TESTIMONY OF

PAUL ROSENZWEIG

SENIOR LEGAL RESEARCH FELLOW
CENTER FOR LEGAL AND JUDICIAL STUDIES

THE HERITAGE FOUNDATION*

214 MASSACHUSETTS AVENUE, NE
WASHINGTON, DC 20002

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REGARDING

SENTENCING IN A POST-BOOKER AND FANFAN WORLD

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Good morning Judge Hinojosa and Members of the Commission. Thank you for the opportunity to testify on the question of what response the Commission should make in the event that the Supreme Court determines in United States v. Booker and United States v. Fanfan that the rule in Blakely v. Washington[1] applies to the Federal Sentencing Guidelines.

For the record, I am a Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am also an Adjunct Professor of Law at George Mason University where I teach Criminal Procedure and an advanced seminar on White Collar and Corporate Crime. I am a graduate of the University of Chicago Law School and a former law clerk to Judge R. Lanier Anderson, III, of the U.S. Court of Appeals for the Eleventh Circuit. For much of the first 15 years of my career I served as a prosecutor in the Department of Justice and elsewhere, prosecuting white-collar offenses. During the two years immediately prior to joining The Heritage Foundation, I was in private practice representing principally white-collar criminal defendants. I have been a Senior Fellow at The Heritage Foundation since April 2002.

I should also add, by way of introduction and disclaimer, that I am associated with two independent outside groups that are considering what a post-Booker and Fanfan world should look like: I am a Member of the Federal Sentencing Guidelines Taskforce of the Federal Bar Association-District of Columbia Chapter, chaired by Mark Allenbaugh; and I also serve as an adviser to former Attorney General Edwin Meese, III, who co-chairs (with former Deputy Attorney General Phillip Heyman) a blue-ribbon commission of academics, practitioners, and judges – The Sentencing Initiative – that has been organized by The Constitution Project. I need to be clear that the views expressed today are my own tentative thoughts and neither reflects the views of either of those organizations nor, necessarily, the scope of any eventual consensus recommendations either group might make.

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At the risk of sounding somewhat overly dramatic, we are, to paraphrase Abraham Lincoln, engaged in a great civil debate to decide whether the current determinate federal sentencing system or any other system so conceived can long endure. In the absence of a concerted, thoughtful response to the Sixth Amendment issues posed by the Supreme Court's rulings, the federal criminal justice system is, or may be, as my friend Frank Bowman says, heading for a "train wreck."

Brief Background -- As I am sure the Commission is aware, the genesis of the challenge to the existence of our determinate sentencing system lies prior to Blakely in the Supreme Court's earlier decision in Apprendi v. New Jersey.[2] There, the Court had held that:

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[1] Blakely v. Washington, 124 S.Ct. 2531 (2004).

[2] 530 U.S. 466 (2000).

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.[3]

Many thought that this admonition had no application to Guidelines because the Guidelines were not, de jure, statutory maximums. After Blakely however, we are confronted with a construction of the law holding that the Guidelines maximums that are subsumed within a larger statutory maximum are themselves, to be treated as "maximum sentences" for purposes of the Constitution's jury guarantee. As the Blakely court put it:

> Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. … In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional facts. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment."[4]

There is, of course, much to be debated about this proposition. I, for one, remain at a loss to understand why unexplained, indeterminate decision-making is constitutionally permissible, but explained, reasoned decision-making is not.

The Framework for Response – But that decision has been made – for good or ill. I take it as a given that we must accept the Constitutional structure given us by the Court and, within that context, address the task that faces the Commission. The question to be considered is whether, against the backdrop of a presumed decision that Blakely applies equally to the Federal Sentencing Guidelines, there is any role for determinate sentencing. More particularly, is there any role for this Commission to play? I believe the answer to both questions is "yes."

To begin with, my analysis depends upon the following predictive assumptions about the legal framework that will prevail. Looking ahead, we may reasonably suppose that the Supreme Court decisions in Booker and Fanfan concluding that the Federal Sentencing Guidelines suffer the same Constitutional defect as the Washington Guidelines will have the following legal effects:

- Facts that are not found by the jury or admitted by the defendant may not be determined by a sentencing judge and used in a manner regulated by law to fix the defendant's sentence;

- The rule in Harris[5] (that a judge may find facts which determine a statutory minimum) will remain unchanged, for the time being;

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[3] Apprendi, 530 U.S. at 490. See also Ring v. Arizona, 536 U.S. 584, 602 (2002).

[4] 124 S.Ct. at 2537 (emphasis supplied).

[5] Harris v. United States, 536 U.S. 545 (2002).

- The rule in Williams[6] allowing indeterminate sentencing decisions by a judge will remain unchanged; and

- The rule allowing judges to determine facts relating to prior criminal history and convictions[7] will remain unchanged for the time being.

I am uncertain how long this state of legal affairs will last – both Harris and Almendarez-Torres are certainly subject to further modification by the Court if it hews strictly to the logic it has advanced in Blakely, though Almendarez-Torres rest, perhaps on slightly firmer ground. Thus, to answer one of the Commission's many questions, I believe that the near-term prospects for the Constitutionality of the so-called, Bowman fix (adopting guidelines with maxima that are equal to the statutorily permissible maximum sentences) are quite good. On the other hand, the logic of Blakely (and the hesitancy of Justice Breyer's concurrence in Harris) suggests that the rule allowing judicial fact-finding to set minimum sentences is not robust in the long term. And that, of course, means that the Bowman fix is not a long-term solution to the extent that, as I understand it, the Bowman fix continues to permit instances of judicial fact finding of aggravating factors to raise the guidelines floor. For just as Blakely sees the top of guidelines as equivalent to a statutory maximum, the bottom of the guidelines are likely to be viewed (in a world after Harris is overturned) as impermissibly judicially determined statutory minima.

Let us, nonetheless, assume the law as I have posited it for purposes of our discussion. These legal principles will have the following practical effects for non-trial settings:

- Defendants will be asked to waive Blakely rights as part of their plea agreements;

- Judges will conduct more searching factual inquiries during plea colloquies;

- Defendants and their counsel, as the price of waiving rights or advancing to plea colloquies, will secure concessions from prosecutors relating to sentencing issues – most especially relating to the length of sentence.

Overall, it is not clear that these are inherently bad results. As a former prosecutor, I'm skeptical of giving additional tools to defense counsel that are unnecessary and obstructive. But one can hardly oppose the defendant's exercise of Constitutionally-protected rights as an unnecessary "cost" of the system.

Indeed, we have long accepted a system where the Constitutionally-protected right to a jury trial may be traded away for concessions from the prosecutor. To some degree this is morally acceptable because it is not so crass a "bargain" but rather a reward for remorse and acceptance of responsibility – a calculus of justice that is firmly entrenched in the Guidelines.

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[6] Williams v. New York, 337 U.S. 241 (1949).

[7] Almendarez- Torres v. United States, 523 U.S. 224 (1998).

But I do not think that we can take too much comfort in this state of affairs. I realize that others disagree -- those who were at the oral argument for the Booker and Fanfan cases will recall that Justice Stevens appeared to take great comfort in the prevalence of plea bargaining as a means of limiting the effect of any decision extending Blakely to the federal system. Though I appreciate his insight – that less than 3% of cases go to trial – I think he misjudges the consequences.

You will forgive me if I reveal my bias as a utilitarian analyst of the criminal justice system – I think that the defendant's decision to forgo his right to a jury trial more typically has little to do with repentance and remorse and far more to do with the magnitude of the concessions that will be afforded him. Because the jury trial method is already quite costly, to avoid the necessity of the trial prosecutors are often willing to make concessions to secure a guilty plea. It is inevitable that any time the costs to a prosecutor of a trial go up, or the benefits go down, the cost-benefit calculus will be rebalanced, to the benefit of criminal defendants.

Thus, since applying Blakely to the Guidelines is unlikely to affect the clearance rate for plea bargains (because, as a practical mater, the Federal system is not able to readily accommodate a substantial increase in the number of jury trials annually), it will almost certainly and necessarily affect the "price" that prosecutors are willing to (or more accurately, will be obliged to) pay to obtain a guilty plea. The Blakely rule will, inevitably, raise the costs of trial by requiring prosecutors to prove more facts to a jury and reduce the benefit by making factual determinations heretofore made by federal judges under a lenient burden of proof subject to the vagaries of jury decision-making under the more stringent standard of "beyond a reasonable doubt." Even if the plea bargain rate does not change, it is inevitable that, without adjustment, the extension of Blakely to the federal system will reduce the period of incarceration experienced by criminal defendants. In short, though the direct effect on trials may be modest, I believe that the indirect effects of Booker and Fanfan are likely to be very significant – and to call, therefore, for a response.

The Necessity and Structure of Commission Engagement -- Some, of course, will not see this effect as a problem. They believe that criminal sentencing in America today is too harsh and thus welcome any development that will change that. Thus, their counsel would be "do nothing."

I think that is most unwise – both because it blinks at political reality, and because it forfeits the opportunity we have now for a considered, thoughtful discussion about sentencing in America, and more fundamentally about the role of the criminal law.

For the political reality is simple – Congress has a pathological appetite for criminal law. The diagnosis is not mine – it is that of Professor William Stuntz of Harvard. As he pointed out, American criminal law "covers far more conduct than any jurisdiction could possibly punish."[8] This wide span of American law is the product of institutional pressures that draw legislators to laws with broader liability rules and harsher sentences.[9] The reason is

[8] William J. Stuntz, "The Pathological Politics of Criminal Law," 100 Mich. L. Rev. 505, 507 (2001).

[9] *Id.* at 510.

the dynamic of legislative consideration: When a legislator is faced with a choice on how to draw a new criminal statute (either narrowly and potentially underinclusive or broadly and potentially overinclusive), the politics of the situation naturally cause the legislator to be overinclusive. The same is true when Congress considers the magnitude of punishment to be imposed. Few, if any, groups regularly lobby legislators regarding criminal law and those that do more commonly seek harsher penalties and more criminal laws, rather than less. The political dynamic is exacerbated by the consideration (usually implicit) of the costs associated with the criminal justice system. Broad and overlapping statutes with minimum obstacles to criminalization and harsh penalties are easier to administer and reduce the costs of the legal system. They induce guilty pleas and produce high conviction rates, minimizing the costs of the cumbersome jury system and producing outcomes popular with the public.[10]

The final piece of the equation is legislative reliance on the existence of prosecutorial discretion. Broader and harsher statutes may produce bad outcomes that the public dislikes, but blame for those outcomes will lie with prosecutors who exercise their discretion poorly, not the legislators who passed the underlying statute. As a consequence, every incentive exists for criminal legislation to be as expansive and punitive as possible. I am fearful that, in the absence of reasoned discourse in this Commission, those impulses will, again hold sway.

So . . . my first recommendation to this Commission is that it must act. In some ways, I care less about the content of your actions than I do about securing your engagement in the issue. To that end, this series of hearings is most welcome.

I realize that some of the possible solutions to the problem posed by Blakely's application to the Guidelines may require legislative changes – and thus that the Commission will only be in a position to make recommendations. But other aspects of the response may be within your capacity now. For the most part, in the discussion that follows I will ignore the distinction, and offer my thoughts on the optimal response to a post-Booker/Fanfan world, irrespective of which institution would have the ultimate authority to adopt the proposed response.

Let me begin by advancing two principles that I think should guide the Commission as it considers what to do or recommend:

- Any initial action should do its best to replicate the *status quo ante*. I offer this suggestion not because of any belief that the *status quo ante* was the optimal system. Indeed, I (like others) look forward to the Commission's 15-year review of the Guidelines and its assessment of the system as it has operated in the past. Rather, I offer this principle because of realistic policy and political concerns. On a policy level it is never good to make important new policy in haste. And let there be no mistake: haste and turmoil in the aftermath of Booker and Fanfan will provide many opportunities for what economists would call "rent seeking" behavior – opportunistic attempts to take advantage of the uncertainty to secure an advantage. For this reason alone, all such efforts should be rejected. But of equal significance, I

[10] *Id.* at 600.

fear a backlash to hasty action – in seeking a windfall defendants may get a worse result. Less likely, but also possible, in seeking a punitive reaction prosecutors may get chaos. The guiding rule should be adoption of a balanced, temporary measure that leaves everyone in the same place they were before the Court changed the rules.

- The important corollary of the return to the *status quo ante* is that any immediate resolution should be temporary. The anticipated Supreme Court ruling affords the Commission (and Congress) the opportunity to conduct, and perhaps imposes the obligation for, a wholesale re-examination of Federal sentencing more generally. While such a re-examination will require time, and should not be rushed, if we do not establish an explicit deadline then the temporary fixes may become permanent. I would, therefore, recommend that any response by the Commission or Congress have a moderate (perhaps 2 year) sunset provision that will act as a spur to final resolution.

I think that 2 years is a reasonable time frame for thoughtful consideration. And if I may be so bold, my recommendation (consistent with my thoughts on the optimal response, outlined below) would be for the Commission to take the lead role in this consideration by conducting a comprehensive review of the existing Guidelines system and, with appropriate public comment, promulgating a single unified response. In my ideal world, Congress would authorize such a process and adopt or reject the entire proposed package in a single up or down vote, lest the considered recommendations and compromises of the Commission's deliberation be "cherry picked" through individual consideration.

Thoughts on Specific Proposals -- Let me next turn to some specific proposals. We all are well aware of the many ideas that have been floating around – indeed, the Commission's introductory letter mentions several of them, including the so-called "Bowman fix" of topless Guidelines; upside down Guidelines; and advisory Guidelines to name the most prominent. I am confident that my colleague on this panel, Professor Berman, will discuss another idea he has – the "Berman distinction" between offender and offense characteristics.

I cannot, in this brief testimony, do justice to all of these ideas, so let me offer my thoughts on two of them: 1) Why advisory guidelines won't work; and 2) My own view that the Commission should seek to achieve important goals that respond to Booker and Fanfan through, in effect, an overlay of reform of the criminal code in the sentencing context – in other words, the "Blakelyization" of the Guidelines.

1) Advisory Guidelines -- One suggestion often heard is that the best response to the Court's anticipated decision is to make the Guidelines purely advisory. Even though this solution is appealing, I don't think it is viable either constitutionally or politically.

What do we mean when we say "advisory guidelines?" Sometimes different advocates mean different things. As I use it here, I mean a system of guidelines, promulgated by this Commission, that are intended to avoid the Sixth Amendment problems posed by the necessity for jury fact finding for facts that might enhance a sentence. To avoid the Constitutional issues yet still allow for consideration of sentence enhancing facts

by a judge it is thought that an advisory guidelines system will suffice – that is a system where the guidelines do not have the force of law and where the facts found by the judge are not, in the language of Blakely "essential to the punishment."

With all due respect to the many who believe that such a system can be constructed, I respectfully submit that they are chasing the equivalent of the legal Holy Grail. The image advanced is that the advisory guidelines will be sufficiently comprehensive that they will, through their moral force and persuasive power, I guess, achieve the goals of uniformity, proportionality and certainty. In other words, the advisory guidelines are viewed by those who advocate them as a mid-way point between completely indeterminate sentencing, and the current overly rigid Guideline structure.

But that mid-point does not, I submit exist. To have any substantial success in reducing disparity the advisory guidelines will need to have some rigor, or if you prefer, "bite." In other words they must have some practical effect on what judges do. If they do not, if they are a purely advisory system with absolutely no practical constraint on judicial decision-making, then they will be little more than a return to completely indeterminate sentencing.

Even advisory guidelines' most vocal supporters do not advocate that sort of complete discretion. Rather, they advocate (as I understand it) a system of modified, reasoning decision-making. In a simple case involving, for example, armed robbery the jury would find guilt and then the court would determine facts relating to potential sentencing enhancements for "brandishing" the weapon and being the "leader" of the criminal act. Based upon those facts, the judge would "consider" the advisory recommendations for enhancement and also other aggravating and mitigating factors and, using all such facts make a just determination of the appropriate sentence.

But, in my judgment if such a system is to have any practical effect in any rigorous and effective way, it must also have a legal effect. For without any legal constraint of any form the system will trend, in my judgment, to a practical nullity and a return to indeterminacy. But, to the extent that the system does have practical effect, that practical constraint will be interpreted as equivalent to a legal constraint – and that brings us right back to the Blakely problem.

In short, the circle cannot be squared. To pass Constitutional review after Blakely the guidelines must, as a matter of law, leave the judge free to impose any sentence between some statutory minimum (which may, of course, in appropriate circumstances be a sentence with no term of incarceration) that arises from the fact of conviction of the base offense and the statutory maximum. If the advisory guidelines act as a legal constraint on the judge's decision then, in my view, they will fail the Blakely test. So even if we wish advisory guidelines, and even if we hope judges will follow them, we are nonetheless left with a system that, if it is to consider non-jury-determined facts must necessarily be completely indeterminate as a matter of law.

Another implication of the Blakely decision on advisory guidelines is even more problematic: One of the great improvements under the Guidelines is the provision for appellate review of sentencing. But I can see no way at all that sentences under an advisory

system can be subject to any meaningful form of appellate review. Review necessarily entails consideration of some reasoned decision made by the lower court – some application of law to the facts under a defined standard of proof. If any of those constraints operate as a legal requirement – if the lower court must "find" brandishing, for example, by some quantum of proof – then both the necessity of making such a finding and the assessment of whether the proof is adequate under the standard required can be subject to appellate review. But the necessity of a finding or the imposition of a standard are necessarily in conflict with the Blakely rule – they make either that finding or that standard an "essential" component of the punishment, and if that finding or standard is determined by a judge, rather than a jury, then, under Blakely the jury guarantee is vitiated. However, without either a required finding or an enforceable standard, meaningful appellate review is impossible.

In fact, the only form of appellate review that would be, in my view, consistent, with Blakely's requirements, is a completely *de novo*, indeterminate review. While constitutionally acceptable, in the first instance, this would seem to serve no useful purpose and merely transfer the indeterminacy to a different level of the judiciary. Moreover, even this type of review will probably be unsustainable in the long run – for as appellate courts develop a common law of sentencing, that law would constrain and guide the lower courts (and subsequent appellate panels, no doubt), and to the extent that these courts acknowledged and applied that common law that law would, in turn, become an essential part of the fact-finding leading to sentencing and, thus, under Blakely, subject to the Sixth Amendment jury objection.[11]

In short, in my view, "advisory guidelines" are really just code for "indeterminate sentencing." I cannot see any way that meaningful legal constraints will not run afoul of Blakely and, thus, I cannot see any way in which advisory guidelines will effectively have any rigorous application. On this ground alone, I believe that advisory guidelines are a bad idea – for in my view, the unlimited discretion of the pre-Guidelines era is not an acceptable alternative.

Perhaps even more importantly, the advisory guideline system will not, in my view, withstand political scrutiny. The fundamental goal of the Sentencing Reform Act was to reduce judicial discretion and disparity in sentencing. That goal finds even greater expression in recent Congressional enactments, such as the Feeney amendment, that demonstrate Congress' continuing attention to, and involvement in, questions of punishment. Advisory guidelines will engender an absolutist response – if offered as a serious alternative, I feel confident that Congress will respond with a plethora of mandatory minimums.

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[11] The only answer to this conundrum may be to say that judge-made common law that constrains lower court judges is a different type of "law" than that enacted by the legislative branch. The Supreme Court accepted this argument in the context of an *Ex Post Facto* challenge to the abolition of a common law limitation on criminal liability for murder. See Rogers v. Tennessee, 532 U.S. 451 (2001). I am not certain, however, that, given the strength of Blakely, the Rogers ruling would be extended in to a common law sentencing régime. Obviously, if it is then this aspect of my concern would be alleviated.

2) Code Reform Through Sentencing Reform – So what is the alternative? My preferred option for the long-term is for us to maintain a system of guided discretion, consistent with the underlying principles of uniformity, predictability and certainty that animated the Sentencing Reform Act, but modified to be consistent with the Sixth Amendment requirements imposed by the Court. To achieve this goal the Commission must undertake the hard and difficult task of a thorough review and re-grouping of the existing federal criminal code.

I think it is common ground that the current structure of the Guidelines cannot be maintained consistent with the jury-determination requirement imposed by Blakely. The number and variety of determinations to be made by the jury (and the concomitant necessity for a multitude of jury instructions) is simply beyond the capacity of courts to administer and, I fear, of juries to understand and implement. As the Government's brief in Booker/Fanfan makes clear, sometimes as many as 24 subsidiary determinations will be necessary and a number of those (for example, the determination of loss in an economic fraud) will require extensive expert testimony and factual development not presently required in a trial.

This proliferation of categories for factual determination is not the Commission's fault. As Professor John Baker of Louisiana State University Law School has recently shown, there are now more than 4,000 separate federal criminal offenses.[12] Estimates of the number of regulatory violations incorporated by reference range from 10,000 to 300,000. Given this cornucopia of law, one can hardly blame confusion on the sentencing régime.

But in the absence of reform of the criminal code (an unrealistic goal in the current political climate) the Commission's goal should be to achieve a workable sentencing system given the current expanse of the criminal law. The objective of its work should, in my judgment, be to seek to simply the Guidelines in a way that maintains their utility and internal consistency, while reducing the number of decision points for a jury to a manageable level.[13]

Before describing what I envision, let me make one preliminary point – some might think that the proposals I offer are little more than academic wishful thinking, ill-suited to the practical reality that faces the Commission. With respect, I would disagree. Believe me, I know that simplification is a difficult and thankless task – one that the Commission has

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[12] See John S. Baker, Jr., "Measuring the Explosive Growth of Federal Crime Legislation," (The Federalist Society for Law and Public Policy, 2004).

[13] For the most part, in outlining this proposal I am going to skip the practical implementation questions about, for example, charging practice. Though the enhancement factors that I believe can be identified will not, *de jure*, be elements of the criminal offense – which is to say that one can be convicted of an offense even in the absence of these enhancing factors – they will probably need to be treated in all other regards as procedurally identical to elements. That is, they will be identified in the indictment as enhancement factors, the subject of pre-trial motion practice and discovery where appropriate, and as required by Blakely made subject to jury determination based upon proof beyond a reasonable doubt as part of a supplemental jury fact-finding. With the possible exception of prior criminal record, I think that most of these will be provable as part of the case in chief and will not necessitate a bifurcated trial.

considered before without success. But we now face a unique moment in history – one that is not wholly of our own choice. It is an opportunity to be embraced – not rejected as too difficult. The Commission can, and should, take the lead in a response to Booker and Fanfan and use the opportunity to drive the Federal system to a more rational paradigm. To paraphrase Nike – "Just Do It."

The components of a simplification scheme of the sort I envision would include the following:

- A wholesale reduction in the number of base categories of criminal offenses. At present there are far too many and the proliferation makes comprehensive reform problematic. One might, for example, envision categories as broad as: Regulatory Fraud; Monetary Fraud Against Individuals; Violence Against Property; and Violence Against Individuals. These would not be the only categories, of course – one wonders where we can put obscure crimes like impersonation of a 4-H Club member, or misuse of the Smokey the Bear symbol. But the core of federal criminal law is, I submit, much simpler than the proliferation of provisions suggests. With these categories, and a few others (for example, one for Narcotics offenses), the Commission could comprehensively describe a good fraction of the panoply of federal offenses. Properly constructed, this categorization could be implemented based on existing rules regarding charging, elements, and the jury's determination of guilt or innocence. With thought, this recharacterization of criminal offenses will not add to existing procedural requirements.

- The description of certain *scienter* characteristics common to various crimes that would serve as enhancing or mitigating factors. Everyone, it seems, concurs that as a matter of first principles, the degree of intent is germane to the level of punishment. And the judicial system has long experience with charging juries regarding *scienter* elements. Thus, it should be relatively easy to describe varying punishment level enhancements tied to jury findings of strict liability, negligence, knowing conduct or willful intent with regard to the base offense. An even more ambitious project would extend the consideration of *scienter* to offense enhancement characteristics. But at a minimum, we should undertake a simple sorting of punishment levels based on the intent with which the defendant is proven to have committed to core offense.

- The identification of a limited number of common offense characteristics that can be determined by a jury and serve as grounds for enhancing a sentence. I can suggests at least three distinct areas where it seems to me comparatively easy for the Commission to identify common offense characteristics that recur with great frequency and where, through modest adjustments, the current Guideline structure can be readily adapted to a jury fact finding system. These would include:

    - Harm – Justice demands that greater harms deserve greater punishment. And the absence of harm (for example, in a paperwork regulatory violation) connotes a lesser punishment. And juries will, I believe, be readily capable of determining whether or not harm has resulted. The difficulty will lie in asking them to determine the magnitude of harm (as is required with the current

finely-tuned fraud and drug distribution tables, for example) especially in areas, like fraud, where that magnitude is often subject to dispute. Thus, I am quite taken with Judge Newman's suggestion (made to the ABA Kennedy Commission) that we adopt a significantly broader set of "range of harm" categories. In both the fraud and drug areas, for example, I believe that a jury could determine and a court could adequately instruct a jury on the magnitude of harm question, if the categories were reduced to, say: Small, Medium, Large, and Really Huge.

- Nature of Victim – A second area will involve determinations that punishment should be enhanced because of the vulnerable nature of the victim. This will include, as it does today, categories such as whether the victim was a child, or elderly, or whether the number of victims was especially numerous. Here some efforts to fully capture the nature of the criminal conduct in question will probably have to be abandoned – it will, for instance, likely prove too difficult to craft jury instructions that allow a jury to determine whether a victim is particularly vulnerable because of a reduced mental capacity (just as it is very difficult to answer that question today with respect to the mental capacity of criminal defendants). But other aspects of this category – for example, whether the victim is below 16 years of age, or whether more than 10,000 stockholders were defrauded – should prove relatively easy to define.

- Breach of Trust – Societally, we also believe that the quantum of punishment is appropriately tied to whether the perpetrator violated some particular position of trust – a lawyer violating a client's confidences, or a school principal molesting a child, for example. Here, again, some such breaches of trust that do not exist "by definition" but rather arise from unique factual contexts will probably not be captured in a revised guideline set. Others however (lawyer, doctor, corporate director, parent, etc.) are fairly readily defined and thus, in theory determinable by a well-instructed jury.

- The similar identification of a limited number of common offender characteristics that can serve as enhancement factors. Here there are at least two areas where I think a modified set of guidelines would be able to capture the appropriate distinctions in conduct in a manner that allows for jury determination of the facts.

  - Role In Offense – As with the concept of harm, the concept of role in the offense is capable of many fine and nuanced distinctions. The current Guidelines, in effect, create as many as 5 or 6 different levels of participation. Here, again, a common sense restructuring that is readily intelligible to jurors seems to me to be very easily achieved. We can, for example, imagine maybe four categories – Top Bosses, Foremen, Workers, and Peons, in my own private colloquial definitions – that a jury could readily grasp and, I think, make supplementary findings about.

  - Prior Criminal History – Clearly, the prior criminal conduct of the defendants is one of the most important grounds for enhanced punishment. And it seems to

me that no good reason in either policy or law exists for requiring a jury finding of prior criminal history. To the contrary, since prior criminal history is so prejudicial to a defendant it is, typically excluded from any trial and since it is usually a matter of public record it is not typically the subject of substantial dispute. Thus, I would sincerely hope that the rule in Almendarez-Torres remains unchanged. In candor, however, given Justice Thomas' confession of error I suspect that the rule does not have long-term prospects for continuing. We will, therefore, need a system for proving prior convictions too a jury. Fortunately, we have a working model for such a system in the felon-in-possession statutes that criminalize a felon's possession of a weapon. There, the prior conviction is charged in the indictment and proven at trial (most often by stipulation). Thus, we know that juries are capable of making this determination and developing rules of proof and charging should be within the realm of possibility. Moreover, whatever new rules are developed should require similar notice and proof requirements for the earlier convictions, with the option of allowing the court to bifurcate the trial if the prior convictions are deemed especially prejudicial.

I offer one final thought about the likely outlines for a new sentencing system in the post-Booker/Fanfan world on the question of "relevant conduct." Here, I confess that I am deeply confused. If we accept and believe the Court when it says that the indeterminate sentencing rule in Williams remains valid then, at a minimum, this must mean that a court can continue to consider relevant conduct in an indeterminate way as a means of enhancing a sentence. But that, it seems to me, is in fundament tension with Blakely, for if Blakely means anything at all it must mean that a judge can't base a sentence of facts it concludes are true that aren't charged or proven to a jury. At its core, perhaps this reflects my own belief that Williams is also inconsistent with Blakely in the seeming inconsistent treatment of judicial fact-finding when it is guided versus when it is unguided. Here, my advice would simply be to temporize – and wait for the Court to clarify what it means.

This is, of course, just an outline of what needs to be done. To be sure other general categories can, and should, be identified and developed. And I realize full well that the scope of the project I have outlined is quite large. I trust, however, that the Commission will accept this task as an important, indeed vital, aspect of its work. I wish you the best of luck.

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Thank you for the opportunity to testify before the Commission. I look forward to answering any questions the Commissioners might have.