

Administrative Order Regarding Sentencing After
Blakely v. Washington For Cases Before Judge William E. Smith

The Court has before it a number of cases that may be affected by the uncertainty created by the United States Supreme Court's opinion in Blakely v. Washington, 124 S. Ct. 2531 (2004).

In order to assess the impact of Blakely, the Court requested and received briefing from the parties in the cases of United States v. Silver, CR No. 03-21S, and United States v. Montegio, CR No. 03-05-01S, on eight specific questions with respect to the effect of Blakely. The Court believes that the pressing question of whether Blakely applies to the Federal Sentencing Guidelines is essentially unanswerable by this Court. Only the Supreme Court can resolve this question and it will no doubt do so after it considers United States v. Booker, 375 F.3d 508 (7th Cir. 2004), cert. granted, 2004 WL 1713654 (U.S. Aug. 2, 2004) (No. 04-104), and United States v. Fanfan, 2004 WL 1723114 (D. Me. June 28, 2004), cert. granted, 2004 WL 1713655 (U.S. Aug. 2, 2004) (No. 04-105), in October. Because expedited review has been granted, and based upon several of the Justices' public statements, it is likely that the Court will address the issue speedily. The intention of this brief ORDER is to provide a framework for dealing with cases currently pending and soon to be filed that may be affected by Blakely.

So much has been written already by several circuit courts and countless district courts about Blakely and its impact that this Court believes no purpose would be served by adding to the volume of judicial analysis. Indeed, this ORDER is not intended to rule one way or another on the application of Blakely to the Guidelines. This ORDER is instead simply intended to provide a practical approach for handling this Court's criminal docket over the next few months.

The merit of this practical approach is apparent. A brief overview of the current state of the law reveals deep divisions among the circuits about how to approach Blakely. The First Circuit has not taken any definitive position. The Second Circuit initially certified questions about Blakely's application to the Guidelines to the Supreme Court in United States v. Penaranda, 375 F.3d 238 (2d Cir. 2004). Subsequently, in United States v. Mincey, 2004 WL 1794717 (2d Cir. Aug. 12, 2004), however, the Second Circuit held that Blakely does not apply until the Supreme Court or Congress says otherwise. The Third, Sixth, and Eighth Circuits have not as yet adopted any definitive approach.¹ Both the Fourth and Fifth Circuits have

¹ In United States v. Montgomery, 2004 WL 1562904 (6th Cir. July 14, 2004), a panel of the Sixth Circuit held the Guidelines unconstitutional based on Blakely. That decision was vacated and rehearing en banc was granted on July 19, 2004. The case was subsequently dismissed. Likewise, a panel of the Eighth Circuit held

held that Blakely does not apply to the Guidelines. United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004)(en banc); United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004). However, the Seventh and Ninth Circuits have held that Blakely renders the Guidelines unconstitutional. United States v. Booker, 375 F.3d 508 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967 (9th Cir. 2004). The Tenth, Eleventh and D.C. Circuits have not stated their respective positions.

As indicated above, the First Circuit has not yet spoken and the other circuits are irreconcilably divided. Several district courts in this circuit have held the Guidelines unconstitutional post-Blakely. These opinions, while interesting, generally reflect the views expressed by several of the circuit courts (specifically, the Seventh, Eighth, and Ninth). This Court believes that the most sensible approach is to wait for the Supreme Court to decide the constitutional questions raised by Blakely, and to develop a procedure for dealing with the pending caseload until then. Therefore, the following procedure will apply to all cases pending and soon to be filed before this Court:

the Guidelines unconstitutional in United States v. Pirani, 2004 WL 1748930 (8th Cir. Aug. 5, 2004), but that opinion was vacated and rehearing en banc was granted on August 16, 2004.

1. Cases in which Defendants have pled guilty or been tried and found guilty, but sentence has not been imposed

These cases are a defined group. It is clear that in many of these cases, the Court may proceed with sentencing as usual, utilizing the Guidelines, because the case either does not raise a Blakely issue or the facts pled to and/or the plea agreement support the enhancement finding. Sentencing will proceed on these cases applying the Guidelines. No special procedures are required. The Court has already sentenced a number of defendants in this group.

The more problematic group of cases are those that involve an enhancement not supported by facts set forth in the plea colloquy, or in the plea agreement; or, if the case has been tried and the Defendant found guilty, no specific jury finding exists to support the enhancement. These are only a limited number of these cases, and in nearly all of them the Defendants face sentences of considerable length (with or without the disputed enhancements). While no doubt the Defendants in these cases want to know their fate, there is no urgency to impose sentence within the next six months, in which time it is highly probable that the Supreme Court will issue decisions in Fanfan and Booker. There is no risk that any Defendant in this group will be incarcerated for a length of time in excess of his

potential sentence as a result of such a delay. In most of these cases the time served by these Defendants in the interim will count against their sentences.² (In the event that there is a case in which the six-month delay might prejudice the Defendant, the Court will conference the case with the attorneys to discuss the matter.)³

Moreover, while any uncertainty resulting from further delay is potentially disconcerting to the Defendants, each Defendant in this group stands to benefit from the delay. If the Supreme Court rules that the Guidelines are unconstitutional these Defendants could potentially receive the benefit of greater judicial discretion in imposing a sentence that might not otherwise exist. If the Court rules that the infirm portions of the Guidelines are constitutionally severable, and that jury fact-finding is required, this Court will proceed accordingly. In all foreseeable circumstances, this Court believes that these Defendants are not harmed and may potentially be benefitted by

² This determination is ultimately made by the Bureau of Prisons and depends on other factors such as whether there exists a parallel state charge or a violation of probation on which a sentence may be imposed.

³ The cases that will be defined are as follows: United States v. Silver, *supra*, at 1; United States v. Montegio, *supra*, at 1; and United States v. Tshibaka, CR No. 03-097S. The case of United States v. Delgado, CR No. 04-057S, will be conferenced prior to sentencing.

awaiting the guidance of the United States Supreme Court (or the First Circuit, if a decision is issued in the interim).

Having said all of this, there may be Defendants in this group who wish to get on with sentencing for either tactical or personal reasons. These Defendants may be willing to enter a supplemental Blakely waiver which would allow judicial fact-finding with a preponderance of the evidence standard of proof. If a Defendant in this group wishes to proceed in this fashion, the Court will entertain such a motion from counsel, and will schedule a supplementary hearing at which time the Court will consider whether the Defendant should be allowed to proceed in this manner. In the event a waiver is obtained, the Court will proceed directly to a sentencing hearing and will apply the Guidelines as usual.

Therefore, for all Defendants who are awaiting sentencing in cases involving significant Blakely issues, sentencing will be postponed until the Supreme Court (or the First Circuit) issues a ruling giving definitive guidance on the application of Blakely to the Guidelines (unless the delay might be longer than the sentence faced by the Defendant, in which case a conference will be called). Any Defendant who wishes to enter a Blakely waiver may file a motion so stating, and the Court will schedule a hearing as soon as practicable.

2. Cases currently pending in which Defendants intend to plead guilty

This group is presumably the majority of new cases. Statistically, about 97% of all criminal cases in the federal system are resolved by guilty plea.⁴ The Government has recently modified its standard plea agreement to reflect a comprehensive waiver of Blakely rights. The Government indicated that all new plea agreements must contain a Blakely waiver provision and that the issue is a "deal breaker." The Assistant Federal Defender has indicated in a conference with this Court that he cannot advise a Defendant to waive the reasonable doubt standard. It is not clear how the respective positions of the Government and the Assistant Federal Defender will play out; time will tell. It is apparent, however, that in all future cases resolved by plea, the Court will apply the Guidelines, including judicial fact-finding and, presumably, a preponderance of the evidence standard of proof, by virtue of the Blakely waiver contained in the plea agreement.

3. New cases that are not resolved by plea agreement and proceed to trial

A certain number of cases that are not resolved by plea agreement will proceed to trial. This group of cases will be

⁴ United States Sentencing Commission, "2002 Source Book of Federal Sentencing Statistics."

manageable because only cases indicted since Blakely which are tried prior to the Supreme Court's decision(s) in Fanfan and Booker will be impacted by the uncertainty created by Blakely. Trials conducted subsequent to the Supreme Court's decision(s) will have the benefit of the Court's guidance. It is therefore likely that this Court will face only a limited number of criminal trials prior to the Supreme Court's resolution of the Blakely issue. Nevertheless, a procedure is necessary to deal with the cases that are tried. Rather than attempting to construct a one-size-fits-all solution, the Court believes that a flexible approach is better suited to these cases. Therefore, the Court will proceed as follows: for all cases which are tried prior to the Supreme Court's resolution of the Blakely issue, the Court will address enhancement issues in detail at its usual final pretrial conference. If the case is one which is not likely to raise enhancement issues, the trial can proceed and, if the Defendant is found guilty, sentence will be imposed pursuant to the Guidelines. If the trial is one that raises significant sentencing enhancement issues implicated by Blakely, then presumably the Government will have filed an appropriate (possibly superceding) indictment to allege the specific facts that support the enhancement. Thus the case should be one in which a trial to a jury of enhancement issues could be

conducted. In the pretrial conference with counsel, the Court will explore whether the "enhancement facts" alleged in the indictment may be presented to the jury without any extraordinary procedures (such as a bifurcated trial). If the factual questions can be submitted to the jury and resolved by virtue of special interrogatories to the jury (the enhancement questions would be answered only if the jury finds the Defendant guilty), then the Court will utilize this approach. On the other hand, in the event that the presentation of enhancement issues would be highly complicated or cumbersome (or would result in prejudice to a Defendant if put before the jury, such as an obstruction of justice enhancement), then the Court may choose to proceed by trying the indicted offense and reserving the enhancement issues. In these situations, the Court may utilize procedures such as redacting the indictment given to the jury during deliberations, and/or bifurcating the trial. If the Defendant is found guilty, and the Court determines that it is not appropriate to submit the enhancement issues to the jury, the Defendant may be placed in the group of cases, supra, at 3, in which sentencing is being deferred until further guidance from the Supreme Court. Given that the Supreme Court is likely to resolve this issue before December, and because sentencing usually occurs approximately 75 days after conviction, the issue

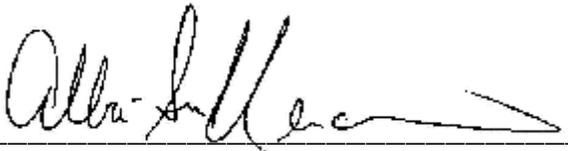
of what to do about the Blakely enhancements should be resolved around the same time that sentencing would normally occur. If the Supreme Court determines that the Guidelines are constitutional as currently configured, then this Court will simply proceed to sentence the Defendant in accordance with the Guidelines; if the Supreme Court determines that the Guidelines are unconstitutional and directs district courts to sentence in a pre-Guideline manner, then this Court will do so, presumably using the Guidelines as a "guide"; and finally, if the Supreme Court determines that district courts should utilize sentencing juries to resolve enhancement issues, this Court may then empanel a sentencing jury for this purpose.

This procedure allows the Court to treat Blakely issues with the greatest amount of flexibility and practicality. There is, of course, the possibility that enhancement issues are tried to a jury, which concludes that the Government has not proved the enhancement fact(s) beyond a reasonable doubt. This determination could be followed by a Supreme Court finding that the Guidelines are unaffected by Blakely. Because of this possibility, the Court believes it would be prudent to place on the record the Court's own finding as to the enhancement facts in the event factfinding is found to be appropriate.

The clerk is directed to circulate this order to all attorneys with cases currently pending in this Court, and to provide a copy to attorneys in all criminal cases after assignment to this Court.

SO ORDERED.

ORDER:

By: 

Deputy Clerk

Enter:



William E. Smith
United States District Judge

Date: September 2, 2004