Nos. 04-1146 & 04-1147

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

TIMOTHY H. BRADLEY & KATHLEEN MARY O'DELL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CONSTITUTION & STATUTES:

RULES:

FEDERAL SENTENCING GUIDELINES:

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Bradley and O'Dell argue in their reply brief that the sentences imposed on them violate their Sixth Amendment right to a jury trial. They rely on the Supreme Court's recent decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), in which the Court 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 they did not raise this Sixth Amendment issue in their opening brief, the defendants have waived this argument. See *KPS & Assoc., Inc.* v. *Designs By FMC, Inc.*, 318 F.3d 1, 25 (1st Cir. 2003) ("An appellant waives any issue which it does not adequately raise in its initial brief.") (quoting *Playboy*

Enters., Inc. v. *Public Svc. Comm'n of P.R.*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990)); *United States* v. *Chapdelaine*, 23 F.3d 11, 13 (1st Cir. 1994) (same). The Eleventh Circuit has recently applied this rule in the context of a *Blakely* claim. See *United States* v. *Levy*, No. 01-17133, 2004 WL 1725406 (11th Cir. Aug. 3, 2004) ("we do not entertain this new issue because [defendant] did not timely raise it in his initial brief on appeal").

If the Court does address this issue, however, for the reasons discussed below, the Court should reject the defendants' argument because *Blakely* did not invalidate the Federal Sentencing Guidelines. In the alternative, if the Court concludes that it did, the Court should affirm the convictions and remand to the district court for resentencing within the district court's traditional sentencing discretion.

I

THE SUPREME COURT'S *BLAKELY* DECISION DOES NOT INVALIDATE BRADLEY'S AND O'DELL'S SENTENCES

Blakely did not invalidate the Federal Sentencing Guidelines, nor did it hold that its rule applies to the Guidelines. See 124 S. Ct. at 2538 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."); see also *Apprendi*, 530 U.S. at 497 n.21 (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]

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[1] This Court, like every other court of appeals, has expressly held that the Guidelines do not violate the rule of *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, under the "law of the circuit" doctrine, this Court's prior decisions continue to bind this Court. See *United States* v. *Chhien*, 266 F.3d 1, 11 (1st Cir. 2001), cert. denied,

This Court therefore may not take it upon itself to cast aside the Guidelines system and the integrated sentencing process it mandates. This was the conclusion of the Fifth Circuit in its thorough and well-reasoned recent decision *United States* v. *Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004); see also *United States* v. *Hammoud*, No. 03-4253, 2004 WL 1730309 (4th Cir. Aug. 2, 2004) (en banc) (unpublished order) (announcing judgment of the en banc court that *Blakely* does not invalidate Federal Sentencing Guidelines) (attached).

Although other Courts of Appeals have held *Blakely* applicable to the Guidelines, this issue will be resolved by the Supreme Court, which has granted the government's petition for certiorari review of a decision of the Seventh Circuit, see *United States* v. *Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004) (2-1 decision), cert. granted, No. 04-104 (Aug. 2, 2004), and granted the government's petition for review prior to judgment of a case pending in this Court, see *United States* v. *Fanfan*, No. 04-105, 2004 WL 171365 (U.S. Aug. 2, 2004).[2]

Even if the Court concludes that *Blakely* applies to the Guidelines, the Court

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534 U.S. 1150 (2002).

[2] The Sixth Circuit vacated and then dismissed its decision holding *Blakely* applicable to the Guidelines, see *United States* v. *Montgomery*, No. 03-5256, 2004 WL 1562904 (6th Cir. July 14, 2004), vacated and en banc review granted July 19, 2004, and dismissed July 23, 2004. The decisions of the Ninth and Eight Circuits so holding are not yet final, see *United States* v. *Ameline*, No. 02-30326, 2004 WL 0635808, (9th Cir. July 21, 2004) (2-1 decision); *United States* v. *Mooney*, 2004 WL 1636960 (8th Cir. July 23, 2004) (2-1 decision). Cf. *United States* v. *Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004) (*en banc*) (certifying to Supreme Court question of *Blakely*'s application to Guidelines).

should still affirm the defendants sentences. The United States does not concede that the sentencing enhancements under Sentencing Guideline 2H4.1(b)(4)(A) for the defendants having committed wire fraud or the enhancement resulting from the grouping rule of Sentencing Guidelines 3D1.2 and 3D1.4 required the district court to make any factual determinations beyond those implicit in the jury's verdict, although the enhancement under Sentencing Guideline 2H4.1(b)(C)(3) for the period in which the victims were held in involuntary servitude did.[3] But even to the extent enhancements were based upon judge-made findings, this was not plain error in this case because the record evidence overwhelmingly supported such findings and they necessarily would have been made by the jury. 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* v. *New Jersey*, 530 U.S. 466 (2000), 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").

[3] That the defendants committed the wire fraud offenses during or in connection with the trafficking offenses is implicit in the jury's guilty verdicts. Also, the application of the grouping rules in this case was essentially mechanical.

II

IF THE COURT CONCLUDES THAT *BLAKELY* DOES INVALIDATE THE DEFENDANTS' SENTENCES, THE COURT SHOULD REMAND FOR RESENTENCING WITHIN THE DISTRICT COURT'S TRADITIONAL DISCRETION

If the Court concludes that *Blakely* does apply to the Federal Sentencing Guidelines and invalidates the defendants' sentences, this Court should remand to the district court for resentencing. Contrary to the defendants' argument, even if *Blakely* applies here, the result would not be to sever from the Guidelines only those parts unhelpful to the defendants. A requirement that facts supporting an increased sentence have to be submitted to the jury and proven beyond a reasonable doubt but those that support a lower sentence do not would distort the operation of the sentencing system in a manner that would not have been intended by Congress or the Sentencing Commission. Accordingly, if *Blakely* precludes judicial factfinding under the Guidelines, the Guidelines as a whole would be invalidated as a binding set of rules governing sentences that must be imposed.

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).

Congress intended the Guidelines to be applied by judges at sentencing, not by juries. See 28 U.S.C. 994(a)(1) (directing Commission to promulgate Guidelines "for use of a sentencing court"); see also 18 U.S.C. 3742(e) (directing appellate courts to give due regard to "the findings of fact of the district court"). The Commission, in promulgating the Guidelines, determined that a preponderance-of-the-evidence standard was appropriate for applying the provisions to a particular defendant. See Sentencing Guidelines § 6A1.3, comment; see also *United States* v. *Watts*, 519 U.S. 148, 155 (1997) (per curiam) (noting "the significance of the different standards of proof that govern at trial and sentencing" under the Guidelines). Moreover, the Guidelines permit courts to base findings on evidence that may not be admissible before a jury under ordinary rules of evidence. See 18 U.S.C. 3661; Sentencing Guidelines § 6A1.3; Fed. R. Evid. 1101(d)(3).

A system under which Guidelines enhancements (but not reductions) had to be submitted to a jury for determination beyond a reasonable doubt would contravene the clear intent of Congress and the Sentencing Commission on each of these points. To be sure, a sentencing system that incorporated jury findings on some factual issues with judicial findings on others could be created. But 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."). In short, the scheme that would result from trying to superimpose the jury system on enhancements (but not reductions) under the Guidelines would put in place a scheme that is so different from what Congress enacted (and the Sentencing Commission thought it was promulgating) that it would in essence be judicial lawmaking, not effectuation of congressional intent.

If the Court concludes that *Blakely* applies to the defendants' sentences, it should affirm the convictions and remand to the district court for resentencing under the traditional indeterminate sentencing system. The district court would then exercise its discretion to sentence defendants within the maximum allowed by statute. 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," remains constitutional. 124 S.Ct. at 2540. In exercising its discretion, the district court should use the Guidelines as guidance, as intended by Congress. Under 18 U.S.C. 3553(b),

> [i]n the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall * * * have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the policy statements of the Sentencing Commission.

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. The constitutionality of that provision is not called into question by *Blakely*.

CONCLUSION

This Court should hold that *Blakely* is not applicable to the Guidelines. In the alternative, it should affirm the convictions and remand to the district court for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2004, I have served the foregoing SUPPLEMENTAL BRIEF OF THE UNITED STATES AS APPELLEE REGARDING *BLAKELY*, along with a disk formatted in WordPerfect 9, by Federal Express Next Business Day delivery on:

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