UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JANICE L. CONLEY,

Petitioner,

vs. **Civil Case Number 8:04-Cv-_____**
Criminal Case Number 8:01-Cr-440-T-27MSS

UNITED STATES OF AMERICA,

Respondent.

_____/

PETITIONER-DEFENDANT JANICE L. CONLEY'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FILED UNDER 28 U.S.C. § 2255 AND *BLAKELY v. WASHINGTON*

COMES NOW the Petitioner-Defendant, JANICE L. CONLEY ("Conley"), by and through her undersigned counsel, WILLIAM MALLORY KENT, pursuant to 28 U.S.C. § 2255 and *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), and files this memorandum of law in support of her request to be resentenced and that she be released on reasonable conditions pending that resentencing. This memorandum of law is presented in six sections as follows:

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1. Conley's Facts and Course of Proceedings Pertinent to *Blakely v. Washington*.

2. The Application of *Blakely v. Washington* to the Federal Sentencing Guidelines Generally.

3. Conley is Entitled to the Application of *Blakely v. Washington* to Her Case Without Regard to Its Possible Retroactivity Under *Yates v. Aiken* and *Penry v. Lynaugh* Because *Blakely v. Washington* is an Elaboration of an Existing Rule, that is, *Apprendi v. New Jersey*.

4. Alternatively, If *Blakely v. Washington* Is a "New Rule," it Should Be Accorded Retroactive Application Because it Is a Watershed Development and Requires the Observance of Procedures Implicit in the Concept of Ordered Liberty and as Such Is Retroactive under *Teague v. Lane*.

5. Conley is Entitled to Resentencing Without Application of the Sentencing Guidelines, or Alternatively, Without Application of Any Enhancement or Increase in the Base Offense Level Except as Was Determined Solely By the Jury Verdict, and if Resentenced Without

Reference to the Guidelines, The Court Should Consider the Abolition of Parole in Determining Her Non-Guideline Sentence.

6. Conley is Entitled to Bail Pending Resolution of This Petition.

1. Conley's Facts and Course of Proceedings Pertinent to *Blakely*.

Conley went to trial on a second superseding indictment returned February 28, 2002 and entered by the clerk on March 1,2002. [D31][1] The indictment was filed well after the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). The indictment did not allege any factor relevant to the application of the federal sentencing guidelines beyond the applicable criminal statutes: count one alleged a conspiracy under 18 U.S.C. § 371, count two alleged mail fraud in violation of 18 U.S.C. § 1341 and 1342, count three alleged a false medicare claim in violation of 18 U.S.C. § 287, count four alleged another false claim under § 287, and count five alleged mail fraud under 18 U.S.C. § 1341 and 1346.

Conley was tried by jury with trial commencing March 24, 2003. Prior to her jury trial she filed a motion in limine to keep out of evidence at trial any testimony

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[1] References to the record will be in the form "D__," wherein "D" refers to the district court docket and the number following refers to the docket entry number. "T-X-_" refers to a transcript, the X will be replaced by the date of the proceeding, followed by the pertinent page number of the transcript.

or evidence relating to six (*sic*)[2] five uncharged and unindicted projects. [D142] The court denied Conley's motion in limine and the government was allowed to present extensive evidence on at trial relating to five projects which had not been included in the indictment and indeed as to which the government confessed it had no knowledge until after the applicable statute of limitations had expired. [T-3/25/2003-18-28; 34]

The jury found Conley guilty May 1, 2003 on all five counts by a general verdict. The government did not request a special verdict on any fact that would relate to the application of the sentencing guidelines. [D190]

A presentence investigation report ("PSR") was prepared by the United States Probation Office ("Probation") pursuant to Rule 32(c)(1), Federal Rules of Criminal Procedure, and U.S.S.G. § 6A1.1. The PSR contained a chart (¶ 26) in which Probation calculated "intended loss" and "actual loss" for purposes of the application of U.S.S.G. § 2F1.1(b)(1).[3] The PSR determined that the applicable loss amount for

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[2] The motion referred to six uncharged projects but in fact it related to only five.

[3] The 1995 version of the sentencing guidelines applied to this case. U.S.S.G. § 1B1.11(b).

U.S.S.G. § 2F1.1(b)(1) was $555,941.82, triggering a *ten level increase* in the base offense level, from level 6 to level 16. (¶ 37) The concepts of intended loss and actual loss were not presented to the jury in Conley's trial. The jury made no finding on loss amount.

The PSR also applied enhancements for "more than minimal planning," *two levels*, (¶ 38), "organizer or leader," *four levels*, (¶ 40), "abuse of trust," *two levels*, (¶ 41) and "obstruction of justice," *two levels*, (¶ 42). None of these enhancements were presented to the jury by the indictment nor did the government request special verdicts on any factor relating to these enhancements.

Conley objected to the use of intended loss, to the role adjustment, to the abuse of trust adjustment and to the obstruction adjustment. (PSR Addendum) At sentencing Conley expressly renewed her objection to consideration of the five projects which had not been included in the indictment. [T-8/4/2003-28-35]

The Court sustained Conley's objection to the obstruction enhancement [T-8/5/2003-9-11] and sustained Conley's objection to the four level role adjustment as to two levels only, leaving a two level upward role adjustment. [T-8/4/2003-55] The *judge's determination* of the applicable sentencing factors at sentencing resulted in

a *sixteen level increase* over the base offense level of six applicable to fraud offenses. [T-8/5/2003-12] This resulted in a total offense level of 22 which at a criminal history category I, yielded a sentencing range of 41-51 months imprisonment.

The Court consistently applied a preponderance standard in making its guideline factor determinations. [T-8/4/2003-40;43;45;54;69; T-8/5/2003-2;3;5;11]

Conley argued for a downward departure on the basis that the case fell outside the "heartland" contemplated by the United States Sentencing Commission in promulgating the guidelines. [T-8/5/2003-19-31] The Court denied the heartland departure. [T-8/5/2003-32-33]

The Court sentenced Conley to the low end of the applicable range, 41 months imprisonment. The Court imposed the minimum fine permitted under U.S.S.G. § 5E1.2(c)(3) for the offense level 22, $7,500. Under U.S.S.G. § 5D1.1, because a term of imprisonment of more than one year was imposed, the court was required to impose, and did impose, a term of supervised release of two years. [T-8/5/2003-34] The judgment was entered by the clerk of the court on August 6, 2003. [D211] Conley did not appeal her judgment or sentence.[4]

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[4] Conley's judgment and sentence did not become final until August 21, 2003, (upon expiration of the ten day period after recording by the clerk of the

Conley commenced service of her sentence on September 29, 2003. [D225] *Blakely v. Washington* was decided June 24, 2004 and this petition followed in a timely manner thereafter.

2. The Application of *Blakely v. Washington* to the Federal Sentencing Guidelines.

A. *Blakely* Applies to the Federal Sentencing Guidelines.

Blakely v. Washington, which is a logical extension of *Apprendi v. New Jersey*, renders the federal sentencing guidelines unconstitutional. Under *Blakely v. Washington* the federal sentencing guidelines may not be applied in whole or in part for determination of sentence in a federal criminal case. The use of the federal sentencing guidelines to determine Conley's sentence violated her rights under the Sixth and Fifth Amendments to the United States Constitution to have the government charge by indictment and prove beyond a reasonable doubt to a unanimous jury all factors used to determine her sentence. Conley is entitled to

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judgment on August 6, 2003, excluding intervening Saturdays and Sundays) in which she could have filed a notice of appeal. Therefore Conley had until August 21, 2004 to file her § 2255 petition. *See* Rule 4(b)(1)(A)(i), Federal Rules of Appellate Procedure, Rule 45, Federal Rules of Criminal Procedure, and 28 U.S.C. § 2255.

resentencing without the application of the federal sentencing guidelines.

Blakely held unconstitutional under the Sixth Amendment a Washington State statute that authorized the sentencing judge to impose a sentence above the "standard" range set forth in the statute punishing the offense if he found any of a list of aggravating factors that justified such a departure.[5] Pursuant to that authority, the trial judge had imposed a sentence of 90 months on the defendant, which exceeded the standard range of 49 to 53 months for the offense, second-degree kidnaping.

Blakely argued that the sentencing enhancement violated *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court in *Apprendi* announced that "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." 530 U.S. at 490.

The meaning of *Apprendi* has been widely debated. There were at least two different interpretations: the impact analysis, and the statutory analysis.

The impact analysis: This approach suggests that if the factor at issue has a

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[5] Much of the argumentation of this memorandum is taken from *United States v. Muefflеman,* 2004 WL 1672320 (D. Mass. 2004), however we take responsibility for the argument herein and any variation from that well reasoned decision.

substantial impact on the sentence, it must be considered an "element" of the offense. In fact, Justice Thomas' concurrence in *Apprendi* suggests a "pure" impact approach: [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact--of whatever sort, including the fact of a prior conviction--the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. *Apprendi* 530 U.S. at 501 (Thomas, J., concurring).

The statutory analysis: This approach emphasizes the formal "maximum penalty" imposed by the statute. *Id.* at 495-96. Throughout the *Apprendi* opinion, the Court repeats the holding that - other than the fact of a prior conviction - any fact that increases the prescribed "statutory maximum penalty" must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi,* 530 U.S. at 476.

The limitation of this approach, as noted by Justice O'Connor's dissent in *Apprendi,* is that legislatures may avoid *Apprendi* 's jury protections by creating a broad penalty range, setting the "statutory maximum" as far as possible from the minimum. *See Apprendi,* 530 U.S. at 540 (O'Connor, J., dissenting). As long as the

judge sentenced within the range, there would be no *Apprendi* issues. Indeed, to the extent that the Courts adopted this approach, the Federal Sentencing Guidelines were arguably unscathed. They simply constructed guidelines within the already broad ranges prescribed by most of the federal criminal statutes.

While in *Apprendi* the Supreme Court did not clearly reconcile the approaches outlined above, subsequent cases validated the statutory approach. *See United States v. Baltas,* 236 F.3d 27, 41 (1st Cir.2001) ("The rule in *Apprendi* - applies in situations where the judge-made factual determination increases the maximum sentence beyond the statutory maximum, and not in situations where the Defendant's potential exposure is increased within the statutory range.")

In *Blakely,* however, the Supreme Court took a different tack, effectively adopting Justice Thomas' impact test: Look at the sentencing first, and evaluate the facts "made essential" to it; any such facts need to have been tested by a jury or pled to by the defendant. What "statutory maximum" means now is not just the broad punishment range in the criminal statutes. It is the "maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant." Blakely,* --- U.S. at ----, 124 S .Ct. at 2537. (Italics supplied.) It is the

maximum that a judge may impose "without any additional findings." *Id.* The rationale was expansive: "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 the punishment,' and the judge exceeds [her] proper authority." *Id.* (citation omitted).

There is no question that this test applies to the Federal Guidelines. Certain provisions of the Guidelines establish a "standard" range. Other provisions establish aggravating factors that if found by the judge increase the range; the judge could even depart upward, outside of the range.

The fact that *Blakely* broadened the rule that had been announced in *Apprendi,* sweeping within it not simply statutory enhancements, but also enhancements under the Federal Sentencing Guidelines is clear for another reason. It was available to the Court to interpret the Washington statute as two crimes - the crime *simpliciter* and the *aggravated* offense. The Court had done just that in *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (holding that the federal carjacking statute, 18 U.S.C. §§ 2119 defined three distinct offenses, rather than "a single crime with a choice of three maximum penalties, two of them dependent on sentencing

factors exempt from the requirements of the charge and jury verdict," *Id.* at 229). Similarly, the Court could have taken the position that the plea in *Blakely* was to the crime *simpliciter*. That plea, then, completely defined the "maximum statutory" punishment range within which the judge should have sentenced, following both *Apprendi* and *Jones*.

Indeed, the Government, appearing as amicus curiae in *Blakely,* argued that there is a difference between a *legislature* creating multiple offenses as in *Jones,* and a *commission* crafting "guidelines" within broad statutory ranges. *See Blakely v. Washington,* 2004 WL 177025 at * 11 (Appellate Brief) (U.S. Jan. 23, 2004) *Brief for the United States as Amicus Curiae Supporting Respondent.* The Court plainly rejected this approach. If the issue is impact, the facts "made essential" to sentencing, it does not matter who promulgated the "guidelines" or standards or rules.

As the Seventh Circuit noted in *United States v. Booker,* 2004 WL 1535858 at *2 (7th Cir. July 9, 2004):

> [I]t is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by

> Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency.

Finally, as the Seventh Circuit noted, the majority did little to answer the predictions of the four dissenting judges, that its decision would have a grievous impact on the Sentencing Guidelines. *See Blakely,* --- U.S. at ----, 124 S.Ct. at 2543 (O'Connor, J. dissenting); *Id.* at 2552 (Breyer J. dissenting).

Numerous courts have now already ruled that *Blakely* applies to the Sentencing Guidelines. *United States v. Ameline,* 2004 WL 1635808 (9th Cir. July 21, 2004), *United States v.* Magana, 2004 WL 1700556 (9th Cir. July 29, 2004), United *States v. Mooney,* No. 02-3388 (8th Cir. July 23, 2003); *United States v. Montgomery,* 2004 WL 1562904 (6th Cir. July 14, 2004), *opinion vacated and rehearing en banc granted*, 2004 WL 1562904, 2004 Fed.App. 0226P (6th Cir. Jul 14, 2004), and *appeal dismissed on motion of parties*, 2004 WL 1637660 (6th Cir. Jul 23, 2004); *United States v. Booker,* 2004 WL 1535858 (7th Cir. July 9, 2004); *United States v. Ward*, 2004 WL 1636967 (7th Cir. July 23, 2004), *United States v. King,* Slip Op., No. 6-04-CR-35 (M.D.Fla. July 19, 2004); *United States v. Einstman,* No. 04 Cr. 97(CM), 2004

WL 1576622 (S.D.N.Y. July 14, 2004); *United States v. Leach,* 2004 U.S. Dist. LEXIS 13291 (E.D.Pa. July 13, 2004); *Unites States v. Toro,* No. 03-CR-362, 2004 WL 1575325 (D.Conn. July 8, 2004); *United States v. Croxford,* 2004 WL 1521560, at *7, *13 (D.Utah, July 7, 2004); *United States v. Medas,* 2004 WL 1498183, at *1 (E.D.N.Y. July 1, 2004); *United States v. Shamblin,* 2004 WL 1468561, at *8 (S.D.W.Va. June 30, 2004); Transcript of Re-sentencing Hearing, *United States v. Watson,* CR-03-0146 (D.D.C. June 30, 2004) available at *http://www.ussguide .com/members/cgi-bin/index.cfm;* Transcript of Sentencing Hearing, *United States v. Fanfan,* No. 03-47-P-H (D. Me. June 28, 2004) available at *http://www.ussguide.com/members/cgi-bin/index.cfm; United States v. Green,* 2004 WL 1381101 (D.Mass. June 18, 2004) (declaring Guidelines unconstitutional pre-*Blakely*); *but see United States v. Pineiro,* No. 03-30437, 2004 WL 1543170, (5th Cir. July 12, 2004) (holding that *Blakely* does not apply to Sentencing Guidelines); *United States v. Penaranda,* No. 03-1055(L), 2004 WL 1551369 (2d Cir. July 12, 2004) (certifying question of *Blakely* 's application to Supreme Court).

Commentary in the wake of the *Blakely* decision has also supported its application to the Federal Sentencing Guidelines. *See e.g.,* Stephanos Bibas, *Blakely's*

Federal Aftermath, 16 Fed.Sent.Rep. (forthcoming June 2004) (noting that "[n]o commentator who has considered the issue [believes Blakely does not apply to the Federal Sentencing Guidelines]," *Id.* at * 4); Nancy J. King and Susan R. Klein, *Beyond Blakely,* 16 Fed.Sent.Rep. (forthcoming June 2004) (concluding that *Blakely* does apply); memorandum of Professor Frank Bowman to the United States Sentencing Commission dated June 27, 2004 concluding that *Blakely* results in invalidity of the Sentencing Guidelines, found at http://www.williamkent.com/ Sentencing %20 Commission %20 Memo.pdf.

But see United States v. Pineiro, 2004 WL 1543170, at * 2 (5th Cir. July 12, 2004) (holding that *Blakely* does not extend to the Federal Sentencing Guidelines).

B. Severability.

(i) The Applicable Standard.

The Supreme Court has held that courts:

> should refrain from invalidating more of the statute than is necessary . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this Court to so declare, and to maintain the act insofar as it is valid.'

Regan v. Time, Inc., 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion). The Court has noted in multiple decisions that if severance would leave a fully operable law, the invalid part of a statute should be severed and the rest maintained "unless it is evident that the Legislature would not have enacted those provisions that are within its power, independently of that which is not." *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (one-house legislative veto provision of Airline Deregulation Act covering regulations applicable to the right of first hire portion was severable); *see also, Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (Executive Order was insufficient to revoke the Chippewa's usufructuary rights because it was not severable from invalid removal order); *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (refusing to address severance of remaining portions of statute after striking funding restriction as unconstitutional, as severance was not addressed by court of appeals); *United States v. Grigsby,* 85 F.Supp.2d 100 (D.R.I.2000) (severing section of Federal Child Support statute creating mandatory presumption in violation of due process from remainder of statute). The absence of a severability clause does not raise a

presumption against severability. *Alaska Airlines,* 480 U.S. at 688.

Ultimately the question of severability is a test of legislative intent - "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.* at 684.

(ii) Analyzing Congress's Intent.

(a) Congress Did Not Enact a Jury Sentencing Scheme When it Had an Opportunity to Do So.

It is inconceivable that Congress would have enacted a jury sentencing scheme of the kind that *Blakely* contemplates. First, Congress did not enact a jury sentencing scheme when it had the opportunity to do so. Code reform would have enhanced the jury's role. There would be a basic offense, the crime *simpliciter,* and then more serious variations on the same theme, the *aggravated* offenses. The jury would have had to determine if there were aggravating factors, like the presence of a weapon, or a more culpable intent, some of the same factors later found in the Sentencing Guidelines. And each finding would be accompanied by a smaller range of penalties.

But Congress did not enact a reform of the federal criminal code. It focused instead on trying to rationalize what it was that judge's do after convictions - namely

sentencing offenders within the broad ranges of the existing criminal law. And it put in the hands of a new administrative entity, the United States Sentencing Commission, not Congress, the job of dividing up criminal sentencing into something like crimes *simpliciter* and *aggravated* offenses. As a result, a judge, not a jury, would decide the code-like facts, with determinate consequences.

b. The Sentencing Reform Act and the Sentencing Guidelines Were Promulgated with Judges in Mind.

The SRA set up a new system, one which sought to carefully balance three institutional players - Congress, the new Sentencing Commission, the Courts. The Commission was charged with promulgating new Guidelines which Congress was asked to approve. The Guidelines were plainly intended to provide standards for judicial sentencing within the broad punishment ranges where there had formerly been none. Indeed, the Commission began its work by examining what judges had been doing in sentencing offenders during the decades before the SRA.

The judge was central to the system as it was originally conceived. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest,* 17 Hofstra L.Rev. 1, 13 (1988). The system was intended to create a

guided discretion system, a system of rules with "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not [adequately] taken into account in the establishment of general sentencing practices." 28 U.S.C. §§ 991(b)(1), 18 U.S.C. §§ 3553(b). The aim was to individualize sentences within a system of rules to achieve both uniformity and proportionality, "certainty and fairness" in sentencing. 28 U.S.C. §§ 991(b)(1); U.S.S.G. §§ 1A Historical Note, formerly §§ 1A.3 (noting three purposes: honesty in sentencing, uniformity and proportionality).

The specific provisions of the Guideline Manual were obviously drafted with judges, not juries, in mind. In parts, the language is vague - for example, what is a "vulnerable victim" or an "otherwise extensive" organization. At times, the Commission invented concepts that were entirely new to the criminal law. Arguably, this was done so that common-law judges would give content to the Guidelines - produce a common-law of sentencing, determined by precedent, with articulable standards. To be sure, the failure of judges to write decisions, or carefully spell out their reasons for interpreting the Guidelines have made this aspect of the Guidelines less successful. But with juries, the problem would be worse. Will there be general

verdicts, or will there be complex interrogatories? Judicial review of jury verdicts is more forgiving than judicial review of opinions. How profoundly then would *Blakely* affect the role of appellate courts in a common law of sentencing?

Jury instructions will have to be drafted dealing with complex issues that had heretofore been reserved for judicial interpretation. In some areas, the sentencing guidelines are different from the substantive law - e.g. the difference between the substantive conspiracy law and the sentencing rule that limits the amount of drugs attributable to a defendant under U.S.S.G. §§ 1B1.3, the difference between substantive entrapment and sentencing entrapment in reverse sting situations, U.S.S.G. §§ 2D1.1 application note 13; the difficulty of trying other accusations of misconduct alleged as "relevant conduct." As the Department of Justice points out, "[a]side from issues arising in applying these definitions . . . requiring jury determinations on relevant conduct could take a criminal trial into areas far afield from the core question that is suitable for jury resolution . . . whether the defendant committed the particular crime with which he was charged."

Nevertheless, it may well be that these problems are not at all insurmountable, that as Professors Nancy J. King and Susan R. Klein argue "[p]redictions that

guideline facts would be impossible to prove to juries or review on appeal are . . . exaggerated." But the core question remains: Is such a system at all like the sentencing regime that Congress would have enacted? The answer to that question has to be "no."

c. Combining *Blakely* and *Feeney*.

Finally, it is not enough to say that the system contemplated by the drafters remains intact even post-*Blakely* because judges still have the power to depart downward from Guideline sentences. *See* U.S.S.G. §§ 1B1.1. That power, after all, has also been eroded with the recent Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), P.L. 108-21 (April 23, 2003). If jury fact finding on enhancements were to be engrafted onto the Guidelines system, the jury's verdict, about quantity, amounts, vulnerable victim, role in the offense, etc ., will effectively be outcome-determinative. That result may be fine in both a constitutional or a policy sense, even considerably fairer than the Guideline system as it has evolved, but it is surely a far cry from the system that the drafters envisioned.

In short, the new reality would be this: Fact-finding that concerns sentencing

enhancements goes to the jury; departures would remain with the judge but are severely limited. The net result would be to take judges even further out of the sentencing calculus. At what point is there constitutional significance to the effective absence of a judicial role in sentencing? At what point does liberty depend so completely on the decisions of the Congress, and the executive, that the constitutional checks and balances regime is endangered?

d. The Case Law.

The only two circuit courts to attempt to resolve this issue are in conflict. The Ninth Circuit has held that the unconstitutional portions of the Guidelines are severable from the constitutional ones. *United States v. Ameline,* 9th Cir. No. 02-30326 (9th Cir. July 21, 2004) (noting that "[w]e are reluctant to establish by judicial fiat an indeterminate sentencing scheme." *Id.* at * 30). On the other hand, the Eighth Circuit has held they are not severable and must be abandoned. *United States v. Mooney,* No. 02-3388 (8th Cir. July 23, 2003) (agreeing with *United States v. Lamoreaux,* 2004 U.S. Dist. Lexis 13225 (W.D.Mo. July 7, 2004) (Sachs, J.) that "the Guidelines were designed as an integrated regime, and therefore cannot be severed into constitutional and unconstitutional parts while still remaining true to the

legislative purpose. *Mooney* at * 23.)

The numerous district courts to speak on the issue similarly have been divided. The *Ameline* decision and others like it, while persuasive, reflect a desire to minimize the impact of *Blakely* and the disarray into which it has thrown the system. The more persuasive arguments on this point have been advanced by judges such as Judge McMahon in *United States v. Einstman,* 2004 WL 1576622 at *6 (S.D.N.Y. July 14, 2004) and Judge Cassell in *United States v. Croxford I,* 2004 WL 1521560 at *12 (D.Utah, July 12, 2004), that the guidelines are not severable.

e. The Government's Position.

The Department of Justice has stated that it believes that if *Blakely* is applicable to the Guidelines the "entire system" of the Guidelines "must fall." Departmental legal Positions and Policies in *Light of Blakely v. Washington,* " Memorandum to All Federal Prosecutors from James Comey, Deputy Attorney General of the United States, p. 3 (July 2, 2004). Conley agrees.

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.

If all of the Guidelines - not just those about enhancements, but even those setting base offense levels - were drafted with judges in mind and further, if the system were intended to cohere as a single regime, how can there be a two-tiered system - one Guideline-based, one indeterminate? In effect, the problem would a structural one, akin to a wrongful delegation challenge, which undermines the organization of the Guidelines in toto and not merely this or that guideline.

On July 21, 2004, the Acting Solicitor General filed petitions for certiorari in two cases, *United States v. Booker,* No. 04-104 (7th Cir., docket 03-4225), and *United States v. Fanfan,* No. 04-105 (D. Maine, docket 03-47). The Supreme Court directed respondents in both cases to file responses to the motions by July 28, 2004. The Acting Solicitor General has proposed an expedited schedule under which oral argument would be heard on September 13, 2004, prior to the beginning of the

Court's October term. Alternatively, the government has proposed oral argument be heard on October 4, 2004. It is to be expected that the Supreme Court will grant certiorari in either or both of these cases and will provide an answer to the *Blakely* questions. However, we ask this Court to not wait for a disposition by the Supreme Court to decide Conley's petition. Conley has been incarcerated since September 29, 2003 and has already served a greater sentence than would have been required under the guidelines applicable to her case but for the judicially imposed enhancements - enhancements which we have persuasively argued are without question unconstitutional under *Blakely*.

3. Conley is Entitled to the Application of *Blakely v. Washington* to Her Case Without Regard to Its Possible Retroactivity Under *Yates v. Aiken* and *Penry v. Lynaugh* Because *Blakely v. Washington* is an Elaboration of an Existing Rule, that is, *Apprendi v. New Jersey* and Was Dictated by *Apprendi.*

As dramatic an impact as *Blakely v. Washington* has made, it is not a "new rule" for purposes of retroactivity analysis under *Teague v. Lane*, but is merely an application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to a new set of facts and the result in *Blakely* was dictated and compelled by

Apprendi. Therefore, under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*,492 U.S. 302, 314-315, 109 S.Ct. 2934,2944-2945 (1989), Conley is entitled to the application of *Blakely v. Washington* to her timely first petition under 28 U.S.C. § 2255.

A case announces a new constitutional rule if the Supreme Court bases its decision in the Constitution and the rule it announces was not dictated nor compelled by precedent. *Beard v. Banks,* --- U.S. ----, 124 S.Ct. 2504, --- L.Ed.2d ---- (2004). As dramatic as *Blakely* seems, *Blakely* merely re iterates the holding in *Apprendi* that, under the Sixth Amendment, all facts used to increase a defendant's sentence beyond the statutory maximum must be charged and proven to a jury. --- U.S. at ----, 124 S.Ct. at 2536. The rule announced in *Blakely* is based in the Constitution and was clearly dictated and compelled by *Apprendi* and its progeny.

To decide Conley's petition, therefore, it is not necessary to determine whether *Blakely* is *retroactively* applicable to cases on collateral review under *Teague v. Lane.* Many "new" holdings are merely applications of principles that are well settled at the time of conviction. As Justice Harlan explained in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969):

The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." 394 U.S., at 263-264, 89 S.Ct., at 1041.

This reasoning, which the Supreme Court endorsed in *Yates v. Aiken*, is

controlling in Conley's case because the decision in *Blakely* was merely an application of the principle that governed the decision in *Apprendi,* which had been decided before Conley's sentencing took place. *Cf. United States v. Johnson,* 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202 (1982): "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *See also Truesdale v. Aiken,* 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (*per curiam*); *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Lee v. Missouri,* 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736 (1979) (*per curiam*).

The Eleventh Circuit itself has already described *Blakely v. Washington* as "revisiting" *Apprendi v. New Jersey*, and quoted from the *Blakely* decision in which Justice Scalia explained that the Supreme Court's precedents made clear that a judge could not determine factors that would increase a sentence:

> [o]ur precedents make clear ... that the "statutory maximum" for

> *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* . . . 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 findings. 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 the punishment," ... and the judge exceeds his proper authority.
>
> *Id.* at 7 (emphasis in original) (citations omitted).

In re Dean, ___ F.3d ___, 2004 WL 1534788 (11th Cir. 2004).

A fortiori it would follow that because *Blakely* is merely an application of clear precedents, then *Blakley* cannot be a new rule for retroactivity purposes. Because it is not a new rule, Conley is entitled to its application in this petition under *Yates* and *Penry*.

As the Supreme Court indicated in *Teague*, "[i]n general ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S., at 301, 109 S.Ct., at 1070. Or, "[t]o put it

differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Ibid. (emphasis in original). *Teague* noted that "[i]t is admittedly often difficult to determine when a case announces a new rule." Ibid. Justice Harlan recognized "the inevitable difficulties that will arise in attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey, supra*, 401 U.S., at 695, 91 S.Ct., at 1181 (opinion concurring in judgments in part and dissenting in part) (quoting *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)). See generally *Yates v. Aiken*, 484 U.S. 211, 216-217, 108 S.Ct. 534, 537-538, 98 L.Ed.2d 546 (1988) (concluding that *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), did not announce a new rule but was "merely an application of the principle that governed the decision in *Sandstrom v. Montana*, [442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979),] which had been decided before petitioner's trial took place").

In order to determine whether *Blakely* should be applied retroactively or

whether retroactivity analysis even comes into play, we must first determine whether it is a "new rule" as contemplated by *Teague*. A rule is new when it "breaks new ground or imposes a *new obligation* on the States or the Federal government" or if it "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334. A rule is not new where precedents "inform, or even control or govern" but do not "compel" its creation. *Saffle v. Parks*, 494 U.S. 484, 491, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

Blakely does not impose any new obligations on the Federal government, instead it merely results in the abolition of the *guidelines* putting the federal courts and federal judges back to where they had always been and reinstating a sentencing regime which had existed since the founding of the Republic. No *new* obligations are imposed by *Blakely*, rather, the new obligations of the Sentencing Guidelines are swept away, and federal judges are put back in control of federal sentencing where the Constitution has always placed them - exercising the same authority in the same manner as had been exercised for two hundred years.

Because *Blakely* is not a new rule, it is applicable to a timely first habeas petition under 28 U.S.C. § 2255.

4. Alternatively, If *Blakely v. Washington* Is a "New Rule," it Should Be Accorded Retroactive Application Because it Is a Watershed Development and Requires the Observance of Procedures Implicit in the Concept of Ordered Liberty and as Such Is Retroactive under *Teague v. Lane.*

Conley argues in the alternative that *Blakely* meets the first criterion of retroactivity under *Teague v. Lane*, that its holding is "implicit in the concept of ordered liberty." Cf. *Apprendi v. New Jersey,* 530 U.S. 466, 499, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J., concurring) (absent *Apprendi's* rule jury trial right "has no intelligible content"); *Ring, supra,* at 610, 122 S.Ct. 2428 (Scalia, J., concurring) (*Apprendi* involves the fundamental meaning of the jury trial guarantee); *Blakely v. Washington, post*, --- U.S., at ----, 124 S.Ct. 2531, 2536 (tracing *Apprendi's* conception of the jury trial right back to Blackstone); *Duncan v. Louisiana,* 391 U.S. 145, 157-158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment jury trial guarantee is a "fundamental right"). Its rule also is "central to an accurate determination" of sentencing factors which increase a statutory maximum. *Teague, supra,* at 313, 109 S.Ct. 1060. This is because *Blakely* (from *Apprendi*) imposes a requirement of juror unanimity and proof beyond a reasonable doubt.

As we see in Conley's case - and it is by no means atypical of the Kafkaesque proceedings which routinely occurred under the federal Sentencing Guidelines - the scales tipped easily and readily in favor of the government's request for "enhancements" because nothing more than a preponderance of the evidence was required and that preponderance was decided by a single judge in the presence of the advocates in the midst of interruptions and argumentation. No better system has ever been devised than the jury and secret deliberations uninterrupted by lawyers' arguments with proof beyond and to the exclusion of every reasonable doubt which must be decided by unanimous verdict to reach an accurate verdict.

As Justice Stevens has pointed out:

> Juries - comprised as they are of a fair cross section of the community - are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano v. Florida,* 468 U.S. 447, 486-487, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Sevens, J., concurring in part

and dissenting in part) (footnote omitted).

The right to have jury sentencing as to factors which increase the statutory maximum is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an accurate assessment of sentencing factors and result in the appropriate punishment.

This Court itself told Conley and her supporters at sentencing that juries never make mistakes. That is a statement that has never been made about judicial decisions. This Court was correct. Juries do not make mistakes and they do not make mistakes because of the matrix of Constitutional protections which insure accurate verdicts.

Blakely satisfies both prongs of the retroactivity requirement of *Teague v. Lane* and as such is entitled to retroactive application to timely first petitions under 28 U.S.C. § 2255.[6]

Teague's basic purpose strongly favors retroactive application of *Blakely's* rule. *Teague's* retroactivity principles reflect the Court's effort to balance competing

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[6] The decision of the Eleventh Circuit in *In re Will C. Dean*, 2004 WL 1534788 (11th Cir. July 9, 2004), is not controlling of this decision. *Dean* decided only that the Supreme Court had not made *Blakely* retroactive for purposes of a *successive* 2255 petition. Supreme retroactivity is not required, of course, for a timely first 2255 petition.

considerations. See 489 U.S., at 309-313, 109 S.Ct. 1060; *Mackey v. United States,* 401 U.S. 667, 675, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in two judgments and dissenting in one); *Desist v. United States,* 394 U.S. 244, 256, 89 S.Ct. 1030 (1969) (Harlan, J., dissenting). On the one hand, interests related to certain of the Great Writ's basic objectives - protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures - favor applying a new procedural rule retroactively. *Teague, supra,* at 312-313, 109 S.Ct. 1060; *Mackey,* 401 U.S., at 693-694, 91 S.Ct. 1171. So too does the legal system's commitment to "equal justice" *i.e.,* to "assur[ing] a uniformity of ultimate treatment among prisoners." *Id.,* at 689, 91 S.Ct. 1171.

Consider, too, the law's commitment to uniformity. *Mackey, supra,* at 689, 91 S.Ct. 1171. Is treatment "uniform" when two offenders each have been sentenced to guideline sentences through the use of procedures that we now know violate the Constitution - but one is allowed to rot in prison while the other receives a new, constitutionally proper sentencing proceeding?

Certainly the ordinary citizen will not understand the difference nor will the prisoner. That citizen and that prisoner will simply witness two individuals, both

sentenced through the use of unconstitutional procedures, one individual serves out an unconstitutional sentence, the other perhaps returning home to her family, all through an accident of timing. How can any Court square such a result with the fundamental purpose of the Great Writ and a system of law based on reason and equal justice?

On the other hand, *Teague* recognizes that important interests argue against, and indeed generally forbid, retroactive application of new procedural rules. These interests include the "interest in insuring that there will at some point be the certainty that comes with an end to litigation;" the desirability of assuring that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community"; and the fact that society does not have endless resources to spend upon retrials, which (where witnesses have become unavailable and other evidence stale) may well produce unreliable results. *Mackey, supra,* at 690-691, 91 S.Ct. 1160 (internal quotation marks omitted); see also *Teague,* 489 U.S., at 308-310, 109 S.Ct. 1060.

None of these interests, however, support denying retroactive application of *Blakely*. Finality and an end to litigation would be hastened rather than delayed by

retroactive application of *Blakely*. Each inmate aggrieved by the federal sentencing guidelines would receive one final Constitutional resentencing. The focus would be on whether the inmate can be safely restored to the community not on technical absurdities. Finally, and most importantly, imagine the huge net benefit and savings of resources which would result from opening the prison doors to the thousands of federal inmates senselessly imprisoned for decades or life because mandated by the federal Sentencing Guidelines.[7] The vast majority of federal inmates are persons like Conley - convicted of non-violent offenses and suffering under guideline sentences that defy rational explanation serving only to embitter the inmate, her family and friends, to create disrespect for the federal judicial system, and needlessly burden the taxpayers with the costs of unnecessary incarceration.

It is not enough, and it is not right, to simply call a halt to the federal sentencing guidelines. Instead, the Courts - this Court - must go back and right the

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[7] The federal Bureau of Prisons webpage states that it is responsible for over 180,000 federal inmates. Of incarcerated inmates, *less than ten percent were convicted of crimes of violence*. BOP data suggests that it costs on average $22,176 per year to house a federal inmate. This amounts to almost Four Billion Dollars ($4,000,000,000.00) per year. There is no question but that it would result in a net savings of resources to apply *Blakely* retroactively, assuming that there was on average a reduction in sentence imposed under the *Blakely* resentencings.

wrongs that have been committed in the name of the guidelines. Persons such as Janice Conley who have been unconstitutionally deprived of their liberty have the right to be resentenced at a rational, fair and *Constitutional* sentencing proceeding.

There was much wrong and little right about the federal sentencing guidelines, but one concept that the guidelines paid lip service to deserves mention - acceptance of responsibility. Now is the time and this is the case for the Court to accept responsibility for the guidelines. The first small step in that direction would be to resentence Janice Conley to probation.

5. Conley is Entitled to Resentencing Without Application of the Sentencing Guidelines, or Alternatively, Without Application of Any Enhancement or Increase in the Base Offense Level Except as Was Determined Solely By the Jury Verdict, and if Resentenced Without Reference to the Guidelines, The Court Should Consider the Abolition of Parole in Determining Her Non-Guideline Sentence.

Because the federal Sentencing Guidelines are unconstitutional, this Court is obliged to sentence Conley according to the pre-1984 system with one exception. Plainly there is a problem with reinstituting an indeterminate system, when there is

no longer parole. Pre-SRA, judges imposed sentences on the understanding that the parole authorities would make careful judgments about who would be released and when. However, just as the courts that declared the Guidelines unconstitutional prior to *Mistretta* concluded, the elimination of parole was part of a comprehensive Guidelines system and itself not severable. *See United States v. Jackson,* 857 F.2d 1285, 1286 (9th Cir.1988)(*per curium*); *Gubiensio-Ortiz v. Kanhele,* 857 F.2d 1245, 1247 (9th Cir.1988). At the same time, since no parole system is currently in place, the Court must take that into account in determining sentence. The Court must assume that a defendant will serve virtually all of the term of imprisonment imposed.

In Conley's case she has already served over ten months in prison, having started service of her sentence on September 29, 2003. We submit that an appropriate sentence for this offense would have been probation prior to the federal guidelines. Conley, however, has already served ten months in prison. In light of that we would ask this Court to simply impose a sentence of time served.

If the Court were to determine that the unconstitutional portion of the guidelines were severable from the balance of the guidelines, then Conley's total offense level as determined solely by the jury verdict would be level six, which at

criminal history category I, would result in a sentencing range of 0-6 months, and have required no supervised release. Her fine range would have been $500-5,000. Similarly, under the constitutional portion of the guidelines, Conley would ask that the Court impose a sentence of six months and reduce her fine to $500.

6. Conley is Entitled to Bail Pending Resolution of This Petition.

In spite of the lack of specific statutory authorization, it is within the inherent power of a District Court of the United States to enlarge a state prisoner on bond pending hearing and decision on her application for a writ of habeas corpus. *United States ex rel. Thomas v. State of New Jersey*, 472 F.2d 735, 743 (3rd Cir.) cert. denied, 414 U.S. 878, 94 S.Ct. 121, 38 L.Ed.2d 123 (1973); *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955); *Goodman v. Ault*, 358 F.Supp. 743 (N.D.Ga.1973); *Jimenez v. Aristiguieta*, 314 F.2d 649 (5th Cir. 1963); Rule 23(d), Federal Rules of Appellate Procedure. The old Fifth Circuit observed that it probably is even within the power of a federal Magistrate Judge to release an inmate on bond pending decision on a federal habeas. *In re Wainwright,* 518 F.2d 173, 174 -175 (5th Cir. 1975).

The federal statute governing bail for persons accused of federal crimes, 18

U.S.C. § 3143 is inapplicable to a convicted defendant who is seeking postconviction relief, whether he is a state prisoner seeking federal habeas corpus under 28 U.S.C. §§ 2254, or, as here, a federal prisoner seeking relief under 28 U.S.C. §§ 2255. See *Ballou v. Commonwealth of Massachusetts,* 382 F.2d 292 (1st Cir.1967) (*per curiam*); *United States v. Dansker,* 561 F.2d 485 (3d Cir.1977) (*en banc*) (*per curiam*); 3A Wright, Federal Practice and Procedure: Crim. §§ 768, at p. 145 (2d ed. 1982); cf. *Baker v. Sard,* 420 F.2d 1342, 1343 (D.C.Cir.1969) (2-judge panel) (*per curiam*).

However, in this *Blakely* sentencing habeas, it might be useful to consider the result of an appeal bond motion under § 3143, had it applied. Section 3143 provides in pertinent part:

> (b) Release or detention pending appeal by the defendant.--(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds–
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in--
> (i) reversal,
> (ii) an order for a new trial,

> (iii) a sentence that does not include a term of imprisonment, or
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

The government did not ask for a warrant for Conley's arrest following her indictment but instead summonsed her to court. She was on an unsecured bond the entire duration of the criminal case and was allowed to voluntarily surrender for service of her sentence. Given that her maximum sentence under the *Blakely* version of the guidelines would have been six months and she has already served ten months, and is not a risk of flight or danger to the community, Conley would have been entitled to release on bail pending appeal of her sentence under the standard set forth in § 3143. Accordingly, we respectfully request this honorable Court release Conley on her own recognizance pending the decision of this petition.

CONCLUSION

Based on the foregoing arguments and citations of authority, JANICE L. CONLEY respectfully requests this Honorable Court grant the relief requested herein, that is, (1) release her on her own recognizance effective immediately, and (2) set her case for resentencing upon due notice, such resentencing to be without consideration of the sentencing guidelines, or alternatively, applying only the base offense level under 2F1.1, that is, level six, based solely on the jury verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been furnished to Assistant United States Attorneys Judy K. Hunt and Patricia Ann Willing, United States Attorney's Office, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, by United States Postal Service, first class postage, prepaid, this the ___ day of August, 2004.

_____

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