UNITED STATES OF AMERICA -vs- MARGARITA CHAPARRO

Crim. No. EP-92-CR-283(KC)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

2004 U.S. Dist. LEXIS 17531

September 1, 2004, Decided

COUNSEL: [*1] For GEORGE AYALA (1), Defendant: George Ayala, Pro Se, El Paso, TX.

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MARGARITA CHAPARRO (3), Defendant: Daniel Anchondo, Attorney At Law, El Paso, TX.

U. S. Attorneys: David L. Nichols U.S. Attorney's Office El Paso, TX.

JUDGES: Kathleen Cardone, United States District Judge.

OPINIONBY: Kathleen Cardone

OPINION: ORDER

Defendant objects arguing that ***Blakely v. Washington***, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), precludes application of a two-point enhancement for obstruction of justice following a factual finding by the sentencing court pursuant to section 3C1.1 of the United States Sentencing Guidelines (Guidelines). The objection is **overruled**.

The recent Fifth Circuit decision of *United States v. Pineiro* holds that "*Blakely* does not extend to the federal Guidelines," 377 F.3d 464, 465 (5th Cir. 2004), thereby precluding defendant's objection. The Court in *Pineiro, see id.* at *1, *9, states that the matter is far from resolved and may be revisited at some level in the future. The contrary holdings of various Courts of Appeals may further support a rehearing **[*2]** on the issue. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004) (holding *Blakely* applicable to Guidelines with Easterbrook, J. dissenting); *United States v. Ameline*, 376 F3d 967 (9th Cir. 2004) (holding same with Gould, J. dissenting); *see also United*

States v. Mincey, Nos. 03-1419L and 03-1520, 2004 WL 1794717 (2d Cir. Aug. 12, 2004) (rejecting *Blakely* challenge to enhancement and adhering to Circuit precedent but staying mandate pending resolution by Supreme Court); *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (certifying question of *Blakely's* applicability to federal guidelines to Supreme Court). While *Pineiro* is undisputedly the law of this Circuit, the following discussion is offered in the event the Court of Appeals elects to reconsider its holding in *Pineiro*.

I. BACKGROUND

Prior to embarking on a discussion of the effect of *Blakely* on Guidelines, it is helpful to discuss the structure and application of the Guidelines, relevant Supreme Court precedent leading up to the *Blakely* decision and the facts of *Blakely*.

A. Federal Sentencing Guidelines [*3]

The federal sentencing guidelines establish ranges that specify an appropriate sentence for each convicted defendant determined by coordinating the offense behavior categories with the offender characteristic categories. 28 U.S.C. § 994(b). The application instructions of the guidelines dictate the manner in which the guidelines are to be applied. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1. First, the sentencing court must determine the appropriate offense guideline section in Chapter 2 (Offense Conduct). *Id.* § 1B1.1(a). Next, a court shall determine the base offense level and apply specific offense characteristics, cross references, and special instructions contained in the appropriate guideline. *Id.* § 1B1.1(b). Specific offense characteristics represent the Sentencing Commission's attempt to consider "real offense" aspects of the underlying offense. *United States v. Condren*, 18 F.3d 1190, 1198 (5th Cir. 1994); *United States v. Manthei*, 913 F.2d 1130, 1134 (5th Cir. 1990).

A court shall then apply upward adjustments "as appropriate" pertaining to victim, role, and obstruction of justice. U.S. SENTENCING GUIDELINES **[*4]** MANUAL § 1B1.1 (c). If the conviction involves multiple counts, the first three steps are repeated for each count, then the individual counts are grouped pursuant to the rules defined in Chapter Three. *Id.* § 1B1.1(d). The sentencing court then considers a downward adjustment for acceptance of responsibility from Chapter Three. *Id.* § 1B1.1(e). A criminal history category is then determined as specified in Part A of Chapter Four, adjusted, if necessary, by adjustments determined from Part B of Chapter Four, which refers to career offenders and criminal livelihood. *Id.* § 1B1.1(f). The applicable guideline range corresponding to the offense level and criminal history category is then determined from Part A of Chapter Five. *Id.* § 1B1.1(g). The sentencing court finally refers to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might bear on the ultimate sentence imposed. *Id.* § 1B1.1(i).

B. Relevant Supreme Court Precedent Prior to *Blakely*

A number of Supreme Court decisions have served as progenitors to *Blakely* in the evolution of Sixth Amendment **[*5]** jurisprudence or likely will direct the application of *Blakely* to the Guidelines. The following are summaries of those decisions.

In McMillan v. Pennsylvania, 477 U.S. 79, 91-92, 91 L. Ed. 2d 67 (1986), the Supreme Court addressed Due Process and Sixth Amendment jury trial guarantee challenges to Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Const. Stat. § 9712 (1982). The law provided for a mandatory minimum sentence of five years' imprisonment for one convicted of certain felonies if the sentencing judge found by a preponderance of the evidence that the offender possessed a firearm during the commission of the offense. *McMillan*, 477 U.S. at 81.

In a decision that centered on the distinction between sentencing considerations and elements of the offense, the Court concluded that Pennsylvania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty . . . [and] gives no impression of having been tailored to permit the . . . possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 87-88. "States **[*6]** may [therefore] treat . . . possession of a firearm as a sentencing consideration rather than an element of a particular offense." *Id.* at 90. In addressing the due process challenge, the Court noted that "sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," *id.* at 91, and further that "we have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance," *id.* at 92. Finally, the Court addressed petitioner's argument that "the jury must determine all ultimate facts concerning the offense committed," by stating "having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact," *id.* at 93.

In Mistretta v. United States, 488 U.S. 361, 102 L. Ed. 2d 714 (1989), the Court addressed separation of powers and non-delegation doctrine attacks **[*7]** on the Sentencing Commission and the Guidelines. Rejecting the argument "that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine," the Court reasoned that Congress may appropriately request assistance from another and does not run afoul of the non-delegation doctrine so long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* at 371 (internal quotation marks omitted). The Court concluded that "we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements," citing the specific goals of the Commission provided in 28 U.S.C. § 991(b)(1), the goals of sentencing articulated in 18 U.S.C. § 3553(a)(2) and the tool by sentencing may be regulated, the sentencing guidelines, 28 U.S.C. § 994 **[*8]** (b). *Mistretta*, 488 U.S. at 374.

The Court then proceeded to reject the contention that the Sentencing Reform Act violated the constitutional principle of separation of powers. *Id.* at 380. The appellant claimed "that in delegating to an independent agency within the Judicial Branch the power to promulgate sentencing guidelines, Congress unconstitutionally has required

the Branch, and individual Article III judges, to exercise not only their judicial authority, but legislative authority -- the making of sentencing policy -- as well." *Id.* at 382. Addressing specific concerns that the make-up of the Commission, including the Article III judges and non-judges, the Court concluded

> Although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches, we conclude, upon close inspection, that petitioner's fears for the fundamental structural protections of the Constitution prove, at least in this case, to be "more smoke than fire," and do not compel us to invalidate Congress' considered scheme **[*9]** for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing.

Id. at 384.

Following *Mistretta*, the Supreme Court decided numerous cases which resolved questions as to the proper application of the Guidelines. n1 In 1997, a majority concluded that relevant conduct may include conduct underlying a crime for which an offender was acquitted if such is proved by a preponderance of the evidence at sentencing, citing the standard proposed in the comment to section 6A1.3, and *McMillan*, in reasoning that a preponderance of the evidence standard at sentencing comports with due process. *United States v. Watts*, 519 U.S. 148, 156, 136 L. Ed. 2d 554 (1997) (per curiam). n2

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> *See Burns v. United States*, 501 U.S. 129, 138-39, 115 L. Ed. 2d 123 (1991) (holding that a district court may not pursuant to Federal Rule of Criminal Procedure 32 *sua sponte* enter an upward departure under sentencing guidelines); *Williams v. United States*, 503 U.S. 193, 201, 117 L. Ed. 2d 341 (1992) ("where . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline"); *Stinson v. United States*, 508 U.S. 36, 44-45, 123 L. Ed. 2d 598 (1993) (in reviewing nature of guideline comments "commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute. . . . . The guidelines are the equivalent of legislative rules adopted by federal agencies"); *United States v. Dunnigan*, 507 U.S. 87, 92, 122 L. Ed. 2d 445 (1993) (concluding proper determination that accused committed perjury at trial requires enhancement of sentence under Sentencing Guidelines and is not in contravention of the privilege of an accused to testify in her own

behalf); *Witte v. United States*, 515 U.S. 389, 404, 132 L. Ed. 2d 351 (1995) (holding consideration as relevant conduct under sentencing guidelines uncharged cocaine importation in order to impose higher sentence on marijuana charges within presumptive range did not impose "punishment" for cocaine conduct for double jeopardy purposes and did not bar subsequent prosecution on cocaine charges); *Koon v. United States*, 518 U.S. 81, 109, 135 L. Ed. 2d 392 (1996), *superseded by statute on other grounds as stated in United States v. Martin*, 363 F.3d 25 (1st Cir. 2004) ("a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no -- as it will be most of the time -- the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline"); *United States v. LaBonte*, 520 U.S. 751, 762, 137 L. Ed. 2d 1001 (1997) (holding unambiguous phrase "at or near the maximum term authorized" requiring court to sentence career offender "at or near" "maximum" prison term available once all relevant statutory sentencing enhancements are taken into account).

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Justice Stevens dissented stating that "since [defendant's] base offense level was increased by this evidence, I believe it should have been proved beyond a reasonable doubt." *Id.* at 163 n.2 (Stevens, J., dissenting).

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In a relatively recent decision on the application of the Guidelines, a unanimous Court concluded that a "judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the offense-related activities." *Edwards v. United States*, 523 U.S. 511, 514-15, 140 L. Ed. 2d 703 (1998). Although declining to address the merits of petitioner's argument that his right to jury trial required a jury make the relevant finding as petitioner failed to preserve the argument at trial, the Court noted that "of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine -- only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the **[*11]** Guidelines. USSG § 5G1.1." *Id.* at 515.

Shortly thereafter, the Court decided *Almendarez-Torres v. United States*, 523 U.S.

224, 140 L. Ed. 2d 350 (1998). At issue was a provision of 8 U.S.C. § 1326 that increased the potential sentence for a defendant from two years to twenty years if such defendant was removed for having committed an aggravated felony. *Id.* at 226. The Court concluded that recidivism for purpose of sentencing for the crime of illegal reentry is a sentencing provision rather than a separate crime, and as such the Government did not offend due process or other constitutional provisions by failing to allege the earlier conviction in the indictment. n3 *Id.* at 226-27.

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> Justice Scalia dissented stating that "it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject is clear enough from our prior cases resolving questions on the margins of this one." *Id.* at 251 (Scalia, J., dissenting).

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The following year, the Court held that provisions of a federal carjacking statute establishing higher penalties when offense results in serious bodily injury or death set forth additional elements of offense rather than sentencing considerations. *Jones v. United States*, 526 U.S. 227, 252, 143 L. Ed. 2d 311 (1999). While *Jones* largely involves statutory construction, in a foreshadowing of its future holdings the Court notes that "there is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern." *Id.* at 248.

Largely viewed as the case that would mark the fall of the Guidelines, in *Apprendi v. New Jersey*, the Supreme Court rejected a proposed characterization of a New Jersey hate crime law as a sentence enhancement rather than as an element of the offense. 530 U.S. 466, 490 (2000). The Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. **[*13]** " n4 *Id.* at 494. Four dissenters lamented that "today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*." casting "serious doubt" on the validity of the Guidelines. *Id.* at 523 (O'Connor, J., dissenting).

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Addressing concerns raised by the dissent, the majority commented that "the Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g., Edwards v. United States*, 523 U.S. 511, 515, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) . . . (noting that "of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 5G1.1 (Nov. 1994)]")." *Id.* at 497 n.21.

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Two years later, a fractured Court revisited *McMillan* in *Harris v. United States*, 536 U. S. 545, 153 L. Ed. 2d 524 (2002), holding only that the context of mandatory minimum sentencing, brandishing a gun for purposes of 18 U.S.C. § 924(c)(1)(A)(ii) is a sentencing factor, not an element of the offense. The majority could not agree on the application of *Apprendi* to mandatory minimum sentences.

That same year, in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), the rule set forth in *Apprendi* was applied to Arizona's death penalty statute in which a judge was required to find at least one aggravating factor in orders to impose death sentence. In so applying *Apprendi*, the Court concluded that "because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense . . . the Sixth Amendment requires that they be found by a jury." *Id.* at 609. n5 The Court thereby revisited the validity of the same Arizona capital sentencing scheme it had upheld under Sixth Amendment challenge in *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511 (1990), **[*15]** and overruled relatively recent precedent under the standard set forth in *Apprendi*.

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Prior to *Blakely*, the Circuit Courts of Appeals unanimously rejected the application of *Apprendi* to guideline factors, concluding that a guideline factor unrelated to statutory maximums need not be submitted to a jury. *United States v. Baltas*, 236 F.3d 27, 40-41 (1st Cir. 2001); *United States v. Williams*, 235 F.3d 858, 863-64 (3d Cir. 2000); *United States v. Angle*, 255 F.3d 514, 5 19 (4th Cir. 2001); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Corrado*, 227 F.3d

528, 542 (6th Cir. 2000); *United States v. Nance*, 236 F.3d 820, 826 (7th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Heckard*, 238 F.3d 1235-36, (10th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 829 n. 3 (11th Cir. 2000).

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C. *Blakely v. Washington*

It is with this background that the Supreme Court approached the validity of an upward sentence enhancement premised on judicial fact-finding imposed under the Washington State Sentencing Guidelines in *Blakely*. *Blakely*, 124 S. Ct. at 2534. Pursuant to a plea agreement, Blakely plead guilty to the charge, admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations. *Id.* at 2534-35. The State recommended a sentence within the standard guideline range of 49 to 53 months. *Id.* at 2535. The judge rejected the State's recommendation and imposed an exceptional sentence of 90 months finding after a three-day hearing that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for upward departure in domestic-violence cases. *Id.*

The judge considered a number of criminal statutes in imposing the sentence. Under Washington law, second-degree kidnaping is a class B felony. WASH. REV. CODE § 9A.40.030(3). n6 The maximum sentence for a class B felony includes a term of imprisonment often years. *Id.* § 9A.20.021(1)(b). Separate from the **[*17]** general class B felony statute is a series of provisions necessary for computation of the standard guideline range. Under the sentencing guidelines, a crime is categorized, representing the vertical column in the standard range table. Second-degree kidnaping is categorized as a category V offense. *Id.* § 9.94A.320 ("crimes included within each seriousness level" providing link for "Kidnapping 2," a category V offense, which defines crime and indicates that crime is Class B felony). The court then referred to a separate statutory provision to determine the offender score, which is used to determine the horizontal component of the sentencing range. In Blakely's particular circumstances, section 9.94A.360, now section 9.94A.525(8), resulted in an offender score of 2. The judge then applied the offender score and seriousness level to the sentencing grid, *id.* § 9.94A.310(1) (now *id.* § 9.94A.510(1)), to obtain a standard sentencing range of 13-17 months. At the time of Blakely's sentencing, section 9.94A.310(3)(b) added a 36-month firearm enhancement, thereby increasing the standard range to 49-53 months.

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The charge also adds requirements for use of a firearm, *id.* § 9.94A.602, and domestic violence, *id.* § 10.99.020(5)(p)).

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The judge then applied section 9.94A.390, which lists illustrative but not exhaustive aggravating factors that justify an upward departure. *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262, 317 (Wash. 2001). Referring to section 9.94A.120(2), now section 9.94A.505, the judge found "substantial and compelling reasons justifying an exceptional sentence," specifically that the criminal conduct involved deliberate cruelty, WASHINGTON REV. CODE § 9.94A.390(2)(h)(iii). Under Washington law, the judicial finding must be based on considerations extrinsic to computation of the standard range as "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *Gore*, 21 P.3d at 277.

The Supreme Court rejected the argument that the upward departure resulting in a ninety month sentence was permissible as it fell within the ten year limit for a class B felony. The Court concluded that the standard range of 49 to 53 months was the relevant sentence for *Apprendi* purposes, and that the upward departure **[*19]** of 37 months violated Blakely's Sixth Amendment rights. In rejecting the argument, it held that the " statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S. Ct. at 2537.

II. DISCUSSION

Having revisited the continuum of decisions leading to *Blakely* and the *Blakely* decision itself, this Court now proceeds to a discussion of the effect, if any, that *Blakely* has upon the application of federal sentencing guidelines. The discussion will proceed through a structural comparison between the federal guidelines and the guidelines before the Court in *Blakely*. It will then address the significance, if any, of the fact that the federal guidelines are promulgated by an independent agency whereas the guidelines before the Court in *Blakely* are promulgated by a legislature. The discussion will conclude with the a determination of the effect of *Blakely* on the federal guidelines as relevant to this case.

A. Comparison between the federal guidelines and the Washington State guidelines

The two guideline schemes **[*20]** are not identical, although both would be characterized as determinate sentencing through presumptive sentences guidelines. n7 BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING xii (2002). The Washington State scheme, however, may fairly be characterized as less fact-intensive. *See* Sentencing

Guidelines Commission, Sentencing Reform Act: Historical Background (available at http://www.sgc.wa.gov/historical.htm) (indicating that "an offender's criminal history is the most complex element in determining the appropriate sentence to impose" and "when substantial and compelling reasons exist, a court may impose a sentence that fells outside the presumptive sentence range. In such cases, the court is required to provide a written explanation for an exceptional sentence, including the aggravating or mitigating factors that justify the exceptional sentence."). Washington also delineates certain fact-finding required to increase the presumptive range, such as possession of a firearm as involved in *Blakely*. The federal sentencing guidelines, in contrast, are fact-intensive and fact-driven, with individual factual determinations raising or **[*21]** lowering the offense level pursuant to the scheme described above. Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 324 (1994) ("Once a defendant's offense level and criminal history category are established, the court must consider whether any factors exist that warrant adjustments or departures. With each of these determinations the court must make specific findings of fact. Each of these determinations of fact is then calculated into the equation that defines the parameters of the judge's limited discretion.") Both the State of Washington and the federal schemes limit the presumptive range to the statutory maximum. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 ("where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence") *to* WASHINGTON REV. CODE § 9.94A.599 ("if the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive **[*22]** sentence").

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> A determinate sentence is defined as "a fixed term that may be reduced by good time or earned time." Presumptive sentencing guidelines meet the following criteria: "(1) the appropriate sentence for an offender in a specific case is presumed to fall within a range of sentences authorized by sentencing guidelines that are adopted by a legislatively created sentencing body, usually a sentencing commission; (2) sentencing judges are expected to sentence within the range or provide written justification for departure; (3) the guidelines provide for some review, usually appellate, of the departure." Bureau of Justice Assistance, *supra*, at xii.

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There is a further distinction between the federal guidelines and Washington state guidelines. The Washington State Legislature enacted its Sentencing Reform Act,

WASHINGTON REV. CODE Ch. 9.94A, which established a Sentencing Guidelines Commission for purposes of providing recommendations to the Legislature as to a determinate sentencing system **[*23]** ultimately made law by the Legislature, In comparison, the United States Sentencing Commission is a body created under the Sentencing Reform Act of 1984. *Mistretta*, 488 U.S. at 362. It is an independent agency, *id.* at 371, placed within the Judicial Branch, *id.* at 390, that actually promulgates the sentencing guidelines, *id.* at 369.

B. Comparative Structures of the Guidelines

While it could be said that the Supreme Court has, in the past, intimated that it would reject an attack on the Guidelines given its incorporation of statutory maximums, this argument is likely without merit following *Blakely*. As an initial matter, the Court's only statement on the Guidelines is that constitutional infirmity is avoided "because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines," *Edwards*, 523 U.S. at 515. This would necessarily be characterized as dicta as the argument was not preserved at trial for purposes of appeal and the Court thereafter plainly indicated, in a pre-*Apprendi* case, "we need not, and we do not, consider the merits of petitioners' statutory **[*24]** and constitutional claims." *Id.* at 515-16. While a footnote in *Apprendi* addressing a dissent might be misconstrued as elevating the *Edwards* dicta to holding status, *see Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held."), the *Edwards* signal introducing the citation in the footnote is illustrative, *i.e.*, "see, e.g." rather than authoritative, *i.e.*, "see" or a direct citation to the case. HARVARD LAW REVIEW ASS'N, A UNIFORM SYSTEM OF CITATION § 1.2 (17th ed. 2002) (meaning of signals is unchanged from 16th edition used in 1998). Furthermore, the quote is preceded by "noting" rather than "holding," thereby affirming its status as dicta.

More significantly, Washington State adopted an analogous provision in its guidelines and, although not citing *Edwards*, unsuccessfully argued that incorporation of the provision precluded a determination that its guidelines violated the defendant's right to a jury trial. ***Blakely v. Washington***, 2004 WL 199237, NO. 02-1632, at *18-*20 (U.S. Jan. 23, 2004) (Respondent's **[*25]** Brief) (discussing section 9.9A.420 (now section 9.9A.599)).

C. Legislative Act or Agency Regulation

The fundamental distinction between the Washington sentencing guidelines and the federal sentencing guidelines is the former is codified as statutes made law by the Washington State Legislature while the latter is promulgated in guidelines by an agency.

The Supreme Court initially analogized the guidelines to the Federal Rules of Criminal and Civil Procedure, as "rules . . . for carrying into execution judgments that the Judiciary has the power to pronounce." *Mistretta*, 488 U.S. at 391. n8 "Just as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases.'' n9 *Id.* The analogy is

not, however, perfect as the "substantive effects of [the] work [of the Sentencing Commission] does to some extent set its rulemaking powers apart from prior judicial rulemaking." *Id.* at 393.

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Stephen L. Carter, *Constitutional Improprieties: Reflections* on Mistretta, Morrison, *and Administrative Government*, 57 U. Chi. L. Rev. 357, 358-59 (1990) (vesting legislative power in agencies).

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Hanna v. Plumer, 380 U.S. 460, 473, 14 L. Ed. 2d 8 (1965) (detailing the "long recognized power of Congress to prescribe . . . rules for federal courts").

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The guidelines were later defined as "the equivalent of legislative rules adopted by federal agencies." n10 *Stinson v. United States*, 508 U.S. at 45. In equating the guidelines to legislative rules, the Court accorded them substantive effect and distinguishes them from other forms of administrative rulemaking such as interpretative rules, general statements of policy and rules of agency organization, procedure or practice. *Chrysler Corp. v. Brown*, 441 U.S. 281, 314, 60 L. Ed. 2d 208 (1979); *see also Batterton v. Francis*, 432 U.S. 416, 425 n.9, 53 L. Ed. 2d 448 (1977) (referring to "legislative, or substantive, regulations")." [P] roperly promulgated, substantive agency regulations have the force and effect of law.'" *Chrysler Corp.*, 441 U.S. at 295; *see also United States v. Mersky*, 361 U.S. 431, 437, 4 L. Ed. 2d 423 (1960) **[*27]** ("in practical effect regulations maybe called little laws'"). n11 "Congress has delegated to the Commission significant discretion in formulating guidelines for sentencing convicted federal offenders. . . . Broad as that discretion may be, however, it must bow to the specific directives of Congress." *United States v. LaBonte*, 520 U.S. 751, 757, 137 L. Ed. 2d 1001 (1997) (internal quotation marks and citations omitted).

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Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 476-77 (2002) (defining legislative regulations as "those that have the force and effect of law [such that] from the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute" and interpretive regulations as all other regulations).

n11

The Circuit Courts of Appeals have unanimously held amendments to Sentencing Guidelines to constitute law for purposes of retroactive analysis under the ex post facto clause. *United States v. Harotunian*, 920 F.2d 1040, 1042 (1st Cir. 1990); *United States v. Young*, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779, 782-83 (4th Cir. 1991); *United States v. Suarez*, 911 F.2d 1016, 1021-22 (5th Cir. 1990); *United States v. Nagi*, 947 F.2d 211, 2 13 n.l (6th Cir. 1991); *United States v. Aman*, 31 F.3d 550, 55 7 (7th Cir. 1994); *United States v. Swanger*, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991); *United States v. Smith*, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); *United States v. Worthy*, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); *United States v. Lam Kwong-Wah*, 288 U.S. App. D.C. 54, 924 F.2d 298, 304-05 (D.C. Cir. 1991).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[*28]**

The Sentencing Commission and the Guidelines have defied attempts at classification, floating somewhere in the nether region between Congress and the Judiciary, statute and regulation. n12 As such, the debate harkens back to that addressed in *Mistretta* involving the nature of the Commission and its product and the attendant separation of powers debate. It is without question that the judiciary may not create crimes. *Morissette v. United States*, 342 U.S. 246, 249-50, 96 L. Ed. 288 (1952). It is further established that "one may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." *Viereck v. United States*, 318 U.S. 236, 241, 87 L. Ed. 734 (1943); *see also United States v. Smull*, 236 U.S. 405, 409, 59 L. Ed. 641 (1915) ("false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty"). Finally, specifications of punishment are "peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 386, 393, 2 L. Ed. 2d 1405 (1958). **[*29]** n13 These guiding principles raise further questions as to the true

nature of the Guidelines.

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n12

"There is something fundamentally troubling about the choice to abandon substantive code reform, which would have empowered the jury, and the choice to pursue a system of sentencing code reform that has only empowered a Sentencing Commission." Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 431 (1999).

n13

28 U.S.C.A. § 994(p) provides: "The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*30]**

While the Supreme Court has not resolved the characterization of the Sentencing Guidelines, it has compared the Parole Commission Guidelines to the Florida Sentencing Guidelines in determining whether Florida's guidelines were "law" for purposes of *ex post facto* prohibitions. *Miller v. Florida*, 482 U.S. 423, 96 L. Ed. 2d 351 (1987). While not perfectly analogous to sentencing guidelines, the analysis touches on a number of considerations relevant to the present analysis. First, the Court rejected the respondent's argument that the Florida guidelines, unlike the agency's guidelines, " merely guide and channel' the sentencing judge's discretion." *Id.* at 434. The Supreme Court cited Circuit decisions holding that federal parole guidelines were not laws, that the guidelines "merely rationalized the exercise of statutory discretion" and that amendments to the guidelines could not increase the

punishment imposed by the sentencing court. *Id.* (citing *Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986)(*en banc*) and cases cited therein). The Court finally rejected a comparison between agency and legislative products reasoning **[*31]** that the sentencing guidelines are "law enacted by the Florida Legislature, and it has the force and effect of law," do not "simply provide flexible guideposts' for use in the exercise of discretion: instead, they create a high hurdle that must be cleared before discretion can be exercised, so that a sentencing judge may impose a departure sentence only after first finding clear and convincing reasons' that are credible,' proven beyond a reasonable doubt,' and not . . . a factor which has already been weighed in arriving at a presumptive sentence'" and that "the . . . guidelines directly and adversely affect the sentence petitioner receives." *Id.* at 435.

Justice Scalia, in his dissent in *Mistretta*, characterizes the Sentencing Commission as "a sort of junior-varsity Congress," an agency that exercises "no governmental powers except the making of rules that have the effect of laws." *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting). Given the past characterization of the Guidelines as binding on judges rather than suggestive, it is difficult to ascertain a principled reason by which an agency delegated lawmaking authority restrained only by a Congressional **[*32]** right of refusal would be permitted to effect the substantive rights of defendants without offending the Constitution while Congressional action of the exact same nature would offend the Constitution. Such an interpretation reduces the right to jury trial to a "mere procedural formality,"*Blakely*, 124 S. Ct. at 2538, in which the essential question becomes not the right itself but rather the source of the procedure. The right to jury trial could be vitiated by simply transferring lawmaking authority to an agency.

While the foregoing will not and cannot provide a clear definition of the nature of the Guidelines, it hopefully serves to establish relevant consideration in comparing Guidelines to statute as necessary to address the effect of *Blakely*.

D. Application of *Blakely* to the Guidelines

When a later decision of the Supreme Court reads on and contradicts an earlier decision of the Supreme Court to the point that the two cannot stand together, the former overrules *sub silentio* the latter. *Adkins v. Children's Hosp.*, 261 U.S. 525, 564, 67 L. Ed. 785 (1923), *overruled in part by West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703 (1937) **[*33]** (Taft, C.J., dissenting) ("It is impossible for me to reconcile the *Bunting* Case and the *Lochner* Case, and I have always supposed that the *Lochner* Case was thus overruled *sub silentio*.") n14 Taken at face value, *Blakely's* holding that the " statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" clearly implicates the Guidelines. n15 *See Booker*, 375 F.3d at 512-13; *Ameline*, 376 F.3d at 974. The standard range under Washington's guideline computation is virtually indistinguishable from the federal guideline's presumptive range.

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n14

The doctrine of *stare decisis* is irrelevant to the determination of whether a later decision implicitly overrules an earlier decision, applying only to direct requests to revisit earlier precedent. The Supreme Court has not hesitated in the past to refuse its application to constitutional precedent and the evolutionary process applicable thereto. *Payne v. Tennessee*, 501 U.S. 808, 828-29, 115 L. Ed. 2d 720 (1991) ("*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."); *see also Crawford v. Washington*, 158 L. Ed. 2d 177, 124 S. Ct. 1354, 1378 (same).

[*34]

n15

"Whatever legislative' attributes might be ascribed to the Sentencing Commission, and to whatever extent the Commission's Guidelines ranges might be considered to be statutory maximums,' we do not believe these ranges are statutory maximums for purposes of applying the constitutional requirements announced by the Supreme Court in Apprendi." *United States v Norris*, 281 F3d 357, 361 (2d Cir. 2002).

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Nor is the *Blakely* holding susceptible to limitation to upward departures rather than all upward adjustments through the federal guideline's sentencing factor considerations. *Blakely* would further appear to limit the ability of a sentencing judge to engage in fact-finding necessary to adjust a base offense level when multiple base offense levels are available for an offense. The effects of the application of *Blakely* on the federal guidelines, with its "real offense" approach requiring intensive judicial fact-finding, is sweeping.

The relevant distinction between the Washington guidelines and the federal guidelines would appear to be the statute/regulation **[*35]** dichotomy. Any amendment to the Guidelines submitted by the Commission may be rejected or modified by Congress. 28 U.S.C.A. § 994(p). It would be difficult to distinguish inaction by Congress in the face of a substantive change from authorization as is necessary to give the punishment imposed by the Guidelines effect. *See Viereck*, 318 U.S. at 241. The requirement that Congress approve the Guidelines would not serve as a meaningful distinction.

The second potential distinction is more esoteric. Prior to creation of federal

guidelines, sentencing judges traditionally were afforded substantial discretion in imposing sentences within statutorily established limits. *Dorszynski v. United States*, 418 U.S. 424, 431, 41 L. Ed. 2d 855 (1974) (reiterating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); *United States v. Tucker*, 404 U.S. 443, 446, 30 L. Ed. 2d 592 (1972) ("[A] trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose."); **[*36]** *Williams v. New York*, 337 U.S. 241, 251, 93 L. Ed. 1337 (1949) (maintaining that judicial discretion at sentencing needs to be broad). Indeterminate sentencing, in which "a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion," does not run afoul of a defendant's right to a jury trial. *Blakely*, 124 S. Ct. at 2540. Conversely, a determinate scheme in which a sentencing judge makes factual findings incident to an increase in the sentence imposed does offend a defendant's jury trial right.

It could certainly be argued that the Guidelines are "merely a constitutional mechanism for channeling the discretion that a sentencing court would otherwise enjoy and "merely guide the discretion of district courts in determining sentences within a legislatively-determined range.' *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000). Such an argument would be a logical extension of right to jury fact-finding in indeterminate sentencing. The question thus becomes the delineation between an indeterminate sentencing scheme and a determinate sentencing scheme, given Congressional **[*37]** controls on the exercise of judicial discretion in sentencing? If Congress grants sentencing courts unfettered discretion, and a court issues a standing order defining a simplistic sentencing scheme, e.g., possession of a firearm in the commission of the offense results in a sentence that is 30% of the maximum, does that implicate a right to jury findings of the fact? What if a district court creates a local rule? What if the Supreme Court were to issue a rule? Finally, what if an independent agency in the Judicial Branch issues a rule? It would appear that the court-made rules would not require jury findings as courts lack authority to define sentences and are empowered to mete out punishment under legislatively-determined standards. As these questions demonstrate, the problem is in the line-drawing inherent in the uncertain range between court-made rule and legislative made-right.

While *Mistretta* certainly can be read in part as avoiding separation of powers concerns by construing the Guidelines as a channeling of judicial discretion, the language cannot be read out of context. *Mistretta*, not surprisingly, does not address jury rights in sentencing. The argument in support **[*38]** of discretion channeling loses force in light of the decision two years prior in *Mitchell* in which the Supreme Court refused to embrace the argument that Florida sentencing guidelines "channeled" a judge's discretion, it would therefore take a legal fiction of the highest order embracing the proposition that the existing Guidelines, which bind a sentencing court to procedures on peril of reversal, are no more than a court rule guiding a judge through sentencing and therefore constitute a form of agreement with the Commission by which discretion is ceded in exchange for predictability. Only such a fabrication would explain why an offender has rights under statutory guidelines and lacks the same rights under a regulatory guideline.

Finally, the significance of prior Supreme Court decisions applying the Guidelines, *see* footnote 1 and cases cited therein, should not be overstated. As has been noted in this Circuit:

> The Supreme Court has long acknowledged a difference in its attitude toward precedent where it is presented with a constitutional question rather than one of statutory interpretation. Justice Brandeis, in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06, 52 S. Ct. 443, 446-47, 76 L. Ed. 815 (1932) **[*39]** (Brandeis, J., dissenting), surmised that in most matters it is more important that the applicable rule of law be settled than that it be settled right (quoted approvingly in, e.g., *United States v. Dayton*, 592 F.2d 253, 256 n. 1 (5th Cir. 1979) (per curiam)) but that in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. Later, in his celebrated opinion in *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938), Justice Brandeis remarked, if only a question of statutory construction were involved, we would not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

United States v. Anderson, 885 F.2d 1248, 1263 n.9 (5th Cir. 1989) (Smith, J., dissenting). The volume of cases defining the metes and bounds in application of a law may not be viewed as precedential on a constitutional question absent discussion of some constitutional argument. In "interpreting . . . **[*40]** a particular statute [,] the scope and purpose of constitutional limitations are in no way involved -- they depend upon considerations of a wholly different character." *Gleason v. Thaw*, 236 U. S. 5 58, 561 (1915). In can thus be said that the earlier decisions applying a particular law are accorded no precedential force when confronted with a constitutional argument as to validity of the application of the law. The relative distinctions of the two render comparison between guideline and Sixth Amendment cases one of chalk with cheese.

E. Facial Invalidity of Sentencing Guidelines

At the outset, *Blakely* makes clear that sentencing guidelines are not defective when an increase in sentence beyond the base offense level is premised on a defendant's stipulations or, judicial admissions. *Id. Blakely* further may not be read as precluding judicial fact-finding incident to the application of a downward adjustment, or precluding upward adjustments should a defendant consent to judicial fact-finding. *Id.* As such, the guidelines would not be unconstitutional on their face under the Sixth Amendment. n16

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n16

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697 (1987). "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an overbreadth' doctrine outside the limited context of the First Amendment." *Id.* While the standard for facial invalidity of a statute has been questioned in the limited context of a woman's right to reproductive autonomy, *see, e.g., A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002), it has not been so questioned in the context of Sixth Amendment challenges.

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F. Application of *Blakely* to the Obstruction of Justice Enhancement

The specific guideline applicable to obstruction of justice provides that

> if (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. A cursory review of the relevant guideline indicates that it requires a factual finding made by the sentencing court, *United States v. Greer*, 158 F.3d 228, 233 (5th Cir. 1998) (identifying obstruction of justice as a factual findings), and such finding serves to increase the penalty above the base offense level. In the present case, there is no admission or a stipulation as to the underlying facts, nor is there consent by defendant to judicial fact-finding. *Blakely*, 124 S. Ct. at 2541-42. As such, the prohibition on judicial fact-finding set forth in *Blakely* **[*42]** is implicated and the enhancement is unconstitutional as applied.

G. Remedy

It is therefore only absent the above circumstances that the application runs afoul of the Sixth Amendment. As such, it is only necessary to address circumstances in which facts are found incident to an upward adjustment in determining the appropriate

Guideline range for sentencing.

While the approaches thus far have been diverse, *see United States v. Gonzalez*, NO. 03 CR. 41 (DAB), 2004 WL 1444872, at *2 (S.D.N.Y. June 28, 2004) ("the Court is currently of the mind to sentence the Defendant solely on the basis of the facts admitted by the defendant' during his guilty plea."); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1242 (D. Utah 2004)(opting for third of three options: "(1) the court could convene a sentencing jury, which would determine (presumably by proof beyond a reasonable doubt) whether the facts underlying the enhancement could be proven; (2) the court could continue to follow the other sections of the Guidelines apart from the defective upward enhancement provisions; or (3) the court could treat the Guidelines as unconstitutional in their entirety **[*43]** in this case and sentence Croxford between the statutory minimum and maximum"); *United States v. Shamblin*, 323 F. Supp. 2d 757 (S.D.W. Va. 2004) (limiting sentence to facts admitted); *United States v. Green*, Nos. CR. A. 02-10054-WGY, CR.A. 01-10469-WGY, and CR.A. 99-10066-WGY, 2004 WL 1381101 (D. Mass. June 18, 2004)(limiting to facts admitted in drug case), the appropriate course would appear to be dictated by whether Guideline adjustments maybe stricken without affecting the validity of the balance of the Guidelines.

Presented with statutory ambiguity, "the cardinal principle of statutory construction is to save and not to destroy." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 81 L. Ed. 893 (1937). In so construing, a court may not "superimpose upon [specific provisions] inferences from general legislative declarations of an ambiguous character, even if found in the same statute." *Id.* A court should not, however, engage in judicial legislation by tampering with the text of a statute. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478, 130 L. Ed. 2d 964 (1995). Presented with an **[*44]** unambiguous provision that offends the Constitution, a court shall adhere to the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 86 L. Ed. 2d 394 (1985). "When different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other -- as when the two things provided are necessary parts of one system -- that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected." *Field v. Clark*, 143 U.S. 649, 696, 36 L. Ed. 294 (1892) (internal quotation marks omitted); *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234, 76 L. Ed. 1062 (1934) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which **[*45]** is not, the invalid part may be dropped if what is left is fully operative as a law."). However, "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Field*, 143 U.S. at 696. These guiding principles apply with no less force to regulations. *White House Vigil for ERA Committee v. Clark*, 46 F.2d 1518, 1529(D.C. Cir. 1984) ("It is not the province of the court to finetune' the regulations so as to institute the single regulatory option the court personally considers most desirable. Courts possess no particular expertise in the drafting of regulatory measures; their role is to uphold regulations which are

constitutional and to strike down those which are not.").

Against the backdrop of this case law, the remaining question is would it be possible to sever unconstitutional provisions in order to salvage the balance of the Guidelines? The answer appears to be no. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993). If adjustments were removed, the base offense level **[*46]** would determine the appropriate sentencing range, resulting in a sentence premised wholly on the actual offense. Such an approach would reject the "real offense" approach adopted by the Commission which requires a sentence based on offense and offender. *Id.* at 239 & n.96. In effect, Guideline applications would result in a sentencing structure that more closely resembles a fixed sentencing scheme than it does a determinate sentencing scheme. This result does not comport with the stated goals of the Guidelines.

In invalidating the Guidelines, a sentencing Court is left with only the pre-Guidelines indeterminate sentencing scheme. Any resolution of Guideline deficiencies necessarily must come from Congress. n17

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n17

> Congressional reform to the Guidelines need not obliterate twenty years of sentencing reform. This assumes that Congress would hand control in the form of relatively unfettered discretion in sentencing to the courts. Jury sentencings are the norm in Texas, and modifying the present system would present changes to the federal jury system, the drafting of indictments and the burden of proof in sentencing, but ultimately would not undo the object or effect of the Guidelines. As such, the effect of *Blakely* on the Guidelines would be one of procedural change and not necessarily sweeping change in existing substantive law that comprises the Guidelines and pre-*Blakely* precedent.

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III. CONCLUSION

Defendant's objection is overruled in light of *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004).

SO ORDERED.

Dated at El Paso, Texas, September 1, 2004.

Kathleen Cardone

United States District Judge

Pending Counts:	Disposition
21:846 & 841 (a) (1) MARIHUANA-SELL, DISTRIBUTE, OR DISPENSE -- CONSPIRACY TO POSSESS A QUANTITY OF MARIHUANA WITH INTENT TO DISTRIBUTE (1)	132 mos. impr. and assessment of $ 50.00. 8 yrs. supervised release and fine of $ 1000.00. Ct. 2 dismissed on govt's motion (1)

Offense Level (opening): 4

Terminated Counts:	Disposition
21:841 (a) (1) MARIHUANA-SELL, DISTRIBUTE, OR DISPENSE -- POSSESSION OF A QUANTITY OF MARIHUANA WITH INTENT TO DISTRIBUTE (2)	Dismissed on govt's motion (2)

Offense Level (disposition): 4

Complaints	Disposition
Knowingly and intentionally conspire to possess, with the intent to distribute, in excess of 100 kilograms of marijuana in violation of Title 21 Section 846. [3:92-m-635]	

Pending Counts:	Disposition
21:846 & 841 (a) (1) MARIHUANA -- SELL, DISTRIBUTE, OR DISPENSE -- CONSPIRACY TO POSSESS A QUANTITY OF MARIHUANA WITH INTENT TO DISTRIBUTE (1)	60 mos. impr. and assessment of $ 50.00. 5 yrs. supervised release and fine of $ 1000.00. Ct. 2 dismissed on govt's motion (1)

[*48]

Offense Level (opening): 4

Terminated Counts:	Disposition
21:841(a)(1) MARIHUANA-SELL, DISTRIBUTE, OR DISPENSE -- POSSESSION OF A QUANTITY OF MARIHUANA WITH INTENT TO DISTRIBUTE (2)	Dismissed on govt's motion (2)

Offense Level (disposition): 4

Complaints	Disposition
Knowingly and intentionally conspire to possess, with the intent to distribute, in excess of 100 kilograms of marijuana in violation of Title 21 Section 846. [3:92-m -635]	

Pending Counts:	Disposition
21:846 & 841(a)(1) MARIHUANA -- SELL, DISTRIBUTE, OR DISPENSE -- CONSPIRACY TO POSSESS A QUANTITY OF MARIHUANA WITH INTENT TO DISTRIBUTE (1)	Deft, sentenced to 63 months imprisonment, 3 years supervised release, $ 100.00 special assessment fee (1)

Offense Level (opening): 4

Terminated Counts:	Disposition
21:841 (a) (1) POSSESSION OF A QUANTITY OF MARIHUANA WITH INTENT TO DISTRIBUTE (2)	Count 2 Dismissed on motion by govt. (2)

Offense Level (disposition): 4

Complaints	Disposition
Knowingly and intentionally conspire to possess, with the	

intent to distribute, in
excess of 100 kilograms of
marijuana in violation of
Title 21 Section 846.
[3:92-m -635]
[*49]

CONCURBY: Case Assigned to: Judge Kathleen Cardone