Comments to the United States Sentencing Commission
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I appreciate the opportunity to appear before you today to share my thoughts about federal sentencing issues.

For those of you who have read my opinions, you know that I have been a vocal critic of the Sentencing Guidelines.[1] My objections have been twofold:

(1) Under mandatory Guidelines, the role of the judiciary was minimized to the point that it threatened judicial independence, and reduced district judges to a mere figurehead, rubber-stamping its imprimatur on the predetermined sentence chosen by the government. In essence, the Court became irrelevant in our criminal justice system; and

(2) The Guideline score often produced arbitrary and grossly unjust sentences.

My first concern has largely been resolved by a series of recent Supreme Court cases: *Booker*, *Kimbrough*, and now *Spears*.

But the lesson from these cases is not only that trial judges now have discretion in the sentencing process.

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[1]*See US v. Belvett*, 2005 U.S. Dist. LEXIS 4659, 18 Fla. L. Weekly Fed. D 372 (M.D. Fla. March 17, 2005); *US v. Hamilton*, 428 F. Supp. 2d 1253 (M.D. Fla. 2006); *US v. Williams*, 481 F. Supp. 2d 1298 (M.D. Fla. 2007); *US v. Delgado*, 2005 U.S. Dist. LEXIS 29966 (M.D. Fla. June 7, 2005); *US v. Miranda-Garcia*, 2006 U. S. Dist. LEXIS 26574 (M.D. Fla. May 4, 2006); *US v. Vasquez*, 2008 U.S. Dist. LEXIS 6984 (M.D. Fla. January 30, 2008).

More importantly, from the Commission's standpoint, judges are now free to consider the weight or effect to be given a particular Guideline based on the Court's view the Guideline's vitality.

And that brings me to my second point. It is now the Sentencing Commission which may become irrelevant, if it continues to promulgate and promote sentencing formulae which the judiciary disregard because of their perceived arbitrariness and lack of empirical foundation. Let me give three examples.

(1) The crack/powder cocaine disparity. The sentencing variance between two substances which are chemically identical and which adversely affects a racial minority defies logic and promotes disrespect for the law, contrary to the mandate of 18 U.S.C. 3553(a).[2] Amendment 706 does little to correct this imbalance.

(2) Illegal re-entry under 2L1.2. The enhancements from 4 to 16 points based upon arbitrary steps of prior criminal conduct often produce grossly unjust results.[3] It would be far better, in my opinion, to simply apply an enhancement range (*e.g.* 2-16 levels) based on the Court's assessment of the seriousness of the prior criminal conduct.

(3) Possession of child pornography under 2G2.2. Sec. 2G2.2 of the United States Sentencing Guidelines has been the subject of much recent criticism by scholars and judges because it is not based on any empirical date or institutional analysis. Thus, because the Guideline is not the product of the Sentencing Commission's institutional strength, and because the Guideline is inherently illogical, many courts have afforded it less deference than it would with an empirically-grounded Guideline. *See e.g. US v.*

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[2] *U.S. v. Hamilton*, 428 F. Supp. 2d 1253 (M.D. Fla. 2006)

[3] *U.S. v. Salazar-Pacheco*, No. 6:05-CR-137 (M.D.Fla. Jan. 20, 2006)

Baird, 580 F. Supp. 2d 889 (D.C. Neb. 2008); *US v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. 2008); *U.S. Shipley*, 560 F. Supp. 2d 739 (SD Iowa 2008); *U.S. Grober*, 2008 WL 5395768 (D. NJ. 2008).

In conclusion, the common law of federal sentencing must be allowed to evolve, and the Commission, if it is to maintain its relevance, must observe and take into account what trial judges are doing and saying.[4] After all, it is the district bench that is on the front line of these issues. We are the ones who have to make the daily hard decisions that affect people and society as a whole in our sentencing decisions.

Judges in my view want guidance. No one wants a return to the pre-Guideline free-for-all which produced vastly different sentences for the same criminal conduct. But, the guidance must be based on the collective wisdom of the actual sentencing process, and not simply a mandate derived from the Commission's notion of sentencing policy, or the desire to placate the apparent will of Congress.

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[4]*See U.S. v. Williams*, 481 F. Supp. 2d 1298 (M.D. Fla. 2007)