

Association of Federal Defense Attorneys (AFDA)

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Online Presentation: Blakely Updates: November 2004

BLAKELY: Informal Presentation on AFDA web site on Monday, November 22, 2004

Good afternoon. Greg Nicolaysen here. Thank you all for attending online.

Lots of activity on Blakely during the past week, as we inch closer to a ruling on Booker / Fanfan (expected by most Supreme Court observers to be released this month).

I would like to begin our chat session today by posting some updates regarding what's been happening over the past week. I do this with the view that we are all so busy with our schedules that it's hard to stay abreast of these events, and that's where the AFDA web site becomes a useful resource in providing a checklist overview with links to key documents.

I hope the following is helpful:

First, THE SENTENCING COMMISSION HELD TWO-DAY HEARINGS ON NOVEMBER 16-17 RE: THE FUTURE OF FEDERAL SENTENCING. All of the transcripts of the proceedings and the lengthy written submissions made by each of the presenters have been posted to the AFDA Message Board. For the entire collection, click Message Board bar in left-hand column, then click "Enter The Message Board", then click "Updates on Federal Criminal Law Topics", then click "Federal Sentencing Developments".

I am posting here the key links to testimony and written submissions that are key to staying abreast of the ongoing discussion/debate, as we inch closer to the Booker/Fanfan ruling.

First, the government's position, which is important because it appears to be setting the benchmark for the discussion overall.

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The Justice Department is advocating "topless guidelines" (aka the "Bowman fix", named after Indiana law professor Frank Bowman). The gov's position was set forth in the testimony before the Commission by Assistant AG Christopher Wray.

http://www.afda.org/afda/news/USSC_Wray_testimony.pdf [CLICK HERE FOR WRAY TESTIMONY

Explaining the so-called "Bowman Fix", which is recommended by the Justice Department and appears to enjoy some support on the commission, the bottom of the sentencing range will not change. The "Bowman fix" would amend the sentencing ranges in the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.

The Bowman fix poses a real problem for the defense bar, as judges will have flexibility to give much longer sentences than the guidelines would otherwise have allowed, up to the statutory maximum, WITHOUT HAVING TO JUSTIFY AN UPWARD DEPARTURE. Conversely, the bottom of the sentencing range doesn't change, so any reduction below the low end of the range would still have to be justified on the existing principles of a downward departure. Thus, no benefit to the defense bar in implementing the Bowman fix.

Ironically, Prof Bowman created his "fix" because he concluded that Blakely DOES APPLY TO THE FEDERAL GUIDELINES. Thus, his starting premise is favorable to the defense, but his proposed methodology is not. It's also worth noting that Bowman said last Wednesday, Nov 17, that he considered his plan only a temporary fix, as he told the Commission: "I think federal sentencing needs a major overhaul."

The American Bar Association submitted to the Sentencing Commission a checklist of recommendations on federal sentencing reform per Blakely. Like the Bowman fix, this checklist does not disturb the existing low end of the range, and in fact explicitly preserves the existing procedure for seeking downward departures. It seems as though the ABA is trying to be politically correct in leaving undisturbed something which Congress clearly does not want to change.

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**[http|www.afda.org/afda/news/ABA_Blakely_proposal_111804.htm](http://www.afda.org/afda/news/ABA_Blakely_proposal_111804.htm)|CLICK HERE
TO READ THE ABA TASK FORCE CHECKLIST**

Before posting additional links to testimony / written presentations, I think it's helpful to have Professor Bowman's (Ohio State Univ school of law) checklist summary of key points covered during the 2-day Sentencing Commission hearing:

"1. Everyone seemed to endorse the concept of binding guidelines — there was virtually no support for a wholly advisory system from any quarter (although the judges, who might be most likely to endorse such a system, did not expressly weigh in with any specific recommendations).

"2. Nearly everyone stressed the importance of trying to simplify the federal sentencing guidelines, although precisely what features of the existing guidelines most needed to be simplified was not always clearly stated.

"3. There was a lot of interesting and dynamic discussion of the timing and timelines for post-Booker/Fanfan changes to the guidelines. The judges stressed the need for clear guidance in the wake of a SCOTUS ruling, and the Commissioners seemed to appreciate the need to move fast after Booker/Fanfan come down. But whether and how there could/should be a short-term fix followed by a long-term fix was a subject of much debate.

"4. The long-term vitality of Harris, the decision approving judicial factfinding for mandatory minimum sentencing, was also the subject of interesting and dynamic discussion. Of course, Harris' vitality is extraordinarily important if Congress and/or the USSC adopt the so-called Bowman fix (aka "topless guidelines") in the wake of Booker/Fanfan.

"5. The essential idea of simplified, Blakely-ized guidelines was probably the favored proposal put forth by most of the presenters, but the USSC's ability to make that happen — both as a matter of timing and as a matter of the USSC's authority — pose a number of tough issues.

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"6. Professor (and former Commissioner) Michael Goldsmith made the very sound suggestion that the Commission try to speak with a unified voice when offering specific proposals and recommendations to Congress. But the Commissioners' diverse questions (combined with the many tough legal, political and practical issues that lie ahead) suggest that unity may be easier said than done.

"I (Prof Berman) came away with the feeling that both the holding and the dicta in Booker/Fanfan will have a profound impact on whether (assuming Blakely applied to the federal system) the Bowman fix or simplified, Blakely-ized guidelines becomes the immediate front-runner for the future of federal sentencing."

[end of Prof Berman's checklist]

Testimony by Assistant Federal Public Defender David Porter (Sacramento, CA) before the US Sentencing Commission on November 16, 2004:

http://www.afda.org/afda/news/USSC_Porter_testimony_111704.pdf | **CLICK HERE TO ACCESS DAVE PORTER'S TESTIMONY**

Key Points made in the Porter presentation:

- * Opposes the "Bowman fix."**
- * Rejects the notion that the application of Blakely to the federal guidelines has wreaked havoc in the world of federal sentencing.**

Excerpt:

"[f]or over 97% of federal sentencings -- those arising from guilty pleas -- the only change required by Blakely is that indictments must now allege any fact (other than the fact of a prior conviction) that is essential to punishment. There are no structural or practical impediments to this requirement, which has already been satisfied in districts throughout the country."

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*** Acknowledges that the "Bowman fix" is at risk as a proposed solution if the Supreme Court's decision in *Harris v. U.S.* is overturned (Harris had upheld the constitutionality of mandatory minimums, but the decision was 5-4 and there is a growing consensus in academic circles that Booker/Fanfan might set the stage for Harris to be overruled by a subsequent Supreme Court case).**

*** views "advisory guidelines as another means of simply evading rather than embracing the principles of Blakely."**

*** projects that more explicit indictments resulting from applying Blakely to the guidelines, by which sentencing factors are pleaded in the indictment, would be beneficial in regard to plea dispositions. Excerpt:**

"We believe that explicit indictments are more likely to encourage plea negotiations, and to permit the parties to compromise on enhancing facts when proof of a single fact is inadequate or questionable, without fear that the issue will re-emerge in a presentence report written by a non-lawyer probation officer unfamiliar with the realities of trial, rules of evidence, subtleties of proof, and ethical constraints imposed upon the prosecutor as a "minister of justice."

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

The other presentation to the Commission from the defense bar was made by Carmen Hernandez of the Federal Defenders Training Group in Wash, DC, on November 16, 2004:

[http|www.afda.org/afda/news/USSC_hernandez_testimony.pdf](http://www.afda.org/afda/news/USSC_hernandez_testimony.pdf)CLICK HERE FOR HERNANDEZ TESTIMONY

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Text of presentation made by Prof Douglas Berman of Ohio State Univ School of Law, to the Sentencing Commission on November 17, 2004. Very much worth reading.

http://www.afda.org/afda/news/USSC_Berman_testimony.pdf [CLICK HERE FOR BERMAN PRESENTATION TO SENTENCING COMMISSION

Text of presentation made by U.S. District Judge Emmet G. Sullivan to the Sentencing Commission on November 16, 2004

http://www.afda.org/afda/news/USSC_Sullivan_testimony.pdf [CLICK HERE FOR SULLIVAN TESTIMONY

Judge Sullivan did not endorse any specific sentencing plan. Excerpt:

“We are not prepared today to convey a Judicial Conference position or offer an opinion on the various questions of law and policy presented by the various proposals. The Committee is actively considering the future of the sentencing process so that the Judicial Conference can be prepared to quickly analyze any proposed legislation and to consider all of the various legislative proposals as they develop.

“The Committee intends to explore the range of alternatives to the existing sentencing process in the event the Supreme Court, in deciding Booker and Fanfan, declares the sentencing guidelines unconstitutional in whole or in part. We will evaluate and, where appropriate, make recommendations to the Conference on any identified alternatives in terms of their legal soundness and their impact on judicial responsibilities, workload, and court administration.”

[end of quote]

If the federal sentencing system must be re-constructed after Booker and Fanfan, it will be interesting to see how federal judges get involved. Note that federal judges were not consulted by the Sentencing Commission during the development of the original set of guidelines from 1984-87.

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Text of presentation made by Stephanos Bibas, Associate Professor, University of Iowa College of Law, to the Sentencing Commission on November 16, 2004:

[http|www.afda.org/afda/news/USSC_Bibas_testimony.pdf](http://www.afda.org/afda/news/USSC_Bibas_testimony.pdf)|CLICK HERE FOR BIBAS TESTIMONY

Prof Bibas expressly endorsed the Bowman fix, but only as a short-term solution and advocated simplified, Blakely-ized guidelines for the long-term.

By contrast, the DOJ's position, through Assistant AG Wray, advocated the Bowman fix as a long-term solution.

Professor Michael Goldsmith: Outline of Remarks before the U.S. Sentencing Commission, November 16, 2004:

[http|www.afda.org/afda/news/USSC_Goldsmith_testimony.pdf](http://www.afda.org/afda/news/USSC_Goldsmith_testimony.pdf)|CLICK HERE FOR GOLDSMITH TESTIMONY

Presentation by Professors Nancy King and Susan Klein on Nov 16, 2004. Nancy King's bottom-line message: "Start over." (ie, create an entirely new sentencing system).

[http|www.afda.org/afda/news/ussc_KingKlein_testimony.pdf](http://www.afda.org/afda/news/ussc_KingKlein_testimony.pdf)|CLICK HERE FOR THE KING-KLEIN PRESENTATION

Testimony by Susan Klein on Nov 17, 2004:

[http|www.afda.org/afda/news/USSC_klein_testimony.pdf](http://www.afda.org/afda/news/USSC_klein_testimony.pdf)|CLICK HERE TO ACCESS KLEIN TESTIMONY

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Memorandum submitted by James Felman on Nov 17, 2004:

[http|www.afda.org/afda/news/USSC_felman_testimony.pdf](http://www.afda.org/afda/news/USSC_felman_testimony.pdf)|Click Here for the Felman memorandum

Written Testimony of Mark Osler on November 17, 2004:

[http|www.afda.org/afda/news/USSC_Osler_testimony.pdf](http://www.afda.org/afda/news/USSC_Osler_testimony.pdf)|CLICK HERE FOR OSLER TESTIMONY

Testimony of Amy Baron-Evans on November 16, 2004, submitted on behalf of the Practitioners Advisory Group:

[http|www.afda.org/afda/news/USSC_baronevans_testimony.pdf](http://www.afda.org/afda/news/USSC_baronevans_testimony.pdf)|CLICK HERE FOR BARON-EVANS TESTIMONY

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Okay, so much for the Sentencing Commission hearings last week.

One more observation from Professor Berman regarding the Commission, and then we move on to other Blakely materials:

Berman on 11/19/04:

"We will be seeing early next week the US Sentencing Commission's long awaited "15 year report." I know the USSC has been working very hard on this project for a number of years, and the report should be chock-full of data and analysis of the pre-Blakely state of federal sentencing. And I expect that the information and conclusions from the Commission's comprehensive pre-Blakely assessment of the operation and efficacies of the federal guidelines should be of enormous value to everyone contemplating the post-Blakely direction of federal sentencing reforms."

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On October 8-9, 2004, Stanford Law School held a very interesting symposium, entitled, "The Future of American Sentencing: A National Roundtable on Blakely."

A link to the transcript to the entire roundtable discussion among leading law professors is provided below. Here's a description of the event provided by Stanford:

"In the wake of the dramatic Supreme Court decision in *Blakely v. Washington*, Stanford Law School convened an assembly of the most eminent academic and professional sentencing experts in the country to jointly assess the meaning of the decision and its implications for federal and state sentencing reform. The event took place on October 8 and 9, just a few months after *Blakely* came down and the very week that the Supreme Court heard the arguments in *United States v. Booker* and *United States v. Fanfan*, the cases that will test *Blakely*'s application to the Federal Sentencing Guidelines. Thus the Roundtable offered these experts an "intellectual breathing space" at a crucial point in American criminal law. The event was built around six sessions, with shifting panels of participants doing brief presentations on the subject of the session, and with others then joining in the discussion. We are pleased that FSR is able to publish this version of the proceedings of the event—a condensed and edited transcript of the sessions."

[http|www.afda.org/afda/news/Blakely_Stanford_symposium.htm](http://www.afda.org/afda/news/Blakely_Stanford_symposium.htm)|CLICK HERE TO ACCESS THE TRANSCRIPT OF THE STANFORD LAW SCHOOL SYMPOSIUM

Okay, here are some recent Blakely cases worth noting:

Two opinions from the now-infamous Utah US District Judge Paul Cassell

1) November 16: US v Angelos: Cassell imposed a 55-year mandatory minimum sentence on Weldon Angelos, a 24-year-old music executive convicted of marijuana dealing a related firearms offenses. Judge Cassell called the sentence he felt obligated to impose "unjust, cruel and even irrational," but he ultimately concluded that he "must reject Mr. Angelos' constitutional challenges." This ruling appears to be a loud denunciation of mandatory minimum sentencing, as if to set the stage for a post-Booker/Fanfan attack on the Supreme Court's ruling in Harris, which upheld mandatory minimums.

[http|www.afda.org/afda/news/Blakely_case_Angelos.pdf](http://www.afda.org/afda/news/Blakely_case_Angelos.pdf)|CLICK HERE TO READ ANGELOS OPINION

**2) U.S. v. Visinaiz
November 16, 2004
U.S. District Judge: Paul Cassell (District of Utah)**

KEY FOCUS: Blakely's applicability to restitution awards. Excerpt worth noting:

quote:

"The court next concludes that the Sixth Amendment right to a jury trial, as expansively interpreted in Blakely, does not extend to restitution awards. Two separate justifications support this conclusion. First, restitution is not a penalty and therefore is simply not covered by the Sixth Amendment. Second, as a matter of historical practice dating to well before the drafting of the Constitution, restitution has traditionally been determined by the judge, not the jury. In light of this history, the Sixth Amendment should not be read as creating a need for jury fact-finding on restitution issues."

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[http|www.afda.org/afda/news/Blakely_case_Visinaiz.pdf](http://www.afda.org/afda/news/Blakely_case_Visinaiz.pdf) [CLICK HERE TO ACCESS THE VISINAIZ OPINION

**United States v. Pittman, 2004 U.S. App. LEXIS 23764
Seventh Circuit
November 12, 2004**

KEY holding: affirms sentence imposed under Career Offender guideline, despite the error on the part of the district court in making a finding as to drug quantity by a preponderance per guidelines. Circuit noted that the drug quantity finding was irrelevant because the sentence was determined by the Career Offender guideline, rather than the Relevant Conduct determination as to quantity.

[http|www.afda.org/afda/news/Blakely_case_Pittman.pdf](http://www.afda.org/afda/news/Blakely_case_Pittman.pdf) [CLICK HERE TO ACCESS THE PITTMAN OPINION

[End of online presentation. Online chat discussion w/defense attorneys which followed the presentation has been omitted.]