**Testimony of Carmen D. Hernandez**
**National Association of Criminal Defense Lawyers**
before the
**United States Sentencing Commission**
November 16, 2004

Each new Comission and Chair have been faced with difficult choices but the challenges facing you today may pose the greatest test. This Commission has been granted a rare opportunity, however, to step back and take a hard look at the sentencing regime you have helped create, to make changes necessary to meet constitutional requirements and to bring about, at long last, the promise of a more just and fair sentencing system. So, Judge Hinojosa, my congratulations on becoming Chair of the Sentencing Commission at this moment in history and to the rest of the Commission as well for the opportunity that lies ahead.

## I. Blakely: Proving Facts to a Jury Beyond a Reasonable Doubt

Let me then start with what I hope is common ground. *Blakely* "is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Blakely v. Washington*, 124 S.Ct. 2531, 2540 (2004). *Blakely* rests, above all else, on a simple fundamental constitutional principle: the deprivation of a person's liberty requires that an accusation be proven to a jury, by competent evidence, beyond a reasonable doubt. *Id.*, at 2537.

### A. Flaws in Federal Sentencing

It is no secret that federal sentencing simply has not worked in this fashion. Since the first Commission made relevant conduct the "cornerstone" of the federal guidelines, sentences have been determined "based not on facts proved to [a defendant's] peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Id.*, at 2542. This description was no mere hyperbole by Justice Scalia in *Blakely*. Every practicing criminal defense attorney can recount cases where the sentence was unduly based on questionable information that passed for evidence or where the government charged a less serious offense only to have the sentence enhanced for uncharged, dismissed or acquitted conduct or cross-referenced to be sentenced as if it were a more serious offense.[1]

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[1] In *United States v. Rodriguez,* 73 F.3d 161 (7th Cir. 1996), for example, the government prosecuted a drug case in which it presented evidence at trial that the defendant was involved with 10 ounces of marijuana. The evidence was so shaky that the judge had to deliver two separate Allen-type "dynamite" charges to blast a guilty verdict out of the jury to a single conspiracy count; still, the jury acquitted on all substantive counts. At sentencing, the government presented accomplice information that the defendant had been involved with 100 kilograms (2200 pounds) of marijuana. On this basis, the judge sentenced the defendant to spend

The federal sentencing system is broken in other ways also. Our federal prisons continue to be the primary social program to which all administrations give their full commitment. Our prisons are filled with black, latino and poor defendants, many suffering from untreated mental health illnesses, whom we imprison at a rate disproportionate to their presence in society and to the harm they cause society. In 1991, the Commission found that the racial disparity in the prison population "developed between 1986 and 1988, after implementation of mandatory minimum drug provisions, and remains constant thereafter." [2] Each year, sentences are further ratcheted up sometimes to comply with congressional directives at other times just to maintain sentences at proportional levels in response to an increase in an equally or less serious offense that may have been the focus of attention in a previous amendment cycle. Fifty-one percent of persons sentenced to prison last year were first-time, non-violent offenders.

### B. The Encroachment of Power by the Department of Justice

So why are the choices so difficult. The plain truth is that after nearly twenty years of processing criminal cases in this fashion, the Department of Justice will find it very difficult to give up a system that has allowed it to obtain convictions by guilty plea in nearly 98% of cases. It is a system where the Department alone controls almost all aspects of the process from pretrial charging decisions, to the term of imprisonment, to something as relatively minor as controlling whether a judge may grant an additional one-level reduction for timely acceptance of responsibility, or as substantial as requiring defendants to waive their right to appeal even an incorrect application of the sentencing guidelines. It is a system where the Department wields substantial power not just in the courtroom but here also before the Sentencing Commission and before the Congress itself. This is said not to demonize the Department of Justice or its prosecutors. It simply describes the facts. And history teaches that human beings and organizations are loathe to give up power once gained. The problem, moreover, as James Madison once observed is that our constitutional freedoms are more often abridged not by violent and sudden usurpations but, as has happened with federal sentencing, "by gradual and silent encroachments of those in power."[3]

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the rest of his natural life behind bars. Acknowledging the additional cost to the government of having to prove the quantity of drugs by a standard greater than preponderance, Judge Posner stated in dissent from a denial of rehearing en banc quite appropriately his view that "to imprison for life a person who sells 10 ounces of marijuana is a miscarriage of justice of sufficient magnitude to warrant some expenditure of resources to prevent." In a poignant reminder that these statistics represent real people, when I once before testified about this case, I received a letter from the defendant, Mr. Rodriguez asking that I represent him in a post-conviction proceeding. At the time, there was no law in Mr. Rodriguez' favor.

[2] *Special Report to the Congress:* Mandatory MinimumPenalties in the Federal Criminal Justice System (Aug. 1991) at 82.

[3] Speech in the Virginia Convention (June 6, 1788), *reprinted at* 11 THE PAPERS OF JAMES **MADISON,** p. 79 (ed. R. Rutland & C. Hobson) (1977).

So the challenge here is not merely for the Commission, it is to the Department. It would be a very good thing for the Department of Justice to rise to the occasion and do the right thing.

My testimony today will address short term responses and leave for others any proposals for long term fixes. In the coming weeks, we would be happy to provide you with additional materials and thoughts on more permanent solutions.

## II. HOW TO REFORM FEDERAL SENTENCING

***Any fool can make things bigger and more complex . . . . it takes a touch of genius – and a lot of courage – to move in the opposite direction.***[4]

First and foremost, any reform should not evade constitutional guarantees. On the fair assumption that the Supreme Court will extend its *Blakely* holding to the federal sentencing guidelines, we strongly recommend that the Commission adopt a response, and urge the Congress to do the same, that embraces the constitutional protections addressed in *Blakely*. Devising alternatives that evade due process and Sixth Amendment guarantees would be wrong. It would be inconsistent with your statutory obligations. And it simply is bad policy. Every criminal defense lawyer in America will challenge any fix that does not provide for these constitutional guarantees and the situation will be back to square one with diverse holdings from the lower federal courts, merely delaying what must be done.

From that premise, we believe that there are three viable alternatives that may be put in place for a period not to exceed one year, while the Commission explores more permanent changes and studies how the temporary provisions are working. The first two options – sentencing without regard to guidelines or advisory guidelines – would be particularly fitting were the Supreme Court were to hold that the Sentencing Reform Act is unconstitutional in its entirety and that no part of the Act is severable. The third option – jury fact-finding – is most apt were the Supreme Court to hold that the sentencing guidelines are unconstitutional as applied in *Booker* and *Fanfan* and either held the offending parts severable or did not address that issue.

### A. Sentences Pursuant to 18 U.S.C. § 3553(a)(1) & (2).

One possibility is for the Commission to propose that federal judges simply impose a sentence pursuant to 18 U.S.C. § 3553(a)(1) & (2) that is "sufficient, but not greater than necessary" to further the stated purposes of sentencing, without regard to any of the sentencing guidelines.

Simply, this would allow United States district judges to impose sentences as they see fit, with only the statutory maximum penalty, their sense of justice, and those portions of the Sentencing Reform Act, which survived *Booker* and *Fanfan* as a guide. Article III judges would have the provisions in 18 U.S.C. § 3553(a) to guide them. A judge would be required to impose a sentence

[4] Albert Einstein.

"sufficient, but not greater than necessary, to comply with" the stated purposes of sentencing, *i.e.*, just punishment, deterrence, protection of the public, and the educational, vocational and correctional treatment needs of the defendant. 18 U.S.C. § 3553(a)(1) & (2). After nearly 20 years of sentencing under the Sentencing Reform Act, this might seem revolutionary but it simply is the way sentences were meted out for most of our history.

It would be an interesting experiment that could provide the Commission with a wealth of information to use, as it once did when it formulated the original set of guidelines as a benchmark for retooled guidelines. The Commission could determine what factors judges view as important, the terms of imprisonment judges deem sufficient, and whether there develop any uniform sentencing patterns that can instruct the Commission's choices. The Commission could also determine how often and why judges impose sentences at or near the statutory maxima or minima.

### B. Advisory Guidelines Without Offending Provisions

A second possibility is to use the federal guidelines as a set of advisory guidelines to be consulted by federal judges in setting sentences, provided however that the most constitutionally adverse provisions of the guidelines be excluded from use. A simple legislative proposal to accomplish this is attached as Exhibit A.

Provisions that are most antithetical to constitutional guarantees that should be eliminated under any system but certainly under a temporary advisory system:

1. Cross-references;

2. Relevant conduct, particularly those provisions that allow for consideration of acquitted, uncharged and dismissed conduct; for conduct that occurred in preparation for or after the offense; and for conduct that was part of the "same course of conduct or common scheme or plan as the offense of conviction" under § 1B.3(a)(2);

3. Offense level 43, which provides for life without parole;

4. Quantity-driven provisions of chapter 2 guidelines that over-represent the culpability of the majority of defendants.

5. Adjustments that can be charged as separate crimes
   a. Obstruction of justice
   b. Enhancements for possession of firearms

6. Criminal History provisions that are fact-laden including the provisions for awarding criminal history points for petty offenses (§ 4A1.2(c)); and for juvenile adjudications (§ 4A1.2(d)).

### C. Jury Fact-Finding, The Kansas Model & the Federal Sentencing Guidelines

The third possibility is to provide for fact-finding of enhancement facts by a jury in a bifurcated proceeding, the remedy adopted by the state of Kansas when faced with a ruling by its Supreme Court that its guidelines did not comport with *Apprendi*. A simple legislative proposal to accomplish this is attached as Exhibit B. It could, however, also be accomplished with a simple amendment by the Sentencing Commission to its U.S.S.G. §6A1.3 policy statement to provide for fact-finding of enhancing facts that are in dispute to be made by a the jury, in a bifurcated proceeding beyond a reaosnable doubt.

This proposal is most apt were the Supreme Court to hold the guidelines unconstitutional as applied in *Booker* and *Fanfan*, severing out only those offending provisions of the guidelines and the Sentencing Reform Act. In such a case, there will be a number of cases where sentencing under the current sentencing guidelines would fully comport with all constitutional requirements. For example, the following offenses against the person in § 2A require no fact-finding beyond the statutory elements: murder, second degree murder, involuntary manslaughter. The same applies to a number of § 2E racketeering and gambling offenses; and a number of the firearm offenses in § 2K, including felon-in-possession (unless *Almendarez-Torres v. United States* is reversed). A number of other offenses could be sentenced under the current guidelines without running afoul of *Blakely*. These group would include cases where no aggravating factors are present, where the defendant admits to the aggravating factor, or where a jury has made all findings necessary for the application of the guideline including robbery, drug offenses.

Adopting this proposal would allow for all federal offenses to be sentenced under the same system of guidelines rather than having one set of offenses sentenced under the current guidelines and other offenses entenced under some other scheme.

We believe the Kansas sentencing model to be eminently workable. Most sentencing determinations in federal court are relatively straightforward. No federal sentencing is as complex as a capital sentencing hearing, where juries deal with fact-finding beyond a reasonable doubt routinely and in accordance with constitutional requirements. Moreover, we understand the Department of Justice maintains that Sixth Amendment compliant sentencing procedures are feasible. See Harris v. United States, 536 U.S. 545, 581-82 (2002) (Thomas, J. dissenting) ("The United States concedes, with respect to prospective application, that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury. Tr. of Oral Arg. 42.").

Indeed, many federal cases involve only a limited number of enhancements. Often, if a case involves one enhancement, others are not necessary. Take, for example, white collar cases sentenced under U.S.S.G. § 2B1.1. If the defendant is a "fence" engaged in the business of receiving stolen property, then all the enhancements involving corporate malfeasance, officer liability, or an effect on the solvency of a financial institution generally will not apply. As Commission statistics reflect, the majority of white collar offenses do not involve complex corporate malfeasance but rather relatively minor dollar amounts involving fraud and theft in its most basic form. Moreover, even in megacases, the facts necessary for sentencing are not nearly as complex as the investigation

that precedes a charge. Recently,in an Enron-related white collar case in Houston, the judge presided over a bifurcated sentencing hearing with no apparent problems.

Similarly, the average drug case sentenced under U.S.S.G. § 2D1.1 requires nothing more than a finding as to the quantity of drugs involved. The next most frequently used enhancement is weapon possession under § 2D1.1(b)(1), which applies in only 13% of cases.[1] In most drug cases, proving the weapon is relatively simple. Whatever difficulty there may be in proving drug quantity, moreover, is one that cannot be avoided in light of the rights guaranteed to all defendants under the Fifth and Sixth Amendments.

With respect to Chapter Three enhancements, the facts belie any argument that a jury finding would be too difficult to apply because the findings to support such enhancements are too complex. First, in most cases the existing application notes provide a ready model for jury instructions. In addition, these enhancements are not that common. Commission statistics show that the most prevalent Chapter Three enhancement – aggravating role – applies in only 5.6% of cases. 2002 Sourcebook at Table 18. A number of the other enhancements are present in fewer than 1% of the cases. In drug cases, there may be enhancements for use of a minor, obstruction of justice or role in the offense. The most prevalent of these enhancements is the aggravating role adjustment and that is applied in only 6.1% of all drug cases. Id. at Table 40.

In addition, to the extent that there are a few cases where proof of aggravating facts necessary to apply all the enhancements under the guidelines would be burdensome, these indicate that the federal guidelines have become too complex and should be simplified. The real cost in such sentencing hearings is that required to actually prove things by competent evidence. But this is a cost that Blakely says the constitution requires us to bear. Simplification of the guidelines is not a bad thing. Indeed, it is a goal that the Commission has sought to implement in the past.

Most importantly, however, is that Blakely stands squarely for the proposition that such trial management concerns cannot diminish a defendant's right under the Sixth Amendment. That "decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. . . . [E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id., at 17 (emphasis original).

Where necessary, the Commission should simplify the guidelines.

## III. OTHER OPTIONS

We agree with the Practitioner's Advisory Group's objections to various other proposals that have been mentioned for possible consideration.

### A. The "Bowman" Fix

We believe that the proposal that has come to be known as the "Bowman approach" is flawed, seeks to evade the rule enunciated in Blakely, and is unconstitutional. In addition to being fundamentally unfair and unbalanced – in that it would allow discretionary upward departures without a similar provision for downward departures – the "Bowman approach" is viable only so long as the opinion of the Court in Harris survives.

*Harris*, which upheld an aggravated mandatory minimum sentences against an Apprendi challenge, was the result of a plurality opinion and may well be in peril in light of Blakely. For as Justice Thomas noted in his dissent, Harris is incompatible with Apprendi. See Harris, 536 U.S. at 579-80 ("there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum."). As Justice Breyer, who concurred in the judgment only, also explained:

> I cannot easily distinguish Apprendi v. New Jersey 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 the Court's judgment, and I join its opinion to the extent that it holds that Apprendi does not apply to mandatory minimums."
> Harris, 536 U.S. at 569-70 (Breyer, J., concurring in part, and concurring in the judgment) (emphasis added).

The dissonance that Justice Breyer and the four dissenters in Harris noted is enhanced by the opinion in Blakely. Because Blakely dissipates the practical and legal benefits that led Justice Breyer to join the Court's judgment even as he disagreed with its logic, we believe that the *Harris* plurality will not hold when called to review the "Bowman approach."

## III. *The Significant Problems We Face Cannot Be Solved at the Same Level of Thinking We Were at When We Created Them.*

The hardest problem you face is the education of Congress and the public about " what we mean to achieve, and what we may in fact achieve, as we continue to mete out long prison sentences. That may still be too tall an order for any person or group. . . . Still, the Commission ought to be helping us grope toward a philosophy."[5] On that score, I commend you for holding this public hearing and urge you to be as public, inclusive and transparent as you can in formulating a response to *Blakely*.

For starters, the Commission, with the full participation of the DOJ ex officio Commissioner must take the lead at this time to explain that what is required here is compliance with constitutional guarantees, as interpreted by the Supreme Court. *Blakely* is not driven by soft-on-crime ideology. It is a bipartisan decision, in which four of the five justices in the majority are Republican appointees.

The Commission must also make the case that one response that surely will not fix anything is mandatory minimum sentences. The Mandatory Minimum Report, which was published in 1991 needs to be updated. The Commission's 15-Year Study should be published and plumbed for what it can teach us.

NACDL has pledged resources to hold a legislative fly-in early next year joining forces with former federal prosecutors, with Professor Stephen Saltzburg, who Chaired the ABA's Justice Kennedy Commission and others for a joint effort to make our case to Congress.

## Conclusion

I want to end by paraphrasing the wise words of one of our greatest Presidents, Abraham Lincoln who remarked that whenever he heard anyone argue for slavery, he felt a strong impulse to see it tried on him personally.[6] I would argue that anyone who persists in arguing for the present system of "real offense" guidelines calculated on the basis of information, not subject to cross examination or the rules of evidence based on a preponderance of evidence should consider being sent to prison for life without the possibility of parole under such a system.

Thank you.

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[5] The Honorable Marvin Frankel, US District Judge, whom some credit as having started the interest in reform that led to the passage of the Sentencing Reform Act.

[6] *Whenever I hear anyone arguing for slavery, I feel a strong impulse to see it tried on him personally.*