	Rule 720	later than 10 days after imposition of sentence.	the motion within 120 days of filing of motion. If court fails to rule within 120 days, motion is deemed denied.	made within 120 day period, court may extend by 30 days the time for a decision to be made.
39. RI	RCRP Rule 35		**Court may reduce a sentence within 120 days after: a.) imposition of sentence; b.) receipt of mandate affirming or dismissing appeal; or c.) receipt of order of U.S. Supreme Court affirming or dismissing appeal. Within 20 days after filing motion to reduce a sentence, the attorney general may file a motion to increase the sentence.**	Court on its own motion, after defendant files motion to reduce sentence, may <u>increase</u> the sentence.
40. SC				South Carolina has no formal rule or statute regarding motions to modify.
41. SD	SD St. Ann §23A-31-1		***<u>Court may reduce a sentence:</u>*** **a.) within one year after it is imposed; b.) within 120 days after receipt of mandate affirming or dismissing appeal; or c.) within 120 days after order of Supreme Court denying review, whichever is later.**	
42. TN	RCRP Rule 35	Motion must be filed within 120 days after date sentence was imposed	No time limit.	
43. TX				Texas has no formal rule or statute regarding

44 UT				motions to modify. Utah has no formal rule or statute regarding motions to modify.
45. VT	RCRP Rule 35		***Court may reduce sentence*** **within 90 days after: a.) sentence is imposed, or b.) entry of order of Supreme Court upholding conviction.**	
46. VA	Va. St. Ann. §19.2-303			**If a person is sentenced to jail, the court may, at any time before the sentence is completely served, suspend the unserved portion. If a person is sentenced for a felony to the Department of Corrections, but has not been actually transferred to a receiving unit, the court may, at any time before the person is transferred, suspend or modify the sentence.**
47. WA				**Washington has *no formal rule or statute* regarding motion to modify.**
48. WV	RCRP Rule 35	**Motion may be made within 120 days after: a.) imposition of sentence; b.) entry of mandate affirming or dismissing appeal; or c.) entry of order by Supreme Court of Appeals dismissing petition for appeal.**	***Court may, on its own, without a motion, reduce a sentence within time frames for filing a motion. However, motion filed timely by defendant must be ruled upon within a reasonable time.***	**In *State v. Head*, 480 SE2d 507 (1996), court held that "as long as the circuit court does not usurp the role of the parole board, *it may consider matters beyond the filing period when such consideration serves the ends of justice."* The delay in ruling on the motion in *Head* was *4 years*. The appellate court remanded for reconsideration of the motion on the merits finding that a ruling**

[redacted]				would be within a reasonable period of time despite the delay of 4 years.
49. Wi	Wi. St. Ann. §973.19	Person who has not requested preparation of transcripts for post conviction hearing may file motion to reduce within 90 days after sentence is ordered.	Court must rule on motion within 90 days after it is filed but may extend time for ruling by no more than 90 additional days.	
50. WY	RCRP Rule 35	*Motion may be made within one year after:* a.) imposition of sentence; b.) receipt of mandate affirming or dismissing appeal or c.) entry of order of Wyoming Supreme Court denying review.	*Court may, on its own, reduce a sentence* within the times provided for filing a motion. If a motion has been filed, *court must rule on it within a reasonable time.*	*Arland v. Wyoming*, 788 P2d 1125 (1990), appellate court remanded for ruling on the merits 3 years after motion was filed.

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U.S. 9th Circuit Court of Appeals
USA v CUEVAS GOMEZ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Vs
LEOPALDO CUEVAS-GOMEZ,
OPINION
Defendant-Appellant.

No. 94-30365
D.C. No.CR-94-00402-WLD

Appeal from the United States District Court for the Western District of Washington William L. Dwyer, District Judge, Presiding

Submitted July 17, 1995
*

Seattle, Washington
Filed August 9, 1995
Before: Jerome Farris, John T. Noonan, Jr. and Michael Daly Hawkins, Circuit Judges.
Opinion by Judge Hawkins
COUNSEL
Thomas W. Hillier, II, Federal Public Defender, Seattle, **Washington**, for the defendant-appellant.
Donald M. Reno, Jr., Assistant United States Attorney, Seattle, **Washington**, for the plaintiff-appellee.
OPINION: HAWKINS, Circuit Judge:
We consider here whether a district court has discretionary authority to depart downward from the sentence mandated by United States Sentencing Guideline ("USSG")S

2L1.2(b)(2), *which requires a 16-level upward adjustment for immigration defendants convicted of aggravated felonies. At sentencing, in response to defense counsel's question, the district court stated that it lacked authority to depart in this case. The court, however, indicated that it "would not at all object to an appellate holding that [departure] is open to the courts . . . .* ***[a]nd if held to be in error, obviously I would consider then whether [the defendant's "criminal" history] is overstated in this case."*** *Our review of whether the district court has authority to depart is de novo.* **United States v. Lira-Barraza, 941 F.2d 745, 746 (9th Cir. 1991)** (en banc). ***We have jurisdiction*** **under 18 U.S.C. S 3742(b) (review of sentence)** and **28 U.S.C. S 1291 (review of final judgment).** *We hold that the downward departure sought by Cuevas-Gomez is within the district court's authority, and we remand for reconsideration of Cuevas-Gomez's sentence.*

The district courts have statutory authority to depart from the Guidelines in those cases in which the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration *by the Sentencing Commission."* **18 U.S.C. S 3553(b); USSG S 5K2.0** (policy statement regarding departure). *Nothing in section 3553(b) or in the Guidelines suggests that the district court's departure authority does not extend to USSG S 2L1.2(b)(2).*

In fact, we have held that the application of USSG S 2L1.2(b)(2) does not violate a defendant's due process rights precisely because **"the district court [is] free to consider [defendant's] individual circumstances." United States v. Estrada-Plata, _____ F.3d _____, Nos. 94-50178, 94-56538, slip op. 6669, 6681 (9th Cir. June 9, 1995).** See also, **United States v. Reyes, 8 F.3d 1379, 1382-89 (9th Cir. 1993)** (S 3553(b) authorizes downward departure from defendant's career offender category); **United States v. Hinds, 803 F. Supp. 675, 676-79 (W.D.N.Y. 1992)** (departing downward under authority of S 3553(b) *in illegal reentry case in which defendant's "aggravated felonies" were comparatively minor drug offenses), aff'd,* ***992 F.2d 321 (2nd Cir. 1993)*** *(table). Thus, the district court does indeed possess the authority to consider whether Cuevas-Gomez's individual circumstances warrant a downward departure. We express no opinion whether CuevasGomez's circumstances merit downward departure; a matter for the district court to consider on remand. 1*

Accordingly, we VACATE Cuevas-Gomez's sentence *and REMAND the case for proceedings consistent with this opinion.*

[Footnote 1] We do not mean to suggest, nor did Cuevas-Gomez argue, that the minor nature of his prior offense did not trigger the 16-level increase mandated by USSG S 2L1.2(b)(2). We simply hold that the district court's general departure authority applies to illegal reentry cases.

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Beyond Blakely

Revised on September 8, 2004 from 16 Fed. Sentencing Reporter 413 (June 2004).

NANCY J. KING 1

& SUSAN R. KLEIN 2

Criminal sentencing in the wake of Blakely v. Washington 3 is, to put it charitably, a *mess.* 111 Wash. App. 851, 47 P. 3d 149

CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON No. 02–1632.

Argued March 23, 2004—Decided June 24, 2004

Petitioner pleaded guilty to kidnapping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed, rejecting petitioner's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held: Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury. Pp. 5–18.

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(a) This case requires the Court to apply the rule of ***Apprendi* v. *New Jersey*, 530 U. S. 466, 490**, 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 relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, ***because:***

Washington law requires an exceptional sentence to be based on factors *other than those* used in computing the standard-range sentence.

Petitioner's sentence is not analogous to those upheld in *McMillan* v. *Pennsylvania*, 477 U. S. 79, and *Williams* v. *New York*, 337 U. S. 241, which were not greater than what state law authorized based on the verdict alone. Regardless of whether the judge's authority to im-pose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence. Pp. 5–9.

(b) This Court's commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of jury trial. Pp. 9–12.

(c) This case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects the Sixth Amendment. The Framers' paradigm for criminal justice is the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. That can be preserved without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. Pp. 12–17. 111 Wash. App. 851, 47 P. 3d 149, reversed and remanded. SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. O'CONNOR, J., filed a dis-senting opinion, in which BREYER, J., joined, and in which REHNQUIST, C. J., and KENNEDY, J., joined except as to Part IV–B. KENNEDY, J., filed a dissenting opinion, in which BREYER, J., joined. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined.

In holding that Blakely's sentence under the Washington State Sentencing Guidelines was imposed in a manner inconsistent with the Sixth Amendment right to a jury trial, the decision threatens the operation of the Federal Sentencing Guidelines and the presumptive sentencing systems in fourteen states.4 In Parts I and II of this article, we address how Blakely has affected the Federal Sentencing Guidelines, and how assistant U.S. attorneys, federal public defenders, and district and appellate court judges might proceed in a post- Blakely world. In Part III, we discuss Blakely challenges raised in cases on direct and collateral review. Finally, in Part IV, we collect some of the various options for reform open to Congress.

Blakely was the latest in a series of decisions defining when a fact used in setting an offender's sentence must be treated as an element under the Constitution. In the most important of these cases, Apprendi v. New Jersey,5 a closely divided Court declared that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [other than the fact of a prior conviction] must be submitted to a jury, and proved beyond a reasonable doubt."6 Two years later, the four justices who dissented in Apprendi, joined by Justice Scalia, held in Harris v. United States 7 that Apprendi did not require a fact triggering a mandatory minimum sentence to be established beyond a reasonable doubt to a jury.8 That same term, the Court in Ring v. Arizona 9 applied Apprendi to hold that because Arizona conditioned eligibility for the death penalty upon the presence of an aggravating fact that was not an element of first degree murder, the Sixth Amendment guaranteed the defendant a right to a jury determination of that fact. ***The Court stated, "[i]f a state makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact — no matter how the state labels it—must be found by a jury beyond a reasonable doubt."***10 Blakely presented the Court with another variation of the Apprendi problem — this one posed by a state sentencing scheme that included what might be called dueling maximum sentence statutes. The statute setting the sentence ranges for each class of felony offense in Washington designated ten years as the maximum punishment for Blakely's

class B kidnapping offense. Washington's Sentencing Reform Act,11 however, specified in a separate statutory provision a "standard range" of 49 to 53 months for Blakely's offense, a range that could not be exceeded unless a judge found a "substantial and compelling reason" justifying an exceptional sentence. The Act enumerated several potential factors that would support a judge's decision to depart from the presumptive range, but provided that the list was not exclusive. The trial judge in Blakely's case imposed an exceptional sentence of 90 months, after finding that Blakely had acted with "deliberate cruelty," an enumerated factor for an exceptional sentence. With Justice Scalia writing for five justices, the Court concluded that because a sentence higher than 53 months required additional factual findings not admitted by the defendant nor proven beyond a reasonable doubt to a jury as part of his conviction, the relevant "statutory maximum" for Blakely's offense was the 53-month presumptive sentence and not the ten-year maximum specified for class B offenses. Any fact triggering a sentence exceeding 53 months, the Court reasoned, must be admitted by the defendant or proven to a jury beyond a reasonable doubt.

I. Blakely's Application to the Federal Sentencing Guidelines

A. Are the U.S.S.G. Distinguishable?

The Court in Blakely v. Washington addressed only the Washington Sentencing Reform Act. Justice Scalia's opinion stated that the Court was not expressing an opinion on the constitutionality of the Federal Sentencing Guidelines.12 The dissenters, plainly unconvinced, predicted the Washington sentencing scheme could not be distinguished from the Guidelines.13 The position of the Department of Justice 14 is that even if facts required to exceed presumptive ranges must be treated as elements under the statutes in Washington, the same is not true for facts that must be established for upward adjustments or departures under the Guidelines. Washington's dueling sentence maxima for Blakely's offense both appeared in statutes; Congress has enacted only a single sentence maximum for each crime, contained in the U.S. Code. The federal guidelines are not "legislatively enacted," but are rather a "unique product of a special delegation of authority" to an independent Commission in the judicial branch.15 The Guidelines "were never intended to operate on the same footing as the statutory maximums."16 This distinction, which rests upon whether or not a legislature first delegates the creation of presumptive sentence ranges to a commission before endorsing them, is unlikely to accepted by the five member majority in Blakely.17 Every sentencing guideline promulgated by the Commission must be ratified by Congress, which "can revoke or amend any or all of the Guidelines as it sees fit."18 Congress has invoked its authority to

reject guidline amendments promulgated by the Sentencing Commission, and to bypass the Commission altogether and amend the Guidelines directly.19 Just as the presumptive sentencing range for the offense of conviction with no additional facts is the "statutory maximum" in Washington after Blakely, so the top of the recommended sentence range as determined by the offense of conviction, without any upward adjustments, is the "statutory maximum" in the federal system. In both statutory schemes, the maximum sentence available is "the maximum [the judge] may impose without any additional findings."20 Several district courts, now joined by decisions from the Seventh, Eighth, and Ninth Circuit Courts of Appeals, agree.21 The majority of federal circuits have declined to apply Blakely to the Federal Sentencing Guidelines, at least until the Supreme Court speaks to the issue. Fifth and Eleventh Circuit cases taking this position are based not upon any clear distinction between the Washington and federal sentencing schemes, but on the Circuits' refusal to reject various prior Supreme Court cases that upheld the federal sentencing guidelines against constitutional challenges (albeit not a Sixth Amendment right to jury trial challenge).22

The Fourth Circuit held that Blakely does not invalidate the Guidelines without offering an explanation.23 Finally, the Sixth and Second Circuits have thus far refused to invalidate the Guidelines in order to preserve existing practice while awaiting Supreme Court resolution.24 Res onding to a request by the Department of Justice to resolve this question on an expedited basis, the Supreme Court granted certiorari on a pair of cases and set oral argument for Oct. 4, 2004. 25

B. If the Guidelines are Indistinguishable, What Features of the Guidelines are Affected? Assuming

that the presumptive sentence ranges established by the Federal Guidelines cannot be meaningfully distinguished from those in Washington State, which factual assessments must be proven to a jury beyond a reasonable doubt?

Consider one illustration. Suppose a defendant is convicted of mail fraud, in violation of 18 U.S.C. § 1341. Assume also that only the elements of § 1341 simpliciter (knowing creation of a scheme to defraud, with specific intent, and a mailing) are admitted or otherwise proven at a jury trial.26 The sentence provided in § 1341 is 0–20 years for simple mail fraud.27 Congress has also provided, via its adoption of U.S.S.G. § 2B1.1, a presumptive sentence of 0–6 months for this offense, absent additional factual findings.28 Before Blakely, judges assumed they were free to find those facts that trigger sentences under the Guidelines that exceeded 6 months, so long as the sentence did not exceed 20 years. So, for example, a judge would impose a sentence of 41–51 months, if she found as part of sentencing that the fraud involved losses exceeding $1 million.29 After Blakely, however, the relevant "statutory maximum" that the judge "may impose without any additional findings"30 is the top of the range designated for the offense of conviction alone, 0–6 months.

Any additional finding triggering a higher range, such as the million dollar loss, must be either admitted or proven beyond a reasonable doubt. Likewise, if the prosecutor or judge wishes to aggravate a defendant's sentence due to his role in the offense, the presence of a gun, injury,31 or relevant conduct,32 or seeks to depart upward from the presumptive sentencing range due to a fact not otherwise taken into account under the Guidelines,33 each of those additional facts must be admitted by the defendant or found by a jury before a sentence higher than six months can be imposed.34 We also believe that Blakely has thrown into doubt those decisions authorizing judges to make findings necessary for forfeiture and restitution awards.35

These cases have reasoned that Apprendi does not apply to factfinding in determining what assets, If any, can be forfeited because the forfeiture and restitution statutes do not create a penalty ceiling. This argument has rested in turn on the assumption that the statutory maximum under which a judge was free to sentence based on specific findings of fact was the maximum sentence codified into the U.S. Code, an assumption that we believe Blakely has now undercut. Instead, because judges may not order forfeiture of defendant's assets without specific factual findings that are not always part of the underlying conviction, these facts must be determined by a jury beyond a reasonable doubt.36 Restitution ordered as part of sentencing is open to the same sort of attack.37 Still, much of the Guidelines scheme is not directly affected by the Blakely rationale. Facts allowing judges to mitigate a defendant's sentence, or that trigger a higher minimum without raising the maximum sentence, may be found by the judge using the preponderance of evidence standard. Prior convictions, too, need not be submitted to a jury and proven beyond a reasonable doubt.

There are quite a number of enhancements based upon prior convictions.38 After Blakely, the government will have a much higher procedural burden to meet before it can advance up through the offense levels on the vertical axis of the sentencing grid, but it can in many cases zip along the horizontal axis as easily as it did before.39 C. Severability: Can the Guidelines Stand As Modified? Assuming that Blakely has invalidated the judicial factfinding we have detailed above, the question for courts is whether the remainder of Congress's sentencing scheme should be retained, or rather, whether the entire statutory scheme must be invalidated. This may prove to be not only the most important, but the most difficult issue to resolve in assessing the impact of Blakely in the federal courts.40 1. The Test for Severability The United States Supreme Court has often repeated that it "should refrain from invalidating more of the statute than is necessary . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this Court to so declare, and to maintain the act in so far as it is valid.'"41 The Court has explained that "[u]nless it is evident that [the Legislature] would not have enacted those provisions that are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."42 This is a test of legislative intent; "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."43 The absence of a severability clause, as is

true of the Sentencing Reform Act of 1984, 44 "does not raise a presumption against severability."45 There is no obvious answer to the hypothetical question — would Congress have enacted the Sentencing Reform Act of 1984 had it known that the sections permitting judges rather than juries to find some enhancements would be stricken as unconstitutional? Looking to the history, purpose, and structure of the Federal Sentencing Reform Act, there are persuasive arguments on each side. 2. Gutting the Guidelines The Government's position is that if Blakely applies to the Federal Sentencing Guidelines at all, the Guidelines as a whole no longer have the force of law, because judicial fact-finding cannot be severed from the remainder of the statutory scheme.46 The Department argues quite credibly that a "requirement that enhancing—but not reducing— facts have to be submitted to the jury and proven beyond a reasonable doubt would distort the operation of the sentencing system in a manner that would not have been intended by Congress or the Sentencing Commission."47 Congress clearly intended that the Guidelines would be applied by judges and not juries,48 and appellate review of jury findings were not envisioned by Congress in enacting 18 U.S.C. § 3742(d). Applying Blakely undercuts the Guidelines effort to end sentencing disparity and many enhancements, particularly relevant conduct, grouping, and post-trial conduct are "not well-suited to submission to juries."49 The Commissioners themselves noted in the Manual that "the Guidelines Manual in effect on a date shall be applied in its entirety,"50 and this was implicitly adopted by Congress in 1987. 51 Joining this side of the debate is Professor Frank Bowman in his Memorandum to the U.S. Sentencing Commission, three days after Blakely was decided.52 Bowman argues that Blakely renders the Guidelines facially unconstitutional. The complex federal sentencing model envisioned by Congress includes post-conviction findings of various facts by district judges; any attempt to salvage the Guidelines by treating those facts as elements would be "transforming them by judicial fiat into something that neither the Sentencing Commission nor Congress ever contemplated that they would become."53 Several judges are reaching this conclusion. In one of the earliest decisions applying Blakely, the District Judge in United States v. Croxford 54 held that "the Federal Sentencing Guidelines are unconstitutional and cannot govern defendant's Croxford's sentencing."55 The judge found that Blakely barred a two level enhancement for obstruction of justice based on defendant's fleeing the jurisdiction before trial, and another two level increase based on an uncharged sexual offense involving another young
victim. The probation officer's recommendation had included these adjustments, as well as a three level decrease for acceptance of responsibility, for an adjusted level of 34 (151–181 months), slightly higher than the range contemplated in the plea agreement of 121–151 months.56 The judge concluded that imposing only the sentence authorized by the Guidelines without the addition for obstruction of justice and relevant conduct "would inevitably tug downward on criminal sentences, perhaps producing sentences that do not provide just punishment or protect public safety."57 Using his pre-Guidelines discretion bound only by the 10-year mandatory minimum and 20-year statutory maximum, the judge sentenced the defendant to 148 months.58 He noted that "should the sentencing guidelines later be found to be constitutional . . . the court will impose a backup sentence under the Guidelines of 151 months."59 Other judges, too, have found the Guidelines were invalidated by Blakely and are sentencing accordingly.60 Blakely flies in the face of Congressional intent to retain judicial fact-finding in sentencing proceedings, and creates procedural barriers where Congress would not have erected them. The decision operates to distort what were otherwise even-handed restraints on judicial discretion, so that after Blakely reducing a presumptive range becomes much easier than raising it. Moreover, Blakely makes it much more difficult to achieve a key component of Congress's sentencing scheme — real offense sentencing, in which conduct other than the offense of conviction carries a specified sentencing price.61 3. Preserving the Guidelines, as Modified What makes the issue of severability a close one is that despite Blakely's clear repudiation of Congressional intent to provide for a real-offense sentencing system with judicially based upward as well as downward adjustments, much of what Congress was trying to accomplish in the Sentencing Reform Act of 1984 is untouched by Blakely. The Sentencing Reform Act was the result of overwhelming bipartisan support for ending disparities that occur at sentencing or at the parole stage.62 Every player in the criminal justice system prior

to 1984 had horror stories about identical offenders before different judges, one who received a sentence of probation while another was sentenced to a lengthy term of imprisonment. "The Sentencing Reform Act sought to remedy this defect by abolishing parole, substituting a system of determinate sentences, and providing sentencing courts with explicit direction, in the form of binding guidelines that prescribed the kinds and lengths of sentences appropriate for typical federal offenders."63 The Act achieved this by 1) rejecting rehabilitation and parole, 2) consolidating power that had been exercised by the sentencing judge and the parole commission instead into the United States Sentencing Commission, 3) making all sentences determinate, 4) making the Sentencing Commission's guidelines binding on the courts, and 5) authorizing limited appellate review of sentencing decisions.64 Congress provided for mandatory sentences, established the United States Sentencing Commission, mandated presentence reports to assist in calculating that range, changed the law regarding fines, special assessment, and probation, provided for appellate review of sentences, and, finally, abolished the Parole Board.65 Blakely does not, and need not, affect all of these provisions. The state of Kansas chose to modify its sentencing scheme to comply with Apprendi through legislation,66 sending sentence-enhancing facts to the jury for proof beyond a reasonable doubt.67 Federal judges probably could accomplish the same thing on their own.68 As in Kansas, a federal jury could hear evidence in a unitary proceeding, or, in the judge's discretion, in a bifurcated proceeding.69 There seems to be no constitutional or federal statutory barrier to this solution. Should the trial be bifurcated, the second hearing would not be a sentencing hearing, but a trial of one or more elements of a criminal offense, and the usual trial procedures would probably apply, including those rules governing jury selection, instruction, argument, as well as evidentiary standards required by statute and the Constitution for proving elements of crimes. Illegally obtained evidence may have to be excluded; as would hearsay if its admission would violate the defendant's rights under the Confrontation Clause. In other words, the government could not, after Blakely, rely on hearsay statements in the presentence report to establish the facts that federal law makes essential to a higher penalty. The jury determination would probably require unanimity, and be limited by the same procedures regulating deadlock instructions, verdicts, polling, and jury misconduct. These entitlements turn, it seems to us, on whether facts identified in Blakely and Apprendi are functioning as elements, or whether, as some have argued in the past, they are hybrids, not quite elements, and not sentencing factors, but something in between — superfacts that require some procedural protections but not all. There is little in Justice Scalia's opinion for the Court in Blakely that would suggest that the Court is considering a novel status for these facts. Everything points to treating them just like any other element.70 Predictions that guideline facts would be impossible to prove to juries 71 or review on appeal 72 are, we believe, exaggerated. Admittedly, upward adjustments for relevant conduct would be difficult to administer after Blakely.73 The Federal Sentencing Guidelines provide that criminal conduct related to the conduct of conviction be brought to the attention of the judge by the Probation Department, and that the judge shall adjust a sentence for relevant conduct, whether the prosecutor makes this request or not.74 As the Department of Justice points out in its recent brief: "Aside from the difficulty of instructing a jury on the quite complex issues arising in applying these definitions, . . . requiring jury determinations on relevant conduct could take a criminal trial into areas far afield from the core question that is suitable for jury resolution — whether the defendant committed the particular crime with which he was charged."75 It would appear that preserving what can be salvaged of the Guidelines after Blakely would require that defendants absorb the risks raised by