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The Model Federal Sentencing Guidelines Project: Determining the Sentencing Range and the Sentence Within Range, Model Sentencing Guidelines §1.2 - 1.8

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Determining the Sentencing Range and the Sentence Within Range: Model Sentencing Guidelines §§1.2-1.8

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Model Sentencing Guidelines §1.2 General Application Instructions

Except as specifically directed, the provisions of these Model Sentencing Guidelines are to be applied as follows:

(a) Determine the offense guideline applicable to each charged offense;

(b) In a case which is to be tried to a jury or to the court, prior to the commencement of trial, identify from the Chapter Two guideline applicable to each charged offense the sentencing facts necessary to determination of the defendant's offense level for each offense, and identify any sentencing facts necessary to establishing the applicability of any aggravating adjustments from Chapter Three of the Model Sentencing Guidelines that could increase the defendant's offense level. In a case tried to a jury, provide appropriate instructions and special verdict forms to the jury as to each sentencing fact the jury is to determine.

(c) In a case which is to be resolved by plea, prior to the entry of a plea of guilty, identify from the Chapter Two guideline applicable to each charged offense the sentencing facts necessary to determination of the defendant's offense level for each offense, and identify any sentencing facts necessary to establishing the applicability of any aggravating adjustments from Chapter Three of the Model Sentencing Guidelines that could increase the defendant's offense level.

(d) Based upon the verdict rendered in a jury or bench trial, or upon the particulars of the defendant's guilty plea, determine the defendant's offense level for each offense of conviction.

(e) If there are multiple counts of conviction, apply Model Sentencing Guidelines §1.4 to group the counts and adjust the offense level accordingly.

(f) Apply the adjustment for the defendant's acceptance of responsibility from Model Sentencing Guidelines §3.7, where applicable.

(g) Determine the defendant's criminal history category pursuant to Chapter Four of the Model Sentencing Guidelines.

(h) Determine the existence of any aggravating or mitigating factor relevant to determining the position of the defendant's sentence within the guideline range.

(i) Determine from the commentary to Model Sentencing Guidelines §1.1 the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(j) Consider the departure provisions of Chapter Five of the Model Sentencing Guidelines, and any other provision of the Model Sentencing Guidelines, relating to whether a sentence below the otherwise applicable sentencing range should be imposed.

Model Sentencing Guidelines §1.3 Determination of Sentencing Range – Proof of Facts

(a) Any fact necessary to the determination of a defendant's offense level on the Sentencing Table must be –

(1) found beyond a reasonable doubt by a jury;

(2) found beyond a reasonable doubt by a judge in a trial or sentencing hearing as to which the defendant has waived the right to a jury;

(3) specifically admitted under oath or stipulated to by the defendant at any time during the pendency of the case;

(4) found beyond a reasonable doubt by a jury, or by a judge in a case in which the defendant waived the right to a jury, in another case in which the defendant was a party, was represented by counsel, and had motive and opportunity to contest the finding.

(b) Facts necessary to determination of a defendant's criminal history category shall be determined by the sentencing judge.

Model Sentencing Guidelines §1.4 Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

i. Group the counts of conviction into Groups of Closely Related Counts ("Groups") by applying the rules specified in Model Sentencing Guidelines §1.4(c).

ii. Determine the offense level applicable to each Group by applying the rules specified in Model Sentencing Guidelines §1.4(d).

iii. Determine the combined offense level applicable to all Groups taken together by applying the rules specified in Model Sentencing Guidelines §1.4(e).

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(b) Exclude from the application of Model Sentencing Guidelines §1.4(c)-(e) the following:
   i. Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment.
   ii. Any count of conviction under 18 U.S.C. § 1028A.

(c) All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm when:
   i. Counts involve the same victim and the same act or transaction;
   ii. Counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan;
   iii. One of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts; or
   iv. The offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the guideline is written to cover such behavior.

   [*Drafter's Note:* A section listing particular offense guidelines that should and should not be grouped, see U.S.S.G. §3D1.2, is omitted, but might be desirable in a completed system.]

(d) Determine the offense level applicable to each of the Groups as follows:
   i. In the case of counts grouped together pursuant to Model Sentencing Guidelines §1.4(c)(i)-(iii), the offense level applicable to the Group is the offense level for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.
   ii. In the case of counts grouped together pursuant to Model Sentencing Guidelines §1.4(c)(iv), the offense level applicable to the Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two of the Model Sentencing Guidelines, plus any other offense level adjustments called for by Chapters Two, Three, and Five of the Model Sentencing Guidelines and authorized by appropriate findings of fact or defendant admissions pursuant to Model Sentencing Guidelines §1.3. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

(e) The combined offense level in a case involving more than one Group is determined by taking the offense level of the Group with the highest offense level and adjusting that offense level as indicated in the following table:

Number of Units	Increase in Offense Level
1	None
1½	None
2 – 2½	Court may add 1 level
3 – 3½	Add 1 level
4 or more	Court may add 2 levels

In determining the number of Units for purposes of this section:
   i. Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or one offense level less serious;
   ii. Count as one-half Unit any Group that is two offense levels less serious than the Group with the highest offense level;
   iii. Disregard any Group that is three or more offense levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level, but may be viewed as an aggravating factor to be considered by the court in setting the defendant's sentence within the applicable sentencing range.

Application Notes:

1. *The multi-count rule in Model Sentencing Guidelines §1.4(e) states that a sentencing court "may" add offense levels if the number of "Units" attributable to groups of closely related counts of conviction is 2–2½ (corresponding to a possible one-level increase) or 4 or more (corresponding to a possible two-level increase). Use of the word "may" means that the presence of the requisite number of Units empowers, but does not requires the court to sentence the defendant within a sentencing range higher than would otherwise be the case. The court is only required to increase the defendant's offense level if there are 3–3½ Units (requiring a one-offense-level increase).*

Model Sentencing Guidelines §1.5 Determination of Sentence Within Range–Proof of Facts

(a) Any aggravating or mitigating fact upon which the sentencing judge relies in determining the position of a defendant's sentence within a sentencing range must be found by the judge by a preponderance of the evidence.

(b) As to any aggravating fact disputed by the defendant, the government bears the burden of proving such fact by a preponderance of the evidence.

(c) As to any mitigating fact disputed by the government, the defendant bears the burden of proving such fact by a preponderance of the evidence.

(d) Information submitted to the probation officer in connection with a presentence investigation or relied upon by the sentencing judge in determining a defendant's sentence must be disclosed to the parties in accordance with [Proposed] Federal Rules of Criminal Procedure 32(c)(3) and 32(c)(4).[1]

(e) Disputed facts must be proven with reliable evidence.

Model Sentencing Guidelines §1.6 Determination of Aggravating Factors Relevant to Sentence Within Range ["Relevant Conduct"]

The existence of aggravating factors relevant to determination of a defendant's sentence within the applicable sentencing range shall be based on the following:

(a) (1) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant during the commission of the offense of conviction, in preparation for that offense, in the course of attempting to avoid detection of or responsibility for that offense, or as part of the same course of conduct or common scheme or plan as that offense; and

(2) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection of or responsibility for that offense;

(b) all harm foreseeable to the defendant that resulted from the acts and omissions described in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(c) any other information specified in the applicable guideline.

Model Sentencing Guidelines §1.7 Determination of Sentence Within Range–Federally Acquitted Conduct

Determination of facts relevant to determination of a defendant's sentence within the applicable sentencing range shall not be made on the basis of any conduct of which the defendant was acquitted in a jury or bench trial conducted in a court of the United States, including U.S. District Courts and courts of the District of Columbia. This prohibition does not apply to acquittals in the courts of any State or foreign country.

Model Sentencing Guidelines §1.8 Determination of Sentence Within Range–Statement of Reasons and Appellate Review

(a) The sentencing judge shall, in every case, provide a meaningful statement of reasons for the sentence imposed. This statement of reasons shall include findings of fact as to all facts that the court considered relevant and material to determining the defendant's sentence within the applicable range, including but not limited to facts listed in the applicable guideline as facts that a sentencing judge should consider in assigning a sentence within the applicable range.

(b) The length of a defendant's sentence within the applicable range shall be reviewable on appeal, but may not be overturned except upon a finding of an abuse of judicial discretion or of one or more clearly erroneous findings of fact regarding a fact or facts material to the court's exercise of its discretion.

DRAFTER'S COMMENTARY

General observations on determination of facts relating to offense seriousness: Drafting language for these sections requires resolution of the tension between several competing objectives—the general desire for procedural regularity at sentencing that informed the original sentencing guidelines, the longstanding criticism (voiced most recently by the Constitution Project Sentencing Initiative (CPSI)) that the Federal Sentencing Guidelines still provide inadequate procedural protections for defendants,[2] the nascent principle of Sixth Amendment jurisprudence favoring increased jury participation in the finding of facts relevant to sentencing,[3] and the overarching desire for simplicity and flexibility embodied in the reform recommendations of the CPSI[4] and other interested observers.[5] For example, in the simplified system proposed here, those facts that determine the offense level on the model grid will be subject to markedly enhanced procedural rigor because, by constitutional command, they must be proven beyond a reasonable doubt or admitted by the defendant.[6] However, this consequence of *Blakely* and *Booker* begs the question of how to treat other facts relating to offense seriousness which do not determine sentencing range, but which a judge considers in setting a sentence within a range. Considerations of fairness and procedural regularity suggest that judges should still be required to make formal findings of such facts and that evidence relating to such facts should still be subject to discovery obligations. Nonetheless, one might argue that retention of these procedural requirements for facts that have no predetermined quantifiable effect on sentencing outcomes vitiates some of the hoped-for gains in terms of simplicity. Put plainly, if parties still must prove and judges still must find facts with only advisory effects, how much simpler would the resulting system really be?

The most basic response to these concerns is that, as a matter of principle, it cannot be right for a judge to justify an increase in a defendant's sentence based on a fact that the judge is unprepared to find the existence of, even by a preponderance of the evidence. It is one thing to say that a judge may properly employ the existence of a particular fact as a rationale for imposition of a particular sentence even though the law does not specify in advance the quantitative effect of that fact. It is another thing altogether to permit a judge to justify a sentencing decision based on the existence of a "fact" that may, so far as the record reveals, not be a fact at all. A system which permits that outcome has abandoned any pretension to being a system of law. Moreover, if sentences are to be reviewable on appeal, the trial court must explain its sentence in relation to factual findings based on record evidence in order for the appellate court to perform the review function.

As for the question of simplicity, under the current system in which guidelines facts have mandatory sentencing consequences, most factual issues at sentencing are resolved by agreement between the parties. There is no reason to believe that this would not continue to be true in a system in which most disputed facts would have only an advisory and quantitatively indeterminate effect on sentence length. Indeed, the elimination of quantification of sentencing values for most facts would doubtless encourage even more informal resolution of factual disputes, with a corresponding decrease in the incidence of factual disputes requiring formal judicial resolution.

Burdens of proof: Model Sentencing Guidelines §1.5 embodies two general principles. First, disputed facts relevant to determination of a defendant's sentence within the range determined by trial or plea must be proven to a preponderance of the evidence by the party asserting the existence of such facts. Second, proof of disputed facts must be based on "reliable evidence." Model Sentencing Guidelines §1.5(e). Constraints of space and time did not permit a more detailed explication here of the procedural rules that should apply in contested sentencing hearings. However, the working group expressed particular concern about the position adopted by a number of circuits that accords evidentiary weight to a fact merely by virtue of its having been asserted in the Probation Department's presentence investigation report and requires defendants to disprove factual assertions in the PSR with which they disagree.[7] In our view, the circuits which have taken this position are misguided. Attaching evidentiary weight to facts in the PSR transforms probation officers into de facto special masters of sentencing facts, thus denying the parties the procedural protections that would attend a hearing in open court and at the same time failing to specify any meaningful rules governing how the probation officer is to exercise his factfinding responsibilities.[8] In this set of Model Guidelines, we have said only that disputed facts relevant to setting a sentence within range must be established by "reliable evidence." Model Sentencing Guidelines §1.5(e). In any effort to transform these Model Guidelines into a set of real guidelines, the question of what constitutes "reliable evidence" and the procedural rules governing judicial findings of sentencing facts should receive considerable attention.

Bifurcation of sentencing proceedings: One question presented by a sentencing system in which juries decide facts not specified by statute as elements of the substantive offense is whether the jury proceedings relating to such sentencing facts should, or could, be conducted separately from the proceedings relating to guilt. Put simply, does the model proposed here require, or permit, bifurcated sentencing proceedings? We do not definitively answer that question here. However, several points seem reasonably clear. First, in the ordinary case, bifurcation should probably not be required or encouraged. Most of the factors committed to jury determination by these model guidelines are facts that would already be presented to the jury in some form or could easily be presented within the framework of a trial on the question of guilt. For example, the quantity of drugs involved in a drug case, the amount of loss in a fraud case, the defendant's role in group crime, and the degree of victim injury in an assault case are currently points on which some evidence is commonly adduced, even if the jury is not asked for specific findings, and the additional evidence that might be necessary to permit a jury to make findings would, in most instances, fit seamlessly into the government's presentation.

There might be cases in which a defendant would be faced with some tactical difficulties in a consolidated trial, as, for example, if he wanted to contest both his participation in a drug case and the amount of drugs involved. ("I didn't possess the cocaine, but if I did, I only had four kilos, not five.") There are at least two responses to this complaint. One might say simply that the possibility of such tactical embarrassments is the price defendants will have to pay for a system that imposes on the government the burden of proving some sentencing facts beyond a reasonable doubt. A more nuanced position might create a presumption favoring unitary trials, but provide that judges should have discretion, for good cause shown, to bifurcate proceedings on sentencing facts that, if addressed in the guilt phase, would present particular obstacles to achieving a fair trial.

Another situation in which juries might address sentencing facts separately from guilt would be one in which the defendant wished to plead guilty to the substantive offense, but contest the government's allegations on certain sentencing facts determinative of offense level. In such a case, it might seem advantageous to the court and the parties to permit the defendant to enter a plea to the substantive offense and contest the disputed sentencing facts to a jury empanelled for the purpose. These Model Guidelines do not specifically authorize or preclude such an option; however, the language of Model Sentencing Guidelines 1.3(a)(2) implies the possibility of a jury sentencing proceeding separate from the trial on the question of guilt.

The Multi-Count Rules: Like the current Federal Sentencing Guidelines, model guidelines of the sort proposed here require rules for determination of offense level in cases involving more than one count of conviction. The rules set forth in Model Sentencing Guidelines §1.4 closely track the language and effect of the existing Guidelines, U.S.S.G. §§3D1.1 – 3D1.5. There is one notable innovation. Under the existing guidelines, a determination that the groups of closely related counts generate a certain number of "Units," as described in U.S.S.G. §3D1.4, *requires* that the defendant's offense level be increased in accordance with the chart in that guideline. By contrast, under the Model Guidelines, the presence of a certain number of "Units" does not always require an offense level increase.

At two points, the Model Guidelines permit, but do not require, an offense level increase.

Several considerations entered into this approach. First, in both the existing and model systems, the smallest possible increase in offense level is one level. However, the effect of a one-level increase is much greater in the Model Guidelines than it is under the existing Federal Sentencing Guidelines. Given that the existing Sentencing Table is composed of overlapping ranges, a one-offense level increase imposes no necessary increase in sentence and the maximum effect of one such increase is fairly small. Under the Model Guidelines, a one-offense-level increase always generates a sentencing range with a minimum sentence that begins at the maximum sentence of the next-lowest range, and because the ranges in the Model Guidelines Table are generally broader than those of the existing system, the difference in potential sentencing exposure between one range and the next highest range is greater. Consequently, there is less ability in the model system to fine-tune the effects of a multi-count conviction. (This is one instance in which a complicated sentencing table with forty-three vertical levels comes in handy.)

Second, the rule of *Blakely* and *Booker* is that, although jury findings of fact are necessary to permit a judge to sentence above the top of the otherwise applicable limit, such jury findings do not require the judge to do so. The Model Guidelines take advantage of this feature of the Court's holdings to expand a judge's upward discretion without mandating its exercise. In effect, the fine tuning that the current Federal Sentencing Guidelines now attempt through one-offense-level adjustments would be delegated to judges.

Finally, even though the calculation of "Units" would be done by the sentencing judge, in my view this approach does not offend *Booker* because the judge's work would be a legal determination of the proper application of the Model Guidelines' multicount rules to the facts embraced by the trial verdict or the contents of the defendant's plea. Several members of the group working on this project felt that *Booker* might be implicated by this model guideline. It was suggested that the determination of whether several counts were or were not parts of a common scheme or plan is sufficiently factual in nature that the issue should be submitted to a jury. My sense is that this and similar questions presented for the sentencing court's determination by this model guideline are at most mixed questions of fact and law that could constitutionally be determined by the court without jury intervention. However, I may well be wrong and the point merits discussion.

"Relevant conduct": A persistent criticism of the existing Federal Sentencing Guidelines has been that facts found by judges, but never submitted to juries, can markedly enhance a defendant's guideline sentencing range. This critique is known by the colorful sobriquet of "the tail wagging the dog." Two notable features of the Guidelines have given this critique particular force. First, the Guidelines for most offenses consist of a fairly low "Base Offense Level" (BOL) associated with mere conviction of a particular crime, plus a fairly lengthy list of "Specific Offense Characteristics" (SOCs), that, if found, increase the defendant's sentencing range above the level set in the Base Offense Level. Accordingly, the guideline sentencing range based upon mere conviction is often quite low, while the range produced by adding to the BOL upward adjustments for all the SOCs found post-conviction by the judge is much higher.[9] Second, pursuant to the "relevant conduct" rules of the Guidelines, judges determining whether SOCs exist are directed to consider conduct beyond the particular offense or offenses of which the defendant was convicted. Judges thus will often set sentencing ranges based on uncharged, unconvicted, or even acquitted conduct, so long as such conduct bears a sufficiently close relation to the offense of conviction and is proven at sentencing to a preponderance.

Whether the tail-wags-dog critique identifies a real problem or only one of perception is subject to reasonable debate. On the one hand, judges in the pre-Guidelines era plainly considered conduct beyond the ambit of the offense of conviction in setting sentences without even a requirement that they admit to doing so, while the Guidelines at least identified those facts that would count and required the government to prove them on the record. Moreover, limiting sentencing judges to consideration of the offense of conviction is an invitation to sentence manipulation during the plea bargaining process. On the other hand, unlike the pre-Guidelines era, the Guidelines accord a quantifiable effect to facts outside the ambit of the offense of conviction, facts that need not have been presented to a jury, and accord these quantifiable effects to facts proven only to a preponderance of the evidence in proceedings shorn of many of the procedural protections that characterize a trial on the merits. As discussed above, the contrast between guidelines sentencing procedures and the trial process is particularly stark in circuits which have conferred evidentiary weight on any fact appearing in the Probation Department's presentence investigation report.

Whatever one's views on the dog-wagging propensities of the pre- or post-*Booker* Federal Sentencing Guidelines, the sentencing model endorsed by the Constitution Project and elaborated here solves the tail-wags-dog problem. Under this system, one can no longer complain that a defendant's sentence will be increased above the maximum authorized by the jury's findings or the defendant's plea of guilty because the facts found by the jury or admitted by plea (in combination with criminal history) determine the defendant's sentencing range. Unconvicted conduct cannot raise the maximum sentence above that range. In the model system, sentencing judges will still be able to consider aggravating facts not proven at trial or admitted by plea, but *only* as to the proper sentence within the assigned sentencing range. In addition, in the model

system, with a few possible exceptions,[10] facts found by judges post-conviction have no predetermined quantitative effect – they are advisory only.

Finally, the scope of aggravating facts a judge may consider in setting the sentence within the applicable range has been somewhat narrowed by Model Sentencing Guidelines §1.6 in comparison to the existing "relevant conduct" rule under U.S.S.G. §1B1.3. The Model Guideline would still permit consideration of conduct not specifically included in the offense(s) of conviction. However, it would permit consideration of unconvicted conduct that was "part of the same course of conduct or common scheme or plan as the offense of conviction" *only* if the defendant himself actually "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused" the unconvicted conduct. Model Sentencing Guidelines §1.6(a). The Model Guideline would limit consideration of unconvicted conduct that was merely the foreseeable consequence of the conduct of a defendant's criminal partners. Under the existing Guidelines, the foreseeable conduct of one's criminal partners may be considered even if it occurred as part of an unconvicted offense, so long as that offense was part of the same course of conduct or common scheme or plan as an offense of conviction. U.S.S.G. §1B1.3(a)(2). Under Model Guidelines §1.6, the foreseeable conduct of criminal partners could be considered if it occurred in furtherance of one of the offenses of conviction, but not if it occurred as part of some unconvicted offense. Finally, Model Sentencing Guideline §1.6(b) modifies the provision of the current Guidelines that includes as relevant conduct "all harm that resulted from" the specified acts of the defendants and his co-venturers, U.S.S.G. §1B1.3(a)(3). The Model Guideline directs the court to consider only harms "foreseeable" to the defendant. This modification brings the existing guideline into conformity with general criminal law principles. Moreover, it is doubtful that the current Guidelines provision has often been applied to enhance a defendant's punishment based on unforeseeable harms.

This is a very difficult area. It will doubtless be the focus of considerable debate during any serious effort to reconfigure the guidelines. Further refinement of the model rule may well be deemed desirable.

Acquitted conduct: This model guideline adopts the CPSI position (and that of numerous critics) precluding use of acquitted conduct to enhance a sentence. However, in consideration of the double jeopardy and dual sovereignty issues presented by attempting to bar the use of conduct as to which there was arguably an acquittal in a state or foreign court, the prohibition is limited to acquittals in federal court. Whether the bar to the use of acquitted conduct should be extended to acquittals in non-federal courts is a question left for further study.

Statement of Reasons and Appellate Review: In any system of law worthy of the name, judges should offer meaningful explanations of the decisions they reach. Such explanations allow the parties and the public to understand the outcome of the case and, as to issues on which appellate review is possible, are essential to the informed exercise of the appellate function. Observers of the federal sentencing system have long called for sentencing judges to provide more detailed statements of the reasons behind their sentencing choices.[11] Under these Model Guidelines, sentencing opinions will be of even greater importance than formerly. Whereas under the existing Guidelines judicial findings of guidelines facts have preset quantitative effects on the sentencing range,[12] the vast majority of post-conviction judicial findings of fact in the model system would have no preset quantitative effect.[13] Rather, they would be aggravating or mitigating factors that the sentencing judge would consider in assigning a sentence within the range set by jury finding or guilty plea. For the parties to understand the resulting sentence and for an appellate court to review that sentence, a detailed and well-reasoned statement of reasons will be essential.

It may well be that the rules requiring a statement of reasons and creating a right of appellate review of within-range sentences embodied in Model Guideline §1.8 should be supplemented by a statute or rule of criminal procedure.

Notes

1 The reference is to expanded sentencing discovery rules proposed in the Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT. REP. 310 (2006) (hereinafter "CPSI, Recommendations").

2 *Id.* at 312-313.

3 *See Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S.Ct. 738 (2005).

4 CPSI, Recommendations, *supra* note 1, at 314.

5 *See, e.g.*, R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL, PUB. POL. & LAW 739 (2001); ABA Justice Kennedy Commission, Report on Punishment, Incarceration, and Sentencing (available at http://www.manningmedia.net/Clients/ABA/ABA288/) .

6 *United States v. Booker*, 125 S.Ct. 738 (2005).

7 *See United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005) ("PSR generally bears 'sufficient indicia of reliability,'" that defendant must rebut with "countervailing proof . . . beyond defendant's self-serving words"); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999) ("sentencing judge may consider [PSR] as evidence in making the factual determinations," and "defendant's rebuttal evidence must demonstrate that the information contained in the PSR is 'materially untrue, inaccurate or unreliable,' and '[m]ere objections do not suffice'"); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997) ("When the district court adopts the PSR's findings [here, probation officer's extrapolation of weight from dollar amounts mentioned by drug addicted informant who did not testify in person], the defendant must offer more than a bare denial of its factual allegations to mount a successful challenge."); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990) ("defendant has an affirmative duty to make a showing that the information in the presentence report is unreliable," and unless the defendant carries that burden, the "court is 'free to adopt the findings of the [presentence report] without more specific inquiry or explanation.").

[8] For a discussion of this and other procedural deficiencies in the current Federal Sentencing Guidelines, *see* Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era*, 12 FED. SENT. REP. 187 (2000) (discussing procedural deficiencies of Guidelines and summarizing other articles on same theme in Vol. 12, No. 4 of the FEDERAL SENTENCING REPORTER).

[9] In drug cases sentenced under U.S.S.G. §2D1.1, the base offense level is variable, depending on the type and quantity of the drug. However, because drug quantity is customarily determined by the court post-conviction, the effect is the same.

[10] This model permits several possible approaches to guiding the exercise of judicial discretion within the applicable guideline range. One approach is to make all factors relevant to determination of a within-range sentence advisory only. A second possibility is to identify some small subset of sentencing factors that would not be submitted to juries, but if found post-conviction by the sentencing judge, would trigger a presumption of a sentence above or below the midpoint of the applicable range. A mechanism of this sort is proposed as an alternative in the general guideline on causing or risking injury, Model Sentencing Guidelines § 3.3, 18 FED. SENT. REP. 366-367 (2006), the enhancement for obstruction of justice during the offense of conviction, Model Sentencing Guidelines §3.5, 18 FED. SENT. REP. 368 (2006) and the economic crime guideline, Model Sentencing Guidelines §2B1(c), 18 FED. SENT. REP. 330 (2006), and the advantages and disadvantages of such an approach are discussed at length in Frank O. Bowman, III, Editor's Observations, *'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT REP. 310 (2006).

[11] *See, e.g.*, Marc L. Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & LAW 3 (1989); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93 (1999); Steven L. Chanenson, *Write On!*, THE YALE LAW JOURNAL POCKET PART (available at http://www.thepocketpart.org/2006/07/pdfs/Chanenson_formatted.pdf); Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175 (2005). See also, ABA Justice Kennedy Commission Report on Punishment, Incarceration and Sentencing, *supra* note 5 (recommending that states, territories, and the federal government "[r]equire a sentencing court to state on the record reasons for increasing or decreasing a presumptive sentence, and permit appellate review of any sentence so imposed").

[12] Of course, post-*Booker* the sentencing range produced by judicial findings of guidelines facts is at least nominally only advisory.

[13] As discussed supra note 7, one option discussed in these Model Guidelines is to identify some small subset of facts that, if found, would generate a presumption of a sentence above or below the midpoint of the applicable range. If this option is adopted, then facts generating such a presumption would have a predetermined quantitative effect, albeit only a presumptive one.