

MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

DATE: January 14, 2005

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SUBJECT: Summary of the Supreme Court's recent decision in *Fanfan* and *Booker*

This memorandum discusses the Supreme Court's recent decision in the consolidated cases of *United States v. Booker*¹ and *United States v. Fanfan*,² and its impact upon the recommendations set forth in our memorandum dated January 11, 2005.

BACKGROUND

Although the Supreme Court noted in *Blakely v. Washington*³ that the federal sentencing guidelines were not at issue before it and specifically declined to express any opinion as to whether its Sixth Amendment analysis applied thereto, it was not long before *Blakely* was indeed used to attack the constitutionality of the guidelines. In fact, on October 4, 2004, the U.S. Supreme Court heard oral arguments in *United States v. Booker, supra*, and *United States v. Fanfan, supra*, two consolidated cases which raised just this very issue.

¹ *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), cert. granted, 125 S.Ct. 11 (2004).

² *United States v. Fanfan*, No. 03-47 (D.Me. 2004), cert. granted before judgment, 125 S.Ct. 12 (2004).

³ *United States v. Washington*, 124 S.Ct. 254 (2004).

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years in prison and a maximum sentence of life. 21 U.S.C. § 841(b)(1)(A)(iii). At sentencing, the judge found by a preponderance of the evidence that Booker: (1) had distributed 566 grams over and above the 92.5 grams that the jury had to have found (Booker did not contest that it was the amount of crack in his duffel bag—he just claimed he hadn't put it there); and (2) had obstructed justice. Under the federal sentencing guidelines, the additional quantity finding increased his base offense level from 32 to 36, U.S.S.G. §§ 2D1.1(c)(2), (4). The effect, together with that of the enhancement that the guidelines prescribe for obstruction of justice, U.S.S.G. § 3C1.1, was to place Booker in a sentencing range of 360 months to life. The judge sentenced him to the bottom of the range. In pertinent part, Booker's appeal challenged the sentence on the ground that the sentencing guidelines violate the Sixth Amendment insofar as they permit a judge to find facts (other than facts relating to a defendant's criminal history) that ultimately determine the applicable sentencing range.

After discussing the Supreme Court's recent decision in *Blakely*, and applying the Supreme Court's Sixth Amendment analysis to the case at hand, the Seventh Circuit found Booker did indeed have a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice. In doing so, the Seventh Circuit stated "that the guidelines, though only in cases such as the present one in which they limit defendants' right to a jury and to the reasonable-doubt standard, and thus the right of defendant Booker to have a jury determine (using that standard) how much cocaine base he possessed and whether he obstructed justice, violate the Sixth Amendment as interpreted by *Blakely*." *Booker, supra* at 513. It then reversed the district court and remanded the matter for resentencing.

II. *United States v. Fanfan*

In *Fanfan*, following a jury trial, defendant was convicted of a conspiracy involving at least 500 grams of cocaine powder. At sentencing, the judge decreased Fanfan's total offense level from 36 to 26 based on *Blakely*. In doing so, the judge noted that the jury's verdict in the case was limited to a finding of a conspiracy to distribute at least 500 grams of cocaine powder, which equates to a total offense level of 26 and a guidelines range of 63 to 78 months in prison. However, prosecutors argued in their sentencing recommendation that the court must also take into account that the case involved trafficking in crack cocaine. The guidelines, the judge found, would have required him to take the crack into consideration and then sentence Fanfan within a range of 188 to 235 months — that is, a guidelines range of 15 years and eight months

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III. Booker and Fanfan on Appeal

On July 21, 2004, the Solicitor General filed a Petition for Writ of Certiorari in both *Booker* and *Fanfan*, and, on August 2, 2004, the Supreme Court consolidated the two cases and granted certiorari. Oral arguments were then heard on October 4, 2004. Both cases raised the following questions:

- (1) Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the guidelines based upon the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the judge or admitted by the defendant.
- (2) 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 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.

THE SUPREME COURT'S DECISION

On January 12, 2005, the Court issued its long awaited decision in these cases in the form of a twin majority opinion. The first opinion, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, focused on the first question stated above and found the current administration of the guidelines violates a defendant's right to a jury trial because judges routinely apply the guidelines and impose sentences based upon facts which the jury did not find beyond a reasonable doubt. The second opinion, authored by Justice Breyer and joined by the Chief Justice and Justices O'Connor, Kennedy, and Ginsburg, addressed the second question stated above and found unconstitutional the provisions of the Federal Sentencing Act of 1984 which make the sentencing guidelines mandatory, effectively retaining much of the existing sentencing system but rendering the guidelines non-binding and merely advisory.

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recognized “[i]t has been settled throughout our history that the Constitution protects every criminal defendant ‘against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,’” and that, “[i]t is equally clear that the ‘Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.’” 543 U.S. ____ (2005) (internal citations omitted).

The Court then proceeded to review its recent decisions interpreting modern criminal statutes and sentencing procedures, upon which its opinion in *Blakely* was based, and concluded “there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case [*Blakely*].” *Id.* The Court did note, however, “[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.” *Id.*

The Court ultimately reaffirmed its earlier decision in *Apprendi*,⁴ reiterating that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Id.*

II. The Provision of the Federal Sentencing Act of 1984 That Make the Guidelines Mandatory, 18 U.S.C. § 3553(b)(1), Must be Severed and Excised, Along with 18 U.S.C. § 3742(e), Effectively Rendering the Guidelines Advisory

In light of the constitutional holding announced in the first part of its opinion, the Court turned its attention upon the second question on appeal, *i.e.*, the question of remedy, and held that it would sever the provision of the Federal Sentencing Act of 1984 that make the guidelines mandatory, as well as the provision establishing the applicable standards of review on appeal. So modified, the federal sentencing statute would effectively render the guidelines advisory such that sentencing courts would still be required to consider them but could ultimately tailor a defendant’s sentence based upon other equally applicable statutory concerns. *Id.*

⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, 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”).

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Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve." *Id.* This latter approach, the Court opined, is much more compatible with Congress' intent as embodied in the 1984 Sentencing Act.

IMPACT OF THE COURT'S DECISION

Despite the fact that the Court's decision has rendered federal sentencing guidelines non-binding and merely advisory, we believe the recommendations and advice set forth in our memorandum dated January 11, 2005 remain applicable.



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