Testimony
United States Sentencing Commission
Possible Changes to the Sentencing Guidelines
November 16, 2004

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Mr. Chairman and members of the Commission: Thank you for the opportunity to address the Commission on this very important issue. The question that will present itself after the Supreme Court issues the decisions in *United States v. Booker* and *United States v. Fanfan* is whether the federal sentencing guidelines can accommodate the principle that any fact other than the fact of a prior conviction that is essential to punishment must be alleged in the indictment and proved to the jury beyond a reasonable doubt and, if so, what changes are necessary to effect that accommodation. We believe that the guidelines can be brought into compliance with *Blakely* and that the Commission should act expeditiously to modify the relevant conduct provisions and eliminate real-offense characteristics and cross-references that allow a defendant to be sentenced for uncharged, dismissed, and acquitted conduct. We appreciate the fact that the Commission has set forth thoughtful and specific questions to guide this hearing, and we endeavor to answer those questions in the following testimony, which supplements the views expressed in our July 9, 2004 letter to the Commission, a copy of which is appended.

If the Supreme Court holds that *Blakely* applies to the federal sentencing guidelines, do you believe the proposal known as the "Bowman fix" would bring the federal guidelines into compliance with the Sixth Amendment?

We do not. The "Bowman fix" would amend the sentencing ranges in the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction. It is a clever yet ultimately formalistic response to *Blakely* that fails to "give intelligible content to the right of jury trial." On the one hand, its proponent acknowledges that *Blakely* applies to the federal sentencing system and that the federal guidelines are in fact more offensive

to the rule in *Blakely* than the Washington state system at issue in that case. On the other hand, the "fix" he proposes would leave federal sentencing virtually unchanged, an outcome he touts as one of its primary virtues. In all fairness to Professor Bowman, his proposal was developed hastily in *Blakely*'s immediate aftermath and was intended solely to be a "stopgap" measure which would serve to prevent the "chaos" that he believed would ensue. But as the National Association of Federal Defenders explained in its *amicus* brief to the Supreme Court in the cases of *United States v. Booker* and *United States v. Fanfan*, a copy of which is attached to this testimony, "For those who practice criminal law in the federal courts every day, the only chaos has been caused not by applying *Blakely* to federal criminal cases, but rather by those trying to avoid its application or to force its reconsideration." In fact, in federal courts across the land, pleas are being negotiated and entered into, sentences are being imposed. As the *amicus* brief demonstrates, for over 97% of federal sentencings -- those arising from guilty pleas -- the only change required by *Blakely* is that indictments must now allege any fact (other than the fact of a prior conviction) that is essential to punishment. There are no structural or practical impediments to this requirement, which has already been satisfied in districts throughout the country.

Do you think there is any danger that the Supreme Court's decision in *Harris* might be overturned?

We in the defense community believe that *Harris* was wrongly decided, so we would view its demise as a salutary advancement for the right to jury trial rather than as a danger. If the "danger" referred to in the question alludes to the risk to the Bowman fix if *Harris* is overturned, we agree that the "fix" is viable only so long as *Harris*'s plurality opinion survives. We believe the decision will likely be overturned, however, with either Justice Breyer or Justice Scalia, or both, joining the four dissenters.

Could the Commission issue a policy statement regarding where in the new broadened sentencing ranges judges should sentence, and what form might such a policy statement take?

We do not believe it would be prudent to put a fix on the fix.

What type of appellate review would you recommend to accompany the Bowman proposal? How rigorous can this review be while avoiding new *Blakely* issues?

Professor Bowman suggested that if the Commission adopted a policy statement recommending that courts not impose sentences more than 25% higher than the guideline minimum in the absence of one or more of the factors now specified in the Guidelines as potential grounds for upward departure, a court's failure to adhere to the recommendation would not be appealable. He did so, presumably, because any meaningful appellate review would likely run afoul of *Blakely*. We agree.

If the Supreme Court holds that the federal guidelines are constitutionally infirm as currently applied, what procedural protections must attach to fact-finding necessary to increase the guideline range and enhance sentences?

Under *Blakely* and *United States v. Cotton*, the facts essential to punishment must be pled in the indictment and proved the jury beyond a reasonable doubt. If a fact is pled in the indictment and its proof is formally conceded by the defendant, further proof and a jury finding are unnecessary, and a sentencing judge may take the fact into account in setting the guideline range. Similarly, a defendant may consent to judicial factfinding in place of a jury determination. Finally, unless *Almendarez-Torres* is overruled, the sentencing judge may still take into account the fact of a prior conviction. Facts relating to criminal history that would require additional factfinding beyond the mere fact of conviction, however, such as the recency of the conduct or criminal justice status, would have to be charged and proved beyond a reasonable doubt.

What changes to the guidelines would be advisable on policy grounds, in order to improve the fair and efficient administration of justice?

We imprison far too many people in this country, and we imprison them far too long. We urge the Commission to heed the words of Justice Kennedy and act expeditiously to revise the guidelines downward:

> In the federal system the sentencing guidelines are responsible in part for the increase in prison terms. In my view the guidelines were, and are, necessary. Before they were in place, a wide disparity existed among the sentences given by different judges, and even among sentences given by a single judge. As my colleague Justice Breyer has pointed out, however, the compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing

Guidelines should be revised downward.

What fact-findings raise *Blakely* issues? All aggravating specific offense characteristics, including even adjustments based on prior offense conduct, such as the recency of that conduct or criminal justice status? The multiple count rules? Facts underlying a court's decision to depart above the applicable guideline range?

All fact-findings, except with respect to the fact of a prior conviction, raise *Blakely* issues. There may, of course, be cases in which the enhancement evidence becomes unduly prejudicial, making it difficult for jurors to render impartial verdicts. But such concerns may be alleviated by a defendant stipulating to the fact or the court bifurcating the proceeding.

Is it possible to amend the current federal sentencing statutes and guidelines to make the guidelines advisory in a rigorous way, sufficient to be both politically acceptable and reasonably likely to achieve sentencing uniformity, proportionality, and certainty?

Many of the same criticisms of the "Bowman fix" apply to the fix of advisory guidelines. In fact, the Bowman proposal is, in effect, a half-advisory system, advisory with respect to upward departures but binding with respect to downward departures. We view advisory guidelines as another means of simply evading rather than embracing the principles of *Blakely*.

How might the Commission eliminate or reduce the effect of sentence enhancements, under the relevant conduct rule, for criminal conduct outside the scope of an offender's offense(s) of conviction?

If the federal sentencing system runs afoul of the Sixth Amendment under *Blakely* then so too does the modified real offense approach. We agree with the Practitioners' Advisory Group that relevant conduct would be a basis for increasing a sentence only in cases in which the defendant is indicted of and convicted for conspiracy upon proper jury instructions.

What is the likely effect of any of the proposed changes on prosecutorial charging and plea negotiation practices? What impact will these changes have on achievement of the goals of the Sentencing Reform Act?

We believe that explicit indictments are more likely to encourage plea negotiations, and to permit the parties to

compromise on enhancing facts when proof of a single fact is inadequate or questionable, without fear that the issue will re-emerge in a presentence report written by a non-lawyer probation officer unfamiliar with the realities of trial, rules of evidence, subtleties of proof, and ethical constraints imposed upon the prosecutor as a "minister of justice." We further submit that *Blakely* will promote accuracy in sentencing precisely because it requires factfinding beyond a reasonable doubt. Accuracy in factual determinations that are essential to punishment reduces unwarranted sentencing disparities, honoring one of the overriding objectives of Congress in passing the Sentencing Reform Act. Applied to the federal guidelines, *Blakely* will ensure that defendants tried and convicted of similar crimes will receive similar sentences. In doing so, *Blakely*'s application will enhance the integrity and public reputation of federal sentencing proceedings.

In exercising its statutory duty to consult with authorities on, and individual and institutional representatives of, the federal criminal justice system when making recommendations to Congress, what timetable do you envision regarding any necessary changes and what process would you recommend to accomplish this task?

We urge the Commission to establish an Ad Hoc Advisory Group composed of Federal Defenders and other members of the defense bar, academics, federal judges, and attorneys from the Department of Justice to offer its recommendations to the Commission.