Mr. Chairman and Distinguished Members of the Committee:

I am pleased to be here this morning to describe the impact of *Blakely v. Washington*[1] in the federal courts.

In my testimony I try to describe the current state of affairs in the federal courts in the wake of *Blakely*. *Blakely* has created considerable uncertainty in the federal criminal justice system. One Circuit Court of Appeals (the Seventh) and a number of District Courts have already declared the federal sentencing guidelines unconstitutional. One Circuit Court of Appeals (the Fifth) has upheld the Guidelines. These rulings and others like them have required the federal courts to devote considerable time and energy to new and novel issues and have unsettled expectations in the criminal justice system.

It would, however, be unfair to describe this situation as a "crisis" or "chaotic." Such a description might demean the skills of hard-working federal judges around the country who will ensure that criminal cases are decided fairly and appropriately under controlling legal principles. But when the legal principles are in such flux – as they are in the wake of *Blakely* – Congress may wish to consider whether it is appropriate to bring whatever certainty can be brought to the system. Obviously that decision must be made by those who are in the political arena. My hope is that whatever is done in the short term will not block on-going dialog between Congress, the Executive, and the Judiciary about appropriate criminal sentencing policy for the future.

As the Committee knows, I am currently serving as a United States District Court Judge for the District of Utah. Before being appointed to the bench, I was a law professor at the S.J. Quinney College of Law at the University of Utah (where I continue to teach in the evenings), an Assistant United States Attorney for the Eastern District of Virginia, an Associate Deputy Attorney General in the U.S. Department of Justice, and a law clerk to Chief Justice Warren E. Burger and then-Judge Antonin Scalia.

At the outset, I should clarify that my testimony is on my own behalf, not on behalf of the Judicial Conference. I am reporting what my experience has been under *Blakely* and, to the extent I have been able to glean it, the experience of other judges around the country. My intent today is to be purely *descriptive* of the situation that the courts face, leaving it to others to provide any detailed *prescriptive* advice as to how Congress might act. This limited role is consistent with the Canons of Judicial Ethics, which permits a judge to participate in public hearings regarding issues connected to judicial administration.[2] Nothing I say today comments on the merits of pending or future cases before me or takes a position on any legal issues arising from *Blakely*.

I. Application of Blakely to the Federal Guidelines

[1] – U.S. –, 2004 WL 1402697 (June 24, 2004).

[2] *See* Canon 4B, Code of Conduct for United States Judges.

In the wake of *Blakely*, federal courts have been forced to wrestle with implications. In this section, I attempt to describe what is happening around the country with respect to constitutional challenges to the Guidelines. I have had only a limited amount of time to assemble this information, as I received an invitation to testify only last Friday. As a result, the information collected here is admittedly tentative and fragmentary. Compounding the difficulties is that many sentencing decisions are not officially reported in the Federal Reporter system, but are picked up in press accounts or internet reports. Finally, *Blakely* was handed down a little more than two weeks ago, and many federal courts are still struggling to analyze its implications.

In collecting these materials, I am greatly indebted to the efforts of Professor Douglas Berman at the Ohio State University, whose excellent website (http://sentencing.typepad.com) is devoted to tracking post-*Blakely* developments, as well as to the very helpful website (www.ussguide.com) prepared by Punch and Jurists, Ltd. – a lively weekly newsletter that tries to track significant new developments in Federal Criminal Law.

A. The District of Utah.

Within my own District of Utah, the effect of *Blakely* was prompt and significant. Five days after *Blakely*, I released what may have been the first opinion in the country analyzing the effects of *Blakely* on the Federal Guidelines.[3] Rather than attempt to summarize the opinion or comment on the opinion, I will simply quote some relevant parts:

> Defendant Brent Croxford is before the court for sentencing on the offense of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a). For more than fifteen years, sentencings such as Croxford's have been governed by the federal sentencing guidelines. Last Thursday, however, the United States Supreme Court ruled that portions of the State of Washington's sentencing guidelines were unconstitutional. The Court held that Washington's guidelines scheme deprived a defendant of his Sixth Amendment right to a jury trial by increasing his presumptive sentence based on a judge's, rather than a jury's, factual findings regarding sentencing factors. Because the federal sentencing guidelines suffer from the same constitutional infirmity, the court holds that, as applied to this case, the federal sentencing guidelines are unconstitutional and cannot govern defendant Croxford's sentencing. Because of the potentially cataclysmic implications of such a holding, the reasoning underlying this conclusion will be set out at some length. . . .
>
> While this court has searched diligently for a way to disagree with the warnings of the dissenters, the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this

[3] *United States v. Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), *superceding* 2004 WL 146211 (D. Utah June 29, 2004).

> one. The rule set forth by the Supreme Court in *Blakely* was 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." A sentence may not be enhanced when doing so requires the judge to make factual findings which go beyond the defendant's plea or the verdict of the jury. Given this rule, there is no way this court can sentence Croxford under the federal sentencing guidelines without violating his right to trial by jury as guaranteed by the Sixth Amendment.[4]

Having found that the Guidelines could not be constitutionally applied to Croxford, I then faced the question of the appropriate remedy to apply. I held:

> the court believes that three options for dealing with *Blakely* are worthy of consideration: (1) the court could convene a sentencing jury, which would determine (presumably by proof beyond a reasonable doubt) whether the facts underlying the enhancement could be proven; (2) the court could continue to follow the other sections of the Guidelines apart from the defective upward enhancement provisions; or (3) the court could treat the Guidelines as unconstitutional in their entirety in this case and sentence Croxford between the statutory minimum and maximum. The court believes that the third option is the only viable one.[5]

I also recommended that judges issue a "backup" sentence in all cases – that is, a sentencing in which it was assumed the Guidelines were unconstitutional and another sentence in which it was assumed they were constitutional. This might help reduce the need for complicated resentencing hearings regardless of which way the Supreme Court would rule in the future. To facilitate this process, I am using the following form in my cases:

□ The court finds that the application of the sentencing guidelines to this defendant is not permitted by *Blakely v. Washington*. Therefore, the sentence in this judgment is a non-guideline sentence. Should the sentencing guidelines later be found to be constitutional, it will be the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of _____.

All other terms and conditions of the judgment will remain the same.

□ The court finds that the application of the sentencing guidelines to this defendant is permitted by *Blakely v. Washington.* Therefore, the sentence in this judgment is a guideline sentence. Should the sentencing guidelines later be found to be unconstitutional in their entirety, it will be the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prison for a term of _____.

All other terms and conditions of the judgment will remain the same.

---

[4] *Id.* (internal citations omitted).

[5] *Id.*

□ The defendant has waived any rights under *Blakely v. Washington*.

I also issued another ruling on *Blakely* in *United States v. Thompson.*[6] In that case, I held that a defendant could not raise a challenge to his sentence under *Blakely* for the following reasons:

> it is possible for the court to fully and completely apply the Guidelines to this case without looking beyond the facts found within the four corners of the plea agreement. Indeed, the court need look no further than the four corners of the indictment to arrive at a Guideline calculation. As a result, *Blakely* does not invalidate application of the Guidelines, and the court must, therefore, follow the statutory command to impose a sentence consistent with the Guidelines.[7]

I also held that it was not permissible for Thompson to raise a facial challenge to the Guidelines.[8]

Even within my own District, there is a conflict regarding the appropriate way in which to analyze *Blakely*. Several days after my decision, my colleague Ted Stewart released his decision in *United States v. Montgomery.*[9] He agreed that the federal sentencing Guidelines were unconstitutional in that case. He further agreed with me that there are three options for dealing with Blakely. Judge Stewart, however, selected the second of the three options. He explained:

> the third option would accomplish precisely what *Blakely* sought to preclude, by allowing judicial determination of the same fact-driven enhancements and departures to achieve the same sentence as would have applied pre-*Blakely* (albeit now with the minimum and maximum sentences defined by the criminal statute, rather than the federal sentencing guidelines).[10]

Accordingly, Judge Stewart applied the Sentencing Guidelines but without upward enhancements.

There is still another approach to these questions within my district. In *United States v. Olivera-Hernanez*,[11] Chief Judge Dee Benson held that he would continue to recognize the

---

[6] No. 2:04-CR-95-PGC (D. Utah 2004), Dckt. #26-1.

[7] *See id.* at 4.

[8] *Id.* at 5.

[9] __ F.Supp.2d ___, 2004 WL 1535646 (D. Utah July 8, 2004).

[10] *Id.* at *2.

[11] No. 2:04-CR-13 (July 12, 2004).

Sentencing Guidelines as valid law. He concluded:

> The predictions of the Guideline's demise are many and they may well be true. It is difficult to read *Blakely* and not see the same wrecking ball heading directly for the sentencing features of the Comprehensive Crime Control Act of 1984. But predictions don't always hold; even sure things sometimes surprise us. Just last October, thousands of Chicago Cubs fans were certain of their teams's first World Series appearance in ninety-five years, with a mere five out to make against the Florida Marlins. Then one of the Cubs' own fans interfered with the catch of a foul ball, and the unraveling began. As Mark Twain observed in 1897 that "the reports of my death are greatly exaggerated," the Sentencing Guidelines may similarly defy present expectations of their impending demise. A distinction, however fine, may be drawn between the Federal Guidelines and the State of Washington's Guidelines. Other issues could become involved. A vote could switch. And so on.[12]

Judge Benson accordingly held that he would apply the Guidelines. As a precautionary measure, however, he would announce a backup sentence in each case.

One final note: In a fourteen-day jury drug trafficking and money laundering trial that concluded last Friday, Judge Kimball expanded his special verdict form to take into account some things that would ordinarily have been handled by a judge. In particular, in addition to rendering verdicts on seventeen counts in the indictment, the verdict form asks the jury to determine: (1) volumes of any illegal drugs distributed; (2) amounts of money money laundered; (3) the defendant's role in the offenses (e.g., organizer/leader or manager/supervisor); and (4) whether a "dangerous weapon possessed in connection with a drug trafficking offense.

Other judges within the District of Utah continue to consider these questions. A number of sentencings have been delayed because of *Blakely* and various change of plea hearings have been rescheduled.

B. The Seventh Circuit.

On July 9, 2004, the Seventh Circuit held that the Guidelines were unconstitutional under *Blakely*. In a decision written by Judge Posner, the Seventh Circuit concluded that "the application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*."[13] The Circuit explained that it had 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 light of *Blakely* . . . , which has cast a long shadow over the federal sentencing guidelines.[14] The Circuit cautioned that "[w]e cannot of course provide definitive

---

[12] *Id.* at 4.

[13] *United States v. Booker*, __ F.3d __, No. 03-4225 (7th Cir. July 9, 2004), slip op. at 10.

[14] *Id.* at 2.

guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution."[15] The opinion concluded:

> To summarize: (1) The application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*; (2) in cases where there are no enhancements — that is, no factual findings by the judge increasing the sentence — there is no constitutional violation in applying the guidelines unless the guidelines are invalid in their entirety; (3) we do not decide the severability of the guidelines, and so that is an issue for consideration on remand should it be made an issue by the parties; (4) if the guidelines are severable, the judge can use a sentencing jury; if not, he can choose any sentence between 10 years and life and in making the latter determination he is free to draw on the guidelines for recommendations as he sees fit; (5) as a matter of prudence, the judge should in any event select a nonguidelines alternative sentence.[16]

Judge Easterbrook dissented, arguing that the invalid guidelines in Washington were constitutionally distinct from the federal guidelines. He concluded: "Today's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon."[17]

C. The Fifth Circuit.

As the testimony was about to be finalized, the Fifth Circuit upheld the Guidelines. Chief Judge King, writing for a unanimous panel that included Judges Barksdale and Pickering, stated:

> This court assuredly will not be the final arbiter of whether *Blakely* applies to the federal Guidelines, but the unremitting press of sentencing appeals requires us to produce a decision. We have undertaken to discern, consistent with our role as an intermediate appellate court, what remains the governing law in the wake of *Blakely*. Having 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.[18]

D. The Eleventh Circuit.

---

[15] *Id.*

[16] *Id.* at 11.

[17] *Id.* at 17 (Easterbrook, J., dissenting).

[18] *United States v. Pineiro*, No. 03-30437 (July 12, 2004).

On July 9, 2004, the Eleventh Circuit held that a prisoner could not file a second or successive habeas petition seeking to challenge his sentence.[19] On July 8, 2004, the Eleventh Circuit held that *Blakely* does not affect mandatory minimum sentences.[20] Presumably these rulings will lead to further litigation.

E. Districts Around the Country.

Here is the information I have been able to gather about other federal district courts around the country. For convenience, I will simply put the districts in alphabetical order. This list is almost surely not comprehensive, as events in this area seem to progress almost hourly. Nor is this is a scientific sample, as I have simply done my best to gather information from acquaintances and opinions that have been drawn to my attention.

District of Connecticut

In *United States v. Toro*,[21] Judge Peter C. Dorsey agreed that with *Croxford* that the Sentencing Guidelines were unconstitutional. He then adopted what *Croxford* described as "option 2" – that is, applying the Guidelines minus the upward enhancements. He emphasized that courts should construe statutes to avoid constitutional questions.

District of Delaware

Judge Kent Jordan reports that the challenges he has encountered (or anticipates encountering) include the following: (1) delayed guilty pleas, while plea negotiations are reconsidered in light of *Blakely*; (2) extended plea colloquies, requiring the defendant to acknowledge that the sentencing guidelines may be found inapplicable and that the defendant may be subject to statutory maximums; (3) delayed sentencing hearings, while defendants file briefs seeking to come within the parameters of *Blakely* and post-*Blakely* precedent invalidating upward enhancements; (4) extended sentencing hearings, requiring decisions on constitutional challenges to proposed applications of the guidelines; (5) added burdens on the Pre-sentence/Probation Office, as probation officers are required to write reports in the alternative, assuming guideline application and assuming sentencing without the guidelines; (6) a flood of § 2254 and § 2255 petitions challenging the state guideline system and challenging the federal guidelines, including upward enhancements and anything and everything else a creative inmate can conjure up; and (7), though it would be harder to measure, a general drag on court time associated with *Blakely*-related issues (for example, added time and effort spent on cases which would have resulted in a plea but now require trial, added time and effort spent on cases requiring resentencing after appeal, as the courts sort out what the new rules of the process are,

---

[19] *In re Dean*, __ F.3d __, 2004 WL 1534788 (11th Cir.) (No. 04-13244).

[20] *Spero v. United States*, ___ F.3d ___, 2004 WL 1516863 (11th Cir.) (No. 03-14586).

[21] No. 3:02-CR-362 (PCD) (D. Conn. July 8, 2004).

and added time and effort doing the extra research and reading necessary to stay on top of the shifting legal terrain). Judge Jordan hastens to add that nothing in this description should be taken as saying that any of these added costs are unjustified. Some added costs will remain even when the uncertainty is washed out of the system, and those remaining costs presumably are the ones that a constitutional reading of the right to a jury trial requires. But many of the costs are solely a function of uncertainty and adjustment, and they look to be significant, particularly in the absence of legislation to address the constitutional concerns raised by *Blakely*.

District of the District of Columbia

In *United States v. Watson*,[22] Judge Thomas P. Jackson held that an earlier sentence he had imposed (in the so-called "Tractor Man Case") was unconstitutional under *Blakely*. He accordingly imposed a substantially reduced non-guideline sentence. I understand that the U.S. Courts of Appeals for the D.C. Circuit has declined to issue a stay in the matter.

District of Kansas

Senior Judge G. Thomas VanBebber reports that at this moment his court has not come to any consensus about post-*Blakely* sentencings. Presently, the judges are working through sentencings on a case-by-case basis. Changes of pleas and sentencings have almost come to a halt in the district, with most defense counsel asking for continuances in order to attempt to analyze the effect of *Blakely* (if any) on their cases. A meeting among the judges to discuss the problem may be held soon.

District of Maine

In *United States v. Fanfan*,[23] Judge D. Brock Hornby reduced a defendant's sentencing guideline range from a level 36 to a level 26 based on *Blakely*. In holding that the federal guidelines were unconstitutional, Judge Hornby concluded that *Blakely* did not permit a judge to conduct additional fact-finding that would increase a defendant's sentence.

District of Maryland

In the District of Maryland, Judge Deborah K. Chasanow has described the situation in the wake of *Blakely* as "unprecedented" and as "definitely creating problems." In her court, judges have apparently adopted widely varying approaches to *Blakely*. Some judges have decided to give alternate sentences to cover different contingencies that might arise. Other judges, however, believe that this approach is tantamount to giving impermissible advisory opinions and therefore is not proper. Some judges have also increased the interrogatories that they have criminal juries answer. One judge has even held a bifurcated proceeding in which a jury was asked to make determination as to the defendant's "role in the offense," an enhancing

[22] No. CR 03-0146 (D.D.C. June 30, 2004).

[23] No. 03-47-P-H (D. Me. June 28, 2004).

factor under the Guidelines. It may also be worthy of noting that later today, Judge Chasanow will participate in the taping of a nationwide teleconference being broadcast by the Federal Judicial Center to judges around the country, in which she and other participants will attempt to describe the varying approaches that courts are taking to resolving the issues posed by *Blakely*.

District of Massachusetts

In *United States v. Mikutowicz*,[24] Judge Rya Zobel rejected a motion for re-sentencing under *Blakely* because the defendant's "notice of appeal has effectively deprived this Court of jurisdiction." Judge Zobel noted, however, that "since the sentence is based in part on facts determined by the Court, it may well be illegal."

Judge Gertner reports that she sentences in cases since *Blakely* in cases in which a) there were no enhancements, b) the defendant had explicitly admitted to the enhancement, c) the defendant waived any Blakely issues (i.e. the Guideline sentence was likely to be less than the amount he or she had already served.) As to all other defendants who have been convicted or have plead guilty (and as to whom she has accepted the plea), she has issued a procedural order to determine if they intend to challenge the constitutionality of the Guidelines or proceed in some other fashion. She has arguments scheduled for next week on a group of cases raising the constitutionality and severability issue.

District of New Mexico

Judge James O. Browning reports that *Blakely* is having various unsettling effects. In an attempt to respond to *Blakely*, Judge Browning (and possibly others) are using a modified Judgment and Conviction Order in New Mexico that include language reflecting alternative sentences. Moreover, the probation office is preparing a separate section in pre-sentence reports that determines "*Blakely* computations" (e.g., enhancements without jury fact-finding).

District of New York (Eastern)

In *United States v. Medas*,[25] Judge I. Leo Glasser found my analysis in *United States v. Croxford* to be persuasive. Accordingly, he found the Guidelines unconstitutional. He also found *Croxford*'s analysis about the difficulties in turning these matters over to a jury to be persuasive. Accordingly, he declined the governments request for a new 20-page Supplemental Verdict Sheet.

A newspaper account also reports that on Friday, Judge Nina Gershon has also found the sentencing guidelines unconstitutional.[26]

---

[24] 2004 U.S. Dist. LEXIS 12516 (July 7, 2004).

[25] 2004 U.S. Dist. LEXIS 11760 (S.D.N.Y. June 25, 2004).

[26] Tom Perrotta, *Another New York Judge Finds Sentencing Guidelines Unconstitutional*, N.Y. LAWYER, July 12, 2004.

District of New York (Southern)

In *United States v. Gonzalez*,[27] Judge Deborah A. Batts postponed the sentencing of the defendant for two weeks following *Blakely*, but noted she was "currently of the mind to sentence the Defendant solely on the facts admitted by the defendant during his guilty plea."[28] She observed that "*Blakely* calls into serious question the long-standing practices of federal courts in implementing the United States Sentencing Guidelines."[29]

In *United States v. Mikelinich*,[30] Judge Colleen McMahon reportedly adopted my argument in the *Croxford* decision, and found the sentencing guidelines unconstitutional. She reduced a defendant's sentence from 37 months to 15 months.[31]

District of Oklahoma (Northern)

Chief Judge Sven Erik Holmes has announced a four-point plan on a going-forward basis in order to maintain a fair and workable process under the federal sentencing guidelines, while fully protecting each Defendant's Sixth Amendment jury trial rights as articulated in *Blakely v. Washington*. Here is the plan in its entirety:

> 1. This Court will only accept a plea of guilty accompanied by a Sixth Amendment waiver of jury that expressly applies to both guilt or innocence and to sentencing. If the Defendant does not desire to waive his or her Sixth Amendment rights in all respects, a jury trial on all relevant issues will ensue. Such a waiver and consent to judicial factfinding is contemplated by the Constitution, *Blakely v. Washington* and sound public policy.
>
> 2. For those cases resolved by a plea pursuant to such a comprehensive waiver, judicial factfinding at sentencing will require that any contested adjustment or departure, both upward and downward, must be based on facts established beyond a reasonable doubt. The Court recognizes this may have significant consequences, particularly in the areas of relevant conduct and determining amounts (e.g. drug quantities; dollar amounts of intended loss). Nevertheless, the Court believes the language in *Blakely* equating judicial factfinding with jury factfinding as a matter of Sixth Amendment jurisprudence implicitly, if not explicitly, requires this enhanced evidentiary standard. Moreover,

---

[27] __ F.Supp.2d ___, 2004 WL1444872 (S.D.N.Y. June 28, 2004).

[28] *Id.* at *2.

[29] *Id.*

[30] No. 03-CR-950 (S.D.N.Y.).

[31] Email from James E. Long, Esq., of Albany, New York, reported on www.ussguide.com.

experience tells us that most such sentencing adjustments are not difficult to establish beyond a reasonable doubt, but that it will simply require more time, energy, and effort to do so.

3. For those cases that go to trial, facts necessary to support relevant sentencing adjustments and departures will be set forth on the verdict form for the jury to find beyond a reasonable doubt. A mechanism will be established whereby all parties have full notice of such possible adjustments prior to trial. The Court will give the jury such instructions as are necessary and appropriate to make these findings of fact. This judicial officer, having met with the jury in every case during my last nine years on the bench, has great confidence in the jury's ability to address these issues fairly and effectively.

4. The United States should include significantly more detail in its charging documents. For those cases that are resolved by entry of a plea, this will reduce the amount of judicial factfinding needed at sentencing. For those cases that go to trial, the jury will have a more complete understanding of the matters that will be presented on the verdict form as items to be proved beyond a reasonable doubt.

Moreover, the Court anticipates that in some cases that go to trial involving relevant conduct, evidence of such conduct may not be admissible because it may be of limited probative value in proving the crime charged and highly prejudicial. Only in the most unique case will the Court permit a bifurcated procedure whereby guilt or innocence will be considered in a first phase and relevant conduct will be offered in a second phase. Since the United States hereafter must prove all relevant conduct beyond a reasonable doubt in any event, the United States should consider simply including any such relevant conduct allegations as part of the crime or crimes being charged. Of course, only time will tell whether, and to what extent, relevant conduct will continue to play a significant role in federal sentencing after *Blakely*. But, in this regard, it should be noted that most everyone involved in our criminal justice system, at least to some extent, has concerns about the manner and degree to which relevant conduct has impacted federal sentencing under the current system.

This four-point plan will maintain the workablity and fairness of the federal guideline system, while addressing the legitimate concerns expressed in *Blakely* that in certain instances judicial factfinding by a lower standard of proof is inconsistent with a Defendant's Sixth Amendment rights.

In Judge Holmes' judgment, if the four-point plan is followed the federal sentencing guidelines are constitutional. Judge Holmes has stated in court that, if the plan is implemented, the constitutionality of the guidelines can be maintained.

District of Oklahoma (Western)

Chief Judge Robin J. Cauthron reports that almost every sentencing has been continued in the wake of *Blakely*, with these requests generally being joint or unopposed applications.

Various meetings between interested parties are on-going and the court expects to rule on the legal issues in the near future. Essentially the system has been paralyzed in the short term, with the long term implications yet to be determined.

District of Rhode Island

Judge William Smith reports that the three active judges have meet several times in an effort to maintain a coordinated approach. No final decision has been reached. In the mean time, a number of criminal proceedings have been postponed. Some pleas continue to be taken, but only in those cases where no *Blakely* issue is apparent. It appears that a majority of these new cases have a potential *Blakely* issue.

District of South Carolina

Judge Cameron Currie reports that the post-*Blakely* situation is more serious than anything she has seen in her 26 years as, variously, federal prosecutor, magistrate judge, federal practitioner, and district judge. Justice O'Connor said that the decision would "wreak havoc," and it has done that in South Carolina. South Carolina does not have a district-wide approach. Several judges initially cancelled sentencings and others forged ahead. As for the Columbia Division (where Judge Currie sits), judges are generally trying to move ahead with sentencings. Federal prisoners here are housed in local jails under contracts with the USMS. Due to overcrowding and cost issues Judge Currie notes that "we simply do not have the luxury of delaying sentencings."

The first judge to sentence after *Blakely* simply removed the *Blakely* enhancement and gave a lower sentence. One of the other judges, who initially cancelled his sentencings, has now rescheduled 20 of them. He intends to advise all counsel by memo to evaluate the impact of *Blakey*, discuss it with their clients and submit additional objections to the pre-sentence report (PSR) if warranted. This will require a new addendum to each PSR where there is a Blakely issue. Judge Currie has not cancelled any sentencings, but has had to continue a few when *Blakely* issues were complex. Her procedure has been to review the PSR to determine if there is a *Blakely* issue and, if so, to advise the Probation Officer to discuss the matter with the defense and prosecution to see if it can be worked out. In a number of cases, she has taken *"Blakely* waivers" and proceeded to sentence. In these cases, she has offered defendants the right to withdraw their pleas, but no one has taken her up on that. In cases where there is no consensual resolution, she is holding that *Blakely*does apply to the U.S. Sentencing Guidelines and finding the Guidelines unconstitutional rather than apply them in a piecemeal fashion. She then sentencing under the general statutes. At the same time, she is ruling on all guidelines objections and stating what her sentence would have been under the guidelines. She is not pronouncing an alternative sentence as she believes there are legal impediments to that procedure. Finally, she is stating what the much lower sentence would have been if she had simply removed the enhancements that are problematic under *Blakely* but otherwise followed the guildelines. In cases where Guideline enhancements derive from criminal history, such as career offender, she has ruled that *Blakely* does not apply per the *Apprendi* reservation re fact of a prior conviction.

This week, Judge Currie anticipates have pre-trial conferences involving 30 - 35 defendants. She further anticipates that the Government will ask for *Blakely* continuances so that they can recall the grand jury to supercede the indictments. Thus, those detained pending trial will be held even longer in local jails. Some of the Federal Public Defenders are advising their clients not to sign plea agreements stipulating to relevant conduct. Judge Currie expects there will be more trials and that some will be bifurcated.

Blakely will add dramatically to the District of South Carolina's budget needs, as the court may need to transport and resentence hundreds of inmates. The workload will increase at the district and appellate levels, trials for those in the pretrial stages will be delayed as indictments are superceded, and there will be more trials which will take longer. The consequent impact on the cost of defender services , fees of jurors, and the U.S. Marshals budget there may be quite significant.

Finally, Judge Currie reports that the Fourth Circuit will hold a hearing *en banc* on a *Blakely* case the first week of August. Even though the case is being expedited, it is not known when a decision will be issued or whether subsequent Supreme Court review will be sought.

District of Texas (Northern)

Judge Barbara M.G. Lynn of the Northern District of Texas reports that *Blakely* is having "considerable unsettling effects." She has held one sentencing hearing since *Blakely*, in which she issued a "backup" sentence under the both the Guidelines and a non-Guidelines approach. A number of other sentencing matters have been continued.

District of Texas (Western)

According to a newspaper report, District Judge W. Royal Furgeson announced at Raja Kaki's sentencing last Thursday that he agreed that *Blakely* had essentially shifted responsibility for enhancing punishment on defendants from judges to juries. San Antonio's three other federal judges said they would issue dual sentences — one under the federal guidelines and a backup not incorporating them — in the event the guidelines are thrown out.[32]

Judge Frank Montalvo reports that the Chief Judge of the District was the first one to encounter a *Blakely* objection. In *United States v. Rucker* (as of yet unpublished and unreported), Chief Judge Walter S. Smith, Jr., dealt with it in a manner similar to *Croxford*, ultimately imposing three sentences. One sentence would assume the Sentencing Guidelines are valid and would be determined by reference thereto. One sentence would assume that *Blakely* applies to the Sentencing Guidelines and that the defendant's sentence must be determined by reference only to facts proved beyond a reasonable doubt or admitted to by the defendant. The last sentence would assume the Sentencing Guidelines are unconstitutional, and the court would then impose a sentence within the statutory sentencing range under indeterminate sentencing.

[32] http://www.mysanantonio.com/news/crime/stories/MYSA071004.1B.arsonsentencing.25fb589d.html.

By doing this, Judge Smith attempt to ensure that at least one of the sentences will survive appeal, and that no defendants will have to be resentenced once it is finally determined what application *Blakely* will have to federal sentencing. Judge Montalvo further reports that since *Blakely* he has taken up seventeen sentences and there were no *Blakely* issues in any of them. He intends to seriously consider following an approach similar to Judge Smith's.

District of Virginia (Eastern)

Judges Henry Hudson and Gerald Lee report that the most conspicuous impact of *Blakely* is a lack of uniformity in sentencing. All eleven judges in the District seem to be adopting different approaches. Moreover, each case requires a separate analysis to determine if the Guidelines are constitutional as applied to that case. The most pressing issues seem to be arising from cases coming up for sentencing following jury trial with significant potential enhancements. It is not immediately clear what solutions will be totally equitable or satisfactory in these circumstances. In addition, a number of guilty pleas have been entered where eliminating upward enhancements might distort the outcome to the extent that it may undermine the "basis of the bargain" – requiring the plea to be set aside on the ground of mutual mistake of law. Needless to say, the U.S. Attorney's Office is struggling to figure out how to include all relevant conduct in the indictment without diverting the jury on time consuming collateral side-trips. Judges are also bracing for the tidal wave of cases returned from the Fourth Circuit for resentencing after it rules on *Blakely*.

District of West Virginia (Southern)

In *United States v. Shamblin*,[33] Judge Joseph R. Goodwin agreed with *Croxford* that "any fact that increases the penalty for a crime beyond the statutory maximum" must be proven beyond a reasonable doubt.[34] According, the federal guidelines were unconstitutional. Judge Goodwin went on to reduce Shamblin's sentence from 240 months under the Guidelines to 12 months under the "option 2" approach described in *Croxford*. Judge Goodwin concluded: "Today, Shamblin's case illustrates the upheaval that *Blakely* will cause in federal courts, at least for a time. At 240 months, Shamblin's sentence represented much that is wrong about the Sentencing Guidelines; at 12 months, it is almost certainly inadequate. My duty, however, is only to apply the law as I find it."[35]

District of Wyoming

Chief Judge William Downes reports that two hearings were continued last week because of *Blakely*, as neither side knew how to handle the issue. He reports that there is "more

---

[33] __ F.Supp.2d ___, 2004 WL 1468561 (S.D.W.Va. June 30, 2004).

[34] *Id.* at *7.

[35] *Id.* at *9.

confusion and more angst about *Blakely* any other decision in recent memory."

II. Possible Congressional Responses to *Blakely*.

The description of varying responses around the country may provide support for the conclusion that *Blakely* had considerable unsettling effects on the federal courts around the country. In such circumstances, it is easy to use terms such as "crisis" or "chaotic" to describe the result. For instance, *USA Today* reported on Monday that some "legal experts" believe the results of *Blakely* "could be chaos in the U.S. Court system."[36] Indeed, one federal judge in Washington State has reportedly described *Blakely* as producing "complete and utter chaos,"[37] while another in Florida has reportedly said things are "very chaotic."[38]

In my view, such apocalyptic terms as "chaos" are inappropriate, at least with respect to describing the federal system. To describe federal criminal practice today as "chaotic" would unfairly minimize the efforts of the capable judges who are laboring to avoid such an outcome. As my description of their efforts hopefully indicates, they are at least having success in resolving the cases before them and, within each individual district, producing an appropriate sentence in light of the law as the judge understands it.

I will leave it to others to decide whether the current situation is worthy of a legislative "quick fix" and, if so, whether such a fix can be drafted consistently with constitutional commands. I would suggest, however, that any short term solution should not lead this Committee and the Congress to ignore the vital issues surrounding criminal sentencing.

In recent months, federal criminal sentencing has been a vibrant topic of discussion. Some have argued that the federal sentencing guidelines are too tough and should be generally adjusted downward. For example, Justice Anthony Kennedy argued at the American Bar Association's Annual Convention last summer that the federal sentencing guidelines should be revised downward.[39] Others believe that the guidelines still result in unduly lenient sentences in some circumstances. For instance, Congressman Sensenbrenner has introduced H.R. 4547, "Defending America's Most Vulnerable: Safe Access to drug treatment and Child Protection Act of 2004." The bill includes a broad slate of tough mandatory sentences for a wide range of drug

---

[36] Joan Biskupic, *High Court Ruling Sows Confusion*, USA TODAY, July 12, 2004.

[37] Tracy Johnson, *"Utter Chaos" Means Less-Severe Sentences for Serious Crimes*, SEATTLE POST-INTELLIGENCER REPORTER, July 12, 2004.

[38] Elaine Silvestrini, *Confusion Rules in Federal Courts*, TAMPA BAY OBSERVER, July 12, 2004.

[39] Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, at 4 (Aug. 9, 2003), *available at* www.supermecourtus.gov/publicinfo/speeches/sp_08–09-03.html.

crimes. Between these various positions, an almost infinite array of positions is possible. I recently espoused my own general view that the federal sentencing guidelines generally produce appropriate sentences, but that the mandatory minimum sentences may conflict with the goals of a guidelines structure.[40] Other arguments for reform have also been advanced.[41]

Today is not the day for finally resolving what the federal sentencing system should look like in the coming decades. My modest suggestion is only that this determination should be made only after a full and informed dialog between Congress, the Executive, the Judiciary, and other interested parties. In other words, while *Blakley* may be viewed as a short term problem requiring an immediate solution, perhaps with longer perspective it can viewed as spur for discussion and improvement.

I would be happy to answer any questions that the Committee might have about my description of the effects of *Blakely*, consistent with my obligation to avoid comment on pending legal issues.

---

[40] Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums*), 56 STAN. L. REV. 1017 (2004).

[41] *See, e.g.*, Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993); REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 1993); U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

STATEMENT

OF

PAUL G. CASSELL

UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF UTAH

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE EFFECT OF *BLAKELY V. WASHINGTON* ON THE FEDERAL COURTS

ON

JULY 13, 2004