

July 2, 2004

TO: All Federal Prosecutors

FROM: /s/
James Comey
Deputy Attorney General

SUBJECT: Departmental Legal Positions and Policies in Light of Blakely v. Washington

I. INTRODUCTION

In Blakely v. Washington, 2004 WL 1402697 (June 24, 2004), the Supreme Court applied the rule announced in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), to invalidate, under the Sixth Amendment, an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. The Court observed that the United States, as *amicus curiae*, “notes differences between Washington’s sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant.” *Id.* at *6 n.9. The Court then reserved whether its Sixth Amendment holding applied to the Guidelines, stating that “[t]he Federal Guidelines are not before us, and we express no opinion on them.” *Ibid.*

This memorandum provides guidance for federal prosecutors concerning the legal positions and charging practices of the United States in light of the Blakely decision. The Criminal Division will provide detailed guidance on the effect of Blakely on indictments, guilty pleas, jury trials, appeals, and collateral challenges under 28 U.S.C. § 2255. The Criminal Division will also provide sample materials for use in court.

II. LEGAL POSITION CONCERNING APPLICATION OF BLAKELY TO THE FEDERAL SENTENCING GUIDELINES.

The position of the United States is that the rule announced in Blakely does not apply to the Federal Sentencing Guidelines, and that the Guidelines may continue to be constitutionally applied in their intended fashion, *i.e.*, through factfinding by a judge, under the preponderance of the evidence standard, at sentencing. The government’s legal argument, which will be developed more fully in a model brief that the Criminal Division will distribute, is that the lower federal courts are not free to invalidate the Guidelines given the prior Supreme Court decisions upholding their constitutionality, and that, on the merits, the Guidelines are distinguishable from

the system invalidated in Blakely. All federal prosecutors should therefore argue in favor of the continued constitutional validity of the Sentencing Guidelines as a system requiring the imposition of sentences by judges. If the court rules that Blakely does invalidate all or part of the Guidelines system, prosecutors should preserve an objection. The Department of Justice has traditionally adhered to the principle that it will defend the constitutionality of Acts of Congress in all but the rarest of instances. The government vindicates that principle here by defending the constitutionality of the Sentencing Guidelines.

III. LEGAL POSITION IF COURTS HOLD THAT BLAKELY APPLIES TO THE FEDERAL SENTENCING GUIDELINES

If courts disagree with the government's legal position on the inapplicability of Blakely to the Guidelines, the next question that arises is what sentencing consequences ensue. The position of the United States is that, if Blakely applies, thus rendering the Guidelines' method of judicial factfinding unconstitutional, the Guidelines cannot be applied at all in certain cases. Those cases consist of prosecutions in which the application of the Guidelines requires the resolution of contested factual issues to determine whether upward adjustments or upward departures should be imposed above the maximum sentence based solely on the facts admitted by the defendant in a guilty plea or established by the jury's verdict. In such a case, overlaying the Blakely procedures on the Guidelines would distort the operation of the sentencing system in a manner that would not have been intended by Congress or the United States Sentencing Commission. Thus, if Blakely applies, the constitutional aspects of the Guidelines cannot be severed from the unconstitutional ones. In that event, the court cannot constitutionally apply the Guidelines, but instead should impose a sentence, in its discretion, within the maximum and minimum terms established by statute for the offense of conviction. In all such cases, the government should argue that, in the exercise of its discretion, the sentencing court should impose a sentence consistent with what would have been the Guidelines sentence.

There are three critical components of this position. **First**, the Guidelines remain constitutional and applicable if the Guidelines sentence can be calculated without the resolution of factual issues beyond the admitted facts or the jury verdict on the elements of the offense of conviction. Thus, in cases where a court, applying the Guidelines as they were intended, finds that there are no applicable upward adjustments under the Guidelines beyond the admitted facts or the jury verdict on the elements of the offense, the Guidelines are constitutional and should be applied. **Second**, in a case in which the defendant agrees to waive his right to resolution of contested factual issues under the Blakely procedural requirements, the Guidelines should be applied. Thus, waivers of "Blakely rights" in connection with plea agreements and guilty pleas may be sought. **Third**, in a case in which there are applicable upward adjustments under the Guidelines, and the defendant desires to contest the underlying facts under the Blakely procedures, the Guidelines system as a whole cannot be constitutionally applied. In that event, the government should urge the court to impose sentence, exercising traditional judicial discretion, within the applicable statutory sentencing range. The government's sentencing recommendation in all such cases should be that the court exercise its discretion to impose a sentence that conforms to a sentence under the Guidelines (including justifiable upward

departures), as determined without regard to Blakely.

This approach of having judges exercise discretion within the minimum and maximum statutory terms, rather than applying the Guidelines piecemeal, does not represent a departure from the Department's commitment to Guidelines sentencing. The Department will continue to urge that the Guidelines are constitutional in that Blakely is inapplicable. The government's alternative position that Blakely cannot be integrated into the existing sentencing scheme represents a recognition that the application of the Blakely charging, jury-trial, and reasonable-doubt procedures to the Guidelines distorts them in ways that render the Guidelines system, as currently configured, unworkable, and that Congress and the Commission would not have intended such a hybrid system. The conclusion that the entire system must fall, if Blakely applies in a particular case, permits prosecutors to urge that sentencing courts impose appropriately severe sentences within the statutory maximum and minimum terms as a matter of their discretion.

The sentencing courts then can, as a matter of discretion, consider the same factors that the Guidelines make relevant to sentencing. Blakely explicitly recognizes the constitutionality of such a discretionary sentencing process that considers all relevant facts. That interim solution, until definitive clarification is obtained from the Supreme Court and Congress, is legally and practically preferable to applying Blakely piecemeal so as to radically disfigure the operation of the Guidelines and in certain cases produce grossly inadequate sentences.

IV. CHARGING, PLEA AND TRIAL PRACTICES UNTIL THE SUPREME COURT CLARIFIES THE IMPACT OF BLAKELY

Until the Supreme Court definitively rules on the constitutional impact of Blakely on the Guidelines, prosecutors should follow certain protective procedures in order to safeguard against the possibility of a changed legal landscape as a result of future court decisions.

1. Indictments. Prosecutors should immediately begin to include in indictments all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the Blakely and Apprendi rules). While the legal position of the government is that inclusion of such factors is not constitutionally required in order to enhance a Guidelines sentence, in light of the unpredictable future path of court rulings, it is prudent for the government to protect against the possibility that such allegations in indictments will be held necessary.

2. Superseding indictments. In pending prosecutions that have not resulted in a plea of guilty or a trial, prosecutors should obtain superseding indictments that allege all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the Blakely and Apprendi rules).

3. Pretrial explanatory filings. Prosecutors should make clear to courts, in appropriate pretrial filings, that the indictment alleges Guidelines sentencing factors as a protective measure, in the event that the court concludes that compliance with the Blakely procedures is constitutionally required to secure upward adjustments and departures and that the Blakely procedures can be applied to the Guidelines. The government should urge the court to rule, before trial, whether it will apply Blakely to the Guidelines and, if so, how it will sentence the defendant upon conviction (*i.e.*, by applying the Guidelines to facts proved under the Blakely-required procedures, or by applying discretionary sentencing within the statutory sentencing range). If the defendant objects to the inclusion in the indictment of Guidelines factors, the government should consider offering to strike the allegations if the defendant agrees to waive any Blakely objection to the imposition of sentence based on the traditional Guidelines sentencing process, including factfinding on Guidelines factors by the judge, generally under the preponderance standard.

4. Plea waivers. Prosecutors should immediately seek to obtain plea agreements that contain waivers of all rights under Blakely. The agreements should generally include provisions stating that the defendant agrees to have his sentence determined under the Sentencing Guidelines; waives any right to have facts that determine his offense level under the Guidelines (including facts that support any specific offense characteristic or other enhancement or adjustment) alleged in an indictment and found by a jury beyond a reasonable doubt; agrees that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agrees to waive all constitutional challenges to the validity of the Sentencing Guidelines. Prosecutors may agree to modified waivers or conditional plea agreements preserving certain challenges if such concessions are found necessary in a particular case.

5. Presentence reports. Prosecutors should urge courts to continue to direct probation officers to prepare presentence reports that contain Guidelines sentencing calculations based on all available factual information normally considered at sentencing before the advent of Blakely. Regardless of what impact Blakely is held to have, the presentence report's computations under the Guidelines will be valuable in assisting the judge at sentencing and in assisting the Department, the Sentencing Commission, and Congress in assessing the effect of Blakely.

6. Alternative sentences. Prosecutors should ask district courts to state alternative sentences to enable efficient and prompt resentencing in the event that later appellate developments reject the approach that the sentencing court applies.

7. Data collection. U.S. Attorney's offices and the components of Main Justice should immediately establish data collection procedures, using standardized procedures to be developed by EOUSA, to ensure collection of information about (a) sentences actually imposed on defendants in light of Blakely and (b) the Guidelines range that would have been applicable absent Blakely. The collection of such data is critical to allow the Department to monitor the sentencing effect of Blakely.

V. CONCLUSION

The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that meet the goals of the Sentencing Reform Act. Despite the current uncertainty about the implications of Blakely, I am confident that federal prosecutors, under the policies described above, can continue to play their vital role in bringing justice to their communities and effectively vindicating federal criminal law.