

No. 04-658

---

---

**In the Supreme Court of the United States**

---

JAMES MCINERNEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES**

---

PAUL D. CLEMENT  
*Acting Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

---

---

**In the Supreme Court of the United States**

---

No. 04-658

JAMES MCINERNEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES**

---

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States v. Booker*, No. 04-104 (Aug. 2, 2004), and *United States v. Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker* and

*Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.\*

PAUL D. CLEMENT  
*Acting Solicitor General*

DECEMBER 2004

---

\* The government waives any further response to the petition unless this Court requests otherwise.