CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MICHAEL H. MARCUS
JUDGE
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123
PHONE (503) 988-3250
FAX (503) 276-0961
Michael.H.Marcus@ojd.state.or.us

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Comments on *Preliminary Draft No. 4, Model Penal Code: Sentencing*

Dear Prof. Reitz:

Hving reviewed the fourth draft responding to *Blakely*, et al, as usual, I largely agree with your approach with the notable exceptions I have expressed before. For the record, I will repeat those exceptions concisely, but will offer here what I hope you will see as helpful comments and suggestions. I will focus on the new portions responsive to *Blakely*, but will also include a few comments on the provisions carried forward. Most reflect my experience in helping to craft the admittedly politically compromised Oregon legislative response. I know you have no obligation to respond, and expect only that what I offer may be helpful to you. I'll start with a few comments for the record, then offer some thoughts regarding the new provisions, and close with a few comments about the provisions carried forward that have occurred to me in this post-*Blakely* reading . I'll append a list of writings which I simply incorporate by reference as embodying my views on this project overall.

For the Record:

I agree that we should promote presumptive guidelines for a variety of reasons, that "Blakelyization" is to be preferred to "Bookerization," and that there is an important function for sentencing commissions and appellate review. I disagree that normalization of just deserts in pursuit of moderation of incarcerationism or of sentencing disparity is a sufficient accomplishment without rigorous pursuit of crime reduction within the limits of proportionality. I disagree that it is appropriate to spare the just deserts component of punishment the rigorous justification you would require of utilitarian purposes – in large part because you enshrine severity. Applying performance measures such as reinforcing social values, obviating vigilantism, and fostering confidence in and respect for institutions of lawful authority would better pursue the goals of sentencing that I believe we share.

I disagree that merely having commissions study and appellate courts review compliance with guidelines largely immunized from rigor accomplishes much of value – witness the UK system of review for severity and leniency, which has produced a largely meaningless body of appellate musings on punishment that is every bit as adrift as the practices you rightly deride as the product of a shopping list of directives in the absence of guidelines. For example, researching the impact of offender, offense, and victim variables on sentences imposed is of profoundly less value than researching the impact of sentences imposed on future criminal behavior in light of those variables. I understand that you favor a common law of sentencing because it might provide a buffer against incarcerationism, but the Oregon experience is hardly unique in demonstrating the capacity of the electorate to override such attempts at moderation. I

propose that we do a better job by tackling the issue on its merits and holding ourselves to best efforts at distributing correctional resources based on what works.

The New Provisions:

By way of disclosure, let me reveal that I am no where near as outraged by *Blakely* and its progeny as you seem to be. I know from your comments in Santa Fe last year that you thought the Supreme Court was being pernicious in imposing a "constitutional tax" on the "enlightened" guideline approach of Washington. I now see some serious frustration coming through in the "Swiss cheese" analysis of the *Blakely* cases. I certainly share your view that the Supreme Court has been regrettably insensitive to sentencing severity in all other contexts, but see no contradiction in its *Blakely* results. I suppose my perspective is related to the notion that guidelines without public safety are not as precious to me as they are to you. But in any event, it is my sense that the judges and policy makers with whom I've interacted in responding to *Blakely* are simply not outraged by the notion that if the existence of a fact is essential to a judge's ability to reach a given level of sentencing severity, the defendant ought to have a jury trial right associated with finding that fact. There is no hypocrisy lurking in the many easy ways the Court appears to allow legislatures to avoid that right, because this isn't about severity or leniency from the Court's point of view, and it isn't even about whether judges or juries ought to be involved in sentencing decisions. So far, it is only about who gets to decide a fact that state law has rendered critical to an enhanced sentence. The jury trial right is no outrage upon constitutional law, however surprised jurisdictions other than Kansas were by *Blakely*. That state law can leave it all up to sentencing discretion (*Williams v. New York*) undermines not at all that a defendant must have the right to have a jury decide the fact when state law makes it prerequisite to a higher sentence than would otherwise be available as a matter of discretion. In this light, the future of *Harris* is not unlike the fringes of any other developing legal issue.

More to the point, as your work and that of many states responding to *Blakely* demonstrates, this is but a bump in the road of the guidelines movement – a movement whose value largely depends (in my view) on how we respond to the public safety issues I continue to assert.

Revised Comment g to §7.XX, and *comment i to New §7.07B* : I would invite you to give some thought to some qualification to your preference for judicial decisions in sentencing matters. I have no problem with the notion that once the jury decides the facts, judicial discretion (with input as wide as *Williams v. New York* permits) should decide the result [once informed and directed in the direction of public safety as I propose]. But disparaging the importance of the jury's work is bad policy and inappropriate for the scope of the potential role juries have. In Oregon, for example, juries are required (unless waived) on the issue of whether an alleged dangerous offender "is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another" so as to be exposed to enhanced sentencing under Oregon's dangerous offender statute, ORS 161.725. *State v. Williams*, 197 Or App 21, 104 P3d 1151 (2005). As you have seen, our *Blakely* "fix" statute applies to such issues. Whatever you may think of juries and such questions, my sense is that jurors are fully competent to sift through and evaluate competing expert opinions – as they regularly do on medical malpractice and other "scientific" issues in my courtroom in civil cases. Judges are not inherently better at it -- and our sentencing culture so far has hardly honed their

social science skills.

New §7.07A, comment c: For whatever it may be worth, Oregon's consecutive sentencing statute is in part particularly susceptible to a *Blakely* analysis:

> **ORS 137.123(5)** The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:
>
> (a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> (b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.
>
> [*emphasis added*]

Our appellate courts have declined to reach *Blakely* consecutive sentencing issues when not preserved at trial [though they have routinely reversed as clear error upward departure sentences in the pipeline imposed before and in violation of *Blakely*]. They will surely get one soon they cannot avoid.

New §7.07A, comment f: First, I repeat here a suggestion I've made in other contexts: There is much to be said for allowing oral findings on the record in lieu of written findings to facilitate meaningful review. In high volume courts, it may well be far more practical for a judge to make such findings orally on the record – particularly because so many cases are *not* going to be appealed, and the purposes of review are fully satisfied by transcribed oral statements. I understand the argument that making a judge write something can result in deeper thought. In practice, however, such writings are usually routinized into check boxes on forms [we have already addressed this in our automated uniform criminal judgment]. Besides, it's not really the trial court that this provision focuses on, but the construction of appellate common law.

Second, the exception from express findings for presumptive sentences is *not* based on a "safe[ ] assumption that the court has ratified the legal and policy analysis of the sentencing commission in crafting guidelines." When a judge imposes presumptive sentences whose severity is based on the value of the stolen car in the market place, there is no necessary ratification that this should make the difference – particularly in a system in which mere disagreement with the presumptive sentence is expressly inadequate justification for departure. It is often wrong in fact, inconsistent in theory, and destructive of credibility to insist that presumptive sentences imply agreement by the court with the policy choices. Drug cases are another whole category in which we commonly impose presumptive sentences because it's our

duty under the guidelines, not because we "ratify" the underlying policy analysis. The point is largely that our job is not to make that policy analysis; we have no call to ratify it and no basis to depart just because we disagree with it. The real reason to dispense with findings is that most presumptive sentences are not going to be appealed or reversed, and that they are presumptive is itself sufficient justification for their imposition.

Original §7.07(4): Consistent with my criticism of the revision's emphasis, I would insert here the essence of what the Oregon legislature has just adopted, and require:

> that a presentence report provide an analysis of what disposition is most likely to reduce the offender's criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody . . .
>
> [2005 Oregon Laws Ch 473 (SB 914)]

New §7.07B(1): It is a mistake to define "penalty ceiling enhancement facts" as those that the government is legally required to prove "*following* a conviction." You go on (properly) to favor contemporaneous trial of guilt and enhancement facts in most cases, and this temporal confusion serves no purpose. I suggest you just take out those words; if you need a temporal qualifier, "before sentencing"– but I see no need for a temporal qualification.

New §7.07B(4): Oregon's legislation distinguishes between "offense-related" enhancement facts to be tried with guilt and innocence, and "offender-related" facts, to be tried separately. The distinction probably works pretty well, but I was able to add to the legislation a safety valve:

> If the court finds that trying an enhancement fact relating to the offense during the trial phase of the criminal proceeding would unfairly prejudice the jury's verdict on an underlying offense, the court shall allow the defendant to defer trial of the enhancement fact to the sentencing phase of the proceeding without waiving the right to a jury trial on the enhancement fact.

(I would have preferred an articulation other than "prejudice the jury's verdict," but legislative counsel insists on doing most of the drafting, and it wasn't worth the risk to introduce amendments for this level of improvement. I doubt that the courts will have any trouble based on this language.)

I certainly agree with your approach.

New §7.07B(4)(b), and comment g: The "alternate" language may cause unforseen problems, as with the Oregon legislation. Most states, including Oregon, provide already for the selection of "alternate jurors." Unless you *intend* to limit substitutions or replacements to those who served as alternates at the guilt phase, the ability to constitute a sentencing jury may be severely impaired by this usage. As you can see, Oregon's legislation allows for empaneling a jury when a defendant returns from appeal on a *Blakely* issue for re-sentencing, and, of course, we start with an entirely different jury. Otherwise, we, too, are limited to "alternates." Although it is of course preferable to use jurors who participated at the guilt phase, it may be impossible to

do that for a variety of reasons, and that impossibility would be an arbitrary reason to foreclose an enhanced sentence. I expect you may mean, and suggest that you should mean, that the court may select replacement or additional jurors. I'd drop the "alternate" designation to avoid the argument that we can't do anything if there were or are no "alternates" available from the guilt phase – and no, I wouldn't try to rescue the word with more language ["not limited to any who served at the guilt phase"], I'd just replace it with the less passive "the court may select substitutes for trial jurors unable to continue service" and let it go at that.

Note this interplay with pre-sentence investigations: It is not unlikely that an "offender-related" enhancement fact may benefit from such an investigation, but the feasibility of keeping the same jury disappears when we have the PSI performed before the sentencing jury convenes. Based on preliminary discussions locally, I expect the practice to evolve that we would promptly convene the sentencing jury to decide enhancement facts alleged by the state, and send the results along with the PSI order for input on whether and how the court should use the resulting range of sentencing discretion.

New §7.07B(7): I see no good reason why the court should not invite the defense to pursue sentence "mitigation" factors in anticipation of sentencing, even though they do not trigger *Blakely* rights. The absence of the reference may result in arguments that a judge has no business "representing" the defendant by suggesting issues in preparation for a sentencing hearing. In other words, I'd expressly allow the court on its own motion to raise any factual consideration that would increase or decrease sentencing.

New §7.07B(8) and comment k: Oregon's legislation provides that a waiver on the issue of guilt operates to waive jury on sentencing issues. I prefer your approach, though I expect it difficult to raise a constitutional objection in Oregon once the defendant is fully informed of the implications before making an otherwise voluntary choice between court and jury [Oregon gives the defendant the constitutional right to choose a court trial - that's the rub here].

For what it's worth, you may find this helpful: The most powerful reason that few *Blakely* juries will be needed is not just that most cases are resolved by pleas and that many defendants waive jury already on guilt issues [which you've noted], but that most defendants (or their lawyers) will understand that sentencing enhancement facts are usually far less likely to outrage a judge than a jury of people who don't have our routine exposure to what should be outrageous. [Forgive me this: poignant proof is that judges are not outraged by our avoidance of smart sentencing which would reduce cruelty to victims and offenders.] Experience has already shown that the last thing most defendants will want is to allow the state to try an enhancement fact to the jury when that fact would otherwise not be part of the guilt phase, and most will fear what a jury would do even at a separate penalty phase with an "offender-related" enhancement fact as compared with what a judge would do. There will be exceptions, to be sure, but this is a powerful factor in reducing the practical cost of *Blakely* compliance. One set of exceptions is cases on *Blakely* remand, where the judge has already imposed an enhanced sentence, and the jury is the defendant's last hope. This is a closed set of cases, of course, but even here, the state is making deals, and we rarely actually have to empanel a new jury.

New §7.07B(9): This works as well as Oregon's similar approach for anticipating non-

departure *Blakely* situations. As noted, our statute supports a particularly strong argument for subjecting some consecutive sentences to *Blakely*, and our responsive legislation already expressly covered dangerous offender (and sexually violent dangerous offender) sentencings.

New §7.07B, comment c: I strongly agree that both that fair notice is required, and that it is not an element in the sense that it need be pleaded. This is the Oregon approach.

New §7.07, comment k: Oregon requires a defendant to elect jury or court on all offender-related, and separately on all offense-related enhancement facts -- except those that are admitted. I doubt that your approach is constitutionally required, but I do not oppose it.

Reporter's Notes, Table 1, page 48: Again, as to consecutive sentencing, the local statute may make all the difference.

Provisions Carried Forward:

Revised §7.ZZ (2): I urge you to consider that allowing review of even presumptive sentences for being "too severe or too lenient" will either be ignored by appellate courts or produce a useless body of mush rather than anything worthy of respect as precedent for any useful purpose. Take a look at Canada and the other countries that follow the UK approach; judges hold forth, commonly in separate opinions when they actually bother to decide something of importance, and -- from my point of view -- typically embarrass themselves by revealing how little they actually know about the realities of criminal justice and corrections, how tenuous is their hold on anything approaching social science, and how distant they are from the cultures which actually surround the victims and perpetrators of the vast majority of crimes.

Even with the values that apparently drive your priorities, appellate review for what does or does not justify a departure and what violates some subconstitutional limit on severity makes far, far more sense than inviting appellate judges to pontificate about leniency and severity.

In my world, and largely for the record, encouraging appellate judges to hold forth on aggravation and mitigation is dangerously to exalt retributive justice -- even if intended to enforce moderation -- and to perpetuate a socially irresponsible avoidance of accountability for public safety outcomes. At the same time, the behavior you would engender would be cruelly stupid in that would be made of whole cloth while pretending precision within the interstices you and I know are extremely broad [the range of deontologically acceptable punishments for a given crime under given circumstances], and in that it would function further to avoid reducing avoidable victimizations and uselessly brutal sentences. OK, I've made my record again.

Revised 7.ZZ(3): I suggest that you drop this confusing use of "mandatory" appeal, as it is apparent that you mean appeal "as of right" "on the same terms as a first appeal from a criminal conviction." "Mandatory" in common usage means an appeal that goes forward whether or not the parties or either of them want an appeal, as in mandatory appeal from a sentence of death. Or do you really mean to require every departure to be appealed whether the parties want that or not? -- if so, that is not "on the same terms as a first appeal from a criminal conviction" in any jurisdiction I know of. Also if so, you substantially raise the burden on appellate courts, though I suspect they'd come up with a mechanism for not expending any

thought on appeals with no advocate.

Revised 7.ZZ(6)(e): I think "automatically" is unnecessary for your meaning -- "shall reverse" should be plenty, and "automatically" really implies something quite different. I also expect that you do not want to discourage deliberation and pronouncement -- both of which are at odds with an "automatic" process.

Revised 7.ZZ(7): I'd order that the sentencing court "impose" rather than "fix" sentence were I attempting to exploit common usage by appellate courts remanding with directions.

§6B.03(6): First, for the record, sentencing commissions ought to be focusing on adopting strategies for encouraging sentences (and sentencing culture) that produces best efforts at sentences that are effective to reduce criminal behavior within the limits of proportionality and resources.

That said, this subsection makes what I'd consider a strategic error from what I understand to be your perspective -- and a part of that perspective with which I concur: it would be a positive thing if whatever "reform" is adopted, it tends to reduce unnecessary severity. The Oregon experience is that the courts have done what they've had to do -- accept the legislative directive as to minimums -- while retaining the limiting effects of guidelines where possible. This approach may be hampered by language that declares the guidelines' "Independen[ce]" from mandatory penalty provisions. *Compare State v. Bagley*, 158 Or App 589, 976 P2d 75 (1999), *with State v. Young*, 183 Or App 400, 52 P 3d 1102 (2002). Why not just declare the intent to control whatever portion of sentencing other law permits? I know you don't want to break bread with mandatory minimums [I share your aversion to them], but let's not shoot ourselves in the foot -- at least without better reason.

"Bookerized" §6B.04, comment g, (4) [page 152]: You say that subsection (4) is a *non sequitur* in its entirety in a "Bookerized" system. [note also the typo *non sequitor*] Although the second clause ("and the guidelines shall in no instance foreclose the individualization of sentences") is clearly unnecessary in an advisory system, the first clause is not. That the commission holds no "formal power" over the exercise hardly means that an "advisory" scheme has no role in encouraging approaches to sentencing -- and I'd argue that the whole point of an advisory scheme is to encourage an approach or approaches to sentencing. Indeed, you expressly "encourage" in other approaches to advisory guidelines (*e.g.,* §6B.04, comment f, (4), and the discussion on page 164). I think what is really going on here is your aversion to what you may consider *excessive* individualization, but that's a very different proposition than implied by "*non sequitur.*" For the record, what's good about "equal treatment" is not subverted with Oregon's existing approach, based on the 1962 guidelines: the purpose is "To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders" (ORS 161.025(1)(f)). Nor is it accomplished by stubborn ignorance of real differences in susceptibility to modes of crime reduction in pursuit of illusory equal treatment.

In any event, though, there is no *non sequitur* in the first sentence of subsection (4) in an advisory guideline system.

§6B.08(1): This approach to limiting incarceration in the case of consecutive sentences has its logical limits. As the Oregon appellate courts have concluded, when the offenses are simply joined for trial as a matter of convenience under the terribly forgiving (and often terribly unfair) modern law of joinder, an offender may be sentenced at the same time for offenses that could as easily have been tried and sentenced separately -- and it makes no sense from most points of view to control the total on the happenstance of joint trial. Thus, for example, *State v. Miller*, 317 Or 297, 855 P2d 1093 (1993), reasoned that even though the text of Oregon's guidelines rules would limit sentences imposed for consecutive sentences, the legislature could not have intended those limits to apply beyond a single "criminal episode."

I tend to agree that once we have a defendant before us on multiple charges, it may make sense to limit what the court can do and why more substantially than the limits applicable to serial convictions and sentencings. Of course, you and I disagree what the focus of the analysis should be after we determine deontological limits. But regardless of our disagreement, if you really intend to cover happenstance joinder as well as connected crimes, I suggest that you say so expressly. What passes for logic now in criminal justice would produce the contrary conclusion.

Related Materials:

Blakely, Booker and the Future of Sentencing, 17 Fed. Sent. Rptr. 243 (2005)

Public Comment on Proposed Priorities to U.S. Sentencing Commission on post-Booker federal guidelines priorities (July 25, 2005)[available at http://www.smartsentencing.com]

Justitia's Bandage: Blind Sentencing, 1 International Journal of Punishment and Sentencing 1 (2005)

Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link,1 Ohio State Journal of Criminal Law 671 (2004)

Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1, 30 American Journal of Criminal Law 135 (2003);

Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It, 16 Fed. Sent. Rptr. 76 (2003)

LR - Limiting Retributivism or Lamentable Retreat? - The Third Draft of Revisions to the Model Penal Code, (August 2004) [a paper presented at a panel of a 2004 conference of the National Association of Sentencing Commissions in Santa Fe, NM, available at http://www.smartsentencing.com]