No. 03-2632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

BRIAN BAILEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE REGARDING *BLAKELY*

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Appellant Brian Bailey argues in his reply brief that the district judge's imposition of the vulnerable-victim adjustment under the Federal Sentencing Guidelines violated his Sixth Amendment right to a jury trial. He relies on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), which applied the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to invalidate a sentencing enhancement, imposed pursuant to state law, that increased the sentence beyond the range authorized by the State of Washington's statutory sentencing scheme. Because Bailey did not raise this Sixth Amendment issue in his opening brief, he has waived it. See *KPS & Assoc., Inc.* v. *Designs By FMC, Inc.*, 318 F.3d 1, 25 (1st Cir. 2003); *United States* v. *Chapdelaine*, 23 F.3d 11, 13 (1st Cir. 1994). The Eleventh Circuit has

recently applied this waiver rule in the context of a *Blakely* claim. See *United States* v. *Curtis*, No. 02-16224, 2004 WL 1774785, at *2 (11th Cir. Aug. 10, 2004).

If the Court does address this issue, however, it should reject Bailey's argument because *Blakely* did not invalidate the Federal Sentencing Guidelines. In the alternative, if the Court concludes that *Blakely* did invalidate the Guidelines, it should affirm Bailey's sentence because he has not demonstrated that reversal is required under the plain-error standard. Finally, if this Court decides that *Blakely* applies to the Federal Sentencing Guidelines and that Bailey's sentence cannot withstand plain-error review, the proper remedy would be to remand to the district court for resentencing within that court's traditional sentencing discretion.

I

THE SUPREME COURT'S *BLAKELY* DECISION DOES NOT INVALIDATE THE FEDERAL SENTENCING GUIDELINES

Blakely did not invalidate the Federal Sentencing Guidelines, nor did it hold that its rule applies to the Guidelines. See *Blakely* v. *Washington*, 124 S. Ct. 2531, 2538 n.9 (2004) ("The Federal Guidelines are not before us, and we express no opinion on them."); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 497 n.21 (2000) (same). In *Apprendi* itself, the Court expressed no view on the Guidelines beyond "what this Court has already held." *Ibid.* (citing *Edwards* v. *United States*, 523 U.S. 511, 515 (1998)). What the Supreme Court has "already held" about the Guidelines therefore continues to provide the governing principle for this Court —

and Supreme Court rulings have consistently upheld the Guidelines against constitutional attack. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361 (1989). The Court in *Edwards* held that so long as a sentence does not exceed the statutory maximums established by Congress for the offense of conviction, a Guidelines sentence can (in fact, sometimes must) be based on judge-found conduct not proved to a jury. *Edwards*, 523 U.S. at 514-515; see also *Witte* v. *United States*, 515 U.S. 389, 399-401 (1995) (conduct not charged in the indictment); *United States* v. *Watts*, 519 U.S. 148, 156-157 (1997) (per curiam) (conduct of which a defendant is acquitted but is established by a preponderance of the evidence). Moreover, the Court has explicitly held that courts are not only bound by the Guidelines, but by their policy statements and commentary as well. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993).

This Court is required to follow these precedents. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("[I]t is [the Supreme Court's] prerogative alone to overrule one of its precedents."); *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (courts of appeals must leave to "this Court the prerogative of overruling its own decisions," even if such a decision "appears to rest on reasons rejected in some other line of decisions").[1] This Court therefore may not take it upon itself to cast

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[1] This Court, like every other court of appeals, has held that the Guidelines do not violate *Apprendi*. See, *e.g.*, *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004). Because the Court in *Blakely* specifically declined to overrule its prior precedents, this Court's prior decisions

(continued...)

aside the Guidelines system and the integrated sentencing process it mandates. This was the conclusion of the Second and Fifth Circuits in *United States* v. *Mincey*, Nos. 03-1419L & 03-1520, 2004 WL 1794717 (2d Cir. Aug. 12, 2004), and *United States* v. *Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004), petition for cert. pending (filed July 14, 2004) (No. 04-5263). As this Court explained in refusing to construe *Apprendi* to "eviscerate the federal sentencing guidelines," "[w]e do not believe that the [Supreme] Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue." *United States* v. *Robinson*, 241 F.3d 115, 121 (1st Cir.), cert. denied, 534 U.S. 856 (2001).

Four of the six courts of appeals that have decided the issue have agreed with the United States that *Blakely* does not invalidate the federal Sentencing Guidelines. See *Mincey*, *supra* (2d Cir.); *United States* v. *Hammoud*, No. 03-4253, 2004 WL 1730309 (4th Cir. Aug. 2, 2004) (en banc), petition for cert. pending (filed Aug. 6, 2004) (No. 04-193); *Pineiro*, *supra* (5th Cir.); *United States v. Koch*, No. 02-6278 (6th Cir. Aug. 13, 2004) (en banc) (unpublished order) (attached in the addendum to this brief). But see *United States* v. *Booker*, 375 F.3d 508 (7th Cir. 2004) (2-1 decision), cert. granted, No. 04-104 (Aug. 2, 2004); *United States* v. *Ameline*, 376 F.3d 967 (9th Cir. 2004) (2-1 decision), petition for

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[1](...continued)
continue to bind this Court. See *United States* v. *Chhien*, 266 F.3d 1, 11 (1st Cir. 2001), cert. denied, 534 U.S. 1150 (2002).

reh'g en banc pending (filed Aug. 4, 2004) (No. 02-30326).[2]

This inter-circuit conflict will be resolved by the Supreme Court, which has granted the United States' petition for a writ of certiorari in *Booker*, see 2004 WL 1713654, and the petition for a writ of certiorari before judgment of a case pending in this Court. See *United States* v. *Fanfan*, 2004 WL 1723114 (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir.), cert. granted, No. 04-105 (Aug. 2, 2004).

II

EVEN IF *BLAKELY* APPLIED TO THE FEDERAL SENTENCING GUIDELINES, BAILEY'S SENTENCE SHOULD BE UPHELD UNDER PLAIN-ERROR REVIEW

Even if this Court were to conclude that *Blakely* applies to the Guidelines, it should nonetheless affirm Bailey's sentence. Bailey's sentence can be reviewed (if at all) only for plain error because he did not raise a Sixth Amendment objection to his sentence in the district court. See *Robinson*, 241 F.3d at 117, 119 (reviewing *Apprendi* issue only for plain error, even though *Apprendi* had not been

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[2] Bailey's reliance (Reply Br. 14, 16) on decisions from the Sixth and Eighth Circuits is misplaced. The Sixth Circuit vacated the panel decision and granted en banc review in *United States* v. *Montgomery*, No. 03-5256, 2004 WL 1562904 (6th Cir. July 19, 2004), and later dismissed the case. 2004 WL 1637660 (6th Cir. July 23, 2004) (en banc). At any rate, the Sixth Circuit's en banc order in *Koch*, *supra*, rejects the position of the *Montgomery* panel. The Eighth Circuit has vacated the panel decision and granted en banc review in *United States* v. *Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. Aug. 6, 2004). See also *United States* v. *Pirani*, No. 03-2871, 2004 WL 1748930 (8th Cir.), vacated for reh'g en banc (8th Cir. Aug. 16, 2004).

decided at the time of sentencing). Reversal is warranted under this standard only if there is

> (1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Johnson v. United States, 520 U.S. 461, 466-467 (1997) (citations and internal quotation marks omitted). An error usually will not affect the defendant's "substantial rights" unless it is "prejudicial," in the sense that it "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993). Bailey bears the burden of proving that these requirements have been satisfied. See *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004). He has not met this heavy burden.

An error is "plain" only if it is "clear" or "obvious." *Olano*, 507 U.S. at 734. To the extent that any error occurred in imposing the vulnerable-victim adjustment based on judge-made factual findings, such a mistake could not be characterized as clear or obvious, especially considering that a majority of the courts of appeals that have addressed the issue have held that *Blakely* does not invalidate the Guidelines. See *United States* v. *Duncan*, No. 03-15315, 2004 WL 1838020, at * 3-4 & n.3 (11th Cir. Aug. 18, 2004) (alleged *Blakely* error is not "plain" because "we cannot conclude that it is obvious from *Blakely*" that it applies to the Federal Sentencing Guidelines and "there is considerable disagreement amongst jurists and amongst the circuits on this issue").

And even if a clear or obvious error occurred here, reversal would not be warranted because the procedure used by the district judge in imposing the vulnerable-victim adjustment did not affect Bailey's substantial rights or undermine the fairness, integrity or public reputation of the judicial proceedings. If the district court had not applied the two-level adjustment, Bailey's offense level would have been 20, which produces a sentencing range of 33 to 41 months. See U.S.S.G. Ch. 5, Pt. A (table). The district court sentenced Bailey to 41 months in prison. Thus, even without the vulnerable-victim adjustment, the court could have imposed the same sentence. See *United States* v. *Carrington*, 96 F.3d 1, 9 (1st Cir. 1996) (alleged error in applying Guidelines did not warrant reversal under a plain-error standard where the district court could have imposed the same sentence absent the error).

Moreover, the evidence underlying the finding of victim vulnerability was overwhelming and essentially uncontroverted. The district judge based the determination of vulnerability on the following evidence: (1) Nikolas Dais was on suicide watch; (2) prison officials had taken his clothing and thus he was nearly naked; (3) he was assaulted because he had been crying out for a blanket; and (4) he was confined to his cell and was not allowed out even to eat. See Appellant's Appendix (App.) at 1020, 1027. There is no serious dispute about any of these underlying facts and, indeed, Bailey admitted most of them. See *id.* at 784, 786,

789, 808-809, 885, 896, 911 (Bailey's testimony that Dais was on suicide watch, was not allowed to have any clothing, was locked in his cell, and was screaming, yelling, and kicking his cell door for about three hours because his requests for a blanket were refused); accord *id.* at 749, 984 (opening statement and closing argument by Bailey's counsel); *id.* at 1017, 1020, 1025-1026 (statements by Bailey's attorney at sentencing hearing). In light of this overwhelming evidence, Bailey has failed to show that having the judge (rather than the jury) make the finding of vulnerability either "affected the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, or seriously undermined the fairness, integrity, or public reputation of judicial proceedings. See *United States v. Cotton*, 535 U.S. 625, 633 (2002) (although reliance on a fact not alleged in indictment to enhance sentence beyond prescribed statutory maximum violated *Apprendi*, that error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings and thus did not warrant reversal under plain error standard where evidence regarding that fact was "overwhelming" and "essentially uncontroverted").

III

IF THIS COURT CONCLUDES THAT *BLAKELY* APPLIES TO THE GUIDELINES AND THAT BAILEY'S SENTENCE CANNOT WITHSTAND PLAIN-ERROR REVIEW, THIS COURT SHOULD REMAND FOR RESENTENCING WITHIN THE DISTRICT COURT'S TRADITIONAL DISCRETION

If the Court concludes that *Blakely* applies to the Federal Sentencing Guidelines and that Bailey's sentence should be overturned under the plain-error standard, this Court should remand for resentencing. If *Blakely* renders unconstitutional a judge's assessment of facts that increase a defendant's Guidelines sentence, the balance of the Sentencing Guidelines is not severable from the unconstitutional judicial factfinding procedures. Accordingly, in any case in which *Blakely* would preclude the sentencing court from making findings required under the Guidelines, the Guidelines as a whole would be inapplicable.

When a court finds some parts of a statutory scheme unconstitutional, the court must inquire into the severability of the remaining provisions. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress" after the unconstitutional provisions have been severed. *Id.* at 685. The court has no authority to "rewrite [the] statute and give it an effect altogether different" from what Congress enacted. *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 362 (1935).

The novel scheme that would result from superimposing jury trials on the Guidelines sentencing process would give birth to a radically different system

from the one that Congress enacted and the Sentencing Commission created. The Guidelines serve the important goal of seeking to avoid unwarranted sentencing disparities between similarly situated defendants resulting from divergent judicial decisions in an indeterminate sentencing system. See *Koon v. United States*, 518 U.S. 81, 92 (1996); 28 U.S.C. 991(b)(1)(B); S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). The Guidelines were plainly designed and written for application by judges, *e.g.*, 28 U.S.C. 994(a)(1); U.S.S.G. 6A1.3(b), and their complexity and holistic nature would defy coherent application with an overlay of *Blakely* procedures. The transformation of the jury into the factfinder on the myriad of issues that the Guidelines often require to be resolved would introduce procedural complications (*e.g.*, bifurcation, complicated jury instructions, elaborate special verdicts) that the federal system has never applied in the ordinary case.

To superimpose *Blakely* on the Guidelines in pending cases awaiting sentencing could have the effect of precluding most upward adjustments that the Guidelines would require, because there could be double jeopardy objections to reconvening a jury to decide facts relevant only to upward adjustments at sentencing. That would seriously thwart the intention of Congress and the Commission to provide for sentences sufficient "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(A), (B), and (C). It is not within "the province of the courts to fashion a remedy," *United*

States v. *Jackson*, 390 U.S. 570, 579 (1968), that would depart so dramatically from Congress's intent (and that of the Sentencing Commission) in the unified Sentencing Guidelines as promulgated. See also *United States* v. *Albertini*, 472 U.S. 675, 680 (1985) (Although "[s]tatutes should be construed to avoid constitutional questions," this "interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.").

Accordingly, in any case in which *Blakely* would preclude the sentencing court from making findings required under the Guidelines, the Guidelines as a whole cannot be implemented as intended, and thus the district court should sentence the defendant in its discretion within the maximum and minimum provided by statute for the offense of conviction. The Court in *Blakely* noted that indeterminate sentencing schemes, in which the judge "may implicitly rule on those facts he deems important to the exercise of his sentencing discretion," remain constitutional. 124 S. Ct. at 2540.

In exercising its discretion, the district court should use the Guidelines as guidance. Congress recognized that there would be cases in which the Guidelines would not be directly applicable. Even in such cases, however, Congress directed that the court should give "due regard" to the applicable Guidelines provisions and policy statements. 18 U.S.C. 3553(b). The constitutionality of that provision is not called into question by *Blakely*.

CONCLUSION

This Court should decline to consider Bailey's Sixth Amendment challenge to his sentence because he waived it by failing to raise it in his opening brief. If the Court considers the issue, it should hold that *Blakely* does not invalidate the Federal Sentencing Guidelines and that even if it did, Bailey's sentence must be affirmed under the plain-error standard of review. In the alternative, the Court should remand the case so that the district court can resentence Bailey using its traditional discretion to select a sentence within the minimum and maximum prescribed by statute for the offense of conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2004, two copies of the foregoing SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE REGARDING *BLAKELY* were served by Federal Express, overnight delivery, on:

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