**Nos. 04-5272, 04-105, 04-104**

IN THE

# Supreme Court of the United States

Jimmy Bijou,
*Petitioner*,
v.
United States.

United States,
*Petitioner*,
v.
Ducan Fanfan.

United States,
*Petitioner*,
v.
Freddie J. Booker.

On Petitions for Writs of Certiorari
to the United States Courts of Appeals
for the Fourth and Seventh Circuits and
a Writ of Certiorari Before Judgment to the First Circuit

## BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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## QUESTIONS PRESENTED

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

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

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## INTERESTS OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] The NACDL seeks to promote the proper administration of justice and to ensure that findings which affect the length of criminal sentences are made according to constitutionally required procedures. The NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including in *Blakely* v. *Washington*, 124 S. Ct. 2531, 2542 (2004), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002).

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

## ARGUMENT

*Amici* submit that this Court should grant certiorari in No. 04-104, *United States* v. *Booker* or in No. 04-5263, *Pineiro* v. *United States*, and should also grant certiorari in No. 04-5272, *Bijou* v. *United States*, but should deny the petition for certiorari before judgment in No. 04-105, *United*

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

*States* v. *Fanfan*. Regardless of which cases the Court decides to hear, it should decide two questions relating to the application of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to the federal Sentencing Guidelines: first, whether judicial factfinding that results in an increase in a defendant's sentence pursuant to the Guidelines violates the rule of *Apprendi* (*id.* at 490) that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"; and second, if so, what role do the Sentencing Reform Act, the Sentencing Guidelines, and Fed. R. Crim. P. 32 continue to have?

In this brief, *amici* make two points regarding how the Court should resolve these questions. In sum, the Court should reframe the questions proposed by the Solicitor General to make them clearer and to ensure that the lower courts receive guidance on the core issues they now confront. And the Court should grant certiorari in *Bijou* rather than in *Fanfan* in order to ensure the best vehicle to decide the range of questions that require this Court's resolution.[2]

We discuss each issue in turn. Preliminarily, however, we submit that this is a case in which suggestions regarding the framing of the questions presented and the selection of appropriate cases to decide those questions deserve special attention. In all but the rarest instances, the government has the ability to select from an array of appellate decisions the most appropriate cases to present to this Court for decision, and it further has the luxury of time in crafting the questions presented. This is the rare exception. Here, the government's view that there is an extraordinarily urgent need for decision necessarily led it to begin immediately preparing petitions in the very first cases it lost in the lower courts after *Blakely*. As we discuss *infra*, those cases present a variety of potential

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[2] *Amicus* NACDL has separately joined the response of the respondent in *Booker* to the government's motion to expedite.

procedural problems. The criminal defense community has subsequently undertaken an extensive review of the extant lower court decisions and pending petitions for certiorari to identify the most important questions that currently confront the lower courts and the cases in which the Court can best answer those questions. Moreover, we have consulted broadly regarding the framing of the questions presented and have held extended discussions with counsel to the defendants in the relevant pending petitions to identify a schedule that will ensure thorough briefing on these questions, which all agree require careful attention. We respectfully request that the Court give these recommendations careful consideration.

## I. The Court Should Reframe The Questions Presented.

The questions presented by the government should be revised in a manner that simultaneously simplifies them and ensures that the Court will resolve all of the issues on which the lower courts most need guidance.

1. The first question presented by the government is intended to resolve whether the Constitution "preclude[s] a sentencing court (absent the defendant's consent) from finding facts * * * that increase a defendant's sentence under the Sentencing Guidelines beyond the level indicated based solely on the jury's findings or the defendant's admissions." *Booker* Pet. 14. As framed by the government, that question is:

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

*Booker* Pet. i.

The question should be revised in several respects. First, the government's reference only to the *Sixth* Amendment is substantially underinclusive. The rights recognized by

*Apprendi* and its progeny include the Fifth Amendment rights to be convicted only upon proof beyond a reasonable doubt and, in the federal system, to be indicted by a grand jury. See *Apprendi*, 530 U.S. at 476. The proposed question's reference to a fact "found by the jury or admitted by the defendant" should thus refer to the requirement of an indictment and proof beyond a reasonable doubt.

The question should also be revised because its reference to an "enhanced sentence" is potentially misleading. Within the Guidelines' scheme, that phrase could be taken to refer only to sentencing enhancements – *viz.*, upward "adjustments" such as "specific offense characteristics." However, judicial factfinding under the Sentencing Guidelines often also determines, for example, the base offense level (as in *Booker* itself) and whether a court may impose any upward departures from the prescribed Guideline ranges (see *United States* v. *Montgomery*, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700, at *15-*16 (D. Utah July 8, 2004)). Any of these determinations may result in a sentence beyond "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, slip op. at 7.

Given the foregoing, we propose the following as the first question presented:

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

2. The second question presented by the government is intended to determine what role, if any, the Guidelines will continue to play if they are subject to *Apprendi*. As framed by the government, that question is:

> If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

*Booker* Pet. i. The question as drafted by the government is flawed because it includes four untested assumptions about the appropriate "remedy" for *Apprendi*'s application to the Guidelines.

First, the government's proposed second question assumes that the Guidelines would continue to apply without modification in those cases in which the Guidelines do not call on the judge to decide "a sentence-enhancing fact." The Court should not indulge that assumption, which is in substantial tension with the government's own "severability" analysis that Congress would not have intended the Guidelines to operate only partially and only selectively as between "similarly situated defendants." *Booker* Pet. 15-17. See *United States* v. *Muefflemen*, 2004 U.S. Dist. LEXIS 14114, at *45-*46 (D. Mass. July 26, 2004) ("At the same time, it is worth noting that the Government advances a selective severability argument. They claim that the Guidelines are only unconstitutional with respect to cases involving sentencing enhancements. The system can be unseverable with respect to the enhancements. In those cases, the Government argues that the Guidelines are a seamless web, wholly unconstitutional, and the Court should sentence under the previous indeterminate regime. In contrast, in cases in which there are no enhancements, the Government argues the Guidelines apply. The argument makes no sense.").

The class of cases excluded by the Solicitor General's formulation is furthermore very large, and the consequences

of that exclusion for the criminal justice system would be sweeping, because the government's formulation apparently would exclude all cases in which no judicial factfinding enhances a defendant's sentence – *e.g.*, cases in which the government requires a defendant, as a condition of a plea agreement, to admit all the facts relevant to sentencing. But the lower courts have already divided on the question whether the Guidelines continue to apply in cases that do not require judicial factfinding, with those opposed to severability reasoning that the Guidelines are meant to apply to *all* defendants, or to none at all.[3] Accordingly, the Court should not accept the government's proposal to limit the remedial question to cases requiring judicial factfinding.

Second, the government's framing of the second question presented erroneously assumes that this Court will have only a single, binary choice when it comes to "remedy." That is, the government presumes that the two options are that the "the Sentencing Guidelines as a whole" would be applicable or inapplicable in every case that requires judicial factfinding

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[3] Compare *United States* v. *King*, No. 6:04-cr-35-Orl-31KRS, 2004 U.S. Dist. LEXIS 13496, at *25 (M.D. Fla. July 19, 2004) ("The suggestion that courts use the Guidelines in some cases but not others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection."), with *United States* v. *Montgomery*, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700, at *8 (D. Utah July 8, 2004) ("The problem lies in upward enhancements and departures * * *.") and *United States* v. *Terrell*, No. 8:04CR24, 2004 U.S. Dist. LEXIS 13781, at *10 (D. Neb. July 22, 2004) ("Application of the Guidelines will not violate the Constitution in every case * * * ."). See also *United States* v. *Montgomery*, No. 03-5256, 2004 U.S. App. LEXIS 14384 (CA6 July 14, 2004) (it is 18 U.S.C. 3553(b), not the Guidelines as such, which are unconstitutional under *Blakely*; § 3553(b) is severable from § 3553(a) and other provisions of the Sentencing Reform Act, leaving advisory guidelines in place), *vacated upon grant of rehearing en banc* (July 19, 2004), *and voluntarily dismissed* (July 23, 2004).

to determine the sentence. But the range of possibilities is much wider: As the Solicitor General explains, the lower courts have adopted "various attempts to implement *Blakely*." *Booker* Pet. 15 (quoting *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (CA2 July 12, 2004) (en banc)).[4] For this Court to single out only one of those solutions would not only unnecessarily complicate the question presented, but it would also encourage the parties to slant their briefing and argument toward addressing the government's stark dichotomy rather than the full range of possible statutory results. A broader framing of the question is also preferable because it would give the Court the opportunity to reach a variety of remedial issues without committing the Court to any particular course.

Third, the government's reference to a "sentence-enhancing fact" imports a concept of the government's invention. It is not a principle recognized in *Apprendi* and its progeny. Instead – in a line of cases from *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), to *Jones* v. *United States*, 526 U.S. 227 (1999), to *Castillo* v. *United States*, 530 U.S. 120 (2000) – the Court has distinguished between "elements" and "sentencing factors." No doubt, the government's proposed phrasing is intended to focus the Court only on factfinding that exposes the defendant to higher

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[4] For example, district courts have imposed a sentence determined under the Guidelines but without any increases based on judicial factfinding, *United States* v. *Montgomery*, 2004 U.S. Dist. LEXIS 12700, at *11 (D. Utah July 8, 2004), convened special sentencing juries, *United States* v. *Landgarten*, No. 04-CR-70 (JBW), 2004 U.S. Dist. LEXIS 13172 (E.D.N.Y. July 15, 2004); see also *United States* v. *Khan*, No. 02-CR-1242 (JBW), 2004 U.S. Dist. LEXIS 13192, at *19-*41 (E.D.N.Y. July 12, 2004) (discussing justification for convening sentencing jury), and considered issuing supplemental verdict sheets to juries, see *United States* v. *Roberts*, No. 03-CR-1369 (LAK) (S.D.N.Y. July 9, 2004), *available at* http://www.ussguide.com/members/BulletinBoard/Blakely/02CA/Index2CA.cfm.

sentences. But whether the Court should shift from its prior focus on elements and sentencing factors to a new focus on "sentence-enhancing facts" should be the subject of briefing and argument, not an assumption built into the question presented.

Fourth, the government's formulation of the question presented incorrectly assumes that the "remedial" issues surrounding *Apprendi*'s application to federal sentencing are limited to the Sentencing Guidelines. In fact, those issues equally encompass the statute under which the Guidelines were promulgated – the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. 3551 et seq.) (see, *e.g.*, *United States* v. *Mueffleman*, 2004 U.S. Dist. LEXIS 14114, at *48 (D. Mass. July 26, 2004)) – as well as Federal Rule of Criminal Procedure 32(i), which calls for judicial factfinding (see, *e.g.*, *United States* v. *Ameline*, 2004 U.S. App. LEXIS 15031, at *33 (CA9 July 21, 2004) (holding Rule 32 unconstitutional)).

We accordingly recommend reframing the second question proposed by the government as follows:

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

## II. The Court Should Grant Certiorari in *Booker* or in No. 04-5263, *Pineiro* v. *United States*, Should Also Grant Certiorari in No. 04-5272, *Bijou* v. *United States*, and Should Deny the Petition for Certiorari Before Judgment in *Fanfan*.

*Amici* submit that it would be appropriate for the Court to grant dual petitions for certiorari relating to the application of *Apprendi* to the Sentencing Guidelines. Despite the best efforts of counsel, it is possible that an unanticipated procedural obstacle will later become apparent that renders one case an inappropriate vehicle to resolve the questions

presented. The issues now confronting the lower courts are too important to defer their resolution until another petition for certiorari can be granted and the case decided on the merits. For that very reason, however, the Court should make every effort at the outset to select both cases carefully, granting certiorari in those petitions that are most likely to provide clear guidance to the lower courts. In our view, assuming that the Court grants the government's petition in No. 04-104, *Booker* v. *United States*, the second case the Court should agree to hear is No. 04-5272, *Bijou* v. *United States*. Accordingly, the Court should deny the government's petition for certiorari before judgment in No. 04-105, *Fanfan* v. *United States*.

1. We specifically recommend that the Court grant certiorari in one case in addition to *Booker* because *Booker* presents a number of potential procedural complications. Indeed, the government's petition hints at "possible later impediments to review." *Booker* Pet. 25. The defendant-respondent in *Booker* did not assert that his sentence violated the Fifth and Sixth Amendments in either the district court or the Seventh Circuit; instead, the court of appeals raised the issue *sua sponte*. And the fact that the defendant "gave a written statement to the police in which he admitted selling" the very drugs that were the basis for the judge's sentence (*Booker* Pet. 2) could lead to an assertion by the government that the error was harmless.[5]

[5] Indeed, the government might even claim that Booker's "admission" to the police counts as an "admission" of the fact under *Blakely* for sentencing purposes. To be clear, our view is that none of these objections has merit in the circumstances of *Booker*, albeit for reasons that this Court would have to reach before deciding the merits of the Sixth Amendment question. The defendant faced a wall of circuit precedent that categorically precluded the successful assertion of an *Apprendi* challenge to his sentence in the district court or court of appeals. See, *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 824-25 (CA7 2000). Moreover, the

The government has suggested that the Court exercise its inherent authority to "overlook[]" all such procedural obstacles. See *Booker* Pet. 23. That would be a substantial departure from the Court's usual practice, and the Court may conclude that the procedural concerns surrounding *Booker* are substantial enough that certiorari should instead be granted in another similar case, No. 04-5263, *Pineiro* v. *United States* (petition for certiorari docketed July 14, 2004). In *Pineiro*, the Fifth Circuit held that *Apprendi* does not apply to the Guidelines, notwithstanding *Blakely*, at least not until this Court expressly holds otherwise. 2004 U.S. App. LEXIS 14259, at *2 (CA5 2004). A jury found the defendant in that case guilty of conspiracy to distribute marijuana and cocaine, but made a special finding that the conspiracy involved significantly smaller amounts of drugs than the government alleged. The sentencing judge nonetheless increased the defendant's sentence considerably after finding by a preponderance of the evidence that the defendant had possessed "amounts of drugs far greater than the amounts found by the jury." *Id.* at *5. In the district court, the defendant preserved an *Apprendi* objection to the district judge's fact-finding with respect to his base offense level (albeit arguably not to other sentencing enhancements). He also preserved all his *Apprendi* objections before the Fifth Circuit. Furthermore, because the jury acquitted the defendant of the very conduct that the judge, in setting a

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government has impliedly waived reliance on each of the described procedural objections twice – both in the court of appeals and subsequently in its petition for certiorari. Our view is moreover that such an *Apprendi* error can never be "harmless" because the defendant is deprived, *inter alia*, of his right to a grand jury indictment, although that issue is itself the subject of a substantial circuit split that could cloud the disposition of *Booker*. See Br. of the U.S. in Opposition, *Suarez* v. *United States*, Nos. 02-10547, 02-10319 (acknowledging the conflict), cert. denied, 124 S. Ct. 70 (2003).

sentence, subsequently found he had committed, there can be no allegation that the *Apprendi* error in *Pineiro* was harmless.

2. In our view, the appropriate companion case to *Booker* or *Pineiro* is No. 04-5272, *Bijou* v. *United States* (petition for certiorari docketed July 19, 2004).[6] In *Bijou*, the government indicted the defendant on two counts of possession of a firearm by a convicted felon and one count of possession of ammunition by a convicted felon, along with a charge of possessing drugs and one of using a firearm in connection with that drug felony. The defendant pled guilty to one felon-in-possession charge and went to jury trial on the remaining charges. After the district court excluded the drug evidence because it was "improbable" that the drugs introduced by the government consisted of "the same item" that had been seized from Bijou's apartment, the government dismissed the firearm-use and drug charges, and Bijou pled guilty to the two remaining felon-in-possession counts.

At sentencing, the judge nonetheless found by a preponderance of the evidence that Bijou had committed the very drug offense set forth in the previously dismissed charge. The judge deemed that offense to require a cross-reference for the purpose of sentencing under the Guidelines, resulting in Bijou's being sentenced under the drug guideline rather than the firearms guideline. According to the presentence investigation report, the base offense level to which Bijou was subject under the felon-in-possession guideline, U.S.S.G. 2K2.1, was 24. With a two-level reduction for Bijou's acceptance of responsibility, the guideline range for the firearm and ammunition charges was 84 to 105 months. But at sentencing, pursuant to the cross-reference for a defendant who uses a firearm "in connection with the commission * * * of another offense," *id.* 2K2.1(c)(1), the judge used the same

[6] We are authorized to represent that counsel for the petitioner in *Bijou* supports review on both of the questions as we have framed them, *supra*.

drug evidence he had excluded as "very unconvincing" to increase the adjusted offense level (after the adjustment for acceptance of responsibility) to 32, producing a range of 210 to 262 months. In other words, on the basis of facts neither proved to a jury beyond a reasonable doubt nor admitted by the defendant, Bijou's maximum sentence was more than doubled.

Bijou timely objected to the court's imposition of a higher sentence based on judicial fact-finding as violative of *Apprendi*. He then appealed the denial of that objection to the Fourth Circuit, which rejected the claim based on settled circuit precedent. See *United States* v. *Bijou*, 92 Fed. Appx. 966 (2004) (unpublished opinion). *Bijou* thus presents a perfectly "clean" vehicle for deciding the questions presented because the constitutional issue was properly preserved throughout the proceedings and because there cannot possibly be an assertion of harmless error.

*Bijou* also has a considerable advantage over any of the other petitions pending before this Court in that it arises from a guilty plea. As the government points out (see *Booker* Pet. 20), some ninety-seven percent of federal criminal charges are resolved by plea. See also *Mitchell* v. *United States*, 526 U.S. 314, 324-25 (1999) (citing similar statistics). The lower courts, prosecutors, and defendants would accordingly benefit most from a ruling by this Court that addresses the application of *Apprendi* and *Blakely* in that context. For this Court instead to grant review only in cases that resulted in jury verdicts would potentially leave unresolved the most important aspects of *Apprendi*'s application to federal criminal procedure.

To be sure, *Bijou* has the marginal disadvantage that the Fourth Circuit's opinion in that case predates this Court's decision in *Blakely*. Ideally, the Court would grant review in a case with facts similar to those in *Bijou* and in which the court of appeals had addressed the effect of *Blakely*. But we have not been able to identify such a case now pending before

the Court. Just as the government notes that it makes no difference that the Seventh Circuit did not consider the "remedial" question in *Booker*, in our view, the numerous lower court opinions already addressing *Blakely*'s applicability to the Guidelines are an acceptable substitute for such an opinion in *Bijou* itself.

3. In our view, *Bijou* is more appropriate than *Fanfan* as a companion case to *Booker* or *Pineiro*. *Fanfan*'s principal flaw is that it has been brought to this Court by way of a petition for a writ of certiorari before judgment, a procedure that (like the Second Circuit's attempted certification of questions in *United States* v. *Penaranda*, 2004 WL 1551369 (July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004)), this Court has traditionally disfavored. If history is any guide, the Court views that fact alone as sufficient to justify denial of review.[7]

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[7] The government suggests that after resolving *Blakely*-related questions in other cases, the "Court could dispose of *Penaranda* as appropriate," as in *Iran National Airlines Corp.* v. *Maschalk Co.*, 453 U.S. 919 (1981). *Booker* Pet. 27. After deciding *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court in *Iran National Airlines* addressed questions certified by the Second Circuit by issuing two "yes or no" answers and by dismissing a third question. 453 U.S. at 919. Three Justices dissented, urging the Court to "dismiss the certificate": "Having rendered an opinion on the subject of those questions, we should not answer them in monosyllables nor attempt a syllabus of a portion of the Court's opinion." *Ibid.* (Powell, J. dissenting) (citing the dismissals in *Foley* v. *Carter*, 449 U.S. 1073 (1981), and *United States* v. *Will*, 449 U.S. 200 (1980)). The greater complexity of the certified questions presented by *Penaranda* counsels more strongly in favor of dismissing the certificate and allowing that case to proceed through the normal appellate processes. In addition, the failure to dismiss the certificate despite the absence of any compelling need to consider it could convey the impression that this Court favors the certification process. Indeed, it could encourage the courts of appeals to certify other *Apprendi*-related questions to this Court in

Nor does any feature of *Fanfan* make it a compelling vehicle. The district court did not issue an opinion and did not even receive briefing from the parties before orally announcing a sentence. Nor, contrary to the government's argument, did the district court suggest that in future cases it would sentence defendants to the minimum base level consistent with the jury's finding of guilt or innocence. Rather, the district court in *Fanfan* held that the jury's pre-*Blakely* verdict was controlling in that case only, presumably because the re-indictment of the defendant and subsequent use of a sentencing jury to find a greater quantity of drugs would violate double jeopardy. See *Fanfan* Pet. App. 11a ("I point out that I'm not making any blanket decision about the federal guidelines. I'm dealing *solely* with drug quantity and with role enhancement *in the context of the case that went to a jury verdict before a jury trial*." (emphases added)). The government's petition in *Fanfan* thus does not satisfy the "strict" (*Fanfan* Pet. 8) standards for granting certiorari before judgment because several pending petitions for review of the rulings of the courts of appeals provide superior suitable vehicles for deciding the questions presented.

The cases cited by the government in which this Court has granted certiorari before judgment (see *Fanfan* Pet. 9) are not analogous. In the rare instances that the Court has granted certiorari before judgment "where cases presenting similar issues had already been accepted for review" (*id.* at 9 n.*), each case presented distinct issues meriting this Court's attention. Thus, in the only such instance since the 1950s, the Court granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), because that case concerned

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the short term. The Court has not accepted a case through the certification process since *Iran National Airlines*; its consistent practice of dismissal could be undermined by its agreement to review *Penaranda* now.

an affirmative action policy with important differences from the program at issue in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). When such a special circumstance has been lacking, the Court has denied certiorari before judgment. See, *e.g.*, *United States* v. *Players Int'l Inc.*, 525 U.S. 1094 (1999) (denying government's petition).

In certain other instances, this Court has granted certiorari before judgment when it was necessary because no decision of a court of appeals presented an available vehicle to decide the (nonetheless pressing) question presented. For example, when this Court granted certiorari before judgment in *Mistretta* v. *United States*, which the government cites here, no court of appeals had yet passed on the constitutionality of the Guidelines. See *Mistretta*, 488 U.S. 361, 371 n.6 (1989). (The "district court" in *Mistretta*, moreover, was a special seven-judge sentencing panel. See 682 F. Supp. 1033 (W.D. Mo. 1988).) That circumstance is not present here.

4. We also recommend against treating *Booker* and *Fanfan* as companion cases because both share a feature that is likely to frustrate this Court's ability to provide adequate guidance to the lower courts, prosecutors, and defendants.

*Booker* and *Fanfan* both arise from drug convictions. To be sure, drug cases are very common in the federal criminal system, and we agree that it would be appropriate for the Court to grant certiorari in *one* such case. But the federal drug laws comprise, by far, the nation's most complicated sentencing scheme, a scheme that has given rise to an extraordinary volume of litigation and an array of disagreements regarding the meaning of the applicable guidelines and statutes. Unlike most other criminal statutes, which simply state a statutory maximum and then leave exact sentencing calculations up to the Guidelines, the principal federal drug statute (21 U.S.C. 841) includes a series of escalating statutory maximums and minimums. The extra complications inherent in this statutory scheme make cases

that arise under it ill-suited vehicles to resolve the threshold question of whether *Apprendi* applies to the Sentencing Guidelines.

Section 841's graduated penalty scheme is essentially a statutory guideline regime that functions anterior to the federal Sentencing Guidelines. A presumptive guideline range can, according to some circuits, be trumped by judicial factfinding triggering a statutory mandatory minimum. Thus, Judge Easterbrook's dissent in *Booker* rests on his assumption (echoed by the government here) that "Congress established the statutory maximum penalties for drug offenses in 21 U.S.C. 841(b)" and that the Sentencing Guidelines "affect sentencing only after the degree of the offense has been established by the jury." *Booker* Pet. 7 (citing *Booker* Pet. App. 18a, 22a). While it would certainly be worthwhile for this Court to resolve Section 841's ambiguities post-*Blakely*, the statute's unique and complex provisions present a poor test case for the constitutionality of the full gamut of Guideline provisions. By contrast, although *Bijou* involves the consideration of drugs as relevant conduct, it does not implicate any of these issues because the underlying conviction was on firearms charges; the dispute is not over the nuances of drug quantity and Section 841(b), but rather whether the drug conduct may be considered at all in sentencing for the firearms offense.

Drug quantity calculations also do not represent some of the most egregious *Apprendi* violations under the Guidelines. The defendants in both *Fanfan* and *Booker* were convicted of distributing or conspiring to distribute cocaine, and the question before the judge was simply "how much?" In contrast, the defendant in *Bijou* was literally sentenced for a different crime from the one to which he had pled guilty. The Sentencing Guidelines mandated this result because the sentence for possession of cocaine was "greater than that determined" for illegally possessing a firearm. U.S.S.G. 2K2.1(c)(1)(A). In *Blakely* this Court was concerned with precisely this sort of conviction by judicial inquisition. "The

jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, slip op. at 10 (emphasis in original).

Finally, cases involving the application of *Apprendi* to drug quantity implicate another significant controversy that *Bijou* avoids: the circuit conflict on the question whether drug quantity is *statutorily* defined as an element of the Section 841 offense. If it is, then it is not necessary to apply *Apprendi*'s constitutional rule in order to reach the conclusion that quantity must be charged in the indictment and determined by the jury beyond a reasonable doubt. Review only of drug cases might fail to resolve the crucial issues arising after *Blakely* because statutory construction could avoid the constitutional question. The D.C. Circuit reached just such a conclusion in *United States* v. *Graham*, 317 F.3d 262 (CADC 2003), in which it applied its settled rule that drug quantity is an offense element under Section 841(b) to strike down the supervised release portion of the defendant's sentence. It did so on purely statutory grounds; indeed, the court specifically held that the supervised release sentence did *not* violate *Apprendi*'s constitutional rule because, although the judge's drug quantity finding triggered an increased statutory minimum period of supervised release, that period did not exceed the statutory *maximum* triggered by the jury's verdict alone. See also *United States* v. *Vazquez*, 271 F.3d 93, 107-16 (CA3 2001) (Becker, C.J., concurring) (reviewing text, structure, and legislative history of Section 841 and concluding that drug quantity is an offense element).

*Graham* conflicts with the holdings of the First, Seventh, and Eleventh Circuits that Section 841(b) statutorily defines drug quantity as a sentencing factor and not an offense element, such that it must be determined by a jury only when *Apprendi*'s constitutional rule is implicated. See *United States* v. *Goodine*, 326 F.3d 26, 28-32 (CA1 2003), cert.

denied, 124 S. Ct. 1600 (2004); *United States* v. *Smith*, 308 F.3d 726, 740-41 (CA7 2002); *United States* v. *Sanchez*, 269 F.3d 1250, 1267-70 (CA11 2001). The Second, Fifth, and Sixth Circuits have agreed with the D.C. Circuit that drug quantity is a statutory offense element but have inexplicably applied that holding only when the *Apprendi* rule would be violated by not doing so. See *United States* v. *Darwich*, 337 F.3d 645, 655 (CA6 2003); *United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 673 (CA5), cert. denied, 123 S. Ct. 2114 (2003); *United States* v. *Thomas*, 274 F.3d 655, 663-64 (CA2 2001) (en banc). This circuit conflict may or may not persist, depending on how this Court ultimately applies *Apprendi* and *Blakely* in the federal Guidelines context. If it does persist, it will eventually merit this Court's resolution. See generally *Goodine* Pet., No. 03-596 (Oct. 16, 2003); *Goodine* Br. of *Amicus Curiae* NACDL et al. (Feb. 6, 2004). But the more pressing questions demanding immediate resolution are the constitutional issues emerging from *Blakely*, and this Court would thus be well served by reviewing a case in which those issues are not clouded by the existence of complicated, overlapping questions of statutory interpretation.

## CONCLUSION

For the foregoing reasons, the Court should reframe the questions presented in the manner suggested above, grant certiorari in *Booker* or in *Pineiro*, also grant certiorari in *Bijou*, and deny the petition for certiorari before judgment in *Fanfan*.

Respectfully submitted,

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