

No. 04-5263

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO D. PINEIRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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. 1-23) is not yet reported in the Federal Reporter, but is available at 2004 WL 1543170.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2004. The petition for a writ of certiorari was filed on July 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court

for the Western District of Louisiana, petitioner was convicted on one count of conspiring to distribute marijuana and cocaine, in violation of 21 U.S.C. 846, and two counts of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 121 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed.

1. Between 1995 and 1999, petitioner was the leader of a drug organization that purchased marijuana and cocaine in Texas and sold the drugs to dealers for distribution in Louisiana. Gov't C.A. Br. 5-16. A federal grand jury returned an indictment charging petitioner with conspiring to distribute 100 kilograms or more of marijuana and 50 grams or more of cocaine, in violation of 21 U.S.C. 846. The indictment also charged petitioner with one count of possessing three-quarters of a pound of marijuana with the intent to distribute it, and one count of possessing 21 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2-3; C.A. App. C. The jury found petitioner guilty on all three counts. The verdict form asked the jury to determine, if it found petitioner guilty on the conspiracy charge, whether he conspired to distribute "100 kilograms or more of marijuana," "50 to 100 kilograms of marijuana," or "less than 50 kilograms of marijuana"; the jury selected "less than 50 kilograms." The

verdict form also asked whether petitioner conspired to distribute "50 grams or more of cocaine" or "50 grams or less of cocaine"; the jury selected "50 grams or less." Pet. App. 3; C.A. App. D.

2. The presentence report (PSR) found that petitioner was responsible for 453 kilograms of marijuana and 1,048 grams of cocaine. Those calculations resulted in a base offense level of 28 under Sentencing Guidelines § 2D1.1. Pet. App. 4; PSR ¶ 34. The PSR also recommended that petitioner receive a four-level enhancement under Guidelines § 3B1.1(a) because he was an organizer or leader of the conspiracy. Pet. App. 4; PSR ¶ 37. At offense level 32 and criminal history category I, petitioner's Guidelines sentencing range was 121 to 151 months of imprisonment. Pet. App. 4; PSR ¶ 62.

Petitioner objected to the PSR's drug-quantity determination, arguing that holding him responsible for amounts greater than those found by the jury would violate Apprendi v. New Jersey, 530 U.S. 466 (2000). Petitioner also argued that the evidence at trial did not support application of the enhancement for his leadership role in the conspiracy, but he did not raise a constitutional objection to that enhancement. Pet. App. 5; Second Addendum to PSR 1-4. At sentencing, the district court overruled petitioner's objections and sentenced him to 121 months' imprisonment. Pet. App. 5.

3. a. On appeal, petitioner renewed his claim that under Apprendi, the Fifth and Sixth Amendments required the court to calculate his Guidelines sentence based on the drug quantities found by the jury. Petitioner acknowledged that this claim was foreclosed by circuit precedent, but stated that he was raising the issue to preserve it for further review. Pet. App. 5; Pet. C.A. Br. 10, 15-18.

On June 24, 2004, this Court issued its decision in Blakely v. Washington, 124 S. Ct. 2531. The following day, the court of appeals ordered the parties to file supplemental briefs addressing the applicability of Blakely to this case. Pet. App. 5. Petitioner argued that he was entitled to be sentenced within the Guidelines range for defendants responsible for the amount of drugs found by the jury (which he calculated at 21.75 pounds), rather than the 453 kilograms found by the judge, and that he was entitled to be sentenced without the four-level leadership enhancement. Pet. Supp. C.A. Br. 1-16. The government argued that Blakely is inapplicable to the Guidelines. Gov't Supp. C.A. Br. 1-12.

b. The court of appeals affirmed petitioner's sentence, concluding that "[h]aving considered the Blakely decision, prior Supreme Court cases, and our own circuit precedent, we hold that Blakely does not extend to the federal Guidelines and that [petitioner's] sentence did not violate the Constitution." Pet.

App. 2. The court explained that it “d[id] not believe that the Sentencing Commission can be thought of as having created for each United States Code section a hundred different Appendi ‘offenses’ corresponding to the myriad possible permutations of Guidelines factors, with each ‘offense’ then requiring jury findings on all of its (Guidelines-supplied) elements.” Pet. App. 19-20.

DISCUSSION

Petitioner contends (Pet. 7-10) that certiorari is warranted in this case because the courts of appeals are divided on the implications of this Court’s decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), for the Sentencing Guidelines, and because uncertainty about Blakely’s application to the Guidelines has led to confusion in federal criminal sentencings.

The government agrees that Blakely has profoundly unsettled the federal criminal justice system and that a “definitive answer” (Pet. App. 20) from this Court about whether and how Blakely applies to the Guidelines is needed. 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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