

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**UNITED STATES OF AMERICA**

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**v.**

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**Criminal No. MJG-02-295**

**GEORGE PAUL CHAMBERS**

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S OBJECTION  
TO EMPANELING OF A SENTENCING JURY**

George Paul Chambers, by and through his counsel, James Wyda, Federal Public Defender, and Sarah Gannett, Staff Attorney, hereby objects to the government’s proposal that the Court empanel a special jury to decide sentencing enhancements under the United States Sentencing Guidelines in the wake of the Supreme Court’s ruling in *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531, 2004 WL 1402697 (2004). In support of this objection, Mr. Chambers submits the following memorandum of law.

**Background**

Mr. Chambers was convicted by a jury on March 23, 2004, of one count of use of an interstate commerce facility to engage in sexual activity, in violation of 18 U.S.C. section 2422(b), and one count of possession of child pornography, in violation of 18 U.S.C. section 2252A(5)(b). On June 23, 2004, the Court imposed a sentence of seventy-two months, applying United States Sentencing Guidelines (“U.S.S.G.”) sections 2G2.1 (Prohibited Sexual Conduct) and 2G2.4 (Possession of Materials Depicting a Minor). In applying these Guidelines, the Court assessed upward adjustments for “Specific Offense Characteristics” totaling eight points: (1) use

of a computer or internet access to entice a minor, U.S.S.G. § 2G1.1(b)(5)(B); (2) victim had not yet attained sixteen years of age, U.S.S.G. § 2G1.1(b)(2)(B); (3) material involved a prepubescent minor, U.S.S.G. § 2G2.4(b)(1); (4) possession resulted from use of a computer, U.S.S.G. § 2G2.4(b)(3). The Court also assessed upward adjustments for obstruction of justice, U.S.S.G. § 3C1.1, on both counts of conviction.

The following day, the Supreme Court issued its decision in *Blakely*, \_\_ U.S. \_\_, 124 S. Ct. 2531, 2004 WL 1402697, which called into question the constitutionality of applying such upward adjustments without affording the defendant the Sixth Amendment rights to a jury trial and proof beyond a reasonable doubt.<sup>1</sup> The Court promptly rescinded Mr. Chambers's sentence because it appeared to be "clear error" after *Blakely*. A new sentencing hearing was tentatively scheduled for September 20, 2004. At that hearing, the government has proposed that the Court should empanel a jury to decide the sentencing enhancements. The defense has objected to this procedure, and the Court has invited briefing on the objection.

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<sup>1</sup> *Blakely* applies the rule expressed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to a sentence imposed under Washington's Sentencing Reform Act. In *Apprendi*, the Court held that "[o]ther 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." *Id.* at 490. *Blakely* defines the statutory maximum for *Apprendi* purposes as "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*, 124 S. Ct. at 2537, 2004 WL 1406697 at \*4 (emphasis added). It rejects the notion that "statutory maximum" for *Apprendi* purposes is the maximum term of confinement set by the legislature. Using this definition of "statutory maximum," the Court ruled that the trial judge erred in increasing the defendant's sentence from the specified range of 49-53 months to 90 months based upon a judicial finding that the defendant acted with deliberate cruelty. Such a sentence could not be constitutionally imposed unless the facts supporting the finding of deliberate cruelty were found by a jury or admitted by the defendant.

## Summary of Argument

The Supreme Court's decision in *Blakely* reveals that all facts which increase a defendant's maximum sentence are elements of the substantive criminal offense that must be alleged in the indictment and proven to a jury beyond a reasonable doubt. Under the Sentencing Reform Act and the Sentencing Guidelines, however, such facts are not treated as elements which trigger Sixth Amendment protections, but instead are sentencing factors, to be found by the district judge based on a preponderance of the evidence. By empaneling a sentencing jury to find facts under the Guidelines, the Court would effectively rewrite federal law, because such a procedure is in direct conflict with the system Congress and the Sentencing Commission enacted. It is Congress, not this Court, that now must decide how to modify federal sentencing law in light of *Blakely*. The Court is without legal authority to create a procedural remedy.

In addition to being inconsistent with the intent of Congress and the Sentencing Commission, treating Guidelines enhancements as elements of an aggravated offense to be decided by a sentencing jury beyond a reasonable doubt would violate the constitutional separation of powers. The Sentencing Commission is an administrative agency within the Judicial Branch, and is without legislative authority to establish offense elements or statutory maximum penalties. In *Mistretta*, the Supreme Court ruled that Congress acted properly in placing the Commission in the Judiciary, because the Commission's authority was limited to promulgating guidelines that would constrain the discretion of **sentencing judges**. To now require that Guidelines factors be proven to a jury in a manner consistent with the Sixth Amendment would run afoul of *Mistretta*, and would impermissibly render the Commission's work product legislative in nature.

Even if the Court possessed the legal authority to act without violating the separation of powers doctrine, in this case—in which the defendant has already been tried and convicted—empaneling a sentencing jury to decide Guidelines enhancements beyond a reasonable doubt would violate the Fifth Amendment’s indictment and double jeopardy clauses. As “elements,” the enhancements to be proven at the sentencing proceeding should have been pled in the indictment, but they were not. To permit them to be tried to a sentencing jury would amount to constructive amendment of the charges in violation of the indictment clause and would be reversible error. Moreover, because the enhancements are functionally elements of an aggravated offense, empaneling a sentencing jury to decide them would amount to trial on the aggravated offense following conviction of the lesser included offense, a procedure that is forbidden by the double jeopardy clause.

For these reasons, this Court should decline to empanel a sentencing jury in this case.

### **Legal Argument**

**I. Under *Apprendi*, *Ring*, and *Blakely*, the facts necessary to establish a defendant’s maximum sentence are elements of the substantive offense that must be proven to a jury beyond a reasonable doubt.**

In a series of landmark cases, the Supreme Court has made clear that all facts which serve to increase a defendant’s sentencing exposure are elements of the substantive offense: “[T]hose facts setting the outer limits of a sentence . . . are elements of the crime for the purposes of the constitutional analysis.” *Harris v. United States*, 536 U.S. 545, 567 (2002). In the first of these cases, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that “[o]ther 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 proven beyond a reasonable doubt.” *Id.* at 490. In

reaching this decision, the Court noted that, as a historical matter, facts which “expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.” *Id.* at 483 n.10.<sup>2</sup>

The Supreme Court has reaffirmed this notion repeatedly since *Apprendi*. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’” *Id.* at 609. As the Court later put it in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), under *Ring*, “the underlying offense of ‘murder’ is a distinct, lesser included offense of ‘murder plus one or more aggravating circumstances.’” *Id.* at 111.<sup>3</sup> Similarly, in *Harris*, the

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<sup>2</sup> See also *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring):

[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 multifactor parsing of statutes . . . 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.

<sup>3</sup> See also *Sattazahn*, 537 U.S. at 111:

Our decision in *Apprendi* . . . clarified what constitutes an “element” of an offense for purposes of the Sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.

Court, while holding that *Apprendi* did not apply to findings which trigger a statutory mandatory minimum penalty (a decision called into question by *Blakely*), made clear that facts which increase a statutory maximum penalty must be treated as elements of an aggravated offense to be found by a jury under the reasonable doubt standard: “*Apprendi* said that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights.” 536 U.S. at 557; *see also id.* at 563:

[*Apprendi* facts] were what the Framers had in mind when they spoke of “crimes” and “criminal prosecutions” in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any “fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone,” the Court concluded, would have been, under the prevailing historical practice, an element of an aggravated offense.

(Citations omitted).

In *Blakely*, the Supreme Court strongly affirmed this notion in the context of guideline sentencing. In so doing, the Court again emphasized that the *Apprendi* rule—whereby facts that increase a defendant’s potential term of imprisonment must be submitted to a jury and proved beyond a reasonable doubt—reflects the longstanding tenet of common-law criminal jurisprudence that “‘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,’ 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872).” 124 S. Ct. at 2536 (footnote omitted).

The Supreme Court’s decisions from *Apprendi* through *Blakely* thus make clear that facts that increase a defendant’s sentencing range under the Guidelines are elements of an aggravated

offense that must be charged and proven to a jury beyond a reasonable doubt. However, as set forth below, this Court is not free to merely graft onto the Guidelines a procedure whereby a sentencing jury engages in fact finding, in an effort to make the Guidelines operate consistent with *Blakely*, because Congress and the Sentencing Commission have designed a much different system; the Court is not empowered to change that system; and to change the system would create other constitutional problems.

**II. Despite the fact that the Sixth Amendment requires that these “elements” be tried to a jury, the Court lacks the legal authority to empanel a sentencing jury to decide them.**

None of the Federal Rules of Criminal Procedure or pertinent statutes permit the Court to empanel a jury solely for the purpose of determining Sentencing Guideline enhancements. Nor do any rules or statutes permit the Court to empanel a different jury than the one which rendered a verdict at a totally separate proceeding. Lacking any such authority, this court cannot empanel a “sentencing jury” as a proxy for the judicial fact-finding mandated by the Rules of Criminal Procedure and the Sentencing Reform Act.

**A. This Court cannot empanel a sentencing jury without directly contravening federal law.**

To empanel a sentencing jury in this case would directly conflict with the procedure for making factual determinations under the Guidelines that was established by Congress and the United States Sentencing Commission. In the Sentencing Reform Act of 1984, Congress delegated to the Commission the authority to formulate federal sentencing policy. It is inarguable that, in enacting the statute, Congress envisioned a set of guidelines that would bind federal judges at sentencing, not a set of factual determinations to be made by a jury under Sixth Amendment standards. This intent is reflected throughout the statute and the Guidelines.

Congress was clear that the Commission was to “promulgate and distribute to all courts . . . guidelines . . . **for use of a sentencing court** in determining the sentence to be imposed in a criminal case[.]” 28 U.S.C. § 994(a)(1) (emphasis added). The Act states that “[**t**]he court . . . shall consider” the Guidelines, 18 U.S.C. § 3553(a) (emphasis added), and the Guidelines manual “directs **the court**” to determine the applicable guideline, the applicable specific offense characteristics, and any other applicable sentencing factors based on relevant conduct. U.S.S.G. § 1B1.2, cmt. n.2 (emphasis added).<sup>4</sup> Likewise, 18 U.S.C. section 3552 and Rule 32 of the Federal Rules of Criminal Procedure each set forth detailed procedures for the preparation and disclosure of presentence reports, objections to such reports, consideration of those objections **by the court**, and the issuance of rulings and written findings. *See* Fed. R. Crim. P. 32(i) (setting forth procedure for “**the court**” to resolve issues under Guidelines at sentencing) (emphasis added).<sup>5</sup>

The Sentencing Reform Act’s provisions for appeal also clearly reflect Congress’ intent that courts and not juries would make the factual determinations necessary to apply the Guidelines. *See* 18 U.S.C. § 3742(e) (courts of appeals “shall give due regard to the

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<sup>4</sup> *See also Koon v. United States*, 518 U.S. 81, 100 (1996) (“**the district court** must determine . . . whether the misconduct that occurred in the particular instance suffices to make the case atypical”) (emphasis added); *United States v. Edwards*, 523 U.S. 511, 513-14 (1998) (“The Sentencing Guidelines instruct **the judge** . . . to determine both the amount and the kind of ‘controlled substances’ for which a defendant should be held accountable.”) (emphasis in original).

<sup>5</sup> This intent also is reflected in numerous provisions of Federal Rule of Criminal Procedure 11, which require the Court to advise a defendant that it is “the court’s obligation to apply the Sentencing Guidelines.” Fed. R. Crim. P. 11(b). Nothing in Rule 11, however, requires the Court to advise the defendant that a jury will determine aspects of his sentence. *See* Fed. R. Crim. P. 11.

**opportunity of the district court** to judge the credibility of the witnesses, and shall accept **the findings of fact of the district court** unless they are clearly erroneous and . . . shall give due deference to the **district court’s application of the guidelines to the facts**”) (emphasis added).<sup>6</sup>

In addition to being inconsistent with these provisions, allowing a sentencing jury to make factual determinations under the Guidelines based on proof beyond a reasonable doubt also would directly conflict with the express requirement that such factual determinations be based on a preponderance of the evidence. *See* U.S.S.G. § 6A1.3, cmt. (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”); *see also United States v. Croxford*, \_\_\_ F. Supp.2d \_\_\_\_, 2004 WL 1521560 at \*8 (D. Utah July 7, 2004) (refusing to rewrite federal sentencing law by convening a sentencing jury to avoid *Blakely*, and noting, as one reason why, that, “while courts apply preponderance standard” at sentencing, “*Apprendi* and its progeny make clear that the companion right [to trial by jury is] to have the jury verdict based on proof beyond a reasonable doubt”) (quotation and footnote omitted), *adhered to* \_\_F. Supp. 2d \_\_, 2004 WL 1551564 (D. Utah July 12, 2004).<sup>7</sup>

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<sup>6</sup> The legislative history of the Act further supports the notion that the Guidelines were intended and designed to be applied by judges not juries. *See* Comprehensive Crime Control Act of 1983, S. Rep. No. 84-225, at 52-53 (1983), reprinted in 1984 U.S.C.C.A.N. 3184, 3235-36 (footnotes omitted) (explaining that “[t]he bill requires **the judge**” to apply the Guidelines in imposing a sentence).

<sup>7</sup> Equally troubling is that empaneling a sentencing jury would undermine the spirit and the structure of the federal rules which “generally are to be read in a holistic manner.” *Stern v. United States*, 214 F.3d 4, 14 (1<sup>st</sup> Cir. 2000). If a court acts in a manner which subverts the purpose of the rules, even absent direct conflict, that judicial action cannot stand. *See id.* (invalidating local rule regarding imposing judicial oversight on grand jury subpoenas involving counsel). Here the Federal Rules of Criminal Procedure are carefully divided into nine sections - each regulating the specific stages in a criminal case. The rules governing “Trial” are in Section

For all these reasons, there can be little doubt that the Sentencing Reform Act establishes criteria for sentencing judges, not sentencing juries.<sup>8</sup> A court may not simply ignore this textual reality by convening a sentencing jury, but instead must apply the scheme that was codified by Congress and established by the Commission. *See Croxford*, \_\_\_ F. Supp.2d \_\_\_\_, 2004 WL 1521560 at \*10-\*11 (sentencing jury “is not legally authorized and not practical”; as legal matter, “this solution is problematic because it effectively requires the courts to redraft the sentencing statutes and implementing Guidelines”); *United States v. Montgomery*, \_\_\_ F. Supp.2d \_\_\_\_, 2004 WL 1535646, \*3 (D. Utah July 8, 2004) (sentencing jury option is “unauthorized and practically unworkable”); *United States v. Mueffleman*, \_\_\_ F. Supp.2d \_\_\_\_, 2004 WL 1672320 at \*1 (D. Mass. July 26, 2004) (“[I]t is inconceivable that the system now required by [*Blakely*] is at all consistent with anything contemplated by the drafters of the Sentencing Reform Act or of the Guidelines. To literally engraft a system of jury trials

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VI, while the rules governing Sentencing are in section VII. To now implement a sentencing procedure so directly contrary to the structure of the Rules, and engraft onto that sentencing procedure rules reserved exclusively for trial, constitutes an impermissible judicial reworking of this structure.

<sup>8</sup> The reasoning of federal courts in upholding 21 U.S.C. section 841 against post-*Apprendi* constitutional attacks also supports the defense’s position. Courts emphasized that “[section 841] does not specify who shall determine drug quantity or identify the appropriate burden of proof for these determinations.” *United States v. Buckland*, 289 F.3d 558, 565 (9<sup>th</sup> Cir. 2002) (en banc). Noting that the statute in *Apprendi* expressly provided that the court should impose a the sentencing enhancement based on a preponderance of the evidence, these courts found “[t]his material difference” distinguished section 841 from the law invalidated in *Apprendi*. *Id.*; *see also United States v. McAllister*, 272 F.3d 228, 232 (4<sup>th</sup> Cir. 2001) (“Nothing in the statute purports to prescribe a *process* by which the elements of the crime and other relevant facts must be determined. Accordingly, nothing in § 841 conflicts with the *Apprendi* rule, which governs that *process* only.”) (citations omitted). Unlike section 841, and as in *Apprendi*, the Sentencing Reform Act and the Guidelines “explicitly provide[] for a . . . sentencing enhancement to be imposed based upon a finding of the trial court by a preponderance of the evidence.” *Buckland*, 289 F.3d at 565.

involving fact-finding enhancements onto the Sentencing Guideline[s] is to create a completely different regime than that comprehensive sentencing system envisioned by the legislation’s drafters or the drafters of the Guidelines.”) (citation omitted).

In its recent petition for a writ of certiorari filed in *United States v. Booker*, the Solicitor General recognized that sentencing juries run afoul of the language and structure of the Sentencing Reform Act and the Guidelines themselves: “The novel scheme that would result from superimposing jury trials on the Guidelines sentencing process would give birth to a radically different system from the one that Congress enacted and the Sentencing Commission created. . . . The Guidelines were plainly designed and written for application by judges, and their complexity and holistic nature would defy coherent application with an overlay of *Blakely* procedures. . . .”<sup>9</sup> And on this point the government is correct: convening a sentencing jury to decide disputed upward adjustments under the Guidelines based on proof beyond a reasonable doubt would directly conflict with the Sentencing Reform Act, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. Such a procedure would be far different from that which Congress and the Commission created.

The Supreme Court’s decision in *United States v. Jackson*, 390 U.S. 570 (1968), is directly on point, and reveals that this Court must not undertake to revamp the Sentencing Reform Act and the Guidelines by empaneling a sentencing jury. In *Jackson*, the Court held

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<sup>9</sup> See also DOJ Sample Brief, at 23 (“A system under which Guidelines enhancements (but not reductions) had to be submitted to a jury for determination beyond a reasonable doubt would contravene the clear intent of Congress and the Sentencing Commission.”); *id.* at 26 (“In short, the scheme that would result from trying to superimpose the jury system on enhancements (but not reductions) under the Guidelines would put in place a scheme that is so different from what Congress enacted (and the Sentencing Commission thought it was promulgating) that it would in essence be judicial lawmaking, not effectuation of congressional intent.”).

unconstitutional a provision of the Federal Kidnaping Act that authorized the death penalty only in cases involving a jury verdict. In an effort to salvage the provision, the government proposed a number of interpretations of the statute and cited *ad hoc* procedures developed by other district courts to cure the constitutional problem. The Court rejected each approach as requiring legislative, not judicial, action. *See id.* at 572–81. In particular, the government proposed a construction of the statute by which the trial court would retain authority to convene a special jury for the limited purpose of deciding whether to recommend the death penalty, *see id.* at 576–77, but the Court refused to adopt this proposal, emphasizing that “[t]he Government would have us give the statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme.” *Id.* at 578. As in *Jackson*, it is unnecessary for this Court to decide the legality of the scheme proposed here—empaneling a sentencing jury to decide factual disputes under the Guidelines—“for it is not in fact the scheme that Congress enacted.” *Id.* at 573.

**B. This Court is not empowered by statute, rule, or inherent supervisory power to act in a manner inconsistent with federal law.**

It is axiomatic that a Court’s authority to conduct proceedings in a criminal case is circumscribed by statute and the Federal Rules of Criminal Procedure. *See, e.g., Carlisle v. United States*, 517 U.S. 416 (1996) (a court cannot “develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.”); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 253–54 (1988) (holding district court may not act contrary to statute or procedural rules). Although courts are said to have “inherent supervisory authority” over administrative matters

such as courtroom decorum and docket control,<sup>10</sup> under no circumstances may a court exercise such authority in a manner that conflicts with any rule, statute or constitutional principle. *See, e.g., United States v. Payner*, 447 U.S. 727, 737 (1980) (supervisory power does not allow the court to “disregard the considered limitations of the law it is charged with enforcing.”). This is so even where the Court’s actions may be workable and level-headed because “[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.” *Bank of Nova Scotia*, 487 U.S. at 254 (quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985)).

Similarly, Rule 57 of the Federal Rules of Criminal Procedure, as essentially a codification of such authority, only permits a court to act in a manner “consistent with” the remaining rules of criminal procedure. Fed. R.Crim. P. 57(b). Accordingly, the court may use Rule 57 to address “only interstitial matters;” but it may **not** invoke this rule to “create or affect substantive rights” or to “institute basic procedural innovations.” *Stern*, 214 F.3d at 13 (internal quotation marks and citation omitted). *See also Baylson v. Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102, 107 (3<sup>rd</sup> Cir. 1992) (Rule 57 is designed only to allow courts to fill in “matters of detail” regarding courtroom procedure left open by other rules).<sup>11</sup>

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<sup>10</sup>Where a court invokes its inherent supervisory authority to act in the absence of a governing statute or rule, its power in this context is “exceedingly narrow,” and used “sparingly” and most appropriately in “situations that do not lend themselves to rules of general application.” *United States v. Harrison*, 716 F.2d 1050, 1053 n.1 (4<sup>th</sup> Cir.1983) (internal quotation marks and citation omitted); *see also United States v. Aisenberg*, 358 F.3d 1327, 1347 (11<sup>th</sup> Cir. 2004); *United States v. Pacheco-Ortiz*, 889 F.2d 301, 308 (1<sup>st</sup> Cir. 1989).

<sup>11</sup> At least one court has suggested that Rule 57 may be invoked as authority for empaneling an advisory sentencing jury. *See United States v. Khan*, 2004 WL 1616460 at \* 9 (E.D.N.Y. July 20, 2004) (suggesting that courts should “borrow” civil practice of using advisory juries). There are several problems with this suggestion. First, an “advisory” jury

In *United States v. Carlisle*, 517 U.S. 416 (1996), for example, the Supreme Court invalidated a district court’s untimely granting of a motion for Judgment of Acquittal because such action violated the express timing provisions governing acquittal motions under Rule 29(a) of the Federal Rules of Criminal Procedure. In so holding, the Court specifically noted that neither Rule 57, nor the Court’s inherent supervisory authority, permits a district judge to go beyond the seven-day time frame for ruling on a post-verdict motion for judgment of acquittal. *See id.* at 425. Such a deviation from the timing provision of Rule 29, the Court held, amounts to acting “inconsistent” with the established rule. *Id.* at 425-26. The Court reasoned that “federal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions.” *Id.* at 426 (*quoting Bank of Nova Scotia*, 487 U.S. at 254-55).<sup>12</sup>

Lower courts following *Carlisle* have compelled district courts to adhere strictly even to the timing provisions of procedural rules without regard for the reasoning behind the district court’s exceeding the bounds of such rules. *See, e.g., United States v. Diaz-Clark*, 292 F.3d 1310, 1317 (11<sup>th</sup> Cir. 2002) (holding district court’s modification of sentence outside time period

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would not fulfill the defendant’s Sixth Amendment right as defined in *Blakely*, because the jury would not be the ultimate fact-finder. Second, the analogy to civil practice is flawed because an advisory jury is only permitted under the civil rules in “actions not triable of right by a jury,” Fed. R. Civ. P. 39(c), and *Blakely* explicitly makes sentencing enhancements triable of right by a jury. Finally, as noted above, use of an advisory jury would be “inconsistent with” the remaining rules of criminal procedure—particularly Rule 32—and therefore would fall outside the ambit of Rule 57.

<sup>12</sup> Notably, in *Carlisle*, the district judge’s only exercise of authority beyond that expressly provided in Rule 29 was extending the time period for granting an acquittal motion. The district judge did not create new powers not already enumerated in Rule 29. Nonetheless, even a slight deviation from the timing provisions of Rule 29 constituted an unwarranted exercise of the district judge’s powers. *See id.*

established in Rule 35 “is an action taken without the requisite jurisdiction, and is a legal nullity”); *United States v. Hall*, 214 F.3d 175 (D.C. Cir. 2000) (reversing district court’s granting of new trial motion after deadline established by Fed. R. Crim. P. 33); *see also United States v. McVeigh*, 931 F. Supp. 753, 755 (D. Colo. 1996) (“The Supreme Court [in *Carlisle*] has very recently made it clear that a district court has no authority to depart from the requirements of the Federal Rules of Criminal Procedure.”).

Here, the Court’s proposed empaneling of a sentencing jury goes far beyond the timing violation at issue in *Carlisle*. As discussed above, the proposal amounts to a wholesale revamping of the Criminal Rules and pertinent sentencing statutes. As such, it is patently and completely unauthorized.

**C. This Court cannot act inconsistently with statutes or rules, even to remedy constitutional problems with established law.**

Because empaneling a “sentencing jury” would directly conflict with the Rules of Criminal Procedure and the Sentencing Reform Act, the Court is without authority to invoke this procedural novelty. This is so even though the Court acts with the purpose of curing constitutional defects arising from applying the Sentencing Guidelines in the wake of *Blakely*. Where a criminal sentencing provision has been declared unconstitutional, a court cannot “create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.” *Jackson*, 390 U.S. at 580.<sup>13</sup>

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<sup>13</sup> The fact that Congress has authorized such a procedure in the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598, does not, as some courts have suggested, give judges the freedom to empanel sentencing juries to save the U.S.S.G. after *Blakely* without such legislative authorization.

As discussed above, in *Jackson*, the Supreme Court flatly rejected a court’s ability to empanel a separate sentencing jury to remedy a constitutional defect in the federal kidnaping statute’s sentencing regime. *See id.* at 576-77 (“Equally untenable is the Government’s argument that the Kidnaping Act authorizes a procedure unique in the federal system – that of convening a special jury, without the defendant’s consent, for the sole purpose of deciding whether he should be put to death.”). In vigorously rejecting the proposal to empanel a sentencing jury, the Court highlighted the chaos and judicial overreaching such a “remedy” would create:

The Government would have us give the [kidnaping] statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme. Not a word in the legislative history so much as hints that a conviction on a plea of guilty or a conviction by a court sitting without a jury might be followed by a separate sentencing proceeding before a penalty jury . . . [t]he background against which Congress legislated was barren of any precedent for the sort of sentencing procedure we are told Congress impliedly authorized.

*Id.* at 578.

Further, the Court explained that a district court, absent Congressional authority, cannot institute entirely new penalty phase procedures involving a “sentencing jury” as a fix to a constitutional violation. The Court reasoned:

It is one thing to fill in a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from the charge of unconstitutionality. . . [the Government] asks us to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, **without the compulsion of a legislative mandate and without the benefit of legislative guidance. That we decline to do.**

*Id.* at 580-81 (emphasis added).

The Court went on to note that a judicial “fix” of this nature would be “fraught with the

gravest difficulties” in light of the total absence of any rules or statutory provisions involving a “sentencing jury”:

If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy? Congress, unlike the state legislatures that have authorized jury proceedings to determine the penalty in capital cases, has addressed itself to none of these questions.

*Id.* at 580 (footnotes omitted).

Here, the proposed empaneling of a sentencing jury to remedy the constitutional infirmities of the Sentencing Guidelines cannot survive under *Jackson*. Like *Jackson*, this Court’s proposal would create an entirely new sentencing scheme with no legislative basis or guidance. Also, like *Jackson*, many of the same “grave difficulties” abound with empaneling a sentencing jury in this case. Without any legislative authority to convene a “sentencing jury,” huge questions remain regarding the procedural scheme that this court can or would employ.

They include:

- How is the defendant’s right to remain silent affected?
- How can Rule 16, which governs discovery, at “trial,” be extended to this proceeding?
- How many peremptory challenges must the court allow?
- Is the defendant afforded the Speedy Trial Act protections?
- Can the defendant’s move for judgment of acquittal pursuant to Rule 29?
- Can the defendant request a “new trial” pursuant to Rule 33, and if so, how does the seven-day window for requesting such new trial function in light of the first jury having rendered a guilt verdict months ago?
- What will happen in the event of a hung jury? Can the court empanel a separate “sentencing jury” to re-litigate these matters?
- Does a “sentencing jury” require juror unanimity?

All of the above questions invoke procedural or statutory authority that circumscribes the Court’s power at *trial*. No comparable legislative authority exists to extend such provisions to a

“sentencing jury” in whole or in part. Thus, as in *Jackson*, the constitutional infirmities with the existing sentencing regime under *Blakely* “require comprehensive legislative and not piecemeal judicial action.” *Id.* at 579 n.17.

**D. Congress, not the Court, must implement any procedural changes to make the Act comply with the Constitutional dictates of *Blakely*.**

Finally, the Court’s empaneling a sentencing jury cannot stand because it amounts to the Court improperly rewriting laws enacted by Congress in an effort to cure a constitutional defect. Where a court declares a statute unconstitutional, it cannot then “redraft” that law to pass constitutional muster. *See, e.g. Freedman v. Maryland*, 380 U.S. 51, 60 (1965) (having declared state law unconstitutional, but then left “for the State to decide” how to cure the infirmity); *United States v. Evans*, 333 U.S. 483, 495 (1948) (where criminal penalty in statute unconstitutionally ambiguous, Court refuses to give statute one meaning because “[i]t is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make”); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (where statute is constitutionally infirm, Courts will not interpret statute contrary to its plain meaning to cure infirmity because “it is for Congress, not this Court, to rewrite the statute”); *see also Jackson*, 390 U.S. at 579 n.17, 580.<sup>14</sup>

This is so because Congress, not the Court, is empowered to enact laws, and thus, only Congress can choose how to remedy a constitutional defect in its laws. *See United States v.*

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<sup>14</sup> Enacting affirmative procedural changes is distinguishable from severing the Guidelines to make them comply with *Blakely*, *see, e.g., United States v. Ameline*, \_\_\_ F.3d \_\_\_2004 WL 1635808 (9<sup>th</sup> Cir. July 21, 2004) and from declaring the Guidelines unconstitutional as a whole, *see, e.g., United States v. Croxford*, 2004 WL 1551564; either of those approaches would be appropriate, traditional judicial action.

*Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.) (“It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”); *see also Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6<sup>th</sup> Cir. 1991) (“courts do not rewrite statutes to create constitutionality”) (citing *American Booksellers Assn*, 484 U.S. 383, 397 (1988) (stating that “we will not rewrite a state law to conform it to constitutional requirements.”); *United States v. Kaluna*, 152 F.3d 1069, 1083 n.17 (9<sup>th</sup> Cir. 1998), *rev’d on other grounds*, 161 F.3d 1188 (9<sup>th</sup> Cir. 1999) (in striking down three-strikes law, court notes that “we cannot simply revise the burden of proof” in that statute because “[t]o do so would require us to rewrite the statute.”).

Here, empaneling a “sentencing jury” absent Congressional authority would amount to an improper “rewriting” of legislation. Congress enacted a sentencing scheme that required judges, not juries, to determine the propriety of upward adjustments under the Sentencing Guidelines. *See e.g.*, Fed. R. Crim. P. 32; 18 U.S.C. § 3553. Nowhere did Congress provide for a jury to supplant the Court’s factfinding role at sentencing. Thus, while *Blakely* renders that scheme constitutionally infirm, it does not authorize the Court to enact an alternative sentencing mechanism that flatly contradicts the scheme originally enacted by Congress. *See Harris*, 536 U.S. at 556 (declining to adopt “a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed”); *United States v. Albertini*, 472 U.S. 675, 680 (1985) (“Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.”).

Because empaneling a jury to determine sentencing guideline adjustments post-*Blakely* is neither “practically workable or legally authorized,” numerous lower courts have refused to do

so. *Croxford*, 2004 WL 1521560; *see also Motions Hearing and Disposition Transcript* at 22-23, *United States v. Moran* (D. Mass. Jul. 8, 2004) (Cr. No. 02-10136-REK) (rejecting Government invitation to convene a “sentencing jury” to decide guideline adjustments to which defendant did not stipulate when he plead guilty to the indictment) available at <http://www.ussguide.com> (attached as Exhibit A); *Montgomery*, 2004 WL 1535646 at \*3 (D. Utah, Jul. 8, 2004) (on motion to reconsider sentence, court refusing to empanel sentencing jury to revisit upward adjustment following rationale of *Croxford*); *Motions Hearing Transcript* at 7-10, *United States v. Watson* (D.D.C. Jun. 30, 2004) (Cr. No. 03-0146-TPJ) (revisiting sentence pursuant to Rule 35 post-*Blakely*, court subtracts 14 points that were added as a result of judicial findings and resentences defendant; court does not empanel a sentencing jury), available at <http://www.ussguide.com> (attached at Exhibit B); *see also Conference Transcript* at 415-16, *United States v. Roberts* (S.D.N.Y. July 9, 2004) (Cr. No. 03-1369-LAK) (rejecting invitation to submit special verdict forms for jury to decide guideline adjustments) available at <http://www.ussguide.com> (attached at Exhibit C); *United States v. Medas*, \_\_\_ F. Supp. \_\_\_, 2004 WL 1498183 at \*10-11 (E.D.N.Y. July 1, 2004) (refusing to send Guideline adjustment to jury if jury were to return a guilty verdict). For the same fundamentally sound reasons, this Court too should refuse to empanel a sentencing jury in Mr. Chambers’s case.

**III. Even if the Court could find authority for empaneling a sentencing jury, to do so would raise significant constitutional questions, including violation of the separation of powers, violation of the indictment clause, and violation of the prohibition against double jeopardy.**

In seeking to remedy the Sixth Amendment infirmities in the Sentencing Guidelines after *Blakely* by empaneling a sentencing jury, the Court will create more constitutional problems than it solves. To begin with, empaneling a sentencing jury to decide Sentencing Guidelines

“elements” would effectively convert the work product of the Sentencing Commission into legislation, in violation of the doctrine of constitutional separation of powers. And, in this case, which already has proceeded to trial and conviction, empaneling a sentencing jury to decide Sentencing Guidelines “elements” would raise serious indictment clause and double jeopardy concerns.

**A. To treat Guidelines factors as elements of an aggravated offense to be found by a sentencing jury beyond a reasonable doubt would render the Sentencing Commission’s work product legislative in nature, in violation of the constitutional separation of powers.**

In *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court found that Congress had violated neither the nondelegation doctrine nor the constitutional separation of powers by enacting the Sentencing Reform Act, establishing the Sentencing Commission, and providing it with the authority to create Guidelines, because the Commission was not creating maximum penalties or imposing requirements on juries, but instead was promulgating binding guidelines for sentencing judges. To now reinterpret the Guidelines as establishing elements to be proven to a jury beyond a reasonable doubt would present the very separation of powers violation that Congress previously avoided. *See, e.g., Staples v. United States*, 511 U.S. 600, 604 (1994) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”) (quotation omitted); *Harris*, 536 U.S. at 549 (“Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts.”); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (“Federal crimes are defined by Congress[.]”); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (“[L]egislatures . . . define criminal liability.”).

In the Sentencing Reform Act, Congress created the Sentencing Commission and, in an

extraordinary step, placed it in the Judicial Branch. *See* 28 U.S.C. § 991(a). Congress then delegated to the Commission very specific powers in regard to federal sentencing law—and only in 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 in the Act did Congress delegate to the Commission any authority or powers outside the area of federal sentencing, and, in particular, Congress did not delegate the authority to create or expand any federal offense. *See Mistretta*, 488 U.S. at 371-79.<sup>15</sup>

In *Mistretta*, the Supreme Court affirmed the validity of the Sentencing Reform Act and the Sentencing Commission. In particular, the Court found that it was proper to place the Sentencing Commission in the Judicial Branch, and that Congress had not impermissibly expanded the Judiciary’s authority by doing so, because federal judges traditionally had decided the precise questions now assigned to the Commission: what sentences are appropriate for what criminal conduct under what circumstances. *See* 488 U.S. at 395. The Court thus concluded

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<sup>15</sup> Indeed, Congress could not have delegated that power to the Sentencing Commission even if it had wanted to do so. The authority to create and define crimes, by naming their essential elements and establishing the statutory maximum penalty, is legislative in nature, not judicial, and resides solely with Congress. *See Mistretta*, 488 U.S. at 371-72 (“[T]he integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch.”) (quotation omitted); *see also 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.”).

that the Sentencing Reform Act was constitutional because the Guidelines “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.” 488 U.S. at 396. “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.* at 412. *Cf. United States v. Kinter*, 235 F.3d 192, 201 (4<sup>th</sup> Cir. 2000) (“The Sentencing Guidelines do not create crimes. They merely guide the discretion of district courts in determining sentences within a legislatively-determined range, and this discretion has been entrusted to the federal courts from the beginning of the Republic.”) (quotation omitted).<sup>16</sup>

*Mistretta* provides yet one more reason to not convene a sentencing jury in this case. For a jury to consider factual questions that the Sentencing Commission alone has identified would transform the Commission’s work product into rules that bind or regulate the “primary conduct” of the public. But the fact that the Sentencing Commission does **not** fill that role keeps it from violating the separation of powers principle. Indeed, allowing juries to decide facts that the

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<sup>16</sup> *See also Kinter*, 235 F.3d at 201 (citation and quotation omitted):  
[T]he Commission’s act of establishing sentencing ranges in the Guidelines is categorically different from the legislative act of setting a maximum penalty in a substantive criminal statute. The Commission’s task is not the fundamentally legislative one of creating and delineating hundreds of new crimes through the Guidelines. Instead, the Sentencing Guidelines are merely a constitutional mechanism for channeling the discretion that a sentencing court would otherwise enjoy in the absence of the Guidelines.

Sentencing Commission deems significant would put the Commission in the business of exercising “legislative responsibility for establishing minimum and maximum penalties for every crime.” That is exactly what *Mistretta* decided the Sentencing Commission may **not** do, lest it aggrandize the judicial branch and encroach upon the legislative, contrary to the Constitution’s structure of separate powers.

For all these reasons, convening a sentencing jury in this case to determine factual issues defined solely by the Sentencing Commission would violate the separation of powers doctrine, because Congress alone must determine the facts that are essential to a federal offense and establish the maximum penalty, and would entail an impermissible delegation of the legislative power to an administrative agency in the Judicial Branch.

**B. To treat Guidelines factors as elements of an aggravated offense to be found by a sentencing jury beyond a reasonable doubt would violate the indictment clause.**

The Fifth Amendment to the United States Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” The right to indictment was not implicated in *Apprendi* or *Blakely*, because it is a federal right that is not applicable in state prosecutions; however, in *Apprendi*, the Court acknowledged that in federal cases, “[t]he judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment.” *Apprendi* at 483 n.10 (2000). Thus, in federal prosecutions, *Apprendi* facts—facts that increase the penalty for a crime beyond the statutory maximum—must not only be submitted to a jury, and proved beyond a reasonable doubt; they must also be charged in the indictment. *See United States v. Cotton*, 535 U.S. 625, 632 (2002) (noting government’s concession “that the indictment’s failure to allege a fact, a drug

quantity, that increased the statutory maximum sentence rendered respondents' enhanced sentences erroneous . . . ."); *see also* Reply Brief on Petition for Certiorari for the United States, *United States v. Fanfan*, No. 04-105 at 4 ("in a federal case the grand jury right goes hand-in-hand with the rights identified in *Apprendi*).

As discussed above, the Court's decision in *Blakely* expanded the category of *Apprendi* facts by redefining "statutory maximum" to mean the base offense level supported by the jury verdict—that is, the maximum sentence that may be imposed without additional fact-finding by the court. *See Blakely*, 124 S. Ct. at 2536, 2004 WL 1402697 at \*4. Because, after *Blakely*, sentencing "enhancements" called for by the Guidelines necessarily increase the redefined statutory maximum, they must be charged in the indictment. In this case, neither the enticing enhancement—that the minor was between thirteen and sixteen years of age—nor the child pornography enhancement—that the pornography depicted prepubescent minors—was pled in the indictment.

The district court cannot remedy these defects in the indictment by empaneling a jury. To do so would amount to impermissible constructive amendment of the indictment and would constitute reversible error. "The basic protection of the grand jury was designed to afford [may not be] defeated by a device or method which subjects the defendant to prosecution for [something] which the grand jury did not charge." *Stirone*, 361 U.S. 212, 218 (1960) (reversing lower court's decision to charge jury on theory of prosecution not contained in the indictment). *Cf. United States v. Randall*, 171 F.3d 195, 203, 210 (4<sup>th</sup> Cir. 1999) (holding that lower court should not have permitted government's broadening of bases of conviction to include predicate offenses not alleged in indictment); *United States v. Floresca*, 38 F.3d 706, 710 (4<sup>th</sup> Cir. 1994)

(reversing lower court’s instruction permitting jury to convict of different provision of witness tampering law than charged in indictment).

It is well settled that indictment may not be amended except by resubmission to the grand jury. *See Russell v. United States*, 369 U.S. 749, 770 (1962); *Stirone*, 361 U.S. at 215-216 (“after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself”). In candid recognition of this constitutional limitation, the Department of Justice has advised its prosecutors: “[A]bsent an indictment that alleges the applicable Guideline factors, a request to empanel a sentencing jury would probably not be well founded.” Memorandum from Christopher A. Wray, Assistant Attorney General at 16. Indeed, “[i]f it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to the suggested changes, the great importance which the common law attaches to an indictment by a grand jury . . . may be frittered away until its value is almost destroyed.” *Stirone*, 361 U.S. at 216 (1960) (quotation omitted).

**C. To treat Guidelines factors as elements of an aggravated offense to be found by a sentencing jury beyond a reasonable doubt would violate the prohibition against double jeopardy.**

The Fifth Amendment also provides that an accused “shall [not] be subject for the same offense to be twice put in jeopardy.” The government has conceded “that there are substantial double jeopardy concerns” with empaneling a sentencing jury.” Memorandum from Christopher A. Wray, Assistant Attorney General at 2. These concerns also have been acknowledged by the courts. *See, e.g., Ameline*, 2004 WL 1635808 at \* 13 (commenting that “[if] the facts sought to be proven by the government to enhance [the defendant’s] sentence constitute elements of a

statutory offense . . . the constitutional prohibition of double jeopardy would [ ] be implicated.”); *Booker*, 2004 WL 1535858 at \* 5 (suggesting that empaneling a jury “will not work if the facts that the government would seek to establish in the sentencing hearing are elements . . .”).

As discussed above, after *Blakely*, sentencing “enhancements” called for by the Guidelines are actually “elements” of an aggravated offense. As a result, empaneling a jury to decide enhancements after a conviction on the base offense would violate double jeopardy because it would amount to a trial on an aggravated offense following conviction of a lesser included offense. For this reason, the Court may not submit to a jury the adjustments to the enticing and pornography guidelines at issue in this case. To do so would be to try Mr. Chambers a second time for what double jeopardy jurisprudence terms the “same” offenses.

Two offenses are the “same offense” for double jeopardy purposes if they contain the same elements. *See United States v. Dixon*, 509 U.S. 688, 696 (1993) (finding that convictions for contempt based on violations of release conditions precluded prosecution for domestic violence and drug offenses that formed the basis for the violations of release conditions). If each offense “requires proof of an additional fact which the other does not,” then the offenses are not the “same.” *Blockburger v. United States*, 284, U.S. 299, 304 (1932) (holding that sales of drugs on different days, one time not “in or from” original stamped package, one time without separate order, were separately punishable). This test is commonly referred to as the “*Blockburger* test.”

In this case, the offenses proved at trial—enticing a minor and possession of child pornography—and the offenses proposed to be proved to a sentencing jury—aggravated enticing a minor and aggravated possession of child pornography—are the same, and do not pass the *Blockburger* test. Instead, the offenses proved at trial are lesser included offenses, because their

elements constitute “a subset” of the elements of the greater offenses proposed to be proved to a sentencing jury. *Schmuck v. United States*, 489 U.S. 705, 716 (1989). The greater offenses—enticing a minor between twelve and sixteen years of age, and possession of child pornography depicting prepubescent minors—simply require proof of an additional element than was proved at trial, that is, that the minor enticed was between twelve and sixteen years of age, and that the child pornography possessed depicted prepubescent minors. *Compare United States v. Frazier*, 89 F.3d 1501, 1504-05 (11<sup>th</sup> Cir. 1996) (holding that double jeopardy barred convictions for possession with intent to distribute cocaine base and possession with intent to distribute cocaine base within 1,000 feet of an elementary school because first is lesser included offense of second).

Having been tried and convicted of the lesser included offenses—simple enticing and possession of child pornography—Mr. Chambers may not be tried for the greater offenses of aggravated enticing and aggravated possession of child pornography. *See Illinois v. Vitale*, 447 U.S. 410, 421 (1980) (holding that “a conviction on a lesser included offense bars subsequent trial on the greater offense”); *see also Brown v. Ohio*, 432 U.S. 161, 169 (1977) (holding that “[w]hatever the sequence may be,” successive prosecution for the greater offense following the termination of jeopardy on an included offense, or the opposite, “the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense”). Thus, the Court may not empanel a sentencing jury to consider the “enhancements” in this case.

### **Conclusion**

Empaneling a sentencing jury to address the *Blakely* problems with the Sentencing Guidelines seems such a simple solution that several courts have suggested it without conducting

any analysis or providing any authority to support it. *See, e.g., Booker*, 2004 WL 1535858 at \*5.

In reality, this “solution” is lawless, and fraught with serious flaws.

WHEREFORE, for the foregoing reasons, Mr. Chambers respectfully requests that this Honorable Court refuse to empanel a sentencing jury to decide Sentencing Guidelines enhancements in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_\_ day of August, 2004, a copy of the foregoing Memorandum was hand-delivered to: Ari Casper, Assistant United States Attorney, Office of the United States Attorney, 101 West Lombard Street, 6625 U.S. Courthouse, Baltimore, Maryland 21201.

\_\_\_\_\_  
SARAH GANNETT  
Staff Attorney