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COMMENTARY: Stop Wagging the Dog: A Plea for the New Commission to Incorporate Due Process and Higher Standards of Proof into the Sentencing Hearing

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TEXT:

In Williams v. New York, n1 the Court held that there was no limitation on the type of information a judge may consider at sentencing. At that time, there were no mandatory minimum sentences, no guidelines, virtually no right of appeal. The sentencing judge had virtually unfettered discretion when imposing a sentence, save for the statutory limitation. What a judge considered relevant and how much, if any, weight was given to a particular factor resided entirely with the court. And even once sentence was imposed, the actual term served would be up to another body, the parole board. Due to a lack of certainty, uniformity, and transparency in the sentencing process, this old regime was considered problematic by many. Hence, the introduction by many states and the federal government of often mandatory, sometimes advisory, sentencing guidelines.

n1 337 U.S. 241 (1949).

Since Williams, the criminal justice system has moved from an indeterminate, rehabilitative model, to a mandatory, retributive-based guidelines scheme (which ultimately was found unconstitutional in 2005), and now to a confused hybrid system where the Federal Sentencing Guidelines are effectively advisory but with little actual change in practice--federal sentences by and large still follow the prior unconstitutional sentencing regime.

Although the sentencing world of today is an entirely different universe from that of Williams, one thing has remained steady--criminal defendants have virtually no due process protection at sentencing. First, the Federal Rules of Evidence do not apply at sentencing. n2 Second, "[no] limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." n3 And third, since shortly after the Commission first promulgated the Guidelines, it has "believe[d]" that "use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." n4 In short, anything (still) goes at sentencing.

n2 See Fed R. Evid. 1101(d)(3).
n3 18 U.S.C. § 3661 (codifying Williams).
n4 U.S.S.G. § 6A1.3.

The concern over a lack of due process at sentencing is nothing new. The Advisory Committee on Evidence Rules to the Judicial Conference of the United States Courts "considered the advisability of drafting evidentiary rules that would apply at the sentencing phase" as far back as 1993. n5 Furthermore, in 1997, the American College of Trial Lawyers observed in a report titled The Rules of Evidence of Sentencing that although

> some may argue that more formalized evidentiary rules will make the sentencing process less streamlined and will consume precious judicial and prosecutorial resources, the reality is that in a criminal justice system where the overwhelming majority of prosecutions are resolved by guilty plea prior to trial, sentencing has become the critical stage of the proceeding. It seems to us, therefore, that the need for uniform, appropriate rules that courts are to follow at a proceeding in which decisions are made concerning whether and, if so, for how long, a person will be incarcerated outweighs any incremental societal cost of implementing such rules. The legacy of the bygone era where courts sentenced to "rehabilitate" is an evidentiary scheme that in many instances does not afford Guidelines defendants adequate protection against enhanced punishment based on unreliable evidence. . . . It seems clear that the unfairness inhering in the present system should be remedied, and that a variety of tools are at the disposal of conscientious courts, legislators and commissioners. n6

> n5 See Advisory Committee on Evidence Rules to the Judicial Conference of the United States Courts, Minutes of the Meeting of September 30-October 2, 1993 (Washington, D.C.).
> n6 See AMERICAN COLLEGE OF TRIAL LAWYERS, THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS 19 (1997).

It is far past time for the Commission to reevaluate the due process protections (or lack thereof) at sentencing. A good start is with a comprehensive review of Chapter Six of the Guidelines Manual, which covers sentencing procedures. The preponderance of the evidence standard, as many district and appellate courts have already observed both pre- and post-Booker, simply is not sufficient to meet due process in many cases. Section 6A1.3 should be reevaluated to require higher standards of proof consistent with the Sixth Amendment analysis set forth in the Booker constitutional opinion. As Justice Sotomayor, writing for the majority in Pepper v. United States, n7 recently reiterated, "[W]here facts found by a judge by a preponderance of the evidence increase[s] the applicable Guidelines range, treating the Guidelines as [effectively] mandatory . . . violate[s] the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt." n8 In fact, in his partial concurrence and partial dissent in Booker, Justice Thomas wrote that the Fifth Amendment also requires that sentencing factors be determined beyond a reasonable doubt. n9

> n7 562 U.S. , 2011 U.S. LEXIS 1902.
> n8 Id. at *25 (emphasis added).
> n9 Booker v. United States, 543 U.S. 220, 319 n.6 (Thomas, J., concurrence in part, dissent in part).

The wholly speculative but often-cited argument that ostensibly averts the constitutional concerns enunciated in Booker--that a sentencing judge could have or, more to the point, would have sentenced a defendant to the exact same sentence anyway under the advisory Guidelines--nevertheless undermines the very constitutional protections Booker announced. Not only does absolutely no empirical evidence support this assertion, but merely because the Guidelines are now effectively advisory does not preclude their application in an effectively mandatory way. As a result, the constitutional protections enunciated in Booker turn on the psychology of the sentencing judge. Is the judge really treating the Guidelines in an advisory manner, or is she deferring her discretion to the Guidelines such that they are effectively mandatory? Due process, of course, should not rest on such psychological speculation.

Another Guideline in need of review is 6A1.1. Whereas the introductory commentary states that "[r]eliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing," no procedures are enunciated to give a sentencing judge any meaningful guidance. Although discussion continues regarding the Presentence Investigation Report (PSR), this dialogue primarily is concerned about when the report should be disclosed. Because the Presentence Investigation Report often is the determining document at sentencing, the Commission should provide guidance to judges for evaluating PSRs and the factual bases underlying the PSRs themselves.

Although the new Commission has many substantive and pressing tasks ahead of it, the long-overlooked language regarding the sufficiency of preponderance of the evidence and the silence regarding reliable fact finding should (finally) be addressed. Without a foundation built on due process, the Guidelines will remain on shaky constitutional grounds, as witnessed by the Booker decision itself. It's far past time for the dog of due process to start wagging its sentencing tail.