



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

October 6, 2004

The Honorable William K. Suter
Clerk, The Supreme Court of the United States
Washington D.C. 20543

Re: United States v. Booker, No. 04-104
United States v. Fanfan, No. 04-105

Dear Mr. Suter:

Pursuant to Rule 32.3 of the Rules of this Court, the United States proposes to lodge material with the Clerk that is relevant to the above-captioned cases.

In the reply brief for the United States, the government stated (at 14-15) that "[t]he Sentencing Commission advises us that, based on staff analysis on 2002 statistics, approximately 65% of federal criminal cases are projected to involve the application of sentence-enhancing factors (other than prior convictions) that, under respondents' view, would have to be submitted to the jury (absent a guilty plea that resolved those issues)." The significance of that information was discussed at the oral argument in these cases.

In order to provide the Court with the underlying information supporting the statement in the government's reply brief, the government proposes to lodge with the Clerk a copy of a three-page memorandum dated July 20, 2004, from Lou Reedt to Tim McGrath on the subject "Estimate of Number of Cases Possibly Impacted by the Blakely Decision," which the Commission's General Counsel made available to the Office of the Solicitor General. The memorandum's author, Dr. Lou Reedt, is Director (Acting), Office of Policy Analysis, United States Sentencing Commission. The memorandum's recipient, Tim McGrath, is Staff Director of the United States Sentencing Commission.

The Commission informs us that the memorandum is an internally generated staff document prepared in an effort to project what the impact of Blakely might be, and that it has been made available to anyone who has requested it. The government does not agree with all of the assumptions and speculations made in the memorandum, particularly with respect to the extent to which plea agreements may reduce the

impact of applying Blakely to the Guidelines through stipulations or waivers. The extent to which such plea agreements could or would reduce the impact of applying Blakely to the Guidelines is unknown. Even under the most conservative assumptions in the memorandum (i.e., that applying Blakely to the Guidelines does not increase the trial rate and that all guilty plea cases validly resolve Blakely issues), however, the data still suggest that 65% of the federal criminal cases that go to trial will pose Blakely issues. Despite the limitations of the document, the underlying data may prove helpful to the Court in assessing the impact of applying Blakely to the Guidelines.

In accordance with Rule 32.3, the memorandum proposed to be lodged will not be submitted until and unless requested by the Clerk.

Sincerely,

Paul D. Clement
Acting Solicitor General

cc: All counsel