IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 03-00399-01/02-CR-W-HFS
	)	
CHRISTOPHER LAMOREAUX, and	)	
ADINA LAMOREAUX,	)	
	)	
Defendants.	)	

ORDER

Defendants are charged with mail fraud in connection with the operation of an alleged kickback scheme. The maximum statutory punishment if there is a conviction would apparently be a prison term of twenty years, as noted on the indictment. They jointly move to dismiss the indictment because it fails to allege offense level enhancements that might be claimed in Guideline sentencing, over and above the base offense level, apparently set forth in §2B1.1 of the Federal Sentencing Guidelines. Defendants cite as authority the Supreme Court's recent decision in Blakely v. Washington, 72 LW 4546 (June 24, 2004).

Blakely does not invalidate indictments but simply affects punishment in certain instances, where a jury has not found enhancing factors which would cause sentencing beyond the statutory maximum. The Blakely analysis lends some support to an argument that base offense levels should be treated as fixing statutory maximum sentences, contrary to the rulings of the various Courts of Appeal. The court is aware that some district judges, in the wake of Blakely, have grudgingly used base offense levels exclusively in setting sentences. See, e.g., United States v. Shamblin, 2004 WL 1468561 (S.D.W.Va. 2004), relying on the practice first used by Chief Judge Young in United States

v. Green, 2004 WL 1381101 (D.Mass. 2004), a pre-Blakely decision which anticipates the Blakely holding on enhancements. News items confirm that exclusive use of base offense levels tends to yield excessively lenient punishment, contrary to Congressional intent, Sentencing Commission formulations and judicial good judgment.

I have indicated in several courtroom proceedings that I find more persuasive the ruling of Judge Cassell in United States v. Croxford, 2004 WL 1462111 (D.Utah 2004) concluding that we have a constitutionally failed system of sentencing, and must disregard both base offense levels and enhancements as mandatory calibrators at sentencing in the wake of Blakely.[1] Guideline provisions seem generally incapable of being severed in a sensible fashion. Unless and until a new system is devised, I anticipate using pre-Guideline methods of sentencing, giving due deference to facts and factors developed for sentencing use–but of course subject to statutory restrictions. If a twenty year sentence is the statutory maximum in this case there should be no impediment to sentencing, if necessary, that balances the need for appropriate severity and sound moderation.

While the form of the indictment could thus pose some problems for the prosecution at sentencing, Blakely does not support an involuntary dismissal.[2]

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[1]My comments could be considered unduly "advisory" but in a change of plea proceeding we have some obligation to tell a defendant what procedures to expect.

[2]Whether the Government's new "Sentencing Information" is helpful will be considered later. Note, however, Judge Glasser's rejection of belated interrogatories for a jury in United States v. Medas, 2004 U.S. Dist. LEXIS 12135 (E.D.N.Y. 2004).

The defendants' joint motion to dismiss indictment is therefore DENIED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

July 7, 2004

Kansas City, Missouri