LEGAL NOTES

Much Ado About Sentencing: The Influence of *Apprendi*, *Blakely*, and *Booker* in the U.S. Courts of Appeals*

MARK S. HURWITZ

In a line of cases commencing with Apprendi v. New Jersey (2000), *the Supreme Court has held the Constitution commands that juries must decide factual issues that lead to sentencing determinations by judges. When the* Apprendi *logic was extended to* Blakely v. Washington (2004) *regarding state sentencing guidelines, the mandatory sentencing scheme in the federal Sentencing Guidelines seemed threatened. Indeed, the Supreme Court continued this line of thinking in* United States v. Booker (2005), *when it held the mandatory nature of the federal Sentencing Guidelines unconstitutional. I analyze the influence of these Supreme Court decisions by showing how the courts of appeals handled these new directives in sentencing, particularly during the short time between* Blakely *and* Booker *when the state of the law in federal courts was in flux. My purpose is to decipher how the federal courts handled this area of the law while it remained open and subject to dissimilar interpretations. Accordingly, I traverse the federal courts' rationale for sentencing from* Apprendi *to* Booker, *concentrating in detail on the short time frame between* Blakely *and* Booker.

For many years, federal court judges enjoyed considerable discretion in their sentencing decisions, as sentences were largely based on an indeterminate system. The consequence was a great disparity of sentences even for those convicted of similar crimes. In response to a system that, for myriad reasons, seemed troubled if not broken, Congress passed the Sentencing Reform Act of 1984. Among other things, this law created a commission empowered to devise sentencing guidelines for the federal system. The commission thereafter promulgated the federal Sentencing Guidelines (hereafter, Sentencing Guidelines), which encompassed a more determinate sentencing scheme the Sentencing Reform Act made binding on federal judges. In this largely determinate system that became effective on November 1, 1987, judges were required to follow the Sentencing Guidelines, though the Guidelines permitted discretion to depart from them when the presiding judge found aggravating or mitigating factors present.

When the constitutionality of this commission was initially challenged, in *Mistretta v. United States* (1989), the Supreme Court held that creation of the commission that designed the Sentencing Guidelines did not violate any separation-of-powers notions. Consequently, the Sentencing Guidelines were deemed constitutional. The Guidelines thus provided the mechanism by which federal judges han-

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dled sentencing for over a decade. Indeed, after *Mistretta*, the authority of the Sentencing Guidelines hardly seemed in doubt.

Then, however, the Supreme Court decided *Apprendi v. New Jersey* (2000), which set into motion a number of cases holding to a line of reasoning that called into question the mandatory nature of sentencing guidelines in both federal and state courts, particularly when these determinate-sentencing schemes permitted judges to depart from the guidelines based on aggravating factors. *Apprendi* provided that facts increasing sentencing determinations must be made by juries, not judges. The Court next applied this so-called *Apprendi* rule a few years later in *Blakely v. Washington* (2004), holding that a state's determinative-sentencing structure was constitutionally unsound. Finally, in United *States v. Booker* (2005), the Court directly addressed the federal Sentencing Guidelines and held that they similarly ran afoul of the *Apprendi* rule when judges, not juries, employed the Sentencing Guidelines to increase sentences.

In this Legal Note, I analyze the *Apprendi* rule as it applies to the federal sentencing scheme. I am especially concerned with how the federal courts of appeals handled sentencing in the wake of *Apprendi* and *Blakely*, before the Court's determination in *Booker* neutered the mandatory nature of the Sentencing Guidelines. To do so, I first discuss these three cases to illustrate their potential impact on sentencing.

APPRENDI AND ITS PROGENY, *BLAKELY* AND *BOOKER*

As Justice Stevens stated for the 5-4 Court majority in *Apprendi*, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (at 490). In addition to Justice Stevens, the *Apprendi* majority included Justices Ginsburg, Scalia, Souter, and Thomas, while Justices Breyer, Kennedy, O'Connor, and Rehnquist dissented. Though this coalition of justices in *Apprendi* was atypical of many other 5-4 decisions during this era (see, e.g., *United States v. Lopez*, 1995), it would reappear in *Blakely* and *Booker*.

The critical theme that juries, not judges, must make factual determinations that ultimately lead to enhanced sentencing decisions runs through this line of cases. The precise constitutional defect in the sentence handed down in *Apprendi* was that the presiding judge added additional time to the defendant's sentence based on the judge's finding, by a preponderance of the evidence, regarding defendant's intended actions that led to his conviction. Although this sentence enhancement was authorized by the relevant state statute, the Supreme Court held the judge's actions violative of both the right to trial by jury and due-process requisites in the Sixth and Fourteenth Amendments.

Apprendi did not specifically pertain to any determinate sentencing scheme. Yet the *Apprendi* rule espoused by Justice Stevens plainly set the stage for the Court's subsequent decisions in *Blakely* and *Booker*, which did address the constitutionality of mandatory sentencing guidelines in state and federal systems, respectively. The

Court clearly was interested in extending this novel line of constitutional thought (see, e.g., *Ring v. Arizona*, 2002, in which the Supreme Court relied on the *Apprendi* rationale to overrule in part the now contrary decision in *Walton v. Arizona*, 1990, where the Court had held that the state law authorizing the judge to make findings on mitigating or aggravating circumstances was not unconstitutional). Sensing the approaching changes on the horizon, Justice O'Connor vigorously dissented in *Apprendi*, calling it a "watershed change in constitutional law" (at 524).[1]

Four years after *Apprendi*, Justice Scalia, who had been the sole dissenter in *Mistretta* fifteen years earlier when the Court held that the commission charged with devising the federal Sentencing Guidelines was not unconstitutional, further extended the *Apprendi* logic in *Blakely v. Washington*. For the Court, he held that Washington State's mandatory sentencing scheme violated the constitutional right to a jury trial to the extent that it required or enabled judges to augment sentences based on information not found by the jury or confessed by the defendant. Whether Justice Scalia found a majority coalition willing to call into question determinate-sentencing schemes in *Blakely* where he was unable to do so in *Mistretta*, or whether he envisioned these two cases as presenting vastly different issues that coincidentally focused on mandatory sentencing guidelines, is beyond the scope of this Note. Nevertheless, this ruling portended a seismic shift in the future of sentencing in both state and federal courts.

In *Blakely*, the defendant had pled guilty to a criminal charge that carried a maximum sentence of fifty-three months under the determinate-sentencing scheme then in effect in Washington State. Finding, however, that the defendant "acted with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases" (at 300), the judge sentenced the defendant to ninety months in prison. In holding the judge's ruling unconstitutional, Justice Scalia underscored that a jury did not reach a conclusion on any facts leading to the judge's "deliberate cruelty" finding, nor did the defendant admit any such facts in his plea; instead, this finding was determined solely by the judge. According to the Court, the *Apprendi* holding applied to *Blakely*, thus putting the state's mandatory sentencing scheme in doubt.

The *Blakely* opinion left open a number of issues. For one, the Court said that it was not ruling determinate-sentencing schemes unconstitutional per se, but was ruling only that this particular judgment pursuant to the sentencing guidelines in Washington was repugnant to a constitutional right to a jury trial. Nonetheless, as the legal provision at issue in *Blakely*, which permitted the judge to increase the sentence on his own, was similar to other guidelines in this and other determinate-sentencing schemes, one could infer from the Court's decision that doubt was being cast on many, if not all, such sentencing schemes.

[1] *Apprendi* was not the first Supreme Court case on this matter, though it was the first to consider this issue directly. Preceding *Apprendi* were *Jones v. United States* (1999), where the Court initially expressed constitutional doubt regarding sentence enhancements based upon the judge's findings by a preponderance of the evidence, and *Almendarez Torres v. United States* (1998), in which the Court had upheld the use of a prior conviction not charged in the indictment as an exception to the rule requiring juries to make findings beyond a reasonable doubt.

This inference leads to the principal focus of this Note—the state of potential confusion in the federal courts resulting from the *Blakely* decision. If determinate-sentencing provisions in the states contained invalid provisions, it appeared that the federal Sentencing Guidelines could similarly be found unconstitutional in part or perhaps entirely. Mindful of this potentiality, the Court in *Blakely* maintained, "The Federal Guidelines are not before us, and we express no opinion on them" (at 305, fn. 9). True enough, but the proverbial writing was on the wall, and the next case would address directly the rationale of *Apprendi* and *Blakely* as it applied to the federal sentencing scheme.

The vigorous dissenting opinions by Justices O'Connor and Breyer in *Blakely*, in which each joined the dissent of the other, require examination. Justice O'Connor echoed the complaints from her *Apprendi* dissent. In particular, she contended that the majority's approach would place the recent sentencing reform movement, specifically determinate-sentencing schemes of which she seems to support, in peril. She also predicted, even lamented, that *Blakely* inevitably would lead to the federal Sentencing Guidelines being ruled unconstitutional. Justice Breyer, earlier a member of the commission that devised the original federal Sentencing Guidelines, was equally displeased with the *Blakely* majority, and he also worried that the federal Sentencing Guidelines would fall under the *Apprendi/Blakely* rationale. He argued that there is no constitutional demand that all facts be decided by a jury. As well, he seemed most troubled about what he perceived would be the unfairness of applying *Blakely* to criminal defendants. Justices O'Connor and Breyer predicted that chaos and turmoil would ensue in both federal and state courts in the wake of *Apprendi* and *Blakely* as sentencing judges sought to decipher how to apply this new constitutional mandate. While Justice Scalia somewhat pejoratively dismissed the concerns of these dissenters, it is the potential confusion in the federal courts they foresaw that is particularly important.[2]

Perhaps anticipating such disarray, the Court soon thereafter granted certiorari in two cases that raised issues like those in *Blakely* but did so with respect to the federal Sentencing Guidelines. The result was the consolidated decision in *United States v. Booker* and *United States v. Fanfan*, referred to as *United States v. Booker*. (The *Fanfan* case, part of the *Booker* decision in the Supreme Court, came through the First Circuit, which never issued a decision as the Court granted certiorari before judgment.) In an opinion written by Justice Stevens for the same five-justice majority, the Court answered the question of whether the *Apprendi/Blakely* reasoning applied

[2] An interesting side note within these cases concerns the intellectual debate waged by Justice Scalia, whose reliance on originalist thinking in the majority opinion is juxtaposed against the O'Connor and Breyer dissents, which disagree with employing such philosophy. For an example, compare these competing rationales in *Blakely*: Scalia: "the very reason the Framers put a jury trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury" (at 308); O'Connor and Breyer: "Because broad judicial sentencing discretion was foreign to the Framers . . . they were never faced with the constitutional choice between submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offenses and offenders" (at 323).

to the Sentencing Guidelines. Indeed, it did apply, said the Court, with the Court holding unconstitutional the Sentencing Reform Act of 1984 to the extent that it, and the Sentencing Guidelines the law begat, mandated sentencing decisions by federal judges. Based on the Fifth and Sixth Amendments, *Booker* specifically reaffirmed *Apprendi* and applied the *Blakely* holding to the federal sentencing scheme, there being "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]" (at 749). Consequently, the mandatory nature of the Sentencing Guidelines was ruled unconstitutional, to be replaced by a reasonableness criterion for sentencing.

Interestingly, the Court in *Booker* decided an additional question, concerning the Sentencing Guidelines' continued applicability. Because Justice Ginsburg joined Breyer's coalition of justices with respect to this issue, Justice Breyer wrote the opinion for the Court on this remedy question.[3] Here, Justice Breyer asserted that, based on Justice Stevens' decision in this case, the mandatory nature of the Sentencing Guidelines was unconstitutional. However, he held the Sentencing Guidelines themselves were not fully unconstitutional; instead, they were rendered "effectively advisory . . . [which] requires a sentencing court to consider Guideline ranges . . . [but] permits the court to tailor the sentence in light of other statutory concerns as well" (at 757).

The result of these seemingly inconsistent majority opinions in *Booker* is that the *Apprendi* rule applies to the federal Sentencing Guidelines and, thus, decisions that enhance a defendant's sentence over the maximum must be based on facts determined by a jury or found in a guilty plea. Nevertheless, the Sentencing Guidelines are not rendered entirely unconstitutional, so long as federal judges consider them advisory, not mandatory, and follow the *Apprendi* rule when sentencing defendants.

The *Blakely* decision on state determinate-sentencing rules was issued June 24, 2004. The *Booker* decision on the federal determinate scheme followed relatively posthaste on January 12, 2005. As anticipated, some confusion did ensue in the federal courts before *Booker,* though perhaps not to the degree Justices O'Connor and Breyer predicted. Justice Breyer's attempt to salvage the Sentencing Guidelines in *Booker,* even if in a merely advisory role, signified the potential for continued disorder in the federal courts on these issues. Nevertheless, to a critical degree *Booker* did settle open issues regarding the Sentencing Guidelines by affirmatively conveying that their mandatory nature was unconstitutional; hence, all issues of fact that go into sentencing enhancements must be admitted by the defendant or found by a jury. *Booker* thus completed the line of reasoning begun and raised in *Apprendi* and *Blakely,* thereby resolving this constitutional issue regarding the Sentencing Guidelines. As a consequence, it is especially important to address the federal courts' response to

[3] Because Justice Ginsburg joined Breyer's decision on the question of a remedy after previously siding with Stevens on the original constitutional question in *Booker*, she was the only justice to be on the winning side of both issues at bar in this case.

Apprendi and particularly to *Blakely* during the time before the *Booker* decision. Indeed, the post-*Blakely*/pre-*Booker* period embodied the greatest potential for uncertainty regarding the federal sentencing system.

FEDERAL SENTENCING POST-*APPRENDI*

I now turn to an analysis of the influence of *Apprendi* and *Blakely* in the courts of appeals. Before the *Booker* case, which chiefly settled the constitutional issues in the federal courts, the *Blakely* decision was the shot across the bow of the federal Sentencing Guidelines. In particular, the *Blakely* rationale regarding the Washington State sentencing guidelines appeared to apply equally to the federal Sentencing Guidelines. Consequently, after *Blakely,* the several circuits, surmising the questionable constitutionality of the Sentencing Guidelines, were quick to act. In fact, a number of circuits sat en banc to decide whether and how *Blakely* would (or would not) apply as the law of their respective circuits. Even before *Blakely,* however, federal courts were confronted with a number of issues previously raised by *Apprendi,* and some circuits had held en banc hearings to determine a circuit-wide response to that ruling.

How did the federal appellate courts address the *Apprendi* rationale before *Blakely* made it apparent that the Sentencing Guidelines had a dubious future? There were a variety of responses to the *Apprendi* rule. Yet the courts of appeals appeared to agree on one critical point that perhaps served to limit the reach of *Apprendi*—that aggravating factors increasing the sentence *beyond* the maximum were subject to *Apprendi*, but not otherwise, as sentence enhancements *within* the Guidelines did not have to be based on facts determined by a jury. Cases from the First and Second Circuits are illustrative here. A First Circuit panel, in *United States v. Baltas* (2001), citing an Eighth Circuit case, held that a judge can increase a defendant's sentence so long as it does not rise above the ceiling permitted in the Sentencing Guidelines. In *United States v. Caba* (2001), the court reached a similar result: "*Apprendi* simply does not apply to guideline findings . . . that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum" (at 101). Both of these First Circuit cases involved sentences that did not exceed the maximum. However, if an aggravating factor served to propel a sentence above the maximum, *Apprendi* clearly applied. As the Second Circuit ruled in *United States v. Thomas* (2001), an en banc decision: "We conclude, following *Apprendi's* teachings, that if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury" (at 660).[4]

[4] All other circuits followed this same general rule: see, e.g., *United States v. Angle* (2001); *United States v. Avery* (2002); *United States v. Copeland* (2003); *United States v. Davis* (2003); *United States v. Doggett* (2001); *United States v. Fields* (2003); *United States v. Jackson* (2003); *United States v. Jordan* (2002); *United States v. Mansoori* (2002); and *United States v. Sanchez Gonzalez* (2002).

Another issue in which the circuits seemed to agree was *Apprendi*'s potential retroactive effect. Typical is *United States v. Jenkins* (2003) from the Third Circuit, where the court held that the *Apprendi* rule is procedural, not substantive, and thus generally not subject to retroactive application. A consequence of these several circuits generally restricting *Apprendi* to future cases was that a broader application of the *Apprendi* rule was forestalled.[5]

These examples substantiate that, while *Apprendi* may have been a watershed ruling as Justice O'Connor had forecast, the circuits seemed to settle rather easily into a particular interpretation of *Apprendi*. In particular, if an aggravating circumstance moved a sentence above the prescribed guideline, that fact must be admitted or found by a jury beyond a reasonable doubt, as dictated by *Apprendi*, but if an aggravating factor increased a sentence within that prescribed by the Sentencing Guidelines, *Apprendi* did not apply. In either event, the rule would not be retroactively applied. In other words, *Apprendi* changed the procedures for sentencing in the federal courts, and defense attorneys clearly attempted to rely on the case to obtain reversal of sentencing decisions. However, the overall impact of *Apprendi* was not nearly as grand as some may have hoped or feared. Such uncertainty and change in the Sentencing Guidelines would have to await the *Blakely* decision.

FEDERAL SENTENCING POST-*BLAKELY*

The real action and uncertainty in the federal courts regarding the influence of the *Apprendi* rationale came with the Supreme Court's decision in *Blakely*. To reiterate, before *Booker* held unconstitutional the mandatory nature of the federal Sentencing Guidelines, *Blakely* had indirectly questioned the constitutionality of the federal scheme. More specifically, *Blakely* held that a state determinate-sentencing structure was constitutionally defective if and when it permitted judges to add time to a defendant's sentence based on aggravating circumstances determined by solely the judge. As the federal Sentencing Guidelines were remarkably similar to the state sentencing system at issue in *Blakely*, the days of the Sentencing Guidelines surely seemed numbered. In this section, I examine each circuit's response to *Blakely* within the courts of appeals before *Booker*, for this was the critical, albeit short, time period during which the dubiousness of the federal Sentencing Guidelines was evident, though as of yet no Supreme Court decision had stated so affirmatively.

Generally, the circuit courts that addressed whether and how *Blakely* would apply to the federal Sentencing Guidelines took one of three stances: 1) some made no direct ruling on the applicability of *Blakely*, as these courts took a wait-and-see approach regarding future Supreme Court action; 2) others specifically held that

[5] Other appeals courts holding that the *Apprendi* rule need not be applied retroactively include *United States v. Brown* (2002); *Browning v. United States* (2001); *Curtis v. United States* (2002); *Goode v. United States* (2002); *McCoy v. United States* (2001); *United States v. Moss* (2001); *United States v. Sanchez Cervantes* (2002); *United States v. Sanders* (2001); and *Sustache Rivera v. United States* (2000).

Blakely did not apply to the Sentencing Guidelines until the Supreme Court particularly said so; and 3) others still held that *Blakely* did apply and, thus, the Guidelines were unconstitutional. I categorize the reaction of the several circuits according to their treatment of *Blakely*. The cases I discuss below are the lead decisions within a circuit that were followed in subsequent cases, or are otherwise typical of how that circuit handled the *Blakely* precedent.

***No Direct Ruling on the Applicability of* Blakely.** The First Circuit addressed the *Blakely* situation in *United States v. Cordoza Estrada* (2004). There, the defendant argued that a prior conviction should not have served to increase the sentence above the maximum and that, in light of *Blakely,* the Sentencing Guidelines should not be followed. The court held there was no error in using the prior conviction, as *Blakely* did not change that aspect of *Apprendi*. With respect to the status of the Sentencing Guidelines, the court stated, "Even if the Sentencing Guidelines as a whole are ultimately declared invalid, we must decide whether any error in applying them was 'plain'" (at 60). Finding no plain error, the court affirmed the sentence, then took a wait-and-see approach to the applicability of the Guidelines, as the other circuits already were split on the issue, and it seemed the Supreme Court would eventually settle the matter. This wait-and-see approach seemed rather prudent. In a separate, unpublished decision, *United States v. Quintana-Perez* (2004), the court held that sentence enhancements were permissible under *Blakely* where they were based on admissions made by the defendant at his plea hearing. The Supreme Court subsequently vacated and remanded the case for sentencing in light of the *Booker* decision that was subsequently released.

In *United States v. Thomas* (2004), the only published decision within the Third Circuit to deal somewhat directly with *Blakely*, the court held that *Blakely* did not apply because the defendant had admitted facts in his plea that led to enhancement of his sentence. As the panel stated (at 426), "If *Blakely* were arguably applicable to this case, we would delay its disposition until the Supreme Court decides" this matter, but the court took no position on whether *Blakely* applied to the Sentencing Guidelines and upheld the sentence.

The Tenth Circuit was another that would not hold *Blakely* applicable to the Sentencing Guidelines, although it never specifically stated that *Blakely* did not so apply. Two cases in point from this circuit are relevant here. *United States v. Sanchez Cruz* (2004) refused to hold the Sentencing Guidelines unconstitutional, as the defendant failed specifically to contest the Guidelines, but as the key aspect of the sentence enhancement was a prior conviction, an exception specifically carved out in both *Apprendi* and *Blakely*, application of the Guidelines was not unconstitutional on those grounds. Similarly, the panel in *Leonard v. United States* (2004) held that as the Supreme Court had not specifically applied *Blakely* to the federal Guidelines, it was inappropriate for the court of appeals to do so.

***Sentencing Guidelines Operative Despite* Blakely.** Due to the importance of, and uncertainty besetting, the Sentencing Guidelines in light of *Blakely*, the Second

Circuit decided to sit en banc in *United States v. Penaranda* (2004), for the sole purpose of certifying questions for Supreme Court review. As the unanimous en banc court contended:

> In sum, there are reasonable arguments both in favor of and against the proposition that *Blakely* applies to the Sentencing Guidelines, and reasonable questions (if it does so apply) about whether it prohibits judicial fact finding that determines the applicable Guidelines sentencing range within an applicable statutory maximum. . . .
>
> . . . We are convinced that a prompt and authoritative answer to our inquiry is needed to avoid a major disruption in the administration of criminal justice in the federal courts—disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements (at 245-46).

Because all it sought in this case was certification to Supreme Court for an expedited briefing and hearing schedule, the Second Circuit in *Penaranda* did not resolve one way or another the issue of whether the Sentencing Guidelines were affected by the *Blakely* ruling.

Once the Supreme Court granted certiorari in *Booker* and *Fanfan*, it did not need to review *Penaranda*. However, before the *Booker* decision, sentences had to be handed out within the Second Circuit. So, in *United States v. Mincey* (2004), a Second Circuit panel held that the Sentencing Guidelines continued to apply in the circuit "until the Supreme Court rules otherwise" (at 106). Of course, the Court did rule otherwise, which meant that *Mincey* was vacated in light of the *Booker* decision. Along with *Penaranda*, *Mincey* is evidence of the apparent disorder in the courts of appeals, even within a single circuit, in the wake of *Blakely* and before *Booker*.

Like the Second Circuit, the Fourth Circuit handled the *Blakely* matter in an en banc setting, holding in *United States v. Hammoud* (2004) that the Sentencing Guidelines remained in effect despite *Blakely*. Even so, the presence of a nontrivial number of dissents from this en banc decision further demonstrates the unsettled state of the federal law before *Booker*.

The Fifth, Sixth, and Eleventh Circuits similarly ruled that *Blakely* did not apply to the federal Sentencing Guidelines. The Fifth Circuit's key decision was *United States v. Pineiro* (2004), where the three-judge panel held, "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" (at 465). In *United States v. Koch* (2004), an en banc decision, the Sixth Circuit likewise provided that *Blakely* did not apply to the Sentencing Guidelines. The Eleventh Circuit was another to hold that *Blakely* did not apply to the Sentencing Guidelines. In *United States v. Reese* (2004) the court stated, "We agree with the Fifth Circuit in *Pineiro* and the Sixth Circuit in *Koch* that *Blakely* does not compel a departure from previous Supreme

Court precedent" (at 1310). All of these cases were vacated in light of the Supreme Court's decision in *Booker*.

***Sentencing Guidelines Unconstitutional Based on* Blakely.** The Seventh Circuit illustrates the conflict among the circuits that *Blakely* engendered. An opinion by Judge Posner for a 2-1 panel in *United States v. Booker* (2004) stated that the Sentencing Guidelines could not stand along with the *Blakely* reasoning, and thus the Guidelines were unconstitutional. Subsequent cases within the Seventh Circuit followed the rule of this case (see, e.g., *United States v. Ward*, 2004). Yet, Judge Posner realized he was treading in unpredictable terrain with respect to the panel's conclusion in *Booker* about the Guidelines: "We cannot be certain of this. But we cannot avoid the duty to decide an issue squarely presented to us. If our decision is wrong, may the Supreme Court speedily reverse it" (*Booker*, at 513). In fact, the Supreme Court agreed with much of the reasoning in this opinion, for this is the appeals-court decision in which the Court granted certiorari and specifically affirmed.

A Ninth Circuit panel, also divided, similarly determined that, based on *Blakely*, the Sentencing Guidelines were unconstitutional. As the court stated in *United States v. Ameline* (2004), "We join the Seventh Circuit [in *Booker*] in holding that there is no principled distinction between the Washington Sentencing Reform Act at issue in *Blakely* and the United States Sentencing Guidelines" (at 974).

Indeterminate Position. Two circuits resist neat categorization. The Eighth Circuit was inconsistent on whether *Blakely* applied to the Sentencing Guidelines. In a published decision in *United States v. Lucca* (2004), the court seemed to take a wait-and-see approach on the applicability of *Blakely* to the Guidelines, saying, "Whatever the ramifications of *Blakely* for the constitutionality of the United States Sentencing Guidelines, we perceive no constitutional flaw in [defendant's] sentence" (at 934). However, the *Lucca* court followed an unpublished 2-1 decision, *United States v. Mooney* (2004), in which a panel held that the Sentencing Guidelines were unconstitutional in light of *Blakely*. The *Mooney* case was subsequently cited as circuit authority in a published decision in *United States v. Mendoza-Mesa* (2004). Because one published decision called for a wait-and-see approach, while another published decision relied on a non-precedential, unpublished decision that called the Sentencing Guidelines unconstitutional, I am unable to categorize this circuit.

And finally, in the only case on the topic that the D.C. Circuit decided during the relevant time period, *United States v. Miller* (2005), the court held that *Blakely* did not change the prior conviction exception from previous cases, but no direct ruling was made on whether this precedent applied to invalidate the Sentencing Guidelines. The D.C. Circuit issued its decision in *Miller* less than a week after the Supreme Court announced its decision in *Booker*, though this Supreme Court case did not appear to affect the holding or rationale of the appeals-court decision in any meaningful way.

Plainly, confusion and conflict reigned in the courts of appeals after *Blakely* raised doubt about the constitutionality of the Sentencing Guidelines. Whatever their legal or ideological inclination, it is likely that most actors directly involved in these mat-

ters, particularly judges and lawyers, were initially relieved when the Supreme Court's *Booker* decision settled the matter by holding that the *Apprendi/Blakely* rule applied to the Guidelines. Whether that relief was justified is another matter entirely.

DID *BOOKER* RESOLVE THE UNCERTAINTY IN THE COURTS OF APPEALS?

While a particularized analysis of how the federal courts handled the new rule espoused in *Booker* is beyond the scope of this Note, a few brief comments about *Booker* are in order. Because of the confusing organization of the *Booker* decision, in which the mandatory nature of the Sentencing Guidelines was ruled unconstitutional but the Guidelines themselves remained in effect as advisory, *Booker* is not likely the final word on this matter. The reaction of the Second Circuit is illustrative. In the immediate aftermath of *Booker,* one panel of that court held in *United States v. Crosby* (2005) that the presiding judge is duty-bound to consider the Sentencing Guidelines in a way similar to but not exactly the same as in the pre-*Booker* era, and the court listed specific standards to consider in light of the reasonableness standard mandated by *Booker.* It was fairly clear that the *Crosby* court was attempting to find objective, valid guidelines for sentencing in light of the new federal mandate. However, in *United States v. Williams* (2005), a subsequent Second Circuit panel reversed a decision in light of *Booker* and *Crosby,* based on an inappropriate sentencing enhancement by the judge. It seems that clarity had not yet come to the Second Circuit with respect to sentencing, even after *Booker.*

Other circuits also addressed the *Booker* decision directly and relatively soon after it was decided, in an attempt to provide district courts some clarity in sentencing and thus avoid the confusion that seemed likely after *Booker*. For instance, the Ninth Circuit sat en banc to review its earlier panel ruling in *United States v. Ameline* (2004) to delineate a specific procedure for sentencing in light of the *Booker* mandate, and its 2005 *Ameline* en banc decision specifically followed the Second Circuit's reasoning in *Crosby*. Whether either the Second or Ninth Circuit, or any other circuit, will succeed in creating an orderly process for sentencing and appeals of those sentences remains to be seen. Nevertheless, these cases make clear that courts are making conscientious attempts to address their sentencing decisions in accord with *Booker*.

COMMENTARY

As this analysis demonstrates, there were clear conflicts on a critical sentencing issue among the circuits after *Blakely* and before *Booker*. In particular, two circuits directly held the Sentencing Guidelines unconstitutional (Seventh and Ninth). These would be the only circuits with which the Supreme Court would agree when it released its *Booker* decision. Five other circuits specifically held that *Blakely* did not apply to the Sentencing Guidelines (Second, Fourth, Fifth, Sixth, and Eleventh). All of the cases cited from these circuits were vacated in light of *Booker*. Three cir-

cuits (First, Third, and Tenth) were in tandem, except that these circuits did not directly address the issue of *Blakely*'s applicability as they awaited express word from the Supreme Court. Finally, one circuit released inconsistent decisions (Eighth) while another (D.C.) issued no relevant decision on the *Blakely* matter.

From this perspective, it was axiomatic that the Supreme Court quickly and definitively settle the uncertainty apparent in the federal circuits after *Blakely*. This seems to bolster what Justice Brandeis famously expressed in *Di Santo v. Pennsylvania* (1927): "It is usually more important that a rule of law be settled, than that it be settled right" (at 42). This is not to suggest that *Blakely* and *Booker* were incorrectly decided; to the contrary, the uncertainty evident in the wake of *Blakely* shows that a relatively settled state of the law is essential to the functioning of the legal system. Thus, the Court needed to delineate whether *Blakely* applied to the Sentencing Guidelines. In *Booker*, it did just that by holding the mandatory nature of the Guidelines unconstitutional to the extent they ran afoul of the *Apprendi* rule as applied in *Blakely*. Yet, its bifurcated decision in *Booker* denoted that some confusion lingered in the trenches where sentencing decisions are made.

In the end we must ask, did the sky fall, as Justices O'Connor and Breyer gravely warned? Indeed, was their alarm justified? Both questions can be answered "yes and no." Plainly, in the wake of *Blakely*, confusion was the norm in the courts of appeals—and in the district courts where judges were making specific sentencing decisions. That is, the circuits split on how to apply the *Blakely* decision, and the federal courts did demand swift resolution from the Supreme Court. Until that occurred in *Booker*, however, the state of the law of sentencing in the federal courts was unsettled at best, perhaps even chaotic.

Even after *Booker*, which generally settled the question of whether *Blakely* applied to the Sentencing Guidelines, the confusing opinions dividing the questions of the constitutional issues and the remedy caused continued problems. Moreover, those courts that in the interim had ruled *Blakely* inapplicable had to revisit their sentencing decisions.

Nonetheless, just as *Blakely* did not have as broad an effect on sentencing systems in state courts (see accompanying Note in this issue) as it did on the federal sentencing regime, it is unlikely that *Booker* will produce massive confusion in the federal courts. In fact, in *United States v. Crosby* (2005), decided shortly after *Booker* when the Second Circuit was attempting to promulgate standards in light of the brand new precedent, Judge Jon Newman conveyed: "*Booker/Fanfan* can be expected to have a significant effect on sentencing in federal criminal cases, although perhaps not as drastic an effect as some might suppose" (at 110-11). Judge Dickran Tevrizian of the Central District of California, whose job it is to sentence, and perhaps resentence, defendants in the wake of *Booker,* echoed this sentiment when he said, "I think in 95 percent of the cases the judges will say the prior sentence was reasonable" (Henry Weinstein, "Court Backs Sentencing Reviews," *Los Angeles Times,* June 2, 2005, p. A10).

In sum, the Supreme Court absolutely changed how sentencing would proceed in the federal courts with its decisions in *Apprendi*, *Blakely*, and *Booker*. Certainly before the *Booker* decision was released, there was much skepticism as to whether the federal Sentencing Guidelines would survive. The Guidelines barely survived, albeit in advisory form, as the determinate system with judicial enhancements originally envisioned by the sentencing commission was ruled unconstitutional. Nevertheless, the federal courts, including the judges and lawyers who practice in matters of sentencing defendants, apparently have adjusted rather expeditiously to the new order. While *Apprendi* and its progeny *Blakely* and *Booker* represented a sea change in some respects, these cases may not have had quite the dramatic influence as one might have first imagined. **jsj**

CASES CITED

Note: *United States v.*: see name of opposing party.

Almendarez Torres v. United States, 523 U.S. 224 (1998).

Ameline, *United States v.*, 376 F.3d 967 (9th Cir. 2004).

Ameline, *United States v.*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

Angle, *United States v.*, 254 F.3d 514 (4th Cir. 2001) (en banc).

Apprendi v. New Jersey, 530 U.S. 466 (2000).

Avery, *United States v.*, 295 F.3d 1158 (10th Cir. 2002).

Baltas, *United States v.*, 236 F.3d. 27 (1st Cir. 2001).

Blakely v. Washington, 542 U.S. 296 (2004).

Booker, *United States v.*, 375 F.3d 508 (7th Cir. 2004), aff'd, 543 U.S. 220 (2005).

Brown, *United States v.*, 305 F.3d 304 (5th Cir. 2002).

Browning v. United States, 241 F.3d 1262 (10th Cir. 2001) (en banc).

Caba, *United States v.*, 241 F.3d. 98 (1st Cir. 2001).

Copeland, *United States v.*, 321 F.3d 582 (6th Cir. 2003).

Cordoza Estrada, *United States v.*, 385 F.3d 56 (1st Cir. 2004).

Crosby, *United States v.*, 397 F.3d 103 (2d Cir. 2005).

Curtis v. United States, 294 F.3d 841 (7th Cir. 2002).

Davis, *United States v.*, 329 F.3d 1250 (11th Cir. 2003).

Di Santo v. Pennsylvania, 273 U.S. 34 (1927).

Doggett, *United States v.*, 230 F.3d 160 (5th Cir. 2001).

Fanfan, *United States v.*, U.S. Dist. LEXIS 18593 (D.ME 2004), vacated by *United States v. Booker*, 543 U.S. 220 (2005).

Fields, *United States v.*, 325 F.3d 286 (DC Cir. 2003).

Goode v. United States, 305 F.3d 378 (6th Cir. 2002).

Hammoud, United States v., 381 F.3d 316 (4th Cir. 2004) (en banc), vacated 543 U.S. ---, 125 S.Ct. 1051 (2005).

Jackson, *United States v.*, 345 F.3d 638 (8th Cir. 2003).

Jenkins, *United States v.*, 333 F.3d 151 (3d Cir. 2003).

Jones v. United States, 526 U.S. 227 (1999).

Jordan, *United States v.*, 291 F.3d 1091 (9th Cir. 2002).

Koch, *United States v.*, 383 F.3d 436 (6th Cir. 2004) (en banc), vacated 543 U.S. ---, 125 S.Ct. 1944 (2005).

Leonard v. United States, 383 F.3d 1146 (10th Cir. 2004).

Lopez, *United States v.*, 514 U.S. 549 (1995).

Lucca, *United States v.*, 377 F.3d 927 (8th Cir. 2004).

Mansoori, *United States v.*, 304 F.3d 635 (7th Cir. 2002).

McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001).

Mendoza-Mesa, *United States v.*, 384 F.3d 951 (8th Cir. 2004).

Miller, *United States v.*, 395 F.3d 452 (DC Cir. 2005).

Mincey, *United States v.*, 380 F.3d 102 (2d Cir. 2004), vacated by *Ferrell v. United States*, 543 U.S. ---, 125 S.Ct. 1071 (2005).

Mistretta v. United States, 488 U.S. 361 (1989).

Mooney, *United States v.*, U.S. App. LEXIS 15301 (2004), vacated U.S. App. LEXIS 16302 (2004), remanded 401 F.3d 940 (8th Cir. 2005).

Moss, *United States v.*, 252 F.3d 993 (8th Cir. 2001).

Penaranda, *United States v.*, 375 F.3d 238 (2d Cir. 2004) (en banc).

Pineiro, *United States v.*, 377 F.3d 464 (5th Cir. 2004), vacated 543 U.S. ---, 125 S.Ct. 1003 (2005).

Quintana-Perez, *United States v.*, 117 Fed. Appx. 773, U.S. App. LEXIS 26759 (1st Cir. 2004), vacated, 544 U.S. ---, 125 S.Ct. 2246 (2005).

Reese, *United States v.*, 382 F.3d 1308 (11th Cir. 2004), vacated 543 U.S. ---, 125 S.Ct. 1089 (2005).

Ring v. Arizona, 536 U.S. 584 (2002).

Sanchez Cervantes, *United States v.*, 282 F.3d 664 (9th Cir. 2002).

Sanchez Cruz, United States v., 392 F.3d 1196 (10th Cir. 2004).

Sanchez Gonzalez, *United States v.*, 294 F.3d 563 (3d Cir. 2002).

Sanders, United States v., 247 F.3d 139 (4th Cir. 2001).

Sustache Rivera v. United States, 221 F.3d 8 (1st Cir. 2000).

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

Thomas, *United States v.*, 389 F.3d 424 (3d Cir. 2004).

Walton v. Arizona, 497 U.S. 639 (1990).

Ward, United States v., 377 F.3d 671 (7th Cir. 2004).

Williams, United States v., 399 F.3d 450 (2d Cir. 2005).