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

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHAWNDALE JAMISON,

Defendant.

REPORT AND RECOMMENDATION

04-CR-133-S

REPORT

Before the court for report and recommendation is defendant Shawndale Jamison's motion to strike the sentencing allegation from the indictment (dkt. 35) and motion to disclose sentencing allegation instructions provided to the grand jury (dkt 20).[1] For the reasons stated below, I am recommending that the court deny both motions.

Dkt. 35: Motion To Strike Surplusage

The grand jury's four count indictment charges Jamison with four sales of cocaine base. After the criminal charges, the indictment adds as a sentencing allegation that "Shawndale Jamison's total offense conduct involved at least 3 but less than 4 grams of cocaine base." Dkt. 6 at 2. Three grams of cocaine base increase the guideline imprisonment range by about three years.

---

[1] Jamison has withdrawn his other two grand jury motions, dkts. 19 and 21. *See* October 4, 2004 letter of Attorney Delyea in the correspondence file.

Jamison has moved to strike the allegation on four grounds: 1) It is prejudicial surplusage; 2) The government does not have statutory authority to include sentencing allegations in an indictment; 3) Presenting sentencing allegations to a jury for proof beyond a reasonable doubt to increase a defendant's sentences violates the constitutional principles of separation of powers and the prohibition against the legislative branch delegating its powers to the executive branch; and, 4) It violates due process for the court to jerry-build a bifurcated sentencing procedure. I have rejected the first three arguments in several recent reports and recommendations and I see no reason to change course at this time. The fourth argument is new but unpersuasive.

Pursuant to *United States v. Booker*, 375 F.2d 508, 513 (7th Cir.), *cert. granted*, ___ U.S. ___, 2004 WL 1713654 (2004), the Sixth Amendment provides criminal defendants the right to have a jury determine beyond a reasonable doubt all facts (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.

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 granted 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 points argued by Jamison.

First, he contends that the sentencing allegation is prejudicial surplusage which must be stricken pursuant to F. R. Cr. P. 7(d). If this were true, then the jury need not learn of the sentencing allegation until after it returns a guilty verdict. Evidence and argument relevant solely to the sentencing allegation will not be presented during the guilt phase of trial. Therefore, the sentencing allegation could not possibly affect the trial on the criminal charges.

In Jamison's case, the facts underlying the sentencing allegation necessarily will be part of the government's evidence during the guilt phase of the trial. Thus, this is a case in which including the sentencing allegation during the guilt phase could not unfairly prejudice the defendant. Indeed, by virtue of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), juries often are *required* to consider evidence about the amount of drugs involved then answer a special verdict question on precisely this issue. Although three grams of crack do not trigger *Apprendi*, this still is a case in which it could make sense to incorporate the cascading special verdict question militated by *Booker* into the guilt phase verdict form in place of more usual *Apprendi* "Yes or No" special verdict question. In any event, Jamison is crying wolf when he claims he will be unfairly prejudiced by letting the jury decide during the guilt phase whether he trafficked less than four grams of crack.

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

The Supreme Court already has rebuffed a challenge to the sentencing guidelines under the nondelegation doctrine. *See Mistretta*, 488 U.S. at 396. Jamison contends 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 Jamison is correct, or if the guidelines are stricken for some other reason, then the court always can hold a new sentencing hearing.

Third, Jamison argues 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." This 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. Rule 7(c) does not require the government to do more than allege the "essential facts" constituting the offense, which customarily are 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 detail and asks "why the government filed such a scanty indictment.") Contrary to the Miesian aesthetic espoused by Jamison, in the case of indictments, more is more.

The more detail the grand jury provides in the indictment, the more information is available to defendants about the government's theory of prosecution, and the more tightly the government locks itself in at trial. The fact that Jamison does not want this much detail in *his* indictment 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 correctly decided at the circuit level, 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 for a trial court is to leave the sentencing allegations in the indictment.

Fourth, Jamison argues that this court has no power to empanel a sentencing jury, citing to *United States v. Jackson*, 390 U.S. 570 (1968). Observations made by the Court in *Jackson* might appear to support Jamison's position, but ultimately it is distinguishable because the Court's was keenly focused on when and how to impose the death penalty. In *Jackson*, the United States appealed a federal district court's finding that the federal kidnaping statute was unconstitutional because of the manner in which it allowed a jury to impose the death penalty. The Supreme Court found the death penalty section of the statute was unconstitutional but severable, so it discarded it and upheld the rest of the statute. *Id.* at 591. In so doing, the Court reproached the government for its attempts to rescue the death penalty by hypothesizing a Rube Goldberg procedure by which a judge, after a bench trial or a guilty plea, would convene a jury "for the sole purpose of deciding whether the accused should live or die." *Id.* at 577. The Court was equally unimpressed with the government's alternate suggestion that district courts be forbidden from accepting guilty pleas or holding bench trials in kidnaping cases, thereby insuring that all kidnaping defendants faced a potential death penalty upon conviction. *Id.* at 584-85.

Here, the court is not calling a special jury solely to impose a penalty, nor is it creating new procedures out of whole cloth in order to expose defendants to higher penalties.

Instead, the court is employing time-tested practices to impanel one jury and assign it two tasks: 1) Determine whether the government has proved the elements of the charged offenses beyond a reasonable doubt; and, 2) Determine whether the government has proved specific facts relevant to sentencing beyond a reasonable doubt. For both phases the court, attorneys and jury will use the same rules of evidence and procedure, and the same jury instructions on evidence, burden of proof and unanimity. Indeed, in some cases–including perhaps this one–the two phases can be combined into one proceeding without prejudicing the defendant.

Do the Federal Rules of Criminal Procedure specifically provide for this bifurcated procedure? No. Does that mean courts cannot employ this procedure? No. In fact, as stated above, the Court of Appeals for the Seventh Circuit has directed district courts to hold sentencing hearings with juries. Apart from this new procedure being the law of the circuit–at least for now–it has the intent and effect of providing criminal defendants with strong procedural safeguards against higher sentences based on insufficient facts.

Procedural technicalities sometimes provide windfalls for savvy lawyers and their clients, so Jamison's arguments are well taken up to a point and might have prevailed absent the Seventh Circuit's unequivocal embrace of sentencing hearings. But even if this court were writing on a blank slate, there is nothing unfair about allowing a jury to determine whether the government has proved beyond a reasonable doubt facts relevant to sentencing. Indeed, this procedure provides defendants with more protection from high sentences than they've ever had, pre- or post-Guidelines.

Jamison's attorney demurs in his reply brief, citing to some cool Latin legal maxims as support for his claim that the court's jury-rigged foray into sentencing trials is unfair because counsel cannot possibly provide effective assistance when there are no announced rules of the game. If this were a croquet match in Wonderland then counsel might have a point. But as noted just above, this court employs at its sentencing trials the same tried-and-true precepts of Anglo-American jurisprudence that it uses during the guilt phase of criminal trials. These practices should be comfortingly familiar to defense attorneys and they impose punctilious procedures and the highest burden of proof on the government. Therefore, both *jus* and *ars* are known and certain. This is particularly true in a simple case where the only sentencing allegation involves a drug quantity. Civil and criminal juries successfully have answered special verdict questions of this nature for centuries without offending the due process clause; a jury certainly will be able to do so in Jamison's case. Perhaps, as Jamison claims, there still are some torpedoes in the bay and the Seventh Circuit has not issued final orders, but this court will proceed full speed ahead, hopefully with the same success as Adm. Farragut.

In sum, this court should deny Jamison's motion to strike the sentencing allegations from the indictment.

Dkt. 20: Motion To Disclose Instructions to the Grand Jury

Jamison's motion to disclose grand jury instructions hinges on his claim that it is improper to include sentencing allegations in the indictment. Even if Jamison were correct, the court probably could provide sufficient relief simply by striking the sentencing allegation without looking into grand jury matters, but that question is moot, at least for the time being. If the court accepts my recommendation to deny Jamison's motion to strike, then the instant motion falls with it. Pursuant to 28 U.S.C. § 636(b)(1)(A), such a motion could be disposed of without a report and recommendation but I am including it because it is inextricably intertwined with Jamison's motion to strike.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), and for the reasons stated above, I recommend that this court deny defendant Shawndale Jamison's motion to strike the sentencing allegation and motion to disclose the grand jury instructions.

Entered this 21st day of October, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge