UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF

UNITED STATES OF AMERICA,	:	
v.	:	**Docket No.**
JOHN DOE,	:	
Defendant.	:	

DEFENDANT'S SUPPLEMENTAL SENTENCING MEMORANDUM
ADDRESSING ISSUES RAISED BY *BLAKELY v. WASHINGTON*

John Doe is scheduled to be sentenced by this Court on Monday, July 26, 2004, at 1:30 p.m., following his pleas of guilty to one count of "possessing [on or about February 8, 1999,] a computer disk or any other material that contained images of child pornography, that were transported in interstate commerce by means of a computer," in violation of 18 U.S.C. § 2252A(a)(5)(B). At sentencing, this Court will be called on by the Sentencing Reform Act to select a sentence that is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to accomplish the various legitimate purposes of sentencing.

This Court will also be called upon to determine the sentencing range resulting from a proper application of the United States Sentencing Guidelines. *Id.* § 3553(a)(4). Although the defendant did not previously object to the Presentence Investigation Report's calculation of the Guideline office level applicable to his case, the Supreme Court's June 24, 2004, decision in *Blakely v. Washington,* 542 U.S. --, 2004 WL

1402697 (2004), calls into question the offense level as determined by the PSI.

In *Blakely*, the Supreme Court held the Washington State sentencing guidelines system unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution, based upon the Court's application of the rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as elaborated in *Ring v. Arizona*, 536 U.S. 584 (2002). *Blakely* extends *Apprendi* to all determinate sentencing schemes involving judicial factfinding; under 18 U.S.C. § 3553(b), the federal Sentencing Reform Act and guidelines are such a scheme.

Blakely involved a Washington state defendant who pled guilty to kidnapping his estranged wife. Under Washington's Sentencing Reform Act, the court in that case was required to impose a sentence within the "standard range," 49 to 53 months, unless it found "substantial and compelling reasons to justify an exceptional sentence." The court in that case found such a reason, to wit, that the defendant had acted with "deliberate cruelty," and then imposed 90 months' imprisonment – 37 months above the top of the "standard range," but within the kidnapping statute's ten-year statutory maximum.

The Supreme Court found that this sentence violated Blakely's Sixth Amendment right to have a jury determine any fact that increases the penalty for a crime beyond the "prescribed statutory maximum." The Court held that by "statutory maximum," for these purposes, it meant

the highest sentence that the governing *sentencing* law permitted the judge to impose based solely on facts admitted by a defendant during the plea proceedings or found by a jury beyond a reasonable doubt:

> [T]he "statutory maximum" for *Apprendi* 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.* See *Ring, supra,* at 602 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483)); *Harris v. United States,* 536 U.S. 545, 563 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra,* § 87, at 55, and the judge exceeds his proper authority

2004 WL 1402697, at 6.

Blakely changes the way the Guidelines must be applied. Once the applicable offense guideline is selected based on the offense of conviction, *see* USSG §§ 1B1.1(a) and 1B1.2, the base offense level and any adjustments to it must now be determined on the basis of "relevant conduct," *see* § 1B1.3, but only to the extent consistent with the Supreme Court's holding in *Blakely.* That means that in addition to meeting the precise requirements of § 1B1.3 for relevant conduct, any base offense level or upward adjustment to it must also be supported by facts admitted by the defendant as part of his guilty plea, or found by a jury to have been proved beyond a reasonable doubt. The District Court

for the Southern District of West Virginia followed this approach in a thorough and thoughtful memorandum opinion and order granting a defendant's motion pursuant to Fed.R.Crim.P. 35(a) to correct a sentencing in light of *Blakely.* See *United States v. Shamblin,* 2004 WL 1468561 (S.D.W.Va. June 30, 2004).[1]

After *Blakely,* Mr. Doe's offense level continues to be Level 15, as determined by the PSI, PSI ¶ 22, because that level is selected solely upon the fact of conviction for violating § 2252A(a)(5)(B). None of the upward adjustments recommended by the PSI may be applied, however. As detailed in the following discussion, not one of those adjustments has a factual basis admitted by the plea and its attendant agreement and colloquy. (Nor were these facts pleaded in the indictment.) Since his adjusted offense level is now Level 15, he is entitled to only a two-level downward adjustment pursuant to USSG § 3E1.1(a) for acceptance of responsibility. His Total Offense Level is therefore Level 13:

Base Offense Level: Because Mr. Doe pled guilty to violating 18 U.S.C. § 2252A(a)(5)(B), the appropriate offense guideline is USSG § 2G2.4, as found by the PSI. PSI ¶ 22. Mr. Doe's base offense level is therefore Level 15.

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[1] This memorandum opinion and order is attached to this motion. Not all Courts have taken Judge Goodwin's approach, however. In *United States v. Croxford,* 2004 WL 1462111 (D. Utah June 29, 2004), for example, Judge Cassell of the District of Utah held that *Blakely* required the Court to find the Guidelines unconstitutional. In *Shamblin,* Judge Goodwin considered this drastic approach, but rejected it as unnecessary and therefore inappropriate. See *Shamblin,* 2004 WL 1468561, *8 n.11. This Court should do so as well.

Specific Offense Characteristics: The PSI found that two specific offense characteristics applied to this case:

1. a two-level adjustment pursuant to § 2G2.4(b)(2), "[b]ecause the defendant possessed 10 or more visual depictions of minors." PSI ¶ 23.
2. a two-level adjustment pursuant to § 2G2.4(b)(3), "[b]ecause the defendant utilized a computer to possess the visual depictions." PSI ¶ 24.

Under the rationale of *Blakely*, neither of these adjustments is applicable to the defendant in this case, because as part of his guilty plea Mr. Doe did not admit to the facts necessary to support them. The indictment charged Mr. Doe with possessing *two* visual depictions of minors, and that is all Mr. Doe admitted to as part of his plea. *See* Plea Agreement ¶ 5. Since Mr. Doe never admitted to possessing 10 or more visual depictions, under the rationale of *Blakely*, the two-level adjustment provided by USSG § 2G2.4(b)(2) is not applicable in this case.

The two-level adjustment provided by § 2G2.4(b)(3) is applicable "[i]f the defendant's possession of the material resulted from the defendant's use of a computer." The indictment charged only that the images Mr. Doe possessed "were transported in interstate commerce by means of a computer." Mr. Doe admitted to no more in his plea agreement. Plea Agmt. ¶ 5 (tracking language of indictment). Because Mr. Doe did not admit that his possession resulted from *his* "use of a computer," as required by the guideline provision, the two-level adjustment provided by § 2G2.4(b)(3) is not applicable to his case, either.

The adjusted offense level is therefore Level 15, not level 19, as suggested by the PSI. PSI ¶ 29. Because the adjusted offense level is less than Level 16, Mr. Doe is then entitled to a two-level (as opposed to a three-level) downward adjustment for acceptance of responsibility under USSG § 3E1.1(a). His Total Offense Level is therefore Level 13 (15 – 2 = 13), not Level 16, as suggested by the PSI. PSI ¶ 31.

Because Criminal History Category I applied, the sentencing range prior to departures is 13-18 months. For the reasons discussed in the defendant's previously-filed motion for downward departure, as well as for the reasons that will be presented at sentencing and in another departure motion that will be filed prior to sentencing, this Court should impose a sentence that is substantially lower than the bottom of this otherwise applicable range.

Respectfully submitted,
LAW OFFICES OF ALAN ELLIS

Date: July __, 2004

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