BLAKELY V. WASHINGTON: A SELECTIVE USER'S GUIDE

By Marc Fernich

INTRODUCTION – HIGH COURT DROPS SENTENCING BOMBSHELL

As its latest term drew to a close, the Supreme Court issued its most significant and far-reaching criminal law decision in recent memory. *Blakely v. Washington*,[1] handed down June 24, is an epic ruling that could work a "sea change" in the way American convicts are sentenced. *United States v. Ameline*, No. 02-30326, _ F.3d _, 2004 WL 1635808, at *4 (9th Cir. July 21, 2004). This article examines some of *Blakely*'s "seismic"[2] repercussions for the federal Sentencing Guidelines ("FSG," "U.S.S.G.," "Guidelines" or "Sentencing Guidelines"), and attempts to sort through the chaos left in its wake.

What Did *Blakely* hold?

Blakely involved a Washington state sentencing scheme fixing a 10 year statutory maximum for kidnaping with a firearm, the crime to which the defendant pled guilty. Despite the 10 year statutory cap, another Washington sentencing provision set a 49-53 month "standard range" for that offense. Nevertheless, the judge imposed an "exceptional" 90 month sentence – above the "standard range" but below the statutory ceiling – on his own factual finding that Blakely had acted with "deliberate cruelty."

Applying the rule announced in *Apprendi v. New Jersey* – "any fact," besides a prior conviction, that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"[3] – the Court struck Blakely's "exceptional" sentence as unconstitutional. Because the "deliberate cruelty" factor had been found by the judge – rather than admitted by Blakely or determined by a jury – the Court held that enhancing the sentence on that ground violated Blakely's Sixth Amendment right to a jury trial. Specifically, it offended his right to have a jury consider **all** facts "essential to the punishment."[4]

More broadly, the Court made clear that the relevant "statutory maximum" for *Apprendi* purposes is the presumptive sentence authorized by "the facts reflected in the jury verdict or admitted by the defendant," **without** additional judicial findings. 124 S. Ct. at 2537 (citations and internal quotes omitted). Conversely, the *Blakely* Court explained, the *Apprendi* "maximum" is **not** the highest penalty allowed under the statute of conviction, as most lower

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1 124 S. Ct. 2531 (2004).

2 *United States v. Mueffleman, et al.*, Criminal Nos. 01-CR-10387-NG, *et al.*, slip op. at 10 (D. Mass. July 26, 2004) (Gertner, J.).

3 530 U.S. 466, 490 (2000).

4 *Blakely*, 124 S. Ct. at 2537 (citation and internal quotes omitted).

courts – including the Second Circuit[5] – had previously assumed. For Blakely, the presumptive sentence meant the unenhanced "standard range" of 49-53 months.

What is *Blakely's* Federal Import?

As scores of courts and commentators have subsequently noted, *Blakely* may have revolutionary implications for the Sentencing Guidelines, the elephant in the room of evolving *Apprendi* jurisprudence. As federal practitioners well know, the Guidelines specify presumptive sentencing ranges or "base offense levels" – far below the maximum statutory penalty for the offense of conviction – for every crime in the United States Code. The base levels are then subject to a series of **mandatory** upward adjustments, embodying such factors as drug quantity, loss amount, role in the offense and obstruction of justice. Similar to the Washington system, the adjustments are predicated on facts found by a judge by a bare preponderance of the evidence.

By virtue of the Guidelines' infamous "relevant conduct" provision,[6] these judicially imposed enhancements – factually untested before any jury – increase jail time exponentially. Extraneous to the integral offense elements, and often premised on uncharged or even acquitted conduct, they can push the ultimate sentence years or decades beyond the presumptive range for the crime of which the defendant was actually convicted (though still within the maximum statutory limit). In these respects and others, the Guidelines closely resemble the Washington sentencing regime discredited in *Blakely*, rendering them constitutionally suspect.

To be sure, Justice Scalia, writing for the *Blakely* majority, explicitly reserved the question of the Guidelines' constitutionality, stating in a footnote that "The Federal Guidelines are not before us, and we express no opinion on them." 124 S. Ct. at 2538 n.9. But despite this apparent disclaimer, the Justice Department, appearing as *amicus curiae*, questioned whether the FSG are distinguishable from the Washington scheme in any "constitutionally significant" way (*id.*) – a position at odds with its current view. And Justices Breyer and O'Connor, in dissenting opinions joined by Justice Kennedy and Chief Justice Rehnquist, essentially agreed and dropped the other shoe, asserting that the Guidelines are, if anything, even **more** vulnerable to constitutional attack.[7]

In the ensuing days and weeks, the dissenters' dire predictions came true: *Blakely* plunged the federal criminal justice system into extraordinary, if not unprecedented, turmoil. In

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[5] *See, e.g., United States v. Norris*, 281 F.3d 357 (2d Cir. 2002).

[6] *See* U.S.S.G. § 1B1.3.

[7] Justice Breyer's position merits special attention because he was "Chief Counsel for the Senate Judiciary Committee" during the Sentencing Reform Act's ("SRA") "gestation," and also served as "Vice-Chair of the first Sentencing Commission" that drafted the Guidelines. *United States v. Leach*, No. CRIM. 02-172-14, _ F. Supp. 2d _, 2004 WL 1610852, at *2 n.1 (E.D. Pa. July 13, 2004).

some jurisdictions, plea bargaining was suspended – and plea and sentencing hearings were postponed – indefinitely, as courts and litigants struggled to assess the Guidelines' viability after *Blakely*. The Justice Department promptly distributed a memo to all federal prosecutors articulating a uniform institutional response to *Blakely*, and attempting to minimize its impact on Guideline calculations. In other pending cases, AUSAs scrambled to seek amended indictments alleging sentence-boosting facts, special Guidelines interrogatories for deliberating *petit* juries, and the impanelment of sentencing juries to consider potential enhancements. These efforts yielded mixed results – sometimes within the same judicial district. *Compare, e.g., United States v. Medas*, No. 03CR1048, _ F. Supp. 2d _, 2004 WL 1498183 (E.D.N.Y. July 1, 2004) (Glasser, J.) (spurning special interrogatories) *and United States v. Roberts*, No. 03 CR 1369(LAK) (S.D.N.Y. July 9, 2004) (Kaplan, J.) (same) *with United States v. Landgarten*, No. 04-CR-70 (JBW), _ F. Supp. 2d _, 2004 WL 1576516 (E.D.N.Y. July 15, 2004) (Weinstein, J.) (empaneling sentencing jury), *vacated as moot*, _ F. Supp. 2d _, 2004 WL 1638083 (E.D.N.Y. July 23, 2003) *and United States v. Khan*, No. 02-CR-1242 (JBW), _ F. Supp. 2d _, 2004 WL 1616460 (E.D.N.Y. July 20, 2004) (Weinstein, J.) (endorsing, *inter alia*, impanelment of sentencing juries).[8]

District courts across the country soon weighed in, debating the Guidelines' continuing validity and crafting disparate sentencing approaches going forward. Congress joined the fray, convening hearings and issuing a resolution that endeavored to gut the decision and asked the Supreme Court to quickly clarify its applicability to the Guidelines. Appeals courts were flooded with *Blakely* challenges to enhanced Guideline sentences, rapidly creating a circuit split. Our own Second Circuit, sitting *en banc*, took the rare step of certifying to the Supreme Court three questions concerning *Blakely*'s effect on the Guidelines, urging immediate action to avert what it perceived as an impending constitutional crisis. *United States v. Penaranda*, Nos. 03-1055(L), -1062(L), 2004 WL 1551369 (2d Cir. July 12, 2004) (*en banc*). Finally, the government petitioned for *certiorari* in two *Blakely*-related Guidelines cases – from the Seventh Circuit and the District of Maine – also requesting expedited treatment. *United States v. Booker*, No. 03-4225, _ F.3d _, 2004 WL 1535858 (7th Cir. July 9, 2004); *United States v. Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004).[9]

The following paragraphs try to make some sense of the widespread confusion that *Blakely* has engendered. In particular, I discuss several emerging issues in the battle over

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[8] The idea of "Blakelefying" a pending indictment, whether by amendment or sentencing interrogatories, may raise due process, *ex post facto* and/or double jeopardy concerns beyond this article's scope. *See, e.g., Ameline*, 2004 WL 1635808, at *13; *Mueffleman*, slip op. at 4 & n.4, 34-35 n.36, 39; *United States v. Zompa*, Criminal No. 04-46-P-S-01, slip op. at 4 (D. Me. July 26, 2004); *cf. United States v. Agett*, No. 2:04-CR-10, _ F. Supp. 2d _, 2004 WL 1698094, at *4 (E.D. Tenn. July 23, 2004); *Booker*, 2004 WL 1535858, at *5.

[9] On August 2, as this article was being finalized, the Supreme Court granted *certiorari* in *Booker* and *Fanfan*, consolidated the cases and set an October 4 argument date.

Blakely's Guidelines consequences,[10] suggesting various strategies for presenting and preserving them. A word of caution, however. Because the legal landscape is changing so fast, certain information in this article may become outdated – due to Congressional action, Supreme Court intervention or otherwise – by the time it appears. For the latest *Blakely* developments, visit Professor Douglas Berman's *Sentencing Law and Policy* site, located at http://sentencing.typepad.com, and explore the other links and resources collected there.

INQUIRING MINDS WANT TO KNOW: FOUR KEY *BLAKELY* QUESTIONS THAT FEDERAL PRACTITIONERS SHOULD MONITOR

1. Does *Blakely* Apply to the Guidelines?

So far, the consensus answer is an emphatic "yes."

Despite its tacit Supreme Court recognition that federal sentencing substantially mirrors Washington's, the government, predictably enough, has shifted course in *Blakely*'s aftermath. As a threshold matter, it now contends that the Guidelines are materially and structurally distinguishable from the Washington regime, rendering *Blakely* wholly inapplicable to them. In support, the government argues that (a) unlike the Washington scheme, the Guidelines were judicially promulgated by the Sentencing Commission rather than legislatively enacted by Congress; (b) *Blakely* expressly reserved ruling on the Guidelines' constitutionality; (c) many other Supreme Court decisions have upheld the Guidelines against an array of constitutional challenges;[11] and (d) absent a specific declaration of unconstitutionality, inferior courts are bound to follow those other decisions.

Aside from their apparent estoppel implications, these claims have been coolly received on the merits. To the contrary, the overwhelming majority of federal courts to consider *Blakely* have adopted the inescapable conclusion of the four dissenters: it "dooms the guidelines insofar as they require that sentences [enhanced beyond the base offense level] be based on facts found by a judge." *Booker*, 2004 WL 1535858, at *2 (Posner, J.); *accord, e.g., Ameline*, 2004 WL 1635808, at *5; *United States v. Mooney*, No. 02-3388, _ F.3d _, 2004 WL 1636960, at *12-*13 (8th Cir. July 27, 2004); *United States v. Montgomery*, No. 03-5256, _ F.3d _, 2004 WL 1562904 (6th Cir. July 14, 2004) ("*Montgomery I*"), *vacated and rehg. en banc granted* (July 19, 2004), *dism'd as moot*, 2004 WL 1637660 (July 23, 2004); *United States v. Croxford*, No. 2:02-CR-

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[10] These issues, and my analysis of them, are by no means exhaustive.

[11] *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989) (impermissible delegation and separation of powers); *United States v. Dunnigan*, 507 U.S. 87 (1993) (Fifth Amendment right to testify); *Stinson v. United States*, 508 U.S. 36 (1993) (Guidelines commentary binding and authoritative); *Witte v. United States*, 515 U.S. (1995) (double jeopardy); *United States v. Watts*, 519 U.S. 148 (1997) (due process); *Edwards v. United States*, 523 U.S. 511, 516 (1998) (declining to consider a mishmash of "statutory and constitutional claims" because ultimate sentence fell within pre-*Blakely* understanding of statutory maximum).

00302PGC, _ F. Supp. 2d __, 2004 WL 1462111 (D. Utah June 29, 2004), *amended*, 2004 WL 1521560 (July 7, 2004) ("*Croxford II*"), *adhered to*, 2004 WL 1551564 (July 12, 2004); *United States v. Shamblin*, No. CRIM.A. 2:03-00217, _ F. Supp. 2d _, 2004 WL 1468561, at *7 (S.D.W.Va. June 30, 2004); *United States v. Einstman*, No. 04 CR. 97(CM), _ F. Supp. 2d _, 2004 WL 1576622 (S.D.N.Y. July 14, 2004) (McMahon, J.); *United States v. Marrero*, No. 04 CR. 0086(JSR), _ F. Supp. 2d _, 2004 WL 162140 (S.D.N.Y. July 21, 2004) (Rakoff, J.); *United States v. Toro*, No. 3:02cr362 (PCD), slip op. at 7 (D. Conn. July _, 2004) (Dorsey, J.); *United States v. Gibson*, No. 1:04-cr-12 (D. Vt. July 30, 2004) (Murtha, J.); *United States v. King*, No. 6:04-cr-35-Orl-31KRS, slip op. at 3-10 (M.D. Fla. July 19, 2004); *Mueffleman*, slip op. at 22-24.

First, these courts reason, the factual premise of the government's initial argument – that the Sentencing Commission is not a legislature but a quasi-administrative judicial body – is simply wrong, as Congress recently "limit[ed] judicial membership on the seven-member ... Commission to a minority of three." *Marrero*, 2004 WL 1621410, at *2, *4 n.1 (citing 28 U.S.C. § 991(a)). More fundamentally, it is well established that the Guidelines operate as "binding legislative rules,"[12] with the force and effect of law. *See Mistretta*, 488 U.S. at 391; *Stinson*, 508 U.S. at 45. And, in writing them, the Commission exercised authority delegated to it by Congress,[13] which – by virtue of its ratification power – retains unchecked discretion to accept, reject or modify proposed amendments as it sees fit. *See, e.g.*, *Ameline*, 2004 WL 1635808, at *7; *Booker*, 2004 WL 1535858, at *2 (quoting *Mistretta*, 488 U.S. at 393-94) ("the Commission is fully accountable to Congress"); *Blakely*, 124 S. Ct. at 2549 (recognizing that "Congress has unfettered control to reject or accept any particular guideline") (O'Connor, J., dissenting) (internal citations omitted).

Indeed, as federal defense lawyers will unhappily recall, Congress liberally flexed that discretion throughout the 1990s, repeatedly killing amendments that would have reduced the crushing penalties for money laundering and eliminated the notorious 100:1 "powder to crack cocaine sentencing ratio." *Ameline*, 2004 WL 1635808, at *7. In fact, Congress went a step further with 2003's controversial PROTECT Act, directly amending the Guidelines on its own initiative. *Id.* Against this backdrop, calling the Guidelines agency regulations rather than legislative enactments exalts form over substance, and draws a "distinction without a difference." *Agett*, 2004 WL 1698094, at *3; *accord, e.g.*, *Booker*, 2004 WL 1535858, at *2; *King*, slip op. at 7-10 and cases cited; *Marrero*, 2004 WL 1621410, at *2 (stressing that *Blakely* "focuses on the manner in which the Constitution confides to the jury certain prerogatives that **no other body**, whether **legislative, executive or judicial** in origin, can override") (citation omitted) (emphasis supplied).

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[12] *King*, slip op. at 9 n.14 (citations and internal quotes omitted).

[13] *See supra* n.12.

Second, as numerous courts have correctly acknowledged,[14] none of the pre-*Blakely* Supreme Court cases cited by the government addressed a Sixth Amendment challenge to the Guidelines, so they are not dispositive. *See supra* n.11.

Third, while it is true that *Blakely* did not explicitly invalidate the Guidelines, that is its unmistakable implication. In this regard, courts have found it "significant"[15] and "worth noting"[16] that, although the "four dissent[ers] ... were unable to identify a meaningful difference between the Washington ... and ... federal sentencing guidelines," *Booker*, 2004 WL 1535858, at *3, the majority "did little to answer" their "grievous" predictions. *Muefffleman*, slip op. at 24. If anything, Justice Scalia actually vindicated their concerns by "choos[ing] a federal statute to illustrate [his] argument." *Toro*, slip op. at 11-12. Speaking for the majority, Scalia wrote as follows:

> Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, ***See* 21 U.S.C. §§ 841(b)(1)(A), (D)**, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than wrong.

Blakely, 124 S. Ct. at 2542 (footnote omitted) (emphasis supplied). "The majority's pointed example of a federal drug sentence as one that was most problematic clearly suggests that the opinion's reasoning extends to the federal Guidelines." *Croxford II*, 2004 WL 1521560, at *9; *see also Booker*, 2004 WL 1535858, at *3 (though Scalia "replied to the dissenting Justices at length, he did **not** say that they were wrong to suggest that the federal sentencing guidelines could not be distinguished from the Washington sentencing guidelines") (emphasis supplied).

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[14] *See, e.g.*, *Mooney*, 2004 WL 1636960, at *12 ("*Booker* and ... *Montgomery* [*I*] well illustrate that the Supreme Court has never, before *Blakely*, directly held whether judicial fact-finding under determinate sentencing schemes like the Guidelines violate[s] a defendant's right to trial by jury"); *Einstman,* 2004 WL 1576622, at *5-*6 (prior Supreme Court cases do not reach "the issue that underlies *Blakely*"); *Marrero*, 2004 WL 1621410, at *2 (Supreme Court has "never considered how the Sixth Amendment's right to a jury trial applies to the Guidelines") (citations and internal quotes omitted); *King*, slip op. at 5-6 (Guidelines have not "faced a Sixth Amendment right-to-jury-trial challenge such as the one mounted in *Blakely*").

[15] *Agett*, 2004 WL 1698094, at *3.

[16] *Croxford II*, 2004 WL 1521560, at *9.

Thus, as one court cogently put it, "the **only** guidance from the United States Supreme Court and the only existing precedent ... to consider in deciding a [federal] Sixth Amendment challenge is the *Blakely* decision itself." *Agett*, 2004 WL 1698094, at *3. For this reason, *Blakely* represents "binding Supreme Court precedent with respect to the constitutionality of the Guidelines" under the Sixth Amendment. *King*, slip op. at 6.

In these circumstances – where "an intervening Supreme Court case undermines"[17] a settled interpretation of the law – courts "cannot avoid the[ir] duty" to make their "own constitutional determination," *Booker*, 2004 WL 1535858, at *4-*5, unencumbered by "previous holdings." *Ameline*, 2004 WL 1635808, at *8; *accord, e.g., Leach*, 2004 WL 1610852, at *3 (refusing to "blind ourselves to *Blakely*'s teaching in the name" of a "likely inapplicable" procedural "prerogative"); *Booker*, 2004 WL 1535858, at *4 ("When the Supreme Court says that it is not resolving an issue, it perforce confides the issue to the lower federal courts for the first pass at resolution."). And here, that intervening Supreme Court case – *Blakely* – compels the conclusion that its holding "applies equally to the Federal Sentencing Guidelines." *Agett*, 2004 WL 1698094, at *3; *see Booker*, 2004 WL 1535858, at *3 ("no basis for thinking that *Blakely* would have been decided differently had the identical guidelines been promulgated, with the identical effect on the sentences, by the Washington Sentencing Commission").

Indeed, the "only realistic possibility" for a contrary result would appear to be a change in Supreme Court "personnel." *Leach*, 2004 WL 1610852, at *3. *But see, e.g., United States v. Pineiro*, No. 03-30437, _ F.3d _, 2004 WL 1543170 (5th Cir. July 12, 2004); *United States v. Hammoud*, No. 03-4253 (4th Cir. August 2, 2004) (*en banc*); *Booker*, 2004 WL 1535858, at *6-*11 (Easterbrook, J., dissenting); *Mooney*, 2004 WL 163690, at *13-*15 (dissenting in part); *Ameline*, 2004 WL 135808, at *14-*15 (Gould, J., dissenting); *United States v. Lauersen*, No. S2 98 Cr. 1134 (WHP), slip op. (S.D.N.Y. July 29, 2004) (Pauley, J.); *United States v. Olivera-Hernandez*, 2004 U.S.App. LEXIS 15031 (D. Utah July 12, 2004) (all holding Guidelines constitutional until Supreme Court specifically says otherwise); *Penaranda*, 2004 WL 1551369 (certifying question of *Blakely*'s Guidelines application to Supreme Court).[18]

In sum, as the weight of authority indicates, *Blakely*'s application to the Guidelines is among the easier questions the decision raises, and seems to be a given. With all respect to the

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[17] *Ameline*, 2004 WL 1635808, at *8.

[18] At least one court has split the difference, applying *Blakely* to Guidelines enhancements that constitute separate crimes – *e.g.*, justice obstruction and gun use – but not to those that merely encompass offense aggravators – *e.g.*, role and drug quantity. *See United States v. Hankins*, No. CR 02-41-M-DWM-03, _ F. Supp. 2d _, 2004 WL 1690128 (D. Mont. July 29, 2004). While novel and intriguing, this unprecedented approach contravenes the spirit, if not the letter, of Justice Scalia's federal narcotics example, discussed in the text. It also defies *Ameline,* controlling Ninth Circuit precedent, which the opinion postdates but appears to have been written before.

Second, Fourth and Fifth Circuits, any other suggestion appears merely to delay the inevitable.[19] At a minimum, then, federal defense counsel should oppose all Guidelines enhancements based on judicially found facts – apart from prior convictions – outside the four corners of the jury verdict or the client's plea admissions.

2. What is the Appropriate Remedy for a Federal *Blakely* Violation?

Assuming *Blakely* embraces the FSG, the harder question is what to do about it. In other words, does the decision vitiate the Guidelines altogether, or can they be severed and administered in a manner consistent with *Blakely* and congressional intent?

This issue has deeply splintered the federal courts. Unless (a) the government seeks a Guidelines sentence based solely on admitted or jury-found facts, or (b) the defendant waives his

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[19] Congress' resolution purporting to equate the federal "statutory maximum" with the maximum statutory penalty for the offense of conviction, rather than the presumptive base offense level, bears no weight. It is for the Court, not Congress, to determine the Guidelines' constitutionality and construe the term "statutory maximum" as used in *Apprendi.* And, in any event, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" – here, the one that passed the SRA. *United States v. Price*, 80 S. Ct. 326, 331 (1960).

Blakely rights and consents to sentencing under the Guidelines – themselves controversial propositions[20] – judges have generally followed three diverse approaches.[21]

First, some courts have approved the convening of sentencing juries to consider Guidelines enhancements not encompassed by the plea or verdict. **Second**, other courts have reverted to discretionary, pre-Guidelines sentencing within the broad statutory range for the offense of conviction, albeit advised by the Guidelines. **Third**, still other courts have imposed the minimum Guidelines sentence established by the plea or verdict – usually the unadorned base offense level – without judicial enhancement. *See, e.g., Croxford II*, 2004 WL 1521560, at *10; *Shamblin*, 2004 WL 1468561, *8, *10 n.11; *United States v. Montgomery*, No. 2:03-CR-801 TS, _ F. Supp. 2d _, 2004 WL 1535646, at *3 (D. Utah July 8, 2004) ("*Montgomery II*"); *Khan*, 2004 WL 1616460, at *7; *Agett*, 2004 WL 1698094, at *4 (all reciting available remedies).

While awaiting definitive instruction from the Supreme Court, defense counsel should advocate the option likely to yield the least punishment, depending on the sentencing tendencies of the individual judge presiding. That said, I briefly examine each alternative in turn.

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[20] For example, a minority of courts and commentators have suggested that *Blakely* rights – especially the proof beyond a reasonable doubt requirement – may be not be waivable, and that Guidelines sentencing may be unconstitutional in **all** instances, even where there are no disputed enhancements beyond the facts reflected in the plea or verdict. *See, e.g., Muefflemen*, slip op. at 35-37; *King*, slip op. at 12-15; *United States v. Terrell*, No. 8:04CR24, _ F. Supp. 2d _, 2004 U.S. Dist. LEXIS 13781, at *14-*15 & n.3 (D. Neb. July 22, 2004); *but see, e.g., United States v. Thompson*, No. 2:04-CR-00095 PGC, _ F. Supp. 2d _, 2004 WL 1551560, at *4 (D. Utah July 8, 2004) (rebuffing similar claim). These suggestions, aside from the colorable one concerning the reasonable doubt standard, appear to conflict with the general presumption in favor of waivability (*see, e.g., New York v. Hill*, 528 U.S. 114 (2000)), and with *Blakely*'s specific caveat that "the State is free to seek judicial enhancements so long as the defendant either **stipulates to the relevant facts or consents to judicial factfinding**." 124 S. Ct. at 2541 (emphasis supplied). More substantial is the suggestion that defendants should not be bound by enhancing admissions made before *Blakely*, as they could not have knowingly and intelligently relinquished rights that did not yet exist. *See, e.g., Ameline*, 2004 WL 1635808, at *13 n.18; *Terrell*, 2004 U.S. Dist. LEXIS 13781, at *17; *Agett*, 2004 WL 1698094, at *4 n.2; *United States v. Harris*, No. 03-244-03, _ F. Supp. 2d _, 2004 U.S. Dist. LEXIS, at *4-*5 (W.D. Pa. July 16, 2004).

[21] Some courts, trying to avoid mass resentencings when the Supreme Court finally decides a federal *Blakely* case, have taken to hedging their bets, passing alternate Guidelines and non-Guidelines sentences. *See, e.g., Croxford II*, 2004 WL 1521560, at *19-*20; *Toro*, slip op. at 13; *Leach*, 2004 WL 1610852, at *4. But even this practice – explicitly recommended in at least two circuits (*see Hammoud*; *Booker*, 2004 WL 1535858, at *6) – has its detractors. *See Zompa*, slip op. at 4-5 (refusing to fashion "hypothetical" alternate sentence).

Sentencing Juries

A few courts have sanctioned the use of sentencing juries, applying the beyond a reasonable doubt standard, to relieve any *Blakely* infirmity afflicting the Guidelines. As the Ninth Circuit explained:

> [F]ederal courts have long employed bifurcated juries in ... capital [cases], as well as in the civil context where a jury may only determine damages once it has separately determined liability. "There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial."

Ameline, 2004 WL 1635808, at *13 (quoting *Booker*, 2004 WL 1535858, at *5)) (footnote omitted); *accord Khan*, 2004 WL 1616460; *Landgarten*, 2004 WL 1576516; *cf. United States v. Green*, No. CR. A. 02-10054-WGY, et al., _ F. Supp. 2d _, 2004 WL 1381101 (D.Mass. June 18, 2004) (Young, C.J.) (pre-*Blakely* case).

On the other hand, critics complain that there is no statutory or decisional authority for such a procedure. *See Croxford II*, 2004 WL 1521560, at *10 ("not legally authorized"; effectively forces courts to rewrite "the sentencing statutes and implementing Guidelines"); *Montgomery II*, 2004 WL 153646, at *3 (legally "unauthorized"); *Agett*, 2004 WL 1698094, at *4 (similar). In fact, the governing statutes – including Fed. R. Crim. P. 32 and 18 U.S.C. § 3742 – specifically contemplate **judicial** sentencing. *See Croxford II*, 2004 WL 1521560, at *10 & n.66; *Ameline*, 2004 WL 1635808, at *10.

Skeptics also point out that Guidelines determinations are "extensive," "nuanced" and legally complicated, making them poor candidates for jury resolution. *Croxford II*, 2004 WL 1521560, at *10-*11 ("[im]practical"); *Montgomery II*, 2004 WL 153646, at *3 ("practically unworkable"); *Toro*, slip op. at 8 n.2 (certain to cause delay and "substantial resource problems"); *Agett*, 2004 WL 1698094, at *4 ("cumbersome" and "burdensome," necessitating a full blown mini-trial); *see generally Muefffleman*, slip op. at 26-31. Indeed, as Judge Gertner aptly notes, the entire Guidelines system was devised "with judges, not juries, in mind," and it is "inconceivable that Congress would have enacted a jury sentencing scheme." *Id.* at 27, 30; *Agett*, 2004 WL 1698094, at *5 (same).

Finally, even its proponents concede that jury sentencing could pose formidable double jeopardy problems. *See Booker*, 2004 WL 1535858, at *5; *Ameline*, 2004 WL 1635808, at *13; *cf. Agett*, 2004 WL 1698094, at *4.

On balance, I find the critics' view more persuasive. If wholesale jury sentencing is to become the norm, it is up to Congress, not the courts, to say so – particularly given the technically intricate and precisely calibrated regime it would replace. *Cf. United States v. Jackson*, 390 U.S. 570, 578-81 (1968) ("It is one thing to fill a minor gap in a statute.... It is quite another ... to create from whole cloth a complex and completely novel [sentencing]

procedure" solely to "rescu[e] a statute from ... unconstitutionality"); *Schriro v. Summerlin*, 124 S. Ct. 2519, 2524-26 (2004) (questioning whether jury sentencing "enhances accuracy").

Severability

Federal courts extending *Blakely* to the Guidelines are equally divided over whether (a) to return to indeterminate sentencing because they logically hinge on judicial factfinding by a preponderance, or (b) to excise the *Blakely*-offending adjustments and impose the minimum Guidelines sentence warranted by the plea or verdict – typically the unenhanced base offense level. *Compare Ameline*, 2004 WL 1635808, at *4 n.2 (describing former approach as "minority" position) *with Mueffleman*, slip op. at 34 n.35 (disputing that description and asserting – correctly – that "district courts have been evenly split, if not tilted towards finding that the Guidelines are **not** severable") (emphasis supplied).[22]

Courts in the first camp generally see the Guidelines – and indeed the SRA itself – as a single integrated whole. They claim that unenhanced Guideline sentences result in excessive leniency and unfair defense windfalls that Congress could not have possibly intended. Judge Arthur J. Schwab's reasoning in *United States v. Harris*, a Western District of Pennsylvania case, is illustrative:

> [B]ecause the relevant conduct and enhancement provisions of the federal guidelines are an integral part of a multi-faceted, interrelated mechanism, it is not possible to declare some parts unconstitutional but spare the remainder ..., leaving intact an incomplete and unintended skeleton.

2004 U.S. Dist. LEXIS 13290, at *2; *accord, e.g., Mooney*, 2004 WL 1636960, at *13; *Montgomery I*, 2004 WL 1562904; *Croxford II*, 2004 WL 1521560, at *12-*13; *Mueffleman*, slip op. at 25-39; *King*, slip op. at 10-15; *United States v. Lamoreaux*, No. 02-003990102CRW, _ F. Supp. 2d _, 2004 WL 1557283 (W.D. Mo. July 7, 2004); *United States v. Carter*, 2004 U.S. Dist. LEXIS 14433 (C.D. Ill. July 23, 2004); *Agett*, 2004 WL 1698094, at *5.

Second Circuit courts subscribe disproportionately to this view, as does the government in cases where *Blakely* is deemed applicable to the Guidelines. *See, e.g., Einstman*, 2004 WL 1576622, at *6-*7; *Marrero*, 2004 WL 1621410, at *3 (Guidelines represent "an intricate set of weights and measures, of upward enhancements and downward adjustments, ... intended to balance ... a host of competing considerations. To accept the 'downward' aspects and ignore the 'upward'" ones would "frustrate" Congress' will); *United States v. Burton*, No. 04 CR 266 (S.D.N.Y. July 9, 2004) (Scheindlin, J.); *United States v. Maflahi*, No. 03-CR-412-NG (E.D.N.Y.

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[22] For the reasons stated in footnote 19, Congress' resolution backing the first approach deserves little weight. Severability is a quintessential legal issue, properly confided to the judiciary.

July 9, 2004) (Gershon, J.); *contra, e.g., Toro*, slip op. at 8-9; *Gibson*; *Khan*, 2004 WL 1616460, at *7.

By contrast, courts in the second camp[23] counter that labeling the Guidelines "advisory" and imposing the same sentence as a matter of judicial "discretion" amounts to a transparent evasion of *Blakely*. *See Montgomery II*, 2004 WL 1535646, at *3-*4. Citing the doctrine of constitutional avoidance – by which judges "avoid a construction of a statute that casts doubt on its constitutionality"[24] – and the strong presumption in favor of severability, these courts observe that *Blakely* itself anticipates continued "determinate sentencing **without** wholesale invalidation." *Ameline*, 2004 WL 1635808, at *11-*12 (emphasis supplied). In this vein, they stress that *Blakely* "did **not** invalidate Washington's entire sentencing scheme," but "merely set aside the defendant's sentence as unconstitutional." *Terrell*, 2004 U.S. Dist. LEXIS 13781, at *10 (emphasis supplied); *accord Ameline*, 2004 WL 1635808, at *11. In fact, the *Blakely* Court made clear that judges should strive to apply the law **as written**, proclaiming: "'This case is **not** about whether determinate sentencing is constitutional, only about how it can be **implemented in a way that respects the Sixth Amendment**.'" *Shamblin*, 2004 1468561, at *8 (quoting *Blakely*, 124 S. Ct. at 2540) (footnote omitted) (emphasis supplied); *accord, e.g., Montgomery II*, 2004 WL 1535646, at *4. Finally, due to the varying degrees of deference judges would give the now "advisory" Guidelines, reverting to a discretionary system would bring back extreme and unwarranted sentencing disparities. *See Ameline*, 2004 WL 1635808, at *11-*13; *Zompa*, slip op. at 3-4 (severance promotes SRA's goal of honest, uniform, proportional sentencing). This is exactly what Congress intended the Guidelines to avoid, and precisely what has happened in *Blakely*'s wake.

For a number of additional reasons, I side with the severance supporters.

First, *Blakely*, the current law of the land, explicitly "**entitle[s]**" defendants to the presumptive sentence justified by the jury verdict or plea admissions – **not** the statutory sentencing range authorized for the crime of conviction. 124 S. Ct. at 2541. So long as the Guidelines remain on the books, that presumptive sentence, in most cases, is the unenhanced base offense level. Moreover, to the extent that *Blakely* merely clarifies the prior *Apprendi* rule, elevating the potential punishment to the statutory limit may well infringe the *Ex Post Facto* Clause with respect to crimes previously committed. *But see, e.g., United States v. Parson*, No. 6:03-cr-204-Orl-31DAB, slip op. (M.D. Fla. July 22, 2004) (imposing 28 month discretionary sentence, rather than presumptive 21-27 month Guideline sentence, without considering *ex post facto* ramifications).

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[23] *See, e.g., Ameline*, 2004 WL 1635808, at *11-*13; *Shamblin*, 2004 WL 1468651, at *8 & n.11; *Fanfan*; *Montgomery II*, 2004 WL 1535646, at *3-*5; *Zompa*, slip op. at 3-4; *Toro*, slip op. at 8-9; *Gibson*; *Terrell*, 2004 U.S. Dist. LEXIS, at *9-*11.

[24] *Terrell*, 2004 U.S. Dist. LEXIS, at *9-*10 (citing *Jones v. United States*, 119 S. Ct. 1215, 1222 (1999)).

Second, it appears that the Supreme Court has already envisioned FSG severance – at least implicitly – holding in *Stinson* that Guidelines commentary is binding "**unless it violates the Constitution** or a federal statute." *Terrell*, 2004 U.S. Dist. LEXIS, at *8 (citing *Stinson*, 508 U.S. at 42) (emphasis supplied). Indeed, courts have invoked this principle to abrogate a variety of U.S.S.G. provisions, yet continued to apply the rest of the Guidelines in their entirety – a severance *sub silentio*. *See, e.g., United States v. Hernandez*, 79 F.3d 584 (7th Cir. 1996) (collecting cases).

Third, any unfairness to the government in imposing unenhanced Guidelines sentences is a function of the Sixth Amendment – whose protections "belong[solely] to the defendant"[25] – and *Blakely* itself, which "deals **only** with **upward** adjustments." *Agett,* 2004 WL 1698094, at *4 & n.5 (emphasis supplied); *accord, e.g., United States v. Outen*, 286 F.3d 622, 638 (2d Cir. 2002) (since *Apprendi* concerns are "absent" in a "mitigating scheme," facts that **decrease** the penalty for a crime are exempt from its strictures) (quoting *Apprendi*, 530 U.S. at 490 & n.16). And, because many enhancing factors also comprise independent offenses,[26] the government can still seek augmented sentences the old-fashioned way: by charging them as separate crimes and proving them to a jury beyond a reasonable doubt. *See, e.g., Montgomery II*, 2004 WL 1535646, at *5 ("If the government subsequently discovers evidence warranting a more severe sentence, it may seek to supersede the indictment."); *Terrell*, 2004 U.S. Dist. LEXIS 13781, at *17 ("If the government had desired to punish the defendant for possession of a short shotgun, sawed-off shotgun, or destructive device, it could have prosecuted him under the statute that criminalizes possession of such devices.") (citation omitted); *Swan*, 2004 WL 1725703, at *4 (similar).

This would not be the first time that prosecution and defense were governed by dual substantive and procedural standards. To the contrary, the phenomenon occurs with some frequency in other contexts, for example, when interpreting the Federal Rules of Evidence. *See, e.g., United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984) (prejudice to the government generally irrelevant, and admissibility standard relaxed, when accused "offers similar acts evidence" for defensive purposes); *accord, e.g., United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991) (Becker, J.) (same with respect to so-called "reverse 404(b)" proof); *Morales v. Portuondo*, 154 F. Supp. 2d 706, 724 (S.D.N.Y. 2001) (right to present defense may "require the admission of evidence that would ordinarily be inadmissible") (citation and internal quotes omitted).

In short, as Judge Bataillon in the District of Nebraska forcefully analogized:

> Reliance on "unfairness to the government" as a rational is akin to the assertion that it is not fair to require the government to prove

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[25] *See also United States v. Swan*, No. 8:03CR570, _ F. Supp. 2d _, 2004 WL 1725703, at *4 (D. Neb. Aug. 2, 2004) ("The protections mandated by the Sixth Amendment are for the benefit of the individual, not the government.") (citation omitted).

[26] *See, e.g., Hankins*, 2004 WL 1690128 (obstruction of justice, gun use, *etc.*).

> every element of its case. Just as it is perfectly fair not to require a defendant to prove his innocence beyond a reasonable doubt, while the government is required to prove his guilt by that standard, it is perfectly fair to permit mitigating sentencing factors to be proved by a preponderance of the evidence, without a jury, while requiring aggravating factors to be established by a jury beyond a reasonable doubt.

Swan, 2004 WL 1725703, at *4 (citations omitted).

Fourth, the anti-severance position overlooks case law suggesting that the Guidelines **themselves** may not be severable from the SRA, a "'comprehensive'" Congressional "approach to making sentencing more determinate." *Gubiensio-Ortiz v. Kanhele*, 857 F.2d 1245, 1268 (9th Cir. 1988); *see, e.g., United States v. Jackson*, 857 F.2d 1285, 1286 (9th Cir. 1988). If so, and if the whole Guidelines regime must fall, it follows that the entire SRA must accompany it. That, in turn, would mean the end of supervised release and the resurrection of parole, probation and expansive good time credit, with all their attending "uncertainty." *Ameline*, 2004 WL 1635808, at *11. If Congress did not intend the perceived leniency of unenhanced Guideline sentences, it surely did not intend the revival of *ad hoc* sentencing that toppling the SRA would entail. *See Muefflemen*, slip op. at 38 (concluding that parole abolition "was part of comprehensive," non-severable scheme, and recognizing that "there is a problem with reinstituting an indeterminate system[] when there is no longer parole").

Fifth, and finally, if unenhanced Guideline sentences are perceived as too low, that "is a matter to be left to the legislature." *Agett*, 2004 WL 1698094, at *4 ("it is not the province of the judiciary to rewrite language enacted ... or authorized by the legislature"); *accord Ameline*, 2004 WL 1635808, at *11 ("We are reluctant to establish by judicial fiat an indeterminate sentencing scheme.") (footnote omitted). And, in my view, the difficulty of "Blaklefying" the Guidelines is greatly exaggerated. For example, Congress could "fix" the *Blakely* "bug" by (a) raising base offense levels to account for aggravating factors that do not constitute distinct offenses; (b) treating mitigating factors – immune from Sixth Amendment scrutiny – as affirmative defenses to be pled by the accused, with the burden and standard of persuasion to be determined; and (c) compelling prosecutors to charge independently all other enhancements that **do** constitute separate crimes. Alternatively, Congress could amend the U.S. Code to emulate most state penal codes – including New York's – by incrementally grading offenses to reflect the presence or absence of aggravating circumstances (*e.g.*, amount of loss, degree of injury, *etc.*). *See Muefflemen*, slip op. at 7, 27 (discussing ill-fated federal "criminal code with discrete, graded offenses").

Yes, these proposed revisions would require extensive time and effort to develop and implement. Nonetheless, they are eminently feasible. And, more important, they would make the system fairer by eliminating the Guidelines' principal vice: bloated sentences based on uncharged and acquitted conduct, judicially found by a bare preponderance.

3. What is the Standard of Appellate Review for an Alleged *Blakely* Error?

With courts sparring over *Blakely*'s substantive application to the Guidelines, the proper standard of appellate review for such claims has garnered scant judicial attention.

Where a defendant anticipated *Blakely*'s holding and objected at sentencing to judge-made enhancements by a preponderance, the government will presumably have to prove the error harmless beyond a reasonable doubt, under *Chapman v. California*'s[27] stringent standard for constitutional infirmities. *See Mooney*, 2004 WL 1636960, at *12; *Ameline*, 2004 WL 1635808, at *1; *Piniero*, 2004 WL 1543170, *2, *11 n.4. Conversely, where the *Blakely* issue is unpreserved, review is for plain error only, under the more forgiving test of *United States v. Olano*, 507 U.S. 725 (1993) and *Johnson v. United States*, 520 U.S. 461 (1997). *See Ameline*, 2004 WL 1635808, at *8-*10; *Mooney*, 2004 WL 1636960, at *12; *cf. Pineiro*, 2004 WL 1543170, *2, *11 n.4; *Booker*, 2004 WL 1535858, at *6. Both standards require, among other criteria, that the defendant have suffered prejudice.

Whether an increased sentence is prejudicial *per se*, or whether appeals courts will examine the degree to which the offending enhancement(s) were contested and the weight of the supporting evidence, appears unsettled. *Compare, e.g., Booker*; *Mooney*; *United States v. Magana*, No. 98-10487, 2004 WL 1700556 (9th Cir. July 29, 2004) (unpublished) (all remanding for resentencing without analyzing evidentiary strength) *with Ameline*, 2004 WL 1635808, at *9-*10 (noting that drug quantity was "vigorously challenged") *and United States v. Friedman*, 327 F.3d 111 (2d Cir. 2002) (considering weight of the evidence) (*Apprendi* claim). Which party bears the burden of persuasion as to plain error prejudice, insofar as *Blakely* constitutes an intervening change of law, exceeds this article's scope. *See, e.g., United States v. Henry*, 325 F.3d 93, 100 (2d Cir. 2003) (explaining Second Circuit's "modified plain-error rule") (citations, internal quotes and footnote omitted).

Finally, the circuits are split on the propriety of raising a belated *Blakely* claim during an appeal's pendency. *Compare, e.g., Ameline*, 2004 WL 1636808; *United States v. Minter*, No. 03-30042, 2004 WL 173918 (9th Cir. July 30, 2004) (unpublished); *Mooney,* 2004 WL 1636960 (all allowing supplemental briefing); *Pineiro*, 2004 WL 1543170 (same where *Apprendi* claim raised in main brief); *Magana*, 2004 WL 1700556 (entertaining *Blakely* claim on rehearing) *with United States v. Scroggins*, No. 03-30481, _ F.3d _, 2004 WL 1658497, at *24-25 n.62 (5th Cir. July 26, 2004) (refusing to consider *Blakely* claim first raised in supplemental brief)[28] *and United States v. Levy*, No. 01-17133, _ F.3d _, 2004 WL 1725406 (11th Cir. Aug. 3, 2004) (refusing to consider *Blakely* claims first raised in reply briefs, supplemental briefs and rehearing petitions). In my experience, the Second Circuit entertains *Blakely* claims presented via rehearing petition – at

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[27] 386 U.S. 18, 24 (1967).

[28] Since the Fifth Circuit holds *Blakely* inapplicable to the Guidelines (*see Pineiro*), this position is probably *dictum*.