UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Appellee,

vs. **Appeal No. 04-50647**
District Court Docket Number 1:03-cr-129

JIM RICH
Appellant.
_____/

APPELLANT RICH'S MOTION FOR RELEASE PENDING APPEAL

COMES NOW JIM RICH, the Appellant herein, by and through his undersigned counsel, William Mallory Kent, pursuant to Rule 9(b), F.R.App. P., and Rule 9 of the Rules of the United States Court of Appeals for the Fifth Circuit, and requests this honorable Court release Appellant Rich pending the disposition of his appeal. In support hereof, Rich would state the following:

Appellant Rich was convicted at trial of seven counts in a white collar fraud case. The offenses were conspiracy to commit bank fraud in violation of 18 U.S.C. § 371, bank fraud, in violation of 18 U.S.C. § 1344, conspiracy to commit money laundering in violation of 18 U.S.C. § 1956 and money laundering in violation of 18 U.S.C. § 1957. Rich was sentenced to 60 months imprisonment and three years supervised release concurrent on all counts. Rich was sentenced on June 18, 2004, but was allowed to voluntarily surrender on or about September 7, 2004.

Rich filed a supplemental motion for release pending appeal with the district court on September 21, 2004 raising the same ground as is raised in this motion. Rich's motion for release was denied by the district court on October 19, 2004. True, correct and complete copies of the supplemental motion for release and the order denying the motion are hereunto annexed and by this reference made a part hereof.

An issue which will be presented on appeal is the constitutionality of the federal sentencing

guidelines in light of *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), and whether Rich is entitled to be resentenced without application of the guideline enhancements which were not alleged in the indictment and proved beyond a reasonable doubt to the jury which convicted him, or perhaps resentenced without application of the guidelines whatsoever.

As this Court is aware, 18 U.S.C. § 3143 provides in pertinent part that for an appellant in a criminal case to be released pending appeal he must show "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . . (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."

It is already law of the case based on the district court's Order dated August 5, 2004 [district court docket number 119] that Rich is neither a risk of flight nor a danger to the community.[1]

Therefore the only prong of the appeal bond statute that remains for Rich to satisfy this Court on is whether his appeal raises the "substantial question" likely to result in "a reduced sentence to a term of imprisonment less than the total of the time already served . . . "

We submit that the *Blakely* issue to be presented in this appeal satisfies this remaining prong under the prevailing standard of this Circuit. We acknowledge that this Circuit has held that *Blakely* does not apply to the federal sentencing guidelines. *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004). However, *Pineiro* does not foreclose an appeal bond based on *Blakely*, as will be discussed below.

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[1] Rich was the owner of an RV dealership who was alleged to have committed fraud in connection with the floor plan financing of the RV inventory at his dealership. He was released on conditions during his trial and allowed to voluntarily surrender after verdict and sentencing. He voluntarily surrendered in a timely manner.

In determining what is a substantial question, this Circuit has essentially adopted the Third Circuit's standard set forth in *United States v. Miller*, 733 F.2d 19 (3rd Cir. 1985), subject to the gloss of the Eleventh Circuit in *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985). *See United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985).

Under the governing standard, a "substantial question" is "one which is either novel, which has not been decided by controlling precedent, *or which is fairly doubtful*." *Miller*, 753 F.2d at 23 (emphasis supplied). Any of the three alternatives will satisfy the substantial question standard. Although the Fifth Circuit has controlling precedent on the issue, *i.e., Pineiro*, the ultimate outcome of the issue remains fairly doubtful - as was acknowledged by this Court in *Pineiro* itself.

> The Supreme Court might later decide that *Blakely* is broad enough to sweep away any distinction between the federal Guidelines and the statutes that the Court addressed in *Apprendi, Ring*, and *Blakely;* the peculiar nature of the Guidelines might not serve to save them from the fate of the statutes involved in those cases. *Cf. Blakely,* at 1249-50 (O'Connor, J., dissenting). Nonetheless, considering the entire matrix of Supreme Court and circuit precedent, we adhere to the position that the Guidelines do not establish maximum sentences for *Apprendi* purposes. In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response.

Pineiro, 377 F.3d at 473 (5th Cir. 2004).

The United States Supreme Court has granted certiorari and had oral argument on October 4, 2004 on two consolidated cases, *United States v. Booker*, 2004 WL 1713654, 73 USLW 3073 (2004) and *United States v. Fanfan*, 2004 WL 1713655, 73 USLW 3073 (2004), to decide the *Blakely* issue as it applies to the federal sentencing guidelines - an issue which has split the circuits. The Seventh and Ninth Circuits have held that *Blakely* applies to the guidelines. The Seventh Circuit determined that the guidelines were unconstitutional based on *Blakely*. *United States v. Booker*, 375 U.S. 508 (7th Cir. 2004). The Ninth Circuit held that guideline enhancements beyond the minimum base level for the offense were unconstitutional under *Blakely*. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). The Second Circuit, *en banc*, certified the question to the Supreme Court in *United States v. Peneranda*, 375 F.3d 238 (2nd Cir. 2004). *See also United States v. Montgomery*, 2004 WL 1636960 (8th Cir. 2004) (vacating a decision holding the guidelines unconstitutional pending rehearing *en banc*). The Fourth and Sixth Circuits have decided to continue to apply the federal guidelines post-*Blakely*. *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004); *United States v. Koch*, 2004 WL 1899930 (6th Cir. 2004) (*en banc*), as has the Eleventh Circuit, *United States v. Reese*, 2004 WL 1946076 (11th Cir. 2004).

Commentators who were present of who have reviewed the transcript of the oral arugment of *Booker* and *Fanfan* have been unanimous in the conclusion that the five member *Blakely* majority has held together and intends to strike down the federal guidelines, in whole or in part. *See Transcript of Oral Argument, United States v. Booker* and *United States v. Fanfan*, Supreme Court, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-104.pdf, October 4,

2004.[2]

At this point it must be beyond dispute that *Blakely's* application to the federal sentencing guidelines presents - at a minimum - a fairly doubtful question, hence satisfying the appeal bond standard for this Circuit.

The very fact of the circuit split and the pending certiorari has been cited as a reason for concluding that an issue meets the test of a substantial question under § 3143(b). *United States v. Di Tullio,* 1988 WL 29316, *3 (E.D. Pa. 1988).

In its cautious rejection of *Blakely*, our siamese twin sister Eleventh Circuit stated:

> We acknowledge that two circuits have held that *Blakely* does apply to the Guidelines, and that it is very difficult to predict whether the Supreme Court will apply *Blakely* to the Guidelines, and, if it does, whether it will hold that the Guidelines fall in their entirety or only in part. In light of this instability, we recognize that district courts might deem it wise and appropriate to take protective steps in case the Guidelines are later found unconstitutional in whole or in part.

United States v. Reese, 382 F.3d 1308, 1312 (11th Cir. 2004).

Recently a respected Judge of the district from which this case arose, Judge Cardone, while acknowledging being bound by *Pineiro* noted that "[t]he Court in *Pineiro*, *see id.* At *1, *9, states that *the matter is far from resolved . . .* " and proceeded to offer its own careful and well-reasoned analysis of *Blakely* as it applies to the federal sentencing guidelines. Judge Cardone concluded that the guidelines are unconstitutional. *United States v. Chaparro*, 2004 WL 1946454, *1 (W.D. Texas 2004) (emphasis supplied).

Appeal bonds are being granted under *Blakely* in other circuits. *Cf. United States v. Lagiglio*,

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[2] Counsel for Rich submitted the oral argument transcript to the district court as supplemental authority [lower court docket number 149], but this filing crossed in the mail with the court's order denying the motion [lower court docket 147].

2004 WL 1718653 (N.D. Ill. 2004); *see also United States v. Castro*, 2004 WL 1945346 (9th Cir. 2004) (allowing district courts the option to reconsider sentences and grant bail pending appeal under *Blakely*).

Rich's case is a classic *Blakely* example. Rich's PSR held him accountable for factors that arguably had not been proved at trial. The government itself stated in its "*Response to Defendant's Objections to the Pre-Sentence Report*" served on trial counsel for Rich May 27, 2004:

> The defendant is correct that the United States did not have Mr. Wright explain in detail the computerized figures which were used to achieve that total . . . [$5,200,000] The reason the United States did not go into detail on these figures during trial was to avoid potentially confusing the jury with complicated financial figures that pertained to an issue unrelated to any issue the jury would have to answer with their verdict. The United States normally presents more detailed information regarding sentencing issues once the defendant's guilt has been determined by the jury since the jury does not assess punishment in a federal criminal trial. The presentation of detailed witness statements directed toward sentencing issues, therefore, would be irrelevant and a waste of time regarding factors which a jury may decide. The jury is not asked to determine whether a defendant is a manager, leader, or supervisor, or the amount of relevant conduct to be assessed a defendant. This determination is to be made in the second stage (punishment) through a process which involves the Probation officer making an independent review of the evidence (**not just that presented at trial**) and providing these findings to the Court. See Rule 32(a)(4) of the Federal Rules of Criminal Procedure. **The findings within the**

PSR are alone sufficient evidence for the Court to make its sentencing determinations unless the defendant offers evidence of the PSI's inaccuracy.

[Emphasis supplied]

The government's own statement summarizes the gravamen of the *Blakely* error in this case. Rich objected not only to the loss amount, he also objected to scoring for more than minimal planning and for role in the offense. Rich went from a base level 6 on the fraud charges to a level 26 due to this process. On the money laundering Rich went from a base level 17 to level 26. At sentencing the level was reduced to 24, at Category II, for a range of 57 to 71 months, and Rich was sentenced to 60 months.

Although the bank fraud count was a class A felony for which probation is not a permitted option, the court could have sentenced Rich on all other counts to probation but for the application of the sentencing guidelines in this case, and as to the bank fraud count, the court could satisfy the statute by imposition of a sentence less than Rich has already served, followed by supervised release. Therefore, if Rich's *Blakely* issue is successful on appeal, as the argument at the Supreme Court in *Booker* and *Fanfan* suggests it will be, then he could be resentenced to a sentence less than the amount of time he has already served or will serve before this appeal is decided. Therefore, Rich is entitled to an appeal bond under § 3143(b).

Given the split in the circuits, that certiorari has been granted on *Booker* and *Fanfan* to resolve the *Blakely* federal guideline application issue, and given the Fifth Circuit's own reservations about its holding in *Pineiro*, we submit that the *Blakely* issue to be raised in Rich's appeal presents a substantial question as required under § 3143(b)(1)(B)(iii) or (iv). Should the guidelines be declared unconstitutional in *Booker* and *Fanfan*, Rich would be entitled to resentencing and could

be sentenced to a sentence of time served.

Accordingly, Rich respectfully requests this honorable Court reestablish his prior conditions of release pending the appeal of his judgment and sentence in this case.

Respectfully submitted,

THE LAW OFFICE OF
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by United States mail, postage prepaid, addressed to Joseph H. Gay, Jr., Assistant United States Attorney, Assistant United States Attorney, 601 NW Loop 410, Suite 600, San Antonio, Texas, 78216 and Elizabeth Cottingham, Assistant United States Attorney, 816 Congress Avenue, Suite 1000, Austin, Texas, 78701-2486 this the 28th day of October 2004.

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William Mallory Kent