NO. 04-10461-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

OSCAR PINARGOTE,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

SUPPLEMENTAL BRIEF OF APPELLANT OSCAR PINARGOTE

KATHLEEN M. WILLIAMS
Federal Public Defender
Richard C. Klugh, Jr.
Assistant Federal Public Defender
Attorney for Appellant
150 West Flagler Street, Suite 1500
Miami, Florida 33130
Telephone No. (305) 536-6900

THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Oscar Pinargote
Case No. 04-10461-F

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Benjamin Daniel	Assistant United States Attorney
Hector Flores	Assistant Federal Public Defender
Karlyn Hunter	Assistant United States Attorney
Marcos Daniel Jimenez	United States Attorney
Honorable James Lawrence King	United States District Judge
Richard C. Klugh, Jr.	Assistant Federal Public Defender
Oscar Pinargote	Defendant/Appellant
Kathleen Salyer	Assistant United States Attorney
Anne Schultz	Assistant United States Attorney
Kathleen M. Williams	Federal Public Defender

STATEMENT REGARDING ORAL ARGUMENT

The defendant respectfully renews his request for oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. This Court jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of United States district courts. The appeal was timely filed on January 29, 2004, from the final judgment and commitment order entered on January 20, 2004, that disposes of all claims between the parties to this cause.

STATEMENT OF THE SUPPLEMENTAL ISSUE

Whether the district court's application of the Federal Sentencing Guidelines in determining appellant's statutorily-mandated sentencing guideline range violated the Fifth Amendment Indictment and Due Process Clauses and the Sixth Amendment right to jury trial, where the district court imposed a four-level upward adjustment in the base offense level premised on a quantity of drugs not charged in the indictment and as to which the defendant did not waive his trial rights.

STATEMENT OF THE CASE

The appellant adopts and incorporates herein his statement of the case in his initial brief and adds additional information below as necessary to the supplemental issue.

Course of Proceedings , Disposition in the District Court, and Statement of Facts

The proceedings relevant to the instant supplemental issue consist of Oscar Pinargote's indictment, Rule 11 plea hearing, and sentencing hearing. On August 19, 2003, Pinargote was charged in a two-count indictment with importing and possessing, with intent to distribute, "one hundred grams or more of" heroin, in violation of 21 U.S.C. §§ 952(a) and 841 (a)(1), respectively. (R1:6). On November 6, 2003, Pinargote pled guilty to the importation count. (R1:16). In the plea colloquy,

no quantity of heroin was specified beyond the 100-gram amount referred to in the indictment. (R3:1-7). A Presentence Investigation Report ("PSI") was prepared by the United States Probation Office in which a probation officer found the amount of the heroin to be 818 grams. See PSI at ¶¶ 8, 12. Based on an amount of heroin exceeding 700 grams, under U.S.S.G. § 2D1.1, the PSI recommended a base offense level of 30, representing a 4-level increase above the offense level applicable to the 100-gram offense charged in the indictment. PSI ¶ 12. No objection was filed as to this calculation, nor was an objection to this finding raised at sentencing on January 16, 2004.

Standard of Review

The constitutional issue raised here is one of law ordinarily subject to de novo review. See United States v. Williams, 340 F.3d 1231, 1243 (11th Cir. 2003) (interpreting 18 U.S.C. § 3742(e)). Because appellant failed to raise the issue in the district court, review is solely for plain error. See United States v. Walker, 59 F.3d 1196, 1198 (11th Cir. 1995) ("Walker challenges the constitutionality of 18 U.S.C. § 922(q)(1)(A) for the first time on appeal. The government argues that because Walker failed to attack the statute's constitutionality in the trial court, he has waived the issue. We disagree. As a general rule, a party must timely object at trial to preserve an issue for appeal. Fed.R.Cr.P. 30. Pursuant to Federal Rule of Criminal Procedure 52(b), however, we review issues not preserved below for plain error.") (citing United States

v. Olano, 507 U.S. 725, 113 S.Ct. 1770 (1993)).

SUMMARY OF THE ARGUMENT

In Blakely v. Washington, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004), the Supreme Court effectively redefined the term "statutory maximum," for constitutional purposes, to include statutorily-mandated guideline range maximums. Although the Supreme Court's opinion in Blakely does not specifically address the burdens of proof and appropriate decisionmaker for guideline range decisions under the Federal Sentencing Guidelines, nevertheless the opinion explains that where any significant increase in a defendant's maximum sentencing exposure is effected by a binding sentencing guideline calculation, trial by jury and proof beyond a reasonable doubt are required. See Blakely, 2004 WL 1402697 at *8 ("Any evaluation of Apprendi's 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, ... based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.") (citation and footnote omitted); see also id. at *16 (O'Connor, J., dissenting) (noting that federal sentencing guideline enhancements under Chapters 2 and 3 of the Federal Sentencing Guidelines are

controlled by the reasoning of Blakely; "Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy."); In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) (constitutional right to trial by jury and proof beyond a reasonable doubt applies to all elements of the offense). In the federal system, the relevant constitutional protections as to offense elements also include the Fifth Amendment Indictment Clause and Due Process Clause. See, e.g., Cotton v. United States, 535 U.S. 625, 632, 122 S.Ct. 1781, 1785-86 (2002).

In Pinargote's case, he was subjected to a 4-level increase in his sentencing guidelines based solely on a sentencing factor – drug quantity exceeding 700 grams of heroin – that was neither included in his indictment nor mentioned at his plea colloquy. For that reason, the increase in his statutorily-mandated guideline maximum violated his Fifth and Sixth Amendment rights and requires resentencing under the statutory maximum applicable to his offense: not more than 46 months.

ARGUMENT AND CITATIONS OF AUTHORITY

The district court's application of the Federal Sentencing Guidelines in determining appellant's statutorily-mandated sentencing guideline range violated the Fifth Amendment Indictment and Due Process Clauses and the Sixth Amendment right to jury trial, where the district court imposed a four-level upward adjustment in the base offense level premised on a quantity of drugs not charged in the indictment and as to which the defendant did not waive his trial rights.

The Supreme Court's decision in Blakely v. Washington, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004), fundamentally undermines prior circuit precedent concerning the constitutional underpinnings of determinate sentencing.[1] By explaining that statutorily-mandated guideline sentencing ranges are statutory maxima which are permissibly set only by offense elements – and not by some lesser category of mere sentencing "factors" – the Supreme Court in Blakely held that as to binding state sentencing guidelines, the Sixth Amendment right to jury trial precludes imposition of a guideline range premised on non-elemental findings. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose **without** any additional

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[1] See, e.g., United States v. Sanchez, 269 F.3d 1250, 1262 (11th Cir. 2001) (en banc) ("Because [Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000)] only addresses facts that increase the penalty for a crime beyond the statutory maximum, it does not apply to those findings that merely cause the guideline range to shift within the statutory range."). Blakely corrects this view of guidelines within an overarching statutory range, by holding that such guidelines are also statutory maximums implicating the defendant's constitutional right to jury trial.

findings." Id., 2004 WL 1402697 at *4 (emphasis in original).

In Blakely, the Supreme Court did not rule that all aspects of guideline sentencing are constitutionally invalid, explaining that "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." Id., 2004 WL 1402697 at *7. Consonant with the dictates of the Fifth and Sixth Amendments and the ruling in Blakely, the defendant's sentence in this case must be cabined within the constitutional limits of the guidelines, those components of the guideline calculation established by the indictment and the jury verdict or guilty plea. See United States v. Cotton, 535 U.S. 625, 632, 122 S.Ct. 1781, 1785-86 (2002) (accepting government concession that sentencing beyond statutory maximum based on unindicted element of offense plainly violates Fifth Amendment's Grand Jury Clause; holding that plain error review applies where issue not raised in district court).

The specific issue in Blakely was whether the court could impose a sentence which was three years beyond what the guidelines law allowed for kidnapping (the crime to which the defendant pled), based upon a disputed finding that the defendant acted with deliberate cruelty – a statutorily enumerated ground for departure. Blakely, 2004 WL 1402697 at *3. Reversing the lower court, the Supreme Court held that imposition of the additional three-year sentence violated the defendant's Sixth Amendment jury trial guarantee. According to Court, this was merely a logical

application of the fundamental rule in Apprendi. See Blakely, 2004 WL 1402697 at *9 ("As Apprendi held, every defendant has the **right** to insist that the prosecutor prove to a jury all facts legally essential to the punishment. . . . That should be the end of the matter.") (emphasis added); see also id., 2004 WL 1402697 at *4 ("When a judge inflicts punishment that the jury's verdict alone does not allow the jury has not found all the facts which the law makes essential to punishment, and the judge exceeds his proper authority.").

The Court rejected the State's argument that there was no Apprendi violation because the relevant "statutory maximum" was not the 53-month maximum of the standard guideline range but, instead, the 10-year maximum for class B felonies, including second-degree kidnaping. Id., 2004 WL 1402697 at *4. The Court clarified that the relevant statutory maximum for purposes of analyzing an alleged Apprendi violation: "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbors." Id., 2004 WL 1402697 at *10.

While the Federal Sentencing Guidelines were not before the Court in Blakely, and accordingly, the Court claimed to have "expressed no opinion" as to the import of its opinion for federal guideline sentencing, id., 2004 WL 1402697 at *6 n. 9, the import is clear. Indeed, in rejecting the idea that "a judge could sentence a man for

committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it," and in questioning "[w]hy perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt," id., 2004 WL 1402697 at *7 n. 11, and in comparing Apprendi's fairness to a regime where "the defendant with no warning in indictment or plea would see his maximum sentence balloon ... not based on fact from proved to his peers beyond a reasonable doubt, but on facts .... compiled by a probation officer who the judge thinks more likely got it right than got it wrong," id., 2004 WL 1402697 at *6, the majority of the Court implicitly – if not explicitly – acknowledged that its holding would preclude **federal district courts** from sentencing defendants based upon uncharged relevant conduct, and from applying many if not most of the adjustments under Chapters 2 and 3 of the Guidelines.

Indeed, Justice O'Connor, writing in dissent and joined by Justice Breyer, candidly acknowledged:

> The structure of the Federal Sentencing Guidelines [] does not, as the Government half-heartedly suggests, provide any grounds for distinction. Brief for United States as Amicus Curiae 27-29. Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. § 3553(b) and implemented in USSG § 5K2.0. **If anything, the structural differences that do exist make the Federal Sentencing Guidelines more vulnerable to attack.** The provision struck down here provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, 'considering the purpose of [the Act], that there are substantial and compelling reasons justifying

> an exceptional sentence.' Wash Rev. Code Ann. § 9.94A.120 (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. § 9.94A.390. The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive Apprendi. Ante, at 8-9. **This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate.** See, e.g., USSG § 2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); § 2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); § 3C1.1 (general increase in offense for obstruction of justice).
>
> Indeed, the 'extraordinary sentence' provision struck down today is as inoffensive to the holding of Apprendi as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's 'real fact' doctrine precludes reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense. See Wash. Rev. Code Ann. § 9.94A.370(2) (2000) (codifying 'real facts' doctrine). **If the Washington scheme does not comport with the Constitution, it is hard to imagine a guideline system that would.**

Id. at *16- *17 (O'Connor, J., dissenting) (emphasis added). Justice O'Connor's views are not unlike the concerns raised by the Solicitor General's Amicus Curiae Brief in Blakely, observing both the impact of the additional federal constraint imposed by the Indictment Clause, see Brief of United States as Amicus Curiae at 31 (citing Cotton, 535 U.S. at 627), and that if the Supreme Court decided Blakely on the basis of the clarified definition of statutory maximum, the federal guidelines would likely be unconstitutional. Brief of United States as Amicus Curiae at 31 ("If the

'facts reflected in the jury verdict alone' are the elements of the offense, petitioner's theory would mandate the application of Apprendi [v. New Jersey, 530 U.S. 466 (2000)] to any facts, other than the offense elements, that increase the defendant's punishment. Such a rule would have **profound** consequences for the federal Guidelines.") (emphasis added).

Accordingly, because the substantial (4-level) upward enhancement of the sentencing guideline range in this case lacked any foundation in the indictment or the plea colloquy (nor was there any plea agreement to sustain the enhancement), the constitutional error in the application of the Federal Sentencing Guidelines in Pinargote's case is plain and requires reversal of his conviction. No constitutionally admissible evidence[2] was ever offered as to the weight of the drugs in this case, nor was the appellant afforded the right of confrontation of witnesses. See, e.g., Crawford

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[2] Whether a Fourth Amendment violation occurred in the seizure of drug evidence in this case was not litigated below due to the district court's erroneous failure to treat the drug quantity as an element of the offense. See United States v. Lynch, 934 F.3d 1226, 1236 (11th Cir. 1991) ("In light of the necessity that judges consider all relevant information before imposing sentence, the detrimental effect of applying the exclusionary rule to sentencing proceedings is apparent."). But see United States v. Roman, 989 F.2d 1117, 1128 n. 26 (11th Cir. 1993) (en banc) (Tjoflat, J., concurring) ("The exclusionary rule might, however, 'apply in sentencing proceedings [where the] evidence [was] unconstitutionally seized solely to enhance the defendant's sentence.' Id. at 1237 n. 15; see also United States v. Jessup, 966 F.2d 1354 (10th Cir.1992) ...; cf. United States v. Gilmer, 811 F.Supp. 578 (D.Colo.1993) (egregious circumstances prohibited use of evidence at sentencing)."). Given Blakely's resolution of the statutory maximum and offense-element issues, Lynch is apparently no longer good law.

v. Washington, 541 U.S. __, 124 S.Ct. 1354 (2004). Whether and to what extent factual disputes could be raised as to the actual weight of the drugs is unknowable on this record. Under Cotton, it is impossible to say that the estimated drug weight evidence was either reliable or tested, much less that it was "overwhelming" or incontrovertible. Cotton, 535 U.S. at 633, 122 S.Ct. at 1786.

Therefore, the drug-weight guideline enhancement not only constitutes plain error affecting Pinargote's substantial rights, cf. United States v. Pease, 240 F.3d 938, 944 (11th Cir. 2001) ("Because the district court sentenced Pease to ... less than the statutory maximum for conspiracy to distribute the quantity admitted [both in his plea agreement and in the plea colloquy], Pease cannot show that the error affects substantial rights."), but also seriously affects the "fairness, integrity, or public reputation of judicial proceedings." Id. at 943; see also United States v. Green, __ F.Supp.2d __, 2004 WL 1381101 at *16 - *32 (D. Mass. June 18, 2004) (opinion by Chief Judge of District of Massachusetts, noting anticipated outcome in Blakely, holding the Federal Sentencing Guidelines unconstitutional insofar as the effective maximum sentences are based on non-elemental guideline calculations).

CONCLUSION

For the foregoing reasons, Oscar Pinargote respectfully requests that his sentence be vacated and his case be remanded to the district court for re-sentencing in conformity with the Supreme Court's decision in Blakely v. Washington.

KATHLEEN M. WILLIAMS
Federal Public Defender

Richard C. Klugh, Jr.
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130
Telephone No. (305) 536-6900

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this ___ day of June, 2004, upon Karlyn Hunter, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132-2111.

Richard C. Klugh, Jr.

APPENDIX A