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

RESPONSE TO MOTION TO EXPEDITE SCHEDULE FOR BRIEFING AND ARGUMENT IF CERTIORARI IS GRANTED

The Respondent, by his counsel of record, opposes the Petitioner's motion to expedite briefing of this matter if the petition is granted.

1. The government overstates the need for urgent review of the lower court's decision. The criminal justice system is neither paralyzed nor dysfunctional. Realizing that the Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), would likely apply to the federal sentencing guidelines, judges and attorneys moved swiftly to accommodate *Blakely*'s demands. The system has adapted well to

Blakely's teachings, ameliorating the need for dangerous haste in settling important and complex constitutional questions.

2. The suggestion that the federal courts are confronting a crisis is mistaken. That point was underscored by the Vice Chairs of the United States Sentencing Commission, Commissioner John R. Steer and Judge William K. Sessions, III, in their joint testimony before the Senate Judiciary Committee. They cautioned that, for a number of reasons, "the waters are not as choppy as some would make them out to be." Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Judiciary Comm., 106th Cong. (July 13, 2004) (hereinafter Senate Judiciary Comm. Hearing) (Joint Prepared Testimony of Commissioner John R. Steer and Judge William K. Sessions, III) (available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3667). Testifying at the same hearing, the Honorable Paul Cassell, U.S. District Judge for the District of Utah, advised the Committee that it would be "unfair to describe this situation as a 'crisis' or 'chaotic.'" Senate Judiciary Comm. Hearing (Testimony of Hon. Paul Cassell) (available at http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669).

3. The Department of Justice promptly reacted to *Blakely* by implementing procedures that are faithful to its commands. If federal prosecutors wish to expose a defendant to a longer guideline maximum

than the base offense level for the charged offense would permit, they are directed to seek indictments that charge those facts that would authorize the enhanced maximum. For defendants who have already been charged, prosecutors are directed to seek superseding indictments to charge readily provable facts that would increase the maximum guideline sentence. 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) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf). Prosecutors are also directed to seek waivers of *Blakely* rights from defendants in plea agreements and guilty pleas. *Id.* at 2, 4. Commissioner Steer and Judge Sessions advised Congress that these procedures "would protect the overwhelming majority of future cases from *Blakely* infirmity." Senate Judiciary Comm. Hearing, Steer and Sessions testimony, *supra.*

4. Just as the executive branch of government immediately altered its practices to comply with *Blakely*, the judiciary responded with swiftness that four law professors with expertise in sentencing characterized as "breathtaking." Senate Judiciary Comm. Hearing (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_berma

nmillerdemleitnerwright_blakely_sen.%20Jud.%20Comm.%20Testimony%20%20(7.13.04).pdf). Courts (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. *Id.* Courts are using such mechanisms as alternative sentences to address any lingering uncertainty about unsettled questions (including whether the guidelines and the legislation that spawned them are unconstitutional in their entirety). *Id.* While lower courts may respond to these questions in different ways, "the legal variety within the federal system is healthy" because it provides Congress with a variety of approaches to draw upon as it considers how to integrate federal sentencing law more seamlessly with the constitutional requirements described in *Blakely*. *Id.*

5. The prompt responses of the executive and judicial branches of government to the *Blakely* decision protect new prosecutions from later claims that sentences are constitutionally infirm. Those responses largely alleviate the need for expedited review. Similarly, immediate action is not needed to avoid upsetting convictions and sentences that became final prior to the *Blakely* decision. Whether *Blakely* applies to those sentences is not a pressing question. Lower courts are unlikely to apply *Blakely* on collateral review unless and until this Court decides

that *Blakely* should apply retroactively. 28 U.S.C. § 2255; *United States v. Simpson*, No. 04-2700, 2004 WL 1588085 (7th Cir. July 16, 2004).

6. The uncertainty about which the government complains is greatest in those cases in which a guilty plea was entered or a verdict rendered before *Blakely* was decided, but which have not become final. Even in that small group of cases, most sentences are unaffected by *Blakely*. As Commissioner Steer and Judge Sessions reminded Congress, "a majority of those cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*." Senate Judiciary Comm. Hearing, Steer and Sessions testimony, *supra.* U.S. District Judge Ruben Castillo of the Northern District of Illinois, another Vice Chair of the Sentencing Commission, remarked that 80 percent of federal prosecutions are unaffected by *Blakely* because they do not involve upward departures. Manson, *Sentencing guidelines will survive: Castillo,* Chicago Daily L. Bull. (July 15, 2004) (available at http://www.lawbulletin.com). Judge Ted Stewart recently arrived at the same conclusion:

> It is this Court's experience that *Blakely*-implicated enhancement cases are among a small minority of cases. Therefore, the Court's decision herein--and, indeed *Blakely* itself--applies only to a narrowly defined set of cases and does not affect the majority of criminal cases before the Court to be sentenced under the guidelines.

United States v. Montgomery, 2004 WL 1535646 *4 (D. Utah July 8, 2004). So long as no judicial fact-finding is required, courts may continue to apply the sentencing guidelines without fear that the sentences they impose will violate the Constitution.

7. Statistics showing the number of sentences imposed by federal courts are not a useful measure of the impact *Blakely* might have on federal sentencing. A significant number of sentences are imposed in "fast-track programs" used in border districts to address illegal border crossings.[1] Judicial Conference, Sentencing Guidelines Downward Departures (available at http://www.uscourts.gov/judiciary2003/downward.pdf). Those sentences frequently involve downward departures, *id.,* and are therefore unaffected by *Blakely.*

8. The complaint that a few defendants might receive a "sentencing windfall" is insufficient to justify expedited review of this case. For about two decades, defendants have been sentenced to longer terms of imprisonment than the facts found by a jury or admitted in a guilty plea warranted. It is difficult to understand why there is a need for urgency to correct sentences perceived to be unduly lenient when it has taken twenty years to avoid sentences that are unduly harsh.

---

[1] The number of cases identified by the government from Table 2 of the statistical report accompanying last year's Sentencing Commission Annual Report (available at http://www.ussc.gov/ANNRPT/2002/table2.pdf) is skewed by the inclusion of thousands of "fast-track" cases from southern border districts (S.D. Fla., D. Ariz., S.D. Tex., W.D. Tex., D.N.M., and S.D. Cal.).

9. In any event, the government typically will have other options if it believes a defendant has not been adequately punished. If the government believes a defendant committed other crimes that cannot be considered "relevant conduct" under U.S.S.G. § 1B1.3 because those crimes were not considered by a jury or admitted in a guilty plea, the government will often be free to seek additional punishment by prosecuting the additional crimes. If (as in the respondent's case) the government believes punishment should be based in part upon perjury the defendant allegedly committed during his trial, the government can seek additional punishment by prosecuting the defendant for perjury even if an upward adjustment pursuant to U.S.S.G. § 3C1.1(b) is no longer available. *See Blakely,* 124 S.Ct. at 2539 n.11 ("Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt … is unclear.") In light of these options, the potential "windfall" to defendants who were found (or pled) guilty before *Blakely* was decided, and whose convictions have not become final, is not a sufficiently weighty concern to justify expedited consideration of this case.

10. The government's warning that federal plea negotiations will suffer as a result of *Blakely* is speculative and illogical. It is more likely that *Blakely* will result in increased opportunities for plea negotiation. In

the pre-*Blakely* regime, the government often charged a single crime that was easy to prove, obtained a guilty plea, and sought to increase the defendant's maximum guideline sentence by proving related crimes or conduct by a preponderance of the evidence at sentencing. Prosecutors had no incentive to plea bargain because they only needed to obtain a conviction on their strongest charge to avoid a trial on other potential charges. Because *Blakely* requires those additional crimes to be proved beyond a reasonable doubt to the satisfaction of a jury, the government and defendants now have an incentive to reach a meeting of the minds as to which accusations meet that standard of proof.

11. Even if *Blakely* results in more trials, that cannot be viewed as a negative outcome that justifies expedited consideration of these important questions. According to the Judicial Conference, only 3 percent of federal defendants take their cases to trial. Judicial Conference, Sentencing Guidelines Downward Departures (available at http://www.uscourts.gov/judiciary2003/downward.pdf). As noted above, when the most significant factual findings bearing on culpability are made at sentencing, not in a trial, defendants have little incentive to exercise their right to a trial. The heightened standard of proof, evidentiary rules, and jury unanimity that attend a trial provide important procedural protections against unwarranted punishment. The

exercise of constitutional rights that are designed to assure accuracy of outcomes cannot be harmful to the criminal justice system.

12. Every significant constitutional decision engenders some period of uncertainty as the lower courts grapple with its ramifications. This Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was viewed by some as revolutionizing sentencing practices. Nonetheless, the criminal justice system adapted to *Apprendi* quickly, just as it will to *Blakely*. Alarmist predictions about the impact of *Blakely* on the federal criminal justice system are entitled to no greater consideration than the similar predictions that were made in the wake of decisions like *Apprendi* and *Miranda v. Arizona*, 384 U.S. 436 (1966).

13. Reaching a full understanding of the impact that *Blakely* has upon the federal guidelines will require time and deliberation. As a deliberative body, the Supreme Court benefits from full and careful arguments advanced by the parties. This Court also benefits greatly from decisions in the courts of appeals. The Court's rules and procedures are designed to assure that parties give due attention to the weighty questions that come before the Court. While the government, with its immense resources, may be positioned to proceed with dispatch, the respondent at this point has only his counsel of record to protect his interests. Proceeding with needless haste would undermine the respondent's opportunity to develop these important issues with the care

they deserve, and would pretermit the work of the federal appellate courts.

14. If the petition is granted, the respondent suggests that briefing proceed on the schedule outlined in Supreme Court Rule 25 and that oral argument be heard promptly after the government's reply brief is filed. As noted above, there is no crisis that necessitates oral argument prior to the beginning of the October term.

15. If briefing in this matter is expedited, the respondent suggests that the second schedule proposed by the government is more reasonable than the first.[2] However, assuming that a briefing schedule is announced on or shortly after August 2, 2004 as the government requests, the government's proposed schedule would afford the government about four weeks to file its brief while permitting the respondent only three weeks to respond. In light of the government's greater resources, a more equitable schedule would be: petitioner's brief

---

[2] There certainly is no need for this Court to expedite this appeal as drastically as it did in the cases cited by the government: *Raines v. Byrd*, 520 U.S. 1194 (1997), and *United States v. Eichman*, 494 U.S. 1063 (1990). Both of those cases involved constitutional challenges to statutes that expressly required this Court to "expedite [an appeal] to the greatest extent possible." Flag Protection Act of 1989, Pub. L. No. 101-131, § 3, 103 Stat. 777; *see also* Line Item Veto Act, Pub. L. No. 104-130, § 3(c), 110 Stat. 1211 (1996) ("It shall be the duty of the … Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of [the constitutionality of this Act]."). Because no similar statutory mandate exists here, this Court has the discretion to grant the parties more time to consider the important issues currently being litigated in the lower courts.

due August 24, 2004; respondent's brief due September 21, 2004; petitioner's reply due September 27, 2004.

16. Counsel of record has consented to the appearance of the National Association of Criminal Defense Lawyers (NACDL) as amicus and is authorized to state that the NACDL joins in this response.

Dated: July 28, 2004.

Respectfully submitted,

_____

T. Christopher Kelly
Counsel of record