A Swift and Temporary Instruction: The Effectiveness of the Circuit Courts Between *Blakely* and *Booker*

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I. INTRODUCTION

At their most fundamental level, the circuit courts are meant to serve as conduits, keeping district courts in line with Supreme Court

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interpretations of federal law.[1] Due to a deluge of cases and a backlogged Supreme Court docket, however, often the circuits are themselves the last word on issues of federal law.[2] Circuit splits develop easily in this reality, and while those splits are appealing to the Supreme Court as issues for certiorari, many of their underlying substantive issues simply will never be addressed by the Court.[3] Consequently, when the Supreme Court leaves open a potential question of federal law, the role of the circuit courts in providing an answer is fraught with competing tensions.[4] Circuit courts confront the admittedly obvious fact that "the law of the circuit," or circuit interpretation of a question of law, ought to be correct.[5] They also face the concern that if one circuit's decision differs from another, the potential for uncertainty and differential treatment arises, and the resulting split creates a potentially damaging lack of uniformity in federal law.[6] Still, there are certain situations where district courts find themselves in dire need of instruction, and these require an elevated level of risk-taking by the circuit courts.[7]

When viewing a constitutional question posed to the circuit courts against this backdrop, an analysis of the courts' willingness to take risks in guiding the district courts becomes particularly relevant. Three recent Supreme Court cases, *Apprendi v. New Jersey*,[8] *Blakely v. Washington*,[9] and *United States v. Booker*,[10] created a unique atmosphere in which to view the above-mentioned tensions arising both from the circuit court's role of conduit and from the duty to offer instruction to the lower courts.[11] These three cases, involving the constitutionality of criminal sentencing procedures, created a situation in which the circuit courts, faced with a pervasive and time-sensitive issue, acted conservatively overall. Few of the courts took risks, but those that did were ultimately the most effective in their role of conduit and guide.

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[1] *See* Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 615 (2003).

[2] *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1459-60 (2003); Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405-07 (1987).

[3] *See* Algero, *supra* note 1, at 606, 613; Baker & McFarland, *supra* note 2, at 1406.

[4] *See* Algero, *supra* note 1, at 614-615.

[5] *See id*. at 616-17.

[6] *See id*. at 608-09; *see also* Baker & McFarland, *supra* note 2, at 1407.

[7] *See, e.g.,* United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004).

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

[9] Blakely v. Washington, 124 S. Ct. 2531, (2004).

[10] United States v. Booker, 125 S. Ct. 738 (2005).

[11] *See, e.g.*, *Booker*, 374 F.3d at 516 (Easterbrook, J., dissenting)

In *Apprendi*, the Court dealt with the constitutionality of a New Jersey sentencing practice and created the rule from which both *Blakely* and *Booker* drew.[12] This rule stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[13] This decision invalidated a sentence imposed upon a white defendant who had pled guilty to charges after firing shots into his African-American neighbor's home.[14] The sentence was unconstitutional because it had been enhanced pursuant to New Jersey's hate crime law, which allowed judges to add jail time where they found by a preponderance of the evidence, that the accused had "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[15] The statute, the Court held in articulating its rule, infringed upon the defendant's Sixth Amendment right to have a jury decide the facts necessary to increase his sentence on a reasonable doubt standard.[16]

After *Apprendi*, the United States Sentencing Guidelines (hereinafter "the Guidelines") could have been called into serious question, but the circuits uniformly upheld them as constitutional, and generally interpreted the Supreme Court's ruling as identifying a Sixth Amendment problem only when a judge's own findings enhanced a defendant's sentence such that the sentence exceeded the crime's statutorily provided maximum sentence.[17] Consequently, there were no Sixth Amendment problems where judges made Guidelines enhancements that produced sentences remaining within the crime's statutory maximum.[18]

This interpretation was prevalent until the Court's follow up case of *Blakely v. Washington*, issued four years later, created serious concerns about the constitutionality of the Guidelines.[19] In *Blakely*, the court clarified the intricacies of the *Apprendi* rule, holding that: "the relevant 'statutory maximum' [under the *Apprendi* rule] is not the maximum

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[12] *See Apprendi*, 530 U.S. at 469; *Blakely*, 124 S. Ct. at 2536; *Booker*, 125 S. Ct. at 749.

[13] *Apprendi*, 530 U.S. at 490.

[14] *Id.* at 469-70.

[15] *Id*. at 468-70 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

[16] *Id.* at 490.

[17] *See generally* Frank Bowman, *Train Wreck? Or Can the Federal Sentencing System be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 220 (2004). *See also* United States v. Pineiro, 377 F.3d 464, 467 (5th Cir. 2004); United States v. Mincey, 380 F.3d 102, 105 (2d Cir. 2004).

[18] *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 348 (4th Cir. 2004).

[19] *See, e.g.*, Blakely v. Washington, 124 S. Ct. 2531, 2549-50 (O'Connor, J., dissenting).

sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[20] Under this rule, Blakely, who had pleaded guilty to a kidnapping crime which carried a statutory maximum ten year sentence, had been sentenced unconstitutionally.[21] Blakely's plea had included admissions of facts which exposed him to a presumptive maximum sentence of fifty-three months.[22] The sentencing judge, however, found by a preponderance of the evidence that Blakely's actions showed "deliberate cruelty," a finding that permitted a sentencing departure under the state's statute.[23] Based on this departure authority, the judge sentenced Blakely to ninety months in prison. [24]

Applying the rule of *Apprendi*, the Supreme Court held that a sentencing scheme that allowed for this type of enhancement based on a judge's findings was unconstitutional.[25] Even though the kidnapping statute prescribed a maximum sentence of ten years, Blakely's maximum for Sixth Amendment purposes was the fifty-three months he faced based on his admissions—anything raising his sentence beyond that should have been presented to a jury and decided beyond a reasonable doubt.[26]

This formulation of the *Apprendi* rule suddenly called into question the sentencing methods used under the Guidelines.[27] As noted above, the circuit courts had previously rejected *Apprendi*-based challenges to the judicial practice under the Guidelines of using a preponderance of the evidence standard to find facts for sentence enhancements.[28] The *Blakely* dissents observed that the majority's expansion of the *Apprendi* notion of the "statutory maximum" would inevitably affect these federal sentencing practices.[29] Justice Scalia, writing for the majority in *Blakely*, was, however, clear that the Court's application of *Apprendi* addressed only the specifics of the Washington state sentencing scheme.[30] Justice Scalia's reference to the Guidelines was clear and assertive: "The Federal Guidelines are not before us, and we express no opinion on them."[31]

This straightforward observation did not, of course, relieve the circuit courts of the continuing obligation to address the Sixth

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[20] *Blakely*, 124 S. Ct. at 2537 (emphasis in the original).
[21] *Id*. at 2534.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 2535.
[25] *Id.* at 2534, 2537-38.
[26] *Id*. at 2537.
[27] *Id.* at 2549-50 (O'Connor, J., dissenting).
[28] *See* United States v. Hammoud, 381 F.3d 316, 348 (4th Cir. 2004).
[29] *See, e.g.*, *Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting).
[30] *Id.* at 2539 n.9.
[31] *Id*.

Amendment problems in the Guideline's sentencing practices, and to do so in light of *Blakely*'s reasoning.[32] As the Fifth Circuit noted in *Pineiro*, Justice Scalia's observation that *Blakely* did not include any opinions on the Guidelines "does not by itself mean that *Blakely* carries no import for the federal Guidelines, for the binding force of a Supreme Court decision is ordinarily not limited to the particular set of facts that produces it."[33] As a result, petitions for certiorari regarding *Blakely*'s application to the Guidelines began to pour into the Supreme Court, and the Court ultimately granted certiorari on two cases: *United States v. Booker*, out of the Seventh Circuit,[34] and *United States v. Fanfan*, a district court case from the District of Maine, which was expedited through the First Circuit.[35]

The *Booker* and *Fanfan* decisions were consolidated by the Supreme Court in the form of *United States v. Booker*, which affirmatively declared that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]."[36] In answering the concerns of the circuit courts about the constitutionality of the Guidelines, the *Booker* decision produced two majority opinions: the first, by Justice Stevens, held that the principles set forth in *Apprendi* and *Blakely* rendered the Guidelines unconstitutional,[37] and the second, by Justice Breyer, detailing a remedial scheme for the district and circuit courts to follow.[38] The remedial scheme severed two sections of the Guidelines, and had the effect of making the Guidelines "advisory" in their entirety.[39]

This comment addresses the reactions and the effectiveness of the circuit courts during the period between *Blakely* and *Booker*. In that interim, a circuit split over the application of *Blakely* to the Guidelines developed rapidly—within only three weeks of the *Blakely* decision.[40] The Fourth and Fifth Circuits decided that *Blakely* did not affect the

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[32] *See* United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004).

[33] United States v. Pineiro, 377 F.3d 464, 469 (5th Cir. 2004).

[34] *Booker*, 375 F.3d 508 (7th Cir. 2004).

[35] United States v. Fanfan, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004). The Supreme Court accepted a petition for a writ of certiorari before judgment to hear this case.

[36] United States v. Booker, 125 S. Ct. 738, 749 (2005).

[37] *See id*. at 746.

[38] *See id*. at 756.

[39] *See id.* at 756-57.

[40] GORDON MEHLER, JOHN GLEESON & DAVID C. JAMES, FEDERAL CRIMINAL PRACTICE: A SECOND CIRCUIT HANDBOOK 677 (LexisNexis 2004 ed.).

Guidelines,[41] with the Fourth Circuit carefully advising district court judges to use the Guidelines, but also "announce, at the time of sentencing, a sentence . . . treating the guidelines as advisory only."[42] The Second Circuit ultimately reached virtually the same result,[43] but it first took the unusual and particularly cautious route of certifying questions to the Supreme Court regarding the constitutional viability of the Guidelines.[44] Two circuits, the Sixth and the Eighth, initially held that *Blakely* was applicable to the Guidelines and created new sentencing procedures for district court judges.[45] Both courts retreated from these initial approaches, however, with the Sixth Circuit vacating its opinion a mere five days later and the Eighth Circuit doing so four days after certiorari was granted in *Booker*.[46]

Of the remaining circuits, only the Seventh and the Ninth held that *Blakely*'s reasoning implied constitutional problems for the Guidelines.[47] Although the Supreme Court would ultimately hold that this was the correct interpretation of *Blakely*,[48] it was not a "safe" decision for a circuit court to make, considering that the Supreme Court had previously upheld the Guidelines in the face of constitutional challenges.[49] Still, as Judge Richard Posner observed: "The majority in *Blakely*, faced with dissenting opinions that as much as said that the decision doomed the federal sentencing guidelines, might have said no, it doesn't; it did not say that."[50] Applying *Blakely* to the Guidelines, risky though it might have been, was a constitutional necessity for the Seventh and Ninth Circuits.[51]

Analysis of the post-*Blakely* circuit split shows that, when faced with a constitutional question that had not been directly addressed by the

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[41] *See* United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004); United States v. Pineiro, 377 F.3d 464, 473 (5th Cir. 2004).

[42] *Hammoud*, 378 F.3d at 426.

[43] *See* United States v. Mincey, 380 F.3d 102, 103 (2d Cir. 2004).

[44] *See* United States v. Penaranda, 375 F.3d 238, 240 (2d Cir. 2004).

[45] *See* United States v. Montgomery, No. 03-5256, 2004 U.S. App. LEXIS 14384, at *8-10 (6th Cir. July 14, 2004), *vacated by* No. 03-5256, 2004 WL 1562904 (6th Cir. July 19, 2004), *dismissed by* No. 03-5256, 2004 WL 1637660 (6th Cir. July 23, 2004); United States v. Mooney, No. 02-3388, 2004 U.S. App. LEXIS 15301, at *39 (8th Cir. July 23, 2004), *vacated by* No. 02-3388, 2004 WL 1636960 (8th Cir. July 27, 2004).

[46] *See Montgomery*, No. 03-5256, 2004 WL 1562904; *Mooney*, No. 02-3388, 2004 WL 1636960.

[47] *See* United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967, 974 (9th Cir. 2004). *See also* United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *3 (D. Me. June 28, 2004).

[48] *See* United States v. Booker, 125 S. Ct. 738, 749 (2005).

[49] *See, e.g.*, United States v. Pineiro, 377 F.3d 464, 470-71 (5th Cir. 2004).

[50] *Booker*, 375 F.3d at 511.

[51] *See Booker*, 375 F.3d at 513, *Ameline*, 376 F.3d at 974.

Supreme Court, and had the potential to dramatically affect the sentencing of criminal defendants, the circuit courts overall took the especially safe route of upholding the Guidelines, particularly after the Court granted certiorari on the issue.[52] The circuits that fell on the other side of the split and decided to apply *Blakely* to the Guidelines better served their district courts. However, they also faced an additional question of how to direct sentencing judges—a question which, the Second Circuit noted, would have to be made without guidance from the Court.[53] The Seventh and Ninth Circuits, for example, addressed the congressional intent and severance issues that the Court would consider in its *Booker* opinion.[54] Overall, these circuits performed their role as conduit and guide well, offering sentencing options that both involved an admirable amount of risk-taking given the Court's expressed concerns in *Blakely*, and were wisely executed, particularly where they were cautiously cushioned by options such as alternative non-Guidelines sentences.[55]

The first part of this comment will address the Supreme Court's treatment of the Washington state sentencing scheme in *Blakely*, highlighting the rule established by the case and its relationship with the holding of *Apprendi*. This section will also address the severity of the choice imposed upon the federal courts as post-*Apprendi* sentencing practices surfaced tenuously in the wake of the *Blakely* decision.[56] This severity is well illustrated by the Second Circuit's decision in *Penaranda*, which will be examined closely.[57]

The second part of this comment will provide an analysis of the circuit split that resulted from concerns such as those expressed by the *Penaranda* court. It will also follow the remedial decisions made by the circuits that applied *Blakely*'s reasoning to strike down the Guidelines.

The third part of this comment will discuss the much anticipated outcome of the Supreme Court's expedited decision in *Booker* and *Fanfan*. The final part will analyze the effectiveness of the circuit courts during the time between *Blakely* and *Booker*. With the fate of so many criminal defendants at issue, this time period presented the circuit courts with a unique situation in which the solutions and remedies so desperately required by sentencing judges were uncertain at best and virtually unattainable at worst.[58] Overall, the circuits' conservative

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[52] *See, e.g.*, United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004).
[53] *Penaranda*, 375 F.3d at 246.
[54] *Booker*, 375 F.3d at 514-15; *Ameline*, 376 F.3d at 981.
[55] *See, e.g.*, *Booker*, 375 F.3d at 514-15.
[56] *See Penaranda*, 375 F.3d at 246.
[57] *Id*.
[58] *See, e.g.*, *Penaranda*, 375 F.3d at 246

reactions are understandable and illustrate an adequate attempt to guide district courts while indirectly maintaining some semblance of uniformity among the circuits. Meanwhile, those circuits that balanced the risk-taking step of applying *Blakely* to the Guidelines with conservative remedial sentencing procedures best fulfilled the institutional role of intermediary between the Supreme Court and the district courts.

II. *BLAKELY V. WASHINGTON* AND ITS IMMEDIATE AFTERMATH—THE SUPREME COURT LAUNCHES THE DEBATE

A. The Blakely *Decision*

Blakely examined the Washington State sentencing guidelines only—a fact made clear by Justice Scalia in his opinion for the Court.[59] Blakely's sentence was governed not only by the statute defining the offense and creating a punishment range for it, but also by the Washington State *Sentencing Reform Act*.[60] In particular, the Court was called upon to examine two aspects of the Act.[61] Essentially, as the *Blakely* Court explained, the Washington Act prescribed "standard ranges" for violations, but it allowed sentencing judges to add to those ranges upon a finding of "'substantial and compelling reasons justifying an exceptional sentence.'"[62] A justification could come from the Act itself—which offered an "illustrative rather than exhaustive" list of "aggravating factors" a judge could rely upon[63]—provided the judge "set[s] forth findings of fact and conclusions of law supporting it."[64] In explaining this enhancement process, the *Blakely* Court focused in particular on the following limitation of Washington state law: when a judge sought to add to a standard sentencing range, "'[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.'"[65]

This "additional factors" notion was particularly important given the specifics of defendant Ralph Howard Blakely's case. In his case, Blakely agreed to plead guilty to a number of facts surrounding an

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[59] Blakely v. Washington, 124 S. Ct. 2531, 2538 n.9 (2004).
[60] *Id*. at 2535.
[61] *Id*. (citing WASH. REV. CODE ANN. §9.94A.320).
[62] *Id*. (citing WASH. REV. CODE ANN §9.94A.120(2)).
[63] *Id*. (citing WASH. REV. CODE ANN §9.94A.390).
[64] *Id*. (citing WASH. REV. CODE ANN §9.94A.120(3)).
[65] Blakely v. Washington, 124 S. Ct. 2531, 2535 (2004) (citing State v. Gore, 21 P.3d 262, 277 (Wash. 2001)).

incident in which he kidnapped his wife at knifepoint after she attempted to divorce him.[66] The admissions made him guilty of "second-degree kidnapping involving domestic violence and use of a firearm."[67] The state law statutory maximum for this offense, categorized as a "class B felony," was ten years, and the standard range under the Washington *Sentencing Reform Act* for the specifics of Blakely's admission was forty-nine to fifty-three months.[68] Though the prosecutor had asked that Blakely be sentenced within that forty-nine to fifty-three month range, the judge ended up sentencing the defendant to ninety months "on the ground that [Blakely] had acted with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases."[69] A hearing was held after the defendant objected and the judge ultimately made thirty-two findings of fact regarding the kidnapping ordeal.[70] The ninety-month sentence stood.[71]

In determining that Blakely's Sixth Amendment rights had been violated by this sentencing process, the Court made use of *Apprendi*.[72] The *Apprendi* rule, which was the result of a detailed, historical analysis that chronicled the relevant Supreme Court case law, made crucial the role of the jury in defining a defendant's maximum punishment and set forth a required standard of proof: "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."[73] The *Blakely* Court referenced the common law tradition of the *Apprendi* rule to explain its continuing relevance and importance to the case at bar.[74] Applying the *Apprendi* rule, however, required some clarification.

The government had argued that the *Apprendi* "statutory maximum" for defendant Blakely was the ten years that the Washington statute had placed as the upper limit for class B felonies.[75] Under this formulation of the *Apprendi* rule, Blakely would lose the argument that

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[66] *Id*. at 2534.
[67] *Id*. (citing WASH. REV. CODE ANN §§ 9A.40.030(1), 10.99.020(3)(p), 9.94A.125).
[68] *See id.* at 2535.
[69] *Id*.
[70] *Id*. at 2535-36.
[71] *Id*. at 2536.
[72] *Id*.
[73] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
[74] *Blakely*, 124 S. Ct. at 2536 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) and 1 J. BISHOP, CRIMINAL PROCEDURE § 87 (2d ed. 1872) for the proposition that defendant has a right to have the "truth of every accusation" against him determined by a jury of his peers and that if a fact is not determined by a jury, then the accusation "is no accusation in reason.").
[75] *Id*. at 2537.

his Sixth Amendment rights had been violated, for though judicial findings led to the ninety-month sentence, ninety months is still less than ten years.[76] Blakely would not have been deprived of his right to have facts essential to his sentence determined by a jury because *Apprendi* would require only that a jury find facts that enhance a sentence past ten years.[77] The Court disposed of this argument swiftly by clarifying the phrase "statutory maximum."[78] The Court held that ten years was not the "statutory maximum" because "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.*'"[79] In Blakely's case, the Court explained, the "statutory maximum" was fifty-three months because that was the most Blakely could have been sentenced, based on the facts he admitted in his plea bargain agreement.[80] The Court continued to explain that ninety months was an "exceptional" sentence notwithstanding the ten-year maximum for class B felonies, for "[h]ad the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."[81] The ninety months could be justified under the Washington *Sentencing Reform Act* only if the judge could show an admission of the "additional factors" explained above, and here there were no real "additional factors" available.[82] Consequently, the Court held that Blakely's ninety-month sentence was unconstitutional.[83]

The majority opinion called this clarification of the *Apprendi* rule a "commitment to *Apprendi* in this context" that was necessary and "reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial."[84]

B. The Dissenting Opinions

The dissenting opinions voiced great concern regarding the ramifications of this use of *Apprendi*. In a particularly forceful interpretation, Justice O'Connor described the majority's holding as "a rigid rule that destroys everything in its path."[85] The Justice addressed the practical consequences of the majority decision, chastising the Court

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[76] *See id*.
[77] *See id*.
[78] *Id*.
[79] *Id*.
[80] *See id*. at 2537-38.
[81] *Id*. at 2538.
[82] *Id*. at 2537.
[83] *Id*. at 2538.
[84] *Id*.
[85] *Id*. at 2547 (O'Connor, J., dissenting).

for "ignor[ing] the havoc it is about to wreak on trial courts across the country."[86] Importantly for the circuit courts, Justice O'Connor broached the issue of the Guidelines which had been side-stepped by the majority.[87] Justice O'Connor stated that "[i]t is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines."[88] The Justice then answered a few arguments that the circuit courts would be forced to take up and decide in the intervening months before the Court issued *Booker*.[89] Specifically, Justice O'Connor concluded that the fact that the Guidelines were promulgated by the Sentencing Commission (an administrative agency), as opposed to a legislature, was "irrelevant to the majority's reasoning."[90] Regardless of the method by which the Guidelines came into being, they "have the force of law," and, consequently, the *Blakely* decision may apply to them as well.[91]

Justice O'Connor also highlighted the structural similarities between the Guidelines and the Washington sentencing scheme, noting that "the structural differences that do exist make the Federal Guidelines more vulnerable to attack."[92] In particular, the Justice discussed the "soft constraints" of the Washington scheme, which the majority held to be in violation of *Apprendi*.[93] These "soft constraints" included the ability to upwardly depart based on "substantial and compelling reasons" by using the "nonexhaustive list of aggravating factors" detailed in the treatment of the majority opinion above.[94] Justice O'Connor observed that if these constraints could not exist under *Apprendi*, then the "hard constraints" of the Guidelines, "which *require* an increase in the sentencing range upon specified factual findings, will meet the same fate."[95]

In another dissent, Justice Breyer echoed this concern of releasing the *Blakely* opinion with only Justice Scalia's footnote to guide the federal courts as to the application of *Blakely* to the Guidelines.[96] After expressing doubt that the Guidelines could be distinguished from the Washington scheme, the Justice warned that "[f]ederal prosecutors will

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[86] *Id*. at 2549 (O'Connor, J., dissenting).
[87] *Id.* (O'Connor, J., dissenting).
[88] *Id*. (O'Connor, J., dissenting).
[89] *Id*. at 2549-50 (O'Connor, J., dissenting).
[90] *Id*. at 2549 (O'Connor, J., dissenting).
[91] *Id*. (O'Connor, J., dissenting).
[92] *Id.* (O'Connor, J., dissenting).
[93] *Id*. at 2550 (O'Connor, J., dissenting) (emphasis added).
[94] *Id.* at 2549-50 (O'Connor, J., dissenting).
[95] *Id.* at 2550 (O'Connor, J., dissenting) (emphasis added).
[96] *Id*. at 2561 (Breyer, J., dissenting).

proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew."[97]

Justice Breyer's dissent mostly addressed the possible sentencing approaches available to legislatures after *Blakely*.[98] The Justice's third such approach, that legislatures would try to keep "structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modify[] them to conform to *Apprendi*'s dictates"[99]—would echo through circuit court opinions during the period between *Blakely* and *Booker*.[100] In particular, Justice Breyer presented and criticized the option of using a "sentencing jury" to "make sentencing guidelines *Apprendi*-compliant[.]"[101] A sentencing jury would convene after a conviction to "try the disputed facts that, if found, would aggravate the sentence."[102] A major problem with the sentencing jury approach, the Justice explained, is that it leaves unanswered the question of what happens to defendants who plead guilty[103]—a situation which would present itself in many of the post-*Blakely* appeals to the circuits.[104] The approach empowers the prosecutor in the plea bargain context, by allowing her to essentially control the ultimate sentence by choosing which elements to charge in the indictment.[105] Requiring a jury determination of these elements removes the Judge's opportunity to consider them for sentencing purposes.[106] As a result, in the plea bargain context, they may never be considered, for defendants might think it wiser to just plead guilty.[107] Making such a choice "would undercut, if not nullify, legislative efforts to ensure through guidelines that punishments reflect a convicted offender's real criminal conduct, rather than that portion of the offender's conduct that a prosecutor decides to charge and prove."[108]

Justice Breyer dissented because so many questions were left open for the federal courts: "Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised."[109]

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[97] *Id.* at 2561-62 (Breyer, J., dissenting).
[98] *Id.* at 2552-54 (Breyer, J., dissenting).
[99] *Id.* at 2554 (Breyer, J., dissenting).
[100] *See, e.g.*, United States v. Booker, 375 F.3d 508, 514-15 (7th Cir. 2004).
[101] *Blakely*, 124 S. Ct. at 2556 (Breyer, J., dissenting).
[102] *Id*. (Breyer, J., dissenting).
[103] *Id*. at 2556-57 (Breyer, J., dissenting).
[104] *See, e.g.*, United States v. Ameline, 376 F.3d 967 (9th Cir. 2004).
[105] *Blakely*, 124 S. Ct. at 2557 (Breyer, J., dissenting).
[106] *Id*. (Breyer, J., dissenting).
[107] *Id*. (Breyer, J., dissenting).
[108] *Id*. (Breyer, J., dissenting).
[109] *Id*. at 2562 (Breyer, J. dissenting).

Unfortunately for the federal courts, as Justice Breyer noted, "that is not the Court's view."[110] So, with the issuance of the *Blakely* opinion, each district court found itself required to determine the state of the Guidelines.

*C. The Immediate Aftermath: The Hectic Post-*Blakely *Atmosphere.*

Justices O'Connor and Breyer's broader concerns about the chaotic post-*Blakely* environment in the federal courts proved to be well-founded. News coverage spoke of the "turmoil that has gripped federal courts nationwide since the Supreme Court ruled [on *Blakely*]"[111] and legal articles offering guidance to practitioners began to surface.[112] With criminal defendants awaiting sentencing, an overall sense of urgency developed in the district courts as judges attempted to decipher the meaning of *Blakely* and its dissents.[113] Judge D. Brock Hornby, of the District of Maine, addressed such a concern at a hearing for defendant Duncan Fanfan, who had been awaiting sentencing for almost eight months: "I am not going to await further briefing, it would be I think unfair to this defendant at this point to continue to delay his sentence."[114] The judge expressed a thought likely running through the minds of many district judges in this predicament: "[M]y obligation is to go ahead and do the best I can with the Supreme Court decision . . . [s]o I'm going to go ahead and rule based upon my understanding of what the *Blakely* decision means."[115] Judge Hornby applied *Blakely* to the Guidelines and, consequently, did not enhance Fanfan's sentence based on any additional findings.[116] Certiorari would later be granted in *Fanfan*'s case by the Supreme Court.[117]

With the district courts in disarray over the application of *Blakely* to the Guidelines, circuit courts soon began to tackle the issue. The policy concerns facing the circuits were perhaps best expressed by the Second Circuit in *Penaranda*.[118] The opinion illustrates the atmosphere of the

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[110] *Id*. at 2561-62 (Breyer, J. dissenting).

[111] Jerry Markon, Court Offers Guidance on Sentencing in Md., Va.,; U.S. Judges Urged to Issue 2 Penalties, THE WASH. POST, Aug. 4, 2004, at A1.

[112] *See, e.g.*, Josh Jacobson, Blakely v. Washington*: Off the Judicial Richter Scale*, BENCH AND BAR OF MINN., Sept. 2004; Steven G. Kalar, Jane L. McClellan, Jon M. Sands, *A* Blakely *Primer: An End to the Federal Sentencing Guidelines*, CHAMPION, Aug. 2004.

[113] *See, e.g.*, United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *1 (D. Me. June 28, 2004).

[114] *Id*.

[115] *Id*.

[116] *Id*. at *5

[117] United States v. Booker, 125 S. Ct. 738, 747 (2005).

[118] United States v. Penaranda, 375 F.3d 238, 246 (2d Cir. 2004).

time period between *Blakely* and *Booker*—an atmosphere in which the answer to the constitutional question was arguably just as important as the need for the circuits to define a role for themselves, one that would balance the duty to defer to Supreme Court precedent with the desire to act as a guide for the district courts.[119] To reconcile these goals, the Second Circuit attempted to reach the Supreme Court with a device it had not used in twenty-three years.[120] In an en banc opinion, the court made the unanimous decision to certify to the Supreme Court three questions regarding the application of *Blakely* to the Guidelines.[121] Before the Second Circuit were two appeals from sentences for drug convictions.[122] Acknowledging that the Supreme Court had asked the circuit courts to reserve the certification option for extreme situations, the Second Circuit used the circumstances surrounding the sentencings of defendants Hector Penaranda and Luis Rojas to illustrate the severity of the choice facing the federal courts after *Blakely*.[123]

The two sentences at issue in *Peneranda* presented ideal examples of how crucial it was for circuit courts to offer immediate guidance to the district courts, because application of *Blakely* to the Guidelines could significantly change the amount of jail time a defendant faces.[124] For example, a jury found Penaranda guilty of possessing five or more kilograms of cocaine and one or more kilogram of heroin; however, he was ultimately sentenced for "at least twenty kilograms of cocaine and at least 1,200 grams of heroin."[125] The discrepancy in quantities was substantial, to say the least. The facts of the second case, concerning defendant Rojas, present the potential benefits of *Blakely* for defendants who choose to plead guilty.[126] Rojas did not enter into a plea bargain when he admitted to conspiracy to distribute cocaine in the amount of "five kilograms or more" and his defense counsel had attempted to argue that Rojas's admission was not specific enough to warrant more than twenty years in jail, the statutory maximum which applies "where the jury has failed to make specific findings concerning quantity."[127] Having lost that argument before the sentencing judge, Rojas entered the

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[119] *See id*; *see also* Algero, *supra* note 1, at 612-15.
[120] *Penaranda*, 375 F.3d at 242.
[121] *Id*. at 240.
[122] *Id.* at 240-41.
[123] *Id*. at 242.
[124] *Id*. at 240-42.
[125] *Id*. at 240.
[126] *Id*. at 241-42.
[127] *Id*. at 241 n.4 (citing 21 U.S.C. § 841(b)(1)(c)(2000)).

sentencing hearing to have the judge determine a base level offense, and ultimately ended up with thirty years in jail.[128]

Examining *Blakely*'s analysis and reformulation of the *Apprendi* "relevant 'statutory maximum'" rule, the Second Circuit used the *Penaranda* opinion to note the possibility that *Blakely* similarly applied to the Guidelines.[129] With "reasonable arguments" on both sides, the circuit found that the sentences could be invalid, but it could not be certain whether a majority of the Supreme Court would extend the reasoning of *Blakely* to these cases.[130] The uncertainty was not just a narrow one, pertaining to a limited number of cases, the Second Circuit continued, but involved a choice that would have far-reaching ramifications and required more guidance from the Supreme Court before the circuit courts could properly act in their roles as conduit for the Court and as adviser to the district courts.[131] This was so because, in particular, *Blakely* "raises the prospect that many thousands of future sentences may be invalidated or, alternatively, that district courts simply will halt sentencing altogether pending a definitive ruling by the Supreme Court."[132] Without further input from the Court, the federal courts would inevitably be involved in a situation where "defendants, victims, and the public will be left uncertain as to what sentences are lawful" by making a choice as to how to proceed and by issuing sentences based on that choice.[133] Whether choosing to apply *Blakely* and to pick a new method of sentencing or proceeding as usual with sentencing hearings, the circuits must know that "[w]hichever conclusion turns out to be incorrect, and one of them will, thousands of cases soon will be adversely affected."[134]

Based on these practical and policy concerns, the Second Circuit certified its three questions to the Supreme Court—one regarding the application of *Blakely* to a judge's ability to determine and depart from offense levels under the guidelines, and the other two specific to the circumstances of Penaranda's and Rojas's cases.[135] This approach was unique to the circuits, and while it provided no substantive answers to the *Blakely* issue, it nicely framed the context of the *Blakely*-application inquiry and illustrated the post-*Blakely* atmosphere by asking the Supreme Court to address the circuits "in order to minimize, to the extent

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[128] *Id.* at 241-42.
[129] *Id.* at 244 (citing Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004)).
[130] *Id*. at 244-45.
[131] *Id.* at 246.
[132] *Id*.
[133] *Id.* at 247.
[134] *Id*. at 246.
[135] *Id*. at 247.

possible, what [the Second Circuit sees] as an impending crisis in the administration of criminal justice in the federal courts."[136]

III. THE CIRCUIT SPLIT & PROPOSED SENTENCING REMEDIES

Given the situation identified by the court in *Peneranda*, it was crucial that the circuit courts act immediately.[137] Their role in this situation, to channel the intent of the Supreme Court in *Blakely* and pass it to the district courts as it guided them towards constitutional sentencing practices,[138] expressed itself with differing results as the circuits began to split on the threshold issue of applying *Blakely*.

A. Refusing to Apply Blakely*'s Reasoning to the Guidelines—The Fifth, Second and Fourth Circuits*

The Fifth, Second and Fourth Circuits acted on the conservative side of this circuit split, refusing to extend *Blakely* to the Guidelines. The Fifth Circuit was the first to uphold the Guidelines in *Pineiro*.[139] After identifying its "role as an intermediate appellate court," the circuit cautiously began to fulfill it.[140] First, the court set the standard for reviewing a Supreme Court decision, holding that it would not "depart from settled law in the absence of an on-point en banc or Supreme Court holding."[141] Next, it analyzed the Supreme Court precedent on sentencing, identifying a series of cases upholding the Guidelines against various constitutional challenges.[142] It appeared the circuit court believed that, given this precedent, the Supreme Court would continue to uphold the constitutionality of the Guidelines in the face of a Sixth Amendment challenge.[143] Under *Piniero*, sentencing would continue as it had post-*Apprendi*, and the applicable "statutory maximum" would continue in the Fifth Circuit to be the maximum provided by the United States Code, making judicial enhancements under the Guidelines permissible as long as they stayed within that limit.[144] Holding otherwise, the circuit noted that it "would not directly 'overrule' any Supreme Court holding—a prerogative reserved unto the Court itself—but it would plainly create an

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[136] *Id*. at 248.

[137] *See, e.g.*, United States v. Pineiro, 377 F.3d 464, 465 (5th Cir. 2004) (noting that "the unremitting press of sentencing appeals requires us to produce a decision.").

[138] *See id*.

[139] *Id*. at 473.

[140] *Id*. at 465.

[141] *Id*. at 468.

[142] *Id*. at 470-72 (citing Mistretta v. United States, 488 U.S. 361 (1989); Edwards v. United States, 523 U.S. 511 (1998); Witte v. United States, 515 U.S. 389 (1995)).

[143] *Id*. at 472-73.

[144] *Id*. at 473.

unsettling tension with them."[145] Consequently, the circuit found it wiser to follow a more conservative approach of maintaining current sentencing practices until instructed otherwise by the Supreme Court.[146]

The Second Circuit was less forthright in its decision to steer clear of an application of *Blakely* to the Guidelines. As discussed above, it had certified questions to the Supreme Court in *Penaranda*,[147] but days after the Court granted certiorari in *Booker* and *Fanfan*, the Second Circuit issued *United States v. Mincey*, which directed district courts to disregard *Blakely* issues and to continue to sentence according to the post-*Apprendi* circuit precedent.[148] With this instruction, the Second Circuit fell in line with the Fifth, noting that Supreme Court jurisprudence in this area seemed to support the use of the Guidelines.[149] The court also cited Justice Scalia's refusal to address the Guidelines as a justification for keeping its sentencing practices in place.[150] Ultimately, however, the Second Circuit's carefully-plotted approach to this issue seemed to be contingent upon the Supreme Court's decision to grant certiorari and an expedited schedule for *Booker* and *Fanfan*.[151] Since "we can expect to be advised soon in the event that the Supreme Court intends to apply *Blakely* to the Guidelines," the court would not risk applying *Blakely* itself and fashioning tenuous remedial sentencing provisions.[152]

The Fourth Circuit, which issued its ruling on the *Blakely* issue on the same day that the Supreme Court granted certiorari in *Booker* and *Fanfan*, adopted the most guarded approach of the three circuits on this side of the split.[153] The Fourth Circuit first issued a brief order, finding that *Blakely* did not affect sentencing under the Guidelines and directing Fourth Circuit district courts to issue a secondary sentence, using the Guidelines merely as an advisory tool.[154] The order was followed roughly a month later by a lengthy opinion, *United States v. Hammoud*, which explained the reasons behind the direction to announce an alternative, "advisory" sentence.[155]

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[145] *Id*.
[146] *Id*.
[147] United States v. Penaranda, 375 F.3d 238, 247 (2d Cir. 2004). Their effort was unavailing. United States v. Penaranda, 125 S. Ct. 984 (2005) (declining to address the Second Circuit's certified questions).
[148] United States v. Mincey, 380 F.3d 102, 106 (2d Cir. 2004).
[149] *Id*. at 106.
[150] *Id*. (quoting Blakely v. Washington, 124 S. Ct. 2531, 2538 n.9 (2004)).
[151] *See id*.
[152] *Id*.
[153] *See* United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004).
[154] *Id*.
[155] United States v. Hammoud, 381 F.3d 316, 353-54 (4th Cir. 2004).

The *Hammoud* court first began by clarifying the court's decision to hold that *Blakely* did not affect the Guidelines by siding with the Fifth and Second Circuits and focusing on the Supreme Court's prior treatment of the Guidelines.[156] The court also implied, however, that the circuits falling on the other side of this split would have been wiser "to account for the factual and legal context in which *Blakely* was decided."[157] This context showed that *Blakely* did not change the *Apprendi* rule, the Fourth Circuit held; it merely applied *Apprendi* to a different type of sentencing scheme—one where two legislative enactments (the Washington State statute defining the crimes and the Washington State *Sentencing Reform Act*, imposing more limits on sentencing)[158] existed to affect sentencing.[159] The Guidelines, by contrast, were promulgated by the Sentencing Commission, so the upper end of the range prescribed in a particular case was not the relevant "statutory maximum" for *Apprendi* purposes.[160] Instead, the relevant maximum sentence remained the one imposed by statute.[161]

The carefully crafted opinion in *Hammoud* shows great deference to Supreme Court precedent, and its cautious character is emphasized by the Fourth Circuit's recommendation that judges announce a non-Guidelines alternative sentence.[162] This alternative sentence would use the Guidelines as an advisory tool, in case the Supreme Court found the Guidelines to violate the Sixth Amendment.[163] The court explained that the purpose of having district judges declare a non-Guidelines sentence was to "serve judicial economy."[164] Taking away the Guidelines would, obviously, change the sentencing process. The court observed that judges might have "to consider issues not generally pertinent in guidelines sentencing."[165] Though it was not specific about what these "issues" might be, the court was certain that the additional inquiries would take more time.[166] Consequently, it was best, in the event *Blakely* was ultimately found to apply to the Guidelines, to have district court judges create the advisory sentence, "at a time when the facts and circumstances [of each case] were clearly in mind."[167]

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156 *Id*. at 350-53.
157 *Id.* at 349.
158 Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004).
159 *Hammoud*, 381 F.3d at 349.
160 *See id.* at 349-50.
161 United States v. Hammoud, 381 F.3d 316, 353 (4th Cir. 2004).
162 *See* United States v. Hammoud, 378 F.3d at 426 (4th Cir. 2004).
163 *Id*.
164 *Hammoud*, 381 F.3d at 353.
165 *Id*.
166 *Id*. at 353-54.
167 *Id*.

Announcing the non-Guidelines sentencing would not completely solve the problem if *Blakely* applied.[168] Procedurally, another hearing might be necessary to impose the non-Guidelines sentence.[169] However, having announced such a sentence already, "the district court and the parties will need to spend far less time preparing because the issues will already have been resolved."[170] The threat of "wasted effort" notwithstanding, the Fourth Circuit was covering all of its bases.[171]

B. Applying Blakely *Only to Vacate That Decision & Its Proposed Remedies—The Sixth & Eighth Circuits.*

The Sixth and Eighth Circuits began their confrontation of the *Blakely* issue with bold decisions invalidating the Guidelines and proposing risky remedies. The Sixth Circuit struck first with *United States v. Montgomery*, which held that the *Blakely* reasoning applied to the Guidelines and, consequently, a Sixth Amendment issue could only be avoided if the sentencing judge used them as advisory and calculated a sentence within the statutorily prescribed range.[172] This decision was vacated a mere five days later—a wise move by the Sixth Circuit considering the questionable reasoning behind the *Montgomery* holding.[173]

At first glance, *Montgomery* seems slightly prescient in choosing to delve a bit into the legislative history, which Justice Breyer would come to consult at length in the remedial opinion of *Booker*.[174] The Sixth Circuit held that the "mandatory system" of the Guidelines could not stand under *Blakely*, instead, "[t]he 'guidelines' will become simply recommendations that the judge should seriously consider but may disregard when she believes that a different sentence is called for."[175] The court expressed its confidence in issuing this instruction by drawing briefly on the language of the *Sentencing Reform Act of 1984*, explaining that the Act "does not by its terms require a mandatory, rule-bound system calibrating sentences to judicially-found facts."[176] Instead, the court interpreted § 3553(a) to require that the court consider the

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[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] *Id*. at 353.
[172] United States v. Montgomery, No. 03-5256, 2004 U.S. App. LEXIS 14384, at *8-10 (6th Cir. July 14, 2004), *vacated by* No. 03-5256, 2004 WL 1562904 (6th Cir. July 19, 2004), *dismissed by* No. 03-5256, 2004 WL 1637660 (6th Cir. July 23, 2004).
[173] *Id.*
[174] *Id*. at *9; United States v. Booker, 125 S. Ct. 738, 749-50 (2005).
[175] *Montgomery*, 2004 U.S. App. LEXIS 14384, at *8-9.
[176] *Id*. at *9-10.

guidelines in addition to a large group of other factors.[177] Section 3553(b)—which the *Booker* court would ultimately interpret as making the Guidelines mandatory[178]—was noted by *Montgomery* only for its allowance that district judges should look at "the 'aggravating or mitigating circumstances' of the particular case" in order to give a sentence outside of the Guidelines.[179] Indeed, according to the Sixth Circuit, it was the Sentencing Commission, not Congress, that viewed the statute as making the Guidelines mandatory.[180] Consequently, the Sixth Circuit simply counseled the district courts to treat the Guidelines as advisory.[181] Sentencing judges were instructed to "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."[182]

This interpretation of the law turned out to be incorrect.[183] The Guidelines were found by the *Booker* Court to have an actual mandatory effect that was intended by Congress, and those mandatory provisions needed to be severed before the Guidelines could be used as advisory.[184] In argument, the Sixth Circuit vacated *Montgomery* and issued new guidance in *Koch*.[185] *Koch* found *Blakely* inapplicable and ordered the district court judges to continue sentencing according to the Guidelines.[186] The case reasserted the Sixth Circuit's position on Supreme Court precedent regarding sentencing, noting that it had always upheld enhancements under the Guidelines "so long as the resulting sentence falls below the congressionally-prescribed statutory maximum."[187]

Koch also relied upon the argument (dismissed in dissent in *Blakely* by Justice O'Connor)[188] that the Guidelines are "agency-promulgated" and not legislatively enacted statutes.[189] Regardless of the ultimate importance of this distinction, the court asserted: "the difference is enough to counsel restraint on the part of a lower court asked to

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177 *Id.* at *10.
178 *Booker*, 125 S. Ct. at 749-50.
179 *Montgomery*, 2004 U.S. App. LEXIS 14384, at *9-10.
180 *Id.*
181 *Id.*
182 *Id.* at *10.
183 *See Booker*, 125 S. Ct. at 749-50.
184 *Id*.
185 United States v. Koch, 383 F.3d 436 (6th Cir. 2004).
186 *Id*. at 438.
187 *Id*. at 440.
188 Blakely v. Washington, 124 S. Ct. 2531, 2550 (2004) (O'Connor, J., dissenting).
189 *Koch*, 383 F.3d at 441.

invalidate the entire regime."[190] Finally, the Sixth Circuit noted that "only a master tailor could invalidate the Guidelines without unraveling the fabric of [] other rulings" that gave judges discretion to make findings of fact and allowed legislatures to distinguish between sentencing "factors," which do not have to be decided by a jury, and "elements," which must be put forth in the indictment.[191] The Circuit refused to perform this role of "master tailor," choosing instead to play a traditional part, refusing activism by vacating *Montgomery* to await guidance from the Supreme Court.[192]

The Eighth Circuit, meanwhile, took perhaps the biggest risk of all of the circuits by interpreting *Blakely* as rendering the Guidelines "wholly unconstitutional" and directing sentencing judges to use them as advisory, unless a defendant agreed to a Guidelines sentence.[193] The opinion, *United States v. Mooney*, was short, choosing to adopt this remedy from District Judge Paul Cassell in the District of Utah.[194] In choosing its route, the Eighth Circuit issued the boldest opinion of all the circuits, finding the Guidelines to be unconstitutional beyond repair—severance, addressed by other circuits and ultimately adopted by the Supreme Court in *Booker*, simply was not an option.[195] The Guidelines would be advisory to give sentencing judges some sense of how to sentence with the broad statutory ranges, but the Sixth Amendment violation was too pervasive to uphold the Guidelines in any form.[196]

Since it was the most extreme opinion, it is perhaps not surprising that the Eighth Circuit vacated *Mooney* four days after the Supreme Court granted certiorari on *Booker* and *Fanfan*.[197] The circuit did not issue another opinion offering interim instruction, instead stepping back entirely from its bold move in *Mooney*.

C. Applying Blakely *to the Guidelines—The Seventh & Ninth Circuits*

With the retreat of the Sixth and Eighth Circuits, only the Seventh and Ninth remained to apply *Blakely* reasoning to the Guidelines and

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[190] *Id.* at 441-42.
[191] *Id*. at 442-43.
[192] United States v. Montgomery, No. 03-5256, 2004 WL 1562904 (6th Cir. July 19, 2004).
[193] United States v. Mooney, No. 02-3388, 2004 U.S. App. LEXIS 15301, at *39 (8th Cir. July 23, 2004), *vacated by* No. 02-3388, 2004 WL 1636960 (8th Cir. July 27, 2004) (citing United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12156 (D.Utah. June 29, 2004)).
[194] *Id.*
[195] *Id.* at *43.
[196] *Id*. at *43-44.
[197] *Id.*

find a Sixth Amendment violation that required remedial opinions.[198] In these circuits, the traditional circuit role of enforcer of Supreme Court interpretation of law was in obvious tension with the additional role of instructor, attempting to control potential disarray among the circuit courts.[199]

The most significant entry from the First Circuit came from one of its district courts, the District of Maine.[200] It was *Fanfan* itself, a sentencing that was accepted for direct appeal to the Supreme Court.[201] District Judge D. Brock Hornby articulated the institutional importance of the traditional roles of each level of the federal courts in this context, declaring: "I conclude that perhaps the Supreme Court can find a way to explain away *Blakely* in its language and its reasoning, but as a trial Judge and a sentencing Judge, I cannot."[202] In light of the reality of placement within the federal structure, and having taken enough of a leap in finding the *Blakely* reasoning applicable to the Guidelines, the Judge refused to go further, choosing the most conservative remedial method available,[203] using only the information available from the jury's finding and declining to depart from that determination.[204] While Judge Hornby explained that he was capable of making additional findings that would increase defendant Fanfan's sentence, to do so on a preponderance of the evidence standard would, in the post-*Blakely* world, constitute a Sixth Amendment violation.[205] With this conservative approach, the court noted, "I will leave it to higher courts to tell me [*Blakely*] does not mean exactly what it says."[206] This call to the circuit courts underscores the importance of their role as instructor—a role which would be taken up by the Seventh Circuit in *United States v. Booker*.[207]

By deciding that *Blakely* created constitutional problems with the application of the Guidelines, the Seventh Circuit in *Booker* spent time orienting itself within the federal structure and justifying its authority to

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[198] United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004); United States v. Booker, 375 F.3d 508, 514-15 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967, 980-81 (9th Cir. 2004).

[199] *See Fanfan*, 2004 WL 1723114, at *5; *Booker*, 375 F.3d at 514-15; *Ameline*, 376 F.3d at 980-81; *see also* United States v. Penaranda, 375 F.3d 238, 246 (2d Cir. 2004) (identifying need to provide direction to lower courts).

[200] *Fanfan*, 2004 WL 1723114.

[201] United States v. Booker, 125 S. Ct. 738, 747 (2005).

[202] *Fanfan*, 2004 WL 172114, at *5.

[203] *Id*.

[204] *Id*.

[205] *Id.*

[206] *Id*.

[207] United States v. Booker*,* 375 F.3d 508, 510 (7th Cir. 2004).

interpret the constitutional issue at hand.[208] The circuit began by noting its reasons for addressing the *Blakely* issue in an expedited decision and by invoking its role as instructor.[209] The district courts, the Seventh Circuit noted, needed guidance for "an avalanche of motions for resentencing in the light of *Blakely*. . ." and while instruction could not be "definitive," the circuit court noted, "our hope is that an early opinion will help speed the issue to a definitive resolution" by the Supreme Court or, alternatively, by Congress.[210] The court thereby established its role in the post-*Blakely* context as including the duty not only to instruct the district courts on rules of the Supreme Court case law, but also to speak on behalf of the district courts, using the *Booker* opinion to get a faster answer from the Court.[211]

The Seventh Circuit then set the stage for the gamble it would take by finding Sixth Amendment difficulties with the Guidelines. First, the circuit court recognized its inability to overrule a Supreme Court ruling "even if it seems manifestly inconsistent with a subsequent decision, unless the subsequent decision explicitly overruled the earlier one."[212] The circuit justified its decision to take the *Blakely* reasoning from the Washington State scheme to the arena of the Guidelines, however, by highlighting the Supreme Court's refusal to explicitly address the potential Sixth Amendment challenge to the Guidelines.[213] Under such circumstances, the court held, the Supreme Court "perforce confides the issue to the lower federal courts for the first pass at the resolution."[214]

Comfortable in its ability to extend *Blakely* to the federal context, the Seventh Circuit easily invalidated the arguments made by the other circuits in support of the Guidelines.[215] It used the above-mentioned theory that the Court had actually intended for the lower courts to address this issue as a justification for refusing to hold that past precedent forced it to uphold the Guidelines.[216] The court also held that the *Blakely* reasoning could still render the Guidelines unconstitutional regardless of the fact that they were created by the administrative Sentencing Commission rather than the legislature.[217] The importance ought not be placed on which body created the sentencing ranges, but on

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[208] *Id.* at 513.
[209] *Id*. at 510, 513.
[210] *Id*. at 510.
[211] *See id*.
[212] *Id.* at 513 (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).
[213] *Id.*
[214] *Id*.
[215] *Id*. at 511, 514.
[216] *Id*. at 513.
[217] *Id*. at 511-512.

who found the facts that would enhance a defendant's punishment, and what standard would be used.[218] Regardless of their origin, the Guidelines were problematic because they were mandatory, and therefore, "*require* that sentences be based on facts found by a judge."[219] Differentiating the Guidelines on the basis of this "administratively promulgated" defense would ignore the spirit of the Supreme Court's Sixth Amendment concerns and fail in protecting the rights of defendants to have sentence-enhancing facts found beyond a reasonable doubt by a jury.[220]

While addressing these arguments, the Seventh Circuit placed much emphasis on the dissenting opinions in *Blakely*.[221] The *Blakely* majority opinion had addressed Justices O'Connor and Breyer's dissents, but "did not say that they were wrong to suggest that the federal sentencing guidelines could not be distinguished from the Washington sentencing guidelines."[222] The circuit court was also careful to restrict its holding, declaring that the Guidelines were only constitutionally problematic to the extent they impeded a defendant's right to a jury.[223] By focusing not only on the substantive arguments by the dissents, but also on the reaction to those arguments made by the majority, the Seventh Circuit was successful in fulfilling a dual role of deferring to the Court's intent while directing district courts in times of constitutional uncertainty.

Once it had addressed the threshold *Blakely*-application question, the Seventh Circuit proceeded to provide a series of options for the sentencing courts.[224] The court highlighted the mandatory nature of the Guidelines, but refused to go further and identify whether the mandatory provisions could be severed to make the Guidelines constitutionally acceptable.[225] Instead, it left the severability question to the parties to raise in the district court on remand.[226] Should the lower court find the mandatory provisions to be severable, the Seventh Circuit held that the Guidelines would then be constitutional if the lower court used a sentencing jury to determine any additional facts for enhancement.[227] If the provisions were not found to be severable, then the Guidelines would have only advisory force, but the district courts could consider them

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[218] *Id*. at 511.
[219] *Id.* (emphasis in original).
[220] *Id.* at 512
[221] *Id*.
[222] *Id*. at 513.
[223] *Id*.
[224] *Id*. at 514-15.
[225] *Id*. at 515.
[226] *Id*.
[227] *Id.*

while sentencing within the statutory range for the crime prescribed by United States Code.[228]

The Seventh Circuit additionally offered an option by which the sentencing court could avoid the severance issue entirely.[229] This was the approach taken by Judge Hornby in *Fanfan*—to sentence the defendant based only on the facts that had been decided by the jury.[230] The problem with this, the Seventh Circuit noted, lay with the potential objection from the government, which might still wish to attempt a sentence enhancement.[231] Regardless, the option remained available as a less risky sentencing option.[232] Finally, in line with the notion of safer sentencing alternatives, the Seventh Circuit concluded the *Booker* opinion by suggesting that "as a matter of prudence," district court judges choose "a nonguidelines alternative sentence" in addition to the sentence calculated via the options listed above.[233] The "nonguidelines alternative" existed for the Seventh Circuit as a sentencing cushion, illustrating a prudence in instructing the lower courts that the Fourth Circuit (discussed above) would come to echo when it issued *Hammoud* two months later.[234]

The final circuit to fall on this side of the post-*Blakely* split was the Ninth Circuit, which held in *United States v. Ameline* that the Supreme Court's reasoning applied to the Guidelines, but that the Guidelines were not unconstitutional as a whole.[235] Only two procedural provisions acted to violate a defendant's Sixth Amendment rights, and, the circuit court found, those could be severed from the Guidelines.[236] In holding that the *Blakely* reasoning applied to the Guidelines, the Ninth Circuit rejected the arguments about administrative promulgation and Supreme Court precedent just as the Seventh Circuit had in *Booker*.[237] The circuit court then held that *Blakely* applied to the Guidelines and that because the factors leading to defendant Alfred Arnold Ameline's enhanced sentence (the quantity of drugs and information about a weapon) were found by the judge by a preponderance of the evidence, the sentence was unconstitutional under the Sixth Amendment and *Blakely*.[238]

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[228] *Id.*
[229] *Id*. at 514.
[230] *Id*.; *see also* United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004).
[231] *Booker*, 375 F.3d at 514.
[232] *Id*. at 514-15.
[233] *Id.* at 515.
[234] *Id*.; *see also* United States v. Hammoud, 381 F.3d 316, 353 (4th Cir. 2004).
[235] United States v. Ameline, 376 F.3d 967, 980 (9th Cir. 2004).
[236] *Id*. at 981.
[237] *Id*. at 976-77; *Booker*, 375 F.3d at 512-14.
[238] *Ameline*, 376 F.3d at 974, 980.

In response to a government argument, the court proceeded to take up the severability issue with regard to 18 U.S.C. § 3742.[239] Noting, as the *Booker* Court would eventually decide, that § 3742 "appears to contemplate that it is the district judge's responsibility to make the requisite findings of fact at sentencing," the Ninth Circuit held that this "assumption" was unconstitutional, however, the Guidelines could survive as a consultation device because the provision could be severed.[240] The congressional intent behind the Guidelines was to promote "consistency of sentences in cases that involve similar offense conduct."[241] The *Blakely* Court, meanwhile, held a similar sentencing scheme invalid because it allowed the judge to find enhancing factors that raised a sentence above the statutory maximum on a preponderance of the evidence standard.[242] If a jury found those factors instead of a judge, the Ninth Circuit reasoned, then the *Blakely* standard would be met, Ameline's Sixth Amendment rights would be protected, and congressional intent would be preserved.[243]

The Guidelines were still mandatory under the Sixth Circuit's analysis, but there existed two paths for sentencing.[244] The government could give up on the enhancement attempt and the judge could sentence based solely on the jury finding or plea bargain admissions (this is the approach mentioned earlier in this paper and used by the *Fanfan* court).[245] Alternatively, the factors for enhancement should be argued to a special sentencing jury (or to the judge should the defendant select that option) on a reasonable doubt standard.[246]

IV. THE *BOOKER* DECISION

Booker found that the Guidelines violated the Sixth Amendment because of their mandatory nature.[247] The mandatory provisions could be severed, however, and the Guidelines used as advisory, though the Court allowed judges to retain a large amount of discretion over fact-finding in the sentencing process, rendering unnecessary the use of such remedies as a "sentencing jury."[248]

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[239] *Id.* at 980.
[240] *Id*. at 981.
[241] *Id*. at 982.
[242] *Id.* at 983.
[243] *Id.* at 980-82.
[244] *Id.* at 983.
[245] *Id.*; United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004).
[246] Ameline, 376 F.3d at 983 n.20.
[247] United States v. Booker, 125 S. Ct. 738, 749-50 (2005).
[248] *Id*. at 758-60.

Given the turmoil created in the aftermath of *Blakely*, the apparent ease with which the Court found the Guidelines to be indistinguishable from the Washington State scheme is striking.[249] Citing the *Blakely* dissents, which had voiced strong concerns about the state of the Guidelines and the potential effect of *Blakely* on sentencing uniformity,[250] the *Booker* Court simply held: "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case."[251] The issue was quickly resolved in an opinion by Justice Stevens, which stated that both the state and federal systems were constitutionally unsound because of their mandatory nature.[252]

Were the Guidelines advisory, Justice Stevens noted, there would be no constitutional problem, for Supreme Court case law supports giving sentencing judges "broad discretion" when it comes to sentencing defendants within a specific range.[253] As mandatory provisions, however, the Guidelines force "the selection of particular sentences in response to differing sets of facts" which make inevitable the reality that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[254]

The Court supported its point by chronicling the "trend" in sentencing—a shift in emphasis from jury findings toward a judge's ability, based on facts found by a preponderance of the evidence, to set the ceiling for sentences.[255] The solution to this diminution of jury power could be found in the reasoning of *Blakely* and was "an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."[256] To protect this Sixth Amendment right, the Court held that the facts arising from a jury trial or guilty plea must govern the determination of a criminal sentence.[257] Any information that might increase a sentence beyond that "must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[258]

Before arriving at this holding, Justice Stevens briefly addressed some of the concerns that had plagued the circuit courts with regards to

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[249] *Id.* at 749.
[250] *See, e.g.*, Blakely v. Washington, 125 S. Ct. 2531, 2543 (2004) (O'Connor, J., dissenting).
[251] *Booker*, 125 S. Ct. at 749.
[252] *Id*. at 749-50.
[253] *Id.*
[254] *Id*.
[255] *Id.* at 751.
[256] *Id*. at 752.
[257] *Id.* at 756.
[258] *Id.*

this threshold *Blakely*-application problem. Stare decisis did not pose a problem, and by requiring additional facts be argued to a jury, the Court was not violating Separation of Powers principles and turning the administratively promulgated Guidelines into a legislative list of crimes.[259] Most significantly, the much analyzed argument that *Blakely* should not apply to the Guidelines because they are the product of the Sentencing Commission, as opposed to Congress, "lacks constitutional significance."[260] The Justice dismissed this argument quickly, citing Justice Scalia's forceful language in *Blakely,* and held that the Sixth Amendment protections for defendants are too important to be jeopardized just because the Sentencing Commission was the body to determine which facts warrant which sentence.[261]

With the initial inquiry of whether to apply *Blakely* solved, the difficult question of what to do next was answered for the Court in a separate opinion by Justice Breyer. The decision severed two provisions of the Sentencing Reform Act, making the entire statute advisory in nature.[262] Given the determination by the majority, Justice Breyer framed the remedial choice as being between two options—the first, "superimposing the constitutional requirement" on the Guidelines, was proposed in dissent by Justice Stevens, and the second, ultimately adopted by the Court, involved "elimination of some provisions of the statute."[263] The opinion began with an examination of the congressional intent behind the Sentencing Reform Act, and concluded that Congress would not want the Court to impose Justice Stevens' remedy and have the jury play such a prominent role in sentencing.[264]

While enacting the sentencing legislation, the Court held, "Congress's basic goal . . . was to move the sentencing system in the direction of increased uniformity."[265] Uniformity meant that individual sentences should relate closely to "real conduct," so that defendants' punishments adequately represent their actions.[266] By "superimposing" the Sixth Amendment jury trial requirement on the sentencing scheme, Justice Breyer argued, the Court would actually be going against Congress's intentions.[267] For example, that requirement would make it unconstitutional for judges to consult pre-sentence reports—tools which,

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[259] *Id.* at 753-55.
[260] *Id*. at 752-53.
[261] *Id*. at 752.
[262] *Id.* at 756-57.
[263] *Id*. at 757.
[264] *Id.* at 758-59.
[265] *Id*. at 761.
[266] *Id.*
[267] *Id.* at 759-60.

the Justice noted, Congress has implicitly supported for actions like allowing a judge to reject a defendant's agreement to a bad plea bargain.[268] As for cases that go to trial, the Court noted that "post-verdict-acquired real conduct" often comes to light.[269] Should the Court require information be tried to a sentencing jury, it would be attenuating that connection between sentencing and "real conduct" as well as placing too much power in the hands of prosecutors—who would essentially control the judge's ability to sentence and the defendant's ability to negotiate, based on what charges they decided to bring.[270] These concerns, among others, were contrary to Congress's intent and consequently, the Court chose the second remedial option and severed two sections: § 3553(b)(1), as well as § 3742(e),[271] which the Ninth Circuit, in *Ameline*, had predicted would be problematic after *Blakely*.[272]

As stated in Justice Stevens' majority opinion regarding the constitutionality of the Guidelines, the mandatory nature of § 3553(b)(1) "is a necessary condition of the constitutional violation."[273] Without this section, the Court held, the goals of the Sentencing Reform Act can still be met—judges will have to consult the Guidelines as advisory, and will still consider the policy concerns behind the Act while sentencing.[274] The Court asserted that judges will still be required "to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care."[275] These sentences may also be appealed, though § 3742(e), the provision that sets standards for appeals, is cross-referenced in § 3553(b)(1) and necessarily was also severed by the Court.[276] Instead of the *de novo* standard for departures imposed by § 3742(e), Justice Breyer instructed the circuit courts to examine sentencing decisions via "review for 'unreasonable[ness]'" a standard which, the Justice maintained, the circuits had been using before § 3742(e) was amended in 2003.[277] The Justice counseled the circuit courts to look to the sentencing factors listed in § 3553(a) when reviewing a sentence for unreasonableness.[278]

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[268] *Id*. at 760.
[269] *Id.* at 762.
[270] *Id*. at 761-62.
[271] *Id.* at 764.
[272] United States v. Ameline, 376 F.3d 967, 980-81 (9th Cir. 2004).
[273] *Booker*, 125 S. Ct. at 764.
[274] *Id.*
[275] *Id*. at 765.
[276] *Id*.
[277] *Id*.
[278] *Id*. at 765-66.

Under the formulation presented by Justice Breyer, the Court requires district judges to "*consult* [the] Guidelines and take them into account when sentencing," but it does not require the judges to apply them.[279] The Court explained the application of this system by affirming the decision of the Seventh Circuit to reverse Booker's sentence as unconstitutional.[280] While Fanfan's sentence, relying only on the jury findings, was constitutional, the Court vacated the decision in case the Government opted to seek a resentencing.[281]

V. THE EFFECTIVENESS OF THE CIRCUIT COURTS BETWEEN *BLAKELY* & *BOOKER*.

The remedial provisions of the *Booker* decision were bold. Given the lack of guidance offered by the *Blakely* Court,[282] rulings made in anticipation of the Supreme Court's ultimate decision ought not be judged too harshly. While the circuits together touched on many of the issues presented by Justice Breyer in the remedial opinion of *Booker*,[283] not one anticipated the severance of both 18 U.S.C. § 3553(b)(1) *and* 18 U.S.C. § 3742(e) to render the Guidelines advisory. Overall, even courts professing an attempt to be prudent could be criticized under the circumstances.[284]

Taking into account the roles our system requires the circuit courts to play, however,[285] it is possible to critique the effectiveness of the choices made on the threshold *Blakely* application issue and, where applicable, on the decisions regarding the remedial sentencing provisions. These roles, as discussed at the beginning of this paper, include not only the requirement that the circuit courts defer to Supreme Court precedent and deliver those rulings accurately upon review of district court decisions, but also that the circuit courts provide instruction where needed.[286] These two roles can create tension where the issue on which the circuits offer instruction is not entirely on point with the Court's precedent and, consequently, leads to a kind of law making, potentially creating splits among the circuits as well as a non-conformity

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[279] *Id.* at 767 (emphasis added).
[280] *Id*. at 769.
[281] *Id*.
[282] United States v. Penaranda, 375 F.3d 238, 245 (2d Cir. 2004).
[283] *See, e.g.*, United States v. Ameline, 376 F.3d 967, 980-81 (9th Cir. 2004) (addressing severance of mandatory procedural provisions).
[284] *See, e.g.*, Markon, *supra* note 111 (noting criticism of careful remedies proposed by the Fourth Circuit in *Hammoud*).
[285] *See* Algero, *supra* note 1, at 614-15.
[286] *See id*., *supra* note 1, at 614-15; *see also* United States v. Pineiro, 377 F.3d 464, 465 (5th Cir. 2004).

with the interpretations of the Court.[287] Keeping this in mind, the actions of the circuits during the time period between *Blakely* and *Booker* propose two conclusions about their success: Those making the riskier decision to apply *Blakely* to the Guidelines were the most useful for the district courts, and of these circuits, those choosing the more conservative sentencing remedies were the most effective.

The circuits that remained cautious about applying the *Blakely* reasoning to the Guidelines voiced a need to remain in line with Supreme Court precedent and to give credit to Justice Scalia's refusal to address the Guidelines.[288] The Court had upheld the Guidelines in the face of constitutional challenges in the past.[289] The anticipation and eventual granting of certiorari also makes the decision not to take risks in this context understandable. This is not a situation where the circuit split might go unanswered. Indeed, the Seventh Circuit indicated that the purpose of its expedited opinion in *Booker* was to draw the attention of the Supreme Court early, so that its interpretation would not be delayed.[290] The Second Circuit's conservative choice in *Mincey* to have judges sentence according to circuit precedent was not, therefore, a disservice to the district courts.[291] Instead, the decision was an effort to refrain from splintering federal law—a choice that was contingent upon the fact that the Supreme Court would soon deliver a ruling on the issue.[292]

Similarly, it was also understandable that the Sixth and Eighth Circuits would vacate their decisions to apply *Blakely* to the Guidelines. As illustrated above, the Sixth Circuit's reasoning in *Montgomery* presented an understanding of the legislative history of the Guidelines that would turn out to be incorrect.[293] Meanwhile, the Eighth Circuit took great risks by holding in *Mooney* that the Guidelines were "wholly unconstitutional."[294] It makes sense, therefore, that the circuit court would vacate this interpretation of *Blakely* soon after the Supreme Court granted certiorari on *Booker* and *Fanfan*.

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[287] *See* Algero, *supra* note 1, at 608-09; *see also* Baker & McFarland, *supra* note 2, at 1406.

[288] *See, e.g.*, *Pineiro*, 377 F.3d at 472-73.

[289] *Id*.

[290] United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004).

[291] United States v. Mincey, 380 F.3d 102, 103 (2d Cir. 2004).

[292] *See id*.

[293] United States v. Montgomery, No. 03-5256, 2004 U.S. App. LEXIS 14384, at *8-10 (6th Cir. July 14, 2004), *vacated by* No. 03-5256, 2004 WL 1562904 (6th Cir. July 19, 2004), *dismissed by* No. 03-5256, 2004 WL 1637660 (6th Cir. July 23, 2004); United States v. Booker, 125 S. Ct. 738, 749-50 (2005).

[294] United States v. Mooney, No. 02-3388, 2004 U.S. App. LEXIS 15301, at *38 (8th Cir. July 23, 2004), *vacated by* No. 02-3388, 2004 WL 1636960 (8th Cir. July 27, 2004).

Though these circuits cannot be overly criticized for taking a conservative position on the threshold *Blakely* application question, they would have been more effective in their roles as conduit and guide if they had taken a risk on the initial question. The Washington State sentencing scheme was indeed "remarkably similar" to the federal scheme, as the Seventh and Ninth Circuits noted.[295] Justice Scalia's refusal to address the Guidelines in *Blakely* did not mean that they ought not to be addressed in the Sixth Amendment context.[296] The Seventh Circuit had a strong argument that Justice Scalia's *additional* refusal in *Blakely*—the refusal to say that the dissents were incorrect in declaring that the Guidelines would be at risk following *Blakely*—was very persuasive.[297] Equally persuasive was that Circuit's recognition that, despite the prior Supreme Court case law in this area, the Sixth Amendment issue raised in *Blakely* was the type that the Court was looking for the lower courts to address.[298] The First, Seventh, and Ninth Circuits served their role of interpreting the Supreme Court's intention to apply the *Blakely* reasoning to the Guidelines well.

As for their second role as instructor to the federal courts, some sentencing remedies delivered the interpretation of Supreme Court intent better than others. Though a risk was wise for the threshold question, restraint was best in the remedial context given the choices made by the Supreme Court in *Booker*.[299] As the *Booker* Court implied, the *Fanfan* approach of sticking strictly to the jury verdict while sentencing was perhaps the most prudent course of action for the circuit courts choosing to apply *Blakely* to the Guidelines.[300] This course, while defendant-friendly and clearly in keeping with the Sixth Amendment, was not the most fulfilling option for the government. It seems likely that defendants sentenced in accordance with this practice during the time between *Blakely* and *Booker* will face an appeal and possibly more jail time.[301]

In his post-*Blakely* analysis of potential avenues for circuit courts applying *Blakely* to the Guidelines, Frank Bowman noted that "[b]ecause *Blakely* appears to prohibit a judge from making the factual findings necessary to employ sentence-enhancing factors, a judge who decides that the Guidelines must be *Blakely*-ized is obliged to confer sentences lower, sometimes far lower, than the Guidelines would require for a

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[295] *See, e.g.*, United States v. Ameline, 376 F.3d 967, 974-75 (9th Cir. 2004).

[296] *See, e.g.*, United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004) (noting the duty of the circuit court to answer questions left open by the Supreme Court).

[297] *Id*.

[298] *Id.*

[299] *See* United States v. Booker, 125 S. Ct. 738, 769 (2005).

[300] *See id*.

[301] *See id.*

defendant in the presence of the same factual findings."[302] This was clearly the case in *Fanfan*, and the result, Judge Hornby noted, "although perhaps surprising to those of us who have been laboring under guideline sentencing for these many years . . . would not bother the *Blakely* court."[303] By applying this reasoning to the sentencing procedures, judges like Judge Hornby were following the safest route toward maintaining the legality of sentencing between *Blakely* and *Booker*.[304] It was the Supreme Court's lack of guidance in this area that required this cautious step; further, even this safe option will require remands and appeals in most cases where the government tries to achieve lengthier sentences, as evidenced by the Court's remand of the *Fanfan* decision.[305]

With *Ameline*, the Ninth Circuit came closest to the *Booker* decision by actually addressing the severance issue, although admittedly, it did not sever all of the necessary provisions.[306] The *Ameline* decision was the most risky of the group, particularly given the *Booker* Court's decision that sentencing juries are unnecessary.[307] In his analysis of the post-*Blakely* decisions of the federal courts, Bowman suggests that severability was a lightly touched issue because of its "unpalatable choices," namely invalidation of the entire Sentencing Reform Act versus "a federal sentencing system cobbled together by the judiciary from selected fragments of the Act and general Sixth Amendment and due process doctrines, featuring as its centerpiece completely unfettered trial court sentencing discretion."[308] While this is a valid observation, the Ninth Circuit's attempt to tackle the Sixth Amendment concerns while preserving the scope of the Sentencing Reform Act was an admirable move under the circumstances. The court had the rule of *Blakely* on the one hand, and the importance of Congress's goal of uniformity in sentencing on the other.[309] It refused to find the Guidelines unconstitutional in their entirety because that route "would do far greater violence to Congress' intent than if we merely excised the unconstitutional procedural requirements."[310]

By choosing to keep the Guidelines and have sentencing juries find facts applicable to enhancements, the Ninth Circuit chose a middle

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[302] Bowman, *supra* note 17, at 230.
[303] United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *3 (D. Me. June 28, 2004).
[304] *See Booker*, 125 S. Ct. at 769.
[305] *See id.*
[306] United States v. Ameline, 376 F.3d 967, 980-81 (9th Cir. 2004).
[307] *See Booker*, 125 S. Ct. at 759-60.
[308] Bowman, *supra* note 17, at 249.
[309] *Ameline*, 376 F.3d at 981-82.
[310] *Id*. at 982.

ground between Bowman's two extremes and offered a good option for sentencing in theory, but it would have better served its district courts if it had acted with more restraint and taken a cue from the Seventh Circuit.[311] The Seventh Circuit left the severance question open for remand, but still cautioned the district courts to calculate a non-Guidelines "alternative sentence" in case the Guidelines were found to be unconstitutional in the future.[312] Had the *Ameline* court adopted this suggestion, it would have placed its sentencing judges in a much safer position given the decision by the *Booker* Court to render the Guidelines advisory.[313]

The Fourth Circuit attempted to cover all of its bases in *Hammoud*, by keeping the Guidelines as valid, but recommending advisory sentences as well.[314] The court did this to "serve judicial economy," and was concerned that sentencing courts should address issues that might be important "when the facts and circumstances [are] clearly in mind" should the Supreme Court invalidate the Guidelines.[315] However, it is a valid complaint that the process of issuing two sentences while refusing to apply the *Blakely* reasoning might have foiled the ultimate purpose of "judicial economy."[316] Indeed, as Circuit Judge Widener noted in partial concurrence and partial dissent in *Hammoud*, if the "advisory-only sentence" constitutes less time than the one under the Guidelines, "an appeal will be guaranteed."[317] That realistic observation undermines the "judicial economy" premise.[318] Also pertinent is Circuit Judge Widener's additional argument that by suggesting that sentencing judges issue two sentences, the circuit court is building a foundation of uncertainty around its decision and "can only indicate to others a doubt, which should not exist, as to the outcome of the principal question in this case, the effect, if any, of *Blakely* on Guidelines sentencing."[319] A circuit court ought not, when addressing the law during such a tumultuous time, seem uncertain in its result.[320] Still, the Fourth Circuit was operating to preserve the sentencing system, and these directions, while perhaps a "wasted effort" as the court acknowledged,[321] may indeed prove to have been well

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311 *See* Bowman, *supra* note 17, at 249.
312 United States v. Booker, 375 F.3d 508, 514-15 (7th Cir. 2004).
313 *See* United States v. Booker, 125 S. Ct. 738, 769 (2005).
314 United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004).
315 United States v. Hammoud, 381 F.3d 316, 353-54 (4th Cir. 2004).
316 Markon, *supra* note 111.
317 *Hammoud*, 381 F.3d at 361(Widener, J., concurring and dissenting).
318 *See id.*
319 *Id*.
320 *See id.*
321 *Id*. at 353.

offered as the numerous sentencing appeals are remanded to the district courts.

VI. CONCLUSION

The time period between *Blakely* and *Booker* provided a unique atmosphere for analyzing the effectiveness of the circuit courts in fulfilling the roles that our judicial structure requires of them.[322] Little about the constitutional viability of the Guidelines was certain after *Blakely*, and although Justices O'Connor and Breyer provided strong arguments that the Guidelines were in peril, they were still dissenting opinions.[323] It was unclear how much they ought to be relied upon.[324] Still, the circuits here were called to interpret the Court's reasoning, just as they would have been in any other context.[325] They had the added duty of potentially taking risks in offering much-needed instruction to the district courts.[326] Though it was understandable that the majority of the circuits would act conservatively and choose not to apply the reasoning of *Blakely* to invalidate the Guidelines, those circuits that were less traditional in this area better fulfilled their role of conduit between the Supreme Court and the district courts. Additionally, those who chose to guide sentencing judges via conservative sentencing remedies acted in the best interest of the district courts.

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[322] *See, e.g.*, Bowman, *supra* note 17, at 219.

[323] *See, e.g.*, Blakely v. Washington, 124 S. Ct. 2531, 2546 (2004) (O'Connor, J., dissenting).

[324] *See* United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2005); United States v. Pineiro, 377 F.3d 464, 473 (5th Cir. 2004).

[325] *See Booker*, 375 F.3d at 510.

[326] *See id*.