TESTIMONY OF J. LEON HOLMES
BEFORE THE UNITED STATES SENTENCING COMMISSION

November 20, 2009

Let me begin by saying thank you for the opportunity to testify here today and thank you for the excellent work that you do with reference to the sentencing guidelines.

I assumed the duties as a judge of the United States District Court for the Eastern District of Arkansas on July 19, 2004, less than a month after *Blakely* was decided and less than five months before *Booker* was decided. My first sentencing was on January 12, 2005 – the day *Booker* was decided. Since that day, I have imposed sentence on 341 offenders.

I believe that the current system strikes a reasonable balance between judicial discretion on the one hand and uniformity and certainty in sentencing on the other. It is helpful to me to have the guidelines to inform me of the sentences typically imposed for offenders committing the crime of which the particular offender to be sentenced has been convicted so that there can be some uniformity in sentencing. I am interested in knowing what has been the judgment of my peers with respect to the application of the section 3553(a) factors in similar cases. At the same time, however, I believe it is important that judges have the discretion to impose a sentence outside the guidelines range because in imposing sentence we are imposing sentence on human persons with their own individual characteristics and history; we are not imposing sentence on types or categories. The current system has the advantage of providing the judge with some indication of what other judges have found to be a reasonable sentencing range in similar cases, while at the same time allowing the judge to tailor the sentence to the human person before the court for sentencing.

While I believe that the current sentencing system is generally a good one, I am concerned that it rests on an unsteady foundation. As we all know, the advisory guidelines system has never been adopted by Congress. It was the result of the decision in *Booker* in which, by a vote of 5-4, the Court held that the mandatory guidelines system was unconstitutional inasmuch as it permitted judges to find facts that could result in sentencing enhancements and therefore violated a defendant's right to trial by jury. We all know that the four justices who dissented from the opinion of the Court on that issue then joined one of the justices in the majority to create a new majority in holding that the remedy for the constitutional violation was to render the guidelines advisory. One justice who joined the opinion of the Court on the constitutional issue joined four justices who dissented on that issue to form a majority voting to excise section 3553(b)(1) and section 3742(e). The result of excising those subsections is that the guidelines are now advisory in many cases in which either no enhancements would apply or the facts that would give rise to enhancements are not in dispute.

It has been nearly five years since *Booker* was decided. We continue to operate under the same statutory scheme, substantially the same rules of criminal procedure, and substantially the same guidelines manual – which is to say that, even though the guidelines have been advisory for five years, we still operate under statutes, rules, and guidelines designed for a system of sentencing in which the guidelines were mandatory. I hope that the Sentencing Commission will recommend changes in the statutes and rules to make them fit the advisory system under which we operate, and also adopt changes to the guidelines, to remove vestiges of the mandatory guidelines system.

I suggest that the Sentencing Commission recommend that Congress repeal 28 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e)(3), which were excised by the Supreme

Court but which remain in the statutes. I also call the attention of the Sentencing Commission to section 3553(f). That provision states, in pertinent part:

> Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that [the five elements for safety valve eligibility are met].

You will all recognize that this section is the statutory safety valve. It allows the court to impose a sentence below the otherwise applicable statutory minimum when certain facts are present. This provision appears to say that the mandatory minimum for a defendant who is eligible for the safety valve is the low end of the guidelines range. The Supreme Court did not hold that section 3553(f) is unconstitutional, nor did the Court excise any portion of that section in the remedy portion of the *Booker* decision. Courts have consistently held that the guidelines are advisory even under section 3553(f), but the reasoning that leads to that conclusion is not particularly cogent.

I also suggest that the Sentencing Commission recommend to Congress that the second sentence of section 3553(e) be repealed. That sentence provides that when the government moves for a departure below the statutory minimum because of the defendant's substantial assistance, the sentence "shall be imposed in accordance with the guidelines . . . ." (Emphasis added.)

The notion of "departures" in the sentencing guidelines manual and in the Federal Rules of Criminal Procedure appears out of place in the context of an advisory guidelines system. In the current system, the duty of the court is to impose a sentence that is sufficient but not greater than necessary to comply with the purposes in 28 U.S.C. § 3553(a)(2). In arriving at a sentence that is sufficient but not greater than necessary to

comply with those purposes, the court will consider the sentencing guidelines range as advisory. When the court imposes a sentence outside the guidelines range, however, the court is not "departing" from anything but is simply performing the function required by the statute and the Supreme Court. The term "departure" suggests a presumption that the appropriate sentence was within the guidelines range and that a sentence outside the guidelines range therefore must be supported by some important justification. It suggests that somehow the parties are entitled to expect a sentence within the guidelines range. The term "variance" has the same infirmity. As we all know, the Supreme Court has rejected the notion that district courts may impose a presumption that a guidelines range sentence is reasonable. It may be important for statistical purposes to make a record of the number of sentences that are within the guidelines range and the number of sentences outside the guidelines range; and it may be important to distinguish between the sentences outside the guidelines range that are based upon motions by the government for leniency because of the defendant's substantial assistance and those that are not; but otherwise the provisions in the guidelines manual pertaining to departures are of no particular significance. It appears to me that the provisions in the manual relating to departures are vestiges of the mandatory guidelines system. My suggestion is that the Sentencing Commission should consider deleting the provisions relating to departures. If there are portions of the guidelines relating to departures that need to be considered in determining the sentencing guidelines range, those portions should be moved to the section of the manual relating to adjustments to the advisory sentence range.

Rule 32(h) of the Federal Rules of Criminal Procedure requires the sentencing judge to give notice of a possible departure from the sentencing guidelines. The Supreme Court held in *Irizarry* that Rule 32(h) does not apply to variances. Rule 32(h) should be repealed. After the Supreme Court's decision in *Irizarry*, Rule 32(h) has no practical effect. A sentencing judge can impose a sentence outside the guidelines range without

notice by basing the sentence on the section 3553(a) factors, which are the factors that ultimately must justify the sentence, without notice.

Let me conclude by saying, again, that I am in favor of an advisory guidelines system. The theme of my suggestions to the Commission is that our statutory scheme, procedural rules, and guidelines manual, which are designed for a mandatory guidelines system, should be redesigned for an advisory guidelines system.