



# The Association of the Bar of the City of New York

Office of the President

**PRESIDENT**

Bettina B. Plevan  
(212) 382-6700  
Fax: (212) 768-8116  
bplevan@abcny.org  
www.abcny.org

April 19, 2005

Honorable F. James Sensenbrenner, Jr.  
United States House of Representatives  
Committee on the Judiciary  
2449 Rayburn House Office Building  
Washington, DC 20515

Honorable John Conyers, Jr.  
United States House of Representatives  
Committee on the Judiciary  
2426 Rayburn House Office Building  
Washington, DC 20515

Dear Honorable Sirs:

The Association of the Bar of the City of New York urges the House Committee on the Judiciary not to send Section Twelve of H.R. 1528, "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005" to the full House of Representatives. Unrelated to drug treatment or child protection, Section Twelve radically changes the Sentencing Reform Act, undermining not only the judiciary's ability to mete out just punishment, but also eviscerating the power of the United States Sentencing Commission to determine uniform sentences in particular circumstances based on data and analysis gathered by the Commission. The result of this "quick fix" would be disastrous.

The changes proposed by Section Twelve are unnecessary. There is no evidence that sentencing practices have changed after the Supreme Court's recent decision in *United States v. Booker*, which made the Sentencing Guidelines advisory. Statistical evidence covering the period following the Supreme Court's decision in *Booker* in fact shows that there has not been any marked deviation from pre-*Booker* sentencing practices. (See Exhibit A, initial statistics provided by the United States Sentencing Commission.) Before taking any action to "fix" any perceived problems with sentencing after *Booker*, the Committee on the Judiciary should allow time for the current system to adapt to its new role and see if any "fix" is warranted.

However, if the Committee on the Judiciary believes that action is necessary, the Association sees two substantial reasons not to pass Section Twelve in its current form. First, the Association believes that the House as well as the public will not have an adequate opportunity to comment on Section Twelve's provisions because it was introduced as an amendment to a bill unrelated to sentencing issues. These sentencing provisions of Section 12 were added hastily with little public discussion or debate, compromising the public's ability to understand the issues raised, let alone express an informed opinion. The Committee should hold extensive public hearings before enacting such unprecedented changes in sentencing discretion. Section Twelve alters the landscape under which individuals may be sentenced without any input from three very important constituencies, the United States Sentencing Commission, the Justice Department and the defense bar. Their contribution on this important issue would be invaluable and any legislation should not proceed without their input.

Second, by converting guideline sentencing from a process to establish appropriate sentencing ranges (subject to factors authorizing a judge to depart upward or downward) to a set of mandatory minimums (with a set of factors which a judge may only use to depart upwards, i.e. to increase sentences), Section Twelve would eliminate an aspect of judicial discretion which the Supreme Court in *Booker* held was essential. The result of this legislative tactic is that HR 1528 will lead to years of uncertainty in federal criminal sentencing.

We ask that this letter be entered into the public record.

Very truly yours,

Bettina B. Plevan  
President

UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500, SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
(202) 502-4500  
FAX (202) 502-4699

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## MEMORANDUM

**TO:** Judge Hinojosa, Chair  
Tim McGrath, Staff Director

**FROM:** Linda Maxfield  
Office of Policy Analysis

**DATE:** February 28, 2005

**SUBJECT:** Numbers on Post-Booker Sentencings

Attached is a table with a look at post-Booker cases received, coded, and edited as part of the Commission's post-Booker project. The numbers are prepared using data extracted at close-of-business on February 17, 2005.

- 65.7 percent are within the guideline advisory range. (This compares to 65.0% in FY02.)
- 2.0 percent are above the advisory guideline range. (This compares to 0.8% in FY02.)
  - Comprising the 2.0 percent of sentences above the guideline range is 0.9 percent classified as an upward departure from the advisory guidelines range. A total of 1.1 percent of all cases either cite no reason, or cite US v Booker or 18 USC § 3553 as a reason, for the sentence above the advisory guideline range.
- 32.4 percent of the sentencings are below the advisory guideline range. Most of these sentences are government-sponsored below-range sentences (20.3%), compared to other below-range sentences (12.0%).
  - *Government-sponsored below-range sentences:* Among the 20.3 percent of cases with a government-sponsored downward departure, the largest proportion (approximately 70% of this category) are due to §5K1.1 substantial assistance departure sentences.
  - *Other below-range sentences:* 12.0 percent of all sentences are below the advisory guideline range for reasons other than a government-sponsored downward departure. The 12.0 percent is comprised of 3.7 percent classified as a “downward departure” from the advisory guideline range. The remaining 8.4 percent either cite no reason, or cite US v Booker or 18 USC § 3553 as a reason, for the below-range sentence.

## Comparison of Sentence Imposed and the Advisory Guideline Range

|   | N            | %            |
|---|--------------|--------------|
| <b>TOTAL<sup>1</sup></b>                                  | <b>1,986</b> | <b>100.0</b> |
| <hr/>   |              |              |
| <b>WITHIN ADVISORY GUIDELINE RANGE</b>                    | <b>1,304</b> | <b>65.7</b>  |
| <hr/>   |              |              |
| <b>ABOVE ADVISORY GUIDELINE RANGE</b>                     | <b>39</b>    | <b>2.0</b>   |
| “Upward departure” from the advisory guideline range      | 17           | 0.9          |
| Otherwise above the advisory guideline range <sup>2</sup> | 22           | 1.1          |
| <hr/>   |              |              |
| <b>BELOW ADVISORY GUIDELINE RANGE</b>                     | <b>643</b>   | <b>32.4</b>  |
| <b>Government Sponsored</b>                               | <b>404</b>   | <b>20.3</b>  |
| §5K1.1 Substantial Assistance departure                   | 281          | 14.1         |
| §5K3.1 EDP/Fast-Track departure                           | 96           | 4.8          |
| Departure pursuant to a plea agreement                    | 27           | 1.4          |
| <b>Other</b>  | <b>239</b>   | <b>12.0</b>  |
| “Downward departure” from advisory guideline range        | 73           | 3.7          |
| Otherwise below the advisory guideline range <sup>3</sup> | 166          | 8.4          |

<sup>1</sup>Of the 2,056 cases sentenced on or after January 12, 2005, and cumulatively received, coded and edited at the U.S. Sentencing Commission, there are 70 cases excluded from the table due to missing information preventing the comparison of the sentence and the guideline range.

<sup>2</sup>All cases explicitly citing either US v Booker or 18 USC § 3553 as a reason for a sentence above the advisory guideline range are classified into this category. This category also includes cases that do not provide a reason for the above-guideline sentence.

<sup>3</sup>All cases explicitly citing either US v Booker or 18 USC § 3553 as a reason for a sentence below the advisory guideline range are classified into this category. This category also includes cases that do not provide a reason for the below-guideline sentence.

SOURCE: United States Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extraction as of February 17, 2005). Numbers may not sum to 100 percent due to rounding.