Practitioners' Advisory Group
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By Messenger

November 15, 2004

Mr. Michael Courlander
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Commission Hearing

Dear Mr. Courlander:

Thank you for extending to the Practitioners' Advisory Group ("PAG") an invitation to testify at the United States Sentencing Commission's public hearing on November 16, 2004.

We enclose written testimony regarding the PAG's views on the approach the Sentencing Commission should take assuming the Supreme Court decides in United States v. Booker (04-104) and United States v. Fanfan (04-105) that the holding in Blakely v. Washington, 124 S. Ct. 2531 (2004) applies to the Sentencing Guidelines. Our testimony also answers the questions identified as of particular interest to the Commission in Mr. McGrath's letter of November 4, 2004. See Enclosure 1. In addition, the PAG submitted a letter to the United States Sentencing Commission on November 4, 2004, setting forth its views at greater length. See Enclosure 2.

We welcome the opportunity to describe the PAG's recommendations and to respond to the Commission's questions. Amy Baron-Evans will be speaking on behalf of the PAG at the hearing.

Sincerely,

Mark Flanagan

Amy Baron-Evans
Co-Chairs
Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

ENCLOSURE 1

Written Testimony on Behalf of Practitioners' Advisory Group
United States Sentencing Commission
November 16, 2004

Amy Baron-Evans and Mark Flanagan
Co-Chairs, Practitioners' Advisory Group

Mr. Chairman and members of the Commission, thank you for inviting the Practitioners' Advisory Group to testify about potential changes to federal sentencing should the Supreme Court decide in United States v. Booker (04-104) and United States v. Fanfan (04-105) that the holding of Blakely v. Washington, 124 S. Ct. 2531 (2004) applies to the United States Sentencing Guidelines.

I. Constitutional Procedural Protections and to Which Facts They Would Apply

If the Supreme Court holds that Blakely applies to the Guidelines, then any fact that increases the sentencing range must be charged in an indictment and either proved to a jury beyond a reasonable doubt with admissible evidence, or admitted by the defendant in a guilty plea.

Unless and until the Supreme Court overrules Almendarez-Torres v. United States, 523 U.S. 224 (1998), the fact of prior conviction need not be charged and proved to a jury beyond a reasonable doubt. Facts relating to criminal history that require additional factfinding beyond the mere fact of conviction, such as the recency of the conduct or criminal justice status, would have to be charged and proved beyond a reasonable doubt. See e.g., United States v. Leach, No. 2:02-CR-00172-SD-14 at *4 (E.D. Pa. July 13, 2004) (declining to add three points based on the offense having been committed while the defendant was on probation and within two years from his release from jail).

As explained in PAG's letter of November 4, 2004, these protections would also apply to certain applications of the multiple count rules, as well as to fines and restitution. The protections would not apply to supervised release, revocation of supervised release, or the selection of a sentencing option.

II. The PAG Recommends Codified Guidelines

The PAG recommends that the Sentencing Commission support the legislative solution outlined by James Felman, former Co-Chair of PAG, in which critical culpability factors, such as drug quantity or loss amount and role in the offense would be codified as elements to be charged and proved to a jury beyond a reasonable doubt. The jury's determination or the defendant's guilty plea would result in a sentencing range within which the judge would impose the sentence. The number of offense levels would be reduced from 43 to 10 or more, and the widths of the resulting ranges increased accordingly, without overlap. A bifurcated proceeding would be available in the trial judge's discretion to prevent prejudice or confusion.

In choosing a sentence within the range determined by the jury's verdict or the defendant's guilty plea, sentencing judges would have discretion to consider on an advisory basis less important factors not codified as elements. A sentence above the top of the range established by the jury's verdict would be prohibited. A sentence below the range based on mitigating factors of a kind or to a degree not adequately encompassed by the elements or the within-range advisory guidelines would be permitted.

The defendant would have the right to appeal a sentence within the range on the same bases for appeal of a jury verdict on any other element, such as insufficiency of the evidence or instructional error. The sentencing court would be required to provide written reasons for a sentence below the range, and the government would have the right to appeal such a sentence on factual or legal grounds. The defendant would have the right to appeal a court's refusal to depart below the range as a matter of law.

The PAG supports this approach for constitutional and policy reasons. First, it ensures the fundamental constitutional right to a jury finding based on proof beyond a reasonable doubt of the facts essential to punishment. Second, a structure in which sentencing ranges are based on particular facts promotes certainty and avoids unwarranted disparity. Third, the increased rigor with which the facts that set the range would be found increases fairness and accuracy. Fourth, by permitting flexibility for individual offense and offender variations (within the range, and below the range for circumstances not encompassed by the elements or advisory guidelines), it advances proportionality and maintains the important judicial role in sentencing.

III. Uncharged, Dismissed, Acquitted and More Serious Offenses

In designing the Guidelines, the Sentencing Commission believed that a charge-based system would give too much sentencing power to the prosecution, which could effectively determine sentence lengths through its charging decisions. The Commission therefore opted for a modified "real offense" system in which the offense of conviction is only one of the factors that determine the sentence. As a result, uncharged, dismissed, and acquitted offenses, and more serious cross-referenced offenses often are the primary determinant of sentence length. Assuming that the Supreme Court decides that Blakely applies to the Sentencing Guidelines, it will have decided that these "real offenses" may no longer be used to increase the sentencing range.

Under the codified approach, certain important sentencing factors would be codified as offense elements. The sentencing range would be determined by the defendant's crime of conviction. The sentencing range could not be determined or increased by conduct that was not charged, dismissed if charged, or of which the defendant was acquitted. Any fact that otherwise is an element of an offense (either in the classical sense or as codified under our proposal) must be charged and either proved to a jury beyond a reasonable doubt or admitted by the defendant as part of a guilty plea. An unproven element may not be used at sentencing.

Under the codified approach, the conduct of others would increase the range only in cases in which the defendant is convicted of conspiracy. The jury would be instructed about the differences between criminal liability and sentencing accountability consistent with the limitations in U.S.S.G. § 1B1.3(a)(1)(B) and application notes 1 and 2. The sentencing impact of others' conduct would thus be restricted to that which was found by the jury to be (i) in furtherance of and (ii) reasonably foreseeable in connection with (iii) only that criminal activity which that particular defendant agreed to jointly undertake.

IV. Effect on Prosecutorial Charging Practices, Plea Negotiation Practices, and Achievement of the Goals of the Sentencing Reform Act

Years of experience under the Guidelines have shown that the minimal burden of proof, lack of evidentiary rules that if present would ensure reliability, and absence of notice or discovery requirements attached to "real offense" factors, have transferred sentencing power from judges and the Sentencing Commission to the prosecution in ways the Commission did not intend. Prosecutors are able to charge the most easily provable offense and obtain a sentence primarily determined by facts that could not be proved beyond a reasonable doubt with admissible evidence, and of which the defendant had no notice until after conviction. The absence of rigorous or reliable factfinding and discovery also gives the prosecution undue leverage in plea bargaining. And though charge bargaining may have been reduced by the Guidelines, fact bargaining has taken its place. The result of the foregoing has been unwarranted and hidden disparity across cases, and inaccurate and unjust sentences in individual cases.

The approach PAG recommends requires notice in an indictment of the elements that dictate the sentencing range, and discovery regarding those elements. Coupled with increased judicial discretion within the range, this will result in less prosecutorial control than now exists, more meaningful plea negotiation, less disparity, and more fairness and accuracy overall.

V. The "Bowman Fix" is Unconstitutional and Unsound Sentencing Policy

The "Bowman fix" would increase the top of each guideline range to the statutory maximum of the offense of conviction and would thus constitute the "maximum" sentence, while the "minimum" sentence would be the fully adjusted Guidelines sentence. Under one version, judges would be required to give a reason for a sentence above the "minimum" sentence subject to abuse of discretion review, while another version would permit such a sentence without a reason or appellate review. A sentence below the "minimum" would remain subject to the PROTECT Act's strict *de novo* review. The sole policy reason said to recommend this solution is that it saves the Guidelines by avoiding the Fifth and Sixth Amendment "problems." Its constitutional viability hangs on the conclusion by Justices Kennedy, Rehnquist, O'Connor and Scalia in Harris v. United States, 536 U.S. 545 (2002) that Apprendi does not apply to facts that extend a minimum sentence.

The PAG opposes the "Bowman fix" for constitutional and policy reasons. Apprendi held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed *range* of penalties to which the defendant is exposed." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis supplied). As the four dissenting justices in Harris noted, "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." Harris, 536 U.S. at 579 (dissenting opinion). Justice Breyer agreed, stating that he could not "easily distinguish [Apprendi] from this case in terms of logic," but that he was not "yet" prepared to accept Apprendi because of its "adverse practical, as well as legal, consequences." Id. at 569-70 (concurring opinion). Justice Breyer was primarily concerned that Apprendi's rule would invalidate the Guidelines. If the Court invalidates the Guidelines, the underpinning of Justice Breyer's resistance will be removed. Moreover, the Bowman proposal is very close to a system of mandatory minimums, which Justice Breyer strongly criticized in Harris. Id. at 570-71.

Justice Scalia also is likely to reject Professor Bowman's proposal. Though he joined the Harris plurality, he also joined the Apprendi majority, which made clear that a legislature may not evade constitutional rights by defining a fact that increases punishment as a mere sentencing factor, Apprendi, 530 U.S. at 490 n.16. He returned to this theme in his majority opinion in Blakely. See Blakely, 124 S. Ct. at 2539. In Blakely, Justice Scalia declared that because the jury is "no procedural formality, but a fundamental reservation of power in our constitutional structure," it is the jury that must find the "facts essential to punishment." The Bowman proposal openly admits to being a device to avoid the requirements of indictment, jury trial, and proof beyond a reasonable doubt that would otherwise attach to Guidelines facts by having them set the "minimum" rather than the "maximum" sentence. See 6/27/04 Bowman Memorandum to U.S. Sentencing Commission at 7. The purpose is to evade the Fifth and Sixth Amendments, and the effect is to exacerbate the existing constitutional problems by removing the Guidelines' cap on increases in punishment based on facts that were never charged, submitted to a jury, or proved beyond a reasonable doubt.

For all of the foregoing reasons, the PAG strongly believe that a majority of the Supreme Court would strike down Professor Bowman's proposal if enacted.

Furthermore, the Bowman fix is an assault on every goal of the Sentencing Reform Act. By creating judicial discretion to sentence up to the statutory maximum subject to no review or only deferential abuse of discretion review, it would promote the unwarranted disparity the Guidelines were intended to eliminate. This disparity would be exacerbated by the unconstrained ability to upwardly depart, while subjecting downward departure to strict *de novo* review. Undue lenity was not a concern of Congress in enacting the Sentencing Reform Act, and is even less so today, when Guidelines sentences have already become too harsh. With no empirical or other rational basis, we would have a system whose operating principle would be to prevent leniency and promote severity. The cost to the public would rise, and proportionality and fairness would be abandoned, for no reason other than to "save" the Guidelines. Importantly, the plea negotiation process would be adversely affected. The Bowman fix would encourage

prosecutors to threaten – even more often than they do now -- to seek sentences above the presumptive range. The proposal would also diminish predictability and certainty.

We do not believe that the Commission could issue a policy statement regarding where in the new broadened sentencing ranges judges should sentence, nor could there be rigorous and balanced appellate review without recreating the unconstitutional system we have today. Yet, it is the lack of sentencing standards and rigorous and balanced appellate review that undermines every tenet of sound sentencing policy.

Similarly, the PAG does not believe that advisory guidelines could be made sufficiently rigorous to achieve sentencing uniformity, proportionality and certainty without running afoul of Apprendi, Blakely, Booker and Fanfan.

VI. Changes to Current Statutes, Rules and Guidelines Necessary to Effectuate Constitutional Procedural Protections

It would not be necessary to rewrite each criminal statute to codify critical culpability factors. Instead, for example, a single statute would set forth the elements and corresponding ranges for all economic crimes.

Titles 18 U.S.C. §§ 3553 and 3742, 28 U.S.C. § 994, Fed. R. Crim. P. 11(b)(1)(M), and Fed. R. Crim. P. 32(i)(3) would be amended to describe a system of sentencing and appellate review in which the sentencing court must impose a sentence within the range established by the elements of the offense of conviction, the sentencing court may choose a sentence within that range based on the advisory sentencing guidelines, and the court may depart downward from the range established by the elements of the offense of conviction based on circumstances not taken into account by the elements or advisory guidelines.

Fed. R. Crim. P. 16 would be amended to mandate disclosure of all categories of discoverable evidence relating to any sentencing element that may be used to determine the sentencing range.

Fed. R. Crim. P. 31 would be amended to provide for a bifurcated proceeding if warranted by potential prejudice or confusion, subject to abuse of discretion review.

Fed. R. Evid. 1101 (d)(3) currently provides that the Rules of Evidence do not apply at sentencing. This was "not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing." See advisory committee's note to subdivision (d). The rule should be explicitly amended to state that the Rules of Evidence do not apply to judicial factfinding in applying advisory guidelines, but that they do apply to jury factfinding regarding elements.

U.S.S.G. Ch. 6, Pt. A of the Guidelines would have to be rewritten to explain that any fact that increases the sentencing range must be charged in an indictment and either proved to a jury beyond a reasonable doubt with admissible evidence, or admitted by the

defendant in a guilty plea, and that the relaxed burden of proof and evidentiary standards set forth in current section 6A1.3 may be used only in applying the advisory guidelines within the range.

VII. Timetable and Process Regarding Necessary Changes

The PAG believes that Congress should direct the Commission, with its substantial expertise in sentencing policy and the data it has collected over the years on actual sentencing practice, to recommend, after notice and comment, which facts currently treated as guidelines factors should be designated as elements to be enacted into law by Congress. The remaining factors would constitute within-range advisory guidelines. The Commission should continue to promulgate, and should consider simplifying, within-range guidelines going forward.

Congress should implement one of two systems in the interim while the elements and within-range guidelines are formulated and enacted. If the Supreme Court rules that the Guidelines are unconstitutional as a whole, Congress should direct that the current Guidelines be applied as advisory in the interim. If the Supreme Court rules that the Guidelines are unconstitutional as applied, Congress should authorize the inclusion of current guideline factors in indictments to be proved to juries beyond a reasonable doubt (or admitted by the defendant) in the interim.

To avoid the simultaneous administration of different sentencing systems, no interim solution other than one of the two logically dictated by the Supreme Court's decision should be adopted. In particular, the "Bowman fix" should not be implemented even as an interim solution. Under the *Ex Post Facto* Clause, that solution – by increasing the potential range of punishment -- could not be imposed unless the offense was committed after it was enacted. By the time a new long-term solution is enacted, those cases would just be making their way to sentencing. Even as a short-term solution, then, its benefit is illusory.

ENCLOSURE 2

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November 4, 2004

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Recommended Long-Term Legislative Response to Blakely v. Washington

Dear Judge Hinojosa:

We write to propose a long-term legislative solution should the Supreme Court decide in United States v. Booker (04-104) and United States v. Fanfan (04-105) that the holding in Blakely v. Washington, 124 S. Ct. 2531 (2004) -- that the maximum constitutional sentence is the maximum sentence the judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant -- applies to the United States Sentencing Guidelines ("Guidelines"). We believe it likely that the Supreme Court will find that the Guidelines, which allow a judge to increase a guideline sentence beyond the guideline range authorized by the jury or defendant's admissions, is inconsistent with a defendant's rights to indictment, jury trial and proof beyond a reasonable doubt.

We have met with the United States Sentencing Commission ("Commission") staff to discuss the broad outlines of a long-term solution, endorsing a proposal suggested by James Felman, former Co-chair of the Practitioners' Advisory Group. Under this proposal, the Guidelines will become part of the criminal code enacted by Congress ("Codified proposal"). The PAG supports that solution because it honors the rule announced in Blakely, advances sound sentencing policy (including the Commission's constructive role in designing and administering a rational sentencing system) and can be implemented as a practical matter.

The discussion below explains in more detail why we support the Codified proposal (See Section I); addresses the staff's questions as to whether and how the existing system will need to be changed under the Codified proposal (See Section II); and identifies the drawbacks to purely advisory guidelines and the so-called Statutory

Maximum approach (See Section III).[1] We hope this information is useful to the Commission in formulating a sentencing framework consistent with the pending Supreme Court decision.

I. The Codified Proposal

Under the Codified proposal, see Exhibit A, critical culpability factors, such as drug quantity, loss amount, or role in the offense will be selected from among the existing guideline factors to be codified as elements of the offense that will be charged and proved to a jury beyond a reasonable doubt. The jury's determination (or the defendant's guilty plea) will result in a sentencing range within which the judge will impose the sentence. The number of offense levels will be reduced from 43 to approximately 10, and the widths of the resulting ranges increased accordingly, without overlap. In choosing a sentence within the range, the judge will have discretion to consider, on an advisory basis, factors not codified as elements. A sentence above the top of the range established by the jury's verdict will be prohibited. A sentence below the range based on mitigating factors of a kind or to a degree not adequately encompassed by the elements or the within-range advisory guidelines will be permitted.

While Congress defines offense elements, we believe the Commission, with its substantial expertise in sentencing policy and the data it has collected over the years on actual sentencing practice, should recommend to Congress which facts currently treated as sentencing factors should be designated as elements. The Commission should continue to promulgate within-range advisory guidelines, perhaps streamlining them to retain some but not all of the existing guideline factors.

We support this approach because it will ensure the fundamental right to a jury finding based on proof beyond a reasonable doubt of the facts essential to punishment, while maintaining the flexibility needed to take account of individual variations. While some believe that a charge offense system places sentencing power in the hands of the prosecution, experience with the Guidelines has shown that the relaxed burden of proof and evidentiary protections attached to sentencing factors has transferred power to the prosecution, has resulted in inaccurate and unjust sentences in individual cases and has fostered widespread unwarranted disparity. The charge-based approach, coupled with sentencing flexibility and subject to appellate review, will make the system more transparent, fair and accurate.

II. Revisions To Consider Under the Codified Proposal

A. Relevant Conduct

The Guidelines, at section 1B1.3, provide the rules for using facts other than those found by the jury or admitted by the defendant to determine a sentence. Relevant

[1] The Chairs wish to thank Jim Felman, David Gottlieb, Carmen Hernandez, Mary Price, Bill Genego, David Debold, Jim Burdick and Nicole Balaci for their material contributions to this letter.

conduct can encompass conduct that was not charged, was charged and later dismissed or even was the subject of a not guilty verdict. Relevant conduct was originally intended to limit the impact of prosecutorial charging discretion on sentence length. Today, relevant conduct is assailed for being the tail that wags the dog at sentencing. Prosecutors are criticized for charging the most easily provable offense and waiting for sentencing, with its relaxed standard of proof and lack of procedural protections, to do the hard work of increasing the time a person will spend incarcerated. Relevant conduct often plays a central role and is frequently the primary determinant of the length of a sentence.

The relevant conduct rules can, for the most part, be readily incorporated into the Codified proposal to accommodate the enhanced role a jury will play in determining the facts that affect a sentence. Putting aside for the moment the treatment of other participants' conduct in section 1B1.3(a)(1)(B), the remaining relevant conduct provisions lend themselves readily to the charge and proof approach. Anything that will otherwise count as an element of an offense (either in the classical or in the Codified proposal's definition, see Exhibit A) that currently comes in at sentencing as relevant conduct will now be charged and subject to proof beyond a reasonable doubt or a stipulation. For example, under section 1B1.3(a)(1)(A), the government will charge and be required to prove "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . ." Similarly, the relevant conduct provision under section 1B1.3(a)(2) is readily amenable to charge and proof to establish the guideline range. Thus, acts that are part of the same course of conduct or common scheme or plan under section 1B1.3(a)(2) will be subject to charge and proof.

The charge and proof approach has the benefit of eliminating the most criticized practices required by the current rules: use of acquitted conduct, dismissed charges and cross referenced offenses. The relevant conduct provision is thus reformed to assure that a defendant is sentenced based on the crime for which he is convicted and not for conduct that was never charged, dismissed if charged or for which he was acquitted.

The Codified proposal will limit the application of section 1B1.3 (a)(1)(B), which establishes the contribution of others' conduct to determining the defendant's sentence, to defendants convicted of conspiracy. (Now it applies whether or not the conduct is charged as a conspiracy). The approach, however, will retain the limits on sentencing exposure contained in the guideline and its commentary which differentiate between criminal liability and culpability. Sentencing for defendants convicted of conspiracy will continue to rely on the Commission's commentary to 1B1.3. Specifically, it will retain the limitations on sentencing exposure imposed by section 1B1.3(a)(1)(B) by treating that subsection and its commentary as jury instructions.

Under this approach, the jury will be instructed about the differences between sentencing accountability and criminal liability consistent with the limitations the guideline currently imposes. The commentary restricts the sentencing impact of others' deeds to conduct that was (i) in furtherance of and (ii) reasonably foreseeable in connection with (iii) only that criminal activity which that particular defendant agreed to

jointly undertake. Thus, if defendant's co-conspirator committed a crime in the course of the conspiracy, then defendant is entitled to an instruction to the jury before he can be sentenced based on that crime following a conviction for conspiracy. That instruction will focus the jury on making necessary findings concerning forseeability and scope of agreement. The application notes contain a wealth of material that can inform the new jury instructions and harmonize the use of relevant conduct to the newly articulated requirement that juries, not judges, find the facts on which an increased sentence is based.

B. Multiple Counts of Conviction

The Guidelines handle multiple count issues in two places -- Chapter 3D and Chapter 5G. In Chapter 3D, the Guidelines address the effect of multiple counts of conviction on calculation of the offense level. They instruct the judge to determine first whether the multiple counts belong in the same "group." If they are in the same group, the conduct relevant to each count in the group is considered when determining whether to apply specific offense characteristics or other adjustments to the offense level. If they are not in the same group, a number of "units" is assigned to each count (or group of counts, if some are in the same group and some are not), and those units translate into offense levels to add to the count that has the highest offense level. In Chapter 5G, the Guidelines address when sentences should be made to run concurrently or consecutively.

Under the Codified proposal, the issue becomes what exactly it is that the jury must find to allow the courts to apply Chapters 3D and 5G. The most frequent way in which counts are "grouped" is where the offense is covered by a Chapter Two guideline listed in the first part of subsection 3D1.2(d). That list identifies offense guidelines where the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved or some other measure of aggregate harm. Drug offenses and fraud/theft offenses fit here.

Under our approach, the court may not sentence based on a finding that increases the guideline range maximum unless that finding is made by the jury or submitted by the defendant. On first blush, grouping under section 3D1.2(d) appears to increase the maximum of the range. Grouping will allow the court, for example, to add drug amounts from count 2 to increase the offense level for the drug offense in count 1. However, without the grouping of these counts, section 3D1.4 would apply and counts 1 and 2 would be assigned either a unit, half a unit, or no units, depending on the relative seriousness of each offense. The total number of units translates into additional offense levels. When compared with grouping under section 3D1.2(d), that could lead to a higher range, the same range, or a lower range, depending on the facts. If grouping leads to the same range or a lower range, there is no Blakely problem. Even if application of the grouping rule yields a higher range in a particular case, it appears that no special jury finding is needed. The grouping decision is made based on which Chapter Two provision applies to the offense of conviction. Thus, guilty verdicts on each of two drug counts, for example, provide all the findings a court will need to hold that the counts should be grouped.

Grouping based on sections 3D1.2(a) – (c) is more problematic. Again, in some cases grouping under these provisions (as compared to not grouping and adding units instead) might raise the guideline range, but much more frequently it will not. In cases where it will not, there is no Blakely problem. In the rare case where grouping leads to a higher offense level, the jury might need to decide, for example, whether two counts "involved the same victim," USSG § 3D1.2(a), or whether the acts or transactions in each count were "connected by a common criminal objective" or "a common scheme or plan," USSG § 3D1.2(b). Subsection (c) applies if one of the counts embodies conduct that is treated as an adjustment to the guideline applicable to another count. Though there may be cases where grouping under (c) will cause a net increase in the range, no special factual finding by the jury is required. Instead, all the judge needs to do is examine whether the guideline calculations for the two counts in question have a factor in common.

As for concurrent versus consecutive sentences, there is a general statutory provision and a general guidelines provision. Under 18 U.S.C. § 3584(b), the court is directed to consider the factors set forth in section 3553(a) in deciding whether to impose concurrent or consecutive sentences. The factors in section 3553(a) are the very ones the courts are directed to consider when choosing the length of the sentence. In other words, these general factors (e.g., the need for the sentence imposed to deter, promote respect for the law or reflect the seriousness of the offense) guide a judge's discretion but do not dictate a particular result. Thus, section 3584 does not appear to require the court to submit additional facts to a jury to justify a consecutive sentence.

There are also special statutory provisions that *require* a consecutive sentence. These statutes, such as 18 U.S.C. §924(c), mandate such treatment for every defendant convicted of the offense. Thus, no additional findings are needed, and Blakely does not come into play. For cases where the statute of conviction does not mandate consecutive sentences, section 5G1.2(d) of the Guidelines directs the court to sentence in that manner only to the extent needed to impose the term of imprisonment that the judge has chosen from within the applicable guideline range. This comes into play where the range, in whole or in part, exceeds what is permitted for the count with the highest statutory maximum. Again, it does not appear that any additional jury findings are needed for the court to follow this directive.

Ultimately, further consideration will need to be given to how consecutive versus concurrent decisions are made. If, under a modified sentence regime, the decision whether to impose consecutive sentences is conditioned on a finding of fact, that regime must put such a finding in the hands of the jury. If, on the other hand, the new regime leaves the decision to the court's discretion, the jury need not play a role.

There is one final multiple count issue that must be addressed. Currently, each offense of conviction carries its own statutory maximum, but conduct that was part of one offense can be used to affect the total sentence imposed on a different count. Under the Codified proposal, certain sentencing factors will become elevated to the status of elements and the offense of conviction will be defined by the combination of traditional

elements and (new) sentencing elements that the jury finds. Each offense will start with a "base" version (based on traditional elements), and any number of aggravated versions will result from the mixing and matching of aggravating factors. Thus, a base drug offense might be punishable within a range of 1 – 2 years. Add in a certain drug amount and a certain role and the penalty might change to 3 – 4.5 years. A different combination of amount and role could lead to a higher range; yet another combination could yield a lower range; and so on. Under such a regime, there will still need to be some consideration as to how an "unrelated" offense (that is, one that is not accounted for in the drug offense calculation, such as a theft) affects the result. Depending on what facts or factors figure into that calculation, there may need to be a jury finding that authorizes consecutive sentencing or – in our example – enhancement of the sentence for the drug offense.

C. Fines, Restitution, Supervised Release/Revocation, Sentencing Options

1. Fines

A monetary fine is part of the defendant's sentence and is a criminal penalty, see 18 U.S.C. § 3551(b)(2), Apprendi v. New Jersey, 530 U.S. 466, 501-502 (2000). Consequently, U.S.S.G. § 5E1.2 must be re-written in certain respects to comply with the right to a jury finding based on proof beyond a reasonable doubt regarding facts essential to punishment. The jury's verdict will establish the offense level and corresponding minimum and maximum fines under section 5E1.2(c)(3) and (4). The factors set forth in 18 U.S.C. § 3572(a) and U.S.S.G. § 5E1.2(d) will be applied by the court as advisory within the range.

Pursuant to statute, in cases of pecuniary gain or loss, the defendant "may be fined not more than the greater of twice the gross gain or twice the gross loss." See 18 U.S.C. § 3571(d). Application Note 4 of section 5E1.2 provides for upward departure in three circumstances: (1) where "two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline" in subsection (c); (2) to ensure "disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture)"; and (3) to ensure "an adequate punitive fine." Under the Codified proposal, gross gain or gross loss for purposes of imposing a fine will be charged in the indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant, and an upward departure will not be available. The guideline range will permit varying levels of "punitiveness" in the judge's discretion.

Though not entirely clear, Application Note 6 of section 5E1.2 can currently be read to permit an upward departure in cases where the court determines that the defendant failed to disclose income or assets. While failure to disclose could be a factor for the court to consider when choosing a fine within the range, it could not form the basis for an upward departure from the range because the defendant's failure would take place – if at all – after the jury verdict and therefore could not be a fact for the jury to find.

Additionally, Application Note 6 provides that if "the court concludes that the defendant *willfully* misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence [and the fine associated with that increased offense level] in accordance with Chapter Three, Part C (Obstruction)." U.S.S.G. § 5E1.2, comment. (n.6) (emphasis supplied). This will no longer be permissible under the Codified proposal. If the government seeks punishment for obstruction of justice in this manner (or any other), it will have to charge it in an indictment and prove it to a jury beyond a reasonable doubt. Cf. Blakely, 124 S. Ct. at 2539 n.11.

2. Restitution

Given that the Guidelines direct a court to order restitution where it is authorized by statute to do so, see U.S.S.G. § 5E1.1(a)(1), any violation of a defendant's right to a jury finding based on proof beyond a reasonable doubt that occurs in ordering a defendant to pay an amount of restitution results from the statutory provisions governing restitution and not the Guidelines. Nevertheless, the statutory provisions governing restitution appear to implicate the rights identified in Blakely. The court is required to order restitution in the full amount of the victim's loss, and to determine the victim's loss, the court must find facts not established by the jury's verdict. See 18 U.S.C. §§ 3663, 3663A, 3664(f)(1)(A).

Restitution is subject to the right to jury factfinding based on proof beyond a reasonable doubt for two reasons: (1) restitution is punishment; and (2) restitution increases based on facts found by a judge by a preponderance of the evidence. Furthermore, the statute itself refers to restitution as a criminal penalty. See 18 U.S.C. § 3663A(a)(1) ("Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to or in lieu of, *any other penalty* authorized by law, that the defendant make restitution to the victim of the offense") (emphasis supplied). Even in the Ex Post Facto context (which says nothing of the Fifth and Sixth Amendment context), the majority view is that restitution is a criminal penalty. See United States v. Edwards, 162 F.3d 87, 89-90 (3d Cir. 1998)(collecting cases); United States v. Siegel, 153 F.3d 1256, 1259-61 (11th Cir. 1998).[2]

Other courts have ruled that restitution is not subject to Apprendi and later Blakely on the ground that restitution is not subject to a "statutory maximum." See United States v. Wooten, 377 F.3d 1134, 1144 (10th Cir. 2004); United States v. Einstman, 325 F. Supp.2d 373, 382 (S.D.N.Y. 2004); see also United States v. Behrman, 235 F.3d 1049, 1053-54 (7th Cir. 2000) (restitution does not violate Apprendi both because it is not a criminal penalty and because the restitution statute "does not include a

[2] However, at least two courts have held that restitution is not subject to Blakely by relying on decisions holding that restitution is not a criminal penalty for purposes of the Ex Post Facto Clause. See United States v. Croxford, 324 F. Supp.2d 1230, 1250 (D. Utah 2004); United States v. Burrell, 2004 WL 1490246 (W.D. Va. 2004). We believe that this conclusion is wrong because none of the courts to rule has adequately considered that restitution is a punishment which increases based on facts found by a judge by a preponderance of the evidence.

'statutory maximum' that could be 'increased' by a given finding."). These courts reason that because a court is authorized by the fact of a defendant's conviction to order restitution for the full amount of the victim's actual loss, without limitation, the court's determination of the amount of loss does not result in an otherwise unauthorized increase in punishment. This view was first articulated in response to a post-Apprendi, pre-Blakely challenge. See Behrman, 235 F.3d at 1053-54. Courts that have adopted that view post-Blakely have done so without considering that what now constitutes the statutory maximum is only what is authorized by the jury's verdict.

Therefore, under the Codified proposal, restitution will be subject to the right to jury factfinding based on proof beyond a reasonable doubt. Facts leading to restitution determinations will be required to be pled and proven or admitted by the defendant.

3. Supervised Release

We do not believe that the Codified proposal requires modification of the Guidelines or statutes pertaining to supervised release. By statute, a court is permitted (and in some instances required) to impose a term of supervised release and the maximum term is also set by statute. See 18 U.S.C. § 3583(a), (b). The Guidelines require a court to impose a term of supervised release whenever a sentence of more than one year of imprisonment is imposed, and also set minimum terms of supervised release. See USSG §§ 5D1.1, 5D1.2. The length of the term of supervised release required under the Guidelines is determined by the statutory classification of the offense of conviction, and the court is not required to find any facts not already established by the jury's verdict. Thus, these provisions do not appear to violate Blakely.

4. Revocation of Supervised Release

It appears that the Sixth Amendment jury trial right does not apply to a supervised release revocation proceeding and thus an order directing a defendant to serve all or part of a term of supervised release in prison will not be subject to Blakely. See Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Fed. R. Crim. P. 32.1 advisory committee notes, 1993 Amendments; United States v. Taveras, 380 F.3d 532, 536-38 (1st Cir. 2004).

By statute, a court has discretion to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute . . . if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . ." See 18 U.S.C. § 3583(e)(3). Before revoking a term of supervised release or ordering a defendant to serve a term of imprisonment based on the violation, the court considers "the factors set forth in" section 3553(a)(1), (a)(2)(B)-(D), and (a)(4)-(7). See 18 U.S.C. § 3583(e).

Subsection (a)(4) of section 3553 requires the court to consider "in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission." See 18 U.S.C. § 3553(a)(4)(B). While section 3553(a)(4)(B) only requires a court to "consider" the Guidelines, section 3553(b)(1) requires the court to impose a sentence within the applicable guideline range. See 18 U.S.C. § 3553 (b)(1) ("the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission").

The Guidelines contain a series of "policy statements" that set forth a comprehensive approach to violations of supervised release, which include establishing different "grades" of violations and a "revocation table" with ranges of imprisonment to be imposed based on the grade of violation and the releasee's criminal history category. See U.S.S.G. § 7B1.1-4. Thus, in revoking a releasee's supervised release, and ordering the releasee to serve all or part of the term of supervised release in prison, a court is unquestionably finding facts that result in the individual being required to serve time in custody. Nevertheless, established precedent mandates the conclusion that this does not violate Blakely because the Sixth Amendment jury trial right does not apply to a supervised release revocation proceeding. See Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Fed. R. Crim. P. 32.1 advisory committee notes, 1993 Amendments; United States v. Taveras, 380 F.3d 532, 536-38 (1st Cir. 2004).

5. Sentencing Options

We do not believe that a court's selection of a sentencing option under U.S.S.G. §§ 5F1.1-7 violates Blakely. A court's discretionary authority to impose, order or recommend these options is provided for by statute and the Guidelines merely recognize the court's discretionary authority to select one of the options in the specified circumstances. The Guidelines do not require a court to find any facts in order to exercise its discretion to select these options where they are available. Therefore, a court's selection of an option does not violate Blakely. Furthermore, with the exception of the denial of eligibility for certain federal benefits under section 5F1.6, the sentencing options are not additional penalties in their own right.

D. Alterations in Rules and Statutes

The Federal Rules of Criminal Procedure and Federal Rules of Evidence will require some amending under the Codified proposal. Below is a summary of the types of issues that will need to be addressed.

1. Rule 11

The language of Rule 11 will be modified so that, in addition to the determination that the plea has a factual basis, such a determination must extend to a factual basis for

each of the elements. Rule 11's existing requirement (that the court advise the defendant when taking the plea of any maximum possible penalty) will necessarily require the court to apprise the defendant of all guidelines determinations at the time of taking the plea.

2. Rule 16

Blakely's greater impact, however, will be felt in the realm of discovery. For example, Rule 16 was designed in great part to streamline pre-trial and trial processes consistent with the Fourth, Fifth and Sixth Amendments' responsibilities and prerogatives and to assure defendants a fair understanding of the actual charges and physical evidence against them, including statements they purportedly made. For example, Rule 16(a)(1)(E) mandates disclosure of certain items of presumptively crucial evidentiary value, if the item is

(i) material to preparing the defense; or
(ii) the government intends to use the item in its case in chief at trial; or
(iii) the item was obtained from *or* belongs to the defendant.

Thus, if the government alleges a pharmacist was selling opiates out of the back door of his pharmacy, any FBI 302, DEA 6 or other agent, police or lab report reflecting the specifics of that conduct is currently mandated for release to defendant at the first pre-trial. On the other hand, pre-Blakely, the government had no obligation to prove at trial the number of pills sold. Therefore, other guideline-relevant as opposed to guilt-relevant analytical reports are not subject to a release requirement under the rule. However, under the Codified proposal, to the extent that the number of units of opiates equates to a specific guideline range, the number of pills sold will become critical for trial purposes and thus discoverable. Adequate preparation for any kind of trial defense will now necessarily involve resolution of some factors which were traditionally sentencing factors. Thus, Rule 16 will have to be amended to *mandate* disclosure of items material to preparing for the jury adjudication of the *sentencing* issues as part of the overall defense.

Certainly, to the extent that sentence enhancing provisions of the Guidelines become a matter of proof in the case-in-chief, the government will also have no alternative but to reveal pre-trial physical evidence it has which is relevant to the evaluation of those elements. Additionally, the government, if not trying to push a plea, currently may at times fight defendants' motions designed to force disclosure of the government's sentencing calculations. Any fair reading of Blakely suggests a requirement that the government release any document it has that in any way tends to prove any enhancement that would increase the guideline range: *why* a victim is "vulnerable;" *how* the defendant would have known; *how* an otherwise "run of the mill" federal felony could be proven to have been involved or intended to promote a federal crime of terrorism.

Finally, all the elements of aggravating (and even mitigating) roles will have to be disclosed (under Rule 16), since they too will have to be proven beyond a reasonable doubt at trial.

3. Rule 31[3]

An amendment to Rule 31 will be necessary if a bifurcated system is implemented.

4. Rule 32

Federal Rule 32 also will require some modest fix. Under Rule 32(i)(3), subsection (A) will not change; however, subsection (B) will require additional language to reflect the Blakely requirement of proof beyond a reasonable doubt for sentencing issues such as follows: "***may consider only substantive and specific jury findings of fact as to any guideline sentencing enhancement factor,*** *or rule on any disputed fact relevant to a defendant's sentence within the guidelines not requiring a jury finding, such as departures below the guidelines under §5K2.0.*"

5. FRE Rule 1101

The Federal Rules of Evidence will undoubtedly be influenced as well, especially rules such as Rule 1101(d)(3), which currently precludes employment of the Rules of Evidence in sentencing. The Rules of Evidence will be relevant since they are based (theoretically, if not always practically) on due process considerations. A jury will be required to make a finding beyond a reasonable doubt as to whether the amount of drugs is five kilos or 500 grams. Thus, the same safeguards on reliability of evidence must be the guiding principle for the jury's decision-making as any other reasonable doubt-required issue.

III. Alternative Proposals

We have discussed above alterations in the sentencing system that the Commission should consider in making recommendations to Congress to make the system consistent with Congress's and the Commission's long-term objectives and the Supreme Court's mandates in Blakely. While there are a number of different approaches that the Commission might support, we urge the Commission not to support any proposal that does not take seriously the purposes of the Sentencing Reform Act ("SRA") and the Supreme Court's concerns in Blakely.

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[3] Bifurcation may be necessary under the Codified proposal. The PAG, however, has not closely examined bifurcation for the purposes of this letter. The PAG can provide further input on this issue if the Commission has questions regarding how bifurcation would be implemented under the Codified proposal.

Our view is that a rational solution will involve a compromise that moves some of the power to determine adjustments to juries and that maintains a meaningful opportunity to account for individual variations. We have therefore urged a system such as the Codified proposal, that provides the jury with the power to determine, within wider limits than now exist, critical culpability issues, but which also retains judicial discretion to account for individual variations. We believe this is the best solution for resolving the competing tensions between the need to control unwarranted disparity, promote judicial economy and appropriately recognize a defendant's jury trial right.

Although some members of the defense bar and academia support proposals to modify the Guidelines to make them advisory rather than mandatory, PAG believes that rules that are mandatory are valuable in controlling unwarranted disparity, and in providing certainty so that defendants can make rational decisions in negotiating plea agreements and in trial strategy. In addition to undermining uniformity and certainty, advisory guidelines, unless coupled with increased procedural safeguards such as a more demanding burden of proof, evidentiary rules and confrontation rights, would once again enshrine the inaccuracy of the pre-Guidelines indeterminate sentencing system. The Codified proposal offers a balanced approach to sentencing in that it preserves a significant degree of discretion for judges while also allowing for mandatory guidelines to avoid unwarranted disparity.

Even more, we oppose "fixes" for the Guidelines that seek abandonment of the very goals that underlie the Guidelines and abandon the compromises that were essential to passage of the SRA in 1984. Professor Frank Bowman wrote the most prominent of these proposals (which is called here the "Statutory Maximum" approach or proposal). This approach seeks to avoid the "problem" of the Guidelines' impingement on a defendant's constitutional rights by dramatically increasing the authorized sentence for each crime. It would maintain the Guidelines as written, with a minor change in language that would have a dramatic impact. Although the minimum term set by each guideline range would remain, and the judge would still decide all sentencing factors by a preponderance of the evidence, the maximum for each guideline range would be removed. Judges could sentence a defendant up to the congressionally imposed statutory maximum, in any case, with review only for abuse of discretion. On the other hand, a judge could not sentence below the guideline range, except under the very strict rules and standard of appellate review imposed by the Feeney Amendment. Errors that increased a defendant's exposure would be treated in a fundamentally different and more lenient fashion than errors that reduced a defendant's sentence. The Statutory Maximum approach, in effect, would replace the structured and balanced system that was contemplated by the SRA with something close to a system of administratively imposed mandatory minimum sentences.

In our view, this or any similar proposal does not further the purpose of the SRA -- the regulation of judicial discretion and undue disparity. The legislative history of the SRA is replete with statements that the indeterminate system it replaced allowed disparate and inconsistent results. The SRA did not spring out of a view that sentences were, on the whole, too lenient. Indeed, the bipartisan and system-wide consensus that

drove the SRA included many in the defense community. Those individuals understood that while some defendants would receive longer sentences in a Guidelines regime, this price was worth paying to control unwarranted severity. Consistent with that promise, the Guidelines contain both a top and a bottom, and they permit and control both upward and downward departures.

The Statutory Maximum proposal abandons the balance that is essential to the fairness of the guideline system. It eliminates control of upward departures and adjustments. The Feeney Amendment strictly limits the ability of judges to depart downward. In combination, the Statutory Maximum approach and the Feeney Amendment go a long way toward converting the Guidelines from a general control on judicial disparity to a system of mandatory minimum sentences. A sentencing system whose major operating premise is to prevent "undue" leniency is not the system that was created in 1984, and is not the system we believe the Commission should go on record as supporting.

The Statutory Maximum proposal does not argue that the deregulation of upward departures and adjustments is, in and of itself, sound policy. It does not assert that the new rules increasing judicial discretion are advisable because judges have been too constrained in their ability to depart in an upward direction. Nor does it take the view that, as a general matter, the Guidelines are too inflexible. If so, it would support the view held by many that the Guidelines should be made purely advisory. Rather, the sole justification is the assertion that it is the simplest method of dealing with the constitutional "problem." The Statutory Maximum approach, however, downplays the costs that are imposed by the proposal, costs that somewhat ironically fall entirely upon the group the Supreme Court sought to benefit in Blakely -- criminal defendants facing increased punishment. The Statutory Maximum proposal argues that the potential for increases in disparity and undue severity that would attend the elimination of mandatory checks on upward adjustments and departures will not be realized, since judges rarely depart upward at present.

We believe that the threat of undue severity is more significant than the Statutory Maximum proposal suggests. While there are few upward departures under the current system, we believe this signifies that the Guidelines are already severe enough, or in many cases too severe. Judges rarely depart upward at present because additional aggravating factors simply are not present in the case and prosecutors cannot prove them. With the elimination of controls on upward departures, judges inclined to impose more severe sentences for any reason or no reason at all will be free to do so.

Perhaps more important is the impact of the Statutory Maximum proposal on plea negotiations. We believe, as do most members of the defense community, that the elimination of binding guideline maximums will encourage AUSAs to threaten, in a more consistent manner, to request sentences above the presumptive range. It would, without question, diminish the predictability that now governs the bargaining process.

Finally, the Statutory Maximum proposal is also flawed, as it is the one most likely to be found in violation of the Constitution. As the Statutory Maximum approach noted, it can survive only so long as the Supreme Court declines to extend the rule in Blakely to findings necessary to enhance a mandatory minimum sentence. Such sentences were held constitutional in Harris v. United States, 536 U.S. 545 (2002), but only by the narrowest of margins, and under circumstances that do not argue strongly for its continued stability.

In Harris, the Court narrowly upheld a judicially imposed mandatory minimum sentence based upon a finding that the defendant had 'brandished' a firearm. A four-member plurality declared that judicially-imposed mandatory minima do not violate a defendant's jury trial right, "since the jury's verdict has authorized the imposition of the minimum, with or without the finding." In a dissent joined by four members of the Court, Justice Thomas disagreed with the notion that enhancement of a minimum sentence should be decided differently from an enhancement of the maximum penalty. He declared that when the legislature provides that a particular fact shall give rise to a "special punishment" the defendant is entitled to a jury trial on that fact.[4]

Although Justice Thomas's position fell one vote short of a majority, Justice Breyer expressed his view that it was difficult to reconcile the result in Harris with the Court's jurisprudence in the Apprendi line of cases:

> I cannot easily distinguish Apprendi v. New Jersey, 530 U.S. 466 (2000) from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction. At the same time, I continue to believe that the Sixth Amendment permits judges to apply sentencing factors--whether those factors lead to a sentence beyond the statutory maximum (as in Apprendi) or the application of a mandatory minimum (as here). And because I believe that extending Apprendi to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule. I therefore join in the Court's judgment, and I join its opinion to the extent that it holds that Apprendi does not apply to mandatory minimums.[5]

To put it mildly, Blakely removes some of the practical reasons that underpinned Justice Breyer's decision in Harris. Although Justice Breyer, in Harris, expressed the view that he was not "yet" ready to accept the Apprendi line of cases, he may well decide in Booker that it is no longer possible to resist its result. Moreover, there will be no practical benefit to a rule declaring that increases in the bottom of a guideline range, but not in the top, can be found by a judge based on a preponderance of the evidence.

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[4]Harris, 536 U.S. at 576 (Thomas, J., dissenting).

[5]Id., 536 U.S. at 569-70 (Breyer, J., concurring).

Finally, the Supreme Court has cautioned that revising the criminal code and sentencing rules with the intent to evade constitutional rights would raise additional constitutional questions.[6]

In sum, we regard the Statutory Maximum proposal as bad policy and as potentially unconstitutional. We urge the Commission not to recommend it to Congress. Instead, we recommend that the Commission adopt a recommendation that incorporates a guideline system such as represented by the Codified proposal.

Sincerely,

Mark Flanagan
Amy Baron-Evans

cc: Hon. Rubin Castillo
Hon. William K. Sessions
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Michael O'Neill
Commissioner Edward F. Reilly, Jr.
Commissioner Deborah J. Rhodes
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

[6] Apprendi, 530 U.S. at 491 n.16.

EXHIBIT A

TO: U.S. Sentencing Commission
FROM: James Felman[1]
RE: Legislative solutions to *Blakely*
DATE: September 16, 2004

I. Introduction – What are the options?

On the assumption that the Supreme Court in *Booker* and *Fanfan* holds that the guideline maximum is the relevant statutory maximum for Sixth Amendment purposes, there are at least three possible legislative responses:

1. *Codified*[2] *Guidelines*

Sentencing ranges within the otherwise existing statutory minimum and maximum sentences could be determined by factors charged in the indictment and found by the jury (or established by stipulation through guilty plea).

2. *Advisory Guidelines*

The existing guidelines could be converted to non-binding advisory guidelines for use by district courts in exercising authority to sentence within the otherwise existing statutory minimum (if any) and maximum sentences.

3. *Guidelines as Mandatory Minimums*

The top end of existing guideline ranges could be eliminated, permitting the district courts to impose a sentence within a range created by the existing guideline minimum and the otherwise existing statutory maximum punishment.

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[1]This memorandum is submitted solely in my individual capacity and does not necessarily represent the views of the American Bar Association, the Federal Bar Association, the Practitioners' Advisory Group, or any other organization.

[2]The term "codified" is likely synonymous with "Blakelyized," as that term has been used by some commentators. I use the term "codified" because it clarifies that the guidelines would become a part of the criminal code enacted by the Congress. (I have also elected to use the term "codified" both because it is easier to pronounce and because it avoids awkward issues such as whether "Blakelyization" is a word).

I believe the first of these three alternatives best accomplishes the policy choices underlying the Sentencing Reform Act ("SRA"), which I assume remain sound notwithstanding *Blakely*. Before turning to the shortcomings of the second and third options, both of which have the superficial appeal of relative simplicity, I would first like to flesh out possible options regarding codification.

II. What would codified guidelines look like?

A. A basic overview

It is fairly easy to state the overall approach to codifying the guidelines: first, certain critical culpability factors would be added as elements of the offense[3] to be charged in the indictment and presented to the jury. Second, the jury's verdict would yield a sentencing range within the existing statutory range that would ordinarily be binding upon the district court. Beyond the basics of this overall approach, there is considerable room for difference in application. For example, at one extreme, the existing guidelines could be adopted wholesale into statute and presented in their current form to the jury. While I have heard some defend this approach with force, the "majority view" seems to be that the existing guidelines are so lengthy and complex that it would be unwieldy to present them in their present form to juries.

If less than all of the existing guidelines factors are to be converted to elements of the offense, the real task is deciding which ones to keep and which to discard.[4]

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[3]Some have referred to "sentencing factors" being charged and proven to the jury as distinct from "elements of the offense." I believe this "sentencing factor" terminology may confuse the issue and that the better course is to refer to any fact which must be charged and found by the jury as – by definition – an "element of the offense." In the same vein, some refer to the addition of offense elements as "code reform," presumably on the assumption that individual criminal statutes would need to be amended to codify the guidelines. This again may risk confusing the issue, as "code reform" certainly sounds like a daunting task. While the addition of elements may have the de facto effect of "code reform," it need not be effectuated by amending individual criminal statutes. Instead, a single statute could be enacted to which all offenses within a particular category are funneled. Thus a single statute resembling U.S.S.G. Section 2B1.1 could set forth the additional elements of all economic crimes.

[4]Of course, there is nothing in *Blakely* which precludes the use of sentencing factors not added as elements of the offense as advisory considerations to aid district courts in their determination of where to sentence within the range established by the jury's verdict. Indeed, it may

These policy decisions are ideally suited to a body such as the United States Sentencing Commission. One possible approach in controlled substances cases, which account for nearly half of the cases, would be to focus on the factors of drug quantity and type and role in the offense. Similarly, sentencing for economic crimes might focus on loss and role in the offense. In light of the critique that the current guidelines overemphasize quantity to the detriment of role, these two factors could be merged through a table where quantity runs down the vertical axis and role runs across the horizontal axis. This would permit a wider variety of policy choices including, for example, setting the punishment for minimal role in an offload lower than that for being the kingpin in a distribution network involving less quantity.

Through careful study, additional culpability factors can be considered and either included as elements or relegated to advisory status for within-range consideration. The number of culpability factors is a trade-off related to both complexity and the width of the sentencing ranges which result – as more factors are submitted to the jury, the system becomes more complex but the resulting sentencing ranges can be kept more narrow. The SRA limited sentencing ranges to 25% or 6 months and allowed them to overlap. This resulted in a sentencing table with 43 levels. On its face, it seems unnecessarily complex to continue with a system of presenting sufficient factors to juries that would enable them to slice a defendant's culpability 43 ways. If district courts could be trusted to sentence within ranges 50% or 12 months in width and overlap between the ranges were eliminated, however, the sentencing table could be simplified to 10 levels:

1. 0- 1 year
2 1 - 2 years
3 2 - 3 years
4 3 - 4.5 years
5 4.5 - 6.75 years
6 6.75 - 10 years
7 10 - 15 years
8 15 - 22.5 years
9 22.5 - 30 years
10 30 years - Life

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be helpful to retain many of the existing functions of the Sentencing Commission to promulgate advisory guidelines to facilitate the exercise of such "within range" discretion.

As with the present table, criminal history may be accounted for through horizontal expansion of the table. To allow sufficient flexibility in this process, a few additional offense levels could be added as needed.

Reasonable people may differ regarding the number and identity of factors to include as elements. And, of course, this proposal says nothing about the length of sentences and whether they should be the same or different from present severity levels. Accordingly, this suggested approach is hopefully apolitical, allows an appropriate balance to be struck between what must be presented to the jury and the avoidance of undue complexity, and preserves a significant degree of discretion for individual judges while avoiding at least the most severe scenarios of unwarranted disparity.

B. Departures and Appeals

Assuming the Court holds that the guidelines maximum is the statutory maximum, this would seem to eliminate the possibility of upward departures from the range established by the jury's verdict. It may well be that there are certain aggravating factors that would justify an upward departure from the existing guidelines, but these factors would need to be added as elements for jury consideration to support an increase in the otherwise applicable range. On the other hand, there is nothing in *Blakely* which would prohibit downward departures. Accordingly, a codification of the guidelines could preserve the ability of a district judge to depart downward based upon mitigating circumstances of a kind or to a degree not adequately considered by either the elements presented to the jury or the "within-range" advisory guidelines. Although a defendant would not be able to appeal from any sentence within the guideline range, and there would be no sentences to appeal from above the range, there could perhaps be a right of appeal similar to the existing one where the court declines to depart as a matter of law rather than fact. The government would presumably be entitled to appeal downward departures both on legal and factual grounds.

C. Other Procedural Issues

There are a number of other procedural issues which would need to be addressed. For example, there may be circumstances in which it will be necessary to bifurcate the jury's consideration of some elements in a manner similar to the practice

in civil cases involving punitive damages. This issue may lend itself to a general statement of principle to be applied by district judges with an abuse of discretion standard of review.

There is also a question of the distribution of authority between the Sentencing Commission and the Congress on a going forward basis. In light of the fact that sentencing factors will be elements of the offense, it would appear to present a *Mistretta* problem for the Commission to promulgate "sentencing elements" of future crimes subject to Congressional veto. Instead, it seems likely that the Congress alone would have authority to promulgate sentencing elements, perhaps acting on recommendations from the Commission. On the other hand, it may be that the Commission could be delegated the authority, subject to Congressional veto, to establish offense levels and corresponding sentencing ranges for newly enacted crimes.

In addition, jury instructions and rules of criminal procedure would need to reflect the new system. The parties would need to be required to exchange information relating to the new "sentencing" elements of the offense in the same manner as the existing elements of the offense.[5] Assuming these rules are balanced appropriately, the risk of undue prosecutorial leverage through the shift to what is essentially a charged offense rather than a real offense system may be lessened. A prosecutor will have a difficult time leveraging a defendant to plead guilty to an unduly severe charge if the defendant is provided with the government's evidence and can evaluate the likelihood of a jury conviction on such a charge.

Obviously the devil is in the details, but I believe a very workable sentencing regime can emerge from the structure outlined above that will honor the appropriate role of the jury, afford limited and guided discretion to district courts, and achieve appropriate proportionality without extreme complexity.

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[5]This would be a valuable improvement over existing practice in that the present rules of criminal procedure do not address discovery regarding sentencing guidelines factors. Instead, the parties present their evidence regarding the guidelines through dueling *ex parte* submissions to the court in the person of the probation officer.

III. What's wrong with advisory guidelines?

Conversion of the guidelines to non-binding advisory references is in large measure a return to the state of affairs prior to 1987 in which individual judges wielded absolute discretion. This option is certainly viable, has the virtue of placing sentencing discretion with those perhaps best suited to exercise it, and has been advocated by well respected organizations such as the National Association of Criminal Defense Lawyers. The downside to such extensive judicial discretion is the possibility of unwarranted disparity – the concern which motivated the passage of the SRA. It seems likely that unwarranted disparity in the near term would be considerably less than that which existed prior to 1987. Most current district judges would likely take advisory guidelines seriously, having applied them for many years as binding. On the other hand, there will be a minority of judges who will generate unwarranted disparity, and this number seems likely to increase as the years go by and the bench is filled with individuals who have no history with binding guidelines. It is this concern for the long term which leads me to believe the first alternative of the three above presents advantages over purely advisory guidelines.

If the Congress feels a need to act quickly after the Court rules in *Booker* and *Fanfan*, this may be a very appropriate interim measure while the details of codified guidelines are formulated. It may also be that this "advisory" approach is what remains of its own accord after the Court rules, thus obviating the need for legislative action. Given the potential for long term unwarranted disparity and the apparent policy concerns in Congress over undue judicial discretion, leaving the guidelines as advisory for the long term may be politically untenable.

IV. What's wrong with guidelines as mandatory minimums?

The third alternative – using the guidelines to set only minimum sentences – seems the least attractive of the three for several reasons. First, this alternative may itself be unconstitutional if the Court overrules *Harris*. It seems difficult in principle to draw a constitutional line between the determination of facts which raise the sentencing ceiling from the determination of facts which raise the sentencing floor.

Second, this alternative does nothing to address unwarranted disparity which results from overly severe sentences. This approach essentially sends the message that we are unconcerned with sentences that are unduly harsh, so long as no one is

punished too leniently. Such a philosophy is incompatible with the long-established principles underlying the rule of lenity in criminal cases and the innate fairness of the notion that it is better to err by allowing the guilty to go free than it is to imprison the innocent. Ironically, it may be predicted that those most likely to suffer from unwarranted severity are those who choose to exercise their jury trial rights so recently enshrined in *Blakely*.

Third, this approach is essentially an emergency response to an unanticipated Court ruling rather than a well reasoned analysis of ideal sentencing policy. The federal courts of this nation serve as an example for the fifty states as well as other nations around the world. The federal courts should sentence under a legislative scheme that represents the best we can achieve when starting from scratch, rather than by hastily putting a band-aid on what remains of a complex scheme which has been essentially gutted.

V. Conclusion

I hope this memorandum is of assistance to the Commission as it prepares its advice to the Congress in the event of an adverse ruling in *Booker* and *Fanfan*. If the Commission has any questions regarding the memorandum or if I can be of additional assistance, I would be happy to provide further input. Thank you for your consideration of my views.