UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO. 04-20075-01
	*	
VERSUS	*	
	*	JUDGE MELANÇON
GREGORY JAMES CATON	*	MAGISTRATE JUDGE HILL

PREHEARING MEMORANDUM

NOW INTO COURT through the undersigned Assistant United States Attorney comes the United States of America who respectfully responds as follows:

This memorandum is in response to the minute entry issued November 16, 2005. The government first maintains that the defendant did not receive ineffective assistance of counsel at sentencing because his attorney failed to argue claims pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2000). As discussed in its original memorandum, the government maintains that at the time that the defendant was sentenced, Blakely was not applicable to the sentencing guidelines. In fact, at the time of the defendant's sentencing United States v. Pineiro, 377 F.3d 464 (5th Cir. July 24, 2004), specifically held that Blakely did not extend to the federal guidelines. This holding was altered on January 12, 2005 by United States v. Booker, 125 S.Ct. 738 (2005). However, the attorney cannot be faulted for failing to foresee the Booker decision.

The reasonableness of an attorney's actions under Strickland is determined by looking at what happened at the time of the counsel's actions. At the time of sentencing there was no reason for the defendant's attorney to raise Blakely. See Lockhart v. Fretwell, 113 S.Ct. 838, 844 (1993).

In one of the few cases in which the Fifth Circuit has found that an attorney was ineffective for failing to raise a case on appeal United States v. Williamson, 183 F.3d 458 (5th Cir. 1999), the Fifth Circuit held that controlling precedent should have been discovered and brought to the court's attention. Id. at 463. That situation is simply just not the case at bar. Counsel is not required to anticipate subsequent developments in the law. Lucas v. Johnson, 132 F.3d 1069, 1078 (5th Cir. 1998).

No court has held that the failure of an attorney to raise Blakely before Booker was decided constitutes ineffective assistance of counsel. Bevil Campbell v. United States, 108 Fed.Appx. 1, No. 02-2387 (1st Cir. Aug. 25, 2004) (unpublished); United States v. William Burgess, IV, 142 Fed.Appx. 232, No. 03-4234 (6th Cir. June 22, 205) (unpublished); United States v. David William Peer, 119 Fed.Appx. 216, No. 04-4138 (10th Cir. Dec. 15, 2004); United States v. Gerardo Mejia, No. 1:04-CR-15-02, 2005 WL 2899674 (W.D.Mich. Nov. 3, 2005); Robert A. Farmer v. United States, 1:04CV287, 1:02CR-61, 2005 WL 2811885 (E.D.Tenn. Oct. 26, 2005); Timothy Joseph Waeghe v. United States, 2:05-CV-115, 2005 WL 2156416 (W.D.Mich. Sept. 7, 2005); United States v. Ferrone Claiborne and Terrence Richardson, No. CRIM.

3:00CR383, 388 F.Supp.2d 676 (E.D.VA Aug. 10, 2005); Charles J. Schenecker v. United States, No. Civ. 05-0331-CV-W-NK, CRIM. 020268CRWNKL., 2005 WL 1861968 (W.D.Mo. Aug. 4, 2005); Ricardo Martinez v. United States, No. Civ.A. 04-CV-1510-WD, CRIM.A. 01-CR-301, 2005 WL 1847152 (D.Colo. July 29, 2005); Frank Mercado v. United States, No. 04 Civ. 10208RCC, 2005 WL 1705066 (S.D.N.Y. July 20, 2005).

Since the Booker decision there have been a plethora of "plain error" cases decided by the Fifth Circuit. A quick check in Westlaw indicates that close to 450 plain error Booker cases have been decided. Under the rationale presented by the defendant, in all those cases the defendants could file 2255s alleging exactly the same claim that the defendant has alleged and would be entitled to relief. On appeal if there had been an objection the standard of review would have been for harmless error whereas without an objection the review would been for plain error. Compare United States v. Mares, 402 F.3d 511 (5th Cir. 2005) with United States v. Pineiro, 410 F.3d 282, 286 (5th Cir. 2005).

As the case cited by the defendant, United States v. White, 371 F.2d 378 (WDNY May 31, 2005), the Court does have a wide discretion in the type of remedy that it can fashion. Pursuant to United States v. Morrison, 101 S.Ct. 665, 668 (1981), the remedy for a Sixth Amendment violation "should be tailored to the injury suffered and should not necessarily infringe on competing interests." In Davis v. Secretary for

the Department of Corrections, 341 F.3d 1310 (11th Cir. Aug. 15, 2003) the Eleventh Circuit did address how to analyze "the unusual claim that trial counsel failed to preserve an issue for appeal." The court indicated that the appropriate prejudice inquiry is whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved. In that case, the attorney had failed to preserve a Batson claim and, thus, the remedy was either to remand the case for a new trial or give him "an opportunity to take an out-of-time appeal wherein his free standing Batson challenge could be decided by the state courts on the merits." In granting the defendant an out-of-time appeal, this Court could fashion a remedy that would not infringe on competing interests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the above and foregoing has been faxed to Wayne Blanchard.

Signed and faxed this 17th day of November, 2005, in Shreveport, Louisiana.

CRISTINA WALKER
Assistant United States Attorney