UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THIS MATERIAL IS BEING SENT VIA FAX

TO: Judge Patti B. Saris 202-502-4777
Chair, United States Sentencing Commission

FROM: Myron H. Bright MHB
United States Circuit Judge

RE: Guidelines System

DATE: January 10, 2012

NUMBER OF PAGES BEING SENT: 8 (INCLUDING COVER PAGE).

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The attached letter and appendix are being forwarded to:
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January 10, 2012

Honorable Patti B. Saris, Chair
United States Sentencing Commission
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Washington, D.C. 20002-8002

FAX: 202-502-4777

Re: Guidelines System

Dear Judge Saris:

Thank you for continuing service to the judiciary as the chair of the Sentencing Commission. I applaud your concern about our current sentencing regime and your diligent work to reform and improve the current guidelines system, including your recent testimony before the House of Representatives' Subcommittee on Crime, Terrorism, and Homeland Security. Judge Patti B. Saris, Prepared Testimony Before the Subcommittee on Crime Terrorism, and Homeland Security, Committee on the Judiciary, United States House Representatives (Oct. 12, 2011) [hereinafter Prepared Testimony]. However, I write to express my concern over recommendations to Congress that move the current guidelines much closer to the previous mandatory system struck down by the Supreme Court.

Recently, I visited with an experienced federal trial judge in Minnesota who has a very high standing in the judiciary. I repeat this conversation about the recent recommendation of the Commission. He said, "Myron, it's incredible to describe the Sentencing Commission's recommendation to, in effect, try to overrule the Supreme Court's recent decision in Booker and its progeny Rita, Gall, and Kimbrough. The Supreme Court's decisions were badly needed. Here comes the Commission to really foul up sentencing."

I think it is very important to reiterate, as you noted in your testimony, that "[d]istrict court judges generally consider proper the discretion afforded to them under the Booker standard of review. Indeed, 75 percent of federal district judges believe that the current advisory guidelines system best achieves the purposes of sentencing." Prepared

Testimony, pp. 13–14. Federal judges have consistently expressed dissatisfaction with the old, mandatory regime, and advocated for greater discretion in sentencing. See, e.g., United States v. Hiveley, 61 F.3d 1358, 1365 (8th Cir.1995) (Bright, J., concurring) (discussing federal judges' dissatisfaction with mandatory sentencing guidelines, citing Federal Judicial Center, Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges (1994)).

Even so, several of your recommendations to Congress would take significant discretion away from the sentencing judge, and increase the power of appellate review. While some circuit judges advocate for more power to review sentencing decisions, I believe the district court should continue to be given strong deference in their sentencing decisions. Circuit judges do not sentence people. They do not look the defendant in the eye, and they do not see near the same volume of sentences compared to a sentencing judge. I say that as a judge with 43 years' experience, and as a judge who has served as a district judge and sentenced people under the old system. Indeed, I also reviewed sentences prior to the guidelines, when appellate judges almost never reviewed the district court sentence. See, e.g., Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) (en banc).

I also did not see in your presentation any mention of the many scholarly articles analyzing and criticizing the mandatory guideline system. Your recommendations to require sentencing judges to give "substantial weight" to the guidelines and to create a heightened standard of review for policy disagreements with the guidelines moves the system much closer to the old mandatory regime and shifts too much discretion away from the sentencing judge to the appellate court. Those recommendations, it seems to me, fly in the face of the recent Supreme Court decisions on the guidelines and sentencing.

What the commission ought to be doing is encouraging district judges not to blindly follow the guidelines in every case, but to evaluate the cases on an individual basis in terms of the § 3553(a) factors. As the Supreme Court noted, "the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." Rita v. United States, 551 U.S. 338, 348 (2007). The retail level sentencing should be left to the district court with minimal interference on appeal.

In 1969, I was at a summer session for appellate judges at New York University School of Law where the new Chief Justice Burger had just joined the faculty. He and I talked

about appellate review of sentences and he said, "appellate judges don't know much about sentencing." I believe that still may hold true today as to many federal appellate judges.

You also seem to take the position that as long as a sentence is within the Guidelines, it should be presumed reasonable on appeal. However, not all of the guidelines are reasonable. While I support the evidence based approach of the commission, some guidelines still do not have such strong underpinnings and therefore do not deserve the same degree of deference at sentencing or on appeal. I think a great explanation of why some sentences under the Guidelines are too harsh and may be unreasonable is the dissent by Judge Merritt in United States v. Overmyer, No. 10-1716, 2011 WL 6351378 (6th Cir. Dec. 20, 2011) (Merritt, J., dissenting), which I have attached as an appendix to this letter. See also, United States v. Beiermann, 599 F.Supp.2d 1087 (N.D. Iowa 2009). Although the Guidelines are legally voluntary, Justice Stevens spoke to their mandatory nature in Rita, noting that "as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in Booker." Rita, 551 U.S. at 367 (Stevens, J., concurring). And in dissent, Justice Souter observed that if a presumption of reasonableness is given to the views of the Sentencing Commission, "a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range . . . ." *Id.* at 391 (Souter, J., dissenting).

Finally, I think one of the major deficiencies of your testimony before Congress was not addressing what has happened to the majority of defendants in the war on drugs. Nowhere does it mention the unnecessarily long sentences for non-violent criminals and the burden this places on our society, especially with the deficits we currently face. See also, Andrew Romano, Jim Webb's Last Crusade, Newsweek, Sept. 19, 2011, at 50–53. Many states are also beginning to address the issue of the high costs society must pay for our sentencing decisions. See, e.g., Douglas A. Berman, Discussion of the High Costs of the Prison Boom from Coast to Coast, Sentencing Law and Policy (Jan. 3, 2012, 3:39 pm), http://sentencing.typepad.com.

This is a time for objective observation of what has gone on in this country with regard to sentencing that is far in excess of the rate in other countries. Americans are not worse criminals than in other countries, and the current approach has caused tremendous problems for our society. We cannot afford to pay over $25,000 a year to incarcerate so many non-violent offenders. See Annual Determination of Average Cost of

Incarceration, 76 Fed. Reg. 6161 (Feb. 3, 2011) (noting the average cost of incarceration for a federal inmate in fiscal year 2009 was $25,251).

Let me be clear. I am not against sensible Guidelines. For example, in Minnesota, the guidelines work very well without the kind of criticism directed at the federal system. However, in my view the current guidelines system has little relevance to fairness under § 3553(a) in many cases.

You have a wonderful staff that I believe could do some great work by being leaders in working with Congress on completely investigating and revising the Guidelines for a better, fairer system. For example, I appreciate your diligent work on researching the impact of mandatory minimums, and I look forward to your upcoming report on the child pornography guidelines.

I make these comments from my long experience as a federal judge. Whether that experience translates into wisdom is for the reader to decide. I am sending copies of this letter to the Chief Justice and the Justices of the Supreme Court, Chief Judge William Jay Riley of the Eighth Circuit, and the Attorney General of the United States.

Thank you for your consideration.

Sincerely,

Myron H. Bright

DISSENT

MERRITT, Circuit Judge, dissenting. The problem in this pornography case is the gross disparity, inequality, and unfairness that exists in sentencing generally, but even more so in these child pornography viewer cases. It illustrates the continued sad dependence of federal judges on a harsh sentencing grid created by a distant bureaucracy. To illustrate the gross disparity and the unfairness of the sentencing guidelines dealing with pornography, we should read carefully the recent case of *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010). In *Grober* the district court and the appellate court disagreed with the government prosecutor's insistence on a 20-year guideline sentence for a viewer of child pornography. The defendant had on his computer considerably more images and videos than Overmyer in the instant case, plus a large collection of adult pornography. In contrast to the instant case, the guidelines grid made the defendant in *Grober* more culpable than Overmyer, ratcheting up his sentence 18 levels to Level 40 with a final guidelines range of 235-293 months. But in *Grober* the district court conducted twelve days of hearings on the subject with witnesses, mental health experts, and a guidelines legal expert, Professor Douglas Berman of Ohio State University. To make a long story short, instead of a 20-year sentence, the district court imposed a sentence limited to the mandatory minimum of five years, the lowest sentence it could impose. In upholding the sentence, the Third Circuit explained that Professor Berman had shown the irrationality and arbitrariness of the sentencing guideline process for constructing the guidelines of child pornography viewers. Both the district and appellate courts in *Grober* found that "most of the enhancements are essentially inherent in the crime and, thus, apply in nearly every case." 624 F.3d at 597. The courts pointed out the constant problem of sentencing disparity and unfairness caused by the unbreakable link between guideline sentencing and the charge brought by the prosecution with the consequence that "the government's charging discretion and plea negotiations unfairly affect defendants." *Ibid.* As in the instant case,

the opinion also said "that *Grober* appeared to have benefitted greatly from therapy" to correct his addiction which led the court to the five-year sentence as "sufficient" under the parsimony provision. The appellate opinion quoted with approval the district judge's conclusion that "as a matter of conscience," any term of imprisonment above the five-year mandatory minimum would be "unfair and unreasonable." *Id.* at 598-99. The Third Circuit opinion is an interesting, long, comprehensive essay on how the Sentencing Commission got so far off track in this area and why so many judges and academic writers have opposed the pornography grid we must apply in this case. The Third Circuit, the district court, and Professor Berman have performed a real service to the federal judiciary; and we should follow their example.

Here the defendant also asserts that "a sentence in the 60 month range would be sufficient but not greater than necessary to punish him for his offense behavior." (Appellant brief, p. 9.) My colleagues do not even discuss, much less take seriously, the parsimony provision. The judge in the instant case stated during the sentencing hearing that he was aware of "a very significant debate going on across the country regarding the advisory guidelines" for those convicted of child pornography crimes, but, that as a policy matter, "I believe that the existing child pornography guidelines are appropriate .... [and] to the extent that there is a policy argument being made by the defendant here that the child pornography guidelines are inappropriately high, I don't agree with that argument, and to the extent that I've got the authority to disagree with the child pornography guidelines on a policy basis, I do not do so because . . . I believe that the guidelines themselves measure the appropriate harm." Sentencing Tr. at 14.

As an appellate judge required by law to review and consider the sentence in this case, I assume I am permitted to disagree respectfully with the sentencing judge about the fairness of the guidelines policy and its application in this case. Like the judges in *Grober*, I would limit the sentence in such cases to the mandatory minimum of 5 years, as requested by defendant. Although sentencing law is filled with a vast combination of presumptions, sentencing jargon and efforts by the Sentencing Commission to make judges adhere to their harsh view of fairness, we should remember that in sentencing

what is most important is the result: how many years will the defendant spend in prison, how long will his liberty be foreclosed. The Guidelines in this case, as in many cases, are too harsh, here "unconscionably" harsh, as the Third Circuit says. For the last 30 years the grid has had a massive effect on incarceration: there has been a 10-fold increase in the federal prison population which has grown from 20,000 to 216,000. The Department of Justice is now bringing about 2,000 of these pornography cases a year with a mean sentence of 10 years in prison for a total of approximately 20,000 prison years for a cost to the taxpayer of approximately $800 million. See 2010 Sourcebook of Federal Sentencing Statistics at 29. In the end it is still supposed to be the Article III sentencing judges at the trial and appellate levels who are responsible for the sentence imposed, even though the grid system has given the prosecutor, a party to the case, a dominant role, as the Third Circuit district and appellate judges discussed in *Grober*.

My colleagues' response to this line of argument is that it is irrelevant and unworthy of serious consideration: They say clearly that if a district court and the grid system are together on a sentence within the grid, a reviewing judge has no business interfering. Presumably, that is the reason my colleagues refuse to discuss the harshness of the sentence, the addictive and nonviolent nature of the crime, the parsimony provision of the Sentencing Act or the validity of the grid policy that the district judge discusses and accepts. No effort is made to rebut the views expressed in the *Grober* case or in the many opinions and articles discussed there which strongly disagree with the guideline policy, and no effort is made to discuss the elemental fact that most of the guidelines enhancements are inherent in the crime itself for which Congress established a mandatory minimum of five years. The only argument that persuades my colleagues is that the district court and the grid are in agreement. When that is the case, the policy and the sentence must be right and no further analysis or commentary is needed. The grid becomes a biblical command for the reviewing judges. I do not agree.