

White Collar Crime - USA

Constitutionality of US Sentencing Guidelines is Questioned

Contributed by **Sideman & Bancroft LLP**

August 16 2004

The international community, and especially any individual or entity facing a federal criminal sentence in the United States, should pay close attention to the recent US Supreme Court case of *Blakely v Washington*,⁽¹⁾ which has plunged the US federal criminal sentencing system into turmoil. The June 24 2004 decision seriously questions the constitutionality of the US Sentencing Guidelines and nearly a dozen state sentencing guideline schemes. In a five-to-four decision, the Supreme Court ruled that Washington's state sentencing guidelines were unconstitutional because they allowed a judge, rather than a jury, to consider factors that increase a defendant's criminal penalty.

Under the US Sentencing Guidelines, developed over the last two decades, a points-based, grid-like system authorizes a judge to set a sentence based on 'aggravating' factors which are not decided by a jury during a trial or admitted to by a defendant in a plea agreement, such as the volume of commerce in an antitrust offence or the leadership role a defendant played in an alleged conspiracy or criminal organization. Nearly all federal prosecutions include one or more of such factors - which frequently enhance a defendant's sentence - but *Blakely* calls this process into doubt by mandating that a jury, rather than a judge, must decide beyond reasonable doubt any facts that would increase a defendant's statutory sentence.

In response to the decision, the US Justice Department rapidly issued a memorandum to federal prosecutors outlining the government's own legal position in light of *Blakely* and a set of procedures aimed at navigating the uncertain legal landscape.⁽²⁾ The official position is that the rule announced in *Blakely* does not apply to the US Sentencing Guidelines, and that the guidelines may continue to be constitutionally applied in their "intended fashion, [that is,] through factfinding by a judge, under the preponderance of the evidence standard, at sentencing".⁽³⁾ Under these guidelines, federal prosecutors are thus urged to argue in favour of the Sentencing Guidelines as a system requiring the imposition of sentences by judges.⁽⁴⁾

The memorandum further instructs, however, that if a court rules that *Blakely* does apply, then the Sentencing Guidelines as a whole cannot be applied in those cases.⁽⁵⁾ Moreover, prosecutors are urged to pursue '*Blakely* waivers' under which defendants agree, as part of a plea bargain, not to use *Blakely* to challenge their sentences.⁽⁶⁾

As a result of *Blakely*, plea bargains have nearly ended in some districts and prosecutors across the country have rushed to add aggravating factors to be considered at sentencing to all pending and new indictments.⁽⁷⁾ In other districts, defence attorneys are attempting to negotiate better plea deals on the theory that the ruling lessens the substantial leverage the prosecutors have gained over defendants under the momentum of the US Sentencing Guidelines. Defence attorneys, where possible, are also flooding US district courts with requests for new and reduced sentences.⁽⁸⁾

How are the district courts responding post-*Blakely*? Thus far, at least six US district judges have ruled

that because Washington state's system resembles the federal one, the Supreme Court's decision in *Blakely* makes part or all of the US Sentencing Guidelines unconstitutional.⁽⁹⁾

At the appellate level, decisions have been mixed. The Sixth Circuit held that a district court judge should no longer view himself as operating a mandatory or determinate sentencing system, but should rather view the guidelines in general as "recommendations to be considered and then applied only if the judge believes they are appropriate and in the interests of justice in the particular case".⁽¹⁰⁾ The Second Circuit took the unique step of issuing a set of three questions for the Supreme Court and urging it to "adjudicate promptly the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines".⁽¹¹⁾ The Seventh Circuit issued a two-to-one decision declaring part of the federal sentencing system unconstitutional,⁽¹²⁾ while the Fifth Circuit reached the opposite conclusion.⁽¹³⁾ Most recently, the Ninth Circuit vacated a defendant's sentence on the grounds that *Blakely* precludes enhanced sentencing based on facts not proven to a jury or admitted during a plea.⁽¹⁴⁾ In doing so, the Ninth Circuit held that *Blakely* applies to the US Sentencing Guidelines, but that the guidelines are not facially unconstitutional.

For the time being, the end result is confusion and unpredictability. However, anyone facing a federal sentence should seriously consider whether *Blakely* may be used to their advantage in plea bargaining or in assessing their potential criminal exposure at trial. In addition, one should keep a close watch on further decisions by the US Supreme Court, which is expected to consider the applicability of *Blakely* to the US Sentencing Guidelines in its autumn session.

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Endnotes

⁽¹⁾ 2004 WL 1402697 (June 24 2004).

⁽²⁾ See July 2 2004 Memorandum from Deputy Attorney General James Comey re Departmental Legal Positions and Policies in Light of *Blakely v Washington*.

⁽³⁾ *Id* at 1.

⁽⁴⁾ *Id* at 2.

⁽⁵⁾ *Id* at 2.

⁽⁶⁾ *Id* at 4.

⁽⁷⁾ Dan Eggen and Jerry Markon, washingtonpost.com, July 13 2004: "High Court Decision Shows Confusion on Sentencing Rules."

⁽⁸⁾ *Id*.

⁽⁹⁾ *Id*.

⁽¹⁰⁾ *United States v Montgomery*, 03-5256 (6th Cir July 14 2004).

⁽¹¹⁾ *United States v Penaranda*, 2004 WL 1551369 (2nd Cir July 12 2004).

⁽¹²⁾ *United States v Booker*, 2004 WL 1535858 (7th Cir July 9 2004).

⁽¹³⁾ *United States v Pneiro*, 2004 WL 1543170 (5th Cir July 12 2004).

⁽¹⁴⁾ *United States v Ameline*, 02-30326 (July 21 2004).

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