UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v. 03 CR 1369(LAK)

ERNEST ROBERTS,

Defendant.

----------x

New York, N.Y.
July 9, 2004
10:30 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

DAVID N. KELLEY
United States Attorney for the
Southern District of New York
CELESTE KOELEVELD
GLENN COLTON
Assistant United States Attorneys

LEONARD J. LEVENSON
Attorney for Defendant

Also present: Felix Santiago, Intern

* * *

THE COURT: All right. Well, I have given this a good deal of thought. Assisted by the submissions of the parties, I have concluded that the government's application to submit special interrogatories or special verdict to the jury -- for the purpose of having the jury make findings, notwithstanding the government's position that the U.S. sentencing guidelines are Constitutional as to whether the defendant obstructed justice, the number of guns involved in the offense of conviction, if indeed there is a conviction, and whether any of the guns is a semiautomatic weapon under U.S. Code 921(a)(30) -- should be denied and I do not intend to submit special interrogatories.

The argument makes the context clear. The Supreme Court in Blakely struck down the Washington state sentencing guidelines because in its view they violated Apprendi's holding that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

Now, the court in Blakely specifically indicated that it was not ruling as to the constitutionality of the U.S.

sentencing guidelines. The government contended in its amicus brief in Blakely that the U.S. guidelines are distinguishable from the Washington state guidelines are constitutional, notwithstanding Blakely, and that is still the government's

position.

We are therefore in a position where there are, as Mr. Levenson indicated, essentially three possibilities. The first is that the sentencing guidelines will be upheld as they now exist, in which case there would have be no need for findings by the jury on sentencing factors. Moreover, in that circumstance, we might find ourselves in the rather unusual and potentially troublesome situation of the jury having found in the defendant's favor on each of the sentencing factors or issues that the government wishes to have submitted, but having done so under a charge that would have required an answer favorable to the government to be made only based upon proof beyond a reasonable doubt and yet the enhancement would ultimately depend on a finding by the judge based on a preponderance of the evidence. In other words, if the guidelines were upheld and the jury has ruled for the defendant on a special verdict, the court could still enhance based on

findings by a preponderance -- just as it did in the guidelines era up until June 20, whatever it was, when Blakely came down in rare cases where it enhanced on the basis of acquitted conduct. Nonetheless, the anomaly that potentially invites is not particularly desirable.

The second possibility is that Blakely will be applied to the sentencing guidelines and the sentencing guidelines will be struck down in their entirety. If that were so, the special

verdict would be of no significance at all.

The third possibility is that Blakely will be applied to the sentencing guidelines but that the guidelines will not be struck down in their entirety. Rather it could be, as a theoretical matter, that the Supreme Court or Congress ultimately will require that any fact which might either alter the base offense level, by which I mean change it, in a way that will result in an upward adjustment of the base level, will have to be submitted to the jury with a request for a special verdict.

I assume for the sake of argument that I have discretion to submit a special verdict to the jury at least if I were to do so only after first taking a guilty verdict,

taking a verdict on liability. If I were to do that, there would be no possibility of contaminating the jury's verdict as to guilt or lack thereof by any consideration of sentencing factors. Indeed, in this case, although the world is changing day by day, this jury has no doubt not the slightest idea that if they were to return a guilty verdict, they might be asked to consider sentencing factors. That wouldn't be true in the future, but it is true today.

So if you were to bifurcate, this jury would approach guilt or lack thereof in a pristine pure environment. There could be no argument as to taint. So I do assume I have discretion to bifurcate and take a second and special verdict

with respect to sentencing. The question is whether I ought to do it in the exercise of discretion. The argument for doing it, it seems to me, is essentially that it is like chicken soup. It may not cure the cold but it isn't going to make it any worse. And who knows? In other words, the chances are that the special verdict ultimately would be meaningless anyway. But in the unlikely event that Blakely would be applied to strike down the sentencing guidelines and it would be applied to do so only in part, that is only with respect to

upward adjustments, then the special verdict might save the sentence.

Furthermore, this is a case in which it is extremely easy to submit. There are only three factual questions that the government wishes to have submitted. All of the evidence with respect to those three factors will have been received, if it has not been already, by the time the case is submitted on liability. All that would be required would be a second opportunity for both sides to argue their positions with respect to the enhancement factors to the jury and a second verdict.

On the other hand there is, it seems to me, an overwhelming argument against doing it. It seems to me that a sentencing scheme that would require jury findings on each and every fact that might result in an increase in the sentence above a base offense level in the guidelines is utterly

unworkable in 99 percent of the cases. It surely is not what Congress intended when it adopted the Sentencing Reform Act. It is not what the government wants, assuming the sentencing guidelines go down, and it has very little to recommend it.

I can't improve on what the government itself said to

the Supreme Court on this precise issue in seeking to have the Supreme Court uphold the Washington sentencing guidelines in part because of the doubt that a contrary ruling would shed on the federal sentencing guidelines. The brief submitted by Solicitor General said the following, and I will quote: "There would be significant administrative difficulties if the myriad of facts that enter into the guidelines calculations had to be found by juries beyond a reasonable doubt, and in federal cases, charged in indictments. Prosecutors would have to anticipate most guidelines adjustments and investigate the facts relevant to them before indicting, and juries would have to work through complex special verdict forms covering multiple issues.

"The number of special findings that might be required would be enormous. For example, the basic federal sentencing guideline for robbery requires more than a dozen different factual determinations about the details of the offense, such as whether the property of a financial institution or a post office was involved; whether a firearm was possessed, used, or discharged; whether people were injured and to what degree; and

how great a financial loss was involved. After those factual

findings are made, the guidelines require a half dozen or more determinations about the victim, such as whether the defendant knew or should have known that the victim was vulnerable. The guidelines then require another half dozen or so determinations about the defendant's role in the offense, such as whether he played a supervisory or leadership role, and, if so, to what degree, and whether the defendant abused a position of trust or used the special skill in committing or concealing the offense. Further factual determinations are also required, such as whether the defendant obstructed justice and whether he recklessly endangered someone in seeking to avoid arrest.

"Some of these finding would have to be made at a sentencing proceedings separate from the underlying trial because they involved conduct occurring or after trial, such as perjury. Indeed, in the federal system, reliance on postindictment conduct might have to be abandoned altogether since it is difficult to see how that conduct could be charged in the indictment. Even when bifurcated proceedings were not required by the nature of the facts involved, bifurcation might be thought advisable (even if not constitutionally required) out of fairness to the defendant. Otherwise, the jury's decision on guilt might be skewed by consideration of facts that bear only on the appropriate punishment. As this court

has noted, a defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved. But the proliferation of bifurcated proceedings would impede the efficient use of judicial resources.

"Other problems would also arise. Jurors might engage in compromise verdicts or nullification in an effort to control the sentence, even if they were not told of the sentencing consequences of their actions. And appellate review of guidelines determinations would be Sharply restricted, thus deriving the system of the 'greater degree of consistency in sentencing' that appeals can produce."

Now, as I say, not each and every one of those factors is present in this case. But at the end of the day, it seems to me that to have a system in which special verdicts would be taken on sentencing factors in simple cases but not in complicated cases is just exceptionally unfair, exceptionally undesirable and certainly not something that any policymaker to date has indicated a willingness to adopt.

In consequence, I just feel that it would not be an appropriate exercise of my discretion to start down that road

by taking a special verdict in this case simply because it is a simple one and it isn't hard to do, and thus, in some way lend some credence to the notion. That sort of system -- against which the Solicitor General in my view quite rightly inveighed in the government's brief in Blakely -- might ultimately come

to pass but in my judgment it ultimately doesn't make sense and so I won't do it.

I hasten to add that I am not in anyway suggesting a view as to the constitutionality of the sentencing guidelines. If and when I deal with that, I will deal with that. For present purposes, I am simply saying that I will not exercise my discretion to take a special verdict in this criminal case against the possibility that the guidelines will be held unconstitutional and against the further contingency that might result in that special verdict saving a sentence in this one case. It is not worth it. So that is my ruling on that, folks.