

## Memorandum

TO: U.S. Sentencing Commission  
FROM: Frank Bowman<sup>1</sup>  
RE: Blakely v. Washington  
DATE: 6/27/04

This memorandum addresses the question of what, if anything, the U.S. Sentencing Commission should do in the wake of the decision in *Blakely v. Washington*. It proceeds from two premises: First, that *Blakely* almost certainly applies to the Federal Sentencing Guidelines, rendering them either unconstitutional as now applied, or facially unconstitutional regardless of how applied. Second, I assume that if *Blakely* does render the Guidelines unconstitutional, the Commission will wish to do what it can to bring the Guidelines into conformity with the Supreme Court's decisional law, if possible. As I will explain below, I believe that can be done in a way that will have very little effect on the operation of the guidelines in practice, albeit my suggestion would appear to require congressional action.

### 1. The Effect of *Blakely* on the Guidelines

You will already have read *Blakely* and drawn your own conclusions. It may be possible to draw technical distinctions between the Washington sentencing scheme invalidated in *Blakely* and the Federal Sentencing Guidelines; however, in the end such distinctions seem unlikely to prove dispositive. In *Washington*, a defendant's conviction of the underlying statutory offense generated a sentencing range within the outer bounds set by the statutory minimum and maximum sentences. The judge was obliged (or at least entitled) to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. In its essentials, therefore, the *Washington* statute is indistinguishable from the federal sentencing guidelines.<sup>2</sup> Thus, although the Court reserved ruling on the application of its

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<sup>2</sup> There are, of course, many differences in the two systems, but most of those differences would seem to be either immaterial or to render the federal guidelines more, not less, objectionable under the *Blakely* analysis. For example: (1) Various observers have pointed out that the *Washington* guidelines are statutory, while the Guidelines are the product of a Sentencing Commission nominally located in the Judicial Branch. However, the federal guidelines were authorized by statute and amendments must be approved by Congress (at least through the negative sanction of inaction). More importantly, the institutional source of the rules seems immaterial to the Court's Sixth Amendment concern about the role of the jury in determining sentencing facts. (2) The federal guidelines are far more detailed than their *Washington* counterparts, but that seems only to make

opinion to the Guidelines, there seems little question that it does impact the Guidelines. Indeed, my strong feeling is that *Blakely* is really about the federal guidelines, in the sense that the Court would never have assembled a five-member majority for the *Blakely* result in the absence of the boiling frustration of the federal judiciary over the state of the federal sentencing system – a point that assumes some importance in the analysis below.

The question then becomes what immediate effect *Blakely* will have on the federal sentencing system. As we have seen from press reports, federal sentencings all over the country have stopped while courts and litigants assess the situation. When judges begin to rule, they will have three basic options: (a) find that *Blakely* does not apply to the federal sentencing guidelines and proceed as though nothing has happened; (b) find that the Sentencing Guidelines survive, but that each guideline factor which produces an increase in sentencing range above the base offense level triggered by conviction of the underlying offense is now an “element” that must be pled and proven to a jury or agreed to as part of the plea; or (c) find that the Guidelines are facially unconstitutional, in which case judges can sentence anywhere within the statutory minimum and maximum sentences of the crime(s) of conviction.

Consider these options and their practical consequences:

(a) *Blakely* does not apply to the Federal Sentencing Guidelines: For the reasons sketched above, I consider this an unlikely result. In any event, even if some judges adopt this approach, I strongly suspect that a far greater number will adopt one of the other two.

(b) *Blakely* transforms the Guidelines into a part of the federal criminal code: The second possibility is that courts could find that the guidelines remain constitutional as a set of sentencing rules, but that the facts necessary to apply the rules must be found beyond a reasonable doubt by a jury or be agreed to by the defendant as a condition of his or her plea. In effect, all Guidelines rules whose application would increase a defendant’s sentencing range<sup>3</sup> would become part of the substantive federal criminal code, to be treated as “elements” of a crime for purposes of indictment, trial, and plea.

As I will discuss in a moment, I think this view of the Guidelines is constitutionally untenable, but it also has a variety of what many will view as highly undesirable practical consequences. These consequences fall into two broad categories – effects on trials and effects on plea bargaining.

First, if the Guidelines were henceforward to be treated as elements of a crime, the government would presumably have to include all guidelines elements in the indictment,

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them a greater offender against the Sixth Amendment principle enunciated in *Blakely*. (3) The modified real-offense structure of the Guidelines, in particular their reliance on uncharged, or even acquitted, relevant conduct, is different than the Washington system, but surely much more offensive to the *Blakely* rule than the Washington scheme.

<sup>3</sup> Possibly excluding rules on criminal history, since the Court has previously held that sentence-enhancing facts relating to criminal history need not be proven to a jury.

provide discovery regarding those elements as required by the Federal Rules of Criminal Procedure, and prove each guideline element to the jury beyond a reasonable doubt. Among other effects, this regime would presumably require that grand juries find guidelines facts, and thus that they be instructed on the meanings of an array of guidelines terms of art – “loss,” reasonable foreseeability, sophisticated means, the differences between “brandishing” and “otherwise using” a weapon, etc. New trial procedures would have to be devised. Either every trial would have to be bifurcated into a guilt phase and subsequent sentencing phase, or pre-*Blake ly* elements and post-*Blake ly* sentencing elements would all be tried to the same jury at the same time.<sup>4</sup> If a unitary system of trial were adopted, the judge would be required to address motions to dismiss particular guidelines elements at the close of the government’s case and of all the evidence,<sup>5</sup> before sending to the jury all guidelines elements that survived the motions to dismiss. In either a unitary or bifurcated system, the judge would be obliged to instruct the jury on the cornucopia of guidelines terms and concepts, and the jury would have to produce detailed special verdicts. The prospect of redesigning pleading rules, discovery and motions practice, evidentiary presentations, jury instructions, and jury deliberations to accommodate the manifold complexities of the Guidelines should give any practical lawyer pause. Leaving all other considerations to one side, the potential for trial error would skyrocket. One of the many perverse results of such a nightmarishly complex system would be the creation of a powerful new disincentive to trials, and thus a probable diminution of the already rare phenomenon of jury fact-finding that the *Blake ly* majority presumably meant to encourage.

Second, treating all Guidelines sentencing enhancements as elements would markedly alter the plea bargaining environment. This reading of *Blake ly* would transform every possible combination of statutory elements and guidelines sentencing elements into a separate “crime” for Sixth Amendment purposes. This has two consequences for plea bargaining: (a) As a procedural matter, each Guidelines factor that generates an increase in sentencing range would have to be stipulated to as part of a plea agreement before a defendant could be subject to the enhancement. (b) More importantly, negotiation between the parties over sentencing facts would no longer be “fact bargaining,” but would become charge bargaining. Because charge bargaining is the historical province of the executive branch, the government would legally free to negotiate every sentencing-enhancing fact, effectively dictating whatever sentence the

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<sup>4</sup> Alternatively, perhaps only those Guidelines elements thought particularly prejudicial to fair determination of guilt on the purely statutory elements would have to be bifurcated, but that option would require a long, messy process of deciding which Guidelines facts could be tried in the “guilt” phase and which could be relegated to the bifurcated sentencing phase.

<sup>5</sup> Unlike other conventional “elements” of a crime, “guidelines elements” would presumably be subject to dismissal at any point in the proceedings without prejudice to the defendant’s ultimate conviction of the core statutory offense. For example, in a unitary trial system, if the government failed to prove drug quantity in its case-in-chief, the drug quantity “element” could (and presumably should) be dismissed pursuant to the F.R.Cr. P. at the close of the government’s case without causing dismissal of the entire prosecution. By contrast, a failure to prove the “intent to distribute” element of a 21 U.S.C. § 841 “possession with intent to distribute” case would require dismissal of the entire prosecution.

government thought best within the broad limits set by the interaction of the evidence and the Guidelines. The government would no longer have any obligation to inform the court of all the relevant sentencing facts and the only power the court would have over the negotiated outcome would be the extraordinary (and extraordinarily rarely used) remedy of rejecting the plea altogether.<sup>6</sup>

A plea bargaining system that operated in this way would be subject to a number of objections:

- i. Some defense attorneys might prefer a system in which fact bargaining was a legitimate option. For some defendants, those with particularly able counsel practicing in districts with particularly malleable prosecutors, the results might be more favorable than are now obtainable under the stern discipline of the current system. On the other hand, making sentencing factor bargaining legitimate would dramatically increase the leverage of prosecutors over individual defendants and the sentencing process as a whole, leading to worse results for some individual defendants and a general systemic tilt in favor of prosecutorial power.
- ii. In any case, any benefit to defendants would inevitably be uneven, varying widely from district to district and case to case. To the extent that the Guidelines have made any gains in reducing unjustifiable disparity, a system in which all sentencing factors can be freely negotiated would surely destroy those gains. (Prevention of this outcome was, after all, the point of the relevant conduct rules.) It might be suggested that the Justice Department's own internal policies regarding charging and accepting pleas to only the most serious readily provable offense would protect against disparity; however, the experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that local U.S. Attorney's Offices cannot be meaningfully restrained by Main Justice from adopting locally convenient plea bargaining practices. Once previously illegitimate "fact bargaining" becomes legally permissible charge bargaining, no amount of haranguing from Washington will prevent progressively increasing local divergence from national norms.
- iii. Ironically, if Blakely were ultimately determined to require (or at least permit) the Guidelines to be transformed into a set of "elements" to be proven to a jury or negotiated by the parties, the effect would be to markedly reduce

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<sup>6</sup> And even this remedy would be of little practical use. If the judge rejected a plea because she felt it was unduly punitive, she could not prevent the government from presenting its case to a jury. If a judge were to reject a plea on the ground that it did not adequately reflect the full extent of the defendant's culpability under Guidelines rules, the judge could not force the government to "charge" the defendant with additional Guidelines sentencing elements. The most the court could do is force the case to trial on whatever combination of statutory and guidelines elements the government was willing to charge – a weak and self-defeating remedy because the two possible outcomes of a trial on such charges are a guilty verdict on the charges the judge thought inadequate in the first instance or a not guilty verdict on some or all of the charges, which would produce even less punishment.

judicial control over the entire federal sentencing process. Not only would district court judges be stripped of the power to determine sentencing facts and apply the Guidelines to their findings, but appellate courts would be stripped of any power of review. Neither jury findings of fact nor the terms of a negotiated plea are subject to appellate review in any but the rarest instances. Thus, the interpretation of *Blakely* discussed here would have the perverse effect of exacerbating one of the central judicial complaints about the current federal sentencing system – the increase of prosecutorial control over sentencing outcomes at the expense of the judiciary.

c. *Blakely renders the Federal Sentencing Guidelines facially unconstitutional: The third possibility is that Blakely will be read to render the Federal Sentencing Guidelines facially unconstitutional, rather than unconstitutional as now applied. Although I have no doubt that some lower courts will adopt the Guidelines-as-elements approach just discussed, in my opinion the most likely final resolution of the question by the Supreme Court is that the Guidelines, as now written, cannot be squared with Blakely and will be declared facially invalid.*

My first reason for thinking so flows from the preceding analysis of how a Guidelines-as-elements system would have to work in practice. Not only would such a system be remarkably ungainly, but far more importantly, it would, as noted, exacerbate those features of the current system that federal judges find most galling. As I noted at the outset, it is difficult to avoid the conclusion that *Blakely* is not really about the Washington state system at all, but is, at bottom a response to the federal judiciary's anger and angst over recent trends in *federal* sentencing. Given recent events, it is hard to imagine that the Supreme Court and many lower courts would not strike down the entire Guidelines system if given a plausible constitutional argument for doing so. Particularly if the only options facing the Court are preserving a simulacrum of the Guidelines system that would make the features judges find most objectionable even worse, or striking the system down in its entirety and starting anew, the choice almost makes itself.

Second, even if federal judges did not have every reason to want to invalidate the Guidelines, *Blakely* appears to me to require that result. Put simply, the analysis is this: *Blakely* finds that it is unconstitutional for a defendant's maximum practically available sentence to be increased, post-conviction, as a result of a judge making a mixed determination of fact and law regarding the existence of a fact not determined by the jury and the application of some set of sentencing rules to that fact.<sup>7</sup> The linchpin of the

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<sup>7</sup> It is not only judicial fact-finding that offends the Sixth Amendment under *Blakely*, though that alone is surely enough. Recall that under the Washington sentencing scheme, a judge who found the presence of a gun was not legally obliged to sentence the defendant in the aggravated range, but had to make the additional determination that the fact found merited an increase. Justice Scalia found that element of judicial choice present in the Washington statute did not save it from constitutional oblivion. A post-conviction judicial finding of fact that enabled the judge to exercise his judgment to impose a higher sentence was, in Justice

entire federal sentencing guidelines system is precisely such post-conviction judicial determinations of mixed questions of law and fact. The Guidelines model has three basic components: (1) post-conviction findings of fact by district court judges; (2) application of Guidelines rules to those findings by district court judges; and (3) appellate review of the actions of the district court. Both the Guidelines themselves and important components of statutes enabling and governing the Guidelines were written to effectuate this model. Although it is intellectually possible to isolate the Guidelines rules from the web of trial court decisions and appellate review procedures within which the rules were designed to operate, doing so does such violence to the language, legislative history, and fundamental conception of the Guidelines structure that one could save them only by transforming them by judicial fiat into something that neither the Sentencing Commission nor Congress ever contemplated that they would become.<sup>8</sup> It is certainly true that when construing statutes facing constitutional objections that courts will attempt to save so much of the statute as can be saved consistent with the constitution. On the other hand, if the reading of a statute required to render it constitutional transforms the statute into something entirely at odds with its original design and conception, courts may properly strike down the statute in its entirety.

Thus, while the Supreme Court could adopt a saving interpretation of the Guidelines which transformed them into elements of a new set of guidelines crimes, the Court could, without any violence to ordinary principles of constitutional adjudication, just as easily find the whole structure invalid. And most importantly, there is every reason to believe that they will *want* to do precisely that.

#### 4. So now what?

There are certainly some who would be delighted to have the entire Guidelines structure be cast aside in the hope that something preferable will arise in its place. If one wants to destroy the whole structure more or less regardless of what might fill the gap, the preferred stance is one of inaction. On balance, however, both the short and long term consequences of such a course seem undesirable.

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Scalia's view, constitutionally impermissible. The fact that an increased offense level is an automatic consequence of most factual determinations under the federal guidelines certainly seems to make them more objectionable, rather than less.

<sup>8</sup> Time and space preclude a detailed exegesis of this point, but consider as but two examples the relevant conduct rules and the provisions of the Sentencing Reform Act (both in its original form and as amended by the recent PROTECT Act) providing for appellate review. The relevant conduct rules plainly contemplate sentences based on judicial determinations of facts not found by jury beyond a reasonable doubt. Similarly, provisions of the Sentencing Reform Act governing appellate review of guidelines determinations are effectively nullified by a guidelines-as-elements-of-the-offense application of *Blakely* because if all upward guidelines adjustments must be determined either by jury verdict or by stipulation, there is virtually nothing left to review.

In the near term, the federal courts will be in chaos as judges try to negotiate the labyrinth created by *Blakely*. In the longer term, either the Guidelines will be transformed into an annex to the criminal code, augmenting the power of prosecutors and decreasing the authority of judges, or more likely the whole structure will be thrown aside and the process of creating a federal sentencing system would have to begin anew. Such a process carries great risks for all those interested in federal sentencing. For the Commission, 17 years of work would be nullified. For prosecutors, the basic idea of guidelines has been a boon; acceding by inaction to the collapse of the current structure with no guarantee of what might replace it would present, at the least, a tremendous gamble. Even those who have no investment in the Guidelines and every interest in radical reform should be very concerned that any replacement could be even more punitive and more restrictive of judicial discretion than the Guidelines themselves. Should the current political alignment in Congress and the Executive persist beyond November, precisely that outcome should reasonably be anticipated.

Assuming that one wants to preserve the fundamental Guidelines structure or at least to avoid the risks presented by letting *Blakely* play itself out, what can be done? I believe that the Guidelines structure can be preserved essentially unchanged with a simple modification – *amend the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.*

As written, *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range. To the extent that *Blakely* itself may be ambiguous on the point, the Supreme Court expressly held in *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986), and reaffirmed in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (June 24, 2002), that a post-conviction judicial finding of fact could raise the *minimum* sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. It bears emphasis that *Harris* was decided only two years ago, and was decided after *Apprendi* and on the very same day as *Ring v. Arizona*, 536 U.S. 584 (June 24, 2002), the case whose reading of *Apprendi* Justice Scalia found so important in his *Blakely* opinion. Thus, the change I suggest would render the federal sentencing guidelines entirely constitutional under *Blakely* and *Harris*.

The practical effect of such an amendment would be to preserve current federal practice almost unchanged. Guidelines factors would not be elements. They could still constitutionally be determined by post-conviction judicial findings of fact. No modifications of pleading or trial practice would be required. The only theoretical difference would be that judges could sentence defendants above the top of the current guideline ranges without the formality of an upward departure. However, given that the current rate of upward departures is 0.6%,<sup>9</sup> and that judges

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<sup>9</sup> U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 63 tbl. 32; 80, tbl. 45 (2002). The rate of upward departures in drug cases has historically been lower still; it was 0.6% in 1992 and declined steadily to 0.2% in 1999 and 2000. U.S. Sentencing Commission, 1992 Annual Report 120 (1993); U.S. Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80, tbl. 45 (2000); U.S. Sentencing Commission, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80, tbl. 45 (2001).

sentence the majority of all offenders at or below the midpoint of existing sentencing ranges, the likelihood that judges would use their newly granted discretion to increase the sentences of very many defendants above now-prevailing levels seems, at best, remote.

This proposal could not be effected without an amendment of the SRA because it would fall afoul of the so-called “25% rule,” 28 U.S.C. § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom. The ranges produced by this proposal would ordinarily violate that provision.

Accordingly, the following statutory language, or something like it, should serve:

*“Notwithstanding any other provision of law to the contrary, the sentencing ranges prescribed by Chapter 5 of the federal sentencing guidelines shall consist of the minimum sentence now or hereafter prescribed by law and a maximum sentence equal to the maximum sentence authorized by the statute defining the offense of conviction, or in cases in which a defendant has been convicted of multiple counts, the sum of the maximum sentences authorized by the statute or statutes defining the offenses of conviction.”*

In addition, if such a statute were passed, the Commission might think it proper to enact a policy statement *recommending* that courts not impose sentences more than 25% higher than the guideline minimum in the absence of one or more of the factors now specified in the Guidelines as potential grounds for upward departure. Failure to adhere to this recommendation would not be appealable, and thus such a provision would not fall foul of *Blakeley*. A few modifications to the Guidelines themselves would also be required to bring them into conformity with *Blakeley* and the new statute – for example, it would have to be made clear that guideline provisions relating to upward departures were now only factors recommended to the district court for its consideration in determining whether to sentence in the upper reaches of the new ranges (or more than 25% above the bottom of the new ranges if the foregoing suggested policy statement were adopted). But otherwise, very little would have to change.

Although the core proposal made here is not one within the power of the Sentencing Commission to enact on its own, the endorsement of such a proposal by the Commission would carry considerable weight with congressional decision makers.

### 3. A Concluding Thought

In the end, the proposal made here might only be a stopgap which would serve to prevent chaos in the near term and give everyone breathing space within which to plan the next step in the evolution of the federal sentencing system. It seems likely that the combination of general discontent in the legal profession with the Guidelines and the very particular and focused displeasure of the Supreme Court may in fairly short order compel some modifications of what

we now do. That is all to the good. Nonetheless, the inevitable changes should come in a reasonably orderly way, rather than in a panicked and disordered jumble. If a proposal like the one made here were to be adopted, it would permit a more consultative and deliberative process of reconsideration of current federal rules, a process that would nonetheless operate in the shadow of the looming possibility of another, and this time definitive, judicial intervention.