No. 04-104

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

FREDDIE J. BOOKER,
RESPONDENT.

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

BRIEF IN RESPONSE

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QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts are not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

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The respondent, by his counsel of record, makes the following response to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The respondent was indicted for two drug crimes, both occurring on February 26, 2003. One involved the sale of a small amount of cocaine base to a friend. The other involved his possession with intent to sell at least 50 grams of cocaine base. Record 2.

During trial, a police detective testified that respondent had admitted selling 20 ounces of

cocaine base between November 2002 and February 2003 at various locations in Wisconsin. Record 64: 37-42. Respondent testified that he did not sell 20 ounces of cocaine base and that the statement was filled with lies. Record 64: 103-04, 121. The police found no evidence to corroborate the allegation that Booker sold 20 ounces of cocaine base prior to the offense of conviction. Record 64: 52-53.

The jury found the respondent guilty of the two crimes that occurred on February 26, 2003. At sentencing, the judge found that those two crimes involved 92.5 ounces of cocaine base. He added 20 ounces (or 567 grams) to the actual amounts at issue in the two counts pursuant to U.S.S.G. § 1B1.3 (relevant conduct), to arrive at an offense level of 36. U.S.S.G. § 2D1.1(c)(2). He added another two levels pursuant to U.S.S.G. § 3C1.1 after finding that respondent obstructed justice by committing perjury during his trial. The resulting Guideline range, when combined with respondent's criminal history score, was 360 months to life. Booker was sentenced to 360 months in prison. Record 66: 9. Without the additional 20 ounces of cocaine base and the enhancement for obstructing justice, the respondent's maximum guideline sentence would have been 262 months. Booker Supp. C.A. Br. 1.

ARGUMENT

The impact of *Blakely* upon federal sentencing practices is an important question that deserves Supreme Court resolution. However, important questions merit deliberate process and unhurried attention. No crisis is

afoot that requires the Court to depart from procedures it has crafted to assure that issues are carefully and fully briefed and argued. *See* Response to Motion to Expedite Schedule for Briefing and Argument if Certiorari Is Granted, filed contemporaneously with this brief.

The government asks the Court to decide a severability question that the Seventh Circuit did not resolve in *Booker.* Obvious flaws in the government's reasoning would have been exposed at an earlier stage if the severability issue had been briefed in the Seventh Circuit. While the respondent's case is appropriate for Supreme Court review, so are others and it would be prudent for the Court to review decisions that have more fully developed this complex issue. If the Court chooses to accept respondent's case for review, it also should accept cases in which appellate courts have more carefully considered the questions left unanswered by the Seventh Circuit. Alternatively, the Court could hold respondent's case until it resolves the questions upon review of a more suitable decision and decide respondent's case thereafter in summary fashion.

A. The Questions Presented Merit Supreme Court Resolution

There is a growing consensus among courts and commentators that *Blakely v. Washington*, 124 S.Ct. 2531 (2004), compels the conclusion that federal judges violate the Sixth Amendment by finding facts that permit a longer sentence than the United States Sentencing Guidelines would authorize solely on the basis of the facts found by a jury or

admitted in a guilty plea. *See* Hon. Paul Cassell testimony before the United States Senate Committee on the Judiciary (July 13, 2004) (collecting cases) (available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3669); Stephanos Bibas, *Blakely's Federal Aftermath,* 16 Fed. Sentencing Rep. at 4 (forthcoming 2004) ("No commentator who has considered the issue agrees with the Department of Justice's position.") (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/bibas_blakelys_federal_aftermath.pdf).

There is nonetheless a division of opinion among the appellate courts as to that threshold issue. *Compare United States v. Booker,* 2004 WL 1535858 (7th Cir. July 9, 2004) (judicial fact-finding that increased the maximum guideline sentence violated the Sixth Amendment), and *United States v. Ameline,* 2004 WL 1635808 (9th Cir. July 21, 2004) (same), *with United States v. Pineiro,* 2004 WL 1543170 (5th Cir. July 12, 2004) (*Blakely* has no impact on the federal sentencing guidelines). The Supreme Court should resolve that conflict to assure the uniform administration of federal sentences.

The circumstances under which judges should continue to rely upon or consider the Sentencing Guidelines, if at all, present a complex issue. The Seventh Circuit did not address the issue in respondent's case. *See Booker,* 2004 WL 1535858 at *5-6 (remanding for resolution in district court). The two circuit courts that have addressed the question are in conflict. *Compare Ameline,* 2004 WL 1635808 at *11 (procedural requirement that judge act as fact-finder can be severed from substantive provisions of

Guidelines) *with United States v. Mooney,* 2004 WL 1636960, *13 (8th Cir. July 23, 2003) ("the Guidelines … cannot be severed into constitutional and unconstitutional parts ….."). At an appropriate time and with an appropriate case, the Court should resolve that conflict to bring uniformity to federal sentencing practices.

B. Respondent's case is an adequate vehicle for addressing the first question but not the second

1. The *Booker* decision squarely addressed the constitutionality of sentencing enhancements that the Guidelines compel on the basis of facts that a judge finds by a preponderance of the evidence. The respondent was convicted of two discrete crimes committed on the same day: delivering a small amount of cocaine base to another man, and possessing with the intent to distribute more than 50 grams of cocaine base. Had he been sentenced on the basis of those facts alone, the maximum sentence authorized by the Guidelines would have been 262 months. At sentencing, over the respondent's objection that the evidence supporting the finding was unreliable, and despite the respondent's denial, the judge found that the respondent had distributed an additional 20 ounces of cocaine base during the weeks prior to the crimes of conviction. That finding raised the respondent's offense level from 32 (applicable to 50 grams) to 36 (applicable to 500 grams). U.S.S.G. § 2D1.1. In addition, the judge found that the respondent obstructed justice by committing perjury during his trial. That finding

increased the offense level to 38. U.S.S.G. § 3C1.1. The enhanced offense level subjected respondent to a maximum guideline sentence of life imprisonment. Although the judge sentenced the respondent at the low end of the enhanced guideline range, the 30 year sentence was 98 months longer than the Guidelines would have authorized in the absence of the facts that the judge found at sentencing—facts that were neither admitted by the respondent nor found by the jury.

The key issue that *Blakely* resolved—whether judges may find facts that are legally essential to the punishment imposed—is framed in respondent's case. Bound by the Sentencing Guidelines, the maximum sentence that the judge was authorized to impose upon the respondent "solely on the basis of facts reflected in the jury verdict or admitted by the defendant," *Blakely,* 124 S.Ct. at 2537, was 262 months. By making "additional findings," the judge imposed an additional 98 months of punishment "that the jury's verdict alone [did] not allow," *id.,* and therefore exceeded his authority by infringing upon the respondent's right to have a jury find those facts beyond a reasonable doubt.

2. The more subtle and complicated issue concerns the remedy for this constitutional violation. The Seventh Circuit concluded that the respondent should be resentenced but did not decide what should happen at his new sentencing hearing. The options left open included the imposition of a sentence without regard to the Guidelines, the imposition of a Guideline sentence on the basis of the facts found by the jury, or the empanelling of a new

jury to find sentencing facts. Because none of these options were briefed and argued,[1] the court did not consider them. *Booker,* 2004 WL 1535858 at *5-6.

The Supreme Court would benefit by reviewing an appellate opinion that more fully develops these questions. The argument against severability that the government hopes to advance in this case was first presented to the court of appeals during oral argument. Pet. at 4 n.1. It is ordinarily unwise for the Supreme Court to consider an issue in the first instance that was not briefed or ruled upon in the lower courts. As Judge Gertner recently observed, the law is best developed through an ongoing dialog between the lower courts and appellate courts. *United States v. Mueffleman,* No. 01-CR-10387-NG, slip op. at 17-18 (D. Mass. July 26, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/gertner_blakely_decision.pdf). That dialog is absent in respondent's case, making it less suitable than others for the resolution of this vital issue.

The respondent suggests that, if the Court grants the petition, it consider respondent's case together with one or more additional cases in which appellate courts have more fully considered and developed this issue. It

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[1] As the petition notes, the Seventh Circuit ordered briefs addressing *Blakely* to be filed two days after granting a motion for supplemental briefing, heard argument four days after that, and issued its opinion three days after the argument. Pet. at 3-4. The abbreviated schedule left little time for thorough consideration of the issues.

should not take long for an appropriate case to reach the Court, if one has not done so already. In the alternative, after accepting a fitting case, the Court could hold respondent's case and later resolve it summarily. As the respondent argued in his response to the petitioner's motion to expedite, there is no need for blinding speed in a rush to confront these issues.

C. The Court should exercise caution in deciding whether and how federal judges should continue to use the sentencing guidelines

Excessive speed can be as dangerous in the courts as it is on the highways. A reckless race to the finish line is more likely to result in casualties than justice.

The government's position on severability is inconsistent, and that inconsistency may be the product of the haste with which the government has analyzed a complex issue. The government asks whether "in a case in which the guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis …." Pet. at I. The framing of the question ignores the larger issues at stake.

1. The question implies that the Guidelines will continue to apply so long as the sentencing judge is not required to find any facts that were not admitted in a guilty plea or determined by a jury. When the government seeks to prove additional facts to enhance a sentence, the government contends that the Guidelines do not apply, and that judges are free to give any sentence they wish between

the statutory minimum and maximum. The government staked out this position soon after *Blakely* was decided. Dep. Att'y Gen. James Comey Memorandum to All Federal Prosecutors Re: Departmental Legal Positions and Policies in Light of *Blakely v. Washington* at 2 (July 2, 2004) ("Comey Memorandum") (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf)

The government's reasoning is flawed. If the Guidelines are unconstitutional in their entirety, they cannot be resurrected in some cases and ignored in others. Congress could not have intended courts to use two sentencing schemes: one that is bound by the Guidelines and one that is not. "The suggestion that courts use the Guidelines in some cases but not in others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection." *United States v. King*, No. 6:04-CR-35-Orl-31KRS, slip op. at 14 (M.D. Fla. July 19, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/us_v.%20King.pdf) The government's breakdown in logic—if the constitutional problem that makes the Guidelines infirm cannot be severed, how can the Guidelines be used at all?—may be the product of analyzing an issue with haste instead of calm reflection. The Court should not repeat that error by forcing the hurried confrontation of these difficult issues.

2. The government also suggests that, even if the Guidelines cannot be constitutionally applied, judges should continue to give them "due regard." Pet. at 17. It seems, then, that the government

believes severability is possible. Federal law requires judges to "consider" the Guidelines, among other factors, when imposing a sentence. 18 U.S.C. § 3553(a)(4). The same law requires judges to follow the Guidelines in all but exceptional cases. 18 U.S.C. § 3553(b). The government wants to leave subsection (a) intact (the statutory authority for considering the Guidelines) while relieving judges of their obligation under subsection (b) to follow the Guidelines. The government does not explain how its position is anything other than an argument for severability. Again, the government's position is probably confused because it was formulated in haste.

3. The government is also unclear in defining the scope of the legislation and rules that are nullified if judicial fact-finding cannot be severed from the balance of federal sentencing law. The Guidelines are a creature of the Sentencing Reform Act ("SRA"), Pub. L. No. 98-473, 98 Stat. 1837 (1987). If, as the government suggests, judicial fact-finding is an essential component of the SRA, is the SRA unconstitutional in its entirety? The government does not consider the consequences of that position: a return to truly indeterminate sentencing, with a parole board deciding when the sentence imposed by the court should be deemed completed; an end to the United States Sentencing Commission and to supervised release; the undoing of the SRA's extensive changes to sentencing options, including fines and probation; and a return to relative unreviewability of sentences on appeal. None of these features of the SRA are affected by *Blakely*, and there is no reason to believe that Congress would not have enacted the Act even

if its desire to have judges determine facts that increase sentences could not be achieved. If *Blakely* is applied to the Guidelines, a determinate sentencing scheme remains. Uniformity will not be lost by changing the fact-finder and the burden of proof. The SRA will continue to serve Congress' principal objectives.

The government fails to address severability at the legislative level, but since severability is a question of legislative intent, *Regan v. Time, Inc.,* 468 U.S. 641, 653 (1984), that is where the analysis should focus. In its rush to bring a case before the Court, the government does not explain why the logical extension of its position would not effectively nullify the SRA.

4. A more calm and considered view leads to the conclusion that those few provisions of federal law that require courts to find sentence-enhancing facts (most prominently, Fed. R. Crim. P. 32(i)(3)) can be severed from the balance of federal sentencing law without doing violence to Congress' intent. The primary goal of the SRA was to eliminate disparity in sentences. 28 U.S.C. § 991(b)(1)(B). The identity of the fact-finder (judge or jury) has no bearing on the attainability of that goal. Since "much of what Congress was trying to accomplish in the Sentencing Reform Act of 1984 is untouched by *Blakely,*" King & Klein, *Beyond Blakely,* 16 Fed. Sent. Rep. ___ at *5 (forthcoming 2004) (available at http://www.ussguide.com/members/BulletinBoard/Blakely/King-Klein.pdf), there is good reason to believe that Congress would have enacted the SRA even if some procedural modifications in the scheme are required to substitute a jury for judge as

fact-finder. In any event, the ramifications of the severability question require cautious consideration that is incompatible with the rush to a decision that the government advocates.

D. If the Court Accepts Review of this Case, It Should Decide How to Remedy the Violation of Respondent's Constitutional Rights on Remand

An equally compelling issue arises in this case if the Court agrees that respondent's Fifth and Sixth Amendment rights were violated and if it finds that sentencing courts should continue to use the Guidelines, substituting a jury for the judge as fact-finder. Anticipating the possibility that the Guidelines will continue to rule the world of federal sentencing, the Seventh Circuit held that respondent was "entitled to a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." *Booker*, 2004 WL 1535858 at *5. In the event that the Court grants the petition and affirms the court of appeals' determination that respondent's sentence violated his Fifth and Sixth Amendment rights, and if requiring facts to be found by a jury instead of a judge does not invalidate the Guidelines (and perhaps the Sentencing Reform Act) in their entirety, the Court should decide how the sentencing judge should proceed when respondent returns for a new sentence.

1. Although the court of appeals found no "novelty" in the concept of "a separate jury trial with regard to the sentence," *id.*, it cited

no authority for holding a second trial in front of a second jury to decide facts that were never charged in the indictment and that expose the respondent to greater punishment than he faced at the end of the first trial. Sentencing hearings before a jury are the norm in federal capital cases because Congress requires a jury to decide whether a defendant should die. 18 U.S.C. § 3593(b), (e). In respondent's noncapital case, Congress has not authorized a sentencing procedure that permits a jury to determine "sentencing facts" after jury has determined the defendant's guilt.[2] The absence of Congressional authorization is fatal to the holding that a sentencing jury can be convened to decide the facts that will determine respondent's guideline range.

In *United States v. Jackson*, 390 U.S. 570, 576-77 (1968), this Court rejected the government's contention that a federal court is authorized to use "a procedure unique in the federal system—that of convening a special jury, without the defendant's consent, for the sole purpose of deciding" whether a particular sentence should be imposed. Finding no evidence "that Congress contemplated any

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[2] *Booker,* 2004 WL 1535858 at *5, also notes that bifurcated jury trials occur in civil cases, with the jury first determining liability and then ruling on damages. Separate trials of issues in a civil case are specifically authorized by Fed. R. Civ. P. 42(b). There is no comparable authority to order a jury to hear sentencing evidence in a federal criminal prosecution that does not seek a death penalty.

such scheme," the Court rejected the view that Congress had authorized "a separate sentencing proceeding before a penalty jury." *Jackson,* 390 U.S. at 578.

Jackson's rejection of a sentencing procedure not authorized by Congress precludes the use of a sentencing jury in respondent's case. The empanelling of a sentencing jury after guilt has already been determined would represent a startling change in criminal procedure. *Jackson* recognized that any such change must be devised by Congress, not the courts:

> It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Id. at 580. The constitutional infirmity of the sentencing guidelines cannot be rescued by creating a sentencing procedure that Congress has not authorized. If the Court reaches the issue, it should decide whether criminal defendants who must be resentenced on *Blakely* grounds can be subjected to another jury trial at sentencing in the absence of Congressional authorization.

2. The Seventh Circuit's endorsement of sentencing juries raises constitutional concerns. The distinction between elements of an offense and sentencing facts, long elusive

and increasingly artificial, may have finally disappeared. *Blakely* notes that a tenet of common-law criminal jurisprudence requires "every fact which is legally essential to the punishment" to be charged in the indictment. 1 J. Bishop, Criminal Procedure, § 87, p. 55 (2d ed. 1872), *cited in Blakely,* 124 S.Ct. at 2536 and n.5. The collective logic of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Ring v. Arizona,* 536 U.S. 584 (2002), and *Blakely* requires sentencing facts to be treated as elements if they help determine the permissible punishment. Bibas, *Blakely's Federal Aftermath, supra* at *3; King & Klein, *Beyond Blakely, supra* at *6. Facts that authorize a judge to impose a longer sentence at least seem to be the functional equivalent of elements, although it is odd (and of constitutional concern) if the Sentencing Commission can effectively legislate elements of a crime.

The Seventh Circuit noted the possibility that facts exposing a defendant to a longer sentence must be treated as elements;[3] if so, the attempt to re-indict with those facts after the trial is over would violate the right to be free from double jeopardy. *Booker,* 2004 WL 1535858 at *5. The Court need not reach these difficult questions in respondent's case

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[3] The Justice Department apparently came to that conclusion quickly. Federal prosecutors have been instructed to charge sentence-enhancing facts in new indictments and to seek superseding indictments in pending cases. Comey memorandum, *supra* at 2.

because the absence of legislative authorization for sentencing trials provides an adequate ground to reject that aspect of the Seventh Circuit's opinion.

E. If the Petition is Accepted, Briefing Should Not Be Expedited

The federal appellate courts are capable of resolving many *Blakely* issues, as are the highest courts of the states in which *Blakely* issues will arise. These issues will continue to filter through the courts, and the results are more likely to be enlightening than damaging.

As respondent demonstrates in his response to the petitioner's motion to expedite the briefing schedule, the government overstates the need for urgent action. All Vice Chairs of the Sentencing Commission agree that federal sentencing is not operating in crisis mode. Response, ¶¶ 2, 6. The parties, the lower federal courts, and this Court need to take their time to allow fair consideration of these important issues. Allowing the customary time for briefing provided by Supreme Court Rule 25 will enhance the quality and usefulness of the briefs while protecting the Court from unforeseen consequences that may arise from inadequately developed arguments.

CONCLUSION

This case presents important issues that should be accepted for review. If, however, cases from the appellate courts arise that have more thoroughly considered the questions presented in the petition, it may be best to focus on those cases and either to decide

respondent's case in conjunction with them or to hold respondent's case until the issues have been resolved through more a more appropriate vehicle.

Respectfully submitted.

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July 28, 2004.