

JUDGE SULLIVAN: Good afternoon, Judge Hinojosa and members of the Sentencing Commission. My name is Emmet G. Sullivan. I am a United States District Judge for the District of Columbia. I am also a member of the Judicial Conference Committee on Criminal Law and serve as the Chair of its Legislative Subcommittee.

On behalf of the Criminal Law Committee and its Chair, Judge Sim Lake, we are delighted to have this opportunity to appear today to express our views on potential changes in the Federal Sentencing Guideline system, regardless of the outcome of the Booker and Fanfan cases. Although Congress clearly has the authority to define crimes and prescribe criminal sentences. The judiciary has a vital interest in any changes made to the Federal Sentencing process. Our goal is to have a process that is fair, workable, transparent and predictable, yet flexible.

We appreciate the fact that the Commission is holding these hearings on proposed changes to the system. Notwithstanding the Commission's exemplary work over the last two decades. It is apparent that the guidelines have become unduly complex. Sentencings have become increasingly complicated and have spawned unnecessary appeals, collateral sentencing challenges, and direct congressional intervention that diminishes the Commission's authority and ignores its expertise in sentencing issues. These hearings and the Commission's talent and hard work create an unprecedented opportunity for a thoughtful and deliberate refinement of the federal sentencing system.

The Criminal Law Committee is prepared to work with the Commission. The Committee's jurisdictional statement authorizes it, among other things, to monitor and analyze legislation affecting the administration of justice, oversee the implementation of the Sentencing Guidelines, and recommend to the Conference proposed amendments to the guidelines including proposals that would increase flexibility under the guidelines. Historically, the Committee has had a major role in shaping criminal law policy. The Committee, through the Judicial Conference, intends to be even more involved in addressing potential changes to the sentencing system regardless of the outcome in the Booker and Fanfan cases.

Over the past two decades the Judicial Conference's position on sentencing reflect the judiciary's opinion that sentencing must always be fair and equitable for all offenders. This opinion was evident in March 1983 when the Conference endorsed a draft sentencing reform bill prepared by the then Committee on the Administration of the Probation System.

The stated purposes of the Conference's bill were, "(A) promoting fairness and certainty in sentencing; (B) eliminating unwarranted disparity in sentencing; and (C) improving the administration of justice." Guiding the Conference in acknowledging the need for sentencing guidelines was a recognition that the sentences judges impose must ensure adequate deterrence of criminal conduct, protect the public from further crimes by convicted offenders, reflect the relative seriousness of different offenses, promote respect for the law, and provide just punishment for criminal conduct, provide restitution to victims of offenses and provide offenders with needed educational or vocational training, medical care, and other correctional treatment in the most effective manner.

After Congress enacted the Sentencing Reform Act, the Committee on the Administration of the Probation System sought to make the system more workable by suggesting technical amendments to the Act. The Judicial Conference authorized the Committee to work with the Administrative Office and the Federal Judicial Center in drafting technical and conforming amendments to improve the operation of the guidelines. Many of the proposals were eventually adopted.

The Conference also created an ad hoc committee on sentencing guidelines to enable the

Conference to react in a timely fashion to the guidelines that would be adopted by the Sentencing Commission. The ad hoc committee was created to assist district and circuit judges to revise sentencing concepts and procedures to conform with the guidelines and to facilitate the exchange of ideas about the guidelines.

Since the sentencing guidelines were implemented, the Committee and the Judicial Conference have only once comprehensively considered the sentencing guideline system. In September 1990 the Committee recommended and the Judicial Conference agreed, to take no action on proposals from the Federal Courts Study Committee that would make fundamental changes to the Sentencing Guidelines.

The Criminal Law Committee agreed with the Study Committee's underlying premise that more sentencing flexibility was needed, but opined that it was premature to ask Congress to modify the Sentencing Reform Act given that the guideline system had been in place for less than one year. As an alternative, the Criminal Law Committee decided that it should develop recommendations to the Sentencing Commission that would give judges more sentencing flexibility within the constraints imposed by the Act. This approach was later reflected in the judiciary's 1995 Long Range Plan, which recommended that the Sentencing Commission afford sentencing judges the ability to impose more alternatives to imprisonment, encourage judges to depart from guideline levels where appropriate in light of factual circumstances, and enable them to consider a number of offender characteristics.

During the September 1990 session the Conference authorized the Criminal Law Committee to periodically submit proposals to the Sentencing Commission to amend the guidelines, including proposals that would increase the flexibility of the guidelines. Since then the Committee has worked closely with the Commission to improve the sentencing guideline system.

The Committee has always enjoyed a good working relationship with the members of the Sentencing Commission. We benefit from your attendance and participation at our Committee meetings. We value your reports to the Committee and we appreciate your willingness to always listen to our concerns and to value our input.

In 1995, recognizing the complexity of the sentencing guideline system, and at the Committee's urging, the Commission undertook an extensive assessment of the sentencing guidelines to determine how they could be streamlined or simplified. Then Commission Chair Judge John Conaboy determined a need for the Commission to take a hiatus from the amendment process to allow the Commission to focus on the assessment. Hearings were held in Washington and Denver, and Commission staff prepared a series of working papers to examine relevant conduct, the level of detail in specific offense guidelines, sentencing options, departures, and the Sentencing Reform Act itself. Due to turnover in commissioners, this review effort stalled. Perhaps efforts to simplify the guidelines can now be renewed.

The Committee also successfully collaborated with the Commission on the "economic crime package." These guideline amendments, which became effective on November 1, 2001, resulted from a six-year study of economic crime sentences by the Commission and other interested groups. Contributors included probation officers, defense counsel, the Department of Justice and the Committee. The Commission conducted hearings and held a major symposium on this important issue. The economic crime package built upon and improved a draft proposal that, with the participation of Committee members, was successfully field-tested in 1998, and was found to surpass previous guideline amendment proposals in organization, workability and resolution of circuit conflicts.

The economic crime package was the first comprehensive rewrite of the guidelines dealing with

the major category of crime. It simplified, it consolidated the theft, property and fraud guidelines, revised the lost table for the consolidated guidelines and a similar tax offense table, and provided a revised definition of loss for the consolidated guidelines. These changes substantially increase penalties for moderate- and high-loss offenders while slightly reducing offense levels for low-loss offenders.

The Conference also recommended "safety valve" legislation initially proposed by then-Commission Chair Judge William Wilkins. While the recommendation did not specify statutory language, the Conference supported a statutory amendment that would authorize district judges to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense and no information to aid prosecutors that could result in a substantial assistance motion and downward departure from the sentencing guidelines.

After receiving input from the Committee in 2002, the Commission proposed an amendment to the guidelines to create a sentencing cap at a base offense level of 30 for drug traffickers who receive a mitigating role adjustment under U.S. Sentencing Guidelines, Section 3B1.2. While some in Congress opposed the sentencing cap amendment, it was enacted in November 2002 after Congress failed to act. Although the Commission decided earlier this year to amend the mitigating role cap, the Committee opposed the proposed amendment because the application of the guideline was not problematic and we were unaware of any need for a change.

Much of the Commission's time in recent years has been devoted to responding to congressional directives, including those that directly amend the guidelines. The Conference opposes direct congressional amendment to the sentencing guidelines because such amendments undermine the basic premise underlying the establishment of the Sentencing Commission--that an independent body of experts appointed by the President and confirmed by the Senate, operating with the benefit of the views of interested members of the public and both public and private institutions, is best suited to develop and refine sentencing guidelines. Therefore, the Conference's position is that Congress should direct the Sentencing Commission to study proposed amendments to any particular guideline and either adjust the guideline accordingly or report to Congress its basis for maintaining the existing guideline.

The Committee is responsible for assuring that working relations are maintained and developed with the Department of Justice and other agencies with respect to issues falling within the Committee's jurisdiction. The Committee has been working to improve the judiciary's relationship with the Department of Justice, and we believe these efforts have enhanced the lines of communication. The federal judiciary and the Department of Justice share a number of goals and concerns related to federal sentencing practices and procedures; as such, we have a mutual interest in working together to the extent practicable.

Judge Carolyn Dineen King, Chair of the Judicial Conference's Executive Committee, expressed this very sentiment to Attorney General John Ashcroft this past fall when the Executive Committee met with the Attorney General to discuss a number of areas of mutual concern. This is one reason Judge Lake and I were delighted to meet with Department of Justice officials a few weeks ago to commence discussions on various legislative alternatives or interim pilot programs regardless of the outcome in Booker and Fanfan. We are hopeful that the lines of communication will remain open and that senior AO and DOJ staff will continue to meet regularly to discuss various proposals and ideas for changes to the federal sentencing system.

The Committee has been monitoring the courts' responses to the Blakely decision. In fact, it was during the Committee's June 2004 meeting in Atlanta, Georgia, with most of the Sentencing

Commissioners in attendance, when the Supreme Court announced its opinion. Since then the Committee has played an active role in keeping the courts informed.

After consulting with the Sentencing Commission and the Bureau of Prisons, the Committee issued important guidance to the courts with respect to alternative sentences. While recognizing that judges must make sentencing decisions based on their own reading of Blakely and in accordance with their own circuit's interpretation, district courts were encouraged to use a new form, the "Supplemental Statement of Reasons," to generally record how Blakely was applied in a case, to standardize data collection of sentencing guideline decisions, and to facilitate implementation of the court's rulings until the Supreme Court decides the Booker and Fanfan cases.

Like the Commission, the Committee is aware of a wide variety of proposals for changes to the federal sentencing system. We are not prepared today to convey a Judicial Conference position or offer an opinion on the various questions of law and policy presented by the various proposals. The Committee is, I assure you, actively considering the future of the sentencing process so that the Judicial Conference can be prepared to quickly analyze any proposed legislation, and to consider all of the various legislative proposals as they develop.

The Committee intends to explore the range of alternatives to the existing sentencing process in the event the Supreme Court, in deciding Booker and Fanfan, declares the sentencing guidelines unconstitutional in whole or in part. We will evaluate and, where appropriate, make recommendations to the Conference on any identified alternatives in terms of their legal soundness and their impact on judicial responsibilities, workload, and court administration. In the course of doing so, the Committee will be interested in receiving and considering the opinions and information from the bench and bar.

The Committee on Criminal Law is taking these steps because we believe we must fully evaluate what procedural protections should apply to the fact-finding necessary to increase guideline ranges and enhance sentences. Working with the relevant rules committees of the Judicial Conference, we also have to consider what changes to the federal statutes and the Federal Rules of Evidence and Criminal Procedure might become necessary in the wake of the Booker and Fanfan decision. We hope that the Sentencing Commission, Department of Justice, Congress, and others will act deliberately and thoughtfully once the Supreme Court issues its opinion.

Judges take their sentencing duties seriously. Most federal judges on the bench today did not serve during the proverbial "old days" of sentencing prior to the sentencing guidelines. They have sentenced defendants only according to our current sentencing guideline regime. While we all agree that improvements are needed to guideline sentencing, we understand that it is neither desirable nor possible to design a sentencing system that provides for every possible contingency of human behavior. Moreover, we have to consider the important policies and directives articulated in 18 U.S. Code, Section 3553 and protect the vital principles of certainty and consistency in sentencing. Congress could have established a system of fixed penalties for broad categories of offenders when it enacted the Sentencing Reform Act, but it wisely chose to establish a more nuanced system. In doing so, Congress recognized that judicial discretion was an indispensable part of any fair sentencing regime.

We hope that the Sentencing Commission will be able to apply its expertise to make appropriate changes to conform the guidelines to the Booker and Fanfan decision. In so doing, we urge the Commission to simplify the sentencing guidelines, restore judicial discretion, and expand the "safety valve." Any changes to the guidelines should be motivated by a desire to maximize the fairness, workability, transparency, predictability, and flexibility of our system of federal criminal sentencing.

We look forward to working with you.

JUDGE HINOJOSA: Thank you, Judge Sullivan.

And we're going to follow this procedure. We will then go to Judge Bucklew and then at the end of Judge Saris's comments, then we will open it up for any questions that members of the Commission may have.

Judge Bucklew, who as I indicated is the Chair of the Judicial Conference of the United States Advisory Committee on Rules of the Criminal Procedure. Judge?

JUDGE BUCKLEW: Chairman Hinojosa, thank you for having me this afternoon. My comments are premised on a certain number of possibilities, and so with anything, what I'm going to say to you cannot be certain.

But if the Supreme Court holds that Blakely applies to the United States Sentencing Guidelines, it is clearly probable that a number of changes will need to be made to the criminal rules. Exactly what changes will need to be made and how the rules are impacted is dependent upon what the Court decides regarding a number of issues, including severability, including what further direction the Court gives in any opinion, what Congress does, and ultimately we will take our direction from the Criminal Law Committee.

But it seems at a minimum that a number of rules will need to be changed: Rule 7, the indictment; Rule 11, the pleas rule; Rule 16; Rule 23, which is the jury/non-jury trial; Rule 31, the jury verdict; Rule 32, sentencing. And I could envision a possibility where as many as 15 to 16 criminal rules would be affected.

There are a number of possible responses, and you outlined some in your direction to us for the testimony here. Some of the possible changes, the determinant sentencing or the pure charge that imposed an identical punishment on identical crimes for defendants that commit those crimes across the United States, that kind of a change would probably not result in very many rule changes if any. Making the guidelines advisory in nature, a return to judicial discretion, again, would probably not result in many rule changes. Limiting judicial discretion concerning the minimum sentence, but making the maximum sentence under the guideline range the statutory maximum for the offense at conviction, would result in some but not a lot of changes, I don't believe, to the criminal rules. Requiring enhancements or aggravators under the guidelines to be charged in the indictment and submitted to juries for fact finding would result in a number of changes to the criminal rules.

I'd like to take just a minute to talk to you about the timing involved for any type of rule change. Rule making generally takes two to three years to accomplish. For example, assuming that the Supreme Court renders a decision at the end of November or in December, and assuming that we get some guidance, we could begin drafting proposed rule amendments for consideration at the April 2005 Criminal Rules Advisory Committee meeting. But then those draft proposed rules would be forwarded to the Standing Committee, who would then decide whether to put them out for publication. If they go out for publication, it would be for a minimum of six months. The Criminal Rule Committee would then conduct, in all probability, public hearings, and we would consider what we learned from the public hearings and the public comment. In April of 2006 the proposed rule changes, as finally agreed upon, would then have to be forwarded to the Standing Committee for consideration at the June 2006 meeting. If approved, the Standing Committee would in turn forward the proposed rules to the Judicial Conference--and we are now looking at a possibility of September 2006--and then if approved by the Judicial Conference, to the Supreme Court.

My purpose in saying this, this is a two-year cycle, and that's assuming that Congress does nothing in the interim, that's assuming that nothing happens in the public hearings that would cause some changes to have to be made to the draft proposed rules, and to have to start the process all over again.

The process can be expedited by the Standing Committee with approval of the Judicial Conference, but it would seem to me that because there is so much public interest in this, that that's really not a good or a real possibility.

In addition, there's also the possibility that Congress could act in the interim and we would have to pull a rule back and start the process again.

I will tell you that there is some precedent for the Judicial Conference in the interim by adopting model local rules based on the proposed draft rules of the Committee. And I think this happened in the early '80s with the bankruptcy rules, and they could then provide some guidance to the district courts. But again, that is up in the air because we would have to have a clear idea of what the rules were that needed to be adopted.

I would like to tell you that we do have a subcommittee within the Criminal Rules Committee, and we are taking guidance from the Criminal Rules, and we have a subcommittee within the Criminal Rules who are looking and trying to identify the rules that will be impacted.

Just on a personal note and taking off my hat as the Chair of the Criminal Rules, I would like to say that as a district judge from the Middle District of Florida, and you may or may not know that we are a heavy criminal district, the Southern District of Florida, the Middle District of Florida, we handle a lot of criminal cases. And after Blakely was decided but before the Eleventh Circuit decided Reese, in which they told us that we should follow the guidelines until such time as the Supreme Court rules. There was much indecision among the district judges. We have 15 district judges in the Middle District of Florida, and there were 15 different things going on.

Some judges found that the guidelines were not constitutional. Some found they were not constitutional as applied. Some were applying the guidelines. My purpose in telling you this is that it would seem to me that it is very important to have some guidance of some type as quickly as possible.

The one other thing I wanted to say with respect to my position as simply a judge and not Chair of the Criminal Rules Advisory Committee, is that having tried a couple of cases after Blakely but before Reese, where I did submit enhancements to a jury for a jury's determination beyond a reasonable doubt, I will tell you that the process is a difficult process with all of the enhancements that we have in the guidelines today. I was able to submit some of the enhancements without any problem. The jury was clearly able to understand them. Some they were not able to understand, and could not intelligently render a decision.

My statement to you is that if that is the position that we end up with, submitting enhancements to the jury for a finding beyond a reasonable doubt, it will certainly be helpful if the guidelines could be simplified, and to be able to intelligently instruct the jury regarding the enhancements, because right now it is a very difficult position.

One other thing I wanted to tell you, again, in my capacity as a district judge, in my district there are currently, in almost all plea agreements, Blakely waiver for good or for bad. And the plea agreements that are being accepted by the Court and being agreed to by the defendants almost universally have Blakely waivers.

Thank you.

JUDGE HINOJOSA: Judge, we appreciate it very much, and we certainly appreciate your

taking off your Chair hat and giving us your views as a district judge also.

Judge Patti Saris, who is the Chair of the Defender Services Committee of the Judicial Conference of the United States, and I have experience with her, having served on that Committee.

JUDGE SARIS: I did want to start off and say thank you for inviting me to come speak here. It's a unique, perhaps historic opportunity to talk about the institutional role of defenders in sentencing policy.

But before I do that, I want to back up and say I did have the opportunity to serve with Judge Hinojosa on Defender Services Committee, and I could never keep up with him in his morning jog. But I do know that he has so much energy, and even more importantly, the independence of thought and the commitment to equal justice, that I think he has, I'm sure, already been and will be a great chair of this Committee. So I'm doubly pleased to be here.

I am testifying in my role as Chair of the Defender Services Committee of the Judicial Conference of the United States. I want to emphasize that I'm not here speaking in my capacity as a judge, although I'd be happy to, as Judge Bucklew did, talk about what's going on in Massachusetts.

The Criminal Law Committee, the Rules Committee, the Judicial Conference, speaks on behalf of the judges, and I'm not here in that capacity. Neither am I here in the capacity to set or to support positions on behalf of the defenders of the United States of America. They do that quite well themselves. And one of the most important principles that our Committee has followed all along is a dedication to the principle of the independence of the defense function. The defenders, as I notice, and I'm thankful, have their own panel here to talk to you today. I will not be taking positions on behalf of the Defense Committee on any of these proposals.

So I suppose the fair question might be, so why am I here? And the reason is, is because I would like to talk a bit about the institutional role of the defenders and the role that the courts play in supporting them. My Committee oversees the provision of legal representation under the Criminal Justice Act, to defendants in criminal cases who cannot afford an adequate defense. There are a large number of these representations, and some years we've been at 169,000 representations. We think, although we don't have definite statistics, it's like to be in the vicinity of well over a majority, and we think as high as 80 or 90 percent of the representations are representations of indigents in our federal courts. As part of this, we are in charge of the administration of the Federal Defender program, making sure that they have adequate resources to carry out their mandates. That includes not just the federal defenders. We have federal defenders in 83 out of the 94 districts, but also to make sure that the panel attorneys get adequate compensation.

In addition to ensuring adequate and qualified representation in individual cases, the mandate includes the obligation under the statute, under the federal statute, to submit written reports to the Commission and otherwise comment on the sentencing guideline matters.

Once again, we have not in any way ever interfered with the role of the defenders in submitting comments to you all on the guidelines. They do that on their own and independently. The Booker and Fanfan cases already have been producing--produce thinking and writing about sentencing that have been creative and thought provoking. This has been an important concern of our Committee to make sure that defenders have the resources necessary to participate as full partners in the sentencing area before your Committee. They will have the resources to participate as full and equal partners with the Department of Justice in providing the Commission with the assistance it needs in meeting the challenges of Booker and Fanfan and all the sentencing issues that come before the Commission.

I am pleased that you'll be hearing today from David Porter, an Assistant Federal Public Defender from the Eastern District of California, one of the federal defenders' leading appellate advocates, and I'm told an absolutely committed Blakely buff. He probably knows as much about it as anybody. I'm also pleased that Jon Sands is here today to support David and may answer questions that you have. Now, Jon Sands was recently made the federal defender from Arizona. I'm told he mentions that he has one of the largest, if not the largest, caseload in the country at this point, from Arizona, and I know that he has been a long-time member of the core committee because he clerked for Judge Schroeder, so he will be here as well.

JUDGE HINOJOSA: He's a well-known dog lover.

JUDGE SARIS: Dog lover?

[Laughter.]

JUDGE SARIS: He is the Chair of a committee that's been appointed of 12 federal defenders from across the country to represent all the many different kinds of caseloads in federal districts, and they will be vetting a lot of these proposals to see how it affects different districts around the United States.

The federal defenders are well-positioned to provide the Commission with critically important insight and information. It is my understanding that federal defenders and the Criminal Justice Act panel attorneys will be represented in this process, and I should also mention we have District Panel representatives in every district, so that although there are not federal defenders in every district, in most of them there are. We also have representatives in every district, so that to the extent that the Commission needs feedback about what the impact of proposals are, we are in a position to help you get that feedback from the defense point of view.

As you know, we also have an advisory structure of defenders who helps the Defender Service Committee. This structure has been useful in helping us provide a defense point of view with the Committee's on policies. I've always found that their point of view has been neutral and objective and professional. It is something Kathy Williams is currently doing for the Federal Public Defenders in the Southern District of Florida, which brings me actually to my most important point.

I want to thank the Criminal Law Committee, Judge Lake's Committee, as well as the United States Judicial Conference, and many members here of the Commission who have individually expressed support for the proposal that went through the Conference to create an ex officio member of the Sentencing Commission from the defense community, in particular, a federal defender representative on the Sentencing Commission. I think that it is absolutely essential that the defense community have an equal role, ex officio role, with the Justice Department in representing the defense community before the Sentencing Commission.

While I understand that this requires legislation that will have to go through a statute through Congress, in the meantime I would urge the Commission to consider allowing a federal defender representative to participate in its meetings, just as the Department of Justice's representative is now doing as an ex officio member.

Many years ago--I guess I can say that--in 1972 Justice Burger analogized the judge, prosecutor and defense attorneys in our criminal justice system to a three-legged stool. And I do think it is true that without the judges, without the defense attorneys, and without the prosecutors, we would not have a fair sentencing system. We rely on the adversarial process in our courtrooms to make sure that the best result comes out, and I think that that would be the most important thing as we're going



through these very difficult days of trying to figure out what to do in the aftermath of Booker and Fanfan, and even if things stay the same with respect to the guidelines, with respect to amendments going forward.

So we are happy to do anything on our Committee that we can to facilitate defense representation. We are willing to provide the resources, vet the people who come here, do whatever you would like, bring matters back to the Committee to make sure that they can fully and fairly assist you in understanding the defense point of view.

I'm also happy to answer questions about what's going on in the famous State of Massachusetts, but in the interim, I'll wait till I get questions about that.

JUDGE HINOJOSA: Thank you, Judge.

Who's got the first question?

COMMISSIONER CASTILLO: I'll start off. First I want to commend our Chair for holding these hearings. I put these hearings in the category of "just in case." There's a lot of things you do just in case, like using a car that has airbags, and since we're on a bumpy road since the Blakely decision went down, I'm glad that we're having these just in case hearings. I also want to thank all three of my colleagues for being here. We're happy to work with all three committees.

And what is really on my mind more than anything else is in light of Blakely, what are the changes that any three of your committees might recommend? We consider at this point in time, because many see this as an opportunity to bring about some changes with the sentencing guidelines. I note that Judge Sullivan, you mentioned specifically the need for improvements, and then you said near the end of your testimony, "simplify." And I hear that. That has been attempted. Restore judicial discretion, which that would be a Herculean task, but one that I'm sympathetic too, obviously; and expand the safety valve. Are there any others that come to mind?

JUDGE SULLIVAN: Not at the present time, but in the coming weeks we're going to be giving a great deal of thought to those issues as well as others, and at the appropriate time we will hopefully have a wealth of suggestions, additional suggestions to make to the Commission.

Life after Blakely's been difficult, and let me just depart from being a Criminal Law Committee member and share district court experience. And I'll tell you--this was one of the first trials after Blakely--one of the issues was whether the government could seek an enhancement based upon an obliterated serial number on a gun.

I had selected a jury panel and told that jury panel, take an oath, make a decision based solely on the evidence in this case. Determine guilt or innocence based only on the evidence. Don't be concerned with sentencing. That rests solely with the court. Don't be concerned about the numbers of people incarcerated. That's not an issue you have to be concerned about.

I think Blakely was decided midstream or so, and the government's, "Well, we have an opportunity now to submit an issue before the jury, Judge." And surprisingly, there was not an objection by defense counsel, to allow the jury to consider at the end of the trial whether or not the government had proved beyond a reasonable doubt that the serial number had been obliterated.

I didn't allow that evidence to come in, sinister evidence that would have prejudiced the defendant in my view, and so not a lot was mentioned, if at all, about the gun, although the gun was in evidence.

And I was concerned about that because I had told that jury to take an oath to make certain decisions, and now I am very consciously about to tell them to decide an issue that impacts sentencing,

which is contrary to the oath that I told them that they had to take to make decision. It had nothing to do with sentencing based solely on the evidence, the issue of guilt and innocence.

So it left a very terrible feeling with the court. Fortunately, for the defendant, the government was not able to get its act together, and it was not able to proceed with its submission of additional evidence, although it was afforded a fair opportunity to do so. It wasn't able to do it within the guidelines, in the time guideline prescribed by the court, and so I didn't have to address that issue. But it's very troubling. It's very troubling to now tell a jury to focus on something that we've never told jurors to focus on in 200 years or so, issues that directly affect sentencing. So we're going to have to consider the seriousness of that particular issue.

JUDGE SARIS: Also, taking off my hat as Chair of Defender Services and just talking about what's going on in Boston, we have the--I think there aren't very many circuits left, but our circuit has not spoken to the issue of the validity of the guidelines after Blakely, and just like--

COMMISSIONER SESSIONS: But Judge Gardner has.

[Laughter.]

JUDGE SARIS: She certainly has, and written an excellent opinion.

COMMISSIONER SESSIONS: Yes, she has.

JUDGE SARIS: Yes, she has.

But essentially, just as Judge Bucklew was describing before the Eleventh, every judge and every prosecutor and every defense attorney is trying to struggle to figure out what to do to best, from the bar's point of view, represent their client's interest, and from the courts trying to figure out what's in the interest of justice. We're all over the spectrum. Some judges have declared it unconstitutional. Some judges have said, "Well, until the Supreme Court speaks we're going to follow the guidelines." Some judges--and I put myself in this category--have gone into this alternative sentencing mode, which is we don't know what's going to happen, and here's what the guideline sentence would be, here's what the alternative sentence would be, and some have gone the third mode. We'll say they take the halfway point, and you can't go up but you can go down. Here's my third sentence as to what I would do.

And I simply say that because we have not had very many pleas. There aren't that many Blakely waivers that we've been seeing. And so some of our clerks laughingly refer to last summer as the summer of the superseding indictment, because what's happened is, is that all the indictments have been superseded with the enhancements, and people aren't even sure how to do a plea colloquy any more. It's a long way of saying maybe we're in this position until we hear what's going to happen, but there's going to have to be a huge amount of guidance, not only with respect to going forward, but what to do in this interim timeframe.

JUDGE BUCKLEW: Could I just add to this? This is a subject in which district judges feel very strongly. I mean this is not an issue that the people are wishy-washy about. You get judges that are very strong on both sides. So, again, I would echo that there needs to be some guidance and as quickly as possible.

JUDGE SULLIVAN: Let me just add also that I've deferred most of my sentencings. I respect my colleagues who have very ambitiously imposed two or three sentences, and I respect that. I just have chosen not to do that. I feel as though whatever sentence I impose, if I impose one, two or three sentences, I'm going to have to revisit whatever I do in light of the Supreme Court's ultimate decision, so I've deferred sentencing with the consent of just about all the parties, and I've not received a lot of pleas with Blakely waivers in the last two or three months.

COMMISSIONER SESSIONS: Judge Sullivan, I've really enjoyed working with the Criminal Law Committee, and--I mean we've got a great relationship with the Committee, and your Committee have had a great relationship over the past five years. You've talked about simplification. You've talked about maintaining judicial discretion as the objective of the Criminal Law Committee. We know that there's the possibility that if Blakely applies to the guidelines, we're going to have a system in which there are a whole series of enhancements, many, many enhancement which trigger the right to a jury trial, and you talk about simplification.

I have two questions. The first is, are you actually thinking about that as a Criminal Law Committee? Are you thinking about ways in which the guidelines can be simplified if in fact Blakely applies to the guidelines and the jury trial right attaches to every enhancement? Are there ways of simplifying it?

And then the second is--I notice from your comments that you had spoken with others in the criminal justice system. Is there a way that we can work closely together to address these questions about simplifying guidelines so that the Criminal Law Committee and the Sentencing Commission work closely together to address these issues?

JUDGE SULLIVAN: The simple answer is yes to everything you said.

COMMISSIONER SESSIONS: Okay. That's the problem with a long question.

JUDGE SULLIVAN: But seriously, we are giving serious thought to everything, everything you touched on, Judge. And at the appropriate time in the not too distant future we hopefully will have many suggestions to make for a collaborative effort, not only with the Sentencing Commission, but with all the other principal players. I've made reference to the various rules committees. It's going to take a collaborative effort to address the unknown, but we're mindful that we're going to have to react very promptly. And the public deserves prompt, deliberate, thoughtful consideration of whatever decision is issued by the Supreme Court, and we're ready, willing and able to take on that task.

But, yes, we're considering everything you've just mentioned. At the appropriate time we'll have many suggestions to make.

COMMISSIONER STEER: I thank all of you for your valuable perspectives and contribution.

I guess I'd like to get your point of view individually or in your official capacity, however you are to give it, or maybe both, about what you see if the Supreme Court extends Blakely to the guidelines? And taking into account the local realities that we're probably still going to have some kind of a guideline system, and also that--you know, I've been--there are resource limitations, and they're about as severe as any I can remember the system being under in the 18 years or so that I've had some direct connection with the federal criminal justice system. What do you see as the big picture impacts down the road of extending Blakely to the guidelines? Where are the resources going to come from? What's going to give? Or do you think that the system will just accommodate? Any of you who would like to make observations on that.

JUDGE SULLIVAN: John, at this point, I can assure you that we're on the same wavelength. I mean we have highlighted that issue, what's life going to be like after Blakely? And I can assure you that we're giving appropriate thought to addressing the issues that you have so eloquently articulated.

I would be remiss though if I offered direct response to you now. I can assure you that there is a work in progress, and we're taking these issues very seriously. I'm a spokesperson for the Committee to let you know that the best is yet to come.

[Laughter.]

COMMISSIONER SESSIONS: Isn't there a song like that?

[Laughter.]

JUDGE HINOJOSA: Professor O'Neill?

COMMISSIONER O'NEILL: I'd like to thank everyone as well for coming. It's always nice to be able to be on the side of things where we're actually asking judges something as opposed to being asked.

I have two quick questions. One we talked a lot about, or you all talked a lot about simplification. If you were going to pick, in the light of Blakely, one area where you thought the Commission would be well served in trying to simplify the guidelines--because for everybody that means something a little bit different--what, given your own experience, would you pick in light of Blakely that the Commission should focus on for purposes of the simplification project?

Secondly I'd like to ask if you can cast your mind back to Apprendi. Apprendi seems like almost forever ago now. But after Apprendi, of course, one of the things that happened in many districts at least, the government was then forced to plead like quantity and type of drug in the indictment, and juries were then faced with having to deal with, you know, those quantity determinations themselves. What I was wondering is if you predict or if you think that it will be difficult for juries, given your experience with them in terms of the aftermath of Apprendi, would be difficult for juries to handle many of the sort of specific offense characteristics or the enhancements that we routinely have in the most commonly used guidelines at least, whether it will be difficult for juries to make those sorts of decisions?

JUDGE SARIS: It would seem that--and again, I'm speaking in my capacity as a judge, not as Chairman of the Rules Committee--but it would seem to me in drug cases, quantity and role would be important. It would seem to me in fraud cases that amount and role would be important, more so than anything else. And if you were simplifying, you would, those areas at least where I come from, are primary cases. Those would be the areas I would look at.

COMMISSIONER CASTILLO: Judge, do you handle a lot of immigration cases?

JUDGE SARIS: You know, not so many. We have some, but it is not--we don't have a whole lot of them.

JUDGE BUCKLEW: For me the issue is--you know, to come down here today, I took a recess from a very difficult patent case that's being tried in front of a jury. It's not so much that they can't understand it. I've got great confidence in jurors. What for me is the question that I wish you'd ask the defense attorneys about as well, is the issue of fairness. A lot of times some of the issues that would come out, if you put the enhancements to the jury, would be things that would otherwise be ruled irrelevant, wouldn't necessarily have to go to a jury. So the issue are how, if you were doing this on a fairness level, it's not that I can't understand it, it's how would you do it to make sure that it was a fair process? I mean, would you be back at the level of two different--a bifurcated trial? How would you do it? And I think that will involve a lot of struggling to try and figure out a fair trial.

JUDGE SULLIVAN: I agree. The jurors are very sophisticated, and I think that a conscientious judge can make a juror's job a lot easier by, in plain English, instructing the jurors what do to. So I'm not concerned about the jurors' ability or lack of ability to address these very complicated issues.

What I'm concerned about is transforming the way in which have been administrating justice for 200 years. I mean we're going to have to change everything we've been doing. In the old days we

were concerned with juror nullification, with people just hanging up, making decisions or not making decisions based solely on the evidence before them. Are we going to have a new type of juror nullification because jurors are now empowered to make sentencing decisions? I think we will, and I think we'd better be very concerned about that.

COMMISSIONER O'NEILL: What about on the issue of simplification, like taking sort of one area the Commission should focus on in terms of simplification?

JUDGE SULLIVAN: There are so many areas. I'm going to defer a response to that and give you the assurance that the Criminal Law Committee will address that issue.

COMMISSIONER O'NEILL: Judge Saris, was there anything that struck you in terms of the simplification question?

JUDGE SARIS: No, not really. Let me just--I didn't come here to take substantive positions on where the guidelines should go, simply because, as I said, we, as a Committee, have never historically done that, and so I invite you to ask the defenders what their reaction to that would be.

COMMISSIONER CASTILLO: Well, just following up on one thing Judge Sullivan said in terms of plain English for jury instructions. Do you think the guidelines, the way they are presently constituted, lend themselves to be translated into viable jury instructions? For any of the three judges here.

JUDGE SULLIVAN: I think a conscientious judge can do anything. So the answer is yes, but it will take some effort. It's going to take a lot of effort.

JUDGE SARIS: And some of them are easier than others. Clearly, some of them you can do that. I mean if you're trying a pornography case using the computer over the Internet, you know, did they use a computer? I mean that's simple. Some are not so simple. I think it varies.

COMMISSIONER CASTILLO: Judge Bucklew, have you ever instructed a jury on the issue of loss, for example?

JUDGE BUCKLEW: Yes.

COMMISSIONER CASTILLO: And determining that, and you found that you could take the guidelines and make them into workable jury instructions?

JUDGE BUCKLEW: You know, yes. On loss I'm not so sure that it's always possible, but I think it depends upon--it depends on the trial that you've had and how clear it is, but, yes, I think it's possible.

JUDGE HINOJOSA: Commissioner Horowitz?

COMMISSIONER HOROWITZ: If I could just briefly, picking up on that, Judge Bucklew, you mentioned, I think in your statement, that there were some examples of cases where juries didn't have difficulty applying the guidelines, but others that did. I was curious as to which ones they might have struggled with, and whether a simplified system might address those concerns?

And then just more broadly, you know, Judge Sullivan mentioned three overarching themes, big picture questions, for us to think about simplification, judicial discretion and safety valves. I was wondering if, not in your role as representatives of committees, but as district judges, whether there are also other big picture issues that we should be thinking about as we look at these issues?

JUDGE BUCKLEW: Well, in answer to your question, I only had the opportunity to instruct two juries between Blakely and Reese, but the one that I--the case that I was thinking of was an enticement case. And I used the example of a computer that was clear, you can instruct on that enhancement and that was not a problem. Then we had the obstruction of justice, which was a little bit

more of a problem, and then we had the misrepresentation of the defendant's age and whether it caused the enticement, and that was clearly very difficult for the jury to understand. So that was the example I was using.

JUDGE SARIS: Just speaking as a personal trial judge, one of the areas that you might want to give a lot of thought to is that some of the assistants have taken the position, understandably, that if it's an element of the offense, you have to provide it beyond a reasonable doubt. So therefore, if you don't agree to all the enhancements, you don't get your three levels for acceptance of responsibility or two levels now.

So one thing, if this all spins out, one thing to think about is maybe whether acceptance of responsibility should at least be retooled to deal with the existing reality. If a guy says, "Well, I'm guilty, but I wasn't plus 4 for leadership," you know, how that plays in--something just that the Commission should probably think about.

COMMISSIONER HOROWITZ: On that issue I just--I wonder. I know some judges have taken the position that when you plead guilty you waive all your rights, your jury rights and your Blakely rights, and I gather there may be some judges that allow a guilty plea, but reserving sentencing issues. I'm wondering if any of the judges have any thoughts on that issue, and any experiences?

JUDGE BUCKLEW: And I haven't either.

JUDGE SULLIVAN: I've not. I've not taken a lot of pleas. Liberty one pleas I've taken since Blakely, but essentially there have been a lot of referrals.

JUDGE HINOJOSA: We have one more question, and I'll take it myself. Judge Bucklew, as far as you know, has there ever been a history in the criminal rules where there's been an emergency amendment that didn't take two years?

JUDGE BUCKLEW: Oh, sure. But--and I say oh, sure, like it happens every day. We are working on an amendment right now that's been expedited, but it's a very simple issue, and the issue is whether district courts can make electronic filing mandatory. In many instances it only required a one-word change. That was fairly easy to expedite because you're not going to, I don't think, get a lot of public comment, and there's not a lot of work in the amendment. But it would seem to me that in this particular situation, depending, obviously, on the opinion, that there's going to be a lot of interest and a number of rule changes.

JUDGE HINOJOSA: On behalf of the Commission again, I want to thank you all very much, and we appreciate the way we work with all three of your committees. We have taken longer than this was scheduled for, but you can leave with the feeling as if you had come to a job interview, and the employer liked you so much that he talked to you longer than you thought they would. And we thank you all very much for your time.

If the next panel would please step forward.