Written Testimony of Mark Osler
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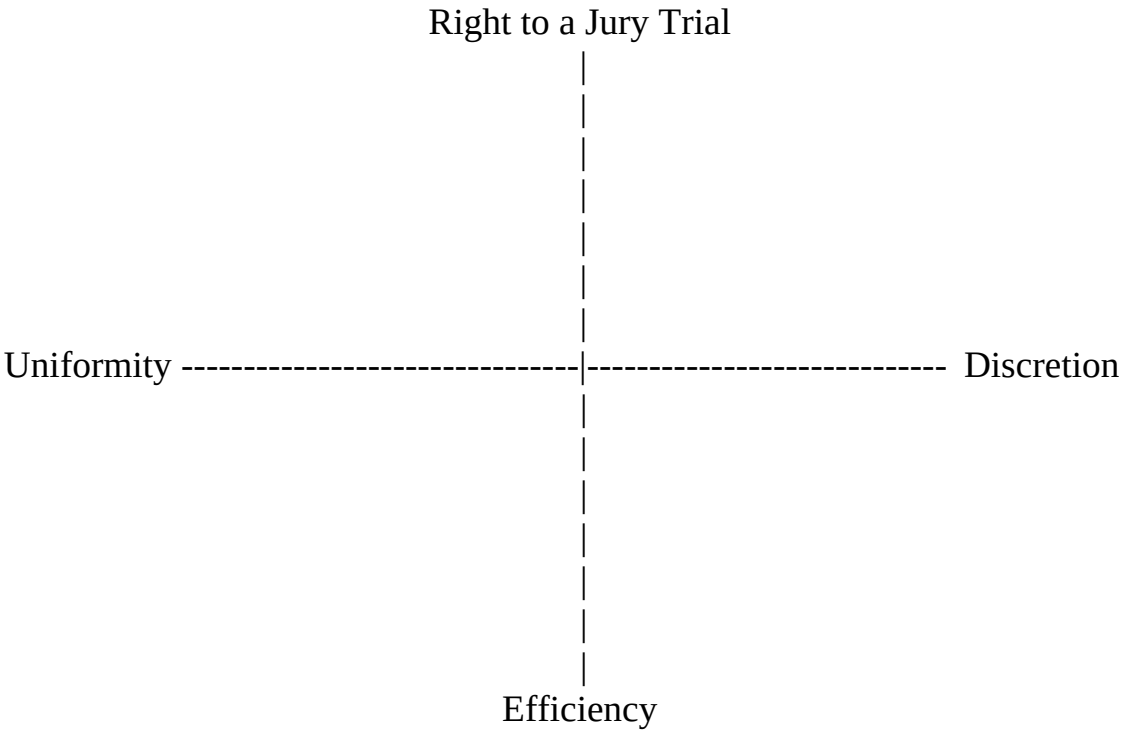
I very much appreciate the opportunity to testify at this important time, as we look forward to what federal sentencing might become. In considering the changes ahead, four important goals need to be balanced:

1. The right to a jury trial (as expressed in *Blakely*),
2. Judicial efficiency,
3. Uniformity, and
4. Respect for judicial discretion.

These goals are a challenging group, because they are in tension with one another, making it difficult as a practical matter to create a system that will serve one without taking away from another. For example, the more that sentencing takes on elements of the jury trial, the less efficient the system becomes. Similarly, the goals of uniformity and discretion pull at one another, as the imposition of uniformity (i.e., through mandatory guidelines) necessarily limits discretion. To help visualize these inherent tensions, we can create a grid between these competing goals:



In short, only the limited expansion of the guideline ranges (I suggest a 3x expansion), combined with the elimination of upward adjustments and departures from the guidelines would achieve an adequate balance between these goals. By making the ranges larger without eliminating their upper ends, we respect the jury rights recognized in *Blakely* (by eliminating those procedures offensive to that decision), maintain the efficiencies of a sentencing system that avoids jury findings, preserve some measure of judicial discretion, and retain a fair measure of uniformity among sentences.

An Outline of the 3X Plan

Four discrete steps could lead to a *Blakely*-compliant and balanced Guidelines system without fundamentally altering the basic procedures of federal criminal practice:

1. The guideline ranges could be tripled in size, with the bottom of the range remaining at the previous level. For example, what is now a 6-12 month range would be broadened to 6-24 months. This would allow judges, in their discretion, to rely on those factors previously included as the basis for upward adjustments and departures (within the enlarged ranges), while maintaining some level of uniformity.

2. The portions of the Guidelines presently offensive to *Blakely* could be stricken from the binding portions of the Guidelines and gathered in an appendix to the Guidelines or a series of application notes, as advisories to guide judges in their use of discretion within the increased ranges

3. The Sentencing Commission could reconfigure U.S.S.G. § § 2B1.1 & 2D1.1 so that there are only three base offense levels determined by the amount of drugs or money involved.

4. To maintain flexibility to account for the most extreme cases, upward departures could be preserved, with the caveat that they be supported by a jury finding or a plea agreement which includes waiver of the right to such a jury finding.

This fix could be implemented almost immediately without introducing wholesale change into the federal sentencing process. One advantage of this proposal is that the statutory and Guideline changes necessary are limited, specific, and largely are mandated by *Blakely* anyways, meaning a less drastic change to the structure of sentencing than elimination of the Guidelines or the addition of jury findings in bifurcated trials**. [**A complete explanation of this scheme can be found in *The Blakely Problem and the 3X Solution*, Federal Sentencing Reporter 16:5 (June 2004).]

Balance and Stability

The grid above lays bare the inadequacies of some other alternatives. For example, the "Bowman Proposal" promotes the elimination of the top limits of the guideline ranges. This proposal favors discretion to the exclusion of uniformity; on the grid above, it would be at the far right.

A second proposal, the shift of the guidelines from mandatory to advisory, would have the same result, with uniformity ignored in favor of discretion. Given the fact that Congress has repeatedly expressed its commitment to uniformity (most recently in the Feeney Amendment), these solutions ignore the will of the ultimate decision-maker in this area.

Others have suggested that jury mechanisms be introduced into the sentencing process. This also distorts the necessary balance, as it would make an already overtaxed system even more inefficient. On the grid above, this proposal would appear at the top of the chart rather than in the middle.

Finally, the imposition of mandatory minimums would come at great cost to judicial discretion, putting this "solution" as off-center (to the left) as some of the others.

One problem with these imbalanced solutions to *Blakely* is that each invites instability over time as advocates for one interest or another tug at the system. Our experience over the past several years is a fair warning of this danger, as judges and Congress have warred over the competing goals of discretion and uniformity. This damaging dialectic has been fought through

statute and subversion, as Congress has limited the discretion of judges in search of uniformity (via the imposition of the Guidelines and mandatory minimums), judges have in turn sought to expand their discretion by stretching the guidelines (through the use of downward departures), and Congress then reacted with greater restrictions (the Feeney amendment). An imbalanced solution to the *Blakely* problem would only invite further acrimony.

For example, if we were to embrace either the Bowman plan or the abandonment of mandatory guidelines, we should expect that sentencing disparities, between judges and districts, would greatly increase. By so drastically increasing the range within which judges can legally sentence, it is inevitable that some judges will go to the top and others to the bottom, and the gap between top and bottom will be much greater than it is now. This will violate the Congressional interest in uniformity, and further restrictive statutes would be necessary to narrow the gap. These changes, of course, would be more jarring than any we have seen since the imposition of the Guidelines themselves.

Similarly, if mandatory minimums are imposed broadly (either as part of restructuring the guidelines or in reaction to increasing disparities), the opposite would occur. On the graph above, the system would be plotted to left of center, with uniformity gaining to the detriment of discretion. In this situation, we can expect that some judges will subvert the mandatory minimums however possible, with one cost being the public nature of criminal sentencing.

Instability is possible due to imbalance on the North-South axis as well. If we value efficiency to the detriment of jury rights, we can expect that the Supreme Court will protect the principle articulated in Blakely, and strike down such a system. I suspect, for example, that a system that eliminates upward departures but not upward adjustments under the guidelines would meet this fate. Of course, it is this very imbalance in the pre-*Blakely* system that caused it to be challenged as constitutionally infirm in the first place. Were we to plot the pre-*Blakely* system on the graph above, it would appear off-center towards the bottom of the square.

Finally, if we choose to employ jury fact-finding in sentencing while maintaining the current guidelines, we can expect that the goal of efficiency

will be frustrated. For example, if defendants refuse to waive these rights to jury findings, dockets will quickly bog down, and this ability in itself could give the defense bar a large hammer to hold over federal courts. This possibility is especially true given that there is no express sanction for refusing to waive these jury rights, as there is within the guidelines for refusing to waive trial; that is, there is no sentencing-jury equivalent to the "acceptance of responsibility" adjustment found in Guideline § 3E1.1.

Balance and the 3X Solution

Important values are at play in this discussion, but we should not ignore the overarching context: That of a decades-long tug-of-war between the legislative and judicial branches, and more recently, between efficiency and the right to a jury trial. To ignore that context is to invite a continuation of the worst aspects of those battles, which include lurching changes in federal sentencing, alienation of those most involved in the system (including district court judges) and constant distraction from what should be our central focus: The maintenance of a sentencing system that is both fair and workable. The 3X solution offers a way to reform federal sentencing without inviting further shocks, while balancing each of the four important goals before us.

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