A "Blakely Scorecard"

By Rob Rufner, Esq., District of Maine
Editing by David Beneman, Maine CJA Resource Counsel

Last update: July 25,2004

Blakely v. Washington, 124 S.Ct. 2531, 72 USLW 4546, (Jun 24, 2004) (NO. 02-1632)

	U.S. v. Marseille, 2004 WL 1627026, *7+ (11th Cir.(Fla.) Jul 21, 2004) (NO. 03-12961) **In FOOTNOTE ruled that Blakely did not apply to enhancements due to obstruction of justice for threatening a witness against him and for his prior convictions.**
	U.S. v. Pineiro, 2004 WL 1543170, *1+ (5th Cir.(La.) Jul 12, 2004) (NO. 03-30437) Nonetheless, considering the entire matrix of Supreme Court and circuit precedent, we adhere to the position that the Guidelines do not establish maximum sentences for Apprendi purposes. In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response.
	U.S. v. Olivera-Hernandez, No. 2:04CR 0013, 2004 U.S. Dist. LEXIS ____ (D.Utah July 12, 2004) (Judge Benson) - **Disagreeing with his colleagues, Judges Cassell and Stewart, Judge Benson held that Blakely did not render the Guidelines constitutionally infirm. "Regardless of the 'sky-is-falling' warnings (or dire prognostications) of the dissenting justices in Blakely, it is undisputably true that Blakely and its reasoning do not (yet) apply to the federal sentencing guidelines."**
	U.S. v. Mooney, 2004 WL 1636960, *1+ (8th Cir.(Minn.) Jul 23, 2004) (NO. 02-3388) **Two of three Judges say Blakely applies and Guidelines are unconstitutional as a whole (no severance)**
	U.S. v. King, No. 6:04-CR-35-ORL-31KRS, 2004 U.S. Dist. LEXIS 13496 (M.D. Fla. July 19, 2004) (Judge Presnell) - Here Judge Presnell concluded: "Taking Blakely to its logical conclusion, the determinate scheme set up by the Guidelines violates the Constitution and can no longer be used in any case. The Court notes, however, that despite a return to an indeterminate sentencing scheme, it will continue to rely on the Guidelines as recommendations worthy of serious consideration." (Emphasis added). In his decision, Judge Presnell also explained: "The suggestion that courts use the Guidelines in some cases but not others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection. Courts simply cannot apply a determinate sentencing code to one defendant whose sentence raises no judicial fact-finding enhancement issues and a separate discretionary scheme to another defendant whose sentence does raise enhancement issues. Such a structure not only seems to violate equal protection principles but would lead to the perverse result that both Government and criminal defense attorneys would plot to finagle their way into the determinate system or indeterminate system

	depending on the judge and the various factors relevant to the particular defendant's sentence."
	U.S. v. Einstman, 2004 WL 1576622, *1 (S.D.N.Y. Jul 14, 2004) (NO. 04 CR.97(CM)) **HN: 2 (S.Ct.) Blakely applies, NOT severable.**
	U.S. v. Marrero, 2004 WL 1621410, *1+ (S.D.N.Y. Jul 21, 2004) (NO. 04 CR. 0086 (JSR)) ìî **HN: 3,6,11 (S.Ct.) Blakely applies, Guidelines fall as a whole.**
	U.S. v. Harris W.D.Pa. 2004 WL 1622035 (W.D. Pa., 2004) July 16, 2004. **Blakely applies. Parties agreed to be sentenced under guidelines. NOT SEVERABLE. Followed Croxford.**
	U.S. v. Croxford, 2004 WL 1551564, *1+ (D.Utah Jul 12, 2004) (NO. 2:02-CR-00302-PGC) ìî **HN: 3,4,6 (S.Ct.) Blakely applies, NOT severable.**
	U.S. v. Sweitzer, No. 1:CR-03-087-01 (M.D.Pa. July 19, 2004) (Judge Rambo) - **Adopting Judge Cassell's reasoning in the Croxford** case, Judge Rambo ruled that "the Guidelines, as applied in this case, are unconstitutional." She then went on to state: "Accordingly, the court will rely on an indeterminate sentencing scheme in accordance with the principles set forth in Croxford to sentence Defendants. See id. at *13-*15.1. The court will, however, make one modification to the Croxford court's decision. The court will announce only one sentence based on an indeterminate scheme instead of announcing both an indeterminate sentence and a sentence calculated under the Guidelines. See id. at *19. Given the court's conclusion that the Guidelines, as applied to this case, are unconstitutional, a sentence calculated under the Guidelines is not needed."
	U.S. v. Thompson, 2004 WL 1551560, *1+ (D.Utah Jul 08, 2004) (NO. 2:04-CR-00095 PGC) **? Did not decide if Blakely applies, because sentenced Defendant only on the basis of admitted facts. Judge CASSELL rejecting argument that if Guidelines fall in one case the fall in all cases.**
	U.S. v. Croxford, 2004 WL 1521560, *3+ (D.Utah Jul 07, 2004) (NO. 2:02-CR-00302-PGC) **Blakely applies, NOT severable.**
	U.S. v. Lockett, --- F.Supp.2d ----, 2004 WL 1607496, E.D.Va., Jul 16, 2004 **Blakely applies. NOT severable. If no enhancements or only on admitted facts Guidelines apply. IF additional enhancements Guidelines are unconstitutional as to that specific proceeding and they will then be advisory.**
	U.S. v. Lamoreaux, 2004 WL 1557283 W.D.Mo.,2004. July 7, 2004. **Blakely applies. NOT severable. Follows Croxford.**
	Pro Guidlines
	U.S. v. Ameline, 2004 WL 1635808, *1+ (9th Cir.(Mont.) Jul 21, 2004) (NO. 02-30326) **Blakely applies and judicial fact finding and preponderance standard can be severed.**
	U.S. v. Watson, CR 03-0146 (D.D.C. June 30, 2004)(Judge Thomas P. Jackson) **Blakely, applies, SEVERABLE. At resentencing did not use the 14 offense level points that were added only as a result of Judges findings.**
	U.S. v. Fanfan. (D.Me) **Applies SEVERABLE. Only used admitted facts.**
	U.S. v. Terrell, No 8:04CR24 (D.Neb July 22, 2004) (Judge Bataillon) **Applies, SEVERABLE only sentenced Defendant based on admitted facts.**
	U.S. v. Landgarten, 2004 WL 1638083, *1 (E.D.N.Y. Jul 23, 2004) (NO. 04-CR-70 JBW) **Moot Defendant consents to guidelines see below.**

	U.S. v. Landgarten, 2004 WL 1576516, *1+ (E.D.N.Y. Jul 15, 2004) (NO. 04-CR-70(JBW)) **Blakely applies, impaneled SENTENCING JURY after GUILTY PLEA!!!!**
	U.S. v. Khan, 2004 WL 1616460, *1+ (E.D.N.Y. Jul 20, 2004) (NO. 02-CR-1242 JBW) ìî **Blakely applies, appears to indicated would have used jury for sentencing issues if not waived by parties. SEVERABLE.**
	U.S. v. Toro, 2004 WL 1575325 (D.Conn) July 8, 2004. **Blakely applies. SEVERABLE. Rejecting Croxford. Goes with Shamblin.** Croxford rejected the first two options and "by default" adopted the third. Croxford, 2004 U.S. Dist. LEXIS 12156, at *40. However, pursuant to the avoidance doctrine, courts generally are to construe statutes to "avoid decision of constitutional questions ." United States v. Thirty-Seven Photographs, 402 U.S. 363, 373, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); see also United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909). Courts must avoid construing a statute so as to render it clearly unconstitutional if there is another reasonable interpretation available. Edmond v. United States, 520 U.S. 651, 658, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997). In light of the avoidance doctrine's cautions about invalidating entire statutory schemes, the Court will adopt the second option, and will apply the base level offense on the basis of facts explicit or implicit in the plea. Although the second option involves finding certain aspects of the USSG unconstitutional (i.e. the consideration of enhancements not based on facts admitted by the defendant or found by a jury), notwithstanding the avoidance doctrine courts may not ignore constitutional infirmities "to the point of disingenuous evasion even to avoid a constitutional question." Miller v. French, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000). Accordingly, any enhancements based on facts not stipulated or admitted by Defendant or found by a jury will not be considered, as pursuant to Blakely this would violate Defendant's Sixth Amendment rights. There remains an allowance for Defendant's acceptance of responsibility. The view expressed in Croxford, that "reducing a sentence without a jury finding .... would create a one-way street, in which the defendant would benefit from downward adjustments to the Guidelines, but would not face upward adjustments," is rejected. Croxford, 2004 U.S. Dist. LEXIS 12156 at *38-*39. Whether the sentence is just and sufficiently punitive is the result of Congress's scheme. Enforcing a defendant's rights is the requirement of the Constitution. See Shamblin, 2004 WL 1468561 at * 10 (the court's duty "is only to apply the law as [the court] find[s] it") .
	U.S. v. Leach, 2004 WL 1610852, *1+ (E.D.Pa. Jul 13, 2004) (NO. CRIM. 02-172-14) **Blakely applies, SEVERABLE sentenced Defendant based on admitted facts. BUT also proposes a back-up sentence in case guidelines are not severable.**
	U.S. v. Shamblin, 2004 WL 1468561, *1+ (S.D.W.Va. Jun 30, 2004) (NO. CRIM.A. 2:03-00217) **Blakely applies, SEVERABLE sentenced Defendant based only on those facts which were admitted during his rule 11. But see judge change mind below**
	U.S. v. Thompson, Crim No. 2:03-00187-02, 2004 U.S. Dist. LEXIS 13213 (S.D.W.Va., July 14, 2004) (Judge Goodwin) (Unpublished) - A brief Order by Judge Goodwin in which, after reviewing all of the major and divergent Blakely decisions of the past two weeks, he concluded that consistent application of the law "is of paramount importance in sentencing matters. Therefore, in the interests of justice, the court will move all sentencing hearings to a date after October 15, 2004."
	U.S. v. Montgomery, 2004 WL 1535646, *1+ (D.Utah Jul 08, 2004) (NO. 2:03-CR-801 TS)

	Blakely applies, SEVERABLE, sentenced Defendant only on admitted facts. **"**or (3) the court could treat the Guidelines as unconstitutional in their entirety in this case and sentence [the defendant] between the statutory minimum and maximum." Croxford, at *9. Further, it is the opinion of this Court that the mechanism born from the third option is incompatible with Blakely. Under the third option, when a Blakely-implicated enhancement is raised, a court would declare that the entire guidelines--including the core guideline range--are inapplicable as unconstitutional. A court would then make factual findings on all relevant issues, including sentence-enhancing factors in violation of Blakely. As noted in Croxford, "the irony is that after Blakely, this court is free to consider the same evidence which, under the unconstitutional Guidelines scheme, would have had to be proven to a jury beyond a reasonable doubt-- including evidence of obstruction of justice and multiple victims." Id. at * 13. In essence, the court would be saying with its mouth that it acknowledges Blakely's affect on federal criminal sentencing while, with its hand, demonstrating a practical disregard for it. *4 The actual result of utilizing option three would be to ignore the constitutional impact of Blakely and to conduct a fiction that a sentence should be at a specific level, having arrived there by the same unconstitutional steps Blakely expressly forbade. In sum, the third option would accomplish precisely what Blakely sought to preclude, by allowing judicial determination of the same fact-driven enhancements and departures to achieve the same sentence as would have applied pre-Blakely (albeit now with the minimum and maximum sentences defined by the criminal statute, rather than the federal sentencing guidelines).
	U.S. v. Wada, 2004 WL 1488695, *4 (D.Or. Jun 29, 2004) (NO. CR 03-96-BR) **Blakely applies. But was not really an issue** FN2. After the evidentiary hearing, the Supreme Court issued an opinion in Blakely v. Washington in which the Court held "every defendant has the right to insist that the prosecutor prove to a jury [beyond a reasonable doubt] all facts legally essential to the punishment." No. 02- 1632, --- U.S. ----, at ----, 124 S.Ct. 2531, --- L.Ed.2d ----, at ----, 2004 WL 1402697, at *9 (June 24, 2004)(emphasis in original). In light of this holding, Wada has the right to have a jury determine the number of firearms involved in Count One. Nonetheless, the Court issues this Opinion and Order in light of the fact that the Court finds in favor of Defendant on this issue, which was raised and argued before Blakely and which, therefore, does not require a different procedure under the circumstances of this case.
	U.S. v. Monteiro, No. 1:03-cr-135-SM (D.N.H. July 1, 2004)
	U.S. v. Moran, No. 02-10136-RED (D.Mass. July 8, 2004)
	U.S. v. Green, D.Mass (Pre-Blakely)
	U.S. v. Penaranda, 2004 WL 1551369, *1+ (2nd Cir.(N.Y.) Jul 12, 2004) (NO. 03-1055(L), 03-1062(L)) After ordering hearing en banc, limited to issue of validity of sentences in light of decision in Blakely, the Court of Appeals, Walker, Chief Judge, held that it **would certify to United States Supreme Court question** as to whether Sixth Amendment permits a federal district judge to find facts, not reflected in a jury's verdict or admitted by a defendant, that form the basis for determining the applicable adjusted offense level under the federal Sentencing Guidelines and any upward departure from that offense level, along with narrower formulations of question applicable to instant cases.
	Simpson v. U.S., 2004 WL 1588085, *1+ (7th Cir. Jul 16, 2004) (NO. 04-2700) **cited Booker but said 2255 was premature.**
	U.S. v. Booker, 2004 WL 1535858, *1+ (7th Cir.(Wis.) Jul 09, 2004) (NO. 03-4225) **Blakely applies but ducked severance issue.**

	U.S. v. Mikutowic, Slip Copy D.Mass.,2004. July 7, 2004. **Sentence based on facts determined by court "may well be illegal" in light of Blakely.**
	In re Dean, 2004 WL 1534788, *1+ (11th Cir. Jul 09, 2004) (NO. 04-13244) **HN: 2 (S.Ct.) Declined to apply Blakely retroactively, did not say Blakely did not apply – did not need to reach that issue.**
	U.S. v. Montgomery, 2004 WL 1562904, *3+, 2004 Fed.App. 0226P, 0226P+ (6th Cir. (Tenn.) Jul 14, 2004) (NO. 03-5256). **Applies but opinion was withdrawn.**
	Spero v. U.S., 2004 WL 1516863, *1+ (11th Cir.(Fla.) Jul 08, 2004) (NO. 03-14586, 03-14587)
	U.S. v. Harp, 2004 WL 1636251, *2+ (N.D.Iowa Jul 22, 2004) (NO. CR00-3035-MWB)
	U.S. v. Stoltz, 2004 WL 1619131, *1+ (D.Minn. Jul 19, 2004) (NO. CR. 99-3563DSDJMM, CIV. 03-5580(DSD)) **Does not reach issue of Applicability, Rules not retroactive**
	U.S. v. Medas, 2004 WL 1498183, *1+ (E.D.N.Y. Jul 01, 2004) (NO. 03CR1048) **Agrees with Croxford, so declines to give Gov't's new jury instructions.**
	U.S. v. Gonzalez, 2004 WL 1444872, *2+ (S.D.N.Y. Jun 28, 2004) (NO. 03 CR. 41 (DAB)) **Blakely applies, grants two week continuance for briefing on how it applies.**
	U.S. v. Byrd, 2004 WL 1618832, *1+ (W.D.Tex. Jul 20, 2004) (NO. SA-03-CR-547-XR) **Declined to apply Blakely to career offender.**
	Garland v. U.S., 2004 WL 1593438, *1+ (N.D.Tex. Jul 15, 2004) (NO. 3-04-CV-1465-H). **2255 Just really mentions 5th Cir says does not apply.**
	~~Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783, 2804, 72 USLW 4649, 4649, 32 Media L. Rep. 1865, 4 Cal. Daily Op. Serv. 5781, 5781, 2004 Daily Journal D.A.R. 7896, 7896, 17 Fla. L. Weekly Fed. S 507, 507 (U.S. Jun 29, 2004) (NO. 03-218) *(in dissent)*~~
	~~Dilts v. Oregon, 124 S.Ct. 2906, 2906, 72 USLW 3767, 3767 (U.S.Or. Jun 28, 2004) (NO. 03-9412)~~
	U.S. v. Castrillon, 2004 WL 1567845, *1+ (2nd Cir.(N.Y.) Jul 14, 2004) (NO. 02-1319(L), 02-1406(CON), 02-1371(XAP), 02-1367(CON))
	~~U.S. v. Bost, 2004 WL 1588180, *1 (3rd Cir.(N.J.) Jul 16, 2004) (Table, text in WESTLAW, NO. 03-3917)~~ **~~HN: 6 (S.Ct.) NOT AN ISSUE~~**
	U.S. v. Ward, 2004 WL 1636967, *5+ (7th Cir.(Ill.) Jul 23, 2004) (NO. 03-2998, 03-2999) **HN: 11 (S.Ct.) Blakely applies, Follows Booker, and vacates sentences and remands for resentencing**
	U.S. v. Morgan, 2004 WL 1636929, *10 (9th Cir.(Cal.) Jul 23, 2004) (NO. 02-50603) **Blakely applies, sentences vacated and remanded for resentencing.**
	~~U.S. v. Deitzen, 2004 WL 1543233, *2 (9th Cir.(Nev.) Jul 08, 2004) (Table, text in WESTLAW, NO. 03-10497)~~ **~~HN: 1 (S.Ct.) NOT AN ISSUE~~**
	U.S. v. Cooper, 2004 WL 1598798, *11 (10th Cir.(Utah) Jul 19, 2004) (NO. 03-4019) **HN: 2 (S.Ct.) Not a Blakely issue, prior convictions.**
	~~U.S. v. Ayeni, 2004 WL 1606990, *12 (D.C.Cir. Jul 20, 2004) (NO. 02-3119)~~ ~~îî~~ **~~NOT AN ISSUE~~**
	~~U.S. v. Richardson, 2004 WL 1562093, *3 (D.Mass. Jul 13, 2004) (NO. CRIM.A. 02-10211-WGY)~~ **~~HN: 11 (S.Ct.) NOT AN ISSUE~~**
	~~U.S. v. Woodward, 2004 WL 1572694, *6 (D.Me. Jul 12, 2004) (NO. CR. 4-13-B-W)~~ **~~HN: 4 (S.Ct.) NOT AN ISSUE~~**
	Schriro v. Summerlin, 124 S.Ct. 2519, 2525+, 72 USLW 4561, 4561+, 4 Cal. Daily Op. Serv.

	5558, 5558+, 2004 Daily Journal D.A.R. 7569, 7569+ (U.S. Jun 24, 2004) (NO. 03-526)
	U.S. v. Burrell, 2004 WL 1490246, *2+ (W.D.Va. Jul 06, 2004) (NO. 2:03CR10095) **HN: 2 (S.Ct.) Applies guidelines, issue in case was career offender.**
	Patterson v. U.S. 2004 WL 1615058, E.D.Mich., Jul 02, 2004 **2255 <u>Blakely</u> not retroactive bud did say::** Blakely casts serious doubt on the preponderance of the evidence standard previously employed in cases like *Pluta*. The question then is whether Petitioner can avail himself of the rule as announced in Blakely.
	U.S. v. Stafford, 2004 WL 1629540, W.D.Wis., Jul 19, 2004 **NOT ON POINT. Defendant trying to resist efforts to collect restitution.**
	U.S. v. Traeger 2004 WL 1609132 N.D.Ill.,2004. July 8, 2004. (Approx. 3 pages) **2255 Not on point.**
	U.S. v. Capanelli, 2004 WL 1542247, S.D.N.Y., Jul 09, 2004 **NOT ON POINT. Denial of motion for release pending appeal.**
	Rice v. Scibana, 2004 WL 1576713, *1 (W.D.Wis. Jul 14, 2004) (NO. 04-C-317-C)
	Rice v. Scibana, 2004 WL 1563328, *1 (W.D.Wis. Jul 12, 2004) (NO. 04-C-317-C)
	State v. Cons, 2004 WL 1633136, *4+ (Ariz.App. Div. 2 Jul 22, 2004) (NO. 2CA-CR 2002-0333)
	People v. Davis, 2004 WL 1626405, *3 (Cal.App. 2 Dist. Jul 21, 2004) (NO. B169481)
	Sigler v. State, 2004 WL 1562912, *5+ (Fla.App. 4 Dist. Jul 14, 2004) (NO. 4D02-4799)
	People v. Motten, 2004 WL 1620813, *1 (Mich.App. Jul 20, 2004) (NO. 246417)
	State v. Whitley, 2004 WL 1613250, *1+ (Minn.App. Jul 20, 2004) (NO. A03-725)
	Davis v. State, 2004 WL 1615070, *1 (Minn.App. Jul 20, 2004) (NO. A03-1767)
	State v. Stockert, 2004 WL 1632100, *9, 2004 ND 146, 146 (N.D. Jul 22, 2004) (NO. 20030105)
	State v. Byington, 2004 WL 1606993, *4+ (Tenn.Crim.App. Jul 19, 2004) (NO. E2003-02316-CCA-R3CD)