A Post-*Blakely* Era or Post-*Blakely* Error?

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I. INTRODUCTION

The Supreme Court's decision in *Blakely v. Washington*[1] was, by early accounts, earth shattering.[2] Although Justice Scalia claimed to faithfully apply years-old precedent to the state sentencing statute at issue in the case,[3] his opinion sparked instant debate over federal sentencing practices.[4] Within a week of the decision, a federal district court, modestly claiming to apply *Blakely*, declared that the Federal Sentencing Guidelines (the "Guidelines") were unconstitutional.[5] After Judge Cassell fired the first shot, the judicial onslaught on the Guidelines escalated, challenging even the most devoted observers to blog the develop-

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1. 124 S. Ct. 2531 (2004).

2. *See, e.g.*, Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT. REP. (forthcoming 2004) (manuscript at 1), *available at* http:// sentencing.typepad.com/sentencing_law_and_policy/files/latest_king_klein_beyond_blakely.pdf (last visited Oct. 1, 2004) ("Federal criminal sentencing in the wake of *Blakely v. Washington* is, to put it charitably, a mess.").

3. *Blakely*, 124 S. Ct. at 2536 ("This case requires us to apply the rule we expressed in *Apprendi v. New Jersey* . . . .") (citation to *Apprendi* omitted).

4. *See, e.g.*, Linda Greenhouse, *Justices, in Bitter 5-4 Split, Raise Doubts on Sentencing Guidelines*, N.Y. TIMES, June 25, 2004, at A1.

5. United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12156 (D. Utah June 29, 2004), *amended by* 324 F. Supp. 2d 1230 (D. Utah 2004), *reaff'd*, 324 F. Supp. 2d 1255 (D. Utah 2004).

ments in real time.[6] With the Court set to address the issue[7] (though not necessarily settle it), now is the time for thoughtful reflection on the decisions of the lower courts, their mistakes, and what this once-in-a-career experience reveals about the way in which we adjudicate constitutional issues.

The central claim I make in this essay — that the Guidelines do not offend the Sixth Amendment — may seem brave in light of all of the authority holding the contrary.[8] Close examination of the post-*Blakely* decisions, however, reveals exactly the opposite: the decisions holding the Guidelines unconstitutional skip a critical step in their analyses. The decisions assert, sometimes without citation and always without explication, that the Guidelines require judicial fact-finding based on a preponderance of the evidence. They do not. Because they do not, and because they do not prevent a court from considering only facts proven to a jury beyond a reasonable doubt (or admitted by the defendant), they are capable of peacefully co-existing with the Sixth Amendment as interpreted in *Blakely*.

This crucial oversight, I argue, is traceable to the ways in which the defense bar and the government have sought to persuade courts to conduct sentencing in light of *Blakely* and, perhaps, the lower courts' desire to offer their own opinions on the subject of federal sentencing policy in the abstract. I do not intend in this essay to fault lawyers for their role in attempting to vindicate their clients' interests. Rather, I intend to demonstrate that in our system, the courts must pay obsessive attention to detail even where the parties would prefer that they overlook them.

II. THE *BLAKELY* INNOVATION

The majority's holding in *Blakely* was innovative not because it articulated a new rule of law, but because it clarified a key

6. *See* Douglas A. Berman, *Sentencing Law & Policy*, *at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/stop_the_world_.html (last visited Aug. 21, 2004) (noting difficulty in keeping pace with developments).

7. United States v. Fanfan, No. 04-105, 2004 U.S. LEXIS 4789 (Aug. 2, 2004); United States v. Booker, No. 04-104, 2004 U.S. LEXIS 4788 (Aug. 2, 2004).

8. For citations to some of these decisions, see *infra* note 25; for a discussion of the reasoning of these decisions, see *infra* Part III.A.

term in the rule originally expressed in *Apprendi v. New Jersey*,[9] greatly expanding the rule's breadth. The rule expressed in the *Apprendi* decision was "[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."[10] Prior to the *Blakely* decision, invocation of the *Apprendi* rule had generally been unsuccessful in challenging sentences imposed under the Guidelines.[11] Although judges *did* (and frequently) find facts based on a preponderance of the evidence in applying the Guidelines,[12] courts generally understood the "statutory maximum" to be the longest term of imprisonment permitted in the statute defining the offense of conviction.[13] This interpretation of *Apprendi* was reasonable — the penalties resulting from application of the Guidelines, which themselves were not established by statute, (almost) always fell below those authorized in the applicable substantive criminal statute, and, thus, there was (almost) always no *Apprendi* violation.[14]

In *Blakely*, the Court considered a Washington state statute that provided, in pertinent part, as follows:

> The court may impose a sentence outside the standard sentence range for that offense *if it finds*, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. . . .

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9. 530 U.S. 466 (2000).

10. Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004) (quoting *Apprendi*, 530 U.S. at 490).

11. *See* United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001) (noting decisions from the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits holding *Apprendi* does not prevent a judge from determining facts necessary to apply Guidelines enhancements and concluding the same).

12. For an example of such fact-finding, see United States v. Prince, 110 F.3d 921, 925 (2d Cir. 1997) (affirming estimate of drug quantity in missing boxes based on quantity in boxes seized).

13. *See, e.g.*, United States v. Baltas, 236 F.3d 27, 40–41 (1st Cir. 2001) ("statutory maximum" for possession of nonspecific amount of heroin was twenty years per relevant provisions of Controlled Substances Act).

14. *See, e.g.*, *id.* at 41 ("The rule in *Apprendi* only applies in situations where the judge-made factual determination increases the maximum sentence beyond the statutory maximum, and not in situations where the Defendant's potential exposure is increased within the statutory range.") (citing United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000)). As explained *infra* Part III.B, notwithstanding this rule, there were situations in which sentences were invalidated on *Apprendi* grounds.

> Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in *written findings of fact and conclusions of law*. A sentence outside the standard range shall be a determinate sentence.[15]

The plain text of the statute seemingly prescribed exactly the judicial fact-finding *Apprendi* prohibited.[16] Washington's argument to the contrary was similar to that which federal prosecutors had successfully advanced to save the Guidelines from *Apprendi* challenges: the "statutory maximum" was not the "standard sentence range" referenced in the statute but rather the higher ceiling on class B felonies in a different provision.[17]

Blakely, however, rejected this argument and the prevailing understanding of the term "statutory maximum." The majority opinion in *Blakely* told us that the word "statutory" in "statutory maximum," does not, in fact, mean statutory:[18] "Our precedents make clear . . . that the statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[19] This interpretation was novel because it seemed to disregard completely the source of the limitation on a judge's discretion — a statute authorizing a broad range of imprisonment could no longer constitutionally immunize upward movement within that range pursuant to any binding provision of law, whether statutory or non-statutory, whether the facts necessary to impose the increased sentence were elements or not.

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15. WASH. REV. CODE ANN. § 9.94A.120 (West 2000) (emphasis added). This provision was amended prior to the *Blakely* decision, 2000 Wash. Legis. Serv. Ch. 28 (S.B. 6223) (West), obviating the need for the Court to rule on the provision's constitutionality.

16. Indeed, the statute at issue in *Apprendi* closely resembled the statute at issue in *Blakely*. *See* N.J. STAT. ANN. § C:44-3 (West 2000) ("The court may . . . sentence a person . . . to an extended term of imprisonment *if it finds* . . . [t]he defendant in committing the crime acted with a purpose to intimidate an individual or groups of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.") (emphasis added). Both statutes made enhanced sentences contingent not only on certain factual findings but also on judicial determination of those facts.

17. Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004).

18. *Cf.* United States v. Booker, 375 F.3d 508, 518 (7th Cir. 2004) (Easterbrook, J., dissenting) ("Why did the Justices deploy that phrase in *Apprendi* and repeat it in *Blakely* . . . ? Just to get a chuckle at the expense of other judges who took them seriously and thought that "statutory maximum" might have something to do with statutes?").

19. *Blakely*, 124 S. Ct. at 2537.

Justice Scalia's rationale for the change is to some extent persuasive. Essentially, Scalia's majority opinion argued that the Sixth Amendment right to a jury trial must not be contingent on the judgment of the legislature or of the courts.[20] The prior interpretation of "statutory maximum" depended on recognition of a constitutionally significant distinction between "elements" and "sentencing factors," the former to be determined by a jury beyond a reasonable doubt and the latter by a judge by a preponderance of the evidence.[21] Scalia's argument exposes the frailty of this distinction by pointing out that if it were given its full effect, nothing would prohibit the legislature from labeling the traditional elements of the crime of murder "sentencing factors." Thus, "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it."[22] The only protection available against such a drastic result would be a case-by-case judicial inquiry into whether the legislature went "too far." This standard, Scalia argued, would be so subjective that conclusions based on it would be irrefutable.[23] For the purposes of this essay, I will not criticize the law expressed in *Blakely*, but rather take it as given.

III. THE EFFECT OF THE *BLAKELY* INNOVATION ON THE GUIDELINES

If the Court meant what is said in *Blakely*, then it was only a matter of time before defendants began to ask the lower courts to revisit their prior decisions that had held the Guidelines did not offend the Sixth Amendment. This is precisely what occurred, and quickly. Although many courts did find that the Guidelines are unconstitutional, their decisions were based upon a faulty premise. While there certainly could not have been "sentencing as usual" after *Blakely*, the courts should have reacted to that decision as they did to *Apprendi*, not by holding the Guidelines to

20. *Id.* at 2540.

21. *Id.*

22. *Id.* at 2539. This example may seem drastic, but to my mind, it is not terribly different than Guidelines sentencing in fraud cases in which, prior to *Blakely*, a judicial finding of loss amount could theoretically elevate a defendant's sentence from a maximum of six to a maximum of 151 months. *See* U.S. SENTENCING GUIDELINES MANUAL §§ B1.1(a)–(b), 5A (2002).

23. *Blakely*, 124 S. Ct. at 2540.

be unconstitutional, but by conforming their sentencing procedures to the requirements of the Sixth Amendment.

A. THE LOWER COURTS' REACTIONS

The lower courts' reactions to *Blakely* have been varied and defy easy categorization.[24] A number of courts have found that *Blakely* renders use of the Guidelines, to some extent, unconstitutional.[25] It is this broad category of cases with which I am concerned. Within this category of cases, some decisions have "severed" those provisions of the Guidelines that they have concluded remain valid from those that are invalid.[26] In other cases, courts have refused to apply any of the Guidelines, reverting to a system of indeterminate sentencing in which the Guidelines' provisions are to be treated as advisory.[27] In a few cases, judges have

24. *See* Douglas A. Berman, *Sentencing Law and Policy*, *at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/updating_the_em.html (last visited Aug. 30, 2004) (describing the effort by the Federal Defenders in Manhattan to classify the decisions by their agreement with discrete propositions).

25. *See, e.g.*, United States v. Mooney, No. 02-3388 (8th Cir. July 23, 2004) (per curium), *available at* http://www.ca8.uscourts.gov/opndir/04/07/023388P.pdf (last visited Sept. 17, 2004), *vacated en banc*, 2004 WL 1636960 (8th Cir. Aug. 8, 2004); United States v. Ameline, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004); United States v. Booker, 375 F.3d. 508 (7th Cir. 2004); United States v. Zompa, No. CRIM.04-46-P-S-01, 2004 WL 1663821 (D. Me. July 26, 2004); United States v. Mueffelman, No. 01-CR-10387-NG, 2004 U.S. Dist. LEXIS 14114 (D. Mass. July 26, 2004); United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12156 (D. Utah June 29, 2004), *amended by* 324 F. Supp. 2d 1230 (D. Utah 2004), *reaff'd*, 324 F. Supp. 2d 1255 (D. Utah 2004). Not all courts to consider the question have found the Guidelines unconstitutional, however. Some for procedural reasons have chosen to adhere to what they believe to be Supreme Court precedent affirming their constitutionality under *Apprendi*. *See, e.g.*, United States v. Pineiro, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004). Judge Weinstein of the Eastern District of New York has declined to address the constitutionality of the Guidelines, instead deciding to convene sentencing juries, a practice which he apparently believes the Guidelines permit. *See generally* United States v. Khan, No. 02-CR-1242 JBW, 2004 WL 1616460 (E.D.N.Y. July 20, 2004).

26. *See, e.g.*, *Ameline*, 2004 WL 1635808, at *11; *Zompa*, 2004 WL 1663821, at *2.

27. *See, e.g.*, *Mooney*, No. 02-3388, at *24 (directing district courts to impose sentence within statutory minimum and maximum and treat Guidelines as advisory in nature); *Mueffelman*, 2004 U.S. Dist. LEXIS 14114, at *47–48 (reverting to indeterminate sentencing with modifications due to the unavailability of parole). Because I do not perceive a constitutional defect in the Guidelines, I do not address the question of whether the Guidelines are severable. I note, however, that the lower courts' discussion of severability is at times mystifying. Assuming, arguendo, that application of the Guidelines enhancements is unconstitutional where the facts necessary to establish those enhancements are disputed, proceeding to apply the enhancements in cases with undisputed facts would not, as Judge Gertner suggests, frustrate the legislative goal of uniform sentencing. *See id.* at *45–46 (rejecting the government's argument that the Guidelines enhancements should

hedged their bets by imposing Guidelines and "non-Guidelines" sentences.[28] Though I acknowledge these differences of opinion on severability and the various stopgap measures associated with them, I am primarily concerned with the courts' predicate determination that application of the Guidelines offends the Sixth Amendment. If this predicate determination was erroneous, the remaining debate was largely premature.

The logic the courts have employed to reach their conclusion that application of the Guidelines offends the Sixth Amendment is rather straightforward. Essentially, the courts' reasoning proceeded as follows: (1) *Blakely* applies to the Guidelines; (2) *Blakely* prohibits, where it applies, judicial fact-finding by a preponderance of the evidence; (3) application of the Guidelines enhancements requires such fact-finding, and *therefore*, application of the Guidelines enhancements is unconstitutional.[29] The first two premises in this argument are uncontestable. As described above, the argument that the enhanced ranges in the Guidelines were something other than "statutory maxima" no longer has any force.[30] The third premise, however, assumed to be true and obviously necessary for the argument to succeed, is suspect.

It is elementary that a decision purporting to determine the constitutionality of a law that has been reduced to writing should examine the text at issue. Remarkably, however, the lower courts have largely ignored the text of the Guidelines and the text

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apply in cases where there are no disputed facts). Post-*Blakely*, it is improper to compare cases in which the defendant contests an allegation (apples) to cases in which the defendants have admitted those same allegations or in which those allegations a fortiori have been proven to a jury beyond a reasonable doubt (oranges). Indeed, the whole purpose of the *Apprendi* rule as interpreted in *Blakely* is to ensure that these classes of defendants are not subject to the same punishment. To put the point another way, Judge Gertner is correct that the government's argument "makes no sense," *id.* at *45, but only because she presupposes (as the government does) that *none* of the Guidelines provisions should apply in cases where there are disputed facts. *Id.*

28. *See, e.g.*, United States v. Leach, No. 02-172-14, 2004 U.S. Dist. LEXIS 13291 (E.D. Pa. July 13, 2004). *But see* United States v. Hakely, No. 1:02-CR-159 (W.D. Mich. Aug. 12, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/US-Hakley-resentencing-revised.wpd (last visited Aug. 21, 2004) (declining to impose an alternate sentence, which would amount to non-binding dicta).

29. *See, e.g.*, *Booker*, 375 F.3d. at 511. ("[T]he issue in *Blakely* was . . . the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof. The vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact.")

30. *See supra* note 19 and accompanying text.

of the statutes authorizing their creation.[31] The Guidelines themselves merely set forth (1) which facts are relevant to sentencing;[32] (2) which facts are irrelevant to sentencing;[33] and (3) the ranges of punishment applicable where each combination of relevant facts exists.[34] I do not deny that since the enactment of the Guidelines judges have been the arbiters of facts in sentencing proceedings, but judges played this role prior to the Guidelines,[35] and the Guidelines neither explicitly require nor depend upon their doing so.[36] Indeed, the Sentencing Commission's official commentary in the only provision treating sentencing procedures assigns ultimate responsibility for determining the appropriate procedure used to resolve factual disputes to the sentencing court.[37] The Guidelines are thus distinguishable in the most significant way possible from the Washington state statute that was at issue in *Blakely* — the latter, and only the latter, *requires* judicial fact-finding.[38]

Notwithstanding the absence of a Guidelines provision requiring judicial fact-finding, the lower courts would have been correct to invalidate the Guidelines (at least in part) if they specified that the facts relevant to establish enhancements need only be proven by a preponderance of the evidence. Again, however, the Guidelines are silent.[39] The preponderance standard, like the assign-

31. Where, as in *Booker*, the court provides citations to the Guidelines and their authorizing statutes, consultation of those provisions confirms that they do not require procedures *Blakely* forbids. *See Booker*, 375 F.3d. at 511–12 (citing 18 U.S.C. §§ 553(a)(4)–(5) and U.S. SENTENCING GUIDELINES MANUAL §§ B1.1, –.3(a)). The provisions cited do direct judges to apply the Guidelines, but they are silent as to the procedure they should use to do so.

32. *See* U.S. SENTENCING GUIDELINES MANUAL §§ A-X.

33. *Id.* § 5H.

34. *Id.* § 5A.

35. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES 26–28 (1973) (describing traditional pre-Guidelines sentencing procedures, which comprised *ex parte* investigations, consideration of untested evidence, and unexplained pronouncements of sentences from the bench); *see also* Williams v. New York, 337 U.S. 241 (1949).

36. *Cf.* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 220 (1991) (concluding that the courts erred by maintaining pre-Guidelines sentencing procedures under the Guidelines and arguing they should have altered them).

37. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3, cmt. (2002) ("The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and *applicable case law*.") (emphasis added).

38. *See supra* note 15 and accompanying text.

39. United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989) ("[T]he Sentencing Commission has *declined to adopt either a burden of proof or particular procedures* to

ment of fact-finding to the sentencing judge, derives from pre-Guidelines case law.[40] In my opinion, *Blakely* overrules these decisions (at least in part), but it does not change the historical fact that these cases, and not the Guidelines, are the sources of law providing for constitutionally infirm sentencing procedures in the federal system.

My rejoinder to the judges who have held the Guidelines unconstitutional, then, is a simple one: if a law does not prescribe a procedure other than that contemplated by the Sixth Amendment, in what way is it incompatible with the Sixth Amendment? The post-*Blakely* decisions correctly decided that the *Apprendi* rule now applied to the Guidelines but failed to ask the next logical question: do the Guidelines offend this rule by requiring that enhancements/elements (1) be determined by a fact-finder other than a jury and/or (2) be established in the judgment of such a fact-finder by a less-than-reasonable-doubt standard? Absent either requirement, the enhancements in the Guidelines are no different than any other criminal prohibition — they are valid unless unconstitutionally vague,[41] retroactive,[42] or prohibitive of a

govern the resolution of disputed sentencing factors.") (emphasis added). At least one court has cited the commentary to section 6A1.3 of the Guidelines for the proposition that the Guidelines require judges to find the facts necessary to support sentencing enhancements using a preponderance of the evidence standard. United States v. O'Daniel, No. 02-CR-159-H, 2004 WL 1767112, at *9 (N.D. Okla. Aug 6, 2004) ("The Guidelines provide that the burden of proof for establishing a sentencing factor is a preponderance of the evidence."). While the commentary does endorse the preponderance standard, the statement that the Commission "believes" that this standard should apply has no effect on the actual instruction for the courts to use procedures consistent with "applicable case law." *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3, cmt. (2002).

40. *Guerra*, 888 F.2d at 249 ("Before the advent of the Sentencing Guidelines, it was well settled that sentencing factors need only be proved by a preponderance of the evidence to satisfy the requisite due process.") (citations omitted); *accord.* McMillan v. Pennsylvania, 477 U.S. 79, 91–93 (1986) (interpreting Pennsylvania law).

41. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted).

42. *See* U.S. Const. Art. I, § 10 (prohibiting ex post facto laws). The Supreme Court has defined an "ex post facto law" "as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.'" Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (quoting Calder v. Bull, 3 U.S. 386, 390 (1789)).

certain status.[43] The failure of a criminal prohibition to explicitly reestablish the procedural guarantees the Constitution makes to a defendant does not render the prohibition unconstitutional.

B. THE APPROPRIATE REACTION

Setting aside for the moment what the lower courts have done with *Blakely*, I wish to explore how the innovation of that decision *should* have been applied to the Guidelines. Instructive in this regard are two decisions from the Second Circuit that appeared prior to *Blakely*.[44] Both involved rare situations in which the court held that the application of the Guidelines through judicial fact-finding by a preponderance of the evidence violated the *Apprendi* rule. Indeed, the situations presented were almost precisely the situations many courts confronted when they adjudicated the constitutionality of the Guidelines post-*Blakely*.[45] These pre-*Blakely* cases indicate that the proper reaction to an *Apprendi* violation under the Guidelines is not to invalidate the federal sentencing system but rather to apply it in a constitutionally sound way.

The two cases I wish to discuss both arose because the Second Circuit had decided that threshold quantities of drugs involved in a narcotics offense were elements of the crimes charged that must be proven to a jury beyond a reasonable doubt.[46] Prior to *Blakely*, courts routinely characterized enhancements under the Guidelines as sentencing factors, removing their adjudication from the procedures of the Sixth Amendment.[47] Consistent with this stance, courts also recognized after *Apprendi* that the quantities of drugs that provided the thresholds for application of various statutory minimum and maximum sentences in the sections of

43. *See, e.g.*, Robinson v. California, 370 U.S. 660, 666–68 (1962) (holding that *any* state criminal penalty for narcotics addiction was "cruel and unusual punishment" within the meaning of the Eighth Amendment).

44. United States v. Doe, 297 F.3d 76 (2d Cir. 2002); United States v. Yu, 285 F.3d 192 (2d Cir. 2002).

45. One insignificant difference is that, in some of the post-*Blakely* cases, the district courts considered the constitutionality of the Guidelines prior to sentencing the defendant whereas in the pre-*Blakely* cases referenced here the defendant had been sentenced and sought relief in the court of appeals.

46. United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (en banc).

47. *See supra* notes 11–14 and accompanying text.

the U.S. Code defining narcotics offenses[48] were elements, not sentencing factors.[49] Because the Sentencing Commission had pegged the Guidelines' drug quantity thresholds to the statutory thresholds,[50] *Apprendi* violations could occur through traditional application of the Guidelines if the sentencing judge determined that a greater quantity of drugs than the jury verdict reflected was involved in the defendant's offense.

In *United States v. Yu*,[51] the defendant had pleaded guilty to participating in a drug conspiracy. Though specific quantities of drugs were identified in his indictment, Yu refused to allocute to the quantity of drugs involved in his crimes. The Second Circuit, relying on *Apprendi* and on its decision in *United States v. Thomas*, which held that drug quantity was an element of the crime, agreed with Yu that "there [was] a defect in the proceedings."[52] The court held that "it was error for the district court to permit Yu to plead guilty to quantity-specific charges while refusing to allocute to quantity."[53]

The court, however, disagreed with Yu's argument that the appropriate relief was to amend his plea to one of guilty on the uncharged crime of the lesser included offense of drug trafficking in an unspecified amount of narcotics (a result similar to that sought by the defendants in the post-*Blakely* cases). The court did not decide what the appropriate relief should be, but set forth several options it felt were available to the district court on remand that would cure the constitutional defect:

> It may be that Yu will seek to withdraw his plea; it may be that the government in that event would prefer to acquiesce in a re-sentencing within the *Guideline* range applicable to the offense sufficiently described in Yu's original plea allocution; it may be that Yu will seek a *jury trial* on the issue

48. *See generally* 21 U.S.C. § 841(b) (2000).

49. *See Thomas*, 274 F.3d at 660; *see also* United States v. Wade, 318 F.3d 698, 705 (6th Cir. 2003); United States v. Smith, 308 F.3d 726, 740 (7th Cir. 2002); United States v. Vasquez, 271 F.3d 93, 99 (3d Cir. 2001); United States v. Promise, 255 F.3d 150, 156 (4th Cir. 2001); United States v. Doggett, 230 F.3d 160, 164–5 (5th Cir. 2000).

50. Michael Tonroy, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355, 358 (1992).

51. 285 F.3d 192 (2d Cir. 2002).

52. *Id.* at 197.

53. *Id*.

> of drug quantity; it may be that the government would in that event argue that Yu's waiver of a jury trial in the plea allocution was a voluntary and knowing waiver of a jury trial on the issue of drug quantity; and it may be that Yu will seek or be consigned to a bench trial at which a finding on quantity would be made *beyond a reasonable doubt*.[54]

Any of these solutions, in the Second Circuit's view, would have been "avenues of relief for the *Apprendi* problem that has arisen in Yu's case."[55]

Yu's case closely mirrors the cases of criminal defendants who had pleaded guilty, allocuted, and were awaiting sentencing prior to *Blakely*. It is unclear why the remedies the court identifies are appropriate in *Yu* but not in the more recent cases. While the *Yu* case clearly stood for the proposition that enhancements based on judicial findings of drug quantity were inappropriate, it also implied that application of the Guidelines is consistent with jury fact-finding. Nothing in *Blakely* calls into question the appropriateness of the remedies in *Yu*. The only change is that these procedures or procedures like them must be utilized not only in cases where drug quantity is disputed but also where, e.g., loss amount,[56] the number of victims,[57] and the use of a firearm[58] are disputed.

I anticipate an objection to my invocation of the *Yu* example on the ground that a significant difference exists between *Yu* and the post-*Blakely* cases because the indictments in some of the post-*Blakely* cases did not allege the enhancement at issue. Enter *United States v. Doe*.[59] In *Doe*, the defendant pleaded guilty to a narcotics count that did not specify any quantity of drugs. The Second Circuit, as it did in *Yu*, found that imposition of a higher sentence based on the quantity of drugs involved violated the *Apprendi* rule. In this case, the court remanded for re-sentencing under the Guidelines based solely on the facts admitted by the defendant — i.e., his admission that he participated in a conspir-

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54. *Id.* at 198 (emphasis added).
55. *Id*.
56. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2002).
57. *Id.* § 2B1.1(b)(2).
58. *See, e.g.*, *id.* § 2B3.1(b)(2).
59. 297 F.3d 76 (2d Cir. 2002).

acy to distribute an unspecified quantity of drugs. *Doe* makes clear that whether the enhancing fact was alleged in the indictment to which the defendant pleaded guilty makes no difference whatsoever to the continued viability of Guidelines sentencing. Nor is it a valid criticism of this approach that a defendant like Doe could, as a result, effectively escape punishment for the full extent of his criminal behavior by claiming that the court's acceptance of a guilty plea bars the government from charging and proving additional facts. The Supreme Court has made clear that the Double Jeopardy Clause may not be "use[d] . . . as a sword"[60] — a defendant who pleads guilty to a lesser included offense does not preempt the government's subsequent attempts to supercede its indictment to reflect facts learned at a later stage in what is essentially the same prosecution.[61]

Another objection to looking to these cases is that the disputed fact in both was drug quantity, which is an easier fact for a jury to determine than other Guidelines provisions. In essence, the substance of this competency argument is that juries would need a great deal of guidance on making certain other determinations, and useful jury instructions are not readily derivable from the vague provisions of the Guidelines. For example, the Guidelines provide for an increase in a convicted robber's sentence if, in the course of committing the robbery, he threatened his victim with death. While it is clear that a death threat must be distinguishable from non-death threats, no additional guidance is available.[62] No doubt "the failure of judges to write decisions, or carefully spell out their reasons for interpreting the Guidelines"[63] has not provided a common law of sentencing from which jury instructions should be drawn. However, it is unclear why the potential difficulties of going forward with sentencing juries should

60. Ohio v. Johnson, 467 U.S. 493, 502 (1984).

61. *Cf.* U.S. v. Quinones, 906 F.2d 924 (2d Cir. 1990) (holding defendant could not avoid facing charges in superceding indictment by pleading guilty).

62. *See generally* United States v. Thomas, 327 F.3d 253 (3d Cir. 2003). In *Thomas*, the court summarily affirmed the application of the death threat enhancement. The defendant had handed the bank teller a note that said "a dye pack will bring me back for your ass." *Id.* at 255.

63. United States v. Mueffelman, No. 01-CR-10387-NG, 2004 WL 1672320, at *10 (D. Mass. July 26, 2004).

have any bearing on whether to do so.[64] If the Guidelines are not unconstitutional and remain binding, the Sixth Amendment gives the defendant the right to a jury trial. Appellate litigation over the proper jury instructions may be a time-consuming process, but if determinate sentencing is not per se unconstitutional, this litigation is inevitable. Indeed, it may prove to be the most important litigation to trace its roots to *Blakely*. Relatively uniform sentencing jury instructions would require far more elaboration of the Guidelines provisions (or any legislatively created substitute) than appellate review of judicial determinations has. In light of the possibility that many criminal cases will continue to be resolved through guilty pleas (the alternative to jury trials emphasized in *Yu*), this litigation will likely not prove unwieldy.[65]

Yu and *Doe* illuminate the proper response to a violation of the Sixth Amendment right to jury trial. They implicitly recognize that the Guidelines provide for enhancements based on the existence of certain facts but that the procedure used to determine the existence of those facts is divorced from those substantive provisions. They demand that sentencing courts use constitutionally sound procedures, but they do not demand that they ignore the substantive law of sentencing. Quite to the contrary, they support the conclusion that once disputed facts are resolved, the Guidelines' substantive provisions should apply. To put the point more plainly these decisions make clear that the Guidelines may be applied in an unconstitutional manner and that the proper remedy, if this event were to occur, is to apply them in a constitutional manner.

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64. *Cf.* United States v. O'Daniel, No. 02-CR-159-H, 2004 WL 1767112, at *12 (N.D. Okla. Aug. 06, 2004).

65. Another potential problem with proceeding with jury trials under the Guidelines regime deserves brief mention. At least one court has noted that the Federal Rules of Evidence do not apply in sentencing proceedings. *See id.* at *9. This purported problem, however, is illusory. To the extent the Constitution requires the exclusion of certain evidence, it will still do so in a sentencing trial, whether or not the Federal Rules of Evidence apply. The non-overlapping provisions (i.e., the extra-constitutional rules) are not required by the Sixth Amendment right to jury trial or any other constitutional provision, and the defendant would have no right to complain that the sentencing trial was unfair.

IV. THE SOURCE OF THE ERROR

I recognize that my argument that many lower courts erred in applying *Blakely* to the Guidelines is not particularly sophisticated, and, if my argument has merit, the obvious question is why has it not figured in the post-*Blakely* litigation. No doubt part of the reason is the speed with which the courts were asked to rule on the Guidelines' constitutionality. More significant in my view, however, was the posture of the parties in the decision-making process — the defendants, the government, and even the judges. None of the parties' interests were coterminous with the correct result. I am unfamiliar with any other constitutional debate in which this situation has occurred, and I do not mean to impugn our reliance on actual litigation to decide questions of constitutional proportion. I make these observations only to demonstrate the limitations we accept sometimes without even realizing them.

In the post-*Blakely* cases, the defendants' objective was, presumably, to minimize the punishment they would receive. Under the Guidelines, this traditionally meant arguing that certain enhancements should not apply. In light of *Blakely*, however, a bold defendant could argue that *no* enhancements could be applied in his case. This position would be premised on the assumption that the application of the enhancements was contingent on not only the finding of certain facts but also the finding of those facts by a judge using a preponderance of the evidence standard. The defendants' argument was that these portions of the Guidelines were unconstitutional and should be disregarded.[66] The result would be that the offense level would be dictated solely by the applicable base offense level, reduced by any applicable downward adjustments.[67] The resulting sentence would thus be lower (perhaps substantially lower) than it would have been if the enhancements were applied.[68]

For its part, the government's objective was exactly the opposite. The government wanted the enhancements to apply as they always had. This position was motivated, presumably, not by

66. *See, e.g.*, *Mueffelman*, 2004 WL 1672320, at *3.
67. *Id*.
68. *Id*.

excessive zeal or vindictiveness, but by the legitimate concern that there are meaningful differences between individual crimes, even when both result in convictions under identical statutes. Indeed, these differences are at the heart of the Guidelines. The government, however, was not prepared to argue that the enhancements could be constitutionally applied through a change in the traditional but non-mandatory procedure. If the government were suddenly required to try its evidence before a jury, cases it thought had been closed would essentially be reopened. The government would at the very least have to renegotiate plea terms with defendants who presumably would have a new bargaining chip. For this reason, the government chose to argue that in the event the Guidelines were unconstitutional, *none* of their provisions should apply, and the court should sentence the defendant without limitation within the statutory minimum and maximum, using the Guidelines provisions as suggestions for how to do so.[69]

The judges listening to these arguments were not, of course, considering them in a vacuum. A year earlier, Congress had constrained their discretion to sentence outside of the Guidelines through passage of the Feeney Amendment.[70] I am not suggesting that the post-*Blakely* decisions were the result of a judicial conspiracy to strike back against Congress. It is impossible, however, to deny that the remedies presented by the defendant and by the government were far more palatable than the alternative — empanelling juries to decide the facts that judges have routinely determined in the past. The courts considering the constitutionality of the Guidelines seized the opportunity to express their views on how defendants should be sentenced in the federal criminal system.[71] The question they were asked to decide was given considerably shorter shrift.

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69. *See generally* Memorandum from Deputy Attorney General James Comey, to All Federal Prosecutors (July 2, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf (last visited on Aug. 21, 2004).

70. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT ACT), Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–75. The provision, inter alia, explicitly precluded certain grounds for downward departures that judges had used in the past.

71. *See supra* notes 25–27 and accompanying text. Jason Hernandez argues that the *Blakely* decision and the questions it inspires provide a valuable opportunity to debate sentencing reform. *See* Jason Hernandez, Blakely's *Potential*, 38 Colum. J.L. & Soc. Probs. 19 (2004). I do not disagree with this conclusion, nor do I believe the judiciary

With neither party arguing for the correct result and the judiciary disinclined to forgo the opportunity to weigh in on sentencing, the critical distinction between the Guidelines and the constitutionally infirm statutes in *Blakely* and other cases was overlooked. This state of affairs points to a troubling feature of the adversarial system of constitutional adjudication for which there may be no solution other than judicial attention to detail. The Supreme Court still may (and I hope it does) reverse the lower courts' course by upholding the Guidelines and explaining how courts should conform their procedures for applying the Guidelines to the Sixth Amendment. Perhaps amicus curiae will argue for this result though the parties have not.[72]

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I may not have been persuasive in this essay and/or I may ultimately be proven incorrect in my description of how *Blakely* should affect the constitutionality of the Guidelines (not at all) and the procedures for applying them (very much so). I hope at least that my effort here will have shown that when it comes to the extraordinary business of invalidating legislative reforms, attention to detail is crucial. The Guidelines were the product of a legislative process in which the interests now debating their constitutionality expressed their views of the desirability of the system as a policy matter. Those opinions and the result of individual cases have little if nothing to do with the constitutional validity of the system ultimately adopted. On the most basic level, the post-*Blakely* error was the lower courts' failure to focus on the narrow question of whether the Guidelines prescribe an unconstitutional system of adjudication in the sentencing phase of criminal cases.

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should be excluded from this debate. Judicial opinions, however, are not the appropriate places for judges to provide its input if unnecessary to decide the issue, especially where, as here, it takes the place of simple legal analysis.

72. The briefs available at the time of this writing put forward the same arguments as the parties put forward in the prior litigation. *See generally* Brief for the United States, United States v. Booker, No. 04-104 (U.S. 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/sgs_booker_and_fanfan_brief.pdf (last visited Sept. 29, 2004).