UNITED STATES DISTRICT COURT

CHAMBERS OF
SUSAN OKI MOLLWAY
DISTRICT JUDGE

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**VIA FAX (202) 502-4699**
Ms. Judith Sheon
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Dear Ms. Sheon:

Thank you for inviting me to participate at the Sentencing Commission's hearing on May 27, 2009. I am including here a written statement summarizing some of my thoughts about the Sentencing Guidelines. As you know, I am a last-minute substitute for my colleague, Chief Judge Helen Gillmor, who is unable to attend the hearing. Given the short notice to me, my remarks are brief.

STATEMENT

I appreciate the opportunity to testify at this hearing. I am a district judge sitting in the District of Hawaii. I have been a district judge since 1998. These comments contain my own views.

I very much appreciate the work of the Sentencing Commission and the guidance provided in the detailed Sentencing Guidelines. When I came to the bench from private practice as a civil litigator, I decided that I would not, as a general rule, rely on law clerks in sentencing matters. I thought that I would learn best about sentencing by working on sentencing issues on my own, aided, of course, by my district's excellent Probation Office. I have not counted the number of sentences I have imposed, but I am confident it is in four figures. Over the years, I have been grateful for the guidance provided by the guidelines, augmented by the Application

Notes that often clarify guideline language. I am also grateful for how responsive the Commission has been to developments in case law, especially when the Commission reacts with guideline amendments that resolve circuit splits in guideline interpretation. My district's Probation Officers have also benefitted from the assistance provided by the Sentencing commission's knowledgeable staff. For all of this, I thank the Commission.

When Booker was decided several years ago, district judges were counseled by some that, despite the discretion vested in them once the guidelines were declared advisory only, they should attempt to sentence within guideline ranges, in the hope of avoiding a congressional backlash that could lead to more mandatory minimum sentences. Others counseled that judges who took seriously the Supreme Court's determination that the guidelines were only advisory should not hesitate to impose sentences that varied from the guidelines when appropriate. Indeed, some worried that judges' concerns about causing a congressional backlash were blunting the effect of Booker, causing judges to be far too timid in varying from the guidelines. For myself, I know that the specifics of a particular case will always have greater impact than hypothetical political considerations.

I am assuming that what the Commission will find most helpful is a discussion of problems I have encountered in sentencing. Some of these problems are not of the Commission's making and not within the Commission's control, but I include them because the respect that the Commission commands in Congress and in the judiciary may make the Commission's views on these matters influential.

First, I am not alone in finding it difficult to reconcile the need to impose a reasonable sentence under 18 U.S.C. § 3553(a) with mandatory minimum sentences. Mandatory minimum sentences are frequently unreasonable. The only recourse left to defendants who receive unreasonable mandatory minimum sentences is to seek clemency from the President. To the extent the Commission can raise its voice to eliminate the conflict that may arise between § 3553(a) and mandatory minimum sentences, I urge the Commission to do so. I understand that the Commission must act thoughtfully and carefully to avoid what could end up to be an unintended legislative result. But nothing will happen unless voices are raised, and the Commission has a well-respected voice that it can use judiciously.

Second, I commend the Commission for the steps it has taken to reduce the disparity between crack cocaine and powder cocaine sentences, but I hope that more will be done in this regard, so that there will ultimately be a 1:1 equivalency. I know that the Department of Justice has recently weighed in, advocating legislation that would eliminate the disparity. I hope action occurs soon. Just this month I had a crack cocaine case in which defense counsel argued that her client should not have to wait for corrective action. The defendant had recently returned from military service in Iraq and had many encouraging circumstances in his background. It happened that this was not a mandatory minimum case, and I told the Assistant United States

Attorney that, if ever a case was a good candidate for equity in the crack/powder calculation, this was it. In the end, relying not just on the crack/powder issue but also on numerous other circumstances before me, I sentenced the defendant to less time in prison than he would have gotten under even the powder cocaine guidelines. I anticipate that courts will see more and more arguments from defense attorneys that courts should now be treating crack cocaine and powder cocaine as equivalents, if there are no statutory bars to doing so.

Third, I have been troubled by Guideline 2G2.2, as applied in certain child pornography cases. More than once, I have viewed the guidelines as suggesting a sentence that is disproportionately high for the offense conduct. I know that this has been the subject of much commentary by judges and scholars, and that the Commission has heard testimony from people who have gone before me, and I add my concern to theirs about 2G2.2.

Fourth, I would very much like to discuss a number of concerns I have about the fraud guidelines, although I hesitate to discuss some of those in detail because I have matters pending before me that may raise those very issues. I would be happy to discuss my views in more detail when those matters are concluded. For now, I will confine myself to my experiences in matters that have been concluded. In a sentence I recently imposed, the defendant's failure to be forthcoming about the location of the victim's assets influenced my decision to impose an above-guideline sentence. The guideline calculation included an enhancement for obstruction of justice, and no deduction for acceptance of responsibility, but I still thought that the range was too low. I almost never sentence above the guideline range, but that fraud case was an instance when I did so.

That case also required me to resolve disputes about how to read Guideline 2B1.1, and clarification by the Commission of that guideline would be helpful. There were two specific issues raised. Both issues concerned 2B1.1(a)(1), which provides for a base offense level of 7 "if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more." The first issue was whether an offense could be considered "referenced to this guideline" if the reference was limited to a listing in Appendix A that cited 2B1.1 as the applicable guideline for the statute in issue. The defense argued that an offense was only "referenced to this guideline" if another guideline (e.g., 2S1.1), not an appendix, was the source of the reference. The second issue concerned how to handle base offense levels if the defendant was convicted of two offenses "referenced to this guideline." If only one of the offenses had a statutory maximum term of imprisonment of 20 years or more, could the base offense level of the other offense still be 7 because the defendant was convicted of "an" offense (albeit an offense different from the one for which I was calculating the base offense level) referenced to 2B1.1 that carried a maximum of 20 years of more? I told the parties that there were aspects of the history of 2B1.1 that could be read as suggesting that the answer was "yes," but I ruled that the syntax of 2B1.1 itself led me to answer "no." Clarification of these issues would be helpful for future cases.

I thank the Commission for giving me a chance to be heard and will be available to respond to questions the Commission may have.

Very truly yours,

Susan Oki Mollway
United States District Judge