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U.S. COURTS

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12 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

13
14 UNITED STATES OF AMERICA)

15 vs.)

16 MITCHELL D. McBRIDE,)
KIMBERLY McBRIDE,)
17 DICK E. BUTCHER,)

18 Defendants.)
19 _____)

CASE NO. 04-064-S-EJL

GOVERNMENT'S RESPONSE
MEMORANDUM TO DEFENDANT'S
OBJECTION TO GOVERNMENT'S
PROPOSED SPECIAL VERDICT FORMS
AND JURY INSTRUCTION

20 The United States of America and Thomas E. Moss, United States Attorney for the District of
21 Idaho, through George W. Breitsameter, the undersigned Assistant United States Attorney, respectfully
22 file this memorandum regarding whether the United States Supreme Court's decision in *Blakely v.*
23 *Washington*, 124 S.Ct. 2531 (U.S. June 24, 2004), or the Ninth Circuit's decision in *United States v.*
24 *Ameline*, No. 02-30326, slip op. (9th Cir. July 21, 2004), requires the United States to allege in the
25 indictment in this case any sentencing enhancements that it would seek to prove to a jury beyond a
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GOVERNMENT'S RESPONSE MEMORANDUM TO DEFENDANT'S OBJECTION TO
GOVERNMENT'S PROPOSED SPECIAL VERDICT FORMS AND JURY INSTRUCTION - 1

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1 reasonable doubt, as claimed by defendants Mitchell and Kimberly McBride. The United States
2 respectfully submits that the Ninth Circuit's opinion in *Ameline* implicitly found that sentencing
3 enhancements are not elements and, therefore, do not need to be alleged in the indictment.

4 5 PROCEDURAL BACKGROUND

6 1. Status of Case

7 On March 11, 2004, a federal grand jury returned a sixty-one count indictment charging
8 defendants Dick Butcher, Mitch and Kimberly McBride with mail fraud and in violation of 18 U.S.C.
9 §§ 1341.

10 The indictment alleges that the defendants defrauded various individuals through pre-arranged
11 funeral services. Trial is scheduled to commence on August 9, 2004.

12 2. The Blakely and Ameline Decisions

13 On June 24, 2004, the Supreme Court issued its decision in *Blakely*, holding that "[o]ther than the
14 fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory
15 maximum must be submitted to a jury, and proved beyond a reasonable doubt." 124 S.Ct. at 2537. In
16 assessing whether the relevant "statutory maximum" was the 53-month statutory "standard range" set by
17 the Washington state determinate sentencing statute at issue in the case or the 10-year maximum penalty
18 for class B felonies, the Supreme Court concluded that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and
19 *Ring v. Arizona*, 536 U.S. 584 (2002), directed that "the 'statutory maximum' for *Apprendi* purposes is
20 the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict
21 or admitted by the defendant." *Blakely*, 124 S.Ct. at 2537. In *Blakely*, the Supreme Court expressly
22 stated that it was not offering an opinion on whether the federal sentencing guidelines suffered from the
23 same Sixth Amendment flaw as did the Washington state determinate sentencing statute.

24 In *Ameline*, the Ninth Circuit panel majority held that the federal sentencing guidelines were
25 indistinguishable from the sentencing scheme at issue in *Blakely* and held that the district court

1 committed plain error in determining sentencing enhancements. *Id.* at 13-27. The panel majority further
2 held that the guidelines were not unconstitutional as a whole and that if, on remand, the government still
3 sought an enhanced sentence, the district court could convene a sentencing jury to resolve factual disputes
4 that could result in that enhanced sentence. *Id.* at 33-34. The panel majority also held that its decision
5 to remand for resentencing did not violate double jeopardy. *Id.* at 35. “Unless the facts sought to be
6 proven by the government to enhance Ameline’s sentence constitute elements of a statutory offense
7 required to be alleged in the original indictment, the constitutional prohibition of double jeopardy would
8 not be implicated.” *Id.* at 35, 36. Finally, the panel majority indicated that, for a case pending trial, the
9 district court could bifurcate the guilt and penalty phases, convene a special sentencing jury, or present
10 the jury at the guilt phase with a special verdict form to find facts bearing on sentencing. *Id.* at 35 n.20.

11 12 ARGUMENT

13 1. The Ninth Circuit Decision in *Ameline* Does Not Require Sentencing Enhancements To 14 be Alleged in an Indictment

15 In *Apprendi*, the Supreme Court held that the threshold drug amounts of Title 21 were elements
16 that had to be charged in an indictment and proven beyond a reasonable doubt if the United States sought
17 an increased sentence based on the threshold drug amounts. 530 U.S. at 490; *see also United States v.*
18 *Buckland*, 277 F.3d 1173 (9th Cir. 2002) (*en banc*); *United States v. Jordan*, 291 F.3d 1091, 1096 (9th Cir.
19 2002). Those threshold drug amounts are specifically set forth in Title 21. Under *Apprendi*, *Buckland*
20 and *Ameline*, however, sentencing enhancements in the guidelines not separately set forth in a criminal
21 statute need not be alleged in an indictment.

22 First, in remanding for resentencing, the Ninth Circuit in *Ameline* implicitly distinguished
23 *Apprendi* and *Buckland*. The *Ameline* indictment was returned *pre-Blakely* and did not allege any
24 sentencing enhancements.

25 Second, in holding that remand for resentencing would not implicate double jeopardy concerns,
26 the Ninth Circuit explicitly stated that “unless the facts sought to be proven by the government to enhance

1 Ameline's sentence constitute elements of a statutory offense required to be alleged in the original
2 indictment, the constitutional prohibition of double jeopardy would not be implicated." In this case, any
3 of the applicable sentencing enhancements are not separately set forth in a criminal statute and do not
4 constitute elements of a statutory offense. For example, there are no threshold loss amounts in Title 18
5 for mail fraud establishing separate statutory penalties depending upon the amount involved in the
6 scheme to defraud. Rather, the sentencing enhancements operate within the statutory maximum. Based
7 on the distinction made by the Ninth Circuit in *Ameline*, binding upon this Court, although the United
8 States may be required to prove these sentencing enhancements to a jury beyond a reasonable doubt, they
9 need not be alleged in the indictment.

10 Finally, the Double Jeopardy clause would have prevented the remand authorized by *Ameline* if
11 the sentencing enhancements were offense elements. Stated differently, if sentencing enhancements were
12 elements of the offense, then *Ameline* would have been convicted of a lesser-included offense and a new
13 trial or a new sentencing on the previously uncharged greater offense would constitute double jeopardy.

14 2. Even if *Ameline* Required Sentencing Enhancements to be Alleged in the Indictment the
15 Indictment in This Case Sufficiently Alleges a Loss Amount of More than \$100,000

16 Even if the Ninth Circuit were to determine that sentencing enhancements must be alleged in an
17 indictment, the United States has done so in this case with respect to a loss amount of more than
18 \$180,000. Under Federal Rule of Criminal Procedure 7(c)(1), an indictment must be a "plain, concise,
19 and definite written statement of the essential facts constituting the offense charged." An indictment is
20 sufficient if it contains the elements of the crime charged in sufficient detail to inform the defendant of
21 the charge and to enable him to plead double jeopardy. *United States v. Buckley*, 689 F.2d 893, 896 (9th
22 Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983). In determining whether an indictment comports with
23 Rule 7(c)(1) and provides sufficient notice, an indictment must be read in its entirety and construed with
24 common sense and practicality. *United States v. Drew*, 722 F.2d 551, 552 (9th Cir. 1983), *cert. denied*,
25 467 U.S. 1216 (1984).

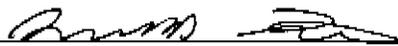
1 The indictment in this case alleges in paragraph 12, "the defendants received approximately
2 \$186,000.00 from approximately two hundred thirty-one (231) purchasers, which the defendants then and
3 there misapplied to their own personal use." Thus, the indictment specifically alleges that the defendants
4 conspired to defraud victims of more than \$180,000.00. In sum, the indictment, read in its entirety and
5 construed with common sense and practicality, sufficiently alleges that the amount of loss is greater than
6 \$180,000.00 and puts the defendant on notice of this loss amount.

7 3. Special Verdict Form and Jury Instructions for Loss Amount and More than Minimal
8 Planning

9 As the sentencing enhancements need not be alleged in the indictment and as a loss amount of
10 more than \$180,000.00 is alleged in the indictment, the United States will be prepared to present to the
11 jury evidence of the total fraud and has submitted a special verdict form to support this enhancement.

12 DATED this 6th day of August, 2004.

13 THOMAS E. MOSS
14 United States Attorney

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16 _____
17 George W. Breitsameter
18 Assistant United States Attorney
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CERTIFICATE OF SERVICE

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2 I HEREBY CERTIFY that on the 6 day of August, 2004, a copy of the foregoing
3 GOVERNMENT'S RESPONSE MEMORANDUM TO DEFENDANT'S OBJECTION TO
4 GOVERNMENT'S PROPOSED SPECIAL VERDICT FORMS AND JURY ISTRUCTIONS was served
5 by:

6 United States Mail, postage prepaid

7 Hand-delivery

8 Facsimile transmission (FAX)

9 Federal Express

10 upon the following person(s):

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