

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 1:04-CR-165

vs.

Hon. Robert Holmes Bell
Chief Judge

WESLEY MYRON BOSS,

Defendant.

_____ /

GOVERNMENT'S RESPONSE TO DEFENDANT
WILLIAM MYRON BOSS' MOTION TO STRIKE
SENTENCING FACTORS FROM INDICTMENT

Now comes the United States of America, by its attorneys, Margaret M. Chiara, United States Attorney, and Thomas J. Gezon, Assistant United States Attorney, and hereby requests the court to defer ruling on the Defendant's Motion to Strike Sentence Guidelines Factors until the Supreme Court issues its opinion in the United States v. Booker, 125 S.Ct. 11; 2004 WL 1713654 (August 2, 2004) and United States vs. FanFan, 125 S.Ct. 12; 2004 WL 1713655 (August 2, 2004). These two cases directly address the constitutionality of the Federal Sentencing Guidelines. The cases have been briefed and oral argument was held earlier this year. There is reason to believe that Booker and FanFan will be decided before the scheduled trial date of April 18, 2005.

The 83-Count Indictment contains a list of relevant sentencing factor enhancements following each count of the Indictment. It is the policy of the Department of Justice that, in an abundance of caution, and in order to provide notice to the defendant, sentencing factors should be listed in Indictments, until the uncertainty caused by the opinion in Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) is resolved by the Supreme Court.

Discussion

The defendant correctly notes that the recent Supreme Court case of Blakely, which invalidated a Washington State sentence guideline structure, has thrown the issue of the validity of the Federal Sentencing Guidelines into doubt. However, since Blakely, several Circuit Courts, including the Sixth Circuit, have held that the Guidelines are valid unless and until the Supreme Court rules to the contrary. US vs. Koch, 838 F.3d 436, 438-39 (6th Cir. 2004). The Government concedes that under Koch, the Indictment sentencing factors are unnecessary. However, because federal criminal practitioners and the courts cannot predict how the Supreme Court will rule on the issue, the Government urges the court to hold the defendant's Motion to Strike Sentencing Factors in abeyance, until the Supreme Court rules on the constitutionality of the Federal Sentencing Guidelines. United States vs. Booker, 125 S.Ct. 11; 2004 WL 1713654 (August 2, 2004); United States vs. FanFan, 125 S.Ct. 12; 2004 WL 1713655 (August 2, 2004) (briefs and oral arguments completed). The next session of the Supreme Court begins on January 11, 2005, well before the scheduled trial date of April 18, 2005. If the court rules on the issue in the January session, the parties will have time to brief the issue prior to trial.

Therefore, the Government urges the court to delay ruling on the defendant's Motion to Strike Sentencing Factors until January 30, 2005, to allow time for the Supreme Court's Opinion in Booker and FanFan to be issued and to allow the parties to brief the issue, following the release of the opinion in the aforementioned cases.

Respectfully submitted,

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United States Attorney

Dated: December 23, 2004

/s/ Thomas J. Gezon
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