

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	CR. NO. 89-1234
	)	
,	)	
	)	
Defendant.	)	

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MOTION TO AMEND 28 U.S.C. § 2255 MOTION

Defendant \_\_\_\_\_, through undersigned counsel, hereby respectfully moves to amend his Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, filed on January 24, 2000. The government filed its response to the motion on June 2, 2000, and defendant filed a reply on January 22, 2001. Mr.

\_\_\_\_\_ seeks to add the claim that his sentence is illegal under Blakely v. Washington, 2004 WL 1402697 (June 24, 2004).

This Court should grant this motion to amend for two reasons. First, although the D.C. Circuit has interpreted Fed. R. Civ. P. 15(c) to prohibit amendments to § 2255 motions based on new legal claims, see United States v. Hicks, 283 F.3d 380, 288-89 (D.C. Cir. 2002), that interpretation of Rule 15 is unduly restrictive and inconsistent with the application of Rule 15 in civil proceedings. See United States v. Ellzey, 324 F.3d 521, 526-27 (7<sup>th</sup> Cir. 2003) (Rule 15(c) allows § 2255 amendments articulating new legal theory to challenge same sentence, recognizing circuit split with Hicks and other cases). The D.C. Circuit should change its interpretation of that rule to allow the amendment of a § 2255 pleading outside the limitations period when the new claim "relates back" to the "conduct, transaction, or occurrence," interpreted to include "the supposedly unlawful sentence," Ellzey, 324 F.3d at 526, not a particular legal claim. Second, this Court should grant the motion

to amend because Mr. \_\_\_\_\_ has up to one year from the decision in Blakely, or until June 24, 2005, to file a claim based on that decision pursuant to § 2255(3). That section permits the filing of a claim based on a right "newly recognized" by the Supreme Court up to one year from the date that right is recognized, if that right is "made retroactively available to cases on collateral review." 28 U.S.C. § 2255(3). As explained below, Blakely recognizes a new rule that this Court should hold has retroactive application to cases on collateral review. See United States v. Dodd, 365 F.3d 1273, 1278 (11<sup>th</sup> Cir. 2004) ("every circuit to consider [the] issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255(3)").

The Supreme Court in Blakely explained that "the 'statutory maximum' for [Apprendi v. New Jersey, 530 U.S. 466 (2000)] 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." Blakely, *id.* at \*4 (emphasis in original). The Court's definition of the "statutory maximum" sentence in Blakely is not limited to the maximum sentence identified by the legislature in a criminal statute. Instead, the sentencing court is limited to the highest sentence authorized by facts found by the jury or admitted by the defendant at a plea hearing, whether those facts may be sentencing factors or the elements of the crime listed by the legislature, and whether the maximum sentence may be stated in sentencing guidelines or in a statute. Blakely applies to the U.S. Sentencing Guidelines for the same reasons it applies to the Washington State guidelines. See, e.g., United States v. Gonzalez, 2004 WL 1444872 (S.D.N.Y. June 28, 2004); United States v. Croxford, 2004 WL 1462111 (D. Utah June 29, 2004); United States v. Shamblin, 2004 WL 1468561 (S.D.W.

Va. June 30, 2004).

Blakely was not dictated by precedent, and thus represents a new constitutional rule of criminal procedure under Teague v. Lane, 489 U.S. 288, 299-301 (1989), which this Court should apply retroactively under Teague. In Teague, the Court recognized the general principle that new procedural rules are not applied retroactively to cases on collateral review, but identified an exception for "watershed" decisions critical to the fundamental fairness and accuracy of the criminal process. 489 U.S. at 311. As the Supreme Court has clarified, this exception "give[s] retroactive effect to only a small set of \"watershed rules of criminal procedure\" implicating the fundamental fairness and accuracy of the criminal proceeding.' That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.' This class of rules is extremely narrow, and 'it is unlikely that any . . . "has yet to emerge."' Schriro v. Summerlin, 2004 WL 1402732, \*3 (June 24, 2004) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague, 489 U.S. at 311)) and Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001)) (emphasis in Summerlin).

In Summerlin, decided the same day as Blakely, the Supreme Court ruled that Ring v. Arizona, 536 U.S. 584 (2002), was not retroactively applicable to cases on collateral review. The Supreme Court in Ring applied Apprendi to require jury findings of aggravated facts supporting a death sentence, but the only issue in that case involved the identity of the factfinder, since the statute at issue there already required the judge to make findings of aggravated facts supporting death beyond a reasonable doubt. Ring, 536 U.S. at 597, 609. In turn, thus, Summerlin involved the finder of fact but not the standard of proof. Summerlin,

2004 WL 1402732 at \*2 n.1. Writing for the majority, Justice Scalia states in Summerlin that “[t]he right to jury trial is fundamental to our system of criminal procedure,” id. at \*7, and as the dissenting justices note, “[t]he majority does not deny that Ring meets the first criterion of Teague, that its holding is ‘implicit in the concept of ordered liberty.’” Id. The Court declined to find retroactivity instead on a secondary inquiry involving accuracy, explaining that the question was not whether juries or judges were more accurate finders of fact, but “whether judicial factfinding so ‘seriously diminishe[s]’ accuracy that there is an ‘impermissibly large risk’” of punishing conduct the law does not reach.” Summerlin, 2004 WL 1402732 at \*5 (quoting Teague, 312-13 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J. dissenting)). The Court found the evidence to be “simply too equivocal to support that conclusion.” Id.

In contrast to Ring, Blakely’s application to the federal Sentencing Guidelines requires jury findings beyond a reasonable doubt. The Supreme Court explained the crucial nature of this right in In re Winship:

The reasonable-doubt standard plays a vital rule in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . . “[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”

. . .

“There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due

process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

In re Winship, 397 U.S. 358, 363-64 (1970) (citations omitted). A defendant who exercises the right to jury trial is also protected by the right to confront witnesses, to remain silent, to compel the presence of witnesses and to present a defense, as well as evidentiary rights such as hearsay rules. If a defendant pleads guilty, proceedings under Fed. R. Crim. P. 11 require the court to obtain a waiver from the defendant of those rights explicitly—and in person. As recognized by the Court in Blakely, the right not to have one's maximum sentence substantially increased absent these protections is equally as crucial to liberty and due process as the right not to be convicted without such protections. Federal sentencing proceedings conducted without a reasonable-doubt standard of proof, and without the evidentiary and other rights granted at trial or at a plea hearing, are seriously lacking in those protections that serve to promote factual accuracy. See, e.g., United States v. Green, 2004 WL 1381101, \*33, \*35 (D. Mass June 18, 2004) ("Although the First Circuit has denied 'that the Apprendi rule can be characterized as a watershed rule of criminal procedure,' there can be little doubt that the requirement of proof beyond a reasonable doubt and the right to have a jury determine facts that expose a defendant to greater punishment are among the surest guarantees that an individual will not be deprived of her liberty in error" (citing United States v. Sepulveda, 330 F.3d 55, 60 (1<sup>st</sup> Cir. 2003)), also noting confrontation and other rights associated with jury trial). In contrast to the right to have a jury instead of a judge decide a particular fact, judicial factfinding by a preponderance

of the evidence, in many cases based on hearsay, "so 'seriously diminish[es]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." Summerlin, [ ] (citing Teague, 312-13, and Desist, 394 U.S. at 262). Accordingly, this Court should find that Blakely, in contrast to Ring, recognizes a new "watershed" rule of constitutional procedure applicable to cases pending on collateral review.<sup>1</sup>

Contrary to Blakely, Mr. \_\_\_\_\_'s sentence was enhanced on the basis of facts found by the sentencing judge instead of the jury. Following his direct appeal, Mr.

\_\_\_\_\_ was sentenced by Judge Norma Holloway Johnson in an extensive order of judgment and commitment and attached memorandum opinion, copies of which are attached to this motion.<sup>2</sup> On counts 2, 53, and 120, Judge Johnson found that Mr.

\_\_\_\_\_ was subject to an offense level of 38 and a criminal history category IV, for a range of 324 to 405 months. The court imposed sentence on those counts of 364 months' imprisonment on each count with the sentences to run concurrently, and also imposed several concurrent shorter sentences on other counts. Order of Judgment and Commitment at

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<sup>1</sup> Though this Court did not view Apprendi to be retroactively applicable to cases on collateral view, United States v. Latney, 131 F. Supp.2d 31, 31 (D.D.C. 2001) (Apprendi does not state new watershed rule); see also United States v. Walls, 215 F.Supp.2d 159, 163-64 (D.D.C. 2002) (same); but see United States v. Shark, 158 F. Supp.2d 43, 64 (D.D.C. 2001) (Apprendi states watershed new rule retroactively applicable on collateral review), aff'd on other grounds, 2003 WL 1823583 (D.C. Cir. March 26, 2003), cert. denied 124 S. Ct. 327 (2003), it should decline to extend that reasoning to Blakely, particularly in light of Summerlin, which recognizes that the right to jury trial implicates the fundamental fairness of the criminal process, leaving open only the question whether sentencing without a reasonable-doubt standard and other trial protections seriously diminishes accuracy.

<sup>2</sup> This sentence was affirmed on appeal except with respect to count 119. See United States v. Anderson, 1998 WL 794870 (D.C. Cir. October 28, 1998) (unpublished opinion).

1-3. In addition, the court imposed a consecutive 60-month sentence pursuant to 18 U.S.C. § 924(c). Id. at 4. The 364-month sentence on counts 2, 53 and 120 was based on drug quantity findings under U.S.S.G. § 2D1.1 and enhancements that included findings by the court that defendant sanctioned the use of violence and that he was an organizer or leader of more than five persons. Defendant disputed these findings, as well as his criminal history calculation, see attached Memorandum Opinion (December 4, 1997), and thus was clearly prejudiced by the failure to sentence him to the maximum sentence authorized by facts found by the jury, as required under Blakely.

CONCLUSION

For the reasons stated above, Mr.

respectfully requests that this Court permit him to amend his § 2255 motion with the claim that his sentence was unlawful because it exceeds the maximum sentence authorized by facts found by the jury, pursuant to Blakely v. Washington.

Respectfully submitted,

A.J. KRAMER  
FEDERAL PUBLIC DEFENDER

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Amend 28 U.S.C. § 2255 Motion was served by first class mail this 8<sup>th</sup> day of July, 2004, upon Robert D. Okun, Chief, Special Proceedings Section, United States Attorney's Office, 555 Fourth Street, N.W., Room 11-858, Washington, D.C. 20530.

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Beverly G. Dyer

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_)  
UNITED STATES OF AMERICA, )  
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Plaintiff, )  
v. ) CR. NO. 89-160-01 (TFH)  
 )  
 )  
Defendant. )  
\_\_\_\_\_)

ORDER

Upon consideration of defendant's motion to amend his 28 U.S.C. §  
2255 motion, it is this \_\_\_ day of \_\_\_\_\_, hereby

**ORDERED** that defendant's motion should be, and is hereby,  
GRANTED.

\_\_\_\_\_  
UNITED STATES DISTRICT COURT CHIEF JUDGE  
THOMAS F. HOGAN