UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2003

Filed by the In Banc Court on July 12, 2004

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UNITED STATES OF AMERICA,

Appellee,

- v. - No. 03-1055(L)

HECTOR PENARANDA, also known as
"El Viejo,"

Defendant-Appellant.

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UNITED STATES OF AMERICA,

Appellee,

- v. - No. 03-1062(L)

LUIS ROJAS, also known as El Gordo,

Defendant-Appellant.

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Before: WALKER, Chief Judge, JACOBS, CALABRESI, CABRANES, STRAUB, POOLER, SACK, SOTOMAYOR, KATZMANN, PARKER, RAGGI, WESLEY, and HALL, Circuit Judges.

Appeals from a judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, Judge) convicting defendant-appellant Penaranda, after a jury trial, of a narcotics offense and from another judgment of the United States District Court for the Southern District of New York (Allen G. Schwartz, Judge)

convicting defendant-appellant Rojas, after a guilty plea, of a narcotics offense. Appeals ordered to be heard in banc, limited to the issue of the validity of the defendants' sentences in light of the Supreme Court's decision in Blakely v. Washington, __ S. Ct. ___, No. 02-1632, 2004 WL 1402697 (U.S.S.C. June 24, 2004).

Questions certified to the Supreme Court of the United States.

Monica R. Jacobson, Alvy & Jacobson, New York, NY, for Defendant-Appellant Hector Penaranda.

Edward D. Wilford, New York, NY, for Defendant-Appellant Luis Rojas.

Helen Cantwell and Joshua A. Levine, Assistant United States Attorneys for the Southern District of New York, New York, NY, for Appellee the United States of America.

CERTIFICATE OF QUESTIONS TO THE SUPREME COURT OF THE UNITED STATES

JOHN M. WALKER, JR., Chief Judge:

We ordered the pending appeals to be heard in banc, limited to the issue of the validity of the defendants' sentences in light of the Supreme Court's recent decision in Blakely v. Washington, ___ S. Ct. ___, No. 02-1632, 2004 WL

1 1402697 (U.S.S.C. June 24, 2004).[1] We have done so because
2 the active judges of this court are unanimously of the view
3 that we should certify to the United States Supreme Court,
4 pursuant to 28 U.S.C. § 1254(2), questions relating to that
5 issue. In the most general sense, our question is whether
6 the Blakely decision applies to the federal Sentencing
7 Guidelines. However, recognizing that the Supreme Court has
8 cautioned against questions of "objectionable generality"
9 and prefers "a definite and clean-cut question of law,"
10 United States v. Mayer, 235 U.S. 55, 66 (1914), we will
11 present three precise questions to the Court: (1) a broad
12 but "clean-cut question of law" regarding Blakely's
13 applicability to judicial fact-finding that results in an
14 upward adjustment under the federal Sentencing Guidelines;
15 and (2) two narrower formulations of that question
16 pertaining specifically to the facts of these cases. Before
17 framing our questions, we set forth the pertinent
18 circumstances of the pending cases and the considerations
19 that have impelled us to invoke the certification procedure.

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[1] Other issues are raised by these appeals, but those are being addressed in the normal course by the panels to which the cases are assigned. See, e.g., People of State of N.Y. by Abrams v. 11 Cornwell Co., 718 F.2d 22 (2d Cir. 1983) (rehearing in banc limited to narrow attorney's fees issue); Daye v. Attorney Gen., 696 F.2d 186 (2d Cir. 1982) (rehearing in banc limited to issue of exhaustion of state remedies). The appeals of co-defendants also remain with the panels to which they were assigned.

1 **I. Circumstances of the Cases**

2 A. Hector Penaranda

3 The first case involves a sentence imposed following a
4 jury verdict in the United States District Court for the
5 Southern District of New York (Robert W. Sweet, Judge).
6 Defendant-appellant Hector Penaranda was charged with and
7 convicted of one count of conspiracy to distribute heroin
8 and cocaine, in violation of 21 U.S.C. §§ 841(a)(1),
9 841(b)(1)(A), and 846. In response to special questions on
10 the verdict form, the jury specified that the conspiracy
11 involved five kilograms or more of a substance containing
12 cocaine and one kilogram or more of a substance containing
13 heroin.

14 At sentencing, the district judge found by a
15 preponderance of the evidence presented at trial that the
16 conspiracy in fact involved at least twenty kilograms of
17 cocaine and at least 1,200 grams of heroin. This meant
18 that, under the Guidelines, Penaranda's crime warranted a
19 base offense level of 34.[2] No adjustments to that base
20 level were made, and Penaranda's relatively clean record
21 placed him in Criminal History Category I. The

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[2]The base offense level of 34 corresponds to a quantity of 5,200 kilograms of marijuana, which is the equivalent (under the Guidelines) of twenty kilograms of cocaine plus 1,200 grams of heroin. See U.S.S.G. § 2D1.1(c), cmt. n.10.

1 corresponding Guidelines range, then, was 151 to 188 months.

2 At the time of sentencing, defense counsel objected to

3 the district judge's calculations; he maintained that the

4 proper base offense level was 32, not 34, because the

5 judge's findings concerning drug quantities were based on a

6 cooperating co-conspirator's uncorroborated allegations and

7 were not verified by the jury's verdict. Defense counsel

8 argued that the court should consider only those quantities

9 specifically determined by the jury -- five kilograms of

10 cocaine and one kilogram of heroin -- in calculating

11 Penaranda's sentence. The court disagreed, concluded that

12 the base offense level of 34 was appropriate, and sentenced

13 Penaranda to 151 months' imprisonment. On appeal, Penaranda

14 argues that his sentence violates Blakely because "the

15 sentencing court determined that [he] was responsible for a

16 larger amount of drugs than that determined beyond a

17 reasonable doubt by the jury."[3] Letter from Monica R.

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[3]Although a sentence of 151 months could also have been imposed at offense level 32, which carries a range of 121 to 151 months, the district judge gave no indication that he would have imposed the same sentence if that level applied. On the contrary, he stated his desire to sentence Penaranda, who was sixty-nine years old at the time of sentencing, to the minimum possible term of imprisonment. See Transcript of Hearing, January 28, 2003, at 12. Thus, the judge's selection of offense level 34 has added thirty months to the sentence the defendant otherwise would have received. Cf. United States v. Bermingham, 855 F.2d 925, 934-35 (2d Cir. 1988) (challenge to sentence within overlapping sentencing ranges need not be resolved where judge indicates that the same sentence would be imposed under either

1 Jacobson, Esq., pursuant to Fed. R. App. P. 28(j), to
2 Roseann MacKechnie, Clerk of the Court (July 8, 2004).

3 B. Luis Rojas

4 The second case pending before us also originates in
5 the United States District Court for the Southern District
6 of New York (Allen G. Schwartz, Judge), but it involves a
7 sentence imposed following a guilty plea. Defendant-
8 appellant Luis Rojas pled guilty, without a plea agreement,
9 to an indictment charging him with one count of conspiracy
10 to distribute five kilograms or more of cocaine in violation
11 of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. During
12 the course of his plea colloquy, Rojas waived his Sixth
13 Amendment right to a jury trial, indicated that he
14 understood that the district judge could "impose sentence
15 just as if a jury had brought in a verdict of guilty"
16 against him, and admitted to having conspired to distribute
17 "five kilograms or more" of cocaine.

18 After his plea, but before sentencing, Rojas argued
19 that, under Apprendi v. New Jersey, 530 U.S. 466, 490
20 (2000), he could not be sentenced to more than twenty years'
21 imprisonment (the statutory maximum for drug crimes
22 involving indeterminate quantities of narcotics, see 21
23 U.S.C. § 841(b)(1)(C)) because he had not allocuted to a

range).

determinate quantity of drugs and no jury had found that he was responsible for a determinate quantity.[4] The Government responded that Apprendi was not implicated because the indictment recited that the conspiracy involved five kilograms or more of cocaine, Rojas had admitted as much, and the admitted quantity was sufficiently specific to sustain a conviction for a determinate quantity of drugs under 21 U.S.C. § 841(b)(1)(A). The district court agreed with the Government and proceeded to conduct a sentencing hearing.

Following the hearing, the district judge first determined, based on his own findings of fact, that the conspiracy involved 2,900 kilograms of cocaine. Under the Guidelines, this yielded a base offense level of 38. See U.S.S.G. §§ 2D1.1(a), (c). The court then applied (again, based on its own fact-finding) a three-level managerial role enhancement under U.S.S.G. § 3B1.1(b), a two-level enhancement for firearm possession under U.S.S.G.

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[4]A conviction under 21 U.S.C. §§ 841(b)(1)(A) and 846 for conspiracy to distribute five kilograms or more of cocaine generally supports a sentence of up to a maximum term of life imprisonment. See 21 U.S.C. § 841(b)(1)(A). But where the jury has failed to make specific findings concerning quantity, the statutory maximum of twenty years' imprisonment, applicable to convictions for drug crimes involving indeterminate quantities of narcotics, applies. See 21 U.S.C. § 841(b)(1)(C); United States v. Thomas, 274 F.3d 655, 663, 666 (2d Cir. 2001) (in banc) (relying on Apprendi, 530 U.S. at 490).

§ 2D1.1(b)(1), and a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b). This resulted in a total offense level of 40. Finally, the court concluded that Rojas's prior criminal activity placed him within Criminal History Category II. The applicable Guidelines range, then, was 324 to 405 months' imprisonment. The court sentenced Rojas within that range, to 360 months' imprisonment.

On appeal, Rojas argues that "the district court usurped the jury function and violated [his] Sixth Amendment rights." Specifically, he maintains that "issues of fact that can result in an increase in the sentence a defendant receives must be decided by a jury by proof beyond a reasonable doubt."

II. Considerations Affecting Certification

A. The Certification Procedure

Section 1254(2) (formerly section 1254(3)) of Title 28 provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
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> . . .
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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2 The Supreme Court has instructed that certification is
3 reserved for "the rare instances . . . when [it] may be
4 advisable in the proper administration and expedition of
5 judicial business." Wisniewski v. United States, 353 U.S.
6 901, 902 (1957) (per curiam). We have heeded that
7 admonition and used the procedure sparingly. The last time
8 was twenty-three years ago. See Iran Nat'l Airlines Corp.
9 v. Marschalk Co., 453 U.S. 919 (1981).

10 B. The Relevant Legal Context

11 Since November 1, 1987, when the Sentencing Guidelines
12 first became effective, district judges have been resolving
13 disputed issues of fact to determine both the applicable
14 sentencing range and the appropriateness of departures above
15 or below the applicable range. Fourteen months after the
16 Guidelines system went into effect, the Supreme Court upheld
17 its constitutionality against delegation and separation-of-
18 powers challenges. See Mistretta v. United States, 488 U.S.
19 361 (1989). Thereafter, the Court clarified that judicial
20 fact-finding under the Guidelines could extend even to
21 acquitted conduct "so long as that conduct has been proved
22 by a preponderance of the evidence." United States v.
23 Watts, 519 U.S. 148, 157 (1997) (per curiam). Of course,
24 fact-finding by district judges in connection with
25 sentencing was a regular practice before the Guidelines.

See, e.g., United States v. Fatico, 603 F.2d 1053, 1055-56 (2d Cir. 1979). Indeed, such fact-finding comports with 18 U.S.C. § 3661, which states that "'[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'" Watts, 519 U.S. at 158 (Scalia, J., concurring) (alteration in original) (quoting § 3661 in observing that "[i]n my view, neither the [Sentencing] Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines may not be considered for that purpose. . . if it pertains to acquitted conduct").

Four years ago, the Supreme Court ruled that "[o]ther 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." Apprendi, 530 U.S. at 490. Although the dissenting Justices in Apprendi said that the Court's "reasoning strongly suggest[ed]" that the determinate sentencing scheme of the Sentencing Guidelines was no longer constitutional, see id. at 551 (O'Connor, J., with whom Rehnquist, C.J., and Kennedy and Breyer, JJ., joined,

dissenting), we have understood Apprendi to be limited, as the majority opinion in that case states, to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," id. at 490 (emphasis added), and therefore have not required that any fact-finding necessary for application of the Guidelines be done by a jury. See United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001). All other circuits have adopted a similar understanding of Apprendi.[5]

Two years ago the Supreme Court applied Apprendi to require a jury to determine a fact that the state legislature had prescribed as a condition for imposing the death penalty:

> Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring v. Arizona, 536 U.S. 584, 589 (2002).

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[5]See 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. Kinter, 235 F.3d 192, 199-200 (4th Cir. 2000); 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. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 932-33 (8th Cir. 2000); United States v. Hernandez-Guardado, 228 F.3d 1017, 1026-27 (9th Cir. 2000); United States v. Heckard, 238 F.3d 1222, 1235-36 (10th Cir. 2001); United States v. Nealy, 232 F.3d 825, 829 n.3 (11th Cir. 2000); In re Sealed Case, 246 F.3d 696, 698-99 (D.C. Cir. 2001).

Then on June 24 of this year the Supreme Court decided Blakely. Blakely involves a sentencing guideline scheme of the State of Washington. That state's statutory law prescribes sentencing ranges for various combinations of facts concerning the defendant's offense and prior record. Although one state statute set the maximum punishment for class B felonies, and therefore Blakely's crime, at ten years' imprisonment, other state statutes specified that, for the particular class B felony committed by Blakely of second-degree kidnaping with a firearm, a sentencing range of 49 to 53 months was appropriate, absent any aggravating circumstances. See Blakely, ___ S. Ct. at ___, 2004 WL 1402697, at *2 (citing Wash. Rev. Code Ann. §§ 9.94A.320, .310(1), .310(3)(b); App. 27 (2000)). The sentencing judge imposed a sentence of 90 months, adding 37 months to the statutory range because the defendant "had acted with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases." Id. at ___, 2004 WL 1402697, at *3 (quoting Wash. Rev. Code Ann. § 9.94A.390(2)(h)(iii)).

The Supreme Court ruled that the Sixth Amendment did not permit the sentencing judge to increase the sentence above the 49-to-53-month range based on facts that were neither reflected in the jury's verdict nor admitted by the

defendant. Id. at ___, 2004 WL 1402697, at *4-*6.

C. Reasons for Certification

A common characteristic of Apprendi, Ring, and Blakely is that a state legislature had made the critical decisions setting the boundaries that the Court held the sentencing judge was not permitted to exceed without either a jury's fact-finding or a defendant's admission. Thus, Apprendi instructed that the judge could not find a fact that resulted in a sentence above the "statutory maximum." 530 U.S. at 490 (emphasis added). Ring ruled that defendants were "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589 (emphasis added). Blakely prohibited a sentencing judge from increasing a sentence above a range specified by state statutes.

The question presented in the cases pending before us is whether the Sixth Amendment also prohibits a sentencing judge from finding facts, not reflected in the jury's verdict or admitted by the defendant, that form the basis for determining the applicable adjusted offense level under the administratively-promulgated federal Sentencing Guidelines. The district judge in Penaranda's case found by a preponderance of the evidence that the crime for which Penaranda was convicted involved at least twenty kilograms

of cocaine and at least 1,200 grams of heroin, and, on that basis, increased Penaranda's base offense level from 32 to 34. The judge in Rojas's case found by a preponderance of the evidence that Rojas was responsible for 2,900 kilograms of cocaine, and increased Rojas's base offense level from 32 (the level corresponding to at least five kilograms but less than fifteen kilograms of cocaine, see U.S.S.G. § 2D1.1(c)) to 38 based on that finding. The judge in Rojas's case further adjusted the offense level upward by five levels, based on findings that Rojas had possessed a gun in connection with his crime and had played a managerial role in the offense of conviction. If the Blakely principle applies, then both defendants' sentences could be invalid. The problem we face, however, is that we cannot be certain whether a majority of the Supreme Court would extend the reasoning of Blakely to these cases.

Some portions of the majority opinion in Blakely indicate that the decision does apply to the federal Sentencing Guidelines. The majority states, for example:

> Our precedents make clear, however, 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. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Blakely, ___ S. Ct. at ___, 2004 WL 1402697, at *4 (emphasis in original; internal citations omitted). It is arguable that this passage applies to the Sentencing Guidelines and invalidates the sentences in the pending cases. Blakely might mean that the judge may not find facts that determine which Guidelines range is applicable. In Penaranda's case, the judge found that Penaranda was responsible for twenty kilograms of cocaine and 1,200 grams of heroin, and it was that finding that made the Guidelines range of 151 to 188 months applicable. Similarly, the judge's finding in Rojas's case that Rojas was responsible for 2,900 kilograms of cocaine made the Guidelines range of 324 to 405 months applicable.

On the other hand, the distinct administrative provenance of the federal Sentencing Guidelines may place them outside the ambit of the Blakely principle. Unlike the provisions at issue in Apprendi, Ring, and Blakely, the federal Sentencing Guidelines, although promulgated pursuant to statute, see 28 U.S.C. § 994(a), and "hav[ing] the force and effect of laws," Mistretta, 488 U.S. at 413 (Scalia, J., dissenting), are not themselves prescribed by statute. They are "the equivalent of legislative rules adopted by federal agencies." Stinson v. United States, 508 U.S. 36, 45 (1993) (emphasis added). The Guidelines were issued by "an

1 independent commission in the judicial branch." 28 U.S.C.
2 § 991(a). Moreover, the Supreme Court has stated that
3 "there can be no serious argument that [in establishing the
4 Sentencing Commission] Congress combined legislative and
5 judicial power within the Judicial Branch," Mistretta, 488
6 U.S. at 394 (emphasis added), and that "Congress did not
7 unconstitutionally delegate its own authority [to the
8 Commission]," id. at 395. That the Sentencing Guidelines
9 are not promulgated by Congress could prove critical to the
10 determination of whether or not they are affected by
11 Blakely.[6] Compare United States v. Booker, No. 03-4225, at
12 __, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004)
13 (Posner, J.) (holding that Blakely applies to the Sentencing
14 Guidelines), with id. at __ (Easterbrook, J., dissenting),
15 and United States v. Pineiro, No. 03-30437 (5th Cir. July
16 12, 2004) (King, J.).
17 We also note that, although Justice O'Connor, in Part

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[6]At least one district court, relying on a passage in Justice O'Connor's dissent in Blakely, has ruled that the non-statutory nature of the Guidelines is not a sufficient basis for distinguishing them from the statutory scheme at issue in Blakely. See United States v. Croxford, No. 2:02-CR-00302-PGC, 2004 WL 1521560, at *8-*9 (D. Utah, July 7, 2004). As Judge Friendly observed, however, "dissenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra's gloom more than of her accuracy." Local 1545, United B'hood. of Carpenters and Joiners v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960).

1 IV(B) of her dissenting opinion in Blakely (which was joined
2 by Justice Breyer), expressed the view that Blakely applied
3 to the federal Sentencing Guidelines, see Blakely, id. at
4 ___, 2004 WL 1402697, at *16-*17, the Court's opinion
5 expressly stated that "[t]he Federal Guidelines are not
6 before us, and we express no opinion on them," id. at ___
7 n.9, 2004 WL 1402697, at *6 n.9. Moreover, two of the
8 Justices in dissent, the Chief Justice and Justice Kennedy,
9 explicitly declined to join Part IV(B) of Justice O'Connor's
10 dissent. See id. at ___, 2004 WL 1402697, at *10.
11 Furthermore, even if Blakely applies to some aspects of
12 sentencing under the Guidelines, it is unclear whether
13 judicial fact-finding that determines the applicable
14 Guidelines range is prohibited. In Penarada's case, for
15 example, the jury's verdict of guilty on a count charging
16 conspiracy to distribute more than five kilograms of cocaine
17 and more than one kilogram of heroin subjected the defendant
18 to a sentence of life under 21 U.S.C. § 841(b)(1)(A). We
19 cannot be certain whether Blakely prevents the sentencing
20 judge from finding facts that determine which Guidelines
21 range within that statutory maximum is applicable. Cf.
22 Edwards v. United States, 523 U.S. 511, 513-14 (1998). In
23 sum, there are reasonable arguments both in favor of and
24 against the proposition that Blakely applies to the

1 Sentencing Guidelines, and reasonable questions (if it does
2 so apply) about whether it prohibits judicial fact-finding
3 that determines the applicable Guidelines sentencing range
4 within an applicable statutory maximum.[7]

5 In the usual case, a measure (even a very large
6 measure) of doctrinal uncertainty may be tolerated. But we
7 believe this is one of those “rare instances” when “the
8 proper administration and expedition of judicial business”
9 warrants certification of a question to the Supreme Court.
10 See Wisniewski, 353 U.S. at 902. Blakely not only casts a
11 pall of uncertainty on more than 220,000 federal sentences
12 imposed since Apprendi was decided, see Blakely, __ S. Ct.
13 at __ n.2, 2004 WL 1402697, at *16 n.2 (O’Connor, J.,
14 dissenting) (citing statistics from the Administrative
15 Office of the United States Courts), but it also raises the
16 prospect that many thousands of future sentences may be
17 invalidated or, alternatively, that district courts simply
18 will halt sentencing altogether pending a definitive ruling
19 by the Supreme Court. We are convinced that a prompt and
20 authoritative answer to our inquiry is needed to avoid a
21 major disruption in the administration of criminal justice

[7]We observe that the Department of Justice has taken the position that Blakely does not apply to the Sentencing Guidelines. See Memorandum from James B. Comey, Deputy Attorney General, to All Federal Prosecutors 2-3 (July 2, 2004).

1 in the federal courts -- disruption that would be unfair to
2 defendants, to crime victims, to the public, and to the
3 judges who must follow applicable constitutional
4 requirements. In thousands of federal cases presently
5 scheduled for trial, parties and judges must decide whether
6 to prove and how to charge scores of facts that could affect
7 Guideline ranges, from drug quantities, U.S.S.G. § 2D1.1, to
8 intended loss, id. § 2B1.1, from aggravating role, id.
9 § 3B1.1, to abuse of a position of trust, id. § 3B1.3, from
10 degrees of bodily injury, id. § 2A2.2(b)(3), to reasonably
11 foreseeable jointly undertaken criminal activity, id.
12 § 1B1.3(a)(1)(B). At present, there are also thousands of
13 cases in which a trial has occurred and the district court
14 is poised to impose sentence, and thousands of pending
15 appeals in which the decision whether or not to apply
16 Blakely to the Sentencing Guidelines will prove
17 determinative.

18 Until they know definitively whether Blakely is
19 applicable to the Sentencing Guidelines, district courts and
20 courts of appeals must choose initially between two options
21 (aside from suspending sentencing and/or disposition of
22 appeals therefrom altogether). First, they may conclude
23 that Blakely is not applicable and continue to apply the
24 Guidelines as they have been doing since 1987. Second, they

may conclude that Blakely applies to the Sentencing Guidelines and proceed to select one of several alternative procedural means for implementing it. Whichever conclusion turns out to be incorrect, and one of them will, thousands of cases soon will be adversely affected.[8] The result will be that thousands of defendants, sentenced in accordance with the incorrect conclusion, will have to be returned to court for resentencing, and that, if the Court rejects the Government's position that Blakely does not affect the Guidelines, the Government (at least in those cases where the time for jury fact-finding is long past and the judgment has become final) might be foreclosed from pursuing the sentence it believes to be appropriate.

Moreover, as already has become evident, once a court concludes that Blakely applies to the Guidelines, it is without guidance as to the means for achieving compliance. Among the disparate techniques that courts have selected to date (albeit only tentatively in some cases) are the following:[9] (1) imposing sentence without regard to the

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[8]With district courts being called upon to impose sentence at a rate of almost 75,000 each year, see Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-4 (2003), the potential for administrative chaos is massive and imminent.

[9]Many techniques currently being implemented by district judges in the aftermath of Blakely can be found on the Internet at Sentencing Law and Policy, at <http://sentencing.typepad.com>

1 Guidelines, obeying only the statutory maximum and minimum,
2 but "consider[ing] the Guidelines as providing useful
3 instruction on the appropriate sentence," see Croxford, 2004
4 WL 1521560, at *6-*9, *15 (holding that Guidelines are
5 unconstitutional in their entirety); (2) imposing sentence
6 following a guilty plea based solely on facts admitted by
7 the defendant, see United States v. Gonzalez, No. 03 Cr. 41
8 (DAB), 2004 WL 1444872 (S.D.N.Y. June 28, 2004); (3) re-
9 determining the applicable sentence following a guilty plea
10 by considering only facts admitted by the defendant,
11 selecting the applicable Guidelines offense level for those
12 facts, reducing that level by two for acceptance of
13 responsibility, and then sentencing the defendant to the
14 maximum of the range for the newly adjusted offense level,
15 see United States v. Shamblin, No. CRIM.A.2:03-00217, 2004
16 WL 1468561 (S.D. W. Va. June 30, 2004); (4) recalling the
17 jury that convicted the defendant to determine whether the
18 facts warranting an enhancement under the Guidelines have
19 been proven, see N.J. Jury Convicts Moors, Philadelphia
20 Inquirer, July 2, 2004; and (5) imposing sentence on each
21 count of the indictment based only on facts found by the
22 jury and then running the sentences consecutively to achieve

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(last visited July 12, 2004; copy available in Court of Appeals' file).

the maximum lawful portion of the term that the Guidelines would have required without the limitation of Apprendi, see United States v. Green, No. CR. A. 02-10054-WGY, 2004 WL 1381101, at *38-*40 (D. Mass. June 18, 2004) (ruling a few days before Blakely was decided).

Many, if not all, of these various attempts to implement Blakely ultimately may prove misguided -- or even wholly unnecessary. In the meantime, however, while these judicial approaches are being litigated, defendants, victims, and the public will be left uncertain as to what sentences are lawful.

D. Questions for Certification

To afford the Supreme Court an opportunity to adjudicate promptly the threshold issue of whether Blakely applies to the federal Sentencing Guidelines, we therefore certify the following three questions (the first pertains to both cases pending before us, the second to Penaranda's case, and the third to Rojas's case):

> 1. Does the Sixth Amendment permit a federal district judge to find facts, not reflected in a jury's verdict or admitted by a defendant, that form the basis for determining the applicable adjusted offense level under the federal Sentencing Guidelines and any upward departure from that offense level?
>
> 2. In a case where a jury has convicted a defendant of possessing with intent to distribute five kilograms or more of cocaine and one kilogram or more of heroin, does the Sixth Amendment permit

1 a federal district judge to determine, under the
2 federal Sentencing Guidelines, the quantity of
3 drugs for which the defendant is responsible and
4 upon which his base offense level and
5 corresponding sentencing range will be calculated,
6 under U.S.S.G. § 2D1.1?
7
8 3. In a case where a defendant has pled guilty to
9 conspiring to distribute five kilograms or more of
10 cocaine, does the Sixth Amendment permit a federal
11 district judge to determine, under the federal
12 Sentencing Guidelines, (a) the quantity of drugs
13 for which the defendant is responsible and upon
14 which his base offense level and corresponding
15 sentencing range will be calculated, under
16 U.S.S.G. § 2D1.1, (b) the applicability of a two-
17 level enhancement to the base offense level for
18 carrying a gun in connection with the offense,
19 under U.S.S.G. § 2D1.1(b)(1), and (c) the
20 applicability of a three-level managerial role
21 enhancement under U.S.S.G. § 3B1.1(b)?

22 We recognize that the current term of the Supreme Court
23 has ended, but we respectfully request that the Court not
24 only entertain this certification, but do so at its earliest
25 convenience, with an expedited briefing and hearing
26 schedule, cf. Dames & Moore v. Regan, 453 U.S. 654 (1981)
27 (setting case for oral argument on June 24, 1981, after
28 regularly scheduled arguments concluded, and deciding case
29 on July 2, 1981); Iran Nat'l Airlines, 453 U.S. at 919
30 (answering certified questions seventeen days after
31 certification), in order to minimize, to the extent
32 possible, what we see as an impending crisis in the
33 administration of criminal justice in the federal courts.
34 The Clerk will promptly transmit to the Supreme Court

1 this opinion and the briefs, joint appendices, and

2 records.[10]

[10] We understand that under 28 U.S.C. § 1254(2), the Supreme Court may "require the entire record to be sent up for decision of the entire matter in controversy." In ordering the records transmitted, we are seeking only to expedite consideration of the certified questions, not to suggest that the Court should decide the entirety of the matters in controversy.