

No. 04-5272

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY BIJOU, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not reported in the Federal Reporter, but is available at 92 Fed. Appx. 966.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2004. The petition for a writ of certiorari was filed on July 12, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court

for the Western District of North Carolina, petitioner was convicted on two counts of possessing firearms after being convicted of a felony, and on one count of possessing ammunition after being convicted of a felony, all in violation of 18 U.S.C. 922(g) (1). He was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed.

1. On January 16, 2001, police officers responding to a report of a "man with a gun" saw petitioner attempting to enter an apartment. Petitioner fled when he saw the police, dropping a loaded handgun in a parking lot behind the apartment building. Gov't C.A. Br. 3-4. On February 5, 2002, officers who went to petitioner's residence to execute a warrant for his arrest saw marijuana in an ashtray in his apartment. After obtaining a warrant to search the apartment, the officers found cocaine base, marijuana, a 9mm handgun and ammunition, and \$10,000 in cash. Gov't C.A. Br. 4.

A federal grand jury returned a superseding indictment charging petitioner with two counts of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g) (1) (Counts One and Two); one count of possessing ammunition after being convicted of a felony, in violation of 18 U.S.C. 922(g) (1) (Count Three); one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (1)

(Count Four); and one count of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count Five). Superseding Indictment (March 6, 2002), at 1-3.

Petitioner pleaded guilty to Count One of the indictment and proceeded to trial on the other four counts. Gov't C.A. Br. 2. At trial, petitioner moved to suppress evidence of the cocaine base found in his apartment. Citing discrepancies in the government's evidence concerning the weight of the seized drugs, he argued that the government had failed to establish that the drugs the government sought to introduce were the drugs that had been seized from his apartment. Gov't C.A. Br. 4-5; Pet. App. 78a-79a. The district court granted the motion to suppress, finding that it was "improbable" that the cocaine base that the government sought to introduce was "the same item" that was seized from petitioner's apartment. Gov't C.A. Br. 5; Pet. App. 82a. The court then dismissed Counts Four and Five on the government's motion, and petitioner pleaded guilty to Counts Two and Three. Gov't C.A. Br. 5.

2. The presentence report (PSR) calculated petitioner's offense level under Sentencing Guidelines § 2K2.1. Section 2K2.1(c)(1)(A) provides that "[i]f the defendant * * * possessed any firearm or ammunition in connection with another felony offense," the court should apply the offense level applicable to the underlying offense, if the resulting offense level is greater

than the offense level that would otherwise apply. The report found that petitioner possessed a firearm in connection with another offense - namely, the possession of cocaine base. PSR ¶ 19; Pet. App. 130a. The underlying drug offense involved "over 50 grams but less than 150 grams of cocaine base," resulting in a base offense level of 32 under Guidelines § 2D1.1. PSR ¶ 19; Pet. App. 130a. With a two-level increase for possession of a firearm during the commission of the drug offense (Guidelines § 2D1.1(b)(1)), and a two-level decrease for acceptance of responsibility (Guidelines § 3E1.1(a)), petitioner's total offense level was 32. PSR ¶¶ 20, 25, 28; Pet. App. 130a-131a. Petitioner fell within criminal history category VI, resulting in a Guidelines sentencing range of 210 to 262 months of imprisonment. PSR ¶ 60; Pet. App. 137a.

Petitioner objected to application of the cross-reference in Guidelines § 2K2.1(c)(1)(A), arguing that "the use of dismissed conduct to enhance [his] sentence * * * violate[d] his Fifth and Sixth Amendment rights" under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). Petitioner's Objections to Presentence Report (Dec. 3, 2002). At sentencing, the district court overruled petitioner's objection and adopted the findings and guidelines applications of the presentence report. Gov't C.A. Br. 6; Pet. App. 113a-114a. The court sentenced petitioner to concurrent terms of 120 months of

imprisonment on Counts Two and Three, and to a consecutive term of 120 months of imprisonment on Count One. Gov't C.A. Br. 7; Pet. App. 88a, 117a-118a; see Sentencing Guidelines § 5G1.2(d).

3. On appeal, petitioner renewed his claim that the district court violated Apprendi by enhancing his sentence pursuant to Guidelines § 2K2.1(c)(1)(A) based on the court's finding that petitioner possessed the firearm in connection with his possession of the drugs found in his apartment. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. The court rejected petitioner's Apprendi claim, concluding that "Apprendi does not require that a jury decide facts that increase a guideline range but do not increase the statutory maximum sentence." Pet. App. 2a (citing United States v. Kinter, 235 F.3d 192, 201-202 (4th Cir. 2000)).

DISCUSSION

Petitioner contends (Pet. 5-11) that certiorari is warranted in this case because uncertainty about the implications of this Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), for the Sentencing Guidelines has led to confusion in federal criminal sentencings.

The government agrees that Blakely has profoundly unsettled the federal criminal justice system and that there is an urgent need for this Court's resolution of questions about whether and

how Blakely applies to the Guidelines. The United States has filed petitions for certiorari in two cases in which courts ruled that Blakely applies to the Sentencing Guidelines. See United States v. Booker, No. 04-104 (filed July 21, 2004), and United States v. Fanfan, No. 04-105 (filed July 21, 2004). The petition in this case should be held pending the disposition of the petitions in Booker and Fanfan, rather than granted. For the reasons set forth in the government's response to the oppositions to the petitions in Booker and Fanfan, those cases present better vehicles for resolution of the applicability of Blakely to judicial factfinding that results in upward adjustments under the Sentencing Guidelines.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions in United States v. Booker, No. 04-104 (filed July 21, 2004), and United States v. Fanfan, No. 04-105 (filed July 21, 2004), and then disposed of accordingly.

Respectfully submitted.

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