United States Sentencing Commission
Public Hearing
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Statement of
Karen K. Caldwell
United States District Judge
Eastern District of Kentucky

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Thank you Judge Hinojosa and members of the Sentencing Commission for inviting me to testify at this hearing marking the 25th anniversary of the Sentencing Reform Act.

Like many, I find that one of my most difficult tasks as a federal judge is sentencing a criminal defendant. The responsibility weighs heavily upon me as virtually every situation is awash in human tragedy. When it comes to determining the fate of an individual coming before me, I believe in utilizing every available resource to ensure that the punishment is fair and just. Therefore, I am grateful for a guideline scheme that infuses order and rationality into the process.

I became an Assistant United States Attorney in 1987, just months before the Federal Sentencing Guidelines became effective. Therefore, for most of my legal career, I worked within the mandatory federal Sentencing Guidelines scheme. As a practitioner and a judge, I have never felt particularly constrained by the guidelines, even in their mandatory form. However, while I value and generally follow the guidance of the Sentencing Commission, I have come to enjoy life after *Booker* and the flexibility an advisory system affords.

The advisory guidelines serve as a model, taking into account relevant factors that should influence every sentence. The methodical arrangement of the Sentencing Guidelines creates a logical framework for considering similar factors in every criminal case. However, to be effective, a uniform analysis need not ensure uniform results. After *Booker*, the Sentencing Guidelines provide federal judges with a solid platform from which to exercise their discretion in achieving the

sentencing objectives of 18 USC §3553(a).

In many ways, post-*Booker,* sentencing has become more difficult. Additional discretion makes sentencing harder, not easier. Judges can no longer hide behind the mandatory guidelines and must take even more time in fashioning sentences in criminal cases. In many instances, factors may be relevant to both guideline departures and variances. Admittedly, conducting the strict guideline departure analysis before the less restrictive variance analysis is sometimes frustrating and time consuming. However, if an advisory guideline scheme is to have any validity, district judges must continue to carefully and correctly calculate the advisory guidelines. Accordingly, I conduct bifurcated sentencing hearings so that guidelines may be properly calculated before variances are considered, not only to avoid error but also to ensure fairness. This process has been particularly valuable when I have imposed a sentence above the advisory guideline range.

Since the Sentencing Guidelines went into effect, lawyers and commentators have argued that federal sentences are simply too long. However, much of that criticism is actually aimed at applicable minimum mandatory statutory penalties rather than the guidelines ranges themselves. These congressionally created guidelines are neither the product nor the responsibility of the Sentencing Commission. However, I encourage the Commission to consider empirical data along with congressional mandates as it re-evaluates and revises guidelines with corresponding statutory minimum sentences.

In almost eight years on the bench, there have been a handful of cases in which I have observed that the minimum mandatory sentence was unduly harsh. In contrast, I've presided over a handful of cases in which I believed that the maximum statutory sentence was too lenient. However, for the most part, in my district, the safety valve and downward departure motions have served to mitigate unduly harsh results that might otherwise have resulted from statutory penalties. While

much of the discretion to depart below a statutory minimum penalty is vested with the prosecution rather than the court, prosecutors in my district make liberal if not generous use of their discretion.

With respect to downward departures based on a defendant's cooperation, it is not uncommon for the most culpable person in a conspiracy to make the most beneficial deal with the government. Under the mandatory guidelines, there were times in which it appeared that a less culpable person, having little information to assist the government, might receive punishment equal to or exceeding a far more culpable co-defendant. Under an advisory scheme, however, the judge is able to avoid injustice by taking into account each defendant's relative culpability in the context of a cooperating defendant's downward departure.

As the Sentencing Commission continues its work, I hope it will examine the sentencing disparities occurring in illegal re-entry cases where the district does not have a fast-track program. Since this affects a large number of cases, the Sentencing Commission should act to eliminate disparities derived solely from the forum rather than the offense or the offender.

In conclusion, I commend the Sentencing Commission for its work both before and after *Booker*. Under the new advisory guideline scheme, I believe that the Commission's work takes on additional relevance as it assists courts in formulating "just" sentences in criminal cases.

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