UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

IN THE MATTER OF	)	
MOTION BY THE UNITED STATES	)	GENERAL NO. _____
TO STAY ALL SCHEDULED	)	
SENTENCING HEARINGS	)	

Motion by the United States for en banc Determination by the District Court to Stay All Scheduled Sentencing Hearings Pending Resolution By the United States Supreme Court on the Application of *Blakely* to the Sentencing Guidelines

The United States applies to the Chief Judge of this District and respectfully requests pursuant to 28 U.S.C. 132(c) and 137 that the United States District Court for the Northern District of Indiana meet en banc and enter an order staying all sentencing hearings pending a determination by the United States Supreme Court as to the applicability of the Court's recent decision in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), to the Sentencing Guidelines.

Respectfully submitted,

_____
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

IN THE MATTER OF	)	
MOTION BY THE UNITED STATES	)	GENERAL NO. _____
TO STAY ALL SCHEDULED	)	
SENTENCING HEARINGS	)	

Memorandum in Support of
Motion by the United States for en banc Determination by the District Court to Stay All Scheduled Sentencing Hearings Pending Resolution By the United States Supreme Court on the Application of *Blakely* to the Sentencing Guidelines

The decision in *Blakely* was handed down on June 24, 2004. While the five justice majority stated that the federal Guidelines were not before them[1], a vigorous dissent noted the obvious application to the federal Guidelines thereby casting "constitutional doubt" over all Guideline sentencings.[2] The dissenters concerns were quickly realized. Since *Blakely*, there is already a major conflict among the Circuit Courts of Appeal as to the applicability of *Blakely* to the Guidelines, there are other variations among the Courts of Appeals as to how to proceed and, in the district courts, there are any number of sentencing methodologies being fashioned.[3]

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[1] 124 S. Ct. 2531 at 2538 n.9.

[2] Justice O'Connor dissenting, 124 S. Ct. 2531 at 2548-49.

[3] *See, e.g., United States v. Booker*, 2004 WL 1535858 (7th Cir. July 9, 2004) (amended July 13, 2004) (applying *Blakely* to U.S. Sentencing Guidelines but not deciding issues including forfeiture/waiver, whether the Guidelines are severable, and whether sentencing juries are appropriate); *United States v. Pineiro*, 2004 WL 1543170 (5th Cir. July 12, 2004) (holding *Blakely* does not apply to federal sentencing guidelines, which are constitutional); *United States v. Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004) (en banc) (stating that it could not be certain whether *Blakely* applied to the U.S. Sentencing Guidelines and certifying questions in this regard to the Supreme Court for immediate consideration to prevent chaos in federal sentencings across the country); *United States v. Montgomery*, 2004 WL 1562904 (July 14, 2003) (case dismissed July 23, 2004) (holding, prior to both parties dismissing the appeal and

Federal sentencing has reached a crisis. To borrow Judge Easterbrook's word from his *Booker* dissent, the entire federal criminal process is "discombobulated."[4] As further evidence of the magnitude of the crisis, in *United States v. Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004), the Second Circuit certified the question of *Blakely*'s applicability to the U.S. Sentencing Guidelines to the U.S. Supreme Court instead of itself tackling the question, explaining that "this is one of those 'rare instances' when 'the proper administration and expedition of judicial business' warrants certification of a question to the Supreme Court." In so doing, the Second Circuit honestly stated that it could not be certain whether *Blakely* extended to the Guidelines or not, *id.* at *4, and astutely noted that *Blakely* raises the prospect that many thousands of future sentences handed down in the coming months may be invalidated by courts coming to the wrong conclusion about the implications of Blakely on federal sentencing. *Id.* at *6 ("Whichever conclusion turns out to be incorrect, and one of them will, thousands of cases soon will be adversely affected.. . . The result will be that thousands of defendants, sentenced in accordance with the incorrect conclusion, will have to be returned to court for resentencing.")

The Congress quickly noted the severity of the problem and, late last week, passed a resolution requesting the Supreme Court to "act expeditiously to resolve the confusion and

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precluding a rehearing, that post-*Blakely* the federal sentencing guidelines are "simply recommendations that the judge should seriously consider but may disregard"); *United States v. Mooney*, 2004 WL 1636960 (8th Cir. July 23, 2004) (remanding to the district court for supplemental briefing and resolution of *Blakely* issues to develop the record for final resolution on appeal, with two of the three judges writing separately to state that the federal sentencing guidelines are wholly unconstitutional and granting the sentencing court the exercise of discretion within the statutory maxima and minima, using the Guidelines as advisory but not necessarily binding); *United States v. Amenline*, 2004 WL 1635808 (9th Cir., July 21, 2004) (*sua sponte* applying *Blakely* to the federal sentencing guidelines, and remanding with instructions to convene a sentencing jury if the government wishes to pursue the imposition of the enhanced sentence).

[4] Judge Easterbrook dissenting, 2004 WL 1535858 at *11.

inconsistency in the Federal criminal justice system caused by [the decision in Blakely]."

In an effort to address the growing disarray, the United States Department of Justice on July 21, 2004, filed two certiorari petitions before the Court. One petition is in *Booke*r, the Seventh Circuit's 2-1 panel decision applying Blakely to the Guidelines. The Seventh Circuit did not, however, address the issue of severability or direct the precise methodology a district judge should employ in post-Booker sentencings. The other is in *United States v. Fanfan*, a First Circuit case. There the district court in Maine applied *Blakely* to the Guidelines but also found that portions of the Guidelines were severable and, therefore, imposed a modified Guideline sentence. Attached hereto are the certiorari petitions in *Booker* and *Fanfan*.

The Department of Justice also filed a Motion to Expedite both petitions. In the Motion to Expedite, the Department proposed an accelerated schedule whereby the Court would announce its decision on whether to accept certiorari by August 2. If certiorari is granted, the Motion further proposes an accelerated briefing and argument schedule in September, with argument to be heard on September 13. Attached hereto is the Motion to Expedite.

There are any number of sentencings currently pending in the Northern District of Indiana. The government respectfully requests that all such sentencings be stayed pending the apparent expedited resolution by the Court.

The government notes that in the Motion to Expedite before the Supreme Court, reference is made to the fact that the District Court for the Southern District of Ohio has apparently entered a 30 day stay on all sentencings in cases that could be affected by Blakely. A similar order could be fashioned in this district, i.e. an initial 30 day stay to be then reviewed to assess developments in the Supreme Court.

The government acknowledges that a request for an en banc order is rare and may indeed be the first such request in this district. Other districts have employed an en banc procedure to address issues of fundamental importance and commonality in cases pending before its district judges.

In *United States v. Anaya*, 509 F. Supp. 289 (S.D. Fla. 1980), the court utilized an en banc procedure to address a plethora of motions pending before all of its judges involving numerous issues surrounding the "Cuban Refugee Freedom Flotilla" which resulted in over 100,000 Cuban nationals entering the United States. That Court held that pursuant to 28 U.S.C. 132(c) and 137, it had the authority to meet en banc and enter a standard order covering 84 different indictments then pending. The Southern District of Florida noted several important policies served by this approach:

> 1) it establishes uniformity of treatment for all similarly situated defendants,
>
> 2) it avoids or at least limits unnecessary duplication of efforts thereby conserving scarce judicial, governmental and private resources. *Id*. at 293.

The Eleventh Circuit affirmed in *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982), and commended the district court for the manner in which it handled these cases. The court noted that the identity of facts and common nuclear issue lent itself to such an en banc procedure. By utilizing such a procedure, the district court insured uniformity and intra court comity. *Id.* at 1275-76.

The government does not, of course, suggest that the facts in any of the pending sentencings in this district are the same. However, whatever the facts are in a particular sentencing, the import of those facts for Guidelines applications is identical, i.e. if two defendants have relevant conduct in a drug case, the Guideline application is identical although

the number of offense levels may be different.

The legal issues present in all pending sentences are identical. There is first the fundamental question of whether the decision in *Blakely* applies to the Guidelines. *Booker*, of course, held that it does and that is now controlling precedent in this district. Other circuits (discussed below) have reached different results. Both the majority in *Booker* ("We cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution") and the dissent ("I trust that our superiors will have something to say about this. Soon.") recognize the urgency for the the Supreme Court to act and the acknowledge that the Court might reach a different result. *Booker*, of course, is one of the two cases for which expedited certiorari is being sought.

The second fundamental issue is that if *Blakely* applies to the Guidelines, how should sentencings be conducted? As noted, Booker did not address the severability argument and also gave little guidance as to how sentencings should proceed. To underscore the current uncertainty in federal sentencing, the *Booker* majority suggested imposition of a "fall-back" sentence.[5]

As noted in the attachment, a number of possibilities have emerged. Some have suggested sentencing juries. That raises any number of uncertainties such as the fundamental authority for even impaneling a sentencing jury, what rules apply (do the FRE, for example apply), etc.

Others have suggested a complete abandonment of the Guidelines and a return to indeterminate sentencing.

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[5] Certainly a prudent suggestion. Nevertheless, the ultimate resolution of this issue may be some sort of hybrid whereby neither sentence would stand.

Still others have fashioned a modified Guideline approach where factors not found by a jury are disregarded, but factors found (or admitted) are utilized and a Guideline sentence is imposed on those factors only. This was essentially the approach taken by the district judge in Maine in the *Fanfan* case, the second case in which expedited certiorari is being sought.

The government also believes that there are questions of forfeiture and waiver in some of the sentencings pending in this district. A stay will not extinguish those issues and there may be a clearer answer to these issues once the Court makes its decision.

The government respectfully suggests that all participants in the criminal justice process and the important interests of the public in some finality to that process will be well served by staying all sentencings until this issue is resolved[6]. *Cf. Penaranda*, 2004 WL 1551369, at *6 ("We are convinced that a prompt and authoritative answer to our inquiry is needed to avoid a major disruption in the administration of criminal justice in the federal courts-- disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements.") There is just too much uncertainty to proceed at this time. Proceeding to sentencing may result in different judges reaching different decisions, thereby treating defendants differently. The Supreme Court's decision might require any number of sentencings to be redone, thereby straining judicial, governmental and defense resources. Everyone will be well served by waiting until we have clear guidance from the Supreme Court. At that time sentencings can proceed with certainty and finality.

One final, and very important, note concerns the question of notice should the court be

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[6] The government recognizes that if the Supreme Court does not act reasonably soon, cases will have to proceed. It appears however that the Court may act very soon and that possibly by this fall there will be clear guidance. This court could fashion an order, for example, staying sentencings for a fixed period to be re-evaluated at the end of that period for any developments.

inclined to proceed in this fashion. Pursuant to 28 U.S.C. section 141, the court may hold a special session "upon such notice as the court orders." The government represents that it has served a copy of this Motion on Jerome Flynn, Community Defender for this District. Mr. Flynn's office represents a large number of the defendants currently awaiting sentencing. The government will work with the Clerk of this Court to ascertain all pending matters that might be impacted and endeavor to provide electronic notice to all. The government will also, of course, take any additional actions this court directs.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF PETITIONS FOR CERTIORARI
AND TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING
AND ARGUMENT IF CERTIORARI IS GRANTED

In petitions for certiorari filed today, the Acting Solicitor General, on behalf of the United States of America, requests this Court to grant review of the judgment of the United States Court of

Appeals for the Seventh Circuit in United States v. Booker and to grant certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the First Circuit in United States v. Fanfan. Because of the singular importance of the questions presented for review in these cases and the urgent need for their prompt resolution, petitioner moves for expedited consideration of the petitions and, if the petitions are granted, for establishment of an expedited briefing schedule so that oral argument could be heard in September or October of this year.

1. On June 24, 2004, this Court held in Blakely v. Washington, 124 S. Ct. 2531 (2004), that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise permitted. The Court expressly noted that "[t]he Federal [Sentencing] Guidelines are not before us, and we express no opinion on them." Id. at 2538 n.9. The Court's decision in Blakely, however, has "cast a long shadow over the federal sentencing guidelines," Booker Pet. App. 2a, and called into question the constitutionality of the procedures by which federal courts, under the Sentencing Guidelines, find the facts necessary to determine a sentencing range for each defendant. In the 27 days since Blakely was decided, the federal sentencing system has fallen into a state of deep uncertainty and disarray about the constitutional validity of the federal Sentencing Guidelines system and what sentencing procedures should govern if

Blakely invalidates that system in whole or in part.

2. As discussed in the government's petitions filed today, in United States v. Booker, the Seventh Circuit concluded that Blakely applies to the Guidelines and remanded to the district court to determine the procedure to be followed for resentencing. Booker Pet. App. 1a-13a. The Fifth Circuit, by contrast, "h[e]ld that Blakely does not extend to the federal Guidelines." United States v. Pineiro, 2004 WL 1543170, *1 (5th Cir. July 12, 2004), petition for cert. pending, No. 04-5263 (filed July 14, 2004). In addition, in an opinion filed just hours ago today, a divided panel of the Ninth Circuit ruled that Blakely applies to the Guidelines. United States v. Ameline, No. 02-30326 (9th Cir. July 21, 2004). The majority went on to reverse the Guidelines sentence in that case, but held that Blakely does not render the Guidelines facially unconstitutional and that the district court may, on remand, convene a sentencing jury to try the issues that increased the Guidelines sentence. Slip. op. 3, 34. One judge dissented, agreeing with the conclusion of the Fifth Circuit in Pineiro and Judge Easterbrook's dissenting opinion in Booker. Id. at 39 (Gould, J., dissenting). Two courts of appeals, the Fourth and the Sixth, have granted en banc review to examine the applicability of Blakely to the Guidelines. See Booker Pet. 14 n.6. The federal district courts, too, have taken widely varying approaches both in addressing the constitutionality of the federal Sentencing Guidelines system and in determining what alternative to implement if they conclude the current system is invalid. See United States

v. Penaranda, 2004 WL 1551369, *7 (2d Cir. July 12, 2004) (outlining five approaches courts have taken to implement Blakely), certification docketed, No. 04-59 (July 13, 2004); Blakely v. Washington and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm., 106th Cong. *7-*16 (July 13, 2004) (statement of Hon. Paul Cassell, Judge, United States District Court for the District of Utah) (district-by-district review of district court efforts to address Blakely decision) (available at http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669) (Cassell Testimony).

The uncertainty among the courts is highlighted by the en banc Second Circuit's invocation of the rarely used certification process of 28 U.S.C. 1254(2) to seek guidance from this Court on the question whether Blakely applies to the Guidelines. See United States v. Penaranda, supra.

3. Expedited consideration is warranted to avoid "an impending crisis in the administration of criminal justice in the federal courts." Penaranda, 2004 WL 1551369, *8. Courts have adopted a variety of mutually inconsistent approaches to implementing Blakely, ranging from invalidating the Guidelines sentencing system and counseling the use of the Sentencing Guidelines Manual as a purely advisory document, to reconvening juries to determine relevant guidelines-enhancement facts. Uncertainty about how to proceed with federal sentencing is straining the resources of federal courts, prosecutors, and defense

counsel. It is also subjecting "defendants, victims, and the public * * * [to] uncertain[ty] as to what sentences are lawful." Penaranda, 2004 WL 1551369, *7. Judges in several districts report that in the face of uncertainty about whether and how to implement Blakely, change-of-plea and sentencing proceedings "have almost come to a halt." Cassell Testimony at *9 (reporting on District of Kansas); see also id. at *13 (reporting on Western District of Oklahoma and District of Rhode Island). The United States District Court for the Southern District of Ohio has declared a 30-day moratorium on sentencing in cases that could be affected by Blakely, and court officials report that at least 100 cases have been put on hold. "Federal Appeals Court Weighs In On Guidelines," Ohio News Network, available at http://www.onnnews.com/Global/story.asp?S=2041464 (visited July 19, 2004). A district judge in the Southern District of West Virginia has concluded that, in light of Blakely and the "paramount importance" of "consistent application of the law * * * in sentencing matters," the court will "move all sentencing hearings to a date after October 15, 2004." United States v. Thompson, Cr. No. 2:03-00187-02, slip op. 2 (S.D. W.Va. July 14, 2004). Other district courts report that they "do not have the luxury of delaying sentencings" because of jail overcrowding and cost issues. Cassell Testimony at *13-*14 (reporting comments of Judge Cameron Currie, United States District Court for the District of South Carolina).

The number of cases potentially affected is staggering. There are approximately 64,000 federal criminal defendants sentenced

under the Guidelines each year. See United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, at Table 2. That means an average of approximately 1,200 federal sentencings occur each week. Given the current disarray, a very large percentage of those cases may result in unlawful sentences. The number of federal cases affected by the questions presented in these cases will increase daily until this Court resolves those questions. "Whichever conclusion turns out to be incorrect, and one of them will, thousands of cases soon will be adversely affected. The result will be that thousands of defendants, sentenced in accordance with the incorrect conclusion, will have to be returned to court for resentencing." Penaranda, 2004 WL 1551369, *6; cf. Booker Pet. App. 2a (noting that district courts "are faced with an avalanche of motions for resentencing in light of Blakely"). Thus, as the en banc Second Circuit concluded, "a prompt and authoritative answer [to Blakely's applicability to the Guidelines] is needed to avoid a major disruption in the administration of criminal justice in the federal courts -- disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements." Penaranda, 2004 WL 1551369, at *6.

4. The government has sought certiorari in two cases as companion vehicles for this Court's consideration of the implications of Blakely for federal sentencing. The government has suggested that the Court grant the petitions in both cases in order to assure that the Court has an appropriate vehicle in which to

reach and resolve the vitally important issues presented. Simultaneous grants of review in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues.

If the Court does grant review in both cases, the government suggests that one hour of oral argument time be allotted for each case, with the parties being directed in the first hour to address principally whether Blakely applies to the Guidelines, and in the second hour to address principally the consequences of any holding that it does.

5. In light of the urgent need for this Court's resolution of the questions presented and the thousands -- or tens of thousands -- of criminal sentencings that will be thrown into doubt until such resolution is achieved, the government moves that the Court adopt a briefing schedule that would require respondents to file responses to the government's petitions by July 28, 2004, so that the Court could announce its decision whether to grant the petitions on August 2, 2004. For purposes of this motion, the government waives the 10-day period provided for in this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition and other materials to the Court.

a. If certiorari is granted, the government suggests that the Court adopt the following schedule for resolution of these cases: (1) petitioner's consolidated opening merits brief to be filed on August 16, 2004; (2) respondents' merits briefs to be filed on August 30, 2004; (3) petitioner's reply brief to be filed on

September 8, 2004; (4) oral argument to be heard on September 13, 2004. Compare, e.g., Raines v. Byrd, 520 U.S. 1194 (1997) (establishing comparable expedited briefing schedule); United States v. Eichman, 494 U.S. 1063 (1990) (same). That schedule would permit the Court to achieve the earliest possible resolution of the questions presented and to return a degree of stability to the federal sentencing system at the earliest possible date. Even several weeks of delay to the beginning of the Court's October 2004 Term would result in additional hardship for the lower courts and parties who are dealing with considerable uncertainty in the wake of the Blakely decision. Delay will also increase the backlog of unsentenced defendants or the number of defendants sentenced under what may turn out to be erroneous procedures, a number that is mounting daily.

b. As an alternative, if the Court determines not to hear oral argument in September, the government proposes the following expedited schedule to allow oral argument at the beginning of the October 2004 Term: (1) petitioner's consolidated opening merits brief to be filed on September 1, 2004; (2) respondents' merits briefs to be filed on September 21, 2004; (3) petitioner's reply brief to be filed on September 27, 2004; (4) oral argument to be heard on October 4, 2004.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JULY 2004

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

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FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is not yet reported in the *Federal Reporter*, but is *available in* 2004 WL 1535858.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 31a-64a.

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, respondent was convicted of possessing at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 841(b)(1)(A)(iii), and distributing cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. A divided court of appeals reversed and remanded for resentencing. App., *infra*, 1a-27a.

1. The underlying facts

On February 26, 2003, respondent sold a quantity of crack cocaine to a customer at the residence of a third party. Before the customer could leave, police officers responding to a criminal trespass complaint arrived and knocked on the door. The officers observed that the customer attempted to swallow what turned out to be crack cocaine. Respondent was apprehended outside the house and detained. Ultimately, the officers found a duffle bag that respondent admitted was his. The bag contained approximately $400, drug paraphernalia, and 92.5 grams of crack cocaine. Respondent gave a written statement to the police in which he admitted selling an additional 20 ounces (566 grams) of crack cocaine. Gov't C.A. Br. 7-10, 11-12; Presentence Report (PSR) 3-4.

2. The district court proceedings

On March 12, 2003, respondent was charged in a two-count indictment in the Western District of Wisconsin with possessing more than 50 grams of cocaine base with intent to distribute it and with distributing cocaine base, both in violation of 21 U.S.C. 841(a)(1). The jury found respondent guilty on both counts. The Presentence Report initially recommended that respondent be held responsible for possession of the 92.5 grams of crack cocaine that was found

in his duffle bag. PSR 6. That would have resulted in an offense level of 32 under the United States Sentencing Guidelines. See Sentencing Guidelines § 2D1.1(c)(4). In an addendum, the PSR adopted the government's position that respondent's relevant conduct under the Guidelines, see Sentencing Guidelines § 1B1.3, should also include the 20 additional ounces of crack cocaine that respondent had admitted selling. Gov't C.A. Br. 11-12.

At sentencing, the court held respondent responsible for the 20 additional ounces of crack cocaine. Sent. Tr. 7-8. That resulted in a total of 658.5 grams of crack cocaine, and an offense level of 36 under Sentencing Guidelines § 2D1.1(c)(2). See Sent. Tr. 7. The court added two additional levels for obstruction of justice under Sentencing Guidelines § 3C1.1, based on the court's finding that respondent had perjured himself at trial when he "knowingly denied any of the elements of the offense," in contradiction of the written statement he had made to the police on the day of his arrest. Sent. Tr. 9-10. Based on his extensive prior record, which included 23 prior convictions, respondent was placed in criminal history category VI. *Id.* at 9; PSR 6-16. His sentencing range was 360 months to life imprisonment. The court imposed a sentence of 360 months of imprisonment. Sent. Tr. 11.

3. The court of appeals' decision

a. On appeal, respondent initially argued that he was entitled to a new trial because the district court had erroneously limited his cross-examination of a government witness and that he was entitled to a new sentencing hearing because his sentence was based on his purportedly unreliable written statement made to police officers on the day of his arrest. Resp. C.A. Br. 13-27.

On June 24, 2004, this Court issued its decision in *Blakely* v. *Washington*, 124 S. Ct. 2531. Six days later, on respondent's motion for supplemental briefing, the court of appeals

ordered both parties to file briefs by July 2 addressing the applicability of *Blakely* to this case. Respondent argued that the the Sixth Amendment entitled him to be sentenced within the Guidelines range for defendants responsible for 92.5 grams of crack cocaine (rather than the 658.5 grams found by the judge) and that he was entitled to be sentenced without the two-level enhancement for obstruction of justice. The government argued that *Blakely* is inapplicable to the Guidelines. The court heard oral argument on July 6.[1]

b. On July 9, 2004, a divided panel of the court of appeals affirmed respondent's conviction, reversed his sentence, and remanded for further proceedings. The court "expedited [its] decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of" *Blakely*—which, the court stated, had "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a.

The court began by reciting this Court's holding in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), 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." App., *infra*, 3a. The court continued that in *Blakely*, this Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

[1] At oral argument, the government urged that, if a court finds that sentencing under the Guidelines must comport with *Blakely* and that there are enhancements under the Guidelines that are not established by the jury verdict or admitted by the defendant, the Guidelines as a whole cannot be applied and the court should impose a sentence, as a matter of its discretion, within the minimum and maximum statutory terms, giving due regard to Guidelines. An audio recording of the argument is available at <http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225>. The government's unofficial transcript of the relevant excerpts of the argument, made from the recording, is reproduced at App., *infra*, 28a-30a.

reflected in the jury verdict or admitted by the defendant." *Ibid.* (quoting *Blakely*, 124 S. Ct. at 2537). Under those holdings, the court concluded, "[t]he maximum sentence that the district judge could have imposed in this case (without an upward departure), had he not made any findings concerning quantity of drugs or obstruction of justice, would have been 262 months, given [respondent's] base offense level of 32 * * * and the defendant's criminal history" under the Guidelines. App., *infra*, 3a-4a. The court thus determined that, absent the defendant's consent, *Blakely* precluded the judge from making additional factual findings that would increase respondent's Guidelines sentence. *Id.* at 9a.

The court rejected a distinction between the federal guidelines at issue here and the state statutory guidelines at issue in *Blakely* based on "the fact that the [federal] guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature." App., *infra*, 4a. "The Commission is exercising power delegated to it by Congress," the court reasoned, "and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." *Ibid.* The court also rejected the contention that this Court's prior decisions in *Edwards* v. *United States*, 523 U.S. 511 (1998), and *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), established the constitutionality of judicial factfinding that supports sentence enhancements under the Guidelines. App., *infra*, 9a-11a.

The court concluded that "the guidelines, though only in cases such as the present one in which they limit defendants' right to a jury and to the reasonable-doubt standard * * * violate the Sixth Amendment as interpreted by *Blakely*." App., *infra*, 8a-9a. Accordingly, the court held, respondent "has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice." *Id.* at 11a.

The court then remanded the case to the district court for resentencing. It noted that, if the government sought a higher Guidelines sentence than 262 months of imprisonment, the district court would have to determine whether the "the aspect of the guidelines that [the court] believe[s] to be unconstitutional, namely the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. If that were the case, then "the guidelines would be invalid in their entirety" and the district judge would be "free as he was before the guidelines were promulgated to fix any sentence within the statutory range." *Id.* at 13a. Stating that the severability issue had "not been briefed or argued," however, the court declined to address it. *Ibid.* The court also declined to resolve procedural issues that might surround any effort to conduct a jury trial on the enhancement factors if the Guidelines were found to be severable. *Id.* at 12a.

The court of appeals thus held that "[t]he application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*." App., *infra*, 13a. But the court noted that it could not be "certain" that its holding was correct. *Id.* at 9a. "If our decision is wrong," the court concluded, "may the Supreme Court speedily reverse it." *Ibid.*[2]

c. Judge Easterbrook dissented. He disagreed with the majority "on both procedural and substantive grounds." App., *infra*, 14a. As a matter of procedure, he concluded that the court of appeals had no authority to hold the

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[2] In an amendment to its order filed on July 13, 2004, the court added that "[b]ecause the government does not argue that [respondent's] Sixth Amendment challenge to the guidelines was forfeited by not being made in the district court, we need not consider the application of the doctrine of plain error." App., *infra*, 26a-27a.

Guidelines unconstitutional because any such holding would be inconsistent with this Court's cases, including *Edwards*, *supra*, which "held that a judge * * * may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum." *Id.* at 15a.

Substantively, Judge Easterbrook noted that this Court had repeatedly described the *Apprendi* rule as triggering Sixth Amendment protections for facts that increase the "*statutory* maximum." See App., *infra*, 18a (emphasis added) (citing *Apprendi*, 530 U.S. at 490; *Blakely*, 124 S. Ct. at 2537). In this case, he noted, Congress established the statutory maximum penalties for drug offenses in 21 U.S.C. 841(b). App., *infra*, 18a. The Guidelines, he reasoned, do not reduce that statutory authorization, but instead affect sentencing only after the degree of the offense has been established by the jury. *Id.* at 22a.

Judge Easterbrook also noted that, "[g]iven the matrix-like nature of the [Sentencing Guidelines] system and the possibility of departure," App., *infra*, 23a, "[e]ven if *Blakely*'s definition reaches regulations adopted by a body such as the Sentencing Commission, it requires an extra step (or three) to say that the jury must make the dozens of findings that matter to the Guidelines' operation in each case." *Id.* at 24a. Judge Easterbrook did not believe that *Blakely* had taken that step. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise per-

mitted. *Id.* at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a. In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for fifteen years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The result has been a wave of instability in the federal sentencing system that has left the government, defendants, and the courts without clear guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month. The sheer volume of federal sentencings has resulted in virtually unprecedented uncertainty. The courts facing the problem have developed a range of mutually inconsistent approaches to federal sentencing. Those conflicting approaches could lead to the need for thousands—or even tens of thousands—of resentencing proceedings once the legal issues are settled. It could also lead to debilitating uncertainty about the proper length of federal sentences, which could cripple other aspects of the system, including plea bargaining practice. Ultimately, the uncertainty could hinder achievement of the crucial social goals at stake in the criminal justice system. The courts of appeals have already fallen into conflict over the implications of *Blakely* and one court of appeals has taken the extraordinary step of certifying questions to this Court in an effort to obtain authoritative guidance on the meaning of *Blakely* for federal sentencing. Further review is warranted on an expedited basis to help restore a stable footing to the federal system of criminal justice.

A. *Blakely* Has Unsettled Understandings About The Inapplicability Of *Apprendi* To The Sentencing Guidelines

In *Blakely*, the defendant was convicted in state court on his guilty plea to second-degree kidnapping, in which he admitted the use of a firearm. One Washington statute authorized a maximum term of ten years of imprisonment for the kidnapping offense. The state's statutory sentencing guidelines system, however, established a range of 49-53 months of imprisonment for his offense of second-degree kidnapping with a firearm, absent a judicial finding, by the preponderance of the evidence, of a "substantial and compelling reason[] justifying an exceptional sentence." 124 S. Ct. at 2535. The sentencing court found that Blakely's offense involved "deliberate cruelty" that justified an exceptional sentence and on that basis imposed a 90-month sentence. Interpreting the rule that it had first announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) ("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."), and then applied in *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002), the Court held in *Blakely* that, because "[t]he facts supporting that finding [of deliberate cruelty] were neither admitted by [the defendant] nor found by a jury," 124 S. Ct. at 2537, the "State's sentencing procedure did not comply with the Sixth Amendment," *id.* at 2538. The Court stated that "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.*" *Id.* at 2537. See *ibid.* ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

The Court in *Blakely* did not reach the question whether *Blakely* applies to the federal Sentencing Guidelines. 124 S. Ct. at 2538 n.9. But the dissenting opinions stated that the majority's reasoning placed the Guidelines in jeopardy. *Id.* at 2549-2550 (O'Connor, J., dissenting); *id.* at 2561 (Breyer, J., dissenting). *Blakely* has indeed had the effect of raising questions about the Guidelines' validity that had previously been regarded as settled.

After this Court's decision four years ago in *Apprendi*, defendants frequently argued that the Sixth Amendment is violated when the judge makes a factual finding under the Sentencing Guidelines that increases the defendant's sentencing range and that results in a more severe sentence than would have been justified based solely on the facts found by the jury. Before *Blakely*, every court of appeals with criminal jurisdiction rejected that argument.[3] The uniform course of appellate decisions reasoned that "the holding in *Apprendi* applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001). Because the Sentencing Guidelines cap the defendant's sentence at the maximum provided by statute for the offense of conviction,

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[3] See, *e.g.*, *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004); *United States* v. *Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004); *United States* v. *Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States* v. *Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), cert. denied, 537 U.S. 936 (2002); *United States* v. *Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004); *United States* v. *Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States* v. *Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004); *United States* v. *Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003); *United States* v. *Ochoa*, 311 F.3d 1133, 1134-1136 (9th Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), cert. denied, 537 U.S. 1063 (2002); *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003); *United States* v. *Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003).

see Sentencing Guidelines § 5G1.1(a); 28 U.S.C. 994(b)(1) (Guidelines sentencing range must be "consistent with all pertinent provisions of title 18"), the Guidelines never lead to the imposition of a sentence on a particular count that exceeds the statutory maximum. For that reason, the courts of appeals uniformly held that judicial factfinding in the application of the Guidelines at sentencing is constitutional under *Apprendi*. This Court's decision in *Blakely* shattered that consensus.

B. The Courts Of Appeals Are In Conflict Over The Applicability Of *Blakely* To Federal Guidelines Sentencing

In the 27 days since *Blakely*, the federal courts have been thrown into conflict on the continuing validity of the current federal sentencing regime. One court of appeals has held that the current regime is unconstitutional in a wide range of cases. A second court of appeals has upheld the validity of the Guidelines consistent with this Court's prior precedent and suggested that any implications of *Blakely* for the Guidelines must be drawn by this Court, rather than the lower federal courts. A third court of appeals, sitting en banc, has taken the extraordinary step of certifying questions to this Court, urging it to grant expedited review to settle the applicability of *Blakely* to judicial factfinding that results in upward adjustments under the Sentencing Guidelines. Two other courts of appeals have already granted en banc consideration of the issue.

1. In this case, the Seventh Circuit determined that respondent's increased Guidelines sentence, based on the sentencing court's finding of facts as required under the Guidelines, denied respondent his right to a jury trial under *Blakely*, and that, therefore, "[t]he application of the guidelines in this case violated the Sixth Amendment." App., *infra*, 13a. The court of appeals reserved judgment on the impact of *Blakely* on cases in which no additional fact finding

beyond the jury verdict is necessary to apply the Guidelines. *Id.* at 9a, 13a. But the court's holding still applies to a large number of federal criminal cases, in which the defendant's sentence under the Guidelines is increased by the sentencing court's factual findings (other than a prior conviction), and the defendant has not consented to factfinding by the judge.[4]

2. In contrast, the Fifth Circuit reached the opposite conclusion in *United States* v. *Pineiro*, 2004 WL 1543170 (July 12, 2004). In that case, the sentencing court made certain factual findings about drug quantity and the defendant's role in the offense that resulted in a much higher sentencing range under the Guidelines than would have been applicable based on the facts found by the jury alone. The Fifth Circuit affirmed the sentence, concluding that "[h]aving considered the *Blakely* decision, prior Supreme Court cases, and our own circuit precedent, we hold that *Blakely* does not extend to the federal Guidelines and that [the defendant's] sentence did not violate the Constitution." *Id.* at *1. The court stated that it "d[id] not believe that the Sentencing Commission can be thought of as having created

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[4] A number of district courts have reached the same conclusion. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), for example, the court held that "the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this one," *id.* at *6, in which "the Guidelines require an upward enhancement of the defendant's sentencing range without a jury determination," *id.* at *9. See *e.g.*, *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004). District courts in a number of other still-unreported cases have also held that the *Blakely* rule applies to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Leach*, No. 02-172-14 (E.D. Pa. July 13, 2004); *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004), petition for cert. pending (filed July 21, 2004); *United States* v. *Toro*, 2004 WL 1575325 (D. Conn. July 8, 2004); *United States* v. *Montgomery*, 2004 WL 1535646 (D. Utah July 8, 2004); *United States* v. *Watson*, Cr. No. 03-0146 (D.D.C. June 30, 2004).

for each United States Code section a hundred different *Apprendi* 'offenses' corresponding to the myriad possible permutations of Guidelines factors, with each 'offense' then requiring jury findings on all of its (Guidelines-supplied) elements." 2004 WL 1543170, at *9.[5]

3. The disarray in the circuits is highlighted by the en banc Second Circuit's extraordinary order certifying to this Court questions pertaining to whether *Blakely* applies to sentencing under the Guidelines. *United States* v. *Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004). The court of appeals found that it "cannot be certain whether a majority of [this] Court would extend the reasoning of *Blakely*" to the Guidelines. *Id.* at *4. The court observed that, while "[s]ome portions of the majority opinion in *Blakely* indicate that the decision does apply to the federal Sentencing Guidelines[,] * * * the distinct administrative provenance of the federal Sentencing Guidelines may place them outside the ambit of the *Blakely* principle." *Id.* at *5. And "even if *Blakely* applies to some aspects of sentencing under the Guidelines, it is unclear whether judicial fact-finding that determines the applicable Guidelines range is prohibited." *Id.* at *6.

The Second Circuit did not reach its own conclusions in *Penaranda.* Rather, it believed that the degree of uncertainty about the implications of *Blakely* raised such serious difficulties for the administration of criminal justice that this Court should have "an opportunity to adjudicate promptly the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." 2004 WL 1551369, at *7. To that end, the en banc court certified questions to this Court under

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[5] A number of district courts have agreed that *Blakely* does not extend to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Olivera-Hernandez*, No. 2:04CR0013 (D. Utah July 12, 2004); United *States* v. *Lazcano-Flores*, No. 04-45 (S.D. Iowa July 8, 2004); *United States* v. *Childs*, No. 03-2056 (N.D. Iowa July 8, 2004).

28 U.S.C. 1254(2) and urged it to "entertain this certification * * * at [the Court's] earliest convenience, with an expedited briefing and hearing schedule * * * in order to minimize, to the extent possible, what we see as an impending crisis in the administration of criminal justice in the federal courts." *Id.* at *8. The recognition by the Second Circuit that, without a Supreme Court ruling, "defendants, victims, and the public will be left uncertain about what sentences are lawful," 2004 WL 1551369, at *7, underscores the need for prompt intervention by this Court.[6]

C. The Lower Federal Courts Are Acutely In Need Of Guidance On The Proper Sentencing Procedures If *Blakely* Is Found Applicable To The Sentencing Guidelines

The Court should also grant review to settle the question that necessarily arises if this Court were to hold, contrary to the government's position, that the principles of *Blakely* preclude a sentencing court (absent the defendant's consent) from finding facts (other than a prior conviction) that increase a defendant's sentence under the Sentencing Guidelines beyond the level indicated based solely on the jury's findings or the defendant's admissions. That remedial question need not be reached if the Court agrees with the government that the federal system is distinguishable from

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[6] The need for prompt resolution of the questions presented is further highlighted by the fact that two other courts of appeals have already granted en banc review of the application of *Blakely* to the Guidelines. A few days after the decision in this case, a panel of the Sixth Circuit concluded that, in light of *Blakely*, the federal sentencing scheme violates the Sixth Amendment in a broad swath of federal criminal cases. *United States* v. *Montgomery*, 2004 WL 1562904, at *2 (6th Cir. July 14, 2004). The Sixth Circuit then sua sponte granted rehearing en banc on the issue and vacated the panel's decision. See *United States* v. *Montgomery*, No. 03-5256 (6th Cir. July 19, 2004). The Fourth Circuit has also granted en banc consideration of the issue. *United States* v. *Hammoud*, No. 03-4253 (4th Cir. June 30, 2004) (argument scheduled for August 2, 2004).

the state statutory guidelines system at issue in *Blakely*. But if the Court were to disagree, the remedial issues that follow would be of critical importance to restoring order to the federal sentencing system. Indeed, a holding by this Court that *Blakely* applies to the Guidelines, without any guidance on the remedial consequences, would threaten to paralyze federal sentencing or compel an enormous waste of resources as courts struggle with "various attempts to implement *Blakely* [that] ultimately may prove misguided." *Penaranda*, 2004 WL 1551369, at *7.

1. The most important question would be one of severability. 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 question whether the unconstitutional provisions are severable turns on an assessment of whether Congress would have enacted the remaining provisions absent the others. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). When "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)), a statutory scheme is not severable and cannot stand in the face of the unconstitutionality of particular features. Under that analysis, 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.

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 Con-

gress 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, as the court of appeals noted, there could be double jeopardy objections to reconvening a jury to decide facts relevant only to upward adjustments at sentencing. App., *infra*, 12a. 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).

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 the court should therefore sentence the defendant in its discretion within the maximum and minimum provided by statute for the offense of conviction.

In doing so, the court should pay due regard to the relevant Guidelines provisions, as an informed and expert body of knowledge on sentencing issues.

2. Although the court of appeals in this case did not resolve how the district court should proceed on remand, the court recognized that the government's position that the Guidelines are not severable "may be right" and that "the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence * * * may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), Judge Cassell reached that holding, concluding that the Guidelines were not severable. After a careful analysis of the options facing the court, see 2004 WL 1521560, at *10-*13, the court concluded that, in cases where the Guidelines require judicial factfinding on upward adjustments, *id.* at *9, it would sentence the defendant "by making a full examination of the relevant evidence and imposing an appropriate sentence within the statutory range set by Congress," *id.* at *13, while considering the "Guidelines as providing useful instruction on the appropriate sentence," *id.* at *15.[7]

3. In contrast, other courts that have applied *Blakely* to the Guidelines have persisted in applying the Guidelines framework, but have limited the sentencing court to the imposition only of a Guidelines sentence whose maximum term is supported by jury findings or admissions by the defendant. *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004), exemplifies this approach. There, the court found that "the upper bound of the appro-

[7] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Einstman*, 2004 WL 1576622 (S.D.N.Y. July 14, 2004) (pre-sentencing memorandum and order); *United States* v. *Lamoreaux*, 2004 WL 1557283 (W.D. Mo. July 7, 2004).

priate [Guidelines] sentencing range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statutory maximum for *Apprendi* purposes." 2004 WL 1468561, at *8. The court conceded that that approach leads to "an artificial application of the Guidelines" because "in drug cases, the amounts of offense conduct and relevant conduct are integral to the determination of sentencing range." *Ibid.* The court nonetheless believed that it was bound to apply the Guidelines in that manner, and therefore reduced the defendant's sentence from imprisonment for 20 years to imprisonment for twelve months. *Id.* at *9.[8]

Under many Guidelines provisions, conviction of an offense, standing alone, triggers a low base offense level, with higher sentences keyed to a judge's findings that the offense involved aggravating factors. Under the fraud Guideline, for example, the base offense level is six or seven, corresponding to a sentence of 0-6 months of imprisonment, for conviction of a fraud offense, but the level can be increased up to 30 levels for the amount of the loss and other aggravating factors. Sentencing Guidelines § 2B1.1. At least in pending cases, in which the jury will not have found the aggravating facts, a conclusion that the Guidelines are severable could produce absurdly low sentences for very serious criminal conduct. See *United States* v. *Einstman*, 2004 WL 1576622, at *6 (S.D.N.Y. July 14, 2004) ("[I]t seems evident * * * that Congress would never have countenanced a Guidelines system in which all first-time offenders

[8] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Fanfan*, *supra* (reducing sentencing range from 188-235 months to 63-78 months of imprisonment); *Leach*, *supra* (reducing sentencing range from 360 months to life imprisonment to 210-262 months of imprisonment); *Watson*, *supra* (reducing sentence from 72 months to 16 months of imprisonment and immediately releasing the defendant); *Toro*, *supra* (reducing sentence from 24 months to 6 months of imprisonment).

who pled guilty to the elements of wire, mail or bank fraud, and nothing more, were limited to a sentence of 0-6 months * * * without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy. Such sentences make a mockery of the real (not 'relevant') statutory maxima that have been set by the Legislative Branch, and effectively eviscerate Congress's expressed intention that * * * a schemer who defrauds his employer be eligible for as much as five years in prison.").

4. Still other alternatives are possible. The court of appeals in this case observed that one potential approach would be to convene "a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." App., *infra*, 11a. The court noted, however, that doing so would raise questions in any case, such as the present one, in which the necessary facts have not been alleged in the indictment. *Id.* at 12a. See also *Penaranda*, 2004 WL 1551369, at *7 (noting possibility of "recalling the jury that convicted the defendant to determine whether the facts warranting an enhancement under the Guidelines have been proven"). No sentencing court can be confident that any particular approach it selects will survive review under the rule ultimately laid down by this Court.

D. The Questions Presented Are Of Enormous Importance

The questions presented in this case are of great public importance and warrant immediate resolution.

1. First, a potentially enormous number of cases is involved. There are approximately 64,000 federal criminal defendants sentenced under the Guidelines each year. See United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics*, at Table 2. That means that an average of approximately 1200 federal sentencings take place each week. Given the current disarray, a very large

percentage of those cases may result in unlawful sentences. The number of federal cases affected by the questions presented in this case will increase daily until this Court is able to address the issues.

Second, the Court's resolution of the questions presented will significantly affect the length of sentences in many of those cases. In the short time since *Blakely*, many courts have reduced sentences below otherwise-applicable Guidelines levels; other courts have elected to move to indeterminate sentencing; and still others have adhered to the Sentencing Guidelines. The effect on the sentence can be substantial.

Third, the uncertainty about how to proceed with federal sentencing imposes burdens on prosecutors, defense counsel, and federal trial and appellate courts. Especially insofar as courts attempt to apply the Guidelines with a *Blakely* overlay of jury findings, a host of complicated procedural issues must be confronted. These would include instructing the jury on Guidelines factors that were never intended for its use (see, *e.g.*, the Relevant Conduct Guideline, § 1B1.3, and its nine pages of application notes); possibly bifurcating the trial into guilt and sentencing phases; and determining the proper procedures for *Blakely* waivers in guilty pleas. All of these issues, and many more, will be fruitful sources for extensive litigation and appeals. All this could turn out to be unnecessary depending on this Court's resolution of the questions presented.

Fourth, the ramifications of the current instability are unsettling areas beyond sentencing. Although approximately 97.1% of federal criminal cases are ordinarily resolved by guilty pleas, see United States Sentencing Comm'n, *supra*, at Fig. C, uncertainty about the sentencing regime that will be applied has made it more difficult for the government and defendants to reach plea agreements. Some defendants may decide to stand trial, rather than enter a plea without

knowing what sentencing process will apply to them.[9] The volume of criminal cases means that even a modest shift from pleas to trials could have enormous consequences for the federal system. Even an increase from 3% to 6% in the number of defendants who stand trial would double the volume of cases that must be adjudicated. That increase would greatly aggravate the burden on courts, prosecutors, defendants, and defense counsel.

2. Although the courts of appeals have disagreed on the merits, they have agreed on the need for this Court's prompt action. See App., *infra*, 2a ("We cannot of course provide definitive guidance; only the Court and Congress can do that."); *Pineiro*, 2004 WL 1543170, at *9 ("We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response."). As Judge Easterbrook noted, the "likely consequence" of holding the Guidelines unconstitutional is "bedlam," and, while the lower "courts are bound to favor different recipes" for sentencing, "[t]he Supreme Court alone can make a definitive judgment." App., *infra*, 14a (dissenting opinion). Judge Easterbrook concluded that "[t]oday's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon." *Ibid.*

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[9] On July 13, 2004, District Judge Cassell testified before the Senate Committee on the Judiciary that, in one district, *Blakely* has led to "delayed guilty pleas," "extended plea colloquies," and "added time and effort spent on cases which would have resulted in a plea but now require trial" and, in another, "pleas and sentencings have almost come to a halt." Blakely v. Washington *and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm.*, 106th Cong., 2d Sess. at *8-*10 (2004) (statement of Hon. Paul Cassell, Judge, United States District Court Judge for the District of Utah), *available in* <http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669>.

The Second Circuit similarly implored the Court to act quickly to resolve the questions presented in its opinion in *Peneranda*. The court of appeals explained that *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." *Penaranda*, 2004 WL 1551369, at *6. The court was "convinced that a prompt and authoritative answer to" what it termed "the pall of uncertainty" on federal sentencing "is needed to avoid a major disruption in the administration of criminal justice in the federal courts—disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements." *Ibid.* The court noted that "[m]any, if not all, of the[] various attempts to implement *Blakely* ultimately may prove misguided—or even wholly unnecessary." *Id.* at *7. But "[i]n the meantime, * * * defendants, victims, and the public will be left uncertain as to what sentences are lawful." *Ibid.*

E. The Court Should Resolve The Questions Presented In This Case

The court of appeals squarely held that *Blakely*'s Sixth Amendment holding extends to the Guidelines, and this Court should promptly review that holding. The question whether any unconstitutional aspects of the Guidelines scheme are severable from the remainder is also properly raised in this petition. The Court should grant review to address that issue as well, if *Blakely* is held applicable to the Guidelines.

1. Although the court of appeals remanded for the district court to determine how to proceed at sentencing, rather than resolving that issue itself, the court of appeals' action does not detract from the appropriateness of granting certiorari on that issue. The Court has jurisdiction to do so.

A grant of certiorari would bring before the Court the entire case, including the severability question of how, if *Blakely* applies to the Guidelines, the sentencing court is to proceed on remand. See 28 U.S.C. 2106 ("The Supreme Court * * * may affirm, *modify*, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, *and may remand the cause and * * * require such further proceedings to be had as may be just under the circumstances*.") (emphasis added). In instances in which the Court has confronted questions of law that "are currently in a state of evolving definition and uncertainty," *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), it has reached the merits, despite procedural obstacles, in order to settle an "important" issue that "appears likely to recur." Cf. *id.* at 257 (overlooking the plain error rule where declining to review the issue on the merits "would serve neither to promote the interests of justice nor to advance efficient judicial administration").[10] While the Court normally does not review an issue not presented or passed on below, in exceptional cases, it will. See *Carlson* v. *Green*, 446 U.S. 14 (1980) (deciding question not pressed or passed on in the lower courts, because it "is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits.").

In *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in the context of an earlier challenge to the Guidelines, this

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[10] See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (reaching issue decided, though not pressed, below because of the "uncertainty" surrounding the issue and its "importance to the administration of federal law"); see also *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540-541 (1999) (resolving legal standards governing principal's liability for punitive damages for actions of its agents under Title VII, although the court below did not reach that issue).

Court granted certiorari on a severability question presented by the government that had not been decided below. In that case, the district court had ruled that the Sentencing Guidelines were constitutional, and it therefore did not reach any issue of severability. Both the government and the defendant petitioned for certiorari before judgment in *Mistretta*. The government's petition presented three questions. Two of them addressed the constitutionality of the Guidelines—the only question addressed by the district court. 87-1904 Pet. at i. The third question, however, was "[w]hether, if the sentencing guidelines are invalid, the 1984 amendments to the statutes governing parole and 'good time' credits are severable and therefore apply to defendants sentenced for crimes committed after November 1, 1987." *Ibid.* The petition explained that the issue was of great importance, that it had divided the district courts, and that, if the Court struck down the Guidelines without resolving the issue, "the current confusion within the federal sentencing system will continue until another case raising those issues reaches this Court." *Id.* at 18. The defendant's petition also presented a severability question, 87-7028 Pet. at i, 7-9, noting that "[i]n order to prevent mass confusion and a flood of federal *habeas corpus* petitions * * *, this Court should address the severability question in this proceeding." *Id.* at 9. The Court granted certiorari on both petitions in full. 486 U.S. 1054 (1988). The same logic dictates a grant of certiorari on the severability issue in this case.

2. The government is also filing today a petition for a writ of certiorari before judgment in *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004). In *Fanfan*, the district court determined that the rule in *Blakely* is applicable to the Guidelines, and it went on to hold that the court was therefore limited to sentencing the defendant to a maximum term under the Guidelines based

solely on the facts found by the jury. Applying a Guidelines range of 63-78 months, rather than the range of 188-235 months that it found that the Guidelines otherwise required, the court sentenced the defendant to a term of 78 months of imprisonment. *Fanfan* thus resolved both questions presented in the petition in this case, and it provides an appropriate companion vehicle for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing. The government suggests that the Court grant the petitions both in this case and in *Fanfan* to assure that the Court has a vehicle in which to reach and resolve the vitally important issues presented. Simultaneous grants of review here and in *Fanfan* would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues.

3. The en banc Second Circuit has certified three questions to this Court under 28 U.S.C. 1254(2), urging the Court to decide "the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." *United States* v. *Penaranda*, 2004 WL 1551369, at *7. While the government agrees with the Second Circuit on the need for expedited resolution of that issue, *Penaranda* provides a less suitable vehicle for resolving the issues than this case and *Fanfan*. First, each of the Second Circuit's certified questions is a variation on the same theme: whether *Blakely* applies to the Guidelines. Unlike the petition in this case, the Second Circuit's certification order does not encompass any question concerning the consequences of holding *Blakely* applicable to the Guidelines. That is not because the Second Circuit regards that issue as unimportant. The court of appeals clearly recognized that "once a court concludes that *Blakely* applies to the Guidelines, it is without guidance as to the means for achieving compliance," *Penaranda*, *id.* at *7, and graphically illustrated the vital need for resolution of that issue by cataloguing five different approaches taken by

district courts and noting the uncertainty that will prevail "while these judicial approaches are being litigated." *Ibid.* But the Second Circuit's certified questions would not permit the Court to reach and resolve those remedial issues. In contrast, the petition for certiorari here squarely raises that issue.

Second, both of the two defendants involved in the *Penaranda* certification (Penaranda and Rojas) raised other issues on appeal.[11] If Penaranda is successful in obtaining a new trial, his sentencing challenges would become moot, at least pending conviction at a retrial. The same might not be true for Rojas, who challenges only the procedures at sentencing, but an advantage of the petition in this case is that the court of appeals has rejected all other challenges raised by the defendant aside from the *Blakely* challenge. App., *infra*, 22a.

Finally, in this case the Court has the benefit of a concrete judgment examining the applicability of *Blakely*; in *Penaranda*, no court has rendered a decision resolving the *Blakely* issues. This case also has the benefit of questions presented that were formulated by the petitioning party, in accordance with the customary practice of this Court. The adversary system contemplates that the parties will normally frame the questions for courts to review. While Congress has retained certification by a court of appeals as a

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[11] In *United States* v. *Rojas*, No. 03-1062(L), the defendant has raised the issue "[w]hether Mr. Rojas' Sixth Amendment rights were violated by the government's suppression of evidence at the *Fatico* [sentencing] hearing." Br. 2, 17-22 (filed Dec. 9, 2003). In *United States* v. *Penaranda*, No. 03-1284(L), the defendant raises three issues challenging the fairness of his trial and seeking a new trial. Br. 4-5, 60 (filed Sept. 18, 2003). The Second Circuit did not grant en banc review on those issues, but instead left them for resolution "in the normal course by the panels to which the cases are assigned." *Penaranda*, at *1 n.1; see *id.* at *8 n.10 (noting that court's transmission of the records to this court was "not to suggest that the Court should decide the entirety of the matters in controversy").

mode of Supreme Court review, it has rarely been employed in recent years. See Robert L. Stern, et al., *Supreme Court Practice* §§ 9.1, 9.3 (8th ed. 2002). Adherence to the normal adversary mode of review has the advantage of settled and well-understood procedures.[12]

F. Expedited Review Is Warranted

In light of the urgent need for this Court's resolution of the questions presented and the thousands—or even tens of thousands—of criminal sentencings that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should consider setting a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration, proposing schedules for the Court's hearing of this case and *United States* v. *Fanfan*. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes a schedule that would give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would allow for

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[12] After deciding this case and *Fanfan*, the Court could dispose of *Penaranda* as appropriate. Cf. *Iran Nat'l Airlines Corp.* v. *Marschalk Co.*, 453 U.S. 919 (1981) (disposing of certified questions in light of Court's decision on merits in case raising similar issue).

argument on the first scheduled day of the October 2004 Term, with corresponding adjustments to the briefing schedule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2004

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the First Circuit.

OPINION BELOW

The sentencing proceedings in this case (App., *infra*, 1a-13a) are not reported.

JURISDICTION

The judgment of the district court (App., *infra*, 16a-21a) was entered on June 30, 2004. The notice of appeal (App, *infra*, 27a) was filed on July 16, 2004. The case was docketed in the court of appeals on July 19, 2004, as No. 04-1946. App., *infra*, 27a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 28a-63a.

STATEMENT

1. The underlying facts

On June 11, 2003, respondent was charged in an indictment in the District of Maine with conspiring to distribute and to possess with intent to distribute 500 or more grams of cocaine, in violation of 21 U.S.C. 846. The maximum penalty for that offense is life imprisonment. In connection with an ongoing investigation, a narcotics agent arrested Donovan Thomas, who had previously delivered cocaine to an informant and was returning to collect money for the delivery. Thomas agreed to cooperate and stated that respondent was his source of supply for the cocaine. Thomas arranged to purchase additional cocaine from respondent. When respondent arrived at a Burger King restaurant to complete the transaction, he was arrested. Agents found 1.25 kilograms of cocaine and 281.6 grams of cocaine base in respondent's vehicle. Presentence Report (PSR) 6.

2. The district court proceedings

After a jury trial, respondent was found guilty. In response to the question on the verdict form, "Was the amount of cocaine 500 or more grams?," the jury checked "Yes." App., *infra*, 15a.

At sentencing on June 28, 2004, the court found that the evidence supported the calculation in the PSR of drug quantity (2.5 kilograms of cocaine powder and 281.6 grams of cocaine base) as relevant conduct attri-

butable to respondent under the Sentencing Guidelines. Sent. Tr. 80; see PSR 7-8. That resulted in a base offense level of 34 under Sentencing Guidelines § 2D1.1(c)(3). App., *infra*, 2a. The court found that a two-level enhancement under Guidelines § 3B1.1(c) for defendant's role as an organizer, leader, manager, or supervisor in the criminal activity was also warranted. *Ibid.* The court determined that respondent's criminal history category was I, producing a sentencing range under the Guidelines of 188-235 months of imprisonment. *Ibid.*

Before imposing sentence, however, the court considered the effect of this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), rendered four days earlier. The court declined to await further briefing on that subject, App., *infra*, 3a, noting that, "if th[e] reasoning of *Blakely* applies here, all the jury verdict permits us to conclude in this case is that [respondent] was guilty of a conspiracy and that it involved at least 500 grams of cocaine powder." *Id.* at 5a. On that basis, the court found that respondent would have a base offense level of 26—the level applicable to offenses involving 500 grams of cocaine—and that no other Guidelines enhancements could be justified. At that level, the court found that respondent's sentencing range would be 63-78 months of imprisonment—"[i]n other words, five or six years instead of 15 or 16 years." *Id.* at 6a. The court concluded that "it is unconstitutional for [the court] to apply the federal guideline enhancements in the sentence of [respondent]" and that "[t]o do so would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. The court sentenced respondent to 78 months of imprisonment, the

maximum sentence permissible under the Guidelines range the court had found applicable. *Id.* at 13a.

The government filed a motion to correct sentence under Federal Rule of Criminal Procedure 35(a). App., *infra*, 23a-26a. The government argued that the court had committed clear error in concluding that this Court's decision in *Blakely* applies to the federal Sentencing Guidelines. The government also argued that the court had committed clear error "by severing out sections of the Guidelines that it believed violated the principles of *Blakely*, and applying the remaining sections." *App.*, *infra*, 23a. The government explained that "the Guidelines cannot constitutionally be applied piecemeal as the Court did at [respondent's] sentencing," because "[s]uch an application distorts the operation of the sentencing system in a manner that was not intended by Congress or the United States Sentencing Commission." *Id.* at 24a. The court denied the motion. *Id.* at 22a.

3. Proceedings on appeal

On July 16, 2004, the government filed a notice of appeal to the United States Court of Appeals for the First Circuit. App., *infra*, 26a. The court of appeals has jurisdiction pursuant to 18 U.S.C. 3742(b). The government's notice of appeal was timely filed within the 30 days allowed by Federal Rule of Appellate Procedure 4(b)(1)(B). The appeal was docketed in the court of appeals on July 19, 2004, as No. 04-1946. App, *infra*, 27a. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 75 (8th ed. 2002).

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise permitted. 124 S. Ct. at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." *United States* v. *Booker*, 2004 WL 15385858, at *1 (7th Cir. July 9, 2004), petition for cert. pending (filed July 21, 2004). In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for 15 years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The government is today filing petitions for certiorari in this case and in *Booker*, *supra*, as companion vehicles for this Court's consideration of the implications of *Blakely* for federal sentencing. Further review is warranted in both cases, on an expedited basis, in order to provide authoritative answers to the questions presented and to provide guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month.

A. Review Of The Implications Of *Blakely* For Federal Criminal Justice Is Warranted

The government's petition for certiorari in *Booker* recounts in detail the conflict in the circuits that has arisen on whether *Blakely* applies to the Guidelines. *Booker* Pet. 11-14. It also explains the importance of the second question presented in both cases: *i.e.*, the issue of how, if the rule in *Blakely* applies to the federal Sentencing Guidelines, sentencing is to be conducted in federal cases in which *Blakely*'s interpretation of the Sixth Amendment invalidates application of certain Guidelines provisions. *Booker* Pet. 14-19.

The resolution of those questions cannot be delayed. Without answers to those questions, federal criminal justice will remain in a state of confusion about the manner in which federal sentences are to be determined in the thousands of criminal cases that go to sentencing each month. If this Court holds that *Blakely* does not apply to the Guidelines, then courts will uniformly return to the familiar Guidelines sentencing procedures that prevailed before *Blakely*. Alternatively, if this Court holds that *Blakely* does apply to the Guidelines, the proper conduct of sentencing turns on the answer to the second question: whether the Guidelines may continue to be used in cases in which judicial factfinding required by the Guidelines would violate the Sixth Amendment. That issue of severability, and of the procedural implications of *Blakely*, is of considerable consequence to sentencing procedures nationwide. A decision from this Court is required to settle the matter.

B. This Case Squarely Presents The Issues Surrounding The *Blakely* Controversy On Which This Court's Guidance Is Needed

This case squarely raises both of the issues presented. The district court determined that *Blakely* applies to the Guidelines. It then imposed sentence based on its conclusion that the Guidelines as a whole could continue to govern federal sentencing, although in a truncated fashion and not in their intended manner. App., *infra*, 1a-13a. The court thus refused to apply Guidelines enhancements for drug quantity and respondent's role in the offense because, the court held, to do so "would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. On that basis, the court sentenced respondent to 78 months of imprisonment (from a 63-78 month sentencing range), rather than sentencing respondent within the 188-235 months range that it concluded the Guidelines would otherwise require. *Id.* at 7a. The case thus squarely presents both the question whether federal sentencing practice is unconstitutional under *Blakely* and, if so, how sentencing should be conducted.

C. Certiorari Should Be Granted Both Here And In *United States* v. *Booker*

In *Booker*, *supra*, the Seventh Circuit held that *Blakely* applies to the Guidelines and precludes their normal operation in cases in which judicial factfinding would increase the defendant's maximum sentence under the Guidelines. *Booker* Pet. App. 8a-9a. The court then remanded the question of severability and other remedial issues to the district court. *Id.* at 13a. The government's petition for certiorari in *Booker* presents the same questions that are presented here. Because the petition in *Booker* seeks review of a decision

of a court of appeals, it offers the opportunity for review of the issues through the Court's customary certiorari procedure.

In this case, unlike *Booker*, the court of appeals has not yet reviewed the judgment. But this case has the advantage of arising from a decision in which the sentencing court resolved both questions presented in the petition. This case thus provides an appropriate companion to *Booker* for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing.

Simultaneous grants of review here and in *Booker* are warranted. Granting certiorari in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues. Assurance that the Court will have a vehicle in which to reach and resolve the important issues presented, and thereby reduce or eliminate the uncertainty that is currently ravaging the federal sentencing system, is warranted in light of what one court has called "an impending crisis in the administration of criminal justice in the federal courts." *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (2d Cir. July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004).

D. A Grant Of Certiorari Before Judgment And Expedited Consideration Is Warranted In The Exceptional Circumstances Of This Case

1. A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case satisfies that strict criterion.

On several occasions, this Court has granted certiorari before judgment when necessary to obtain expeditious resolution of exceptionally important legal questions. Most notably, the Court granted certiorari before judgment in *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in which, as in this case, the constitutionality of the federal sentencing scheme was at issue. The Court also granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2001); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States* v. *Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (steel seizure case); and *Ex parte Quirin*, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs).* See generally James Lindgren & William R. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259. The constitutionality of federal sentencing practice in light of *Blakely* concerns a subject of equal national importance and warrants certiorari before judgment in this case.

2. In light of the urgent need for this Court's resolution of the questions presented and the thousands —or even tens of thousands—of criminal sentencings

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* See *Barefoot* v. *Estelle*, 463 U.S. 880 (1982) (certiorari before judgment to decide standards governing stay of execution pending litigation of habeas petition); *Clark* v. *Roemer*, 501 U.S. 1246 (1991) (granting certiorari before judgment and summarily vacating and remanding case for further consideration in light of intervening Supreme Court decision). In addition to *Gratz*, the Court has granted certiorari before judgment in other cases where cases presenting similar issues had already been accepted for review. See, *e.g.*, *Taylor* v. *McElroy*, 358 U.S. 918 (1958); *Bolling* v. *Sharpe*, 344 U.S. 873 (1952); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should set a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration in this case and in *Booker*, *supra*, proposing schedules for the Court's hearing of the cases. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes that the Court give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument on September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would permit argument on the first day of oral argument in the October 2004 term.

CONCLUSION

The petition for a writ of certiorari should be granted.

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