

TO: U.S. Sentencing Commission
FROM: James Felman¹
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:

¹This 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.

1. *Codified² 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.

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?

²The 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).

B. *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 offense³ 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 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

³Some 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.

⁴Of 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 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.

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

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.

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

⁵This 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.

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.