APPENDICES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Docket No. 03-47-P-H

UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for Sentencing Hearing before the HON. D. BROCK HORNBY, in the United States District Court, Portland, Maine, on the 28th day of June, 2004, at 9:36 a.m.

APPEARANCES:

For the Government:

Helene Kazanjian, Esq.

For the Defendant:

Bruce Merrill, Esq.

Rosemary Curran Scapicchio, Esq.

* * * *

[86]

* * * *

MS. SCAPICCHIO: Judge, I've had an opportunity to speak to Mr. Fanfan, he'd like to proceed with sentencing today, to be able to argue Blakely, but not necessarily brief it.

MS. KAZANJIAN: I would prefer to brief it, I think, but I can preliminarily explain to the court why.

THE COURT: Go ahead.

MS. KAZANJIAN: Some initial issues. My position is that Blakely does not apply to federal sentencing guidelines. It should not be applied, and for several reasons, and I would—I think it's more complex than I think Blakely ap-

pears at first blush. First of all, the Supreme Court in Footnote 9, that majority decision indicates that it's not addressing whether [87] it applies to federal sentencing guidelines, does not make that finding. As pointed out by both—several of the decisions, dissenting decisions, there is case law precedent that appears to be inconsistent with Blakely, if Blakely were to be applied to the federal sentencing guidelines. That is what I'd like the chance to point out to the court, how those cases which are still good law, the Supreme Court did not explicitly reverse those cases. Those cases are—some of them are cited in my memorandum, the Witte case, the Edwards case, there's also the Watts case, all of those cases are actually cited both by Justices—Chief Justice Rehnquist and by Justice O'Connor. Those cases apply to sentencing guidelines and the enhancements in the sentencing guidelines and permit the court to do that at the time of sentencing. And while at first blush appear inconsistent to Blakely, I would like the opportunity to be able to explain to the court with further reflection myself as to why they are different.

The other point is that the Supreme Court did not do an analysis of the differences between the Washington sentencing guidelines and/or sentencing statutes and the federal sentencing guidelines, and I have not had a chance to do that piece of it because that takes an additional amount of work, but I am prepared to argue to the court, [88] would like to argue in more detail as to why Blakely does not apply, but I again would ask the court allow us briefing time.

THE COURT: Let me hear the full benefit of your argument, then I'll reserve whether we'll do briefing as well.

MS. KAZANJIAN: Again, I'm not sure I'm able to give the court everything that there is out there. But first of all, I think that United States did argue in the context of Blakely that the Washington system was different from the federal sentencing guidelines for several reasons. Unlike the Washington system, the federal sentencing guidelines were not—the guidelines were not enacted by the legislature, but promulgated by the Sentencing Commission, and that is an independent Commission in the judicial branch of the United

States, and that is Supreme Court decision of Mistretta v. United States, 488 U.S. 361, cited for that proposition. The guidelines are not statutes, but sentencing rules, they are a unique product of a special and limited delegation of the authority of the Commission, and I think this should be treated—they should be treated differently.

The Washington system is, I know enough to know from sources that I'm relying on in the Department of Justice **[89]** that the system and the federal guidelines are somewhat different. The guidelines do not establish statutory maximum for criminal offenses. Federal system in contrast to the Washington system, the offense of conviction does not dictate a sentencing range, the sentencing range is only determined after the various factors are figured in. And it is at that point that a range is established. My understanding is it differs in that respect, again, I have not had a substantial amount of time to analyze how those statutes work, but I believe they do differ in that respect. I think the court should mostly look at the fact that the Supreme Court precedent of Witte, Watts, Edwards, Mellon, all have been—not been explicitly reversed by the Supreme Court, by the majority decision, even the dissenting decisions don't indicate they have been reversed, they raise concerns about squaring those decisions and the consistencies and how it's going to apply going forward, but nobody suggests those decisions are no longer good law. In this particular case, the Edwards decision that I cite in my memorandum is right on point, it does authorize the court to take into consideration factors such as relevant conduct and to factor in the relevant conduct in the determination of the guidelines. The court under Edwards as well as the Witte and Watts **[90]** decisions backing it up can look at for example the crack cocaine, any cocaine that was outside the conspiracy period, factor that in as a matter of sentencing pursuant to the sentencing guidelines. It would seem to be a huge step for this court to in the face of even the majority saying that it's not indicating that this applies to the federal sentencing guidelines, the court to apply it under these circumstances in this case in effect, ignoring that precedent, which is, does deal directly

with the federal sentencing guidelines by the Supreme Court, and does deal directly with the issue of relevant conduct and other types of enhancements. Again, those cases standing for the proposition that uncharged conduct, even acquitted conduct, can be factored in by the court in determining the offense level for which the defendant should be sentenced by. And again the way the guidelines operate, all of those factors are to be figured in before there is ever a range, before a range is ever determined. So there is no such range that is capping this defendant's sentence as there was under the Washington sentencing scheme. In this particular case, I think the Supreme Court has said over and over in dealing with Apprendi issues that the maximum statutory penalties are set forth in Title 21, Section 841, in this case, it's Section 841(b), that is **[91]** always the—considered to be the maximum statutory penalty. This sentence would not exceed that, it's a 40 year maximum statutory penalty. And there would be no violation of the Apprendi rules for the court to impose a sentence within the guideline range that it has determined today applies. That's the best I can do for the court today.

THE COURT: Thank you, Ms. Kazanjian. Defense counsel.

MS. SCAPICCHIO: Thank you, Your Honor. Judge, I interpreted Blakely a little bit different in terms of the definition of statutory max. I understood Blakely, the Blakely court to define statutory max as the maximum a Judge may impose based solely on the facts reflected in the jury's verdict or admitted by a defendant. In this case, that would limit the statutory max to what the jury heard in this case and all the jury heard from which they could consider is the evidence relative to the conspiracy. So I think that Blakely applies the rule of Apprendi and Ring and sweeps a little more broadly in terms of what the court is able to do under the sentencing guidelines. I'm not sure as I stand here today whether or not Blakely invalidates the guidelines. I do believe, however, that what Blakely clearly says is that any fact that wasn't **[92]** pled to the jury, proved beyond a reasonable doubt, that would increase a defendant's sentence

beyond what the jury found is improper now under Blakely, and I think that encompasses anything—with respect to role in the offense, anything with respect to relevant conduct, anything with respect to criminal history category, that wasn't presented to a jury and proven beyond a reasonable doubt. Under that scenario, Judge, I think this court is limited to sentencing Mr. Fanfan to what the government proved in this case to a jury beyond a reasonable doubt. In my understanding of what the government proved to a jury beyond a reasonable doubt is simply a conspiracy to distribute cocaine hydrochloride, without any reference at all to crack cocaine, and without any reference at all to any of the other sentencing factors that we've argued before you here today. I think under Blakely, all of that is gone. And I think Blakely applies Apprendi to mean what it says it means as far as a defendant's right to have a jury determine what he's guilty of and to have the government prove to a jury what they want to include in sentencing. I think what Blakely does most is to force the government to present to the jury everything that it wants it to consider in terms of sentencing. And this case, the government presented no evidence as far as crack cocaine to **[93]** the jury, presented no evidence as far as relevant conduct to the jury from which the jury could consider and render a verdict that is now based upon what this court can sentence. So I think that under Blakely, we're stuck with what the government proved at trial, and what the government proved at trial simply amounts to a conspiracy to distribute 500 grams of cocaine hydrochloride. I also believe, Judge, that because there wasn't a specific verdict, an amount found by the jury of 500 grams, that Mr. Fanfan is entitled under Blakely and under Apprendi in this case to the lowest possible sentence that the court can impose.

THE COURT: Well, there was a finding.

MS. KAZANJIAN: Yes, there was a finding.

MS. SCAPICCHIO: Of 500 grams?

MS. KAZANJIAN: Yes.

MS. SCAPICCHIO: I didn't have within the papers I had, I apologize for that.

THE COURT: While you're on that, there is a finding, whether it meets Colon-Solis is a separate question. There was a finding, I think you'll have to go back and look at the jury instructions, but I think it would reflect the scope of the conspiracy—

MS. SCAPICCHIO: Right, I think that's what it was, Judge, the finding by the jury in this case of 500 grams—thank you. If the jury, if the jury in this **[94]** case did find that Mr. Fanfan was responsible for distributing or conspiring to distribute cocaine, 500 grams or more, there still has to be an individual determination as to what Mr. Fanfan's accountability is. I don't think we can tell that from this jury verdict as far as what the jury might have thought Mr. Fanfan was accountable for was what was foreseeable as far as Mr. Fanfan is concerned, I think is something that Blakely has considered, and Blakely has said unless it's clear from the jury verdict, Mr. Fanfan gets the benefit of leniency in terms of sentencing. So I would suggest --

THE COURT: Wouldn't that be harmless error, however, here in light of the fact that all the testimony was that he was the only source? In other words, this is not like the typical conspiracy where other people might have been dealing with amounts that did not come from him.

MS. SCAPICCHIO: Well, Judge, I think that we get back to this issue of foreseeability and the issue of Blakely as to what the jury—we don't know as we stand here today how the jury came up with their verdict that Mr. Fanfan was responsible for 500 grams or more of cocaine hydrochloride. Because we don't know that, and we don't know what process they went through to reach that, we can't say with any degree of certainty that they didn't include other amounts that weren't necessarily attributable to **[95]** Mr. Fanfan under the conspiracy, amounts attributable to Ash or Smith in this case, in coming up with their verdict.

THE COURT: When he was arrested, he had 1.25 kilos of powder in his possession.

MS. SCAPICCHIO: Conspiracy ended, Judge, that can't be considered, the conspiracy ended at that point. The jury verdict was on the conspiracy alone. None of the stuff that he's found with at that—in that parking lot ever gets before the court under Blakely because the conspiracy ended. And if the conspiracy ended, and that information was introduced to the jury, but not considered by them in finding him guilty in this case, then you do have a problem of what Mr. Fanfan is accountable for under Blakely. And I think because this case doesn't charge Mr. Fanfan with the substantive offense of anything that may have happened in Somerville in this case, the court is stuck with what the jury found in this case, which is 500 grams of cocaine hydrochloride, exclusive of any of the crack cocaine or any of the other substances that are attributed directly to Fanfan at the arrest. Thank you.

THE COURT: Thank you. Any rebuttal?

MS. KAZANJIAN: No, Your Honor, only—well, I'll only state that the jury did, was instructed, did find 500 grams or more in the verdict.

[96] THE COURT: What about the Colon-Solis issue that raises. In other words, the First Circuit has said that in other contexts, just because the jury finds a scope of conspiracy that the sentencing Judge pre Blakely has an obligation to find that was reasonably foreseeable for this defendant as to how much he or she should be saddled with under relevant conduct, is that an issue now given Blakely?

MS. KAZANJIAN: No, I don't think Blakely affects that, I mean, first of all, that is the—an issue for sentencing according to the First Circuit, Blakely doesn't address that type of issue, it addresses issues that are enhancements under a sentencing structure. And I think the point that it's harmless error is actually accurate, worst case here, we have evidence that—clear evidence that Mr. Fanfan was the only source for all of the cocaine that was part of this conspiracy, and it was proved, and therefore, there's no way the jury could have found otherwise.

THE COURT: Thank you, Ms. Kazanjian.

* * * *