TESTIMONY
United States Senate Committee on the Judiciary
***Blakely v. Washington* and the Future of the Federal Sentencing Guidelines**
13 July 2004

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Joint Prepared Testimony of
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Mr. Chairman and Distinguished Members of the Committee, we are here this morning as Vice Chairs of the United States Sentencing Commission. We want to thank you for holding this very timely hearing and inviting us to testify today regarding the impact of the U.S. Supreme Court's decision in *Blakely v. Washington* on the current and future operation of the federal sentencing guidelines. The *Blakely* decision represents potentially the most significant case affecting the federal guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta v. United States*, particularly if it is, in fact, extended to the federal sentencing guidelines. The *Blakely* decision already has raised significant concerns regarding the validity of the federal guideline system.

Over the past three weeks, the Sentencing Commission has worked intensively with Congress, the Department of Justice, representatives of the federal judiciary, and other interested persons to analyze the impact of the Supreme Court's decision and help guide the discussion concerning the future of the federal sentencing guidelines system. We, along with Vice Chair Judge Ruben Castillo, chair-nominee Judge Ricardo Hinojosa, Commissioners Michael O' Neill and Michael Horowitz, and the entire Sentencing Commission staff stand ready to assist Congress as you navigate the post-*Blakely* waters.

Even if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be. The viability of the federal guidelines previously was called into question by some after the Supreme Court decided *Apprendi v. New Jersey*.[1] After an initial period of uncertainty, however, the circuit courts issued opinions and the Department of Justice instituted procedures to ensure that future cases complied with *Apprendi's* requirements and also left the guidelines system intact.

In light of the *Blakely* decision, the Department of Justice already has instituted procedures which would protect the overwhelming majority of future cases from *Blakely*

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[1]530 U.S. 466 (2000).

infirmity. The Department of Justice has issued detailed guidance for every stage of the prosecution from indictment to final sentencing, including alleging facts that would support sentencing enhancements and requiring defendants to waive any potential *Blakely* rights in plea agreements.[2] It is also worth noting that a majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*.

The court system also appears to be working expeditiously on the *Blakely* issue, as we would expect. In the last two business days, two circuits – the Fifth and Seventh Circuits – have issued opinions regarding the applicability of *Blakely* to the federal sentencing guidelines. A Fifth Circuit panel issued a 3-0 decision finding that *Blakely* does not apply to the federal guidelines,[3] and a well-respected judge in the Seventh Circuit reached a similar conclusion in a dissenting opinion.[4]

Our testimony today focuses on some of the unique characteristics of the federal sentencing guidelines system, offers some observations about what we understand are some of the legislative ideas Congress may be considering to remedy temporarily any potential *Blakely* problems that may exist within the federal sentencing system, and expresses our critical need for a chair and a full slate of confirmed commissioners to assist in meeting these new challenges.

The Federal Sentencing Guidelines Remain Valid

At the outset, we wish to state our belief that the federal sentencing guidelines remain valid despite the *Blakely* decision. We understand, however, that the federal district, circuit appellate, and ultimately, the U.S. Supreme Court will have to make that determination. We simply point out that the Supreme Court majority in *Blakely* reserved judgment on the applicability of its holding to the federal guidelines. And until that case clearly applies, we will continue to work under the umbrella of presumed constitutionality afforded by the Supreme Court in a long line of other cases.

Thus, we are pleased that the Department of Justice plans to work with us and offer a vigorous defense of the guidelines. We concur in its position that *Blakely* is inapplicable to the federal sentencing guidelines and that our system is distinguishable from the Washington state system that the *Blakely* court found to be constitutionally infirm.

The Sentencing Commission is not, however, operating with willful blindness to the significant impact *Blakely* already has had on the federal sentencing system. The Sentencing Commission stands ready to work with Congress, the Department of Justice, and others on

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[2]In fiscal year 2002, 97.1 percent of federal defendants were sentenced pursuant to plea agreements.

[3]*United States v. Pineiro*, No. 03-30437 (5th Cir. July 12, 2004).

[4]*United States v. Booker*, No. 03-4225 (7th Cir. July 9, 2004).

contingency plans in the event that the Supreme Court determines that *Blakely* does in fact apply to the federal system.

Supreme Court Precedent Validates the Federal Sentencing Guidelines

What must be kept in mind for today's purposes is the well settled Supreme Court admonition that it is the prerogative of that Court alone to overrule its precedents.[5] Accordingly, and until that day comes, the long line of cases upholding our guidelines system stands firm.

Since shortly after the inception of the Sentencing Commission and the federal guidelines system, the Supreme Court repeatedly has upheld their constitutionality and, in a variety of contexts, has validated the appropriateness of judicial fact-finding to determine an applicable, guideline-based sentence within statutory parameters. The *Blakely* decision does not alter that extensive body of law.

The federal guidelines system endured its first constitutional challenge in 1989. In *Mistretta*,[6] the Supreme Court upheld the constitutionality of both the federal guidelines system and the Sentencing Commission against both nondelegation and separation of powers challenges.[7]

Since establishing the constitutionality of the overall federal sentencing scheme, the Supreme Court has reviewed various federal sentencing guidelines' applications and upheld sentences based on factors determined by a sentencing judge rather than a jury. Throughout the course of its decisions, the Supreme Court has not retreated from its declaration that the federal sentencing guidelines are constitutional.[8]

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[5]*See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)(the prerogative to overrule one of its precedents rests solely with the Supreme Court); *Agostini v. Felton*, 521 U.S. 203, 237 (1997)(courts of appeals must leave to the Supreme Court the prerogative of overruling its own decisions, even if such decision "appears to rest on reasons rejected in some other line of decisions")(quotations and citations omitted).

[6]488 U.S. 361 (1989).

[7]*Mistretta*, 488 U.S. at 412.

[8]*See, e.g.*, *United States v. Nichols*, 511 U.S. 738 (1994)(upholding use of an uncounseled misdemeanor conviction to enhance punishment for a subsequent conviction because recidivism is an important factor in determining appropriate sentence); *Witte v. United States*, 515 U.S. 389 (1995)(upholding federal sentencing guidelines relevant conduct scheme); *United States v. Watts*, 519 U.S. 148 (1997)(upholding consideration of acquitted conduct by sentencing court so long as conduct proved by preponderance of the evidence); *Edwards v. United States*, 523 U.S. 511 (1998)(upholding federal sentencing guidelines against 6th Amendment challenge by noting that a maximum sentence set by statute trumps a higher sentence set forth in the guidelines);

This long line of cases and the massive body of law flowing from it over the last fifteen years has neither been overruled nor distinguished by the Supreme Court in the decisions that have brought us together today. In *Apprendi*, for example, the Court "expressed no view" on the federal guidelines beyond "what this Court has already held,"[9] which was the constitutionality of the federal sentencing guidelines and the Sentencing Commission. Likewise, the Supreme Court did not address the federal guidelines in *Blakely*. Specifically, the Supreme Court majority stated: "The federal Guidelines are not before us, and we express no opinion on them."[10]

The Federal Sentencing Guidelines System Is Distinguishable from State Systems

Those who would extend *Blakely* to the federal sentencing system must understand that the federal system is different in many important respects from the guideline system employed by Washington state.

Structurally, the federal sentencing guidelines are distinct from those of states like Washington. The federal guidelines are not enacted in total by a legislature but, for the most part, are promulgated by the Sentencing Commission, "an independent commission in the judicial branch of the United States."[11] The federal sentencing guidelines, therefore, are not statutes but sentencing rules; the unique product of a special and limited delegation of authority to the Sentencing Commission from Congress.[12]

Another structural difference relates to what is built into the final guideline range and the way in which a sentencing court arrives at that final range. The Washington state system, for example, requires application of an offense level and, in turn, a "standard guideline range." In the Washington system, therefore, the *Blakely* holding (that the maximum punishment for *Apprendi* purposes is the maximum sentence that may be imposed based solely on facts found by the jury) makes more sense.

The federal sentencing guidelines are structured quite differently. They start with a base offense level that typically applies to commission of an offense in its simplest form, and they

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Harris v. United States, 536 U.S. 545 (2002)(holding that the 5th and 6th Amendment guarantee a defendant will never get more punishment than bargained for, but do not promise "anything less" than that; therefore, not all facts affecting a defendant's punishment are elements subject to indictment, jury, and proof requirements).

[9]*Apprendi*, 530 U.S. at 497n.21 (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998)).

[10]*Blakely*, 542 U.S. __ slip op. 9n.9 (June 24, 2004).

[11]*Mistretta*, 488 U.S. at 385; 28 U.S.C. § 991(a).

[12]*Id.*; *see also Stinson v. United States*, 508 U.S. 36, 45 (1993).

result in an adjusted offense level that generally is somewhat less than the statutory maximum penalty for the offense of conviction. That final offense level is based on a number of sentencing factors that historically judges, in their discretion, considered. In the historical, pre-guidelines world, judges took into account many factors relating to the offense and the offender, including conduct beyond the elements of the statutory offense that was nevertheless relevant to the offense, and even post-offense conduct. These are critically important distinctions that make the *Blakely* holding impractical when an attempt is made to apply it to the federal system. In the federal sentencing system, the statutory maximum penalty legislated by Congress remains the effective maximum penalty to which a defendant can be exposed upon a finding of guilt. The final guideline offense level and upper end of the ultimately determined guideline range act as checks on the judge's discretion to impose a sentence within the bounds of the statutory penalty.

Looking at the structural differences more broadly, state sentencing systems like Washington's tend to establish standard sentencing ranges with little deviation, whereas the federal sentencing guidelines, following the mandates set forth in the Sentencing Reform Act and refined through Congressional directives, contain subtle nuances designed to individualize sentences. For example, the *Guidelines Manual* currently contains three pages of application notes devoted solely to assisting the sentencing court in making a determination of "loss" for the variety of complex economic crimes federal judges confront.

It also is important to understand that the federal system places the burden on the Government to prove sentencing enhancements and that it also contains a number of downward adjustments that can benefit a defendant. By contrast, state systems typically start at standardized punishment midpoints and provide scant room to navigate throughout a particular guideline, up or down. Thus, they do little to individualize punishment to the facts of the real offense conduct and characteristics of the offender (other than criminal history).

If the assumption behind applying *Blakely* to the federal sentencing guidelines system is a desire to enhance fairness and a defendant's rights, it must be noted that the federal guidelines system has done much to move in that direction already. The *Blakely* Court recognizes that a defendant's Sixth Amendment rights are not violated by a judge's unfettered discretion to impose a sentence the judge might deem fit within broad statutory parameters. That kind of system, as recognized by the Supreme Court in *Mistretta*, was the system that existed in federal courts prior to the advent of the federal sentencing guidelines system.[13]

The federal guidelines system answers concern (by Congress and others) about unfettered judicial discretion in a number of ways. Judges do make factual and guideline application decisions, but both defendants and the Government have an opportunity to contest application of the guidelines before the judge as neutral arbitrator. In addition, the Sentencing Reform Act, as adjusted by the PROTECT Act, requires a sentencing judge to state with specificity reasons for imposing a sentence. Additionally, the Sentencing Reform Act, for the first time, provided

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[13]*Mistretta,* 488 U.S. at 364.

sentence appellate rights for both defendants and the Government. The federal guidelines system thus minimizes the role a judge's personal philosophy may play in sentencing. These are just some of the ways in which the federal guidelines seek to assure fairness, uniformity, and certainty in sentencing.

It is important to note, moreover, that the federal sentencing system does not strip away all judicial discretion in sentencing. In fact, the federal system is designed to give judges maximum discretion within the parameters set forth in the Sentencing Reform Act,[14] as well as to allow them to check prosecutorial charging discretion, to an extent, by constructing a guideline sentence based on the defendant's actual offense conduct. Additionally, rather than construct a unique guideline for each of the hundreds of criminal statutes contained in the United States Code (as many of the state systems do), the federal sentencing guidelines are generic and often cover a broad array of conceptually similar crimes scattered throughout the criminal code.

For example, several hundred fraud crimes are found throughout the United States Code and carry statutory maximum penalties ranging from five to thirty years. Instead of having a separate guideline for each of these disparate offenses, the federal sentencing guidelines have one applicable guideline that uses particular enhancements to capture the individualized nature of the offense conduct. The federal sentencing guidelines, therefore, try to rationalize penalties and further the Sentencing Reform Act's goal of ensuring similar punishment for similar offenses.

If *Blakely* were to apply to the federal sentencing guidelines, it could result in a much more cumbersome system, a significant increase in prosecutorial discretion at the charging stage of the criminal process, and increasing uncertainty in sentencing.

To be sure, the Sentencing Commission recognizes that the federal guidelines system is not without its problems. The Sentencing Commission always welcomes debate and input on how to improve the system. But we hope that there will be common interest among policymakers in preserving a viable guidelines system, rather than seeking to use the current uncertainty as an opportunity to press a favorite sentencing policy agenda.

Legislative Proposals under Consideration

The Sentencing Commission believes that the federal sentencing guidelines, as currently promulgated, further the purposes of sentencing set forth in the Sentencing Reform Act, are constitutionally sound, and will withstand *Blakely* scrutiny, but it is planning for the possibility that *Blakely* may be held to apply to the federal system. The Sentencing Commission appreciates Congress' prompt but careful attention to this issue as it reviews a number of legislative proposals under consideration.

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[14]28 U.S.C. § 994(b)(2) generally limits the maximum width of guideline ranges to the greater of six months or 25 percent.

At this early juncture, we are not prepared to endorse either the necessity of immediate legislative action or any particular model. If Congress decides to act, however, we hope that the legislation will preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid a wholesale rewriting of a system that has operated well for nearly two decades.

Moreover, if Congress determines that legislation is appropriate, it should be the goal of any legislation to address problem areas as definitively as possible without burdening the system with a host of new issues that have to be litigated. Finally, we suggest that any corrective legislation contain, as one element, an amendment to the Sentencing Reform Act expressly stating that the guidelines operate within the statutory parameters set by Congress. While this implicit rule has been recognized by the courts, its express statement by Congress would address a key *Blakely* issue by making clear that the federal guidelines do not establish their own "statutory" maximum penalties.

As we move forward in the wake of *Blakely*, it may be necessary for the Sentencing Commission to receive emergency amendment authority to address expeditiously congressional concerns. We remain ready to work with Congress, the Department of Justice, and others in further scrutinizing any legislative proposals.

The Sentencing Commission Remains in Critical Need of a Full Slate of Commissioners

Both of us have had the privilege of serving on the Sentencing Commission since 1999. When we arrived, the Sentencing Commission had been without commissioners for over one year. As a body, and under the leadership of Judge Diana E. Murphy, we came together to set an aggressive agenda that addressed the significant backlog of work that had accumulated as a result of those vacancies. We continue to set aggressive agendas and are pleased to state that we have no significant backlog of congressional directives.

What we do have, however, is a critical leadership void that is only worsened by the *Blakely* decision. In January of this year, Judge Murphy resigned as chair and member of the Sentencing Commission. The President has nominated Judge Ricardo Hinojosa to succeed her.

In addition to being without a chair, two Commissioners' terms have expired and they currently serve in the final months of their statutory holdover period. The President has nominated Commissioner Michael O'Neill and Judge Ruben Castillo for reappointment.

We raise this internal concern with you because, in the period of uncertainty wrought by the *Blakely* decision, it is all the more important that the Sentencing Commission have a chair and a full slate of commissioners.

As we have indicated, the Sentencing Commission is as fully operational as it can be given the above-described position. We have announced a tentative list of priorities for the coming amendment cycle, and will include a thorough review of the impact of the *Blakely* decision on the federal guidelines and a host of other important sentencing issues (including

immigration, criminal history, environmental offenses, drugs, and compassionate release), if resources allow. We continue to respond promptly to congressional initiatives necessitating guidelines amendments.

Mr. Chairman and Members of the Committee, thank you again for holding this very important hearing on matters of critical importance to the federal criminal justice system. We will be glad to try to answer any questions you may have.