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
Department 34

Public Affairs-Priorities Comment
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-800

July 25, 2005

Re: Public Comment on Proposed Priorities

Dear Commissioners:

I write to urge that those of us responding to *Booker* and *Blakely* seize this opportunity to revise sentencing guidelines so that they promote sentences that best serve public safety within the available range of just and available sanctions. Virginia is unique in having made substantial strides in this direction; Oregon has begun officially to consider the mere possibility of doing so; but state and federal guidelines otherwise have nothing intentionally to do with crime reduction. We invest the resources of public agencies and private "think tanks" across the spectrum of penal philosophy, yet exclude their accumulated data from any role in sentencing. We need to fix that, because the result is irresponsible cruelty to victims whose crimes smarter sentencing would have prevented. Avoiding accountability for crime reduction is also irresponsible to the taxpayers who pay for a criminal justice system that yields unacceptable recidivism while squandering correctional resources.

Most state and federal statutes proclaiming the purposes of sentencing date from the mid-century fallacy that merely proclaiming those purposes would accomplish their achievement. The 1962 Model Penal Code was an effective articulation of the assumption that sentences served public safety by a combination of deterrence, reformation, and incapacitation, with substantial deference to proportionality and what became known as the medical model of punishment: that most offenders would respond to diagnosis and treatment by reducing their criminal behavior. Those skeptical of rehabilitation eventually gained substantial vindication in growing scientific evidence that treatment success was limited and rare -- and in growing frustration with the recidivism easily attributed to parole boards laboring with blunt predictive tools under indeterminate sentencing laws.

By the late 20th century, the skirmish lines shifted. "Truth in sentencing" and, soon, guideline schemes achieved an equilibrium among competing sentencing ideologies. Those who resisted long prison sentences hoped guidelines would moderate what they deemed "punitivism." They celebrated guidelines' function of limiting sentencing disparity as a sufficient accomplishment, even when those who favor incapacitation elevated guideline ranges with ballot measures and legislation. Initially suspicious of what they saw as the structural leniency of guidelines, the latter now generally support guidelines but struggle to raise sentencing floors and minimize judicial discretion to depart downward.

The resulting *de facto* coalition supporting guidelines enables their consistent failure to improve the crime reduction impact of sentencing. While it surely has social value to determine some metric by which to spread just deserts appropriately among offenders based on their present and past crimes, we must not rest on such puny laurels. The actual range of "just punishment" is quite broad by any popular, historical, or analytical model. While crimes that rightly cause outrage or cause great harm or reflect brutality clearly call for severe punishment, the most common crimes don't evoke a consensus for any but the broadest range of appropriate punishment. Yet we construct intricate matrices that create the illusion of precision but have nothing whatever to do with public safety except by accident -- while achieving consistency in large part by ignoring variables we should not ignore.

I submit that merely ordering just deserts is a woefully insufficient talisman [and a pitiful performance measure] for the exercise of sentencing functions, and that our public responsibility requires that we stop avoiding the mission the public properly expects and prizes above all others: crime reduction.

Of course it is much more challenging to insist on best efforts to achieve crime reduction within the limits of proportionality than to punish within the typically wide range of "appropriate" dispositions. But until we undertake that challenge, we are essentially exploiting just deserts to avoid accountability for the outcomes of our sentencing decisions -- and outcomes are inevitable whether or not we accept responsibility for achieving better rather than worse results. At present, our outcomes amount to unacceptable recidivism, avoidable victimizations, wasted resources, and deflated public confidence in criminal justice.

I am not suggesting that we must be more severe or more lenient. I submit that we must be far smarter in our approach to sentencing -- we must accept the challenge that science posed by finding so much treatment ineffective. Medicine did not abandon empiricism for empty ritual when it found itself powerless against the plague -- it struggled to learn more, piece by piece, and to improve its ability to solve the mysteries of disease. Sentencing, in contrast, essentially retreated to ceremony instead of learning more about the limits and the promise of treatment. Criminologists have learned a great deal, and can now identify program characteristics that correlate with substantial reductions in recidivism, but we generally ignore such matters in sentencing.

But this is not just a struggle between treatment or "rehabilitation" on the one hand and incarceration on the other. Not just programs, but everything we do (and the way we do it) works better on some than on other offenders. "Rehabilitation" proponents must understand that incarceration works tremendously well for almost all offenders during the period of incarceration. "Incarcerationists" must understand that for some offenders, incarceration may increase their criminality to the point that their recidivism after release makes up for lost time several fold when they return to their communities. We have a wide range of responses to crime -- from treatment (outpatient, inpatient and secure custodial), alternative sanctions, and various forms and lengths of supervision, to jail and prison of varying duration. A responsible criminal justice system goes far beyond merely accepting a just deserts calculus for using these resources to reduce the risk of harm at the hands of offenders. A responsible criminal justice system does its best to learn which responses are most likely to reduce the total risk of harm posed by an

offender over the course of a potential criminal career-- and to apply that learning within the limits of proportionality and resources. A responsible criminal justice system understands that what works on one offender may not work on another -- and that on some offenders, nothing but incapacitation works.

**I submit that the highest calling of sentencing commissions is to promote sentencing laws and practices that pursue best efforts at crime reduction with at least the same vigor that they pursue adherence to a matrix of expected severity.** Few have taken that route -- after all, merely publishing a matrix and monitoring how well judges adhere to it is far, far less challenging than the task I propose. It is also far, far less valuable for public safety or even fiscal responsibility -- recidivism is not just cruel; it is also inefficient, as recidivists repeatedly tax our resources as they victimize our citizens.

Virginia has provided a worthy example of how sentencing law and guidelines can promote public safety and smarter sentencing. Its sentencing commission studied, refined, and validated risk assessment, then incorporated risk assessment into its guidelines. The first result was far longer sentences for sex offenders who posed a greater risk of recidivism than others. Later, Virginia extended risk assessment to ensure that prison beds were available for a wide range of offenders who represented an elevated risk of harm while relegating lower risk offenders to alternative sanctions. The history and results of this effort are available on the Virginia Criminal Sentencing Commission's web site, http://www.vcsc.state.va.us/reports.htm.

Oregon's guidelines, like those of other states and the federal system, have virtually nothing intentionally to do with crime reduction. They serve public safety only by the accident that worse crimes and records generally result in longer sentences. In spite of repeated legislative proclamations that crime reduction is our mission, our guidelines (which govern felony sentencing) ignore that mission, and essentially erect our calculus solely around crime seriousness, criminal history, and prison resources. Our current effort to get beyond the woefully ineffective status quo is embedded in 2005 Oregon Laws, chapter 474 (SB 919):

> The Oregon Criminal Justice Commission shall conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines and, if it is possible, the means of doing so.

Of course, this is a most modest first step. But I submit that the path is one that all of us should take if we are adequately to pursue the public safety component of sentencing.

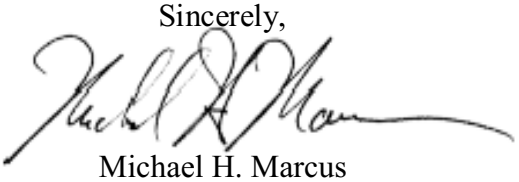
In short, until and unless we become responsible about making guidelines and other sentencing laws and practices reflect best efforts at crime reduction, we will have accomplished little of substantial value. Meanwhile, we are responsible, at some level, for the victimizations we could and should have prevented.

I have expanded on these points in *Blakely, Booker and the Future of Sentencing*, 17 Fed. Sent. Rptr. 243 (2005), of which I will send a copy as soon as I receive the final version (unless you indicate that you do not wish to receive it); *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) [Available on Lexis at 1 Ohio St. J. Crim. L. 671]; *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 American Journal of Criminal Law 135 (2003) [Available on WestLaw at 30 AMJCRL 135]; *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It,* 16 Fed. Sent. Rptr. 76 (2003). *See also, 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 conference of the National Association of Sentencing Commissions in Santa Fe, NM], available at http://www.smartsentencing.com, along with other articles, legislative and judicial materials, and a description of our local sentencing decision support technology.

I would welcome the opportunity to provide further information or assistance on these issues, including Oregon's statutory response to *Blakely* in which I participated. I would also greatly value any information about other attempts to bring responsible crime reduction practices into the function of guidelines.

Sincerely,



Michael H. Marcus
Judge