

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 18 2004

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

SHERMA LEE LEACH,)

Defendant.)

Case No. 03-CR-114-H

ORDER

This matter comes before the Court for sentencing pursuant to a plea of guilty entered by Defendant Sherma Lee Leach on December 4, 2003, in accordance with Fed. R. Crim. P. 11. Defendant now argues that to apply to the instant case the Federal Sentencing Guidelines (the "Guidelines") promulgated under the Sentencing Reform Act of 1984 (the "Act") would be unconstitutional under Blakely v. Washington, 2004 WL 1402697 (U.S. June 24, 2004). Blakely held that a sentence enhancement imposed by a Washington state court pursuant to judicial factfinding under that state's statutory sentencing guideline scheme violated the defendant's Sixth Amendment rights to a jury and therefore was unconstitutional.

For the reasons set forth below, the Court finds as follows: (i) the Sixth Amendment rights articulated in Blakely apply to any sentence enhancement imposed under the Guidelines; (ii) going forward, the Guidelines can be applied to all cases in a manner that fully protects the Sixth Amendment rights articulated in Blakely, and therefore the Guidelines are constitutional; and (iii) the Guidelines can be applied to the instant case in a manner that fully protects Defendant's Sixth Amendment rights, and therefore sentencing Defendant under the Guidelines

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here is constitutional. Based on these findings, the Court hereby imposes the sentence described below.

I

A. Nature of the Offense

Defendant Sherma Lee Leach was employed by the United States Postal Service in Bartlesville, Oklahoma. In her position, Defendant sorted incoming mail and placed it in designated bins. As she came across misdirected mail, Defendant gathered it and took it to a designated location in the post office where it would then be sent to the appropriate address. Defendant was also responsible for opening and closing post office boxes and for the keys to the post office boxes.

In the course of her duties, Defendant had contact with large volumes of mail addressed to the Voice of the Martyrs ("VOM"). VOM is a nonprofit organization that assists Christians around the world who are being persecuted for their faith. The group is headquartered in Bartlesville, Oklahoma, and has thirty international affiliated offices. The group finances its educational and ministry programs through charitable donations.

In 1999, VOM realized that it was not receiving all of its intended contributions via the postal service when donors contacted VOM to request receipts for contributions previously mailed in the form of checks. VOM advised the donors that the particular contributions had not been received.¹ In accordance with an established internal procedure, VOM began compiling a log, recording each time it was notified that a donation had not been received.

¹It was VOM's standard procedure to issue receipts to donors who contributed through checks; VOM did not typically send receipts to cash donors.

In 1999, VOM first complained to the United States Postal Inspectors of donations and contributions lost in the mail. In July 2003, the Postal Inspectors received several new complaints from VOM of the same nature. Because of the complaints, the Postal Inspectors began an investigation at the Bartlesville Main Post Office. The investigation included surveillance of Defendant as she performed her duties at the post office.

During this surveillance, investigators observed Defendant sort mail which included VOM mail. They watched her place pieces of VOM mail in the appropriate bin, but also saw her place VOM mail in two unauthorized cubbyholes at her work station. More than once during her shift, Defendant gathered the VOM mail from the unauthorized cubbyholes, stacked the mail, turned the top piece of mail over, and placed a rubber band around the stack of mail. Defendant then gathered the stack of VOM mail and the pieces of misdirected mail and took them to the proper location in the post office for misdirected mail. After depositing the misdirected mail in the appropriate location, Defendant carried the stack of VOM mail to an area of the post office that afforded access to post office boxes. Defendant placed the stolen VOM mail into an unused post office box. She then returned to her work station to finish her shift.

On July 9, 2003, Defendant returned to the post office lobby several hours after the end of her shift. Postal Inspectors observed Defendant opening the post office box, in which she had placed the stolen VOM mail earlier that day, and removing the mail. Defendant was apprehended by United States Postal Inspector Rey Santiago after she retrieved thirty-one pieces of VOM mail. The majority of the stolen mail was addressed to VOM; however, other pieces were addressed to Prayer by Letters, Saint Matthew's Church, Southwest Indian Children's Fund, Word of Faith, Robert Tilton Ministries, and to two private residences in Bartlesville. The pieces

of mail sent to addresses other than VOM contained donations or special occasion cards. The stolen mail found in Defendant's possession at the time of her arrest contained a total of \$1,504 in checks and \$34 in cash.

Defendant agreed to speak with the Postal Inspectors after consulting with Linda Culp, a union steward with the National Association of Letter Carriers Union. Accompanied by Ms. Culp, Defendant spoke with investigators regarding her criminal activities. According to the testimony of Inspector Santiago, Defendant admitted that she had been stealing mail for five or six years. Inspector Santiago also testified that Defendant stated she occasionally took up to \$600 from the VOM business mail, but the amount fluctuated with the volume of mail and with Defendant's absences from work due to illness or vacation. According to Inspector Santiago, Defendant admitted that she took at least \$100 in cash each week. Defendant informed the Postal inspectors that when she first began taking the mail, she smuggled it out of the back door of the post office to her car, concealed in her personal belongings. After she became responsible for sorting mail, she began placing the mail in unused post office boxes. She admitted to using the empty post office boxes to stash embezzled mail and to retrieving the mail later from the customer lobby side of the post office box with a key she took from the post office.

Defendant told the investigators that she opened most of the stolen mail at her residence. She said that sometimes she held pieces of mail up to a light source to determine its contents. If the envelope appeared to contain a check rather than cash, Defendant returned the unopened piece of mail to the post office the next day for proper handling. Eventually, Defendant ceased returning the checks to the post office and began placing them in the trash cans at her house, along with the discarded envelopes that had contained cash.

On July 9, 2003, Defendant consented to a search of her residence. During the search, inspectors discovered at least forty-five pieces of discarded mail in Defendant's trash cans. The majority of the mail was addressed to VOM, and several of the envelopes contained checks payable to VOM. However, at least four pieces of mail were addressed to Robert Tilton Ministries, to Brother Joe Adams, and to two private residences in Bartlesville. These pieces of mail contained donations or special occasion cards. The checks totaled \$3,169; they were forwarded to the appropriate addressee. Thus, the total amount of cash and checks found in Defendant's possession on the date of her arrest (both on her person and in her house), was \$4,707.

The Court finds that, based on the evidence, since at least 1999, until the date of her arrest, Defendant consistently stole mail from the United States Post Office in Bartlesville. During this period, VOM recorded at least 1,233 pieces of lost mail; these lost pieces of mail contained at least \$253,555.42 in contributions. Additionally, Defendant is accountable for \$4,707 contained in that mail found in her possession (from the post office box and the trash cans at her home) on July 9, 2003.

On August 26, 2003, the United States filed an Information, charging Defendant with embezzling eighty letters addressed to Voice of the Martyrs while working as a postal employee from June 15, 2003 to July 9, 2003, in violation of 18 U.S.C. § 1709.

B. Procedural History

On December 4, 2003, Defendant requested to change her plea from not guilty to guilty under Fed. R. Crim. P. 11. There was no plea agreement with the government in this case. In accordance with the practice of the Northern District of Oklahoma, the change of plea request

was accompanied by a Petition to Enter Plea of Guilty (the "Petition"). The Petition specifies certain facts relevant to the nature of the offense and directly addresses the issue of Defendant's Sixth Amendment rights.²

The Petition recites the following facts:

During June and July of 2003, I worked as a United States Postal Service Employee in Bartlesville, Oklahoma, which is in the Northern District of Oklahoma. While I was working at the Post Office, I stole eighty (80) undelivered letters. The letters were entrusted to me, for delivery to the addressee. I had no right to take the letters. At the time I embezzled these letters, I knew what I was doing and I knew it was wrong.

(Pet. to Enter Plea of Guilty at 2.)

With respect to sentencing and her right to jury under the Sixth Amendment, the Petition provides:

I have been advised by counsel I will be sentenced pursuant to the sentencing guidelines procedure established by Title 18 U.S.C. sections 3553 et seq. I understand sentencing is a matter left exclusively in the province of the Court; and I understand the sentence imposed by the Court may be within the guideline table range provided by law, or for good cause stated the Court may depart therefrom after a review of all relevant facts and circumstances of my case have been considered by the Court.

(Petition at 4.)

At the hearing on December 4, 2003, in accordance with Fed. R. Crim. P. 11, the Court reviewed with Defendant in detail the provisions of the Petition to ensure that she knew, comprehended, and accepted its terms. In addition, the Court received clear and unequivocal representations from Defendant that she understood and agreed that acceptance of her plea by the Court would constitute an express waiver of her rights to a jury trial under the Sixth Amendment.

² The Sixth Amendment provides in applicable part as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const. amend. VI. Thus, Defendant's right under this portion of the Sixth Amendment is to receive a jury trial.

Fed. R. Crim. P. 11(b)(1)(F). In accordance with the policy of the Northern District of Oklahoma, this waiver was memorialized in a written document styled "Waiver of Jury," executed by Defendant, which provided in its entirety as follows: "Comes now the undersigned defendant having been fully apprised of my rights, do hereby waive a jury and agree to try the above styled and numbered criminal proceedings to the Court as provided by Rule 23(a), Rules of Criminal Procedure." (Waiver of Jury at 1.)

At the December 4, 2003 hearing, the Court also engaged in an extensive colloquy with both the assistant United States Attorney (the "AUSA") and Defendant's counsel regarding the loss amount in the case. The Court expressed concern with respect to the disparity between the conduct charged in the Information (two weeks' worth of embezzling mail) and the facts indicated in the Postal Inspector's report (approximately five years' worth of embezzling mail). The Court asked counsel whether there would be a dispute as to the amount of loss at sentencing. Both the AUSA and Defendant's attorney assured the Court that while there was some dispute about the exact loss amount, the parties would likely reach an agreement regarding the proper range of loss amount prior to sentencing.

At the first sentencing hearing on June 18, 2004,³ the Court was informed that the parties had not agreed on a loss amount. The Presentence Investigation Report ("PSI") indicated a loss amount of \$269,963.62. Defendant argued that the loss amount was much lower, possibly more than \$10,000, but less than \$30,000. The Court reset sentencing for July 9, 2004, in order that the dispute over loss amount might be resolved.

³ Sentencing was delayed several times in this case, at Defendant's request.

On July 2, 2004, Defendant filed her objections to the PSI, essentially making three arguments. First, Defendant argued that the holding in Blakely v. Washington, 2004 WL 1402697, applied to the Federal Sentencing Guidelines (the "Guidelines"). Second, Defendant argued that Blakely prohibited the Court from engaging in judicial factfinding in order to determine whether facts existed that supported an enhancement to her sentence other than facts charged in the information or admitted in her guilty plea. Finally, in the event that the Court rejected her first two arguments, Defendant argued that the loss calculation in the PSI was incorrect, because it could not be proven beyond a reasonable doubt, or even by a preponderance of the evidence.

On July 9, 2004, the Court held a status hearing to determine whether the parties had resolved their dispute about the loss amount and to address the possible impact of the Supreme Court decision in Blakely. First, the Court determined that the parties had still not agreed about the loss amount. The Court then addressed the application of the Blakely decision to Defendant's case. The Court observed that, because the loss amount was in dispute, the Court would have to serve as factfinder in determining the appropriate amount of loss. Thus, the Court determined that Blakely issues were implicated in the case. Another hearing was set for July 27, 2004, in order that the parties would have an opportunity to address adequately those issues.

At the July 27 hearing, the parties addressed Defendant's objections to the PSI, specifically those objections based on the Blakely decision. Defendant argued that she only waived her right to a jury for purposes of determining guilt or innocence, not for purposes of sentencing, and that Blakely now prohibited judicial factfinding with respect to sentencing. The Court inquired as to whether Defendant desired the Court to vacate the plea, thereby returning the

parties to the status quo ante, but Defendant stated that she did not desire to make such a request. Defendant indicated that her plea was willing and knowing and that she was simply now entitled to be sentenced without judicial factfinding under Blakely.⁴

⁴ The following is an excerpt from Defendant's Plea Hearing:

THE COURT: So if you believe as I do that it [the right to a jury for factfinding at sentencing] is not segmentable and indeed it arises out of the exact same words of the Constitution [as the right to a jury for factfinding at trial], right, and therefore that's where all such rights are derived, if it's not segmentable then you're saying that I must find that the plea was infirm and vacate it.

MS. O'CONNELL: If it's not segmentable I guess that's what you would – that you would have to do. That's not what I'm asking you to do at all because I think especially looking at how these, the post-Blakely decisions across the country are unfolding, what's happening – of course there's a wide range of various things that are happening, but I'm not seeing much in the way of pleas being vacated. Courts are taking lots of choices, exercising lots of options, but –

THE COURT: Right. Well, and the reason for that is, is that people are taking the position that you're taking which is, "I had a willing and knowing waiver of my Sixth Amendment right to a jury, I just later found out that that may include sentencing as well, but I don't want to vacate my plea or my waiver or my consent, I just want to say that you can't do it now." Right?

MS. O'CONNELL: Right.

THE COURT: All right. And your record is preserved in that regard?

MS. O'CONNELL: I think it is, your Honor.

THE COURT: Okay. All right. The Court finds that a willing and knowing waiver of one's Sixth Amendment rights in which there is an express consent to judicial factfinding contained in the petition is sufficient basis upon which to proceed a head to judicial factfinding as contemplated at the time and that the waiver is quite express in regard to waiver of jury. And the language of that waiver, although we have modified it on a going-forward basis, only to be in an absolute abundance of caution, just to ensure that everybody appreciates that a waiver of your Sixth Amendment right to a jury in all respects, which of course a waiver of jury was in all respects before, but now it's clear that it was in all respects, but from the standpoint of this Court they are not segmentable rights, and as long as they are articulated as being a belief that there is no basis upon which to vacate the plea, then the Court will enforce the waiver and the record will so reflect. All right, does that cover your record in that regard, Ms. O'Connell?

MS. O'CONNELL: I believe it does, your Honor.

Because Defendant represented that her plea was willing and knowing, the Court expressed its intention to engage in judicial factfinding with respect to any possible enhancements to Defendant's sentence pursuant to Defendant's explicit waiver of jury and consent to judicial factfinding set forth in the Petition, the Waiver of Jury, and the Rule 11 colloquy. The Court noted that if the plea was "willing and knowing," as represented by Defendant, and Defendant objected to vacating the plea, then the natural consequence of these actions was to proceed to sentencing pursuant to the unequivocal waiver of jury and consent to judicial factfinding expressed by Defendant at the time the guilty plea was accepted.⁵

Under the Guidelines, a violation of 18 U.S.C. § 1709 warrants a base offense level of 6. U.S. Sentencing Guidelines Manual § 2B1.1(a)(2) (2003).⁶ The offense level is then increased under § 2B1.1(b)(1), depending on the amount of loss attributed to the defendant's criminal conduct.⁷ If the loss is more than \$120,000 but less than \$200,000, the base offense level is

⁵ The Court observes that in this case, Defendant received greater protections at sentencing than existed at the time she entered her plea of guilty, and therefore is not prejudiced by this application of Blakely. Specifically, at her change of plea, Defendant waived her right to jury and consented to judicial factfinding under the preponderance of the evidence standard of proof. Pursuant to Blakely, Defendant now receives judicial factfinding under the higher standard of proof of beyond a reasonable doubt.

⁶ Section 2B1.1 is entitled, "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States." U.S. Sentencing Guidelines Manual § 2B1.1 (2003).

⁷ The Commentary to § 2B1.1 provides in relevant part:

Loss under Subsection (b)(1)

- (A) General Rule. – Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
- (i) Actual Loss. – "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
- (ii) Intended Loss. – "Intended loss" (I) means the pecuniary harm that was intended

increased by ten levels. U.S. Sentencing Guidelines Manual § 2B1.1(b)(1)(F) (2003). If the loss is more than \$200,000 but less than \$400,000, the base offense level is increased by twelve levels. U.S. Sentencing Guidelines Manual § 2B1.1(b)(1)(G) (2003).

The base offense level should be increased by two more levels if the offense involved ten or more victims, under § 2B1.1(b)(2)(A), or by four levels if the offense involved fifty or more victims under § 2B1.1(b)(2)(B). U.S. Sentencing Guidelines Manual § 2B1.1(b)(2) (2003). Finally, under § 3B1.3, the base offense level should be adjusted upward two more levels because Defendant abused her position of trust as United States postal employee when she embezzled the mail entrusted to her. U.S. Sentencing Guidelines Manual § 3B1.3, cmt. n.1 (2003). The PSI recommended that Defendant's sentence be increased by twelve levels under § 2B1.1(a)(2), identifying a loss in excess of \$200,000 based on VOM's records. The PSI recommended a further increase of two levels under § 2B1.1(b), concluding that Defendant's conduct affected over ten victims, and two more levels under § 3B1.3 for her role in the offense, because she abused her position of trust.

As noted above, Defendant objected to both the enhancement based on the amount of loss and the enhancement based on the number of victims, on the grounds that the facts necessary to support these enhancements can only be established through judicial factfinding.⁸ The Court denied this objection because the waiver of jury and consent to judicial factfinding at the change of plea hearing were clear and unequivocal, and Defendant had objected to vacating the plea,

to result from the offense; and (II) includes the intended pecuniary harm that would have been impossible or unlikely to occur

⁸ Defendant did not object to the enhancement for her role in the offense, because the facts supporting that enhancement were admitted at her plea hearing, as discussed below.

representing that the change of plea was “willing and knowing.” The United States, through its “Supplemental Memorandum Brief Concerning Blakely v. Washington’s Application to Sentencing,” objected to the application of the beyond a reasonable doubt standard of proof and the rules of evidence at the hearing. The Court denied this objection based on Blakely’s language indicating that judicial factfinding, pursuant to waiver and consent, and jury factfinding are interchangeable. See Blakely, 2004 WL 1402697 at 7. The Court observes that there is simply nothing interchangeable about a fact established beyond a reasonable doubt under the rules of evidence and a fact established by a preponderance of the evidence using hearsay testimony.

As described more fully below, based on the evidence adduced at the evidentiary hearings, the Court finds that the United States has, beyond a reasonable doubt, established the facts necessary to support an enhancement under § 2B1.1(b)(1)(F) (loss amount more than \$120,000 but less than \$200,000), and § 2B1.1(b)(2)(B) (crime involving fifty or more victims). U.S. Sentencing Guidelines Manual §§ 2B1.1(b)(1)(F) and 2B1.1(b)(2)(B). The Court further finds that the United States has established by a preponderance of the evidence the facts necessary to support an enhancement under § 2B1.1(b)(1)(G) (loss amount over \$200,000, but less than \$400,000), but has failed to establish such facts beyond a reasonable doubt.

II

The threshold question is whether Blakely applies to the Federal Sentencing Guidelines. True enough, the Supreme Court stated in footnote 9 as follows: “The United States, as amicus curiae, urges us to affirm. It notes differences between Washington’s sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally

significant The Federal Guidelines are not before us, and we express no opinion on them.”

Blakely, 2004 WL 1402697 at 6 (emphasis added).

Notwithstanding this disclaimer, the substance of the opinion clearly forecasts that Sixth Amendment rights are implicated by any sentencing system, including the Guidelines, wherein the judge, rather than the jury, establishes the facts that form the basis for a sentencing enhancement, absent proper waiver and consent. The Supreme Court stated:

Our precedents make clear, however, that the “statutory maximum” for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, *supra*, at 602 (“the maximum he would receive if punished according to the facts reflected in the jury verdict alone” (quoting Apprendi, *supra*, at 483)); Harris v. United States, 536 U.S. 545, 563, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion) (same); cf. Apprendi, *supra*, at 488 (facts admitted by the defendant). In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

Blakely, 2004 WL 1402697 at 4 (emphasis in original).

The Court finds persuasive the analysis of this issue by the Seventh Circuit in United States v. Booker. The Booker court stated:

But the issue in Blakely was not sentencing discretion — it was the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof. The vices of the guidelines are thus that they require the sentencing judge to make findings of fact (and to do so under the wrong standard of proof), and that the judge’s findings largely determine the sentence, given the limits on upward and downward departures. The finding of facts (other than the fact of the defendant’s criminal history) bearing on the length of the sentence is just what the Supreme Court in Blakely has determined to be the province of the jury.

United States v. Booker, 2004 WL 1535858 (7th Cir. July 9, 2004) (internal citations omitted)

(emphasis in original).

The Court finds that in all legally significant respects, specifically regarding the role of the judge as factfinder at sentencing for purposes of any sentencing enhancement, the system in the state of Washington is the same as the Federal Sentencing Guidelines. Therefore, the Court finds that Blakely applies to the Guidelines, and that any sentence enhancement under the Guidelines must be imposed in a manner that fully accommodates the Sixth Amendment rights articulated in Blakely.

III

The next issue is whether the application of Blakely to the Guidelines renders the Guidelines constitutionally infirm. The Supreme Court stated in Blakely as follows: “By reversing the judgment below, we are not, as the State would have it, ‘find[ing] determinate sentencing schemes unconstitutional.’ (Brief for Respondent 34.) This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.” Blakely, 2004 WL 1402697 at 6. Clearly, this indicates that courts should first, if possible, undertake to sustain the current system, as modified to accommodate Blakely, rather than to declare the Guidelines unconstitutional. Indeed, it is well settled that a court is responsible for upholding established law rather than extending its reach. See, e.g., Ronald J. Krotoszynski Jr., “On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited,” 38 Wm. & Mary L. Rev. 417, 445. (“Put simplistically, judges are meant merely to interpret existing law; they do not create it out of whole cloth.”)

The question becomes, therefore, whether the Guidelines can be applied so as to accommodate the Sixth Amendment rights articulated in Blakely, while maintaining the integrity of the federal sentencing system. As described more fully below, the Court finds that the

Guidelines can be applied in a manner consistent with Blakely and therefore, if so applied, the Guidelines are constitutional.

On July 8, 2004, this Court announced a four-point plan (the "Plan") to be applied to all criminal cases going-forward to ensure the viability of the Guidelines while fully protecting the Sixth Amendment rights described in Blakely.⁹ The Plan provides as follows:

1. The Court will only accept a plea of guilty accompanied by a Sixth Amendment waiver of jury that expressly applies to both guilt or innocence and to sentencing. If a defendant does not desire to waive his or her jury rights in all respects, a jury trial on all relevant issues will ensue in accordance with the Sixth Amendment.
2. For those cases resolved by a plea pursuant to such a comprehensive waiver, judicial factfinding at sentencing will require that any contested enhancement or departure must be based on facts established beyond a reasonable doubt in accordance with the federal rules of evidence. The Court recognizes this may have significant consequences, particularly in areas such as relevant conduct, determining amounts (e.g. drug quantities and dollar amounts) and role in the offense. Nevertheless, the Court believes the language in Blakely equating judicial factfinding with jury factfinding as a matter of Sixth Amendment jurisprudence implicitly, if not explicitly, requires the application of such enhanced evidentiary standards.

⁹ It is noteworthy that the current confusion occasioned by Blakely arises exclusively in the context of "straddle" cases, that is, cases in which a trial was held, or guilty plea entered, prior to Blakely, and in which sentencing follows Blakely. See, e.g., Booker, 2004 WL 1535858; United States v. Fanfan, No. 03-47-P-H (D. Me. June 28, 2004). Since the record upon which sentencing is based in those cases was developed prior to Blakely, there will necessarily be different sentencing outcomes depending on the facts of each case, and on what was established in the record. The focus here is going forward, wherein all facts are established in full compliance with Blakely, from charging documents, to the entry of a plea or holding of a trial, to sentencing. The Court believes that the "straddle" cases will soon pass through the system, and therefore should not form the basis for determining what is best for federal sentencing policy in the long term. The Court further believes that, in the long term, with all parties able to develop a more complete, appropriate, and useful record, it will be possible to implement Blakely while maintaining the constitutionality of the Guidelines.

3. For those cases that go to trial, facts necessary to support relevant sentencing enhancements and departures will be set forth on the verdict form for the jury to find beyond a reasonable doubt. A mechanism will be established whereby all parties have full notice of such potential enhancements prior to trial. The Court will give the jury such instructions as are necessary and appropriate to make these findings of fact.
4. The United States should include significantly more detail in its charging documents. For those cases that are resolved by entry of a plea, this will reduce the amount of judicial factfinding needed at sentencing. For those cases that go to trial, the jury will have a more complete understanding of the questions that will be presented on the verdict form as matters to be proved beyond a reasonable doubt. The Court anticipates that in some cases that go to trial involving certain sentencing enhancements, particularly relevant conduct, evidence regarding such enhancements may not be admissible because it may be of limited probative value in proving the crime charged and highly prejudicial. Only in special cases, for good cause shown, will the Court utilize a bifurcated procedure whereby guilt or innocence will be considered in a first phase and sentencing evidence will be offered in a second phase. Specifically with respect to relevant conduct, since the United States hereafter must prove all relevant conduct beyond a reasonable doubt in any event, wherever possible the United States should consider simply including any such relevant conduct allegations as part of the crime or crimes being charged.

The various elements of the Plan, operating together, are intended to maintain the workability and fairness of the Guideline system, while fully protecting each defendant's Sixth Amendment rights under Blakely. While mutually interdependent, each element will be subject to appeal and may, as a result, be modified. However, any such modification will not cause the system to fail. For example, the Plan will still function effectively if the Supreme Court ultimately determines that the burden of proof should remain preponderance of the evidence, rather than beyond a reasonable doubt, which is the standard applied here. Furthermore, experience in future cases may suggest that bifurcated proceedings, separating the guilt phase and the sentencing phase, can and should be utilized on a more frequent basis. The purpose here is to

set forth a system that is constitutional under Blakely, while maintaining the integrity and viability of the Guidelines. The Court will address each element of the Plan in turn.

A. Waiver of Jury

The Supreme Court announced new Sixth Amendment rights in Blakely. The Court, however, did nothing to disturb the current jurisprudence applicable to the waiver of those Sixth Amendment rights. To the contrary, Blakely states:

Justice Breyer argues that Apprendi works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. Post, at ---- - ----4-5. But nothing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See Apprendi, 530 U.S., at 488; Duncan v. Louisiana, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how Apprendi can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

Blakely, 2004 WL 1402697 at 8.

Prior to Blakely, the cornerstone of the criminal justice system was waiver of jury, entry of a plea of guilty, and consent to sentencing under the Sentencing Reform Act of 1984, which includes at its heart judicial factfinding. Indeed, 97.1% of all criminal cases in 2002 were resolved without a jury trial at the request of the defendant pursuant to a waiver of his or her Sixth Amendment rights.¹⁰ There is simply nothing in Blakely to suggest that this should change in a post-Blakely environment. Rather, except to the extent that it affects the applicable rules of

¹⁰ United States Sentencing Commission, "2002 Sourcebook of Federal Sentencing Statistics."

evidence and burden of proof, Blakely predominantly impacts only those cases in which the defendant does not waive his Sixth Amendment rights, and instead proceeds to a trial by jury as guaranteed by the Constitution. In those cases, which constitute a fraction of the total number of criminal cases in the federal system, it is eminently possible to protect the defendant's Blakely rights under the Sixth Amendment.

A defendant is entitled to a trial by jury as a constitutional right. There is, however, simply no constitutional right to waive a jury trial. Waiver is a privilege granted by Fed. R. Crim. P. 23, and is expressly conditioned on the consent of the government and approval of the Court. Fed. R. Crim. P. 23(a)(2) and (3); Singer v. United States, 380 U.S. 24, 36 (1965). Further, there is no authority that grants a defendant a constitutional right to selectively waive his or her Sixth Amendment right to some issues (e.g. guilt or innocence) and not others (e.g. sentencing). Nor is a defendant constitutionally entitled to enter a plea of guilty by waiving his right to a jury, and yet resurrect his right to a jury at sentencing by interposing a constitutional challenge to the Guidelines. A waiver of the Sixth Amendment right to jury is just that, a waiver of jury. A court cannot, and must not, act so as to exert pressure on a defendant to waive his right to a jury. But a court certainly can require that a defendant accept the full and natural consequences of such a waiver, including judicial factfinding at sentencing. If a defendant determines not to accept such consequences, as is his right, the matter should be scheduled for trial in order to fully vindicate the defendant's Sixth Amendment rights.

This Court believes that the constitutional viability of the Guidelines depends on the continued viability of the current system of waiver and consent. The jurisprudence supporting

this system was not challenged in any way by Blakely. Accordingly, waiver and consent should remain the cornerstone of the criminal justice system in the future.

B. Burden of Proof and Rules of Evidence

The Guidelines provide that the burden of proof for establishing a sentencing factor is a preponderance of the evidence. U.S. Sentencing Guidelines Manual § 6A1.3 cmt. (2003).¹¹ The commentary to § 6A1.3 states, “The Commission believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts in the case.” Id. The Guidelines further provide that the rules of evidence do not apply to the determination of whether facts support a sentencing enhancement:

When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

U.S. Sentencing Guidelines Manual § 6A1.3(a) (2003).¹²

¹¹ This parallels Fed. R. Evid. 1101(d)(3), which directs that the rules of evidence do not apply to sentencing.

¹² The Commentary to § 6A1.3 further provides:

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant’s prior criminal conduct even when the

The United States asserts that these principles are not disturbed by Blakely. The United States argues in the alternative that if Blakely applied in such a way as to change the burden of proof or the applicability of the rules of evidence, this would alter an integral element of the guideline system and, as a result, the entire guideline system would fall. See Memorandum by James Comey, Deputy Attorney General, "Department Legal Positions and Policies in Light of Blakely v. Washington" (July 2, 2004). For the reasons discussed below, the Court disagrees. As noted previously, Blakely provides that pursuant to proper waiver and consent a court may engage in judicial factfinding. Blakely, 2004 WL 1402696 at 8. This does not suggest, however, that a defendant's Sixth Amendment rights are protected by judicial factfinding under a relaxed burden of proof and without application of the rules of evidence. To the contrary, the Supreme

conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 S. Ct. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 497 U.S. (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F. 2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

U.S. Sentencing Guidelines Manual § 6A1.3 cmt. (2003).

This Guideline provision is derived from the federal statute that states:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661 (2000).

Court equates judicial factfinding with jury factfinding and states that the one may be substituted for the other pursuant to proper consent and waiver. See id. at 8. Moreover, the Supreme Court reminds us that Apprendi involved the same concern for such a higher standard of proof, stating, “This case requires us to apply the rule we expressed in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’” Id. at 4.

Logic and common sense dictate that a judge may not constitutionally substitute judicial factfinding for jury factfinding under Blakely without a more exacting standard of proof and the application of the rules of evidence. Moreover, there is little remarkable about these adjustments in the context of a criminal case. Under Fed. R. Crim. P. 23, a defendant may waive his or her right to a jury and try the case to the court. There can be no argument that in so doing the defendant would then be subject to a lower burden of proof, or that the rules of evidence should no longer apply. Similarly, under Blakely, the Sixth Amendment is the guiding legal principle applicable to factfinding at sentencing, whether by the jury or by the judge, and the Sixth Amendment protections of a higher burden of proof and the application of the rules of evidence should apply no matter which factfinder is selected. Simply stated, there can be no dilution of one’s rights under the Sixth Amendment when one factfinder is selected over the other.

The United States argues that any change in the burden of proof would disrupt the guideline system so significantly that the Guidelines would fail as a result. This argument is a companion argument to the claim that, as a matter of severability analysis, certain changes in the current system render the Guidelines inapplicable as a whole. The Court disagrees. The burden

of proof is not a significant aspect of the overall interdependency of the various component parts of the Guidelines. As stated above, the cornerstone of the criminal justice system under the Guidelines is the defendant's waiver of jury, entry of a plea of guilty, and consent to sentencing by the judge under the Sentencing Reform Act of 1984. While adjusting the burden of proof and applying the rules of evidence to cases where a defendant enters a plea and consents to judicial factfinding may require the United States to include more detail in its charging documents or gather more evidence for sentencing, such changes should not precipitate a failure of the system. More importantly, there is simply nothing in the Guidelines, the Act and its legislative history, or the case law to support the Government's claim.

Finally, as a practical matter, every district court judge is aware that in the vast majority of cases, the facts necessary to support sentencing enhancements can be established without regard to the burden of proof. For example, whether the defendant was carrying a gun. In some cases, however, particularly those involving amounts, a defendant's role in the offense, and relevant conduct, the burden of proof will have a significant effect. The Court would only observe that these areas were vexing for purposes of proof prior to Blakely, and district court judges developed ways of fairly dealing with these problems.

The Court concludes that a clear purpose of Blakely is to ensure that each fact necessary to support a sentencing enhancement must be proved under the rules of evidence beyond a reasonable doubt to a jury or, pursuant to proper waiver and consent, to a judge. This will have its greatest impact in the area of relevant conduct. In this regard, the Court simply comments that, at least to some extent, relevant conduct has long caused discomfort to those involved in the criminal justice system, and Blakely directly speaks to that discomfort.

C. Trial by Jury

In Blakely, the Supreme Court held that any fact necessary to support a sentencing enhancement must be determined by a jury. As discussed in Section A above, Blakely permits a district court judge to conduct the necessary factfinding pursuant to a proper waiver and consent. As discussed in Section B above, this grant of authority to the judge must be accompanied by a change in the burden of proof and the application of the rules of evidence to fully equate jury factfinding with judicial factfinding. These steps will effectively resolve over 97% of the cases in the federal criminal justice system.

The remaining cases will present particular problems that require additional time, energy, and effort on the part of all responsible parties in the criminal justice system. But the changes required in the system are not difficult, and district court judges are well experienced in implementing the kind of safeguards that are necessary to protect a defendant's Sixth Amendment rights.

To ensure that Blakely is followed, the trial court must put before the jury each fact that must be established to support a sentencing enhancement.¹³ Notably, the trial court is not required to put before the jury each specific sentencing enhancement, but only the facts necessary to support any such enhancement. Accordingly, for certain complex enhancements, it may be

¹³ The Court notes that nothing in this opinion is inconsistent with the holdings in Fanfan, No. 03-47-P-H (D. Mc. June 28, 2004), or in Booker, 2004 WL 1535858. In both of those cases, the defendant had been tried by a jury. The respective courts held that in that situation, only facts that had been submitted to and found by the jury could be considered at sentencing. No additional facts were determined by the jury that could support any sentencing enhancements, and therefore no enhancements were imposed. Moreover, because the defendants elected to exercise their Sixth Amendment right to a trial by jury, no waiver and consent issues were raised.

possible to establish the requisite factual basis without requiring the jury to sift through all the applicable definitions described in the Guidelines.

This Court believes that, in most cases, requiring the jury to find each fact necessary to support a sentencing enhancement beyond a reasonable doubt is neither novel nor onerous. Pursuant to Apprendi, 530 U.S. 466, courts already require juries to determine beyond a reasonable doubt certain issues, such as amounts, that dictate the nature of a statutory offense. See, e.g. 21 U.S.C. § 841(b) (1994); See also Fanfan, No. 03-47-P-H (D. Me. June 28, 2004). Further, in civil cases, district court judges routinely put before juries numerous interrogatories on the verdict form. While posing several questions to the jury in a criminal setting will be more delicate, the civil case experience informs district court judges on the best manner in which to implement this process, and puts district judges on ground that is both solid and familiar.¹⁴

Of course, in certain cases the issues will compel a procedure that is complicated and time consuming. But because issues in isolated cases are complicated and time consuming does not mean that they cannot be managed in a way that is both effective and fair. There is nothing in this Court's experience with juries that would suggest that a jury cannot make very sophisticated sentencing decisions with proper guidance and instruction by the Court.

D. Unique Cases

In limited instances, jury factfinding will require specialized procedures. The proper administration of these cases will reside with the district court judges who have vast experience in tailoring the process to ensure fair and efficient outcomes.

¹⁴ As in any complicated case, whether civil or criminal, judges can put in place requirements for filing proposed verdict forms and instructions well in advance of trial to ensure the fair and expeditious treatment of these issues.

The Court anticipates that, in particular, special problems will arise in future cases involving relevant conduct. Instances will occur where evidence of relevant conduct will not be probative of the crime charged and will be highly prejudicial. In such cases, the evidence cannot be admitted during the guilt phase of the trial, thus forcing a second phase for presentation of sentencing evidence to the jury. These cases should be rare. Indeed, since the Government must now establish all facts necessary to support a sentencing enhancement beyond a reasonable doubt, wherever possible the Government should simply charge the relevant conduct under applicable law in the indictment, rather than seek to raise it solely at sentencing.

With respect to those cases in which a bifurcated proceeding is required, the Court notes that district court judges are quite familiar with this process. For example, punitive damage cases routinely require such a procedure. District court judges clearly can adjust without difficulty to the needs presented by such cases.

The Court finds that the Guidelines are constitutional if implemented in accordance with this four-point Plan. The Plan will maintain the workability of the Guidelines, while addressing the concerns expressed in Blakely that judicial factfinding by a lower standard of proof can be inconsistent with a defendant's rights under the Sixth Amendment. As noted in Blakely, the Supreme Court's goal was not to eradicate sentencing guideline systems, but to ensure that they are implemented in a manner consistent with each defendant's Sixth Amendment rights. Blakely, 2004 WL 1402697 at 7. The Court believes that the Plan achieves this goal.

IV

In the instant case, Defendant entered a plea of guilty to the Theft of Mail Matter by Officer or Employee (of the United States Postal Service). 18 U.S.C. § 1709. As described in

detail above, in so doing Defendant waived her right to a jury and expressly consented to judicial factfinding for purposes of sentencing under the Sentencing Reform Act of 1984.

Applying the Federal Sentencing Guidelines, without enhancements, the Court determines the base offense level to be 6. U.S. Sentencing Guidelines Manual § 2B1.1(a)(2). Additionally, Defendant's Petition contained statements which support a two-point enhancement for Defendant's role in the offense under § 3B1.3 because Defendant admitted to stealing mail entrusted to her as a United States postal employee.¹⁵ The Commentary to this section provides in relevant part, "... because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail." U.S. Sentencing Guidelines Manual § 3B1.3 cmt. n.1 (2003). This brings the offense level to 8, without objection.

Two further enhancements based on specific offense characteristics, each requiring judicial factfinding, have been recommended in the Presentence Investigation Report. These two enhancements, amounting to a potential increase of fourteen additional levels, are objected to by Defendant.¹⁶ Thus, under Blakely, the United States must prove beyond a reasonable doubt the facts necessary to support each enhancement.

¹⁵ Section 3B1.3 provides in relevant part as follows:

Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels

¹⁶ The government argues that the second enhancement recommended in the PSI should be increased by two more levels, for a total increase of sixteen levels.

A. The Amount of Loss

The first issue is the amount of loss attributable to Defendant's criminal activity. This issue presents two questions: the actual amount of loss suffered by the victims that can be proved beyond a reasonable doubt, and the amount of loss that can be attributed to Defendant beyond a reasonable doubt. The Court will address each of these issues in turn.

1. The Amount of Loss Suffered by the Victims

The Commentary to § 2B1.1 provides that the sentencing court need not determine the loss with precision, but must make a reasonable estimate of the loss, based on the available information. See, e.g. United States v. Osborne, 332 F.3d 1307, 1313 (10th Cir. 2003). Here, Defendant had \$4,707 in stolen cash and checks on her person at the time of arrest. Accordingly, this amount of loss can be readily determined beyond a reasonable doubt.

VOM, the victim most heavily impacted by Defendant's criminal acts, developed careful records of its loss amounts. William "Woodie" Rains, the Director of Finance for VOM, testified as to the procedure by which VOM recorded reports of undelivered checks. Once Mr. Rains realized that VOM had received several reports of undelivered checks within a short period of time, sometime around early 1999, VOM began recording the reports of uncashed checks. Using a computer spreadsheet, VOM maintained a list (the "VOM report") of reported undelivered donations. The VOM report contains the date each undelivered check was reported, the check number, the donor's name and address, the amount of the donation, and the estimated date the donation was mailed. Such a record was made every time an undelivered check was reported. Mr. Rains prepared some reports himself, and oversaw the filing of reports by others in his department. VOM determined that approximately 1,233 undelivered checks, totaling

approximately \$253,555.42, were reported during the period of Defendant's employment. The Court finds that VOM's records establish by a preponderance of the evidence that the amount of its loss totaled \$253,555.42. However, the Court finds that more proof is required to establish this amount of loss beyond a reasonable doubt.

The Court finds that the required quantum of proof has been provided to establish a loss amount of \$134,571.34 through evidence of replacement donations received by VOM. Many contributors, when informed that their original donations had not been received by VOM, sent replacement donations. A donation was categorized as a "replacement" donation when it was the same amount as the original donation, received within four months of notification that the original donation did not arrive, and was not part of a fixed program of systematic giving (e.g., someone who gave \$25 every three months, and made another \$25 donation within four months of discovering the last donation had not arrived). The evidence reflects that VOM received replacement checks for \$134,571.34 of the undelivered donations. VOM maintained detailed records of these replacement donations. VOM marked both the replacement donor's name and donation amount by highlighting the appropriate line on the VOM report containing that donor's information. The Court finds that the fact that a contributor sent a replacement check in the same amount after learning that the original check did not arrive establishes beyond a reasonable doubt that the check had been sent in the first place. Thus, the loss to VOM established beyond a reasonable doubt is \$134,571.34.¹⁷

¹⁷ The Court notes that an equally appropriate method of calculating the amount of loss also yields an amount in excess of \$120,000. Specifically, if the total amount of reported undelivered donations, \$253,555.42, is reduced by the amount of substitute donations, \$134,571.34, the result is a net loss to VOM of \$118,983.59. When this amount is added to the \$4,707 found in Defendant's possession at the time of her arrest and the search of her residence,

In addition to the loss suffered by VOM, each contributor who sent a replacement donation lost the value of the stamp he or she used to mail the original donation, and incurred further loss through the expenses of writing a new check, using a new envelope, and the cost of transportation to effect mailing. Thus, the Court finds beyond a reasonable doubt that the value of the postage on the original donations and the expenses incurred in mailing a replacement check are also part of the amount of loss attributable to Defendant's criminal activity.¹⁸

2. The Amount of Loss Attributable to Defendant

Having established the total amount of loss, the question becomes whether, and to what extent, this amount of loss can be attributed to Defendant. As noted above, the amount of loss is the greater of either the actual loss caused by Defendant's conduct, or the intended loss. In this case, the logs kept by VOM reflect that checks which had been sent were not being delivered during the approximately four-and-a-half year period of Defendant's employment, from January of 1999 until July of 2003. Notably, the VOM records also establish a period of time, from July 11, 2001 until February 2, 2002, when no undelivered checks were reported. The evidence adduced at the hearing demonstrates that this period corresponds to a period when Defendant missed work to recover from surgery, from August of 2001 until March of 2002. Significantly, VOM again began regularly receiving reports of undelivered checks following Defendant's return to work in March.

it exceeds \$120,000. This figure would then be increased to reflect the expenses incurred by those sending replacement donations, as discussed below.

¹⁸ The Court notes that this loss is tangible, albeit minimal.

Furthermore, Inspector Santiago testified that Defendant confessed that she had been embezzling mail for nearly five years. Defendant denied this at her plea hearing. However, the Court finds Inspector Santiago to be a highly credible witness. Given Inspector Santiago's lack of motivation to fabricate testimony and the credibility of his statements, the Court finds that Defendant did in fact confess to conducting her criminal activity during the time VOM recorded undelivered checks.

Based on the above evidence, the Court finds that the United States has established beyond a reasonable doubt that the total amount of loss to VOM, \$134,571.34, discussed above, can be attributed to Defendant, as can the amount of loss incurred by those donors who sent replacement checks. Thus, Defendant's offense level will be enhanced by ten points, for a loss amount greater than \$120,000, but less than \$200,000. U.S. Sentencing Guidelines Manual § 2B1.1(b)(1)(F) (2003). This brings the offense level to 18.

B. The Number of Victims

The second issue involves a possible enhancement for the number of victims of the offense. The PSI recommends a two-point increase, for a crime involving ten or more victims, based on the fact that the mail found in Defendant's possession at the time of her arrest was addressed to nine different persons or entities. Based on the length of time over which Defendant committed the offense and the volume of mail for which she was responsible, the PSI concludes that Defendant's criminal acts likely affected well over ten victims.

The United States asserts that, based on VOM's records and the testimony of Mr. Rains, the base offense level should be increased by four levels, because the offense involved more than fifty victims. The Court agrees. The Commentary to § 2B1.1, in Application Note 1, defines

“victim” as “(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. ‘Person’ includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.” U.S. Sentencing Guidelines Manual cmt. n.1 (2003). The Commentary further provides as follows:

(B) Undelivered United States Mail

- (i) In General – In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property . . . possessed was undelivered United States mail, “victim” means (I) any victim as defined in Application Note 1, or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

U.S. Sentencing Guidelines Manual cmt. n. 4(B)(i) (2003).

The Court finds that the evidence adduced at the hearing establishes beyond a reasonable doubt that there were more than fifty victims of Defendant’s crime. The losses of those who intended to make donations to VOM have been proved beyond a reasonable doubt. Mr. Rains sponsored an exhibit, which demonstrates that over 200 people reported undelivered donations and incurred the expense of writing and mailing a replacement check. The names of those victims are identified on the highlighted VOM report. Thus, there are over 200 victims under § 2B1.1, as defined in Application Note 1. In addition to those who wrote replacement checks, VOM, Prayer by Letters, Saint Matthew’s Church, Southwest Indian Children’s Fund, Word of Faith, Robert Tilton Ministries, and two private residences in Bartlesville constitute victims as defined in Application Note 4(B)(1). Because Defendant’s criminal activity had more than fifty

victims, the Court concludes that the offense level should be increased by four points. U.S. Sentencing Guidelines Manual § 2B1.1(b)(2)(B) (2003).

V

Based on the Court's finding that the above enhancements have been established beyond a reasonable doubt, the adjusted offense level in this case is 22, and after a three-point adjustment for acceptance of responsibility, the total offense level is 19. Defendant has a criminal history category of I, and therefore the range under the Guidelines is 30-37 months. Based on the record, the Court hereby sentences Defendant to 37 months, which is at the high end of the applicable guideline range.

The Court finds that a sentence at the high end of the range is appropriate because Defendant not only took advantage of vulnerable and unsuspecting users of the United States Postal Service, she preyed in particular upon charitable organizations that rely heavily on the type of donations stolen by Defendant to maintain their existence. Moreover, due to the nature of Defendant's offense, and the long period of time over which the offense was committed, it is likely that there were many unidentified victims of Defendant's conduct.

VI

In conclusion, the Court finds that Blakely applies to the Guidelines and the Court has a judicial responsibility to uphold the Guidelines, if possible, while protecting the Sixth Amendment rights articulated in Blakely. The Court further finds that, if applied in accordance with the above-described four-point Plan, the Guidelines are constitutional.

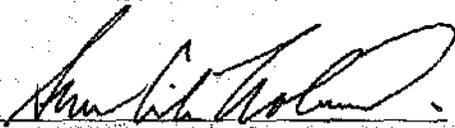
Applying the terms of the Plan to the instant case, the Court finds that the United States has proved beyond a reasonable doubt the facts necessary to support the proposed enhancements

under §§ 2B1.1(b)(2)(B), 2B1.1(b)(1)(F) and 3B1.3, such that the Guideline range should be 30-37 months. For the reasons set forth above, Defendant is hereby sentenced under the Act to 37 months.

Defendant expressed her notice of appeal of this sentence in open court at the sentencing hearing on August 12, 2004.

IT IS SO ORDERED.

This 13TH day of August, 2004.



Sven Erik Holmes, Chief Judge
United States District Court