

# Fiercer Than a Tiger - White Collar Offenders Face Harsh Sentencing in Post-Booker World

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# FIERCER THAN A TIGER: WHITE-COLLAR OFFENDERS FACE HARSH SENTENCING IN A POST-*BOOKER* WORLD

P.J. Meitl\*

In June 2005, prosecutors argued that Adelphia Communications founder John Rigas deserved 215 years in prison for his conviction on fraud and conspiracy charges.<sup>1</sup> At the time of his conviction, Rigas was eighty years old, suffered from bladder cancer and was recovering from triple bypass surgery.<sup>2</sup> Prosecutors justified seeking one of the longest white-collar sentences in United States history by pointing to the loss figures stemming from Rigas' fraudulent actions.<sup>3</sup> Adelphia and Rigas had already agreed in a settlement with the government "to forfeit assets valued at hundreds of millions of dollars to compensate victims of the fraud."<sup>4</sup>

During the same month, federal prosecutors in Boston sought a sixteen-year prison term for Harold Stonier after he was convicted of hiring a hit man to kill his wife.<sup>5</sup> Stonier showed no remorse after his conviction, calling his wife "spiteful, conniving, and unrelenting."<sup>6</sup> Prosecutors stated that they believed Stonier remained a "serious threat to the community in general and to his wife in particular."<sup>7</sup>

Although both Rigas and Stonier deserved lengthy sentences, it seems hardly just, appropriate, or sensible that federal prosecutors would seek such an extremely harsh sentence for John Rigas and then seek a relatively lenient one for a man who attempted to solicit the murder of his wife and was unremorseful about his actions. Unfortunately, the design of the current system of sentencing in the post-*Booker* world necessitates disparities of this kind, particularly in relation to white-collar offenses.

The prosecution and sentencing of white-collar offenders has always proved troublesome for prosecutors and judges. For a number of reasons, white-collar offenders are the most likely of all convicted defendants to receive vastly disparate sentences for similar crimes. Sentences are often based on loss amounts that prosecutors, probation officers, and sometimes judges attempt to calculate. Not only is this an inexact science, but when the crime involves a public company these figures tend to be astronomical and over-representative of the true effect of the crime. Additionally, current Department of Justice ("DOJ") policy requires federal prosecutors to seek the harshest punishment available under the now advisory guidelines.<sup>8</sup> The overall effect is a system in which prosecutors are forced to seek overly harsh sentences for white-collar offenders.<sup>9</sup>

This article attempts to describe the lineage of this result. In Part I, the article defines white-collar crime, reviews the history of prosecutorial interest and activity in the field, and then explores the pattern of lenient sentences that white-collar offenders were likely to receive prior to the imposition of the federal sentencing guidelines. Part II discusses the guidelines themselves and the role that white-collar crimes played in their enactment and the growing uneasiness with the guidelines that resulted in a slew of infamous cases known as *Apprendi*, *Blakely*, and *Booker*. In Part III, the article examines the post-*Booker* world and the immediate effects that white-collar sentencing witnessed in relation to the changes. In particular, white-collar offenders were more likely to receive harsh sentences in relation to other offenders. Part IV discusses in detail the underlying causes of these overly harsh sentences, including the calculation of loss figures, current DOJ policy, and increased media scrutiny. Lastly, Part V proposes some changes that would create a more consistent and fair policy in regard to sentencing white-collar offenders.

## The Special Problem of White-Collar Crime and its Sentencing

### Defining White-Collar Crime

"White-collar" crime, is a term of criminal behavior used by academics and practitioners for the past sixty-five years. Edwin Sutherland, a noted sociologist first coined the term in a speech given to the American Sociological Society in 1939.<sup>10</sup> Sutherland defined white-collar crime as illegal activities "committed by anyone of high social respectability in the course of his or her occupation."<sup>11</sup> This early definition, although important, was not without its critics, and debate has continued as a more accurate definition has been sought. Academics and practitioners have debated whether the definition should be based on the type of criminal activity, the social status of the criminal, or to the crimes perpetrated by organizations themselves.<sup>12</sup> Today, the term has come to be used generically, dealing with a wide variety of work-related illegal acts by persons at all organizational levels.<sup>13</sup> For this article's purpose and for sake of clarity, we will adopt the Department of Justice standard as stated in the Attorney General's report, which defined white-collar crimes as

[I]llegal acts that use deceit and concealment – rather than the application or threat of physical force or violence – to obtain money, property, or service; to avoid the payment or loss of money; or to secure a business or personal advantage. White-collar criminals occupy positions of responsibility and trust in government, industry, the professions, and civic organizations.<sup>14</sup>

Such a definition implicitly alters Sutherland’s initial approach at defining the criminal behavior by “including the criminal acts of non-elite persons” and by adopting an “offense based rather than an offender-based definition.”<sup>15</sup> The DOJ’s definition was not merely a change of words from Sutherland’s; it had significant ramifications for the investigation, prosecution, and increased public awareness of white-collar crime.

### Increased Government and Public Attention

The government’s definition necessarily widens the class of potential criminals and prosecutable crimes, and this effect can be seen in the government prosecution of white-collar crimes over the last thirty years. “Beginning in the mid-1970s, in the aftermath of the Watergate and foreign government bribery scandals, the federal government began targeting white-collar crime as a high-priority prosecutorial area.”<sup>16</sup> In the early 1980s, this “extraordinary expansion of the legal concept”<sup>17</sup> of white-collar crime had a substantial effect on how law enforcement proceeded in approaching and allocating resources for investigations, prosecutions and sentencing of white-collar criminals. For example, the increasing emphasis of the DOJ on the investigation and prosecution of white-collar crime “caused grand jury practice in the federal courts to expand exponentially”<sup>18</sup> and allowed prosecutors the ability to “give much greater attention to white-collar crime” while investigations took “place over a broad range of activity, from bank and securities fraud to public corruption to abuses of the health care system.”<sup>19</sup> During the 1980s, white-collar crime became one of the federal government’s “top national priorities,”<sup>20</sup> and Congress nearly quadrupled the DOJ’s budget to fight it.<sup>21</sup> This trend continued into the 1990s. By 1993, the DOJ had \$9.3 billion in its war chest<sup>22</sup> and Attorney General Reno labeled prosecution of white-collar crime as one of the DOJ’s top priorities.<sup>23</sup> For example, in 1997, 17% of the federal criminal caseload consisted of fraud charges, an increase from 12% in 1957.<sup>24</sup> A broad look at the data reveals that “over the past twenty years, prosecutions of white-collar crime have increased exponentially in volume and visibility.”<sup>25</sup>

### Pre-Guidelines Leniency

Despite the increase in resources and attention to the problems of white-collar crime, the sentencing of white-collar criminals was still one of the biggest challenges left to prosecutors and judges. Prior to the imposition of the guidelines, the prevailing theory was that white-collar criminals received substantially more lenient sentences than other criminals.<sup>26</sup>

Although the empirical evidence for disparities between sentences involving street crimes and white-collar crimes lacks the breadth and scope necessary to make solid conclusions,<sup>27</sup> the lexicon of academic writing suggests that those responsible for doling out punishment were predisposed to sentencing white-collar defendants to lighter sentences.<sup>28</sup> This tendency was due to many reasons. Researchers have argued that juries might have been impressed or intimidated by high level, powerful defendants and thus reluctant to find guilt.<sup>29</sup> Some have suggested that lenient or non-penal sentences were often imposed because of a perception that white-collar criminals are more sensitive or redeemable.<sup>30</sup> Other researchers have focused on judges and found that (pre-

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*“The bottom line is that white collar criminals are just as much criminals as those who steal with a gun or knife. They do real harm to real people. They ruin lives.”*

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*Booker*) “it appears that judges in some jurisdictions are overly willing to depart downward” and sentence white-collar “offenders to minimal (if any) jail time, home detention, or even probation.”<sup>31</sup> Still others have concluded that “courts apply far more lenient standard[s]” to white-collar employees.<sup>32</sup>

As the belief that white-collar defendants were receiving significantly more lenient sentences became widely recognized, the call for a more uniform system of sentencing grew in strength. The justification for such a system was not hard to find, particularly in the arena of sentencing white-collar defendants. As Michael Chertoff, former criminal chief of the DOJ, noted in 2002:

The bottom line is that white collar criminals are just as much criminals as those who steal with a gun or knife. They do real harm to real people. They ruin lives. Jail time performs two functions: it holds white collar criminals accountable for their past misdeeds, and it prevents future misbehavior

by those executives who might toy with the idea of beating the system.<sup>33</sup>

## Sentencing Policy and White-Collar Crime's Role

### Sentencing Guidelines Take Effect

Accepting the belief that white-collar defendants received more lenient sentences, coupled with increasing uneasiness about judicial disparity in sentences across the country as a whole, lawmakers sought to create a system of guidelines that would serve as a set of mandatory rules in sentencing for federal judges across the nation.

The Sentencing Reform Act of 1984 implemented “the most broad reaching reform of federal sentencing in this century.”<sup>34</sup> The act made key changes in corporate sentencing standards for federal crimes. As Senator Kennedy has noted:

One important goal of the 1984 Act was to eliminate the two-tier system of justice in which white-collar criminals received lenient treatments for acts of theft and fraud that would merit lengthy prison terms if committed on the street.<sup>35</sup>

Most importantly, the act sought to standardize the sentences given to all convicted criminals after November 1, 1987, including white-collar criminals. The system used a thorough Guidelines Manual that divided offenses into nineteen parts. Each guideline has a base offense level that may be adjusted up or down given the specific characteristics of the crime and the criminal.<sup>36</sup> A guideline may also have cross-references to other guidelines, which are equally binding and may dramatically increase the guideline range.

Supporters of the guidelines have argued that these guidelines have worked as intended, pointing to studies that support the view that inter-judge sentencing disparity has decreased.<sup>37</sup> Other supporters have suggested that the complexity of the federal guidelines serves policies of rational sentencing and limiting prosecutorial discretion.<sup>38</sup>

There has also been significant criticism of the guidelines. Critics argue that the guidelines unwisely intrude upon and unduly restrict the sentencing court's discretion.<sup>39</sup> Prior to the Sentencing Reform Act of 1984, courts in the United States enjoyed nearly unfettered discretion in sentencing those who had been convicted of a crime.<sup>40</sup> Other critics argue that the guidelines fail to give adequate consideration to an offender's individual characteristics bearing on blameworthiness.<sup>41</sup> Still other critics suggest that the guidelines result in overly harsh sentences, over-empower prosecutors and probation officers, and fail to achieve the goal of eliminating unjustified disparity in sentences.<sup>42</sup>

Although the criticisms take varying shapes and are broad in scope, there is no doubt that the vast majority of federal judges did not favor the guidelines.

A survey of federal judges released by the Federal Judicial Center in 1994, based on a survey conducted in October 1992, shows that two years ago (and two years after the commission's own survey), judges remained overwhelmingly critical of the guidelines. It found that 59 percent of circuit judges and 69 percent of district judges were “strongly” or “moderately” opposed to the retention of the “current system of mandatory guidelines” (with three times as many circuit judges and six times as many district judges giving the stronger of the two answers). Only 24 percent of circuit judges and 18 percent of district judges “strongly” or “moderately” supported the guidelines system. A smaller but still substantial percentage of judges—40 percent of circuit judges and 49 percent of district judges—would have eliminated the sentencing guidelines entirely.<sup>43</sup>

### The History of a Reversal

With such considerable criticism, the guidelines fell under increasing attack. In 2000, the U.S Supreme Court issued its decision in *Apprendi v. New Jersey*, holding that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.<sup>44</sup> *Apprendi* essentially took “scores of factual determinations from judges and placed [them] back in the hands of juries.”<sup>45</sup>

In 2004, the Supreme Court evaluated the state of Washington's sentencing guidelines in the landmark case, *Blakely v. Washington*. Building on its decision in *Apprendi*, the Court found that the Washington statute, which allowed judges to impose sentences beyond the guidelines, was invalid because it violated the Sixth Amendment right to a jury trial.<sup>46</sup> Almost immediately, the federal courts found themselves in turmoil as they wrestled with *Blakely*'s impact on the continuing validity of the federal guidelines.<sup>47</sup> They would not have to wait long, as the court moved to hear two cases at the beginning of its October 2004 term.<sup>48</sup>

In January 2005, the Supreme Court released its opinions regarding dual cases, *U.S. v. Booker* and *U.S. v. Fanfan*. In a split 5-4 decision, the Court ruled that its decision in *Blakely* applied to the Federal Sentencing Guidelines, which they had found to be mandatory and therefore

unconstitutional.<sup>49</sup> The Court's remedy was to make the guidelines an advisory system, effectively giving judges greater discretion and freedom to sentence outside the bounds of the guidelines.<sup>50</sup> As one district court judge put it shortly after the *Booker* decision:

Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not an invitation to do business as usual.<sup>51</sup>

### Post-Booker Developments and Policy

Following *U.S. v. Booker*, judges, prosecutors, and defense attorneys were uncertain how to use the guidelines. Should the guidelines truly only be advisory and used as one factor out of many, which would lead to a higher number of departures from the guideline ranges, or should judges adhere to the guidelines in all but the most extreme cases?

The considerable confusion led many judges and prosecutors to maintain the status quo. Several of the early decisions post-*Booker* exemplified the belief by many judges as to the necessity of using guidelines.<sup>52</sup> Some went as far as to say that the guidelines should be viewed as essentially mandatory rules. For example, Judge Paul Cassell, a federal district court judge from Utah stated that in the post-*Booker* world, "only close adherence to the Guidelines offers any prospect of treating similarly-situated offenders equally."<sup>53</sup> Judge Cassell, who had the honor of being the first judge to issue a post-*Booker* sentencing decision, also stated "the Guidelines are the *only* way to create consistent sentencing as they are the only uniform standard available to guide the hundreds of district judges around the country."<sup>54</sup> Judge Cassell concluded that the "court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons."<sup>55</sup> Judge Cassell's initial approach was followed by a number of federal courts around the country in some manner. For example, the United States Court of Appeals for the Second Circuit recently held that judges do not have "unfettered discretion" after *Booker* and that the congressionally-mandated factors set forth in the Sentencing Reform Act, prominently including the Guidelines, still constrain the imposition of criminal sentences.<sup>56</sup>

Judges were not alone in treating the Guidelines with far greater deference than the term "advisory" implies. Shortly after *Booker*, the DOJ issued a policy statement saying that its prosecutors will urge that sentences should coincide with the

calculated Guidelines range in all but extraordinary cases.<sup>57</sup> As one court has stated "in essence, the Department of Justice continues to treat the guidelines as mandatory, by asserting that the Court has no discretion to deviate therefrom."<sup>58</sup>

In particular, experts were uncertain about the effect that the *Booker* decision would have on white-collar sentences. Given that one of the justifications for imposing the guidelines in 1987 was that white-collar criminals received substantially more lenient sentences, many predicted that judges and juries would revert to pre-guidelines form and sentence those convicted of white-collar crimes to substantially lower sentences.<sup>59</sup> On the other hand, given the wave of corporate wrongdoing in the early part of the decade,<sup>60</sup> the increased media scrutiny of financial crimes,<sup>61</sup> and notable white-collar defendants in the headlines,<sup>62</sup> some wondered if white-collar defendants would receive harsher sentences, a reversal of the pre-1987 typology of lenient sentencing.

The latter concern, that white-collar offenders would be more likely to receive excessively harsh sentences, seemed to manifest itself in a number of cases in 2005. Prosecutors, particularly in high profile cases, sought sentences that, although technically still within the guideline ranges, seemed disproportionately harsh. Some examples include:

- Federal prosecutors asked a judge to impose what amounted to a life sentence for former WorldCom CEO Bernard Ebbers, convicted in the company's \$11 billion accounting fraud.<sup>63</sup> "In the Ebbers case, the sentencing request was largely the result of the size of the decline in WorldCom's market value as a result of the fraud."<sup>64</sup> Ebbers attorneys "maintained that the dollar amount of the loss caused by the fraud overstated the seriousness of the crime. They also argued that the fraud ultimately yielded 'little or no gain' to Mr. Ebbers because of the steep decline in WorldCom's stock price. Defense Counsel cited his community service, his charity work and his health" as justifications for a less harsh sentence.<sup>65</sup> Ebbers was eventually sentenced to 25 years.<sup>66</sup>
- Prosecutors sought a fourteen year and a thirty-three year sentence in the case of two former Merrill Lynch executives for their role in the Enron Nigerian barge fiasco.<sup>67</sup> The bankers had been primary actors in a scheme where Enron sold electricity-producing barges in Nigeria to Merrill Lynch but later bought them back at a predetermined price.<sup>68</sup> Prosecutors based the requested sentences on the calculations of loss to Enron shareholders, which they estimated to be \$43.8 million.<sup>69</sup> The sentencing judge disputed this figure and found that he couldn't accurately determine the loss. Instead he used an alternative

figure of \$1.4 million, an amount that represented the gains from the fraudulent conduct.<sup>70</sup>

## The Underlying Causes of Harsh White-Collar Sentencing

Prosecutors will likely continue to seek sentences similar to these two examples for a number of reasons. Particularly in financial crimes involving public companies, government attorneys are at the same time constrained by DOJ rules and set free by the interpretation of those rules. The calculation of loss coupled with DOJ policy regarding flexibility in seeking sentences creates a perfect storm for harsh sentencing. Add the additional pressures that prosecutors face, such as intense media scrutiny and the increased public attention, to the mix, and the system is designed to ensure sentences that are disproportionately harsh on white-collar offenders. A more detailed analysis of the underlying reasons is considered below.

### Calculation of Loss Amounts

White-collar cases are unique in that the sentence sought is often heavily dependent upon a loss figure that the prosecutor in conjunction with the probation officer finds prior to sentencing.<sup>71</sup> A calculation of loss by the prosecutor is required in all cases involving fraud, larceny, and embezzlement cases (known as economic crimes).<sup>72</sup> Economic crimes make up a substantial portion of the crimes prosecuted in federal courts. For example, in 1999, sixteen to twenty percent, of the 54,903 federal cases sentenced required a determination of “loss.”<sup>73</sup>

Under the Guidelines, ‘loss’ is “the value of the money, property or services unlawfully taken.”<sup>74</sup> The greater of the actual or intended loss controls. The loss calculation includes not only the count or counts of conviction, but all relevant conduct.<sup>75</sup> The government has the burden of proving loss by a preponderance of the evidence. Although “the loss need not be determined with precision” and a “reasonable estimate” is enough, speculation will not suffice.<sup>76</sup>

But the loss figure can be inflated in a number of ways. For example, the defendant’s conduct must only be one cause of the loss. A common case in which this principle produces high loss numbers occurs when a defendant defrauds a public corporation and the stock price drops over the same period of time. Other factors, such as the overall market, competitors, etc. do not necessarily have to be taken into account. Although there is no Supreme Court opinion on the subject, most circuits have found that the loss found is usually

the entire loss that the victim suffered and not just the percentage of the loss equal to the percentage of causation attributable to the defendant,<sup>77</sup> necessarily inflating the loss number and giving the prosecutor and the judge the ability to over-inflate the sentence. On the other hand, the Ninth Circuit has held that the defendant cannot be held responsible for losses “caused by the intervening, independent, and unforeseeable criminal misconduct of a third party.”<sup>78</sup>

Judges are free to find their own figure, but in reality, the prosecutor’s figure is usually used because of the complexity and time-intensive nature of the calculation. Given the malleability of the number, prosecutors are often able to manipulate the process. It is possible that prosecutors as a whole are a conscientious and moral group that seeks to find the accurate loss number. Pressure for a lengthier sentence, however, can be a powerful influence in a number of cases such as in a high-profile trial, in a case where the defendant or the defendant’s attorney has been particularly antagonistic, or when the prosecution has expended considerably more time and resources than usual.

For example, in a pre-*Booker* case, a Houston jury found Jamie Olis, a former executive at Dynergy, a Houston-based pipeline company, guilty of a battery of charges — conspiracy, securities fraud, mail fraud and wire fraud — related to an accounting scheme called Project Alpha, which attempted to mask \$300 million of debt as revenue.<sup>79</sup> The case received notable attention, because of Dynergy’s ties to Enron.

Olis was sentenced to 24 years in prison, largely because of the judge’s loss finding.<sup>80</sup> U.S. District Judge Sim Lake put the loss at a minimum of \$105 million.<sup>81</sup> He based that finding on his view of losses suffered by the University of California, a major Dynergy shareholder and lead plaintiff in a class-action lawsuit against the company.<sup>82</sup> This figure, which many

experts deemed excessively high and out of touch with the reality of the harm actually incurred, was a drop in the bucket compared to what prosecutors sought. The government urged Lake to figure investors’ losses at more than \$500 million — and perhaps twice that amount — based on the hit taken by all shareholders, not just the university.<sup>83</sup> Olis’s sentence of 24 years is even more remarkable because it was his first offense, he is not eligible for parole at any point during the sentence, and because the judge appeared reluctant to sentence Olis so harshly.<sup>84</sup> “I take no pleasure in sentencing you to 292 months,” Lake stated, “[s]ometimes good people commit bad acts, and that’s what happened in this case.”<sup>85</sup>

The calculation of loss amounts can, at times, greatly overstate the true effect of the criminal behavior. This is particularly true in public corporation settings, where millions

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*The new policy also states that prosecutors must seek the most severe sentence allowed by the law unless there are overriding considerations.*

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and perhaps billions of dollars are lost after a revelation that criminal acts have occurred inside a company. Although there is a consensus that greater sentencing should occur when there are greater losses, today's system is destined to produce overly harsh sentences for white-collar offenders.

### **DOJ Policy Requiring Most Severe Sentencing**

In addition to loss calculations, the DOJ's policy regarding prosecutorial discretion in seeking sentences is another roadblock to achieving just and more consistent sentencing for white-collar offenders. In September 2003, Attorney General John Ashcroft issued a policy directive to all DOJ attorneys that required the seeking of the most serious charges possible in almost all cases.<sup>86</sup> Except in limited, narrow circumstances, federal prosecutors must seek to bring charges for "the most serious, readily provable offense that can be supported by the facts of the case."<sup>87</sup> The new policy also states that prosecutors must seek the most severe sentence allowed by the law unless there are overriding considerations.<sup>88</sup>

The move was only one in a series of steps taken by the Justice Department to concentrate power in the Attorney General's office and to crack down on perceived "lenient practices by some prosecutors and judges."<sup>89</sup> Ashcroft stated, "[t]he direction I am giving our U.S. Attorneys today is direct and emphatic."<sup>90</sup> Ashcroft's move effectively reversed Attorney General Janet Reno's policy, which was issued in the mid-1990s and gave prosecutors more discretion over how their cases should be handled by allowing for an "individualized assessment" of the facts and circumstances of the case.<sup>91</sup>

Given the fact that Justice Department attorneys are acting as if the guidelines are still mandatory,<sup>92</sup> prosecuting attorneys have little choice but to seek the highest sentence possible for a white-collar offender. Coupled with the loss amount, the prosecutor is often left with little choice but to seek a sentence that they know is overly harsh and inappropriate.

### **Pressures on Prosecutors**

Prosecutors, although generally "in it" for the right reasons, are still not immune from a number of unique pressures that can add to the likelihood that prosecutors will seek a harsh sentence. Given the prosecutor's unique role in the system of criminal justice and sentencing, these pressures, if manifested in an abuse of power or poor decision-making, are factors that will increase the probability of harsh sentencing.

As Joy Anne Boyd describes, U.S. Attorneys play a crucial role in the system and their discretion is a hallmark of their responsibilities:

[F]ederal prosecutors have broad discretionary powers in charging a defendant and recommending a sentence if the defendant is convicted. Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file. Given that most judges still give the guidelines either substantial weight in their sentencing decisions or use them as one of a limited number of factors, this power is critical. Because many criminal acts potentially involve a number of offenses - the sentences for which vary (sometimes greatly) - the prosecutor's decision as to which "base offense" to charge could have an enormous impact on the length of the sentence imposed. . . The federal prosecutor also has the power to decide which, if any, aggravating factors will be presented to the court. The totality of the prosecutor's decisions as to which offenses will be charged and which aggravating factors to present in the end points to one sentencing range.<sup>93</sup>

In the case of white-collar offenders, these factors often lead to harsh and overstated sentences.

With great power comes great pressure. The political and media pressure to be "tough on crime" and therefore seek harsh sentences is extremely intense.<sup>94</sup> "When the media jumps on a case, splashing it across the front pages of newspapers or making it the lead story on the local news, the attention often moves public opinion, subjecting prosecutors, whose boss is elected by voters, to public opinion and political pressure."<sup>95</sup> Prosecutors themselves recognize this pressure. Manuals on prosecuting in the limelight have stated that when a "well-known person is suspected; the added media attention can visit incredible pressure upon the prosecutor. At the outset, the prosecutor should be tough in making the charging decision - certainly a safe and generally popular move."<sup>96</sup>

Prosecutors might place pressure on themselves as well. As one former prosecutor has noted, "the pressure to seek and obtain [a certain sentence] depends not only on the 'media's portrayal of the case' at hand but on circumstances external to it: For example, there might be a significant case recently lost which compels the prosecutor to seek to regain public confidence."<sup>97</sup>

Pressure on a prosecutor is unlikely to go away or recede from the prosecutorial landscape; however, when added to a mix that includes top-heavy loss calculations and inflexible Justice Department standards, these pressures have added importance. One of the last bastions of prosecutorial discretion lies in prosecutors' ability to choose who to file against and what to file. If a prosecutor is pressured by the media, politics, or by their own subjective feelings, harsher sentences are even more likely than before.

## Proposed Changes

Although we are only eleven months post-*Booker*, the system seems to be aligned in a way that forces and encourages prosecutors to seek overly harsh sentences for white-collar offenders. A solution to this dilemma is both complex and contentious but we can begin by offering broad-policy based solutions. The following modest bare-bones proposals are meant only to be starting-off points for further discussion and analysis.

First, the DOJ should issue new guidelines that alter the calculation of loss. The current system, which bases calculations on the directives and edicts proscribed by the federal sentencing guidelines, fail to take into account the overstatement that occurs when the crime involves a public corporation. By requiring the prosecutor to attribute the percentage of the loss equal to the percentage of causation by the defendant, we would go a long way towards alleviating the overstatement of loss that is currently endemic in white-collar sentencing. Detailed guidelines could be included in this policy, which could be created in conjunction with market analysts, economists, and forensic accountants. The policy would of course be left open to interpretation to some degree but by clearly laying out the objectives of the policy, prosecutors would be more likely to arrive at fairer numbers that more accurately reflected the loss caused by the offender.

Second, the DOJ should reverse its own policy in regard to seeking the highest sentences possible for white-collar crimes. While this article does not explore the effects that Ashcroft's policy has had on other crimes and sentencings, it seems clear that prosecutors should be given greater discretion when choosing what sentences to seek in white-collar offenses. The reasoning behind this argument lies mainly in the calculation of loss, which, if the prosecutor feels is overstated, can be adjusted for by the discretion of the prosecuting attorney. It is unlikely, given the increased awareness and pressures previously mentioned that a slew of lenient sentences would be doled out upon the reversal of this policy. The likely result would simply be a departure downwards in sought sentences in cases where justice required such an adjustment.

Congressional action, in the form of a response to *U.S. v. Booker*, would likely concentrate on the creation of mandatory minimums and some form of a re-establishment of the Guidelines. The effect of such a move, which seems increasingly unlikely,<sup>98</sup> is uncertain. On the one hand, if the Congressional action focused on enacting sentence minimums, it would have little effect on the current harshness of the system. On the other hand, such a move might alleviate some of the pressure from Main Justice to force sentences and charges on its prosecutors, effectively freeing up discretion and allowing individual prosecutors to seek just sentencing.

The prosecutors seeking a sentence of 215 years for John Rigas, an 80 year old man suffering from bladder cancer, have in a way been victims of the three pressures previously discussed: overstated loss calculations, inflexible DOJ mandates, and media/political pressure. These pressures have grown over time and have now created a perfect storm for overly harsh sentencing of white-collar offenders. Although prosecutors were hoping to send a message with their conviction and sentence, did they send the message they had hoped for?

*\* Since he entered law school, PJ Meitl has worked in the Department of Defense's General Counsel's Office, Pepco Holdings Inc. General Counsel's Office, the Fraud and Public Corruption Section of the US Attorney's Office for the District of Columbia and Bryan Cave LLP. Today, Mr. Meitl is a 4<sup>th</sup> year JD/MBA student at Georgetown University. He is currently Editor-in-Chief of the American Criminal Law Review, a well known publication famous for its Annual Review of White Collar Crime.*

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<sup>1</sup> David Voreacos, *Adelphia's Rigases Deserve 215 Years, Prosecutors Say*, Bloomberg.com June 13, 2005, <http://www.bloomberg.com/apps/news?pid=10000103&sid=aUIWI39CYdRE&refer=us> (describing how the Rigases hid \$2.3 billion in debt from investors and used Adelphia money for improper purposes, including ordering two Christmas trees flown to New York for his daughter for \$6,000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (noting that the settlements included two agreements which, between cash, stock and Rigas Family real estate, will result in the provision of assets to the Adelphia Victim Fund totaling more than \$720 million).

<sup>5</sup> Denise Lavoie, *16-year Sentence Sought for Man in Wife's Murder-for-Hire Plot*, Associated Press, July 6, 2005.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Part IV. B. for discussion of this requirement.

<sup>9</sup> The title of this article stems from a quote by Confucius, the ancient Asian sage who compared a harsh government to that of a tiger. "Fiercer even than a tiger is a government which oppresses. You can make a pitfall to trap a fierce tiger. Once it

has fallen into the pit it is under control. Later, you can even kill it. But there is no way that you can get rid of and control a harsh system of government.” See XIAOTONG FEI, CHINA’S GENTRY: ESSAYS ON RURAL-URBAN RELATIONS, 22 (Univ. of Chicago Press, Ltd. London) (1953).

<sup>10</sup> NEAL SHOVER & JOHN PAUL WRIGHT, CRIMES OF PRIVILEGE, READINGS IN WHITE COLLAR CRIME, 1 (Oxford University Press) (2001).

<sup>11</sup> KITTY CALAVITA, HENRY N. PONTELL & ROBERT H. TILLMAN, BIG MONEY CRIME, 79 (University of California Press) (1997).

<sup>12</sup> See generally YOAV VARDI & ELY WEITZ, MISBEHAVIOR IN ORGANIZATIONS: THEORY, RESEARCH, AND MANAGEMENT, - BUSINESS & ECONOMICS -2003, 16-20 (2003).

<sup>13</sup> *Id.* at 17.

<sup>14</sup> Department of Justice, Attorney General’s Report (1983). Similarly, the U.S. Department of Justice’s Dictionary of Criminal Justice defines white-collar crime as “nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional, or semi-professional and utilizing their special occupational skills and opportunities.” Dictionary of Criminal Justice Data Terminology 215 (2d Ed. 1981).

<sup>15</sup> TONY G. POVEDA, *RETHINKING WHITE-COLLAR CRIME*, 134 (Praeger Publishers) (1994); see also Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 393-94 (1994) (using an approach “that looks to the activity involved and classifies that activity based upon its attributes as opposed to the socio-economic status of the individuals who engage in the acts.”).

<sup>16</sup> Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993).

<sup>17</sup> Gilbert Geis & Joseph F. C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 374 (2002).

<sup>18</sup> JOHN F. WALSH, PRACTICAL CONSIDERATIONS IN FEDERAL GRAND JURY PRACTICE, IN FEDERAL CRIMINAL LITIGATION 1, 2 (Barbara A. Reeves et al. eds., 1994).

<sup>19</sup> Peter J. Henning, *Defense Discovery In White Collar Criminal Prosecutions*, 15 GA. ST. U.L. REV. 601, 604 (1999).

<sup>20</sup> ROGER J. MAGNUSON, THE WHITE COLLAR-CRIME EXPLOSION, 6 (McGraw-Hill, Inc.) (1992) (quoting statement of William Sessions).

<sup>21</sup> Robert S. Bennett, *Foreword to Eighth Survey of White Collar Crime*, 30 AM. CRIM. L. REV. 441, 441 (1993).

<sup>22</sup> *Id.*

<sup>23</sup> See *Reno Sets Priorities at Confirmation Hearing*, DOJ ALERT, April 1993, at 1 (Attorney General Janet Reno identified “complex economic crime that cuts across state lines” as a department priority).

<sup>24</sup> See *Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. L. REP. 23. (stating that, with drug prosecutions removed, fraud prosecutions represented 26 percent of the federal criminal caseload in 1997).

<sup>25</sup> PAMELA H. BUCY, WHITE COLLAR CRIME: CASES AND MATERIALS, 1 (West Pub. Co.) (2d ed. 1998).

<sup>26</sup> See U.S. Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at vii (2004) (stating that the Commission’s study of past sentencing practices revealed that in the pre-guidelines era, sentences for economic crimes received less severe sentences than for street crimes where there were similar monetary loss).

<sup>27</sup> John Hagan, Ilene H. Nagel & Celesta Albonetti, *The Differential Sentencing of White Collar Offenders in Ten Federal District Courts*, 45 AMERICAN SOCIOLOGICAL REVIEW 802 (1980) (using an offender-based approach rather than an offense based one).

<sup>28</sup> John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 763 (1982) (finding that it is also true, of course, that white-collar criminals who are convicted get more lenient sentences than common criminals whose crimes do less harm).

<sup>29</sup> See John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 415, 462 (1980) (“in the case of health and safety statutes the odds are high that. . . these laws will be substantially offset by judicial nullification when sentencing judges confront ‘flesh and blood’ defendants having impeccable backgrounds, community ties, and tearful families”).

<sup>30</sup> Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357 (1992).

<sup>31</sup> Michael Chertoff, *Are We Really Getting Tough on White Collar Crime?* Hearing Before Subcommittee on Crime and Drugs Senate Judiciary Committee (July 10, 2002), 15 FED. SENT’G. REP. 244.

<sup>32</sup> Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 975-76 (1982) (arguing that the courts’ leniency toward subjective standards in white collar situations is in striking contrast to the courts’ strict scrutiny of subjective standards in blue collar situations.)

<sup>33</sup> Michael Chertoff, *Are We Really Getting Tough on White Collar Crime?* Hearing Before Subcommittee on Crime and Drugs Senate Judiciary Committee (July 10, 2002), 15 FED. SENT’G. REP. 244.

<sup>34</sup> Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990).

<sup>35</sup> Senator Edward Kennedy, *Corporate Crime in America: Strengthening the “Good Citizen” Corporation*, Address at the U.S. Sentencing Commission Symposium on Crime and Punishment in the United States (September 7-8, 1995), at <http://www.ussc.gov/sympo/wcsympo.pdf#search=‘Senator%20Kennedy%20U.S.%20Sentencing%20Commission%20Symposium%20on%20Corporate%20Crime’>.

<sup>36</sup> See U.S. SENTENCING GUIDELINES MANUAL Chapters 1, 2 & 4 [hereinafter U.S.S.G.] (for white-collar offenses, the most common offense-characteristic adjustments are made for the amount of loss involved and the presence of more than minimal planning).

<sup>37</sup> See Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity*, 29 AM. CRIM. L. REV. 875 (1992) (discussing the debate between Senior Judge Gerald W. Heaney of the Eighth Circuit and the Chair of the Sentencing Commission, Fourth Circuit Judge William W. Wilkins, Jr., about whether the disparity in sentencing between different regions and districts decreased after the enactment of the Guidelines); see also William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795, 808-20 (1992) (Sentencing Commission's study of sentencing under the guidelines shows disparity reduced from pre-guidelines levels).

<sup>38</sup> See Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992) (countering critics' complaint that the Guidelines are too complex by explaining that the complexity of the Guidelines was purposeful and actually increases the uniformity of sentencing).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938-39 (1988).

<sup>42</sup> Margareth Etienne, *Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 443-44 (2004).

<sup>43</sup> Marc L. Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 182 (Jan-Feb, 1995) citing Federal Judicial Center, October 1992 SURVEY OF FEDERAL JUDGES 15, 37 (1994).

<sup>44</sup> 530 U.S. 466, 490 (2000).

<sup>45</sup> Jason Colin Cyrulnik, *Overlooking a Sixth Amendment Framework*, 114 YALE L.J. 905 (January 2005).

<sup>46</sup> *Blakely v. Washington*, 542 U.S. 296 (2004).

<sup>47</sup> See *A Supreme Mess*, WASH. POST, July 15, 2004, at A20 (stating "ever since the Supreme Court handed down a decision in the case of *Blakely v. Washington* at the end of its recent term, the lower federal courts have been in turmoil."); Lyle Denniston, *Justices Agree To Consider Sentencing*, N.Y. TIMES, August 3, 2004, at A6 (explaining that "by acting in its summer recess, the court signaled a sense of urgency about resolving some of the turmoil in the lower courts stirred up by a decision from the Supreme Court itself").

<sup>48</sup> *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Fanfan*, 543 U.S. 220 (2004).

<sup>49</sup> See *United States v. Booker*, 543 U.S. 220 (2005) (holding that the mandatory sentencing guidelines are unconstitutional under the *Apprendi* and *Blakely* decisions).

<sup>50</sup> See Myron H. Thompson, *Sentencing and Sensibility*, N.Y. TIMES, January 21, 2005, at A1 (arguing that the court's holding may increase trial judges' discretion in sentencing).

<sup>51</sup> See *United States v. Ranum*, 353 F. Supp. 2d 984, 985 (D. Wis., 2005) (imposing a prison sentence of one year and one day, substantially below the range indicated by the sentencing guidelines).

<sup>52</sup> For example, in *United States v. Perez-Chavez*, the district court stated that "in all but the most unusual circumstances, the recommended Guidelines sentence will still be the most

appropriate sentence. This is because the manner in which the Guidelines have been developed strongly suggests that in almost all cases the proposed Guidelines sentence will faithfully reflect the purposes of sentencing." 2005 U.S. DIST. LEXIS 9252, at 12 (D. Utah May 16, 2005).

<sup>53</sup> Paul G. Cassell, Statement Before the United States Sentencing Commission Concerning the Effect of *United States v. Booker* on the Federal Sentencing Guidelines 18 (February 15, 2005), available at [http://www.uscc.gov/hearings/02\\_15\\_05/cassell\\_testimony.pdf#search=Paul%20G.%20Cassell%20United%20States%20Sentencing%20Commission%20United%20States%20v.%20Booker%20Federal%20Sentencing%20Guidelines](http://www.uscc.gov/hearings/02_15_05/cassell_testimony.pdf#search=Paul%20G.%20Cassell%20United%20States%20Sentencing%20Commission%20United%20States%20v.%20Booker%20Federal%20Sentencing%20Guidelines).

<sup>54</sup> *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah, 2005).

<sup>55</sup> *Id.*

<sup>56</sup> See *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (explaining how despite the fact that the Guidelines are no longer mandatory, judges still have a duty to "consider" them along with mandated factors); see also *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005) (holding that "[c]onsistent with the remedial scheme set forth in *Booker*, a district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines. Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence.").

<sup>57</sup> See James P. Comey, Deputy Attorney General, U.S. Dept. of Justice, *Department Policies and Procedures Concerning Sentencing* (January 28, 2005) ("DOJ Sentencing Policy Memo").

<sup>58</sup> *United States v. Williams*, 2005 U.S. Dist. LEXIS 8178, 4 (D. Fla., 2005).

<sup>59</sup> Professor Peter Henning on White-Collar Crime Prof Blog (April 8, 2005), available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2005/04/will\\_white\\_coll.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/04/will_white_coll.html) (stating that "white collar defendants have the most to gain from a discretionary sentencing system . . . because they are more likely to make arguments that appeal to the judges") (last visited on July 3, 2005).

<sup>60</sup> See Kurt Eichenwald, *Clay Feet; Could Capitalists Actually Bring Down Capitalism?*, N.Y. TIMES, June 30, 2002 at Section 4, 1 (discussing the increase in corporate crimes in the recent months).

<sup>61</sup> See generally Beth A. Wilkinson & Steven H. Schulman, *When Talk is Not Cheap: Communications with the Media, The Government, and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 206-07 (2002) (discussing how despite the fact that an attorney may be limited by ethical issues in discussing a client's case with the media, this does not prevent the media from reporting on the case).

<sup>62</sup> See Roger Lowenstein, *Corporate Upheavals Make Me Optimistic*, WASH. POST, March 14, 2004 at B05 (discussing the prosecutions of Martha Stewart, Dennis Kozlowski, Bernie Ebbers, Richard Scrushy and Jeffrey Skilling).

<sup>63</sup> Jonathan D. Glater, *Seeking Deterrent, U.S. Wants A Life Prison Term for Ebbers*, N.Y. TIMES, June 29, 2005, at C5.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *WorldCom Ex-CEO Gets 25 Years in Prison*, WASH. POST, July 17, 2005 at A03.

<sup>67</sup> Mary Flood, *Former Merrill Lynch Executives Get Less Prison Than Requested*, HOUSTON CHRONICLE, April 23, 2005, at <http://www.chron.com/cs/CDA/ssistory.mpl/special/enron/3146490> (last visited Nov. 1, 2005).

<sup>68</sup> *3 Sentenced for Enron Deal*, N.Y. TIMES, May 13, 2005, at C12.

<sup>69</sup> Flood, *supra* note 67.

<sup>70</sup> *Id.*

<sup>71</sup> For example: “the new economic crime guideline retains the rule of the former fraud guideline that where the loss a defendant intended to inflict was larger than the loss the victim actually sustained, the larger intended loss figure should be used to calculate the sentence. See Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 75 (2001).

<sup>72</sup> See U.S.S.G. §§ 2B1.1 app. n.2, 2F1.1 app. n. 7-8 (2000) (including sentencing guidelines for larceny, embezzlement and other forms of theft, and for fraud and deceit, respectively).

<sup>73</sup> U.S. SENTENCING COMM’N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, at 24 Table 1.11 (Guilty Pleas and Trials in Each Primary Offense Category).

<sup>74</sup> U.S.S.G. § 2F1.1 app. n.8; see, e.g., *United States v. Harper*, 32 F.3d 1387, 1391 (9th Cir. 1994) (“Actual loss is a measure of what the victims of the fraud were actually relieved of.”).

<sup>75</sup> See U.S.S.G. §§ 1B1.3(a) and app. n.2(c)(1)-(2) 2F1.1 app. n.7; *United States v. Smith*, 218 F.3d 777, 782-83 (7th Cir. 2000).

<sup>76</sup> See, e.g., *United States v. Rowe*, 202 F.3d 37, 42 (1st Cir. 2000); *United States v. Vitek Supply Corp.*, 144 F.3d 476, 490-92 (7th Cir. 1998); *United States v. Barnes*, 125 F.3d 1287, 1290 (9th Cir. 1997); *United States v. Comer*, 93 F.3d 1271, 1284-85 (6th Cir. 1996); *United States v. Deutsch*, 987 F.2d 878, 886 (2d Cir. 1993); *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993); cf. *United States v. Krenning*, 93 F.3d 1257, 1269-70 (5th Cir. 1996) (method used to calculate loss must bear “some reasonable relation to the actual or intended harm of the offense”).

<sup>77</sup> See, e.g., *United States v. Reeder*, 170 F.3d 93, 109-10 (1st Cir.), cert. denied, 528 U.S. 872 (1999); *United States v. Blocker*, 104 F.3d 720, 735-36 (5th Cir. 1997); *United States v. Morris*, 80 F.3d 1151, 1171-74 (7th Cir. 1996); *United States v. Sarno*, 73 F.3d 1470, 1500-01 (9th Cir. 1995); *United States v. Stedman*, 69 F.3d 737, 740-41 (5th Cir. 1995); cf. *United States v. Christopher*, 142 F.3d 46, 56-57 (1st Cir. 1998) (upholding district court decision not to reduce loss on multiple causation grounds; noting that other factor was not “an independent cause” of the loss).

<sup>78</sup> *United States v. Hicks*, 217 F.3d 1038, 1049 (9th Cir. 2000).

<sup>79</sup> See Mark Costello, *Throwing Away the Key*, N.Y. TIMES, June 6, 2004, at 6-41; see also Carrie Johnson & Brooke A. Masters, *Restraining The Gavel’s Power; Ruling Could Prompt Challenges to White-Collar Sentences*, WASH. POST, June 30, 2004, at E01; see also Tom Fowler, *Dynegy Settlement Wins Final Approval*, HOUSTON CHRONICLE, July 9, 2005 at B-1.

<sup>80</sup> Jonathan Peterson, *White-Collar Prison Terms Under Debate; Determining the length of punishment is far from an exact science, and the standards may be changing*, L.A. TIMES, July 11, 2004 at C1.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The Fifth Circuit Court of Appeals overturned Olis’ sentence in November and called for a resentencing. Michael Stravatoapin & Tom Fowler, *Sentence Likely to Shrink*, HOUSTON CHRONICLE, Dec. 3, 2005. Although a reduction in his sentence is likely, it will still largely depend on loss calculations and still be substantial. *Id.*

<sup>85</sup> Costello, *supra* note 79, at 41.

<sup>86</sup> See John Ashcroft, Attorney General, U.S. Dept. of Justice, *Department Policy Concerning Charging Criminal offenses, Disposition of Charges, and Sentencing*, September 22, 2003.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> See *id.* at 6 (directing that “downward departure” from sentencing guidelines should not be used to encourage plea bargaining or to avoid trials, but rather only in certain “fast-track” programs or in the cases where the defendant provided “substantial assistance.”).

<sup>89</sup> Eric Lichtblau, *Ashcroft Limiting Prosecutors’ Use of Plea Bargains*, N.Y. TIMES, September 23, 2003, at A1.

<sup>90</sup> John Ashcroft, Attorney General, U.S. Dept. of Justice, Statement following the enactment of the PROTECT Act (Public Law 108-21) September 22, 2003 (“The direction I am giving our U.S. Attorneys today is direct and emphatic. It is the policy of the Department of Justice that federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case except in limited, narrow circumstances”); see also Lichtblau, *supra* note 89, at A1.

<sup>91</sup> Lichtblau, *supra* note 89, at A1.

<sup>92</sup> See *infra* text, Part III.

<sup>93</sup> Joy Anne Boyd, *Power, Policy, and Practice: The Department of Justice’s Plea Bargain Policy as Applied to the Federal Prosecutor’s Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 592 (2004) (citing in part Kay A. Knapp & Denis J. Hauptly, *U.S. Sentencing Guidelines in Perspective: A Theoretical Background and Overview*, in *U.S. Sentencing Guidelines: Implications for Criminal Justice* 3-18 (Dean J. Champion ed., 1989)).

<sup>94</sup> Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, n. 182 (2001) (citing memorandum to Smith where a prosecutor discussed the pressures of the job and how they reduced his ability to feel compassion for victims).

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<sup>95</sup> Jennifer Taylor, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983 (2002) (discussing the impact of media pressure for strict sentencing on the adoption of California's Proposition 21, a measure that increased prosecutorial discretion in choosing to try children as adults).

<sup>96</sup> Paul R. Wallace, *Prosecuting in the Limelight*, 22 DELAWARE LAWYER 20, 21 (2005).

<sup>97</sup> Anthony Amsterdam et al, *Amicus Brief*, 27 N.Y.U. REV. L. & SOC. CHANGE 399, (2000/2001) (citing Thomas Johnson, *When Prosecutors Seek the Death Penalty*, 22 AM. J. CRIM. LAW 280 (1994)) (discussing the particular pressures of high-stakes prosecuting in the context of the death penalty).

<sup>98</sup> *Most Sentencing Still Within Guidelines Following Booker Decision*, *Officials Say*, 73 U.S.L.W. 2569 (2005) Senator Arlen Specter, chair of the Senate Judiciary Committee, indicated that he was content to let lower courts apply and interpret the Supreme Court's ruling in *United States v. Booker*. "Let's see what the courts are going to do," said Specter. "The courts have a lot of leeway - we'll take a little time and let it percolate for a while and get some experience." Similarly, Rep. Jeff Flake (R-Ariz.) asked in subcommittee hearing, "Why doesn't it make sense to take a year and see how Booker plays out?").

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## SUPREME COURT WATCH: UPCOMING CRIMINAL CASES ON THE 2005-2006 DOCKET *CLB Staff*\*

Given the constantly evolving nature of the criminal justice system, it is important to stay on top of developments in the law, especially the most recent Supreme Court decisions. This section provides an overview of criminal cases that the Supreme Court has agreed to hear as part of the 2005-06 docket.

### Patrick Day v. James Crosby (Fl. Department of Corrections)

Docket Number: 04-1324

- Eleventh Circuit
- Questions Presented:
  1. When the state fails to plead or otherwise raise a statute of limitations defense and expressly concedes that the petition was timely, does it waive that defense to a habeas corpus petition?
  2. Can a district court rely on habeas rule 4 in order to dismiss a habeas petition on its own motion after the state has filed an answer that is based on a ground not raised in that answer?

▪ Facts:

After his conviction for second degree murder, Day filed a petition for writ of habeas corpus; however, the statute of limitations for filing the petition had expired. A federal magistrate ordered the state to submit an answer addressing all its affirmative defenses to the petition. The state's answer, however, erroneously agreed that Day had submitted his petition in compliance with the statute of limitations and therefore did not raise a limitations defense. The district court then issued an order, *sua sponte*, dismissing Day's petition as untimely, and the Eleventh Circuit Court of Appeals affirmed the dismissal. Since habeas cases are not governed by the general rule that when a defendant fails to plead the statute of limitations as an affirmative defense, it waives that defense, a court may review the scenario *sua sponte*.

### Bobby Holmes v. South Carolina

Docket Number: 04-1327

- South Carolina Supreme Court
- Question Presented:

Does a state's rule governing admissibility of third-party guilt evidence violate a criminal defendant's constitutional right to present a complete defense?

▪ Facts:  
Holmes was convicted of multiple crimes, including first degree murder, and sentenced to death. At his trial, the court did not allow Holmes to present evidence that a third party had committed the crimes with which he had been charged. On appeal, the South Carolina Supreme Court affirmed, applying