Preliminary Findings:
Federal Sentencing Practices Subsequent to the Supreme Court's Decision in *Blakely v. Washington*

Commission Activities

Multiple sources of information. Commission staff have used a variety of sources to obtain information on changes in federal sentencing practices subsequent to the decision in *Blakely v. Washington*. The Office of General Counsel is reviewing all court opinions available through electronic databases. The Outreach Team has interviewed a sample of 40 people to include judges, defense attorneys, and probation officers in most of the districts in the two circuits which have held that *Blakely* applies to the federal sentencing guidelines. The Office of Policy Analysis, working with the Monitoring Unit, has undertaken a *Blakely* coding project to examine, on an expedited basis, all documents submitted to the Commission for cases sentenced subsequent to June 24, 2004, the date of the decision. As of November 1, data on 6,292 cases have been entered. Because cases are selected unsystematically (they are coded roughly in the order in which they arrive at the Commission) this sample may be considered quasi-random and used to provide preliminary estimates of the frequency of various practices among cases sentenced in the period immediately following *Blakely*. These information sources have been combined with information from allied agencies, press reports, and other outside sources to paint a picture of federal sentencing in the post-*Blakely* world.

Interview protocol. The questions on which information has been sought are listed in the interview protocol attached to this report. The protocol is divided into sections concerning the practices of the prosecution and defense, practices of the court, and practices of the probation office. The protocol is a comprehensive checklist of topics of interest rather than a rigid questionnaire. Interviewees were encouraged to freely share their experiences with post-*Blakely* sentencing. Many participants have had no experience with many of the topics and were not asked to speculate.

Limited Range of Post-*Blakely *Sentencing Practices

Continuances. Several lines of evidence suggest that *Blakely* has led to a delay in final sentencing in a large portion of cases. A decline in sentencings is reflected in the decrease in case documentation received by the Commission. To date, the Commission has received documents on 10,822 cases sentenced on or after June 24, 2004, compared to 11,356 cases during the same time period last year. Interviews in the 7th and 9th circuits confirm that continuances have generally increased in courts holding that *Blakely* applies to the federal guidelines, although there is considerable variation from district to district. While several

districts reported no increase in continuances or only minimal delays, over twice as many reported a substantial increase in continuances. Several interviewees reported that continuances are being granted "in 75 percent of cases" or "in any case with aggravating adjustments." In more districts, however, continuances are granted in a smaller portion of cases in which the defendant does not admit at the plea taking the facts needed to apply aggravating adjustments or agree to waive *Blakely* rights. Some court administrators are concerned that, after a slow summer, the backlog of cases will strain resources when the cases start moving.

***Sentencing post-*Blakely.** Courts have identified a limited range of possible responses to the *Blakely* decision, as outlined in the decision tree attached to this report. After deciding whether *Blakely* applies to federal sentencing today, courts must decide whether to announce alternative sentences and, if *Blakely* is held to apply, what rules and procedures are now constitutionally required. Some courts have decided to use discretionary sentencing within the statutory range, perhaps treating the guidelines as advisory. Other courts have felt bound by the guidelines but have severed and not applied those provisions that implicate *Blakely* unless its procedural requirements have been satisfied. (There is continuing disagreement about which provisions implicate *Blakely*, and what type of notice, admission, or waiver will satisfy its requirements.) Other courts have adopted enhanced procedures to find aggravating sentencing facts, including special efforts to obtain factual stipulations or waivers of *Blakely* rights, enhanced fact finding procedures by judges, or use of a jury.

Among courts that have held that *Blakely* applies to the federal guidelines, the most common response appears to be to treat the guidelines as advisory. The 9th circuit presents a somewhat different picture because of the decision in *Ameline*, which severed sentencing enhancements (discussed further below). Few courts are ignoring the guidelines altogether and reverting to pre-guideline discretionary sentencing within the full statutory range. A small number of courts have used juries to find sentencing facts. Some courts have altered pre-sentencing practices to encourage parties to reach a negotiated agreements regarding aggravating facts, or to seek defendant waivers of *Blakely* rights as part of guilty pleas, as in Judge Holmes' "four point plan."

Alternative sentencing. A few circuits (4th, 6th, and 7th) have advised district courts to consider announcing alternative sentences, treating the guidelines as advisory, in the event the Supreme Court holds the federal guidelines are in some way constitutionally infirm. Similarly, some courts in the 7th and 9th circuits are determining and announcing the previously applicable guideline sentence, even though these circuits have held the federal guidelines are unconstitutional. These proposals have raised questions among some commentators, as well as requests for information on whether alternatives are being imposed and how the alternative compares to the guideline sentence. Some judges have formally declined to follow their circuit's recommendation (US v. Johnson, No 6:04-00042, S. D. W. Va., Aug. 13, 2004).

One district in the 7th Circuit reported that judges were placing alternative sentences on the record, using the J & C and SOR forms to communicate both sentences to the BOP. In

another, some of the judges were reported to be imposing alternative sentences, while in another district judges had stated on the record in some cases that "they would give the same sentence if the guidelines were constitutional." An report based on interviews in the 4th circuit, however, has suggested that most courts were not following the recommendation regarding alternative sentences (report of Prof. Ronald Wright). Interviewees in our survey in several districts also reported that judges were not announcing alternative sentences and one judge said he had tried the practice but abandoned it.

The *Blakely* coding project has found documentary evidence of alternative sentencing in just 4.9 percent of the cases coded as of November 1. The Commission is not collecting data to compare alternative sentences with guideline sentences. Interviewees report that judges who have treated the guidelines as advisory have imposed some sentences below the guideline range, some above it, and some within it. It appears that cases in which alternatives are being announced are unrepresentative of the full caseload and would be an unreliable basis for estimating the impact of a change to discretionary sentencing.

Case and factor severability. Courts that apply *Blakely* to the federal guidelines must determine if the guidelines are unconstitutional in all cases, or only in those with sentencing enhancements. In addition, in cases with offending enhancements, the court must determine whether the non-offending guidelines remain binding or whether guidelines as a whole are invalid. While the 7th circuit declined to reach issues of severability, the 9th circuit held in *Ameline* that the guidelines were infirm only in cases involving offending enhancements and that the offending provisions should be severed. The Department of Justice has argued that, if *Blakely* applies to the federal guidelines, only cases with offending enhancements are affected and that in such cases the guidelines as a whole should be treated as advisory. Documentary data are not yet sufficient to quantify the portion of cases adopting any particular approach to severability.

Interviews in the 7th and 9th circuits suggest that most judges are holding the guidelines invalid only in cases with offending adjustments. Further, there is evidence that many judges, even in the 9th circuit, resist severing the offending provisions and applying the guidelines without aggravating adjustments. For offenders who pled guilty prior to *Blakely*, severing offending provisions can result in a dramatically reduced sentence. One judge reported attempting to obtain admissions or waivers, or lacking this, continuing the case, rather than apply the logic of *Ameline*. For offenders pleading guilty subsequent to *Blakely*, a variety of presentencing practices have developed to deal with aggravating adjustments, as discussed further below, to prevent lopsided sentencing that takes into account only mitigating factors.

Sentencing "windfalls." Press and case reports have indicated that some offenders are receiving sentencing "windfalls" when courts cannot apply upward guideline adjustments. Interviews with participants in the 7th and 9th circuits suggest that sentencing windfalls due to non-application of aggravating adjustments have occurred but are relatively rare. Windfalls appear to be largely limited to cases that plead guilty pre-*Blakely*, because defendants now

stipulate to at least some of the aggravating adjustment or waive their *Blakely* rights.

Identifying offending adjustments. Disputes have arisen concerning which guideline adjustment raise *Blakely* issues. Criminal history is generally viewed as falling within the *Almendarez-Torres* exception, although some districts have determined that criminal justice status, the recency of the instant offense to prior imprisonment, or defendant age (used to determine career offender status) may raise *Blakely* issues. Documentation shows that at least one court has decided the multiple count rules raise a *Blakely* issue.

Emerging issues with jury factfinding. While numerous interviewees report hearing of jury fact finding in their districts, at this point we have relatively little experience with which to assess its ease or success. One interview reported that it took 10 minutes of testimony and 10 minutes of deliberation for the jury to find that a firearm contained an obliterated serial number. Some judges have asked the jury to find the elements of the offense and then to reconvene to answer interrogatories concerning sentencing factors. Another court reported great difficulty in fashioning interrogatories that would be sufficiently simple and comprehensible for a jury. Other judges who have reported experiences with jury fact finding indicate that they have used very straightforward interrogatories that require a yes or "no" response. None have reported using the guideline application notes to help guide the jury's determinations.

Practices of the Prosecution, Defense, and Probation Officers

Indictments. Following Department of Justice recommendations, interviewees report that indictments now frequently include facts needed to apply guideline enhancements that raise *Blakely* issues, although variations in this practice continue to be reported. Superceding indictments have been common in some districts. Indictments sometimes include a special "sentencing factors" section, although at least one court has found that such labeling is prejudicial. Factors such as role in the offense, drug amount, loss amount, and co-defendant involvement have all reportedly been included in indictments. Some districts report an overall drop in the number of indictments being filed.

One district reported that prosecutors now include in indictments, and seek enhancements at sentencing, only for those facts that might readily be proven beyond a reasonable doubt. More complicated facts, such as intended loss, are now simply excluded from consideration. Relevant conduct raises particular issues for indictments, and at least some relevant conduct is often included in indictments, though some interviewees suggested its scope is now more limited than pre-*Blakely*. Interviewees reported no other readily apparent changes in charging practices, such as an increased use of conspiracy counts or mandatory minimum statutes. An emerging legal issue concerns the legality of including offense conduct beyond the statutory elements of the crime if doing so would be prejudicial to the defendant.

Plea bargaining. Plea bargaining practices have been affected in districts in which

Blakely has been applied to the federal guidelines, with considerable variation among districts. Some districts report no apparent change in the willingness of defendants to plead guilty, while others report more difficulty reaching agreement, with a possible uptick in the trial rate once continuances are no longer granted. In the present climate of uncertainty, some parties have been unable to reach a plea agreement, leading judges to delay the case. Some defense attorneys report preferring to plead "straight up" and maintain their *Blakely* rights rather than reach an agreement. Some defense attorneys report that it has been somewhat easier to obtain favorable plea agreements in the post-*Blakely* environment. Some probation officers and judges report seeing plea agreements that were "repugnant" and that gave the defendant a "sentencing windfall." One district reported that probation officers were told to advise the court of plea agreements did not include other readily provable counts. Another district reported that plea agreements were often silent on key issues and that the system was "bogging down."

Districts vary in the degree of pressure placed on defendants to plead guilty and in the incentives offered for doing so. Some judges and probation officers report no problem obtaining *Blakely* waivers from defendants when the clear alternative is to go to trial. Defense attorneys in other districts appear to be refusing to waive *Blakely* rights in the absence of a significant concession, such as a stipulation to less than the full offense conduct.

Presentence investigations and reports. Most probation offices report continuing to conduct presentence investigations in much the same way as pre-*Blakely*. Some districts have explicitly considered, but rejected, changing the format of the presentence report. One district in the 9th circuit reports that the offense conduct section is now divided into sections that include only facts found beyond a reasonable doubt by the jury or admitted by the defendant, and a section that reports other offense conduct found by a preponderance of the evidence. Under *Ameline*, only the former is used to guideline calculations. Several other 9th circuit districts appear to report both the previous guideline sentence and the sentence under an *Ameline* calculation that excludes aggravating factors not proven beyond a reasonable doubt. Transcripts of plea takings are sometimes used to determine the facts admitted by the defendant

Commission staff have collected from several 9th circuit interviewees examples of newly formatted presentence reports and local policy guidelines issued to probation officers regarding how presentence reports should be changed to accommodate *Ameline*.

Questions for the Field Regarding the Impact of *Blakely* on Federal Sentencing

Combined Detailed Question List 10/06

<u>Practices of the Prosecution and Defense</u>

How have indictments changed?

- Do they now include all aggravating sentencing factors?
  - Have they included grounds for upward departure?
- Have all or most cases pending conviction been issued superceding indictments post-*Blakely*?
- Has there been an increase in use of certain counts, mandatory penalties, or enhancements?
  - Such as conspiracy, 18 U.S.C. § 924(c), 21 U.S.C. § 841/851 for prior convictions?
- How is notice of relevant conduct given?
  - Do indictments include all conduct "before, during..." or "same course of conduct..."?
  - In conspiracy cases, do indictments particularize each offender's accountability?
  - Do indictments include conduct to support use of applicable cross-references?
- Have there been issues raised regarding what should be included in the indictment?
  - Such as guideline enhancements that are not statutory elements considered surplusage?
  - Some factors considered prejudicial to defendant? Which ones?

How has plea bargaining changed?

- Are defendants less willing to plead guilty, resulting in potential increase in number of trials?
- Have there been changes to plea agreements?
  - Has there been an increase in stipulations that sentencing factors do or do not apply?
  - Does it appear defendants are pleading to full offense conduct?
    - Or are they offered concessions? Same or more than pre-*Blakely?*
  - Are there differences in bargaining power among different defendants?
  - Are there significant differences in *Blakely* lawyering skills among attorneys?

- Are defendants willing to waive their *Blakely* rights?
  - Are there partial waivers?
    - Trial but not sentencing?
    - Some but not all factors?

<u>Practices of the Court</u>

Are judges now advising defendants of *Blakely* rights at the plea colloquy?

- Are they seeking a waiver of *Blakely* rights?
  - Have they tried Holmes 4-point plan (waiver+higher stnd of proof)? Is this working?

Have sentencings been delayed? Until what?

Is *Blakely* held to apply to the federal guidelines?

☐ In all cases or ☐ only those with upward enhancements?

How are judges sentencing in affected cases?

- ☐ Imposing entirely discretionary sentence within statutory range
- ☐ Imposing discretionary sentence using guidelines as advisory
  - Generally sentencing ☐ within ☐ below or ☐ above recommended guideline range
- ☐ Judges apply guidelines using enhanced procedures for enhancements (*a la Johns)*
- ☐ Judges apply guidelines severing unconstitutional aspects
  - ☐ Sever all upward enhancements ☐ Only elements of other offenses (*a la Hankins*)
- ☐ Judges use jury to find disputed sentencing facts ☐ In all cases ☐ Only in trial cases

Are judges imposing alternative sentences?

Which alternatives from above?
What contingencies invoke alternatives?
How are the alternatives communicated to BOP?

What factors have been seen as raising *Blakely* issues?

All aggravating SOCs?
Relevant conduct, including other offenses, co-participant liability? Etc.
Criminal history points? Recency? Criminal justice status? Career offender?
Multiple counts?
Consecutive or concurrent sentences?

What procedures are judges using to find facts at a judicial sentencing hearing?

Are they using the Federal Rules of Evidence?
Proof beyond a reasonable doubt?

Have new trial procedures been developed?

Has guilt / sentencing bifurcation been used? How has it worked?

Have procedures for jury sentencing fact-finding been developed

Do Federal Rules of Evidence apply to sentencing? Beyond a reasonable doubt standard?
Have jury instructions and verdict forms for sentencing factors been developed?
If so, how were they developed? Will you send them to us?
Has there been occasion for bifurcation of sentencing factors (*a la Harris*)?
Have juries been used to find upward departure facts, or mitigating factors?

Is the new supplement to the statement of reasons form being used?

Who is completing it, and are there any problems completing it?

Practices of the Probation Office

Has the presentence investigation changed?

Were you independently investigating offense conduct prior to *Blakely?* Successfully?
Are you investigating offense conduct ☐ more, ☐ less, or ☐ the same as pre-*Blakely*?

Has the presentence report changed?

Are you calculating the guideline sentence as before for all judges?
Are you determining multiple guideline ranges under various scenarios?

Have defendants received any sentencing "windfalls" due to *Blakely*? If so, how?

☐ better plea deals ☐ no guideline aggravating adjustments ☐ no upward departures

Anything else going on that is raising issues or causing problems?

POST-*BLAKELY* JUDICIAL SENTENCING DECISION TREE