



U.S. Department of Justice

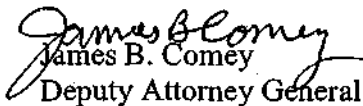
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 28, 2005

TO: All Federal Prosecutors

FROM:   
James B. Comey  
Deputy Attorney General

SUBJECT: Department Policies and Procedures Concerning Sentencing

## I. INTRODUCTION

The past few months have been a time of change and uncertainty in federal sentencing. Federal prosecutors have had to adapt to a shifting landscape, which you have done with characteristic professionalism and dedication. I thank you and commend you for your flexibility, your creativity and your good humor in these difficult circumstances. The challenges continue. Although the Supreme Court's ruling in *United States v. Booker* answered some of the questions raised in *Blakely v. Washington*, the sentencing system will continue to be a source of debate and litigation. Throughout, we must remain focused on our principles and our mission, which are clear and enduring.

First, we must do everything in our power to ensure that sentences carry out the fundamental purposes of sentencing. Those purposes, as articulated by Congress in the Sentencing Reform Act, are to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford deterrence, to protect the public, and to offer opportunities for rehabilitation to the defendant.

Second, we must take all steps necessary to ensure adherence to the Sentencing Guidelines. One of the fundamental imperatives of the federal sentencing system is to avoid unwarranted disparity among similarly situated defendants. The Guidelines have helped to ensure consistent, fair, determinate and proportional punishment. They have also contributed to historic declines in crime. We must do our part to ensure that the Guidelines continue to set the standard for federal sentencing.

## **II. DEPARTMENT POLICIES AND PROCEDURES CONCERNING SENTENCING**

Sentencing is a shared responsibility of the three branches of the federal government. The role of the Executive Branch is to enforce the law by bringing appropriate charges and advocating the consistent application of the Sentencing Guidelines and mandatory minimums, which reflect the judgments Congress has made about appropriate sentences for federal crimes. The following guidance is intended to help you faithfully execute that role in the wake of *Booker*.

### **A. *Consistency in charging, pleas, and sentencing***

Federal prosecutors must consult the Sentencing Guidelines at the charging stage, just as federal judges must consult the Guidelines at sentencing. In order to do our part in avoiding unwarranted disparities, federal prosecutors must continue to charge and pursue the most serious readily provable offenses. As set forth in Attorney General Ashcroft's Memorandum on Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003), the "most serious" readily provable offenses are those that would generate the most substantial sentence pursuant to: (1) the Guidelines; (2) one or more applicable mandatory minimums; and/or (3) a consecutive sentence required by statute. One of the fundamental principles underlying the Guidelines is that punishment should be based on the real offense conduct of the defendant. To ensure that sentences reflect real offense conduct, prosecutors must present to the district court all readily provable facts relevant to sentencing.

### **B. *Compliance with the Sentencing Guidelines***

Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases. Under the Guidelines, departures are reserved for rare cases involving circumstances that were not contemplated by the Sentencing Commission. Accordingly, federal prosecutors must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate Guidelines range or to refrain from objecting to a defendant's request for such a sentence.

### **C. *Appeals of unreasonable sentences***

Federal prosecutors must preserve the ability of the United States to appeal "unreasonable" sentences. The Solicitor General will ensure that the Department takes consistent and judicious positions in pursuing sentencing appeals. Accordingly, in any case in which the sentence imposed is below what the United States believes is the appropriate Sentencing Guidelines range (except uncontested departures pursuant to the Guidelines, with supervisory approval), federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best position possible on appeal. If a sentence not only is below the Guidelines range, but also, in the judgment of the United States Attorney or component head, fails to reflect the

purposes of sentencing, then the prosecutor should seek approval from the Solicitor General to file an appeal.

**D. *Reporting of adverse sentencing decisions***

Although the Department has not proposed or endorsed any particular action by Congress or the Sentencing Commission in the wake of *Booker*, we must continuously assess the impact of the Supreme Court's rulings based on accurate, real-time information on sentencing, in order to play an appropriate and effective role in the public debate. The existing requirements for reporting adverse decisions set forth in the U.S. Attorney's Manual remain in effect. In addition, the Executive Office for United States Attorneys is distributing instructions for reporting (1) sentences outside the appropriate Sentencing Guidelines range, and (2) cases in which the district court failed to calculate a Guideline range before imposing an unreasonable sentence. This reporting requirement applies to all United States Attorney's Offices and litigating divisions.

**III. CONCLUSION**

I know how hard you work and what credit that work brings to this great institution and this country. Our job is to bring justice to criminals and for their victims. Your ability and dedication will get the job done in these challenging times.