

**Testimony of Frank O. Bowman, III**  
M. Dale Palmer Professor of Law  
Indiana University School of Law - Indianapolis  
**Before the Subcommittee on Crime, Terrorism, and Homeland Security,**  
**Committee on the Judiciary**  
**U.S. House of Representatives**  
**July 6, 2004**

**Blakely v. Washington and H. 4547**

I am grateful to the Subcommittee for the opportunity to testify today regarding H. 4547, which has been titled 'Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004'. My testimony will address two general subjects: (1) the undesirability of proceeding with significant sentencing legislation of this type in light of the profound uncertainties created by the U.S. Supreme Court's very recent decision in *Blakely v. Washington*; and (2) what seem to me to be shortcomings in the bill itself.

**I. Introduction**

I am currently on the faculty of the Indiana University School of Law – Indianapolis where I am the M. Dale Palmer Professor of Law. Before becoming a teacher, I was a trial lawyer for 17 years, roughly 13 of which were spent as a federal or state prosecutor. I began my career as a Trial Attorney for the Criminal Division of the U.S. Department of Justice (1979-82), and later served as a Deputy District Attorney in Denver, Colorado (1983-87). For seven years, from 1989-96, I served as an Assistant U.S. Attorney for the Southern District of Florida (Miami), where for a period I was Deputy Chief of the Southern Criminal Division. I have prosecuted or supervised the prosecution of numerous drug cases, from small hand-to-hand drug sales in state court to complex importation schemes involving hundreds or thousands of kilograms of cocaine in Miami.

I do not favor the legalization of drugs. I believe that the criminal law has an important function to play in anti-drug strategies. I believe that federal prosecution, in particular, is a critical component of overall anti-drug efforts, particularly because of the interstate and international character of the drug trade. When I entered the academy, my first article was a defense of the federal role in drug law enforcement.<sup>1</sup> In a later article I wrote: "I have no truck with drug dealers. ... I have prosecuted many traffickers, urged their lengthy incarceration with zeal, and witnessed its imposition with satisfaction."<sup>2</sup> While I suspect that my prosecutorial ardor may have mellowed somewhat in the intervening years, my fundamental position has remained the same – drug trafficking is an evil and criminal law enforcement, including the imposition of significant prison sentences in appropriate cases, plays a vital role in combating that evil.

---

<sup>1</sup> Frank O. Bowman, III, *Playing "21" With Narcotics Enforcement*, 52 WASH. & LEE L.R. 937 (1995).

<sup>2</sup> Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679 (1996).

Likewise, I am not a proponent of unchecked judicial sentencing discretion. I have been a long-time supporter of structured sentencing systems and of the federal sentencing guidelines in particular. I have written a number of articles defending the federal sentencing guidelines as a beneficial set of constraints on judicial sentencing authority.<sup>3</sup>

Therefore, I come before you today entirely in sympathy with what I take to be the fundamental aims of H. 4547. Nonetheless, I urge the Judiciary Committee not to approve this bill.

First, because of the Supreme Court's decision less than two weeks ago in *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 2004 WL 1402697 (June 24, 2004), the constitutionality of the federal sentencing guidelines (and of sentencing systems in numerous states) is presently in grave doubt. It is not an exaggeration to say that the federal criminal justice system is in chaos.<sup>4</sup> As I will explain below, there is good reason to believe that congressional action may be required to provide both short and long-term solutions to the disruption caused by *Blakely*. H. 4547 would significantly modify important components of federal sentencing law. Congress should be cautious about adding new complexities to an already volatile situation, at least until the constitutional status of the federal sentencing guidelines becomes clear and the shape of the post-*Blakely* sentencing universe solidifies.

Second, even if *Blakely* had not turned the sentencing universe upside down, I would still be urging the Committee not to approve this bill. As sympathetic as I am to its laudable aims, the particulars of the legislation do not seem to me to be helpful additions to the armamentarium of those fighting drug trafficking and abuse, and would in many instances create more problems than they solve.

## **II. Blakely v. Washington**

In this section of my testimony, I will briefly analyze the effect of *Blakely* on federal sentencing law and then outline a possible legislative response to the crisis created by that decision.

### **A. The Effect of *Blakely* on the Guidelines**

A detailed analysis of the *Blakely* opinion is beyond the scope of this testimony.<sup>5</sup> In summary, the case involved a challenge to the Washington state sentencing guidelines. In Washington, a defendant's conviction of a felony produces two immediate sentencing consequences -- first, the conviction makes the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of

---

<sup>3</sup> See, e.g., *Id.*; Frank O. Bowman, III, *Fear of Law: Thoughts on 'Fear of Judging' and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS L.J. 299 (2000).

<sup>4</sup> A great many states are in the same unhappy situation, but their difficulties do not bear directly on the subject of today's hearing.

<sup>5</sup> The best currently available judicial analysis of *Blakely's* effect on the federal system is Judge Paul Cassell's opinion in *U.S. v. Croxford*, Case No. 2:02-CR-00302PGC (D. Utah June 29, 2004), holding the Federal Sentencing Guidelines unconstitutional in light of *Blakely*. No assessment of the current state of affairs would be complete with reading this opinion.

conviction, and second, the conviction places the defendant in a presumptive sentencing range set by the state sentencing guidelines. This range will be within the statutory minimum and maximum sentences. Under the Washington state sentencing guidelines, a judge is obliged (or at least entitled) to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years. The fact of conviction generated a “standard range” of 49-53 months; however, the judge found that Blakely had committed the crime with “deliberate cruelty,” a statutorily enumerated factor that permits imposition of a sentence above the standard range, and imposed a sentence of 90 months. The Supreme Court found that imposition of the enhanced sentence violated the defendant’s Sixth Amendment right to a trial by jury.

In reaching its result, the Court relied on a rule it first announced four years ago in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In the years since *Apprendi*, many observers (including myself) assumed that *Apprendi*’s rule applied only if a post-conviction judicial finding of fact could raise the defendant’s sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction. For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant’s motive in committing the offense was racial animus. The Supreme Court held that increasing Apprendi’s sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what we have always before thought of as the statutory maximum. Henceforward, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, *supra* (Opinion of Justice Scalia; emphasis in original).

Accordingly, the Federal Sentencing Guidelines seem to fall within the *Blakely* rule. A defendant convicted of a federal offense is nominally subject to any sentence below the statutory maximum; however, the actual sentence which a judge may impose can only be ascertained after a series of post-conviction findings of fact. The maximum guideline sentence applicable to a defendant increases as the judge finds more facts triggering upward adjustments of the defendant’s offense level. In their essentials, therefore, the Federal Sentencing Guidelines are indistinguishable from the Washington guidelines struck down by the Court.<sup>6</sup> Thus, although the Court reserved ruling on the application

---

<sup>6</sup> There are, of course, many differences in the two systems, but most of those differences would seem to be either immaterial or to render the federal guidelines more, not less, objectionable under the *Blakely* analysis. For example: (1) Various observers have pointed out that the Washington guidelines are statutory, while the Guidelines are the product of a Sentencing Commission nominally located in the

of its opinion to the Guidelines, there seems little question that it does impact the Guidelines.

The question then becomes what immediate effect *Blakely* will have on the federal sentencing system. In the last week, federal sentencings all over the country have stopped while courts and litigants assess the situation.<sup>7</sup> As judges begin to rule, they face three basic options: (a) find that *Blakely* does not apply to the federal sentencing guidelines and proceed as though nothing has happened; (b) find that the Sentencing Guidelines survive, but that each guideline factor which produces an increase in sentencing range above the base offense level triggered by conviction of the underlying offense is now an “element” that must be pled and proven to a jury or agreed to as part of the plea; or (c) find that the Guidelines are facially unconstitutional, in which case judges can sentence anywhere within the statutory minimum and maximum sentences of the crime(s) of conviction.

Consider these options and their practical consequences:

- (a) *Blakely* does not apply to the Federal Sentencing Guidelines: For the reasons sketched above, this seems an unlikely result. Of the roughly half-dozen district court judges who have so far issued opinions addressing the *Blakely*’s impact on the Guidelines, none has found that *Blakely* does not apply.
- (b) *Blakely* transforms the Guidelines into a part of the federal criminal code: The second possibility is that courts could find that the guidelines remain constitutional as a set of sentencing rules, but that the facts necessary to apply the rules must be found beyond a reasonable doubt by a jury or be agreed to by the defendant as a condition of his or her plea. In effect, all Guidelines rules whose application would increase a defendant’s sentencing range<sup>8</sup> would be treated as “elements” of a crime for purposes of indictment, trial, and plea. During the last week, several district court judges have used essentially this approach to reduce the sentences of convicted defendants whose cases were awaiting sentencing or pending appeal.<sup>9</sup>

---

Judicial Branch. However, the federal guidelines were authorized by statute and amendments must be approved by Congress (at least through the negative sanction of inaction). More importantly, the institutional source of the rules seems immaterial to the Court’s Sixth Amendment concern about the role of the jury in determining sentencing facts. (2) The federal guidelines are far more detailed than their Washington counterparts, but that seems only to make them a greater offender against the Sixth Amendment principle enunciated in *Blakely*. (3) The modified real-offense structure of the Guidelines, in particular their reliance on uncharged, or even acquitted, relevant conduct, is different than the Washington system, but surely much more offensive to the *Blakely* rule than the Washington scheme.

<sup>7</sup> Similar stoppages have occurred in many state courts, but the implications of *Blakely* for state sentencing are beyond the scope of this testimony.

<sup>8</sup> Probably excluding rules on criminal history, since the Court has previously held that sentence-enhancing facts relating to criminal history need not be proven to a jury.

<sup>9</sup> See, e.g., *United States v. Shamblin*, Crim. Action No. 2:03-00217 (S.D. W.Va. June 30, 2004) (Goodwin, J.).

If Guidelines adjustments were henceforward to be treated as elements of a crime to be proven beyond a reasonable doubt at trial, a host of new rules and procedures would have to be devised. At this point, no one has fully mapped out all the modifications that would be required; however, the list would seem to include at least the following:

- The government would presumably have to include all guidelines elements in the indictment. However, this is not certain. Perhaps guidelines enhancements sought by the prosecution could be enumerated in separate sentencing informations; but if so, such a procedure would presumably have to be authorized by statute and might not pass constitutional muster.
- If guidelines elements were required to be stated in indictments, grand juries as well as trial juries would have to find guidelines facts, and thus grand jurors would have to be instructed on the meanings of an array of guidelines terms of art – “loss,” reasonable foreseeability, sophisticated means, the differences between “brandishing” and “otherwise using” a weapon, etc.
- Since guidelines enhancements would be elements for proof at trial, the Federal Rules of Criminal Procedure and local discovery rules and practices would have to be revised to provide discovery regarding those elements.
- New trial procedures would have to be devised. Either every trial would have to be bifurcated into a guilt phase and subsequent sentencing phase, or pre-*Blakely* elements and post-*Blakely* sentencing elements would all be tried to the same jury at the same time.<sup>10</sup> There is now no provision in federal statutes or rules for bifurcated sentencing proceedings, except in capital cases, and there is at least some doubt that such bifurcated trials would even be legal in the absence of legislation authorizing them.
- If a unitary system of trial were adopted, the judge would be required to address motions to dismiss particular guidelines elements at the close of the government’s case and of all the evidence,<sup>11</sup> before sending to the jury all guidelines elements that survived the motions to dismiss.

---

<sup>10</sup> Alternatively, perhaps only those Guidelines elements thought particularly prejudicial to fair determination of guilt on the purely statutory elements would have to be bifurcated, but that option would require a long, messy process of deciding which Guidelines facts could be tried in the “guilt” phase and which could be relegated to the bifurcated sentencing phase.

<sup>11</sup> Unlike other conventional “elements” of a crime, “guidelines elements” would presumably be subject to dismissal at any point in the proceedings without prejudice to the defendant’s ultimate conviction of the core statutory offense. For example, in a unitary trial system, if the government failed to prove drug quantity in its case-in-chief, the drug quantity “element” could (and presumably should) be dismissed pursuant to the F.R.Cr. P. at the close of the government’s case without causing dismissal of the entire prosecution. By contrast, a failure to prove the “intent to distribute” element of a 21 U.S.C. § 841 “possession with intent to distribute” case would require dismissal of the entire prosecution.

- In either a unitary or bifurcated system, the judge would be obliged to instruct the jury on the cornucopia of guidelines terms and concepts, and the jury would have to produce detailed special verdicts.

The prospect of redesigning pleading rules, discovery and motions practice, evidentiary presentations, jury instructions, and jury deliberations to accommodate the manifold complexities of the Guidelines should give any practical lawyer pause. The new system would take years to design and shake down. In the interim, uncertainty would be endemic. Even when the new system settled in, the sheer complexity of a regime that grafted hundreds of pages of guidelines rules onto the trial process would dramatically increase the potential for trial error. One of the many perverse results of such a nightmarishly complex system would be the creation of a powerful new disincentive to trials, and thus a probable diminution of the already rare phenomenon of jury fact-finding that the *Blakely* majority presumably meant to encourage.

The second consequence of treating all Guidelines sentencing enhancements as elements would be to markedly alter the plea bargaining environment. This reading of *Blakely* would transform every possible combination of statutory elements and guidelines sentencing elements into a separate “crime” for Sixth Amendment purposes. This has two consequences for plea bargaining: (a) As a procedural matter, each Guidelines factor that generates an increase in sentencing range would have to be stipulated to as part of a plea agreement before a defendant could be subject to the enhancement. (b) More importantly, negotiation between the parties over sentencing facts would no longer be “fact bargaining,” but would become charge bargaining. Because charge bargaining is the historical province of the executive branch, the government would legally free to negotiate every sentencing-enhancing fact, effectively dictating whatever sentence the government thought best within the broad limits set by the interaction of the evidence and the Guidelines. The government would no longer have any obligation to inform the court of all the relevant sentencing facts and the only power the court would have over the negotiated outcome would be the extraordinary (and extraordinarily rarely used) remedy of rejecting the plea altogether.<sup>12</sup>

A plea bargaining system that operated in this way might benefit some defendants with particularly able counsel practicing in districts with particularly malleable prosecutors. On the other hand, making sentencing factor bargaining legitimate

---

<sup>12</sup> And even this remedy would be of little practical use. If the judge rejected a plea because she felt it was unduly punitive, she could not prevent the government from presenting its case to a jury. If a judge were to reject a plea on the ground that it did not adequately reflect the full extent of the defendant’s culpability under Guidelines rules, the judge could not force the government to “charge” the defendant with additional Guidelines sentencing elements. The most the court could do is force the case to trial on whatever combination of statutory and guidelines elements the government was willing to charge – a weak and self-defeating remedy because the two possible outcomes of a trial on such charges are a guilty verdict on the charges the judge thought inadequate in the first instance or a not guilty verdict on some or all of the charges, which would produce even less punishment.

would dramatically increase the leverage of prosecutors over individual defendants and the sentencing process as a whole, leading to worse results for some individual defendants and a general systemic tilt in favor of prosecutorial power.

In any case, any benefit to defendants would inevitably be uneven, varying widely from district to district and case to case. To the extent that the Guidelines have made any gains in reducing unjustifiable disparity, a system in which all sentencing factors can be freely negotiated would surely destroy those gains. (Prevention of this outcome was, after all, the point of the Guidelines' "relevant conduct" rules, see U.S.S.G. §1B1.3.) It might be suggested that the Justice Department's own internal policies regarding charging and accepting pleas to only the most serious readily provable offense would protect against disparity; however, the experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that local U.S. Attorney's Offices cannot be meaningfully restrained by Main Justice from adopting locally convenient plea bargaining practices.<sup>13</sup> Once previously illegitimate "fact bargaining" becomes legally permissible charge bargaining, no amount of haranguing from Washington will prevent progressively increasing local divergence from national norms.

Ironically, if *Blakely* were ultimately determined to require (or at least permit) the Guidelines to be transformed into a set of "elements" to be proven to a jury or negotiated by the parties, the effect would be to markedly reduce judicial control over the entire federal sentencing process. Not only would district court judges be stripped of the power to determine sentencing facts and apply the Guidelines to their findings, but appellate courts would be stripped of any power of review. Neither jury findings of fact nor the terms of a negotiated plea are subject to appellate review in any but the rarest instances. Thus, the interpretation of *Blakely* discussed here would have the perverse effect of exacerbating one of the central judicial complaints about the current federal sentencing system – the increase of prosecutorial control over sentencing outcomes at the expense of the judiciary.

Finally, even if one likes the idea of transforming guidelines factors into elements, it is doubtful that judges alone could effect the transformation. Legislation and Sentencing Commission action would almost certainly be required to modify the Sentencing Reform Act, the Guidelines, and the Federal Rules of Criminal Procedure to accommodate the new constitutional model, a process that would take months or years to accomplish.

---

<sup>13</sup> A number of studies have found evidence of significant local variation in plea negotiation and other sentencing practices among different districts and circuits. See, e.g., Frank O. Bowman, III, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 531-34, 560 (2002) (noting inter-district and inter-circuit disparities in average drug sentences and discussing the "stubborn localism of judicial and prosecutorial behavior").

- c. *Blakely* renders the Federal Sentencing Guidelines facially unconstitutional: The third reading of *Blakely* open to judges is that it renders the Federal Sentencing Guidelines in their present form facially unconstitutional, at least within the current framework of procedural rules governing criminal trials, sentencings, and appeals. At least two district court judges have issued rulings to this effect, including an elegant and persuasive opinion by Judge Paul Cassell of the District of Utah.<sup>14</sup> I think Judge Cassell is right and that the Supreme Court will ultimately agree.

*Blakely* appears to require this result. *Blakely* finds it unconstitutional for the maximum sentence to which a defendant is exposed based purely on the facts found by a jury or admitted in a plea agreement to be increased based on post-conviction judicial findings of fact.<sup>15</sup> The linchpin of the entire federal sentencing guidelines system is precisely such post-conviction judicial findings. The Guidelines model has three basic components: (1) post-conviction findings of fact by district court judges; (2) application of Guidelines rules to those findings by district court judges; and (3) appellate review of the actions of the district court. Both the Guidelines themselves and important components of statutes enabling and governing the Guidelines were written to effectuate this model. Although it is intellectually possible to isolate the Guidelines rules from the web of trial court decisions and appellate review procedures within which the rules were designed to operate, doing so does such violence to the language, legislative history, and fundamental conception of the Guidelines structure that one could save them only by transforming them by judicial fiat into something that neither the Sentencing Commission nor Congress ever contemplated that they would become.<sup>16</sup> It is certainly true that when construing statutes facing constitutional objections that courts will attempt to save so much of the statute as can be saved consistent with the constitution. On the other hand, if the reading of a statute

---

<sup>14</sup> United States v. Croxford, No. 2:02-CR-00302PGC (D. Utah June 29, 2004) (Cassell, J.); United States v. Medas, 2004 U.S. Dist. LEXIS 12135 (E.D. N.Y. July 1, 2004 ) (adopting the reasoning and conclusions of Judge Cassell in Croxford).

<sup>15</sup> It is not only judicial fact-finding that offends the Sixth Amendment under *Blakely*, though that alone is surely enough. Recall that under the Washington sentencing scheme, a judge who found the presence of a gun was not legally obliged to sentence the defendant in the aggravated range, but had to make the additional determination that the fact found merited an increase. Justice Scalia found that element of judicial choice present in the Washington statute did not save it from constitutional oblivion. A post-conviction judicial finding of fact that enabled the judge to exercise his judgment to impose a higher sentence was, in Justice Scalia's view, constitutionally impermissible. The fact that an increased offense level is an automatic consequence of most factual determinations under the federal guidelines certainly seems to make them more objectionable, rather than less.

<sup>16</sup> Time and space preclude a detailed exegesis of this point, but consider as but two examples the relevant conduct rules, U.S.S.G. §1B1.3, and the provisions of the Sentencing Reform Act (both in its original form and as amended by the recent PROTECT Act) providing for appellate review. The relevant conduct rules plainly contemplate sentences based on judicial determinations of facts not found by jury beyond a reasonable doubt. Similarly, provisions of the Sentencing Reform Act governing appellate review of guidelines determinations are effectively nullified by a guidelines-as-elements-of-the-offense application of *Blakely* because if all upward guidelines adjustments must be determined either by jury verdict or by stipulation, there is virtually nothing left to review.

required to render it constitutional transforms the statute into something entirely at odds with its original design and conception, courts may properly strike down the statute in its entirety.

Not only does the reasoning and language of *Blakely* seem to require invalidation of the Guidelines, but the real world effects of the alternative Guidelines-as-elements interpretation outlined in the previous section will give thoughtful judges reason to shy away from it. Not only would such a system be remarkably ungainly, but far more importantly, it would, as noted, exacerbate those features of the current system that federal judges find most galling. If the only options facing the Court were (a) preserving a simulacrum of the Guidelines system that would make the features judges now find most objectionable even worse, or (b) striking the system down in its entirety and starting anew, it is hard to imagine that a majority of the justices would not strike down the system given a plausible constitutional argument for doing so.

Thus, while the Supreme Court could adopt a saving interpretation of the Guidelines which transformed them into elements of a new set of guidelines crimes, the Court could, without any violence to ordinary principles of constitutional adjudication, just as easily find the whole structure invalid.

#### B. What Can Congress Do?

There are certainly some who would be delighted to have the entire Guidelines regime be cast aside in the hope that something preferable will arise in its place. If one wants to destroy the whole structure more or less regardless of what might fill the gap, the preferred stance is one of inaction. On balance, however, both the short and long term consequences of such a course seem undesirable.

In the near term, the federal courts will continue in chaos as judges try to negotiate the labyrinth created by *Blakely*. In the longer term, absent congressional action, either the Guidelines will be transformed by judicial decisions into an annex to the criminal code, augmenting the power of prosecutors and decreasing the authority of judges, or more likely the whole structure will be invalidated as unconstitutional and the process of creating a federal sentencing system would have to begin anew. Such a process carries great risks for all those interested in federal sentencing. For Congress and the Sentencing Commission, seventeen years of work would be nullified. For prosecutors, the Guidelines have been a boon; acceding by inaction to the collapse of the current structure with no guarantee of what might replace it would present, at the least, a tremendous gamble. Even those who have no investment in the Guidelines and every interest in radical reform should be very concerned that any replacement could be even more punitive and more restrictive of judicial discretion than the Guidelines themselves.

Assuming that one wants to preserve the fundamental Guidelines structure or at least to avoid the risks presented by letting *Blakely* play itself out, what can be done? I

believe that the Guidelines structure can be preserved essentially unchanged with a simple modification – amend the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.

As written, *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range. To the extent that *Blakely* itself may be ambiguous on the point, the Supreme Court expressly held in *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986), and reaffirmed in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (June 24, 2002), that a post-conviction judicial finding of fact could raise the *minimum* sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. It bears emphasis that *Harris* was decided only two years ago, and was decided after *Apprendi* and on the very same day as *Ring v. Arizona*, 536 U.S. 584 (June 24, 2002), the case whose reading of *Apprendi* Justice Scalia found so important in his *Blakely* opinion. Thus, the change I suggest would render the federal sentencing guidelines entirely constitutional under *Blakely* and *Harris*.

The practical effect of such an amendment would be to preserve current federal practice almost unchanged. Guidelines factors would not be elements. They could still constitutionally be determined by post-conviction judicial findings of fact. No modifications of pleading or trial practice would be required. The only theoretical difference would be that judges could sentence defendants above the top of the current guideline ranges without the formality of an upward departure. However, given that the current rate of upward departures is 0.6%,<sup>17</sup> and that judges sentence the majority of all offenders at or below the midpoint of existing sentencing ranges, the likelihood that judges would use their newly granted discretion to increase the sentences of very many defendants above now-prevailing levels seems, at best, remote.

This proposal could not be effected without an amendment of the Sentencing Reform Act because it would fall afoul of the so-called “25% rule,” 28 U.S.C. § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom. The ranges produced by this proposal would ordinarily violate that provision.

Accordingly, the following statutory language, or something like it, should serve:

---

<sup>17</sup> U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 63 tbl. 32; 80, tbl. 45 (2002). The rate of upward departures in drug cases has historically been lower still; it was 0.6% in 1992 and declined steadily to 0.2% in 1999 and 2000. U.S. Sentencing Commission, 1992 Annual Report 120 (1993); U.S. Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80, tbl. 45 (2000); U.S. Sentencing Commission, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80, tbl. 45 (2001).

*“Notwithstanding any other provision of law to the contrary, the sentencing ranges prescribed by Chapter 5 of the federal sentencing guidelines shall consist of the minimum sentence now or hereafter prescribed by law and a maximum sentence equal to the maximum sentence authorized by the statute defining the offense of conviction, or in cases in which a defendant has been convicted of multiple counts, the sum of the maximum sentences authorized by the statute or statutes defining the offenses of conviction.”*

In addition, if such a statute were passed, Congress might think it proper to direct the Sentencing Commission to enact a policy statement *recommending* that courts not impose sentences more than 25% higher than the guideline minimum in the absence of one or more of the factors now specified in the Guidelines as potential grounds for upward departure. In order to avoid falling foul of *Blakely*, failure to adhere to this recommendation would either not be appealable at all or appealable only on an abuse of discretion standard. A few modifications to the Guidelines themselves would also be required to bring them into conformity with *Blakely* and the new statute – for example, it would have to be made clear that guideline provisions relating to upward departures were now only factors recommended to the district court for its consideration in determining whether to sentence in the upper reaches of the new ranges (or more than 25% above the bottom of the new ranges if the foregoing suggested policy statement were adopted). But otherwise, very little would have to change.

#### C. The Relation of a *Blakely* Fix to H. 4547

In the end, the proposal made here might only be a stopgap which would serve to prevent chaos in the near term and give everyone breathing space within which to plan the next step in the evolution of the federal sentencing system. The Supreme Court has yet to speak its final word on the constitutionality of the Guidelines as they exist today, much less on the constitutionality of judicial or legislative modifications of the Guidelines and sentencing procedures in response to *Blakely*. If the foregoing presentation has established nothing else, I hope it has convinced you that the problems created by *Blakely* are very complicated indeed and will require careful thought and sustained work by all those involved in federal sentencing. At a time like this, it seems imprudent to push forward with a far-reaching piece of drug sentencing legislation built around a sentencing structure whose future shape and very survival are now in doubt.

### **III. An Analysis of Provisions of H. 4547**

Time and space preclude a detailed analysis of all the provisions of H. 4547. I address the mandatory sentencing provisions of the bill in detail and discuss a few of its guidelines provisions more briefly.

#### A. Mandatory Sentencing Provisions of Sections 2 and 4 of H. 4547

Sections 2 and 4 of H. 4547 create lengthy new mandatory minimum sentences for three classes of cases: (1) drug offenses committed within 1000 feet of a long list of public and private facilities associated with children and young adults; (2) drug offenses committed within 1000 feet of medical facilities related to drug treatment; and (3) drug distribution by adults to minors (or in one case to persons under the age of 21).

As the Committee is doubtless aware, mandatory minimum sentences have been the subject of widespread criticism from the bench,<sup>18</sup> the bar,<sup>19</sup> the academy,<sup>20</sup> public advocacy organizations,<sup>21</sup> and the press. The United States Sentencing Commission has also repeatedly opposed mandatory minimum sentences as inconsistent with a system of guidelines sentencing.<sup>22</sup> I am not necessarily opposed to mandatory minimum sentences in principle. Such sentences are certainly within the power of Congress to adopt, and it seems absurd to suggest that no minimum sentence should ever be set for any crime, as for example a minimum period of incarceration for a homicide, an aggravated assault, or a very serious drug trafficking offense. That said, it seems equally clear that mandatory minimum sentences are a legislative and law enforcement tool to be used sparingly and only when certain common sense conditions are met. These include:

- Mandatory minimum sentences should be imposed only on carefully defined categories of crime. When Congress creates a mandatory minimum sentence, it defines a set of circumstances which it believes should *always* result in a preset prison sentence for every person whose conduct falls within the statutory definition, and it precludes judicial evaluation of whether any individual defendant is truly one of those at whom the statute was aimed or whether a defendant's personal circumstances should, in justice, mitigate the penalty. Particularly when the mandatory term is long, Congress should exercise the utmost care in

---

<sup>18</sup> Judicial disapproval of mandatory minimum sentences is close to universal and includes even staunchly pro-law enforcement jurists otherwise supportive of structured sentencing. See, e.g., Address of Justice Anthony Kennedy to the American Bar Association, August 9, 2003 ("By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."); Paul G. Cassell, *A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STANFORD L. REV. 1017 (2004); John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 *Notre Dame J. of Law, Ethics & Public Policy* 311 (2004).

<sup>19</sup> The American Bar Association has long been on record as opposing minimum mandatory sentences.

<sup>20</sup> See, e.g., Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AMER. CRIM. L. REV. 87 (2003).

<sup>21</sup> One entire public advocacy organization, Families Against Mandatory Minimums (FAMM), is devoted to this subject.

<sup>22</sup> U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991); William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 317 (1993) ("Now that the Commission is in place, Congress must begin to reassess the manner in which it sets sentencing policy. Mandatory minimum penalty statutes are inconsistent with the guidelines system.")

ensuring that all those who fall within the statute's terms deserve the mandated sentence.

- A proposed statute mandating a minimum mandatory sentence should be rejected if it is over-inclusive, in the sense that its language applies to a substantial number of defendants who are not engaged in the kind of conduct against which the statute is primarily directed.
- A proposed statute mandating a minimum mandatory sentence should be rejected if it likely to create irrational sentencing disparities between similarly situated defendants.
- A proposed statute mandating a minimum mandatory sentence should be rejected if it is likely to require disproportionately harsh penalties for a significant proportion of the persons to whom its language applies.
- Congress should be cautious about enacting minimum mandatory sentences which are likely to be applied selectively or to be bargained away by prosecutors.
- Congress should be particularly cautious about enacting minimum mandatory sentences which seem likely to have a racially or economically disparate impact, at least in the absence of compelling evidence of the necessity for such sentences.

Each of the mandatory minimum sentence provisions of Sections 2 and 4 appear to offend some or all of the foregoing conditions.

a. The Proximity Provisions

Section 2(c) of H. 4547 provides for a minimum mandatory five-year term of imprisonment for any person who distributes, possesses with intent to distribute, or conspires or attempts to distribute or possess with intent to distribute any quantity of any controlled substance (excepting five grams or less of marijuana) "in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or a public or private youth center, public swimming pool, or video arcade facility, or a public library or public or private daycare facility." Any person convicted of this crime who has one prior federal or state felony drug conviction would receive a minimum mandatory ten-year sentence.

Section 4 of H. 4547 imposes the same five and ten-year mandatory minimums on drug offenses committed within 1000 feet of a "drug treatment facility," which is defined as virtually any hospital, clinic, or other location which either performs drug treatment or refers patients for drug treatment. Section 4 is directed at deterring dealers from lurking near drug treatment facilities with the specific intent to tempt recovering addicts going to and from treatment back into chemical bondage. However, as drafted it would apply to

any drug crime within the protected zone regardless of whether the drug recipient was in drug treatment or even needed drug treatment.

The entirely laudable purposes of Section 2(c) are, first, to deter the sale of drugs to minors and, more generally, to protect minors from collateral harms incident to drug sales such as inter-dealer violence by deterring drug sellers from engaging in their trade in places where children congregate. The evils that the bill's proponents undoubtedly have in mind are images of pushers selling drugs to kids on the playground or drug gangs shooting it out at the neighborhood youth center with bullets whizzing around the ears of innocent young bystanders. Such deplorable activities should be punished severely (and are under existing law). However, H. 4547 would apply equally to a pair of grizzled 40-year-old addicts selling a gram of heroin in an alley at 2 a.m., a defendant caught storing a few ounces of cocaine in a bus station locker, or a defendant meeting with an undercover policeman in a parking lot to discuss a future sale of a half-pound of marijuana, so long as the alley, bus station, or parking lot was within 1000 feet of any of the facilities listed in the statute. Indeed, because the list of facilities is so comprehensive and the size of the exclusionary zone is so large, the actual effect of Section 2(c), particularly when considered together with Section 4, is to impose five-year minimum mandatory sentences on virtually any drug offense committed anywhere in an urban area.

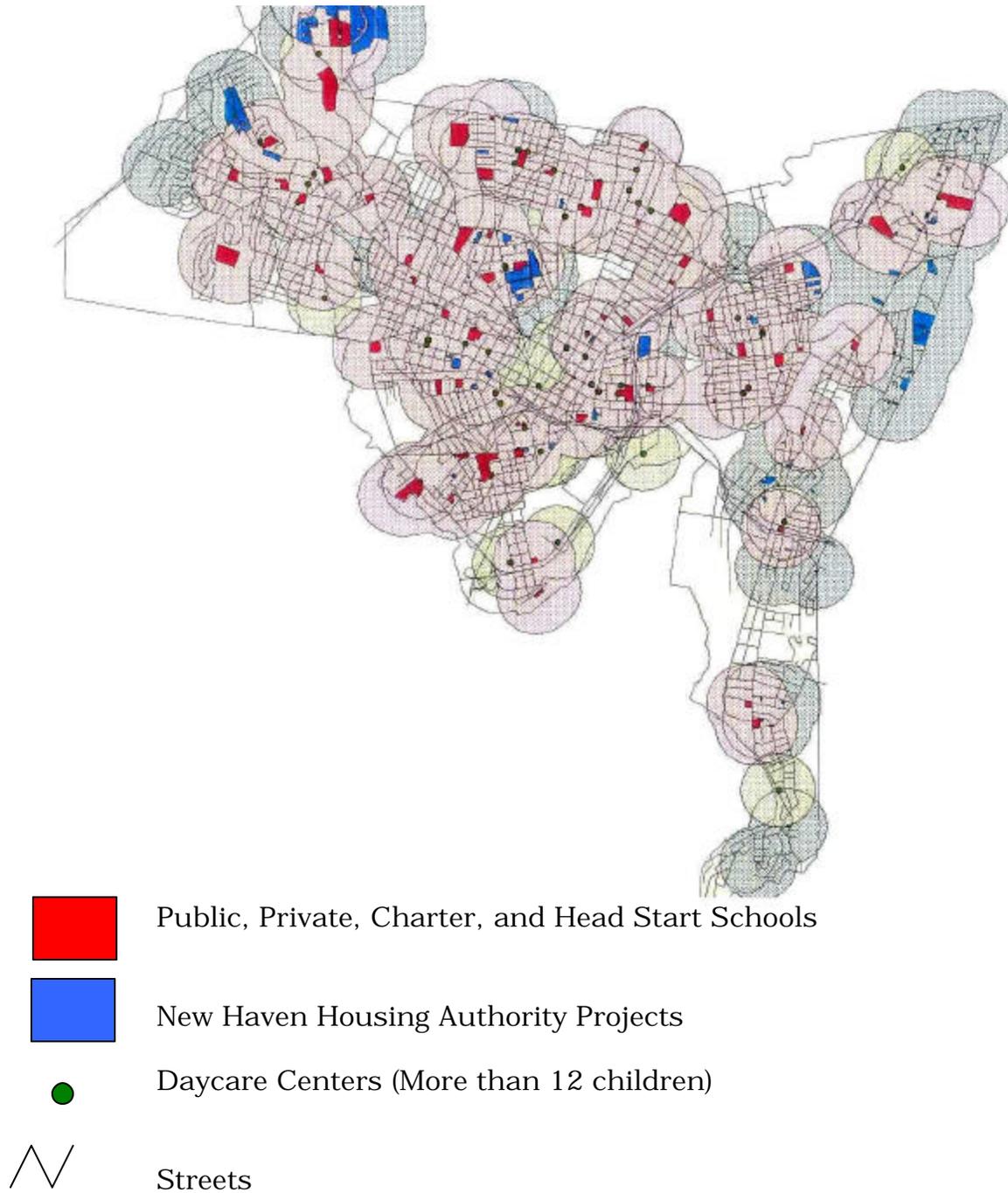
The foregoing assertion is not mere hyperbole. In 2001, the Connecticut legislature considered the real world effects of several state statutes similar in design to H. 4547. Connecticut law at the time imposed minimum mandatory sentences on a variety of drug offenses committed within 1500 feet of elementary and secondary schools, a licensed child day care center identified as such by a sign posted in a conspicuous place, or public housing projects.<sup>23</sup> Connecticut's legislative research organization prepared maps of various Connecticut cities to determine which areas fell within the geographical reach of these laws. They found that their laws covered the urban core of every city they examined, and in the case of New Haven reached virtually every square foot of the city excepting parts of the Yale golf course and a swamp. After viewing these maps and considering other information, the Connecticut legislature amended their laws to provide greater judicial discretion in the application of drug statutes. Copies of the maps of New Haven, Hartford, and Stamford, Connecticut appear below.<sup>24</sup>

---

<sup>23</sup> See CGS § 21-278a(b) (2001) (imposing three-year minimum mandatory sentence for certain drug sales or possession with intent to sell); CGS § 21a-279(d) (2001) (imposing two-year minimum mandatory sentence for certain possessory drug offenses; and CGS § 21a-267(c) (2001) (imposing a one-year minimum mandatory sentence for possession of drug paraphernalia by a non-student on or within 1500 feet of a school).

<sup>24</sup> The Hartford and Stamford maps are from George Coppola, Dan Duffy, and Jack Burrieschi, Drug Crimes Near Schools, Day Care Centers and Public Housing, OLR Research Report 2001-R-0330 (March 20, 2001).

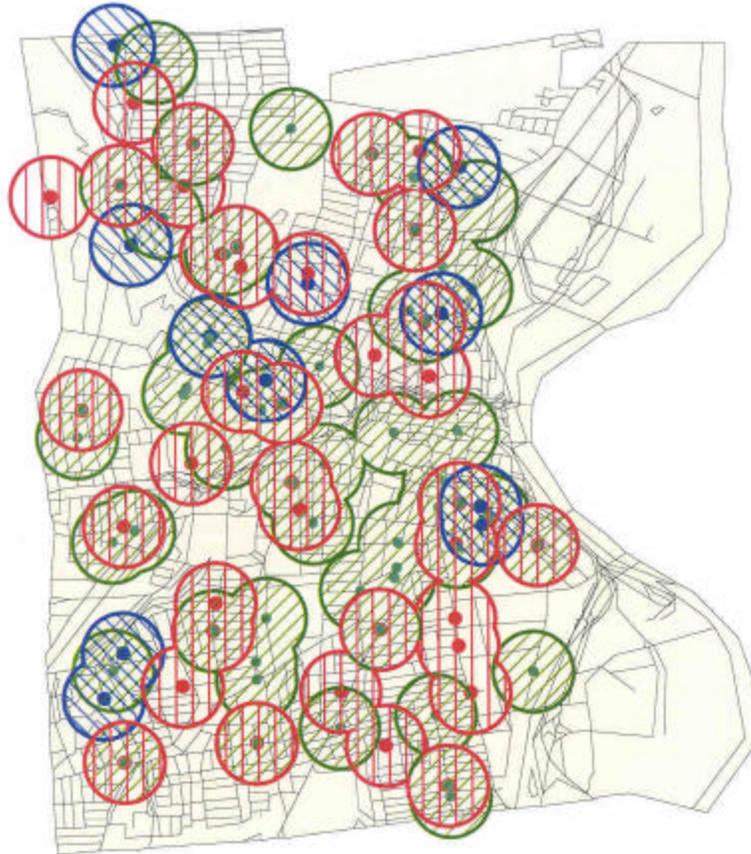
**Map 1: New Haven – 1500 ft Buffer for Schools, Daycare Centers, and Housing Authority Projects<sup>25</sup>**



<sup>25</sup> From George Coppolo, Drug Sales Near Schools, Day Care Centers, and Public Housing Projects, Connecticut OLR Research Report 2001-R-0016 (Jan. 19, 2001).

# Hartford

## 1500 Foot Enhanced Penalty Zone for Schools, Public Housing, and Day Care Centers



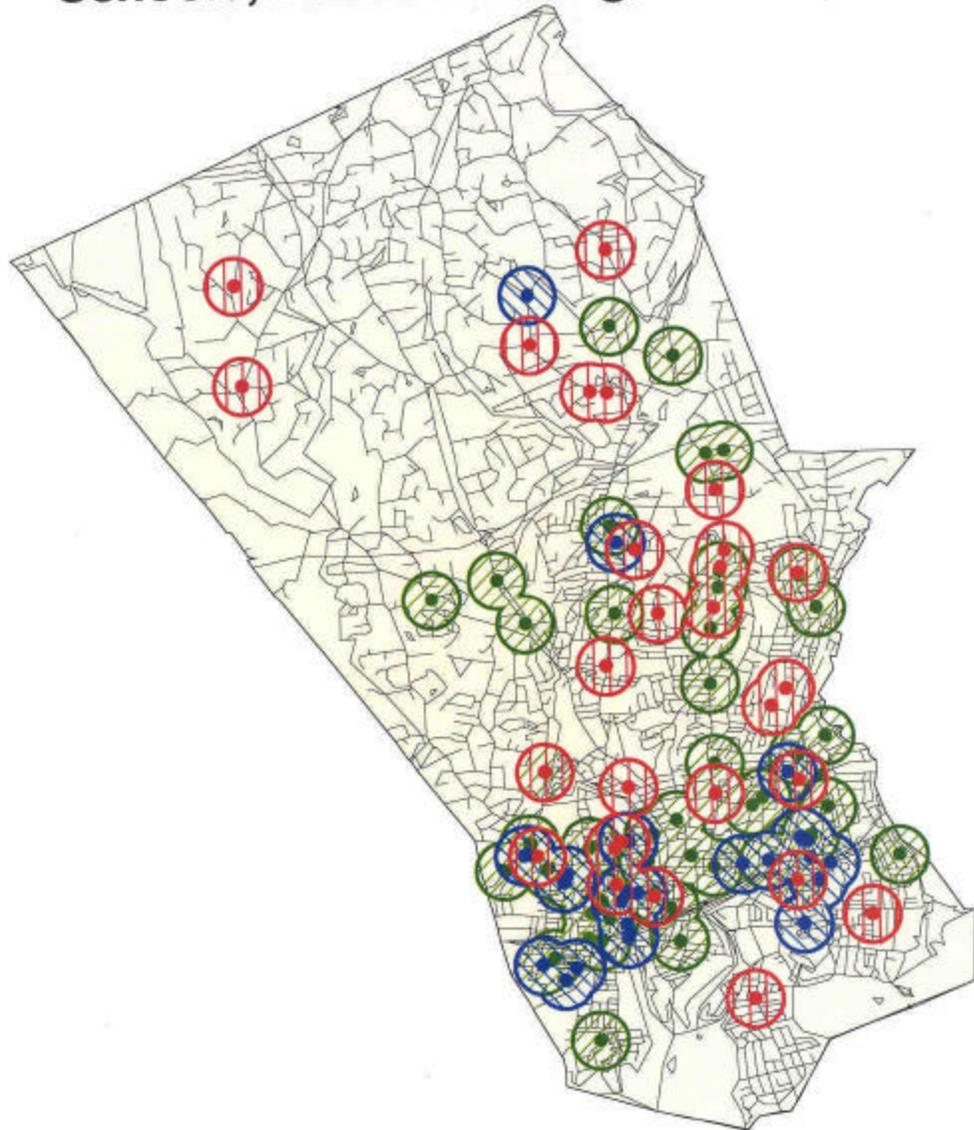
Prepared By  
Office of Legislative Research  
Depiction of Zones Based on  
Addresses, Not Property Boundaries

-  **Schools**
-  **Public Housing**
-  **Day Care**



# Stamford

## 1500 Foot Enhanced Penalty Zone for Schools, Public Housing, and Day Care



Prepared by  
Office of Legislative Research  
Depiction of Zones Based on  
Addresses, Not Property Boundaries

-  Schools
-  Public Housing
-  Day Care



These maps provide a fair visual approximation of the combined reach of Sections 2 and 4 of H. 4547. Under Connecticut law, the radius of the protected zone around each individual facility is larger than would be the case under H. 4547 (1500 feet vs. 1000 feet). On the other hand, H. 4547 lists far more protected facilities than does Connecticut law, adding colleges and vocational schools, playgrounds, public or private youth centers, public swimming pools and libraries, video arcades, private day care facilities not identified as such with any sign, and all health care facilities connected with providing drug treatment.

Because of their sheer geographic reach, Sections 2 and 4 of H. 4547 violate every one of the conditions suggested above for acceptable mandatory minimum statutes:

- a. Sections 2 and 4 are not narrowly drawn, but are instead markedly over-inclusive. Although they are intended to combat a narrow subset of drug activities affecting children and persons in drug treatment, they cover virtually all drug crimes committed in urban areas. They would even apply to drug crimes committed by persons who took special precautions to avoid contact with or impact on children or persons in drug treatment.
- b. Sections 2 and 4 would create irrational sentencing disparities between similarly situated defendants. Under Section 2 of H. 4547, a 35-year-old man who sold 6 grams of marijuana to a 40-year-old man at 2:00 a.m., while standing 999 feet from a locked and shuttered urban video arcade, would receive a mandatory five years in prison, while the same man conducting the same sale to the same customer on a suburban street or country road would be eligible for probation under the Sentencing Guidelines.<sup>26</sup> At the edges of the protected zones, the sentence for a drug crime would vary by five years or more based not on the mental state of the defendant, the identity of other participants in the offense, or any other meaningful indicator of the inherent seriousness of the crime, but on whether the defendant was standing 999 or 1001 feet from the local swimming pool.
- c. Sections 2 and 4 impose disproportionately harsh penalties on many of the persons to whom their provisions plainly apply. Pursuant to these provisions, every on-campus sale of six or more grams of marijuana from one college student to another, every sale of one tab of Ecstasy at a downtown club that happened to be 1000 from the main branch of the public library, and every sale of a single rock of crack in a public housing project would be subject to a *mandatory* five-year federal prison sentence.

---

<sup>26</sup> U.S.S.G. §2D1.1(c)(19). The base offense level for less than 250 grams of marijuana is 6, and for a first-time offender the sentencing guideline range is 0-6 months; at this level, even a repeat offender would be eligible for a non-prison sentence. U.S.S.G. §5B1.1. As a practical matter, given the de minimis penalties currently prescribed for such an offense, it would almost certainly never be federally prosecuted. As noted below, passage of H. 4547 might well alter that reality.

- Even if one agrees that these and similar transactions should be criminal, a five-year mandatory sentence is plainly disproportionate to the offense.
- d. Given the obvious overbreadth of Sections 2 and 4, they would surely be only selectively enforced. Prosecutors would decline to bring charges under the newly amended mandatory provisions in many, probably most, of the cases to which those provisions apply, and would bargain away charges under these provisions in many cases they did bring in order to secure expeditious pleas. By enacting Sections 2 and 4 of H. 4547, Congress would be approving harshly punitive mandatory sentences for a group known in advance to be too broadly defined and then relying on prosecutors to apply the penalties only to the “right” defendants. I yield to no one in my admiration for federal prosecutors, and I view prosecutorial charging discretion as an important component of a well-balanced criminal justice system. Nonetheless, while unfettered judicial sentencing discretion is undesirable, placing unreviewable power in the hands of prosecutors to impose or refrain from imposing lengthy mandatory sentences is probably even less so.
  - e. Sections 2 and 4 present a substantial risk of creating racial and economic disparities in sentencing. As the Connecticut maps illustrate, Sections 2 and 4 would apply disproportionately to the most densely populated cores of urban areas. Not only is an urban-suburban disparity between drug penalty levels facially inappropriate, but such a disparity would inevitably, even if entirely unintentionally, fall most heavily on minorities and the poor who are to a disproportionate degree the inhabitants of urban centers. It is fair to say that, at least among African-Americans, the single most bitterly resented provision of federal drug law is the crack cocaine-powder cocaine sentencing differential.<sup>27</sup> It is by no means unreasonable to expect that Sections 2 and 4 would have a similarly disparate racial impact and would thus exacerbate the impression that federal criminal law discriminates based on race and class. Congress should be reluctant to pass criminal statutes that are likely to have racially disparate effects in the absence of the most compelling public necessity. As great a danger to public order and tranquility as drug trafficking may be, a widespread loss of faith in the basic fairness of American criminal justice is surely a greater one.

It will doubtless be noted that Sections 2 and 4 of H. 4547 are merely amendments to an existing statute, 21 U.S.C. § 860, which already provides for minimum mandatory sentences for certain drug crimes committed within specified distances of many of the same facilities and which has not so far inspired widespread outrage or caused the negative effects I have foreshadowed for H. 4547. However, this fact is not an argument in favor of H. 4547.

---

<sup>27</sup> In 2002, 81.4% of all crack defendants in federal court were black, while only 30.9% of powder cocaine defendants were black. U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 34 (2004). A similar pattern has persisted since the advent of the enhanced crack penalties.

First, the current law is already subject to most of the objections noted above. Fundamentally, it makes little sense to impose enhanced penalties on drug crimes based purely on the fortuity of their proximity to such a long list of public and private facilities. The existing 21 U.S.C. § 860, therefore, ought at a minimum to be redrafted to focus on drug transactions that really do involve or pose some particular risk to minors.

Second, the currently specified mandatory sentence for a first offense under 21 U.S.C. § 860 is one year, not the five years called for by H. 4547. Thus, the current penalty is not so obviously disproportionate to the seriousness of many of the covered offenses as a five-year penalty would be.

Third, and most importantly, the current relatively mild statute is rarely applied, but there are good reasons to believe that a new harsher version would be employed far more frequently, sometimes in earnest and even more often as a bargaining chip. At present, U.S. Attorney's Offices rarely prosecute drug cases calling for sentences as low as one year, viewing such cases as being of insufficient importance to merit the expenditure of scarce prosecutorial resources. Cases presently accepted for prosecution will almost certainly involve charges that, if proven, would require a prison sentence longer than one year either under the Guidelines or other existing minimum mandatory sentences. However, prosecutors tend to measure the value of cases in part by the sentence the legislature prescribes; if Congress signals that any low-level urban drug crime merits a five-year sentence, at least some U.S. Attorney's Offices will begin prosecuting a lot more of such cases. The crack experience provides an instructive example. It is indisputable that federal prosecutors now pursue many low-quantity crack cases they would never pursue in the absence of the five and fifty gram quantity thresholds for mandatory crack sentences.

b. The Distribution to Minors Provisions

Section 2(a) of H. 4547 would amend 21 U.S.C. § 859(a) to impose a five-year minimum mandatory sentence on any person 18 years old or older who distributes any quantity of any controlled substance (excepting five grams or less of marijuana) to any person 21 years old or older. If the distributor is 21 years old or older and the recipient is under 18, the mandatory minimum sentence would double to ten years. By way of illustration, under H. 4547, if an eighteen year-old college freshman sells six grams of marijuana (a few marijuana cigarettes) to a 20-year-old college junior, she must serve five years in federal prison. And if a 21-year-old college senior sells six grams of marijuana to a 17-year-old freshman, the older girl must serve ten years in federal prison. Finally, under Section 2(b) of H. 4547, if the 21-year-old college junior happened to have one prior felony drug conviction, even (it appears) for felony possession, her sentence for selling six

grams of marijuana to her 17-year-old friend would be mandatory life imprisonment. Or putting it another way, the penalty for selling drugs to a person under 18 for any defendant with a prior felony drug conviction would henceforth be mandatory life imprisonment.

Sections 2(a) and 2(b) are subject to a number of the same objections as the proximity provisions of Section 2(c), but their central problems are two: overbreadth and overpunishment. The evil against which these provisions are directed is adult drug dealers preying on vulnerable kids. The image in the minds of the drafters is presumably that of greasy grownup pushers hanging around the schoolyard, but the language of the bill would extend its coverage to tens of thousands of people who look nothing like this image. In the name of “Protecting Children From Drug Traffickers,” the bill would impose mandatory prison terms on young adults of college and military age who sell personal use quantities of drugs to each other. Moreover, the length of the sentences prescribed, while perhaps defensible for adult defendants dealing heroin to twelve-year-olds, would be facially unreasonable for most of the defendants to whom the bill’s language actually applies.

### 3. H. 4547, the PROTECT Act, and the Ashcroft Memo

In addition to the other difficulties described above, the mandatory sentencing provisions of H. 4547 are in tension with important components of the PROTECT Act of 2003 and the ensuing memorandum on prosecutorial charging and plea bargaining policy issued by Attorney General Ashcroft. One objective of the PROTECT Act was to ensure that prosecutors prosecute all defendants for the most serious offense provable on the evidence and that judges sentence all defendants in conformity with the expressed wishes of Congress by applying, with only rare departures, the most serious applicable sentencing law. As written, H. 4547 imperils this objective. The bill prescribes mandatory penalties for tens of thousands of persons whom most of us would agree should not be subject to them, as well as for some much smaller number who perhaps should. If federal prosecutors were to prosecute everyone who violated this statute and judges were to impose the sentences it requires, the result would be frequent individual injustices, public outcry, and widespread revulsion against the entire federal anti-drug program. If instead, as would surely be the case, prosecutors employed the statute only rarely and selectively, it would become merely a bargaining lever used to induce pleas and pressure defendants to cooperate in the prosecution of others.

Congress should not enact sentencing laws whose sole purpose or primary real world effect is to give bargaining leverage to prosecutors. This is not to say that prosecutors should not plea bargain to facilitate expeditious processing of criminal cases or offer sentence reductions to criminals as an inducement to cooperate against their fellows. Indeed, I “flipped” many defendants when I was

a prosecutor and have written articles defending the necessity of the practice.<sup>28</sup> Nonetheless, there are limits. Inducing cooperation from defendants by offering reductions from otherwise applicable sentencing levels is entirely proper *if* the sentence with which the defendant is being threatened would be a just punishment for the crime he committed. In many instances covered by the language of H. 4547, that would not be so.

## B. Sections 3 and 5

As a long-time drug prosecutor, I am sometimes in disagreement with those who argue that drug sentences should not be based on drug quantity. In principle, I think drug quantity does serve as a decent rough proxy for offense seriousness in drug cases. However, quantity is not an invariably accurate proxy for offense seriousness or for the blameworthiness of individual offenders. In particular, it tends to overstate the culpability of persons, especially first-time offenders, who play minor or transient roles in drug transactions or organizations.

The Sentencing Commission, and indeed Congress itself, have long recognized the potential for unfair overpunishment of minor players in drug transactions. Congress sought to mitigate the effects of pure quantity-based sentences when in 1994 it enacted the “safety valve,” 18 U.S.C. § 3553(f), relieving certain first-time non-violent offenders from the strictures of mandatory sentences. The Sentencing Commission followed suit in 1995 with a guidelines safety valve, U.S.S.G. §2D1.1(b)(6), which provides a two-offense-level reduction for persons who qualify for the statutory safety valve and whose guideline range is 26 or greater. Several years ago, the Commission reacted to continuing concern among front-line sentencing professionals about overpunishment of minor players by enacting the so-called “mitigating role cap,” U.S.S.G. §2D1.1(a)(3). This guideline caps the offense level of a defendant who is determined by the court to have been a “minor” or “minimal participant” at 30, which is to say a guideline range of 97-120 months. Finally, the Commission responded to the potential for overly expansive applications of conspiracy law to peripheral conspirators by modifying the relevant conduct rules to restrict (to a modest degree) the inclusion of co-conspirator conduct in calculations of relevant conduct.

Sections 3 of H. 4547 would eliminate both the two-level guidelines safety valve adjustment and the mitigating role cap. Section 5 would re-expand conspiratorial liability for sentencing-enhancing conduct to the fullest possible extent. These provisions are objectionable on two grounds. First, they are unjustifiably harsh and would abandon without justification years of efforts to make drug sentences conform more closely to the real culpability of individual defendants. Second, by directly amending the Sentencing Guidelines and prohibiting the Sentencing Commission from revisiting these issues in the future, the Bill exhibits a corrosive disrespect of the

---

<sup>28</sup> See, e.g., Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L.R. 7 (1999).

important function of the Sentencing Commission as an independent body of sentencing experts.

### C. General observations

The provisions of H. 4547 that I have not analyzed in detail are much of a piece with those examined above. They raise sentences, decrease judicial discretion, and denigrate the role of the Sentencing Commission. The primary objection to the entire package is that it is simply not necessary. There is no groundswell of public opinion demanding higher drug sentences. Indeed, the nearly universal trend in the states is for lower sentences, less mandatory sentences, and more attention to non-incarcerative approaches to drug crime. Nor is there any demand for this bill among line federal prosecutors. The Department of Justice may support it, but I submit that few, if any, line prosecutors would contend that its provisions are necessary to their work.

Not only is the bill of doubtful necessity, but this Committee should be concerned about its probable costs. Incarcerating more people for longer periods costs money. Given the budgetary pressures facing the country, some estimate of the likely cost of the bill ought to be obtained before the Committee proceeds.

### CONCLUSION

Let me repeat my thanks for having been given the opportunity to address the Committee. As noted, I have the deepest personal and professional sympathy with the objectives of H. 4547. Nonetheless, for all the reasons enumerated above, I recommend that the Committee not act favorably on this legislation at the present.