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I thank the Commission for the opportunity to testify on behalf of the CJA panel in Kansas. I do not presume to inform the Commission on the mechanics of the guidelines, sentencing statistics, or case law trends. I am confident that the Commission is more familiar than I with those issues. Instead, I present a perspective of the guidelines from CJA defense attorneys and the persons we represent.

As I mull appropriate issues to raise, I am mindful that sentencing is a profoundly human process. Every decision the Commission or Congress takes affects not just defendants and their families, but also community safety and crime victims' interests.

The guidelines should reflect the highest ideals of American justice. In practice, as with any code that attempts to regulate human behavior, the guidelines both achieve and miss those ideals.

The guidelines succeed when they reduce geographical and racial bias in sentencing, punish criminal behavior judiciously, protect our communities, and preserve a constitutional balance of power. They fail when they calculate overly harsh sentences, obfuscate the law, and skew constitutional balance.

The narrow scope of my practice does not equip me to present a statistically valid survey of the guidelines. My practice does, however, give me direct, close access to persons serving guideline sentences, and the CJA attorneys who represent them. The following five points address their most pressing observations.

1. Racial, Economic, And Geographic Disparity In Sentencing

There is some irony that a sentencing system designed to eliminate disparity effectively furthers disparate sentencing through some of its provisions. Even more troubling than our national incarceration rate are the disparities in incarceration rates by race.

Eliminating or at least further reducing the gap between crack and powder cocaine guidelines would be a good start toward addressing this problem. However, sentencing statistics betray racial and economic disparities outside the powder-crack arena as well. For example,

criminal history computations, especially for minor offenses, sometimes work against the poor and minorities.

Adjusting the sentencing zones on the guideline chart could ameliorate these disparities. I recently studied the Commission's data on recidivism. I was interested to note the difference in long-term success rates of probationers versus prisoners.

My own practice experience confirms the Commission's data. The Kansas state sentencing guidelines promote non-prison sanctions more readily than do the federal guidelines for comparable crimes. Besides traditional probation, I have seen success with boot camp programs and residential centers.

The absence of §5K3.1 fast-track programs in some districts creates geographical disparity. In illegal reentry cases, the location of arrest within the country, or even within the 10th Circuit, can dramatically affect an alien's sentence. Making fast-track programs universally available would promote sentencing integrity and consistency.

I recognize that issues of bias in sentencing are complex, and do not lend themselves to simple solutions. Root causes of sentencing disparities transcend the law, and are beyond the Commission's purview. A compounding factor is that persons subject to disproportionate sentences typically have a small voice in the public arena.

Despite these complex challenges, the Commission should continue to tackle the broader issues related to disparate sentencing. Hopefully the public and the state and national legislatures will join the Sentencing Commission in giving this important topic its due attention.

2. Transfer Of Sentencing Authority From The Courts To The Prosecution

Certain statutes and guidelines invariably shift sentencing power toward the prosecution, and create opportunities for misuse. An example is the Congressionally-mandated third point for acceptance of responsibility being controlled by the prosecution. A consequence is that the government can, if it desires, wield its authority over the third point in ways that stretch the spirit of acceptance of responsibility.

Mandatory minimums have a similar effect. Prosecution decisions regarding drug quantities, §924(c) counts, or §851 enhancements dramatically affect a judge's authority over sentencing. The prosecution has great power to determine where sentencing discussions will begin.

Moreover, mandatory minimums are blunt tools. Especially in large conspiracy cases, they do not distinguish well between principals and accessories.

The Commission should encourage Congress to repeal mandatory minimum laws. Hand in hand with this should be a decoupling of guidelines linked to mandatory minimums.

This is not to suggest that mandatory minimum sentences are always too severe. I am confident the courts would continue to impose severe sentences in appropriate cases with or without mandatory minimums.

A final example of the guidelines altering the balance of sentencing power is §5K1.1. There can be significant differences in §5K1.1 motions from district to district, and even from courthouse to courthouse within a district. This seems arbitrary, especially when a §5K1.1 motion might be the only means for a defendant to avoid a mandatory minimum sentence.

A simple change to allow §5K1.1 motions from the defense and the court would level this playing field somewhat. Relying on the courts to achieve the same result through variances is not a solution to this imbalance.

3. Guideline Complexity

Kansas CJA attorneys practice under both state and federal sentencing guidelines. We thus see the federal guidelines through a comparative lens. In Kansas state courts, defense attorneys can predict guideline ranges for their clients with great certainty. Making such predictions for clients in federal court is much more challenging.

The greatest difficulty lies in relevant conduct calculations. At best, those calculations can be unpredictable. At worst, especially in the context of suppressed evidence or acquitted counts, they diminish sentencing integrity. At a minimum, the Commission should remove suppressed evidence and acquitted counts from relevant conduct consideration.

The federal guidelines necessarily are comprehensive, and should not be gutted for simplicity's sake. However, they could be more comprehensible. A good rubric would be whether ordinary citizens without specialized training can understand the sentencing rules that govern their conduct. Guideline clarity would promote transparency in sentencing.

4. Advisory Guidelines

Booker and its progeny have brought balance into federal sentencing while preserving the guidelines' vital role in the sentencing process. In simple terms, advisory guidelines have restored a human element to sentencing.

Judges now can address defendants as human beings with unique histories and criminal motivations. Pre-*Booker*, judges ultimately addressed defendants as intersections of offense levels and criminal history categories. Guideline departures rarely altered this.

Sentencing hearings essentially are human, often tragic, dramas. Mandatory guidelines typically captured just a facsimile of this drama. By contrast, advisory guidelines enable the court to fully consider the drama. This is not necessarily advantageous to the defense, but it is fair.

Ultimately, the defense seeks to understand clients on a human level, and then communicate that understanding to the court at sentencing. The prosecution does likewise with victims and broad societal interests. Under the advisory guidelines, that communication to the court from both parties now is much more relevant.

In an indirect sense, the guidelines are more vital now than pre-*Booker*. They remain a valuable resource, and provide a common language through which the court, the defense, and the prosecution communicate. They are not perfect, but they are an authoritative reference generally based on respected empirical data.

5. Obstruction Enhancement For Testifying At Trial

My panel's strongest request was for elimination of the §3C1.1 obstruction enhancement for defendants who testify on their own behalf at trial. Many defendants, both guilty and innocent, want very much to have their day in court. They want a jury to hear their personal defense, even when that defense may be partially incriminating.

Those defendants can accept that a jury might reject their defense, and convict them. However, they struggle to accept that their sentences may be enhanced because they exercised their right to speak on their own behalf at their own trial.

This final issue speaks to the broader ideals I mentioned earlier. For the guidelines to authentically seek justice, it seems there should be no provision that chills the legitimate exercise of constitutional rights.