UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES	)	
	)	Cr. No. 02-145-1-B
v.	)	
R. SCOTT BROOKS	)	

DEFENDANT'S MEMORANDUM REGARDING THE EFFECT OF *BLAKELY v. WASHINGTON* ON THE SENTENCING IN THIS CASE

The defendant R. Scott Brooks (Mr. Brooks) submits this memorandum to assist the Court in determining the effect of the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004) on the sentencing in this case, and in support of his motion that the Court impose that sentence to which he has a legal right under the Guidelines based on his offense of conviction pursuant to Blakely.

BACKGROUND

1. The Plea Agreement

On August 11, 2003, the government and Mr. Brooks signed a Plea Agreement. In it, Mr. Brooks agreed to plead guilty to Counts 3 and 4 of a Superseding Indictment alleging violations of 18 U.S.C. § 1007, and the government agreed that this satisfied all criminal liability as a result of Mr. Brooks' participation in the conduct which formed the basis of the Superseding Indictment and that it would dismiss the remaining three counts. See Plea Agreement at ¶¶ 1, 11. The Plea Agreement stated that the government would have to prove the statutory elements of the offenses beyond a reasonable doubt to a jury, enumerated those elements, and stated that by pleading guilty Mr. Brooks would waive his right to such a trial. Id. at ¶¶ 2, 7.

The parties further agreed that the November 1, 1995 United States Sentencing Guidelines ("Guidelines") applied, id. at ¶ 1(C)(1), that the Court was required to consider any applicable Sentencing Guidelines, id. at ¶ 4, that the loss under U.S.S.G. § 2F1.1(b)(1) was more than $200,000 but not more than $800,000, id. at ¶ 1(C)(2), and that the defendant was free to argue for any downward departures he reasonably believed were applicable. Id. at ¶ 1(C)(7). When the Plea Agreement was signed, the defendant contemplated moving for downward departure on grounds of diminished capacity and that the loss determined under the Guidelines overstated the seriousness of the offense.[1] The Plea Agreement made no provision for upward departure, and made no mention of an adjustment for more than minimal planning under U.S.S.G. § 2F1.1(b)(2).

2. The Guilty Plea

On October 20, 2003, Mr. Brooks pled guilty to the statutory elements of Counts 3 and 4 of the Superseding Indictment. See 10/20/03 Tr. at 26-28. The Superseding Indictment did not allege a loss amount or more than minimal planning as defined in U.S.S.G. § 2F1.1, nor did Mr. Brooks stipulate or agree to such facts during the change of plea hearing. The Court informed Mr. Brooks that he was waiving his right to a jury trial on the offenses to which he was pleading guilty, id. at 35-36, that the statutory maximum

[1]Prior to entering into the Plea Agreement, counsel was informed that the FDIC had settled with other borrowers for a small percentage of their available assets. Subsequent to the plea, defense counsel obtained from the government FDIC policy manuals and documentation of a settlement between FDIC and other borrowers. Based on these materials, an accounting expert prepared a loss calculation. We provided this to the Probation Officer, with a statement that by doing so we were not waiving Mr. Brooks' rights under Blakely, and that our position was that Mr. Brooks' sentence should not include any enhancement for loss.

for those offenses was thirty years, and that he would be sentenced by the Court under the Guidelines.[2] Id. at 34-35, 36.

3. The Blakely Decision

On June 24, 2004, the Supreme Court decided Blakely, holding as follows:

> 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 facts reflected in the jury verdict or admitted by the defendant*. [citing Ring v. Arizona, 536 U.S. 584, 602 (2002); Harris v. United States, 536 U.S. 545, 563 (2002); Apprendi v. New Jersey, 530 U.S. 466, 483, 488 (2000)] 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to punishment," Bishop, supra, § 87, at 55, and the judge exceeds his proper authority.

Id. at 2537 (emphasis in original).

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[2] In taking a guilty plea, a court must thoroughly and specifically discuss with the defendant the rights he is waiving. See, e.g., Boykin v. Alabama, 395 U.S. 238, 243 (1969); United States v. Teeter, 257 F.3d 14, 24 & n.7 (1st Cir. 2001). Here, as in Blakely, the defendant was advised of the statutory maximum, see Exh. A, Blakely Tr. at 33, and neither counsel nor the Court explained to the defendant that the rights he was waiving included a jury finding on sentencing facts by proof beyond a reasonable doubt. To the extent the government may claim that Mr. Brooks waived any rights under Blakely by being advised that the Court would be sentencing him under the Guidelines, a defendant cannot knowingly and voluntarily waive rights neither he nor the Court knew he had. See Exh. B, Memorandum and Order, United States v. Moran, No. 02-10136-REK (D. Mass. July 8, 2004) (declining to hold the defendant to pre-Blakely agreement that judge would find a fact requiring a 20-year mandatory minimum because the defendant could not waive a right he did not know existed). Cf. United States v. Ameline, 376 F.3d 967, 983 n.18 (9th Cir. 2004) (defendant not held to quantity admitted in colloquy when he "mistakenly thought the burden of proof . . . was preponderance of the evidence."); United States v. Agett, 327 F. Supp.2d 899, 903 n.2 (E.D. Tenn. 2004) ("It is one thing . . . to agree that certain facts exist by a preponderance of the evidence while it is quite another to suggest that a defendant would also agree that those same facts could be proven . . . to a jury beyond a reasonable doubt."); United States v. Terrell, 2004 WL 1661018 at *6 (D. Neb. July 22, 2004) (rejecting government's argument that plea agreement precluded objecting to enhancements "defendant could not have knowingly waived rights that neither he nor this court knew he had before the Blakely decision.").

Under Blakely, the Fifth and Sixth Amendments would be violated if the Court relied on a loss amount or more than minimal planning to increase the maximum sentence to which Mr. Brooks has a legal right under the Guidelines by virtue of his guilty plea, because those facts were neither charged in the indictment nor stipulated to by him.[3] E.g., United States v. Booker, 375 F.3d 508, 514 (7th Cir. 2004); United States v. Croxford, 324 F.Supp.2d 1230, 1239-42 (D. Utah 2004).

4. The Swan Sentencing

In United States v. Swan, No. CR. 03-36-01-B (July 21, 2004), the prosecutors argued that the Guidelines were non-severable because applying Blakely (in that case) would create a "one-way street" in which the defendant would benefit from downward adjustments but would avoid upward adjustments, which Congress would not have intended (Swan Sentencing Tr. at 28-29), but that in compliance with the instruction of the Department of Justice, "henceforth, all formerly specific offense characteristics, upward adjustments will be put in indictments and will be submitted to a grand jury [and the Court] will be bound by the jury's verdict on those decisions using the guidelines." (Id. at 39-41) The government was "unfamiliar with the legislative history" of the Sentencing Reform Act. (Id. at 29)

This Court recognized that the government could avoid Blakely problems by charging the facts and asking the jury to find them beyond a reasonable doubt in cases entering the system after Bakely, but that in cases "where the prosecutor was not on notice of the Blakely requirements," the defendant "can be sentenced under an

[3]Although restitution is punishment, United States v. Gilberg, 75 F.3d 15, 21 (1st Cir. 1996), we do not believe that restitution under 18 U.S.C. § 3663 would violate Blakely or the *ex post facto* clause because (unlike 18 U.S.C. § 3663A) it does not make restitution mandatory and the law was in effect at the time of the offense.

indeterminate regime." (Id. at 34-35) The Court agreed with the government that applying the Guidelines in the latter case may result in sentences that were unnecessarily lenient (Id. at 30) and therefore it would not sentence Mr. Swan to the sentence to which he had a legal right under the Guidelines based on his offense of conviction, but would not apply the Guidelines at all and would sentence within the statutorily prescribed maximum sentence, using the Guidelines as guides. (Id. at 44)

SUMMARY OF ARGUMENT

There are compelling reasons, which were not argued or considered in Swan or other cases reaching the same conclusion, that Mr. Brooks may not be sentenced indeterminately but must be sentenced under the Guidelines in accordance with Blakely, even if that means his sentence may not be increased beyond the base offense level.

First, the defendant has a right to fair notice under the Due Process Clause not to be sentenced under a regime that retroactively increases the range of punishment or lessens evidentiary protections or the burden of proof. Because indeterminate sentencing does both, the failure of fair notice is dispositive, regardless of the outcome of the severability question.

Second, the government has no constitutional right to notice. To the extent notice to the government is a consideration, it militates in favor of applying the Guidelines in strict compliance with Blakely in this case. Since Apprendi v. New Jersey, 530 U.S. 466 (2000) was decided, the government has been on notice and it was reasonably foreseeable to the government that the Apprendi rule would be applied to sentencing guidelines. But the government chose to vigorously contend that it did not. Application of the maximum sentence permitted by the Constitution was the remedy in cases in this anomalous posture

following Apprendi, and is simply what the Constitution requires. The argument the Department of Justice now instructs prosecutors to make -- that indeterminate sentencing should be applied to impose a sentence that "conforms" to the Guidelines when the government would otherwise lose the opportunity to obtain an upward adjustment -- is a blatant evasion of Blakely.

Third, the legislative history, purposes and structure of the Sentencing Reform Act make clear that Congress would never have chosen indeterminate sentencing, in some or all cases, over the Sentencing Reform Act with Guidelines subject to the rights of indictment, jury trial and proof beyond a reasonable doubt. As the government argued and the Court recognized in Swan, the government is able to charge and present sentencing facts to a jury or negotiate stipulations as Blakely requires, and is doing so now. Thus, the Guidelines are fully operative as a law, and advance congressional goals of uniformity, proportionality, certainty and fairness far better than the previous indeterminate sentencing regime. If the inability to impose upward adjustments in a temporary subset of cases creates any disparity, it is disparity that is *warranted* by the Constitution.

Fourth, Congress would never have enacted the post-Blakely indeterminate sentencing option because it is a hodgepodge of conflicting sentencing policies that creates more disparity and unfairness than what existed twenty years ago. By not only eliminating the Guidelines and appellate review, but also parole, there is no mechanism at all to correct for disparity or unfairness. A dual system, in which some defendants are sentenced indeterminately and others are sentenced under sentencing guidelines, compounds the disparity already inherent in indeterminate sentencing, discriminates

arbitrarily, and burdens the exercise of constitutional rights. Finally, the Guidelines should not be discarded without also striking down other significant provisions of the Sentencing Reform Act that are mutually dependent parts of the determinate sentencing scheme Congress enacted. Indeterminate sentencing eliminates the Guidelines cap and appellate review, but a court cannot revive parole, extensive good time credit, or its own authority to correct a sentence without government motion. Supervised release, restitution, and fines are called into question. For the defendant and the system, this is the worst of both worlds.

Fifth, although the Blakely decision did not explicitly rule on severability, it strongly indicates that the Supreme Court will hold that the unconstitutional procedures are severable from the Guidelines and the Sentencing Reform Act.

ARGUMENT

I. The Fair Notice Component of the Due Process Clause Precludes Indeterminate Sentencing in this Case.

Under the fair notice component of the Due Process Clause, a court may not construe a statute in a manner that the legislature would be prohibited from doing under the *Ex Post Facto* Clause. See Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964) ("If a . . . legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a . . . [c]ourt is barred from achieving precisely the same result by judicial construction."). Congress would be prohibited by the *Ex Post Facto* Clause from enacting a sentencing law that retroactively increased the sentencing range for the same conduct, or that required less or different evidence or lessened the burden of proof.

Indeterminate sentencing does both, and therefore is prohibited by the fair notice component of the Due Process Clause.[4]

Through the prohibition against *ex post facto* laws, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981). The law in effect when Mr. Brooks committed the offense mandated that the courts apply the Guidelines. See 18 U.S.C. 3553(b). Under the Guidelines, courts may not upwardly depart from the applicable Guideline range unless they find an aggravating circumstance of a kind or to a degree not adequately considered by the Sentencing Commission in formulating the Guidelines. See 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. The court must state its reasons for imposition of the particular sentence, including its reasons for any upward departure. See 18 U.S.C. § 3553(c). The defendant has a right to appeal the sentence on the basis that it was imposed in violation of the law, resulted from an incorrect application of the Guidelines, or was greater than the maximum established in the guideline range. See 18 U.S.C. § 3742(a), (e).

Furthermore, in contrast to the "informal fashion" in which factors relevant to sentencing were determined in the pre-guidelines indeterminate sentencing regime, "[m]ore formality" is required in sentencing under the Guidelines in order to ensure that the sentencing process is "accurate and fair." U.S.S.G. §6A1.3, comment. Thus, "disputes about sentencing factors must be resolved with care." Id. The defendant receives notice of all potentially applicable Guidelines factors and grounds for upward departure, the court must hold a hearing to resolve disputed factors at which evidence

[4] None of the courts to rule on severability one way or the other has addressed this argument.

may be presented and witness statements must be produced, the information presented must have, at minimum, "sufficient indicia of reliability to support its probable accuracy," and the court must make findings for each matter controverted. See U.S.S.G. § 6A1.3(a), (b); Fed. R. Crim. P. 32(d), (e), (h), (i).

Under indeterminate sentencing, the judge may impose a sentence up to the statutory maximum for the offense of conviction without complying with standards for upward adjustment or departure, stating reasons, or being subject to appellate review. In doing so, the court can informally consider information that is not subject to any standard of reliability and can consider facts the Guidelines would make irrelevant. See Blakely, 124 S. Ct. at 2538; Dorszynski v. United States, 418 U.S. 424, 431 (1974); Croxford, 324 F. Supp.2d at 1247-48.

Indeterminate sentencing in this case would violate fair notice because it would replace the applicable Guideline range with the thirty-year statutory maximum for 18 U.S.C. § 1007. Because determinate sentencing schemes have the force of law, defendants subject to them are entitled to a sentence no greater than the correctly applied guideline range. That much is plain in Blakely,[5] as well as prior decisions of the Supreme Court. For example, in United States v. R.L.C., 503 U.S. 291 (1992), the Court found that because the "proper application of a statutorily mandated Guideline . . . would bar imposition of a sentence up to the limit [of the statutory maximum for the offense of conviction], and an unwarranted upward departure from the proper Guideline range would be reversible error," the "maximum term of imprisonment that would be

[5] See Blakely, 124 S. Ct. at 2540 (defendants under Washington's determinate scheme have a "legal *right*" and are "*entitled* to" that sentence) (emphasis in original), id. at 2538 ("The 'maximum sentence' is no more 10 years here than it was 20 years in Apprendi . . . or death in Ring."); id. at 2549 ("The Guidelines have the force of law.") (O'Connor, J., dissenting).

authorized if the juvenile had been tried and convicted as an adult" was not the statutory maximum, but the "maximum length of sentence to which a similarly situated adult would be subject if . . . sentenced under the statute requiring application of the Guidelines, § 3553(b)." Id. at 297-98, 306. See also Glover v. United States, 531 U.S. 198, 203-04 (2001) ("any amount of actual jail time . . . under a determinate system of constrained discretion such as the Sentencing Guidelines" that results from counsel's deficient performance constitutes prejudice under Strickland).

The same principle applies for *ex post facto* and fair notice purposes. In Miller v. Florida, 482 U.S. 423 (1987), the defendant was sentenced to seven years under Florida's sentencing guidelines. When he committed the offense, the guidelines provided for a presumptive range of 3 ½ to 4 ½ years based on the composite score for the offense and other factors. Any sentence above the presumptive range required clear and convincing reasons, in writing, that were credible, proved beyond a reasonable doubt, and not a factor already weighed in arriving at the presumptive sentence, and such a sentence was subject to appellate review. Under new guidelines, which the court applied at sentencing, the presumptive range was 5 ½ to 7 years. Id. at 424-27. The statutory maximum was unchanged, but Florida's guidelines, like the Federal Sentencing Guidelines, had the "force and effect of law." Id. at 435. The Court held that the defendant did not receive fair notice because the law in effect at the time he acted did not warn him of the increase in the range. Id. at 431. This substantially disadvantaged the defendant because to impose a 7-year sentence under the old law, the judge "would have had to provide clear and convincing reasons in writing for the departure, on facts proved beyond a reasonable doubt, and his determination would be reviewable on appeal," while in contrast, "because

a 7-year sentence is within the presumptive range under the revised law, the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable." Id. at 432-33, 435.

The Miller Court rejected the state's argument that the defendant had to show that he would have received a shorter sentence under the old law, stating that "one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." Id. at 432. In doing so, it cited Lindsey v. Washington, 301 U.S. 397, 401-02 (1937), where the Court stated:

> It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause *looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed*. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the material disadvantage of the wrongdoer. It is for this reason that an increase in the *possible penalty* is *ex post facto*, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier.

Id. at 401 (emphasis supplied) (internal citations omitted).

In Weaver v. Graham, 450 U.S. 24 (1981), when the defendant committed the offense, there was a certain formula in place for deducting gain time from prison sentences. Three years after he committed the offense and two years after he began serving his fifteen-year sentence, the formula was changed in a manner that could increase the length of his sentence by over two years. Id. at 25-27. This violated the *Ex Post Facto* Clause. It made no difference that the defendant did not have an enforceable right to a particular amount of gain time, because "[c]ritical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice

and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Id. at 30. Nor did it matter that the new statute provided for a discretionary increase in gain time, id. at 34-36, because the "inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." Id. at 33. See also Garner v. Jones, 529 U.S. 244, 251, 253 (2000) (any change in a sentencing law or regulation that "creates a significant risk of prolonging" incarceration violates the *Ex Post Facto* Clause, and the existence of discretion "does not displace the protections of the *Ex Post Facto* Clause.").

Accordingly, retroactively increasing the potential penalty from the applicable Guidelines range to the statutorily prescribed maximum in this case would violate the fair notice component of the Due Process Clause. Indeterminate sentencing would also violate fair notice by retroactively removing any guarantee of accuracy and fairness in sentencing, as well as any recourse on appeal. See Carmell v. Texas, 529 U.S. 513, 522-553 (2000); Calder v. Bull, 3 U.S. 386, 390 (1798).

The first court to use indeterminate sentencing after Blakely declared that the Guidelines are "out of play," so the "only 'legally essential' fact is the fact of conviction," thus permitting use of the statutory maximum for the offense of conviction and the use of indeterminate sentencing up to that maximum. Croxford, 324 F. Supp.2d at 1247. But the Guidelines are not "out of play" for *ex post facto* and fair notice purposes, for which the relevant date is the date of the offense. See Weaver, 450 U.S. at 31. Retroactively making the fact of conviction the only legally essential fact retroactively increases the sentencing range, just as the increase in primary offense points did in Miller and the decrease in gain time did in Weaver.

Under the fair notice component of the Due Process Clause, Mr. Brooks cannot be sentenced under an indeterminate regime, when a Guidelines regime was in place when he committed the offense. Mr. Brooks therefore is entitled to be sentenced under the Guidelines and to receive a sentence no greater than one within the applicable Guideline range. After Blakely, the only permissible Guideline range is that corresponding to the base offense level for the offense of conviction. See Blakely, 124 S. Ct. at 2540 (defendants subject to determinate sentencing scheme have a "legal *right*" and are "*entitled* to" that maximum sentence).

II. To the Extent Notice to the Government is a Consideration, it Militates in Favor of Applying the Guidelines in Strict Compliance with Blakely in this Case.

The government has no constitutional right to notice. As several courts in Blakely's wake have pointed out, constitutional rights belong to the defendant, not the government, and if an enhancement cannot be applied in a case in this anomalous posture because of Blakely, that is simply what the Constitution requires. See United States v. Montgomery, 324 F.Supp.2d 1266, 1272 (D. Utah 2004) ("even if the option adopted by the Court were perceived to disadvantage the government, the Court would note that the protections mandated by the Sixth Amendment are for the benefit of the individual, not the government"); United States v. Hankins, 2004 WL 1690128, *9 n.5 (D. Mont. July 29, 2004) ("However, fairness is a relative notion and any suggestion that judges can decide to ignore legislative schemes because of unfairness to one party or another to the litigation is fraught with structural problems."); United States v. Toro, 2004 WL 1575325 at *5 (D. Conn. July 8, 2004) ("Whether the sentence is just and sufficiently punitive is the result of Congress's scheme. Enforcing a defendant's rights is the requirement of the

Constitution."); United States v. Shamblin, 323 F. Supp.2d 757, 768 (S.D. W. Va. 2004) ("At 240 months, Shamblin's sentence represented much that is wrong about the Sentencing Guidelines; at 12 months, it is almost certainly inadequate. My duty, however, is to apply the law as I find it."); United States v. Swan, 327 F. Supp.2d 1068, 1072 (D. Neb. 2004) ("The protections mandated by the Sixth Amendment are for the benefit of the individual, not the government. . . . Reliance on 'unfairness to the government' as a rationale is akin to the assertion that it is not fair to require the government to prove every element of its case.").

In the period following Apprendi, prosecutors charged drug quantity and type and either obtained stipulations or tried them to a jury. In those cases in the same posture as this case, where the government had not charged drug quantity and type, the courts invalidated that part of the sentence that exceeded the maximum that could constitutionally be imposed under Apprendi. See United States v. Perez-Ruiz, 353 F.3d 1, 19-20 (1st Cir. 2003); United States v. Collazo-Aponte, 281 F.3d 320, 324 (1st Cir. 2002); United States v. Thomas, 274 F.3d 655, 672-73 (2d Cir. 2001) (en banc); United States v. McCulligan, 256 F.3d 97, 106-07 (3d Cir. 2001); United States v. Villarreal, 253 F.3d 831, 839 (5th Cir. 2001); United States v. Barnes, 251 F.3d 251, 261 (1st Cir. 2001). Then as now, that this resulted in the loss of some upward adjustments in some cases was simply what the Constitution required.

To the extent notice to the government is a consideration, it militates in favor of applying the Guidelines in strict compliance with Blakely in this case. Since the Supreme Court decided Apprendi on June 26, 2000, and earlier, see Jones v. United States, 119 S. Ct. 1215, 1224 n.6 (1999), the government was on notice and it was

reasonably foreseeable to the government that sentencing guidelines would be subject to indictment and proof to a jury beyond a reasonable doubt. The government, however, vigorously contended otherwise and convinced the lower courts that it was right. The Supreme Court has now informed us that this position was clearly wrong. See Blakely, 124 S. Ct. at 2537 ("*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 facts reflected in the jury verdict or admitted by the defendant*.") (emphasis supplied and in original). The government should bear the consequences of its own miscalculation. The government can appeal if the Supreme Court's decision in Booker and FanFan gives it a basis for doing so. These risks and burdens should fall on the government, not Mr. Brooks.

Post-Blakely, the Department of Justice quickly directed federal prosecutors to argue, in those cases where it could not otherwise obtain a Guidelines enhancement, that the court should not apply the Guidelines "at all" but should impose a sentence "that conforms to the sentence calculated under the Guidelines (without regard to Blakely)."[6] This is a blatant evasion of Blakely.

But whether the Court imposes a sentence that "conforms" to the Guidelines "without regard to Blakely," or some other sentence, indeterminate sentencing -- by eliminating the constitutionally relevant maximum sentence under Apprendi and Blakely

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[6] See Memorandum from Christopher A. Wray, Assistant Attorney General, to All Federal Prosecutors at 6 (undated) (hereinafter Wray Memo), available at http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/more_doj_analys.html. In another, apparently slightly earlier, version, prosecutors were directed to argue for a sentence that "conforms to a sentence under the Guidelines (including justifiable upward departures), as determined without regard to Blakely." See Memorandum from James Comey, Deputy Attorney General to All Federal Prosecutors at 2-3 (July 2, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.wpd.

and using judicial factfinding without a heightened standard of proof or the rules of evidence -- evades Blakely by accomplishing precisely what it prohibits. See Montgomery, 324 F.Supp.2d at 1271 ("In essence, the court would be saying with its mouth that it acknowledges Blakely's affect on federal criminal sentencing while, with its hand, demonstrating a practical disregard for it."); Croxford, 324 F. Supp.2d at 1247 (noting "irony" and "paradox"); United States v. Muefflemen, 327 F. Supp.2d 79, 96 (2004) (finding this "troubling"); United States v. Emmenegger, 2004 WL 1752599 at *8 & n.10 (S.D.N.Y. Aug. 9, 2004) ("slavishly following, as a matter of ostensible discretion, the dictates of an unconstitutional system," would be unconstitutional itself).

If it would not be permissible for a legislature to evade Apprendi by enacting a sentencing law raising the statutory maximum in all cases, Apprendi, 530 U.S. at 490 n.16, the courts should not accept the government's invitation to do so through a severability analysis that, we hope to demonstrate, is deeply flawed.

III. The Unconstitutional Procedures Are Severable From the Guidelines and the Sentencing Reform Act.

A. The Test

"Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability."[7] Regan v. Time, 468 U.S. 641, 653 (1984). When a court finds some part of a statute unconstitutional, it "should refrain from invalidating more of the statute than is necessary." Id. at 652. Thus, "whenever an act of Congress contains

[7] "In the absence of a severability clause," which the Sentencing Reform Act does not have, "Congress' silence is just that – silence – and does not raise a presumption against severability." Alaska Airlines, 480 U.S. at 686.

unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court to so declare, and to maintain the act insofar as it is valid." Id. at 652 (internal citations and quotation marks omitted).

The Supreme Court has explained that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). "What is left" need not function identically to the law as enacted as long as it "will function in a *manner* consistent with the intent of Congress." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis in original). "The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Id. at 685. See also Buckley v. Valeo, 424 U.S. 1, 108-09 (1976); United States v. Ameline, 376 F.3d 967, 981 (9th Cir. 2004).

Thus, the question is whether Congress would have preferred, over the previous indeterminate sentencing regime, to enact the Sentencing Reform Act of 1984 ("the Act") with Guidelines subject to the rights of indictment, jury trial and proof beyond a reasonable doubt. If the Act can function in a manner consistent with the intent of Congress with the Guidelines subject to those rights and still advance Congress' overall goals, the unconstitutional procedures should be severed. The question is not, we submit, whether a sentence is unnecessarily lenient in a particular case due to its anomalous procedural posture.

B. Purpose, Structure and History of the Sentencing Reform Act

The stated goals of the Act were uniformity, honesty, proportionality, certainty and fairness. See 28 U.S.C. § 991(b)(1)(B); S. Rep. No. 225, 98th Cong., 1st Sess. 38-60 (1983) (hereinafter "Senate Report"). Under the previous indeterminate regime, courts were free to exercise discretion in widely divergent ways in imposing sentence, there was extensive good time credit which the Bureau of Prisons had authority to adjust, and the Parole Commission set the release date according to its own standards. In addition, alternatives to all or part of a prison term were lacking, which resulted in prison sentences that were unnecessary to achieve the purposes of sentencing. Congress found that the direct result of this unfettered discretion, lack of statutory guidance as to the kinds and lengths of sentences, and absence of review procedures, was unwarranted disparity and lack of proportionality honesty, certainty and fairness. Id. at 38, 41-52.

Congress therefore designed a comprehensive statutory system to "structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain." Id. at 65. The Act (1) eliminated parole, (2) established the United States Sentencing Commission and directed it to create guidelines and sentencing options,[8] (3) directed judges to sentence within the Guidelines, to depart if the Guidelines failed adequately to reflect a pertinent aggravating or mitigating circumstance, and to state the reasons for the sentence imposed,[9] (4) created regularized sentencing options in the form of fines, probation with a range of conditions including restitution, and community confinement,[10] (5) replaced extensive and

[8] 28 U.S.C. § 991(b), 994(a), 18 U.S.C. § 3553(a).

[9] 18 U.S.C. §§ 3553(b), (c).

[10] 18 U.S.C. § 3551(b), 18 U.S.C. §§ 3561-66, 3663, 3571-74, 3621.

adjustable good time credit with minimal and certain good time credit,[11] (6) instituted the 10% rule to re-integrate the offender into the community,[12] (7) created standardized supervised release,[13] (8) created appellate review,[14] and (9) took away the court's authority to correct an illegal sentence at any time or a sentence imposed in an illegal manner within 120 days on motion of either party or no motion at all, gave the court authority only to correct clear error within 7 days, and gave the government the sole power to move to reduce a sentence later than that and only on the basis of substantial assistance.[15] See Senate Report at 50-60, 149-52, 158.

On July 21, 2004, Congress passed a concurrent resolution (1) reiterating that it "enacted the Sentencing Reform Act of 1984 to provide certainty and fairness in sentencing, avoid unwarranted disparities among defendants with similar records found guilty of similar offenses, and maintain sufficient flexibility to permit individualized sentences when warranted," (2) asking the Supreme Court to "act expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines," and (3) expressing its current intention not to take corrective legislative action pending clarification by the Court. See S. Con. Res. 130 (2004).

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[11] 18 U.S.C. § 3624(b).

[12] 18 U.S.C. § 3624(c).

[13] 18 U.S.C. §§ 3583.

[14] 18 U.S.C. § 3742.

[15] Fed. R. Crim. P. 35.

C. The Sentencing Reform Act Can Function in a Manner Consistent with Congressional Intent When the Guidelines are Applied with Fundamental Constitutional Protections.

The Supreme Court explicitly declared in Blakely that it was not holding determinate sentencing unconstitutional, but only the way in which it has been, but need not be, implemented. Blakely, 124 S. Ct. at 2540 ("By reversing the judgment below, we are not, as the State would have it, 'find[ing] determinate sentencing schemes unconstitutional.' 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."). "Clearly, this indicates that courts should first, if possible, undertake to sustain the current system, as modified to accommodate Blakely, rather than to declare the Guidelines unconstitutional. Indeed, it is well settled that a court is responsible for upholding established law rather than extending its reach." United States v. O'Daniel, __ F. Supp.2d __, 2004 WL 1767112 at *6 (D. Okl. Aug. 6, 2004).

In cases charged after Blakely, the government is free to charge, negotiate over, and seek to prove to a jury (or judge if the defendant waives a jury) all of the sentencing facts. In cases charged before Blakely, the government can supersede if the defendant has not yet been convicted. As the prosecutor argued in Swan, the Department of Justice has directed prosecutors to take those steps and they are doing so now. In cases like this one, in which the defendant was already convicted before Blakely, the government can negotiate for a full or partial Blakely waiver. Failing that, the enhancement cannot be imposed.

The net loss of applying Blakely to the Guidelines is that some upward adjustments cannot be applied in some cases in which the defendant was convicted and

awaiting sentencing when Blakely was decided. To the extent this creates any disparity, it is disparity that is *warranted* by the Constitution.[16] As many courts have found, this does not undermine the conclusion that the Guidelines can be applied in a manner that is consistent with Congress' intent and that promotes congressional goals better than indeterminate sentencing.[17] If courts should refrain from striking down more of a statute than is necessary, this is an insufficient basis for striking down the Guidelines and significant other provisions of the Sentencing Reform Act. See O'Daniel, 2004 WL 1767112 at *7 n.5 ("the 'straddle' cases will soon pass through the system, and therefore should not form the basis for determining what is best for federal sentencing policy in the long term.").

The Supreme Court has had no trouble severing penalty provisions even when it meant that the penalty would not be available at all unless and until Congress amended the statute to make it constitutional. In United States v. Jackson, 390 U.S. 570 (1968),

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[16] It is worth noting that even fully adjusted Guidelines sentences have never been identical for similarly situated defendants, often for reasons that are entirely *unwarranted*. Disparity on the basis of race, gender, and the assertion of constitutional rights has existed and been tolerated over the past twenty years. See United States v. Green, No. CR. A. 02-10054-WGY, CR.A. 01-10469-WGY, CR.A. 99-10066-WGY, 2004 WL 1381101 at **4 & n.26, 5, 8 & nn. 54-57, 9, 10-11, 46 (D. Mass. June 18, 2004); United States Sentencing Commission, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice at 19-21 (Jan. 1998), available at http://www.ussc.gov/publicat/5kreport.pdf.

[17] See Ameline, 376 F.3d at 981-82; O'Daniel, 2004 WL 1767112 at *6-12 & n.9; Swan, 327 F. Supp.2d at 1072-73; Gibson, slip op. at *4-5; Zompa, 326 F. Supp.2d at 178; Terrell, 2004 WL 1661018 at *3-4; United States v. Lewis, No. 03-30015-MAP (D. Mass. July 21, 2004); United States v. LaFlora, 2004 WL 1851533 at *2 (D.Kan. July 16, 2004); United States v. Leach, 325 F.Supp.2d 557 (E.D. Pa. 2004); Montgomery, 324 F.Supp.2d at 1271-72; United States v. Moran, No. 02-10136-REK (D. Mass. July 8, 2004); Toro, 2004 WL 1575325 at *5; Shamblin, 323 F. Supp.2d at 766-67 & n.11; United States v. Watson, CR 03-0146 (D.D.C. June 30, 2004), transcript available at http://www.ussguide.com/members/cgi-bin/index.cfm; United States v. Fanfan, No. 03-47-P-H 2004 WL 1723114 (D. Me. June 28, 2004); United States v. Gonzalez, No. 03 CR 41 (DAB), 2004 WL 1444872 (S.D.N.Y. June 28, 2004); United States v. Green, No. CR. A. 02-10054-WGY, CR.A. 01-10469-WGY, CR.A. 99-10066-WGY, 2004 WL 1381101 (D. Mass. June 18, 2004).

the Court found that the clause providing for capital punishment in the federal Kidnapping Act was unconstitutional (in that it burdened the right to jury trial), and found that it was severable for reasons applicable here – its elimination did not alter the substantive reach of the statute, did not change its basic operation, and left intact punishment less than death. Id. at 585-91. See also New York v. United States, 505 U.S. 144, 186-87 (1992) (unconstitutional provision of statute requiring states to take title to radioactive waste and become liable for all damages unless they regulate waste pursuant to Congress' direction, as one of three incentives to achieve Congress' purpose, was severable because the statute still included two other incentives that were constitutional). If the penalty provisions in these cases can be severed, it would seem that where the Guidelines are still fully operative as a law in every case but some in a fleeting procedural posture, severance is the correct answer here.

In holding that Apprendi invalidated an aggravated sentence in a case before it, the Kansas Supreme Court did not find that judicial factfinding and the preponderance standard were not severable from the statutory scheme, but held that "Apprendi must be applied here and in all cases pending on direct appeal or which are not yet final or which arose after [Apprendi was decided]." States v. Gould, 23 P.3d 801, 814 (Kan. 2001). The state legislature then enacted a system requiring aggravating factors to be proved to a jury beyond a reasonable doubt. Congress can do the same here as necessary and appropriate after the Supreme Court definitively rules on the effect of Apprendi and Blakely on the Guidelines. The Supreme Court seems to have anticipated that legislatures would amend the sentencing laws, Blakely, 124 S. Ct. 2541, and Congress is poised to do just that. See S. Con. Res. 130. Consistent with the principle that the courts

should refrain from invalidating more of a statute than is necessary, Regan, 468 U.S. at 652-53, the courts should not invalidate the Guidelines.

In the meantime, the few references in the law to judicial factfinding, the civil burden of proof, and inapplicability of the Rules of Evidence or the Confrontation Clause at sentencing can be severed or simply not applied.[18] See Ameline, 376 F.3d at 980-83; O'Daniel, 2004 WL 1767112 at *6-12; United States v. Zompa, 326 F.Supp.2d 176, 177-78 (D. Me. 2004); cf. Mueffleman, 327 F. Supp.2d at 96.

D. Congress Would Have Preferred the Sentencing Reform Act With Guidelines Subject to Fundamental Constitutional Protections Over An Indeterminate Sentencing Scheme.

Congress would have preferred to enact the Sentencing Reform Act with the Guidelines subject to the rights of indictment, jury trial and proof beyond a reasonable

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[18] It is worth noting that although Congress assumed that there would be judicial factfinding, see 18 U.S.C. § 3742, 28 U.S.C. § 994(a)(1), there was no explicit *requirement* of judicial factfinding until it was added to Rule 32 in 2002. See Fed. R. Crim. P. 32(i)(3). These provisions are unconstitutional under Blakely, can be amended after the Supreme Court rules in Booker and FanFan, and are easily severable in the meantime. Ameline, 376 F.3d at 981. Importantly, Congress said nothing in the Act or the legislative history about the burden of proof, the Rules of Evidence, or the Confrontation Clause. These raise no severability issue at all because Congress did not enact them, they are subject to what amount to severability clauses where they do appear, and even if Congress had enacted them, they would be severable. While the Sentencing Commission issued commentary endorsing the general appropriateness of the preponderance standard and that the rules of evidence need not be applied in all cases, U.S.S.G. § 6A1.3, p.s., such commentary is not binding and need not be give any weight if it violates the Constitution. Stinson v. United States, 508 U.S. 36, 45 (1993). Similarly, Fed. R. Evid. 1101(d)(3) was "not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing." See advisory committee's note. Well before Blakely, higher standards of proof -- from clear and convincing to beyond a reasonable doubt -- were permissible without raising any severability issue. See, e.g., United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996); United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992); United States v. Kikumura, 918 F.2d 1084, 1101-02 (3d Cir. 1990). Judge Gertner acknowledged as much in Mueffleman. See Mueffleman, 327 F. Supp.2d at 96 ("I will exercise my discretion to continue to apply procedural protections to these hearings – sworn testimony, cross-examination, the application of the evidentiary rules, and clear and convincing proof."). Cf. Keith Fulton & Sons, Inc. v. New England Teamsters, 762 F.2d 1124, 1136-37 (1st Cir. 1984) (change in "burden of proof" severed); United States v. Grigsby, 85 F. Supp.2d 100, 109 (D.R.I. 2000) (change in "requirements of proof" severed).

doubt, than to have passed no statute at all. Alaska Airlines, 480 U.S. at 697. The Sentencing Reform Act, including the Guidelines, was designed to end the disparity, disproportionality, uncertainty and unfairness that resulted from the indeterminate regime then in place. Congress found that indeterminate sentencing was an "arbitrary and capricious" method of sentencing that had produced "shameful disparity." See Senate Report at 65. Its primary goal, in fact, was to "eliminate indeterminate sentencing." Id. (emphasis supplied).

Indeterminate sentencing inevitably created disparity because judges had unconstrained discretion to impose sentences of any length up to the statutory maximum, undermined proportionality because the statutory maximums were not intended to reflect proportionality, and undermined accuracy and honesty by providing no substantive or procedural standards for imposing any particular sentence. Id. at 41-46; Mistretta v. United States, 488 U.S. 361, 366 (1989). As the Croxford court noted, "After all, the very purpose of the Sentencing Reform Act, which created the Guidelines, was to eliminate such judicial discretion. Congress was concerned about creating a system where prison sentences 'appeared to depend on what the judge ate for breakfast on the day of the sentencing,'" and the current Congress is even more distrustful of greater judicial discretion. Croxford, 324 F. Supp.2d at 1254.

A guidelines system with jury factfinding will result in more uniformity, proportionality, certainty and fairness than did the indeterminate regime prior to the Act's passage. Regardless of the factfinder, proof beyond a reasonable doubt will produce greater accuracy than proof by a preponderance of the evidence, which better serves all of Congress' goals. Judicial factfinding was not critical to Congress' goals because, as the

government has conceded, the Guidelines can be applied without it. See Part C, supra. Therefore, rather than undermining Congress' objectives, severance facilitates them. See Ameline, 376 F.3d at 980 n.15 & 981-983; United States v. Gibson, No. 1:04-cr-12-01, slip op. at *4-5 (D. Vt. July 29, 2004); Zompa, 326 F.Supp.2d at 178; O'Daniel 2004 WL 1767112, at *6-12 & n.9; Montgomery, 324 F.Supp.2d at 1272; Swan, 327 F. Supp.2d at 1072-73; Nancy J. King and Susan R. Klein, Beyond Blakely, 16 Fed. Sent. Rep. __, Part IC3 (forthcoming September 2004) (application of the Guidelines and Sentencing Reform Act in pending and future cases in compliance with Blakely continues to advance Congress's overall goals).

E. The Post-Blakely Indeterminate Sentencing Option is a Hodgepodge of Conflicting Sentencing Policies That Compounds the Disparity and Unfairness of the Old Indeterminate Regime.

1. No Mechanism to Correct for Disparity

The courts that have adopted indeterminate sentencing have not addressed the fact that even if most courts follow the Guidelines as guides,[19] there is no requirement that they do so in a uniform or consistent way, and there would be no mechanism to correct for the resulting disparity. In enacting the Sentencing Reform Act, Congress stressed the importance of appellate review to correct sentences that were too lenient or too harsh, a "consideration [that] has led most western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system," and one it "consider[ed] to be a critical part of the foundation for the bill's sentencing structure." Id. at 151. Appellate review is effectively non-existent in an

[19] According to some courts, indeterminate sentencing would be no different today than it was twenty years ago, Croxford, 324 F. Supp.2d at 1246-47, while according to others, it would never be the same because the courts will apply the Guidelines as guides. Mueffleman, 327 F. Supp.2d at 96; King, 2004 WL 1769148 at *5; Emmenegger, 2004 WL 1752599 at *8 & n.10.

indeterminate scheme. The sentence could not be appealed on the basis that it incorrectly applied the Guidelines, was greater than that specified in the applicable guideline range, or departed from the Guidelines, whether for inappropriate reasons, an insufficient factual basis, or to an unreasonable degree. See 18 U.S.C. § 3742. Furthermore, the disparity of the old indeterminate regime would be magnified because the "leveling force" of parole would be absent. See United States v. Bogle, 693 F. Supp. 1102, 1111 (S.D. Fla. 1988). Congress would not have taken the contradictory steps of removing the channeling effect of the guidelines and the corrective effect of appellate review, and leaving in place the abolition of parole, which provided the only check on disparity under the old system.[20] See Senate Report at 46.

2. Dual Sentencing System

Congress would never have intended the use of two sentencing systems side by side, sentencing some defendants under binding guidelines and others under no guidelines at all. Under this dual system, in those cases where the government did not charge and prove the sentencing facts to a jury, whether the Guidelines or indeterminate sentencing will be applied depends on whether or not the defendant waives his right to indictment and either stipulates to the facts or waives jury factfinding. See United States v. Grant, 2004 WL 1803196, *2 (M.D. Fl. Aug. 12, 2004); United States v. Thompson, 324 F. Supp.2d 1273 (D. Utah 2004); Wray Memo at 6. A defendant who stands on his constitutional rights is sentenced indeterminately up to the statutory maximum with no

[20] Only one court to have adopted indeterminate sentencing has recognized that "plainly there is a problem with reinstituting an indeterminate system, when there is no longer parole," and that appellate review would be "different." See Mueffleman, 327 F. Supp.2d at 96 & n. 38. The court did not address how systemwide disparity could be controlled without parole or meaningful appellate review.

due process at all, while an identical defendant who waives his rights receives at least some due process, a sentence capped by the Guidelines, and meaningful appellate review.

Congress would never have enacted such a system because it (1) compounds the disparity already inherent in indeterminate sentencing, (2) creates at least inequity and injustice and may violate equal protection principles, See United States v. King, No. 6:04-CR-35-ORL-31KRS, 2004 WL 1769148 at *6 & n.21 (M.D. Fla. July 19, 2004), and (3) unconstitutionally burdens the assertion of constitutional rights. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); Jackson, 390 U.S. at 581-83 (statute that made capital punishment available only if defendant did not plead guilty and went to trial unconstitutionally burdened basic constitutional rights).

3. Indeterminate Sentencing Cannot Be Applied Without Also Striking Down Other Significant Provisions of the Sentencing Reform Act.

With the Sentencing Reform Act, Congress replaced indeterminate sentencing, parole, extensive good time credit, and the sentencing court's broad authority to correct a sentence within 120 days without government motion, with the Guidelines, minimal good time credit, supervised release, restitution, fines and appellate review. Because the components of the Act are mutually dependent, the courts that declared the Guidelines unconstitutional in the 1980s held that the Guidelines were not severable from other provisions of the Act, and struck them down along with the Guidelines. See, e.g., United States v. Jackson, 857 F.2d 1285 (9th Cir. 1988) (supervised release not severable); Bogle, 693 F. Supp. at 1111 (elimination of parole not severable); United States v.

Ortega-Fernandez, 1988 WL 108491 at *2 (S.D.N.Y. 1988) (good-time provisions not severable).

Thus, the Guidelines should not be discarded without also striking down other significant provisions of the Sentencing Reform Act. A defendant sentenced indeterminately should be able to have his sentence corrected within 120 days without government motion and for reasons other than substantial assistance, be parole eligible when one third of his sentence is served, receive extensive good time credit, and not be subject to supervised release, a fine or restitution. But today, without congressional authorization, the courts cannot implement most of these measures in individual cases. The result is the worst of both worlds for the defendant and the system: The Guidelines cap is off, appellate review is unavailable, and there is no opportunity to have the sentence corrected by the sentencing judge or ameliorated by a parole board. This result is irrational, unfair, and something Congress would not have intended.

F. The Blakely Decision Strongly Indicates that the Supreme Court Will Hold that the Unconstitutional Manner in Which Determinate Sentencing Has Been Applied Is Severable from the Guidelines and the Sentencing Reform Act.

A number of courts, in holding that the unconstitutional procedures used to apply the Federal Sentencing Guidelines are severable from the Guidelines themselves, have relied on Blakely itself:

> It is worth noting that the Supreme Court in Blakely did not declare the State of Washington's sentencing regime unconstitutional. Blakely merely reversed the judgment of the state court and remanded for further consistent proceedings. In contrast, in both Apprendi and Ring, the Supreme Court declared the state statutes at issue unconstitutional. This Court finds significant that the Supreme Court refrained from the opportunity to strike the state statute under its Sixth Amendment analysis but, instead, only found the upward departure based upon judicial fact-finding unconstitutional. . . . [T]he federal sentencing guidelines,

> themselves, do not run afoul of the Sixth Amendment. The problem lies in upward enhancements and departures, and their accompanying lack of a citizenry "check," and the lack of the otherwise-required heightened standard of proof (beyond a reasonable doubt) that would be required in that setting.

Montgomery, 324 F.Supp.2d at 1270. Accord Gibson, slip op. at *4-5; United States v. Terrell, 2004 WL 1661018 at *3-4 (D. Neb. July 22, 2004); Toro, 2004 WL 1575325 at *5; Shamblin, 323 F. Supp.2d at 766-67 & n.11.

Though the Supreme Court did not explicitly rule on severability, there is much in its opinion that indicates it will find that the unconstitutional procedures are severable. It (1) made clear that it was not striking down determinate sentencing, Washington's determinate sentencing scheme, or the "deliberate cruelty" adjustment itself but only the identity of the factfinder and the burden of proof, see 124 S. St. at 2540 ("[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented to respect the Sixth Amendment,"), (2) lauded determinate sentencing's "salutary objectives" of proportionality and parity, id., (3) made suggestions as to how determinate sentencing could be constitutionally carried out in a practical manner in future cases, id. at 2541 (pointing to the Kansas system of applying Apprendi to its determinate regime as an alternative to reesetablishing indeterminate sentencing), id. (holding that a defendant can waive his right to jury factfinding by stipulating to the relevant facts or consenting to judicial factfinding after either a guilty plea or trial), (4) dismissed the dissent's prediction that such a system may be too expensive or unwieldy, id. at 2541 n.12, and (5) held simply that "petitioner's *sentence* is invalid." Id. at 2538 (emphasis supplied).

As the Montgomery court noted, in contrast, the Court in Apprendi struck down New Jersey's entire hate crime statute, Apprendi, 530 U.S. at 491, and in Ring, it struck down Arizona's entire capital sentencing statute. Ring, 536 U.S. at 588-89, 609. It did not do the same in Blakely. What probably explains this is that there was nothing left of the statutes at issue in Apprendi and Ring without the unconstitutional provisions. In contrast, when judicial factfinding and the preponderance standard are severed from a comprehensive determinate sentencing scheme, quite a bit is left untouched. What is left still functions as a law in a manner consistent with the intent of the legislature and continues to advance its overall goals. This is true of Washington's sentencing law, and is even more true of the Sentencing Reform Act. The Supreme Court, moreover, has not held an entire federal law non-severable since the 1930s. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

If the "Framers would not have thought it too much to demand that, before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of" indictment, jury trial and proof beyond a reasonable doubt, Blakely, 124 S. Ct. at 2543, Congress should not be presumed to prefer to scrap twenty years of sentencing reform to placing those modest burdens on the government. Given Congress's express purpose to eliminate indeterminate sentencing, there is every reason to believe that Congress would still have enacted the Sentencing Reform Act. The indeterminate sentencing option as applied today would create even more disparity and unfairness than the regime of twenty years ago.

On the other hand, there is little if any reason to believe that the loss of some upward adjustments in some cases in which the government did not have notice of

Blakely vitiates congressional intent as to the entire Sentencing Reform Act. If the Guidelines are applied in all cases in compliance with the rights to indictment and proof beyond a reasonable doubt to a jury, there is no issue of *unwarranted* disparity. A determinate sentencing scheme administered in compliance with Blakely still promotes the Act's purposes of reducing unwarranted disparity and promoting uniformity, proportionality, honesty and certainty. Requiring the government to charge sentencing facts and prove them beyond a reasonable doubt to a different factfinder does not adversely affect those purposes.

CONCLUSION

Because Mr. Brooks' right to fair notice under the Due Process Clause would be violated by indeterminate sentencing regardless of the severability question, and because the manner in which the Guidelines have been applied are severable from the Guidelines and the Sentencing Reform Act, the Court should impose that sentence to which he has a legal right under the Guidelines based on his offense of conviction pursuant to Blakely.

Respectfully submitted,
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Dated: September 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September 2004 a true and accurate copy of this motion was served by Facsimile and by mail upon Arnold H. Huftalen, the United States Attorney in this case.

_____
Amy Baron-Evans