Remarks of Judge Robin J. Cauthron, Western District of Oklahoma

I thank the Sentencing Commission for taking the time to hear judges' views on the Sentencing Guidelines after 25 years of experience under the Sentencing Reform Act, and particularly for allowing me to appear on this panel. I have polled the U.S. District Judges in Oklahoma and the Magistrate Judges in the Western District and for the most part there is an amazing consensus of views.

What was wrong with the Guidelines, and so difficult for sentencing judges to live with, has been fixed by Booker. We now have the ability to vary from those Guidelines in the appropriate case, while still having a baseline, or national average, against which to compare the sentence. This results in the best of both worlds – consistency in sentencing and a clear outline of the facts and circumstances to consider, coupled with the discretion to find additional facts and circumstances suggesting a different sentence. The present system enhances the sense of fairness in sentencing from the viewpoint of all participants.

The analysis to be undertaken by sentencing judges is clearly set out in 18 U.S.C. § 3553 and it works: calculate the Guidelines and consider the other facts set out by statute. It seems to me that offense characteristics more often than not are sufficiently taken into account in the Guideline calculation. For me, it is usually offender characteristics, which would not have justified a Guidelines departure, but which lead me to vary. As an example, I sentenced a 23-year-old man recently who was a career offender based on three drug offenses, relatively minor but still felonies, committed before he reached the age of 18, but for which he was certified and convicted as an adult. He received a probationary sentence on all three. In my case, under the Guidelines as a career offender, he faced a minimum of 183 months for a drug conspiracy, the leader and organizer of which had already received a 90-month sentence. The ability to vary from the Guidelines gave me the opportunity to give consideration to his age, the over-representation of criminal history, and

lack of any prior imprisonment, and to avoid unwarranted sentence disparities.

In my experience the Guidelines adequately cover the majority of crimes and offenders; but in cases where offender characteristics might suggest a different result, it is far preferable to give the judge discretion rather than make an attempt to cover all contingencies in the Guidelines themselves. There are simply too many variables to make this fit within the Guidelines.

It seems to me the recent Supreme Court cases regarding the standard of appellate review[1] have reached a proper result – considerable deference to the sentencing judge's determination. That deference seems wholly appropriate. Part of what I have to do as a sentencing judge is look into the eyes of each defendant and try to determine whether, given a number of variables, the inevitable assurances of having learned one's lesson are plausible. This is more than just a

[1] Rita v. United States, 551 U.S. 338 (2007); Gall v. United States,552 U.S. 38 (2007).

credibility determination; it is partly a matter of predicting the future. With my very best efforts, that process probably does not rise much above a shot in the dark, but at least I have the person in front of me with some opportunity to evaluate the intangibles. Appellate judges cannot do that. There is nothing wrong with expecting me to articulate some reason for what I have done, but I am certainly in a better position to do that than an appellate panel.

One benefit of the Booker change may not be fully appreciated by the judiciary: that is the opportunity for effective advocacy on the part of defense counsel. The chance to actually influence the sentencing judge, virtually absent for the last 25 years, is bringing a renewed energy to the defense bar, and hopefully will result in more frequent and more enthusiastic participation in our CJA panels. A recent Oklahoma Bar Journal article is directed specifically to effective advocacy in federal sentencing hearings, a topic that would have been far too esoteric for publication prior to Booker.

Finally, some suggestions for change, or at least further thought:

1. Is a departure under the Guidelines an anachronism (at least other than § 5k.1)? Given the different standard of review for departures and variances, does any sentencing judge depart rather than vary?[2]

2. Continue to work for fewer statutory minimums. Besides those cases where they are excessive, too often the discretion is given to the prosecutor who can charge bargain to avoid the mandatory minimums, while the sentencing judge has no such ability.

3. The Guideline sentences for child pornography cases are often too harsh where the defendant's crime is solely possession unaccompanied by an indication of "acting out" behavior on the part of the defendant. It is too often the case that a defendant appears to be a social misfit looking at dirty pictures in the privacy of his own home without any real prospect of touching or otherwise acting out as to any person. As foul as child pornography is, I am unpersuaded by the

[2] At least in the Tenth Circuit, the standard of review of departure sentences has not changed after Rita and Gall. See United States v. Robertson, 568 F.3d 1203 (10th Cir. 2009), pet. for cert. filed, No. 09-7404 (Nov. 2, 2009),

suggestion that a direct link has been proven between viewing child porn and molesting children. I have two specific suggestions: (a) keep the Guidelines in this area flexible, recognizing that a broad range of conduct is encompassed within them, some of which is truly evil deserving very harsh penalties and some of which is considerably less so; and (b) consider whether the enhancement for use of a computer makes sense. As widespread as computer use is now, enhancing for use of a computer is a little like penalizing speeding but then adding an extra penalty if a car is involved.

4. Similarly, the Guideline for manufacturing methamphetamine includes an enhancement for unlawful release into the environment of a hazardous substance,[3] which is a necessary part of the manufacturing process. This seems redundant to me.

5. I am often taken aback at the relatively low Offense Levels for fraud and financial crimes as compared to drug offenses. I have

[3] USSG § 2D1.1(b)(10)

thought quite often that the fraud levels are too low, but after reflection, I think the drug levels are too high. The end result is that when compared to each other, they are out of whack.

6. Misdemeanor Guidelines should be simplified, perhaps eliminated in assimilated crime sentencing.

Thank you again for inviting me, and I'd be happy to respond to any questions.