

**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

**GREGORY JAMES CATON'S OBJECTIONS TO REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE**

NOW INTO COURT, through undersigned counsel, comes GREGORY JAMES CATON, (hereinafter "Caton") who respectfully makes the following objection to the Report and Recommendation of November 23, 2005 by the Honorable Magistrate Judge C. Michael Hill.

OBJECTION NO. 1 - The Magistrate's finding that Caton's district court counsel was not ineffective for failing to object to the application of the United States Sentencing Guidelines to his sentence after the United States Supreme Court decided *Blakely v. Washington*, 124 S.Ct. 2531 (2004) is incorrect under the facts of this case.

Caton objects to the Magistrate's conclusion denying the ineffectiveness claim against his district court counsel for failing to object at sentencing based on *Blakely*. The Magistrate finding stated that "petitioner has not demonstrated that his counsel's performance was objectively unreasonable or that he was prejudiced by his counsel's alleged inaction." (Report and Recommendation p. 27). Caton submits that due to the nature of the landmark decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and the subsequent circuit rulings such as *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 7-12-04) ([j]udicial findings under the Guidelines that set sentences within that [statutorily] authorized range ... do not offend the constitution) *Id.* at 473, *United States*

v. Booker, 375 F.3d 508, 515 (7th Cir. 7-9-04) and *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 7-21-04) (*Blakely* did apply to the Guidelines) that a challenge to the constitutionality of the United States Sentencing Guidelines should have been anticipated. Notably, by August 2, 2004, the United States Supreme Court had granted certiorari in *United States v. Booker/Fanfan* (case consolidated) 542 U.S. 956, 125 S.Ct. 11 (2004), and some twenty days later, on August 24, 2004 Caton was sentenced in this matter. Arguably, any prudent counsel similarly situated would have had ample time to consider filing objections to the application of the Guidelines to his client's sentence based on *Blakely* and the pending *Booker/Fanfan* outcome to preserve the issue for appeal.

At the hearing, when questioned by counsel for the government, Cristina Walker (hereinafter "Walker") Caton's district court attorney Lewis Unglesby stated the following:

Walker : And you agree that you don't specifically recall whether or not you discussed an appeal after sentencing?

Unglesby: I can't remember if we discussed it. I don't think we did. Maybe we did, but if we did it was only in the context of, well, we don't have to. I mean, you know, we're not communicating. I don't care what Greg Caton and his wife say today, I'm tell you when we walked out of this courtroom that day and he only got 33 months, we were sad that he was going to have to go to jail but he was very relieved that he got the least.

Walker: So would you agree that if there had been no discussion concerning an appeal after sentencing, it was because in the context of the case of him pleading guilty and getting a favorable sentence versus a long, drawn-out trial, then an appeal would not have been discussed?

Unglesby: There was nothing to appeal.

Walker: Would you agree with that in the context of the case?

Unglesby: Yeah. There was nothing to appeal. What am I going to appeal? The judge gave him the least. (Transcript of hearing, November 18, 2005, p. 26).

By Unglesby's own testimony, he felt that because Caton had been sentenced to 33 months, there would not have been any reason to file an appeal, even granting that the constitutionality of the United States Sentencing Guidelines had been called into question and the United States Supreme Court had granted cert on the issue.

The Magistrate's finding that Unglesby was not ineffective for failing to object to the application of the Guidelines to Caton's sentence and preserve the issue for appeal is contrary to what would have been legally prudent. At the time that Caton was sentenced with *Booker/Fanfan* was pending in the United States Supreme Court. By Unglesby's admission, there was no reason to file an appeal since Caton had gotten the "least." Because numerous pleas were entered into during the pendency of *Blakely* where defendants preserved for the record the constitutionality of the Guidelines, and Caton was not required as a condition of his guilty plea to waive any objections that he might potentially have had under *Blakely*, had an appeal been filed, it is reasonable to believe that his appeal would have been pending, allowing review for harmless error. Pursuant to Fifth Circuit jurisprudence, upon re-sentencing, conceivably Judge Melancon could determine whether or not he would re-sentence Caton under the same Guidelines scheme or consider the 18 U.S.C. § 3553(a) factors, and give a non Guidelines sentence of either more or less than the sentence given under a mandatory scheme. Having sentenced Caton to the low end of the mandatory Guidelines applicable to him, conceivably, Judge Melancon on re-sentencing would have given Caton, under an advisory scheme, a non-Guidelines sentence, less than the 33 months and Caton could have by now satisfied his term of imprisonment. Accordingly, the Magistrate's Report and Recommendation concluding that Caton's district court counsel was not ineffective for failing to object to the application of the United States Sentencing Guidelines to his sentence after *Blakely* and during the pendency of

Booker/Fanfan before the United States Supreme Court, is incorrect under the facts of this case. The district court should reverse the Dismissal With Prejudice and review the facts of this case and re-sentence Caton under an advisory Guidelines scheme.

RESPECTFULLY SUBMITTED,

REBECCA L. HUDSMITH
FEDERAL PUBLIC DEFENDER FOR THE
MIDDLE & WESTERN DISTRICTS OF LOUISIANA

By: _____
s/WAYNE J. BLANCHARD (LA 3113)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above OBJECTION TO REPORT AND RECOMMENDATION ON INEFFECTIVE ASSISTANCE OF COUNSEL has been served on the Honorable C. Michael Hill, United States Magistrate Judge, Western District of Louisiana, 800 Lafayette Street, Suite 3400, Lafayette, Louisiana, 70501, Ms. Cristina Walker, Assistant United States Attorney, 800 Lafayette Street, Suite 2200, Lafayette, Louisiana, 70501-6832, and Mr. Gregory James Caton, c/o Lafayette Parish Correctional Center, P.O. Box 2537, Lafayette, Louisiana, 70502 by first class United States mail with proper postage affixed.

Lafayette, Louisiana, this 7th day of December, 2005.

s/WAYNE J. BLANCHARD

