

Proposal for a Viable Federal Sentencing Scheme in the Wake of *Blakely v. Washington*

by Larry Kupers¹

I. INTRODUCTION

Soon, perhaps within weeks, the United States Supreme Court will decide whether its startling decision in *Blakely v. Washington*² means the end of some or all of the federal sentencing guidelines.³

Those personally or institutionally invested in the current federal sentencing regime (i.e., federal legislators, federal prosecutors and their supporting policy wonks at the Department of Justice, many federal judges, federal probation officers, the members and staff of the United States Sentencing Commission – “the USSC” or “the Commission” – and a minority of academic voices) insist that to dismantle this regime is to destroy the great and wondrous work of sentencing reform that has created and refined the current system over the past two decades. Those critical of this current sentencing regime retort that the Sentencing Reform Act of 1984 engendered not reform but injustice without efficiency, injustice compounded yearly by repeated Congressional enactments and Commission promulgations of unfair and counterproductive sentencing laws.

The two sides to the debate must agree, however, that (1) *Blakely* set off a tsunami of confusion and consternation for all players in the federal criminal justice system; and (2) if *Blakely* results in the constitutional infirmity of a significant portion of the federal guidelines, an entirely new federal sentencing paradigm must be designed, enacted and implemented. Rather than swear at the impertinence of Justice Scalia and the other four justices who joined him in the *Blakely* majority, this article proposes that *Blakely* is a clarion call – the time is right and the opportunity awaits to truly reconstruct federal sentencing law.

In pursuit of that aim, this article proposes a new paradigm, one that promises a more effective and just criminal justice system. The author is one of the critics of the current regime and proposes this new paradigm in order to overcome what he perceives as countless and incurable defects in the present system. But that discussion aside,⁴ if *Blakely II* crashes the guideline system, a new system will be needed. The proposal here is intended to facilitate and inform the conversation that will have to take place before the requisite legislative action can be taken.

II. FIVE KEY COMPONENTS OF THE PROPOSED SENTENCING REGIME

Component One: The Commission Will Replace Base Offense Levels, Criminal History Categories, and Boxes on a Grid with Base Guideline Ranges.

The current scheme commands a sentencing judge to undertake a series of calculations in order to end up with a final guideline sentencing range, one of 258 boxes on the infamous Sentencing Grid. The expert body, the Sentencing Commission, sets a base offense level for each offense of conviction. Then levels are added or subtracted from the base level by the

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sentencing court's finding of various predicate facts triggering upward or downward adjustments.⁵ Thereafter, in the event the defendant was convicted on more than one count, a set of "grouping rules" must be applied that will more often than not lead to a higher offense level. Next, again using a slew of rules, the defendant's criminal history score is computed, slating the defendant into one of six criminal history categories.

When the adjusted offense level is collated with the defendant's criminal history category, an adjusted guideline range results. That range becomes the final range unless the court sees fit to depart from the range either toward a more severe or more lenient sentence on the basis of finding exceptional circumstances. If there is a departure, either on the vertical plane of the Sentencing Grid by increasing or decreasing the offense level or on the horizontal plane by increasing or decreasing the criminal history category, then a final guideline range emerges different from the adjusted range. Somehow the court winds through this labyrinthine obstacle course of rule applications and the defendant is pigeon-holed into one of the 258 boxes. The court then metes out a sentence that falls within that final guideline range.

In the new scheme, the Commission would retain a critical role, one carefully demarcated to comply with *Blakely's* constitutional imperatives and yet still take advantage of the Commission's expertise. The Commission, beginning from the broad statutory sentencing ranges enacted by Congress, would directly promulgate a basic guideline range for each offense.⁶ These ranges, unlike some of the present base offense levels, could not incorporate any factors that are not elements of the offense of conviction. Otherwise, the base guideline ranges would be infirm under *Blakely*.

These base guideline ranges would be broader than the current ranges in the Sentencing Grid. By Congressional mandate, the current system follows what is called the 25% Rule. That rule limits the length of any one sentencing range. Under the rule, the time span between the low and high ends of a sentencing range cannot exceed either 6 months or 25% of the low end of the range.⁷ For example, if the low end of the range is 100 months, the high end cannot be more than 25 months higher than 100 months. Thus, a sentencing range can go from 100 to 125 months but cannot go from 100 to 140 months.

In the new scheme, the base sentencing ranges would necessarily be of greater span. For example, in the current scheme, the base offense level for bank robbery (once a two-level enhancement is added for robbery of a bank or financial institution, which is an element of the statutory offense) is 22. A defendant in criminal history would have a base range of 41 to 51 months whereas a defendant in criminal history VI would have a base range of 84 to 105 months. In the new scheme, the Commission would set one base guideline range for bank robbery that might cover the equivalent of at least two guideline ranges under the current scheme. Thus, the Commission might set the base guideline range at 41 to 57 months by taking the low end of the range at criminal history category I and combining it with the high end of the range at criminal history category II.

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If the defendant is convicted of only one count or charge, and if there are no statutory aggravating factors, *see infra* Component Two, then the court would sentence the defendant within the base guideline range unless an exceptional circumstance or set of circumstances were to compel the court to depart downward from that range. *See infra* Component Four.

If the defendant is convicted of more than one count, then the court would have to apply a set of grouping rules in order to obtain the base guideline range. The grouping rules would work to increase the entire base guideline range.⁸ Such an enhancement is proper under *Blakely* because it is grounded in the facts and only the facts found by the jury in rendering a guilty verdict. That is, the court is not basing the increase in the sentencing range on facts that were not submitted to the jury for adjudication.

The requisite grouping rules would have to be generally applicable to all multiple count convictions. For that reason, a bit of arithmetical skill will be required in formulating a serviceable formula or recipe. The recipe might take the form of the following steps or directions to the court: (1) take the base guideline range for the most serious offense; (2) for each additional count of conviction, add to both the lower and higher ends of that base guideline range 1/10 of the lower end of the base guideline range for the offense that constitutes the additional count of conviction; (3) repeat step (2) for each additional count or offense of conviction.

For example, if the defendant is convicted of bank robbery and also of a second count, false statement to a government agent, then the court would begin with the base guideline range for bank robbery because that is the more serious of the two counts of conviction. Say that range is 41 to 57 months. Then the court would consider the base guideline range for false statement, say 10 to 21 months. If the rule is so formulated, the court would then take 1/10 of the lower end of that base guideline range, 1 month, and add that to both ends of the base guideline range in order to get a base guideline range of 42 to 58 months for the defendant's combined counts of conviction.

Component Two: Congressional Enactment of a Set of Statutory Enhancements

In the current scheme, Congress expected the Commission to delineate facts and circumstances, aggravating factors, that would trigger guideline enhancements incrementally punishing defendants for the additional harms their conduct caused.⁹ Congress identified some of these aggravating factors in the 1984 Act and some in a series of directives to the Commission issued throughout the 90s. The Commission was delegated the power to fill out the list of aggravating factors and set appropriate increments of punishment. But the *Blakely* Court's reasoning, if and when applied to federal sentencing, means that such power in the hands of the Commission is constitutionally verboten.

Accordingly, in the new scheme, any aggravating factors that trigger increased punishment must be Congress's work product. And rather than attempt to hatch a labyrinthine statutory scheme rivaling the Guidelines in counterproductive convoluted and confusion, Congress should follow the lead of several states – recall Justice Brandeis' admonition that states

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should be used as laboratories of experimentation¹⁰ – and decide upon a carefully selected list of the most critical aggravating factors whose presence requires sentence increases.

Although the *Blakely* decision leaves much still to be reckoned, it seems clear that any such statutory enhancements, to be constitutionally licit under *Blakely*, would have to meet three conditions: the fact or facts necessary to trigger an enhancement would have to be (1) charged in an indictment and (2) proved to a jury (3) with proof beyond a reasonable doubt. That much is clear; but no more.

After the Court's *Apprendi* decision in 2000, the circuit courts generated a good deal of confusing doctrine about such enhancements, refusing them the label "element" of an offense and instead using an ugly somewhat disingenuous epithet such as "functional equivalent of an element." For example, the Ninth Circuit Court of Appeals recognized in a series of cases that the type and quantity of drugs in a drug trafficking case charged under 21 U.S.C. § 841 are not elements of the offense but rather are "penalty provisions with heightened due process requirements."¹¹ For the most part, the cash value of such an alternative label has been twofold: because the aggravating fact is not an element of an aggravated crime, (1) the government's failure to prove it would not result in an acquittal for the defendant; and (2) the government is not allowed to admit unduly prejudicial evidence of the aggravating fact during the trial of the underlying offense.¹²

Despite the confusions and discrepancies in the lower courts' application of *Apprendi*, the *Blakely* decision does little to resolve matters. Instead, *Blakely* leaves several key questions unanswered:

- (1) Is the fact triggering the enhancement an element of an aggravated version of the underlying offense such that if the government fails to prove that fact, despite proving all other elements of the underlying offense, the defendant must be acquitted?
- (2) If the fact is not an element of a compound or aggravated offense, is the defendant entitled to a bifurcated proceeding in which a jury adjudicates guilt or innocence on the underlying offense, and in the event of guilt, subsequently adjudicates the presence or absence of the enhancement fact in a second proceeding? and
- (3) If the proceeding is bifurcated, do the rules of evidence apply to the second or sentencing phase of the bifurcated proceeding?¹³

Any new sentencing scheme should provide answers to these questions in a fashion that will withstand Supreme Court decisions that follow upon *Apprendi* and *Blakely*.

The good news is that the Supreme Court has and likely will continue to recognize that within certain broad constitutional limitations, defining what are and are not offenses and elements and crafting the procedural rules that dictate how such elements and offenses are treated within criminal prosecutions are matters for Congress. Thus, some of the questions that

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have befuddled circuit courts in the wake of *Apprendi* can be resolved or rendered moot by congressional legislation.

Of critical moment for providing such answers is the recognition that while *Apprendi*'s holding combined a due process component rooted in the Fifth Amendment and the Sixth Amendment right to trial, *Blakely*'s holding was grounded firmly and exclusively in the right to jury trial guarantee of the Sixth Amendment. *Blakely*, therefore, does not allow lower courts to forget or downplay the Sixth Amendment component of the *Apprendi* rule. A sentencing scheme must, therefore, pass not only due process muster but also right to jury trial muster. Certainly the convergence of these separate constitutional guarantees in the sentencing arena counsels lawmakers and judges to proceed with caution when considering expedited procedures that make the administration of justice more efficient for courts and prosecutors but threaten to curb the scope of constitutional protection for the accused.

Accordingly, to *Blakely*-proof the proposed sentencing scheme, the statutory enhancements would be enacted with the following characteristics and procedural requirements:

- 1) Any predicate facts for a statutory enhancement would have to be alleged in the indictment in a separate count;
- 2) The facts would have to be adjudicated by a jury beyond a reasonable doubt;
- 3) The defendant would be entitled to a bifurcated proceeding in which the underlying offense is first tried to the jury and, in the event of a conviction, the predicate facts are tried to the jury in a subsequent sentencing proceeding;¹⁴ and
- 4) The rules of evidence would apply to both phases of the bifurcated proceeding.

The defendant's entitlement to bifurcation is part and parcel of the determination that the statutory enhancement is not an element of an aggravated or compound offense. If the enhancement were treated in the latter fashion, the defendant would have no entitlement to a bifurcated proceeding but would be entitled to an acquittal if the government did not prove the predicate facts. Thus, the fair trade off for prosecution and defense alike in treating these statutory enhancements as separate offenses and not elements of aggravated offenses is (i) the defendant does not get a windfall acquittal by prevailing on the statutory enhancement alone but (ii) the government does not get a windfall by getting in prejudicial evidence of aggravating circumstances in the trial of an offense that does not include as elements those circumstances.

It is noteworthy that this proposed treatment of statutory enhancements is similar to the existing statutory enhancement for possessing, carrying or using a firearm in connection with a drug trafficking crime or crime of violence, 18 U.S.C. § 924(c). As a matter of course, that enhancement is alleged in the indictment in a separate count and must be proved to a jury

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beyond a reasonable doubt. A jury can convict a defendant of the underlying offense, say, bank robbery, but acquit the accused of the section 924(c) charge.¹⁵ Also, the enhancement is an offense that can be charged in a case even when the underlying offense is not charged. Generally courts do not bifurcate trials involving section 924(c) counts because facts about the defendant’s use of the gun typically are admissible in the trial of the underlying offense as other acts evidence under Fed.R.Evid. 404(b).

Thus, consistent with the constitutional jurisprudence of *Blakely*, the statutory enhancements proposed here amount to separate offenses rather than elements of compound or aggravated offenses and rather than some constitutionally infirm misfit labeled “the functional equivalent of an element” or “an *Apprendi* sentencing factor.” The reasoning of *Blakely* rules out the creation by the lower courts of such illicit hybrids because *Blakely* emphasizes the Sixth Amendment right to jury component present but widely underplayed in *Apprendi*.¹⁶ Nor in the wake of *Blakely* will the lower courts be able, without legislative intervention, to *Blakely-ize* the sentencing process by *sua sponte* empaneling “sentencing juries.”¹⁷

The next question is the number and nature of statutory enhancements Congress should enact. In contrast to the profligate number of guideline enhancement provisions under the current system, the congressionally enumerated statutory enhancements should number between 10 and 15, thereby constituting only those critical factors Congress considers the quintessential grounds for additional punishment. If Congress enacts more than the core statutory enhancements, its micro-management of sentencing law threatens to render nugatory the work of the Commission as an expert body.

The number of enhancements proposed, 5 to 15, derives from a quick canvas of state systems of statutory enhancements. For illustrative purposes, the following table enumerates the statutory enhancements of the Kansas and Washington state schemes.

	Kansas ¹⁸	Washington ¹⁹
1	particularly vulnerable victim	offender’s conduct involved deliberate cruelty toward victim
2	excessively brutal conduct	defendant knew or should have known that victim was particularly vulnerable
3	offense motivated by prejudice against victim’s race, color, religion, gender, nationality, ethnicity or sexual orientation	offense was violent and defendant knew victim was pregnant
4	offense involved pre-existing fiduciary relationship between offender & victim	offense was a major economic offense
5	adult defendant recruited minor to commit crime	offense was particular serious drug trafficking crime
6	crime of extreme sexual violence by predatory sexual offender	offense was sexually motivated
7	defendant was incarcerated during commission of offense	offense was part of an ongoing pattern of sexual abuse of the same minor victim
8		offense involved domestic violence
9		offense conduct involved multiple offenses and presumptive sentence is too lenient
10		defendant’s prior unscored criminal history (misdemeanors and foreign convictions) results in presumptive sentence that is too lenient

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11		offense resulted in pregnancy of child victim of rape
12		victim was a youth without parent or guardian and offender sought relationship with victim for primary purpose of victimization
13		offense was committed with intent to obstruct or impair human or animal health or agricultural or forestry research or commercial production

The nature of the enhancements in the proposed federal scheme would parallel state schemes to an extent but also deviate from them in order to account for certain factors more germane to federal criminal interests than typical state interests. Careful scrutiny of existing guideline enhancements could lead to a distillation of their excessive number down to an essential core of enhancements. The resulting core enhancements might include: (1) use of a firearm or dangerous weapon in committing the offense;(2) supervising role in drug trafficking involving over x amount of y type of Schedule I substance; (3) offense conduct causing serious bodily injury or death; (4) use of a minor in committing a drug-trafficking or violent offense; (5) offense committed with deliberate cruelty; (6) offense deliberately directed at vulnerable victim or motivated by prejudice against victim's race, color, ethnicity, national origin, religion, gender, or sexual orientation; (7) loss amount over \$100,000; and (8) loss amount over \$1,000,000;

In addition, there could be two statutory enhancements addressing a defendant's criminal history, thereby creating three categories of criminal history rather than the current scheme's six categories. The first category would include those with no or minor criminal history. These defendants would not be subject to an enhancement.

The second category would include defendants with a significant criminal history but one that did not include violence or heinous crimes. According to the U.S. Commission's latest studies on recidivism, this category should include those defendants whose criminal history is limited to non-violent drug trafficking crimes because those defendants present a reduced risk of recidivism compared with violent offenders. Yet for the past two decades Congress has grouped drug trafficking crimes with violent crimes when gauging the seriousness of various types of crimes. If that unfortunate trend continues, then those with drug crime histories will likely be subject to the third or most aggravated category of criminal history. In any event, the second category could be deemed to increase by 3 years the maximum potential sentences provided by the base guideline range.

The third category should be aimed exclusively at those defendants whose history demonstrates that they are serious repeat violent offenders. Recidivism studies demonstrate that these offenders are more likely than other categories of defendants to commit future crimes. Thus, these defendants threaten society with a double whammy: they are more likely to commit crimes in the future and because of their proclivity to commit violent crimes, the crimes they will likely commit in the future will be more serious and harmful crimes. Accordingly, for the third category, the base guideline range would be increased by a potential increment of 8 additional years, with the caveat that only one or the other of the two statutory enhancements for criminal history could be pleaded in any one case.

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Proposed Federal Statutory Enhancements

	Enhancement	Maximum Sentencing Increment
1	Use of a firearm or dangerous weapon in committing the offense	3 years
2	Supervising role in drug trafficking offense involving x amount of y type of Schedule I substance	6 years
3	Offense causing serious bodily injury or death	5 years
4	Use of a minor in committing drug-trafficking or violent offense	3 years
5	Offense committed with deliberate cruelty toward victim	3 years
6	Offense deliberately directed at vulnerable victim ²⁰ or motivated by prejudice on account of victim’s race, color, ethnicity, nationality, religion, gender, or sexual orientation	3 years
7	Offense caused loss exceeding \$100,000	3 years
8	Offense cause loss exceeding \$1,000,000	5 years
9	Offender with significant but non-violent criminal history	3 years
10	Offender with significant criminal history including two or more convictions for violent felony offenses	8 years

The criminal history facts would, as with all other statutory enhancement facts, have to be charged in the indictment and proved to a jury beyond a reasonable doubt. Arguably, this is not required by the *Apprendi/Blakely* rule. On account of its earlier ruling in *Almendarez-Torres*, the Supreme Court has excepted from the constitutional requirement to prove all statutory-maximum raising facts to a jury beyond a reasonable doubt “the fact of a prior conviction.”²¹

Here is a case in point where Congress should proceed with a surfeit of caution. As commentators have highlighted, Justice Thomas’ *Apprendi* concurrence made it clear that he regrets his vote in *Almendarez-Torres* and would no longer vote with the majority in that case. He sees no reason for excepting recidivist facts (or, for that matter, mandatory minima) from the *Apprendi/Blakely* rule. As a result, there are now five justices who would not support the holding of *Almendarez-Torres*.

Given the dubious status of the *Almendarez-Torres* exception to the *Apprendi/Blakely* rule, and given that proof of prior convictions is not difficult for the government, the criminal history statutory enhancements should bear the same proof requirements as all other statutory enhancements. In practice, defendants will more often than not stipulate to the fact of a prior conviction as they typically do when charged with the offense of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).²²

Component Three: The U.S. Sentencing Commission Would Promulgate Sentencing Recommendations Aimed at Guiding the Courts’ Exercise of Sentencing Discretion Within the Broad Statutory Ranges

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The above proposed scheme of basic guideline ranges and statutory enhancements comes into operation after the jury has rendered its verdict on the underlying offense or offenses and the statutory enhancements. Reserved for the sentencing judge in this scheme are two types of judgments: (1) where in the base guideline range the defendant's sentence should fall; and (2) how much additional punishment should be imposed as a result of one or more statutory enhancements.

These two areas in which sentencing judges exercise discretion are optimal areas for an expert sentencing body such as the Commission to offer guidelines or recommendations to inform and guide the exercise of discretion. Finally the term "guideline" would find proper use. By promulgating guidelines that are followed in the majority of cases, the Commission could play the role Congress assigned it in reducing unwarranted disparity and increasing certainty and fairness in sentencing.

Accordingly, in the new scheme the Commission would promulgate recommendations as to how the sentencing court reaches the appropriate sentence within a particular guideline range and recommendations as to how much of a statutory enhancement range should be added to that base sentence. These recommendations could take into account some or all of the various factors the current guideline scheme applies, factors that were not considered of sufficient importance to incorporate into one of the statutory enhancements enacted by Congress. The recommendations would be in the form of specific numbers of months above the low end of the basic guideline range. The court could not go below that basic guideline range unless it finds that certain exceptional mitigating factors or circumstances are present in the case.

For example, if the low end of the base guideline range for bank robbery is 41 months, and if Congress had not provided for a statutory enhancement for carjacking, the Commission could recommend that sentencing courts add 12 months to the low end of 41 months if the offense conduct included carjacking. The recommendation would therefore be that the sentence should not be below 53 months although the sentencing judge could impose a sentence higher than 53 months (but lower than the high end of the basic guideline range). Because such recommended enhancements are advisory, they would not offend the constitutional principles set out in *Apprendi* and *Blakely*.²³ Such recommendations would come with the caveat that the sentencing court could not sentence in excess of the high end of the base guideline range unless a jury returns a verdict on a statutory enhancement.²⁴

Component Four: Sentencing Courts Could Depart Downward from the Base Guideline Range

Many of the true-blue severe punishment advocates were outraged by the core asymmetry in *Blakely*'s holding: that the Constitution is offended by an increase in potential criminal punishment not directly tied to a jury adjudication beyond a reasonable doubt but in no way offended by a corresponding decrease in punishment. But such asymmetry is neither

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surprising nor unreasonable because the Bill of Rights operates, exactly as originally intended, to curb or limit threatened governmental travesties against individuals. And these advocates neglect to acknowledge that in the courts, where criminal justice policy meets up with harsh reality of meted-out punishment, the past 20 years have seen a continuous and unprecedented escalation of incarceration, both in the number of defendants incarcerated and in the length of their periods of incarceration. This wholesale (and extremely counterproductive) upward ratcheting of punishment has little to fear from the Supreme Court because the Court has in recent years taken for all practical purposes the notion of excessive punishment off its plate.²⁵

In other words, Congress has virtually free reign to maintain the current severity in federal criminal punishment. *Apprendi* and *Blakely* merely require that such severity in sentencing come with the proper procedural protections for those subject to the severity. Under the proposed scheme, Congress can ensure prison sentences for various types of offenses and offenders by continuing and expanding the current portfolio of mandatory minimum statutes and enacting new ones. Congress should not do so because mandatory minimums result in unwarranted uniformity, a vice just as invidious to justice as unwarranted disparity.²⁶ Moreover, Congress can (but should not) direct the Commission to increase the base guideline ranges discussed *supra* as Component One.²⁷

That said, the new scheme holds the promise of affording sentencing judges greater discretion than the current hidebound guideline scheme. It does so by allowing a sentencing judge, after carefully considering Commission recommendations, to craft the appropriate sentence for the defendant by choosing the right term within the base guideline range and, in the event of statutory enhancements, adding the right increment or increments to that base sentence.

The sentencing judge must be afforded one more dimension of discretion – the option of a downward departure from the base guideline range in a case with an exceptional mitigating factor or combination of such factors. As the 1984 Congress recognized in shaping the current scheme, accommodation must be made to do justice in the individual case. For this reason, the 1984 Act inaugurated and the federal courts expanded and refined a jurisprudence of departures. In the proposed scheme, the court, heeding the counsel of the defense attorney, the probation officer and perhaps even the prosecutor, should have the ability to reduce the defendant's punishment in an exceptionally sympathetic case. For that reason, the new scheme preserves the downward departure mechanism found in the current scheme.

But tough-on-crime advocates can be assured that the severity of punishment scale will extend in both directions under this new scheme. Congress, the Commission, prosecutors and the sentencing courts will continue to have the ability to see that a certain type of defendant engaged in a certain especially egregious type of offense conduct suffers a punishment substantially more harsh than the base guideline range.

Finally, a defendant's decision to accept responsibility for the offense conduct, forego the right to trial and plead guilty, will routinely be treated as a factor to be considered by the court when imposing a sentence within the guideline range. However, the sentencing judge will have

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the discretion to depart downward in a case exhibiting either an extraordinary acceptance of responsibility or another type of extraordinary, atypical or exceptional mitigating circumstance.

Component Five: A Significantly Modified Appellate Review Scheme

Given the first four components of the new scheme, the current scheme's mechanism for appellate review will have to be significantly modified. Under the current scheme, recently modified by the Feeney Amendment to the PROTECT Act,²⁸ appellate review of a guideline sentence follows these rules:

- 1) The defendant or the government may challenge under a *de novo* standard the application of a guideline provision in his or her case but may challenge the court's factual findings underlying that application only under the very deferential clear error standard;
- 2) The defendant or the government may not challenge the court's exercise of discretion in selecting a sentence within the appropriate guideline range;
- 3) The defendant may not challenge the court's discretionary denial of a motion to depart downward nor may the government challenge the court's discretionary denial of a motion to depart upward;
- 4) The government may challenge a court's decision to depart downward from the guideline range under a *de novo* standard²⁹ but may challenge the factual findings underlying the departure decision only under the clear error standard; and
- 5) the defendant may challenge a court's decision to depart upward from the guideline range under a *de novo* standard but may challenge the factual findings underlying the departure decision only under the clear error standard.

The new scheme would be simpler and promise a marked reduction in the number of sentencing appeals now clogging our federal appellate courts:

- 1) The defendant or the government could challenge the district court's choice of a sentence within the base guideline range and also challenge the court's choice of an increment to the sentence within a statutory enhancement range but under the very deferential abuse of discretion standard. Such challenges would be based on the sentencing court's deviance from the Commission's recommendations (i.e., non-binding guidelines). The sentencing court would, as is currently the practice, have to set down in writing its reasons for the sentence. Factual findings of the sentencing court would be subject to challenges only for clear error.

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- 2) A district court's discretionary decision not to depart downward would remain immune to appellate review.
- 3) A district court's decision to depart downward would be subject to a heightened review standard, *de novo* review. The factual findings supporting the grant of departure would be reviewed for clear error.

In other words, sentencing courts operating within the base guideline ranges and the incremental ranges for statutory enhancements would be accorded significant deference. Also, sentencing courts, encouraged to follow the Commission's recommendations as to what sentences to impose within the base and statutory enhancement ranges, would normally not be reversed for failing to follow such recommendations. Still, the government or a defendant would be entitled to argue to the appellate court that the sentencing court, having diverged substantially from the Commission's recommendations, abused its discretion. Because sentencing courts would be required to state with specificity the reasons for the sentence imposed, the statement of reasons would be the focal point for any appellate challenge to the sentence under an abuse of discretion standard.

As is current practice, defendants could waive appeal of the sentencing court's exercise of discretion within the statutory ranges in exchange for some benefit from the government. Such waivers would do much less violence to the structure of the sentencing scheme than the waivers currently extracted by federal prosecutors from defendants. The current practice with waivers, wherein the prosecutor succeeds all too often in obtaining an unconditional and unilateral waiver (i.e., the government does not give up its appeal rights) is emblematic of the decidedly unequal bargaining positions of prosecutor and defendant in the current scheme. By obtaining such waivers, government prosecutors contravene and subvert one of Congress' clear intentions in passing the Sentencing Reform Act of 1984: that appellate courts actively monitor district courts' applications of the Guidelines to assure fair and uniform sentencing and avoid unjustified excesses and deviations attributable to the idiosyncracies of particular judges.

In the proposed scheme, juries, not judges, will decide the larger questions by adjudicating guilt on the underlying offense and applicability of statutory enhancements. The appropriate ranges of punishment having been justified by proof beyond a reasonable doubt to a jury, the judges' exercises of discretion within those ranges should not be micro-managed or second-guessed by appellate courts removed from the action.³⁰ Rather, appellate courts should intervene only when such an exercise of discretion is quite clearly unreasonable either because the reasons given are inappropriate, appropriate but not supportive of the resulting sentence, or based on clearly erroneous factual findings.

III. Examples

The following four examples are merely illustrative of how the proposed scheme might operate. Each example requires a number of suppositions as to what laws or statutory enhancements Congress might enact and what rules or provisions the Commission might

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promulgate. The severity or leniency of the resulting sentences is therefore not intrinsic to the proposed scheme; rather, these examples merely illustrate how the different components of the scheme would combine to generate sentences.

Example One: is charged with two counts of unarmed bank robbery in violation of 18 U.S.C. § 2113(a). The statutory maximum sentence for each count is 20 years imprisonment. In the indictment, the government alleges that took over \$100,000 from one of the banks and that caused serious bodily injury to a teller at one of the banks.

Sentencing Analysis:

According to the Commission, 's base guideline range is 41 to 51 months. The Commission recommends that 1/5 of that range be added to the low end of the range to account for conviction on a second count of the same offense. In addition, because the jury returns a guilty verdict on the statutory enhancements for serious bodily injury and for loss amount over \$100,000, 's potential maximum sentence is increased from 51 months to 111 months (5 years additional for serious bodily injury or death, 2 years additional for loss over \$100,000). Given the nature of the bodily injury and the exact loss amount of \$151,000, the sentencing court would impose a sentence of 93 months if it follows the Commission's recommendations with regard to the base guideline range and increments for the statutory enhancements.

Example Two: is charged with wire fraud in violation of 18 U.S.C. § 1341. The loss amount alleged is \$1,200,000. Because it was a telemarketing scheme aimed primarily at elderly retirees, the government alleged in the indictment the statutory enhancement for vulnerable victims. After conviction, the government contends that the court should sentence at or near the high end of the base guideline range because the scheme involved a pretense that money was being collected on behalf of a charitable organization.

Sentencing Analysis:

's base guideline range, assuming little or no criminal history, is 0 to 12 months. The Commission recommends adding one half of the range to the lower end when the fraudulent scheme involved a pretense of charitable organization. A jury finding that the loss amount exceeds \$1,000,000 adds 5 years to the high end of the base guideline range. The recommendation from the Commission for that amount of loss is 36 additional months in prison. A jury finding of vulnerable victims adds another 2 years to the statutory maximum. The Commission recommendation is a 24-month increment given the type and number of victims targeted by this fraudulent scheme. If it followed the Commission's recommendations, the court would sentence to 66 months or 5 ½ years. Under the current guideline scheme, would face a sentence of 70 to 87 months after conviction at trial or 51 to 63 months after a guilty plea.

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Example Three: is charged with conspiracy to possess with intent to distribute over 50 grams of crack in violation of 21 U.S.C. § 848. The government also pleaded the statutory enhancement of being a supervisor or manager of a drug trafficking operation involving more than 50 grams of crack. The government also alleged as a statutory enhancement's two prior felony convictions for drug trafficking. is convicted of the underlying drug trafficking conspiracies and the two statutory enhancements.

Sentencing Analysis:

The base guideline range for trafficking in crack cocaine is 12 to 60 months.³¹ Based on the type and amount of drugs and's role in the offense, the recommendation is 46 months. Up to six years is added to the statutory maximum because of the combination of drug type, amount and's role. The Commission's recommendation for an increment within the enhancement range 24 additional months or 2 years. Finally, 's history of drug trafficking convictions statutorily elevates him to the second criminal history category in which he is facing an added increment of 3 years. Given the number and nature of his prior convictions, the Commission recommends an 18-month sentence enhancement. Following the Commission's guidelines, the court sentences to 88 months incarceration.³²

Example Four: is charged with being a felon in possession of firearm in violation of 18 U.S.C. § 922(g)(1) and for possession of an unregistered firearm in violation of 26 U.S.C. § 5861. The government alleges as a statutory enhancement's two prior convictions for serious violent felonies. In addition, the government alleges at sentencing that possessed not one but four firearms at the time of his arrest.

Sentencing Analysis:

The base guideline range for felon in possession of a firearm is 37 to 63 months. The Commission recommends an increase of 6 months from the low end of that range for a case involving 3 to 7 firearms. The jury's placement of in the third or most serious criminal history category means an 8-year potential increase of maximum sentence from 63 months to 159 months. Given the number and nature of the prior convictions, the Commission guideline is for the court to use 6 years or 72 months of that potential 8-year increase. If the court follows the Commission's recommendations, receives a sentence of at least 115 months. The court could sentence to a maximum term of imprisonment of 159 months.

IV. CONCLUSION

The scheme proposed here is not an end-run around *Blakely* but rather an embodiment of the noble constitutional guarantees that *Blakely* recognized. Congress would still demarcate the broad outlines for punishment and still articulate the overriding goals or purposes of sentencing. The Sentencing Commission would still play an indispensable and invaluable role in using its expert resources to promote the very best sentencing practices. Best of all, sentencing judges would no longer feel like accountants mechanistically applying a convoluted tax code to produce individual returns. Rather, these judges, informed and guided by the Sentencing Commission's expertise, and duly accountable to appellate review, would be encouraged to use not only their analytical intelligence but also the wisdom they have gained from years of courtroom and life experience. The operation of such a system would assure that the goddess Justice remained blind to the irrelevant differences among defendants but responsive to the salient features of each offender and offense.

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NOTES

¹ The author, Larry Kupers, has practiced in the area of federal criminal law as an assistant federal public defender in the Northern District of California since 1991. From October 2003 to May 2004, he served as the Federal Public Defenders' visiting counsel to the United States Sentencing Commission. Currently he is completing a temporary duty assignment with the Office of Defender Services of the Administrative Office of the United States Courts. The views expressed in this article are entirely personal to the author and are neither intended nor authorized as statements of the organizations with whom the author has worked or currently works.

² 124 S. Ct. 2531 (2004).

³ On August 2, 2004, the Supreme Court granted the Department of Justice's petition for writ of certiorari in two cases: (1) 04-104, *United States v. Freddie J. Booker*; and (2) 04-105, *United States v. Duncan Fanfan*. The Department of Justice had requested the Court answer two questions: (1) whether the holding of *Blakely* applies to the Federal Sentencing Guidelines; and (2) if so, whether the Guidelines are severable. The Court ignored a well-reasoned argument from the defense community (in an amicus brief filed by the National Association of Criminal Defense Lawyers) that (a) the questions should be posed more carefully to make sure that the Court resolves the issues based on the Fifth and Sixth Amendments, not just the Sixth Amendment as the government posed the question, and to make sure that the Court addresses all types of guideline provisions that potentially could fall under the *Apprendi/Blakely* rule, not just upward adjustments such as specific offender characteristics; and (b) in order to best resolve the most pressing issues, the Court should review two other cases that do not involve only drug charges and that do not involve any admissions by the defendant that may take the case outside the *Apprendi/Blakely* rule or provide a basis for a harmless error ruling. The Court ignored these arguments but did not in its order granting the government's petition explicitly set out the questions it would address. Oral argument is scheduled for October 4, 2004.

⁴ The author plans in the very near future to publish a longer version of this article that critiques the current Guidelines sentencing scheme, examines basic sentencing principles, and compares this proposal to competing proposals.

⁵ As critics of the guideline scheme contend, the adjustments are mostly enhancements that make for a "ratchet up" system. Such adjustments include specific offense characteristics (e.g., "more than minimal planning," loss amounts, causing serious bodily injury, etc.) found in the Chapter 2 offense provisions of the Guidelines Manual, more general mitigating and aggravating factors (e.g., role adjustments, acceptance of responsibility, vulnerable victim, official victim) found in Chapter 3, and cross-references (i.e., directions to use another guideline provision intended for a more serious offense).

⁶ The old scheme does not apply to Class B or C misdemeanors (i.e., offenses with a maximum penalty of 6 months incarceration or less). See U.S.S.C. § 1B1.9 (Sentencing Guidelines do not apply to Class B or Class C misdemeanors or infractions). It makes sense for the new scheme to exclude these minor criminal offenses as well.

⁷ See 28 U.S.C. § 994(b)(2) (25% rule). This rule promotes one of the purposes Congress set out for the Sentencing Commission: "to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" 28 U.S.C. § 991(b)(1)(B).

⁸ In the current guideline scheme, the grouping rules are set out in Part D of Chapter 3 of the Guidelines Manual. Grouping rules play a critical role in the approach underlying the Guidelines. Before the Guidelines, when a defendant was convicted of three counts of unarmed bank robbery, the 20-year statutory maximum for the offense

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of bank robbery would be stacked to allow the court the discretion to sentence the defendant to up to 60 years in prison. The grouping rules, however, typically aggregate multiple counts into punishments within the statutory maximum for the most serious offense.

Moreover, in keeping with its basic “real offense” approach to sentencing, the Commission sought in formulating the grouping rules to balance two concerns: (1) providing appropriate incremental punishments for the additional offense conduct involved in multi-count convictions; but (2) ensuring that prosecutors’ discretion to charge or not to charge additional counts did not lead to unwarranted disparities among defendants guilty of the same conduct because some received charging “breaks” from prosecutors while others did not.

⁹ See 28 U.S.C. § 994(c)(2) (the Commission shall consider *inter alia* circumstances that “aggravate the seriousness of the offense”).

¹⁰ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹¹ *United States v. Thomas*, 355 F.3d 1191, 1192 (9th Cir. 2004) (characterizing the holding of *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (*en banc*)).

¹² *Thomas*, 355 F.3d at 1195 (citing post-*Buckland* Ninth Circuit decisions, *United States v. Toliver*, 351 F.3d 423, 430 (9th Cir. 2003), *United States v. Valensia*, 299 F.3d 1068, 1074 (9th Cir. 2002), *United States v. Minore*, 292 F.3d 1109, 1116-17 (9th Cir. 2002)).

¹³ There is a very important fourth question: is the enhancement fact to be treated as an element in the sense that generally a *mens rea* showing is a requirement for proof of the fact? In the wake of *Buckland*, the circuit courts unanimously rejected the contention that proof of drug type and quantity for purposes of a drug trafficking prosecution under 21 U.S.C. § 841 included proof that the defendant knew the drug type and quantity. The Supreme Court has yet to consider this issue.

¹⁴ If the predicate facts for a statutory enhancement are admitted by the court in the trial of the underlying offense under Fed.R.Evid. 404(b), then there is no need for a bifurcated proceeding rather than a verdict form with special findings beyond the guilt/innocence finding for the underlying offense.

Moreover, in the case of a bifurcated proceeding, immediately after it rendered a guilty verdict on the underlying offense, the jury would convene to hear and adjudicate the government’s case for the application of statutory enhancements. Thus, there would be no need to call the jury back for a subsequent sentencing hearing. When such a hearing took place later in the process, scheduled far enough down the line to permit a pretrial investigation and report from the United States Probation Office, the proceeding would be of the same nature as sentencing hearings under the current guideline scheme. In other words, most of the hearing would be devoted to orations and arguments from opposing counsel as to how the court should exercise its discretion within the statutory ranges triggered by the jury’s verdict or verdicts.

¹⁵ It might be thought that statutory enhancements such as Section 924(c) that are predicated on proof of an underlying offense implicate the Double Jeopardy Clause. That is, section 924(c) requires proof that the defendant (i) committed a drug trafficking crime or crime of violence and (ii) used, carried or possessed a firearm during and in relation to that crime. Thus, the section 924(c) charge includes all the elements of the underlying offense. Under the *Blockburger* test, therefore, the section 924(c) charge and the underlying offense are the “same” offense for purposes of double jeopardy. See *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Blockburger v. United States*, 284 U.S. 299, 304 (1932). As such, it would seem that the Double Jeopardy clause would preclude punishment for the underlying offense and then additional punishment for the section 924(c) offense. However, cumulative punishments

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for the same offenses does not violate implicate double jeopardy concerns “if it is evident that [the] legislature intended to authorize cumulative punishments” *Ohio v. Johnson*, 467 U.S. 493, 499 n.8 (1984).

Thus, the scheme of statutory enhancements proposed here would not violate the Double Jeopardy clause.

¹⁶ It should now be apparent from *Blakely*, *Apprendi* and their precedents that for constitutional purposes, a fact or factor is **either** an element of an offense (with the constitutional guarantees that it is charged in an indictment and proved to a jury beyond a reasonable doubt) **or** it is merely a sentencing factor, something a judge can elect to take into account at sentencing purely on a discretionary basis (i.e., guiding the court’s determination of a sentence within the statutory minima and maxima set either by Congress or an agency to which authority to set such boundaries has been delegated).

For example, in *Castillo v. United States*, 530 U.S. 120 (2000), the Court set out the issue in the opening paragraph of the decision: “In this case we once again decide whether words in a federal criminal statute create offense elements (determined by a jury) or sentencing factors (determined by a judge).” In *Jones v. United States*, 526 U.S. 227, 232 (1999), the Court stated:

Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in an indictment, submitted to a jury and proven by the Government beyond a reasonable doubt.

Thus, the Court never contemplated or left open the possibility that there could be a tripartite classification of (i) elements (charged in the indictment and proved to a jury beyond a reasonable doubt), (ii) sentencing factors (not charged in the indictment and only considered by a judge during the sentencing phase) and (iii) a third category of *special* sentencing factors (proved to a jury beyond a reasonable doubt but possibly not charged in the indictment because not considered elements).

Justice Thomas’ incisive concurrence in *Apprendi* explains why this chimerical third category is a non-starter. The reason is that the *Apprendi* rule, according to Justice Thomas, is rooted in the fundamental question of what is and is not a crime: “This case turns on the seemingly simple question of what constitutes a ‘crime.’” *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring). In other words, the *Apprendi* rule is fundamentally a question of what is and is not an element. Justice Thomas further explains:

Sentencing enhancements may be new creatures, but the question that they create for courts is not. Courts have long had to consider which facts are elements in order to determine the sufficiency of an accusation (usually in an indictment). The answer that courts have provided regarding the accusation tells us what an element is, and it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case – here *Winship* and the right to a trial by jury.

. . . .
This authority establishes that a “crime” includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact – such as a fact that is proportional to the value of stolen goods – that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since *McMillan*, is necessary. One need only look to the kind, degree or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

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Id. at 500-501 (Thomas, J., concurring). Thus, there can be no hybrid category of purportedly *Apprendi*-strength sentencing facts that somehow are not elements of a crime.

Blakely confirms this pristine dichotomy between elements and sentencing factors. At the very start of the majority opinion’s legal discussion, Justice Scalia writes that the *Apprendi* rule “reflects two longstanding tenets of common-law criminal jurisprudence . . .” *Blakely*, 124 S. Ct. at 2536. The second tenet is: “[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.” *Id.* (quoting 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872)). The majority opinion’s according of prominence to this common-law tenet indicates unequivocally that any fact falling under the *Apprendi* rule is a fact that must be charged in the indictment as part of the crime or offense charged against the defendant. Thus, *Blakely*, *Apprendi* and their precedents leave no conceptual space for a fact or factor that must be proved to a jury beyond a reasonable doubt and yet is somehow distinguishable from an element of a criminal offense.

Thus, circuit courts cannot mistakenly read *Blakely*, as they read *Apprendi*, merely to require that certain sentencing facts be proved to a jury beyond a reasonable doubt. *Apprendi*’s insistence that such facts be proved to a jury should have but did not lead these courts away from creating a third category of hybrid facts not amounting to elements but with element-like requirements. *Blakely*, however, leaves little if any doubt: if a fact, when found, triggers an increase in the statutory maximum, then it must be charged in the indictment and proved to a jury beyond a reasonable doubt **because** such procedural requirements are part of the defendant’s Sixth Amendment right to a jury trial. In other words, that fact is a statutory element of either an aggravated offense (in combination with an underlying offense) or an offense separate from the underlying offense – it cannot be deemed a parasitic element-like creature.

¹⁷ For the same reasons, lower courts cannot “cure” the constitutional infirmity of upward adjustment provisions in the Guidelines by calling in a sentencing jury and requiring the government to prove the predicate facts to such enhancements to this jury beyond a reasonable doubt. Seemingly a move required by the doctrine of constitutional doubt, this move is verboten by another constitutional doctrine – separation of powers. In other words, this “cure” means that the Sentencing Commission has enacted federal criminal statutes rather than merely promulgated sentencing guidelines. Whether or not Congress could in principle delegate to the Commission the power to enact criminal statutes (i.e., not simply enunciating penalties but actually creating federal crimes), there is nothing in the Sentencing Reform Act of 1984 or any other Congressional legislation to suggest that Congress did in fact delegate to the Commission such authority. Accordingly, the sentencing jury cure, discussed by Justice Breyer in his dissent to *Blakely*, and rejected by District Court Judge Paul Cassell, see *United States v. Croxford*, 2004 WL 1462111 (D. Utah June 29, 2004), is not viable. But see *United States v. Ameline*, No. 02-30326(9th Cir. July 21, 2004) (remanding with approval for a sentencing jury remedy to the *Blakely* problem of applying guideline upward adjustments).

¹⁸ K.S. § 21-4716(c)(2) (Imposition of presumptive sentence; departure sentencing; aggravating factors).

¹⁹ R.C.W. § 9.94A.535(2) (Departures from the Guidelines; Aggravating Circumstances).

²⁰ In order to account for the harm caused by sexual offenses involving child victims, the term vulnerable victim in this statutory enhancement could be deemed automatically to encompass victims who are a certain age of younger.

²¹ See *Blakely*, 124 S.Ct. at 2536 (“Other than the fact of a prior conviction . . .”). But it remains to be seen how broadly or narrowly the courts will construe the phrase “other than the fact of a prior conviction.” For example, for many guideline enhancements, a court must find that a prior conviction falls under a certain category such as the category of “crime of violence” for purposes of application of the career offender guideline. See U.S.S.G. §4B1.2(a) (defining “crime of violence”). Arguably a court’s legal determination that a certain conviction under a state criminal statute is a crime of violence goes beyond the mere fact of that prior conviction and therefore does not fall

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outside the scope of the *Apprendi/Blakely* rule. If so, then the allegation that the defendant previously has been convicted of a crime of violence requires proof beyond a reasonable doubt to a jury.

²² See *Old Chief v. United States*, 519 U.S. 172 (1997).

²³ Such recommendations also operate as increased minimums, not increased maximums, and therefore do not offend the *Apprendi/Blakely* rule. See *Harris v. United States*, 536 U.S. 545 (2002). Even if *Harris* is reversed, the right thing for the Court to do, no constitutional problem arises because these Commission rules are advisory, not binding.

²⁴ The Commission also could promulgate recommended reductions based on mitigating factors such as a defendant's acceptance of responsibility or minimal role in the offense.

²⁵ See *Lockyer v. Andrade*, 583 U.S. 63, 123 S.Ct. 1166 (2003) (50 years to life sentence for offender convicted of petty theft with numerous but non-violent priors is constitutional); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Life without parole for first-time offender convicted of possessing 672 grams of cocaine passes constitutional muster).

²⁶ Not only academic commentators but the Sentencing Commission itself has repeatedly criticized Congress' penchant for mandatory minimums on a number of compelling grounds. Such mandatory minimums set up sentencing "cliffs" or "tariffs" the blindly and unjustly aggregate defendants whose offense conduct and offender characteristics differ in critical ways and therefore whose punishments also should differ. See

²⁷ The key idea behind establishing a sentencing commission to promulgate sentencing guidelines was reliance by a political body vulnerable to the transient cross currents of public opinion and media sensationalism on a non-political body with special social-scientific expertise and practical experience in the field of sentencing. Congress' ever-increasing proclivity during the 90s to micro-manage the Commission's operation by enacting directives, both advisory and binding, went beyond the pale in the PROTECT Act of 2003. There Congress actually drafted the guidelines the Commission was to promulgate and made such guidelines effective even before their official promulgation by the Commission. Adding insult to injury, Congress also explicitly dictated for inclusion in the Guidelines Manual specific commentary, thereby actually drafting a portion of the Guidelines Manual in the voice of the Commission. As Ronald Weich noted in his testimony before the Senate Judiciary Committee concerning the impact of *Blakely*, by usurping the Commission's voice, Congress played the role of ventriloquist using the commissioners as its wooden dummies. See Ronald Weich, Testimony before the Senate Judiciary Committee, Hearing on "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines" (July 13, 2004), available at www.judiciary.senate.gov/testimony.

²⁸ Pub. L. No. 108-21, §§ 401 et seq.

²⁹ Before the PROTECT ACT, the Supreme Court's decision in *Koon v. United States*, U.S. (1996) held that the standard of review for challenging a district court's decision to depart upward or downward was the deferential standard of . . .

³⁰ See *Koon v. United States*, 518 U.S. 81, 98 (1996) ("District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.").

³¹ The base guideline range for drug trafficking must be fairly broad in order to allow for salient differences in the types and amounts of drugs trafficked and in the role played by the defendant in the trafficking.

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³² Of course these judgments and computations are all for naught if still existent at the time of 's offense conduct is the draconian 10-year mandatory minimum under 21 U.S.C. § 841(b). That enhancement, save for the safety-valve exception, applies no matter how small and insignificant 's role in the offense, no matter how close to the 50-gram line are the drugs attributed to , and no matter the dearth of any violent criminal activity in 's past.