IN THE SUPREME COURT OF THE UNITED STATES

No. 04-104

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

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

No. 04-105

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY IN SUPPORT OF MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR CERTIORARI AND TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING AND ARGUMENT IF CERTIORARI IS GRANTED

This Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), undeniably has "cast a long shadow over the federal sentencing guidelines." Booker Pet. App. 2a. Noting the "urgent need for clarification," United States v. Mooney, 2004 WL 1636960,

*13 (8th Cir. July 23, 2004) (opinion of Lay and Bright, JJ.), the courts of appeals have expedited consideration and resolution of cases addressing the application of Blakely to the federal Sentencing Guidelines. Id. at *12; Booker Pet. App. 2a ("We have expedited our decision * * * to provide some guidance to the district courts (and our own court's staff), who are faced with an avalanche of motions for resentencing in light of Blakely."). As a result, in just over a month since Blakely was decided, five courts of appeals have decided whether that decision applies to the federal Sentencing Guidelines, and a sixth court of appeals -- acting en banc -- has certified the question to this Court. Those courts have asked this Court to address the question with similar dispatch, urging the Court to act "at its earliest convenience, with an expedited briefing and hearing schedule." United States v. Penaranda, 2004 WL 1551369, *8 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004); Booker Pet. App. 9a; id. at 25a (Easterbrook, J., dissenting).

Respondents and amicus the National Association of Criminal Defense Lawyers (NACDL) nevertheless urge this Court to "take [its] time" (Booker Br. 16) and consider these cases in the ordinary course under Rule 25. But as the en banc Second Circuit concluded, "a prompt and authoritative answer [to Blakely's applicability to the Guidelines] is needed to avoid a major disruption in the administration of criminal justice in the federal courts -- disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable

constitutional requirements." Penaranda, 2004 WL 1551369, *6. Expedited review is both critical and clearly warranted.

1. The Circuit Conflict Has Deepened Since The Government's Petitions Were Filed. In its petitions, the government noted that the federal courts have been thrown into conflict on the continuing validity of the current federal sentencing scheme. In the brief time since the petitions were filed, that conflict has only deepened. Just hours before the government's petitions were filed, a divided panel of the Ninth Circuit ruled that Blakely applies to the Guidelines. United States v. Ameline, 2004 WL 1635808 (July 21, 2004). The majority reversed the Guidelines sentence in that case and remanded for resentencing, but held that Blakely does not render the Guidelines facially unconstitutional. Instead, the majority held that the Double Jeopardy Clause would not prohibit the empaneling of a sentencing jury on remand to consider sentencing enhancements not charged in the original indictment. Id. at *13. One judge dissented, agreeing with the conclusion of the Fifth Circuit in United States v. Pineiro, 2004 WL 1543170 (5th Cir. July 12, 2004), and Judge Easterbrook's dissenting opinion in Booker, see Booker Pet. App. 14a-25a, that "the Guidelines are not affected by [Blakely]." Ameline, 2004 WL 1635808, *14 (Gould, J., dissenting).

The Eighth Circuit, also in a divided opinion, has held that "the federal sentencing guidelines are unconstitutional under Blakely," Mooney, 2004 WL 1636960, *12 (per curiam), explicitly relying on the majority opinion in Booker and the Sixth Circuit

panel's decision in United States v. Montgomery, 2004 WL 1562904 (July 14, 2004), vacated and reh'g en banc granted (July 19, 2004), dismissed, 2004 WL 1637660 (July 23, 2004). Mooney, 2004 WL 1636960, *12 (opinion of Lay and Bright, JJ.). Noting that "[a] variety of potential remedies have circulated within the courts," the majority held that the proper approach was to revert to discretionary sentencing within the statutory minimum and maximum using the Guidelines Manual as an advisory document. Id. at *13. In holding that the Guidelines could not be applied through the use of sentencing juries, the court noted that "the Guidelines were designed as an integrated regime, and therefore cannot be severed into constitutional and unconstitutional parts while still remaining true to the legislative purpose." Ibid. In dissent, Judge Murphy noted that this Court "has upheld the[] constitutionality" of the Sentencing Guidelines in every case in which it has been called to consider the question, id. at *14, and the courts of appeals were obliged "to follow its existing precedent until the Court has overruled it, even if the reasoning of that precedent has been questioned in a subsequent case." Ibid. Judge Murphy also noted that prompt review by this Court would make it unnecessary for the Eighth Circuit "to create its own new constitutional rule in the interim." Ibid.

The Sixth Circuit, which sua sponte granted rehearing en banc in the Montgomery case on which the Mooney majority relied, see Booker Pet. 14 n.6, has since dismissed that case. See United States v. Montgomery, 2004 WL 1637660 (July 23, 2004). The court

has ordered expedited briefing and rehearing en banc in another case presenting the question of Blakely's applicability to the Guidelines, see United States v. Koch, 373 F.3d 775 (6th Cir. June 29, 2004), vacated (July 21, 2004), reh'g en banc granted (July 27, 2004), with oral argument to be held on August 11. As noted in the Booker petition (at 14 n.6), the en banc Fourth Circuit will hear argument in a case addressing Blakely's application to the Guidelines on August 2.

2. The Lower Federal Courts Are Acutely In Need Of Guidance. Respondent Booker, joined by amicus NACDL, claims that "[c]ourts (the Fifth Circuit excepted) have reached a near consensus that Blakely applies to the federal sentencing guidelines and have conformed their practices to its requirements." Booker Resp. To Motion To Expedite Schedule For Briefing And Argument If Certiorari Is Granted (Booker Resp.) 4; see also id. at 11. Even if that were true -- and the reality is quite different -- that would not support a leisurely approach to deciding the issues presented. Even if the Court's ultimate decision were only to reverse the Fifth Circuit's holding, that would itself potentially require an enormous number of cases to be revisited, with the count mounting with each passing day. The courts of the Fifth Circuit are second only to those of the Ninth Circuit in the number of Guidelines sentences they impose annually (12,667 in Fiscal Year 2002), and that number is nearly double that of the next-closest court (the Eleventh Circuit). See United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics (2002 Sourcebook), at

Table 2. But there is also no guarantee that this Court ultimately would agree with Booker's claimed "consensus" in the other circuits, and thus a decision by this Court could require resentencing in those circuits in a tremendous number of cases.

In fact, there is nothing like "consensus" about whether Blakely applies to the Sentencing Guidelines or what the consequences are if it does. The en banc Second Circuit concluded that it was by no means clear that the reasoning of Blakely would extend to the Guidelines. Penaranda, 2004 WL 1551369, *4-5. Those courts of appeals that have decided that Blakely applies to the Guidelines uniformly have done so over strong dissents. See Booker Pet. App. 14a-25a (Easterbrook, J., dissenting); Ameline, 2004 WL 1635808, *14-15 (Gould, J., dissenting); Mooney, 2004 WL 1636960, *13-15 (Murphy, J., dissenting). Although a panel of the Sixth Circuit unanimously held that Blakely applied to the Guidelines, the full court promptly vacated that opinion sua sponte and voted to rehear the question en banc, which hardly bespeaks a consensus within that court that the panel decision was correct.

The division of the courts on the question whether Blakely applies to the Guidelines (the first question presented by the petitions) pales in comparison to the profound confusion in the lower courts over the implications for sentencing if it does. The Seventh Circuit majority noted several uncertainties over the implications of applying Blakely to the Guidelines. Booker Pet. App. 11a-13a. As noted above, the Eighth and Ninth Circuits have adopted diametrically opposed approaches to Guidelines sentencing

in the wake of Blakely. At the time the government filed its petitions, the Second Circuit had already identified five different approaches to implementing the Blakely decision. See Penaranda, 2004 WL 1551369, *7; see also Mooney, 2004 WL 1636960, *13 (opinion of Lay and Bright, JJ.) (noting the "variety of potential remedies [that] have circulated within the courts" and the "urgent need for clarification"). Since then, the district courts have continued to apply a variety of mutually inconsistent approaches to implementing Blakely.[1]

Although Booker contends that it is "healthy" (Resp. 4) that courts are implementing a wide variety of sentencing schemes, those actually responsible for reviewing criminal sentences disagree. As Judge Murphy, the most recent former Chair of the Sentencing

---

[1] See United States v. Zompa, No. 04-46-P-S-01 (D. Me. July 26, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/USA_v_ZOMPA.pdf) (holding that enhancements from base offense level can be applied if the facts supporting them are included in the indictment and proved to a jury beyond a reasonable doubt; sentencing defendant in accordance with base offense level only, and denying government's request for a statement of an alternative sentence); United States v. Muefflemen, No. 01-CR-10387-NG (D. Mass. July 26, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/gertner_blakely_decision.pdf) (suggesting that the Guidelines as binding rules are wholly unconstitutional in all cases, regardless of whether the case involved enhancing facts; regarding the Guidelines as only advisory); United States v. Terrell, 2004 WL 1661018 (D. Neb. July 22, 2004) (Guidelines should continue to be applied based on facts found by jury or admitted by defendant); United States v. Marrero, 2004 WL 1621410 (S.D.N.Y. July 21, 2004) (finding Guidelines unconstitutional, engaging in indeterminate sentencing, and treating Guidelines as advisory); United States v. King, No. 6:04-cr-35-Orl-31KRS (M.D. Fla. July 19, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/us_v.%20King.pdf) (holding that Guidelines are unconstitutional and cannot be used in any case, regardless of whether the case involves judicial fact-finding, and engaging in indeterminate sentencing using Guidelines as advisory).

Commission, noted in her dissent in Mooney, "[t]he many conflicting decisions around the country applying Blakely in different ways are creating wide sentencing disparity, and prevention of such disparity was a major policy reason behind the Sentencing Reform Act and the creation of the federal sentencing guidelines." Mooney, 2004 WL 1636960, *14. In light of the profoundly fractured nature of the lower courts' holdings, it cannot seriously be maintained that the federal courts have "adapted well to Blakely's teachings." Booker Resp. 2-3.

3. The Questions Presented Are Of Enormous Importance. Booker also contends that Blakely will affect at most a "small group of cases" (Resp. 5) involving "a few defendants." Id. at 6. That position is untenable. Respondent relies on the congressional testimony of two Commissioners of the Sentencing Commission who indicated, in passing and without further explanation or citation, that "a majority of th[e] cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate Blakely."[2] But that testimony, given in the context of the Commission urging Congress not to respond to Blakely with legislation attempting a short-term solution for future cases, does not indicate the problem facing the courts is a small one. At best, it indicates that such cases do not constitute a majority of

[2] Booker Resp. 5 (quoting Blakely v. Washington and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm., 106th Cong. (July 13, 2004) (statement of Commissioners John R. Steer and William K. Sessions, III) (available at http://judiciary.senate.gov/testimony.cfm?id=1260& wit_id=3667).

the approximately 64,000 offenders sentenced under the Guidelines each year. See 2002 Sourcebook at Table 2. But enhancements related to the victim, role in the offense, or obstruction of justice, and specific aspects of offense conduct such as use of more than minimal planning or use of a weapon are of vital importance in cases involving those facts. So too are enhanced base offense levels that reflect, for example, the loss amount or drug amount at issue in cases. See Sentencing Guidelines §§ 2B1.1(b)(1), 2D1.1(c). Every federal fraud case involving a loss of more than $5,000 (which is the vast majority of federal fraud cases), id. § 2B1.1(b)(1), and every federal drug case involving more than a small amount of drugs (which is the majority of federal drug cases), id. § 2D1.1(c)(17), potentially involves sentence increases based on judge-found facts.

Booker's assurance that Blakely will affect only a "few defendants" (Resp. 6) rings hollow in light of the actual experience of judges who state that they are "faced with an avalanche of motions for resentencing in light of Blakely." Booker Pet. App. 2a. District Judge Nancy Gertner, for example, recently indicated that she alone has "thirty cases in [her] docket" involving "sentencing enhancements or upward departures based on facts that were not admitted to or found by a jury."[3] Even assuming Judge Gertner has three times as many such cases as the

[3] United States v. Mueffleman, No 01-CR-10387-NG, slip op. 3 & n.2 (D. Mass. July 26, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/gertner_blakely_decision.pdf).

average district judge, that would still mean that there are approximately 6,510 such cases now pending before the nation's 651 federal district judges. See The Judicial Business of the United States Courts 30 (2003) (noting 680 authorized judgeships and 29 current vacancies). In addition, there were 8,320 appeals pending in the federal courts of appeals raising sentencing issues as of March 31 of this year, Blakely, 124 S. Ct. at 2549 n.2 (O'Connor, J., dissenting), and in thousands of those cases, the decision whether to apply Blakely to the Sentencing Guidelines could prove determinative.

Respondents and their amici advance arguments suggesting that the number is even larger. If respondents and their amici are correct in their assertion that Blakely will result in the invalidation of the Guidelines irrespective of whether a case involved enhancements based on judicially found facts, see Booker Br. 9; NACDL et al. Amicus Brief (NACDL Br.) 5-6, every single Guidelines sentence is potentially invalid. Thus, as Judge Gould noted in dissent in Ameline, applying Blakely to the Sentencing Guidelines could have a "drastic impact on the administration of criminal law and potentially on tens of thousands of cases." Ameline, 2004 WL 1635808, *15.

4. Respondent's Authorities Do Not Support Delaying Review. Most of the statements on which Booker relies to support his argument that the lower courts have the situation well in hand were made in the context of arguing that Congress should not adopt interim legislation in an effort to create a temporary prospective

solution to the turmoil in the courts.[4] The Senate itself has drawn a distinction between the need for legislation affecting future cases and the need for Court action to address the current crisis. The Senate noted that witnesses at a recent hearing considering the implications of Blakely for the federal sentencing system had "advised the [Judiciary] Committee that corrective legislation was not necessary at this time, with the hope that the Supreme Court would clarify the applicability of the Blakely decision to the Federal Sentencing Guidelines in an expeditious manner." Sen. Con. Res. 130 at 3 (July 21, 2003) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:sc130rfh.txt.pdf). Indeed, the Senate unanimously passed a resolution stating that "the Supreme Court of the United States should act expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines." Id. at 4.

The criminal defense bar as a whole appears to concur in the need for expeditious review. NACDL and the National Association of Federal Defenders agree (NACDL Br. 8-9) that a grant of review in two cases is warranted because it is unacceptable to risk that a procedural obstacle would prevent prompt resolution of the

---

[4] See, e.g., Senate Hearings (written testimony of Douglas A. Berman, Marc L. Miller, Nora V. Demleitner, and Ronald F. Wright) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/final_bermanmillerdemleitnerwright_blakely_sen.%20Jud.%20Comm.%20Testimony%20%20(7.13.04).pdf)

questions presented by the petitions: "[t]he issues now confronting the courts are too important to defer their resolution until another petition for certiorari can be granted and the case decided on the merits." Id. at 9. They also agree that the questions presented by the government's petitions "demand[] immediate resolution" Id. at 18. Cf. Fanfan Opp. 4 ("The government is certainly correct that this question warrants prompt resolution by this Court.").

5. The Department's New Charging And Plea Agreement Procedures Do Not Lessen The Need For Urgent Review. Booker errs in contending that the Department's response to the uncertainty created by Blakely, advising prosecutors to charge sentencing enhancements and modify model plea agreements, will "largely alleviate the need for expedited review." Resp. 4. Contrary to that contention, the fact that the government now seeks waivers of Blakely rights from defendants pleading guilty and seeks indictments that include sentence-enhancing facts under the Guidelines does not alter the need for expedited review. Many defendants may not agree to waive Blakely rights, especially in the current environment, in which the existence and scope of those rights is unclear. Indeed, the extent to which Blakely rights are subject to waiver could also raise a host of questions in district courts and subsequent appeals; the resolution of those questions may be significantly affected or become entirely unnecessary based on this Court's decisions in the pending cases.

Including enhancing facts in indictments also does not lessen

the need for expeditious review. Many enhancing facts that would traditionally be taken into account at sentencing both before and after the Guidelines may not be known at the time of indictment; their absence from the sentencing calculus would distort the resulting sentences. The questions whether and how to submit enhancing facts to the jury also would raise a host of issues that may divide the lower courts and result in the need to resentence hundreds or thousands of defendants. Moreover, depending on the Court's resolution of the remedial questions raised in the petitions, the practice may be radically inconsistent with Congress' intent. Quick review by this Court could either render all that litigation and resentencing unnecessary or, at least, alter the correct analysis of the numerous questions that will be presented.

6. There Is No Need For Further Development Of The Law In The Lower Courts. Although Booker contends that additional delay is warranted to give the lower courts additional time to develop their views, there is no need to wait for further development of the law. Because the courts of appeals and district courts have promptly addressed the implications of Blakely for the federal Sentencing Guidelines, there already is a body of opinions discussing both of the issues presented by the government's petitions. Accordingly, there is no need to delay review to permit further discussion of the issues. As Judge Murphy has noted, "the multitude of lower court decisions which have already applied Blakely to the federal system illustrate some of the many of alternatives the Supreme

Court might consider." Mooney, 2004 WL 1636960, *14 (Murphy, J., dissenting).

7. The Alternative Briefing Schedule Proposed By Respondents Is Inappropriate. Respondents argue that, if briefing is to be expedited, it should be conducted under a schedule they propose under which the government, as petitioner in two cases, would receive 22 days to prepare its principal brief, and respondents would receive 28 days to respond. See Booker Resp. 10-11; Fanfan Resp. 2. Respondents' proposed schedule differs radically from the briefing schedule established by this Court's Rule 25, under which petitioner has 45 days and respondent 35 days, see S. Ct. R. 25.1, 25.2, in recognition of the fact that respondents can begin their preparation while awaiting service of petitioner's brief. Indeed, respondents' proposal would turn the allocation of briefing time in the Court's rules on its head, by giving respondents significantly more time than petitioner. By contrast, the schedules proposed by the government are roughly proportionate to the ordinary briefing schedule that Rule 25 provides.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JULY 2004