No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is not yet reported in the *Federal Reporter*, but is *available in* 2004 WL 1535858.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 31a-64a.

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, respondent was convicted of possessing at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 841(b)(1)(A)(iii), and distributing cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. A divided court of appeals reversed and remanded for resentencing. App., *infra*, 1a-27a.

1. The underlying facts

On February 26, 2003, respondent sold a quantity of crack cocaine to a customer at the residence of a third party. Before the customer could leave, police officers responding to a criminal trespass complaint arrived and knocked on the door. The officers observed that the customer attempted to swallow what turned out to be crack cocaine. Respondent was apprehended outside the house and detained. Ultimately, the officers found a duffle bag that respondent admitted was his. The bag contained approximately $400, drug paraphernalia, and 92.5 grams of crack cocaine. Respondent gave a written statement to the police in which he admitted selling an additional 20 ounces (566 grams) of crack cocaine. Gov't C.A. Br. 7-10, 11-12; Presentence Report (PSR) 3-4.

2. The district court proceedings

On March 12, 2003, respondent was charged in a two-count indictment in the Western District of Wisconsin with possessing more than 50 grams of cocaine base with intent to distribute it and with distributing cocaine base, both in violation of 21 U.S.C. 841(a)(1). The jury found respondent guilty on both counts. The Presentence Report initially recommended that respondent be held responsible for possession of the 92.5 grams of crack cocaine that was found

in his duffle bag. PSR 6. That would have resulted in an offense level of 32 under the United States Sentencing Guidelines. See Sentencing Guidelines § 2D1.1(c)(4). In an addendum, the PSR adopted the government's position that respondent's relevant conduct under the Guidelines, see Sentencing Guidelines § 1B1.3, should also include the 20 additional ounces of crack cocaine that respondent had admitted selling. Gov't C.A. Br. 11-12.

At sentencing, the court held respondent responsible for the 20 additional ounces of crack cocaine. Sent. Tr. 7-8. That resulted in a total of 658.5 grams of crack cocaine, and an offense level of 36 under Sentencing Guidelines § 2D1.1(c)(2). See Sent. Tr. 7. The court added two additional levels for obstruction of justice under Sentencing Guidelines § 3C1.1, based on the court's finding that respondent had perjured himself at trial when he "knowingly denied any of the elements of the offense," in contradiction of the written statement he had made to the police on the day of his arrest. Sent. Tr. 9-10. Based on his extensive prior record, which included 23 prior convictions, respondent was placed in criminal history category VI. *Id.* at 9; PSR 6-16. His sentencing range was 360 months to life imprisonment. The court imposed a sentence of 360 months of imprisonment. Sent. Tr. 11.

3. The court of appeals' decision

a. On appeal, respondent initially argued that he was entitled to a new trial because the district court had erroneously limited his cross-examination of a government witness and that he was entitled to a new sentencing hearing because his sentence was based on his purportedly unreliable written statement made to police officers on the day of his arrest. Resp. C.A. Br. 13-27.

On June 24, 2004, this Court issued its decision in *Blakely* v. *Washington*, 124 S. Ct. 2531. Six days later, on respondent's motion for supplemental briefing, the court of appeals

ordered both parties to file briefs by July 2 addressing the applicability of *Blakely* to this case. Respondent argued that the the Sixth Amendment entitled him to be sentenced within the Guidelines range for defendants responsible for 92.5 grams of crack cocaine (rather than the 658.5 grams found by the judge) and that he was entitled to be sentenced without the two-level enhancement for obstruction of justice. The government argued that *Blakely* is inapplicable to the Guidelines. The court heard oral argument on July 6.[1]

b. On July 9, 2004, a divided panel of the court of appeals affirmed respondent's conviction, reversed his sentence, and remanded for further proceedings. The court "expedited [its] decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of" *Blakely*—which, the court stated, had "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a.

The court began by reciting this Court's holding in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." App., *infra*, 3a. The court continued that in *Blakely*, this Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

[1] At oral argument, the government urged that, if a court finds that sentencing under the Guidelines must comport with *Blakely* and that there are enhancements under the Guidelines that are not established by the jury verdict or admitted by the defendant, the Guidelines as a whole cannot be applied and the court should impose a sentence, as a matter of its discretion, within the minimum and maximum statutory terms, giving due regard to Guidelines. An audio recording of the argument is available at <http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225>. The government's unofficial transcript of the relevant excerpts of the argument, made from the recording, is reproduced at App., *infra*, 28a-30a.

reflected in the jury verdict or admitted by the defendant." *Ibid.* (quoting *Blakely*, 124 S. Ct. at 2537). Under those holdings, the court concluded, "[t]he maximum sentence that the district judge could have imposed in this case (without an upward departure), had he not made any findings concerning quantity of drugs or obstruction of justice, would have been 262 months, given [respondent's] base offense level of 32 * * * and the defendant's criminal history" under the Guidelines. App., *infra*, 3a-4a. The court thus determined that, absent the defendant's consent, *Blakely* precluded the judge from making additional factual findings that would increase respondent's Guidelines sentence. *Id.* at 9a.

The court rejected a distinction between the federal guidelines at issue here and the state statutory guidelines at issue in *Blakely* based on "the fact that the [federal] guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature." App., *infra*, 4a. "The Commission is exercising power delegated to it by Congress," the court reasoned, "and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." *Ibid.* The court also rejected the contention that this Court's prior decisions in *Edwards* v. *United States*, 523 U.S. 511 (1998), and *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), established the constitutionality of judicial factfinding that supports sentence enhancements under the Guidelines. App., *infra*, 9a-11a.

The court concluded that "the guidelines, though only in cases such as the present one in which they limit defendants' right to a jury and to the reasonable-doubt standard * * * violate the Sixth Amendment as interpreted by *Blakely*." App., *infra*, 8a-9a. Accordingly, the court held, respondent "has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice." *Id.* at 11a.

The court then remanded the case to the district court for resentencing. It noted that, if the government sought a higher Guidelines sentence than 262 months of imprisonment, the district court would have to determine whether the "the aspect of the guidelines that [the court] believe[s] to be unconstitutional, namely the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. If that were the case, then "the guidelines would be invalid in their entirety" and the district judge would be "free as he was before the guidelines were promulgated to fix any sentence within the statutory range." *Id.* at 13a. Stating that the severability issue had "not been briefed or argued," however, the court declined to address it. *Ibid.* The court also declined to resolve procedural issues that might surround any effort to conduct a jury trial on the enhancement factors if the Guidelines were found to be severable. *Id.* at 12a.

The court of appeals thus held that "[t]he application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*." App., *infra*, 13a. But the court noted that it could not be "certain" that its holding was correct. *Id.* at 9a. "If our decision is wrong," the court concluded, "may the Supreme Court speedily reverse it." *Ibid.*[2]

c. Judge Easterbrook dissented. He disagreed with the majority "on both procedural and substantive grounds." App., *infra*, 14a. As a matter of procedure, he concluded that the court of appeals had no authority to hold the

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[2] In an amendment to its order filed on July 13, 2004, the court added that "[b]ecause the government does not argue that [respondent's] Sixth Amendment challenge to the guidelines was forfeited by not being made in the district court, we need not consider the application of the doctrine of plain error." App., *infra*, 26a-27a.

Guidelines unconstitutional because any such holding would be inconsistent with this Court's cases, including *Edwards*, *supra*, which "held that a judge * * * may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum." *Id.* at 15a.

Substantively, Judge Easterbrook noted that this Court had repeatedly described the *Apprendi* rule as triggering Sixth Amendment protections for facts that increase the "*statutory* maximum." See App., *infra*, 18a (emphasis added) (citing *Apprendi*, 530 U.S. at 490; *Blakely*, 124 S. Ct. at 2537). In this case, he noted, Congress established the statutory maximum penalties for drug offenses in 21 U.S.C. 841(b). App., *infra*, 18a. The Guidelines, he reasoned, do not reduce that statutory authorization, but instead affect sentencing only after the degree of the offense has been established by the jury. *Id.* at 22a.

Judge Easterbrook also noted that, "[g]iven the matrix-like nature of the [Sentencing Guidelines] system and the possibility of departure," App., *infra*, 23a, "[e]ven if *Blakely*'s definition reaches regulations adopted by a body such as the Sentencing Commission, it requires an extra step (or three) to say that the jury must make the dozens of findings that matter to the Guidelines' operation in each case." *Id.* at 24a. Judge Easterbrook did not believe that *Blakely* had taken that step. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise per-

mitted. *Id.* at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a. In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for fifteen years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The result has been a wave of instability in the federal sentencing system that has left the government, defendants, and the courts without clear guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month. The sheer volume of federal sentencings has resulted in virtually unprecedented uncertainty. The courts facing the problem have developed a range of mutually inconsistent approaches to federal sentencing. Those conflicting approaches could lead to the need for thousands—or even tens of thousands—of resentencing proceedings once the legal issues are settled. It could also lead to debilitating uncertainty about the proper length of federal sentences, which could cripple other aspects of the system, including plea bargaining practice. Ultimately, the uncertainty could hinder achievement of the crucial social goals at stake in the criminal justice system. The courts of appeals have already fallen into conflict over the implications of *Blakely* and one court of appeals has taken the extraordinary step of certifying questions to this Court in an effort to obtain authoritative guidance on the meaning of *Blakely* for federal sentencing. Further review is warranted on an expedited basis to help restore a stable footing to the federal system of criminal justice.

A. *Blakely* Has Unsettled Understandings About The Inapplicability Of *Apprendi* To The Sentencing Guidelines

In *Blakely*, the defendant was convicted in state court on his guilty plea to second-degree kidnapping, in which he admitted the use of a firearm. One Washington statute authorized a maximum term of ten years of imprisonment for the kidnapping offense. The state's statutory sentencing guidelines system, however, established a range of 49-53 months of imprisonment for his offense of second-degree kidnapping with a firearm, absent a judicial finding, by the preponderance of the evidence, of a "substantial and compelling reason[] justifying an exceptional sentence." 124 S. Ct. at 2535. The sentencing court found that Blakely's offense involved "deliberate cruelty" that justified an exceptional sentence and on that basis imposed a 90-month sentence. Interpreting the rule that it had first announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) ("Other 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."), and then applied in *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002), the Court held in *Blakely* that, because "[t]he facts supporting that finding [of deliberate cruelty] were neither admitted by [the defendant] nor found by a jury," 124 S. Ct. at 2537, the "State's sentencing procedure did not comply with the Sixth Amendment," *id.* at 2538. The Court stated 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.*" *Id.* at 2537. See *ibid.* ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

The Court in *Blakely* did not reach the question whether *Blakely* applies to the federal Sentencing Guidelines. 124 S. Ct. at 2538 n.9. But the dissenting opinions stated that the majority's reasoning placed the Guidelines in jeopardy. *Id.* at 2549-2550 (O'Connor, J., dissenting); *id.* at 2561 (Breyer, J., dissenting). *Blakely* has indeed had the effect of raising questions about the Guidelines' validity that had previously been regarded as settled.

After this Court's decision four years ago in *Apprendi*, defendants frequently argued that the Sixth Amendment is violated when the judge makes a factual finding under the Sentencing Guidelines that increases the defendant's sentencing range and that results in a more severe sentence than would have been justified based solely on the facts found by the jury. Before *Blakely*, every court of appeals with criminal jurisdiction rejected that argument.[3] The uniform course of appellate decisions reasoned that "the holding in *Apprendi* applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001). Because the Sentencing Guidelines cap the defendant's sentence at the maximum provided by statute for the offense of conviction,

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[3] See, *e.g.*, *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004); *United States* v. *Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004); *United States* v. *Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States* v. *Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), cert. denied, 537 U.S. 936 (2002); *United States* v. *Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004); *United States* v. *Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States* v. *Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004); *United States* v. *Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003); *United States* v. *Ochoa*, 311 F.3d 1133, 1134-1136 (9th Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), cert. denied, 537 U.S. 1063 (2002); *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003); *United States* v. *Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003).

see Sentencing Guidelines § 5G1.1(a); 28 U.S.C. 994(b)(1) (Guidelines sentencing range must be "consistent with all pertinent provisions of title 18"), the Guidelines never lead to the imposition of a sentence on a particular count that exceeds the statutory maximum. For that reason, the courts of appeals uniformly held that judicial factfinding in the application of the Guidelines at sentencing is constitutional under *Apprendi*. This Court's decision in *Blakely* shattered that consensus.

B. The Courts Of Appeals Are In Conflict Over The Applicability Of *Blakely* To Federal Guidelines Sentencing

In the 27 days since *Blakely*, the federal courts have been thrown into conflict on the continuing validity of the current federal sentencing regime. One court of appeals has held that the current regime is unconstitutional in a wide range of cases. A second court of appeals has upheld the validity of the Guidelines consistent with this Court's prior precedent and suggested that any implications of *Blakely* for the Guidelines must be drawn by this Court, rather than the lower federal courts. A third court of appeals, sitting en banc, has taken the extraordinary step of certifying questions to this Court, urging it to grant expedited review to settle the applicability of *Blakely* to judicial factfinding that results in upward adjustments under the Sentencing Guidelines. Two other courts of appeals have already granted en banc consideration of the issue.

1. In this case, the Seventh Circuit determined that respondent's increased Guidelines sentence, based on the sentencing court's finding of facts as required under the Guidelines, denied respondent his right to a jury trial under *Blakely*, and that, therefore, "[t]he application of the guidelines in this case violated the Sixth Amendment." App., *infra*, 13a. The court of appeals reserved judgment on the impact of *Blakely* on cases in which no additional fact finding

beyond the jury verdict is necessary to apply the Guidelines. *Id.* at 9a, 13a. But the court's holding still applies to a large number of federal criminal cases, in which the defendant's sentence under the Guidelines is increased by the sentencing court's factual findings (other than a prior conviction), and the defendant has not consented to factfinding by the judge.[4]

2. In contrast, the Fifth Circuit reached the opposite conclusion in *United States* v. *Pineiro*, 2004 WL 1543170 (July 12, 2004). In that case, the sentencing court made certain factual findings about drug quantity and the defendant's role in the offense that resulted in a much higher sentencing range under the Guidelines than would have been applicable based on the facts found by the jury alone. The Fifth Circuit affirmed the sentence, concluding that "[h]aving considered the *Blakely* decision, prior Supreme Court cases, and our own circuit precedent, we hold that *Blakely* does not extend to the federal Guidelines and that [the defendant's] sentence did not violate the Constitution." *Id.* at *1. The court stated that it "d[id] not believe that the Sentencing Commission can be thought of as having created

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[4] A number of district courts have reached the same conclusion. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), for example, the court held that "the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this one," *id.* at *6, in which "the Guidelines require an upward enhancement of the defendant's sentencing range without a jury determination," *id.* at *9. See *e.g.*, *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004). District courts in a number of other still-unreported cases have also held that the *Blakely* rule applies to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Leach*, No. 02-172-14 (E.D. Pa. July 13, 2004); *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004), petition for cert. pending (filed July 21, 2004); *United States* v. *Toro*, 2004 WL 1575325 (D. Conn. July 8, 2004); *United States* v. *Montgomery*, 2004 WL 1535646 (D. Utah July 8, 2004); *United States* v. *Watson*, Cr. No. 03-0146 (D.D.C. June 30, 2004).

for each United States Code section a hundred different *Apprendi* 'offenses' corresponding to the myriad possible permutations of Guidelines factors, with each 'offense' then requiring jury findings on all of its (Guidelines-supplied) elements." 2004 WL 1543170, at *9.[5]

3. The disarray in the circuits is highlighted by the en banc Second Circuit's extraordinary order certifying to this Court questions pertaining to whether *Blakely* applies to sentencing under the Guidelines. *United States* v. *Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004). The court of appeals found that it "cannot be certain whether a majority of [this] Court would extend the reasoning of *Blakely*" to the Guidelines. *Id.* at *4. The court observed that, while "[s]ome portions of the majority opinion in *Blakely* indicate that the decision does apply to the federal Sentencing Guidelines[,] * * * the distinct administrative provenance of the federal Sentencing Guidelines may place them outside the ambit of the *Blakely* principle." *Id.* at *5. And "even if *Blakely* applies to some aspects of sentencing under the Guidelines, it is unclear whether judicial fact-finding that determines the applicable Guidelines range is prohibited." *Id.* at *6.

The Second Circuit did not reach its own conclusions in *Penaranda.* Rather, it believed that the degree of uncertainty about the implications of *Blakely* raised such serious difficulties for the administration of criminal justice that this Court should have "an opportunity to adjudicate promptly the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." 2004 WL 1551369, at *7. To that end, the en banc court certified questions to this Court under

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[5] A number of district courts have agreed that *Blakely* does not extend to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Olivera-Hernandez*, No. 2:04CR0013 (D. Utah July 12, 2004); United *States* v. *Lazcano-Flores*, No. 04-45 (S.D. Iowa July 8, 2004); *United States* v. *Childs*, No. 03-2056 (N.D. Iowa July 8, 2004).

28 U.S.C. 1254(2) and urged it to "entertain this certification * * * at [the Court's] earliest convenience, with an expedited briefing and hearing schedule * * * in order to minimize, to the extent possible, what we see as an impending crisis in the administration of criminal justice in the federal courts." *Id.* at *8. The recognition by the Second Circuit that, without a Supreme Court ruling, "defendants, victims, and the public will be left uncertain about what sentences are lawful," 2004 WL 1551369, at *7, underscores the need for prompt intervention by this Court.[6]

C. The Lower Federal Courts Are Acutely In Need Of Guidance On The Proper Sentencing Procedures If *Blakely* Is Found Applicable To The Sentencing Guidelines

The Court should also grant review to settle the question that necessarily arises if this Court were to hold, contrary to the government's position, that the principles of *Blakely* preclude a sentencing court (absent the defendant's consent) from finding facts (other than a prior conviction) that increase a defendant's sentence under the Sentencing Guidelines beyond the level indicated based solely on the jury's findings or the defendant's admissions. That remedial question need not be reached if the Court agrees with the government that the federal system is distinguishable from

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[6] The need for prompt resolution of the questions presented is further highlighted by the fact that two other courts of appeals have already granted en banc review of the application of *Blakely* to the Guidelines. A few days after the decision in this case, a panel of the Sixth Circuit concluded that, in light of *Blakely*, the federal sentencing scheme violates the Sixth Amendment in a broad swath of federal criminal cases. *United States* v. *Montgomery*, 2004 WL 1562904, at *2 (6th Cir. July 14, 2004). The Sixth Circuit then sua sponte granted rehearing en banc on the issue and vacated the panel's decision. See *United States* v. *Montgomery*, No. 03-5256 (6th Cir. July 19, 2004). The Fourth Circuit has also granted en banc consideration of the issue. *United States* v. *Hammoud*, No. 03-4253 (4th Cir. June 30, 2004) (argument scheduled for August 2, 2004).

the state statutory guidelines system at issue in *Blakely*. But if the Court were to disagree, the remedial issues that follow would be of critical importance to restoring order to the federal sentencing system. Indeed, a holding by this Court that *Blakely* applies to the Guidelines, without any guidance on the remedial consequences, would threaten to paralyze federal sentencing or compel an enormous waste of resources as courts struggle with "various attempts to implement *Blakely* [that] ultimately may prove misguided." *Penaranda*, 2004 WL 1551369, at *7.

1. The most important question would be one of severability. When a court finds some parts of a statutory scheme unconstitutional, the court must inquire into the severability of the remaining provisions. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). The question whether the unconstitutional provisions are severable turns on an assessment of whether Congress would have enacted the remaining provisions absent the others. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). When "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)), a statutory scheme is not severable and cannot stand in the face of the unconstitutionality of particular features. Under that analysis, if *Blakely* renders unconstitutional a judge's assessment of facts that increase a defendant's Guidelines sentence, the balance of the Sentencing Guidelines is not severable from the unconstitutional judicial factfinding procedures.

The novel scheme that would result from superimposing jury trials on the Guidelines sentencing process would give birth to a radically different system from the one that Con-

gress enacted and the Sentencing Commission created. The Guidelines serve the important goal of seeking to avoid unwarranted sentencing disparities between similarly situated defendants resulting from divergent judicial decisions in an indeterminate sentencing system. See *Koon* v. *United States*, 518 U.S. 81, 92 (1996); 28 U.S.C. 991(b)(1)(B); S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). The Guidelines were plainly designed and written for application by judges, *e.g.*, 28 U.S.C. 994(a)(1); Sentencing Guidelines § 6A1.3(b), and their complexity and holistic nature would defy coherent application with an overlay of *Blakely* procedures. The transformation of the jury into the factfinder on the myriad of issues that the Guidelines often require to be resolved would introduce procedural complications (*e.g.*, bifurcation, complicated jury instructions, elaborate special verdicts) that the federal system has never applied in the ordinary case. To superimpose *Blakely* on the Guidelines in pending cases awaiting sentencing could have the effect of precluding most upward adjustments that the Guidelines would require, because, as the court of appeals noted, there could be double jeopardy objections to reconvening a jury to decide facts relevant only to upward adjustments at sentencing. App., *infra*, 12a. That would seriously thwart the intention of Congress and the Commission to provide for sentences sufficient "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(A), (B), and (C).

Accordingly, in any case in which *Blakely* would preclude the sentencing court from making findings required under the Guidelines, the Guidelines as a whole cannot be implemented as intended, and the court should therefore sentence the defendant in its discretion within the maximum and minimum provided by statute for the offense of conviction.

In doing so, the court should pay due regard to the relevant Guidelines provisions, as an informed and expert body of knowledge on sentencing issues.

2. Although the court of appeals in this case did not resolve how the district court should proceed on remand, the court recognized that the government's position that the Guidelines are not severable "may be right" and that "the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence * * * may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), Judge Cassell reached that holding, concluding that the Guidelines were not severable. After a careful analysis of the options facing the court, see 2004 WL 1521560, at *10-*13, the court concluded that, in cases where the Guidelines require judicial factfinding on upward adjustments, *id.* at *9, it would sentence the defendant "by making a full examination of the relevant evidence and imposing an appropriate sentence within the statutory range set by Congress," *id.* at *13, while considering the "Guidelines as providing useful instruction on the appropriate sentence," *id.* at *15.[7]

3. In contrast, other courts that have applied *Blakely* to the Guidelines have persisted in applying the Guidelines framework, but have limited the sentencing court to the imposition only of a Guidelines sentence whose maximum term is supported by jury findings or admissions by the defendant. *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004), exemplifies this approach. There, the court found that "the upper bound of the appro-

[7] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Einstman*, 2004 WL 1576622 (S.D.N.Y. July 14, 2004) (pre-sentencing memorandum and order); *United States* v. *Lamoreaux*, 2004 WL 1557283 (W.D. Mo. July 7, 2004).

priate [Guidelines] sentencing range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statutory maximum for *Apprendi* purposes." 2004 WL 1468561, at *8. The court conceded that that approach leads to "an artificial application of the Guidelines" because "in drug cases, the amounts of offense conduct and relevant conduct are integral to the determination of sentencing range." *Ibid.* The court nonetheless believed that it was bound to apply the Guidelines in that manner, and therefore reduced the defendant's sentence from imprisonment for 20 years to imprisonment for twelve months. *Id.* at *9.[8]

Under many Guidelines provisions, conviction of an offense, standing alone, triggers a low base offense level, with higher sentences keyed to a judge's findings that the offense involved aggravating factors. Under the fraud Guideline, for example, the base offense level is six or seven, corresponding to a sentence of 0-6 months of imprisonment, for conviction of a fraud offense, but the level can be increased up to 30 levels for the amount of the loss and other aggravating factors. Sentencing Guidelines § 2B1.1. At least in pending cases, in which the jury will not have found the aggravating facts, a conclusion that the Guidelines are severable could produce absurdly low sentences for very serious criminal conduct. See *United States* v. *Einstman*, 2004 WL 1576622, at *6 (S.D.N.Y. July 14, 2004) ("[I]t seems evident * * * that Congress would never have countenanced a Guidelines system in which all first-time offenders

[8] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Fanfan*, *supra* (reducing sentencing range from 188-235 months to 63-78 months of imprisonment); *Leach*, *supra* (reducing sentencing range from 360 months to life imprisonment to 210-262 months of imprisonment); *Watson*, *supra* (reducing sentence from 72 months to 16 months of imprisonment and immediately releasing the defendant); *Toro*, *supra* (reducing sentence from 24 months to 6 months of imprisonment).

who pled guilty to the elements of wire, mail or bank fraud, and nothing more, were limited to a sentence of 0-6 months * * * without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy. Such sentences make a mockery of the real (not 'relevant') statutory maxima that have been set by the Legislative Branch, and effectively eviscerate Congress's expressed intention that * * * a schemer who defrauds his employer be eligible for as much as five years in prison.").

4. Still other alternatives are possible. The court of appeals in this case observed that one potential approach would be to convene "a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." App., *infra*, 11a. The court noted, however, that doing so would raise questions in any case, such as the present one, in which the necessary facts have not been alleged in the indictment. *Id.* at 12a. See also *Penaranda*, 2004 WL 1551369, at *7 (noting possibility of "recalling the jury that convicted the defendant to determine whether the facts warranting an enhancement under the Guidelines have been proven"). No sentencing court can be confident that any particular approach it selects will survive review under the rule ultimately laid down by this Court.

D. The Questions Presented Are Of Enormous Importance

The questions presented in this case are of great public importance and warrant immediate resolution.

1. First, a potentially enormous number of cases is involved. There are approximately 64,000 federal criminal defendants sentenced under the Guidelines each year. See United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics*, at Table 2. That means that an average of approximately 1200 federal sentencings take place each week. Given the current disarray, a very large

percentage of those cases may result in unlawful sentences. The number of federal cases affected by the questions presented in this case will increase daily until this Court is able to address the issues.

Second, the Court's resolution of the questions presented will significantly affect the length of sentences in many of those cases. In the short time since *Blakely*, many courts have reduced sentences below otherwise-applicable Guidelines levels; other courts have elected to move to indeterminate sentencing; and still others have adhered to the Sentencing Guidelines. The effect on the sentence can be substantial.

Third, the uncertainty about how to proceed with federal sentencing imposes burdens on prosecutors, defense counsel, and federal trial and appellate courts. Especially insofar as courts attempt to apply the Guidelines with a *Blakely* overlay of jury findings, a host of complicated procedural issues must be confronted. These would include instructing the jury on Guidelines factors that were never intended for its use (see, *e.g.*, the Relevant Conduct Guideline, § 1B1.3, and its nine pages of application notes); possibly bifurcating the trial into guilt and sentencing phases; and determining the proper procedures for *Blakely* waivers in guilty pleas. All of these issues, and many more, will be fruitful sources for extensive litigation and appeals. All this could turn out to be unnecessary depending on this Court's resolution of the questions presented.

Fourth, the ramifications of the current instability are unsettling areas beyond sentencing. Although approximately 97.1% of federal criminal cases are ordinarily resolved by guilty pleas, see United States Sentencing Comm'n, *supra*, at Fig. C, uncertainty about the sentencing regime that will be applied has made it more difficult for the government and defendants to reach plea agreements. Some defendants may decide to stand trial, rather than enter a plea without

knowing what sentencing process will apply to them.[9] The volume of criminal cases means that even a modest shift from pleas to trials could have enormous consequences for the federal system. Even an increase from 3% to 6% in the number of defendants who stand trial would double the volume of cases that must be adjudicated. That increase would greatly aggravate the burden on courts, prosecutors, defendants, and defense counsel.

2. Although the courts of appeals have disagreed on the merits, they have agreed on the need for this Court's prompt action. See App., *infra*, 2a ("We cannot of course provide definitive guidance; only the Court and Congress can do that."); *Pineiro*, 2004 WL 1543170, at *9 ("We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response."). As Judge Easterbrook noted, the "likely consequence" of holding the Guidelines unconstitutional is "bedlam," and, while the lower "courts are bound to favor different recipes" for sentencing, "[t]he Supreme Court alone can make a definitive judgment." App., *infra*, 14a (dissenting opinion). Judge Easterbrook concluded that "[t]oday's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon." *Ibid.*

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[9] On July 13, 2004, District Judge Cassell testified before the Senate Committee on the Judiciary that, in one district, *Blakely* has led to "delayed guilty pleas," "extended plea colloquies," and "added time and effort spent on cases which would have resulted in a plea but now require trial" and, in another, "pleas and sentencings have almost come to a halt." Blakely v. Washington *and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm.*, 106th Cong., 2d Sess. at *8-*10 (2004) (statement of Hon. Paul Cassell, Judge, United States District Court Judge for the District of Utah), *available in* <http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669>.

The Second Circuit similarly implored the Court to act quickly to resolve the questions presented in its opinion in *Peneranda*. The court of appeals explained that *Blakely* "raises the prospect that many thousands of future sentences may be invalidated or, alternatively, that district courts simply will halt sentencing altogether pending a definitive ruling by the Supreme Court." *Penaranda*, 2004 WL 1551369, at *6. The court was "convinced that a prompt and authoritative answer to" what it termed "the pall of uncertainty" on federal sentencing "is needed to avoid a major disruption in the administration of criminal justice in the federal courts—disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements." *Ibid.* The court noted that "[m]any, if not all, of the[] various attempts to implement *Blakely* ultimately may prove misguided—or even wholly unnecessary." *Id.* at *7. But "[i]n the meantime, * * * defendants, victims, and the public will be left uncertain as to what sentences are lawful." *Ibid.*

E. The Court Should Resolve The Questions Presented In This Case

The court of appeals squarely held that *Blakely*'s Sixth Amendment holding extends to the Guidelines, and this Court should promptly review that holding. The question whether any unconstitutional aspects of the Guidelines scheme are severable from the remainder is also properly raised in this petition. The Court should grant review to address that issue as well, if *Blakely* is held applicable to the Guidelines.

1. Although the court of appeals remanded for the district court to determine how to proceed at sentencing, rather than resolving that issue itself, the court of appeals' action does not detract from the appropriateness of granting certiorari on that issue. The Court has jurisdiction to do so.

A grant of certiorari would bring before the Court the entire case, including the severability question of how, if *Blakely* applies to the Guidelines, the sentencing court is to proceed on remand. See 28 U.S.C. 2106 ("The Supreme Court * * * may affirm, *modify*, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, *and may remand the cause and * * * require such further proceedings to be had as may be just under the circumstances*.") (emphasis added). In instances in which the Court has confronted questions of law that "are currently in a state of evolving definition and uncertainty," *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), it has reached the merits, despite procedural obstacles, in order to settle an "important" issue that "appears likely to recur." Cf. *id.* at 257 (overlooking the plain error rule where declining to review the issue on the merits "would serve neither to promote the interests of justice nor to advance efficient judicial administration").[10] While the Court normally does not review an issue not presented or passed on below, in exceptional cases, it will. See *Carlson* v. *Green*, 446 U.S. 14 (1980) (deciding question not pressed or passed on in the lower courts, because it "is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits.").

In *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in the context of an earlier challenge to the Guidelines, this

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[10] See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (reaching issue decided, though not pressed, below because of the "uncertainty" surrounding the issue and its "importance to the administration of federal law"); see also *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540-541 (1999) (resolving legal standards governing principal's liability for punitive damages for actions of its agents under Title VII, although the court below did not reach that issue).

Court granted certiorari on a severability question presented by the government that had not been decided below. In that case, the district court had ruled that the Sentencing Guidelines were constitutional, and it therefore did not reach any issue of severability. Both the government and the defendant petitioned for certiorari before judgment in *Mistretta*. The government's petition presented three questions. Two of them addressed the constitutionality of the Guidelines—the only question addressed by the district court. 87-1904 Pet. at i. The third question, however, was "[w]hether, if the sentencing guidelines are invalid, the 1984 amendments to the statutes governing parole and 'good time' credits are severable and therefore apply to defendants sentenced for crimes committed after November 1, 1987." *Ibid.* The petition explained that the issue was of great importance, that it had divided the district courts, and that, if the Court struck down the Guidelines without resolving the issue, "the current confusion within the federal sentencing system will continue until another case raising those issues reaches this Court." *Id.* at 18. The defendant's petition also presented a severability question, 87-7028 Pet. at i, 7-9, noting that "[i]n order to prevent mass confusion and a flood of federal *habeas corpus* petitions * * *, this Court should address the severability question in this proceeding." *Id.* at 9. The Court granted certiorari on both petitions in full. 486 U.S. 1054 (1988). The same logic dictates a grant of certiorari on the severability issue in this case.

2. The government is also filing today a petition for a writ of certiorari before judgment in *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004). In *Fanfan*, the district court determined that the rule in *Blakely* is applicable to the Guidelines, and it went on to hold that the court was therefore limited to sentencing the defendant to a maximum term under the Guidelines based

solely on the facts found by the jury. Applying a Guidelines range of 63-78 months, rather than the range of 188-235 months that it found that the Guidelines otherwise required, the court sentenced the defendant to a term of 78 months of imprisonment. *Fanfan* thus resolved both questions presented in the petition in this case, and it provides an appropriate companion vehicle for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing. The government suggests that the Court grant the petitions both in this case and in *Fanfan* to assure that the Court has a vehicle in which to reach and resolve the vitally important issues presented. Simultaneous grants of review here and in *Fanfan* would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues.

3. The en banc Second Circuit has certified three questions to this Court under 28 U.S.C. 1254(2), urging the Court to decide "the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." *United States* v. *Penaranda*, 2004 WL 1551369, at *7. While the government agrees with the Second Circuit on the need for expedited resolution of that issue, *Penaranda* provides a less suitable vehicle for resolving the issues than this case and *Fanfan*. First, each of the Second Circuit's certified questions is a variation on the same theme: whether *Blakely* applies to the Guidelines. Unlike the petition in this case, the Second Circuit's certification order does not encompass any question concerning the consequences of holding *Blakely* applicable to the Guidelines. That is not because the Second Circuit regards that issue as unimportant. The court of appeals clearly recognized that "once a court concludes that *Blakely* applies to the Guidelines, it is without guidance as to the means for achieving compliance," *Penaranda*, *id.* at *7, and graphically illustrated the vital need for resolution of that issue by cataloguing five different approaches taken by

district courts and noting the uncertainty that will prevail "while these judicial approaches are being litigated." *Ibid.* But the Second Circuit's certified questions would not permit the Court to reach and resolve those remedial issues. In contrast, the petition for certiorari here squarely raises that issue.

Second, both of the two defendants involved in the *Penaranda* certification (Penaranda and Rojas) raised other issues on appeal.[11] If Penaranda is successful in obtaining a new trial, his sentencing challenges would become moot, at least pending conviction at a retrial. The same might not be true for Rojas, who challenges only the procedures at sentencing, but an advantage of the petition in this case is that the court of appeals has rejected all other challenges raised by the defendant aside from the *Blakely* challenge. App., *infra*, 22a.

Finally, in this case the Court has the benefit of a concrete judgment examining the applicability of *Blakely*; in *Penaranda*, no court has rendered a decision resolving the *Blakely* issues. This case also has the benefit of questions presented that were formulated by the petitioning party, in accordance with the customary practice of this Court. The adversary system contemplates that the parties will normally frame the questions for courts to review. While Congress has retained certification by a court of appeals as a

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[11] In *United States* v. *Rojas*, No. 03-1062(L), the defendant has raised the issue "[w]hether Mr. Rojas' Sixth Amendment rights were violated by the government's suppression of evidence at the *Fatico* [sentencing] hearing." Br. 2, 17-22 (filed Dec. 9, 2003). In *United States* v. *Penaranda*, No. 03-1284(L), the defendant raises three issues challenging the fairness of his trial and seeking a new trial. Br. 4-5, 60 (filed Sept. 18, 2003). The Second Circuit did not grant en banc review on those issues, but instead left them for resolution "in the normal course by the panels to which the cases are assigned." *Penaranda*, at *1 n.1; see *id.* at *8 n.10 (noting that court's transmission of the records to this court was "not to suggest that the Court should decide the entirety of the matters in controversy").

mode of Supreme Court review, it has rarely been employed in recent years. See Robert L. Stern, et al., *Supreme Court Practice* §§ 9.1, 9.3 (8th ed. 2002). Adherence to the normal adversary mode of review has the advantage of settled and well-understood procedures.[12]

F. Expedited Review Is Warranted

In light of the urgent need for this Court's resolution of the questions presented and the thousands—or even tens of thousands—of criminal sentencings that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should consider setting a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration, proposing schedules for the Court's hearing of this case and *United States* v. *Fanfan*. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes a schedule that would give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would allow for

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[12] After deciding this case and *Fanfan*, the Court could dispose of *Penaranda* as appropriate. Cf. *Iran Nat'l Airlines Corp.* v. *Marschalk Co.*, 453 U.S. 919 (1981) (disposing of certified questions in light of Court's decision on merits in case raising similar issue).

argument on the first scheduled day of the October 2004 Term, with corresponding adjustments to the briefing schedule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2004