UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 01-CR- 1234

,

Defendant.

DEFENDANT'S MEMORANDUM
ON *BLAKELY v. WASHINGTON*

I.

INTRODUCTION

Not quite two weeks ago, the United States Supreme Court decided *Blakely v. Washington*, 125 S.Ct. ____ (June 24, 2004) (available on Westlaw, 2004 WL 1402697). *Blakely* does not address the determinate sentencing scheme in federal courts under the United States Sentencing Guidelines. All the same, it casts substantial doubt on key components of the federal sentencing guideline scheme.

Here, is charged with theft of a truck valued at over $1,000, contrary to 18 U.S.C. § 661 and 1153(a). The government advised defense counsel that it will seek to impose the enhancements for committing an offense that involved theft from the person of another, UNITED STATES SENTENCING GUIDELINES MANUAL § 2B1.1(b)(3); and engaging in an offense that involved the conscious or reckless risk of death or serious bodily injury, U.S.S.G. § 2B1.1(b)(11).

Although the government did not indicate precisely how it would seek to prove these enhancements in light of *Blakely*, the government's position in another case, *United States v. Abu-Shawish, et al.*, Case No. 03-Cr-211, suggests that it might accommodate *Blakely* by submitting special verdicts addressing the offense level enhancements the prosecution seeks under the sentencing guidelines.

If the government pursues that proposal in this case as well, objects. His reasons stem as much from the first Supreme Court decision that did address the federal sentencing guidelines, *Mistretta v. United States*, 488 U.S. 361 (1989), as from *Blakely*. In *Mistretta*, the Court acknowledged that Congress placed the United States Sentencing Commission within the judicial branch of the federal government. That so, submitting to a jury factual issues that the Sentencing Commission defined, rather than Congress, for determining proof beyond a reasonable doubt would create two constitutional problems. Both concern the separation of powers that the United States Constitution implicitly decreed in establishing three branches of the federal government.

First, it would violate separation of powers doctrine by aggrandizing the judicial branch, or allowing that branch to encroach upon the legislative, because the legislative branch alone must determine what facts are essential to a federal criminal conviction and to the maximum penalty. Second, it would entail an impermissible delegation of legislative power (defining federal crimes and their maximum punishment) to an independent judicial branch agency, the Sentencing Commission.

here asks the Court to instruct the jury only on the facts that Congress identified by statute in defining the charged offenses. If

is convicted, his sentence then should be confined to the base offense level established under Chapter 2 of the Sentencing Guidelines, adjusted downward by any applicable mitigating provisions in Chapters 2, 3 and 5 and applied to the appropriate criminal history category under Chapter 4 (which, in this case, the Court may determine). agrees to no judicial determination of any fact that increases his guideline range above the base offense level, under any burden of proof. He does not agree, either, to waive a jury trial on any factual issue that increases the guideline range above the base offense level.

The government must live with what is left of the guidelines until the proper body, Congress, acts to alleviate the sentencing guidelines' impingement on the Sixth Amendment right to a jury trial. Four years ago, the Supreme Court presaged the current problem in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and all

but confirmed it last week in *Blakely*. More remarkably, the Seventh Circuit itself anticipated *Blakely*, and its eventual application to the Sentencing Guidelines, nearly eleven years ago. *United States v. Haddad*, 10 F.3d 1252, 1261-62 & n.2 (7th Cir. 1993) (Eisele, J., sitting by designation).

explains below in more detail why he thinks the government's proposal a mistake, and why *Mistretta* and *Blakely*, read together, along with *Haddad* instead require the course the defendants suggest. In the end, he urges that federal trials should proceed just as before *Blakely*. Only sentencing will be different.

II.

DISCUSSION

A. *Blakely* Arrives. The facts in *Blakely v. Washington* guide lawyers and courts in understanding how that decision will apply to the federal sentencing guideline scheme. Ralph Blakely, charged in Washington state court with first-degree kidnapping, reached a plea agreement with the prosecutor. Under that agreement, Blakely pled guilty to second-degree kidnaping involving domestic violence and use of a firearm in exchange for the prosecutor's dismissal of the first-degree kidnaping charge.

Washington state has a guideline sentencing scheme that provides two kinds of statutory sentence maxima for each offense. First, because second-degree

kidnapping is a Class B felony, Blakely faced no more than 10 years imprisonment. Second, under the Washington state sentencing reform act, guidelines produced a standard or presumptive sentencing range of 49 to 53 months.

The first statutory maximum, 10 years, set an absolute limit beyond which the sentencing judge could not go. The second statutory maximum, 53 months (that is, the high end of the presumptive sentencing range) was not an absolute limit; rather, the sentencing judge could adjust the sentence upward if the judge found one or more of the statutorily-enumerated aggravating factors or an analogous factor. Such an upward adjustment or "exceptional sentence" was legal, however, only if the judge explicitly found an aggravating factor apart from the elements that the jury found at trial.

In Blakely's case, the Washington state judge rejected the prosecutor's recommendation of 53 months and found that Blakely had acted with deliberate cruelty, one of the statutorily-enumerated aggravating factors. On that basis, the judge adjusted Blakely's sentence upward by 37 months for a final sentence of 90 months. Blakely appealed, citing *Apprendi* for the proposition that 37 months could not be tacked on to his presumptive sentence maximum unless a jury found the facts supporting the incremental punishment beyond a reasonable doubt.

The United States Supreme Court agreed with Blakely, concluding that upward adjustments under the Washington state scheme violate the constitutional rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Blakely* began with a now familiar

general proposition. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 2004 WL 1402697 at *4, citing *Apprendi*, 530 U.S. at 490. Next, *Blakely* noted that the Supreme Court's precedents clarified what the term "statutory maximum" means for *Apprendi* purposes: "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 2004 WL 1402697 at *4 (italics in original).

Applying this definition of "statutory maximum," *Blakely* made clear that guideline systems, such as the Washington state scheme, featuring two types of statutory maxima (*e.g.*, in Blakely's case, the 10-year maximum because the offense of conviction was a Class B felony and the 53-month maximum because that was the high end of the presumptive sentence range for the offense of conviction), the *Apprendi* rule applies to the lower statutory maximum:

> 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.

Id. Because the Washington state sentencing judge could not impose a sentence above 53 months unless he explicitly found one or more additional facts, the *Apprendi* rule applied to the 53-month maximum.

This reasoning applies equally to the federal guideline scheme. Each federal offense carries a congressionally-fixed statutory maximum, typically found in the statute that creates the criminal offense. But the guideline system sets up a lower or subsidiary statutory maximum: the base offense level assigned to the offense of conviction, indexed to the defendant's criminal history. The result is a sentencing range. The judge cannot increase the defendant's sentence above the high end of that range unless he or she finds one or more additional facts.

Under the federal guideline scheme, the judge applies various sentencing increases only if he or she finds by a preponderance various aggravating facts. These upward adjustment provisions are every bit as infirm as the provision in the Washington state scheme that permitted the judge to increase Blakely's sentence from 53 to 90 months.

In other words, the federal upward adjustment provisions are unconstitutional. These include all specific offense characteristics (part (b) of each Chapter 2 guideline) that increase the offense level, all cross-references (part (c) or part (d) of some Chapter 2 guidelines) that increase the base offense level, all Chapter 3 adjustments that increase the offense level, and all upward departures under Chapter 5.

If the government tries to salvage these enhancement provisions by distinguishing the federal guideline scheme from the Washington state scheme, it

likely will fail. This Court can gain some insight into the government's views by reading the amicus brief of the United States in *Blakely*.

The government's principal argument to distinguish the federal sentencing scheme from Washington's was that "the federal Guidelines are not enacted by a legislature but are promulgated by the Sentencing Commission," which the Solicitor General correctly noted is an independent commission in the judicial branch. BRIEF OF THE UNITED STATES AS AMICUS CURIAE in *Blakely v. Washington*, No. 02-1632, at 26 (filed in U.S. S.Ct. January 23, 2004).

The majority opinion in *Blakely* made no mention of this distinction. The silence is telling. But Justice O'Connor addressed the Solicitor General's proposed distinction in dissent. She thought not much of it. "The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning." *Blakely*, 2004 WL 1402697 at *16 (O'Connor, J., dissenting). Justice O'Connor concluded, "The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction.". *Id*. Her analysis of the guideline enhancement provisions in Chapters 2 and 3 of the Guidelines "suggests [such provisions] will meet the same fate [as the Washington state enhancement provisions]." *Id*.

In this respect, Justice O'Connor's reasoning is convincing. The Sentencing Commission acts pursuant to express statutory authorization in

promulgating guidelines. 28 U.S.C. §§ 994(a)(1), (b)(1). Congress must approve all guideline amendments, if only by inaction. 28 U.S.C. § 994(p). Even the Commission's commentary has the force of law, provided that the commentary is not contrary to the Constitution or federal statute, and is not plainly erroneous or inconsistent with the guidelines themselves. *Stinson v. United States*, 508 U.S. 36, 47 (1993). The actual guidelines "'bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases.'" *Stinson*, 508 U.S. at 42 (quoting *Mistretta*, 488 U.S. at 391).

More fundamentally, the government's amicus brief in *Blakely* offered nought to support the idea that the judiciary has any more right to limit the Sixth Amendment right to a jury trial than has the legislature. If the issue is an individual accused's right to a jury trial, as it is under *Blakely*, it cannot matter which branch of government seeks to whittle away that right.

The Solicitor General's second effort to distinguish the federal guidelines from the Washington scheme observed that the latter state scheme uses a convicted-offense model, while the federal guidelines use a real-offense model in setting offense level. BRIEF OF THE UNITED STATES AS AMICUS CURIAE, at 27. That is true. But the distinction makes no difference at best, and at worst cuts against upholding the federal scheme after rejecting the Washington guidelines. The real-offense model is, if anything, more reliant on judicial fact-finding than the convicted-offense model. In permitting a judge to decide how far the real offense extends

beyond the narrow offense of conviction, it certainly vests more decisionmaking in "a lone employee of the state," *Blakely*, 2004 WL 1402697 at *10, not less. In that light, the federal real-offense model is at greater odds with the Sixth Amendment than Washington's convicted-offense model. The thrust of *Blakely* is that the Sixth Amendment entrenches an unmistakable preference for citizen juries as fact-finders, not lone judges.

So *Blakely*'s reasoning compels a conclusion that the enhancement provisions of the federal sentencing guidelines are unconstitutional. More accurately, they are unconstitutional if applied to a defendant who has not consented to judicial fact-finding on issues that increase his offense level, and has not admitted those facts. Unsurprisingly, at least two district judges have reached the conclusion that *Blakely* governs the federal sentencing guidelines. *United States v. Croxford*, No. 2:02-CR-00302PGC slip op. (D. Utah June 29, 2004) (Cassell, J.) (*Blakely* invalidates the entire federal guideline scheme); *United States v. Shamblin*, No. 2:03-00217 slip op. (S.D. W.Va. June 30, 2004) (Goodwin, J.) (*Blakely* invalidates only disputed upward adjustments; the federal guidelines otherwise apply).

Indeed, dictum in *Haddad* almost eleven years ago anticipated both *Blakely* and its application to the federal sentencing guidelines. In relevant part, *Haddad* considered an adjustment for obstruction of justice, U.S. SENTENCING GUIDELINE MANUAL § 3C1.1, and rejected it. The court held that an alleged threat to a prosecutor, assuming the defendant made it, was not conduct related to the

underlying charge of possessing a gun as a felon and could not support an obstruction enhancement. *Haddad*, 10 F.3d at 1266, citing U.S. SENTENCING GUIDELINE MANUAL § 1B1.3. A second basis for the obstruction enhancement, the defendant's supposed effort in court to influence his girlfriend's testimony, had inadequate factual support. *Haddad*, 10 F.3d at 1266.

As *Haddad* noted, then, the court had no need to decide a constitutional question; the obstruction enhancement failed under the guidelines themselves. Still, the senior district judge, sitting by designation, who authored the opinion added a footnote that now merits quoting at length:

> There are judges, and this judge is one of them, that believe that most of the "related conduct" enhancements are unconstitutional. *See United States v. Galloway*, 943 F.2d 897 (8th Cir.1991), *rehearing en banc*, 976 F.2d 414 (8th Cir.1992), *cert. denied*, 507 U.S. 974, 113 S.Ct. 1420, 122 L.Ed.2d 790, and *United States v. Clark*, 792 F.Supp. 637 (E.D.Ark.1992). Why? Because these enhancements are nothing more or less than *crimes* and, as such, trigger the requirements of the 5th and 6th Amendments to the constitution requiring separate indictment by a grand jury, criminal trial quality due process, the right of confrontation, trial by jury and proof beyond a reasonable doubt. Why must they be understood to be "crimes" and involve "criminal prosecutions" within the letter and spirit of those constitutional provisions? The answer is obvious if one agrees that a "crime" is any act or conduct, the proof of which will subject a person to lawful imprisonment and to a deprivation of his or her liberty for a period of months or years *and, without the proof of which, that person may not be so imprisoned*.
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> Under the old discretionary sentencing regime these constitutional problems simply did not arise. Congress

vested in Article III judges the authority to impose sentences within statutory limits and did not limit the manner of the exercise of that discretion. Proof of the crime charged released this broad sentencing discretion. *No proof of additional facts or conduct (that is, beyond the proof of the elements of the crime charged) was required* to permit any sentence within the *statutory* limits.

Under the new (post-November 1987) sentencing regime, the judge may not, in the exercise of discretion, impose a sentence greater than the top of the range permitted by the "Guidelines" for the offense of conviction unless additional facts or conduct are proved. So it is not now proper to state that these additional facts are just "sentencing factors" relating to the conviction of the crime charged in the indictment. Why? Because the maximum sentence for the crime charged is now precisely set by the Guidelines. Therefore any sentence *in addition thereto cannot possibly be for that crime*. No, *the additional sentence is based on proof of additional facts and conduct*. And the sentence imposed may not exceed the maximum sentence permitted under the guidelines for the offense of conviction, *absent* the proof of these additional facts, conduct or circumstances. Put another way, these additional facts, conduct or circumstances have nothing to do with the establishment of the maximum penalty for the crime actually charged.

For instance, the maximum sentence here without the "enhancement" for obstruction would be 21 months. Remember, the offense level would then be 12 and the criminal history category III yielding a range of 15 to 21 months. The sentence actually imposed was 25 months. But everyone acknowledges that the Court would not be able to impose a sentence above 21 months without establishing the "adjustment" of obstruction. So the extra four months sentence that the court imposed was not imposed for the crime of conviction (for which the maximum sentence was 21 months). It could only be imposed upon a finding of *obstruction*. Again, the 4 months' sentence is for "obstruction", and not for the crime

> charged (possessing the Intratec TEC-9, 9 millimeter, semiautomatic pistol having previously been convicted of a crime punishable by imprisonment for a term exceeding one year). So if the Court is sending Mr. Haddad to prison for 4 months for obstruction, and if the Court could not have sent him to prison for that 4 month period *without proof of that obstruction of justice*, how can it be argued that such obstruction is not a *crime*? And if it is a "crime," and if it is involved in a "criminal prosecution," why then do the 5th and 6th Amendments not apply? It is suggested that they do apply and that the U.S. Supreme Court will so hold if it ever accepts such a case. But the constitutional issue need not be reached here because the trial court did not meet the requirements of the current sentencing regime.

Id. at 1262 n.2 (italics in original).

Dictum though it was, that footnote foretold *Blakely's* holding with notable accuracy. Its logic also impels applying *Blakely* to the federal guidelines.

B. *Mistretta* Stays. While *Blakely* demurs from any direct opinion on the federal sentencing guidelines, 2004 WL 1402697 at *6 n.9, the same Court fifteen years ago devoted *Mistretta* to nothing but the guidelines. That decision presumably remains authoritative, notwithstanding a recent powerful opinion of the chief judge for the District of Massachusetts. *See United States v. Green*, No. 02-10054 slip op. (D. Mass. June 18, 2004) (declaring in Part Two that the United States Sentencing Guidelines offend *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002), and also anticipating *Blakely*). Today, then, this Court must reconcile *Blakely* with *Mistretta*.

Mistretta accepted wholeheartedly the congressional decision to establish the United States Sentencing Commission as "'an independent commission in the judicial branch of the United States.'" *Mistretta*, 488 U.S. at 368, quoting 28 U.S.C. § 991(a); *see also Mistretta*, 488 U.S. at 384-97. In cases involving the judicial branch, the Court reasserted its "vigilance" against assigning or allowing the judiciary to undertake "'tasks that are more properly accomplished by [other] branches.'" *Mistretta*, 488 U.S. at 383, quoting *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988). "Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary." *Mistretta*, 488 U.S. at 385.

The Court concluded that the Sentencing Commission's role was safely judicial. It summed up this way:

> Although the Guidelines are intended to have substantive effects on public behavior (as do the rules of procedure), they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime.

Id. at 396.

In the end, although *Mistretta* conceded that the Sentencing Commission is "an unusual hybrid in structure and authority," *id*. at 412, the Court

held that, "Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here." *Id*.

The government now asks this Court to use a jury to decide aggravating facts that support offense level increases. In making that suggestion, the government must argue at least tacitly that *Blakely* does not nullify outright the guidelines' upward adjustment provisions, but rather requires that such provisions apply only upon proof to a jury beyond a reasonable doubt of the predicate aggravating facts. As the argument must go, if the jury finds the government has proven those facts beyond a reasonable doubt, then this Court can apply the guideline enhancements that the facts trigger.

disagrees. *Mistretta* and the United States Constitution place at least two related obstacles in the government's path. Both are facets of the doctrine of separate powers implicit in the Constitution.

Congress set just three goals for the Sentencing Commission: assuring that courts meet the purposes of sentencing under the Sentencing Reform Act; providing certainty and fairness in sentencing, particularly by avoiding unwarranted sentencing disparities among defendants with similar records; and

reflecting "to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." *Id.* at 374. These certainly are sentencing goals, not the moral and political calculations of what primary conduct to proscribe. They are responses to crime, not definitions of it.

Additionally, *Mistretta* noted, Congress directed the Sentencing Commission to serve four purposes of sentencing. Those four purposes — fashioning a sentence proportional to seriousness of the crime, assuring deterrence, protecting the public, and providing needed correctional treatment to the defendant, *id.* — all sound in the traditional realm of sentencing. They do not extend to determining what conduct the law will prohibit or punish in the first instance.

In short, Congress never delegated to the Sentencing Commission the authority to define the elements of crimes, in whole or in part. Congress gave the Sentencing Commission the power only to set out the penalty ranges for committing such crimes, within congressional caps. Yet to apply the guidelines so that the upward adjustment provisions depend upon the Sixth Amendment right to a jury trial, alá *Apprendi*, would be to construe such provisions as defining criminal offenses. Because Congress never delegated to the Sentencing Commission the power to enact or define crimes, even were such a delegation in principle permissible under our constitutional framework, the upward adjustment guideline provisions cannot be rendered constitutional by reading into them a right to jury trial.

Again, the Court must reconcile *Blakely* with *Mistretta*. *Blakely* requires that any guideline adjustment that increases a defendant's sentence comply with the rule of *Apprendi*. That rule, a consequence of the Sixth Amendment's guarantee of a jury trial, requires that any fact potentially triggering an increased sentence appear first in an indictment and later to a jury beyond a reasonable doubt.

Apprendi and its precedents make clear that for constitutional purposes, a fact either is an element of an offense (with the constitutional guarantee that it is charged in an indictment and proved to a jury beyond a reasonable doubt) or is a mere sentencing factor, something a court can elect to take into account in sentencing with the bounds of its discretion. For example, in *Castillo v. United States*, 530 U.S. 120 (2000), the Supreme Court set out the issue in the opening paragraph of the decision: "In this case we once again decide whether words in a federal criminal statute create offense elements (determined by a jury) or sentencing factors (determined by a judge)." Similarly, in *Jones v. United States*, 526 U.S. 227, 232 (1999), the Court wrote, "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in an indictment, submitted to a jury and proven by the Government beyond a reasonable doubt."

Thus, the Supreme Court never contemplated or left open the possibility that there could be a tripartite classification of (i) elements (charged in the indictment and proved to a jury beyond a reasonable doubt), (ii) sentencing factors

(not charged in the indictment and only considered by a judge during the sentencing phase), and (iii) *Apprendi* sentencing factors (proved to a jury beyond a reasonable doubt but possibly not charged in the indictment because not considered elements). In effect, the government proposes that tripartite classification here.

Justice Thomas' concurrence in *Apprendi* demonstrated why the third category cannot be. The reason is that the *Apprendi* rule, according to Justice Thomas, is rooted in the fundamental question of what is and is not a crime. "This case turns on the seemingly simple question of what constitutes a 'crime.'" *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring). In other words, the *Apprendi* rule is fundamentally a question of what is and is not an element. Justice Thomas further explained:

> Sentencing enhancements may be new creatures, but the question that they create for courts is not. Courts have long had to consider which facts are elements in order to determine the sufficiency of an accusation (usually in an indictment). The answer that courts have provided regarding the accusation tells us what an element is, and it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case — here *Winship* and the right to a trial by jury.
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> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact — of whatever sort, including the fact of a prior conviction —

> the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact — such as a fact that is proportional to the value of stolen goods — that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since *McMillan,* is necessary. One need only look to the kind, degree or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at 500-501 (Thomas, J., concurring). On that reasoning, there can be no hybrid third category of *Apprendi* sentencing facts that somehow are not elements of the crime.

Blakely confirms a clean dichotomy between elements and sentencing factors, which leaves no room for a hybrid third category. At the very start of the majority opinion's legal discussion, Justice Scalia writes that the *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence . . . ." *Blakely*, 2004 WL 1402697 at *4. The second tenet is "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'" *Id*., quoting 1 J. Bishop, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872). The majority opinion's emphasis on this common-law tenet suggests unequivocally that any fact falling under the *Apprendi* rule is a fact that must be charged in the indictment as part of the crime charged against the defendant, and in the end proven

to the jury. Thus, *Blakely* and *Apprendi* leave no conceptual space for a fact that must be proved to a jury beyond a reasonable doubt and yet is distinguishable from an element of a criminal offense.

Accordingly, if a court attempts to cure *Apprendi* error with regard to guideline enhancements and the procedural framework by which they have been applied until now (on proof to a judge by a preponderance), and does so by requiring that the predicate facts for such provisions be charged in an indictment and proved to a jury beyond a reasonable doubt, then this construction of the sentencing guidelines and their enabling act transforms the predicate facts into elements of aggravated crimes. *Cf. Blakely*, 2004 WL 1402697 at *22 (Breyer, J., dissenting) (available option in wake of *Blakely* "would be for legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type of victim, presence of violence, degree of injury, use of gun, and so on").

That presents two problems under separation of powers doctrine. The first concerns one branch seizing power inappropriately from another. Here the judiciary takes power rightly belonging to the legislature. Courts refer to this power-grab problem as aggrandizement (of the grabbing branch) or encroachment (on the losing branch).

The second concerns one branch inappropriately ducking its political role, and thus its political accountability, by passing its power to another branch.

Usually the shift goes from the least politically insulated branch, the legislative, to the most politically insulated, the judicial. But in rare cases it may go from the legislative to the executive. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935) (invalidating congressional delegation to president of power to fix a code of fair competition under the National Industrial Recovery Act of 1933).

Either way, a court might conceive this not as a power-grab, but as a power-gift. The formal doctrinal category is non-delegation.

addresses these two separation of powers problems in that order.

1. ***Separation of Powers: Aggrandizement.*** In light of *Blakely*, specific offense characteristics that increase the offense level, Chapter 3 increases, and of course upward departures all now would rest on facts that the government must prove, and the jury must find, beyond a reasonable doubt (assuming again that the defendant does not waive relevant rights under the Sixth Amendment by plea agreement or otherwise). On that reasoning, factors that the Sentencing Commission, and the Sentencing Commission alone, identified and selected purport to determine whether a defendant is subject to an increased sentence or not. The new maximum sentence itself would be "statutory," as *Blakely* construed Washington's guideline scheme. *Blakely*, 2004 WL 1402697 at *4 ("Our precedents make clear, however, 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;" italics in original). In that respect, the federal guideline scheme is indistinguishable from Washington's.

A jury decides whether the accused committed a crime; its determination permits (or forecloses) sentencing, and therefore is a necessary step before a judge may impose a sentence at all. While judges still have a role in determining facts at sentencing, those facts now may not increase the maximum sentence — either guideline range or the traditional statutory cap — that the court may impose, with the sole exception of prior convictions. All other facts, committed to the jury, determine whether the defendant may be sentenced at all within the higher range.

Allowing juries to consider factual questions that the Sentencing Commission alone has identified accordingly would transform the Commission's work into rules that bind or regulate the "primary conduct" of the public. *Mistretta*, 488 U.S. at 396. The fact that the Sentencing Commission does *not* fill that role is what saved it from violating the principle of separation of powers, though. Indeed, allowing juries to decide facts that the Sentencing Commission alone deems significant would put that Commission in the business of exercising "legislative responsibility for establishing minimum and maximum penalties for every crime." *Id*. at 396. That is quintessentially what *Mistretta* decided the Sentencing Commission does *not* do, lest it aggrandize the judicial branch and encroach upon the legislative, contrary to the Constitution's structure of separate powers.

Because *Mistretta* persists, then, federal courts may not extend the Sentencing Commission's role to selecting facts that juries will be asked to find. Doing so would mean that the Sentencing Commission can set maximum sentences, and fix what the very crime of conviction entails. That role is the legislature's, not the judiciary's.

In short, *Blakely* holds on one hand that a jury must find the facts that determine a maximum sentence, even as a matter of the guideline range. *Mistretta* necessarily means on the other hand that the Sentencing Commission does not promulgate such facts for a jury's determination; Congress must. The constitutional principle of separation of powers reserves that role to the legislative branch, rather than allows it to the Sentencing Commission or any other actor in the judicial branch.

So neither judge nor jury may make factual determinations increasing the guideline range, as matters now stand. Why? Because it is no answer to a violation of the Sixth Amendment right to a jury trial that a federal court instead should trample the separation of powers doctrine. *Blakely* coexists with *Mistretta*. It certainly does not overrule or change the bounds that saved the Sentencing Commission under that decision fifteen years ago.

2. *Separation of Powers: Non-Delegation.* *Mistretta* also turned back an argument that Congress unconstitutionally delegated its power to the Sentencing Commission. The Supreme Court held that Congress provided an

"intelligible principle" to the Sentencing Commission in fulfilling its goals, and therefore permissibly did no more than "obtain[ ] the assistance of its coordinate Branches." *Mistretta*, 488 U.S. at 372.

The Sentencing Reform Act of 1984, by its plain language and its legislative intent, created an agency within the judicial branch, the United States Sentencing Commission, and delegated to that Sentencing Commission very specific powers with regard to federal sentencing law — and only with regard to federal sentencing law. *See* 28 U.S.C. § 991(b) (providing in pertinent part that "[t]he purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system . . . and develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code"). Nowhere did Congress delegate to the Sentencing Commission any authority or powers outside the area of federal sentencing. Specifically, Congress has not delegated its authority to create or expand through Sentencing Commission process any federal offense.

Congress in fact could not delegate to the Sentencing Commission that power. That such authority to create and define crimes, by naming their essential elements, resides alone with Congress is beyond dispute. Since the Crimes Act of 1790, an act that created the first serious federal offenses apart from those found in the Constitution, Congress has had exclusive authority over the

creation of federal felony offenses. As the Supreme Court noted in *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion):

> Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.

Moreover, whether Congress in principle can delegate to an agency the power to enact some federal crimes (at least serious federal crimes) or not, the simple fact here is that Congress has not tried to delegate that power to the United States Sentencing Commission. The Sentencing Reform Act includes no such delegation. The Supreme Court held as much in *Mistretta*. 488 U.S. at 371-79.

Therefore, because neither the Sentencing Reform Act of 1984 nor any other congressional act delegated to the Sentencing Commission the power to enact, promulgate or expand federal criminal offenses, and because construing guideline enhancement provisions to comply with the procedural protections of *Apprendi* and *Blakely* would transform the triggering aggravating facts into elements of new aggravated crimes, such a construction of the federal guidelines is unconstitutional. It would entail an improper delegation of legislative power to the judiciary.

C. Less Favored Alternative. If, and only if, the Court rejects the defendants' arguments, the Court will have to consider how to submit sentencing

guideline issues to a jury. The government might suggest a special verdict form, with interrogatories on potential offense level enhancements following the question of whether the government proved or did not prove ’s guilt.

Assuming the Court must address that suggestion because it finds no separation of powers violation and no impermissible delegation of legislative power to a judicial branch agency, proposes that the Court instead bifurcate the trial into guilt/innocence and sentencing phases. At the first phase, trial would proceed exactly as before *Blakely*. The jury would consider only whether the government had proven the statutory elements that Congress established, explicitly or implicitly, in defining the federal crimes charged here.

If the jury returns a guilty verdict, a second trial would commence on sentencing issues. There, the government would have an opportunity to present additional evidence on sentencing guideline issues that might increase ’s offense level. The defense would have an opportunity to answer that evidence. A government rebuttal case could follow. In the end, the government would bear the burden of proof beyond a reasonable doubt on those issues.

After appropriate instructions, the Court would submit the cause to the jury, with verdict forms allowing findings of “proven” or “not proven” as to each potential enhancement in dispute. This procedure would bear some similarity to the bifurcated trial that federal law, and the law of many states, decrees in capital prosecutions. *Compare* 18 U.S.C. § 3593(c), (d).

Again, does not prefer this procedure. He objects to it. But he thinks it better than submitting to the jury a special verdict form with interrogatories on sentencing enhancements.

III.

CONCLUSION

asks the Court to submit only a general verdict form, and to limit the jury's consideration to elements that Congress chose, explicitly or implicitly, in defining the criminal offense at issue here. In simplest terms, the Court should instruct this jury exactly as it would have instructed a jury before June 24, when the Supreme Court announced its decision in *Blakely*. At the same time, reiterates that he does not waive his right to a jury trial, or to the jury's finding on proof beyond a reasonable doubt, on any fact necessary to increase his sentencing guideline range above the base offense level under the Sentencing Guidelines. Only over objection, and as a less favored alternative, does concede that a bifurcated jury trial, at which the parties might contest in a sentencing phase any disputed offense level enhancements with the government bearing the burden of proof beyond a reasonable doubt, would be better than a special verdict submitted with the initial determination of guilt or innocence.

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Respectfully submitted,

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