Testimony of

The Honorable Bill Mercer

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THE U.S. SENTENCING GUIDLELINES AND BLAKELY V. WASHINGTON
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INTRODUCTION

Chairman Hatch, Senator Leahy, members of the CommitteeB
Twenty years ago, in the spring and summer of 1984, this Committee, in this very room, coalesced around the noble idea of making the federal criminal justice system more honest, more fair, and more effective. Members of both political parties, liberals and conservatives B some of whom are still members of the Committee B unified under the common recognition that unstructured criminal sentencing had evolved into a vehicle for disparity in sentencing that simply could not be justified and uncertainty in sentencing that was contributing to intolerable levels of crime.

Together with states such as Minnesota, Pennsylvania, and Washington, this Committee and the federal government as a whole embarked on what was then considered a novel venture B reform of criminal sentencing. The enacted reforms would transform the criminal justice system. While prior to the Sentencing Reform Act of 1984, similar offenders who committed similar offenses received and served substantially different sentences with disturbing regularity, under the Act and the federal sentencing guidelines it spawned, sentencing courts are directed to evaluate specific enumerated factors grounded in judicial experience and reason and to engage in rigorous and appealable factfinding to determine whether these factors are present in each case. The sentences handed down under the Act are now predictable and tough. While there are still points of debate over sentencing policy, a genuine consensus has emerged in support of the Act and around the principles of determinate sentencing and sentencing reform.

A few weeks ago, some twenty years after federal sentencing reform, the Supreme Court, in Blakely v. Washington, cast doubt on some of the procedures of federal sentencing reform as well as some of the procedures of state sentencing reforms. I am here today first and foremost, to reaffirm the commitment of this Administration to the principles of sentencing reform that

unified this Committee twenty years ago and which we hope will once again unify the Committee now B we remain steadfastly dedicated to certainty, truth, and greater justice in sentencing. Second, I am here to briefly lay out for the Committee why the United States continues to believe B and is now arguing in courts throughout the country B that the federal sentencing guidelines system is significantly distinguishable from the Washington state guidelines system at issue in Blakely. We believe the design of Congress and the United States Sentencing Commission for arriving at federal sentences B utilized in hundreds of thousands of cases over the past 15 years B meets all constitutional requirements.

Because some lower courts have disagreed with our reasoning, I will, third, discuss the Department=s legal position on how federal sentencings should proceed before courts that find the federal guidelines are implicated by Blakely. Finally, I will outline why we at the Department of Justice believe Congress should take the time to carefully consider any legislative proposals that try to remedy the current uncertainty surrounding federal sentencing policy. We believe Congress should closely monitor the emerging litigation and continue the dialogue begun by this hearing with the Department of Justice, the United States Sentencing Commission, and the federal criminal justice community as a whole.

To try to resolve the current uncertainty in federal sentencing policy created by Blakely in a manner consistent with the principles of sentencing reform, the Department of Justice intends to seek review of an appropriate case B in the very short term B before the Supreme Court and to ask the Court to expedite review of the case. However, in the event that we are incorrect about the inapplicability of Blakely to the Federal Sentencing Guidelines, federal prosecutors have begun to charge cases in a prophylactic fashion and a number of Department lawyers are analyzing policy options which might restore the system to its pre-Blakely status. Nonetheless, we think having the Court provide a definitive ruling on the application of Blakely to the federal sentencing guidelines is one important answer necessary to address the somewhat chaotic state of events of the last two weeks.

THE FEDERAL SENTENCING REFORM EFFORT

Before I turn to the Blakely case, I would like to review briefly the history of federal sentencing reform and the benefits that have accrued from it. The federal sentencing system in place before sentencing reform was almost entirely discretionary. Choosing a sentence for those convicted of federal offenses was left to the discretion of federal judges and essentially was ungoverned by law. Beyond a statutory direction limiting the maximum sentence, judges had the discretion to decide what factors in a case were relevant to sentencing and how such factors should be weighed.

After much study, Congress, the Department of Justice, a good number of academics, commentators, and judges found the largely unfettered sentencing discretion that characterized the former system resulted too often in unacceptable outcomes and unwarranted sentencing disparity. The unwarranted disparity problem was exacerbated by a parole system that incarcerated some offenders for all of their sentences and others for as little as one-third; this often led to judges trying to outguess expected parole decisions. In addition, a substantial percentage of offenders were not sentenced to prison at all. The result was that similar offenders

who committed similar offenses often received and served substantially different sentences. And, in many cases, sentences were not sufficiently punitive. Congress, the Department, and other analysts recognized that such inconsistency and uncertainty in federal sentencing practices were incompatible with effective crime control.

In response to these findings and persistent concerns, a bi-partisan Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. The Act created the United States Sentencing Commission and mandated that the Commission design sentencing guidelines to bring consistency and certainty to federal sentencing law. Although a number of factors made the development of federal sentencing guidelines difficult, the Commission accomplished this task in 18 months, and the guidelines took effect in November 1987, after the requisite six months= congressional review. The guidelines and the Sentencing Commission withstood constitutional challenges with the Supreme Court decision in Mistretta v. United States, 488 U.S. 362 (1989).

The federal sentencing system in place under the Sentencing Reform Act has been very different from the inconsistent and uncertain system in place before the Sentencing Reform Act. Its guiding principle has been similar treatment of defendants with similar criminal records who have been convicted of similar criminal conduct. It has been a structured and tough sentencing system. Under the guidelines, sentencing courts are directed to evaluate enumerated factors and engage in appropriate factfinding to determine whether these factors are present in each case. If they are, the guidelines and Commission policy statements provide the court with substantial guidance as to how these factors should contribute to the sentence. This structure provides fairness, predictability, and appropriate uniformity. In addition, the guidelines structure allows for targeting longer sentences to especially dangerous or recidivist criminals. In 2002, over 63,000 convicted defendants were sentenced in federal courts under the sentencing guidelines. And because of the guidelines sentences in their cases did not depend on the district where they committed the offense or the judge who imposed the sentence, the guidelines minimized the probability that similarly-situated defendants were subject to unwarranted disparity in punishment.

The structure designed to calibrate sentences is only part of the story. Congress has established important statutory purposes of punishment. Among other things, sentences must reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant. The guidelines are tough, providing appropriately punitive sentences for violent, predatory, and other dangerous offenders, sentences substantially longer than those meted out before the guidelines. Studies have shown, for example, that since the guidelines have been in place, sentences for drug and violent offenders have increased substantially. In addition, the Commission in its original guidelines specifically raised penalties for white collar offenses and civil rights crimes, including police brutality offenses. The Commission determined that before the guidelines sentences for these classes of offenses were simply too low and did not provide sufficient deterrence. Also, as part of the original guidelines, the Commission developed and implemented a Athree-strikes@ provision that ensured penalties near the statutory maximum for serious repeat offenders.

We believe this type of tough sentencing is smart sentencing. While some critics have argued that federal criminal sentences are too long and that we need to have "smarter" sentences, the facts demonstrate that they are wrong. The increase in federal sentences under the guidelines, and the increase in state sentences as states followed the lead of the federal government in adopting truth-in-sentencing regimes, have resulted in significant reductions in crime, which is exactly what we would expect to observe. The more offenders who are incapacitated, the less crime. Sentencing policy has contributed to the fact that our nation is experiencing a 30-year low in crime. We do not believe it is a coincidence that the stark decreases in crime started in the 1990's, shortly after the Supreme Court upheld the sentencing guidelines. Over the preceding decade, nearly 27.5 million violent crimes were not committed because of the reduction in crime.

It should not surprise anyone that tough sentencing produces less crime. Again according to the Bureau of Justice Statistics, more than 90 percent of prison inmates had a criminal record prior to their current imprisonment or were in prison for a violent crime. Given the active criminal careers of the vast majority of prisoners, incarceration works. And social scientists have validated through research the common sense that imprisonment is effective at crime reduction. For example, two studies published in 2000 come to similar conclusion about the effect of tougher sentencing policies: more than one quarter of the reduction in the homicide rate and crime rate during the 1990s can be attributed to tougher sentencing policies.

THE BLAKELY DECISION AND ITS IMMEDIATE AFTERMATH

As you may already know, the Blakely decision has caused a tremendous upheaval in the federal criminal justice system and has put the constitutionality of federal sentencing guidelines into question. Before discussing this further, I want to take just a moment to let this Committee know of the tremendous dedication, public spirit, and commitment to justice of the career prosecutors of the Department of Justice and the tremendous response to Blakely these prosecutors have made for the people of the United States. From the Solicitor General's Office, to the litigating divisions of the Department, to every single United States Attorney=s Office in every state of this country, career federal prosecutors have spent innumerable hours and sacrificed countless time to represent the United States and to try to ensure justice in the tens of thousands of criminal cases about which Blakely questions will surely be raised. These career civil servants are among the most talented, disciplined, and creative legal minds in the country. From the Attorney General on down, we are extremely proud of and honored to work with these prosecutors, and we believe this Committee and the American people should be equally proud.

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It is absolutely vital to be clear on what the Supreme Court held in Blakely and what it did not. The Court in Blakely applied the rule announced in Apprendi v. New Jersey to invalidate, under the Sixth Amendment, an upward departure under the Washington state sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. The Court did not wholly invalidate the Washington state sentencing guidelines nor did it invalidate the federal guidelines. In fact, Justice Scalia noted in the majority opinion: "By reversing the judgment below, we are not, as the State would have it, 'find[ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only

about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. Nothing we have said impugns those salutary objectives."

It is also, we believe, important to understand the facts of Blakely and the structure of the Washington state sentencing system to best evaluate alternative litigation. The defendant in Blakely pleaded guilty to second degree kidnapping. A state statute provided that the maximum sentence for that offense was 10 years imprisonment. Another statute established a grid of Astandard@ sentence ranges, based on the seriousness of the offense and the defendant=s criminal history. The statute also authorized a sentencing court to depart upward from the standard range, and impose a sentence up to the statutory maximum, if it found substantial and compelling reasons warranting an exceptional sentence. Among such reasons was the fact that the defendant acted with Adeliberate cruelty.@ Blakely=s standard sentencing range was 49 to 53 months= imprisonment, but the sentencing court found that he had acted with deliberate cruelty and departed upward, sentencing him to 90 months= imprisonment.

Blakely argued that because he was sentenced above the maximum standard sentence of 53 months based on a finding made by the court, the upward departure violated Apprendi=s holding 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." The State contended that there was no Apprendi violation because Blakely=s sentence was within the 10-year statutory maximum. The Court rejected that argument, holding 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."

The Court observed that the United States, as amicus curiae in Blakely, Anotes differences between Washington=s sentencing regime and the federal sentencing guidelines,@ although it questioned whether those differences are constitutionally significant. The Court then reserved whether its Sixth Amendment holding applied to the federal guidelines, stating that "[t]he Federal Guidelines are not before us, and we express no opinion on them."

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Much has transpired in the two and a half weeks since the Blakely decision was handed down by the Court. Even though the Supreme Court did not rule on the federal sentencing guidelines, some lower courts have already B and we believe prematurely B invalidated them. Others, have applied the guidelines in ways never contemplated by the Congress or the United States Sentencing Commission. The results in these cases have been at times quite disturbing. A number of courts have imposed dramatically inadequate sentences for serious and dangerous offenders, severing parts of the guidelines system and then applying the remainder in a manner inconsistent with the clear intent of Congress.

For example, two weeks ago in West Virginia, a federal judge reduced the sentence of a dangerous drug dealer from 20 years to 12 months. The dealer, Ronald Shamblin, was no bit player, no courier, no low-level dupe. According to uncontested findings of the U.S. Probation Office and the court, Shamblin was a leader in an extensive methamphetamine and cocaine

manufacturing and distribution conspiracy. He possessed a dangerous weapon during his crime, enlisted a 14-year-old to join his conspiracy, and obstructed justice. All told, under the sentencing guidelines, Shamblin should have been sentenced to life imprisonment. Because of the Apprendi decision, the court was limited to a maximum penalty under the statute as charged to 20 years imprisonment. Because of the court=s interpretation of Blakely, the court believed it was obligated to sentence Shamblin to no more than 12 months imprisonment.

Here in Washington, about ten days ago, Dwight Ware Watson, the tobacco farmer who created havoc in the city by crashing his tractor into a pond on the National Mall, was released from prison also after a judge felt compelled to reduce his sentence. If you recall, Mr. Watson created major disruptions in the Nation's Capital for days in a standoff with the police. Under the sentencing guidelines, Watson was at first sentenced to six years in prison for his crime. However, after Blakely, the court resentenced Watson to just 16 months imprisonment. In both of these cases, the courts proceeded without complete briefing on the significant issues involved, severed the aggravating elements from the sentence calculation, and then applied only the base guideline sentence and the guideline mitigating factors, in a manner we believe was a distortion of the federal sentencing system and requiring a twisted reading of federal law that is inconsistent with congressional intent and policy. It is hard to see how either sentence promotes respect for the law, provides adequate deterrence, or protects the public. Both of these sentences, and many others like them, if not reversed on appeal, will result not only in manifest injustices to those involved in the individual cases, but almost certainly, as well, in additional, unnecessary crimes and additional, unnecessary victims as offenders are released prematurely.

On the other hand, some courts have continued to uphold and apply the federal sentencing guidelines, awaiting definitive word from the Supreme Court. Still others have seen fit to invalidate some or all of the procedures of the federal guidelines, but have nonetheless looked to the guidelines to mete out sentences consistent with congressional intent and policy.

THE DEPARTMENT=S LEGAL POSITION CONCERNING APPLICATION OF BLAKELY TO THE FEDERAL SENTENCING GUIDELINES

The legal position of the United States is that the rule announced in Blakely does not apply to the federal sentencing guidelines, and that the guidelines may continue to be constitutionally applied in their intended fashion, i.e., through factfinding by a judge, under the preponderance of the evidence standard, at sentencing. The government=s legal argument is twofold: first, that the lower federal courts are not free to invalidate the guidelines given the prior Supreme Court decisions upholding their constitutionality, and second, that, on the merits, the guidelines are distinguishable from the Washington State system invalidated in Blakely.

The Department of Justice has traditionally adhered to the principle that it will defend the constitutionality of Acts of Congress in all but the rarest of instances. The government vindicates that principle here by defending the constitutionality of the federal sentencing guidelines, and all federal prosecutors are now arguing in favor of the continued constitutional validity of the federal sentencing guidelines as a system requiring the imposition of sentences by judges.

We take this position B that the federal guidelines are distinguishable B for several reasons that we have set forth in detail in a variety of pleadings before a variety of courts. Simply put for this

hearing, we note that the Washington State system of legislatively passed guidelines that set legislatively directed maximum penalties for individual crimes is just not how the federal sentencing system operates. Congress has only created one set of statutory maximums for federal crimes. The guidelines operate within those maximums, see USSG '5G1.1, and set forth a host of factors (the current Guidelines Manual runs some 491 pages) that courts are to consider, both in aggravation and mitigation, in individualizing a particular sentence. These factors correspond to those that judges have always taken into account B such as the manner in which a crime was committed, the nature of the victim, the defendant=s role in the offense, whether he obstructed justice at trial, and whether he accepted responsibility for his actions B in fashioning sentences. As the Supreme Court has previously indicated, the federal guidelines were never intended to operate on the same footing as the statutory maximums. Indeed, that very assumption sits at the heart of the guidelines: Athey do not bind or regulate the primary conduct of the public or . . . establish[] minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations B impose sentences within the broad limits established by Congress.@ Mistretta v. United States, 488 U.S. 361, 396 (1989).

As I mentioned above, courts have already disagreed with the government=s legal position on the inapplicability of Blakely to the guidelines. In those courts, the next question that has arisen is what sentencing consequences ensue. The position of the United States is that, if a court finds that Blakely applies to the federal sentencing guidelines, thus rendering the guidelines= method of judicial factfinding unconstitutional, the guidelines cannot be applied at all in many cases. Those cases consist of prosecutions in which the application of the guidelines requires the resolution of contested factual issues to determine whether upward adjustments or upward departures should be imposed above the maximum sentence based solely on the facts admitted by the defendant in a guilty plea or established by the jury=s verdict. In such cases, overlaying the Blakely/jury procedures on the guidelines would distort the operation of the sentencing system B creating a one-way road where sentences move more easily downward than upward B in a manner that would not have been intended by Congress or the United States Sentencing Commission. Thus, if Blakely applies, we do not believe the constitutional aspects of the guidelines can be severed from the unconstitutional ones. In that event, the court cannot constitutionally apply the guidelines, but instead should impose a sentence, in its discretion, within the maximum and minimum terms established by statute for the offense of conviction. In all such cases, government prosecutors are arguing that, in the exercise of its discretion, the sentencing court should impose a sentence consistent with what would have been the guidelines sentence.

There are three critical components of this position. First, the guidelines remain constitutional and applicable if the guidelines sentence can be calculated without the resolution of factual issues beyond the jury verdict on the elements of the offense of conviction. Thus, in cases where a court, applying the guidelines as they were intended, finds that there are no applicable upward adjustments under the guidelines beyond the jury verdict on the elements of the offense, the guidelines are constitutional and should be applied. Second, in a case in which the defendant agrees to waive his right to resolution of contested factual issues under the Blakely procedural requirements, the guidelines should be applied. Thus, waivers of ABlakely rights@ in connection with plea agreements and guilty pleas may be made. Third, in a case in which there are

applicable upward adjustments under the guidelines, and the defendant contests the underlying facts under the Blakely procedures, the guidelines system as a whole cannot be constitutionally applied. In that event, we believe the court should impose sentence, exercising traditional judicial discretion, within the applicable statutory sentencing range. The government=s sentencing recommendation in all such cases will be that the court exercise its discretion to impose a sentence that conforms to a sentence under the guidelines (including justifiable upward departures), as determined without regard to Blakely.

This approach of having judges exercise discretion within the minimum and maximum statutory terms, rather than applying the guidelines piecemeal, does not in any way represent a departure from the Department=s commitment to guidelines sentencing or the principles of sentencing reform. The Department will continue to urge that the guidelines are constitutional in that Blakely is inapplicable. The government=s alternative position that Blakely cannot be integrated into the existing sentencing scheme represents a recognition that the application of the Blakely charging, jury-trial, and reasonable-doubt procedures to the guidelines distorts them in ways that render the guidelines system, as currently configured, unworkable, and that Congress and the Commission would not have intended such a hybrid system. The conclusion that the entire system must fall, if Blakely applies in a particular case, permits prosecutors to urge that sentencing courts impose appropriately severe sentences within the statutory maximum and minimum terms as a matter of their discretion.

The sentencing courts then can, as a matter of discretion, consider the same factors that the guidelines make relevant to sentencing. Blakely explicitly recognizes the constitutionality of such a discretionary sentencing process that considers all relevant facts. That interim solution, until definitive clarification is obtained from the Supreme Court and Congress, is legally and practically preferable to applying Blakely piecemeal so as to radically disfigure the operation of the guidelines and in certain cases produce grossly inadequate sentences. Moreover, you should be assured that at least until the constitutional issues are definitively resolved, the rulings of individual sentencing courts regarding Blakely will have no effect on the Department=s sentencing recommendations in court. Department attorneys will neither draw back from the guidelines, nor attempt to take advantage of opportunities for indeterminate sentencing, but will continue to adhere to the guidelines in every case.

Because the final legal outcome is far from certain, we have asked prosecutors to immediately begin to include in indictments all readily provable guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the Blakely and Apprendi rules). While the legal position of the government is that inclusion of such factors is not constitutionally required in order to enhance a guidelines sentence, in light of the unpredictable future path of court rulings, we believe it is prudent for the government to protect against the possibility that such allegations in indictments will be held necessary. Taking these prophylactic measures - more complex indictments, grand jury proceedings, and trials - will be extremely difficult and time-consuming both for prosecutors and judges. But until the effects of Blakely on the sentencing guidelines are more clearly understood, Department attorneys will be required to adopt these measures to protect the public to the greatest extent possible.

PROPOSED LEGISLATION

Within days after the Blakely decision was handed down, legislative proposals were being suggested to address the uncertainty in federal sentencing policy and the tremendous litigation that would follow the decision. We believe this Committee, and Congress as a whole, should be careful and deliberate in considering legislative proposals designed to address Blakely. Sentencing policy impacts nearly every single one of the more than 66,000 federal defendants charged on average with felonies or Class A misdemeanors each year.

In examining any short term legislative proposal, we are guided by, and we suggest that the Committee consider, the following criteria, among others: 1. Will the legislation provide a clear short- and long-term solution to the many pending litigation issues? 2. Is the legislation consistent with the principles of sentencing reform that have been supported by both Republican and Democratic majorities of Congress for 20 years and by Republican and Democratic administrations for 20 years? 3. Does the legislation address all of the constitutional issues that remain unresolved or is there a significant likelihood that the Court will be reviewing federal sentencing policy shortly even with the legislative change?

CONCLUSION

The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that meet the goals of the Sentencing Reform Act. Despite the current uncertainty about the implications of Blakely, we are confident that federal sentencing policy can and will continue to play its vital role in bringing justice to the communities of this country and effectively vindicating federal criminal law.

I would be happy to try to answer any questions that the Committee may have.