04-0835-cr

To be Argued By:
MARK D. RUBINO

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United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-0835-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

TROY HAYES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF AND APPENDIX
FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

MARK D. RUBINO
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Burns, J.) after a jury found the defendant guilty of unlawful possession of ammunition. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant timely filed a notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to the judgment of conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES PRESENTED

I. Did the district court abuse its discretion in refusing to bifurcate the jury's consideration of the elements of the felon-in-possession-of-ammunition charge?

II. Did the district court violate the defendant's Sixth Amendment rights by imposing a sentence within a guideline range based in part on facts not proven beyond a reasonable doubt to the trial jury?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant was charged in an indictment with possessing with intent to distribute cocaine base in Count One, and with being a felon in possession of ammunition in Count Two. The district court held a bifurcated jury trial. After the government presented its evidence on Count One, the jury conducted its deliberations, which ultimately resulted in a hung jury. The government then

presented its evidence as to Count Two. The jury conducted its deliberations as to Count Two and returned a guilty verdict.

At sentencing, the district court determined that the defendant qualified as an Armed Career Criminal since he had three prior qualifying convictions. In addition, the court made a finding that the defendant possessed the ammunition in connection with a controlled substance offense, which resulted in a further enhancement under the Armed Career Criminal guidelines section. The district court then sentenced the defendant to a term of 262 months of imprisonment.

On appeal, defendant does not challenge the sufficiency of the evidence against him. Rather, defendant argues that the district court erred in denying his request to bifurcate the jury's consideration of the elements of the felon-in-possession-of-ammunition charge. Defendant maintains that the jury should have been advised of his prior felony conviction only after the jury made a preliminary finding that he possessed the ammunition.

Defendant further argues that his sentence violates the Sixth Amendment in that the facts used to enhance his sentence were not proven to a jury beyond a reasonable doubt. Specifically, defendant argues that his sentence should not have been enhanced based upon his prior convictions and that the court was precluded from applying an additional enhancement after making a finding that he possessed the ammunition in connection with a controlled substance offense.

For the reasons that follow, each contention is meritless, and this Court should affirm the defendant's conviction and sentence.

Statement of the Case

On August 15, 2001, a federal grand jury in Connecticut returned an indictment charging the defendant in Count One with possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii); and in Count Two with being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

On August 12, 2003, the jury was selected and advised of the nature of the charges against the defendant.

On August 21, 2003, after jury selection and before the start of evidence, the defendant filed a motion to bifurcate the elements of the offense in Count Two. Defendant's Appendix ("DA") 4. Defendant proposed to have the jury hear evidence of his prior felony conviction only after the jury made a finding that he possessed the ammunition. The government filed a response in opposition. DA 6.

On August 22, 2003, the district court denied the defendant's motion to bifurcate the elements of Count Two and adopted the government's suggestion to bifurcate the trial so that the jury would separately consider each of the offenses charged in Counts One and Two of the indictment. DA 22.

Trial commenced on August 26, 2003. The government presented its case to the jury regarding defendant's possession with intent to distribute cocaine base. The parties made their closing arguments to the jury at the end of the day on August 27, 2003. At 4:20 p.m., the jury retired to the deliberation room to commence its deliberations. Trial Transcript ("Tr.") at 215 (08/27/03). The jury was excused for the day at 5:05 p.m. *Id.* The jury resumed its deliberations on the morning of August 28, 2003. Later that day, the court declared a mistrial after the jury failed to reach a unanimous verdict.

On August 28, 2003, the government then proceeded with its evidence as to Count Two, which charged defendant with being a felon in possession of ammunition. The government concluded its case as to Count Two on August 29, 2003. The parties then made closing arguments to the jury. Toward the end of the day on August 29, 2003, the jury returned a verdict of guilty as to Count Two.

On January 29, 2004, the district court sentenced the defendant to 262 months of imprisonment, and entered judgment. DA 134. On February 3, 2004, the defendant filed a timely notice of appeal. The defendant is presently serving his sentence.

Statement of Facts

A. The Offense Conduct

On May 13, 2001, between approximately 10:30 p.m. and 11:00 p.m., Officers John Dupont and Kenneth Sullivan from the East Hartford Police Department were on foot patrol in the area of the Venus Lounge, which is a strip bar located on Main Street in East Hartford. Tr. at 14 (08/26/03). This location is in an area known for heavy narcotics activity, illegal drinking and prostitution. *Id.* While patrolling the parking area behind the Venus Lounge, Officer Dupont shone his flashlight into a black Jeep and observed a gun on the driver's floor of the vehicle. Tr. at 15 (08/26/03). Upon seeing the gun, he summoned Officer Sullivan, who also observed the gun. *Id.*

After the officers notified their supervisor, Sergeant John Egan, of the existence of the gun, the officers decided to wait for the owner of the vehicle to return so that they could inquire whether the owner had a permit and determine why the gun was left on the floor of the vehicle. Tr. at 17 (08/26/03). To that end, Officers Dupont, Sullivan, Egan and canine officer William Proulx stationed themselves at different locations near the Jeep. Tr. at 18-19 (08/26/03). Approximately twenty minutes later, defendant Troy Hayes entered the parking lot and walked toward the black Jeep. Tr. at 24 (08/26/03). Hayes then removed a set of keys from his pocket and motioned as if he was inserting a key into the driver's door locking mechanism. Tr. at 145 (08/26/03). Officer Proulx, who was positioned behind a dumpster only a few feet away

with his dog Dakota, identified himself as a police officer and ordered the defendant to show his hands. *Id.* Defendant failed to comply with Officer Proulx's command and immediately started backing up in a rapid manner. Tr. at 146 (08/26/03). At that point, Officer Proulx repeated his command that the defendant not back away any further. Tr. at 148 (08/26/03).

The defendant ignored the officer's commands, continued to back up and began reaching for his waist area. Tr. at 148 (08/26/03). When the defendant reached for his pockets, Officer Proulx feared the defendant might be reaching for a weapon, and instructed Dakota to engage the suspect. Tr. at 149 (08/26/03). Officers Proulx and Dupont observed the defendant remove a clear plastic baggy from his waist area and toss it to the ground. Tr. at 26, 148 (08/26/03). After Dakota engaged the defendant in the upper leg area, Officer Proulx attempted to subdue the defendant. Tr. at 149-50 (08/26/03). Defendant resisted by flailing his arms, and Dakota engaged the defendant again in the shoulder area. Tr. at 151-52 (08/26/03). Ultimately, the officers were able to subdue the defendant and place him in handcuffs. Tr. at 150-51 (08/26/03).

Immediately after the defendant was handcuffed, Officer Proulx picked up the clear plastic bag containing a hard cream-colored substance that Hayes discarded and handed it to Officer Dupont.[1] Tr. at 153 (08/26/03). A

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[1] On page 6 of the defendant's brief, he states that a "baggy" was found on the opposite side of the fence. This is (continued...)

search of the defendant's front pockets revealed a second clear plastic baggy containing a hard cream-colored substance and a third plastic baggy containing six 9 mm bullets. Tr. at 32-33 (08/26/03). In another pocket, Officer Dupont recovered $716 in U.S. currency. Tr. at 33 (08/26/03).

Using the defendant's key, Officer Dupont opened the door to the Jeep and took control of the Colt semi-automatic pistol on the floor. Tr. at 43 (08/26/03). The pistol was fully loaded and ready to fire, with one round in the chamber. *Id.* The bullets located in the pistol were the same type as those recovered from the defendant's pocket. Tr. at 31 (08/28/03). A total of 13 bullets were recovered, *i.e.*, 11 rounds of Remington-Peters ammunition and two rounds of Federal Cartridge ammunition. Tr. at 29-31 (08/28/03).

While the defendant was handcuffed and sitting on the ground, an individual known as Samuel Carter asked Officer Dupont what was going on with the defendant. Tr. at 64 (08/26/03). Officer Dupont asked Carter why he

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[1] (...continued)
not accurate and there is nothing in the record to support this statement. It appears that the defendant is confusing some of the facts in this case with those of another case that was pending against him at the same time. In *United States v. Troy Hayes*, Case No. 3:01CR203(EBB), the defendant was charged with possessing with intent to distribute a quantity of cocaine base that was contained in a plastic bag that the defendant had thrown over a fence while being pursued by law enforcement officers. The government dismissed this case after the defendant was convicted in the instant matter.

wanted to know. *Id.* At that point, defendant Hayes volunteered that he had driven Carter to the location. *Id.*

A laboratory analysis confirmed that the cream-colored substances contained cocaine base with a total net weight of 7.6 grams. Tr. at 207 (08/26/03). The investigation determined that the firearm had been stolen from the Colt Firearms factory in Hartford, Connecticut, in 1999. Although the gun had not traveled in interstate commerce, the ammunition had. According to the testimony of Special Agent John Fretts, the 11 rounds of Remington-Peters ammunition had been manufactured in Loanoke, Arkansas, Tr. at 30 (08/28/03), and the two rounds of Federal Cartridge ammunition had been manufactured in Anoka, Minnesota, Tr. at 34 (08/28/03).

Defendant, who has several prior felony convictions, stipulated to his status as a convicted felon during the trial. Tr. at 55-56 (08/29/03). During the presentation of the evidence on Count Two and after the government presented the testimony of Special Agent Fretts and Officer Dupont, government counsel read the stipulation into the record. The stipulation, identified as Government Exhibit 14, stated: "The United States of America and the Defendant, Troy Hayes, stipulate and agree that prior to May 13, 2001 Troy Hayes was convicted of a crime punishable by imprisonment for a term exceeding one year in Superior Court, Hartford, Connecticut." Tr. at 55 (08/29/03), Government's Appendix ("GA") at 1-2. The parties further stipulated at trial that the ammunition had been tested for fingerprints and that no latent prints suitable for identification had been recovered. Tr. at 56-57 (08/29/03).

B. The Sentencing

In the Presentence Investigation Report ("PSR"), the probation officer determined the defendant's base offense level to be 24 under U.S.S.G. § 2K2.1(a)(2), but found that a four-level increase was warranted under Section 2K2.1(b)(5) since defendant possessed the ammunition in connection with a drug trafficking offense. DA 25. This brought the defendant's adjusted offense level to 28. DA 25.

However, because the defendant had three qualifying prior convictions, subjecting him to enhanced penalties under 18 U.S.C. § 924(e)(1), the PSR recommended that he be sentenced as an Armed Career Criminal under U.S.S.G. § 4B1.4. DA 25-26. The probation officer also found that the defendant possessed the firearm in connection with a controlled substance offense, and set his offense level at 34 pursuant to Section 4B1.4(b)(3)(A). DA 26.

According to the defendant's criminal history computation, he had 14 criminal history points resulting from his prior convictions. DA 26-28. In addition, the PSR added two points pursuant to U.S.S.G. § 4A1.1(e) because the defendant committed the instant offense less than two years after his release from prison in November 1999. DA 28. This fact increased the defendant's total criminal history points to 16, resulting in a criminal history category of VI. DA 28. As an Armed Career Criminal, however, the defendant would have automatically been sentenced under criminal history category VI pursuant to Section 4B1.4(c)(2). DA 28.

With a total offense level of 34 and a criminal history category of VI, the defendant's sentencing guidelines range was 262 to 327 months. DA 32.

At sentencing, defendant argued that one of his prior convictions should not be counted toward his criminal history

since, according to the defendant, the conviction was vacated and reopened after the defendant violated his probation. Defendant maintained that, since the conviction was "re-opened," there was no final judgment. DA 74-83. The district court rejected this argument based upon a reading of the state court transcript which indicated that the judgment had been reopened for purposes of sentencing the defendant on a violation of probation. DA 83.

Further, defendant argued that he should not be sentenced as an Armed Career Criminal, contending that two of his prior sale of narcotics convictions were not "serious drug offenses" as defined in 18 U.S.C. § 924(e)(2)(A)(ii), because they were not punishable by imprisonment of ten years or more. DA 83-97. The court rejected this argument since the prior state court convictions carried a maximum sentence of 15 years of imprisonment. DA 91-92.

Lastly, defendant argued that he did not possess the ammunition in connection with a controlled substance offense. DA 98-108. The district court rejected the defendant's argument, finding that defendant did possess the ammunition in connection with a drug trafficking offense. DA 126. The court sentenced defendant to 262 months of imprisonment. DA 134.

SUMMARY OF ARGUMENT

I. This Court has held that a district court *cannot* commit reversible error when it denies a defendant's motion to bifurcate the elements of a felon-in-possession-of-ammunition charge. Since the existence of a prior felony conviction is an element of the offense, the defendant was not prejudiced by having the jury consider proof of that fact when considering the § 922(g) charge. Any prejudice that the defendant could conceivably have

suffered was only with respect to the drug charge, and that danger was eliminated when the court bifurcated the proof as to Counts One and Two.

II. The district court's application of the Armed Career Criminal sentencing guideline section under U.S.S.G. § 4B1.4, its finding that defendant possessed the ammunition in connection with another felony offense under U.S.S.G. § 4B1.4(b)(3)(A), and its attribution of 16 criminal history points under U.S.S.G. § 4A1.1 did not violate the defendant's Sixth Amendment rights. Under this Court's recent decision in *United States v. Mincey*, the proposition set forth in *Blakely v. Washington*, that facts which enhance a defendant's maximum possible sentence as to any particular count must be proven beyond a reasonable doubt to a jury, does not apply to the federal sentencing guidelines.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO BIFURCATE THE FELON-IN-POSSESSION CHARGE

A. GOVERNING LAW AND STANDARD OF REVIEW

In *United States v. Belk*, 346 F.3d 305 (2d Cir. 2003) this Court held that a district court cannot err when it refuses to bifurcate the elements of a § 922(g)(1) charge. In *Belk*, the defendant proposed to have the jury consider separately the questions of whether he was in possession of a firearm and whether he had previously been convicted of a felony. *Id*. at 307. Belk argued that bifurcation was necessary so that the jury would not be prejudiced by learning of his status as a convicted

felon before it addressed the sole disputed issue at trial, which was whether he possessed the firearm. *Id.*

The district court denied Belk's request, relying upon *United States v. Gilliam*, 994 F.2d 97 (2d Cir. 1993), in which this Court held that a district court cannot eliminate from the jury's consideration evidence of an element of the offense. 246 F.3d at 308. The district court in *Belk* reasoned that bifurcation, like the stipulation proposed in *Gilliam*, would improperly remove from the jury's consideration a critical element of the offense. *Id.* at 308-09.

On appeal, this Court affirmed. The Court reasoned that, because a "defendant's prior conviction in a § 922(g)(1) case -- when accompanied by a proper curative instruction and limited to the fact of the conviction itself -- is *by definition* not prejudicial, a district court cannot err by failing to take additional measures, such as bifurcation, intended to mitigate any asserted prejudice." *Id*. at 310 (emphasis in original).

Although the *Belk* court left open the possibility of bifurcation in some unforeseeable "extraordinarily unusual case," 346 F.3d at 311, it emphasized that a district court's refusal to allow such bifurcation is never error. *See id*. at 307 ("We hold that a district court *does not err* when it refuses to bifurcate a defendant's jury trial to provide for separate consideration of the elements of a felon-in-possession charge.") (emphasis added); *id.* at 310 ("Assuming that *Gilliam* does not go so far as to prohibit a District Court's bifurcation of the separate elements of a § 922(g)(1) charge, we think that *Gilliam* at least makes it clear that a district court's exercise of its discretion in refusing to bifurcate the elements of a § 922(g)(1) charge *is not* reversible error.") (emphasis added).

Many other circuits have held that a felon-in-possession trial cannot be bifurcated into a prior conviction element

and a possession element. *See, e.g., United States v. Clark*, 184 F.3d 858 (D.C. Cir. 1999) (rejecting a request for bifurcation on the grounds that the jury must be told all the elements of the crime in order to truly assess whether the defendant's conduct was unlawful); *United States v. Koskela*, 86 F.3d 122, 125-26 (8th Cir. 1996) (same); *United States v. Dean*, 76 F.3d 329, 332 (10th Cir. 1996) (same); *United States v. Jacobs*, 44 F.3d 1219, 1222 (3d Cir. 1995) (same); *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993), *reh'g denied and amended in part by* 20 F.3d 365 (9th Cir. 1994) (same); *United States v. Birdsong*, 982 F.2d 481, 482 (11th Cir. 1993) (same); *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989), *overruled on other grounds, United States v. Tavares*, 21 F.3d 1 (1st Cir. 1994) (same).

A district court's decision regarding bifurcation is generally reviewable for abuse of discretion, *see Belk*, 346 F.3d at 310, though by definition a court's refusal to bifurcate the elements of a § 922(g)(1) charge *is not* reversible error, *id.*

B. Discussion

The district court did not abuse its discretion in denying the defendant's motion to bifurcate the felon-in-possession charge.

This is a garden variety criminal case where defendant was arrested in possession of drugs, a gun, and ammunition. There was nothing unusual about the physical evidence or the witness testimony. The drugs and ammunition were found in the defendant's pants pockets, and the arresting officers were the principal government witnesses.

At trial, defendant was afforded all of the protections necessary to ensure that he received a fair trial. First, the government agreed to bifurcate the jury's consideration of Counts One and Two, which meant that the jury did not know that the defendant was a convicted felon when they were deliberating on whether to convict him of possessing with the intent to distribute cocaine base. Arguably, this strategy paid off for the defendant since the jury was unable to reach a unanimous verdict as to Count One, which resulted in the court declaring a mistrial.

During the presentation of the evidence as to Count Two, the government read into the record a stipulation that simply stated that the defendant had been convicted of a felony before the date he allegedly possessed the ammunition. GA 1-2. This stipulation contained no reference to the number or nature of the defendant's prior convictions. Moreover, review of the transcript of the government's closing argument demonstrates that government counsel made two, very brief references to the stipulation in the course of reviewing the government's proof as to each element of the offense. GA 3-5. Thus, there can be no claim that the government made any improper arguments to the jury regarding the purpose for which the jury could consider the defendant's prior felony conviction. Further, the court gave the jury a cautionary instruction during its final instructions, specifically instructing the jury that the stipulation as to the prior conviction was to be considered only for the fact that it exists, and for no other reason. GA 6-7.

Lastly, the jury was provided with a redacted copy of the indictment, again with no reference to the number or nature of the prior convictions. GA 8. Simply put, defendant fails to articulate how all of these safeguards did

not adequately protect him or how a jury might have reached a different conclusion had the elements of Count Two been bifurcated.

Defendant's argument is further undermined by the fact that possession was never a real issue at trial since several rounds of ammunition were found in the defendant's own pants pocket. Although defense counsel suggested to the jury that they ought to consider whether the arresting officer (Officer Dupont) was being truthful when he testified that he found the ammunition in the defendant's pockets, the defendant did not present any evidence disputing where the ammunition was located. Rather, as the trial transcript demonstrates, defense counsel spent the bulk of his time attempting to discredit the ATF agent's testimony that the 13 rounds of ammunition were manufactured outside the State of Connecticut, an argument that the jury obviously rejected. Tr. at 41-47 (08/28/03), Tr. at 3-14 (08/29/03).

In his brief, defendant argues that the quick verdict of guilty on Count Two means that the jury must have been prejudiced by evidence of his prior conviction since the only evidence admitted during the second phase of the trial was "entry of a stipulation as to a prior felony and testimony as to the effect on interstate commerce." Def. Brief at 10. First, defendant incorrectly summarizes the trial evidence. During the second phase of trial, the government also recalled Officer Dupont to testify once more regarding the location of the bullets. Tr. at 46 (08/29/03). This was necessary since, during cross-examination of the ATF agent who was testifying as to the interstate commerce element, defense counsel noted that the ATF agent's (Special Agent Fretts) report indicated that he was asked to examined 13 rounds of ammunition that were found in the defendant's

car.[1] Tr. at 41 (08/28/03). This was an obvious error in the ATF report. In fact, Special Agent Fretts testified that it was not accurate since his review of the seizing officer's report indicated that six rounds of ammunition were seized from the defendant's pocket and seven were found in the gun on the floor of the vehicle, and that he never spoke to anyone from the East Hartford Police Department about the case. Tr. at 24 (08/29/03). When recalled to the stand, Officer Dupont testified that he likewise never spoke to anyone from ATF regarding the evidence in the case, and that he did indeed find six bullets in a plastic bag in the defendant's pocket and that the balance of the bullets were found in the gun which was located on the floor of the defendant's vehicle. Tr. at 47 (08/29/03).

Moreover, a more plausible explanation for the swift verdict was the fact that there was absolutely no evidence to contradict Officer Dupont's testimony that he found the ammunition in the defendant's pocket, and there was no issue as to the interstate commerce nexus.

In sum, there was nothing "extraordinarily unusual" about this case. The defendant's rights were more than adequately protected as to Count One by bifurcating consideration of the § 922(g)(1) charge, and as to Count Two by limiting the government's evidence regarding the prior conviction to a redacted stipulation that made no mention of the number or nature of the underlying convictions. Accordingly, the district court's refusal to

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[1] The record indicates that the summary of evidence contained in Special Agent Fretts' report likely came from a cover letter from the U.S. Attorney's Office, and not from any law enforcement reports. Tr. at 26 (08/29/03).

bifurcate the elements of Count Two was well-grounded in fact and law and should be affirmed.

II. THE DISTRICT COURT'S SENTENCE DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT

The defendant claims that the district court's sentence violated his rights under the Sixth Amendment because it was based on facts not found by the jury beyond a reasonable doubt. Specifically, he relies upon the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court improperly (1) applied a four-level enhancement for possession of ammunition in connection with another felony offense, under U.S.S.G. § 2K2.1(b)(5), (2) attributed 16 criminal history points to him by virtue of his prior convictions (14 points) and the fact that he committed the instant offense less than two years after having been released from prison (2 points), and (3) sentenced him as an Armed Career Criminal under U.S.S.G. § 4B1.4 based upon three qualifying prior convictions. The defendant claims that, under *Blakely*, he has a constitutional right to have the four-level enhancement, the criminal history points, and the prior convictions established by facts which are proven to a jury under the reasonable doubt standard.

This Court's recent decision in *United States v. Mincey*, No. 03-1419L, 2004 WL 1794717 (2d Cir. Aug. 12, 2004) (per curiam), is directly on point. In *Mincey*, this Court decided that it would not apply *Blakely* to the federal sentencing guidelines, so that enhancements and departures provided for under the guidelines need not be proven to a jury beyond a reasonable doubt. Specifically, the Court stated:

> We therefore reject appellants' arguments that, in this Circuit, the Sixth Amendment now requires every enhancement factor that increases a Guidelines range to

> be pleaded and proved to a jury beyond a reasonable doubt. Unless and until the Supreme Court rules otherwise, the law in this Circuit remains as stated in *Garcia, Thomas,* and our other related case law. We conclude that the district court did not err in sentencing defendants in accordance with the Guidelines as previously interpreted by this Court.
>
> In so holding, we expect that, until the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines.

The Supreme Court will address the issue squarely when it considers the appeals in *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105 during the October 2004 term. This Court, therefore, in accordance with its August 6, 2004 memorandum, should withhold the mandate in this case until after the Court's decision in the *Booker/Fanfan* cases and, depending on the outcome of those cases, permit either party to file supplemental petitions for rehearing in this case with appropriate briefing at that time.

It bears note, however, that a portion of the defendant's argument is directly undermined by the Court's decision in *Blakely*, even assuming *arguendo* that the holding applies to the federal sentencing guidelines. The defendant claims that the district court's attribution of 16 criminal history points and its finding that defendant qualified as an Armed Career Criminal based upon his prior convictions violated the principles set forth in *Blakely* because the facts giving rise to these criminal history points were not found by a jury beyond a reasonable doubt. *See* Def.'s Brief at 14-16. The Court's decision in *Blakely*, however, explicitly exempts criminal convictions from its purview. *See Blakely*, 124 S. Ct. at 2536. In doing so, the Court

continues to apply the principle set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "*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." *Id.* (emphasis added); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (holding that defendant's recidivism need not be treated as element of offense and can be determined by court at sentencing); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) ("[W]e read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related [factual] issues . . . [including] the 'who, what, when, and where' of a prior conviction"), *cert. denied*, 535 U.S. 1070 (2002); *Belk*, 346 F.3d at 307 n.1 (rejecting *Apprendi*-based challenge to Armed Career Criminal sentence, in reliance on *Santiago*).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 15, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

MARK D. RUBINO
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

GOVERNMENT'S APPENDIX

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ADDENDUM OF STATUTES AND GUIDELINES

18 U.S.C. § 922(g)(1)

(g) It shall be unlawful for any person–

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
to . . . possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 924(e)(1)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection–

(A) the term "serious drug offense" means--
(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or
(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one

year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

U.S.S.G. § 2K2.1. **Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

(a) Base Offense Level (Apply the Greatest):

(1) **26,** if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24,** if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22,** if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20,** if –

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);

5. **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30);

6. **14,** if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(d);

7. **12,** except as provided below; or

8. **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-7	add **2**
(B)	8-24	add **4**
(C)	25-99	add **6**
(D)	100-199	add **8**
(E)	200 or more	add **10.**

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved a destructive device, increase by **2** levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by **2** levels.

Provided, that the cumulative offense level determined above shall not exceed level **29.**

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted

commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply-

(A) §2X1.1 (Attempt, Solicitation or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

U.S.S.G. § 4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.

(f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of **3** points for this item. *Provided,* that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. § 4B1.4. <u>Armed Career Criminal</u>

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of

violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type describe din 26 U.S.C. § 5845(a)*; or

(B) 33, otherwise.*

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.