

## Beyond *Blakely*\*

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Federal criminal sentencing in the wake of *Blakely v. Washington*<sup>3</sup> is, to put it charitably, a mess. In holding that *Blakely*'s sentence under the Washington State Sentencing Guidelines was imposed in a manner inconsistent with the Sixth Amendment right to a jury trial, the decision threatens the operation of the Federal Sentencing Guidelines and the presumptive sentencing systems in fourteen states.<sup>4</sup> In Parts I and II of this article, we address how *Blakely* has affected the Federal Sentencing Guidelines, and how assistant U.S. attorneys, federal public defenders, and district and appellate court judges might proceed in a post-*Blakely* world. In Part III, we discuss *Blakely* challenges raised in cases on direct and collateral review. Finally, in Part IV, we collect some of the various options for reform open to Congress.

*Blakely* was the latest in a series of decisions defining when a fact used in setting an offender's sentence must be treated as an element under the Constitution. In the most important of these cases, *Apprendi v. New Jersey*,<sup>5</sup> a closely divided Court declared that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [other than the fact of a prior conviction] must be submitted to a jury and proved beyond a reasonable doubt."<sup>6</sup> Two years later, the four justices who dissented in *Apprendi*, joined by Justice Scalia, held in *Harris v. United States*<sup>7</sup> that *Apprendi* did not require a fact triggering a mandatory minimum sentence to be established beyond a reasonable doubt to a jury.<sup>8</sup> That same term, the Court in *Ring v. Arizona*<sup>9</sup> applied *Apprendi* to hold that because Arizona conditioned eligibility for the death penalty upon the presence of an aggravating fact that was not an element of first degree murder, the Sixth Amendment guaranteed the defendant a right to a jury determination of that fact. The Court stated, "if the state makes an increase in the defendant's authorized punishment contingent on a finding of fact, that fact -- no matter how the state labels it -- must be found by a jury beyond a reasonable doubt."<sup>10</sup>

*Blakely* presented the Court with another variation of the *Apprendi* problem - this one posed by a state sentencing scheme that included what might be called dueling maximum sentence statutes. The statute setting the sentence ranges for each class of felony offense in Washington designated ten years as the maximum punishment for *Blakely*'s class B kidnapping offense. Washington's Sentencing Reform Act,<sup>11</sup> however, specified in a separate statutory provision a "standard range" of 49 to 53 months for *Blakely*'s offense, a range that could not be exceeded unless a judge found a "substantial and compelling reason" justifying an exceptional sentence. The Act enumerated several potential factors that would support a judge's decision to depart from the presumptive range, but provided that the list was not exclusive. The trial judge in *Blakely*'s case imposed an exceptional

sentence of 90 months, after finding that Blakely had acted with "deliberate cruelty," an enumerated factor for an exceptional sentence. With Justice Scalia writing for five justices, the Court concluded that because a sentence higher than 53 months required additional factual findings not admitted by the defendant nor proven beyond a reasonable doubt to a jury as part of his conviction, the relevant "statutory maximum" for Blakely's offense was the 53-month presumptive sentence and *not* the ten-year maximum specified for class B offenses. Any fact triggering a sentence exceeding 53 months, the Court reasoned, must be admitted by the defendant or proven to a jury beyond a reasonable doubt.

## **I. *Blakely's* Application to the Federal Sentencing Guidelines**

### **A. Are the U.S.S.G. distinguishable?**

The Court in *Blakely v. Washington* addressed only the Washington Sentencing Reform Act. Justice Scalia's opinion stated that the Court was not expressing an opinion on the constitutionality of the Federal Sentencing Guidelines.<sup>12</sup> The dissenters, plainly unconvinced, predicted the Washington sentencing scheme could not be distinguished from the Guidelines.<sup>13</sup>

The position of the Department of Justice<sup>14</sup> is that even if facts required to exceed presumptive ranges must be treated as elements under the statutes in Washington, the same is not true for facts that must be established for upward adjustments or departures under the Guidelines. Washington's dueling sentence maxima for Blakely's offense were both codified in statutes; Congress has enacted only a single sentence maximum for each crime, contained in the U.S. Code. The federal guidelines are not "legislatively enacted," but are rather "a unique product of a special delegation of authority" to an independent Commission in the judicial branch.<sup>15</sup> The Guidelines "were never intended to operate on the same footing as the statutory maximums."<sup>16</sup>

This distinction, which rests upon whether or not a legislature first delegates the creation of presumptive sentence ranges to a commission before endorsing them, is unlikely to be accepted by the five member majority in *Blakely*.<sup>17</sup> 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."<sup>18</sup> Congress has invoked its authority to reject guideline amendments promulgated by the Sentencing Commission, and to bypass the Commission altogether and amend the Guidelines directly.<sup>19</sup> Just as the presumptive sentencing range for the offense of conviction with no additional facts is the "statutory maximum" in Washington after *Blakely*, so the top of the recommended sentence range as determined by the offense of conviction, without any upward adjustments, is the "statutory maximum" in the federal system. In both statutory schemes, the maximum sentence available is "the maximum [the judge] may impose *without* any additional findings."<sup>20</sup> Several district courts, now joined by a decision of the Seventh Circuit Court of Appeals, agree.<sup>21</sup> The Fifth Circuit has taken the opposite position, holding that "*Blakely* does not extend to the federal Guidelines".<sup>22</sup> That opinion is based not upon any meaningful distinction between the Washington and federal sentencing schemes, but on the panel's refusal to reject various prior Supreme Court cases that upheld the federal sentencing guidelines against constitutional challenges, albeit not a Sixth Amendment right to jury trial challenge.<sup>23</sup> Finally, the Second Circuit has certified this

question to the United States Supreme Court.<sup>24</sup>

## **B. If the Guidelines are Indistinguishable, What Features of the Guidelines are Affected?**

Assuming that the presumptive sentence ranges established by the Federal Guidelines cannot be meaningfully distinguished from those in Washington State, which factual assessments must be proven to a jury beyond a reasonable doubt? Consider one illustration. Suppose a defendant is convicted of mail fraud, in violation of 18 U.S.C. § 1341. Assume also that only the elements of § 1341 simpliciter (knowing creation of a scheme to defraud, with specific intent, and a mailing) are admitted or otherwise proven at a jury trial.<sup>25</sup> The sentence provided in § 1341 is 0 - 20 years for simple mail fraud.<sup>26</sup> Congress has also provided, via its adoption of U.S.S.G. § 2B1.1, a presumptive sentence of 0 - 6 months for this offense, absent additional factual findings.<sup>27</sup> Before *Blakely*, judges assumed they were free to find those facts that trigger sentences under the Guidelines that exceeded 6 months, so long as the sentence did not exceed 20 years. So, for example, a judge would impose a sentence of 41 - 51 months, if she found as part of sentencing that the fraud involved losses exceeding \$1 million.<sup>28</sup> After *Blakely*, however, the relevant "statutory maximum" that the judge "may impose *without* any additional findings"<sup>29</sup> is the top of the range designated for the offense of conviction alone, 0 - 6 months. Any additional finding triggering a higher range, such as the million dollar loss, must be either admitted or proven beyond a reasonable doubt. Likewise, if the prosecutor or judge wishes to aggravate a defendant's sentence due to his role in the offense, the presence of a gun, his leadership position, injury,<sup>30</sup> or relevant conduct,<sup>31</sup> or seeks to depart upward from the presumptive sentencing range due to a fact not otherwise taken into account under the Guidelines,<sup>32</sup> each of those additional facts must all be admitted by the defendant or found by a jury before a sentence higher than six months can be imposed.<sup>33</sup>

We also believe that *Blakely* has thrown into doubt those decisions authorizing judges to make findings necessary for forfeiture and restitution awards.<sup>34</sup> These cases have reasoned that *Apprendi* does not apply to fact finding in determining what assets, if any, can be forfeited because the forfeiture and restitution statutes do not create a penalty ceiling. This argument has rested in turn on the assumption that the statutory maximum under which a judge was free to sentence based on specific findings of fact was the maximum sentence codified into the U.S. Code, an assumption that we believe *Blakely* has now undercut. Instead, because judges may not order forfeiture of defendant's assets without specific factual findings that are not always part of the underlying conviction, these facts must be determined by a jury beyond a reasonable doubt.<sup>35</sup> Restitution ordered as part of sentencing is open to the same sort of attack.<sup>36</sup>

Still, much of the Guidelines scheme is not directly affected by the *Blakely* rationale. Facts allowing judges to mitigate a defendant's sentence, or that trigger a higher minimum without raising the maximum sentence, may be found by the judge using the preponderance of evidence standard. Prior convictions, too, need not be submitted to a jury and proven beyond a reasonable doubt. There are quite a number of such enhancements based upon prior convictions.<sup>37</sup> After *Blakely*, the government will have a much higher procedural burden to meet before it can

advance up through the offense levels on the vertical axis of the sentencing grid, but it can in many cases zip along the horizontal axis as easily as it did before.<sup>38</sup>

### **C. Severability: Can the Guidelines Stand As Modified?**

Assuming that *Blakely* has invalidated the judicial fact-finding we have detailed above, the question for courts is whether the remainder of Congress's sentencing scheme should remain standing, or rather, whether the entire statutory scheme must be invalidated. This may prove to be not only the most important, but the most difficult issue to resolve in assessing the impact of *Blakely* in the federal courts.<sup>39</sup>

#### **1. The Test for Severability**

The United States Supreme Court has often repeated that it "should refrain from invalidating more of the statute than is necessary . . . [W]henver an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this Court to so declare, and to maintain the act insofar as it is valid."<sup>40</sup> The Court has explained that "unless it is evident that the Legislature would not have enacted those provisions that 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."<sup>41</sup> This is a test of legislative intent; "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."<sup>42</sup> The absence of a severability clause, as is true of the Sentencing Reform Act of 1984,<sup>43</sup> "does not raise a presumption against severability."<sup>44</sup> There is no obvious answer to the hypothetical question – would Congress have enacted the Sentencing Reform Act of 1984 had it known that the sections permitting judges rather than juries to find enhancements would be stricken as unconstitutional? Looking to the history, purpose, and structure of the Federal Sentencing Reform Act, there are persuasive arguments on each side.

#### **2. Gutting the Guidelines**

The Government's position is that if *Blakely* applies to the Federal Sentencing Guidelines at all, the Guidelines as a whole no longer have the force of law, because judicial fact-finding cannot be severed from the remainder of the statutory scheme.<sup>45</sup> The Department argues quite credibly that a "requirement that enhancing -- but not reducing -- facts have to be submitted to the jury and proven beyond a reasonable doubt would distort the operation of the sentencing system in a manner that would not have been intended by Congress or the Sentencing Commission."<sup>46</sup> Congress clearly intended that the Guidelines would be applied by judges and not juries,<sup>47</sup> and appellate review of jury findings were not envisioned by Congress in enacting 18 U.S.C. § 3742(d). Applying *Blakely* undercuts the Guidelines effort to end sentencing disparity and many enhancements, particularly relevant conduct, grouping, and post-trial conduct are "not well-suited to submission to juries."<sup>48</sup> The Commissioners themselves noted in the Manual that "the Guidelines Manual in effect on a date shall be applied in its entirety,"<sup>49</sup> and this was implicitly adopted by Congress in 1987.<sup>50</sup>

Joining this side of the debate is Professor Frank Bowman in his Memorandum to the U.S. Sentencing Commission, three days after *Blakely* was decided.<sup>51</sup> Bowman argues that *Blakely* renders the Guidelines facially unconstitutional. The complex federal sentencing model envisioned by Congress includes post-conviction findings of various facts by district judges; any attempt to salvage the Guidelines by treating those facts as elements would be "transforming them by judicial fiat into something that neither the Sentencing Commission nor Congress ever contemplated that they would become."<sup>52</sup>

Some judges are reaching this result already. In one of the earliest decisions applying *Blakely*, the District Judge in *United States v. Croxford*<sup>53</sup> held that "the Federal Sentencing Guidelines are unconstitutional and cannot govern defendant's Croxford's sentencing."<sup>54</sup> The judge found that *Blakely* barred a 2 level enhancement for obstruction of justice based on defendant's fleeing the jurisdiction before trial, and an increase based on an uncharged sexual offense involving another young victim. The probation officer's recommendation had included these adjustments, as well as a 3 level decrease for acceptance of responsibility, for an adjusted level of 34 (151-181 months), slightly higher than the range contemplated in the plea agreement of 121-151 months.<sup>55</sup> The judge concluded that imposing only the sentence authorized by the Guidelines without the addition for obstruction of justice and relevant conduct "would be fundamentally unfair to the United States and would distort the Guidelines."<sup>56</sup> Using his pre-Guidelines discretion bound only by the 10-year mandatory minimum and 20 statutory maximum, the judge sentenced the defendant to 148 months. He noted that "should an appellate court later hold that the Guidelines can be constitutionally applied in this case, the court will impose a sentence of 151 months." Other judges, too, have found the Guidelines were invalidated by *Blakely* and are sentencing accordingly.<sup>57</sup>

*Blakely* flies in the face of Congressional intent to retain judicial fact-finding in sentencing proceedings, and creates procedural barriers where Congress would not have erected them. The decision operates to distort what were otherwise even-handed restraints on judicial discretion, so that after *Blakely* reducing a presumptive range becomes much easier than raising it. Moreover, *Blakely* makes it much more difficult to achieve a key component of Congress's sentencing scheme -- real offense sentencing, in which conduct other than the offense of conviction carries a specified sentencing price.<sup>58</sup>

### **3. Preserving the Guidelines, as Modified**

What makes the issue of severability a close one is that despite *Blakely*'s clear repudiation of Congressional intent to provide for a real-offense sentencing system with judicially-based upward as well as downward adjustments, much of what Congress was trying to accomplish in the Sentencing Reform Act of 1984 is untouched by *Blakely*. The Sentencing Reform Act was the result of overwhelming bi-partisan support for ending disparities that occur at sentencing or at the parole stage.<sup>59</sup> Every player in the criminal justice system prior to 1984 had horror stories about identical offenders before different judges, one who received a sentence of probation while another was sentenced to a lengthy term of imprisonment. "The Sentencing Reform Act sought to remedy this defect by abolishing parole, substituting a system of determinate sentences, and

providing sentencing court with explicit direction, in the form of binding guidelines that prescribed the kinds and lengths of sentences appropriate for typical federal offenders."<sup>60</sup> The Act achieved this by 1) rejecting rehabilitation and parole, 2) consolidating power that had been exercised by the sentencing judge and the parole commission instead into the United States Sentencing Commission, 3) making all sentences determinate, 4) making the Sentencing Commission's guidelines binding on the courts, and 5) authorizing limited appellate review of sentencing decisions.<sup>61</sup> Congress provided for mandatory sentences, established the United States Sentencing Commission, mandated presentence reports to assist in calculating that range, changed the law regarding fines, special assessment, and probation, provided for appellate review of sentences, and, finally, abolished the Parole Board.<sup>62</sup> *Blakely* does not, and need not, affect all of these provisions.

The state of Kansas chose to modify its sentencing scheme to comply with *Apprendi* through legislation,<sup>63</sup> sending sentence-enhancing facts to the jury for proof beyond a reasonable doubt.<sup>64</sup> Federal judges probably could accomplish the same thing on their own.<sup>65</sup> As in Kansas, a federal jury could hear evidence of guilt and evidence supporting aggravating facts, either in a unitary proceeding, or, in the judge's discretion, in a bifurcated proceeding.<sup>66</sup> There seems to be no constitutional or federal statutory barrier to this solution.

Should the trial be bifurcated, the second hearing would not be a sentencing hearing, but a trial of one or more elements of a criminal offense, and the usual trial procedures would probably apply, including those rules governing jury selection, instruction, argument, as well as evidentiary standards required by statute and Constitution for proving elements of crimes. Illegally obtained evidence may have to be excluded; as would hearsay if its admission would violate the defendant's rights under the Confrontation Clause. In other words, the government could not, after *Blakely*, rely on hearsay statements in the presentence report to establish the facts that federal law makes essential to a higher penalty. The jury determination would probably require unanimity, and be limited by the same procedures regulating deadlock instructions, verdicts, polling, and jury misconduct. These entitlements turn, it seems to us, on whether facts identified in *Blakely* and *Apprendi* are functioning as elements, or whether, as some have argued in the past, they are hybrids, not quite elements, and not sentencing factors, but something in between - superfacts that require some procedural protections but not all. There is little in Justice Scalia's opinion for the Court in *Blakely* that would suggest that the Court is considering a novel status for these facts. Everything points to treating them just like any other element.<sup>67</sup>

Predictions that guideline facts would be impossible to prove to juries<sup>68</sup> or review on appeal<sup>69</sup> are, we believe, exaggerated. Admittedly, upward adjustments for relevant conduct would be difficult to administer after *Blakely*.<sup>70</sup> The Federal Sentencing Guidelines provide that criminal conduct related to the conduct of conviction be brought to the attention of the judge by the Probation Department, and that the judge *shall* adjust a sentence for relevant conduct, whether the prosecutor makes this request or not.<sup>71</sup> As the Department of Justice points out in its recent brief: "Aside from the issues arising in applying these definitions, . . . requiring jury determinations on relevant conduct could take a criminal trial into areas far afield from the core question that is suitable for jury resolution - whether the defendant committed the particular

crime with which he was charged.” It would appear that preserving what can be salvaged of the Guidelines after *Blakely* would require that defendants absorb the risks raised by adding findings of other criminal conduct to a trial, unless a judge chooses to bifurcate the trial. Further, it would require interpreting *Blakely* to overruling *Witte v. United States*,<sup>72</sup> and *United States v. Watts*,<sup>73</sup> to the extent that they permit the judge to make findings regarding uncharged and acquitted conduct that enhances a defendant’s sentence beyond the maximum sentence specified in the Guidelines for the offense of conviction.

One important set of adjustments is entirely lost. Increases based on conduct that occurs during or after the trial is no longer available after *Blakely*. Perjury, obstruction of justice, or intimidation of witnesses now must be dealt with via contempt proceedings<sup>74</sup> or through additional criminal charges.

Nevertheless, juries can be instructed on the meaning of most Guidelines factors,<sup>75</sup> and their findings reviewed using the same standards applied to guilty verdicts today. Judicial application of the Guidelines, given the jury’s findings, may be reviewed just as they were before *Blakely*. Juries need not be asked to apply the grouping provisions as they appear now, but need only find the underlying facts, such as whether the count involved substantially the same harm.<sup>76</sup> *Blakely* does not mandate jury sentencing, only jury fact-finding for facts triggering sentences beyond those authorized by the conviction alone; the jury will still not know the punishment consequences of its findings. While the jury will be tasked with many more factual findings, all of the policy choices made by the Commission about how much time follows from what sorts of facts would remain in place.

Finally, it is important to recognize that the Guidelines remain unchanged in cases where, for example, the judge sentences a defendant within the presumptive sentencing range provided for the offense of conviction, or raises the sentence based on prior convictions alone. A facial challenge to the Guidelines, therefore, is a non-starter.<sup>77</sup> Consider the unsuccessful attempt by a panel of the Ninth Circuit to invalidate on its face 21 U.S.C. § 841 after the Court’s decision in *Apprendi*. In enacting § 841, Congress had clearly intended that drug quantities would be determined by a judge.<sup>78</sup> *Apprendi* struck down this legislative scheme in cases where findings of drug quantity raised the defendant’s sentence above the maximum term authorized without that finding.<sup>79</sup> En banc, the Ninth Circuit Court of Appeals rejected a panel opinion that had concluded that 21 U.S.C. § 841 was facially invalid due to *Apprendi*’s rule.<sup>80</sup> The Supreme Court signaled approval of this treatment when it remanded a case involving this provision to the Court of Appeals for the Tenth Circuit for reconsideration in light of *Apprendi*.<sup>81</sup>

Following *Blakely*, just as some courts have begun to sentence without the Guidelines after concluding the entire scheme is unconstitutional, a number of courts have chosen to assume they are still binding and apply a modified version of the Guidelines.<sup>82</sup> For example, in *United States v. Fanfan*,<sup>83</sup> the judge held that since the indictment alleged only a 500 gram powder cocaine conspiracy, producing a presumptive guideline range of 63-78 months, *Blakely* required that he reject the Probation Department’s Presentence report calculating a guideline sentence 188-235 months based upon relevant conduct involving crack cocaine and the defendant’s leadership role in

the conspiracy, and that he impose a sentence of no more than 78 months.<sup>84</sup> In *United States v. Montgomery*, the judge rejected the option of discarding the guidelines and instead chose to sentence the defendant to the range mandated by the guidelines for only the facts admitted by the defendant.<sup>85</sup>

In sum, patching the hole in the Guidelines scheme left by *Blakely* may prove challenging and somewhat incomplete, and surely unsatisfying for the long run, but it is not impossible. As Justice Scalia stated in *Blakely*, the decision “is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.”<sup>86</sup> Severing from the Guidelines only judicial fact-finding for maximum-enhancing facts will render the Act less effective in securing the uniformity in sentencing that Congress originally intended. Even without this feature, however, the Act continues to advance its overall goals.<sup>87</sup> Whether Congress would have chosen to enact a Guidelines system that complies with *Blakely*, rather than retain criminal sentencing in its pre-1984 state, is anybody’s guess. If we had to decide the issue of severability today, we would come down in favor of retaining what is left of the Guidelines.

## II. Post-Blakely Strategy

In this section, we review some of the anecdotal information we have been picking up about *Blakely* in practice. The best public source of information on *Blakely* so far is the web site maintained by Professor Doug Berman, <http://sentencing.typepad.com>. Based upon what we hear from sources at various U.S. Attorney's offices, Federal Public Defender services, and federal judicial chambers across the country (not by any means a scientific sample), we can be sure of only one thing: no one is certain how to proceed in the wake of *Blakely*.

Most judges we have reached tell us that until Congress, the U.S. Sentencing Commission, or the Court says otherwise, they will assume that *Blakely* does apply to the Guidelines, and that the new "statutory maximum" is the top of the range designated for the offense of conviction absent additional findings. As the early decisions under *Blakely* recounted above demonstrate, however, there is no consensus on severability.

The Department of Justice memorandum states the official position for prosecutors: Prosecutors have been instructed seek to obtain plea agreements that waive all rights under *Blakely*, and include provisions that "the defendant agrees to have his sentence determined under the Sentencing Guidelines, waives any right to have facts that determine his offense level under the Guidelines ... alleged in an indictment and found by a jury beyond a reasonable doubt; agrees that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agrees to waive all constitutional challenges".<sup>88</sup> Some prosecutors may not vigorously defend the position advanced in the DOJ memo that *Blakely* does not apply, or that these waivers are valid. As one prosecutor put it, “where there is tension between what my local district judge wants and what General Ashcroft wants, the local judge wins every time.”

We are also hearing from some prosecutors that they will try to pack as many aggravating sentencing factors into plea agreements as possible. The chief of one prosecutor's office tells us that he is adding aggravating factors into indictments where indictments have not yet been returned, and filing notices of aggravating sentencing factors after indictments and before plea or trial. His position is that if a defendant agrees to waive a jury trial on guilt or innocence she should also agree to waive the same regarding aggravating sentencing factors included. For those cases that will proceed to jury trial, he will request that the aggravating sentencing factors be submitted to the jury as special issues of fact findings to be made after the defendant has been found guilty of the underlying offense.

Federal prosecutors may also attempt to pick the charges with the highest base offense levels. This will not be generally helpful, however, as the Guidelines are structured such that similar charges result in the same sentencing grid.<sup>89</sup> Prosecutors may try to select charges that include sentencing enhancements based upon prior convictions,<sup>90</sup> exempted from *Apprendi*'s rule,<sup>91</sup> or that carry mandatory minimum sentences, also exempt.<sup>92</sup> Because mandatory minimum sentences trump a lower guidelines sentence,<sup>93</sup> the "maximum sentence" for the offense of conviction will always be at least the mandatory minimum sentence.<sup>94</sup> There may be instances where prosecutors would have dropped a 18 U.S.C. § 924(c)(1)(A) in exchange for a plea to the underlying drug offense, accepting a 2 level increase for the possession of a firearm in lieu of the five-year consecutive mandatory minimum sentence under § 924(c). Post-*Blakely*, a prosecutor will need to obtain a defense stipulation to the weapon before the plea agreement can include a sentence based on this fact, making this sort of deal less attractive.

In many cases, prosecutors predict that in plea bargaining over these types of factors they may have to give up certain enhancements or charges in order to obtain defendants' admissions to other factors and charges. The Department of Justice is advising its attorneys to seek waivers of both jury and burden of proof,<sup>95</sup> but defendants will not be keen to waive, without some significant benefit in return, the higher burden of proof in cases where the government's evidence supporting the aggravating fact is inadmissible hearsay, or leaves room for doubt. In these cases, this will change the dynamic of plea bargaining in favor of the defendant, as the prosecutor must now also bargain for admissions to sentence enhancing facts, facts which, without the defendant's admissions, the prosecutor would have to establish a beyond a reasonable doubt using only admissible evidence.<sup>96</sup> On the other hand, in some cases certain aggravating facts are so prejudicial to a defendant that the prosecutor loses nothing by refusing to bargain over them, knowing that the defendant will not want the issue raised to a jury. A defendant may offer to plead guilty to everything but the aggravator, then have that fact tried to the bench, but the prosecutor would have the authority to veto this compromise and force the defendant to choose between admitting everything or a jury trial. Much will depend on the type of aggravating fact and the strength of the government's proof on that fact.

Our contacts in federal public defenders offices and the private criminal defense bar tell the same story. Despite the Thornburgh, Reno, and Ashcroft memoranda ostensibly limiting prosecutorial power to bargain (which some believe are still honored most often in the breach),<sup>97</sup> defenders expect to be in a position to attain better deals in many cases. The higher burden of proof

and more restrictive evidence rules may defeat some allegations that had been successful in the past. In at least one office, some federal public defenders have been able to obtain lower guideline sentences by pleading open to existing charges, before prosecutors could secure superceding indictments with added enhancing facts. This is only a short term strategy, already ending as prosecutors add aggravating facts to indictments.<sup>98</sup>

The word from some chambers is that judges will let their magistrates take the pleas, and will not formally accept them until sentencing - and then only if the defendant either stipulates to every aggravator in the presentence report, the prosecutor declines to pursue that aggravator, or a jury is empaneled to decide the matter. A number have also indicated that they will formally warn each defendant about the ramifications of *Blakely* during the Rule 11 colloquy. While some judges appear willing to offer two sentences, one under the Guidelines pre-*Blakely* and one with the unaggravated sentencing range,<sup>99</sup> others may refuse to do this. With *Blakely* less than a month old, its effect on charging, bargaining, and sentencing norms is far from clear.

### **Part III. Raising *Blakely* on Direct Appeal and Collateral Review**

The review of cases in which defendants have already been sentenced pose additional issues. A small number of defendants sentenced just as the *Blakely* decision was announced may be able to seek resentencing under Rule 35(a) (formerly Rule 35(c) before the 2002 “restyling” of the FRCrP), but that relief is available only within 7 days after sentencing.<sup>100</sup> There is also some authority limiting such motions to technical or clerical corrections of the sentence, not the sort of resentencing that would be required under *Blakely*.<sup>101</sup> The vast majority of federal prisoners will be raising *Blakely* on appeal or in applications for relief under 28 U.S.C. § 2255.

#### **A. Challenging federal sentences on appeal**

Defendants can expect to encounter several barriers to appellate relief when challenging their sentences under *Blakely*. First, as noted in Part II, for defendants convicted following guilty plea, none of the facts admitted by the defendant, at the plea hearing, in the plea or sentencing agreement, or at sentencing may form the basis for a *Blakely* appeal.<sup>102</sup> Nor can a defendant who was convicted at trial maintain a *Blakely* claim if the contested facts triggering the higher sentence range were specifically found as part of the jury’s verdict of guilt. If the defendant waived a jury and was convicted after a bench trial, facts found by the judge beyond a reasonable doubt under Rule 23(c) are not subject to challenge either. Even without these findings or admissions, relief may be unavailable due to the defendant’s waiver of the right to raise his *Blakely* claim, or due to the application of harmless error and plain error review standards under F. R. Cr. P. 52.

##### **1. Express Waiver.**

Many defendants sentenced prior to *Blakely* will have entered into a plea agreement containing an express waiver of the right to challenge their sentences on appeal. Knowing and voluntary waivers of the right to appeal were held to bar otherwise valid claims for relief under *Apprendi*, and should have the same effect here.<sup>103</sup> Whether a waiver bars relief will depend on its

wording. Consider a defendant who reserved in his plea or sentencing agreement the right to appeal a sentence imposed above the “statutory maximum,” with no reference to a specific statute or statutory maximum sentence. He may have a shot at arguing that the agreement allows appeal of any sentence that exceeds the top of the guidelines range authorized by the facts admitted or proved beyond a reasonable doubt, that is, the “statutory maximum” as defined for purposes of the Sixth Amendment by the Supreme Court in *Blakely*.<sup>104</sup> Similarly, a defendant who reserved the right to appeal any sentence imposed in violation of *Apprendi* should be able to raise a *Blakely* claim on appeal. A waiver of the right to appeal the conviction, without any mention of sentence, will not bar a *Blakely* claim on appeal.

Many waiver provisions, however, condition the right of appeal upon the imposition of a sentence over a specified ceiling or restrict appeal to specified claims of error.<sup>105</sup> A waiver might reserve the right to appeal only if the judge departs upward under U.S.S.G. Part 5, for example. Such a waiver will probably bar any challenge under *Blakely* or *Apprendi* to sentences other than those in which the judge actually relied upon an upward departure.<sup>106</sup> One claim commonly exempted from appeal waiver provisions is the ineffective assistance of counsel.<sup>107</sup> A defendant who is barred by his waiver from raising *Blakely* error directly on appeal may succeed in raising it indirectly, as a claim that his attorney should have pursued or reserved an *Apprendi* challenge to his sentence.

## **2. Plain Error.**

Even for those defendants who do not expressly waive their claims, relief may be difficult to obtain. A defendant who did not raise his claim while in trial court will be entitled to relief only if he can meet the plain error standard of Rule 52. The Court stated this review standard succinctly in *U.S. v. Cotton*.<sup>108</sup>

[B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Turning to the second requirement, that the error be plain, the Court has explained that it is enough that the error be clear under the law as it stands *at appeal*. That the law at the time of trial appeared contrary to *Blakely* does not preclude relief,<sup>109</sup> it does not matter that the trial judge and the attorneys in the case didn’t see *Blakely* coming.

The third and fourth requirements will be key in many of these cases. The defendant will have the burden of demonstrating that if had he raised the error, there is a reasonable probability that he would have received a lower sentence.<sup>110</sup> In cases where there is overwhelming and uncontroverted evidence to establish the facts contested under *Blakely*, relief will be unavailable.<sup>111</sup> In cases where the aggravating fact was based on disputed hearsay, a defendant may be able to meet this burden.

## **3. Harmless Error**

A defendant should be entitled to relief from his illegal sentence if he has preserved his *Blakely* challenge for appeal, and demonstrates that his sentence exceeded the punishment authorized solely by the facts admitted or proven as part of his conviction. A defendant preserves his *Blakely* challenge, we believe, if he objects under *Apprendi* to the omission of facts triggering upward adjustments from the indictment, or demands the right to a jury determination or proof beyond a reasonable doubt for those facts. With upward adjustments common in setting offense levels under the Guidelines, a defendant may very well find some fact not admitted or proven to a jury that had an effect on the authorized sentence range. However, in some cases the government might be able to demonstrate beyond a reasonable doubt that the defendant would have received the same sentence had *Blakely* been followed.<sup>112</sup> For example, an upward adjustment may have had no effect on a defendant's sentencing range if the range was mandated independently by the defendant's prior criminal history, still a valid enhancement under *Almendarez-Torres*.<sup>113</sup>

Alternatively, if the trial judge happened to place on the record the sentence she would have imposed assuming the Guidelines were held to be unconstitutional in whole or in part, and if the Court holds that due to *Blakely*, judges are not bound by even those guidelines specifying ranges for minimum offense levels, a reviewing court may be able to point to the court's alternative, non-Guideline sentence as proof that the *Blakely* error did not affect the outcome.

The Court has not addressed directly the application of harmless error review to the failure to charge an *Apprendi* fact in an indictment, but lower courts have found that indictment defects will be reviewed for harmless error just as the failure to prove the fact to a jury with proof beyond a reasonable doubt.<sup>114</sup>

#### **4. What is the appropriate remedy?**

Assuming that a reviewing court finds that a *Blakely* error was not harmless, a reviewing court may choose to simply reduce the defendant's sentence to the maximum allowed based on the elements that were admitted or proven beyond a reasonable doubt. A more difficult issue is raised if the case is remanded for resentencing.

One option always open to the parties faced with a *Blakely* violation is settlement, even after appeal. Alternatively, if a trial judge anticipates that *Blakely* has vitiated the entire mandatory Guidelines scheme, leaving only the statutory ranges specified in the statute defining the offense, or a set of voluntary guidelines with no binding effect, the judge may choose to resentence the defendant as if the Guidelines were no longer binding. A judge should avoid resentencing the defendant to a more severe sentence to steer clear of any claim of vindictiveness,<sup>115</sup> but would otherwise be free to select a sentence under the traditional relaxed sentencing processes upheld in *Williams v. New York*.<sup>116</sup> This option is a good one for the defendant if the judge, freed of the Guidelines' constraints, would have imposed a lower sentence. On the other hand, a judge may choose to impose the exact same sentence that she would have imposed under the Guidelines, so that the defendant gains exactly nothing by a successful *Blakely* appeal.

If a judge concludes that *Blakely* does not permit this option, but instead invalidates only the

provisions authorizing judicial findings by a preponderance of facts triggering upward adjustments and departures, leaving the rest of the Guidelines intact, the next issue is whether the Double Jeopardy Clause will allow the government an opportunity to establish the *Blakely/Apprendi*-facts on remand. Although remand for “resentencing” is not barred by double jeopardy,<sup>117</sup> *Blakely/Apprendi* facts are elements, and a hearing to establish them is equivalent to a trial on the elements of offense.

First, double jeopardy may bar additional proof on the aggravating facts on remand if the offender’s conviction is considered an implied acquittal of the greater offense that the government wants a second chance to prove.<sup>118</sup> However, no double jeopardy problem is posed by trial of the aggravating factor or factors on remand if *Blakely* error is no different in kind from other errors in procedure that affect the determination of the elements of crime, such as the empaneling of a biased jury or a faulty burden of proof instruction.<sup>119</sup> When the defendant’s allegation of error under *Blakely* is that he deserved certain procedural protections and didn’t get them, *not* that evidence on the aggravating element was insufficient, his claim is equivalent to a demand for a new trial. Remand and retrial will provide the defendant everything he is entitled to under the Constitution. For example, in Arizona, the state’s high court rejected a double jeopardy challenge to resentencing by defendants whose death sentences were invalidated by *Ring*, after reasoning that a judge, the fact-finder, “made those findings necessary to impose a death sentence. In no sense has a fact-finder concluded that the state failed to prove aggravating circumstances beyond a reasonable doubt. Accordingly, we hold that jeopardy has not attached”<sup>120</sup> The Supreme Court of Idaho agrees with this rationale, and has also approved of trials upon remand of the aggravating facts in *Ring*-affected cases.<sup>121</sup>

Admittedly, there is no express statutory authority for a judge to empanel a jury to make such findings. What’s left of the federal sentencing statute does not provide for juries to find these facts.<sup>122</sup> Nevertheless, there does not appear to be any statutory or constitutional prohibition against partial guilty pleas or bifurcated trials, so long as the parties have agreed. Thus, one option open to judges facing resentencing after a conviction by either jury trial or plea, would be to empanel a jury for the purpose of determining the *Blakely* facts alone.<sup>123</sup> The judge would limit proof to evidence relevant to the facts at issue, and instruct the jury to determine only whether those facts have been established by the government beyond a reasonable doubt.<sup>124</sup> In essence this proceeding would be one part of a bifurcated proceeding - with some of the elements of the offense being resolved in one proceeding (by plea or jury trial) and other elements resolved in this later jury trial. And assuming a defendant had pleaded guilty to the basic offense prior to appeal of his sentence, both parties would have agreed to settlement as a resolution, of at least those elements, and the charge need not be reopened to be tried or negotiated anew. Only the unresolved aggravating features would remain to be determined, and a defendant could only waive his right to a jury determination of those facts with the consent of the government and the court.<sup>125</sup>

A more potent double jeopardy problem is raised, we believe, in cases in which the *Apprendi/Blakely* facts, essentially elements of a greater offense, were never alleged in the indictment. A defendant should not be subjected to retrial on remand if he shows not only that the aggravating fact was decided by the wrong fact-finder under the wrong standard of proof, but also

that the fact was never alleged in the indictment. When the defect in the indictment is not harmless, (e.g., the record lacks proof of the fact beyond a reasonable doubt), then the judge should be limited to sentencing within the legal maximum for the offense alleged in the indictment.<sup>126</sup> A trial of the aggravating factors after remand would require a new indictment on the greater offense, which would constitute a second prosecution for the same offense.<sup>127</sup>

## **B. Collateral Review under § 2255**

Under *Teague v. Lane*, federal courts may not grant relief under § 2255 on the basis of a “new” rule of criminal procedure announced after the prisoner’s conviction became final.<sup>128</sup> Prisoners whose convictions became final before *Blakely* was handed down on June 24, 2004, are probably not going to be able to rely on the decision for relief, but we believe this is a close question. If we are wrong about this, and *Blakely* was not a new rule, but was instead an inescapable application of *Apprendi*, then, just as Justice O’Connor predicted in her *Blakely* dissent, prisoners whose convictions became final anytime after *Apprendi* was announced could seek relief under § 2255.

### **1. Blakely is Probably a New Rule, applicable only to those cases with appeals pending as of June 24, 2004.**

The key here will be determining whether *Blakely* is “new” or was instead “mandated,” “compelled” and “dictated by then-existing precedent,” so that “the unlawfulness . . . was apparent to all reasonable jurists”<sup>129</sup> once *Apprendi* was announced. Our own impression is that judges and lawyers around the nation were stunned by the *Blakely* decision. But lack of prescience by criminal justice insiders is not the test. The test is one of logic and legal reasoning, and the result is not overwhelmingly obvious.

Prisoners seeking retroactive application of *Blakely* back to the date *Apprendi* was decided must confront the Court’s decision in *Schiro v. Summerlin*,<sup>130</sup> in which the Court held that the rule in *Ring* requiring jury determination of aggravating facts could not be applied retroactively to Summerlin’s case, because the rule was “new” when Summerlin’s direct appeal ended, and did not fit within an exception to the bar against retroactive application of new rules on collateral review. Defendants may argue that *Blakely*, unlike *Ring*, is not “new,” because it did not require the Court to overrule an earlier precedent.<sup>131</sup> In *Apprendi* itself, some justices warned of the decision’s impact on presumptive sentencing systems such as the one in Washington and the federal guidelines,<sup>132</sup> and several scholars evaluating the *Apprendi* decision concluded the same. Furthermore, many of the prisoners that challenged their federal sentences after *Apprendi* made the very argument that later garnered five votes in *Blakely*.<sup>133</sup> Most important, defendants will point out, even though the Court declared the rule in *Ring* “new” for purposes of Summerlin’s case, because Summerlin’s conviction was final well before the Court decided *Apprendi*, the Court never addressed whether the rule in *Ring* may have been compelled, dictated, or mandated by *Apprendi* itself.<sup>134</sup> If the *Blakely* rule was dictated by *Apprendi*, then prisoners whose direct appeals were pending when *Apprendi* was announced will not be barred by *Teague* from raising their *Blakely* claims.

Alternatively, a prisoner may argue that even if *Apprendi* did not announce what all reasonable jurists should have recognized then as the *Blakely* rule, *Ring* did. *Ring* stated that a defendant is entitled to the right to a jury trial on those factors which raise "the ceiling of the sentencing range available"<sup>135</sup> and rejected the state's argument that the statutory maximum sentence for first degree murder was death, instead looking at the effect of the state law in limiting a convicted murderer's sentence to life unless additional facts were found.<sup>136</sup> The state's first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," wrote the Court, "for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." This move in *Ring*, clarifying that the maximum penalty authorized by the verdict for purposes of the Sixth Amendment is not the "formal" ceiling identified by the statute defining the offense, but is instead the maximum penalty authorized by additional sentencing provisions, arguable "dictated" and "compelled" the *Blakely* decision. If so, then the window for relief under § 2255 for *Blakely* claimants shrinks to those with convictions that became final after June 2002.

Against retroactive application, however, are the following, and we think, more persuasive, arguments. *Blakely* was a close case, with a bare majority of justices finding that the Constitution required its holding. When four justices of the Supreme Court reject a rule as *not* compelled by the Constitution, it is difficult to maintain that the rule was dictated by precedent and apparent to "all reasonable jurists." As Justice O'Connor points out in her dissent, *Apprendi* would have been consistent with a different outcome in *Blakely*. The "statutory maximum" sentence that the *Apprendi* Court held must not be exceeded could have been interpreted in the *Blakely* case to be the ceiling for all class B felonies in the Washington code, not the presumptive ceiling under the codified guidelines. Not only did four justices disagree with the *Blakely* Court's application of *Apprendi*, every state supreme court and federal court of appeals, other than Kansas, had rejected the argument that *Apprendi* invalidated presumptive sentencing schemes.<sup>137</sup> Judge Tjoflat, for example, stated that the constitutionality under *Apprendi* of guidelines sentences within the maximum sentence designated in the U.S. Code was "obvious."<sup>138</sup> In sum, *Blakely* may be consistent with *Apprendi* and *Ring*,<sup>139</sup> but it is difficult to maintain that "no other interpretation" of *Apprendi* or *Ring* was "reasonable."<sup>140</sup>

## **2. Blakely would not meet the exception for retroactive application of watershed rules**

If indeed *Blakely* was not compelled by *Apprendi*, then retroactive application is possible only if the rule it declares fits within one of the narrow exceptions in *Teague*. There is little hope for retroactive application of *Blakely* under the exception for watershed rules of criminal procedure essential to the fairness of the proceeding now that the Court in *Summerlin* held that the same rule in *Ring* fails to meet this exception.<sup>141</sup>

A memorandum for panel attorneys prepared in the wake of *Blakely* argues that because the Court in *Summerlin* addressed only the retroactivity of the right to jury holding of *Ring* and did not address whether the proof-beyond-a-reasonable-doubt requirement was retroactive,<sup>142</sup> there is still a chance that proof-beyond-a-reasonable-doubt requirement of *Blakely*, and *Apprendi* itself, would be applied retroactively. The memo points to *Hankerson v. North Carolina*, in which *Mullaney* was

held to apply retroactively, and to *Ivan V v. City of New York*, applying *Winship* retroactively.<sup>143</sup> There are three reasons to anticipate rejection of this rationale as a basis for applying *Blakely* and *Apprendi* retroactively on collateral review.

First, both older cases applying the burden of proof rulings retroactively preceded *Teague*. Unlike *Gideon*, which the Court in its cases applying *Teague* holds out as a paradigm for retroactive application on collateral review, both of the older burden of proof cases involved retroactive application *on direct appeal* not on collateral review. Second, the *Apprendi/Blakely* rule is arguably, not as sweeping and fundamental as the rule established in *Winship* or *Mullaney*, much less *Gideon*. *Mullaney* reallocated the burden of proof, from defense to prosecution, for certain factual findings; *Blakely* and *Apprendi* simply raised, by degree, a burden of proof that had already rested with the government. Moreover, while *Winship*, like *Blakely* and *Apprendi*, raised a burden already carried by the government, it did so in cases in which none of the elements had been established previously beyond a reasonable doubt. The change brought about by *Blakely* and *Apprendi* was much less fundamental - adding certain facts to the list of elements already proven beyond a reasonable doubt. Unlike cases falling afoul of *Winship*, in any *Blakely* or *Apprendi* case, the defendant will have been provided with the right to proof beyond a reasonable doubt on every element of *some* offense, albeit a lesser offense than the one for which he was sentenced. *Winship*, then, was essential to prevent the punishment of defendants innocent of any crime. *Mullaney*, too, involved a fact that if established would have exonerated the defendant entirely. *Apprendi* and *Blakely* operate to calibrate punishment for defendants constitutionally convicted of at least a lesser offense.

Finally, compared to the rule in *Gideon*, which the Court in *Summerlin* noted was so sweeping that it affected “every felony case,” and which affected the very structure of the trial and appellate process itself, the rule in *Blakely/Apprendi* is far less sweeping. Unlike *Gideon*, it affects only the process for proving of certain additional elements, not the entire case. This feature persuaded the Court in *Cotton* to conclude that *Apprendi* is not a rule that requires relief under plain error review should the defendant fail to raise it in the trial court.<sup>144</sup>

### **3. Successive Motions and Late Filings Under § 2255**

Applicants who raise their *Blakely* claims in a second or successive § 2255 motion will encounter a dead end. Relief for such claims is available only if the court of appeals will certify that the claim is based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.”<sup>145</sup> But, as the Court made clear in *Tyler v. Cain*,<sup>146</sup> no Court of Appeals can make such a certification unless and until the United States Supreme Court decides that *Blakely* should be applied retroactively, a decision we believe is unlikely to materialize.<sup>147</sup>

A retroactivity problem also arises if a defendant’s first attempt to seek relief from *Blakely* error under § 2255 is filed more than a year following the date on which the original judgment became final. An exception to the one-year limitations period provides that the period will not begin to run until the “date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to

cases on collateral review... .”

#### IV. Congressional Response to *Blakely*

In this section we collect some of the options Congress might pursue in response to *Blakely*, assuming that courts hold that the case applies to the Guidelines, and that judicial fact-finding for upward adjustments is severable from the remainder of the federal sentencing scheme. Three options are noted by Justice Breyer in his *Blakely* dissent. First, Congress could return to the 18th century pure "charge offense" or "determinate" sentencing.<sup>148</sup> We agree with Justice Breyer that such a system "assures uniformity, but at intolerable costs."<sup>149</sup> It imposes identical punishments on defendants who commit their crimes quite differently, and thus fails to provide individual justice.

Second, Justice Breyer recognizes that Congress could return to the pre-1984 system of discretionary sentencing based on pure judicial discretion within the statutory maximum penalty. Or, as Professors Kate Stith and William Stuntz suggest,<sup>150</sup> Congress could make the Guidelines voluntary. Either scenario seems to us highly unlikely in today's political climate. The goals of punishment proportional to the gravity of the offense and parity among defendants that prompted the determinate sentencing movement, have not diminished since 1984.<sup>151</sup> The animating purpose underlying the Sentencing Reform Act was precisely to eliminate such wide judicial discretion, and in its recent actions Congress has shown only an interest in constricting, not expanding, the little discretion that federal judges still possess.<sup>152</sup>

Finally, Justice Breyer notes a third option (the one "which the Court seems to believe legislators will in fact take"<sup>153</sup>) is for the legislative bodies to do nothing and allow aggravators under the Federal Sentencing Guidelines to be submitted to juries, limiting judicial discretion to downward departures. In the short run, this is just what many courts are doing. Some defenders are urging that Congress and the Commission codify this approach.<sup>154</sup>

We see at least two more options. Congress might take Judge Cassell's suggestion in *Croxford* of "replacing the carefully-calibrated Guidelines with a series of flat mandatory minimum sentences."<sup>155</sup> Much more realistically, Congress could model the federal guidelines on the Pennsylvania Sentencing Guidelines, which limit judicial discretion only concerning the minimum sentence but say nothing about the maximum, which can be as high as the statutory maximum for the offense.<sup>156</sup> Professor Bowman has suggested a similar quick fix, recommending that the Commission "amend the sentencing range on the Chapter 5 sentencing table to increase the top of each Guidelines range to the statutory maximum of the offense(s) of conviction."<sup>157</sup> By chopping the tops off the ranges and omitting the most problematic aggravating facts (such as obstruction and relevant conduct), and by encouraging judges to follow prior ceilings as unenforceable maxima in policy statements, many of the existing gradations between defendants and offenses can be preserved.

There are reasons to be wary of such a proposal, and the debate is unfolding in Washington as this is written. Judicial discretion will not be cabined at the top - only at the bottom. Moreover, it may undercut the "real offense" component of the Sentencing Guidelines, increasing disparity based

upon what the prosecutor charges, rather than what the judge finds the defendant actually did. We do believe that such a transformation of sentencing factors into "de facto" mandatory minimum penalties will probably survive constitutional challenge in the Supreme Court, so long as *Harris v. United States*, upholding the constitutional validity of judicial fact-finding for mandatory minimum sentences, remains good law.<sup>158</sup> Whether *Harris* survives will depend on the views of the justices about the function of the Sixth Amendment jury trial right, and how closely that guarantee limits legislative authority to define the substantive criminal law.

<sup>1</sup> Nancy J. King is the Lee S. & Charles A. Professor of Law at Vanderbilt University Law School. We thank William Allison, Doug Berman, Jerold Israel, Kevin Reitz, and Jordan Steiker for their helpful comments on this article as it has taken shape in the days since the Court delivered the *Blakely* bombshell.

<sup>2</sup> Susan R. Klein is the Baker & Botts Professor in Law at the University of Texas at Austin.

<sup>3</sup> 541 U.S. \_\_\_\_ (June 24, 2004). The five-four breakdown is along the same lines as the breakdown in *Apprendi*.

<sup>4</sup> See *United States v. Penaranda*, 2004 U.S. App. LEXSIS 14268, at \*24 (2d Cir. July 12, 2004) (in banc) (“the potential for administrative chaos is massive and imminent”). For an excellent guide to *Blakely* and state sentencing, see the National Center for State Court’s forthcoming “*Blakely v. Washington*: Implications for State Courts,” listing affected states as Indiana, Kansas, Michigan, Minnesota, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Washington, and to a lesser extent, Arizona, California, Colorado, and Illinois. As Kevin Reitz has commented, relatively small percentages of defendants in these states are sentenced above presumptive ranges, and when they are, far fewer facts are involved.

<sup>5</sup> 530 U.S. 466 (2000) (Stevens, J., writing for majority, joined by Scalia, Souter, Thomas, and Ginsburg) (O’Connor, J., dissented, joined by Breyer, and Kennedy, JJ., and Rehnquist, C.J.).

<sup>6</sup> *Apprendi*, 530 U.S. at 490.

<sup>7</sup> 536 U.S. 545 (2002) (Kennedy, O’Connor, Scalia, JJ., and Rehnquist, C.J., writing for the plurality; Breyer, J., concurring; and Thomas, Stevens, Souter, and Ginsburg, JJ., dissenting).

<sup>8</sup> *Id.* Though the particular factual findings triggers a mandatory minimum, that fact may be found by the judge at sentencing because it does not give the judge discretion to sentence a defendant outside the maximum authorized by the jury’s finding of facts. The plurality noted that statutes raising the minimum but not the maximum sentence did not exist until relatively recently, and that consequently there was no historical tradition that would compel that facts that triggering higher minimum sentences be treated as elements. *Id.* at 560.

<sup>9</sup> 536 U.S. 584, 587 (2002).

<sup>10</sup> *Ring*, 536 U.S. at 602.

<sup>11</sup> The Act provides crime-by-crime guideline ranges, set forth in the state code in the form of a sentencing grid. See Wash. Rev. Code § 9.94A.310 (2004).

<sup>12</sup> *Blakely*, slip opinion, at 9 n. 9; at 12.

<sup>13</sup> See Justice O’Connor’s dissent in *Blakely*, slip opinion, at 1, 6, 11, and 12; Justice Breyer’s dissent in *Blakely*, slip opinion, at 2, 7, 18, and 19.

<sup>14</sup> Available at Sentencing Law and Policy [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/dag\\_blakely\\_memo\\_7204.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf) (hereinafter “Comey memo”) and a sample brief from DOJ, downloadable from posting dated Wednesday, July 7, 2004 at <http://sentencing.typepad.com> (hereinafter “DOJ sample brief”).

<sup>15</sup> DOJ sample brief at 16. See also Brief for the United States as Amicus Curiae Support Respondent, *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (No. 02-1632) (“unlike the Washington system, the federal guidelines are not enacted by a legislature but are promulgated by the Sentencing Commission, ‘an independent Commission in the judicial branch of the United States.’” citing 28 U.S.C. 921(a)).

<sup>16</sup> DOJ sample brief at 15. Dissenting in *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir., July 9, 2004), Judge Easterbrook also argues that *Blakely* is limited to “statutes” (analogizing the Commission’s Sentencing Guidelines to the federal Parole Commission’s release guidelines, which are not submitted to a jury)

<sup>17</sup> Justice Scalia, the author of *Blakely*, is on record that the Federal Sentencing Guidelines are unconstitutional. *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (terming the Commission a “juniorvarsity Congress”).

<sup>18</sup> *Mistretta*, 488 U.S. at 393-94. See also *Stinson v. United States*, 508 U.S. 36 (1993) (the Federal Sentencing Guidelines have the force of law).

<sup>19</sup> See e.g., Congressional rejection of two attempts by the U.S. Sentencing Commission to modify the 100-1 powder to crack cocaine sentencing ratio, text of proposed amendments reprinted at 57 Crim. L. Rep. 2095, 2096 (1995) and 10 Fed. Sent. Rptr. 184 (1998); PROTECT Act, Pub. L. 108-21, § 41(b),(g), and (i), 117 Stat. 668-69, 671-73 (April 30, 2003) (amending guidelines regarding child pornography, curbing judicial discretion to depart downward, and changing appellate standard of review of criminal sentences).

<sup>20</sup> *Blakely*, slip op. at 7.

<sup>21</sup> See *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004 (Opinion by Posner, J.)). The decision includes an interesting debate over whether the Court would have to overrule its decision in *Edwards v. United States*, 523 U.S. 511 (1998), in order to reach this conclusion. We agree with Judge Posner on this point. See also *United States v. Lamoreaux*, No. 03-00399 (W.D. Mo, July 7, 2004) (agreeing with Judge Cassell in *Croxford* that *Blakely* does apply to the federal sentencing guidelines, and that the Guidelines provisions providing for judicial factfinding cannot be severed). An up-to-date list of district and Circuit opinions post-*Blakely* can be found on <http://sentencing.typepad.com> - click on USSGuide *Blakely*.

<sup>22</sup> See *United States v. Pineiro*, No. 03-30437 (5th Cir. July 12, 2004, per Chief Judge King) (where jury found defendant guilty of conspiring to distribute less than 50 kilograms of marijuana and 50 grams or less of cocaine, court upheld judicial sentence based upon much higher quantities of drugs indicated in the Presentence investigation Report and enhancement based upon defendant’s leadership role).

<sup>23</sup> *Id.* at 13 - 18 (noting that the Court has upheld the Guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989), *Edwards v. United States*, 523 U.S. 511 (1998), *Witte v. United States*, 515 U.S. 389 (1995), and *United States v. Watts*, 519 U.S. 148 (1997)).

<sup>24</sup> *United States v. Penaranda*, No. 03-1055(L) and *United States v. Rojas*, No. 03-1062(L) (2nd Cir. en banc 7/12/04) (per Chief Judge Walker) (presenting three questions to the Court pursuant to 28 U.S.C. section 1254(2), which can be distilled to whether *Blakely* applies to judicial fact-finding that results in a higher offense level and other upward adjustment under the federal Sentencing Guidelines).

<sup>25</sup> See 18 U.S.C. § 1341 (Fifth Circuit Pattern Jury Instruction Criminal § 2.60, p. 171 (West 1997)).

<sup>26</sup> 18 U.S.C. § 1341 (West 2004).

<sup>27</sup> U.S.S.G. § 2B1.1(a) which gives an offense level of 6, and assuming a criminal history category of 1 (or 0 criminal history points).

<sup>28</sup> U.S.S.G. § 2B1.1(b)(I).

<sup>29</sup> *Blakely*, slip opinion, at 7 (emphasis in original).

<sup>30</sup> U.S. Sentencing Manual, Chaps. 2 and 3.

<sup>31</sup> See U.S.S.G. § 1B1.3.

<sup>32</sup> See U.S.S.G. § 5K. See also *Dilts v. Oregon*, 2004 WL 540530, \_\_\_\_ S.Ct. \_\_\_\_ (June 28, 2004) (vacating the case and remanding to the Supreme Court of Oregon for further consideration in light of *Blakely*). In *State v. Dilts*, 336 Ore. 158, 82 P.3d 593 (Sup. Ct. Ore. en banc 2003) the court held that an imposition of an upward departure sentence based on the defendant's racial animus did not violate *Apprendi* as it was still within the prescribed statutory maximum sentence for the offense of assault in the third degree to which defendant pled guilty. Though the Supreme Court of Oregon accepted the argument that an upward departure under the Oregon Determinate Sentencing Regime did not violate *Apprendi* so long as it was within the statutory maximum penalty for a third degree felony, the United States Supreme Court obviously disagreed.

<sup>33</sup> Not only must all facts increasing the Guidelines range for the offense of conviction be submitted the jury or admitted by the defendant, they must also be charged by the grand jury in the indictment. This follows from the unanimous Court's decision in *United States v. Cotton*, that *Apprendi* "facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625 (2002).

<sup>34</sup> See, e.g., *United States v. Shyrook*, 342 F.3d 948 (9th Cir. 2003) (collecting authority). For discussion of criminal forfeiture proceedings, see Wright, King & Klein, 3 Federal Practice and Procedure, Criminal 3d § 546.

<sup>35</sup> See King & Klein, *Aprés Apprendi*, (Aug. 23, 2002 version printed on the Federal Judicial Center website: <http://www.fjc.gov>), revised in May of 2002 from original in 12 FED. SENT. RPTR. 331 (2002), p. 3, n. 9 (collecting cases).

<sup>36</sup> E.g., *United States v. Syme*, 276 F.3d 131 (3d Cir. 2002) (holding that because the statute under which the District Court sentenced defendant to pay restitution contains no maximum penalty, *Apprendi* does not apply); *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002). An additional argument that might be offered to salvage restitution rulings, but that we believe is unlikely to succeed, is the claim that restitution is not "punishment" at all, within the meaning of the due process clause, but instead is a civil, remedial measure. See *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000) (holding *Apprendi* inapplicable to restitution orders "because restitution for harm done is a classic civil remedy"). Compare *United States v. Ross*, 279 F.3d 600 (3d Cir. 2001) (restitution is a criminal penalty); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (same).

<sup>37</sup> See *infra* n. 90 for partial list.

<sup>38</sup> There are some factual assessments required in the U.S.C.G. Manual sections 4A1.1, 4A1.2, and 4A1.3 that may require a jury finding beyond a reasonable doubt, even after *Almendarez-Torres*. 523 U.S. 224 (1998). For example, criminal history may be influenced by whether the defendant committed the instant offense while under release, whether a prior state offense was insufficiently serious to counted, and whether an offense was a 'crime of violence.' Compare, e.g., *U.S. v. Santiago*, 268 F.3d 151 (2d Cir. 2001) (finding that a defendant's prior convictions were committed on separate occasions, required for sentencing under section 924(e), need not be submitted to a jury); *U.S. v. Tighe*, 266 F.3d 1187 (9th Cir. 2001) (juvenile adjudications that do not afford the right to a jury trial and proof beyond a reasonable doubt are not "prior convictions" within the *Almendarez-Torres* exception). See also *People v. Thomas*, 91 Cal.App.4th 212, 110 Cal. Rptr. 2d 572 (2001) ("notably, the recidivism enhancement in *Almendarez-Torres* had elements apart from the mere fact of a prior conviction ... the prior conviction had to involve an 'aggravated felony' which occurred before the alien accused's removal from this country"); *Robinson v. State*, 793 So.2d 891 (Fla. 2001) (whether a recidivist committed a new offense within three years of being released was not an element under *Apprendi*).

<sup>39</sup> The Seventh Circuit in its decision in *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004), raised, but declined to decide this issue.

<sup>40</sup> *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

<sup>41</sup> *Alaska Airline, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (the one-house legislative veto provision of the Airline Deregulation Act covering regulations applicable to the right of first hire portion was severable from the remainder of the program); *see also*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (revocation of usufructuary rights from the portion of the treaty requiring removal of the Indians, as that part of the executive order absent the removal is incoherent); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking funding restriction as unconstitutional, and refusing to address severance of remaining portions of statute, as severance was not addressed by court of appeals); *United States v. Grigsby*, 85 F.Supp.2d 100 (Dist. of R.I. 2000) (section of Federal Child Support statute creating mandatory presumption in violation of due process could be severed from remainder of statute).

<sup>42</sup> *Alaska Airlines*, 480 U.S. 678 at 684.

<sup>43</sup> A 1996 amendment to 18 U.S.C. § 3563, addressing conditions of probation, did include a severability provision.

<sup>44</sup> *Alaska Airlines*, 480 U.S. 678 at 688.

<sup>45</sup> Comey memo (adopting as fallback position, in the event that the Court applies *Blakely* to the federal sentencing guidelines, that "the constitutional aspects of the Guidelines cannot be severed from the unconstitutional ones" in any case where a defendant desires to contest the underlying facts of an enhancement); DOJ sample brief at 19 - 36; *supra* n. 14.

<sup>46</sup> DOJ sample brief at 20, *supra* n. 14. It is quite clear from the legislative history of the Act that Congress envisioned that factual findings triggering sentencing enhancements would be made by the judge. See U.S. Code Congressional and Administrative News, 98th Congress, 2nd session, vol 4 at 3258, 3261, 3262. It is equally clear, however, that they never gave a moment's thought to the propriety of the system if the jury were to make these factual findings.

<sup>47</sup> DOJ sample brief at 22, citing 28 U.S.C. § 944(a)(1), *supra* n. 14.

<sup>48</sup> DOJ sample brief at 29, *supra* n. 14.

<sup>49</sup> U.S.S.G. § 1B1.11.

<sup>50</sup> Because the Federal Sentencing Reform Act anticipates a constant dialogue between Congress and the Commissioners, a persuasive argument can be made that the Court should look at legislative intent from 1984 until the last set of amendments to the U.S. Sentencing Guidelines in June of 2004, rather than limiting itself to the year 1984.

<sup>51</sup> The Bowman Memo can be found at Sentencing Law and Policy <http://sentencing.typepad.com>

<sup>52</sup> Bowman Memorandum at 6.

<sup>53</sup> *United States v. Croxford*, 2004 WL 1462111 (Dist. of Utah, Central Division, June 29, 2004) (revised at *United States v. Croxford*, 2004 WL 1551564 (July 12, 2004)).

<sup>54</sup> *Croxford* at 1 and 2. Though the judge claimed to hold that the Guidelines were unconstitutional only as applied to this case, his reasoning make them inapplicable to any case involving an upward adjustment beyond the sentencing range assigned for those facts admitted or proven beyond a reasonable doubt.

<sup>55</sup> *Croxford* at 5.

<sup>56</sup> *Id.* at 23. He further noted that "the Guidelines . . . are a holistic system, calibrated to produce a fair sentence by a series of both downwards *and* upward adjustments. " *Id.* at 24.

<sup>57</sup> *United States v. Rucker*, No. 03-CR-00039 (W. D. Tex. July 7, 2004).

<sup>58</sup> Notably, several courts prior to the U.S. Supreme Court's holding in *United States v. Mistretta* that the Guidelines were constitutional, held that certain provisions of the Guidelines were not only unconstitutional, but not severable. *See, e.g., Gubiensio-Ortis v. Canahele*, 857 F.2d 1245 (9th Cir. 1988) (finding that statute establishing Federal Sentencing Commission violated the separation of powers doctrine, and that the provisions of the Sentencing Reform Act curtailing good time credits are not severable from the unconstitutional provision of the statute). We note that the Court was not required to address this question (question No. 3 in the cert. petition) because it held the Guidelines were constitutional.

<sup>59</sup> *See* Brief of United States Senate as amicus curiae in *United States v. Mistretta*, 109 S.Ct. 647 (1999) (citing legislative history).

<sup>60</sup> Brief of United States Senator as amicus curiae at p. 5 (citing legislative history and statutes).

<sup>61</sup> *Mistretta v. United States*, 488 U.S. 361 at 366 (1989).

<sup>62</sup> *See, e.g.,* Wright, King & Klein, Federal Practice and Procedure, §§ 521-539 (West 2004).

<sup>63</sup> The legislature responded to *Apprendi* and the State Supreme Court's decision in *State v. Gould*, 23 P.3d 801 (Kansas 2001), by amending the Guidelines to provide that all such facts "shall be submitted to a jury and proved beyond a reasonable doubt." K.S.A. 2002 Supp. section 21-4718(b)(2).

<sup>64</sup> In the Kansas Supreme Court in *Gould* held that *Apprendi v. New Jersey* demanded that all facts triggering upward departures under the Kansas Sentencing Guidelines be submitted to the jury. *See Blakely*, slip opinion, at 13-14.

<sup>65</sup> We believe judges have the inherent authority to submit elements of an offense to a jury. After *Apprendi*, judges had no trouble submitting drug types and quantities to juries, despite no new legislation permitting this.

<sup>66</sup> K.S.A. § 21-4718(b)(4) (2003).

<sup>67</sup> *See also Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' quoting *Apprendi*); *id.* at 610 (2002) (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt").

This Court rejected in another context a novel in-between status for certain penalties that would have mandated some protections reserved for crime but not others. *See Hudson* (rejecting Halper).

<sup>68</sup> DOJ sample brief at 30, quoting *Croxford*, 2004 WL 1462111, at \*10.

<sup>69</sup> *Croxford* at 21; Sol. Gen. amicus brief in *Blakely* at 22.

<sup>70</sup> U.S.S.G. § 1B1.3.

<sup>71</sup> 18 U.S.C. § 3661; U.S.S.G. § 1B13(a)(2) (requiring the sentencing court to consider "all acts or omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction").

<sup>72</sup> 515 U.S. 389 (1995).

<sup>73</sup> 519 U.S. 148 (1997) (per curiam).

<sup>74</sup> See Wright, King and Klein, 3A Federal Practice and Procedure Criminal 3d §§ 701-720 (2004) (discussing summary and non-summary criminal contempt). Obstruction of justice under the current guidelines is not limited to post-charge conduct, however. See *United States v. Amedeo*, 370 F.3d 1305 (11th Cir. 2004).

<sup>75</sup> Judicial committees will no doubt have to redraft their criminal pattern jury instructions to account for all of these factors.

<sup>76</sup> See U.S.S.G. § 3 D1.2 (West 2002).

<sup>77</sup> The Court generally and strongly disapproves of facial attacks on federal statutes. See, e.g., *Sabri v. United States*, 541 U.S. \_\_\_\_ (2004).

<sup>78</sup> Compare 21 U.S.C. § 841(b)(1)(B) (providing for a sentence between 5-40 years imprisonment for 500 grams or more of cocaine) with 21 U.S.C. § 841(b)(1)(A) (providing for imprisonment of between 10 years and life for 5 kilograms or more of cocaine). Congress labeled these increases under the heading "Penalties" after all elements of the drug offense were completed, and every court prior to *Apprendi* had interpreted the drug quantity provisions as sentencing factors, not elements.

<sup>79</sup> See King & Klein, *supra* n. 35, at 3, n. 9 (collecting cases).

<sup>80</sup> *United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002) (en banc).

<sup>81</sup> *United States v. Jones*, 194 F.3d 1178 (10th Cir. 1999), certiorari granted, *Carless Jones v. United States*, 530 U.S. 1271 (2000), judgment vacated, case remanded in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>82</sup> *United States v. Gonzalez*, 2004 WL 1444872 (S.D.N.Y. June 28, 2004) (refusing to grant increased sentence based on possession of gun); *United States v. Green*, 2004 WL 1381101 (D. Mass) (finding, prior to *Blakely*, that *Apprendi* applied to the Guidelines, and that "between 'Apprendi-izing' the Guidelines and ignoring them altogether, the Court chooses the former").

<sup>83</sup> Judge Brock Hornby, D. Maine, docket 03-47-P-H.

<sup>84</sup> A transcript of this opinion can be found at <http://sentencing.typepad.com>. See also *U.S. v. Shamblin*, Crim. No. 2:03-00217 (S.D. of W.Va., June 30, 2004, Judge Goodwin) (resentencing defendant to 12 months imprisonment rather than his previous determination of 240 months, as the prior sentence was based almost exclusively on relevant conduct and sentencing enhancements not proven to a jury beyond a reasonable doubt).

<sup>85</sup> *United States v. Montgomery*, No. 2:03 - CR -801 TS, (C.D. Utah, July 8, 2004).

<sup>86</sup> *Blakely*, slip opinion, at 12.

<sup>87</sup> Congress considered and rejected several competing statutes for sentencing reform when it adopted the Sentencing Reform Act of 1984. For example, Congress declined to adopt a determinate sentencing system where sentences were fixed by Congress, as it providing too little flexibility, and rejected a proposal that would have made the Sentencing Guidelines advisory, because voluntary guidelines had proved to be generally ineffective in the states that had used them. See Brief for the United States in *United States v. Mistretta*.

<sup>88</sup> Comey memo, *supra* n. 14.

<sup>89</sup> For example, where a Hobbs Act violation involves extortion under color of official right rather than robbery by force, it receives the same base offense level as federal bribery under § 2C1.1, whether theft is by mail fraud or stealth it receives the same base offense level under § 2B1.1, and where money laundering is alleged, the base offense level is that assigned to the offense from which laundered funds were derived. § 2S1.1(a).

<sup>90</sup> See, e.g., 7 U.S.C. section 2402(b) (food stamp fraud); 8 U.S.C. section 1326(b) (illegal reentry following deportation); 18 U.S.C. sections 922(g)(1), 924(e)(1), and 924(c)(1) (weapons offenses); 18 U.S.C. sections 1030(c) and 1029(c) (unauthorized use of computers/access devices, credit card fraud) 18 U.S.C. sections 1461 and 1462 (interstate transportation of obscene materials); 18 U.S.C. sections 2241(c), 2251(e), and 2252(b) (sexual abuse of child and child pornography); 21 U.S.C. sections 841(b), 843(b), and 848 (drug offenses). All provide for sentence bumps based upon prior convictions.

<sup>91</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (upholding 8 U.S.C. § 1326(b)(2) (1994) which, despite an otherwise applicable statutory maximum of 2 years imprisonment, authorizes a 20-year term of imprisonment for alien reentry if a judge determines that the initial deportation was for commission of an aggravated felony).

<sup>92</sup> *Harris v. United States*, 536 U.S. 545, 563 (2002) (plurality opinion).

<sup>93</sup> *Neal v. United States*, 516 U.S. 284 (1996) (mandatory minimum sentence for LSD trumps the lower guideline sentence).

<sup>94</sup> For example, under 21 U.S.C. § 841(b), 50 grams or more of cocaine base provides a mandatory minimum sentence of 10 years; under the Federal Sentencing Guidelines manual § 2(d)(1.1)(4), 50 grams of cocaine base likewise provides a level 32 which translates to 121-151 months.

<sup>95</sup> See Comey memo.

<sup>96</sup> See generally King & Klein, 54 STAN. L.REV. 295, 296 (2001) (arguing that prosecutorial bargaining chips were transferred to criminal defendants post-*Apprendi*).

<sup>97</sup> The Thornburg memo is reprinted in 6 Fed. Sent. Rptr. 347 (1994), and moderated by the 1993 Reno Memorandum, reprinted in 6 Fed. Sent. Rptr. 352 (1994). The Ashcroft version can be found at [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) (prohibiting line prosecutors from making deals involving charge or sentencing bargaining, except as authorized). See also USAM 9-27.400 (Sept. 1997).

<sup>98</sup> Once a prosecutor alleges an enhancement in an indictment, defense pleas of guilt to a lesser offense this will not prevent retrial on the "greater offense" of the charged offense plus the sentencing aggravators. See *Jeffers v. United States*, 432 U.S. 137, 152 (1977) (defendant waives double jeopardy claim by requesting severance of charges).

<sup>99</sup> See, e.g., *Croxford*; *U.S. v. Rucker*, No. 03-CR-0039 (W.D. Tex. 7/7/04). See also *United States v. Booker*, *supra* (advising judge on remand to sentence in the alternative); Penny Roberts, Sentencing guidelines in question, 2theadvocate.com (Baton Rouge), July 11, 2004 (noting local case in which judge sentenced in alternative).

<sup>100</sup> See, e.g., *United States v. Shamblin*, Cr. No. 2:03-00217, 2004 WL 1468561 (S.D.W.Va. June 30, 2004) (correcting "obvious" mistake in sentencing and reducing sentence under Blakely). See also *United States v. De La Torre*, 327 F.3d 605 (7th Cir. 2003) (reviewing sentence following district court's decision to grant motion for correction of sentence under Rule 35 to correct *Apprendi* error).

<sup>101</sup> See Wright, King & Klein, 3 Federal Practice and Procedure Criminal 3d § 585.2 (collecting cases).

<sup>102</sup> *Blakely*, 2004 WL 1402697, at \* 8 (noting governments are “free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.” and that “[e]ven a defendant who stands trial may consent to judicial fact finding as to sentence enhancements”).

<sup>103</sup> *See, e.g., United States v. Martinez*, 2004 U.S. App. LEXIS 793 (2d Cir. Jan. 20, 2004) (rejecting *Apprendi* claim, finding that the defendant expressly waived his right to appeal any sentence between 87 and 108 months in the plea agreement); *United States v. Daniels*, 2003 U.S. App. LEXIS 561 (4th Cir. Jan. 15, 2003) (waiver barred *Apprendi* claim). *But see United States v. Ayon*, 2002 U.S. App. LEXIS 24145 (9th Cir. Nov. 22, 2002) (reaching *Apprendi* claim despite appeal waiver); *United States v. Santiago*, 2003 U.S. App. LEXIS 20789 (2d Cir. 2003) (declining to decide whether to enforce, without specific advisement from the bench at the plea hearing, a waiver provision entitled “Waiver of Right to Challenge Absence of Jury Findings,” that cited and explained *Apprendi*, then read: “[The defendant] understands that he might be able to argue that his three predicate felony convictions that give rise to a sentencing enhancement under section 924(e) of Title 18 should all have been presented to the grand jury, and charged in the indictment. The defendant knowingly and voluntarily waives his right to have or have had such facts submitted for findings by a grant jury or trial jury.”); *United States v. General*, 278 F.3d 389, 399 n. 4 (4th Cir. 2002) (noting that the government conceded that defendant’s appeal waiver did not bar challenges to defendant’s sentence pursuant to *Apprendi* or on account of his lack of competency, since both were “challenges that are not subject to contractual waivers”).

<sup>104</sup> Consider for example the waiver provision in *United States v. Shimoda*, 334 F.3d 846 (9th Cir. 2003) (emphasis added):

Defendant knowingly waives the right to appeal, except as indicated in subparagraph "b" below, any sentence within the *maximum provided in the statute(s) of conviction* or the manner in which that sentence was determined on any of the grounds set forth in Section 3742, or on any ground whatever, in exchange for the concessions made by the prosecution in this plea agreement. . . . b. If the Court in imposing sentence departs (as that term is used in Part K of the Sentencing Guide-lines) upward from the guideline range determined by the Court to be applicable to the Defendant, the Defendant retains the right to appeal the upward departure portion of his sentence and the manner in which that portion was determined under Section 3742 and to challenge that portion of his sentence in a collateral attack.”

Probably this provision would be construed to bar all but Part K departures, so long as the sentence was within the maximum sentence provided in the statute defining the offense of conviction, not the maximum sentence provided in the Guidelines absent additional facts. Interestingly, the Court in *Shimoda*, a pre-*Blakely* case, rejected *Shimoda*'s *Apprendi* claim, which was based on his “argument that the term ‘statute(s) of conviction,’ as used in the plea agreement, includes the federal sentencing guidelines.”

<sup>105</sup> *See, e.g., United States v. Amsden*, 2002 U.S. App. LEXIS 22567 (2d Cir. Oct. 29, 2002) (rejecting *Apprendi* claim due to appeal waiver, stating “the plea agreement in the instant case stipulated an anticipated sentencing range, and explicitly waived any right the defendant might otherwise have had to appeal his sentence so long as that sentence fell within, or below, the stipulated range, and did so regardless of the method by which the district court reached that sentence”).

<sup>106</sup> *See, e.g., Shimoda, supra* n. 104.

<sup>107</sup> *See, e.g., Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's "Fast-Track" Policies*, September 22, 2003, reprinted in 16 Fed. Sent. Rptr. 135-135 (2003) (requiring that cases include appeal waivers, but waivers that expressly exempt only ineffective assistance claims); *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) (holding that a “plea agreement waiver of post-conviction rights does not waive the right to bring a [habeas] petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver”); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (“We agree . . . that dismissal of an appeal based on a waiver in the plea agreement is inappropriate where the defendant’s motion to withdraw the plea incorporates a claim that the plea agreement generally, and the defendant’s waiver of appeal specifically, were tainted by ineffective assistance of counsel.”).

<sup>108</sup> 535 U.S. 625, 631 (citations and internal quotes omitted).

<sup>109</sup> *Johnson v. United States*, 520 U.S. 461, 468 (1997) ("Where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration").

<sup>110</sup> *United States v. Dominguez-Benitez*, 124 S. Ct. 2333 (2004); *Olano*, 507 U.S. 725, 734 (error must have affected the outcome of the district court proceedings).

<sup>111</sup> *See Cotton*, 535 U.S. at 633-634 ("Indeed, the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments. The real threat then to the "fairness, integrity, and public reputation of judicial proceedings" would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.").

<sup>112</sup> The Court in *Neder v. United States*, 527 U.S. 1 (1999), held that omitting an element entirely from jury instructions can be harmless error, and after *Apprendi* lower courts extended *Neder* to facts that should have been proven beyond a reasonable doubt to a jury. *Cotton* also suggests *Apprendi* and *Blakely* error can be harmless.

<sup>113</sup> 523 U.S. 224 (1998).

<sup>114</sup> *See United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004) (collecting authority, and noting, "although *Cotton* dealt only with plain error and expressly reserved the question whether a defect in an indictment is structural error, the Court's analysis suggests strongly that such a defect is not the sort of structural error that necessarily escapes harmless error review).

<sup>115</sup> *See North Carolina v. Pearce*, 395 U.S. 711 (1969), and related cases, discussed in Wayne La Fave, Jerold Israel & Nancy King, 5 Criminal Procedure § 26.8 (2d ed. 2000 & Supp.) (Westlaw database CRIMPROC).

<sup>116</sup> 337 U.S. 241 (1949).

<sup>117</sup> *E.g., Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985).

<sup>118</sup> *Burks v. United States*, 437 U.S. 1 (1978); *Green v. United States*, 355 U.S. 184 (1957).

<sup>119</sup> *See Ball v. United States*, 163 U.S. 662 (1896).

<sup>120</sup> *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003).

<sup>121</sup> *State v. Lovelace*, 90 P.3d 298 (Idaho 2004) ("Because the sentencing judge concluded there was sufficient evidence to find three aggravating circumstances to support imposition of the death sentence, Lovelace cannot claim that he was acquitted of the greater offense of "first-degree murder plus aggravating circumstances." . . . [T]he findings of the sentencing judge do not establish that the government failed to prove one or more aggravating circumstance beyond a reasonable doubt, as they would, had the original findings been in favor of a sentence less than death. The double jeopardy protection, which bars a second prosecution on the same offense after an acquittal, is thus not implicated.").

<sup>122</sup> *See e.g.*, 28 U.S.C. § 994(a)(1) ("The Commission . . . shall promulgate and distribute to all courts . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case."); Fed. R. Crim. Pro. 32(i) (assuming court, not jury, would resolve issues under the Guidelines at sentencing).

<sup>123</sup> Cf. *United States v. Jackson*, 345 F.3d 638 (8th Cir. 2003) (“The district court was not required to submit the principal organizer and drug quantity special interrogatories to the jury. However, we find no error with this cautious approach as well as the district court's agreement with the jury's factual findings.”).

<sup>124</sup> For an example of such instructions, see *United States v. Medas*, 2004 U. S. Dist. LEXIS 12135 (E.D.N.Y. July 1, 2004).

<sup>125</sup> *Singer v. United States*, 380 U.S. 24 (1965); Fed. R. Cr. P. 23(a).

<sup>126</sup> *Cotton* did not suggest that the government could reopen proof on the omitted element; instead, the government had the opportunity to show to the reviewing court that given the evidence that was submitted below, curing the error would have made no difference in the outcome. *Cotton*, however, was a case where the omission of the element was harmless; the Court did not address the remedy if the omission had not been harmless.

<sup>127</sup> See *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004) (observing that reindictment at the remand stage would “present a double jeopardy issue,” but declining to address that issue). Assuming the government did not object to a defendant’s guilty plea in the trial court, we note that the government will not be able to argue that the defendant has waived his right to a prosecution on the greater offense by pleading guilty to the lesser, the situation in *Ohio v. Johnson*, 467 U.S. 493 (1984). See also cases collected in Wayne La Fave, Jerold Israel, and Nancy King, 5 Criminal Procedure § 25.4(d) nn. 45-47 (2d ed. 1999 & Supp.) (Westlaw database CRIMPROC).

<sup>128</sup> See *Schriro v. Summerlin*, 541 U.S. \_\_\_, 2004 U.S. LEXIS 4574, \*8 (2004) (citing *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), and holding that the rule requiring jury determination of aggravating facts in *Ring* could not be applied retroactively to Summerlin’s case, because the rule was “new” when Summerlin’s direct appeal ended, well before the date the Court decided *Apprendi v. New Jersey*, and did not fit within an exception to the bar against retroactive application of new rules on collateral review).

<sup>129</sup> See *Beard v. Banks*, 2004 U.S. LEXIS 4572, \*11 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997), finding that the rule in *Mills v. Maryland*, 496 U.S. 367 (1988), could not be applied retroactively to Bank’s case, because it was “new” in 1987 when Bank’s direct appeal concluded, and did not fit within an exception to the bar against retroactive application of new rules on collateral review).

<sup>130</sup> 2004 U.S. LEXIS 4574 (2004); see n. 128 *supra*.

<sup>131</sup> See *Ring v. Arizona*, 536 U.S. 584 (2002) (overruling, in part, *Walton v. Arizona*, 497 U.S. 639 (1990)). In several prior decisions, the Court has endorsed judicial findings for facts triggering higher ranges under the Guidelines *Edwards v. United States*, 523 U.S. 511, 514-15 (1998); *Witte v. United States*, 515 U.S. 389, 399-401 (1995); *United States v. Watts*, 519 U.S. 148, 156-57 (1997) (per curiam). Thus, a later decision applying *Blakely* to the Federal Guidelines may, like *Ring*, require the Court to reject earlier precedent.

<sup>132</sup> *Apprendi*, 120 S.Ct. at 2348, 2369 (Thomas, J., concurring); *id.* at 2391 (O’Connor, J., dissenting).

<sup>133</sup> [add cites] See also *Shamblin*, *supra* n. 84, (stating *Blakely* “flowed naturally from *Apprendi* and its progeny”).

<sup>134</sup> Consider, for example, the following dicta in *McNair v. Campbell*, 307 F. Supp. 2d 1277 (M.D.Ala.2004): It is worth pointing out that, for some petitioners, *Ring* is arguably not a new constitutional rule of criminal procedure. Imagine a hypothetical habeas petitioner whose conviction became final between the time when the Supreme Court decided *Apprendi* and the time it decided *Ring*. . . . [If] the outcome in *Ring* was dictated by *Apprendi*, . . . , our hypothetical petitioner could arguably rely on *Ring* because it was dictated by *Apprendi*, "precedent existing at the time [the petitioner's] conviction became final," *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070. At the same time, however, there is a good argument that even for our

hypothetical petitioner, Ring would still be considered a new rule. The Supreme Court has written that "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision." *Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 897, 122 L. Ed. 2d 260 (1993). On this reasoning, Ring is new for purposes of *Teague* because it overruled *Walton*, notwithstanding that Ring appears to be an application of *Apprendi*. See also *Besser v. Walsh*, 2003 U.S. Dist. LEXIS 21474 (SDNY 2003) (although Ring was new vis a vis *Apprendi* for death cases, Ring's overruling of *Walton* did not automatically render Ring's holding a "new rule" as to the non-capital case at bar).

<sup>135</sup> See *Ring*, 536 U.S. at 601.

<sup>136</sup> See *Ring*, 536 U.S. at \_\_\_ (rejecting state's argument that the statute specifying "death or life imprisonment" as the only sentencing options meant that the statutory range authorized by the jury verdict was death, noting "This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." . . . In effect, "the required finding [of an aggravated circumstance] exposed [Ring] to a greater punishment than that authorized by the jury's guilty verdict.").

<sup>137</sup> See e.g., *Caspari v. Bohlen*, 510 U.S. 383, 393-95 (1994) (after "concluding that a reasonable jurist reviewing [the Supreme Court's] precedents at the time [the] conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by [its] precedents," the Supreme Court stated: "this analysis is confirmed by the experience of the lower courts" and also stated "in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts"); *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997) (considering lower federal court and state court decisions in *Teague* "new rule" analysis).

<sup>138</sup> *United States v. Maldenaldo Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (Tjoflat, C.J., concurring) ("It is obvious from the start that there is no *Apprendi* error in this case. Because the Sanchezes' sentences did not exceed the twenty-year maximum sentence prescribed by 21 U.S.C. § 841(b)(1)(C), *Apprendi* simply does not apply."). For additional authority rejecting *Apprendi* challenges to the Guidelines, see, e.g., *United States v. Casas*, 356 F.3d 104, 128 (1<sup>st</sup> Cir. 2004); *United States v. Luciano*, 311 F.3d 146, 153 (2d Cir. 2002); *United States v. Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States v. Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir. 2002); *United States v. Floyd*, 343 F.3d 363, 372 (5<sup>th</sup> Cir. 2003); *United States v. Tarwater*, 308 F.3d 494, 517 (6<sup>th</sup> Cir. 2002); *United States v. Merritt*, 361 F.3d 1005, 1015 (7<sup>th</sup> Cir. 2004); *United States v. Banks*, 340 F.3d 683, 684-65 (8<sup>th</sup> Cir. 2003); *United States v. Ochoa*, 311 F.3d 1133, 1134-36 (9<sup>th</sup> Cir. 2002); *United States v. Mendez-Zamora*, 296 F.3d 1013, 1020 (10<sup>th</sup> Cir. 2002); *United States v. Ortiz*, 318 F.3d 1030, 1039 (11<sup>th</sup> Cir. 2003); *United States v. Pettigrew*, 346 F.3d 1139, 1147 n. 18 (D.C. Cir. 2003).

<sup>139</sup> Consider our own assertions: "nothing in *Apprendi* changes the government's ability to relitigate at sentencing any fact that was not proven beyond a reasonable doubt at trial. Even facts expressly rejected by a trial jury may be proven at sentencing by a preponderance, and used by the judge to set a sentence, so long as that sentence is *within the statutory maximum*." King & Klein, *Apres Apprendi*, *supra* n. 35 (emphasis added).

<sup>140</sup> See *Lambrix v. Singletary*, 521 U.S. 151 (1997).

<sup>141</sup> One might argue that the *Teague* retroactivity rules do not even apply because *Blakely* was a rule of substantive law, not procedural law. This argument failed in *Summerlin* when made in connection with *Ring*, and it will fail with *Blakely* for the same reasons.

<sup>142</sup> See *Ring*, at \_\_\_ n. 4 ("Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him").

<sup>143</sup> Porter, *Blakely and Beyond*, A Memorandum for Panel Attorneys, dated July 6, 2004, at p. 9 (available at <http://sentencing.typepad.com>) (citing *Ivan V. v. City of New York*, 407 U.S. 203 (1972) (*Winship* retroactive); *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (*Mullaney* retroactive)).

144 *Cotton*, at \_\_\_\_.

145 28 U.S.C. § 2255.

146 121 S.Ct. 2478 (2001).

147 The 11th Circuit Court of Appeals denied a successive petition on this basis in *In Re Dean*, decided July 9, 2004.

148 *Blakely*, 541 U.S. at \_\_\_\_ (2004) (Breyer, J., dissenting). Thus, everyone convicted of robbery, murder, a drug offense, etc., would receive precisely the same sentence.

149 *Id.* at \_\_\_\_.

150 Kate Stith & William Stuntz, "Sense and Sentencing," *New York Times*, June 29, 2004.

151 *See, e.g.*, The American Bar Association's Justice Kennedy Commission Final Report, issued June 23, 2004, which can be accessed through the ABA website.

152 U.S.A. PROTECT Act, *supra* n. 19.

153 *Blakely*, 541 U.S. at \_\_\_\_ (Breyer, J., dissenting).

154 Letter to the U.S. Sentencing Commission from Jon M. Sands, Chair, Sentencing Guidelines Committee of the Federal and Community Defenders, dated July 9, 2004, available at <http://sentencing.typepad.com>.

155 *Croxford* at 38.

156 See OpEd piece co-authored by Steven L. Chanenson, Professor of Law at Villanova, and State Representative Frank Dermody, Democrat from Oakmont and Chairman of the Pennsylvania Commission on Sentencing, *In Pennsylvania, Sentencing Remains the Same*, *Pittsburgh Post-Gazette*, A19, June 30, 2004.

157 June 27, 2004 Memorandum from Frank Bowman to the U.S. Sentencing Commission, *supra* n. 51. The text of Bowman's proposed bill to amend 18 U.S.C. sections 3551, 3742 and 28 U.S.C. section 994 can be accessed on <http://sentencing.typepad.com>.

In addition to Bowman's proposal, Congress and the Commission are entertaining such diverse proposals as letting 100 flowers bloom in the district courts (Professors Berman, Miller, Demleitner, and Wright, written testimony submitted to the Senate Committee on the Judiciary, July 13th, 2004); tripling each Guidelines range (Prof. Mark Osler, submitted to Sentencing Commission); and converting the Federal Sentencing Guidelines into truly "advisory" suggestions with no force of law (Professors Stith and Stuntz). These can all be accessed on the website above.

158 Justice Scalia joined the four dissenters from *Blakely* and *Apprendi* -- Chief Justice Rehnquist, Justice Kennedy, Justice O'Connor, and Justice Breyer -- to make up the majority in *Harris*. 536 U.S. 545 (2002). Since Justice Breyer concurred in *Harris* only because he had not accepted *Apprendi*, it is possible that there may now be votes to overrule. *See also* Klein & Steiker, *The Search for Equality in Criminal Sentencing*, 2002 *Sup. Ct. Rev.* 223 255-61 (2003) (suggesting that the *Harris* decision is best explained not by its internal logic, but by fear of its application to determinate sentencing regimes).