Examining the *Blakely* Earthquake and Its Aftershocks

DOUGLAS A. BERMAN

FSR Editor; Associate Professor of Law at The Ohio State University Moritz College of Law

Since the 1970s, sentencing has undergone a political and legal revolution; it has been transformed from a field once rightly accused of being "lawless" to one that is now replete with law. Legislatures and sentencing commissions have developed various "structured" or "guideline" systems to govern sentencing in state and federal courts, and the evolution of modern sentencing reforms is one of the most dynamic and interesting stories in American legal history.

On June 24, 2004, the sentencing reform story was forever changed when an earthquake in the form of the Supreme Court's decision in *Blakely v. Washington*[1] struck the sentencing landscape. Though technically only declaring unconstitutional one portion of one state's sentencing guideline system, Justice Scalia's dramatic opinion for the Court in *Blakely* suggests that the Constitution requires any and every fact which increases a defendant's effective maximum sentence must be found by a jury beyond a reasonable doubt or admitted by the defendant. In other words, *Blakely* suggests the Constitutional does not permit *judges* to find facts which increase applicable sentencing ranges, even though nearly all sentencing reforms of the past two decades have made judges central and essential fact-finders in the application of sentencing laws. Consequently, the ramifications of *Blakely* for modern guideline sentencing reforms — indeed, for the entire criminal justice system — cannot be overstated.

Many books could (and perhaps will) be written about the dynamic legal and political events leading up to *Blakely*, the rich and compelling opinions authored by the Justices in *Blakely*, and the stunning legal and political developments in the weeks following *Blakely*. Indeed, many future Issues of the *Federal Sentencing Reporter* will be devoted to examining just how *Blakely* came to pass, what *Blakely* might mean, and the new sentencing universe that *Blakely* has created. For now, however, historical perspective will have to wait; this special Issue of FSR endeavors just to make an initial assessment of the *Blakely* earthquake and its initial aftershocks.

The Rumbling of the Constitutional Ground

Though the *Blakely* ruling might seem like a sudden event, the constitutional ground under sentencing reform had been rumbling for some time before the *Blakely* earthquake hit.

In cases through the 1990s, defendants' claims for greater procedural rights at sentencing started to highlight the conceptual difficulties of reliance on lax sentencing procedures after guideline reforms turned sentencing decision-making into more of a trial-like enterprise.[2] In these cases, a few Justices noted that guideline reforms, by transforming the nature of sentencing decision-making, raised questions about the Supreme Court's long-standing approval of limited procedural rights at sentencing.[3] Justice Stevens in particular assailed the continued approval of limited procedural rights for defendants in a world of guideline sentencing.[4]

These issues became more tangible in the Supreme Court's decisions in *Almendarez-Torres v. United States*[5] and *Jones v. United States*[6] — cases in which a number of Justices started to express concern with traditional sentencing procedures. In 1998, the Supreme Court in *Almendarez-Torres* concluded that evidence of a defendant's recidivism could be used to increase his sentence without being subject to the procedural rules for elements of crimes; but the 5–4 division of the Court in *Almendarez- Torres*, and Justice Scalia's dissent asserting that the Court's holding raised serious constitutional problems, was a harbinger of decisions to come.

Though the Blakely *ruling might seem like a sudden event, the constitutional ground under sentencing reform had been rumbling for some time before the* Blakely *earthquake hit.*

Federal Sentencing Reporter, Vol. 16, No. 5, pp. 307–311, ISSN 1053-9867, electronic ISSN 1533-8363.

The following term, in *Jones v. United States*, five Justices suggested that *Almendarez-Torres* announced a recidivism "exception" to a rule that facts establishing higher penalties must be treated procedurally as elements; the *Jones* Court asserted that "a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century" suggested the principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[7]

In 2000, the Supreme Court in *Apprendi v. New Jersey*[8] converted the *Jones* Court's dicta into the "watershed" holding 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."[9] At the time, observes of modern sentencing reforms realized that, by establishing a constitutional limitation on the procedures attending a legislative sentencing scheme, *Apprendi* was a landmark decision. However, the split 5–4 vote and the five separate opinions delivered by the Justices raised many questions about the exact scope and import of the Court's ruling.

Ultimately, the *Apprendi* decision itself proved to have a smaller impact than many observers and the *Apprendi* dissenters may have expected (or perhaps even hoped or feared). Though the decision generated much litigation and many appellate decisions trying to interpret and give effect to the *Apprendi* ruling, its impact on established criminal law doctrines was relatively limited because lower federal and state courts typically interpreted *Apprendi* narrowly,[10] and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*.[11]

It was thought that the Supreme Court would use Blakely *to rule, as had nearly all lower courts, that* Apprendi *had no applicability to judicial fact-finding which simply impacted guideline sentencing outcomes* within *otherwise applicable statutory ranges.*

The Supreme Court itself contributed significantly to restricting the reach of *Apprendi* in *Harris v. United States*,[12] where the Court held (in another 5–4 decision) that facts which establish minimum penalties do not require submission to a jury or proof beyond a reasonable doubt.[13] Interestingly, on the same day *Harris* was decided, the Court also expanded *Apprendi*'s reach in *Ring v. Arizona*[14] by holding that facts which establish eligibility for the death penalty require submission to a jury and proof beyond a reasonable doubt. However, because most jurisdictions already relied on jury sentencing in capital cases, the Court's decision in *Harris* to limit the procedural requirements for imposition of minimum sentences was the most important and telling iteration of the apparent scope of *Apprendi*. As Professor Stephanos Bibas put it, through *Harris* the Supreme Court seemed to have "caged the potentially ravenous, radical *Apprendi* tiger that threatened to devour modern sentencing law."[15] Or, to return to our main metaphor, it seemed that lower court rulings combined with the High Court's *Harris* decision served to quell constitutional rumblings even after *Apprendi* started to shake the foundations of sentencing reform.

The Big One Hits

When certiorari was granted in *Blakely v. Washington*, most observers believed the case was to serve as final confirmation that the *Apprendi* decision would not radically transform modern sentencing practices. It was thought that the Supreme Court would use *Blakely* to rule, as had nearly all lower courts, that *Apprendi* had no applicability to judicial fact-finding which simply impacted guideline sentencing outcomes *within* otherwise applicable statutory ranges.

But then the big one hit. In an opinion that is at once majestic and mysterious, Justice Scalia writing for the Court in *Blakely* concluded that Ralph Blakely's Sixth Amendment right to trial was violated when a Washington sentencing judge enhanced his guideline sentence based on the judge's factual finding that his kidnaping offense involved "deliberate cruelty." Linking this holding back to the Court's *Apprendi* ruling, Justice Scalia explained:

> 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*. In other words, the 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.[16]

Justice Scalia further explained that this particular articulation of the meaning and reach of *Apprendi* "reflects not just respect for longstanding precedent, but the need to give intelligible

content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[17]

Because the *Blakely* decision suggests that any and every fact "legally essential to the punishment" must be proven beyond a reasonable doubt to a jury or admitted by the defendant, the potential impact of *Blakely* on modern sentencing systems is staggering. Indeed, the dissenters spoke in near cataclysmic terms about what *Blakely* might mean. Justice O'Connor predicted that the "practical consequences of today's decision may be disastrous,"[18] because if "the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would."[19] She concluded her dissent by lamenting that "[o]ver 20 years of sentencing reform are all but lost; and tens of thousands of criminal judgments are in jeopardy."[20]

Justices Kennedy and Breyer likewise expressed dire concerns about the *Blakely* ruling. Justice Kennedy lamented that the decision does "considerable damage to our laws and to the administration of the criminal justice system" and he suggested the decision essentially commanded jurisdictions with sentencing guidelines "to scrap everything and start over."[21] Justice Breyer commented that he "thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion."[22]

Moreover, Justices O'Connor and Breyer both highlighted the many questions that the *Blakely* decision left in its wake. Justice O'Connor asked:

> How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.[23]

Justice Breyer focused his questions on the federal sentencing system and pondered:

> (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as "elements" of the crime? (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? (4) How are juries to deal with highly complex or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge?[24]

The *Blakely* majority's response to the dissenters questions and concerns was spartan and tepid. Justice Scalia said simply that "we are not . . . finding determinate sentencing schemes unconstitutional. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."[25] And, in response to the dissenters' complaints that the majority's broad ruling would render unconstitutional fundamental provisions of the federal sentencing guidelines, Justice Scalia asserted simply: "The Federal Guidelines are not before us, and we express no opinion on them."[26]

Because the Blakely *decision suggests that any and every fact "legally essential to the punishment" must be proven beyond a reasonable doubt to a jury or admitted by the defendant, the potential impact of* Blakely *on modern sentencing systems is staggering.*

Initial Aftershocks of the *Blakely* Earthquake

Scholars are sure to be discussing and debating the meaning, reach and importance of the *Blakely* decision for many years. However, it took only days before *Blakely* began to have a profound impact on sentencing systems, and especially on the operation of the federal guidelines. As reflected in a rapid-fire series of lower federal court decisions, the *Blakely* earthquake produced huge and dramatic legal aftershocks. And, because no court could be certain of the applicable sentencing rules, nor certain about when or how the rules would be clarified, the federal criminal justice slipped into a period that might be reasonably described as legal anarchy.

Less than a week after *Blakely* was handed down, three federal district judges had already declared at least portions of the federal sentencing guidelines unconstitutional. Judge Joseph Goodwin in *United States v. Shamblin*[27] and D. Brock Hornsby in *United States v. Fanfan*[28] concluded that *Blakely* precluded the application of guideline sentencing enhancements that relied on judicial fact-finding. However, Judges Goodwin and Hornsby concluded that they must follow the guidelines' other instructions. Meanwhile, Judge Paul Cassell in *United States v. Croxford*[29] also found guideline enhancements based on judicial fact-finding unconstitutional, but concluded that these parts of the guidelines were not severable from the rest of the federal sentencing system. This meant, in Judge Cassell's view, that the entire guidelines system must be legally inoperative in cases that required guideline enhancements involving judicial fact-finding.

While these and other cases were struggling with the appropriate remedy after finding that *Blakely* rendered some guidelines provisions unconstitutional, the Department of Justice issued official guidance to all federal prosecutors which disputed the initial premise that *Blakely* made portions of the federal guidelines unconstitutional. As detailed through a memo by Deputy Attorney General James Comey (which is reprinted in this Issue), DOJ started to press arguments nationwide that the federal sentencing guidelines were still constitutional and still legally binding despite *Blakely*.

Not long after federal district courts across the country started expressing a wide variety of views about the guidelines' status after *Blakely*, the federal circuit courts got into the act. In fact, on consecutive business days only two weeks after the *Blakely* decision, the Seventh Circuit in *United States v. Booker*[30] became the first circuit to declare the federal guidelines unconstitutional due to *Blakely*, and then the Fifth Circuit in *United States v. Pineiro* became the first circuit to find the federal guidelines still constitutional despite *Blakely*,[31] and then the Second Circuit in *United States v. Penaranda*[32] decided in banc to "punt" this critical issue by certifying three questions about the guidelines' constitutionality to the Supreme Court. All three decisions urged immediate action by the Supreme Court to clarify the meaning and impact of *Blakely* for the federal sentencing system.

Also acting swifly, Congress within three weeks of the *Blakely* decision had held two hearings that discussed *Blakely*'s impact on federal sentencing and possible legislative responses. Though presented with a variety of plausible ways to "fix" federal sentencing in the immediate wake of *Blakely*, the Senate was content (for now) to issue a resolution that implored the Supreme Court to clarify quickly *Blakely*'s applicability to the federal sentencing guidelines. Notably, the "Concurrent Resolution" that the Senate passed on July 21, 2004 (and which is reprinted in this Issue) included language that seemed to speak to the guidelines' constitutionality and severability, issues that the Supreme Court would need to address in any case concerning the meaning of the *Blakely* decision for the federal sentencing system.

On the same day that the Senate exhorted the Supreme Court to act quickly, the Acting Solicitor General filed for certiorari and expedited consideration in two of the first lower court cases finding portions of the federal sentencing guidelines unconstitutional. The Acting Solicitor General asserted that "*Blakely* has profoundly unsettled the federal criminal justice system and . . . there is an urgent need for this Court's resolution of questions about whether and how *Blakely* applies to the Guidelines."[33] Mincing no words, the Acting Solicitor General also stated:

> [T]here is widespread sentiment in the lower federal judiciary that, absent this Court's expedited intervention, federal sentencing threatens to descend even further into a balkanized set of regimes in which each circuit, if not each individual district court judge, literally makes up the rules as he or she goes along. This chaotic state of affairs cannot stand. It can only be rectified by expeditious action by this Court.[34]

Perhaps unsurprisingly in light of the urgent pleas put forward by the Executive, Legislative and Judicial Branches, the Supreme Court on August 2, 2004 granted certiorari in *United States v. Booker* and *United States v. Fanfan*, the two cases in which the Acting Solicitor General sought review. The Supreme Court has ordered expedited briefing and scheduled two hours of oral argument for the first day of its October 2004 term.

Surveying the Impact of the *Blakely* Earthquake and Moving Forward

With so much happening so fast, it is almost impossible to keep track of all the *Blakely* action. (Indeed, on my website *Sentencing Law and Policy*, http://sentencing.typepad.com, I have been reporting on major post-*Blakely* developments nearly every day.) Fortunately, with the help of effective and speedy authors, this special Issue of the *Federal Sentencing Reporter* is able to provide an immediate survey and assessment of the (ever-shifting) post-*Blakely* sentencing landscape. The commentaries in this Issue authored by Professors Rachel Barkow, Stephanos Bibas, Susan Klein and Nancy King, and Mark Osler collectively do a wondrous job chronicling this chaotic period in federal sentencing law, canvassing the array of legal issues and questions that now confront courts, and making important recommendations concerning how judges and lawmakers ought to respond to the *Blakely* decision. In addition, in this Issue we reprint two memoranda written by Professor Frank Bowman to the U.S. Sentencing Commission and a letter from the Practitioners Advisory Group to the Commission — documents which provide another set of perspectives about what *Blakely* could and should mean for the present and future of federal sentencing.

Blakely's aftershocks will be rumbling in many ways in many settings for many years, and FSR expects to cover the legal, political and practical impact of the Blakely *decision in many future issues.*

Last but certainly not least, this Issue also includes a memorandum authored by Brad O'Connell of the First District Appellate Project in California, completed just a few days after *Blakely* was handed down, which comprehensively discusses what *Blakely* might mean for California sentences under its Determinate Sentencing Law. With all the major post-*Blakely* developments in the federal system, it is dangerously easy to give insufficient attention to *Blakely*'s impact on state sentencing systems. Particularly because the state sentencing story is quite important — more than 90% of all criminal convictions are in state courts — and quite dynamic — state sentencing structures are interestingly diverse and will be impacted by *Blakely* in interestingly diverse ways — FSR is glad to include state materials in this Issue and expects to provide additional coverage of state developments in many future issues.

Blakely's aftershocks will be rumbling in many ways in many settings for many years, and FSR expects to cover the legal, political and practical impact of the *Blakely* decision in many future issues. Though this Issue should help readers understand and appreciate the initial damage that *Blakely* has done to structured sentencing reforms, the *Federal Sentencing Reporter* hopes to play an integral role in all the necessary and important rebuilding efforts.

Notes

1 124 S. Ct. 2531 (2004).
2 *See* Douglas A. Berman, *Appreciating* Apprendi: *Developing Sentencing Procedures in the Shadow of the Constitution*, 67 CRIM. L. BULL. 627, 629–45 (2001).
3 *See, e.g., United States v. Watts*, 519 U.S. 148, 170–71 (1997) (Kennedy, J., dissenting); *Nichols v. United States*, 511 U.S. 738, 754–63 (1994) (Blackmun, J., dissenting).
4 See, e.g., *Watts*, 519 U.S. at 165–66 (Stevens, J. dissenting); *Witte v. United States*, 515 U.S. 389, 409–11 (1995) (Stevens, J. dissenting).
5 523 U.S. 224 (1998).
6 526 U.S. 227 (1999).
7 526 U.S. at 243 n.6, 252.
8 530 U.S. 466 (2000).
9 *Apprendi*, 530 U.S. at 490. Justice O'Connor, writing in dissent in *Apprendi*, used the term "watershed" to describe the majority's decision. *See id*. at 524 (O'Connor, J., dissenting) (asserting that *Apprendi* "will surely be remembered as a watershed change in constitutional law").
10 *See generally* Stephanos Bibas, Apprendi *in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).
11 The one exception to this story comes from Kansas, where the Kansas Supreme Court held after *Apprendi* that its judicially administered sentencing guidelines system was constitutionally problematic. *See* State v. Gould, 23 P.3d 801, 814 (Kan. 2001); State v. Cullen, 60 P.3d 933 (Kan. 2003). The Kansas legislature responded by creating procedures for using sentencing juries to find necessary facts in certain cases. *See* KANSAS STATUTES ANNOTATED § 21–4718.
12 122 S. Ct. 2406 (2002).
13 On the same day it decided *Harris*, the Supreme Court in *United States v. Cotton*, 122 S. Ct. 1781 (2002), effectively limited the impact of *Apprendi* by ruling that indictments rendered defective by *Apprendi* should be reviewed for plain error and not lead to automatic reversal of a conviction or sentence.
14 122 S. Ct. 2428 (2002).
15 Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *to Upset Most Sentencing*, 15 FED. SENT. REP. 79, 79 (2002).
16 *Blakely*, 124 S. Ct. at 2537 (emphasis in original).
17 *Id.* at 2538–39.
18 *Id.* at 2544 (O'Connor, J., dissenting).
19 *Id.* at 2550.
20 *Id.*
21 *Id.* at 2550–51 (Kennedy, J., dissenting).
22 *Id.* at 2561 (Breyer, J., dissenting).
23 *Id.* at 2549 (O'Connor, J., dissenting).
24 *Id.* at 2561–62 (Breyer, J., dissenting).
25 *Blakely*, 124 S. Ct. at 2540.
26 *Id.* at 2538 n.9.
27 2004 WL 1468561 (S.D. W.Va. June 30, 2004).
28 No. 03-47-P-H (D. Me. June 28, 2004).
29 2004 WL 1462111 (D. Utah June 29, 2004), *amended* 2004 WL 1521560 (D. Utah July 7, 2004).
30 2004 WL 1535858 (7th Cir. July 9, 2004).
31 2004 WL 1543170 (5th Cir. July 12, 2004).
32 2004 WL 1551369 (2d Cir. July 12, 2004).
33 Brief of the United States in Opposition to Granting Certiorari in *United States v. Bijou* at 5–6 (July 29, 2004).
34 Reply Brief of the United States in Support of Granting Certiorari in *United States v. Booker* and *United States v. Fanfan* at 20–21 (July 29, 2004).