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Federal Sentencing during the Interregnum: Defense Practice as the Blakely Dust Settles

Ian Weinstein

Fordham University School of Law, iweinstein@law.fordham.edu

Nathaniel Z. Marmor

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Federal Sentencing During the Interregnum: Defense Practice as the *Blakely* Dust Settles

Although the long term impact of *Blakely v. Washington*¹ is not yet clear, no one can doubt that the case raises a host of immediate, significant and perplexing practical questions for federal criminal defense attorneys. The Supreme Court has granted *certiorari* in a pair of cases raising *Blakely* issues² and oral argument is scheduled for October 4, 2004. It seems likely that the Supreme Court will offer some guidance by Thanksgiving.³ Until the Court rules, uncertainty will continue as the lower courts interpret *Blakely* in disparate ways.⁴ Once the Court does rule, many hard questions may remain unanswered. This article suggests how defense counsel can effectively represent clients during this period of uncertainty.⁵

A.

We start with the observation that *Blakely* should be understood by defense lawyers as much more than a sentencing case.⁶ Although the Supreme Court may tell us otherwise, *Blakely* can fairly be read to require proof beyond a reasonable doubt, to a jury, of all facts necessary to support an upward sentencing adjustment or departure. It thus suggests that what we formerly understood as “sentencing factors” are now much more akin to traditional statutory “elements,” to be pleaded and proved in much the same manner.⁷ In this period of uncertainty, and perhaps for some time into the future, counsel must think about *Blakely* at the inception of a case and consider its effect on pretrial motions, including motions to dismiss indictments, discovery and evidentiary issues. We must also question the continued vitality of what we thought was settled law, including the constitutionality of judicial fact finding in mandatory minimum sentencing⁸ and the “prior conviction exception” of *Almendarez-Torres*.⁹ Of course, *Blakely* presents novel issues as well. Counsel must start thinking about bifurcated trials, sentencing juries, jury instructions on sentencing issues and *Blakely* waivers. In short, defense counsel must consider arguing *Blakely*'s implications from bail¹⁰ through habeas petitions.¹¹

We should also recognize that most cases will continue to result in guilty pleas. The expansion of the federal criminal code, the severity of sentencing provisions and the twenty-year shift of discretion from judges to the executive branch still give federal prosecutors tremendous

bargaining power in many cases, notwithstanding their new burdens. Anecdotal evidence suggests that many prosecutors are making relatively better offers to secure *Blakely* waivers during this period of uncertainty. *Blakely*'s long term impact on plea negotiations is uncertain and has been the subject of debate among academics, as well as between the majority and dissenting justices in *Blakely*. Would a *Blakely*-ized federal sentencing scheme redistribute power back to judges and defendants, or would it bring even more overcharging to induce pleas?

Whether *Blakely* will help or hurt a particular client whose case is adjudicated during this period of ferment depends on the facts of the case, the current *Blakely* views of the trial judge (or the Circuit in which he or she sits), the general sentencing philosophy of the trial judge, and an analysis of the possible Supreme Court rulings in *Booker* and *Fanfan*. Although this abstract answer is not terribly helpful, it perhaps highlights the central problem: case analysis and strategic decision-making is severely hampered by the current uncertainty. It is critical for defense counsel to be alert not only for opportunities to better a client's sentence, but also to preserve various pre-trial and trial issues, to exploit “collateral” *Blakely* benefits — e.g., additional discovery — and to be wary of *Blakely*'s possible downside application to a particular case.

For example, a Guidelines sentence may protect a particularly unappealing defendant from a discretionary sentence at or near the statutory maximum.¹² Defense counsel may well defend the Guidelines in such a case. Similarly, a Guidelines sentencing range in Zone A or Zone B — which allows for a non-incarcerative sentence — may be preferable to a statutory 0-5 year range. On the other hand, an offense whose Guideline range appears to be unfairly driven by uncharged conduct may well yield a better sentence if the Guidelines are held unconstitutional.

Further complicating matters is the crucial question of severability.¹³ If the Supreme Court holds that *Blakely* applies to the Guidelines, it will also have to determine whether the Guidelines as a whole continue to function. That is, whether Congress would have preferred — over the pre-SRA discretionary sentencing scheme — a system in which enhancements are subject to jury trial rights, whereas downward adjustments may be found by a judge to a preponderance. If not, courts will also have to decide



**IAN WEINSTEIN
&
NATHANIEL Z.
MARMUR**

Ian Weinstein is
Professor of Law,
Fordham University
School of Law.
iweinstein@fordham.
law.edu

Nathaniel Z. Marmor is a
Partner at Stillman &
Friedman, P.C.
nmarmor@
stillmanfriedman.com

whether the Guidelines can be severed from other parts of the SRA, including the abolition of parole and the implementations of supervised release.

Thus, analysis of the most favorable sentencing scheme for a particular client is only the beginning. For example, if your client would benefit from a Guidelines sentence, and the court will likely impose a Guidelines, either because that is the view of the trial judge or the Circuit court has directed that result, counsel should still consider whether to raise *Blakely* objections to protect the record, knowing that an appeal could be withdrawn if subsequent events make that prudent.¹⁴ The desirability of preserving the issue will depend on counsel's evaluation of how the client would fare on remand under regimes of strong severability, different flavors of intermediate severability, and non-severability. Counsel would also have to evaluate the likelihood that higher sentences on remand will be limited by *ex post facto* or double jeopardy concerns, as well as the possibility that the Court will surprise us with a ruling on some particular issue that benefits some narrow class of cases. Similar considerations will inform whether counsel will choose to defend the Guidelines, or more likely some particular (*Blakely* influenced, perhaps) Guidelines calculation before a discretionary sentencing judge, even if the discretionary sentence to be imposed is likely to be favorable.

Strategic decision-making in this context requires answers, or at least informed predictions, for a host of questions. Lawyers must now ponder: What kind of benefit will the prosecutor offer in exchange for a waiver of a defendant's *Blakely* rights? Will the judge simply impose a discretionary sentence that matches the Guidelines range that would have applied? Will the prosecutor threaten to supersede to charge additional mandatory minimum counts or sentencing factors? Will the judge allow a jury to consider Guidelines factors? Will the government have admissible sentencing evidence sufficient for proof beyond a reasonable doubt? Each of these questions must be considered in light of potential appeals and possible remedies on remand.

B.

With these considerations in mind, we turn to the specific application of *Blakely* in various settings. We have organized the discussion by dividing cases into six procedural postures:

1. Cases in which a sentence was imposed prior to *Blakely* and an appeal is pending.
2. Cases in which there is a pre-*Blakely* jury verdict of guilt and sentence is pending.
3. Cases in which a plea of guilty was entered prior to *Blakely* and sentence is pending.
4. Cases in which a pre-*Blakely* indictment is pending.

5. Cases in which a post-*Blakely* indictment is pending.
6. Cases in which no formal charge has been brought.

Although there is fair overlap among the issues raised, each category presents distinct issues.

I. Sentence Imposed and Appeal Pending

Blakely applies to all cases that were not "final" on June 24, 2004, the day the decision was issued.¹⁵ Thus, *Blakely* (whatever it may stand for in any particular courtroom) applies to any case in which a petition for *certiorari* is still undecided or the time to file the petition has not yet run.¹⁶ Since it is likely that counsel did not lodge a constitutional objection to the imposition of enhancements in the trial court, many of these cases will pose preservation problems.¹⁷ *Blakely* errors not preserved below are subject to demanding standard of plain error review. The judicial support for finding plain error in this setting is rather weak, however, with one Circuit denying plain error review and, one Circuit suggesting plain error review would be appropriate.¹⁸

If counsel has not yet filed a brief in a case in which sentence was imposed before *Blakely* was issued, *Blakely* issues not raised below may still be raised on appeal, and should be argued as plain error. If counsel has already filed a brief, consideration may be given to filing a supplemental brief, although some courts have rejected supplemental briefing.¹⁹ If counsel was prescient enough to have preserved the relevant issues below, a pat on the back is in order.

In some circuits, *Blakely* issues are being held deferred until the Supreme Court decides *Booker* and *Fanfan*²⁰ while other circuits are ruling on cases as they arise.²¹ In the former jurisdictions, holding *Blakely* issues until the Supreme Court rules, the issues must still be raised by counsel to preserve them for post-*Booker* review by the appellate courts.

If the Supreme Court overturns the Guidelines, some of these pre-*Blakely* Guidelines sentences will be reversed. Remanded cases will pose novel double jeopardy and *ex post facto* issues. Can the government seek a new indictment adding sentencing factors after remand?²² If the law is changed by the Courts or Congress before the remanded case is resentenced, and the changes would lengthen the sentence, there may well be *ex post facto* problems with imposing the new sentence.²³

II. Post-Trial, Presentence Cases

Cases that went to trial before *Blakely* and will be sentenced in this interim period pose a host of interesting questions. If the judge has held the Guidelines constitutional, sentencing will be familiar, but counsel will probably want to preserve all *Blakely* issues. Counsel should be careful to object to both judicial, as opposed to jury, fact-finding and to the lower standard of, and less

formal, proof than that required by *Blakely*.²⁴ Objections to supervised release, restitution and other incidents of sentencing that could fall with a strong version of non-severability should also be preserved.²⁵ If the sentence involves mandatory minimums, counsel may be advised to challenge both the Guidelines and the continued vitality of mandatory minimums under *Harris*, after *Blakely*.²⁶ Similarly, if the sentence involves a prior conviction as an aggravating sentencing factor, counsel should consider preserving a challenge to *Almendarez-Torres*²⁷ in the post-*Blakely* world.

If the judge holds the Guidelines unconstitutional after a jury verdict of guilt on a pre-*Blakely* indictment and there are aggravating sentencing factors at issue, the judge may choose among or combine:

A. Discretionary Sentencing with, or without, an Alternative Guidelines Sentence

Some judges have returned to old law discretionary sentencing.²⁸ Their sentences are bounded only by the statutory minimum and maximum. Although this option may be the simplest among the alternatives, it still raises difficult questions. In some cases, counsel may see advantage in joining the Government in arguing that the Guidelines survive *Blakely*. This is especially true for cases with very low guidelines ranges and high statutory maximums. Of course, counsel will have to make an informed judgment about the probable length of the discretionary sentence the judge will impose. Some defendants may also value the relative predictability of a Guidelines sentence over discretionary sentencing.

In addition to arguing that the Guidelines survive *Blakely*, defense counsel might also consider an *ex post facto* argument if the discretionary sentence is higher than the top of the otherwise-applicable Guidelines range. This claim takes the case into uncharted waters but presents a reasonable argument for the defendant.

Whether or not counsel objects to the revival of old law discretionary sentencing, he or she should evaluate the judge's position on other incidents of sentencing, including fines, restitution and supervised release. All are vulnerable to attack on a strong version of unseverability, which would render the whole Sentencing Reform Act unconstitutional. It is fair to say that *Blakely's* impact on restitution is uncertain,²⁹ and some have suggested that if the SRA is unconstitutional, parole is back.³⁰ To the extent discretionary fines exceed those that could be imposed under the Guidelines, they too are subject to attack.

We also suggest that counsel should be careful about making factual concessions in the course of an old fashioned sentencing pitch. The old strategy of seeking judicial mercy by with a fulsome statement of remorse for all one's wrongdoings may pose risks in this period of uncertainty. If the Supreme Court upholds the Guidelines and the case comes back for resentencing, those factual statement could be admissions justifying an increased sentencing range on remand.

B. A Partial Guidelines Sentence

Some courts have also held that the unconstitutional aspects of the Guidelines are severable from the constitutional aspects. Typically, these rulings eliminate all aggravating factors, but give the defendant the benefit of downward adjustments and permit Guidelines sentencing on the basis of facts found by the jury or admitted by the defendant. This approach will usually result in a more favorable sentence than the application of the full Guidelines. Counsel should, however, evaluate whether a completely discretionary sentence would be advantageous. For example, counsel might well consider challenging the severability of the Guidelines in cases in which the offense carries a high Guidelines base offense level or the defendant was convicted upon an "Apprendi-ized" indictment that included allegations of drug quantity. In other words, even if there is no enhancement, a defendant may still have a *Blakely* argument based on the possible unconstitutionality of the Guidelines as a whole.

C. "Blakely-ized" Sentencing

If the trial court determines that *Blakely* applies to the guidelines and that the government can prove sentencing factors to the jury (notwithstanding that those factors were not charged in the indictment), the court would have to empanel a sentencing jury. Although this approach represents the most straightforward application of *Blakely*, it appears to be rarely employed. This is because *Blakely*-ized sentencing raises a host of difficult issues. If the jury has already rendered a verdict, the government's effort to secure a new indictment, charging sentencing facts, raises significant double jeopardy concerns.³¹ In addition, there is no statutory authority for empanelling a sentencing jury.³²

But if counsel faces a sentencing jury, the proceeding should be approached as a whole new trial. Counsel should request a pre-trial motions schedule and consider all available challenges to the new charging document. In addition to the double jeopardy issues, fifth amendment challenges to the charging instrument should also be considered. If the government does not return to the grand jury, but puts some other form of sentencing charging document in front of the jury, there are grounds to argue that the fifth amendment grand jury right to indictment by grand jury has been violated.³³ If the prosecution does return to the grand jury, defense counsel may raise double jeopardy concerns,³⁴ arguing that the unconstitutionality of the Guidelines infects this use of the grand jury, as well as arguing that there is simply no statutory or other legal authority for the proceedings.

The full panoply of "pre-trial" tactics should be considered and employed. Formal discovery should be demanded. Counsel should read Rule 16 broadly and consider the range of discovery is now relevant and required. A bill of particulars may be especially useful in situations in which judges reject the argument that a new indictment is required, particularly when those cases involve relevant

conduct such as other drug deals that were formerly not pled or subject to formal discovery. Evidentiary issues should also be considered. Although old style sentencing hearings were not governed by the Federal Rules of Evidence, *Blakely* sentencing proceedings are more akin to trials before juries. Presumably, the government cannot proceed by proffer and affidavit, as was the practice for sentencing hearings under the Guidelines and under the old sentencing law.³⁵

Counsel should also consider the range of mitigating evidence that is relevant at this new proceeding. If the government seeks to prove the defendant was a leader or organizer, the defendant may take the position that all evidence tending to show minimal participation is relevant to negate that factual finding. That would appear likely even if the judge finds that the ultimate decision on that mitigating factor is for the court, not the jury, on some version of severability.

Finally, some judges are covering more than one base by issuing sentences in the alternative, often a discretionary sentence that happens to be within the Guidelines range.³⁶ Counsel may consider making a record about the similarity of the two sentences in an effort to preserve the issue, although we hold out no great hope for relief when the alternative sentences are identical.³⁷

III. Cases Awaiting Sentence in which a Guilty Plea was Entered Before *Blakely*

Defendants in this category may be in the best position. The government may be precluded by the double jeopardy clause from seeking enhancements by means of a superseding indictment, or discouraged from making the effort by the risk of successful appeal. Thus, where judges hold the Guidelines severable, defendants may well reap a windfall — a base offense level sentence. The issue may be complicated, however, if the defendant entered into a plea agreement or made factual admissions during the plea. Pre-*Blakely* plea agreements are unlikely to satisfy *Blakely* since there is typically no waiver of the jury trial right.³⁸ Moreover, any factual stipulation, it should be argued, is properly read only as an acknowledgment that the government would be able to prove the fact to the court by a preponderance of the evidence (not beyond a reasonable doubt), and perhaps only on the basis of inadmissible evidence — not as a plea of guilty to the sentencing “element” of the crime. A pre-*Blakely* plea agreement should not be sufficient to waive *Blakely* rights.

In the post-plea pre-sentence phase, counsel also has the possibility of a Rule 11(d) motion to withdraw the plea upon a showing of a “fair and just reason.” For example, if a defendant pled expecting moderate Guidelines and now faces a harsh sentencing judge who has reclaimed discretionary authority, withdrawal might be attractive. Of course, withdrawal only gets returns the defendant back to the pre-plea stage, but cases will arise in which a trial, or new, *Blakely*-ized negotiations with the prosecutor will

be preferable to discretionary sentencing or some other version of *Blakely* federal sentencing.

Some judges may seek explicit waivers of *Blakely* rights at the time of sentence.³⁹ Some defendants will see no disadvantage to waiving and protecting their deals. In other cases counsel might try to explore the judge’s view on the waiver. Absent a waiver, some judges may turn to some form of *Blakely*-ized sentencing to protect the record, even on a plea, while other judges may try to protect the record, but will not be inclined to impose consequences for the failure to waive *Blakely* rights. Resisting judicial efforts to extract a waiver can put the defense in a difficult situation in some courtrooms.

If the judge proposes *Blakely*-ized sentencing in response to a defendant’s reluctance to waive *Blakely* rights, counsel might argue that the plea agreement already in place sets the upper limit of the sentencing facts that may be charged by the government. On this view, arguably supported by the *ex post facto* clause, the sentencing trial should be free, in the sense that the worst outcome would be a verdict of guilty to the sentencing facts that establish the bargained for range. In this scenario, better outcomes include the range of verdicts rejecting some or all of the sentencing facts. It seems unlikely, however, that a judge and prosecutor would not exact some price from a defendant who refused to waive and put the system to the cost of a sentencing trial.

Judges, or prosecutors, may seek waiver of both *Blakely* rights at the trial level and appellate review of the waiver, the procedures and the outcome. Given the high degree of uncertainty we now face, we urge counsel to be very cautious in waiving these rights. They are of greater value now and defendants should receive some significant benefit from giving them up.

IV. Open Case Indicted Before *Blakely*

The uncertainty surrounding *Blakely*’s potential application to the sentencing guidelines presents defendants facing open, pre-*Blakely* indictments with a unique bargaining opportunity during the interregnum. Although the government can easily seek a superseding indictment to charge sentencing enhancements, and has done so in a number of cases, the filing of a superseder may provide the defendant with greater insight into possible sentencing factors as well as trigger Rule 16 discovery obligations on the part of the government. On the other hand, if the government supersedes, the defendant may not be able to plead to the indictment without accepting all of the charged sentencing enhancements.⁴⁰ Another risk is that the government may supersede to charge additional counts carrying mandatory minimum sentences, such as adding a 924(c) count to a drug indictment.⁴¹

Given that most federal criminal cases result in guilty pleas, counsel facing a pre-*Blakely* indictment will likely find the most beneficial strategy to be a waiver of a defendant’s *Blakely* rights in exchange for sentencing concessions by the government. *Blakely* has created

an administrative headache for the government as the backlog of criminal cases expands during this period of uncertainty. By necessity, a greater premium is being placed on moving cases through the system. Defendants may be able to capitalize on the situation by negotiating Guidelines plea or cooperation agreements that include “*Blakely* waivers.”

By waiving *Blakely* rights, a defendant agrees that the Guidelines apply to the case and that sentencing factors do not have to be submitted to a jury and proved beyond a reasonable doubt. As of August 25, 2004, the relevant language in standard plea and cooperation agreements in the Southern District of New York is:

By entering this plea agreement, the defendant agrees to waive all constitutional challenges to the Sentencing Guidelines. Specifically, the defendant waives any right to have facts that the law makes essential to punishment either (1) charged in an information or indictment, (2) proven to a jury, or (3) proven beyond a reasonable doubt. The defendant explicitly consents to be sentenced pursuant to the application of the applicable Sentencing Guidelines and to have his sentence imposed (including any enhancements, adjustments and departures) based on facts to be found by the sentencing judge by a preponderance of the evidence. The defendant explicitly acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. The defendant understands that, in determining the applicable Sentencing Guidelines, the sentencing court may consider any reliable evidence, including hearsay.

The waiver may be overbroad. It is not clear whether a defendant may waive the proof beyond a reasonable doubt standard, or even the applicability of the rules of evidence.⁴² The issue is likely to arise only in cases in which there are disputed sentencing factors and the district court finds, by a preponderance, the existence of an aggravating fact. Because the benefit to the defendant of a *Blakely* waiver would be to obtain sentencing concessions, however, it seems unlikely that the defendant would sign such a plea agreement without a stipulated Guidelines range. In such cases, the sentencing facts will be admitted and uncontested, thus premitting the burden of proof question. In short, efforts to remove the burden of proof language in *Blakely* waivers is probably not an effective use of a defendant’s negotiating capital outside that small class of cases in which there will be a sentencing hearing or there is a real risk that the court will not abide by the parties’ stipulation.⁴³

In deciding whether to waive the benefits of *Blakely*, a defendant must carefully balance a number of competing factors. The primary factor, or course, is the sentencing benefit the government is willing to confer in exchange for the waiver. Defense counsel will have to measure that concrete benefit against, among other things, the

sentencing judge’s *Blakely* rulings (if any) and general sentencing philosophy. If the judge has held that *Blakely* applies and the government must prove aggravating circumstances, a defendant is in an enviable position. Presumably he can extract a significant concession in exchange for relieving the government of the burden of superseding the indictment and proving enhancements to a sentencing jury. Indeed, the government might be reluctant to prove enhancements in a sentencing proceeding in which the rules of evidence would likely apply, for example, if doing so would compromise a cooperating witness.

If the judge believes the Guidelines are non-severable, however, counsel must proceed with caution. In those cases, it is important to understand the judge’s general sentencing philosophy to appreciate the benefits and risks of discretionary sentencing.

Another important factor is counsel’s prediction of the outcome of Supreme Court *Blakely* cases. The more likely one believes that the Court will rule that *Blakely* applies to the Guidelines, the greater concession one may seek on a Guidelines plea. On the other hand, if counsel believes that the Supreme Court will distinguish the Guidelines from the Washington State sentencing scheme, then it may be preferable to lock the government in to a lower guidelines sentence rather than to seek benefits under *Blakely* that will not stand up on a government appeal.

If the parties cannot reach a satisfactory plea agreement, the defendant may still wish to plead guilty to the indictment and make a sentencing pitch to the trial judge. Before *Blakely*, this option was available to defendants without the government’s consent.⁴⁴ Now, however, the government has de facto veto power because the court will undoubtedly allow the government time to supersede the indictment to charge sentencing factors. Thus, as a practical matter, defendants wishing to be sentenced without a plea agreement will most likely have to waive their *Blakely* rights and agree to a traditional Guidelines sentencing procedure.⁴⁵

Finally, a defendant who is to be sentenced by a judge who employs a discretionary sentencing scheme will nonetheless want to determine what the applicable Guidelines sentencing range would have been. There is a strong argument that a sentence higher than the top of that range would violate the due process clause, and thus the issue should be preserved.⁴⁶

V. Pre-Indictment Cases

Pre-indictment cases present the greatest uncertainty. In those circuits that have not given guidance to trial courts, the views of the sentencing judge — who probably has not yet have been assigned — will be crucial, but unknown. Although strategic issues will arise much the same as they do in cases already indicted, the potential risks and benefits of various courses of action will be magnified by the additional uncertainty. Defendants’

risk-tolerance therefore takes on greater importance in decision making.⁴⁷

All of the negotiating considerations discussed above will apply in this setting, except that the government will not yet have invested resources in an indictment so there will be a bit less pre-*Blakely* inertia. A *Blakely* waiver will still be of real value to the government, however, as it will eliminate the need to secure and litigate a more detailed *Blakely*-ized indictment. Of course, some counsel will see tremendous potential in litigating the host of issues a *Blakely*-ized indictment will bring and we now turn to that class of cases.

VI. Cases in which *Blakely* Indictments have been Filed

In a small but growing category of cases defendants will be faced with *Blakely*-ized indictments that charge sentencing facts. As we noted above in discussing *Blakely*-ized sentencing in post plea and post verdict cases, these indictments open up a host of issue. We urge counsel to treat the sentencing factors as “elements” of the crime. Among other things, counsel should expand Rule 16 demands⁴⁸ and requests for bills of particular to gain additional discovery on these sentencing elements.⁴⁹ Using these tools, counsel should seek to bind the government to a particular theory of increased sentencing, such as the method of calculating loss amount or identification of the victim whose trust was abused. If the government later seeks to change its theory, it may be subject to a challenge on grounds of constructive amendment or variance.

In addition, we urge challenges to these new indictments. Counsel may move to strike sentencing factors charged in the indictment as prejudicial surplusage — a meritorious motion if the Supreme Court rules that *Blakely* does not apply to the Guidelines. Moreover, even if *Blakely* does apply, there is no clear statutory basis for charging these factors, nor are any of the procedures for bringing these issues to a jury developed.⁵⁰ Severance motions (directed to counts of the indictment or defendants in multi-defendant cases) could be appropriate where sentencing factors introduce damaging allegations that would not have gone to the jury in the past.

Counsel should, as we have noted above, be sensitive to the range of evidentiary issues these more detailed indictments could introduce. No one has a good sense of how a case will be tried under a detailed, *Blakely*-ized indictment, or even the acceptable range of such indictments. But that is very much at the core of the uncertainty of this moment in federal criminal practice.

Conclusion

Blakely has thrown federal criminal practice into turmoil. This period of uncertainty is challenging, but offers many opportunities for defense counsel. In some cases counsel

will want to move quickly to secure a favorable outcome during this interim period. It has been broadly noted that there will be some “sentencing windfalls” in the next several months. Of course, one person’s windfall is another’s just and fair sentence.

In other cases, counsel will choose to move slowly, preserve the broadest range of issues and look to litigate through this period of change, with an eye toward benefitting from one of the upcoming twists and turns in the law. As always, different cases will require different approaches, but *Blakely* has opened up a world of new possibilities.

Notes

- ¹ 124 S. Ct. 2531 (2004) (holding that the Washington State sentencing scheme violates sixth amendment jury trial guarantee). Two very good discussions of emerging *Blakely* issues are: Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 FED. SENT. REP. 333 (June 2004), and Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT. REP. 316 (June 2004). Both articles, and a host of other valuable resources and regular updates on *Blakely* developments, are available at Prof. Douglas Berman’s Sentencing Law and Policy website, which is at: <http://sentencing.typepad.com/>
- ² *United States v. Booker*, 2004 WL 1713654 (Aug. 2, 2004); *United States v. Fanfan*, 2004 WL 1713655 (Aug. 2, 2004).
- ³ Predictions in this area must be taken with a grain of salt, however as surprise and uncertainty have been the defining characteristic of the post-*Blakely* world of federal sentencing.
- ⁴ The Seventh and Ninth Circuits have held “that *Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge.” *United States v. Ameline*, 376 F.3d 967, (9th Cir. 2004); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), cert. granted, 2004 WL 1713654 (Aug. 2, 2004). The Fifth Circuit has held that *Blakely* has not altered the Guidelines because of “constitutionally meaningful differences between Guidelines ranges and United States Code maxima,” with the statutory maximum for *Apprendi* purposes found in the United States Code, rather than the Guidelines. *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004). The Second and Sixth Circuits have upheld them primarily on practical grounds to preserve the status quo pending the Supreme Court rulings in *Booker* and *Fanfan*, *United States v. Mincey*, 380 F.3d 102 (2d Cir. Aug. 12, 2004); *United States v. Koch*, 2004 WL 1899930 (6th Cir. August 26, 2004) (*en banc*), and the Fourth Circuit has, without explanation, concluded that *Blakely* “does not invalidate the Guidelines,” *United States v. Hammoud*, 2004 WL 1730309 (4th Cir. August 2, 2004) (*en banc*). The Third Circuit has not spoken to the issue and the Eighth Circuit has issued an opinion that does not provide definitive answers, *United States v. Mooney*, 2004 WL 1636960 (8th Cir. July 27, 2004) (remanding case for consideration of issues raised under *Blakely*).
- ⁵ The current situation in the trial courts is a bit familiar to those who recall the period between the effective date of the Sentencing Reform Act, November 1987, and the Court’s ruling in *Mistretta v. United States*, 488 U.S. 361 (1989), which held the Guidelines constitutional. Both periods were characterized by variations in sentencing practice by the lower federal courts, even with in the same district. Compare, e.g., *United States v. Sumpter*, 690 F. Supp 1274 (S.D.N.Y. 1988) (Conboy) (holding Guidelines unconstitutional), with *United States v. Hickernell*, 690 F.

- Supp 272 (S.D.N.Y. 1988) (Brieant) (holding Guidelines constitutional).
- 6 Judge Gould, arguing against severability in his dissent from the Ninth Circuit's decision in *Ameline*, noted that "... the application of *Blakely* to the Guidelines may require, among other things, changes to grand jury procedure, new forms of arraignments, revision of plea colloquy procedures, resolution of novel evidence and trial issues, whole new forms of jury instructions, possibly a bifurcated trial for sentencing, and decision on a host of other issues perhaps not yet identified" *Ameline*, 376 F.3d at 987 (Gould, J. dissenting).
 - 7 District of Nebraska Judge Batillon noted, "[t]his court reads *Blakely*, together with the cases on which it is premised, as establishing that a fact that enhances a defendant's sentence beyond the maximum, as understood in *Blakely*, operates as the functional equivalent of an element and must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt." *United States v. Terrell*, 2004 WL 1661018 at *5 (D. Neb. July 22, 2004).
 - 8 Before *Blakely*, the Supreme Court affirmed mandatory minimum sentencing based on facts found by judges. *United States v. Harris*, 536 U.S. 545 (2002) (holding that *Apprendi* does not apply statutory mandatory minimum sentences). *Harris* is already the subject of much well founded criticism and is quite hard to square with *Blakely*. Although all reasonable Court observers would agree that the Supreme Court is unlikely to abandon a recent and clear precedent, almost all reasonable observers predicted *Blakely* would come out the other way. We urge defense counsel to consider preserving challenges to *Harris* and mandatory minimum sentencing, at least during this period of greatest uncertainty. The few lawyers who preserved *Apprendi* challenges to the Guidelines in the face of clear precedent may have looked silly three months ago, but now they look like geniuses.
 - 9 *Almendarez-Torres v. United States*, 523 U.S. 224 (1997) (holding that sentencing enhancements based on the fact of a prior conviction are beyond the reach of *Apprendi*).
 - 10 Some of the early action in *Blakely* has been in bail motions. In the Southern District of New York, Judge Cedarbaum cited *Blakely* in granting release pending appeal to Martha Stewart, although Judge Cedarbaum also ruled that *Blakely* had no impact on the Guidelines. *United States v. Stewart*, No. 03 Cr. 717 (MGC) (S.D.N.Y. July 13, 2004) (memo endorsement). In the same district, Judge Pauley rejected a motion for bail pending resentencing in which a well developed *Blakely* argument had been advanced. *United States v. Lauersen*, 2004 WL 1713186 (S.D.N.Y. July 26, 2004). Given the uncertainty in sentencing, lawyers will now be able to argue that many defendants have lower incentives to flee when arguing for pre-or post-trial release.
 - 11 Collateral review and the very complex question of retroactivity are, unfortunately, beyond the scope of this article.
 - 12 Given the history of judicial discomfort with the severity of the Guidelines, cases in which the discretionary sentence is greater than the presumptive Guidelines range will likely be rare.
 - 13 The Ninth Circuit has held portions of the Guidelines unconstitutional, but severable, *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), as has the Seventh Circuit, *United States v. Booker*, 375 F.3d 508 (7th Cir. Jul. 9, 2004), cert. granted, 2004 WL 1713654 (Aug. 2, 2004). For a particularly good discussion of the severability issue, see Judge Nancy Gertner's opinion in *United States v. Mueffleman*, 01 Cr 10387 (NG) (D. Mass. July 26, 2004) (holding Guidelines unconstitutional and unseverable).
 - 14 There will be cases in which the defense notice of appeal will be met with a cross-appeal. In that case, defense counsel may not be able to prevent appellate review.
 - 15 *Griffith v. Kentucky*, 479 U.S. 314 (1987).
 - 16 *Id.* See S. Ct. Rule 13 (Review on Certiorari: Time for Petitioning). The retroactivity issue is also analyzed in both Bibas, *supra* note 1, and King & Klein, *supra* note 1.
 - 17 Many of these cases also pose potential waiver issues, as many defendants will have entered into pre-*Blakely* plea agreements. Waiver issues are discussed below.
 - 18 For a good discussion of the caselaw as of mid-August, see *United States v. Duncan*, 2004 WL 1838020 (11th Cir. August 18, 2004) (rejecting plain error review and rather vigorously contending that *Blakely* errors cannot be plain because courts have expressed so many different views on the issue). The Ninth Circuit has suggested that some *Blakely* errors would be reviewable as plain error. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). Two well argued discussions of this issue, neither of which have precedential force, are *Pirani*, in which a panel of the Eighth Circuit had found plain error in a *Blakely* case, *United States v. Pirani*, 2004 WL 1748930 (8th Cir. Aug. 5, 2004), vacated on reh'g en banc, 2004 U.S. App. LEXIS 17012 (8th Cir. Aug. 16, 2004), and *United States v. Koch*, 2004 WL 1899930 (6th Cir. August 26, 2004) (en banc) (Martin, J. dissenting) (arguing that *Blakely* errors meet plain error test).
 - 19 See, e.g. *United States v. Curtis*, 380 F.3d 1308 (11th Cir. 2004) (order declining to permit a supplemental brief raising a *Blakely* issue for the first time).
 - 20 For example, the Second Circuit is deciding other issues and withholding the mandate in cases raising *Blakely* issues, directing the parties to file any supplemental papers they deem appropriate within fourteen days after the Supreme Court decides *Booker* and *Fanfan*. See *Mincey*, *supra* note 4.
 - 21 Particularly the Fourth and Sixth Circuits, which have upheld the Guidelines.
 - 22 The law in this area is unclear. The Supreme Court has held that jeopardy does not prevent prosecution for murder after the defendant entered a plea, over the objection of the government, to one count of the same indictment charging the lesser included crime of manslaughter. *Ohio v. Johnson*, 467 U.S. 493 (1984). Nor does double jeopardy bar reprosecution in the face of changed facts, as when a defendant convicted of attempted murder is prosecuted for murder upon the death of the victim. *Baumann v. Nelson*, 1997 WL 699655 (N.D. Ill Nov. 7, 1997). But if the government did not object to the plea at the time, and the facts have not changed, reindictment after remand may well pose a significant problem. See *United States v. Booker*, 375 F.3d 508 (7th Cir. Jul. 9, 2004) (noting, but not deciding, the issue), cert. granted, 2004 WL 1713654 (Aug. 2, 2004).
 - 23 The *ex post facto* issue will turn, in part, on whether courts view the changes as procedural, in which a harsher sentence is more likely to be permissible, or substantive. For a good discussion, see Bibas, *supra* note 1 at notes 69-71 and accompanying text.
 - 24 *Ring v. Arizona*, 536 U.S. 584, 592-93 (2002) (holding that the imposition of the death penalty requires a jury finding applying the reasonable doubt standard of proof).
 - 25 For example, the restoration of old law sentencing could bring back suspended sentences and probation eligibility for a broader range of cases.
 - 26 See *supra* note 8.
 - 27 See *supra* note 9.
 - 28 For an example, see *United States v. Mueffleman*, *supra* note 13.

²⁹ For a discussion of *Blakely's* impact on restitution, see *United States v. Wooten*, 327 F.3d 1134 (10th Cir. 2004) (rejecting a claim that restitution amounts must be found by a jury).

³⁰ Indeed, in *Mistretta*, the government endorsed the view that the parole provisions of the SRA were not severable from the guidelines. The Solicitor General argued in response to one of the certified questions that “[i]f the Sentencing Reform Act is held unconstitutional, the provision of the Act abolishing parole must also be struck down.” The Solicitor General explained:

Because the parole system was an inefficient means of addressing the problem of disparities in sentencing, Congress chose to supplant the parole system with the sentencing guideline system, a more effective vehicle for rationalizing sentences. But if the guideline system (including the appellate review process) is struck down and the provision of the Act abolishing parole is preserved, the result will be to increase the disparities among sentences, since there will be no check on the disparate treatment that similarly situated offenders could receive from different judges. That result would be fatally inconsistent with Congress’s repeatedly stated intention to eliminate sentencing disparities in the federal courts. For that reason, we agree with petitioner that Congress would not have wished to abolish parole if the guideline system were not available to replace it.

Mistretta v. United States, Brief for the United States, Point III, available at 1988 WL 1026050 (August 29, 1988). The Court did not reach the issue because it upheld the Guidelines. See also S. Rep. No. 98–225 at 188–89, 98th Cong., 1st Sess., September 14, 1983; 1984 U.S.C.C.A.N. at 3372–73 (SRA delayed implementation of parole and good time changes to insure that “the [then] current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances” would remain effective until the guidelines “replace[d] the existing sentencing system.”).

³¹ See *supra* note 22.

³² See *United States v. Emmenegger*, 04 Cr. 334, 2004 U.S. Dist. LEXIS 15142, at *54 (S.D.N.Y. August 4, 2004) (GEL) (noting that sentencing jury trials are not authorized by any legal authority in the course of a thoughtful argument that Guidelines survive *Blakely*).

³³ In *United States v. Harris*, 2004 WL 1853920 (D.N.J. Aug. 18, 2004), Judge Simandle submitted sentencing factors to a jury following a conviction. The prosecutor drafted a “Notice of Sentencing Factors,” and the judge rejected the defendant’s fifth amendment grand jury based objections to this procedure, focusing on the notice prong of the grand jury right.

³⁴ Jeopardy attaches when the jury is sworn. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

³⁵ Although Federal Rule of Evidence 1101(d)(3) makes the rules inapplicable to sentencing proceedings, there is a strong argument that the rule only applies to judicial sentencing proceedings and never contemplated jury trials on sentencing factors, which are akin to jury trials. The sentencing phase of a federal capital trial is not governed by the FRE, pursuant to specific statutory authority. 21 U.S.C. § 848(j); see *United States v. Beckford*, 964 F. Supp. 993 (E.D.N.Y. 1997) (discussing statute). Although the analogy is somewhat weak because “death is different,” the special statutory authority taking this jury proceeding outside the reach of the FRE suggests that in the absence of such special treatment of *Blakely*-ized sentencing, the rules would apply.

³⁶ For a notable example of a judge taking the alternative sentencing approach seriously, see *Emmenegger*, *supra* note 32, in which Judge Lynch of the Southern District of New York noted he would impose a discretionary sentence of 24

months had he not found the Guidelines still binding, but imposing a 33 month Guidelines sentence.

³⁷ One court has refused to impose sentences in the alternative, noting that the Supreme Court may rule that neither a discretionary sentence, nor a full Guidelines sentence is legal and arguing that hypothetical rulings are an abdication of judicial responsibility. *U.S. v. Johnson*, No. 6:04-00042, 2004 U.S. Dist. LEXIS 16077 (S.D.W.Va. Aug. 13, 2004).

³⁸ For a good discussion of the waiver issues, noting that the requirement for proof beyond a reasonable doubt cannot be waived by the defendant and holding that a pre-*Blakely* plea agreement cannot constitute an implicit waiver of *Blakely* rights, see *United States v. Terrell*, 2004 WL 1661018 (D. Neb. July 22, 2004).

³⁹ While defendants can clearly waive their right to a jury trial on the sentencing issues, judges should not seek a waiver of the right to proof beyond a reasonable doubt. *Terrell*, 2004 WL 1661018, *5 n.3 (noting that the burden of proof is not the defendant’s to waive). Rather, the defendant’s factual admissions, sometimes affirmed by government proffer, are sufficient to establish the facts to that degree of certainty. The *Blakely* sentencing plea will be no different from the standard Rule 11 plea, in which the defendant waives a jury trial and “trial rights,” FRCrP 11(b)(1)(F), but does not waive proof beyond a reasonable doubt. The judge must still be satisfied of factual guilt beyond a reasonable doubt and, in practice, is always convinced to the requisite degree by the defendant’s admission.

⁴⁰ Defending against indictments charging sentencing facts is discussed further in section 6, *infra*.

⁴¹ 18 U.S.C. § 924(c).

⁴² *Blakely* addressed only jury trial — and not standard of proof — waivers. See 124 S.Ct. at 2541 (“nothing prevents a defendant from waiving his *Apprendi* rights . . . [and] [i]f appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty”). For an excellent discussion of the issue, see *United States v. Terrell*, 2004 WL 1661018, at *5 n.3 (D. Neb. July 22, 2004) (“Simply put, the standard of proof is not the defendant’s to waive; it is a burden placed on the government, without which a conviction cannot be obtained.”). See also *United States v. O’Daniel*, 2004 WL 1767112, at *10 (N.D. Okla. August 6, 2004) (“Logic and common sense dictate that a judge may not constitutionally substitute judicial factfinding for jury factfinding under *Blakely* without a more exacting standard of proof and the application of the rules of evidence.”). But see *United States v. Khan*, 2004 WL 1616460 at *7 (E.D.N.Y. July 20, 2004) (Weinstein, J.) (defendant “may waive or stipulate to avoid *Blakely*”); *United States v. Harris*, 2004 WL 1622035 at *3 (W.D. Pa. July 16, 2004) (accepting parties’ waiver of *Blakely’s* application to pre-*Blakely* plea agreement).

⁴³ Generally speaking, plea agreements also include a waiver of a defendant’s appellate rights, at least if the sentence imposed is within the range stipulated by the parties. These waivers make it even less likely that the burden of proof issue will be preserved for further review.

⁴⁴ See FRCrP 11(a)(1) (“A defendant may plead guilty, not guilty, or (with the court’s consent) nolo contendere.”).

⁴⁵ One somewhat risky strategy may allow the defendant two bites at the sentencing apple. To exploit this option, the defendant would plead guilty to the indictment (assuming it has not been superseded to charge sentencing factors) and to take a position on *Blakely’s* application to the Guidelines inconsistent with the trial judge’s previous *Blakely* rulings. For example, if the judge has been imposing indeterminate sentences, then defense counsel would argue that *Blakely* either does not apply to the Guidelines or that the

government would have to prove the enhancements to a sentencing jury. Counsel then would appeal the sentencing decision. If the trial judge's position is upheld by the Supreme Court, then the defendant must live with the sentence. If, on the other hand, defense counsel's stated position is sustained, then the defendant will get a new sentence. The benefit of this tactic is that the defendant's sentence on remand will be presumptively "capped" by the initial sentence under *North Carolina v. Pearce*, 395 U.S. 711 (1969) (higher sentence imposed following successful appeal and subsequent conviction gives rise to presumption of vindictiveness in violation of due process clause). *Pearce* applies in the context of a successful appeal of a sentence. See, e.g., *United States v. Evans*, 314 F.3d 329 (8th Cir. 2002); *United States v. Cox*, 299 F.3d 143 (2d Cir. 2000); *United States v. Garcia-Guizar*, 234 F.3d 483 (9th Cir. 2000); *United States v. Broughton-Jones*, 71 F.3d 1143 (4th Cir. 1995); *United States v. Duso*, 42 F.3d 365 (6th Cir. 1994).

⁴⁶ In *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), the Supreme Court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law." *Bouie* applies in the sentencing context as well. See, e.g., *Hill v. Hopkins*, 245 F.3d 1038, 1039 (8th Cir. 2001) (holding that, even in the sentencing context, "an expansion of criminal liability that occurs by virtue of a shift in the judicial reading of a statute violates due process if it is both retroactive and unforeseeable"); *Helton v. Fauver*, 930 F.2d 1040, 1045 (3d Cir. 1991) ("the *Bouie* principle applies equally to after-the-fact increases in the degree of punishment"). Given

that no court of appeals had held that *Apprendi* or *Ring* applied to the sentencing guidelines, the *Blakely* decision was certainly "unforeseeable."

⁴⁷ In the post-SRA, pre-*Mistretta* period, similar confusion affected the plea bargaining process. As two commentators explained "[S]ince *Mistretta* had not yet been decided, the majority of judges refused to apply the Guidelines, or were willing to hold them unconstitutional whenever the defense chose to present a challenge. Except . . . where the circuit court of appeals had required all district courts to treat the Guidelines as constitutional, Guideline implementation was partial and to some extent unpredictable. Attorneys might not know if they had a "Guidelines" case until it was assigned to a judge for trial. Moreover, the defense might not raise a constitutional challenge in all Guideline cases." Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 261 (1989) (footnote omitted).

⁴⁸ Although as a practical matter much of this discovery might otherwise be provided, especially if the evidence would be admissible under FRE 404(b), counsel may be able to obtain it earlier through more formalized discovery requests.

⁴⁹ Kansas, which employs sentencing juries, requires disclosure of the evidence the State will seek to introduce at the sentencing hearing. See KANSAS STAT. § 21-4718(b)(5) ("Only such evidence as the state has made known to the defendant prior to the upward durational departure sentence proceeding shall be admissible . . .").

⁵⁰ FRCP 32(i)(3) requires the *judge*, not the *jury*, to make sentencing findings. Similarly, 18 U.S.C. § 3553(b) assigns the role of sentencing fact finder to the judge.