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BLAKELY AND BEYOND

A Memorandum for Panel Attorneys[1]

In 2000, the Supreme Court held in *Apprendi v. New Jersey* that any fact, other than the fact of a prior conviction, that exposes a defendant to a penalty in excess of the statutory maximum must be pled and proved to the jury beyond a reasonable doubt. Some visionaries predicted the decision would lead to the demise of the federal sentencing guidelines. While every circuit court in the country to have considered the issue rejected such challenges, it appears that the visionaries may yet be vindicated. On June 24, 2004, in *Blakely v. Washington*, the Supreme Court struck down a state sentencing scheme that in many ways resembles the federal sentencing guidelines. This outline summarizes the *Blakely* decision and discusses its ramifications for the federal sentencing guidelines. It explores various sentencing challenges that may be raised in general and in specific types of cases.

I. The *Blakely* Decision

A. The Facts

After the defendant's wife sued him for divorce, he abducted her from their home, bound her with duct tape, and forced her at knifepoint into a wooden box in the back of his pickup truck. He ordered his son to follow him in another car and threatened to harm his wife if he did not do so. The boy ultimately escaped, but the defendant drove on to Montana, where he was arrested and the wife set free.

B. The Procedure

1. The Charges and Plea

The defendant was charged with first-degree kidnaping, but pled guilty to second-degree kidnaping involving domestic violence and use of a firearm, a Class B felony. He entered a plea admitting the elements of second-degree kidnaping, and the domestic-violence and firearm allegations, but no other relevant facts.

2. Washington Sentencing Laws

The Washington statutes set forth graduated maximum terms for various classes of felonies; 10 years is the maximum for a Class B felony. But other statutes further limit the range of sentences a judge may impose, and in this case, the state's sentencing reform act specified a "standard range" of 49 to 53 months. A judge may impose a sentence above this range if she finds "substantial and compelling reasons justifying an exceptional sentence. The act sets forth a non-exclusive list of aggravating factors. But a reason offered to justify an exceptional sentence can be considered *only* if it takes into account factors *other* than those used in computing the standard range sentence.

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3. The Sentence

While the state recommended a sentence within the standard range, the judge, after hearing testimony and making 32 findings of fact, imposed an exceptional sentence of 90 months -- 37 months beyond the standard maximum -- on the ground that the defendant acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. The defendant preserved the issue by arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

C. The Holding

In a 5-4 decision written by Justice Scalia, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority. 2004 U.S. LEXIS 4573, *13-*14 (emphasis in original, citation omitted). The majority is made up of the same justices as in *Apprendi*; joining Scalia is Stevens, Ginsberg, Souter, and Thomas. Justices O'Connor, Breyer, and Kennedy filed separate dissenting opinions.

D. The Analysis

In *Apprendi*, the Court held that "any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury." 530 U.S. 466, 490 (2000) (emphasis added). Many lawyers, and certainly most judges, and undoubtedly every prosecutor, thought that to determine the "prescribed statutory maximum," one would look to the statute setting forth the crime or class of crimes and see what maximum term of years the court could impose. But the *Blakely* Court rejected that approach, explaining that in both *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002), the Court had held that the defendants' constitutional rights had been violated because the judge had imposed a sentence "greater than the maximum he could have imposed under state law without the challenged factual finding." In this case, the defendant was sentenced to more than 3 years above what the Court called "the 53-month statutory maximum of the standard range" because he had acted with "deliberate cruelty." Because the facts supporting that finding were neither admitted by the defendant nor found by a jury, the sentence violated the defendant's right to trial by jury. The Court rejected the state's two attempts to save the guidelines scheme. It found distinguishable *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the mandatory minimum case, and *Williams v. New York*, 337 U.S. 241 (1949), which involved an indeterminate-sentencing regime that allowed, but did not compel, a judge to rely on facts outside the trial record in determining whether to impose a death sentence, explaining that neither case involved a sentence greater than what state law authorized on the basis of the verdict alone. The Court also found immaterial the distinction that in *Apprendi* and *Ring*, the statutory grounds for departure were exclusive while under Washington's

scheme the grounds were illustrative, because in all those systems, the jury's verdict alone does not authorize the sentence. The majority criticized the dissenters' standard for distinguishing between elements of the crime and sentencing enhancements -- what Justice Scalia calls "the constitutional principle that tail shall not wag dog" -- as wholly subjective.

II. Implications for the Federal Sentencing Guidelines

A. From the majority and dissenting opinions

While the majority opinion notes that the federal guidelines are not before the Court, and professes to "express no opinion on them," it gives several strong signals that they too are unconstitutional under the rule expressed. When Justice Scalia responds to Justice Breyer's contention that *Apprendi* is unfair to criminal defendants because it gives prosecutors more power, he explains that any evaluation of *Apprendi*'s fairness must compare it with "the regime it *replaced*" (notice use of the past tense) and, of all the state and federal laws he has to choose from, he picks the federal drug statute to illustrate his point: "with no warning in either his indictment or plea, [the defendant] would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U.S.C. § 841(b)(1)(A), (D)." 2004 U.S. LEXIS 4573 at *28. Certainly, the dissenters see the writing on the wall. Justice O'Connor wrote that the decision "casts constitutional doubt" over guidelines system, notes that Washington's scheme is almost identical to the federal upward departure regime, and states that the majority opinion "suggests" that enhancements in Chapters 2 and 3 of the guidelines are unlikely to survive. She goes so far as to warn that "all criminal sentences imposed under the federal . . . guidelines since *Apprendi* . . . arguably remain open to collateral attack." 2004 U.S. LEXIS 4573 at *48 & n.2 (vast majority of 272,191 defendants sentenced in federal court since *Apprendi* were sentenced under guidelines). In her closing lament, she writes, "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy." Id. at *52. Similarly, Justice Breyer ponders that "[p]erhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how." Id. at *86. The dissenters' worries are well-founded because the sentencing systems of the federal government and Washington state are substantially similar and, where they differ, the federal guidelines are even more vulnerable to *Apprendi* challenges.

B. A Comparison of Washington and federal sentencing systems.

1. The Washington System

In Washington, a single statute sets forth graduated maximum terms of imprisonment for various classes of felonies. The state was one of the first to pass a sentencing reform act, supplanting its prior indeterminate sentencing law, at the core of which is a grid of relatively narrow "standard ranges," or "presumptive sentences," calculated according to the seriousness of the offense, which is determined by "the offense of conviction," and the criminal history of the offender. The act provides that the court "shall impose" a sentence within the standard range unless it finds "substantial and compelling reasons justifying an exceptional sentence." The act then lists several "aggravating

circumstances," such as manifesting deliberate cruelty, but emphasizes that these circumstances are illustrative, not exhaustive. Nevertheless, according to caselaw, a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those used in determining the standard range. In determining the appropriate sentence (including whether an exceptional sentence is warranted), the court may consider facts proved at sentencing by a preponderance of the evidence. If the court imposes an exceptional sentence, the outer boundary of the defendant's sentencing exposure is the statutory maximum.

2. The Federal System

The federal sentencing system shares many of Washington system's features. It too, of course, sets forth statutory maximum terms of imprisonment for the classes of felonies, but for most offenses, the actual sentences imposed are based on a sentencing table. As in Washington, the federal statute provides that a court "shall impose" a sentence within the guideline range, unless it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b)(1).

3. Differences between the systems

There are two principal differences between the state and federal systems. One is that unlike Washington's guidelines, which are enacted by the legislature, the federal guidelines are promulgated by a commission, not by Congress. The other difference is that under the federal system, the presumptive sentence does not turn exclusively on facts established by the offense of conviction and the offender's criminal history, as Washington's generally does. Instead, conduct outside the elements of the offense enters into federal guidelines calculations at many levels. Where such conduct plainly enters into calculations is in determining the amount and type of drugs; applying numerous specific offense characteristics, such as whether a weapon was used or possessed in the commission of the crime, amount of loss, and age of the victim; applying certain cross-references, such as witness bribery in respect to a criminal offense; following certain special instructions; and, applying role adjustments. But conduct outside the offense elements can creep in more insidiously, and often with more substantial results, by application of relevant conduct principles which, as we well know, sweeps in facts far outside the offense of conviction. See U.S.S.G. § 1B1.3 background ("[c]onduct that is not formally charged or is not an element of the offense may enter into the determination of the applicable guideline range). In short, in Washington, the judicial factfinding at sentencing does not begin until *after* the standard range is determined, whereas in the federal system, in the vast majority of cases, the court is obliged to find facts *before* determining the guideline range.

4. The differences do not protect the federal system from an *Apprendi* challenge.

Justice O'Connor summarily dismissed the argument that the federal guidelines should survive an *Apprendi* challenge because they are administratively promulgated: "The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency is irrelevant to the majority's reasoning. The Guidelines have the force of law, and Congress has unfettered control to

reject or accept any particular guideline." 2004 U.S. LEXIS at 49-50 (citations omitted).[2] (She discretely refrained from mentioning the Commission's recent demotion from junior varsity to water boy, as Congress has stepped in to enact guidelines itself.) As Justice O'Connor also notes, the structural differences between the systems make the federal guidelines more vulnerable to attack because under those guidelines a court must increase the sentencing range on specified factual findings whereas under the state guidelines the court is simply authorized to impose a longer term than the upper end of the presumptive sentencing range.[3]

III. Various Lines of Attack

A. Upward Departures

A quick review of the grounds for upward departures, such as for a defendant's unusually heinous, cruel, brutal, or degrading conduct to a victim, see U.S.S.G. § 5K2.8 (Policy Statement), indicates that they would not be based on facts necessarily encompassed in the jury's verdict and, therefore, would not survive an *Apprendi* challenge.

B. Heightened Base Offense Levels

Certain alternative base offense levels are triggered by facts not found by the jury, such as the one in U.S.S.G. § 2M3.2 (BOL of 35 if top secret information was gathered; BOL of 30 otherwise).

C. Aggravating Specific Offense Characteristics

Most of these are also not based on facts solely reflected in the jury verdict or admitted by the defendant. The most frequently applied aggravating factors are drug amount and type that, as Justice Scalia noted, can balloon a maximum sentence from five years to life. Other common aggravating SOCs include amount of loss, weapon use or possession, victim's age or vulnerability, bodily injury, and economic gain motivation.

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[2] Nevertheless, this will probably be a major battleground when the federal guidelines come before the Court, so if your case involves a guideline where Congress took a more active role or enacted it itself, you should stress that point.

[3] The attempt by the federal government in its *amicus* brief to distinguish the federal system is described by Justice O'Connor as "half-hearted." Maybe now they'll try harder in the lower courts, although if they do, there are some great statements in the *amicus* that you can throw back at them, for example, "[i]f the 'facts reflected in the jury verdict alone' are the elements of the offense, petitioner's theory would mandate the application of *Apprendi* to any facts, other than the offense elements, that increase the defendant's punishment." 2002 U.S. Briefs 1632 at *26.

D. Cross-references

A common cross-reference is based on the defendant's motive for committing the crime, a factor not considered by the jury and thus invalid under *Apprendi*. See, e.g., U.S.S.G. § 2H3.1(c) (Eavesdropping) (if purpose of offense was to facilitate another offense, apply guideline applicable to attempt to commit that other offense, if higher).

E. Relevant Conduct

Relevant conduct sweeps within its ambit a wide range of acts not alleged or proven to the jury, especially with respect to "certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity." U.S.S.G. § 1B1.3 background.

F. Priors

We've been waiting patiently for four years for the other shoe to drop, that is, for the Court to overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and hold that the fact of a prior conviction must also be pled and proved to the jury. *Blakely* holds out hope that soon the Court might also expand *Apprendi* in this way. Until then, it is important to object and preserve the issue.[4] In many cases, however, judge-made findings about a prior may go beyond the fact of the conviction, for example, to whether it qualifies as a crime of violence, or whether the defendant was on probation or parole or within two years of release, and these should be subject to *Apprendi* challenges. Under the "modified categorical approach" of *Taylor v. United States*, 495 U.S. 575 (1990), a court is permitted to examine documentation, such as an indictment, judgment of conviction, jury instructions, signed plea agreements, and plea hearing transcripts, or judicially noticeable facts to determine whether a conviction qualifies as a predicate conviction for enhancement purposes (for example, as a crime of violence for ACCA). That is arguably an inherently factual inquiry that goes beyond the mere fact of conviction. *See* Fed. R. Evid. 201(g) (jury is not required to accept as conclusive any fact judicially noticed). Accordingly, *Apprendi* challenges may be appropriate in a wide variety of cases raising these issues, including deported alien cases, Armed Career Criminal cases, and career offender cases.

G. The Guidelines as a whole and the question of remedies

It appears that the type of judicial decisionmaking prohibited by the Sixth Amendment so permeates the federal sentencing guidelines that they should be declared unconstitutional as whole. Judge Cassell in the District of Utah took this approach when he declared the guidelines unconstitutional six days after *Blakely* was decided. He found that he had three options to remedy the constitutional violation: (1) convene a sentencing jury; (2) continue to follow the provisions of the guidelines "apart from the defective upward enhancement provisions"; or (3) treat the guidelines as unconstitutional in the entirety and sentence the

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[4] Other decisions might be similarly vulnerable to attack now, including *Harris v. United States*, 536 U.S. 545 (2002) (mandatory minimums); *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (acquitted conduct); *Witte v. United States*, 515 U.S. 389 (1995) (double jeopardy).

defendant between the statutory minimum of ten years and maximum of twenty.[5] He rejected the first option both as a practical matter and as unauthorized by statute. The second option was unfair to the government and would "distort the Guidelines," so he adopted the third option "[b]y default." *United States v. Brent Croxford*, Cr. 02-302 PGC (D. Utah June 29, 2004) at 24 (available at) .[6]

Other judges have followed the second option. Judge Young in the District of Massachusetts, sentenced a defendant based solely on the offense of conviction and any prior convictions. *United States v. Richard Green, et al.*, Cr. 02-10054, 2004 WL 1381101, (D. Mass. June 18, 2004)[7].

Judge Hornby, in a case out of the District of Maine, ruled that it would be unconstitutional to increase the offense level for drug quantity beyond that found by the jury, or for any role enhancement, saving the defendant ("the ring leader of a significant drug conspiracy") ten years. *United States v. Ducan Fanfan*, Cr. 03-47 DBH (D. Maine June 28, 2004)[8]

Judge Goodwin, in the Southern District of West Virginia, who had already knocked down a life sentence to twenty years under *Apprendi*, further reduced it on a Rule 35 motion to 12 months under *Blakely*, based only on those sentencing factors that the defendant admitted during the plea colloquy (i.e., buying Sudafed in exchange for meth). *United States v. Ronald Shamblin*, Cr. 03-217 (S.D.W.V. June 30, 2004).[9] In sum, you need to determine

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[5] Given that so many of the guideline provisions violate the Sixth Amendment, it does not appear that they would not meet the test for severability, i.e., it's doubtful that after the invalid part is dropped what is left is "fully operative as a law," and even more doubtful that the Commission would have enacted only those provisions that are within its powers. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683-84 (1986).

[6] Most of the opinions and briefs mentioned can be accessed via the NACDL web site, http://www.nacdl.org/public.nsf/newsissues/blakely?opendocument
Croxford opinion: http://www.utd.uscourts.gov/opinions/202cr0030200000096.pdf
The Croxford court sentenced the defendant, who was convicted of a single count of sexual exploitation of a child, to just over 12 years. Interestingly, the 148-month sentence was three months shy of the term called for in sentencing guidelines, with the enhancements (the court computed the guidelines sentence in case its judgment was reversed on appeal). There's no mention of any term of supervised release.

[7] http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=young/pdf/supersentencing%20memo.pdf

[8] http://sentencing.typepad.com/sentencing_law_and_policy/files/hornby_postblakely_decision.pdf

[9] http://www.wvsd.uscourts.gov/district/opinions/pdf/2004-Blakely%20FINAL.pdf
This approach is more consistent with what the Court seems to be doing in *Blakely* itself:

whether your client would be better off if the entire system were struck down -- for example, if your client's a good egg caught up in an ugly crime and you've got a sympathetic judge -- or if the guidelines (properly construed and applied under *Blakely*) would restrain the judge's "discretion" in a positive way -- for example, if your client's a bad guy with a lot of relevant conduct but the drug amount underlying the conviction offense is relatively low.

IV. Appeal Issues

A. Guilty Pleas and Appeal Waivers

If you're going to enter a plea, you need to be very careful about the facts to which you stipulate, either in the plea agreement or during the plea colloquy. As *Blakely* emphasized, "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." 2004 U.S. LEXIS 4573 at *25. If you stipulate to the enhancement fact, you arguably have waived the issues for appeal. Similarly, it might be time to be reconsidering whether to agree to appeal waivers in the plea agreement or at least to insist on greater concessions from the government, given the increased bargaining power resulting from *Blakely*. Appeal waivers must also be carefully examined. A waiver of the right to appeal *the conviction*, for example, will not be construed as a waiver of the right to appeal *the sentence*. *See, e.g.*, *United States v. Sar-Avi*, 255 F.3d 1163, 1166-67 (9th Cir. 2001); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1991). Even an express waiver of the right to appeal a sentence may be subject to certain exceptions such as a claim that an illegal sentence was imposed in excess of a maximum statutory penalty. *See United States v. Baramdyka,* 95 F.3d 840, 843 (9th Cir. 1986). It is at least arguable that an appeal waiver was unknowing, and therefore unenforceable, because the defendant didn't understand that the statutory maximum was the top of the guideline range based on the base offense level.

B. Harmless Error

It is important to preserve *Apprendi* issues for appeal by objecting promptly and comprehensively (e.g., violation of right to indictment, right to due process, right to trial by jury) in order to avoid the very high hurdle of plain error review. *See United States v. Cotton*, 535 U.S. 625 (2002).

C. Plain Error

While the plain error standard is high, it is not insurmountable. Types of cases where the standard might well be satisfied include internet luring or traveler cases where the district court found intent to rape; obstruction of justice and other post-indictment conduct enhancements; disputed quantity/loss amount issues; disputed cross-references; role/skill/trust-abuse enhancements; conduct of the conspiracy attributed to the defendant (reasonable foreseeability, withdrawal, length of conspiracy); and cases in which disputed hearsay was the basis for the enhancement.

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that is, analyzing the process by which his sentence was computed and vacating that sentence, rather than analyzing the sentencing scheme as a whole and striking down the statute as unconstitutional.

D. Collateral Review

Generally speaking, once a decision becomes final on the completion of direct appellate review, it becomes much more difficult to obtain relief in federal habeas corpus because of procedural hurdles erected and raised by the Rehnquist court and the Antiterrorism and Effective Death Penalty Act. One of the more difficult hurdles to overcome is that new rules of constitutional procedure do not apply retroactively on collateral review unless they constitute "watershed rules" of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288 (1989). After *Apprendi* was decided, all the circuits rejected petitioners' requests to apply *Apprendi* retroactively, and the Court did not grant certiorari on the issue.

In 2002, the Court held in *Ring v. Arizona,* 536 U.S. 584, that under a state law which required the finding of an aggravating factor before death could be imposed, the Sixth Amendment mandated that the enumerated aggravating factors be found by a jury. When the Ninth Circuit held *Ring* to be retroactive on habeas, the Court granted certiorari to address the retroactivity issue, and on the same day *Blakely* was decided, the Court issued *Schriro v. Summerlin*, 2004 U.S. LEXIS 4574 (June 24, 2004). The Court held, in a 5-to-4 decision, that the jury requirement of *Apprendi* was not retroactive to collateral proceedings.

There are at least two silver linings, however. First, the majority noted that the question whether the beyond-a-reasonable-doubt requirement of *Apprendi* would be retroactive on collateral proceedings was not before it because Arizona required that judges find aggravating circumstances BRD in death cases. Given that prior BRD rulings, such as *In Re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), were held retroactive because they were essential to accurate fact-finding, *see Ivan V. v. City of New York*, 407 U.S. 203 (1972)(*Winship* retroactive); *Hankerson v. North Carolina*, 432 U.S. 233 (1977)(*Mullaney* retroactive), and given the 5-4 split in *Summerlin*, it is at least arguable that the Court will hold that the *Apprendi* BRD requirement constitutes a watershed rule, which would be fully retroactive.[10] Second, all the Justices appear to agree that the first requirement for a watershed rule, fundamental fairness, is met -- the battle was over whether the jury requirement increased accuracy. The Ninth Circuit in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (2002), held that the *Apprendi* rule was not sufficiently "sweeping" or "bedrock" as to be considered "fundamental . . . within *Teague*'s second exception." *Id*. at 669-70. *Summerlin* casts considerable doubt over this conclusion. Moreover, Justice O'Connor wrote that despite *Summerlin*, even final guideline judgments "arguably remain open to collateral attack," 2004 U.S. LEXIS 4573 at *48, so be prepared for your former clients to insist that you file section 2255 motions on their behalf.

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[10] *Blakely* also reinforced the Ninth Circuit's holding in *United States v. Tighe*, 266 F.3d 1187 (2001), that *Apprendi*'s narrow "prior conviction" exception was limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt, and therefore, the "prior conviction" exception did not include nonjury juvenile adjudications.