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Online Seminar On Cases Applying Ninth Circuit's Ruling in U.S. v. Ameline

On Friday, November 12, 2004, AFDA conducted an online presentation and chat discussion covering cases that have applied the Ninth Circuit's key decision in U.S. v. Ameline.

A complete reprint of the online presentation, including links to the 18 cited opinions, is set forth below. The chat discussion among defense attorneys which followed the online presentation is not reprinted below.

For a calendar of upcoming online seminars and chat discussions, click the ONLINE SEMINAR button on the left-hand side of your screen.

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Ameline Chat session: Friday, November 12, 2004

Good morning, and thank you for attending. I'm Greg Nicolaysen, from Los Angeles.

I welcome everyone to our online chat on court rulings in the 9th circuits that have applied U.S. v. Ameline, 376 F.3d 967 (9th Cir. Montana, July 21, 2004)

Here's a selected list of opinions showing (up through the end of October 2004) how courts within the Ninth Circuit have been applying Ameline.

After the conclusion of the summary below, the floor is open to discussion, so that we can share ideas / experiences re: sentencing in the post-Ameline world, as we all await Booker / Fanfan.

You will see links to the opinions. Click on the link and the opinion will appear on your screen in a separate browser window, in pdf" format.

You are welcome to save the opinion to your hard drive. At the conclusion of our online chat, you can save a copy of the text presentation by clicking the GET TRANSCRIPT button in the lower right hand corner of your screen.

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http://www.afda.org/afda/news/Blakely_case_Ameline.pdf

In Ameline, based on Ameline's admission of distributing a detectable amount of methamphetamine, without any additional jury findings, Ameline's sentencing range would have been 10 to 16 months under the Guidelines.

However, based on the judge's factual findings regarding drug quantity and possession of a firearm, Ameline's Guideline range was 135 to 168 months.

Ameline received a sentence of 150 months. Applying Blakely, the 9th Circuit vacated Ameline's sentence and remanded for resentencing.

Key quote from Ameline, 376 F.3d at 980:

quote:

"We hold that the district judge's imposition of this sentence after determining the material sentencing facts by a preponderance of the evidence, rather than relying on a jury's determination of the facts beyond a reasonable doubt, violated Ameline's Sixth Amendment rights as explained in Blakely.").

Opinions from district courts within the Ninth Circuit, and from the Ninth Circuit itself, that have applied the Ameline ruling:

U.S. v. Castro, 382 F.3d 927 (9th Cir., August 27, 2004).

http://www.afda.org/afda/news/Blakely_case_Castro.pdf

The following excerpt is worth noting in terms of the unique context in which the remand was made back to the district court per Ameline and the latitude given to the district court by the circuit to "take whatever action it determines to be proper

under the circumstances":

quote:

Here, however, circumstances prompt us to act on the sentencing issues at this point, instead of staying proceedings pending the Court's decisions in Booker and Fanfan. Had Castro's sentence been based only on the facts that were found by the jury and not on those found by the district judge, he would already have completed serving his sentence. Where the portion of the sentence that is clearly unaffected by Blakely and Ameline has expired or will expire shortly, we deem it appropriate to remand the case to the district court for whatever action it determines to be proper under the circumstances. Among the options available to the district court, within the exercise of its discretion, would be to reconsider its sentence or to stay further proceedings pending the outcome of Booker and Fanfan, with or without granting bail to the defendant.

The Castro opinion also provides the following useful explanation of the Ameline ruling:

quote:

In United States v. Ameline, [citation omitted] applied to the United States Sentencing Guidelines and, thus, the imposition of an enhanced sentence on the basis of judge-found facts violates the Sixth Amendment. After we decided Ameline, but prior to the submission of this case, the Supreme Court granted certiorari in United States v. Booker, [citation omitted] and United States v. Fanfan [citation omitted].

quote:

As we recognized in Ameline, "the Blakely court worked a sea change in the body of sentencing law." 376 F.3d at 973. Whatever the outcome of the Supreme Court proceedings in Booker and Fanfan, those decisions will likely have a profound impact

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upon our disposition of sentencing issues in direct [*3] criminal appeals and will certainly affect the continued vitality of Ameline. Accordingly, in a

case in which the defendant appeals both his conviction and his sentence, if we decide to affirm the conviction and if the sentence imposed implicates Blakely or Ameline, we would ordinarily withhold our decision until the Court decides Booker and Fanfan.

The Castro opinion also comments on the procedure which the Circuit wants attorneys to follow in notifying the Circuit about Blakely / Ameline issues on pending appeals:

quote:

In Ameline, we held that we are not precluded from addressing Blakely issues even when a defendant raises them for the first time after the case is submitted. 376 F.3d at 972-74. Although we have the authority to identify and consider such sentencing issues sua sponte, it would be appropriate for parties with pending cases to inform this court by letter at any time, jointly or severally, when a potential Blakely or Ameline issue exists, or when particular circumstances warrant action on our part prior to the Supreme Court's decisions. We note with approval that Castro filed a letter advising this court that his re-sentencing was affected by Blakely. Absent particular circumstances warranting earlier action, a motion to file a supplemental brief or a supplemental petition raising Blakely or Ameline issues will ordinarily be denied without prejudice to renew following the Supreme Court's decisions. A petition for panel rehearing or for rehearing en banc raising Blakely or Ameline issues will also likely be held in abeyance in most cases. If further proceedings have been stayed, no such petition need be filed until the stay expires or is terminated. If no stay has been issued, either party may request that one be entered.

Moving on to other cases:

It is important to note that if the sentence is supported by admitted facts or by the

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jury verdict, the Ninth Circuit will acknowledge that there is no Ameline problem.

**United States v. Smith, 2004 U.S. App. LEXIS 21470 (9th Cir., October 15, 2004)
("We face no Ameline problem in this case, however, because the enhancement is supported by admitted facts and by the jury verdict, not by district court factual findings.")**

http://www.afda.org/afda/news/Blakely_case_Smith.pdf

Additional opinions worth noting:

U.S. v. Hymes, 2004 U.S. App. LEXIS 22175 (9th Cir., October 22, 2004) [Circuit grants appellant's "Motion To Take Judicial Notice" seeking remand under Ameline. Citing and quoting from Castro opinion under similar factual circumstances, opinion states: "the portion of Hymes's sentence that is clearly unaffected by Ameline has expired or will soon expire, so 'we deem it appropriate to remand the case to the district court for whatever action it determines to be proper under the circumstances.'"].

http://www.afda.org/afda/news/Blakely_case_Hymes.pdf

U.S. v. McCray (October 29, 2004) [fraud: parties agree that Blakely affects how defendant was sentenced under 2B1.1 re: calculation of loss, etc, and Circuit vacates sentence and remands]

http://www.afda.org/afda/news/Blakely_case_Mccray.pdf

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USE OF ACQUITTED CONDUCT AT SENTENCING:

U.S. v. Davis, 330 F. Supp. 2d 1098 (C.D. Cal, August 13, 2004, Judge William J. Rea) [fraud case:

THIS IS AN IMPORTANT DECISION:

it applies Ameline to UNCHARGED CONDUCT: Court denies gov's request to include loss amount based on transactions as to which statute of limitations had already expired and gov thus could not have included in indictment]

http://www.afda.org/afda/news/Blakely_case_Davis.pdf

United States v. Fernandez, et. al., 2004 U.S. App. LEXIS 22328 (9th Cir, October 27, 2004) (Mexican Mafia appeal. 140+-page opinion on numerous issues. As to Blakely / Ameline, Circuit holds that two appellants are entitled to have sentences vacated per Ameline but decided not to issue the mandate until Supreme Court rules in Booker / Fanfan. This opinion is worth noting re: Circuit's decision to stay issuance of the mandate).

http://www.afda.org/afda/news/Blakely_case_Fernandez.pdf

U.S. v. Mercado [UNPUBLISHED], 2004 U.S. App. LEXIS 19053 (9th Cir, September 8, 2004) [Another Mexican Mafia appeal, ruled on concurrently w/Fernandez case above. Ruling worth noting because Circuit applies Blakely / Ameline to vacate - remand based on the district court's use of ACQUITTED CONDUCT in determining the sentence under the guidelines. Thus, the 9th Cir. acknowledges that the broad reach of Ameline eliminates acquitted conduct, as well as uncharged conduct which we see above in the Davis case above].

http://www.afda.org/afda/news/Blakely_case_Bravo.pdf

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PLAIN ERROR STANDARD: NOT NECESSARILY AN AUTOMATIC REMAND FOR RE-SENTENCING UNDER AMELINE:

Mere Ameline violation alone does not automatically warrant remand: violation must have been prejudicial and affected fairness of the proceedings.

United States v. Chetty, 2004 U.S. App. LEXIS 17935 [UNPUBLISHED but worth noting]

http://www.afda.org/afda/news/Blakely_case_Chetty.pdf

The following excerpt from the Chetty opinion suggests a bizarre effort to limit Ameline: adding a new layer to the Plain Error standard: yes, Ameline violation = plain error, but still no remand unless you also pass the prejudicial / fairness of the proceedings test.

It appears from the Chetty case that at least certain 9th Circuit judges do not want to disrupt district court sentences by having plain error found automatically upon a Blakely error.

quote:

After Blakely [full citation omitted], it is plain error under the Sixth Amendment to increase punishment beyond the maximum standard range based on facts not admitted by the defendant or found by a jury beyond a reasonable doubt, unless the right to jury trial is waived. Ameline, [citation omitted]. Though Blakely involved a state sentencing scheme, enhancements under the U.S. Sentencing Guidelines are also subject to the Blakely rule. Ameline [citation omitted].

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Quote, cont'd:

Under Ameline, Chetty's eight-level enhancement for loss found by the district judge by a preponderance of the evidence was plain error. [citation omitted] To warrant reversal, however, the error must have been prejudicial and have affected the fairness of the proceedings. Id. In Ameline we found prejudicial error where the district judge's enhancement was based on a factor premised on hearsay and contested by many of the defendants' witnesses and objected to by the defendant. Id. We thus ruled that "it cannot be seriously disputed that the lower standard of proof affected the outcome" of the sentence. Id.

In Chetty's case, however, the indictment stated the portion of the bad check, \$ 210,000, Chetty asked White to wire and Chetty testified to sending the wire instruction. Chetty only argued that the loss amount should be reduced by the \$ 12,000 he had returned to the bank, making his enhancement a seven-level one rather than an eight-level one. If his enhancement was reduced by one level, as he asked, he would be at an offense level of 13 and a range of 12-18 months of imprisonment based on his offender category. U.S.S.G. ch.5, pt. A, at 272 (1995). The district judge sentenced him to 15 months of imprisonment followed by five months of supervised release. The term of imprisonment is within the range of the offense level Chetty sought. While in light of Blakely and Ameline, the district judge's enhancement based on his finding of loss amount was plain error, it was not prejudicial and does not warrant remand for resentencing."

[end of quote]

I checked Shepards, and as we would expect with an unpublished opinion, this case has not been cited in any subsequent opinion.

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Watch out for appellate waivers as an out by which Ninth Circuit can avoid addressing a Blakely issue:

United States v. Green, 2004 U.S. App. LEXIS 17911 [UNPUBLISHED]
["Defendant waived the right to appeal her sentence, and we therefore dismiss her appeal. Because defendant's waiver also precludes us from considering her argument based on (Blakely), we deny her motion for supplemental briefing."] [This opinion was little more than the quoted sentence and thus no link to the opinion is provided here.]

DRUG CASES:

Here are a couple worth noting: U.S. v Page, and U.S. v Mayfield

If you stipulate to amount of drugs in plea agreement, no Ameline issue.

United States v. Page, 2004 U.S. App. LEXIS 21319 [UNPUBLISHED] (holds that Blakely and Ameline "inapplicable because the district court did not calculate the amount of drugs used to determine the offense level; the parties stipulated to drug quantity in the plea agreement.").

http://www.afda.org/afda/news/Blakely_case_Page.pdf

An important case to note is U.S. v Mayfield, 2004 U.S. App. LEXIS 22534 (October 29, 2004), in which the Circuit found no Blakely / Ameline violation in a drug case because the 262-month sentence under the sentencing guidelines was based on facts that fell within the parameters of the jury's verdict.

What is important about this case is that the opinion does NOT mention that any special verdict was submitted to the jury in regard to factual findings regarding drug quantity.

Instead, the opinion simply mentions that the indictment, filed back in the year 1997, charged the defendants with possession with the intent to distribute 552 grams of cocaine base, and that the jury convicted them.

The opinion then quotes Blakely as follows:

quote:

(T)he Supreme Court clarified that the term 'statutory maximum' for purposes of Apprendi v. New Jersey is 'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'

Focus on the phrase, "facts reflected in the jury verdict." In drug cases, the 9th Circuit seems to be willing to take a liberal approach to this standard to minimize reversible errors.

The Circuit in Mayfield accepted the 262-month guideline sentence, commenting as follows:

quote:

Therefore, the district court did not violate the principles of Blakely because the court could have imposed a 262-month sentence solely on the basis of the facts reflected by the jury's verdict.

What the Mayfield opinion suggests is that the 9th Circuit may be inclined to accept a GENERAL JURY VERDICT in a drug case, where the indictment charges a specific quantity of drugs, as tantamount to a specific jury finding as to that quantity, which satisfies the Blakely / Ameline test and thus avoids reversible error.

The Circuit's logic seems to be: if the indictment charges a specific amount, and the jury convicts, then a general verdict is tantamount to a special verdict as to that amount, which suffices for Blakely/Ameline purposes, thereby authorizing the imposition of a guideline sentence based on that amount.

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This type of reasoning is particularly compelling because it is being used to affirm an extremely harsh sentence. Thus, the Circuit is not demonstrating any compassionate approach to federal sentencing whereby Blakely / Ameline offers an opportunity to rectify severe injustices caused by guideline sentences in drug cases.

http://www.afda.org/afda/news/Blakey_case_Mayfield.pdf

Financial Crimes Cases

Sentence vacated under Ameline where district court made pre-Ameline factual determinations on loss amount:

United States v. Montgomery, 384 F.3d 1050 (September 15, 2004) [fraud case. "Because the district court enhanced O'Connor's sentence seven levels on the basis on an amount of loss that was neither found by the jury nor alleged in the indictment, there is plain error."].

http://www.afda.org/afda/news/Blakely_case_Montgomery.pdf

If district court made sentencing determination of amount of loss pursuant to guidelines, and specific loss amount was not stipulated to by parties, there is a potential Ameline issue:

United States v. Tomlinson, 2004 U.S. App. LEXIS 22611 [UNPUBLISHED] (vacates / remands per Ameline where parties had raised an appellate challenge to district court's loss calculation under sentencing guidelines).

http://www.afda.org/afda/news/Blakely_case_Tomlinson.pdf

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Pointers re: Appellate Procedure

If there is possibility that client's custodial sentence may expire prior to Supreme Court's issuance of ruling in Booker / Fanfan, 9th Circuit is likely to decline to decide the constitutionality of the guideline-imposed sentence and simply vacate / remand back to district court for immediate determination as to whether defendant should be re-sentenced pursuant to Ameline.

United States v. Mirikitani, 380 F.3d 1223 (August 31, 2004) ["Because the portion of Mirikitani's sentence unaffected by Blakely is about to expire, however, we remand to the district court for whatever action it deems lawful and appropriate in light of (Blakely / Ameline)."]

Point: motion for leave to file supplemental brief denied in order to expedite remand back to district court.]

http://www.afda.org/afda/news/Blakely_case_Mirikitani.pdf

United States v. March, 2004 U.S. App. LEXIS 20992 [UNPUBLISHED] [Normally, we would defer consideration of this (Blakely) issue until the Supreme Court issues its decisions in (Booker / Fanfan). However, because there is a substantial possibility that March's sentence would expire before a decision is issued in those cases, we must remand the issue to the district court(.)].

http://www.afda.org/afda/news/Blakely_case_March.pdf

United States v. Dipace, 2004 U.S. App. LEXIS 20925 [UNPUBLISHED] ["Where the portion of the sentence that is clearly unaffected by Blakely and Ameline has expired or will expire shortly, we remand the case to the district court for whatever action it determines to be proper under the circumstances. Among the options available to the district court, within the exercise of its discretion, would be to reconsider its sentence or to stay further proceedings pending the outcome of the Supreme Court in (Booker / Fanfan)]."]

http://www.afda.org/afda/news/Blakely_case_Dipace.pdf

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Felon-in-possession: conviction at trial: no Ameline issue

United States v. Lewis, 2004 U.S. App. LEXIS 20547 [UNPUBLISHED] ["Before appellant's federal sentence was imposed, a jury convicted him beyond a reasonable doubt of the state offense that furnished the basis for the increase of his federal sentence. Thus, the sentence was, in fact, "imposed solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."].

http://www.afda.org/afda/news/Blakely_case_Lewis.pdf

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More District Court Opinions

United States v. Taitano, 2004 U.S. Dist. LEXIS 19351 [September 24, 2004, Dist No Mariana Islands] (denies motion to strike surplusage directed at superseding indictment containing sentencing factors that were added by government pursuant to Blakely).

http://www.afda.org/afda/news/Blakely_case_Taitano.pdf

United States v. Cino, 2004 U.S. Dist. LEXIS 21583 (September 16, 2004, District of Nevada) [2255 proceeding; court finds that Blakely is a procedural rule "that was not a 'watershed rule' implicating the fundamental fairness and accuracy of the earlier proceedings against defendant", and thus is not retroactive.).

http://www.afda.org/afda/news/Blakely_case_Cino.pdf

[END]