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MEMORANDUM

TO: FEDERAL DEFENDERS
FROM: STEVE WAX AND STEVE SADY
DATE: JANUARY 31, 2005

This memo is to circulate a letter brief we have put together on the requirement that reasonable doubt standard apply when, post-*Booker*, contested facts are alleged that would increase the advisory guideline range. We would appreciate feedback; we know more detailed briefing may well need to be filed in the future. We think it is important that defenders nationally be aware of the strength of this position and make consistent arguments.

A. *Booker* Is, By Its Terms, Strictly A Sixth Amendment Case

As held in *In re Winship*, 397 U.S. 358, 363-64 (1970), the reasonable doubt standard is derived from the Fifth Amendment's Due Process Clause. In *Winship*, the Supreme Court, in the context of a judge's determination of juvenile delinquency, held that the Due Process Clause requires that the juvenile's potential loss of liberty, even though no jury was involved, be preceded by a finding that the government has borne its burden of proving guilt beyond a reasonable doubt. 397 U.S. at 361-64.

In *Jones v. United States*, 526 U.S. 227 (1999), the Supreme Court foreshadowed the developments that led to *Booker*. In construing the carjacking statute to avoid constitutional doubt, the Court noted that, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact, other than prior conviction" that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Jones*, 526 U.S. at 243 n.6.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court built on *Jones* to discard distinctions between elements and sentencing factors to find that any fact (other than prior conviction) that increased the maximum sentence had to be proved to a jury beyond a reasonable doubt. *Apprendi* expressly referred back to the due process roots of the reasonable doubt requirement: "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or

innocence, but simply to the length of his sentence.” *Apprendi*, 530 U.S. at 484 (citation omitted).

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court, in its most explicit pronouncement on the issue, made clear that any “increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact -- no matter how the state labels it -- must be found by a jury beyond a reasonable doubt.” 536 U.S. at 602. The tandem treatment of jury trial and reasonable doubt was separated in *Summerlin v. Schriro*, 124 S. Ct. 2519 (2004), in which the Court held that *Ring* was not retroactive. Having found that the rights at stake were fundamental, the Court then had to consider whether the rule implicated “the fundamental fairness and accuracy of the criminal proceeding.” *Schriro*, 124 S. Ct. at 2524 (citing *Saffle v. Park*, 494 U.S. 484, 495 (1990) (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989)). Because the reasonable doubt standard protected the accuracy of the rulings, retroactive application was not necessary.

In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), the Court applied the jury trial and reasonable doubt holdings of *Apprendi* to state sentencing guidelines. 124 S. Ct. at 2536. This decision set the stage for a decision regarding the federal sentencing guidelines, which the Ninth Circuit indicated were implicated by *Blakely* in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

In *Booker*, the merits majority specified that the question was whether the Federal Sentencing Guidelines violated the Sixth Amendment. The *Booker* majority repeated, in the context of the right to have the jury find facts, that the facts must be “reflected in the jury verdict or admitted by the defendant.” *Booker* therefore left the precedent in place requiring proof beyond a reasonable doubt of factors increasing the offense level. The Court does not rule on issues not necessary to its decision. *Clark v. Martinez*, 2005 WL 50099, at *5 (U.S., Jan. 12, 2005).

B. Under The *Winship/Booker* Analysis, The Guidelines, Even If Advisory, Require Proof Beyond A Reasonable Doubt.

1. United States v. Siegelbaum

While not the holding of the case, Judge Panter’s recent decision in *United States v. Siegelbaum*, CR No. 02-179-PA (D.Or. Jan. 18, 2005), sets forth an analysis of *Booker* that fully supports the view that the reasonable doubt standard is applicable at least to the guidelines portion of sentencing.

As Judge Panter noted, “at least five Justices have said that sentence enhancements are of sufficient importance to warrant application of the reasonable doubt standard in some instances.” *United States v. Siegelbaum*, CR No. 02-179-PA, Opinion at 5-6 (D. Or. Jan. 18, 2005). Even if the guidelines are viewed as advisory or presumptive, they constitute legislatively defined facts that measurably increase the range of potential punishment. Because *Booker* only addressed the Sixth Amendment, the Fifth Amendment question of the reasonable-doubt standard, which derives from the Due Process Clause, remains under the guidelines. *Winship*, 397 U.S. at 363-64. “The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.” *Id.* at 363.

Judge Panner recognized the “second component to *Blakely/Booker*”: “Facts used to enhance a sentence, if not admitted, must be proven beyond a reasonable doubt rather than by a preponderance of the evidence.” *Supra* at 6. By citing to the Supreme Court cases finding *Winship* to apply retroactively, Judge Panner noted the critical importance of the high standard of proof where liberty is at stake. *Id.*

2. *The Doctrine Of Constitutional Avoidance Requires Use Of The Reasonable Doubt Standard.*

Because the sentencing statutes and rules do not set out a standard of proof for guideline enhancements, this Court need only assess whether the reasonable doubt question is a serious one. If so, the Court is required to apply the doctrine of constitutional avoidance to construe the sentencing statutes to require proof beyond a reasonable doubt as to contested facts. *Clark v. Martinez*, 2005 WL 50099, at *6 (U.S., Jan. 12, 2005). This is exactly what the Ninth Circuit did to insulate the federal drug statutes from unconstitutionality under *Apprendi*. *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc). Despite a generation of litigation construing quantity as a sentencing factor, the Court recognized the need to avoid constitutional questions and read into the statute a requirement of proof beyond a reasonable doubt to a jury.

The doctrine of constitutional avoidance is appropriate for the federal sentencing statutes and rules. Nothing in the statutes or even the guidelines forecloses a proof beyond a reasonable doubt requirement. In commentary to a policy statement, the Sentencing Commission stated it “believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements. . . .” U.S.S.G. § 6A1.3, comment. (¶ 3). As Justice Thomas pointed out in footnote 6 of his dissent in *Booker*, “the Court’s holding today corrects this mistaken belief.”

3. *Booker Left In Place All Guideline Factfinding Rules And Procedures*

Under the remedial portion of *Booker*, the reasonable doubt standard should be required. The Court left in place the legislatively established process of probation officer recommendation, the opportunity to object, and factual resolution by the court of criminal acts that would lead to legislative advice to the judge to impose a harsher sentence. The reasonable doubt standard is necessary to protect the liberty interests at risk under these circumstances. As in *Winship*, the reasonable doubt standard is a necessary concomitant of the presumption of innocence (*Winship*, 397 U.S. at 363) (reasonable doubt “standard provides concrete substance for the presumption of innocence”). It also protects the right against self-incrimination, which -- with a preponderance standard -- would necessarily be burdened by increased punishment where the defendant remains silent.

4. *Most Guideline Enhancements Involve Other Criminal Conduct The Use Of Which Should Require Proof Beyond A Reasonable Doubt Under The Booker Analysis*

Virtually all contested specific offense characteristics and upward adjustments involve separate criminal conduct. For example, additional drug transactions, as relevant conduct, are each separate crimes; aggravating factors involving greater harm during robbery, assaults, and sexual offenses are separate crimes; incidents of stealing, computed as additional relevant conduct loss in larceny and fraud cases, are all separate crimes. For each of these facts, the defendant, as he or she stands at sentencing, is both presumptively innocent and has a right against self-incrimination. *Mitchell v. United States*, 526 U.S. 314 (1999); *United States v. Antelope*, No. 03-30334 (9th Cir. Jan. 27, 2005) (Fifth Amendment covers any proceeding that could lead to “longer incarceration”) (citing *McKune v. Lile*, 536 U.S. 24, 52 (2002) (O’Connor, J., concurring)). The reasonable doubt standard is a necessary safeguard to assure that “longer incarceration” does not result from a prisoner’s exercise of self-incrimination rights at sentencing, leading to an unreliable result on a controverted issue by use of a preponderance standard.

Even non-criminal enhancements have analogies to situations requiring proof beyond a reasonable doubt. Criminal contempt, whether direct or indirect, requires proof beyond a reasonable doubt before subjecting the defendant to discretionary punishment. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 444 (1911). The Ninth Circuit recently noted that, where the court largely relied on out-of-court facts provided by deputy marshals, the alleged contemnor, who was also a fraud defendant, had rights -- including proof beyond a reasonable doubt -- regarding false statements allegedly made to secure counsel in the criminal case. *United States v. Glass*, 361 F.3d 580, 590 n.13 (9th Cir. 2004) (citing *F.J. Hanshaw Enterprises v. Emerald River Development*, 244 F.3d 1128, 1138-41 (9th Cir. 2001) (large money sanction for misbehavior in civil proceeding requires proof beyond a reasonable doubt)).

The case often cited for broad fact-gathering by the sentencing court has been impliedly overruled by *Ring* and can be read consistently with requiring reasonable doubt on controverted facts related to the scope of the offense. In *Williams v. New York*, 337 U.S. 241 (1949), the defendant was convicted of first degree murder, the jury recommended life, but the trial judge imposed death. Thus, it has been implicitly overruled by *Ring*, which required jury findings for a death sentence. However, even the text of the overruled opinion does not involve controverted facts related to the offense. In fact, the jury had already found all the elements of first degree murder beyond a reasonable doubt. Because the jury had already found the necessary facts for the death sentence, the court did not even need to address the question of harsher punishment based on facts not found beyond a reasonable doubt. The opinion largely dealt with the type of personal background information that is seldom controverted.

C. The Court Should Require The Reasonable Doubt Standard As A Matter Of Statutory Construction Or Judicial Discretion Rather Than Reach The Constitutional Merits.

It is a cardinal principle of statutory interpretation that, if there is a “serious doubt” as to a statute’s constitutionality, the Court must “first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)

(quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). “[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (*en banc*) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

In *Buckland*, the *en banc* Ninth Circuit addressed the effect of *Apprendi* on the federal narcotics trafficking statute -- 21 U.S.C. § 841. Previously, courts had uniformly interpreted this statute to allow drug quantity to be determined by a judge using a preponderance of the evidence standard. In the wake of *Apprendi*, the Court reexamined the statute seeking to avoid a finding that it was unconstitutional. *Buckland*, 289 F.3d at 564 (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems”) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

The survival of the reasonable doubt standard separate from the Sixth Amendment right to a jury trial raises just such a doubt. The concern is especially high because of the extreme personal interest in liberty, the danger of erroneous punishment under a lesser standard, and the constellation of constitutional rights at issue where unadjudicated criminal conduct results in a higher sentence. The reasonable doubt standard is included among the interests “of transcending value” that cannot be compromised. See *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

In *Martinez*, the Supreme Court emphasized that constitutional avoidance is not a ruling on the merits but an application of a statutory rule of construction. *Supra* at *6. The Court also emphasized that the rule depends upon the “least common denominator” -- or the application of the rule that brings the statute closest to unconstitutionality. *Id.* (citing *Leocal v. Ashcroft*, 1255 S. Ct. 377, 384 n.8 (2004)).

The district courts have already announced an array of approaches to *Booker*. These include at least two applications of the post-*Booker* guidelines that are virtually indistinguishable in practice from the pre-*Booker* guidelines, which were subject to departures under the *Koon* standards including encouraged circumstances. *Koon v. United States*, 518 U.S. 81, 94-95 (1996). One judge has announced his intention to treat the guidelines as mandatory. *United States v. Barkley*, No. 04-CR-119-H (N.D. Ok., Jan. 24, 2005); another has announced that heavy deference will be given to the sentencing guidelines (*United States v. Wilson*, No. 2:03-CR-00882 (D. Utah Jan. 13, 2005)).

Even the more advisory side of the spectrum, such as Judge Adelman in *United States v. Ranum*, No. 04-CR-31 (E.D. Wis. Jan. 19, 2005), implicates constitutional interests. The court will be considering a higher sentence based on a fact that usually involves criminal action that was not either admitted or adjudicated to a jury beyond a reasonable doubt. The defendant at sentencing, who controverts the fact, is presumptively innocent and supposedly protected by the right against self-incrimination. The Legislature intends a harsher punishment, which has unmistakably been communicated to the Judiciary, in the form of the demand for uniformity, which *Booker* duly acknowledged.

Under these circumstances, the Court should avoid the difficult constitutional question of whether the Constitution requires the reasonable doubt standard and should utilize proof beyond a reasonable doubt as a matter of statutory construction or judicial discretion. This result is not only compelled by law, but is good sentencing policy. The greater certainty of the reasonable doubt standard encourages confidence in the judicial system that only punishes based on facts proven to a high standard. The evil of the pre-*Booker* guidelines of the “tail wagging the dog” -- a conviction for a relatively minor amount of drugs resulting in a huge sentence based on transactions only provable by a preponderance -- will be a thing of the past. The reasonable doubt standard is essential to fair and accurate sentencing.