED STATES SENTENCING COMMISSION, *Downward Departures from the Federal Sentencing Guidelines* 68-69 (October 2003) (“Downward Departures”).

⁴*Id.* at 69.

⁵Judge Hinojosa’s written testimony states that 20,000 of the post-*Booker* cases were reported on a “variety of forms” other than forms “issued in December 2003 or thereafter.” *See* Testimony of Ricardo H. Hinojosa at 4. No particular form was required until the Patriot Act became law on March 9, 2006. *See* Pub. L. No. 109-177.

One form provides only two choices for a sentence outside the guideline range – a substantial assistance motion filed by the government, or other “specific reason(s).” If the government moved for a downward departure other than for substantial assistance, or agreed to or did not oppose a defense motion for downward departure, and the court did not state what the government’s position was (that question not having been asked by the form), the Commission recorded the sentence as one not supported by the government. I understand this form was still being used by some districts during the post-*Booker* coding period.

Another form was approved by the Judicial Conference in December 2003 and distributed to the district courts on February 11, 2004, although it was not adopted by every district. This form for the first time listed grounds for departure other than substantial assistance, and contained boxes to check indicating that the government (1) moved for a departure other than under 5K1.1, (2) entered into a plea agreement for such a departure, (3) agreed in a plea agreement not to oppose a defense motion for departure, or (4) did not object to a defense motion for departure.

Next, a Supplemental Statement of Reasons form was approved in August 2004 in response

Furthermore, it is my understanding that if the court did use such a form and checked the box indicating that the government did not object to a defense motion for downward departure, the Commission attributes the sentence to the court rather than to the government. When the government does not object, many courts understand this to mean that the government implicitly approves of the departure.⁶ If the Commission is reporting these departures as ones the government did not support, that would understate the actual number of departures the government at least implicitly supported.

Even taking the data as reported by the Sentencing Commission, the increased rate of departures does not justify legislation in light of the following evidence:

- C Average sentence length has increased from 56 months pre-Protect Act to 57 months post-Protect Act to 58 months post-*Booker*.⁷

to *Blakely*. It contained boxes indicating whether the court applied the guidelines in full, applied the guidelines in part, imposed a discretionary sentence, or took “some other action.” We do not know how many districts used this form, for what period of time, or whether any district that used it also used a form indicating whether the government moved for, agreed not to oppose, or did not object to a sentence below the otherwise applicable guideline range.

In June 2005, the Judicial Conference approved yet another form, which listed reasons for sentences outside the guideline range as required by *Booker*, and contained boxes permitting the judge to indicate the government’s agreement or lack of objection. It is my understanding that no district adopted this form until the late Fall of 2005, just before the post-*Booker* period ended. According to the Booker Report, only 2/3 of districts are using this form today, and “to varying degrees.” Booker Report, *supra* note 1, at v.

⁶See Downward Departures, *supra* note 3, at 60 (number of government initiated departures “may not reflect fully the extent to which the government acquiesces to downward departures granted by sentencing courts”); *United States v. Lazenby*, ___ F.3d ___, 2006 WL 569284 (8th Cir. 2006) (Loken, J.) (prosecutor stated at sentencing that the defendant was similarly situated to a co-defendant who received a much lower sentence and that the court could reduce her sentence based on her residence in a halfway house for which the Bureau of Prisons would give her no credit, but maintained that she “was not authorized” to support a variance).

⁷Booker Report, *supra* note 1, at 71, Table 3.

- C “[L]arge reductions below the minimum of the within-range sentence . . . have decreased in the post-*Booker* time period. Overall, the courts are imposing below-range sentences more often but are not differing from the guideline sentence by a greater extent today compared to the two previous time periods.”⁸
- C Courts are sentencing people to prison at a higher rate than before. Courts reduced sentences from a term of imprisonment to probation at a rate of only 10.3% post-*Booker*, while the rate was 14.5% pre-Protect Act and 13.3% post-Protect Act.⁹
- C At the conclusion of the post-*Booker* period, the rate of judicial below-guideline sentences was less, and the rate of within-guideline sentences more, than immediately following *Booker*.¹⁰

II. Sex offenses

Following release of the Booker Report, Chairman Sensenbrenner voiced strong concerns about sentencing patterns for certain sex crimes. The Chairman also went further to suggest that these concerns regarding sex crimes were significant enough that Congress should restrict judges’ discretion for all offenses, not just sex offenses.¹¹ But sex offenses are such a minuscule percentage of the federal caseload that they cannot form a basis for any conclusions about overall sentencing trends, and should not serve as the basis for legislation regarding all federal cases.

Sex crimes comprise a mere 2% of all cases sentenced post-*Booker*.¹² There were a total of 304 cases involving sexual abuse, sexual abuse of a minor and abusive sexual contact – roughly one-

⁸*Id.* at 63.

⁹*Id.*

¹⁰*Id.* at 60, Fig. 4.

¹¹U.S. House of Representatives Committee on the Judiciary, F. James Sensenbrenner, Jr., Chairman, *News Advisory* (March 14, 2006) (“News Advisory”).

¹²*Booker Report, supra* note 1, at 119, Table 16 (1308 of 65,368 cases).

half of one percent of the 65,368 post-*Booker* cases.¹³ And of those 304 cases, 88.4% were sentenced within or above the guideline range or received government sponsored downward departures.¹⁴ This exceeds the overall within or above-guideline rate of 87.5%. Of the 144 sexual abuse cases sentenced, 90.9% received sentences within or above the guidelines or benefitted from government sponsored downward departures and only 9% or a mere 13 defendants received a below-guideline sentence.¹⁵ Those 13 defendants make up only .019% of all post-*Booker* cases. Of the 130 cases involving sexual abuse of a minor, 87.7% of defendants received within or above guideline sentences or received government sponsored downward departures.¹⁶ Only 16 defendants received below guideline sentences.¹⁷

Average sentence lengths in all but one category of sex crime have increased substantially from pre-*Booker* sentences. The sentences for criminal sexual abuse increased from 144 post-Protect Act to 158 months post-*Booker*, or nearly 10%. The sentences for exploitation of a minor (production of pornography) increased 30% from 162 to 209 months.¹⁸

The Chairman cited a six-fold increase in below-range sentences for defendants convicted of sexual abuse of a minor.¹⁹ The significance of this statistic shrivels in light of the fact that the

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 118, Table 15.

¹⁹News Advisory, *supra* note 11.

increase is based on the difference between 2 below-guideline sentences post-Protect Act and 16 below-guideline cases post-*Booker*.²⁰ The Chairman similarly pointed to a five-fold increase in below-range sentences for defendants convicted of sexual exploitation of a child.²¹ This increase is based on the difference between 2 below-guideline sentences post-PROTECT Act and 10 below-guideline cases post-*Booker*.²² In light of the more than 65,000 cases sentenced since *Booker*, I would urge the Congress not to base wholesale changes in federal sentencing policy on 26 cases.

Aside from the minuscule number of cases at issue, the disparity inherent in the structure of the sex offense guidelines may provide some clues about certain kinds of below-guideline sentencing statistics. Native Americans comprise only 1.5% of the U.S. population, yet they were subject to more than half the sexual abuse convictions in federal court in 2001 through 2003.²³ Post-*Booker*, they make up 62.1% of federal offenders convicted of criminal sexual abuse, 39.5% of federal offenders convicted of sexual abuse of a minor, and 80% of federal offenders convicted of abusive sexual contact.²⁴ This is not because Native Americans commit these offenses more often than those of other races, but because offenders of other races are prosecuted for the same conduct

²⁰Booker Report, *supra* note 1, at 119, Table 16. The spread is eight-fold. The difference in numbers may reflect the fact that the original version of the Booker Report contained some errors in Table 16. See Explanation of Revisions, *supra* note 2.

²¹News Advisory, *supra* note 11.

²²Booker Report, *supra* note 1, at 119, Table 16.

²³*Report of the Native American Advisory Group* 21 (Nov. 4, 2003), <http://www.ussc.gov/NAAG/NativeAmer.pdf>. (“NAAG Report”); UNITED STATES SENTENCING COMMISSION, *2002 Sourcebook of Federal Sentencing Statistics* at 14, Table 4 (“2002 Sourcebook”); *2003 Sourcebook of Federal Sentencing Statistics* at 16, Table 4 (“2003 Sourcebook”).

²⁴Booker Report, *supra* note 1, at E-11, Appendix E-10.

in state court. Although their crimes are the same, similarly situated defendants who are white, black or Hispanic, receive shorter sentences simply by virtue of the fact that they are not subject to federal prosecution. In November 2003, the Sentencing Commission's Ad Hoc Advisory Group on Native American Sentencing Issues ("Advisory Group") reported that federal sentences in 2001 and 2002 were more severe than state sentences for sexual abuse offenses, and that the perception that Native Americans receive harsher sentences for sexual abuse offenses than non-Native Americans was accurate.²⁵

Notwithstanding these findings, penalties for sex offenses were then substantially increased by new mandatory minimums and direct guideline amendments in the PROTECT Act of 2003 and another round of amendments in 2004. Between 2002 and 2004, even without those increases reflected in the data, average sentence lengths for all sexual abuse offenses nearly doubled (from 58 to 95.2 months) and mean sentence lengths nearly tripled (from 28 to 78 months).²⁶ These increases mean that the disparity between sentences imposed on Native Americans in federal court and sentences imposed on similarly situated offenders of other races convicted of the same conduct in state court has widened since the Advisory Group issued its report.

Cases involving non-Native Americans may also present circumstances where rigid adherence to the guideline range may result in unwarranted and unintended severity. This point is illustrated in *United States v. Bailey*, 369 F. Supp. 2d 1090 (D. Neb. 2005), in which the district court (Kopf, J.) departed from a guideline range sentence of 21 to 27 months to probation in a child

²⁵NAAG Report, *supra* note 23, at 21-23.

²⁶*Compare* 2002 Sourcebook at 29, *supra* note 23, at Table 13 with UNITED STATES SENTENCING COMMISSION, *Selected 2004 Sourcebook Tables* at Table 13, at http://www.ussc.gov/ANNRPT/2004/selected_2004.pdf.

pornography case. Bailey pled guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The government agreed the case was “unique” because the images were not consciously downloaded by Bailey but by the operating system, he viewed the images via the Internet only briefly, and he had no intention of retaining them. Bailey was examined by a psychologist who determined that he was not a danger to society. The probation officer who drafted the Pre-Sentence Investigation Report agreed that he was not a typical child pornography offender and his circumstances may warrant a sentence different from the calculated guideline.²⁷

Prior to his arrest, Bailey had custody of his daughter, who periodically visited her mother. The daughter had returned home from these visits with bruises starting at age 4 and there was evidence that she was molested on more than one occasion by her mother’s boyfriend. The matter was referred to police but charges were not brought. Bailey lost custody of his daughter to her mother upon his arrest. She was 9 years old. Social services investigating the household reported a high level of domestic violence between the mother and her boyfriend. They also found that another friend of the mother’s frequently sexually molested the daughter while babysitting for her.²⁸ The district court carefully documented the emotional and physical trauma the daughter had endured. The judge examined the exhaustive social service process that led the state to return her to her father, even though he was charged with a child pornography offense, and noted his efforts at counseling and rehabilitation as well as his daughter’s need to be in the stable, loving and safe

²⁷*Bailey*, 369 F. Supp. 2d at 1093-94.

²⁸*Id.* at 1097-98.

home that he and his wife provided her. Bailey, he found, was critical to his daughter's recovery from Post-Traumatic Stress Disorder.²⁹

The guidelines range called for Bailey to serve 21 to 27 months in prison. The judge departed 8 levels to probation and imposed fines, lengthy probation, one year of home confinement with electronic monitoring, counseling and treatment.³⁰ The government did not appeal.³¹

III. Cooperation reductions without government motion

The topic of sentencing below the guidelines range based on cooperation without a government motion was discussed at the hearing. There is a great deal we do not yet know about this issue. The Commission's Report indicates that there have been 258 cases post-*Booker* that were treated as variances based on cooperation without a government motion.³² The Report explains, however, that in 114 of these 258 cases, the Commission does not know whether the government filed a substantial assistance motion, and therefore "some of these cases might involve government-sponsored reductions."³³ Further, of these 258 cases, cooperation was the sole basis for the variance in only 28 cases. This means that in the other 230 cases, the courts may have imposed the same sentence pre-*Booker* without mentioning cooperation as a consideration. As a result, we do not

²⁹*Id.* at 1099.

³⁰*Id.* at 1103.

³¹District of Nebraska B Docket Report, *United States v. Bailey*, No. 4:02-cr-03040, at https://ecf.ned.uscourts.gov/cgi-bin/dktRpt.pl?435200417296289-L_923_0-1 (last visited March 29, 2006).

³²*Booker* Report, *supra* note 1, at 113.

³³*Id.* at 114.

know how much of the reported effect of *Booker* is a change in description rather than a change in practice.

Focusing on the remaining 28 cases in which cooperation was the sole basis for the departure, we do not know how many of them might actually involve government motions. Moreover, even if all of these cases were without government motion, 28 cases in the year after *Booker* roughly corresponds with the 29 such cases in the 13-month post-Protect Act period and the 17 such cases in the 7-month pre-Protect Act period.³⁴ What appears to be a slight increase may well be a stable trend.

It would also be helpful in evaluating this issue to know the number of these cases appealed by the government. As discussed in my written testimony, I was able to find only one case in which the government appealed a below-guidelines sentence based on cooperation without a government motion, and the sentence in that case was reversed.³⁵ It seems likely that the government would have appealed any cases in which it believed the district court had acted unreasonably.

We also do not know anything about the facts of these cases. The pre-*Booker* caselaw reveals numerous examples of the government declining to file a substantial assistance motion where a motion would appear to have been justified and appropriate.³⁶ Examination of the facts of the

³⁴Booker Report, *supra* note 1, at 115 Table 14.

³⁵See *United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005).

³⁶*United States v. Lazenby*, 2006 WL 569284, at *2, *5 (8th Cir. Mar. 10, 2006) (defendant “cooperated with the government and stood ready to testify against other conspirators” at trial and at the sentencing of another coconspirator; she was “the first of her co-defendants to plead guilty” and “her pledge of full cooperation played a role in the rapid guilty pleas entered by her conspirators, and in [the other conspirator] dropping objections to the offense as described in her PSR”); *In re Sealed Case*, 244 F.3d 961, 963 (D.C. Cir. 2001) (defendant’s cooperation resulted in “superseding drug indictments against several individuals who thereafter pled guilty”); *United States v. Anzalone*, 148 F.3d 940, 941 (8th Cir. 1998) (government admitted defendant had substantially

below-guideline cooperation cases could well show that the government's decision to withhold a motion was not justified and that the court's decision to sentence below the guidelines range was appropriate and furthered the interests of justice.³⁷

Additionally, it would be worth examining by district data regarding below-range sentences based on cooperation without a government motion. As reflected in the Commission's Report, the rate at which the government sponsors below-guidelines range sentences varies widely by district.³⁸ The government's "irregular and inconsistent policies among the various districts" regarding substantial assistance motions results in widely divergent percentages of cases in which the government makes such motions, varying from less than 5% to more than 40%, depending on the district.³⁹ There is not even agreement among the districts about what constitutes "substantial

assisted in investigation and prosecution of members of cocaine distribution conspiracy); *United States v. Wilder*, 15 F.3d 1292, 1295 n.7 (5th Cir. 1994) (defendant testified before multiple grand juries, his cooperation led to several guilty pleas, and his cooperation was expected to result in additional future indictments); *United States v. De la Fuente*, 8 F.3d 1333, 1339-40 (9th Cir. 1993) (defendant cooperated in drug prosecution of family member); *United States v. Knights*, 968 F.2d 1483, 1484-85 (2d Cir. 1992) (defendant testified at trial against co-defendant); *United States v. Drown*, 942 F.2d 55, 57 (1st Cir. 1991) (defendant's cooperation led to the apprehension of two "significant cocaine trafficking targets," he testified at trial against one of the apprehended cocaine traffickers, and he provided information regarding another cocaine trafficking organization); *United States v. Garcia*, 926 F.2d 125, 126-27 (2d Cir. 1991) (defendant's early plea and offer to testify "br[oke] the log jam in a multi-defendant case," resulting in guilty pleas by co-defendants).

³⁷I have been able to locate one post-*Booker* case where a district court took into consideration the defendant's cooperation without a government motion. In that case, the defendant provided information after he was sentenced which led to multiple indictments, including two for murder. *United States v. Murray*, 2005 WL 1200185, *2-3, *5 (S.D.N.Y. May 20, 2005) (granting resentencing after remand in light of *Booker*). The court found the defendant's cooperation was "significant" and "goes to the heart of the characteristics of this Defendant and provides support for his genuine contrition." *Id.* at 5.

³⁸*Booker* Report, *supra* note 1, at 93-104.

³⁹See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing*

assistance.”⁴⁰ Some of the cases in which courts imposed below-range sentences based on cooperation may well be the result of such regional anomalies.

IV. The “reasonableness” appellate standard

In his testimony before the Subcommittee on March 16, 2006, Department of Justice representative William W. Mercer stated that the government had filed approximately 122 appeals of below guideline sentences post-*Booker*, many of which were still pending, and indicated that the “reasonableness” standard of review was so unfavorable to the government that it was not worth the resources to file more appeals. Again, I disagree.

Of the 23 government appeals of below-guideline sentences listed in the Commission’s Report, the government prevailed in fifteen, which were reversed as unreasonable. Two more were remanded for further hearing and explanation in the district court.⁴¹ Only six were affirmed as reasonable. This government win rate of 73.9% hardly indicates a standard of review unfavorable to the government. In the eight years for which there is data before *Booker*, the government prevailed on appeal of downward departures at a lower rate in some years (ranging from 28-73%), a higher rate in others (ranging from 76-87%), and a lower rate overall at 71.8%.⁴²

Reform, 103-04 (2004) (“Fifteen Year Study”).

⁴⁰Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy & Practice*, 8-9, 26, available at <http://www.ussc.gov/publicat.5kreport.pdf> (“Substantial Assistance”); see also Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 U.C.L.A. L. Rev. 105, 125 (1994).

⁴¹*Booker* Report, *supra* note 1, at 30, Ex. 2.

⁴² Year	#Issues	#Reversed	#Affirmed	Govt Win %
1996	53	41	12	77
1997	23	20	3	87
1998	41	26	15	63

“Reasonableness” review appropriately respects the district courts’ expertise and vantage point in sentencing, but it is not a “rubber stamp.”⁴³ As the Commission’s review of the appellate caselaw makes clear, every circuit has held that the district court must begin by calculating the guideline range, the correctness of which is reviewed *de novo*; that findings of fact, as always, are reviewed for clear error; that the district court must carefully articulate its reasons for the sentence; and that the more the sentence differs from the guideline range, the more compelling must be the justification.⁴⁴

There is further evidence that the government is not suffering under the reasonableness standard of review. In stark contrast to the government’s high 73.9% success rate in appealing sentences below the guideline range is the low rate of 12.5% at which defendants prevail on appeals

1999	25	7	18	28
2000	15	13	2	87
2001	25	19	6	76
2002	32	27	5	84
2003	63	46	17	73
Totals	277	199	78	71.8

The Sentencing Commission produced tables on government appeals with affirmance rates beginning in the 1996 Sourcebook and continuing through the 2003 Sourcebook, the last one published. Because these tables count the number of issues rather than cases, the government’s success rate is based on the numbers of issues involving downward departures. These were government appeals of downward departures in §4A1.3 (over-representative criminal history), §5K2.0 (departures), §5K2.10 (victim’s conduct), §5K2.11 (lesser harms), §5K2.12 (coercion and duress), §5K2.13 (diminished capacity), §5H1.4 (physical condition), §5H1.6 (family ties and responsibilities), §5H1.10 (race, sex, national origin, creed, socio-economic status) and §5H1.12 (lack of guidance as youth).

⁴³*United States v. Moreland*, 437 F.3d 424, 433-34 (4th Cir. 2006) (“Although this standard clearly requires a degree of deference to the sentencing decisions of the district court, ‘reasonableness’ is not a code word for ‘rubber stamp.’ Our task is ‘a complex and nuanced’ one, requiring us to consider the extent to which the sentence imposed by the district court comports with the various, and sometimes competing, goals of § 3553(a).”).

⁴⁴Booker Report, *supra* note 1, at 24-30.

of sentences above the guideline range, all the more striking because the rate of sentences above the range has doubled after *Booker*.⁴⁵ In the single case in which a court of appeals reversed a within-guideline sentence, the Eighth Circuit did not find that the 87-month guideline sentence was unreasonable. The circuit court instead held that the district court did not adequately consider a number of relevant factors, and therefore remanded for consideration of those factors.⁴⁶ In the same case, the court reversed a 12-month below-guideline sentence of a similarly situated co-conspirator as being unreasonably low because, although her post-offense rehabilitation was “dramatic,” a 12-month sentence did not reflect the seriousness of the offense and created unwarranted disparity compared with higher sentences imposed on less culpable members of the same conspiracy.⁴⁷ This case demonstrates that the reasonableness standard is working.

Finally, the spate of below-guideline reversals under the reasonableness standard has no doubt contributed to the lower rate of below-guideline sentences at the end of the post-*Booker* period than immediately after *Booker*.⁴⁸ While a stricter standard of review is likely to be unconstitutional and would denigrate the societal value of face-to-face sentencing, there is no evidence that a heightened standard, even if upheld, would cause a lower rate of sentences below the guideline range than the reasonableness standard does. While the government sometimes claims that the abuse of discretion standard established in *Koon v. United States*, 518 U.S. 81 (1996), caused an increase in downward departures, the Sentencing Commission finds that *Koon* had little effect on the downward

⁴⁵*Id.* at 30, Ex. 2; *id.* at vii.

⁴⁶*United States v. Lazenby*, ___ F.3d ___, 2006 WL 569284 (8th Cir. 2006) (Loken, J.).

⁴⁷*Id.* at **3-4.

⁴⁸Booker Report, *supra* note 1, at 60, Fig. 4.

departure rate, and that though the government rarely appealed departures after *Koon*, it was highly successful when it did.⁴⁹ Nor did the Commission find any clear effect on the rate of downward departures as a result of the Protect Act’s *de novo* standard of review, since departures were already declining before it was enacted.⁵⁰

V. Race and sentence length

The Executive Summary to the Commission’s Report states that sentences for Black offenders were 4.9% longer than those for Whites and that sentences for “other races,” predominantly Native Americans, were 10.8% longer.⁵¹ In the body of the Report, Judge Hinojosa’s testimony, and the Commission’s Fifteen Year Study, the Commission makes clear that this association between race and sentence length does not result from judicial racial bias, and that the primary causes of racial disparity in federal sentencing are built into certain sentencing rules, as well as the unreviewable exercise of prosecutorial discretion. Because the Commission’s multivariate analysis controlled for those rules and prosecutorial decisions,⁵² the data set forth in the Report does not reflect the primary causes of racial disparity.

The sentencing disparity between White and minority offenders was small in the pre-Guideline era, but widened considerably in the Guidelines era. For example, by 1994, the number of months of imprisonment for Black offenders was nearly double that for Whites, and has narrowed

⁴⁹*Id.* at 49-50 & n.257 (citing Mark T. Bailey, *Feeney’s Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 Iowa L. Rev. 269, 296-97 (2004) (government rarely appealed departures after *Koon*, and was highly successful when it did, and *Koon* had little effect on departure rates)).

⁵⁰*Id.* at 52-54.

⁵¹*Id.*, Executive Summary at viii.

⁵²*Id.* at B-22-39.

only slightly since then.⁵³ According to the Commission, most of the disparity is due to differences in the seriousness of the offense and criminal history, and little if any is due to discrimination by judges.⁵⁴ A statistically significant amount of the racial sentencing gap, however, is due to the following guidelines, statutes and practices, which are not necessary to achieve legitimate sentencing purposes:⁵⁵

- C Crack/powder ratio “The harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine,” and “[h]igh penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers.”⁵⁶
- C Career Offender Guideline The career offender guideline dramatically overstates the risk of recidivism for offenders classified as career offenders based on prior drug trafficking offenses. Further, lengthy incapacitation of low-level drug sellers under the career offender guideline “prevents little, if any, drug selling; the crime is simply committed by someone else.”⁵⁷ Because these offenders are disproportionately Black, the career offender guideline has a disparate racial impact not justified by sentencing purposes.⁵⁸ Nonetheless, the Commission, without explanation, limited the extent of a departure for criminal history score overstating the risk of recidivism of a career offender to one level.⁵⁹

⁵³Fifteen Year Study, *supra* note 39, at 115-16 & Fig. 4.2, 120-27.

⁵⁴*Id.* at 117.

⁵⁵*Id.* at 127, 113, 131, 134.

⁵⁶*Id.* at 131-32.

⁵⁷*Id.* at 133-34.

⁵⁸*Id.* at 133-34.

⁵⁹U.S.S.G., App. C, amend. 651 (2004).

- C Criminal History Rules The use of non-moving traffic violations in the criminal history score may adversely impact minorities without advancing a purpose of sentencing.⁶⁰
- C Mandatory Minimum Laws, Drug Guidelines, Relevant Conduct Rules Mandatory minimums have a disparate racial impact, create more disparity than downward departures, are costly, and have little effect on crime control.⁶¹ The “drug trafficking guideline,” modeled on the mandatory minimum drug statute but broader, “in combination with the relevant conduct rule” increases “prison terms . . . in many cases above the level required by the literal terms of the mandatory minimum statutes.”⁶²
- C Uneven charging practices The government uses statutory penalty enhancements based on prior offenses, 924(c) enhancements, and mandatory minimums “unevenly.” While *not* using these enhancements “can lead to *more* proportionate sentencing” that better serves the purposes of sentencing in particular cases, the government’s “charging decisions disproportionately disadvantage minorities.”⁶³
- C Substantial Assistance Motions In a study published in 1998, the Commission found that “factors that were associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity.” Legally irrelevant factors including race, gender, ethnicity and citizenship are “statistically significant in explaining §5K1.1 departures,” while legally relevant

⁶⁰Fifteen Year Study, *supra* note 39, at 134.

⁶¹*See Id.* at 21-22, 48; CONSTITUTION PROJECT’S SENTENCING INITIATIVE, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); AMERICAN BAR ASSOCIATION, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); UNITED STATES SENTENCING COMMISSION, *Cocaine and Federal Sentencing Policy* (May 2002); FEDERAL JUDICIAL CENTER, *The Consequences of Mandatory Prison Terms* (1994); UNITED STATES SENTENCING COMMISSION, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); FEDERAL JUDICIAL CENTER, *The Consequences of Mandatory Prison Terms* (1994); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

⁶²Fifteen Year Study, *supra* note 39, at 48-49.

⁶³*Id.* at 89-91.

factors such as the type or benefit of cooperation, defendant culpability and offense type “generally were found to be inadequate in explaining §5K1.1 departures.” The unreviewability of prosecutors’ reasons for making substantial motions is “exactly [what] led to charges of unwarranted disparity and passage of the SRA.”⁶⁴

After *Booker*, the courts have ameliorated the irrationality of some of these rules to some extent.⁶⁵

With respect to the possibility of judicial bias, the Commission has found that offense-to-offense and year-to-year fluctuations in racial effects on sentence length should not be assumed to reflect stereotyping or discrimination.⁶⁶ Here, there was a statistically significant difference between black and white offenders’ sentences in drug cases post-Protect Act, but no significantly significant difference in drug cases post-*Booker*.⁶⁷ Because drug cases comprise the largest proportion of the federal docket,⁶⁸ the situation apparently has improved post-*Booker*. Further, the Commission’s demographic analysis did not measure the effect of certain factors, such as the nature of criminal history and the bail determination, which can affect sentence length for reasons not due to racial bias.⁶⁹ “If it were possible to include these unmeasured factors in the models, the statistical significance and impact of these demographic variables would likely change.”⁷⁰

⁶⁴Substantial Assistance, *supra* note 40, at 20-21.

⁶⁵*E.g.*, Booker Report, *supra* note 1, at x, 136-140 (courts imposed more below-guideline sentences for career offenders and these were primarily drug cases); 126-131 (rate of below-guideline sentences in crack cases increased but sentence length remained the same); 79 (problems with criminal history rules one of most frequently cited reasons for below-guideline sentence).

⁶⁶Fifteen Year Study, *supra* note 39, at 125; Booker Report, *supra* note 1, at 108.

⁶⁷Booker Report, *supra* note 1, at 108.

⁶⁸Fifteen Year Study, *supra* note 39, at 47.

⁶⁹Booker Report, *supra* note 1, at 105 & nn.317-18.

⁷⁰*Id.* at 106; Testimony of Ricardo H. Hinojosa at 14-15 & nn.41-42.

In sum, the “evidence shows that if unfairness continues in the federal sentencing process, it is more an ‘institutionalized unfairness’ built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. ... Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁷¹

VI. Increased judicial discretion achieves public purposes

In response to questions at the hearing regarding the disparity created by the government’s disparate use of substantial assistance motions, the Department of Justice representative responded that such disparity helps protect the public, while consideration of statutory factors that are prohibited or discouraged by the Guidelines do not. I must take issue with both parts of the Department’s answer.

First, when the government fails to reward cooperation fairly and equitably, it harms the public by discouraging others from assisting law enforcement. Second, as one would expect, the purposes of sentencing identified by Congress – just punishment, deterrence, incapacitation and rehabilitation – are public purposes.⁷² While Congress directed the Sentencing Commission to assure that the purposes of sentencing were effectively met and to minimize prison overcrowding,⁷³ the Commission has acknowledged that those goals have not been fully implemented.⁷⁴ As a result,

⁷¹Fifteen Year Study, *supra* note 39, at 135.

⁷²18 U.S.C. § 3553(a)(2).

⁷³28 U.S.C. §§ 991(b)(1), (2); 994(g).

⁷⁴Fifteen Year Study, *supra* note 39, at 77-78, 139-140, 143.

before *Booker*, the courts were required to impose sentences in some cases that were unjust and wasteful. With the federal prison population now at 190,000 at a cost to the taxpayers of over \$4 billion per year, and the Bureau of Prisons at 40% overcapacity, the modest increase in judicial discretion to correct for the inefficiencies of the guidelines should be viewed as a positive change.

One of the reasons that mandatory guidelines sometimes failed to promote public purposes is that the Commission prohibited or deemed “not ordinarily relevant” many facts that can be directly relevant to those purposes.⁷⁵ For example, the Commission has only recently performed studies revealing that the following factors, although either prohibited or deemed “not ordinarily relevant” under the guidelines, reduce the risk of recidivism and the need for deterrence and incapacitation:

- C Recidivism rates decline steadily with age.
- C Lower rates of recidivism are associated with stable employment, educational level, family ties, and abstinence from drug use.
- C A lower risk of recidivism is associated with first offender status, *i.e.*, no prior contact with the criminal justice system.
- C Drug trafficking offenders have the lowest rates of recidivism.

⁷⁵The Commission deemed “not ordinarily relevant”: age; education and vocational skills; mental and emotional conditions; physical condition; employment record; family ties and responsibilities unless the defendant was “irreplaceable;” public service, charitable and military contributions. U.S.S.G. §§5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, 5H1.11. The Commission prohibited consideration of a single aberrant act if the defendant had any “significant prior criminal behavior” even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum; lack of guidance as a youth or disadvantaged background; drug or alcohol dependence, gambling addiction; personal financial difficulties, economic pressures upon a trade or business; post-sentencing rehabilitative efforts no matter how exceptional; diminished capacity if the offense involved a threat of violence, or where diminished capacity was caused by voluntary use of drugs or other intoxicants. U.S.S.G. §§ 5H1.4, 5H1.12, 5K2.12, 5K2.13, 5K2.19, 5K2.20(c).

- C The career offender guideline vastly overstates the risk of recidivism when the predicates are drug offenses.
- C Certain minor offenses included in the criminal history score, such as non-moving traffic violations, do not clearly promote sentencing purposes.
- C Programs to reduce drug use and provide education would have a high cost-benefit value.⁷⁶

After *Booker*, the most frequent reasons for below-guideline sentences are the overstatement of the seriousness of risk of recidivism by the defendant’s criminal history score, the defendant’s family ties and circumstances, and purposes of sentencing that would better be achieved by a below-guideline sentence.⁷⁷ The courts have more frequently imposed below-guideline sentences for first offenders and career offenders, primarily in drug cases.⁷⁸ Courts rely on age and poor health more frequently than in the past, because elderly or ill defendants present a low risk of recidivism and it

⁷⁶UNITED STATES SENTENCING COMMISSION, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, 9, 12-13, 15-16 (May 2004)(“Measuring Recidivism”); Fifteen Year Study, *supra* note 39, at 133-34.

⁷⁷*Booker* Report, *supra* note 1, at 79. *See, e.g., United States v. Gorsuch*, 404 F.3d 543 (1st Cir. 2005) (“serious mental illness, maternal responsibilities, and lack of a criminal record [are] more relevant than under the pre-*Booker* regime of mandatory guidelines”); *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005) (defendant was caretaker for brain damaged son though there were alternative means of care); *United States v. Haidley*, 400 F.3d 642, 645 (8th Cir. Mar. 16, 2005) (defendant used embezzled money for her child’s high medical expenses, and had two young children at home); *United States v. Williams*, 432 F.3d 621 (6th Cir. 2005) (departure in felon in possession case was appropriate where defendant’s prior felony was 15 years old, no new offenses in interim); *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. May 6, 2005) (defendant was neglected and abandoned by his addicted mother, his only male role models were drug dealers, he re-established ties with his children and lived drug free for a year after the offense).

⁷⁸*Booker* Report, *supra* note 1, at 132-140. *See, e.g., United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006) (decision to vary in career offender case based on small amounts of drugs and lack of violence in past and current offenses was reasonable, but unreasonable in extent); *United States v. Hued*, 338 F. Supp. 2d 453 (S.D.N.Y. 2004) (first offender guilty of storing heroin, not involved in planning criminal conduct, and involved for limited duration which was marked deviation from otherwise law-abiding life).

is so costly to house them.⁷⁹ While courts almost never considered employment record, education, or rehabilitative or treatment needs because of the restrictions imposed by the guidelines, they are considering those issues now to the extent they promote public purposes.⁸⁰

The Commission has also found that sentences for many drug offenders are greater than necessary to achieve legitimate sentencing purposes, result in unwarranted uniformity among offenders of widely divergent levels of culpability, are the major cause of prison population growth, and are a primary cause of racial disparity.⁸¹ In a study published in 1994, the Department of Justice concluded that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system. Though these offenders “are much less likely than high-level defendants to re-offend” and “a short prison sentence is just as likely to deter them from future offending as a long prison sentence,” they “still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme.” The Department recommended that the resources expended on these low-level drug offenders “could be used more efficiently to promote other criminal justice needs.”⁸²

⁷⁹*See, e.g., United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005) (advanced age and serious medical problems indicated no risk of recidivism and burden on prison system); *United States v. Lata*, 415 F.3d 107, 113 (1st Cir. 2005) (though age and infirmity were discouraged bases for departure, they may be considered under 3553(a), especially where they diminish the risk of re-offense).

⁸⁰Booker Report, *supra* note 1, at 80-83; compare 2003 Sourcebook, *supra* note 23, at Table 25A. *See, e.g., United States v. Spigner*, 416 F.3d 708 (8th Cir. 2005) (sentence below guideline range would be appropriate to provide treatment of severe kidney failure in most effective manner).

⁸¹Fifteen Year Study, *supra* note 39, at 47-55, 76, 132, 134. The Commission attributes 75% of the more than doubling of drug sentences to the mandatory minimum laws, and 25% to its own independent actions. *Id.* at 102, 138-39.

⁸²United States Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary 2-5 (February 4, 1994)(“DOJ Drug Offender

In the post-*Booker* period, approximately 26% of all drug offenders had no prior contact with the criminal justice system whatsoever,⁸³ and drug trafficking offenders comprised 38% of all first offenders.⁸⁴ Of all first offender cases in which courts sentenced below the range, 36% were drug cases, and of all first offender cases in which the government sponsored a below-guideline sentence, 54% were drug cases.⁸⁵ While this did not reduce the average length of drug trafficking sentences overall,⁸⁶ it does appear that public purposes were better served and resources saved in these cases.

VII. Mandatory guidelines are not responsible for reduced crime rates

For many of the reasons just stated and others, I must also take issue with the Department of Justice's claim that mandatory guideline sentences are responsible for reducing the crime rate overall and the rate of violent crime in particular. To begin with, because the incarceration rate includes all offenses, but the crime rate measures only property and violent crime and not drug offenses, comparing the crime rate to the incarceration rate makes it appear as if increased incarceration has led to a greater reduction in crime than it actually has.⁸⁷ The drop in the crime rate

Analysis").

⁸³See Booker Report, *supra* note 1, at E-18 (6112 drug offenders were first offenders); D-6 (approximately 23,000 drug offenders).

⁸⁴*Id.* at 134.

⁸⁵*Id.* at E-18 (866 of 2378 total, 2012 of 3682 total).

⁸⁶*Id.* at 130, D-18.

⁸⁷The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 2 (2005) ("Incarceration and Crime"); see also Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1332-33 (May 2005); Henry Ruth & Kevin Reitz, *The Challenge of Crime: Rethinking Our Response* 5, 15-18 (2003).

is due to declines in violent and property offenses, which are prosecuted primarily by the states.⁸⁸ Further, three-quarters of the decline in violent crime in the 1990s was due to factors other than incarceration, such as economic trends and employment rates.⁸⁹

According to a study cited by the Department of Justice, only 14.8% of federal inmates in 1997 were convicted of a violent offense, while 62.6% were convicted of a drug offense, 14.8% of a public-order offense, and 6.8% of a property offense.⁹⁰ Federal drug offenders are primarily low-level couriers or street dealers (59-66% for cocaine base and powder offenders in 2000), had no weapon involvement (85.2% in 2003), and are in Criminal History Category I (55.1% in 2003).⁹¹

As the Commission and the Department of Justice have found, drug crime is driven by demand, and low-level dealers and couriers are easily replaced.⁹² Thus, even while the federal prison population has increased from 24,000 to 190,000 in the guideline era, drug use rates have remained substantial and even increased over the past few years.⁹³ The answer, according to the Sentencing Commission and other reputable researchers, is drug treatment, education, and intervention in at-risk families, not more federal incarceration.⁹⁴

⁸⁸Incarceration and Crime, *supra* note 87, at 6-7.

⁸⁹*Id.* at 4.

⁹⁰See Bureau of Justice Statistics, *Correctional Populations of the United States, 1997*, Table 4.3 (Nov. 2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf>.

⁹¹Incarceration and Crime, *supra* note 87, at 6-7; 2003 Sourcebook, *supra* note 23, at Tables 37, 39.

⁹²Fifteen Year Study, *supra* note 39, at 134; DOJ Drug Offender Analysis, *supra* note 82.

⁹³Incarceration and Crime, *supra* note 87, at 6-7.

⁹⁴Measuring Recidivism, *supra* note 76, at 15-16; Incarceration and Crime, *supra* note 87, at 8, and Rand Corporation studies cited therein finding that if a small portion of the budget

VIII. Regional disparity

According to the Commission Report, the same regional differences in sentencing practices that existed prior to *Booker* continue to exist after *Booker*.⁹⁵ At 23.7%, the rate of government-sponsored below-range sentences is double that of all other below-range sentences, and this accounts for the widest variation among districts.⁹⁶ As before *Booker*, the most significant cause of *unwarranted* regional disparity is the government's own policies and practices.⁹⁷

Mr. Mercer called it “troubling” that different districts within the same circuit have different rates of within-guideline sentences. These differences long preceded the past twelve months. As the Commission noted in its Fifteen Year Study, differences among districts within the circuits were always more pronounced than differences among the circuits. Besides differences in judicial departure rates, “composition of the caseload and the role of government-sponsored departures were shown to be important determinants of interdistrict variations.”⁹⁸ To suggest that differences among districts shows anything about the effect of *Booker* is therefore potentially misleading.

The Sentencing Commission has not reported whether inter-district disparity has increased or decreased after *Booker*, but it does report that the spread between the districts with the lowest and highest government-sponsored rates is much greater than that between the districts with the lowest

currently dedicated to incarceration were dedicated to treatment, education and families, it would reduce drug consumption by many tons and save billions of taxpayer dollars.

⁹⁵Booker Report, *supra* note 1, at viii.

⁹⁶*Id.* at 90-91, 92, Figs. 10 & 11.

⁹⁷Fifteen Year Study, *supra* note 39, at 102, 141; *see also id.* at 89-92, 103-107, 112.

⁹⁸*Id.* at 85.

and highest judicial rates.⁹⁹ The difference for judicial below-guideline sentences may actually have decreased after *Booker* if the data overstates the rate of judicial below-guideline sentences for the District of Massachusetts. Professor Frank Bowman has studied the data and concluded that any increase in regional disparity is statistically insignificant, and further, that *Booker* appears to have caused less inter-district disparity than did the Protect Act.¹⁰⁰

Further, claims of inter-district disparity are meaningless without the data to “fully compare the offenders and the offenses for which they are convicted.”¹⁰¹ The Commission defines “unwarranted disparity” as “different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing,” and recognizes that there is no unwarranted disparity “when sentencing decisions are based only on offense and offender characteristics related to the seriousness of the offense, the offender’s risk of recidivism, or some other legitimate purpose of sentencing.”¹⁰² However, the Commission acknowledges that it lacks “good data on all legally relevant considerations that might help explain differences in sentences,” and that the “lack of data is especially severe regarding circumstances that might justify departure from the guidelines,” because it does not collect data on offense and offender characteristics that may justify a sentence outside

⁹⁹Booker Report, *supra* note 1, at 90-91, Figs. 10 & 11

¹⁰⁰Frank O. Bowman III, *The Year of Jubilee...or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, at **37-44, forthcoming in 43 *Houston L. Rev.* __ (2006), available at <http://ssrn.com/abstract=882507>. Professor Bowman does not distinguish between judicial and government-sponsored variation.

¹⁰¹General Accounting Office, *Federal Drug Offenses, Departures from Sentencing Guidelines and Mandatory Minimums*, Fiscal Years 1999-2001 at 1 (October 2003).

¹⁰²Fifteen Year Study, *supra* note 39, at 80, 113 (emphasis in original).

the guideline range unless a departure was actually granted.¹⁰³ Thus, if a defendant in District A receives a below-guideline sentence for extraordinary family circumstances, the Commission records the reason, then reports it as “non-compliant.” If a similarly situated defendant in District B receives a guideline sentence, the Commission collects no information about her extraordinary family circumstances and reports the sentence as “compliant.” Despite the labels, the Commission’s data does not tell us whether the defendant in District A received unwarranted leniency or the defendant in District B received unwarranted severity.

IX. The *Booker* Opinion

During the hearing Mr. Feeney and I could not agree on the number of Supreme Court Justices who believe binding guidelines are unconstitutional. I expressed the view that at least five Justices had held mandatory guidelines unconstitutional in *Booker*. Mr. Feeney expressed the view that seven Justices believed binding guidelines were constitutionally permissible. Given that there are only nine Justices, the only way I can reconcile our difference is if there was some confusion regarding the identity of the fact-finder.

My statement was premised on the assumption that the facts used to determine the binding guideline range were to be found by a judge rather than a jury. It is clear from *Booker* that Justices Stevens, Souter, Scalia, Thomas and Ginsburg believe the Sixth Amendment prohibits increasing a mandatory guidelines range based on judicial fact-finding. Only four justices (Breyer, Rehnquist, O’Connor, and Kennedy, two of whom are no longer on the Court) expressed the view that mandatory guidelines are constitutional even if the facts are not submitted to a jury.

¹⁰³*Id.* at 119.

On the other hand, if Mr. Feeney was thinking of binding guidelines driven by *jury* fact-finding, then I believe he has undercounted the number of Justices on the *Booker* Court who would uphold binding guidelines. Indeed, all nine justices in *Booker* would find mandatory guidelines constitutional if the facts used to increase the guideline range were admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt. In the event I am incorrect about the reason for the disagreement between Mr. Feeney and me , I would certainly welcome the opportunity to address the basis for Mr. Feeney’s position if he is willing to identify the seven Justices to which he refers and the opinions from which he infers their willingness to uphold binding guidelines driven by judicial fact-finding.

X. Conclusion

I again thank the Subcommittee for the opportunity to address these important issues. I hope this supplemental submission is of assistance in the Subcommittee’s work, and I would be pleased to answer any additional questions the Subcommittee might have.

Sincerely,

James E. Felman