COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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March 23, 2006

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Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism
and Homeland Security
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Coble:

I am writing to provide additional information to the Committee in connection with the hearing you held on Thursday, March 16, 2006, on the subject of criminal sentencing.

Information from Massachusetts Judges

During the hearing, members of the Subcommittee expressed considerable interest in how criminal sentencings are proceeding in the District of Massachusetts. I have received a letter from Chief Judge Mark Wolf explaining facts regarding that district that may be of interest. I respectfully request that you include this letter and its enclosures in the hearing record.

The Justice Departments Examples of "Problems" Under *Booker*

In the written testimony submitted by William W. Mercer, the Department of Justice cites six cases to represent "the problems in sentencing post-*Booker*."[1] As I noted in my own oral testimony, four of these six cases were decided before *U.S. v. Booker*,[2] and two of these cases are still being reviewed on appeal.[3] Each of the six cases cited by the Department involved a unique set of facts that were carefully assessed by the sentencing judge. Although reasonable minds may differ about whether these judges got it right when they sentenced these defendants to these particular punishments, an examination of published opinions shows that the sentencing judges considered significant sentencing factors beyond those cited in the Department's written testimony.

United States v. Menyweather

In *United States v. Menyweather*,[4] the defendant pleaded guilty to one count of mail fraud and admitted to making between $350,000 and $500,000 in unauthorized purchases on her government credit cards. The guidelines sentencing range for this offense was 21-27 months, but the district judge made an eight-level downward departure, and imposed a shorter term of incarceration. The Department's testimony indicates that the court "imposed a sentence of 40 days in jail-like facility on consecutive weekends."[5] That description, however, is not wholly accurate: the court not only sentenced Dorothy Menyweather to five years of probation (40 days of which had to be served in a jail-type institution on consecutive weekends) but also ordered her to pay $435,918 in restitution, and ordered her to serve 3,000 hours of community service. The district court characterized this probation as very "strenuous."[6] Menyweather was also prohibited from seeking a loan or credit without the prior approval of the probation office. This sentence was imposed well before *Booker*.

In this complex case, the government has appealed this sentence four times, three of which have resulted in substantive opinions. The first time, the Ninth Circuit remanded back to the district court to allow that court to provide detailed reasons for "the direction and the degree of the departure."[7] The second time, noting that government had not received adequate notice of the district court's consideration of "post-conviction rehabilitation" (a basis the district court later

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[1] Statement of William W. Mercer, United States Attorney for the District of Montana and Principal Associate Deputy Attorney General, United States Department of Justice, 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 March 16, 2006, at 18.

[2] United States v. Menyweather; United States v. Leyva-Franco; United States v. Rivas-Gonzales; United States v. Edwards.

[3] United States v. Menyweather; United States v. Medearis.

[4] *See* United States v. Menyweather, 36 Fed. Appx. 262 (9th Cir. 2002) (Menyweather I); United States v. Menyweather, 69 Fed. Appx. 874 (9th Cir. 2003) (Menyweather II); United States v. Menyweather, 431 F.3d 692 (9th Cir. 2005) (Menyweather III).

[5] Mercer, *supra* note _Ref130745590\h1 at 19.

[6] Menyweather III, at 702.

[7] Menyweather I, at 263.

abandoned), and noting that the extent of the departure was still unexplained, the Court of Appeals vacated the sentence and remanded again.[8] The district court adopted expanded findings of fact and conclusions of law, imposing the same sentence, and the government appealed the third time. While this third appeal was pending, the *Booker* decision was decided, rendering the guidelines advisory.

In this third appeal – *Menyweather III* – the Ninth Circuit Court of Appeals arrived at three interrelated conclusions: (1) Given that the district court sentenced Menyweather under the assumption that the Guidelines were mandatory, the district court did not abuse its discretion by downwardly departing from the Guidelines; (2) even if the district court had exceeded the departure authority available under the pre-*Booker* Guidelines, any error was harmless in view of the sentencing factors listed in 18 U.S.C. § 3553(a) (which the district court can now consider after *Booker*); and (3) the resulting sentence was reasonable.[9]

The Ninth Circuit's standard of review was equivalent to abuse of discretion,[10] and the circuit found that the district court's findings of fact supported a mitigated sentence. The district court had awarded an eight-level downward departure for a number of reasons, including Menyweather's diminished capacity (a forensic psychologist had testified at the sentencing hearing that she suffered from severe symptoms of post-traumatic stress after being abandoned by her parents and after experiencing the murder of her fiancé),[11] Menyweather's role as single parent and breadwinner for her eleven-year-old daughter,[12] Menyweather's crime did not require lengthy incarceration to protect the public,[13] and a sentence of probation would better allow Menyweather to pay restitution to her victims.[14]

Reasonable people can differ on whether this was the right punishment for Dorothy Menyweather. Indeed, Circuit Judge Andrew Kleinfeld wrote a strong dissent.[15] Dissatisfied with the sentence, the government has taken the appropriate step: appealing the decision for a fourth time, seeking *en banc* review of the matter.

United States v. Leyva-Franco

Another pre-*Booker* case from the Ninth Circuit (also appealed three times by the government), *United States v. Leyva-Franco* involved a four-level downward departure for "aberrant

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[8] *See* Menyweather II, at 875.
[9] *See* Menyweather III, at 694.
[10] *Id.* at 697 (identifying "abuse of discretion" as the appropriate standard of review in evaluating reasonableness).
[11] *See id.* at 698-99 (describing psychological testimony).
[12] *See id.* at 700 (describing the district court's finding that Menyweather's relationship with her daughter, and the care she provides, are unusual as compared with the situation of other single parents).
[13] *See id.* at 702.
[14] *See id.*
[15] *Id.*at 704 (Kleinfeld, J., dissenting).

conduct" granted by the district court.[16] A defendant is eligible for an aberrant conduct departure when his crime was extraordinary and involved a single criminal occurrence or transaction that (1) was committed without significant planning, (2) was of limited duration, and (3) represents a marked deviation by the defendant from an otherwise law-abiding life. When Oscar Guadalupe Leyva-Franco pleaded guilty to importing five or more kilograms of cocaine from Mexico, the prosecution claimed that Leyva-Franco had admitted to a customs inspector that he had crossed the border with cocaine several times in the week before his arrest. Leyva-Franco, however, denied making such a statement. Although the presentence report indicated that this controverted fact was an issue, it did not make a recommendation on resolving the matter. At the sentencing hearing, while the district court indicated that it had considered the issue, it did not specifically resolve the issue. The district court sentenced Mr. Leyva-Franco to forty-eight months in prison and sixty months of supervised release.

The government appealed, and the Ninth Circuit reversed and remanded the case for resolution of the disputed issue about Leyva-Franco's statement to the customs inspector. On remand, the district court found Leyva-Franco committed a single criminal transaction and imposed the same four-level departure for aberrant behavior. The government appealed again, and *in Leyva-Franco II*,[17] the Ninth Circuit concluded that the district court had failed to resolve the threshold question of whether Leyva-Franco's aberrant conduct had indeed been "extraordinary." The sentence was vacated and the case was remanded again. The district court then analyzed the issue and concluded both that Leyva-Franco's conduct was extraordinary and that a downward departure for aberrant behavior was warranted. It then imposed the same four-level departure in the wake of the *Booker* decision.

On appeal, the Ninth Circuit held that the sentence was reasonable.[18] It did so because, based upon the facts of the case, the district court determined that Leyva-Franco's conduct was indeed extraordinary: a single criminal occurrence, committed without significant planning, of limited duration, and one that was a marked deviation from Leyva-Franco's otherwise law-abiding life.[19]

United States v. Rivas-Gonzalez

In *United States v. Rivas-Gonzalez*,[20] another pre-*Booker* case from the Ninth Circuit cited by the government, the government actually prevailed on appeal. Although the written testimony of the Department suggests that the district court awarded an eight-level departure solely on the basis of cultural assimilation,[21] there were additional important reasons for the court's departure (notably,

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[16] 311 F.3d 1194 (9th Cir. 2002).
[17] 89 Fed. Appx. 50 (9th Cir. 2004).
[18] 2006 WL 64422 (9th Cir. 2006).
[19] *See id.*
[20] 384 F.3d 1034 (9th Cir. 2004).
[21] *See* Mercer, *supra* note _Ref130745590\h1 at 23 ("The district court made an 8-level departure based upon the cultural assimilation of Rivas-Gonzalez.").

extraordinary family ties)[22] — indeed, the district judge said that this was "the most extraordinary of these illegal alien cases that [the sentencing judge] has seen in seven years on the bench"[23] and that Ernesto Rivas-Gonzalez was "the kind of person we want to have living in this country," "a good citizen," and a man with connections to his community that surpass most of those who live here by birth.[24] The Ninth Circuit Court of Appeals, however, rejected the departure awarded on the basis of cultural assimilation. The appellate court agreed that – because Rivas-Gonzalez's social, economic, and cultural ties to the United States were formed after he illegally re-entered the country – the downward departure for cultural assimilation was incorrect.[25] The case was then remanded for resentencing.

On remand, the district court imposed the same six-month sentence as before, but based its departure from the Guideline range on the factors in 18 U.S.C. § 3553(a) rather than any specific factors mentioned in the Guidelines. The court also noted that Rivas-Gonzalez had been deported during the pendency of the appeal, meaning that any resentencing was an empty gesture:

> Although the government appealed the original sentence, it has no interest in seeing the Defendant re-sentenced. As the government stated in its most recent submission to the court,
>
> > [T]he Department of Justice believes that any costs incurred by the government to re-sentence the defendant would be money ill-spent. There is no urgency to re-sentence him. In fact, if he does not return to the United States, he need not be re-sentenced. . . . Therefore, the United States does not believe that re-sentencing the defendant at this time is necessary or the most beneficial use of limited resources.[26]

United States v. Edwards

In *United States v. Edwards*,[27] yet another pre-*Booker* case appealed to the Ninth Circuit, the district court did not apply the sentencing enhancements recommended in the presentence report because it believed it was precluded from finding sentence-enhancing facts because of the Ninth Circuit's *Blakely*-related case, *United States v. Ameline*.[28] Because the district court did not apply a

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[22] 384 F.3d 1034, 1041 ("[T]he district court did not explicitly differentiate between cultural assimilation and family ties when it articulated its reasons for departing … [but] explained why, in its view, the case stood 'outside the heartland' of cases governed by the Sentencing Guidelines.").
[23] *Id.* at 1041.
[24] *Id.* at 1042.
[25] *Id.* at 1045.
[26] Order, *United States v. Rivas-Gonzalez*, Case No. CR 02-11-BU-DWM (Feb. 24, 2006) at 6-7.
[27] 2005 U.S. App. LEXIS 28908.
[28] 376 F.3d 967 (9th Cir. 2004).

ten-level upward adjustment for loss amount or a two-level upward increase for more than minimal planning, it sentenced Duncan William Edwards to seven months of house arrest, *followed by* five years probation (not five years probation, *including* seven months of home detention, as characterized by the Department in its written testimony).[29] The government appealed this sentence, and although the Ninth Circuit Court of Appeals declined to hold that the sentence was unreasonable,[30] it did remand the case to the district court so that the district court could determine whether it would have imposed a different sentence had it understood that the sentencing guidelines were advisory.[31] The Ninth Circuit suggested that "[t]he sentence imposed after the *Ameline* remand may well be different from the sentence imposed, and the government will be free to argue at that point, if it so desires, that the remaining sentence is unreasonably low."[32]

The district court imposed the same non-custodial sentence on remand. The government has appealed,[33] which means that the sentence is not yet final.

United States v. Montgomery

In *United States v. Montgomery*,[34] the district court sentenced Angela Montgomery to eight months of imprisonment for bank fraud (as well as five years of supervised release), but the government appealed her sentence as unreasonable.[35] While in the government's testimony, it characterizes the district court's listing of the statutory sentencing factors as "a perfunctory and boilerplate recitation,"[36] the Eleventh Circuit Court of Appeals described the district court's identification of the procedure it followed and the reasons it gave for the sentence it imposed as precisely what is needed to facilitate meaningful appellate review,[37] as required by law.[38]

The court of appeals held that Montgomery's sentence was reasonable.[39] In making this determination, the Eleventh Circuit looked at more than the fact that she "was a first offender and that the trial court believed she would not commit a new crime"[40] – as the Department's testimony tersely describes it. Rather, the Eleventh Circuit considered the 18 U.S.C. § 3553 sentencing factors imposed by Congress, including:

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[29] Compare *Edwards* at *1 ("The court sentenced the defendant to seven months house arrest followed by five years probation") with Mercer, *supra* note _Ref130745590\h1 at 26 ("[T]he court sentenced Edwards to probation for five years, including seven months of home detention with electronic monitoring.").
[30] *Id.* at *3.
[31] *Id.* at *2.
[32] *Id.* at *3.
[33] *United States v. Edwards*, No. 06-30163 (9th Cir.).
[34] 2006 U.S. App. LEXIS 2891 (per curiam).
[35] *Id.* at *1.
[36] Mercer, *supra* note _Ref130745590\h1 at 27.
[37] *Montgomery*, at *4.
[38] *See* 18 U.S.C. § 3553(c)(2).
[39] *Montgomery*, at *6.
[40] Mercer, *supra* note _Ref130745590\h1 at 28.

1. The seriousness of the offense
2. Just punishment
3. Adequate deterrence
4. The criminal history and personal characteristics of Montgomery: "This crime was Montgomery's first and only offense . . . . Based on her lack of a criminal history, Montgomery is unlikely to commit further crimes in the future such that she would need a lengthy period of incarceration to protect the public."[41]
5. The need to provide restitution to Montgomery's victims: "Restitution was an important component in providing punishment for the offense, and the district court recognized this in ordering Montgomery to pay a large amount of restitution and sentencing her to the maximum five years of supervised release in order to make restitution payments."[42]
6. The need to provide the Montgomery with medical care for her mental illness: "Montgomery had a history of mental illness, which the district court took into account in fashioning its sentence."[43]

While reasonable minds may differ as to whether eight months imprisonment and five years of supervised release was the right sentence for Angela Montgomery, it seems important to understand that she was a non-violent offender with a history of mental illness, given a shorter sentence so as to provide greater restitution to the crime victim. Perhaps it is because of these facts that the the government has chosen not to appeal this case.

United States v. Medearis

In *United States v. Medearis*,[44] the district court sentenced Mark Medearis (a drug user in possession of a short-barreled shotgun and a stolen firearm) to five years of probation instead of to the 46-57 month prison term recommended by the sentencing guidelines. The district court so sentenced Medearis after considering the relevant 18 U.S.C. § 3553 sentencing factors, including the need for deterrence, Medearis' criminal history and personal characteristics, extraordinary community and family support, his credible religious conversion, and the lack of a need to protect the public.

The sentencing judge had the opportunity to interact with Medearis and to assess his claims of religious conversion. The sentencing judge also had the opportunity to speak with the 15-20 members of Medearis' church who appeared on his behalf at sentencing, and with the 15-20 members of Medearis' family who were there, as well. The government has just appealed the sentence to the Eight Circuit, so if the government's assessment of this case is correct, then the

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[41] *Montgomery*, at *6, *7.
[42] *Id.* at *6-*7.
[43] *Id.* at *7.
[44] No. 04-05031-CR-SW-ODS (W.D. Missouri, 2006).

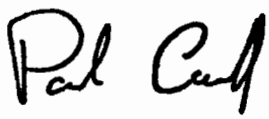
sentence will presumably be reversed. At this point, however, the sentence that will finally be imposed has yet to be determined.

Conclusion

In the government's written testimony, it is said that "[t]here are hundreds and hundreds more examples of judges reducing sentences below the guidelines ... including drug trafficking cases, sex abuse cases, and even terrorism cases."[45] But if the six cases cited by the government are in any way representative of these others, they suggest that the courts of appeals, rather than hastily enacted legislation, are the appropriate mechanism to establish a meaningful jurisprudence of reasonableness.

I would be happy to provide any additional information that might be of assistance to the Subcommittee and look forward, on behalf of the Judicial Conference, to working with the Subcommittee to insure that the federal sentencing system continues to be fair to all concerned.

Sincerely,



Paul Cassell, Chair

Enclosures

cc: Honorable Bobby Scott
Ranking Democrat

[45] Mercer, *supra* note _Ref130745590\h1, at 28.

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

March 22, 2006

Honorable Paul G. Cassell
Chair, Judicial Conference
Criminal Law Committee
United States District Court
350 South Main Street
Salt Lake City, UT 84101

Dear Judge Cassell:

Because the recent sentencing practices of the judges in the United States District Court for the District of Massachusetts were discussed at the March 16, 2006 hearing of the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, you have asked me to provide you with some pertinent information. I am pleased to do so in this letter and in the attached report which amplifies it.

I understand that the United States Sentencing Commission's reported statistics indicate that judges in the District of Massachusetts have relied on the discretion afforded by the Supreme Court's decision in United States v. Booker to impose sentences below the guideline range in almost 26% of all case. However, we believe that the figures for Massachusetts are not accurate because of the manner in which the bases for our decisions were initially recorded and because of the way the Commission interpreted some of our reports. As the Sentencing Commission has written, "caution should be exercised in drawing conclusions from the post-Booker data collected and analyzed thus far."[1] We are now using the new Judgment and Commitment form, which should more accurately capture what is actually occurring in the District of Massachusetts and elsewhere.

The length of the sentences being imposed in the District of Massachusetts can be determined accurately. We are advised by our

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[1]United States Sentencing Commission, Report on the Impact of United States V. Booker on Federal Sentencing, at vi (March 2006)(the "Booker Report").

Probation Department that the length of sentences imposed in this District has not changed after Booker.[2] This is consistent with the national experience.[3]

The Department of Justice illustrated its argument for legislation further limiting judicial discretion by pointing out that while judges in the District of Massachusetts have reportedly relied on Booker to sentence almost 26% of defendants below the guideline range, judges in the neighboring Northern District of New York have done so only about 9% of the time.[4] However, the Sentencing Commission's statistics indicate that in both districts, sentences within the guideline range are imposed in about 53% of the cases.[5] In the Northern District of New York the government sponsors departures in about 32% of the cases, while in Massachusetts it does so only in about 12% of them[6] - approximately half the national average rate of about 24%.[7]

These comparative figures are a reminder that any just system of sentencing will necessarily involve the exercise of some discretion. The risk of unwarranted disparity may be increased by decisions of prosecutors and reduced in response by decisions of district judges, who in contrast to prosecutors are neutral and exercise their discretion in an open manner, subject to appellate review. In essence, it appears that prosecutors in the District of Massachusetts are requesting departures or variances to promote just sentences far less often than their colleagues across the United States. As the attached report illustrates, in some of the cases in which the government does not sponsor a departure or variance a sentence in the guideline range plainly would not be just. Thus, the aberrant practices of prosecutors in the District

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[2]Massachusetts statistics reported by the Department of Probation, D. Mass.

[3]Booker Report at vii. ("The severity of sentences imposed has not changed substantially across time. The average sentence length after Booker has increased.")

[4]Federal Sentencing After United States v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (2006) (statement of William W. Mercer, United States Attorney, District of Montana and Associate Deputy Attorney General at 5).

[5]Booker Report at Appendix D-19.

[6]Id.

[7]Id. at Appendix D-10.

of Massachusetts may explain and justify any higher than average rate of judicially initiated departures or variances resulting in sentences below the guideline range.

However, we agree with the General Accounting Office that one cannot properly evaluate interdistrict disparity unless one also has data to "fully compare the offenders and the offenses for which they are convicted."[8] Without such data it is impossible to reach any reliable judgments on whether similarly situated offenders are being sentenced differently in the District of Massachusetts and elsewhere, including the Northern District of New York. Developing such data may be a challenging task, but it is necessary if statistics are going to be used in making legislative judgments which will profoundly effect the public, defendants, victims, and confidence in the administration of justice.

As you testified, when the Courts of Appeals, and perhaps the Supreme Court, clarify the applicable law, any unreasonable disparities in sentences imposed after Booker should diminish.[9] In this evolutionary process, we will all gain insights from experience that should inform the decision as to whether further legislation is appropriate and, if so, what it should provide.

We understand and share the interest of Congress and the Department of Justice in the matter of federal sentencing law. As you explained in your testimony, the federal judiciary looks forward to being part of the colloquy concerning both the relative roles of the Legislative, Executive, and Judicial branches in this important area and the substance of federal sentencing law in the future.

Thank you for the opportunity to submit this information about the District of Massachusetts for inclusion in the record with your testimony.

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[8]United States General Accounting Office, Federal Drug Offenses Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001 at 1, see also pp. 19-22 (October 2003).

[9]It was only two weeks ago that the case law in the First circuit had ripened sufficiently to permit the Court of Appeals to issue a definitive decision "en banc to provide stable guidance in this Circuit for the determination and review of post-Booker sentences." United States v. Jiminez-Beltre, ___ F.3d ___, 2006 WL 562154 *1 (1st Cir. (Mass.) March 9, 2006).

With best wishes,

Sincerely yours,

Mark L. Wolf
Chief Judge

REPORT ON POST-BOOKER SENTENCING
IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

March 22, 2006

We have reviewed the statistics for the District of Massachusetts in the U.S. Sentencing Commission's Report on the Impact of United States v. Booker on Federal Sentencing (March 2006) (the "Booker Report"). We wish to address five general points:

First, Commission statistics concerning "Booker variances" for the most part reflect the period before the formal adoption of the new Judgment and Commitment form. As such, they are not accurate for a number of reasons described below.

Second, sentencing lengths in this district have not changed post Booker, and are comparable to the national averages.

Third, the grounds on which Massachusetts judges are relying for Booker variances are consistent with those used by other judges around the country. We suggest that the content of the "Booker variances," not just the fact of variances, must be analyzed to determine whether they reflect real problems with certain Guidelines.[1]

Fourth, to the extent that there are issues raised by the data, they will be addressed through the courts of appeals. It is clear that there has not been a return to the pre-Guidelines era. The Guidelines are being followed in the majority of cases. Where district courts diverge from the Guidelines, they have spelled out their reasons with care, and have been subject to appeal. The post Booker period both within our district and across the country has produced more careful sentencing procedures and more thoughtful sentencing decisions than ever before. The guidance we are just beginning to receive from the courts of appeals will assure that this is increasingly true. See, e.g., United States v. Jiminez-Beltre, _ F.3d _, 2006 WL 562154 (1st Cir. (Mass.) March 9, 2006).

Fifth, to the extent the statistics are accurate, they raise other issues, namely disparity in the rates of substantial assistance motions brought by the government, in the rates of government-sponsored sentences, in government appeal rates, and differences in the case load of the various districts around the country. Similarly

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[1] As the Commission noted in its August 2003 Departure Report, p. ii, http://www.ussc.gov/departrpt03/departrpt03.pdf, : "Departure decisions also provide the Commission with important feedback from courts regarding the operation of the guidelines and improve its ability to make ongoing refinements to the sentencing guidelines. Frequent or increasing use of departures for a particular offense, for example, might indicate that the guideline for that offense does not adequately take into account a particular recurring circumstance."

situated offenders may be treated differently across the country because prosecutors differ in their approaches on issues including which cases to bring in federal court rather than state courts, when to offer cooperation departures, when to appeal.

On the question of statistics:

a. **There are serious conceptual problems in the field which have not yet been resolved**. What is a Booker departure? For example, is a departure because a case presents a set of facts that are outside the heartland of the Guidelines a traditional departure ground pre- Booker, or will it now be considered a new Booker variance?

b. **There are problems in the way the District of Massachusetts characterized its sentences in the Judgment and Commitment orders.** For example, at the beginning of this period some judges erroneously labeled all their sentences "Booker" sentences even when they were not. This District quickly implemented the new J & C form because of our concerns with the reporting problems. Nothing in the old J & C form would have required a court to identify the issues that now appear to be salient in the Commission's reports.

c. **There are problems in the way the Commission interpreted District of Massachusetts data.** Commission "coders" reviewed the old J & C forms and interpreted the entries. In some instances, they were doing so without sentencing transcripts in which judges would explain their reasons or even written decisions, because those materials had not been electronically attached. We had been on the Electronic Filing System for approximately a year, but we did not learn about these problems until the fall of 2005. We have since corrected them. Still, we do not believe that the Commission "re-coded" the earlier data.[2]

d. **When the Commission coders could not determine what the basis for the sentence was -- for example, because all the papers had not been**

[2] Data from the period of time when we were not recording our sentencing accurately is over-represented in the 2006 table. The table reflects 56,086 cases sentenced after Booker which the Commission had time to receive, code and "edit" before December 21, 2005. We understand the Commission indicated that that process took two weeks to months. That means that the 2006 table is, to a considerable extent, based on data before we introduced the new J & C in November 2005.

attached -- they merely added that data to the "Booker" category. In fact, the category "can't tell" was inappropriately folded into the Booker departure column for the report on individual districts.

e. **Since the forms did not have a space for "government sponsored" departures, the data understates the numbers of sentences those in which the government in fact agreed to the ultimate sentence.** For example, our data suggests that in eighteen instances in which defendants were charged with illegal reentry after deportation, the government agreed to a lesser sentence in exchange for a quick plea and no PSR, in thirteen cases without a formal plea agreement. In addition, there are ten instances in which the government filed a post-sentencing motion under Rule 35 to reduce the sentence because of cooperation, although it is not clear how these adjustments were recorded.[3]

f. Some of these problems have already been ameliorated with the new and more detailed J & C form; some will have to await the development of the case law. The Commission has acknowledged that there was a lack of uniformity in the reporting of sentencing information, that the categories which the Commissions' report reflects were not captured on the forms filled out by courts. Booker Report, Executive Summary, pp. v., vi.

On the issue of sentencing patterns, the data suggests the following:

a. Sentencing lengths have not changed post Booker in this District and are comparable to the national average sentence.

b. The grounds for departures or variances are consistent with like cases around the country. Indeed, rather than showing problems with judges sentencing post-Booker, they show substantive issues with Guideline sentencing -- criminal history issues, crediting time spent in ICE detention, concern about disparity between codefendants, which should be addressed.

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[3] While the Commission noted that in 2003 they had begun to determine the proportion of non-substantial assistance departures that were sponsored by the government, since the J & C had no such category, it is not clear how the Commission would have known that the government did not oppose the ultimate sentence where there was no PSR, no plea agreement, and no transcript attached to the judgment.

The following are some examples of sentences resulting from Booker variances that demonstrate why an advisory guideline system is critical.

Case 1: An individual charged with illegal reentry after deportation. The government requested a guideline sentence of ten months, with a split sentence, including five months in home detention. The defendant had already served seven months in the custody of Immigration Customs Enforcement. If he received a sentence of time served, the likelihood is that he would be detained for another two months, before deportation, totaling nine months in custody, only one month short of the guideline sentence. Moreover, one aspect of the guideline sentence requested by the government could not be implemented: the defendant had no home in which to be detained. In addition, the defendant had a three-month-old son who needed surgery in his home country and the defendant would need to work in his home country to pay for it. The Court sentenced him to time served. The government did not appeal.

Case 2: Defendant was charged with bank robbery. As a career offender his guideline range was 151-188 months in prison. If he were not a career offender, the range would be 77-96 months. While the Guidelines concluded that "lack of guidance as a youth" was a prohibited ground for departure, the Court noted the following: The defendant's mother was 14 when he was born and she was drug addicted. She and her boyfriend gave the defendant heroin starting when he was 11. The defendant committed some of the crimes that form his criminal history to help his mother who was dying from AIDS and provide her boyfriend with drugs. All of his prior offenses were non-violent. The defendant committed the bank robbery and was arrested, shortly after, inside a train station counting his wad of cash, $620. He had never done state prison time, nor had he ever had drug treatment. The Court also noted that there were innumerable drug addicts with similar records prosecuted in state court, facing substantially lower sentences. The Court departed downward in part based on the fact that his criminal history overstated his culpability, and in part on a variety

of § 3553(a) factors, and imposed an 86 month sentence. The government did not appeal.

Case 3: Defendants were charged with distribution of pseudoephedrine. The acknowledged mastermind of the pseudoephedrine operation, who had funded and advised the defendants and defendants across the country in setting up drug factories, had been held responsible in another state for a substantially smaller amount of drug quantity than the defendants and received a substantially lower sentence than the sentence the defendants were facing. The Court noted: "Ironically, in this case, the Guidelines concerns about 'unwarranted disparity among defendants with similar records who have been found guilty of similar conduct,' 18 U.S.C. § 3553(a)(6), call for an out-of-Guidelines adjustment. Ordinarily, the Guidelines do not permit me to make adjustments as between co-defendants in a single case, much less between defendants in separate indictments. See United States v. Kneeland, 148 F.3d 6, 16 (1st Cir.1998). However, in the instant case, there is something troubling about the extent to which differences in sentencing were driven not by differences in the crime, but by the happenstance of the way the government indicted, the jurisdictions of indictment, and who ran to cooperate first. Because of Abu-Lawi's prominence [Abu-Lawi was the mastermind], and the timing of his cooperation, the government had virtually all it needed before it got to Jaber [who had also offered to cooperate]. Some adjustment is essential to reduce unwarranted disparity in the case at bar." U.S. v. Jaber, 362 F. Supp. 2d 365, 380 (D. Mass. 2005). The government did not appeal.

To the extent the data show any change post-Booker, and to the extent accurate information can be gleaned from the data at all, an important source of disparity may be prosecution based. For example, the data suggests that the District of Massachusetts United States Attorney's office has a much more limited approach to substantial assistance departures than offices around the country, i.e. granting it to fewer defendants than do other offices. (For example, the Northern District of New York is at

32% substantial assistance departures, and the District of Massachusetts is at 12%, according to the most recent statistics.) [4]

Moreover, real differences between jurisdictions can only be evaluated by understanding differences in case load. The caseload from circuit to circuit and district to district varies enormously. If judges in X district go outside the guidelines 40% of the time and in Y district only 20%, that does not mean, as it might superficially appear, that the X judges are departing in cases where the Y district judges would not. It may mean the X district judges are seeing different kinds of cases. [5]

Our Probation Department advises us that in Massachusetts, sixty percent of our case load consists of street crime including drugs (43%), weapons (7.3%), robbery, larceny, gambling, assault, escape, homicide, burglary. The figure could well be higher if you add in cases which may be street offenses charged as racketeering (1.7%), obstruction of justice/perjury (3.0%), perhaps money laundering (1.4%). 17.2% of the cases in the District of Massachusetts are for fraud, 6.5% for immigration, and 1.7% for tax offenses.[6] We do not have comparable statistics for other districts, which makes meaningful comparisons be possible.

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[4] Frank Bowman notes that the institution most responsible for sentences outside the Guidelines post-Booker is the government, not only formally, through substantial assistance departures and "fast track" programs, but also through plea agreements (so called "government sponsored" departures.) . Bowman, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker* 43 Houston L. Rev. __ (2006),

[5] This is precisely what the UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL DRUG OFFENSES DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 at 1, see also pp. 19-22 (October 2003) noted in its Departure Report, namely that one could not evaluate interdistrict disparity unless one also had data to "fully compare the offenders and the offenses for which they were convicted."

[6] Indeed, in Frank Bowman's recent article, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker* 43 Houston L. Rev. __41 (2006), he notes that developments "within the pre-*Booker* mandatory guidelines system apparently caused *greater* increases in regional sentencing disparity than the *Booker* decision transforming the character of the Guidelines from mandatory to advisory." (Italics supplied.)