Beyond Blakely

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Beyond Blakely

Federal criminal sentencing in the wake of Blakely v. Washington 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. 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, 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." Two years later, the four justices who dissented in Apprendi, joined by Justice Scalia, held in Harris v. United States that Apprendi did not require a fact triggering a mandatory minimum sentence to be established beyond a reasonable doubt to a jury. That same term, the Court in Ring v. Arizona 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, "[i]f a state makes an increase in a defendant's authorized punishment contingent upon the finding of a fact, that fact — no matter how the state labels it — must be found by a jury beyond a reasonable doubt." 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 a sentencing 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, 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. The dissenters, plainly unconvinced, predicted the Washington sentencing scheme could not be distinguished from the Guidelines.

The position of the Department of Justice 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 dualing 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. The Guidelines "were never intended to operate on the same footing as the statutory maximums."
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.* 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." 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. 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." Several district courts, now joined by decisions from the Seventh and Ninth Circuit Courts of Appeals, agree. The Fifth Circuit has taken the opposite position, holding that "*Blakely* does not extend to the federal Guidelines." 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. The Sixth Circuit is reviewing en banc a panel decision which held that *Blakely* returns the federal system to an indeterminate sentencing regime, such that the district judge "should view the guidelines in general as recommendations to be considered and then applied only if the judge believes they are appropriate and in the interests of justice in the particular case." Finally, the Second Circuit has certified this question to the United States Supreme Court.

**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. The sentence provided in § 1341 is 0–20 years for simple mail fraud. 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. 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. After *Blakely,* however, the relevant "statutory maximum" that the judge "may impose without any additional findings" 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, injury, or relevant conduct, or seeks to depart upward from the presumptive sentencing range due to a fact not otherwise taken into account under the Guidelines, each of those additional facts must be admitted by the defendant or found by a jury before a sentence higher than six months can be imposed.

We also believe that *Blakely* has thrown into doubt those decisions authorizing judges to make findings necessary for forfeiture and restitution awards. These cases have reasoned that *Apprendi* does not apply to factfinding 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 the 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. Restitution ordered as part of sentencing is open to the same sort of attack.

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 enhancements based upon prior convictions. 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.

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

Assuming that *Blakely* has invalidated the judicial factfinding we have detailed above, the question for courts is whether the remainder of Congress's sentencing scheme should be retained, 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.\textsuperscript{44}

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 in so far as it is valid."\textsuperscript{45} The Court has explained that "[i]nless 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."\textsuperscript{46} 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."\textsuperscript{47} The absence of a severability clause, as is true of the Sentencing Reform Act of 1984,\textsuperscript{48} "does not raise a presumption against severability."\textsuperscript{49} 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.\textsuperscript{50} 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."\textsuperscript{51} Congress clearly intended that the Guidelines would be applied by judges and not juries,\textsuperscript{52} and appellate review of jury findings were not envisioned in Congress 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."\textsuperscript{53} The Commissionerse themselves noted in the Manual that "the Guidelines Manual in effect on a date shall be applied in its entirety,"\textsuperscript{54} and this was implicitly adopted by Congress in 1987.\textsuperscript{55}

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.\textsuperscript{56} 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."\textsuperscript{57}

Some judges are reaching this result already. In one of the earliest decisions applying Blakely, the District Judge in United States v. Croxford\textsuperscript{58} held that "the Federal Sentencing Guidelines are unconstitutional and cannot govern defendant's Croxford's sentencing."\textsuperscript{59} The judge found that Blakely barred a two level enhancement for obstruction of justice based on defendant's fleeing the jurisdiction before trial, and another two level increase based on an uncharged sexual offense involving another young victim. The probation officer's recommendation had included these adjustments, as well as a three 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.\textsuperscript{60} The judge concluded that imposing only the sentence authorized by the Guidelines without the addition for obstruction of justice and relevant conduct "would inevitably tug downward on criminal sentences, perhaps producing sentences that do not provide just punishment or protect public safety."\textsuperscript{61} Using his pre-Guidelines discretion bound only by the 10-year mandatory minimum and 20-year statutory maximum, the judge sentenced the defendant to 148 months.\textsuperscript{62} He noted that "should the sentencing guidelines later be found to be constitutional... the court will impose a backup sentence under the Guidelines of 151 months."\textsuperscript{63} Other judges, too, have found the Guidelines were invalidated by Blakely and are sentencing accordingly.\textsuperscript{64}

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.\textsuperscript{65}

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 bipartisan support for ending disparities that occur at sentencing or at the parole stage.\textsuperscript{66} 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 courts with explicit direction, in the form of binding guidelines that prescribed the kinds and lengths of sentences appropriate for typical federal offenders." 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. 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. 

The state of Kansas chose to modify its sentencing scheme to comply with Apprendi through legislation, sending sentence-enhancing facts to the jury for proof beyond a reasonable doubt. Federal judges probably could accomplish the same thing on their own. 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. 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 the 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. Predictions that guideline facts would be impossible to prove to juries or review on appeal are, we believe, exaggerated. Admittedly, upward adjustments for relevant conduct would be difficult to administer after Blakely. 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. As the Department of Justice points out in its recent brief: "Aside from the difficulty of instructing a jury on the quite complex 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 overrule Witte v. United States, and United States v. Watts, to the extent that those cases permit the judge to make findings regarding uncharged and acquitted conduct that enhance 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 or through additional criminal charges.

Nevertheless, juries can be instructed on the meaning of most Guidelines factors and their factual 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. 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.84 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.85 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.86 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.87

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.88 For example, in United States v. Fanfan,89 the judge held that since the indictment alleged only a conspiracy involving 500 grams of powder cocaine, producing a presumptive guideline range of 63–78 months, Blakely required that he reject the Probation Department’s Presentence report calculating a guideline sentence of 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.90 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.91

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.”92 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.93 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 to 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.”94 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 into plea agreements.95 Whether a defendant agrees to have his sentence determined under the Sentences Guidelines; waives any right to have facts 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.”94 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.”

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be at least the mandatory minimum sentence. There may be instances where prosecutors would have dropped an 18 U.S.C. § 924(c)(1)(A) charge in exchange for a plea to the underlying drug offense, accepting a two 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, 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 other factors and charges. The Department of Justice is advising its attorneys to seek waivers of both jury and burden of proof.

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), defendants 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.

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, 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.

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 Fed. R. Crim. P., but that relief is available only within seven days after sentencing. 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. 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. 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 Fed. R. Crim. 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 in some circuits, and should have the same effect here. Some courts have concluded that they will not enforce agreements to insulate from review what are essentially illegal sentences, beyond the authority of courts to impose. In circuits that uphold Apprendi or Blakely waivers, 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.16 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.18 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 may bar any challenge under Blakely or Apprendi to sentences other than those in the judge actually relied upon an upward departure.19 One claim commonly exempted from appeal waiver provisions is the ineffective assistance of counsel.20 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 United States v. Cotton.21

Before 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;22 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 he had raised the error, there is a reasonable probability that he would have received a lower sentence.23 In cases where there is overwhelming and uncontroverted evidence to establish the facts contested under Blakely, relief will be unavailable.24 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.25 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.26

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.27

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, but would otherwise be free to select a sentence under the traditional relaxed sentencing processes upheld in Williams v. New York. 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 for 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, Blakely/Apprendi facts are elements, and a hearing to establish them is equivalent to a trial on the elements of the 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. 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. 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. On remand, no defendant can receive a sentence greater than that which already has been imposed. Accordingly, we hold that jeopardy has not attached. 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.

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. 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. 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. 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.

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. 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.

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. 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" 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 Schriro v. Summerlin, 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. 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, 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. 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. 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" 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. 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. 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." In sum, Blakely may be consistent with Apprendi and Ring, but it is difficult to maintain that "no other interpretation" of Apprendi or Ring was "reasonable."

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.

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, there is still a chance that the 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 v. Wilbur was held to apply retroactively, and to Ivan V v. City of New York, applying In re Winship retroactively. 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 v. Wainwright, 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.

Finally, compared to the rule providing the right to counsel 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 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.

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." But, as the Court made clear in Tyler v. Cain, 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.

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. 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. We agree with Justice Breyer that such a system "assures uniformity, but at intolerable costs." 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, 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. 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.

Finally, Justice Breyer notes a third option (the one "which the Court seems to believe legislators will in fact take") 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.

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." 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. 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 guideline range to the statutory maximum of the offense(s) of conviction." By chopping the tops off the ranges and by encouraging judges to follow prior ceilings as unenforceable maxima in policy statements, many of the existing gradations between defendants and offenses might be preserved, assuming that judges take the Commission's recommendations to heart.

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. 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.

FEDERAL SENTENCING REPORTER • VOL. 16, NO. 5 • JUNE 2004

325
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.

Notes

1 Nancy J. King is the Lee S. & Charles A. Professor of Law at Vanderbilt University Law School.
2 Susan R. Klein is the Baker & Botts Professor in Law at the University of Texas at Austin.
3 124 S. Ct. 2531 (2004). The five-four breakdown is along the same lines as the breakdown in Apprendi v. New Jersey, 530 U.S. 545 (2002).
4 See U.S. v. Penaranda, 2004 U.S. App. LEXIS 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 Anne Skove, National Center for State Courts, Blakely v. Washington: Implications for State Courts, http://www.ncsconline.org/WC/Publications/Kis.SentenBlakely.pdf (July 19, 2004) 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.
6 Id. at 490.
8 Id. Though the particular factual finding 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.
10 Id. at 602.
12 Blakely, 124 S. Ct. at 2538 n. 9.
13 Id. at 2543, 2546, 2548-50 (O'Connor, J., dissenting); Id. at 2552, 2554-55, 2560-61 (Breyer, J., dissenting).
15 DOJ sample brief, supra note 14, at 14. See also Brief for the U.S. as Amicus Curiae Supporting Resp't., Blakely v. Washington, 2004 WL 177025 at *26, 124 S. Ct. 2531 (2004) ("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. § 991(a) (2004)).
16 DOJ sample brief, supra note 14, at 13. Dissenting in U.S. v. Booker, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004), Judge Easterbrook also argues that Blakely is limited to "statutes" (analogy the Commission's Sentencing Guidelines to the federal Parole Commission's release guidelines, which are not submitted to a jury).
17 Justice Scalia, the author of Blakely, for example, is on record that the Federal Sentencing Guidelines are unconstitutional. Mistretta v. U.S., 488 U.S. 361, 413, 426 (1989) (Scalia, J., dissenting) (terming the Commission a "junior-varsity Congress").
18 Id. at 393-94. See also Slovin v. U.S., 508 U.S. 36 (1993) (the Federal Sentencing Guidelines have the force of law).
20 Blakely, 124 S.Ct. at 2537.
21 See Booker, 2004 U.S. App. LEXIS 14223 (7th Cir. July 7/9/04) (opinion by Posner, J.). The decision includes an interesting debate over whether the Court would have to overrule its decision in Edwards v. U.S., 523 U.S. 511 (1998), in order to reach this conclusion. We agree with Judge Posner on this point. See also U.S. v. Lamoreaux, 2004 WL 1557283 (W.D. Mo. July 7, 2004) (agreeing with Judge Cassell in Crawford that Blakely does apply to the federal sentencing guidelines, and that the Guidelines provisions providing for judicial factfinding cannot be severed). See also U.S. v. Ameline, No. 02-30326 (9th Cir. July 21, 2004) ("we hold that Blakely's definition of statutory maximum applies to the determination of the base offense presumptive ranges under § 201.1(c) of the Sentencing Guidelines..."). See also United States v. Epps, 2004 WL 1562934, (9th Cir. July 12, 2004) (remanding case to district court in light of United States Supreme Court certiorari in Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), cert. granted, No. 03-1454 (U.S. June 28, 2004), and, if conviction remains intact, for resentencing in light of Blakely). An up-to-date list of District and Circuit opinions post-Blakely can be found on http://sentencing.typepad.com — click on USSGuide Blakely.
22 See U.S. v. Pineiro, 2004 WL 1543170 (5th Cir. July 12, 2004) (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).
23 Id. at **6-10 (noting that the Court has upheld the Guidelines in Mistretta v. U.S., 488 U.S. 361 (1989), Edwards

Penaranda, 2004 U.S. App. LEXIS 14268; U.S. v. Rojas, 2004 U.S. App. LEXIS 14268 (2d Cir. July 12, 2004) (en banc) (presenting three questions to the Court pursuant to 28 U.S.C. § 1254(2), which can be distilling to whether Blakely applies to judicial fact-finding that results in a higher offense level and other upward adjustment under the federal Sentencing Guidelines).


U.S. Sentencing Guidelines Manual § 2B1.1(a)(1) (2003) (which gives an offense level of 6, and assuming a criminal history category of 1 (or 0 criminal history points)).


Blakely, 124 S. Ct. at 2537 (emphasis in original).


See U.S. Sentencing Guidelines Manual § 5K (2003). See also Dilds v. Oregon, 2004 WL 540530 (June 28, 2004) (vacating the case and remanding to the Supreme Court of Oregon for further consideration in light of Blakely). In State v. Dilds 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. 82 P.3d 593 (Or. 2003) (en banc). 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 apparently believed the decision required reconsideration in light of Blakely.

Not only must all facts increasing the Guidelines range for the offense of conviction be submitted to 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 U.S. v. Cotton, that Apprendi “facts must also be charged in the indictment.” Cotton, 535 U.S. 625, 627 (2002).


E.g., U.S. v. Syms, 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), cert. denied, 123 S. Ct. 619 (2002); U.S. v. Vera, 278 F.3d 672, 673 (7th Cir. 2002), cert. denied, 536 U.S. 911 (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 U.S. v. Behman, 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 U.S. v. Ross, 279 F.3d 600 (3d Cir. 2001) (restitution is a criminal penalty); U.S. v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997) (restitution is a criminal penalty).

Intra n. 93 for partial list.

There are some factual assessments required in the U.S.S.G. §§ 4A1.1, 4A1.2, and 4A1.3 that may require a jury finding beyond a reasonable doubt, even after U.S. v. Almendarez-Torres, 523 U.S. 224 (1998). For example, criminal history may be influenced by whether the defendant committed the instant offense while on release, whether a prior state offense was insuffically serious to be 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 § 924(e), need not be submitted to a jury), cert. denied, 535 U.S. 1070 (2002); 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, 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”), cert. denied, 535 U.S. 938 (2002); 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).


Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 24 U.S. L. (1976)) (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); U.S. v. Grigsby, 85 F. Supp. 2d 100 (D.R.I. 2000) (section of Federal Child Support statute creating mandatory presumption in violation of due process could be severed from remainder of statute).

Alaska Airlines, 480 U.S. at 685.

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

Alaska Airlines, 480 U.S. at 686.
Mistretta, See unconstitutional provision of the statute). We note that the good time credits are not severable from the provisions of the Sentencing Reform Act curtailing the power of the Federal Sentencing Commission, as those credits were a part of the constitutional system, calibrated to produce a fair sentence by a judge, and the judges had no authority to substitute drug types and quantities to juries, despite no new legislation permitting this. See also Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting Apprendi, "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense'"; id. at 610 (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").


DOJ sample brief, supra n. 14, at 24 (quoting original but unpublished Croxford, 2004 WL 1462111 at *10 (D. Utah June 28, 2004)). See also revised Croxford, 2004 WL 1521560 at *11, 12, 20 (D. Utah July 7, 2004); Blakely, 124 S.Ct. at 2537-40 (Breyer, J., dissenting).


18 U.S.C. § 3661 (2004); U.S. Sentencing Guidelines Manual § 1B1.3(a)(2) (2003) (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").

DOJ sample brief, supra note 14.


Judicial committees will no doubt have to readjust their criminal pattern jury instructions to account for all of these factors. See U.S. Sentencing Guidelines Manual § 3D1.2 (2002).

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. See, e.g., U.S. v. Twitty, 2000 U.S. App. Lexis 12225 (4th Cir. May 23, 2000) (collecting cases).

See Apprendi, supra note 36.

U.S. v. Buckland, 277 F.3d 1173 (9th Cir. 2002), cert. denied, 535 U.S. 1105 (2002), superceded, 289 F.3d 558 (9th Cir. 2002) (en banc).


Id. See also U.S. v. Shamblin, 2004 WL 1468561 (S.D.W. Va., June 30, 2004) (resentencing defendant to twelve 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).

2004 WL 1535646 (D. Utah July 8, 2004). As this article goes to press, a panel of the Ninth Circuit in U.S. v. Ameline, No. 02-30263 (July 21, 2004), reached the issue of severability and held that “the government has failed to overcome the presumption of severability,” and that “preserving the essential provisions of the Guidelines that are not constitutionally infirm will effectuate Congressional intent by preventing a return to the days of indeterminate sentencing.”

Blakely, 124 S. Ct. at 2540.

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 Br. for the U.S., U.S. v. Mistretta, 488 U.S. 361 (1989).

Comey memo, supra note 14, at 4.

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 theft 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.

See, e.g., 7 U.S.C. § 2024(b) (food stamp fraud); 8 U.S.C. § 1326(b) (illegally reentering following deportation); 18 U.S.C. §§ 924(e)(1), 924(e)(X) (weapons offenses); 18 U.S.C. §§ 1030(c), 1029(c) (unauthorized use of computers/access devices, credit card fraud) 18 U.S.C. §§ 1461, 1462 (interstate transportation of obscene materials); 18 U.S.C. §§ 2241(c), 2251(e), 2252(b) (sexual abuse of child and child pornography); 21 U.S.C. §§ 841(b), 843(b), 848 (drug offenses). All provide for sentence bumps based upon prior convictions.

See Almendarez-Torres v. U.S., 523 U.S. 224, 247 (1998) (upholding 8 U.S.C. § 1326(b)(2) (1994) which, despite an otherwise applicable statutory maximum of two 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).


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)(A), 50 grams of cocaine base likewise provides a level 32 which translates to 121-151 months.

See Comey memo, supra note 14.

See generally Nancy J. King & Susan R. Klein, Apprendi and Plea Bargaining, 54 Stan. L. REV. 295, 296 (2002) (arguing that prosecutorial bargaining chips were transferred to criminal defendants post-Apprendi).


See e.g. U.S. v. Shamblin, 2004 WL 1468561 (S.D.W. Va., June 30, 2004) (correcting “obvious” mistake in sentencing and reducing sentence under Blakely). See also U.S. 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).


Blakely, 124 S. Ct. at 2541 (noting governments are “free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.” and that “[e]ven a defendant who stands trial may consent to judicial factfinding as to sentence enhancements”).

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

Consider for example the waiver provision in U.S. v.
Shimoda, 334 F.3d 846, 848 (9th Cir. 2003) (emphasis
added):

Defendant knowingly waive[s] 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. . . . If the Court in imposing sentence
deports (as that term is used in Part K of the Sentencing
Guidelines) 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 claim, 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.” Id. at
880.

See, e.g., U.S. v. Amsden, 2002 U.S. App. LEXIS 22567 at *4
(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”).

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”).

See e.g. U.S. 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”);
U.S. 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.”).

535 U.S. 625, 631 (2002) (citations and internal quotes
omitted).
june. however, we find no error with this cautious approach as well as the district court’s agreement with the jury’s factual findings.

129 For an example of such instructions, see U.S. v. Medas, 2004 U.S. Dist. LEXIS 12135 (E.D.N.Y July 1, 2004).


131 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.

132 See U.S. v. Booker, 2004 U.S. App. LEXIS 14223 at *17 (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 conviction. See Apprendi v. New Jersey, 530 U.S. 466, 501-02 (Thomas, J., concurring). 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 (1993). On this reasoning, Ring is not for purposes of Teague because it overruled Walton, notwithstanding that Ring appears to be an application of Apprendi.

133 See also Besser v. Walsh, 2003 U.S. Dist. LEXIS 21474 (S.D.N.Y. 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).

134 See Ring, 536 U.S. at 601.

135 See Ring, 536 U.S. at 603-04 (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 is not of form, but of effect.’ ... In effect, ‘the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury’s guilty verdict.”

136 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: “[I]t is not clear that the conclusion of the lower courts is 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).


138 Consider our own assertions: “nothing in Apprendi changes the government’s ability to reiterate 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.” Klein & King, Après Apprendi, supra note 36 (emphasis added).

FEDERAL SENTENCING REPORTER • VOL. 16, NO. 5 • JUNE 2004
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.

See Ring, 536 U.S. at 597 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").


Cotton, 535 U.S. at 632-33.


The 11th Circuit Court of Appeals denied a successive petition on this basis in In Re Dean, decided July 9, 2004. 2004 WL 1534788 (11th Cir. July 9, 2003).

Id. at 2553.


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.

PROTECT Act, supra n. 19.

Blakely, 124 S. Ct. at 2554 (Breyer, J., dissenting).


Croxford, 2004 WL 1521560 at *21.


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 (Professor 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 at sentencing.typepad.com.

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 plurality in Harris. 536 U.S. 545 (2002). One of us believes that since Justice Breyer concurred in Harris only because he had not yet accepted Apprendi, there is the slight chance that there may be enough votes to overrule. See Susan R. Klein & Jordan Steiker, The Search for Equality in Criminal Sentencing, 2002, SUPREME COURT 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).