IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEROME K. CROSS and
SASHA M. DENNIS,

Defendants.

REPORT AND
RECOMMENDATION

04-CR-112-C

REPORT

Before the court for report and recommendation is defendants' joint motion to strike the sentencing allegations from the indictment (dkt. 13). I am recommending that the court deny this motion. The bottom line is that the current law of this circuit requires the government to include sentencing allegations in its indictments even though it doesn't want to, and none of the defendant's counter-arguments are sufficiently persuasive to justify striking the allegations.

The grand jury's nine-count indictment charges Cross and Dennis with conspiring to traffic cocaine base and with actually distributing cocaine base. The conspiracy charge in Count 1 alleges that "this conspiracy involve[d] 50 grams or more of cocaine base." Dkt. 2 at 1. After the nine criminal charges, the indictment adds these two sentencing allegations:

> 1. With respect to each count of the Indictment, as to both defendants, total offense conduct involved at least 50 grams but less than 150 grams of cocaine base.

> 2. With respect to Count 8 as to both defendants, the defendants used a person less than 18 years of age to commit the offense.

Dkt. 2 at 4-5.

Defendants argue that this court should strike the two sentencing allegations for three reasons: 1) The allegations are prejudicial surplusage; 2) The government does not have statutory authority to include sentencing allegations in an indictment; and 3) Presenting sentencing allegations to a jury for proof beyond a reasonable doubt to increase defendants' sentences violates the constitutional principles of separation of powers and the prohibition against the legislative branch delegating its powers to the executive branch. The government demurs, noting that it has no choice but to include sentencing allegations in the indictment under the current law of this circuit. The government is correct.

Pursuant to *United States v. Booker*, 375 F.2d 508, 513 (7th Cir.), *cert. granted*, ___ U.S. ___, 2004 WL 1713654 (2004), criminal defendants have a Sixth Amendment right to have a jury determine beyond a reasonable doubt acts (such as drug amounts) that affect a defendant's guideline range, and hence his maximum sentence. The government disagrees with this ruling, but is bound by it unless and until the Supreme Court reverses it. Hopefully, the Supreme Court will issue its opinion in *Booker* before the end of the year, but we can't wait until then to determine how to handle this court's pending indictments.

As defendants note in their reply brief (dkt.30 at 2, n.1), so far three district courts have weighed in on this issue. In *United States v. Baert*, ___ F.Supp. 2d __, 2004 WL

2009275 (D.Me.), Judge Hornby held in a one paragraph opinion that until the Supreme Court rules otherwise, his interpretation of *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004) in *United States v. Fanfan*, ___ F.Supp. 2d ___ 2004 WL 1723114 (D.Me. 2004), *cert. granted,* ___ U.S. ___, 2004 WL 1713655(2004) (the companion case to *Booker*), requires the government to include sentencing allegations in its indictments. As Judge Hornby noted in *Fanfan*, absent a Supreme Court decision explaining to him why *Blakely* "does not mean exactly what it says," to apply federal guideline enhancements using facts not found by a jury "would unconstitutionally impinge upon Mr. Fanfan's Sixth Amendment right to a trial by jury." *Id.* at *5.

In *United States v. Brown*, ____ F.Supp. 2d ___, 2004 WL 1879949 (N.D. Ill. 2004), Judge Gettleman granted the defendant's motion to strike sentencing allegations from the indictment and forbade the government from proving up, either at trial or at a bifurcated sentencing hearing, any evidence of obstruction of justice. Judge Gettleman did not provide his rationale in his written order, but he *did* grant the government's motion to continue the trial until after the "expected expeditious rulings in *Booker* and *Fanfan*." *Id.* at *1.

In *United States v. Mulcher*, ___ F.Supp. 2d ___, 2004 WL 2004080 (S.D. Iowa 2004), Judge Pratt granted defendants' motion to strike four "aggravating factors" from the superseding indictment. While acknowledging the validity of government's fear that the defendants might receive a sentencing windfall depending on the ruling in *Booker*, the court determined that "the aggravating factors are not criminal conduct defined by Congress and,

as such have no place within the charging documents against the Defendants." *Id*. at *4, citing *United States v. Worrall,* 2 U.S. 384, (1798). Although the court found that the government's reference to Count One in each of the aggravating factors rendered the indictment "technically compliant" with F.R.Cr.P. 7(c), the factors were based on the U.S. Sentencing Guidelines which were not laws, but merely procedural rules for the court. Judge Pratt concluded that this was not sufficient authority to bring the allegations "properly before a trier of fact in a United States courtroom." *Id.* at *4. Absent an act of Congress establishing an aggravating factor as an element of an offense under the law, the court would not allow the jury to consider such allegations. *Id.* at *6.

The Seventh Circuit does not share this concern. It observed in *Booker* that if the facts the government would seek to establish at Booker's subsequent sentencing hearing were elements of a statutory offense, then those facts "would have to be alleged in the indictment" and would present a double jeopardy concern in his case; but it then ordered Booker's case remanded to the district court for a post-trial sentencing hearing "at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." *See* 375 F.3d at 514. This may be dicta, but it's a clear enough indication that the Seventh Circuit envisions federal prosecutors proceeding in exactly the manner employed in the instant case. *See also United States v. Shearer*, 379 F.3d 453, 456-57 (7th Cir. 2004)(case remanded for re-sentencing including a jury determination of factual issues that will increase the defendant's sentence).

Viewed pragmatically, unless the court stays all of its pending criminal trials, the most risk-free course of action is to continue the current practice of allowing sentencing allegations in the indictment and holding a bifurcated sentencing hearing. This minimizes the possibility of a double-jeopardy problem for the government while still allowing defendants a do-over if they are entitled to one after the *Booker* decision. This probably is enough of an analysis to support my recommendation to deny the motion to strike, but I will address briefly the three specific points argued by the defendants.

First, they contend that the sentencing allegations are prejudicial surplusage which must be stricken pursuant to F. R. Cr. P. 7(d). But as the government observes, the jury will not even learn of the sentencing allegations unless and until after it returns a guilty verdict. Evidence and argument relevant solely to the sentencing allegations will not be presented until the guilt phase of trial. Therefore, the sentencing allegations cannot possibly affect the trial on the criminal charges. In any event, in this particular case, most of the facts underlying the two sentencing allegations will be part of the government's evidence during the guilt phase of the trial; the only distinction is that the jury will not have to answer special verdict questions about them. First, the evidence regarding the amount of cocaine base involved is indisputably relevant to the case, not just to prove guilt, but to frame the applicable sentencing ranges pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Additionally, at least the identity and participation of the juvenile is relevant to prove up the criminal charges. Arguably, proving the juvenile's age during the guilt phase would be

irrelevant and perhaps prejudicial, but that's the extent of it. Pursuant to *Booker*, this court can reserve proof of this fact for the sentencing phase if justice requires it.

Second, defendants argue that F. R. Cr. P. 7(c)(1) does not allow the government to include sentencing allegations in an indictment because they cannot be considered "essential facts constituting the offense charged." The defendants' argument is a variation on the maxim "expressio unius, exclusio alterius est" which is palpably inapplicable to a Rule 7(c)(1) review of an indictment. Indeed, it is mildly ironic that defendants would make this request while simultaneously requesting a bill of particulars pursuant to Rule 7(f) asking the court to *require* the government to spell out in the indictment the basis for its claim that defendants trafficked more than 50 grams of cocaine base. As the government points out in response to both requests, Rule 7(c) does not require the government to do more than allege the "essential facts" constituting the offense, which customarily is thought of as the elements. But the grand jury often returns "speaking" indictments and no one would suppose that this runs afoul of Rule 7(c); in fact, defense attorneys usually complain that the grand jury doesn't return enough speaking indictments. *Cf. United States v. Webster* 125 F.3d 1024, 1030-31 (7th Cir. 1997)(court finds bankruptcy fraud indictment "minimally sufficient" despite lack of factual detail and asks "why the government filed such a scanty indictment.") Contrary to the Miesean aesthetic espoused by the defendants, in the case of indictments, more is more.

The more detail the grand jury provides in the indictment, the more information is available to the defendants about the government's theory of prosecution, and the more

tightly the government locks itself in at trial. The fact that the defendants do not want such "detail" in this case is irrelevant to the question whether such detail violates Rule 7(c)(1). Clearly, it does not. Additionally, as the government observes, if Booker is correct, then sentencing allegations may have become "essential facts" under Rule 7(c)(1) and the Sixth Amendment. Until the upper courts have sorted it all out, the best course is to leave the sentencing allegations in the indictment.

Third, the defendants contend that the practice of charging sentencing allegations in an indictment illegally confers legislative authority on the Sentencing Commission, a body of the judicial branch. *See* 28 U.S.C. § 991(a). Defendants' Brief in Support, Dkt. 13 at 6. Although *Booker* might change things, this premise currently is incorrect. The Sentencing Commission exercises power delegated to it by Congress; "in contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the guidelines as it sees fit either within the 180-day waiting period or at any time." *United States v. Booker*, 375 F.3d at 511, quoting *Mistretta v. United States*, 488 U.S. 361, 377, 393-94 (1989). Additionally, what *Booker* requires is that the petit jury find *facts* that might be used to increase a sentence. Obviously the jury does not actually impose a sentence, or even determine the exact fashion in which any found fact will be used. It simply separates the supportable allegations from those that cannot be proved beyond a reasonable doubt; the rest is up to the sentencing judge. This cannot be equated with the creation of new "elements" of criminal offenses by the Sentencing Commission; indeed, in a bifurcated

trial, the sentencing allegations don't even enter the mix until the jury has found the genuine elements beyond a reasonable doubt.

Finally, the Supreme Court already has rebuffed a challenge to the sentencing guidelines under the nondelegation doctrine. *See Mistretta*, 488 U.S. at 396. Defendants seem to concede as much, but circle back to their argument that pursuant to *Blakely* and *Booker*, the Sentencing Commission now has the authority to define the elements of crime. This may turn out to be correct, but not until the Supreme Court says so. Until the Supreme Court decides *Booker*, the best way to protect both sides' interest in federal criminal prosecutions is to continue with the court's current practice. If it turns out that Cross and Dennis are correct, or if the guidelines are stricken for some other reason, then the court always can hold a new sentencing hearing.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), and for the reasons stated above, I recommend that this court deny defendants' joint motion to strike the sentencing allegations from the indictment.

Entered this 1st day of October, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge