MEMORANDUM

To: All Federal Prosecutors

From: Christopher A. Wray
Assistant Attorney General

Subject: Guidance Regarding The Application Of Blakely v. Washington, 2004 WL 1402697 (June 24, 2004), To Pending Cases

Introduction

In Blakely v. Washington, 2004 WL 1402697 (June 24, 2004), the Supreme Court applied the rule announced in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), to invalidate an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. Because the facts supporting the departure were "neither admitted by [the defendant] nor found by a jury," the Court held, the sentence violated the Sixth Amendment. 2004 WL 1402697, at *4-*6.

The Deputy Attorney General, in his memorandum of July 2, 2004, has determined the legal positions of the United States and has provided guidance for federal prosecutors with respect to our charging, plea, and trial practices in light of the Blakely decision. This memorandum provides additional legal and practical guidance concerning the effect of the Blakely decision on federal criminal cases, based on our current assessment of the impact of Blakely. The Criminal Division will provide further guidance in light of developments in the law as the courts begin to apply Blakely.

1The material in this document consists of attorney work product and should not be disseminated outside the Department of Justice.
Section 1 summarizes the *Blakely* decision.

Section 2 describes the government’s legal argument that *Blakely* does not apply to the Sentencing Guidelines.

Section 3 sets forth the government’s position if courts hold that *Blakely* is applicable to the Guidelines in a particular case.

Section 4 suggests protective measures prosecutors should take to safeguard against the possibility that courts may hold that the Guidelines must be applied by giving defendants the procedural rights set forth in *Blakely* with respect to facts that increase a Guidelines sentence above the maximum sentence that may be imposed solely on the basis of the facts found by the jury verdict (or admitted by the defendant).

Sections 5 and 6 discuss approaches for responding to *Blakely* claims raised on direct appeal or in motions under 28 U.S.C. 2255.

**Summary**

Before turning to these sections, we here summarize the key guidance contained in them.

A. In all cases:

1. Argue first that *Blakely* does not invalidate the Guidelines or alter the manner in which they are to be applied. If the court rejects that position, argue the contingencies as set forth below.

2. After a defendant is convicted or enters a guilty plea, urge the court to direct the probation office to prepare a presentence report with the Guidelines calculations.

3. Regardless of which approach the sentencing court adopts, ask the court to state what sentence it would impose 1) under the Guidelines without regard to *Blakely*; 2) in the court’s discretion within the statutory range; and 3) under the Guidelines if *Blakely* applies.
B. In cases in which trial has commenced, a guilty plea has been entered, or a verdict has been rendered but sentence has not yet been imposed:

1. If a Guidelines sentence can be calculated without any upward enhancements (including relevant conduct, upward adjustments, and upward departures) beyond the defendant’s admissions or the jury’s verdict, argue that the Guidelines remain applicable, and that the defendant should be sentenced under them.

2. Where a defendant’s Guidelines sentence requires application of upward enhancements not proven to a jury or admitted in a plea, argue that the Guidelines cannot be constitutionally applied at all. Urge the court to impose a sentence, in its discretion, within the minimum and maximum statutory terms, consistent with what would have been the Guidelines sentence.

3. Where a defendant, pursuant to a plea agreement, agreed that his sentence would be determined under the Guidelines or agreed to a particular Guidelines sentence or sentencing range, argue that the defendant’s plea waived any Blakely claim. If the defendant admitted to facts supporting enhancements under the Guidelines, it may be possible to argue that the guilty plea waived any challenge to the failure to allege those facts in the indictment. If you lose on these arguments, argue for discretionary sentencing within the statutory range and urge the court to exercise its discretion to impose the sentence the Guidelines would require.

4. If a court believes, contrary to our argument, that the Blakely procedures (i.e., proof to a jury beyond a reasonable doubt) can apply to the Guidelines, and if the indictment contains allegations to support the applicable Guidelines factors, consider asking the court to empanel a jury to decide the sentencing factors (but be aware that there are substantial double jeopardy concerns about that course).

5. In all cases, ask the court to state alternative sentences as set forth above.

C. For pre-trial/plea cases, take the following protective measures pending a Supreme Court decision on the fate of the Guidelines:

1. Indictments. Allege in indictments all Guidelines enhancement factors that are readily provable beyond a reasonable doubt (except prior convictions). Supersede current indictments if necessary.

2. Pretrial Filings. Ask the court, in pretrial filings, to explain how it will sentence the defendant upon conviction (i.e., by applying the Guidelines without regard to Blakely, by sentencing the defendant in its discretion within the statutory sentencing range, or by applying Blakely procedures to the Guidelines).

a. Seek agreements in which the defendant waives his Blakely rights and agrees to be sentenced under the Guidelines.

b. At the plea colloquy, ask the court to advise the defendant of the terms of the Blakely waiver and to determine that he understands it.

c. If the defendant refuses to waive his Blakely rights, you should ask him to admit the facts supporting any applicable Guidelines enhancements.

d. If a defendant refuses to waive his Blakely rights or to admit facts supporting Guidelines enhancements, prosecutors may agree to a "partial" plea, in which the defendant reserves any charged enhancements. This may require a separate sentencing mini-trial if the court believes it should apply the Blakely procedures to the Guidelines.

e. If a defendant has agreed to plead guilty, but not yet entered his plea, ask him to waive his rights under Blakely. If the defendant will not waive his Blakely rights, and if there has been no detrimental reliance, offices may determine, subject to supervisory or U.S. Attorney approval, whether it is appropriate to withdraw the plea offer pursuant to the controlling law.

4. At trial. Present evidence sufficient to prove all charged Guidelines enhancement factors beyond a reasonable doubt. Present the jury with a special verdict form to make findings on the charged factors.

5. At sentencing. Ask the court to state alternative sentences as set forth above.

D. Blakely claims raised in pending direct appeals or on collateral review.

1. On appeal. Argue that Blakely does not apply to the Guidelines. If the defendant did not preserve a Blakely objection, argue that he cannot demonstrate plain error.

2. On collateral review. Argue that Blakely does not apply on collateral review. Also argue, where applicable, that the defendant cannot show cause for failing to raise the claim earlier and "actual prejudice" resulting from the Blakely error.

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1. The Blakely Decision.

The defendant in Blakely pleaded guilty to second degree kidnapping. A state statute provided that the maximum sentence for that offense was 10 years' imprisonment. Another statute established a grid of "standard" sentence ranges, based on the seriousness of the offense and the defendant's criminal history. The statute also authorized a sentencing court to depart
upward from the standard range, and impose a sentence up to the statutory maximum, if it found substantial and compelling reasons warranting an exceptional sentence. Among such reasons was the fact that the defendant acted with "deliberate cruelty." Blakely's standard sentencing range was 49 to 53 months' imprisonment, but the sentencing court found that he had acted with deliberate cruelty and departed upward, sentencing him to 90 months' imprisonment.

Blakely argued that because he was sentenced above the maximum standard sentence of 53 months based on a finding made by the court, the upward departure violated Apprendi's 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." 530 U.S. at 490. The State contended that there was no Apprendi violation because Blakely's sentence was within the 10-year statutory maximum. The Court rejected that argument, holding 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." 2004 WL 1402697, at *4 (emphasis in original).

The Court observed that the United States, as amicus curiae, "note[d] differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant." Id. at *6 n.9. The Court then reserved the issue, stating that "[t]he Federal Guidelines are not before us, and we express no opinion on them." Ibid.

Justice O'Connor, in a portion of her dissenting opinion joined by Justice Breyer, predicted that Blakely would affect the continued viability of the Federal Sentencing Guidelines. She reasoned that "[t]he fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, *** and Congress has unfettered control to reject or accept any particular guideline." Id. at *16 (O'Connor, J., dissenting) (citations omitted); see also id. at *29 (Breyer, J., dissenting) ("Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.").


The position of the United States is that the rule announced in Blakely does not apply to the Federal Sentencing Guidelines, and that the Guidelines may continue to be constitutionally applied in their intended fashion, i.e., through factfinding by a judge, under the preponderance of the evidence standard, at sentencing. The government's legal argument is that the lower federal courts are not free to invalidate the Guidelines given the prior Supreme Court decisions upholding their constitutionality, and that, on the merits, the Guidelines are distinguishable from the system invalidated in Blakely. The Criminal Division will distribute a sample brief making this argument. Prosecutors should therefore argue in favor of the continued constitutional validity of the Sentencing Guidelines as a system requiring the imposition of sentences by judges.
If the court rules that Blakely does invalidate all or part of the Guidelines system, prosecutors should preserve an objection.


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

There are three critical components of this position. First, the Guidelines remain constitutional and applicable if the Guidelines sentence can be calculated without the resolution of factual issues beyond the admitted facts or the jury verdict on the elements of the offense of conviction. Thus, in cases where a court, applying the Guidelines as they were intended, finds that there are no applicable upward adjustments under the Guidelines beyond the admitted facts or the jury verdict on the elements of the offense, the Guidelines are constitutional and should be applied. Second, in a case in which the defendant agrees to waive his right to resolution of contested factual issues under the Blakely procedural requirements, the Guidelines should be applied. Thus, waivers of "Blakely rights" in connection with plea agreements and guilty pleas may be sought. Third, in a case in which there are applicable upward adjustments under the Guidelines, and the defendant desires to contest the underlying facts under the Blakely procedures, the Guidelines system as a whole cannot be constitutionally applied. In that event, the government should urge the court to impose sentence, exercising traditional judicial discretion, within the applicable statutory sentencing range. The government's sentencing recommendation in all such cases should be that the court exercise its discretion to impose a sentence that conforms to the sentence calculated under the Guidelines (without regard to Blakely). As set forth below, prosecutors should ask the court to state what sentence it would impose 1) under the Guidelines without regard to Blakely; 2) if the Guidelines fall because of Blakely and the court has discretion to impose sentence within the statutory range; and 3) under the Guidelines if Blakely applies.

As set forth above, we will argue first, that Blakely does not apply to the federal Sentencing Guidelines, and second, if the resolution of contested facts surrounding Guidelines enhancements is necessary, that courts which conclude that Blakely does apply should undertake discretionary sentencing within the statutory range. Nevertheless, prosecutors should immediately begin following certain protective procedures in order to safeguard against the possibility that courts may hold that the Guidelines must be applied by giving defendants the procedural rights set forth in Blakely with respect to facts that increase a Guidelines sentence.

Guidelines Factors to Which Blakely Would Apply. Blakely held that a defendant may not be sentenced above the maximum the court could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, * * * without any additional findings." 2004 WL 1402697, at *4 (emphasizes in original). Although it is difficult to predict how Blakely might be applied to the Guidelines, a likely outcome is that a defendant's sentence would be determined by the base offense level applicable to the offense of conviction and any upward adjustment based on an element of the offense (for example, the specific offense characteristics in Guidelines § 2B3.1 for robbery of a financial institution and use of a dangerous weapon, where the offense of conviction is armed bank robbery), with any downward adjustments, and the defendant's criminal history category. The top of the applicable Guidelines range would be the maximum sentence permitted under Blakely. If applicable, Blakely would appear to preclude the sentencing court from imposing upward adjustments or upward departures based on facts (including determinations of relevant conduct) that are not reflected in the jury verdict. Blakely would not apply to facts that support downward adjustments -- acceptance of responsibility or minor or minimal role in the offense, for example -- or downward departures. See Apprendi, 530 U.S. at 490 n.16 (recognizing distinction between "facts in aggravation of punishment and facts in mitigation").

Blakely would not apply to the court's determination of the defendant's criminal history category insofar as it is based on prior convictions. See Apprendi, 530 U.S. at 490 (facts "[o]ther than the fact of a prior conviction" that increase statutory maximum must be found by jury beyond a reasonable doubt); Almendarez-Torres v. United States, 523 U.S. 224 (1998). Courts have generally interpreted the prior conviction exception to the Apprendi rule broadly. See, e.g., United States v. Morris, 293 F.3d 1010, 1013 (7th Cir. 2002) (Apprendi recidivism exception encompasses issue of whether prior convictions were for offenses "committed on occasions different from one another" under Armed Career Criminal Act, 18 U.S.C. 924(e)); United States v. Santiago, 268 F.3d 151, 156-157 (2d Cir. 2001) (same; Apprendi leaves to the judge "the task of finding not only the mere fact of prior convictions but other related issues as well"); United States v. Davis, 260 F.3d 965, 969 (8th Cir. 2001) ("a fact of prior conviction includes not only the fact that a prior conviction exists, but also a determination of whether a conviction is one of the enumerated types qualifying for the sentence enhancement" under the three-strikes statute, 18 U.S.C. 3559). But cf. United States v. Matthews, 312 F.3d 652, 663-664 (5th Cir. 2002)
(Appendix applies to "additional factual findings unrelated to nature of prior conviction" under criminal street gang statute, 18 U.S.C. 521). Blakely would presumably apply, however, to facts that increase a defendant's criminal history score under Guidelines § 4A1.1 but do not involve prior convictions - for example, that the defendant committed the offense while on supervised release (Section 4A1.1(d)).

**Statutory Mandatory Minimums.** Blakely also did not overrule Harris v. United States, 536 U.S. 545 (2002). In Harris, the Court reaffirmed the holding of McMillan v. Pennsylvania, 477 U.S. 79 (1986), that a fact that increases a statutory minimum sentence within the authorized range may be found by the sentencing judge by a preponderance of the evidence, and limited the Appendix rule to facts that increase a statutory maximum. 536 U.S. at 568-569; id. at 556-568 (opinion of Kennedy, J.); id. at 569-572 (opinion of Breyer, J.); see Blakely, 2004 WL 1402697, at *5 (distinguishing McMillan). Thus, for example, even if Blakely applies to the Sentencing Guidelines, a district court sentencing a defendant for a violation of 18 U.S.C. 924(c) would be required to impose a mandatory minimum sentence of seven years' imprisonment if the court finds by a preponderance of the evidence that the defendant brandished a firearm. 18 U.S.C. 924(c)(1)(A)(ii); see Harris, 536 U.S. at 568-569. Pre-Blakely law in each circuit concerning the application of Harris to sentences under the drug statute will continue to apply. Compare, e.g., United States v. Luciano, 311 U.S. 146, 154 (2d Cir. 2002) (claim that the imposition of a mandatory minimum sentence under 21 U.S.C. 841(b) without a jury finding violates Appendix "is not tenable after Harris"), with United States v. Velasco-Heredia, 319 F.3d 1080, 1085 (9th Cir. 2003) (Harris does not apply to imposition of mandatory minimum sentence under 21 U.S.C. 841(b) because, unlike 18 U.S.C. 924(c), finding which increases mandatory minimum sentence under Section 841(b) also exposes defendant to higher statutory maximum).

**Procedures That Blakely Would Require.** Any fact to which Blakely applies must be charged in the indictment, and either found by the jury beyond a reasonable doubt or admitted by the defendant. Blakely, 2004 WL 1402697, at *4; United States v. Corton, 535 U.S. 625, 627 (2002) (indictment requirement applies in a federal prosecution).

After Appendix was decided, we were able to reduce the impact of the decision by immediately beginning to charge and prove to the jury facts that increase the statutory maximum -- for example, drug type and quantity for offenses under 21 U.S.C. 841. Applying Appendix procedures to facts that support upward adjustments under the Guidelines poses a much more complicated problem than we faced in dealing with the drug statute and other federal statutes, and at best we may only be able to approximate what the Guidelines sentence would have been before the Blakely decision. It may be difficult for a prosecutor drafting an indictment to anticipate which Guidelines adjustments will apply at sentencing. Some facts that would support imposition of an upward adjustment -- for example, the defendant's perjury at trial -- may not even exist when the indictment is returned. Obtaining jury findings on numerous Guidelines factors may require cumbersome special verdict forms, and possibly bifurcated trials. Nevertheless, until the Supreme Court definitively rules on the constitutional impact of Blakely on the Guidelines, prosecutors should follow certain protective procedures in order to safeguard
against the possibility of a changed legal landscape as a result of future court decisions.

A. Indictments and Informations. Prosecutors should immediately begin to include in indictments all Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the Blakely and Apprendi rules) that are readily provable beyond a reasonable doubt. Facts that will need to be alleged may include Chapter Two factors that determine the base offense level (including relevant conduct), Chapter Two specific offense characteristics, Chapter Three upward adjustments, and Chapter Five departure grounds. In a drug case, for example, this might include the quantity of drugs as set forth in the drug quantity table of Guidelines § 2D1.1(c) (for example, that the defendant distributed at least 2 kg but less than 3.5 kg of cocaine, which would result in an offense level of 28), that a dangerous weapon was possessed (Guidelines § 2D1.1(b)(1)), and that the defendant was an organizer or leader of criminal activity that involved five or more participants (Guidelines § 3B1.1(a)). Prior convictions do not need to be alleged in the indictment, but prosecutors should allege facts other than prior convictions that increase a defendant's criminal history score and are readily provable beyond a reasonable doubt. The allegations of enhancement factors should track the language of the applicable Sentencing Guidelines. Prosecutors also may choose to allege Guidelines enhancements in informations where the defendant has agreed to enter a guilty plea and to waive indictment, but has not agreed to waive his Blakely rights.

If a defendant has already been indicted but has not yet gone to trial or pleaded guilty, prosecutors should supersede the indictment to allege Guidelines factors. The Criminal Division will prepare and distribute sample indictments.

B. Guilty Pleas

1. Plea Agreements. In plea negotiations, prosecutors should immediately seek to obtain plea agreements that contain waivers of all rights under Blakely. The agreements should generally include provisions stating that the defendant agrees to have his sentence determined pursuant to the Sentencing Guidelines; waives any right to have facts that determine his offense level under the Guidelines (including facts that support any specific offense characteristic or other enhancement or adjustment) alleged in an indictment and found by a jury beyond a reasonable doubt; agrees that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agrees to waive all constitutional challenges to the validity of the Sentencing Guidelines. Prosecutors may agree to modified waivers or conditional plea agreements preserving certain challenges if such concessions are found necessary in a particular case or district. For example, in a district where the judges have held that Blakely applies to the Guidelines, the agreement might provide that the defendant agrees to waive jury factfinding on Guidelines enhancements, but that the judge will apply the reasonable-doubt standard at sentencing. Likewise, a defendant who refuses to waive his Blakely rights might be willing to admit all Guidelines enhancements that are readily provable beyond a reasonable doubt, and agree to be sentenced either pursuant to the court’s discretion or under the Guidelines as applied
consistent with Blakely.

If a defendant refuses to waive his rights under Blakely and the court concludes that Blakely applies to the Guidelines and holds, contrary to the government's legal position, that the Guidelines may be applied subject to compliance with the procedures required by Blakely, prosecutors, in their discretion, may agree to "partial" pleas in which the defendant pleads to the statutory elements of his offense and reserves any charged sentencing enhancements. That course, however, would require a separate mini-trial before any Guidelines enhancements could be applied. There is a division of authority with respect to whether a district court may, over the government's objection, accept a defendant's plea of guilty to the statutory elements of an offense without admitting charged Apprendi factors. Compare United States v. Yu, 285 F.3d 192, 197-198 (2d Cir. 2002) (holding that "it was error for the district court to permit [the defendant] to plead guilty to quantity-specific charges while refusing to allocate to quantity" and that the defendant was not entitled to "be sentenced *** as he would have been if a jury had decided the drug-quantity issue in his favor."), with United States v. Thomas, 355 F.3d 1191, 1196-1197 (9th Cir. 2004) (defendant may enter a plea to a violation of 21 U.S.C. 841(a) without admitting to the drug quantity alleged in the indictment because drug quantity is not a true element of the offense).

2. Plea Hearings. When the defendant has waived his rights under Blakely, the prosecutor should ask the court to advise the defendant of the terms of the waiver during the plea colloquy and determine that he understands it. The court should confirm the defendant's understanding that, assuming the Sentencing Guidelines must be applied subject to the procedural requirements of Blakely, the defendant (1) has the right to have facts that determine his sentence under the Guidelines — including the base offense level and any specific offense characteristics applicable to the charged offense, any other upward adjustments or enhancements to the offense level, and any upward departures — charged in an indictment and proved to a jury beyond a reasonable doubt; and (2) is waiving those rights in favor of determination by the sentencing judge under a preponderance-of-the-evidence standard. In addition to advising the defendant of the nature of the charge, see Fed. R.Crim. P. 11(b)(1)(G), the court should also give similar advice about the nature of each Guidelines factor that the government would be required to prove to the jury beyond a reasonable doubt. Cf. United States v. Minore, 292 F.3d 1109, 1117 (9th Cir. 2002) ("where drug quantity exposes the defendant to a higher statutory maximum sentence than he would otherwise receive, it is the functional equivalent of a critical element"); accordingly, "Rule 11[] and due process require the district court to advise the defendant *** that the government would have to prove drug quantity as it would prove any element — to the jury beyond a reasonable doubt"). Courts should continue to advise defendants of the applicable statutory maximum and any applicable mandatory minimum as they do now.

3. Cases in which the defendant has agreed to a plea offer but has not yet entered a plea. Before the district court has accepted a guilty plea, the general rule is that the government may withdraw a plea offer even if the defendant already has agreed to accept the offer. The Supreme Court has recognized that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does
not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Mabry v. Johnson, 467 U.S. 504, 507 (1984). Thus, it is generally only "when the prosecution breaches its promise with respect to an executed plea agreement" that a defendant can properly complain that he has "ple[d] guilty on a false premise" and thereby establish a due process violation. Id. at 509 (emphasis added). There is, however, an exception to the general rule. A plea agreement may be binding on the government prior to acceptance by the court if the defendant has relied to his detriment on the agreement – for example, by providing information that the government used in an ongoing investigation. See, e.g., United States v. Wells, 211 F.3d 988, 994 n.3 (6th Cir. 2000); United States v. Savage, 978 F.2d 1136, 1138 (9th Cir. 1992); but see United States v. Coon, 805 F.2d 822, 825 (8th Cir. 1986) (defendant not in "worse position" after making confession based on inaccurate information from prosecutor because he could have sought to exclude the confession from evidence and proceeded to trial as if no plea agreement had existed). If the defendant has agreed to plead guilty, a prosecutor should ask the defendant to waive his rights under Blakely. If the defendant will not waive his Blakely rights, and there has been no detrimental reliance, prosecutors may consider whether it is appropriate to withdraw the plea offer pursuant to the controlling law. See, e.g., United States v. Pleasant, 730 F.2d 657, 663-65 (11th Cir. 1984) ("Like any offeror, [the prosecutor] can withdraw his offer at any time, unless, perhaps, the [defendant] has relied on the offer and the prosecutor should be estopped from withdrawing it."); see also United States v. Dockery, 965 F.2d 1112, 1116 (D.C. Cir. 1992). Because this approach requires prosecutors to withdraw an agreement they entered, even if not binding, offices should require supervisory or U.S. Attorney approval before withdrawal. If the office does withdraw a plea offer, the government could then consider prosecuting the defendant on other charges that otherwise would have been dismissed pursuant to the plea bargain and superseding the indictment to charge the applicable Guidelines enhancements.

4. Cases in which the defendant has entered a plea but has not yet been sentenced.

a. Waiver. In some cases, we may be able to argue that the defendant waived a Blakely claim by pleading guilty and entering into a plea agreement. Whether we can make a waiver argument in a particular case will depend on the allegations of the indictment, the terms of the plea agreement, and the facts the defendant admitted in the agreement or at the plea colloquy.

Generally speaking, a defendant who pleads guilty waives all claims relating to constitutional violations that occur before the entry of the plea. See, e.g., Tollett v. Henderson, 411 U.S. 258, 266 (1973). A guilty plea does not, however, waive challenges to subsequent rulings, including claims of error at sentencing. Thus, a defendant who pleads guilty to an offense does not by his plea alone waive a claim under Blakely that the sentencing judge could not sentence based on an upward adjustment that was neither alleged in the indictment nor admitted by the defendant during the plea proceeding.

Plea Agreements: In some cases, however, we will be able to argue that by agreeing to particular provisions of the plea agreement, the defendant waived any challenge based on Blakely
to the application of the Guidelines. For example, the defendant may have agreed that his sentence would be determined under the Sentencing Guidelines; agreed to a particular sentence or sentencing range, under Fed. R. Crim. P. 11(c)(1)(C); agreed as to the applicability of specific factors that increase the offense level under the Guidelines; or agreed that the applicability of a given Guidelines provision would be resolved by the judge at sentencing. Depending on the particular provisions in the plea agreement, prosecutors may be able to argue that the agreement waived any Blakely claim. A defendant entering into a plea agreement may waive rights that extend beyond those intrinsic in the fact of pleading guilty, and courts will generally enforce such waivers. See generally, e.g., United States v. Mezzanotto, 513 U.S. 196, 200-203 (1995); Calderon v. United States, 163 F.3d 644, 646 (D.C. Cir. 1999) (per curiam) (defendant's claim for downward sentencing adjustment barred by plea agreement not to seek any adjustment not expressly identified in agreement). Courts have applied these general principles in the Appendix context. See, e.g., United States v. Leachman, 309 F.3d 377, 383-385 (6th Cir. 2002) (where indictment alleged drug quantity, defendant waived Appendix claim by entering into guilty plea that contemplated judicial determination of drug quantity at sentencing); United States v. Sanchez, 269 F.3d 1250, 1271-1272 & n.40 (11th Cir. 2001) (en banc) ("by entering a guilty plea and ultimately stipulating to or not contesting drug quantity, defendants thereby waived the right to appeal on the basis of Appendix"); cf. United States v. Yu, 285 F.3d at 198 (leaving open question whether defendant's "waiver of a jury trial in the plea allocution was a knowing and voluntary waiver of a jury trial on the issue of drug quantity").

Plea Colloquies: In addition, in some cases one or more facts supporting an increased sentence under the Guidelines will be alleged in the indictment and specifically admitted during the plea colloquy. In such cases, prosecutors can argue that even if Blakely applies to the Guidelines, its requirements were met as to the charged and conceded facts, because the guilty plea waived the defendant's rights under Blakely to jury resolution of those facts in the same way that the plea waived the defendant's right to jury trial on the statutory elements of the offense. See Blakely, 2004 WL 1402697, at *4 (statutory maximum is maximum judge may impose based on facts reflected in jury verdict or "admitted by the defendant"); cf. United States v. Harper, 246 F.3d 520, 530-531 (6th Cir. 2001) (defendant "stipulated to the amount of drugs for which he was held responsible, and the district court did not rely on any fact outside of the plea agreement to determine drug quantity at sentencing. Therefore, the principles articulated in Appendix are not implicated by the instant case, and [defendant's] Appendix argument must fail.")., overruled on other grounds, Leachman, 309 F.3d at 383.

If the facts that support an increased sentence under the Guidelines were not alleged in the indictment, but the defendant specifically admitted them during the plea colloquy and acknowledged them as a basis for imposition of an enhanced sentence, it may be possible to argue that the guilty plea waived any challenge to the failure of the indictment to allege the enhancing facts. See United States v. Silva, 247 F.3d 1051, 1059-1060 (9th Cir. 2001) (even though indictment did not specify drug quantity, defendants waived any Appendix claim by entering into plea agreement that specifically admitted drug quantity, acknowledged applicable sentencing provisions, and waived right to challenge sentence); Harper, 246 F.3d at 530-531. Cf.
generally Fed. R. Crim. P. 7(b) (defendant can waive right to indictment in open court); United States v. Cotran, 302 F.3d 279, 283 (5th Cir. 2002) (guilty plea and waiver of indictment under Rule 7(b) waived challenge to adequacy of indictment); United States v. Lopez, 300 F.3d 46, 58-60 (1st Cir. 2002) (defendant waived claim that indictment failed to allege drug quantity, where defendant pleaded guilty despite being aware of Apprendi issue, and did so to avoid possible indictment); United States v. Gaudette, 81 F.3d 585, 590 (5th Cir. 1996) (defendant can implicitly waive right to indictment) (citing cases).

Defendants are likely to argue that they did not knowingly, intelligently, and voluntarily plead guilty to the Guidelines enhancements, because they were not aware that, under Blakely, the enhancing facts had to be alleged in the indictment and found beyond a reasonable doubt by the jury, and therefore did not waive their Blakely rights. We could reasonably respond, however, that a plea of guilty is not rendered invalid simply because the defendant is unaware of legal challenges that could have been raised but were not. Cf., e.g., Sanchez, 269 F.3d at 1285 (under plain-error standard, rejecting claim that guilty plea entered before Apprendi was not intelligent and voluntary). See generally, e.g., United States v. Ruiz, 536 U.S. 622, 630 (2002) ("[T]he Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of constitutional rights, despite various forms of misapprehension under which a defendant might labor."); United States v. Broce, 488 U.S. 563, 572 (1989) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise") (quoting Brady v. United States, 397 U.S. 742, 757 (1970)).

If the court concludes that it cannot apply Guidelines enhancements based on the facts admitted by the defendant, we should argue that the court should sentence the defendant, exercising traditional discretion, within the statutory sentencing range. As explained more fully in Section 3 above, we should urge the court to impose a sentence that conforms to the sentence called for by the Guidelines, as they would have been applied pre-Blakely.

b. Withdrawal. If the defendant has already entered a guilty plea, the government should not urge the court to set the plea aside on the basis of the intervening Blakely decision, even if the court has not yet accepted the plea agreement. We have successfully argued in the Supreme Court that a defendant who has entered a guilty plea may not withdraw it except in accordance with the plain terms of Rule 11 (and former Rule 32(e)). See United States v. Hyde, 520 U.S. 670 (1997); also cf. Carlisle v. United States, 517 U.S. 416, 444-445 (1996) (district court may not use "inherent supervisory authority" to consider motion for judgment of acquittal filed outside 7-day limit imposed by Rule 29). The rules contain no provision for a government motion to set aside a guilty plea, and it is not in our long-term interest to take the position that the district courts have the inherent authority to disturb guilty pleas. Defendants would inevitably invoke that authority in attempting to get out of their pleas based on intervening case law or other changed circumstances.
Depending on the circumstances of the case, prosecutors may consider urging the court not to accept the plea agreement if the defendant has entered a plea but is now attempting to invoke the intervening Blakely decision in a manner that would frustrate the purpose of the agreement. That argument, however, may encounter substantial obstacles. The frustration of purpose doctrine discharges a party from its contractual obligations only when a supervening event renders the other party’s performance "virtually worthless" and when "the non-occurrence of the supervening event [was] a basic assumption of the agreement." See, e.g., United States v. Thompson, 237 F.3d 1258, 1261 (10th Cir. 2001) (where state’s failure to charge defendant before statute of limitations had run rendered defendant’s promise to plead guilty in state court worthless to federal government, government was relieved from its corresponding obligation not to prosecute defendant on related federal charges); United States v. Moulder, 141 F.3d 568, 571-572 (5th Cir. 1998) (intervening decision in Bailey frustrated purpose of plea agreement by establishing that conduct admitted by defendant was not a crime; government discharged from promise not to reinstate other charges); United States v. burner, 134 F.3d 1000, 1004 (10th Cir. 1998) (same). It is likely to be difficult to establish that the application of Blakely renders a defendant’s acceptance of the plea bargain "virtually worthless"; Blakely does not undermine the defendant’s conviction but merely results in a lesser sentence. Further, at least one court of appeals has refused to extend the similar mistake-of-law and mistake-of-fact doctrines to plea agreements. See United States v. Barron, 172 F.3d 1153, 1158-1159 (9th Cir. 1999) (en banc) (plea agreement was not subject to rescission when conduct supporting one of three charges to which defendant pleaded guilty was determined to be non-criminal following Bailey); United States v. Partida-Parra, 859 F.2d 629, 634 (9th Cir. 1988) (government not entitled to relief from plea agreement despite realization that defendant had mistakenly been allowed to enter guilty plea to misdemeanor rather than felony, as parties had contemplated). In many cases, the prosecutor may conclude that it is preferable to stick with the plea agreement and hold the defendant to the admission of guilt reflected in his plea, even if Blakely means that sentencing will be conducted under different circumstances than were originally contemplated.

C. Pretrial Explanatory Filings. Prosecutors should make clear to courts, in appropriate pretrial filings, that the indictment alleges Guidelines sentencing factors as a protective measure, in the event that the court concludes that compliance with the Blakely procedures is constitutionally required to secure upward adjustments and departures and that the Blakely procedures can be applied to the Guidelines. If the defendant objects to the inclusion in the indictment of Guidelines factors, the government should consider offering to strike the allegations if the defendant agrees to waive any Blakely objection to the imposition of sentence based on the traditional Guidelines sentencing process, including factfinding on Guidelines factors by the judge, generally under the preponderance standard.

The government should urge the court to rule, before trial, on whether Blakely applies to the Guidelines and how it will sentence the defendant upon conviction (i.e., by applying the Guidelines as a whole, without regard to Blakely; by applying discretionary sentencing within the statutory sentencing range; or by applying the Guidelines to facts proved under the Blakely-required procedures). As explained below, if the court agrees with our first legal
argument (and rules that the Guidelines will be applied without regard to Blakely), or agrees with
our second legal argument (and rules that discretionary sentencing applies), prosecutors may
nevertheless wish to prove the Guidelines enhancements at trial and to obtain special jury
verdicts as a protective measure.

D. Trials. At trial, if the court concludes that Blakely does not apply to the Guidelines,
prosecutors may still wish to present evidence to support Guidelines enhancements to the jury
and to request special jury verdicts on the enhancements. Prosecutors may choose to follow this
approach to protect against possible changes in the law as a result of future court decisions.

If the court rules that it will apply indeterminate discretionary sentencing should the
defendant be found guilty, prosecutors may nevertheless consider presenting evidence to support
Guidelines enhancements and requesting the court to obtain special verdicts from the jury on
those factors. If the defendant objects to this procedure, prosecutors may attempt to obtain from
the defendant a waiver of his Blakely objections based on the failure to obtain a jury verdict on
guidelines adjustments.

If the court concludes that the government must comply with the Blakely procedures in
order to obtain upward adjustments under the Guidelines, prosecutors should attempt to present
evidence sufficient to prove all of the charged Guidelines factors beyond a reasonable doubt. We
should request that the jury be given a special verdict form that asks the jury, if it convicts the
defendant of an offense, to then make findings as to the Guidelines factors that were alleged in the
indictment. The Criminal Division will prepare and distribute sample special verdict forms and
jury instructions.

Defendants may challenge this procedure as unfair and request bifurcated trials. In
general, it is probably in our interest to oppose bifurcation, although we may want to consider
agreeing to bifurcation in particular cases. In other contexts, courts have been reluctant to
require bifurcated trials. See, e.g., United States v. Belk, 346 F.3d 305, 310-311 (2d Cir. 2003)
district court does not err in refusing to bifurcate elements of felon in possession of firearm
charge under 18 U.S.C. 922(g)(1); United States v. Mangum, 100 F.3d 164, 170-171 (D.C. Cir.
1996) (same); United States v. Dean, 76 F.3d 329, 332 (10th Cir. 1996) (same); United States v.
Jacobs, 44 F.3d 1219, 1221-1223 (3d Cir. 1995) (same); United States v. Birdsong, 982 F.2d
481, 482 (11th Cir. 1993) (same); United States v. Barker, 1 F.3d 957, 959 (9th Cir. 1993),
amended in part by 20 F.3d 365 (9th Cir. 1994) (reversing, on mandamus, district court’s attempt
to bifurcate a felon-in-possession trial); United States v. Collumore, 868 F.2d 24, 27-28 (1st Cir.
1989) (same), overruled in part on other grounds, 21 F.3d 1 (1st Cir. 1994) (en banc). In lieu of
bifurcation, some defendants may be willing to waive a jury determination on Guidelines facts
and to have those findings made by the judge at sentencing under the reasonable-doubt standard.

E. Sentencing Procedures in Cases Where the Defendant Was Convicted or Entered
a Guilty Plea Before Blakely. If a defendant was convicted at trial or pleaded guilty before
Blakely, but has not yet been sentenced, and the court concludes that Blakely applies to the
Guidelines, prosecutors should consider whether application of the Guidelines would require the resolution of contested factual issues to determine whether upward adjustments or upward departures should be imposed above the maximum sentence that would apply based on facts admitted by the defendant or established by the jury's verdict. In such cases, prosecutors should argue, as set forth above, that the Guidelines cannot be constitutionally applied, and the district court should impose sentence, exercising traditional judicial discretion, within the applicable statutory sentencing range. In all cases in which we argue that discretionary sentencing applies, prosecutors should urge the court to exercise its discretion to impose a sentence consistent with what would have been the Guidelines sentence.

If the court concludes that the Guidelines should be applied subject to the procedural requirements of Blakely, prosecutors may want to request that the court empanel a sentencing jury to resolve relevant factual issues. Defendants are likely to object to this procedure on double jeopardy grounds, however, and there is no definitive case law that would support it. Cf. Ohio v. Johnson, 467 U.S. 493, 500-502 (1984) (Double Jeopardy Clause did not preclude the defendant's continuing prosecution on the remaining counts of an indictment after the trial court over the State's objection, accepted the defendant's pleas to lesser included offenses and sentenced him to a term of imprisonment). Moreover, absent an indictment that alleges the applicable Guidelines factors, a request to empanel a sentencing jury would probably not be well founded.

F. Sentencing Procedures That Apply in All Cases.

**Alternative Sentences.** In every case, prosecutors should ask district courts to state alternative sentences to enable efficient and prompt resentencing in the event that later appellate developments reject the approach that the sentencing court applies. Prosecutors should request that the court state what sentence it would impose 1) under the Guidelines without regard to Blakely; 2) if the court has discretion to impose sentence within the statutory range; and 3) under the Guidelines if Blakely applies.

**Presentence Reports.** Prosecutors should request that courts continue to direct probation officers to prepare presentence reports that contain Guidelines sentencing calculations based on all available factual information normally considered at sentencing before the advent of Blakely.

**Restitution.** We should argue that Blakely does not apply to restitution. See, e.g., United States v. Syre, 276 F.3d 131, 159 (3d Cir. 2002); United States v. Behrman, 235 F.3d 1049, 1053-1054 (7th Cir. 2000); United States v. Croxford, 2004 WL 1462111, at *15 (D. Utah June 29, 2004).

**Data Collection.** U.S. Attorney's Offices and the components of Main Justice should immediately establish data collection procedures, using standardized procedures to be developed by EOUSA, to ensure collection of information about a) sentences actually imposed on defendants in light of Blakely and b) the Guidelines range that would have been applicable
absent Blakely.

5. Blakely Claims Raised on Direct Appeal.

A. Application to Pending Cases. Blakely is applicable to all cases "pending on direct review or not yet final" as of June 24, 2004. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987). A case is "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Id. at 321 n.6; see Clay v. United States, 537 U.S. 522, 524-525 (2003) (where no petition for a writ of certiorari is filed, conviction becomes final upon expiration of the 90-day period for filing a petition).

If the defendant failed to raise a Blakely claim in his opening brief on appeal, we can argue that he has waived the claim and the court should not consider it. See, e.g., United States v. Collins, 361 F.3d 343, 349 (7th Cir. 2004) (applying general rule that legal issues not raised or adequately developed in opening brief are waived); United States v. Brower, 336 F.3d 274 277 n.2 (4th Cir. 2003) (same); Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) (same); but see United States v. Miranda, 248 F.3d 434, 444 (5th Cir. 2001) (declining to treat Apprendi claim as waived when not raised in appellate briefs where Apprendi was decided after briefing and one defendant referred to decision in post-argument brief); Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565, 1583 (9th Cir. 1994) (permitting party to pursue claim not raised in its initial appellate brief where substantial change in law occurred after brief was filed).

Our first argument in any case on appeal will be that Blakely does not apply to the Federal Sentencing Guidelines. In addition, we have other arguments we can make, depending on whether the defendant preserved a Blakely objection in the district court.

B. Has the Defendant Preserved a Blakely Objection? To preserve a Blakely objection in the district court, the defendant must have argued that the Guidelines or procedures used to determine Guidelines factors were unconstitutional under Apprendi or the Fifth or Sixth Amendment, or must have objected to his sentence on the ground that Guidelines factors were not alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. Merely contesting disputed Guidelines factors is not sufficient to preserve a Blakely claim. See United States v. Candelario, 240 F.3d 1300, 1304 (11th Cir. 2001) (objection is sufficient to preserve Apprendi claim if it relies on Apprendi or its predecessor, Jones v. United States, 526 U.S. 227 (1999); cites the Fifth or Sixth Amendment; or argues that drug quantity should have "gone to the jury" or should have been proved beyond a reasonable doubt); see also United States v. Lott, 310 F.3d 1231, 1240 (10th Cir. 2002).

C. Plain Error. If a defendant did not preserve a Blakely objection in the district court, his Blakely claim is forfeited, and he bears the burden of demonstrating plain error under Federal Rule of Criminal Procedure 52(b). See United States v. Cotton, 535 U.S. 625 (2002) (failure to allege drug quantity in indictment in violation of Apprendi is subject to plain-error
review). In *Cotton*, 535 U.S. at 631-632, *Johnson v. United States*, 520 U.S. 461, 466-467 (1997), and *United States v. Olano*, 507 U.S. 725, 732 (1993), the Supreme Court established a four-part plain-error standard. "Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is 'plain' [which the Court stated is "'synonymous with 'clear' or equivalently, 'obvious'"], and (3) that affects substantial rights [i.e., that actually prejudiced the defendant]. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467 (internal punctuation, quotations, and citations omitted).

In every case, we should first argue that there was no error because *Blakely* does not apply to the Sentencing Guidelines. See Section 2, supra. We can also argue that because the Supreme Court did not hold that *Blakely* applies to the federal Guidelines, any error in failing to charge and prove to the jury facts that support upward adjustments under the Guidelines is not "plain" under the second prong of the *Johnson* test. Depending on the facts of a particular case, we can also argue that the defendant cannot show that the error "affect[ed] substantial rights" or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" because, for example, the relevant Guidelines factors were uncontested or supported by overwhelming evidence. See *Cotton*, 535 U.S. at 633 (where evidence of drug quantity was "overwhelming" and "essentially uncontroverted," *Apprendi* indictment error did not seriously affect fairness, integrity, or public reputation of judicial proceedings).

**D. Harmless Error.** If the defendant preserved a *Blakely* objection, the government will bear the burden of proving that any error under *Blakely* was harmless. See Fed. R. Crim. P. 52(a). Because *Blakely* involves constitutional error, the standard for determining whether an error was harmless is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Courts of appeals have disagreed about the application of harmless-error review to *Apprendi* claims where the fact that increased the defendant's statutory maximum was not alleged in the indictment. Compare *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002) (*Apprendi* errors are harmless if no rational jury could have failed to find the fact needed to support the imposition of an enhanced sentence), and *United States v. Anderson*, 289 F.3d 1321, 1323-1325 (11th Cir. 2002) (same), with *United States v. Mackins*, 315 F.3d 399, 408-409 (4th Cir. 2003) (*Apprendi* error required reversal of sentence on harmless-error review although "the conspiracy charged here indisputably involved quantities of cocaine and cocaine base far in excess of the minimum amounts necessary to sustain the sentence"), and *United States v. Jordan*, 291 F.3d 1091, 1097 (9th Cir. 2002) (regardless of strength of evidence of drug quantity, error is not harmless if "the sentence received is greater than the combined maximum sentences for the indeterminate quantity offenses charged"); cf. *United States v. Cotton*, 535 U.S. at 632 & n.2 (declining to decide whether defendants could satisfy third prong of the plain-error test, either because the *Apprendi* error was "structural" or because it otherwise affected their substantial rights). At least in circuits where a harmless-error argument is available, we may be able to argue that any *Blakely* error was harmless, depending
on the strength of our proof of the relevant Guidelines fact and on whether the fact was contested.

E. Government Appeals. If the court applies Blakely to the Guidelines and imposes a sentence below what would have been required before Blakely, the government could appeal under 18 U.S.C. 3742(b). If the court invalidates the Guidelines and imposes a discretionary sentence, the government may be able to appeal. Section 3742(b)(4) authorizes the government to appeal a sentence that "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." 18 U.S.C. 3742(b)(4); but cf. Dorsey v. United States, 418 U.S. 424, 431 (1974) (stating traditional rule that "once it is determined that a sentence is within the limitations set forth in the statute under which it was imposed, appellate review is at an end").

The current policy requiring U.S. Attorney's Offices to report adverse sentencing decisions remains in effect. We plan to issue additional guidance on reporting of adverse sentencing decisions soon.


Defendants whose convictions became final before June 24, 2004, and who seek to raise a Blakely claim in an initial or successive motion under 28 U.S.C. 2255 must overcome a number of additional procedural hurdles.

A. Retroactivity. We should argue that the principle adopted in Blakely constitutes a "new constitutional rule of criminal procedure," which, under Teague, is not retroactively applicable to cases that became final before the decision was announced. The Supreme Court's decision in Schriro v. Summerlin, 2004 WL 1402732 (June 24, 2004), supports our argument that Blakely is a new procedural rule that is not retroactive to cases on collateral review. In Summerlin, the Court considered whether Ring v. Arizona, 536 U.S. 584 (2002), applies retroactively to cases that had already become final when Ring was decided. Ring held that because Arizona law authorized the death penalty only if an aggravating factor was present, Apprendi required the existence of such a factor to be proved to a jury rather

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2In Justice O'Connor's dissenting opinion in Blakely, she suggested that Blakely might be viewed as merely an application of the rule announced in Apprendi, with the result that "all criminal sentences imposed under the federal * * * guidelines since Apprendi was decided in 2000 arguably remain open to collateral attack." 2004 WL 1402697, at *16 (O'Connor, J., dissenting). However, the Supreme Court has defined a "new rule" under Teague as one that was not "dictated by precedent existing at the time the defendant's conviction became final." Graham v. Collins, 506 U.S. 451, 467 (1993) (quoting Teague, 489 U.S. at 301 (emphasis in Teague)); see Sawyer v. Smith, 497 U.S. 227, 234 (1990). Subsequent decisions have made clear that a rule may be "new" despite the fact that earlier cases supported it, Sawyer v. Smith, 497 U.S. at 236, "or even control or govern" it, Saffle v. Parks, 494 U.S. 484, 491 (1990). Under that definition, we can argue that Blakely announced a new rule for Teague purposes.
than to a judge. Summerlin's conviction and death sentence, which was imposed under the same Arizona law that was at issue in Ring, became final long before Ring was decided.

The Supreme Court held that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." 2004 WL 1402732, at *7. The Court explained that a "new rule" resulting from one of its decisions applies to convictions that are already final only in limited circumstances. New substantive rules generally apply retroactively, but new procedural rules generally do not -- only "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" are given retroactive effect. Id. at *3. The Court concluded that Ring's holding is properly classified as procedural, rather than substantive, because it did not alter the range of conduct or the class of persons subject to the death penalty in Arizona; instead, it merely changed the method of determining whether the defendant engaged in that conduct. Id. at *4. The Court also held that Ring did not fall within Teague's narrow exception for "watershed rules of criminal procedure. To qualify as a watershed rule, the Court explained, a new procedural rule must be one "without which the likelihood of an accurate conviction is seriously diminished." The Court held that Ring did not announce a watershed rule of criminal procedure because it could not confidently say that judicial factfinding seriously diminishes the accuracy of capital sentencing proceedings. Id. at *4-5.

Consistent with the reasoning of Summerlin, all of the courts of appeals have held that because Apprendi is a procedural rule that does not fall within the "watershed" exception, it is not retroactively applicable to cases on collateral review. See, e.g., United States v. Swinton, 333 F.3d 481 (3d Cir. 2003); Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Goode v. United States, 305 F.3d 378 (6th Cir. 2002); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139 (4th Cir. 2001).

B. Procedural Default. In responding to a Blakely claim that was not preserved at trial and raised on direct review, we should also argue that the defendant must show "cause" for his failure to raise the issue at trial and on direct appeal, and "actual prejudice" resulting from the Blakely error. See Bousley 523 U.S. at 622; United States v. Frady, 456 U.S. 152 (1982).

As to "cause," we should argue that, even though prior to Blakely, every court of appeals had rejected challenges to the Sentencing Guidelines under Apprendi, see Blakely, 2004 WL 1402697, at *14 n.1 (O'Connor, J., dissenting) (citing cases), "the futility of presenting an objection *** cannot alone constitute cause for a failure to object at trial." Engle v. Isaac, 456 U.S. 107, 130 (1982); see Bousley v. United States, 523 U.S. 614, 623 (1998). We should also argue that the prisoner must show "actual prejudice," i.e., that the error "worked to his actual and substantial disadvantage." Frady, 456 U.S. at 170. This is a demanding standard; it requires the
defendant to carry a burden "significantly higher" than he would be required to satisfy on direct review under the plain-error standard. Id. at 167. We should argue that the defendant cannot satisfy that standard for the same reasons outlined above with respect to the third and fourth prongs of the plain-error test.

In cases where the defendant cannot satisfy the cause and prejudice test, he may argue that he is "actually innocent" of the higher sentence. See Bousley, 523 U.S. at 623. We have taken the position that the actual innocence exception applies to "facts other than recidivism that would increase the statutory maximum sentence." Brief for the United States as Amicus Curiae Supporting Petitioner, Dretke v. Haley, No. 02-1824, at 21. If the court concludes that the Guidelines must be applied in accordance with the procedural requirements of Blakely, our position suggests that we would not be able to argue that the concept of actual innocence does not apply to factors that increase the defendant's offense level under the Guidelines. We can argue, however, that a defendant who claims to be actually innocent of a Guidelines enhancement factor must show that he is "factually innocent" by demonstrating that "in light of all the evidence, it is more likely than not that no reasonable juror would have" found the enhancing factor. See Bousley, 523 U.S. at 623.

C. Second or Successive Collateral Attacks. If a defendant attempts to raise a Blakely claim in a second or successive motion under Section 2255, we can argue that the claim is barred by the gatekeeping requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The gatekeeping provisions state that a "second or successive motion must be certified * * * by a panel of the appropriate court of appeals to contain * * * a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255 ¶ 8(2). In Tyler v. Cain, 533 US. 656 (2001), the Supreme Court held that a virtually identical provision governing collateral attacks by state prisoners, 28 U.S.C. 2244(b)(2)(A), means that the Supreme Court itself must have issued a decision making the new rule retroactive to cases on collateral review before a court of appeals may authorize the filing of a successive collateral attack. Because the Supreme Court has not "made" Blakely – a case decided on direct review of the judgment of the Washington court – retroactive to cases on collateral review, defendants should not be able to raise Blakely claims in second or successive Section 2255 motions.

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We recognize the many difficult issues that Blakely raises for almost every aspect of federal prosecutions. We hope that this memorandum provides useful guidance, and we will continue to provide assistance in meeting the challenges presented by Blakely. If you have questions about the application of Blakely to the Sentencing Guidelines, please call your liaison in the Appellate Section of the Criminal Division.