CASE NO. 03-41527

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

V.

JULIETTA LEZA
Defendant - Appellant

APPEAL FROM THE
JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT, JULIETTA LEZA

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ISSUE PRESENTED

The narrow issue addressed in this Supplemental Brief is whether Leza was constitutionally entitled to have a jury decide certain additional facts that were legally essential to her sentence, and if so, did the failure to do so constitute plain error?

ARGUMENT & AUTHORITIES

DUE PROCESS AND THE RIGHT TO TRIAL BY JURY

The Sixth Amendment entitles a criminal defendant to trial by jury. The jury must determine if there is sufficient evidence, beyond a reasonable doubt, of each and every element of the crime for which the defendant is accused. *Apprendi v. New Jersey*, 530 U.S. 466, 476-477, 120 S.Ct. 2348, 2355-2356 (2000). When a jury finds a defendant guilty of a crime (or the defendant pleads guilty), the defendant is entitled to be sentenced for that crime and no other. Any result to the contrary is a violation of due process. Hand-in-hand with the crime of which the defendant is accused is the stated punishment for that crime. Consequently, "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 v. New Jersey*, 530 U.S. at 490, 120 S.Ct. at 2362-2363.

THE INHERENT NATURE OF THE SENTENCING GUIDELINES

The Sentencing Guidelines are a framework designed to deal with the "heartland" of criminal cases in federal courts. Their intent is to impose a more or less uniform sentence for those similarly situated before the law. They attempt to dictate equity within the rule of law by leavening justice with mercy based on the facts and circumstances of the particular defendant, the crime committed and the interests of society.

This framework creates parameters within which the sentencing judge may sentence the defendant. These parameters are for the most part factually specific. The role of the sentencing judge is to determine these facts and apply the appropriate Guideline. When the appropriate Guideline is not applied or the facts do not support the Guideline applied, the judge has abused his or her discretion and the sentence is subject to reversal and remand by the appellate courts.

If relief is available for an abuse of discretion, the discretion at issue must be inherently limited otherwise there could be no abuse. It is the very nature of these types of limitations that is the focus of *Blakely v. Washington*, 2004 WL 1402697, 124 S.Ct. 2531 (June 24, 2004).

BLAKELY EXPANDS THE MEANING OF STATUTORY MAXIMUM

Prior to *Blakely v. Washington*, 2004 WL 1402697, 124 S.Ct. 2531 (June 24, 2004), the Supreme Court spoke of "statutory maximums" within the context of the maximum penalty for crimes as set out in the legislative enactment for a particular crime. See fn. 16, *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S.Ct. at 2363.

The majority opinion in *Blakely* expanded the meaning of "statutory maximum" to include not only the legislative maximum for offenses falling within a given category but also the lesser sentencing ranges for specific offenses within

those categories.[1] Under the Washington Sentencing Reform Act, the legislative ten year maximum for Class B felonies is lowered to 53 months for the second degree kidnapping charge for which Blakely was convicted. Nevertheless, the trial judge found, by a preponderance of the evidence, that Blakely had engaged in "deliberate cruelty" and increased his sentence to 90 months. *Blakely v. Washington*, 124 S.Ct. at 2535. This finding and the resulting sentence complied with the permissible "upward departures" allowed by the Washington sentencing act and was well within the ten year maximum punishment for Class B Felonies.

Blakely argued "that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Blakely v. Washington*, 124 S.Ct. at 2536. The Supreme Court agreed. In reversing Blakely's sentence, the Supreme Court took issue with the manner in which the upward departure was achieved, namely by facts determined by a trial judge under a preponderance standard:

> ...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* . . . [i]n other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the

[1] Leza anticipates that the Government will argue that Leza has waived her *Blakely* objection by failing to raise it at trial or in her initial brief to this Court, all of which occurred before *Blakely* was decided. Leza's lack of clairvoyance does not preclude consideration where manifest injustice results -- particularly in *Apprendi* situations. See *United States v. Garcia*, 242 F.3d 593, 599 fn.5 (5th Cir. 2002).

> maximum he may impose *without* any additional facts. *Blakely v. Washington*, 124 S.Ct. at 2537 [emphasis in the original].

Without the additional facts found by the judge in *Blakely*, the sentence could not have exceeded 53 months. "Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed." *Blakely v. Washington*, 124 S.Ct. at 2538. The additional facts found by the judge were essential to the sentence and this judicial fact finding is impermissible:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. *Blakely v. Washington*, 124 S.Ct. at 2538 citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

DOES *BLAKELY* EXTEND TO THE FEDERAL GUIDELINES?

Like the State of Washington, our Federal system requires the jury to determine the facts concerning guilt beyond a reasonable doubt. If a guilty verdict is reached then the judge determines additional facts, not necessarily heard by the jury, within a preponderance of the evidence standard in order to apply the framework of the Guidelines.

While the Supreme Court was careful to state that "[t]he Federal Guidelines are not before us, and we express no opinion on them" [*Blakely v. Washington*, 124 S.Ct. at 2538, fn. 9] there is seemingly no difference in application or result between the Sentencing Guidelines and the guidelines contained in the Washington Sentencing Reform Act. The United States filed an amicus brief in the *Blakely* case urging the Court to reject Blakely's *Apprendi* arguments for fear that the Federal Guidelines would likewise fall. *Amicus Brief of the United States*, 2004 WL 177025 at *25-26, 29-30 (January 23, 2004). Noting that the Washington Sentencing Reform Act was enacted by the Washington legislature while the Federal Guidelines were promulgated under authority of the United States Congress but separately formulated by an administrative commission, the Government nevertheless concedes that the difference may have "little constitutional significance" particularly in light of the fact that Congress has exercised its authority previously to amend the Guidelines, the Sentencing Commission is fully accountable to Congress, and "the Guidelines are binding *legislative* rules." *Amicus Brief of the United States*, 2004 WL 177025 at *30 (January 23, 2004), emphasis added.

At least two other Circuits agree:

> We are unconvinced that the Congressional delegation of authority to the Sentencing Commission to set presumptive sentencing ranges in the first instance creates any meaningful distinction. Congress retains the

> authority to, and indeed must, ratify the Guidelines. Every Sentencing Guideline promulgated by the Commission must be ratified by Congress, which can "revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period or at any time." ... Congress has utilized this authority to shape the Guidelines directly ... In short, we agree with the Seventh Circuit that "[t]he pattern [of the Guidelines] is the same as that in the Washington statute, and it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference." *United States v. Ameline*, 376 F.3d 967, (9th Cir. July 21, 2004) quoting *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), cert. granted, _____ S.Ct. _____, 2004 WL 1713654 (Aug. 2, 2004).

The fear of the United States that the Federal Guidelines fall as a result of *Blakely* is well-founded.

While this Circuit has determined that Blakely does not *directly* discredit the Federal Guidelines, it nevertheless concludes that "[t]his court assuredly will not be the final arbiter of whether *Blakely* applies to the federal Guidelines..." *United States v. Pineiro*, ____ F.3d ____, 2004 WL 1543170 (5th Cir. July 12, 2004) at *1. Nor does this Circuit discount the possibility in the event that "an on-point en banc or Supreme Court holding" is made. *United States v. Pineiro*, ____ F.3d ____, 2004 WL 1543170 at *3. While the 11th Circuit has summarily denied all

appellants with pending cases before it the opportunity to brief the *Blakely* issue, this Circuit has not.[2]

While *Blakely* directly addresses the Washington Sentencing Reform Act, the only statutory scheme before the Court, the true holding of *Blakely* is not that the system used in Washington is unconstitutional but rather that *any* system that permits a judge to find additional facts that result in a sentence in excess of the statutory maximum, namely the maximum that the jury could have been imposed based on the facts found by that jury, violates the Sixth Amendment:

> Because the State's sentencing *procedure* did not comply with the Sixth Amendment, petitioner's sentence is invalid. *Blakely v. Washington*, 124 S.Ct. at 2538. [emphasis added].

If *Blakely* is so narrowly read as to be restricted to Washington's sentencing scheme alone and not others like it, such a reading would dictate the absurd result that the Supreme Court must pass individual constitutional judgment on each and every law of every state and territory within the country. Under such tortured logic, state imposed racial segregation could (and probably would) have survived into the 21st century.

As this Circuit so recently stated, "the binding force of a Supreme Court decision is ordinarily not limited to the particular set of facts that produces it."

[2] *United States v. Curtis*, 2004 WL 1784746 (11th Cir. August 11, 2004) - *Blakely* Motion to Supplement denied under separate order at 2004 WL 1774785 (11th Cir.)

United States v. Pineiro, ____ F.3d ____, 2004 WL 1543170 at *5. *Blakely*'s failure to specifically apply its holding to the Federal Guidelines was simply because those Guidelines were not directly before it. The Court did not say that the rationale and constitutional principles contained in its opinion were of no import to any other sentencing scheme and should be ignored. To the opposite, Justice Scalia pointedly demonstrates that the constitutional basis of *Blakely* should apply to the very statute of conviction of Leza in the instant case:

> 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 got it wrong. *Blakely v. Washington*, 124 S.Ct. at 2542.

Leza submits that the principle behind *Blakely* is clear and that Justice Scalia chose his words ever carefully. The Justices in dissent apparently agree:

> It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines ... The structure of the Federal Guidelines ... does not, as the Government half-heartedly suggests, provide any grounds for distinction. *Blakely v. Washington*, 124 S.Ct. at 2549 (dissent, Justice O'Connor joined by Justice Breyer and [in part] Justice Kennedy and Chief Justice Rehnquist).

While the repurcussions of *Blakely* may be overwhelming, the constitutional result is unquestionably clear. The Constitution does not cave under the weight of administrative logistics. If it did, *Plessey v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896) would remain the law of the land.

APPLICATION OF *BLAKELY* TO DRUG CONSPIRACY SENTENCING

It is a violation of 21 U.S.C. §841(a) to distribute a controlled substance. When the controlled substance is cocaine weighing five kilograms or more the distributor is subject to imprisonment for no less than ten years nor more than life. 21 U.S.C. §841(b)(1). A conspiracy to commit a violation of 21 U.S.C. §841 subjects the conspirator to the same penalties as that contained in 21 U.S.C. §841(b)(1). 21 U.S.C. §846.

Quantity Determinations

The Sentencing Guidelines provide a base offense level used in determining the actual sentence based on the quantity of cocaine distributed. For instance, if the quantity is determined to be between 5 and 15 kilograms, the base level is 32. On the other hand if the quantity is determined to be more than 150 kilograms the base level is 38. U.S.S.G. §2D1.1. Assuming no other adjustments, the minimum range of sentence in the first instance is between 121 and 151 months. In the second instance the sentence range is between 235 and 293 months. [U.S.S.G. Chap. 5,

Sentencing Table]. The six point base level difference nearly doubles the time of imprisonment.

While the jury determines if the facts are sufficient beyond a reasonable doubt to convict a defendant of conspiracy to distribute 5 kilograms or more of cocaine, the actual quantity of cocaine attributable to a defendant for purposes of determining the sentence range under the Guidelines is determined by the judge based upon a preponderance of the evidence.

Paradoxically the only quantity evidence before the jury at trial may be 5 kilograms, just barely sufficient to support the conviction; at the subsequent sentencing hearing the judge often hears new and different evidence, much of it otherwise inadmissible hearsay, and from this evidence the facts legally essential to the defendant's sentence are determined on a more likely than not basis. Those additional facts, which might never be admissible before a jury, may result in a determination that the quantity of cocaine attributable to a defendant is 10 or even 100 times the quantity that would have been found by the jury. The effect is that of two trials: the first before a jury with proper evidentiary safeguards under a reasonable doubt standard to determine if any crime has been committed and the second before a judge without those safeguards under a more likely than not standard to determine the extent of the crime and the appropriate sentence for that crime. The first trial is a mere warm up for the second.

The Guidelines do what Congress did not. They segregate the crime of drug distribution in general into separate offenses with different punishments based on quantity.[3] It is ludicrous to argue that a jury is incapable of determining applicable quantity, since in the first instance the jury must determine whether 5 kilograms or more are attributable to the defendant in order to convict.

In short, the Guidelines set out a statutory maximum for 5 kilograms of cocaine at 151 months. Any sentence in excess of 151 months requires the finding of some additional fact by the judge at the sentencing trial. That additional finding, not made by a jury beyond a reasonable doubt, violates *Apprendi*.

Role in the Offense

Conspiracies are generally composed of leaders and followers. A follower may have a minimal, minor or average level of participation and thus less "culpable of those involved in the conduct of the group." U.S.S.G. §3B1.2, comments 4 and 5. The Guidelines recognize this simple fact of life and seek to leaven punishment accordingly by requiring an examination of the role of the defendant be "in relation to the conduct for which he was held accountable." *United States v. Garcia*, 242 F.3d 593, 598 (5th Cir. 2001).

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[3] Many states, including Texas have legislated different offenses with different punishments based on drug quantity. See Tex. Health & Safety Code Ann. §481.112 and the corresponding Tex. Penal. Code Ann. §§12.32-12.35 making distribution of less than one gram of cocaine a state jail felony (up to 2 yrs), 1-4 grams a second degree felony (2-20 yrs), 4-200 grams a first degree felony (5-99 yrs), 200-400 grams (10-99 yrs) and 400+ grams (15-99 yrs).

Under U.S.S.G. §3B1.2 a minor participant receives a downward adjustment of 2 to the base level while a minimal participant receives a downward adjustment of 4. In drug offenses, any such "mitigating role" results in an *automatic* decrease in the base level to no more than 30, regardless of the quantity involved. U.S.S.G. §2D1.1(a)(3). Hence a minor participant in a cocaine conspiracy involving 200 kilograms of cocaine would have a base level of 30 rather than 38. The maximum imprisonment under the Guidelines for a base level of 30 is 121 months. The maximum imprisonment under the Guidelines for a base level of 38 on the other hand is 293 months. [U.S.S.G. Chap. 5, Sentencing Table].

Like the quantity determination, the mitigating role of the defendant is found by the judge at the sentencing trial, often based on otherwise inadmissible hearsay, under a more likely than not standard. The issue is never presented to the jury even though the inherent nature of the determination is factually intensive:

> The commentary to §3B1.2 provides that the determination of a defendant's status as a minor participant is "heavily dependent upon the facts of the particular case." The determination of participant status is a *complex fact question*, which requires the court to consider the broad context of the defendant's crime. *United States v. Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991) emphasis added.

Like the issue as to ultimate quantity, the facts as to the participant's role in the conspiracy, legally essential to the defendant's sentence, are not determined by the jury under a reasonable doubt standard and *Apprendi* is violated.

LEZA'S SENTENCING

The jury convicted Leza of a single count of participating in a conspiracy that distributed 5 kilograms or more of cocaine. The jury determined, however, that Leza was *not guilty* of two additional counts: one of distribution of 164 kilograms of cocaine and the other of 65 kilograms of cocaine. The jury struggled with Leza's participation level in the conspiracy, at one time asking in Jury Note Number 3: "How can a person be a member of [a] conspiracy w/out knowing all detail of a scheme & a mere presence at a scene does not thereby become a conspirator." [R: v. 1, p. 35, jury note 3; v.5, p. 92].

After her conviction by the jury on the single count of conspiring to distribute 5 kilograms or more of cocaine, Leza voluntarily debriefed with the FBI. That debriefing was recorded and a transcription of the interview introduced at the sentencing. [R. v. 7, Sealed Sentencing, Govt. Ex. 1]. The only testifying witness at sentencing other than Leza was Bill Cassity, an FBI agent who participated in the debriefing. [R. v. 7, pp. 5-6, Sealed Sentencing]. Leza admitted in her interview that at Felipe's request she delivered three kilograms of cocaine to Richard Gutierrez. [R. v. 7, pp. 6, 8, 25-26, Sealed Sentencing]. All parties agreed that Leza

had admitted in the debriefing to having introduced Felipe Alvarez, the leader of the conspiracy, to a person named "Weedy" in Mexico, an acquaintance of Leza's ex-husband, who in turn introduced Felipe and Leza to a person named "Tatch" also in Mexico. [R. v. 7, pp. 8-10, Sealed Sentencing]. Leza was present in the car while Felipe and Tatch met outside and did not participate in the conversation. [R. v. 7, pp. 16-17, Sealed Sentencing]. Felipe and his co-conspirators had been distributing cocaine "in a substantial way" and "on a large scale" for several years prior to this introduction. [R. v. 7, pp. 17-19, Sealed Sentencing]. The reported source for the cocaine prior to Tatch was Felipe's cousin and at least one of his brothers. [R. v. 7, p. 23, Sealed Sentencing]. From this introduction to Tatch, Felipe acquired either 45 or 50 kilograms of cocaine. [R. v. 7, pp. 8-9, Sealed Sentencing]. The cocaine was apparently of low grade, known as "re-con" or "re-conditioned". [R. v. 7, pp. 10-11, Sealed Sentencing]. Apparently Felipe requested Leza to contact Tatch and advise Tatch of the problem. She was reluctant to do so. [R. v. 7, pp. 11, 17, Sealed Sentencing]. Felipe then advised Tatch and apparently restructured the original deal resulting in a total of 90 kilograms for both transactions. [R. v. 7, p. 17, Sealed Sentencing]. The transcript of the debriefing interview as to many of these points is unclear; the evidence at sentencing for the most part consists of Agent Cassity's memory of what he believed Leza said in the interview together with other information from his investigation -- a memory that

he admits is not necessarily accurate or complete. [R. v. 7, pp. 10, 12, 15, 19-20, 23, 30, Sealed Sentencing].

During the sentencing, the Government recommended to the court that Leza receive the "safety valve" resulting in a 2 level reduction. [R. v. 7, p. 16, Sealed Sentencing]. Leza argued both in her objections and at sentencing that she should have been entitled to a further reduction as a minor participant in the conspiracy. These were overruled by the court without explanation. [R. v. 7, p. 31, Sealed Sentencing].

The court without explanation found a total offense level of 38, apparently finding that in excess of 150 kilograms of cocaine was attributable to Leza under U.S.S.G. §2D1.1. The court applied the safety valve reducing her base level to 36 and then imposed a sentence of 188 months. [R. v. 7, pp. 39-40, Sealed Sentencing].

THE *BLAKELY* RESULT IN LEZA'S CASE

The additional facts found by the judge at sentencing as to the quantity of cocaine attributable to Leza and her participation in the conspiracy, on their face, violate *Apprendi*. Notwithstanding, does this violation constitute plain error? Leza submits that it does.

Taking the limited "facts" proferred at sentencing in the light most favorable to the Government, either 48, 53 or 93 kilograms of cocaine are directly

attributable to Leza. The 3 kilograms she delivered to Richard Gutierrez are not in dispute. The uncertainty exists in the amount that resulted in the first transaction between Felipe and Tatch. The Government at one time refers to the first transaction and the replacement transaction as being a combined 90 kilograms, apparently broken out 45/45. [R. v. 7, p. 8, Sealed Sentencing]. Is Leza responsible for every subsequent transaction between Felipe and Tatch simply by way of her initial introduction? If so, the evidence still only supports a total of 90 kilograms. Added to the three kilograms admitted by Leza, the total attributable is less than 100 kilograms. This would yield a base level of 36, not 38 as found by the sentencing judge. With the safety valve reduction, Leza's base level would then fall to 34. On the other hand if only the first transaction is attributable to Leza, the total quantity at issue falls to 48 kilograms, placing her at a base level of 34. With the safety valve reduction, her base level falls to 32.

The judge at sentencing found, without explanation, that Leza was an average participant in the conspiracy and did not qualify for a reduction under U.S.S.G. §3B1.2. The question is not what Leza's role was vis-a-vis her other co-conspirators but whether her "involvement is comparable to that of an 'average participant.'" *United States v. Garcia*, 242 F.3d at 598. Leza's involvement, as described partly at trial and partly at sentencing was (a) she was present when drug money was counted and at a subsequent lunch conversation immediately following

that count where drugs were discussed between Felipe and another co-conspirator, (b) she introduced Felipe to a friend of a friend of her ex-husband as a cocaine source and (c) she transported 3 kilograms on one occasion at the request of Felipe. For a multi-year conspiracy involving in excess of 1800 kilograms of cocaine, her involvement was somewhat short of average, it was insignificant.

The jury struggled with whether Leza was even a member of the conspiracy. Yet apparently more than 150 kilograms of cocaine were attributed to Leza at sentencing, despite her lack of actual involvement. This Circuit recognizes that "when a sentence is based on an activity in which a defendant was actually involved, §3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." *United States v. Atanda,* 60 F.3d 196, 199 (5th Cir. 1995). By corollary, when the sentence is not based directly on such activity, the reduction is required.

Based on its question to the court during trial, it is probable that this jury, under a reasonable doubt standard, and after weighing all of the evidence including that evidence at sentencing that may have been otherwise inadmissible, would have found Leza's role to be at most that of a minor participant. This finding alone, regardless of the quantity of cocaine attributed to her would have reduced her base level under the Guidelines to no more than 30 not including the safety valve

reduction. Her sentence would have been capped at 121 months. Instead she received 188 months.

PLAIN ERROR

Based on the Government's opposition to Leza's Request for Supplemental Briefing Leza anticipates that the Government will contend that by failing to make an *Apprendi* based objection at trial, Leza's *Blakely* claims must be reviewed under plain error. [United States' Response in Opposition at pp. 3-4]. So be it.

The test for plain error requires that an appellant demonstrate that (a) error occurred, (b) the error was "plain", (c) the error affected "substantial rights" and (d) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770 (1993).

If the ruling in *Blakely* that a judge cannot find additional facts that result in a sentence in excess of the statutory maximum, namely the maximum that the jury could have been imposed based on the facts found by that jury, is a constitutional rule and not solely limited to the Washington Sentencing Reform Act as Leza contends, then Leza's sentence is error.

But is the error plain? Leza anticipates that the Government will argue, with some authority, that it is not. First, a panel of this Circuit has stated in a footnote that the ruling in *Pineiro* forecloses plain error. *United States v. Scroggins*, ___ F.3d ____, 2004 WL 1658487 fn. 62 (5th Cir. July 26, 2004). Though not

explicitly stated, the footnote implies that because *Pineiro* "did not invalidate the Federal Sentencing Guidelines" there can be no error, much less plain error. Yet *Pineiro* by its language is a stop-gap panel opinion, holding that *Blakely* does not apply until the Supreme Court or this Circuit, *en banc*, says it does. Presumedly, if the Supreme Court or this Circuit, *en banc*, says *Blakely* does apply, the *Scroggins* footnote is no longer relevant to error, much less plain error.[4]

Second, as this supplemental brief was in final preparation, the 11th Circuit issued its opinion in *United States v. Duncan*, ___ F.3d ___, 2004 WL 1838020 (11th Cir. August 15, 2004). Opining that because the circuits have split on the application of *Blakely* to the Sentencing Guidelines, the error, if any, cannot be said to be plain:

> In this Circuit, we follow the rule that "where neither the Supreme Court nor this Court has ever resolved an issue, and other circuits are split on it," the error is not ""plain" or "obvious." *United States v. Duncan*, ___ F.3d ___, 2004 WL 1838020 (11th Cir. August 15, 2004) citing *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) and *United States v. Humphrey*, 164 F.3d 585, 587 (11th Cir. 1999).

The initial problem with the holding in *Duncan* is the conclusion that the Supreme Court has not resolved the issue. The 7th and 9th Circuits believe it has and only through limiting *Blakely* to the particular set of facts that produced *Blakely* and

[4] The appellant in *Pineiro* did not move for rehearing (panel or *en banc*) and instead has petitioned for certiorari to the Supreme Court (S.Ct. Docket No. 04-5263). Conference has been

ignoring the import of its ultimate constitutional holding does the *Duncan* assumption hold water. Aside from this issue however, *Duncan*'s reliance on *Aguillard* and *Humphrey* is misplaced.

Aguillard involved the propriety of taking the availability of rehabilitative programs into account when determining the length of a sentence upon revocation of supervised release. Finding that only six circuits had ever addressed the issue and that *all six* had previously allowed such action, the 11th Circuit determined that any error in allowing such consideration was not plain. *United States v. Aguillard*, 217 F.3d at 1321.

Humphrey involved a guilty plea and a consecutive sentence issue where the trial court failed to inform the defendant at the time of the plea that the sentences would be consecutive. The court concluded that since there was no Supreme Court case at the time addressing whether a defendant should be so informed and determining that other circuits that found such information was required were distinguishable, or at best split on the issue, the error was not plain. *United States v. Humphrey*, 164 F.3d at 588. Unlike the defendant in *Humphrey*, Leza's situation cannot be readily distinguished from *Blakely, Ameline* or *Booker*.

More importantly *Humphrey* specifically noted (consistent with the holding in *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544 (1997)) that where

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set for September 27, 2004.

definitions change or statutes are later ruled unconstitutional after trial but during the pendency of an appeal, the error is plain error. *United States v. Humphrey*, 164 F.3d at 588, fn 5. *Humphrey* in effect holds that if the Supreme Court has addressed the issue, the error is plain. The circle is complete. If *Blakely* applies to the Guidelines, there is plain error. If it does not, there is no error, much less plain error.

The "plain error" analysis in *Duncan* is simply a mislabelled "error" analysis. The opinion first assumes that *Blakely*'s application is uncertain. It then attempts to resolve that uncertainty by reviewing the opinions of other circuits. Finding that the circuits are in disagreement it must therefore conclude that the error is uncertain. If the error is uncertain then the error cannot be plain. *Duncan* ultimately stands for the proposition that the 11th Circuit is unsure if *Blakely* applies to the Guidelines.

The 9th Circuit has no such uncertainty. Blakely applies and plain error is evident:

> ... in determining whether the error was plain, the [Supreme] Court has explained that it is sufficient for the error to be clear under the law as it exists at the time of appeal ... It is clear after Blakely that increasing Ameline's punishment based on facts not admitted by him or determined by a jury beyond a reasonable doubt (or by the district judge with a jury waived) was clearly contrary to his Sixth Amendment jury right. *United States v. Ameline*, 376 F.3d 967, (9th Cir. July 21, 2004) citing *Johnson v. United States*, 520 U.S. at 468.

The violation of Leza's constitutional rights is plain. It affected the outcome of the proceeding, namely her sentence, adding over five years unwarranted imprisonment. Such an outcome must, by logic, if not by definition, seriously affect the fairness, integrity or public reputation of judicial proceedings. Justice has been undone.

CONCLUSION & RELIEF SOUGHT

Leza unquestionably demonstrates that her constitutional rights were violated by the manner in which her sentencing was imposed under the Guidelines and that such violation constitutes plain error.

In addition to Leza's previous request for relief, Leza supplementally requests this Court to reverse the judgment and remand the case for re-consideration in a manner consistent with her rights under *Apprendi*.

Respectfully submitted,

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JULIETTA LEZA

CERTIFICATE OF SERVICE & FILING

I hereby certify that a true and correct copy of Appellant's Supplemental Brief was served on James Lee Turner, Assistant United States Attorney by mailing a paper copy of same and an electronic copy in PDF format, United States Mail, First Class, postage prepaid addressed to P.O. Box 61129, Houston, Texas 77208-1129 and to Julietta Leza #25870179, Appellant by mailing a paper copy of same, United States Mail, First Class, postage prepaid addressed to Federal Medical Center, Carswell, P.O. Box 27137, Fort Worth, Texas 76127 on this the 19th day of August, 2004.

I further certify that pursuant to F.R.A.P. 25(d)(2) Appellant's Brief was filed with the Clerk (paper and PDF) by Federal Express on the 19th day of August, 2004.

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Walter A. Boyd, III

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 5,451 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in 14 point Times New Roman font.

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WALTER A. BOYD, III
August 19, 2004