No. 03-2011, 03-2012, 03-2019 & 03-2036

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross Appellant

v.

MATIAS SERRATA, JR., WILLIAM FULLER,
and KENDALL LIPSCOMB,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE WILLIAM P. JOHNSON

SUPPLEMENTAL BRIEF FOR THE UNITED STATES REGARDING *BLAKELY*

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This brief is filed pursuant to this Court's order of August 16, 2004, directing the parties to file supplemental briefs to address three issues relating to the Supreme Court's recent decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004).

In *Blakely*, the Supreme 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. In letters dated June 30, 2004, July 1, 2004, and July 6, 2004, and filed with this Court pursuant to Federal Rules of

Appellate Procedure 28(j), defendants Serrata, Lipscomb, and Fuller, respectively, cite *Blakely* and contend that the district court erred in using Sentencing Guidelines § 2A2.2, the guideline for aggravated assault, to calculate the offense level and impose enhancements, based on use of a dangerous weapon, restraint of the victim, and Fuller's leadership role.[1] We address the issues raised by the Court in sequence.

1. Because defendants did not argue in their opening briefs that any enhancements, adjustments or application of, the Guidelines were unjustified because the underlying predicate facts were not alleged in the indictment and found by the jury, they have waived those claims. See *Arst* v. *Stifel, Nicolaus & Co.*, 86 F.3d 973, 981 n.7 (10th Cir. 1996). 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).

Moreover, defendants are not in a position to claim that a jury, rather than the district court, should have found that the victim was restrained and Fuller was a leader of the conspiracy. Defendants in their opening briefs did not challenge the imposition of, or the sufficiency of the factual predicate for, those

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[1] All three defendants maintain that the district court erred in imposing an upward adjustment for use of a dangerous weapon. Lipscomb also contends that the district court erred in calculating his offense level pursuant the guideline for aggravated assault. In addition, Lipscomb and Fuller both argue that the district court erred in imposing an enhancement because the victim was restrained. Finally, Fuller objects to the imposition of an enhancement for his leadership role.

enhancements. In addition, since Fuller conceded in the court below that he was "in charge" of "prepar[ing] * * * and help[ing] other[s] prepare" the[] reports" that contained the false accounts of the assault and contended that the leadership enhancement was inappropriate exclusively because as "the lieutenant in charge" he had the "responsib[ility] [of getting] the[] reports together," the district court did not have to make a factual finding prior to imposing that enhancement. (11/6/02 Tr. 69).[2] Consequently, defendants have all waived their claims that the district court wrongly imposed enhancements based on restraint of the victim and Fuller's leadership role.

2. If this Court chooses to address the issues defendants presented, their claims may be reviewed (if at all) only for plain error since they did not raise a Sixth Amendment challenge to their sentences in the district court. See *United States* v. *Lott*, 310 F.3d 1231, 1240 (10th Cir. 2002) (reviewing *Apprendi* issue only for plain error, even though *Apprendi* had not been decided at the time of sentencing), cert. denied, 538 U.S. 936 (2003). 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

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[2] "11/6/02 Tr." followed by a number refers to the page number of the transcripts of the sentencing hearing held on November 6, 2002. "Tr." followed by a number refers to the page number of the trial transcript. "R." refers to the record entry number on the district court docket sheet. "F.Br." refers to the initial brief defendant Fuller filed with this Court.

> 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). Accordingly, defendants' sentences must be affirmed unless a plain error affects the defendants' "substantial rights" and "affect[s] the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

3. *Blakely* has no impact on the sentencing adjustments in this case because: (a) that decision did not invalidate the Sentencing Guidelines; and (b) defendants have not demonstrated that reversal is required under the plain-error review.

a. *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"). 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 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, No. 04-5263 (filed July 14, 2004). 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, No. 04-193 (filed Aug. 6, 2004); *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 reh'g en banc pending (filed Aug. 4, 2004) (No. 02-30326).

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. 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).

b.1. Should this Court conclude that *Blakely* did invalidate the Guidelines, it should nonetheless affirm defendants' sentences. Defendants fail to demonstrate that reversal is required under plain-error review.

An error is "plain" only if it is "clear" or "obvious." *Olano*, 507 U.S. at 734. To the extent that any error in applying guidelines or imposing adjustments or enhancements occurred based on judge-made factual findings, such a mistake could not be characterized as clear or obvious, since the Supreme Court has yet to consider whether *Blakely* invalidates the Guidelines, and a majority of the courts of appeals have held that *Blakely* does not. 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). See also *United States* v. *Marshall*, 307 F.3d 1267, 1270 (10th Cir. 2002) (explaining that any error in jury instructions "cannot be plain" where there is no Supreme Court or controlling circuit authority, and other circuit authority is divided).

b.2. Defendants also cannot demonstrate plain error because the record reflects that the jury had to have credited the overwhelming evidence that justifies the application of Sentencing Guidelines § 2A2.2, the guideline for aggravated assault and the enhancement for use of a dangerous weapon. The Sentencing Guidelines provide that an "aggravated assault" is a felonious assault that involves "a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon," or "serious bodily injury." Sentencing Guidelines § 2A2.2, comment. (n. 1). See *United States* v. *Sherwin*, 271 F.3d 1231, 1234 (10th Cir. 2001); *United States* v. *Tissnolthtos*, 115 F.3d 759, 763 (10th Cir. 1997). As stated in our opening brief (Br. 49), this Court has held, consistent with the Guidelines that a "dangerous weapon" encompasses "anything that serves or contributes to the accomplishment" of inflicting serious bodily injury. See Sentencing Guidelines § 1B1.1, comment. (n.1(d)) (a "[d]angerous

weapon means * * * an instrument capable of inflicting death or serious bodily injury").

Because the jury had to have believed that Fuller intended to injure Duran when he repeatedly kicked him in the head with his boots, the district court correctly concluded that it was merely "giv[ing] effect to the jury's verdict" when it used the aggravated assault guideline to calculate the offense level and imposed an enhancement for use of a dangerous weapon. (11/06/02 Tr. 50).[3] Accordingly, the alleged errors could not have "affected the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, and do not seriously undermine the fairness, integrity, or public reputation of the 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

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[3] At the sentencing hearing, Fuller conceded, consistent with this Court's precedent and the Guidelines, that his conduct, as found by the jury, repeatedly kicking Duran in the head with his boots, was capable of causing serious bodily injury. Defense counsel disputed whether Fuller intended to injure Duran and stated (11/6/02 Tr. 28-29 (emphasis added))

> The government did not prove by a preponderance of the evidence that Mr. Fuller used his boot with * * * specific intent. Had he, had this man * * * a 380-pound man, intended to cause injury with his boot, he *would have caused serious injury with his boot.*
>
> *It's only common sense that a forceful kick to the head by Mr. Fuller would have caused severe head trauma to Mr. Duran.*

reputation of judicial proceedings and thus did not warrant reversal under plain error standard where evidence regarding that fact was "overwhelming" and "essentially uncontroverted").

On its face, the guilty verdict and the indictment establish that the jury found that Fuller "kick[ed] [Duran] multiple times in the head, causing * * * injur[ies]," including multiple contusions and abrasions, a concussion, and loss of consciousness. R. 1. at 2. See F.Br. 32 (conceding that "the jury's verdict finding that Fuller kicked Duran more than once in the head as charged in the indictment must be accepted"). Since both the government and defense witnesses agreed that all correctional officers, including defendants, are taught that, even when force is justified, the head and neck are "no strike" zones because there is high risk of permanent injury or death from blows to those areas, (Tr. 419-420, 497; 703, 718 (defense witness); 972-975 (defense witnesses)), it is wholly illogical to suggest that a jury that credited the testimony of numerous eyewitnesses and found that Fuller brutally kicked Duran in the head did not believe that Fuller intended to and knew (although not required) that he would injure Duran. See R. 145, Instr. 5D (instructing jury that it is reasonable to "find that the defendants intended all the consequences that a correctional officer, standing in like circumstances and possessing like knowledge, should have expected to result from his acts knowingly done"). Indeed, even without such training, it is difficult, if not impossible to believe that multiple kicks to a person's head are not intended to cause bodily injury. Accordingly, the district court could not have committed

plain error when it applied Sentencing Guidelines § 2A2.2, the aggravated assault guideline and imposed an enhancement for use of a dangerous weapon.

b.3. Defendants cannot demonstrate error, no less error that is plain, based on the district court's imposition of a two level enhancement for restraint of the victim. That is because the indictment and the jury's guilty verdict were predicated on the conduct of Fuller and Serrata *after* Duran was under control and fully restrained. As the district court explained at defendant's sentencing, because Fuller would not have been convicted "if the jury had accepted [his version] that all he did was step on [Duran's] head" and did not use any force once Duran was restrained, it would have had "to set aside the jury's verdict" to grant defendants' request not to apply the enhancement for restraint of the victim. (11/6/2002 Tr. 46, 68). Accordingly, the district court clearly properly relied on the jury verdict to apply the enhancement for restraint of the victim.

b.4. The evidence justifying the enhancement based on Fuller's leadership role was overwhelming and uncontroverted. As previously noted, Fuller conceded that he was "in charge" of "prepar[ing] * * * and help[ing] other[s] prepare" the reports that contained the false accounts of the assault (11/6/02 Tr. 69). In addition, immediately after the incident, Fuller ordered Butler to punch himself in the face to bolster a false charge that Duran had assaulted Butler (Tr. 129-130). Fuller also ordered all the officers who observed the incident to go to the conference room and wait for him to write their reports and then when he appeared directed them to provide false accounts of the attack that

justified the use of force and did not mention him (Tr. 133, 139, 420-422, 610, 771-772, 1073-1074). Defendant's own witnesses also corroborated his leadership role (Tr. 836, 838-841, 860). Both Officers Hernandez and Cagle, who were present during the assault and in the conference room when defendants and others filled out paperwork, testified that Fuller directed them to put false statements in their report, including that Fuller was not in the hallway and that Duran initiated the fight (Tr. 836, 838-841, 860).

Given this overwhelming evidence that Fuller initiated and directed the efforts to cover-up the assault, jurors would likely have found that he was the leader of the conspiracy had they been asked to do so. Consequently, Fuller has failed to show that imposition of the enhancement for his aggravating role in the offense affected the outcome of the district court proceedings or seriously undermined the fairness, integrity, or public reputation of judicial proceedings.

c. If the Court concludes that *Blakely* applies to the Federal Sentencing Guidelines and that defendants' sentences 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 fact-finding 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); Sentencing Guidelines § 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 defendants' Sixth Amendment challenge to their sentences because they waived it by failing to raise it in their opening briefs. If the Court considers the issue, it should hold that *Blakely* does not invalidate the Federal Sentencing Guidelines and that even if it did, defendants' sentences 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 defendants 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 COMPLIANCE WITH

FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

As required by Federal Rule of Appellate Procedure 32(a)(7)(B), I, Lisa J. Stark, counsel for appellee/cross-appellant United States, certify that this brief is proportionally spaced Times New Roman, 14 point font, and is less than 20 pages as per order of this Court.

I certify that the information on this form is true and correct to the best of my

knowledge and belief formed after a reasonable inquiry.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2004, two copies of the SUPPLEMENTAL BRIEF FOR THE UNITED STATES REGARDING *BLAKELY* were served by Federal Express, overnight delivery, to the following counsel of record:

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