# Written Statement to the United States Sentencing Commission

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Thank you for the opportunity to submit a formal written statement regarding sentencing under the guidelines. The Sentencing Commission performs an exceptional service, and to say it is underappreciated is the understatement of the last quarter-century. The guidance the Commission provides through its training programs and reports is valuable in and of itself. When coupled with weighing the diverse perspectives of Congress, the judiciary, and other less formal but nonetheless persistent constituents, that the Commission has performed not only admirably, but in an exemplary manner, is remarkable, and you have my thanks.

As will become evident in short order, these comments are not the result of careful research and scholarship, but some thoughts after more than thirteen years of dealing with sentencing issues as a judge, and nearly nineteen years as a practicing lawyer, primarily in trial work, much of it criminal defense. Most suggestions are beyond the reach of the Sentencing Commission, but the system has so many interrelated factors that the Sentencing Commission hearing seems the most appropriate forum for presentation.

At the time I clerked for retired Associate Justice Tom C. Clark (1976-1977), my career starting point, the guidelines were several years from implementation. After the guidelines became effective, my criminal practice experience involved only the Kansas state system. I did not avoid the federal system, I just did not have a federal criminal practice. A few years later, the State of Kansas adopted a guideline system quite different from the federal system.

In January 1996, when I came to the bench, I knew nothing about the federal sentencing guidelines apart from second-hand comments, all of which were negative. The two consistent

complaints were the severity and lack of flexibility. Complexity was also mentioned frequently, but having to work hard to understand how they worked was not as big a hurdle for the judges as the loss of discretion.

During my first week of formal training, as excellent sentencing commission representatives were trying to walk us through the basics, I was first confused, then confused and concerned, and finally confused, concerned and somewhat in disbelief. I may have misconstrued what we were told, but it seems to me we were encouraged to seek grounds for departure when a guidelines sentence appeared to be too harsh.

Now, as I mentioned, criminal defense was a significant part of my practice – probably 25% – and I had worked hard at trying to present reasonable sentencing alternatives to the court. The two key questions were: 1) what fits the crime; and, given that variable, 2) what fits this offender? From my perspective, the sentencing guidelines essentially reduced a real person to a two-dimensional object that (not "who," but "that") could be plotted on a graph and frozen.

Conceptually, I understood "guidelines" and agreed with the purpose – to base sentences on conduct and to eliminate disparity. But as is the case with so many good intentions – particularly where politics is very much a part of the picture – the road to hell is thusly paved. To me, a "guideline" is not synonymous with "rule" or "mandate" or "directive." Rather, it is something to use as a guide, to give direction, a place to start.

Professor Steve Saltzberg of George Washington University Law School once spoke at a sentencing workshop I attended, and mentioned his experience while clerking at the federal trial court level in California during the Vietnam era. As I recall his talk, he mentioned that for some period of time, the federal judges in his district placed persons convicted of burning their draft

cards on probation. Then a new judge was appointed, and he sentenced draft card burners to five years in prison. So what was going to happen, if you were prosecuted for burning a draft card, literally was dependent on the luck of the draw. Professor Saltzberg indicated that did not seem right, and he, of course, was absolutely correct.

The disparities in sentencing by region, race, and judge, as well as the many other factors identified in justifying the creation of the guidelines are compelling. One can hardly quarrel with the idea that someone convicted of a particular crime, who has a particular criminal history, should, for purposes of sentencing, start out at the same place as another person convicted of the same crime, with the same criminal history. The problem was that this was not just the starting point; it also was, for all intents and purposes, the ending point, as well. The very factors which differentiate one person from another remain disfavored factors under §5H1.1, *et seq*. of the Guidelines.

It is fair to ask why should any of that matters if sentencing is conduct-based, a question not lending itself to a short answer. The beginning of the answer is rooted in the very bedrock of our system.

Our system's legitimacy relies on the people's belief in its fairness. "The people" are rarely those directly affected by a case, be it the victim, the victim's family and friends, or the defendant, and his or her family and friends. Few persons who suffer great loss, or cause great loss, have an objective view of the harm and the person causing it. Their pain is personal and understandable, which is why those persons will have a voice, but ultimately will not decide a defendant's sentence.

Although detached, members of Congress occupy a position which does not allow an objective perspective of such matters. From time to time, Congress confronts a hot-button issue, moves with lightning speed to enact a nationwide legislative solution to a problem which is not truly a nationwide problem, but has the public stirred up until the next thing comes along. As part of this package, Congress creates a penalty which, in its judgment, allegedly is proportionate to the crime, but, in a more dispassionate moment, is unduly severe. The law plays well on the news, but does not work so well in the courts. Members of Congress have to run for reelection, and taking an unpopular position is rarely rewarded by the voting public.

A few years ago, at a sentencing institute, a congressional staff person told the assembled group of judges and probation officers that "we" (referring to Congress) had told "you" (the judges) what judges have to do in sentencing whether we liked it or not, and that then Chief Justice Rehnquist had told us (the judges) that, like them or not, we (the judges) had better do what the guidelines said. I believed then, and believe now, that no congressman knows as much about any defendant facing sentencing as the prosecutor, the defense lawyer, the probation officer and the judge. Each of those persons has the opportunity to weigh in on the appropriate sentence. Given that set of facts, how can Congress legitimately tell any judge how to sentence any given person, and still hope the people will maintain their faith in the system? As I mentioned before, the guidelines provide an excellent starting point, but the real work does not begin until the judge considers the sentencing factors.

On this same point, Congress is not without a say on who holds federal judgeships. My understanding always has been that persons appointed to a federal judgeship should be persons who have some experience with the legal system, who have demonstrated professional integrity

and judgment. Federal judicial nominees undergo, at a minimum, an FBI investigation and an evaluation by the ABA Committee on Judicial Qualifications. The Senate Judiciary Committee reviews volumes of material about each nominee, which includes speeches and presentations the nominee has made, and news articles concerning the nominee. If the nominee is voted out of committee, the full Senate votes on confirmation. Once a judge has taken office, Congress has impeachment power if a judge runs afoul of the "good Behaviour" Constitutional requirement. In other words, given the level of scrutiny before taking federal judicial office, one would expect the judge to merit a measure of trust in sentencing. The guidelines, when mandatory, sent a decidedly different message.

Following *Koon*[1], lawyers had an opportunity to test their creativity and advocacy skills in fashioning the "exceptionals." Here in the Tenth Circuit, "exceptional remorse"[2] took its place along side exceptional post-offense rehabilitation[3] and post-arrest sobriety[4] as legitimate grounds for departures.

*Blakely*[5] created a series of problems regarding how trial judges were to approach sentencing where the guidelines were deemed constitutional for the moment, but might be held to

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[1]*Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

[2]*U.S. v. Fagan*, 162 F.3d 1280 (10th Cir. 1998).

[3]*U.S. v. Benally*, 215 F.3d 1068 (10th Cir. 2000).

[4]*Id.*

[5]*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

be unconstitutional, a situation mercifully alleviated by *Booker*.[6] And thereafter, *Gall*[7] eliminated the "exceptional" standard when sentencing outside the guidelines.

From a trial judge's perspective, things are better post-*Booker* in terms of variances and departures, but Congress casts a long shadow. There are judges who do not do what they feel is appropriate within the bounds of the law and the spirit of the guidelines for fear of being the tipping point for further Congressional action. Although there are exceptions, Congress's history with crimes and punishments is reasonably consistent – more and more crimes which once were the exclusive province of the state courts are being federalized, and punishments are toughened rather than eased. To be called "soft on crime" is anathema to a political figure.

This trend also has consequences which are rarely discussed. Thirty-five years ago, federal prosecutors focused their efforts on white collar crime, aircraft hijackings, tax evasion, gun-running, racketeering, immigration, and obvious interstate crimes – kidnaping, auto theft, human trafficking. The length of guideline sentences, coupled with the federalization of street crime, has triggered a huge increase in federal prosecutions, particularly in the drug/firearm area. While dual sovereignty allows both the state and the federal authorities to prosecute, states frequently defer because federal sentences are more severe, and the federal courts now bear a striking resemblance to the state courts of a few decades ago. Federal prosecutors, probation officers, the U.S. Marshal's Office, many federal courts and the federal prisons are dealing with offenders who the state would traditionally have prosecuted, every bit as effectively as the federal system. While not the sole cause, the guidelines have been, and remain, at least a catalyst in the

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[6]*United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

[7]*Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

movement of cases from the state to the federal courts.

Another point to consider – the early prosecutorial decisions – whether to charge or not to charge, and, if the decision is to charge, what crimes to charge – drives to a large extent our sentencing decisions. Relevant conduct is chief among them.

Finally, a word about appellate review. As a long-time practitioner representing persons accused of crime, I was delighted when appeals courts gained the statutory authority to hear sentencing appeals. Since the appeals court began reviewing my decisions, I have not changed that view. However, I am also looking at the appellate decisions with more interest than in my practice days. Every once in a while, it appears that the appeals court steps beyond its appropriate review function to substitute its judgment for that of the sentencing judge.

As a trial judge, I am certain my impartiality on this point will be questioned, but it is a matter I believe worth considering. Because it should involve an exercise of judgment, sentencing should be an art, not a science. That was part of the problem with the non-discretionary guidelines era. The judge must be consider and apply the human factors in sentencing, and that cannot be done with a formula or strict rules. If it were otherwise, there would be no need to have anyone present for sentencing. The judge could simply read the report, consider written objections, and write up the sentence. But the law requires more. It requires that the sentencing judge see the face and hear the voice of the defendant as well as others with an interest in the outcome.

Looking at a cold record is no substitute for being present when the parties are presenting their arguments. The record does not reflect the atmosphere, the tone of voice, the anguish, and even the hope that is nearly visceral in some instances. Once in a while, a judge senses a spark in

a defendant, which, if properly nurtured, can be life-altering in the very best sense of the word, and there are times the judge cannot articulate that intangible quality adequately. That, of course, means that whether the sentence stands up to appellate review will depend on how well the judge did in stating his reasons for the record.

During my clerkship, in an early draft of an opinion, I referred to the trial court as the "lower court," which was how most opinions read. Justice Clark reviewed the draft and asked me if I had ever noticed that in his opinions he did not refer to the "lower court," but to the "district court" or the "trial court." He explained that in his view the trial court was the most important of all courts; it was where the parties presented evidence, where persons saw the faces and heard the voices of the persons whose lives were being affected. He said while the Constitution referred in Article III to such "inferior Courts as the Congress may from time to time ordain and establish," that did not in any way diminish either the trial court or the court of appeals. His comment made a lasting impression which has only grown stronger over the years.

In *The Republic*, Plato concluded that justice was each person doing what he or she does best. Part of that must be a recognition that there are areas where we have to defer to others who are uniquely suited for the task at hand. That is the gist of my point here – the guidelines have their place, and it is an appropriate one when they function as guidelines. But when they become anything more than that, the confidence of the people in the fairness of the system is undermined. Better that a judge take the heat for what is a perceived injustice than the system.

To close, I believe the guidelines have an important place in the federal courts, but we still have a ways to go before we achieve an appropriate balance between direction and discretion. Bryan Stevenson is a Montgomery, Alabama lawyer who has spent his professional

career representing persons on death row. I keep his statement about the worth of persons convicted of crime on a worktable next my bench in the courtroom, so it is never far from my sight, or my thoughts. At the center of every sentence I impose, I try to keep this in mind:

> I believe each person in our society is more than the worst thing they've ever done. I believe if you tell a lie, you're not just a liar. If you take something that doesn't belong to you, you're not just a thief. And I believe even if you kill someone, you are not just a killer. There is a basic human dignity that deserves to be protected.

I suspect the Commission has heard nothing new in these remarks. More likely, they reaffirm the concerns you have heard judges express over the years from one end of the country to the other. I am grateful for the opportunity to share my thoughts with you.