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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, )  
 )  
Plaintiff )  
 )  
-VS- ) Criminal No. 02-10136-REK  
 ) Pages 1 - 52  
BRYAN MORAN, )  
 )  
Defendant )

MOTION HEARING/DISPOSITION

BEFORE THE HONORABLE ROBERT E. KEETON  
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

JOHN A. WORTMANN, JR. and CYNTHIA W. LIE, ESQ., ESQ.,  
Assistant United States Attorneys, Office of the United  
States Attorney, 1 Courthouse Way, Boston, Massachusetts,  
02210, for the Plaintiff.

PETER B. KRUPP, ESQ., Lurie & Krupp, LLP,  
One McKinley Square, Boston, Massachusetts, 02109, for the  
Defendant, Bryan Moran.

ALSO PRESENT:

NEIL F. FAIGEL, ESQ., Law Offices of Neil F. Faigel &  
Associates, 265 Broadway, Methuen, Massachusetts, 01844, for  
Saul Melendez.

United States District Court  
1 Courthouse Way, Courtroom 3  
Boston, Massachusetts  
July 8, 2004, 9:30 a.m.

LEE A. MARZILLI  
CERTIFIED REALTIME REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617)345-6787

1 P R O C E E D I N G S

2 THE COURT: Good morning. You may be seated.

3 THE CLERK: This is Criminal Case 02-10136, United  
4 States Vs. Bryan Moran and others. Will the parties please  
5 identify themselves for the record.

6 MR. WORTMANN: Your Honor, good morning. John  
7 Wortmann and Cynthia Lie for the United States.

8 THE COURT: Good morning.

9 MR. KRUPP: Your Honor, Peter Krupp for Bryan  
10 Moran, and he's here at counsel table with me.

11 THE COURT: Good morning.

12 MR. FAIGEL: Your Honor, Neil Faigel for  
13 co-defendant Saul Melendez.

14 THE COURT: Good morning.

15 MR. FAIGEL: I filed a motion to join and adopt the  
16 memorandum filed by my brother, Attorney Krupp, in an  
17 abundance of caution and I think in the interest of judicial  
18 economy. I know that Mr. Wortmann has no objection to that  
19 motion.

20 THE COURT: All right, I'll receive it.

21 MR. FAIGEL: Thank you.

22 THE COURT: Are you ready to proceed, Mr. Krupp?

23 MR. KRUPP: Yes.

24 THE COURT: All right, you may proceed.

25 MR. KRUPP: Your Honor, I don't know the extent to

1 which I ought to address the issues raised in my papers. I'm  
2 happy to go through the issues as I understand them. As a  
3 threshold issue, it's our position that Blakely applies to  
4 the Federal Sentencing Guidelines, that it applies in this  
5 case, that Mr. Moran has already entered pleas on two of the  
6 counts and received a jury trial on the third count; and that  
7 based on the facts that he admitted and the facts that were  
8 necessarily found by the jury, the Court should impose  
9 sentence; and that Blakely prevents the Court from  
10 constitutionally imposing a sentence on Mr. Moran which takes  
11 into account for enhancement purposes any facts that were not  
12 either admitted to by Mr. Moran or found necessarily by the  
13 jury in connection with its verdict. I'm happy to address  
14 any of those issues in more detail. I think they're set out  
15 in some fair detail in the papers.

16           There are a number of courts which have already  
17 confronted the issue of whether Blakely applies to the  
18 Federal Sentencing Guidelines since Blakely was decided.  
19 I've tried to provide those authorities to your Honor,  
20 including most recently a transcript I received yesterday  
21 afternoon from a decision by Judge Jackson in D.C. where he  
22 made exactly that finding. He did not find that the Federal  
23 Sentencing Guidelines were unconstitutional. He just said  
24 that Blakely requires us to sentence people based on the  
25 facts that they admit or that are found beyond a reasonable

1 doubt by a jury. And he imposed a sentence -- in fact, he  
2 revised a sentence that he imposed shortly before Blakely was  
3 decided so that he would impose a sentence that was based on  
4 those facts.

5           Now, the government's principal argument is that  
6 Mr. Moran waived his Blakely rights back in April of 2003  
7 when he pled guilty. And he pled guilty to two counts. He  
8 pled guilty without a plea agreement. He did not believe at  
9 the time he pled guilty that he was giving up any rights.  
10 Obviously he didn't know about his Blakely rights.

11           I've submitted two affidavits to the Court, one  
12 from his prior counsel who represented him at the time and  
13 one from Mr. Moran. I've handed up to the Court this morning  
14 his signed affidavit -- I submitted one ECF with the S  
15 signature yesterday -- indicating that Mr. Moran didn't know  
16 that he was giving up anything, he didn't believe he was  
17 giving up anything, he hadn't been advised by his counsel  
18 that he was giving up anything, and his counsel's affidavit  
19 indicates that his counsel didn't believe that he was giving  
20 up or advising his client to give up anything. And that was  
21 right as a matter of law at the time. The Supreme Court  
22 hadn't said that these kinds of factors need be decided by a  
23 jury, nor had the First Circuit.

24           And the only evidence, if you will, with respect to  
25 waiver is the plea colloquy, to the extent that it addressed

1 this issue at all. And in connection with that plea  
2 colloquy, Mr. Wortmann made a statement that Mr. Moran was  
3 giving up or waiving any rights, not "the" rights, but any  
4 rights that he may have under Apprendi. Mr. Budreau has put  
5 in an affidavit saying he didn't believe he was giving up any  
6 rights. Your Honor did not specifically query Mr. Moran,  
7 didn't inform him that he had a right to a jury trial on  
8 these issues, he didn't have a right to proof beyond a  
9 reasonable doubt on these issues, didn't inform him that he  
10 had any rights at all about these issues or determine whether  
11 he had spoken with his counsel about any rights he was giving  
12 up in that regard specifically. And Mr. Moran for his part  
13 didn't acknowledge that he knew he was giving up anything.  
14 In fact, his belief was that this was a discussion about the  
15 way in which the case was going to proceed, which was agreed  
16 to by everybody as to be the state of the law at the time.  
17 Mr. Wortmann may contest that about what he believed, but the  
18 issue isn't what Mr. Wortmann believed. The issue is what  
19 Mr. Moran believed and what he was knowingly or voluntarily  
20 giving up. And I'd suggest that he didn't knowingly or  
21 voluntarily give up his rights under Blakely to have these  
22 sentencing issues decided beyond a reasonable doubt by a  
23 jury.

24 Applying Blakely in this case on the facts that are  
25 before the Court, based on Mr. Moran's admissions and based

1 on the jury finding, would result in a sentence under the  
2 Federal Sentencing Guidelines greater than the amount of time  
3 Mr. Moran has already spent in jail, which I --

4 THE COURT: Let me ask a couple of questions in  
5 that connection. Now, that assertion is based, I take it, on  
6 several premises. One, at least, is that grouping is  
7 appropriate here because the sentence has to be not only on  
8 the count that was tried to the jury but also on the other  
9 two counts.

10 MR. KRUPP: Yes.

11 THE COURT: And so it is your position, I take it,  
12 that grouping is appropriate, and that the calculations that  
13 are shown in the Presentence Report on Page 10 leading to a  
14 total offense level of 14 is a correct calculation?

15 MR. KRUPP: No.

16 THE COURT: No?

17 MR. KRUPP: I don't disagree with Paragraph 49 of  
18 the PSR which says that these counts should be grouped and  
19 cites to the relevant Guidelines provision; but with respect  
20 to Paragraphs 52 and 53 which deals with the quantity of  
21 heroin, I do contest that number and believe that to find  
22 that number would result in fact-findings that the Court  
23 makes and not things that Mr. --

24 THE COURT: Well, I understand that. Now, have I

1 total offense level of 14 and a criminal history category of  
2 4, the guideline imprisonment range is 27 to 33 months."

3 MR. KRUPP: I have two things to say about that. I  
4 don't believe that the total offense level should be 14. I  
5 think that the total offense --

6 THE COURT: But even if it is 14, you win.

7 MR. KRUPP: Yes, I agree.

8 THE COURT: Well, so why should I be spending my  
9 time dealing with an issue that doesn't make any difference  
10 in the outcome?

11 MR. KRUPP: I think it matters --

12 THE COURT: I don't object to your making your  
13 objection on the record so if the appellate court finds  
14 somehow or other that it makes a difference, you've preserved  
15 your position, but I don't see why I should be spending a lot  
16 of time resolving that question which would not affect my  
17 decision.

18 MR. KRUPP: The only way it would affect anything  
19 in this case is, and I don't expect this to happen, but if  
20 Mr. Moran were to have a violation of supervised release  
21 after this case, the Guidelines for supervised release are a  
22 function of what the offense level or the criminal history  
23 category was at the time Mr. Moran was sentenced. And so I  
24 do think it matters that the Court make a determination of

25 what the appropriate offense level is and what the

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1 appropriate criminal history category is.

2 My second objection with respect to Paragraph 92 is  
3 with respect to the criminal history category. I had a  
4 discussion with Mr. Gomes before your Honor took the bench,  
5 and I think we're in agreement that one of the prior juvenile  
6 convictions which was scored with a 3 should actually be  
7 scored with a 2, which would take Mr. Moran at least to  
8 Criminal History Category 3, at most, that is to say, to  
9 Criminal History Category 3 from 4. And given the facts  
10 which were admitted to by Mr. Moran at the plea and found  
11 necessarily by the jury, I think that the highest total  
12 offense level that your Honor could impose after Blakely  
13 would be a total offense level of 12 at Criminal History  
14 Category 3. That would be my position with respect to the  
15 appropriate Guidelines provisions. One could reserve --

16 THE COURT: Well, what does 12 and 3 produce?

17 MR. WORTMANN: It's 15 to 21 months, your Honor.

18 THE COURT: Which would mean that the time in  
19 custody is well beyond the maximum if your contention on the  
20 effect of Blakely is correct.

21 MR. KRUPP: That's right. And the other little  
22 tweak on the 12 is that that 12 is a number as a base offense  
23 level, given the amount of drugs admitted to or found by the

24 jury, and that doesn't take into account acceptance of  
25 responsibility. The Presentence Report indicates that

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1 Mr. Moran should receive two points off for acceptance of  
2 responsibility. The government may well object to that. I  
3 don't know. We could have a discussion about whether that's  
4 appropriate. But it may well be that his guidelines should  
5 be even lower than 12 as the adjusted offense level under the  
6 Guidelines, and then you apply Criminal History Category 3 to  
7 that.

8 THE COURT: All right. Now, does the record before  
9 me show anything with respect to whether Mr. Moran undertook  
10 to cooperate with the government, not knowing that anybody  
11 else had made any disclosures to the government that would be  
12 relevant?

13 MR. KRUPP: I don't believe it does. There's no 5K  
14 in this case. There's no evidence of that before your  
15 Honor. The only evidence that relates to that in any way is  
16 attached to the motion filed by Mr. Wortmann seeking to put  
17 off the hearing for today, and attached to that motion was a  
18 letter that Mr. Wortmann sent to prior counsel attaching a  
19 draft plea agreement for Mr. Moran's consideration, which  
20 indicated that it would be a plea and cooperation agreement.  
21 That plea and cooperation agreement was never signed. There  
22 was no plea agreement in this case. That was never an  
23 agreement of any of the parties in the case.

24 THE COURT: All right. All right, thank you. I'll  
25 hear from the government. Mr. Wortmann?

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1 MR. WORTMANN: Thank you, your Honor. In looking  
2 at the whole collection of issues that you have in front of  
3 you, your Honor, it's the government's view that the only one  
4 you have to address is the question of waiver.

5 THE COURT: Is what?

6 MR. WORTMANN: Is waiver, your Honor.

7 THE COURT: Well, all right, let's talk about that  
8 one. How are you going to persuade me that one can waive a  
9 right that he thinks does not exist, and that the judge  
10 thinks does not exist, and that his counsel thinks does not  
11 exist, and government counsel thought did not exist, or at  
12 least government counsel never explained to me or anybody  
13 else that such a right existed? All of us thought the  
14 guiding precedent from the Supreme Court was that he had no  
15 such right. How can one waive a right that the Supreme Court  
16 of the United States tells him he does not have?

17 MR. WORTMANN: The Supreme Court of the United  
18 States -- with respect, your Honor, I disagree with your  
19 premise, and I'd like to explain to you why.

20 THE COURT: All right, tell me why.

21 MR. WORTMANN: First, we start from the proposition  
22 that the Supreme Court has in fact said that "Absent

23 misrepresentation or other impermissible conduct, a guilty  
24 plea intelligently made in light of the applicable law does  
25 not become vulnerable because later judicial decisions

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1 indicate that the plea rested on a faulty premise."

2 THE COURT: Yes, but, you see, that's not quite our  
3 case. Our case goes beyond that. That would be applicable  
4 if there were no precedent on the matter, but there was  
5 precedent on the matter, which I respected, and as far as I  
6 knew you respected, and certainly the defense counsel  
7 respected.

8 MR. WORTMANN: There was, your Honor, and there was  
9 at least two precedents. One is Apprendi which dealt with  
10 the question of anything that exceeded the statutory maximum,  
11 and the second case was United States V. Martinez in which  
12 Judge Gertner had said Apprendi doesn't apply here because of  
13 the extent of the differential between the sale and the  
14 maximum, the 20-year maximum contained in Section 841(c), and  
15 therefore Apprendi requires you to supersede.

16 But, your Honor, if we can take a step back, the  
17 question basically assumes something that's just wrong, and  
18 let me explain to your Honor. It assumes that the question  
19 of whether the right existed is meaningful. The fact is and  
20 what the record before you shows --

21 THE COURT: Wait a minute. Are you saying that the  
22 question of whether the right existed is not meaningful?

23 MR. WORTMANN: That's exactly what I'm saying, and  
24 I'll explain to you why, your Honor.

25 THE COURT: That's a startling proposition.

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1 MR. WORTMANN: Because what Mr. Moran and  
2 Mr. Budreau did is, they induced a certain conduct on the  
3 part of the government, which was to refrain from superseding  
4 in this case, which I was prepared to do and which I would  
5 have done. Moreover, your Honor, the fact is, they did have  
6 that right because they had the right to press the --

7 THE COURT: You didn't have any right to rely upon  
8 the position they were taking when the position they were  
9 taking was one that we all thought was correct. And if you  
10 are claiming reliance on that, that is not persuasive. If  
11 that's the basis of your argument to me, I have to rule  
12 against it.

13 MR. WORTMANN: Well, what I'm saying, your Honor,  
14 is that the defendants had the right to argue under  
15 United States V. Martinez and under Apprendi that Apprendi  
16 required the overdose to be pled to the jury beyond a  
17 reasonable doubt at trial.

18 THE COURT: But to argue that, they would have also  
19 had to argue to me that I should disregard a Supreme Court  
20 decision to the contrary, and --

21 MR. WORTMANN: Actually that's not --

22 THE COURT: -- they would have lost that argument.  
23 You know they would have lost it, I know they would have lost  
24 it, they know they would have lost it.

25 MR. WORTMANN: Your Honor, I don't think that's

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1 accurate at all because I had already made that argument in  
2 another court in this building, and I had lost that argument  
3 on grounds that suggested, indeed, there was support in the  
4 Supreme Court precedent which said that when the offense  
5 conduct -- when other factors are the tail that wags the dog,  
6 something more is required. So I think Judge Gertner's  
7 decision, your Honor, in Martinez made it clear that applying  
8 Apprendi to the overdose made that a very real possibility.  
9 But --

10 THE COURT: Judge Gertner's case is easily  
11 distinguishable from this case, point one. Point two, if  
12 there is a conflict between what Judge Gertner decides and  
13 what the Supreme Court has told me I should decide, I follow  
14 the Supreme Court. Though I respect my fellow judge --

15 MR. WORTMANN: I understand that, your Honor.

16 THE COURT: -- I feel that I am obligated to follow  
17 the Supreme Court.

18 MR. WORTMANN: And, your Honor, I'll come back to  
19 that one because I think that's an important point today.  
20 But with respect, there's absolutely nothing in Apprendi that  
21 specifically addressed the question of whether a fact by a

22 preponderance -- or in McMillan or in Harris V. New York,  
23 when the sentence went from, as Mr. Krupp has told you, a  
24 Level 10 to a Level 38, that was a very real argument. It  
25 was a very real issue.

14

1           And, your Honor, here's the question that I have.  
2 If that had been included in the indictment, we would have  
3 been obligated to prove it beyond a reasonable doubt in front  
4 of the jury. That's exactly what I would have done, and  
5 that's exactly what the jury would have heard, and at the end  
6 of that, your Honor, Mr. Moran and all the other defendants  
7 would have gotten exactly the procedure that they're now  
8 complaining about.

9           THE COURT: For purposes of considering the  
10 argument, let us assume you would have done all of that.

11           MR. WORTMANN: And I would have, your Honor.

12           THE COURT: You didn't.

13           MR. WORTMANN: Well, and the reason --

14           THE COURT: You did not, and we tried the case, and  
15 neither you nor the defendant asked me to put any question to  
16 the jury other than the ones that I did put, and I did not  
17 put the critical question here about the additional facts  
18 that would bear on the sentencing that all three of us  
19 thought it would be my responsibility to decide and not a  
20 jury.

21                   MR. WORTMANN: You're absolutely right about that,  
22 your Honor, and the reason we didn't do that is because in  
23 the Rule 11 hearing, on the record, we had explained to the  
24 Court that this was an issue, that the defendants had waived  
25 that right, and they had agreed --

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1                   THE COURT: No, that is not the reason. That may  
2 have been the reason for your behaving as you did, but it was  
3 not the reason I behaved as I did.

4                   MR. WORTMANN: Well, the reason it was --

5                   THE COURT: And I know why I behaved as I did, and  
6 that's not the reason. So your attributing to me a reason  
7 that was not my reason just gets you nowhere.

8                   MR. WORTMANN: And I don't mean to do that, your  
9 Honor. What I mean to do is explain the reason as what  
10 counsel agreed upon, and why I went through that issue with  
11 your Honor at the Rule 11 hearing, and why I specifically  
12 explained on the record to the Court and in the presence of  
13 Mr. Moran and Mr. Budreau what the agreement was. And that  
14 agreement was that these defendants are waiving that right,  
15 that everybody's agreeing that it will be a sentencing factor  
16 to be decided by the Court by a preponderance of the  
17 evidence, which is exactly what Judge Scalia predicted in  
18 Blakely cases would happen.

19                   And, obviously, your Honor, I respect your views on  
20 it, but let me ask -- and if it's inappropriate for me to ask

21 the Court a question, I apologize, but --

22 THE COURT: That's all right, go ahead.

23 MR. WORTMANN: What else in this situation, given  
24 the flux in the law, could the government have done in this  
25 case other than what it did?

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1 THE COURT: I assume nothing, but that doesn't get  
2 you anywhere. That doesn't mean that there was a waiver. I  
3 will not hold that a defendant has waived a right that he  
4 believed did not exist, that the Court believed did not  
5 exist, and that government counsel never told the court, if  
6 they believed otherwise, that they believed did exist. I  
7 won't do it. I think that would be a shocking denial of  
8 justice.

9 MR. WORTMANN: And, your Honor, the only thing I  
10 can say is that having procured that agreement from counsel  
11 and having relied on that agreement of counsel as it was  
12 explained --

13 THE COURT: Well, the agreement of counsel was not  
14 the agreement as you state it.

15 MR. WORTMANN: Well, I think it was, your Honor.

16 THE COURT: No, no. The agreement is on the  
17 record, and the interpretation of that agreement is not your  
18 interpretation to be controlling. If there is a difference  
19 of interpretation, I have to do the interpreting, subject to

20 a correction by a higher court. The Executive Branch can't  
21 tell me how to interpret.

22 MR. WORTMANN: And again, your Honor, just so it's  
23 clear, I'm not suggesting that, I respect your views on it,  
24 but I have an obligation to set forth the government's views.

25 THE COURT: And you've done so.

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1 MR. WORTMANN: And that's what I'm doing, your  
2 Honor.

3 THE COURT: And I rule against you.

4 MR. WORTMANN: All right, your Honor, assuming  
5 therefore that there's no waiver issue, and obviously, your  
6 Honor, the government objects to that -- and I know you  
7 understand the reasons why I say that --

8 THE COURT: Yes, of course.

9 MR. WORTMANN: -- the question then becomes, well,  
10 what do we do then? And it seems to me that there's a few  
11 issues. The first one is that this is not a Blakely issue at  
12 all. The reason it's not a Blakely issue at all is that this  
13 is a mandatory minimum case. This is not a case where the  
14 Guidelines are driving the sentence. In Blakely  
15 Judge Scalia's opinion makes it very clear that  
16 Harris V. New York and McMillan V. Pennsylvania, the cases  
17 which say judicial fact-finding on a mandatory minimum  
18 sentence does not implicate the due process clause, that  
19 that's still acceptable. And because this is a mandatory

20 minimum case, your Honor, Blakely doesn't apply. Blakely has  
21 no effect on this case. And the only way, in the  
22 government's view, your Honor, the only way I can understand  
23 the decision from Judge Scalia and his reference to McMillan  
24 and Harris --

25 THE COURT: Listen, there is a passage in Blakely

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1 in which the Court declares, "Any fact that increases the  
2 penalty for a crime beyond the prescribed statutory maximum  
3 must be submitted to a jury." We have had a jury trial in  
4 this case.

5 MR. WORTMANN: Yes.

6 THE COURT: Now, you see, the case before the Court  
7 in Blakely, they had not had the jury trial, so Blakely on  
8 its facts is distinguishable from my case. And you may argue  
9 as a result that what the Supreme Court opinion of the court  
10 in Blakely says is obiter dicta because it doesn't apply to  
11 my case, but whatever it is, it's a considered declaration by  
12 the Supreme Court of the United States, and I must follow  
13 it. That's my view.

14 MR. WORTMANN: Well, and, your Honor, again on that  
15 one, you know -- and let me not leave that question because I  
16 think it's an important one. It's one that I disagree with  
17 the Court on, your Honor, and that is, if that's the fact,  
18 then it's impossible to square the fact that Judge Scalia

19 went out of his way to say that Harris and McMillan mandatory  
20 minimums are unaffected by this decision.

21 THE COURT: No, not at all. He's talking about  
22 cases that are unlike my case. You see, the case before me,  
23 Mr. Moran's case, is one in which we have had the trial, and  
24 we did not -- nobody asked me to and I did not submit to the  
25 jury any instructions or questions that called for them to

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1 make a finding on this subject. And so we've had the trial.  
2 It is now impossible for the jury that tried this case and  
3 whose verdict, unless you ask me to set it aside, and you  
4 haven't done that, whose verdict I accept, neither party has  
5 asked me to set it aside, and I don't propose to.

6 I'll tell you frankly also that if one of you asked  
7 me to set it aside, I don't see how I could do it. So I'm  
8 not criticizing you for not asking me to set it aside, but  
9 I'm just saying, there it is. And so there is no way that  
10 the jury that was convened to hear the case and gave us the  
11 verdict in this case on Count 3 could now be somehow or other  
12 reconstituted, brought back. We can't do that.

13 MR. WORTMANN: And again, your Honor, --

14 THE COURT: So there is the impossibility then that  
15 these facts that would increase the penalty for a crime  
16 beyond the prescribed statutory maximum can be submitted to  
17 that jury. Now, there's no way to contest that. I assume  
18 you accept that, but if you don't --

19 MR. WORTMANN: No, no, your Honor, with respect to  
20 a Guidelines application, I do, but with respect to a  
21 mandatory minimum, I do not because again --

22 THE COURT: Wait a minute. I didn't ask you --  
23 that's an answer that is not responsive. We've had the trial  
24 before a jury.

25 MR. WORTMANN: Yes.

20

1 THE COURT: Do you agree that there's no way we can  
2 now submit to that jury questions about these added facts?

3 MR. WORTMANN: I agree with that, your Honor.

4 THE COURT: All right.

5 MR. WORTMANN: But again, your Honor, I say it  
6 doesn't matter because McMillan and Harris remain good law.  
7 The First Circuit has interpreted McMillan and Harris to mean  
8 that judicial fact-finding on mandatory minimums stands under  
9 those cases, and those cases are unaffected by Blakely.

10 In addition, your Honor, you know -- and I need to  
11 say, your Honor has indicated, and I respect it, that  
12 adherence to this Supreme Court case is required, but Blakely  
13 does not specifically reach the Guidelines. And the Supreme  
14 Court has admonished -- and this is from Figueroa V. Rivera,  
15 your Honor -- "The Supreme Court has admonished the lower  
16 federal courts to follow its directly applicable precedent,  
17 even if that precedent appears weakened by pronouncements in

18 its subsequent decisions."

19           Your Honor, the Supreme Court has upheld the  
20 Sentencing Guidelines against these kinds of attacks again  
21 and again Blakely calls into question. But in an issue of  
22 this magnitude, with respect, your Honor, I say that it is  
23 for the Supreme Court or the First Circuit to make that  
24 decision, and the Court should not extend Blakely to the  
25 Federal Sentencing Guidelines, that that's a job for an

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1 appellate court. And I want to make that argument, your  
2 Honor, because I think it's an important one that needs to be  
3 made.

4           But assuming I lose that one as well, your Honor,  
5 the issue then becomes that in all of these facts and  
6 circumstances, what's the appropriate remedy? And I've made  
7 two arguments in the brief, your Honor, that I'd ask you to  
8 consider. The first one is that it is appropriate, and,  
9 quite frankly, necessary to do justice in this case to  
10 convene a sentencing jury, which I believe is both  
11 permissible and is also required in this case, again, to  
12 achieve justice and to make a determination as to whether  
13 Mr. Moran is responsible for the death of a 19-year-old kid.  
14 That's the issue. And effectively by what he did in this  
15 case, he's walking away from that, your Honor. That, with  
16 respect, your Honor, is not justice. And a sentencing jury  
17 is a way that both allows him to get the rights that in the

18 government's view he gave up but that he wants to assert now,  
19 now that Blakely's happened, and that he wants to use Blakely  
20 to walk away from that.

21           And, secondly, there's something that is not  
22 prohibited by --

23           THE COURT: It doesn't allow him to get those  
24 rights. It allows him to get a different set of rights, a  
25 trial before a different jury, and a trial that in all the

22

1 years I've been on this court, which is now over 25, I have  
2 never been asked to conduct.

3           MR. WORTMANN: Yes, I understand that, your Honor.

4           THE COURT: It's a really very different kind of  
5 trial from the criminal trials that have been the tradition  
6 from the first forward --

7           MR. WORTMANN: Yes, it is a --

8           THE COURT: -- for all the years I've been on the  
9 bench. That presents issues of a very fundamental dimension,  
10 constitutional in an even different sense from our United  
11 States Constitution, constitutional in more of the earlier  
12 sense, that it's so fundamental that nobody's ever made the  
13 contention, it's so far out of bounds.

14           MR. WORTMANN: Well, and, your Honor, for the past  
15 20 years we've dealt with the Guidelines system, and what's  
16 happening today is, it's an entirely different perspective.

17 And in these circumstances, given the uniqueness of the  
18 situation we're in, it's akin to a sentencing jury that's  
19 provided for in the Federal Death Penalty Act, but it's the  
20 one thing that will enable an appropriate, fair and just  
21 sentence to be reached, that all of the expectations of the  
22 parties be fulfilled, and that will give Mr. Moran --

23 THE COURT: It is not akin to the death penalty.  
24 The death penalty situation is one in which there are special  
25 reasons -- statutory, constitutional -- for jury

23

1 participation in the decision to impose the ultimate penalty  
2 of death.

3 MR. WORTMANN: Yes.

4 THE COURT: Our tradition has been that it's none  
5 of the jury's business what the sentence is. That's for the  
6 Court's determination.

7 MR. WORTMANN: But, your Honor, don't you see? But  
8 that's exactly the point of the arguments being made here,  
9 that starting today or starting last Thursday, the jury gets  
10 involved.

11 THE COURT: No, but the point is that the jury gets  
12 involved in that situation, the death penalty, for the very  
13 special reasons of the death penalty circumstance. That  
14 doesn't mean that the jury gets involved in every other  
15 situation. Just because a decision has been made to treat  
16 death cases differently, that doesn't mean you treat every

17 other case differently too if the government wants to do so.  
18 And basically you're asking that the government be given the  
19 choice here and that the defendant have no choice. That's a  
20 one-sided proposition.

21 MR. WORTMANN: Well, your Honor, the defendant was  
22 given his choice and he made it. You haven't accepted that  
23 argument, and I respect that. But in order for a sentence to  
24 be imposed that's consistent with the seriousness of the  
25 underlying conduct, in view of the changed circumstances,

24

1 which Blakely means, because everybody at that Rule 11  
2 hearing, your Honor, understood and agreed that we were going  
3 to go forward and there was going to be a determination  
4 before the end of this case as to whether or not Bryan Moran  
5 was responsible for the death of Matthew Lessard, and what  
6 your Honor is saying today is -- and again, your Honor, I  
7 understand it and I accept it -- that's not going to happen  
8 in the way in which the parties anticipated it would at the  
9 Rule 11 hearing and when we went to trial on the one count  
10 that he declined to plead guilty to.

11 THE COURT: Well, not only that it's not going to  
12 happen, that it's impossible for it to happen.

13 MR. WORTMANN: And I disagree, your Honor. It's  
14 not impossible to happen. Although it is certainly  
15 impossible for the trial jury to consider that issue, it's

16 not impossible to put twelve additional people in the box and  
17 try that, because that's exactly what's going to happen in  
18 post-Blakely cases, that the jury is going to be involved.

19 THE COURT: Well, that remains to be seen, but  
20 assuming you're correct about that, that's not the same  
21 thing. That is a very different and a very much more limited  
22 right.

23 MR. WORTMANN: But in the circumstances of this  
24 case, it is an appropriate and just and proper thing to  
25 happen in this case because of the nature of the underlying

25

1 conduct, and because, your Honor -- and I ask you to think  
2 about it -- of the unique circumstances in this case, which  
3 is that certainly the government understood that we were  
4 going to have that issue. And again, your Honor, I gave the  
5 defendants a choice. They made that choice. They could have  
6 insisted. If any one of them had said to me, "No, no, I  
7 think that there's an issue here under Martinez," we would  
8 have had a trial in front of the jury. They induced me not  
9 to supersede. Your Honor has ruled on that. I respect that.  
10 But in those circumstances, in the particular facts of this  
11 case, your Honor, how can it be just that the parties'  
12 expectations, mutual expectations, appropriate ones or  
13 inappropriate ones, are dashed like that? It's not right and  
14 it's not fair.

15 So I would ask your Honor to convene a sentencing

16 jury in this case, and I would also ask your Honor to -- you  
17 know, I got the PSR five minutes ago, and I understand the  
18 circumstances why, your Honor, but also, if your Honor  
19 rejects the sentencing jury, the question is, what's left of  
20 the Guidelines and do the Guidelines have any relevance  
21 here? And in the brief, your Honor, I demonstrated, I hope,  
22 that under traditional principles of severability under  
23 constitutional issues, that you cannot take a piece of the  
24 statute and use it if the part that you can't use -- because  
25 make no mistake about it, your Honor, if you apply Blakely to

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1 the Sentencing Guidelines, you are declaring portions of the  
2 Sentencing Guidelines unconstitutional.

3 THE COURT: That is not correct.

4 MR. WORTMANN: It is correct, your Honor.

5 THE COURT: That is not correct. You cannot  
6 declare what I am deciding. I declare what I am deciding,  
7 and I declare right now that I do not have the issue before  
8 me as to whether the Guidelines are constitutional. That is  
9 not an issue that I will decide in this case.

10 MR. WORTMANN: Well, your Honor, if I can  
11 explain -- and again, your Honor, I'm not trying to tell the  
12 Court what to do. What I'm trying to do is advocate the  
13 position that I think is appropriate.

14 THE COURT: You may advocate your position, but you

15 may not in advocating it attribute to me a ruling that I am  
16 not making.

17 MR. WORTMANN: Here is why, your Honor. And I  
18 apologize, your Honor. It wasn't my intent to do that. The  
19 Guidelines say that sentencing determinations shall be made  
20 by a judge by a preponderance of the evidence. That's  
21 1(b)(1). I'm sorry, I don't have the cite off the top of my  
22 head. To apply Blakely to the Sentencing Guidelines  
23 necessitates a determination, in the government's view, your  
24 Honor -- and you may not share that -- necessitates a  
25 determination that that portion of the Guidelines is

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1 unconstitutional in derogation of the defendant's Sixth  
2 Amendment rights.

3 THE COURT: Well, I just rule the other way on  
4 that. That's not an issue I will decide, the  
5 constitutionality of the Guidelines. It's not presented to  
6 me in this case. I don't need to decide it and I will not.

7 MR. WORTMANN: Your Honor, the -- what I -- well, I  
8 don't know what else to say about that because in the  
9 government's view, in effect you are saying, "I cannot apply  
10 the upward adjustments in this case because it would be  
11 unconstitutional to do so because to do so would be in  
12 derogation of the defendant's Sixth Amendment rights."

13 THE COURT: No, that's not what I'm saying. That's  
14 not an issue that I have to decide in this case.

15                   MR. WORTMANN: Your Honor, the last thing I would  
16 ask the Court to do would be to not apply the Guidelines in  
17 the bifurcated way that the defendant suggests, but that  
18 ultimately we should arrive at an indeterminate sentencing in  
19 which your Honor is free to decide based on the seriousness  
20 of the offense under pre-Guidelines principles. Again, that  
21 request is based on a determination that if you're unable  
22 because of the Sixth Amendment issue to apply the Guidelines  
23 structure as a whole, that it makes no sense and it's unfair  
24 and would be inappropriate to do so, basically, you know,  
25 giving the defendant all the advantages and then saddling him

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1 with none of the burdens of the Guidelines structure, which,  
2 as the Croxford case said, your Honor, is a wholistic system  
3 that you can't piece and parcel. And it seems to me that if  
4 you accept the defendant's argument here and you reach that,  
5 that's exactly what the Court is doing. So I would object to  
6 applying the Guidelines.

7                   In addition, your Honor, I don't think acceptance  
8 of responsibility is appropriate here. You know, I can't  
9 assess the issues with respect to criminal history that  
10 Mr. Krupp raised because I just saw the PSR, for a good  
11 reason, and I understand that, your Honor. But it seems to  
12 me, at a minimum, I don't see how we can proceed if your  
13 Honor has rejected every one of the government's arguments,

14 and I think you have, how we can proceed with sentencing  
15 until and unless we go through objections, your Honor. You  
16 know, Mr. Gomes has determined that it's 27 to 33 months.  
17 Mr. Krupp says something otherwise. The government hasn't  
18 had an opportunity to review the PSR and make objections,  
19 which I think it has the right to do under Rule 32. And I  
20 don't see how we can proceed until we at least deal with --  
21 assuming your Honor rejects all the government's arguments  
22 and says this is a Guidelines case in which I'm only going to  
23 do it in conformity with your Honor's understanding of  
24 Blakely, we still can't do that today. It's not fair because  
25 we haven't seen the PSR and I'm not sure what the objections

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1 are yet. So I would ask that, even accepting all of your  
2 Honor's ruling, that we need to continue this so that I can  
3 read the PSR, so that Mr. Krupp can phrase any objections  
4 that he has to the PSR, and that your Honor can then apply  
5 the Guidelines to the extent you believe they're  
6 applicable -- and as I understand the Court's position, you  
7 believe they are -- and apply them in a manner which your  
8 Honor thinks is appropriate. And, again, I respect your  
9 rulings, your Honor. I can't say to the Court that I agree  
10 with them, but I respect them. I object to the waiver  
11 argument. I object to the application of Blakely to the  
12 Sentencing Guidelines. I object to the Court's ruling that  
13 Blakely affects a case in which there is a mandatory minimum

14 because I don't believe that it does. And if your Honor is  
15 saying that your Honor will not convene a sentencing jury, I  
16 object to that. And I'd also object to any sentencing that  
17 goes forward based on the Guidelines as your Honor has  
18 interpreted them. And I hope you understand, your Honor, the  
19 reasons for me being so clear on the record.

20 THE COURT: I do, and I assume you're also  
21 continuing your objection to my even holding this hearing  
22 today on the ground that we all need more time to understand  
23 the meaning of Blakely?

24 MR. WORTMANN: Your Honor, I took an awful lot of  
25 time to lay out over the last 48 hours, and, you know, your

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1 Honor was -- I'm not going to object to that because if your  
2 Honor thinks it's appropriate to go forward, I filed the  
3 briefs in accordance with your Honor's -- I hope they lay out  
4 the issues for your Honor so that you understood them. And I  
5 think it would have been helpful to all of us had we had some  
6 more time, but I respect your Honor's ruling and the denial  
7 of the motion to continue.

8 THE COURT: Mr. Krupp?

9 MR. KRUPP: I'm not going to address much of what  
10 Mr. Wortmann said. I agree with much of what the Court  
11 said. Let me address the last point that he raised only,  
12 which is the issue of whether we need more time. I too got

13 the Presentence Report this morning, and if what Mr. Wortmann  
14 is concerned about is my opportunity to review it and make  
15 objections, I'm ready to do that. I don't think at the end  
16 of the day, once we put those objections on the record, that  
17 there will be any distinction, any dispute that matters, as  
18 your Honor pointed out at the early part of the hearing.

19 Our position is that any facts that were not found  
20 by the jury or admitted to my Mr. Moran cannot be considered  
21 by the Court. The Presentence Report contains a version of  
22 an offense, offense conduct and what have you, submitted not  
23 by me but by Mr. Wortmann, and most all of it contains facts  
24 which were neither admitted to by Mr. Moran nor found by the  
25 sentencing jury. And so it is very easy for me to articulate

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1 to the Court what parts of the Presentence Report the Court  
2 can and cannot rely on. The guts of it, the ultimate  
3 conclusion, I've already described to the Court with respect  
4 to offense level and criminal history category. And with  
5 respect to the only issue I think that Mr. Wortmann might  
6 reasonably say "I need more time" on, I'm in agreement with  
7 the probation officer, and I think the probation officer  
8 agrees with me, that the criminal history category would be 3  
9 and not 4.

10 So if Mr. Wortmann wants some time to look at it, I  
11 have no problem. We can come back later today, but I think  
12 that given the fact that Mr. Moran has already done more time

13 in jail than he reasonably would likely face post-Blakely,  
14 the Court should not put this hearing off.

15 I should say also, I suppose, that Mr. Moran was  
16 interviewed by the Probation Office back in 2003, even before  
17 I was appointed to represent him. The Presentence Report  
18 does not contain, you know, biographical information. It  
19 contains the guts of what's needed for purposes of sentencing  
20 under the Sentencing Guidelines, and I'm willing to go  
21 forward on that basis.

22 THE COURT: Is there a report of that interview  
23 before me?

24 MR. KRUPP: The Presentence Report, to the extent  
25 that it contains facts that were gleaned from that interview,

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1 is before you. I don't believe that there is much  
2 biographical information. I suspect that the information on  
3 the face sheet of the draft Presentence Report, your Honor,  
4 would have been taken from that interview. Other facts  
5 contained in the Presentence Report may have been taken from  
6 that interview. Certainly the conclusion that Mr. Moran  
7 should be given points off for acceptance of responsibility  
8 would have been taken from that interview, at least in part.  
9 But there is not the biographical background information  
10 about Mr. Moran's family and what have you. There is  
11 information about his financial condition and what have you.

12                   To the extent that the Presentence Report is used  
13 by the Probation Office to supervise or used by the Bureau of  
14 Prisons to classify a person, I think that the fuller  
15 Presentence Report could be prepared post-sentencing without  
16 a problem.

17                   THE COURT: Even though the government has changed  
18 its reasons for asking for postponement of the sentencing, it  
19 is still asking me not to go forward, that more time is  
20 needed now for a different reason that before the government  
21 was asking me. And from all of the submissions before me  
22 with respect to directions the government is getting from  
23 Washington, it seems to me that you're still under directions  
24 that you're not following, that it should be the position in  
25 every case that any case involving Blakely issues should be

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1 postponed so that the parties have more time to brief and the  
2 Court has more time to consider, and any judicial officer,  
3 whether this court or a higher court, has more time to  
4 consider the implications of Blakely. And both of those  
5 points seem to me to be valid.

6                   I say to you candidly at this point, because of  
7 that passage in the Blakely opinion that I quoted to you  
8 earlier, I think it is highly unlikely that I will have a  
9 different view hours, weeks, months, or years from now until  
10 the Supreme Court finally settles the matter about the  
11 proposition that any fact that increases the penalty for a

12 crime beyond the prescribed statutory maximum must be  
13 submitted to a jury, and that as applied to this case, that  
14 means the jury that did sit in this case, so that it is now  
15 an impossibility to comply with that. But even though that  
16 is my view of the matter, I still think it's appropriate to  
17 give more time for consideration.

18           Now, as I have thought about that in the last  
19 couple of days, it has seemed to me that there is a way to  
20 deal with that problem, and that is that instead of  
21 sentencing today, to which the government would object and  
22 the defendant would ask for a lot of hearings that would take  
23 us through the day and perhaps beyond the day before we'd be  
24 ready for the sentencing determinations, it seems to me that  
25 I can make the determination at this point that it is highly

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1 unlikely that I will come to the conclusion that the sentence  
2 that I am able to impose consistently with Blakely and the  
3 Guidelines, and everything else to which I am supposed to  
4 look for guidance, could be one longer than the period  
5 Mr. Moran has already been in custody.

6           Now, if that is so, then it seems to me I should be  
7 acting immediately to release him from custody, unless  
8 there's some special reason he cannot be released from  
9 custody. So as I look to the statutes and precedents with  
10 respect to matters bearing on whether that is possible, of

11 course one of those statutes is 18 United States Code,  
12 Section 3143. 3143(a) concerns release or detention pending  
13 sentence, which is where we are right now: "1. Except as  
14 provided in Paragraph 2 --" that we'll come to later -- "the  
15 judicial officer shall order that a person who has been found  
16 guilty of an offense and who is awaiting imposition or  
17 execution of sentence, other than a person for whom the  
18 applicable guideline promulgated pursuant to 28 U.S.C. 994  
19 does not recommend a term of imprisonment, be detained,  
20 unless the judicial officer finds by clear and convincing  
21 evidence that the person is not likely to flee or pose a  
22 danger to the safety of any other person or the community if  
23 released under Section 3142(b) or (c)."

24           So it seems to me that I have to consider this  
25 morning, or today since I'm raising the issue with you now.

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1 And I don't know whether you've considered this possibility  
2 before or not. Nobody's mentioned it to me in any of the  
3 submissions that you have. I will of course give you time to  
4 think about it and respond to the question I am posing -- "If  
5 the judicial officer makes such a finding, such judicial  
6 officer shall order the release of the person in accordance  
7 with Section 3142(b) or (c)."

8           Now, in these statutory provisions and the body of  
9 precedents with respect to interpreting and applying them,  
10 there runs an idea that when the court determines that it is

11 highly likely, almost certain, that the court will not be  
12 able to sentence to a term beyond the months already served  
13 in custody, the court should immediately release, unless  
14 there's some special reason that makes it appropriate that a  
15 person be held in custody beyond the time that probably will  
16 be a legitimate lawful sentence, because the court needs more  
17 time to think about it and the parties need more time to  
18 brief. That doesn't make sense. So I am seriously  
19 considering that instead of sentencing today, I order release  
20 on conditions. And unless there's some other circumstance  
21 shown that makes it inappropriate to do so, that would be on  
22 personal recognizance; of course, only after the defendant  
23 has undertaken before a judicial officer and signed an  
24 undertaking before a judicial officer, to appear whenever  
25 ordered to appear, so it won't be necessary to have due

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1 process, a subpoena, and other process of service.

2           Now, if I do that, this is a sufficiently unusual  
3 circumstance that I think I should stay the enforcement of my  
4 order of release 72 hours, or whatever it takes to give you  
5 reasonable opportunity, either of you, to seek review, file a  
6 notice of appeal. And then if the notice of appeal is filed  
7 by one or the other within that period of time, that the stay  
8 of enforcement remain in effect for another period of a  
9 couple of weeks, or whatever seems reasonable to give the

10 Court of Appeals an opportunity without having to first make  
11 another extension of the time of the stay for them to  
12 consider whether to affirm or modify or reverse and give us  
13 whatever directions they would give us.

14 MR. KRUPP: May I address that, your Honor?

15 THE COURT: Yes, you may.

16 MR. KRUPP: We did think about this. I did call  
17 Mr. Wortmann last week -- I believe it was last week -- it  
18 may have been early this week, but I think it was last  
19 week -- and asked him specifically whether he would agree to  
20 release, since he was asking for more time, whether he would  
21 agree to release pending consideration of these issues, and  
22 he told me he would not. So I didn't come prepared to  
23 address those issues, but I'm not sure that -- I pulled  
24 together all the authority I could possibly think of. I  
25 understand why everybody in the room would like to have more

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1 time to think about the issue, but I got my arms around as  
2 much as I possibly could on the issue. I think Mr. Wortmann,  
3 who filed a 40-page brief earlier in the week, got his arms  
4 around everything that he thought he needed to tell the  
5 Court. To be sure, the Department of Justice would like to  
6 have a long time to brief and consider this issue, but I do  
7 think that the issue is ready to be decided.

8 Now, if your Honor wants to release Mr. Moran on  
9 personal recognizance and he comes back in a few weeks so

10 that Mr. Wortmann can have an opportunity to address the few  
11 objections he might have to the Presentence Report and I can  
12 put those objections in writing to the Presentence Report  
13 preparer, that's fine. But I don't think even for the two  
14 weeks, or what have you, period of a stay Mr. Moran ought to  
15 be in custody. I think we ought to go forward with the  
16 sentencing today. But that said, we're not going to object  
17 to the release.

18 MR. WORTMANN: Your Honor, it seems to me, if your  
19 Honor wants some more time to consider all the things that  
20 we've done, I completely understand that. And, quite  
21 frankly, to be candid with the Court, it doesn't sound to me  
22 like that's going to make a difference. And in those  
23 circumstances, were Mr. Krupp to stand up and move for a  
24 review of the prior detention order, in the circumstances, I  
25 could understand your Honor releasing him. I don't think

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1 release is appropriate under 31 --

2 THE COURT: Well, wait a minute. I don't  
3 understand.

4 MR. WORTMANN: Well, your Honor, it seems to me  
5 that there has been a detention order entered in this case.

6 THE COURT: He's standing up right now through his  
7 counsel saying, "I want a release order," so --

8 MR. WORTMANN: Right, but I don't think the

9 provision of the statute that your Honor referred to is the  
10 correct one, simply because --

11 THE COURT: Well, it is not drafted to apply  
12 plainly to our particular situation.

13 MR. WORTMANN: Right.

14 THE COURT: But neither is anything else in the  
15 whole world of law that I should look to for guidance, so  
16 it's an issue of first impression.

17 MR. WORTMANN: If the Court ultimately issues a  
18 decision which says that the maximum sentence is less than  
19 27 months, it would be unjust for Mr. Moran to stay in jail.  
20 I agree with that.

21 THE COURT: Well, and it seems likely to me at this  
22 point that at some point when the matter is fully developed,  
23 that is what my decision will be, and that is what the  
24 decision of higher courts will be. That seems likely to me.  
25 So that being so, don't you recognize the fundamental

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1 injustice of keeping the defendant in custody any longer?

2 MR. WORTMANN: Your Honor, forgive me. I thought I  
3 was clear. I just said I did. And I agree with the Court, I  
4 don't think it would be right. No matter how strongly I  
5 disagree with your Honor's views, that would be wrong. So I  
6 think that perhaps what we should do is -- I mean, if your  
7 Honor is inclined to do that, I'm happy to list conditions  
8 that would seem to me to be appropriate.

9 THE COURT: All right, what do you propose as the  
10 conditions?

11 MR. WORTMANN: Well, I would propose that Mr. Moran  
12 be required to report -- I mean, I guess maybe it would make  
13 sense to get the Pretrial Services officer up here, since  
14 they would continue to be responsible for supervising him,  
15 your Honor. And I'm sure that if we had an hour or so, we  
16 could update Pretrial as to what is going on, that they could  
17 come to the court, they could impose conditions, and we could  
18 add to those until your Honor issues a decision, because even  
19 once your Honor issues the decision, if he's out, he's still  
20 going to be subject to 3142 once the government takes an  
21 appeal. And again, your Honor, it will come as no surprise  
22 that we will appeal this. So it seems to me that we should  
23 call Pretrial, we should ask for somebody from Pretrial to  
24 come up, that we can be back in court in an hour.

25 THE COURT: Wait a minute. Now, if I release him

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1 without having determined the sentence, then there won't be  
2 any appeal from the sentence. Are you saying the government  
3 will take an appeal --

4 MR. WORTMANN: Your Honor, with respect to the  
5 release order, I agree with you. If you ultimately conclude  
6 that there is no grounds for him to be sentenced, you know,  
7 he should not be in jail. And it would be unlikely that we

8 would appeal the release order because I think that your  
9 Honor's not going to -- I would be shocked in your Honor told  
10 me that he was prepared to stay the release order until we  
11 take the appeal, and I don't think the First Circuit is going  
12 to deal with that --

13 THE COURT: You would be shocked?

14 MR. WORTMANN: Yes, because it wouldn't be right if  
15 your Honor --

16 THE COURT: You're absolutely wrong about that. I  
17 would stay.

18 MR. WORTMANN: You'd order him to stay in jail  
19 until the appeal was completed?

20 THE COURT: For probably 72 hours, and if an appeal  
21 was taken within that 72 hours, for an additional period of  
22 time to give the Court of Appeals an opportunity to either  
23 decide or to extend the stay or to revoke it. That's a  
24 matter of hours, days, or two or three weeks, something like  
25 that. That's a very different matter from a longer term.

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1 And it does seem to me that because this is an issue of first  
2 impression, that it's more appropriate that the final  
3 decision be at least possibly placed before a judicial  
4 officer of a higher court instead of a single judicial of the  
5 District Court making that. So that's what I would have in  
6 mind.

7 MR. WORTMANN: Your Honor, what I'd ask the Court

8 to do is, if we could have 24 hours, we come back, I'll be  
9 able to tell the Court exactly. We'll get Pretrial Services  
10 up here. I will advise the Court at that point whether or  
11 not, if your Honor were to release Mr. Moran on conditions,  
12 whether the government would appeal that release order,  
13 because I need to think about that. And we would be prepared  
14 to deal with it tomorrow, if that's convenient for the  
15 Court.

16 THE COURT: I think it would be better for us to  
17 deal with it today.

18 MR. WORTMANN: Okay.

19 THE COURT: And so what I propose to do now -- it's  
20 twenty minutes till 11:00 -- is recess, let's say, until  
21 noon, and see if we can get the necessary consultation done  
22 within that period of time. And in the meantime I will have  
23 a draft memorandum and order as to what I would propose with  
24 the provisions for the stay so you'll have an opportunity to  
25 see that and give me your views on that as well.

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1 MR. KRUPP: Just so I understand exactly what your  
2 Honor is thinking about, do you envision setting a sentencing  
3 date a short time out --

4 THE COURT: No.

5 MR. KRUPP: -- or simply to give the opportunity to  
6 the government to appeal the issue of release or detention,

7 given your Honor's preliminary conclusion that it is unlikely  
8 that your Honor would impose a sentence in excess of the  
9 amount of time?

10 THE COURT: Well, I don't have any problem with  
11 setting on our calendar a sentencing date that would take  
12 account of the needs for responses by both sides and the  
13 probation officer's preparation of any revision of the  
14 Presentence Report. But if the Court of Appeals affirms my  
15 decision and the defendant is on release on appropriate  
16 conditions, I don't see why there is urgency about setting  
17 that sentencing date before the higher courts, including the  
18 Supreme Court, have enough time to decide the issues that are  
19 involved in Blakely that might affect the sentencing  
20 decision.

21 MR. KRUPP: My concern is that the court, for  
22 example, could decide an appeal on the procedural posture  
23 that your Honor is imagining simply based on the conclusion,  
24 as Mr. Wortmann articulated it, that 3143, although an issue  
25 of first impression, doesn't permit the release, given that

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1 the government, if you look under 3143(a)(2), the government  
2 is recommending a sentence of imprisonment be imposed beyond  
3 what Mr. Moran has already --

4 THE COURT: I understand that, but my view on that  
5 matter is, if that's what the Court of Appeals does, then  
6 I'll go forward promptly with the sentencing. But if that's

7 not what they do, it seems to me it would be better to  
8 postpone that instead of having to do the sentencing over  
9 again, with whatever implications that might have, and also  
10 implications for the timing of any collateral review that  
11 might come later.

12 MR. KRUPP: I would ask your Honor to impose  
13 sentence on a short time frame. I think release is  
14 appropriate to give the government, as it's asked for, more  
15 time to look at the draft Presentence Report. But in terms  
16 of postponing the sentence --

17 THE COURT: Well, I'm not going to make a promise  
18 that I'll make that decision. I will consider that  
19 possibility depending on, but I'll wait first to see what the  
20 Court of Appeals decides to do. It may tell us to do that or  
21 it may tell us not to.

22 MR. KRUPP: I appreciate that.

23 THE COURT: All right, recess till noon?

24 MR. WORTMANN: Thank you, your Honor.

25 THE COURT: All right.

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1 MR. WORTMANN: And, your Honor, we'll contact -- if  
2 I could ask Mr. Gomes to contact Pretrial Services and make  
3 sure they have someone here.

4 MR. KRUPP: I'll contact them now, your Honor.

5 THE CLERK: All rise.

6 (A recess was taken, 10:45 a.m.)

7 (Resumed, 12:04 p.m.)

8 THE COURT: The draft memorandum and order which  
9 counsel have from the Clerk has one provision in it that I  
10 have not discussed with you; that is, the time for the  
11 sentencing hearing for Bryan Moran. And after looking at the  
12 calendar, I suggest that 2:00 p.m. on Thursday,  
13 September 16. If there's a problem about that time, I'll  
14 reconsider that.

15 MR. WORTMANN: That's fine, your Honor.

16 MR. KRUPP: Your Honor, the 16th is a Jewish  
17 holiday, Rosh Hashanah, so I will not be here for that.

18 THE COURT: All right.

19 MR. KRUPP: May I suggest a date earlier than  
20 that? I know your Honor has thought about the time, but I  
21 know that the other co-defendants are scheduled for a  
22 sentencing hearing on the Blakely issue approximately a month  
23 from now, August, I believe, 3rd. And it may be  
24 appropriate -- that will give the government plenty of time  
25 to brief the issue if there's further briefing and what have

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1 you, although I don't know that more will be necessary in  
2 this case, and I think it would be appropriate to set  
3 Mr. Moran's sentencing down for August 3 as well.

4 MR. WORTMANN: Your Honor, I don't have a problem  
5 with that. If there's anything that comes up in the

6 meantime, just in the -- and again, your Honor, I don't want  
7 to, but I just want to advise the Court that another judge in  
8 this building has today determined that Blakely does not  
9 apply to the Sentencing Guidelines. Judge Tauro issued a  
10 decision from the bench today. I know your Honor will make  
11 his own decision. In the interest of full disclosure, I just  
12 wanted to advise the Court of that and obviously reiterate  
13 the objections I made, that pending a First Circuit case and  
14 a Supreme Court case, that that's the appropriate result and  
15 the Court should not reach the decision it has with respect  
16 to Blakely. But August 3 is fine, your Honor.

17 THE COURT: All right, now, the Melendez and Stella  
18 sentencing is set for 9:30. Do you want to set this at the  
19 same time or later in the day?

20 MR. KRUPP: It doesn't matter, your Honor.

21 THE COURT: Well, all right, we'll put it on at the  
22 same time then. So I'll change this order to 9:30 a.m. on  
23 Tuesday, August 3, 2004. I don't think that requires any  
24 other change. Is there any other provision that anyone  
25 wanted to discuss before I make this order?

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1 MR. WORTMANN: No, your Honor. Obviously the  
2 government is preserving all the objections it made earlier  
3 today.

4 THE COURT: Yes. All right, then we'll make that

5 change and get it into the hands of the Clerk's office  
6 forthwith.

7 MR. WORTMANN: Your Honor?

8 THE COURT: Yes.

9 MR. WORTMANN: Did the Court want to actually set  
10 conditions for Mr. Moran's release today or on the 12th or  
11 whenever he's released?

12 THE COURT: I think it's more appropriate to do  
13 that whenever he is released.

14 MR. WORTMANN: Okay.

15 THE COURT: And that will give everybody an  
16 opportunity to consider whether there's any other matter that  
17 needs to be brought to the attention of the judicial officer  
18 who's making the release. That will very likely not be me --

19 MR. WORTMANN: You'll refer that back to the  
20 magistrate?

21 THE COURT: Yes.

22 MR. WORTMANN: I understand. Thank you, your  
23 Honor.

24 MR. KRUPP: My concern is only the record. If the  
25 government chooses to appeal between now and Tuesday, if

1 there have been no conditions of release yet set, I'm  
2 concerned that the record on appeal will be only your Honor's  
3 order and will be an incomplete set of conditions for the  
4 Court of Appeals to review. And I went over with Mr. Riley

5 at some length this morning what conditions might be  
6 appropriate. Mr. Moran can live at his mother's house.  
7 There is a Pretrial Services report that was prepared when he  
8 was first arrested in this case which Mr. Riley has  
9 reviewed. I've spoken to Mr. Moran's mother. She's here in  
10 the courtroom now. He can live at her house. I don't  
11 believe Mr. Riley was going to recommend any conditions of  
12 release beyond that Mr. Moran check in once a week with  
13 Pretrial Services and reside at his mother's house. I think  
14 he was going to suggest that travel be restricted to  
15 Massachusetts other than with prior approval of Pretrial  
16 Services. And I think that was about the extent -- correct  
17 me if I'm wrong -- of the recommendations that were going to  
18 be made by Pretrial Services.

19 I think in the interest of having a record that is  
20 clear for the Court of Appeals, we ought to have that before  
21 the notice of appeal is filed, rather than having this matter  
22 stayed before those conditions of release are set.

23 MR. WORTMANN: Your Honor, and I'm happy to do  
24 that, whatever your Honor's preference is. I would also  
25 request, however -- and if Mr. Riley has any additional sort

1 of standard conditions, I rely on Mr. Riley's good  
2 judgment -- but two things. One is, a witness in this case  
3 was threatened outside in the hallway last Wednesday before,

4 and there's also been somebody who's been charged by criminal  
5 complaint. So I would ask, just to avoid the possibility,  
6 that Mr. Moran be ordered to have no contact with any of the  
7 witnesses in this case and no contact with any member of the  
8 victim's family.

9 THE COURT: Do you have any problem with that?

10 MR. KRUPP: So long as those people are  
11 identified. I obviously didn't try the case. I don't want  
12 to have a blanket order. If those people's names can be put  
13 on the record, I don't have a problem with that no-contact  
14 order.

15 MR. WORTMANN: And, your Honor, the individuals  
16 would be Leann Bridge, who was a witness in the case. The  
17 members of Mr. Lessard's family are William and Kelly  
18 Collura, and Mr. Lessard's former fiancée, Christy Sawyer.  
19 If I overlooked anyone, your Honor, I'll file a motion to  
20 supplement that.

21 THE COURT: All right. Now, I'll approve that. Of  
22 course, it will be subject to modification that anybody can  
23 so request before the judicial officer who is making the  
24 release order upon the signature of undertaking by the  
25 defendant. Now, that's on the record of this hearing. If

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1 you want something more than that -- I don't think anything  
2 more is required, but if you want something more than that,  
3 you can let me know.

4                   MR. KRUPP: I don't think anything more would be  
5 required, your Honor. The only question I have is  
6 procedurally whether we would have a hearing scheduled in  
7 front of a magistrate judge for noon on July 12 that we  
8 should all put on our calendars in the event that the  
9 government does not seek an appeal for the setting of those  
10 conditions and signing the appropriate papers.

11                   MR. WORTMANN: Mr. Krupp and I can contact the  
12 magistrate's clerk and set that up, your Honor.

13                   THE COURT: All right. All right, that's fine.  
14 All right, anything else?

15                   MR. WORTMANN: Not from the government. Thank you,  
16 your Honor.

17                   MR. KRUPP: I will file a request for an expedited  
18 transcript so we can have it for the magistrate judge's  
19 consideration on Monday, if necessary.

20                   THE COURT: All right.

21                   MR. FAIGEL: Your Honor, on behalf of Saul  
22 Melendez, I know this is a little extraordinary, this wasn't  
23 my hearing. However, because we are a co-defendant in the  
24 case sitting here today and listening to all of the  
25 arguments, and I discussed this with Mr. Wortmann before,

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1 it's my contention that what's good for one is good for the  
2 rest in regards to the case. I mean, the law hasn't changed,

3 the issues haven't changed, the facts haven't changed. And I  
4 was wondering if we could have some kind of discussion with  
5 regards to how this affects Mr. Melendez, and I would be  
6 willing to go along with this exact court order as well. I  
7 don't think we really have a need for a subsequent hearing to  
8 rehash the same issues that Attorney Krupp and  
9 Attorney Wortmann have put before the bench today. And I  
10 know it's a little different with me standing up here because  
11 it's not my hearing. I'm looking for a little guidance from  
12 the Court on how to proceed with regard to Mr. Melendez. And  
13 I know Mr. Watkins would probably be doing the same except  
14 he's on vacation. But with regard to Mr. Melendez, I mean,  
15 the facts and circumstances are exactly the same, the legal  
16 arguments are the same. And instead of scheduling another  
17 hearing doing two hours in front of the judge, you know, in  
18 front of the bench again, if we could just have an  
19 understanding that I ride on the coattails of Mr. Krupp, and  
20 I could have my hearing scheduled for the 12th and the 20th  
21 as well. I don't see the need to reinvent the wheel again  
22 with regard to all the issues.

23 MR. WORTMANN: Your Honor, the government thinks  
24 there's a fundamental difference, and that is that  
25 Mr. Melendez signed a plea agreement. And to be honest, I

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1 haven't had time to think through this, but there is an issue  
2 as to whether --

3 THE COURT: Well, I think there's another  
4 fundamental difference, that we've had a jury trial for  
5 Mr. Moran.

6 MR. FAIGEL: I understand that.

7 THE COURT: And we have not --

8 MR. FAIGEL: The only other issue --

9 THE COURT: And the issue I have decided is  
10 fundamentally associated with the fact that we have had that  
11 jury trial.

12 MR. FAIGEL: I understand that, and I thought that  
13 through, and my thinking was that, you know, the government's  
14 argument would focus on the waiver issue with regard to the  
15 plea agreement. And if the focus was on the waiver, then the  
16 same argument would apply with regard to the fact that you  
17 can't waive something you don't actually know.

18 THE COURT: Well, I don't think it's appropriate  
19 for me to make rulings now on what I will rule when I hear  
20 whatever arguments are presented by both sides on the  
21 Melendez case because it is a different case, materially  
22 different from the Bryan Moran case.

23 MR. FAIGEL: Okay, so we'll stick with the August 3  
24 date in that regard. That's fine. Thank you, your Honor.

25 THE COURT: All right.

1 MR. WORTMANN: Your Honor, I apologize. Can I have

2 a moment?

3 THE COURT: Yes.

4 (Pause.)

5 MR. WORTMANN: Thank you, your Honor. My  
6 apologies. The government has nothing else.

7 THE COURT: All right, we'll be in recess.

8 THE CLERK: All rise.

9 (Adjourned, 12:15 p.m.)

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UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 52 inclusive, was recorded by me stenographically at the time and place aforesaid in Criminal No. 02-10136-REK, United States of America Vs. Bryan Moran, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 9th day of July, 2004.

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LEE A. MARZILLI, CRR  
OFFICIAL FEDERAL COURT REPORTER