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4 UNITED STATES DISTRICT COURT
5 CENTRAL DISTRICT OF CALIFORNIA
6

7) No. CR 03-41 WJR
8 UNITED STATES OF AMERICA,)
9 Plaintiff,) OPINION AND ORDER
10 v.)
11 KELLI DAVIS,)
12 Defendant.)
_____)
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16 Having considered the motion, the papers filed in support
17 thereof and in opposition thereto, the oral argument of counsel, and
18 the file in the case, the Court now makes the following decision.
19 The Court finds that Blakely v. Washington, 124 S. Ct. 2351 (2004),
20 applies to Defendant's sentencing as explained in United States of
21 America v. Ameline, No. 02-30326, __ F.3d __, 2004 U.S. App. LEXIS
22 15031 (9th Cir. July 21, 2004). The Court will sentence Defendant
23 as scheduled on September 13, 2004, based on an eight point offense
24 level without the aid of a sentencing jury.
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1 **BACKGROUND**

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3 Defendant, Kelli Davis ("Defendant") was charged on January 6,
4 2003, with six counts of wire fraud resulting from six real estate
5 loan transactions in which Defendant acted as a loan broker.
6 Defendant was charged with submitting false information about
7 borrowers' residence, employment, and income in applications for
8 loans insured by the Federal Housing Administration ("FHA").

9 The indictment also charged Defendant with causing "fraudulent
10 FHA-insured loan applications seeking not less than \$9 million to be
11 submitted in the names of...non-qualifying and straw buyers."
12 However, the six charged transactions resulted in only \$644,515.00
13 in loss to the FHA. Because the Government did not pursue any
14 counts against Defendant other than the six originally charged, the
15 Court granted Defendant's motion to strike the reference to the \$9
16 million.¹ See Judge Baird's Minute Order of February 22, 2003.

17 On April 4, 2003, the jury returned guilty verdicts on the six
18 charged wire fraud counts. The jury made no findings, however,
19 regarding any uncharged transactions.

20 Defendant moved for an order establishing that the rule
21 announced in Blakely applies to sentencing in this case. Since the
22 time Defendant filed its motion, the Ninth Circuit in Ameline
23 addressed the issues raised by Blakely and held that the Blakely
24 Court's reasoning applies fully to the United States Sentencing
25 Guidelines. This Court is bound by the Ameline decision.

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28 ¹ On March 4, 2003, Judge Baird transferred this case to the
calendar of Judge Rea for all further proceedings.

1 In this case, the government seeks the Court to apply a 13
2 point enhancement for the amount of loss to the victim, the FHA.
3 Under the Guidelines, the Court must apply this 13 point enhancement
4 if it finds that Defendant's fraudulent acts in making 82 loans that
5 were not charged in the indictment caused the loss to FHA. Clearly,
6 the Court may not make such a finding under Blakely and Ameline.

7 Simply transferring this inquiry to a sentencing jury, however,
8 will not resolve the constitutional infirmity under Blakely.
9 Defense counsel's reply briefly informs the Court that the
10 government could not have charged Defendant with the 82 additional
11 counts of wire fraud because the statute of limitations on those
12 counts had already run. Thus, even if the trial occurred after
13 Blakely, the government could not have presented the additional 82
14 counts to the jury. The Court will not allow the government to
15 circumvent the statute of limitations through sentencing. Because
16 these facts were barred by the statute of limitations and, thus,
17 could not have been decided by the jury during trial, the Court will
18 not allow them to get in through the back door as sentencing
19 factors.² See Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct.
20 2348, 147 L. Ed. 435 (2000) (rejecting government's attempt to
21 disguise element of a crime as a sentencing factor). A sentencing
22 jury is not appropriate for this type of enhancement, which is based
23 on the Defendant's alleged commission of 82 crimes in addition to

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25 ² The government additionally seeks a two point enhancement based
26 on the amount of planning involved in the crime. The Court believes
27 that this enhancement is warranted based on the jury's original
28 findings. However, the sentence allowable with this enhancement is no
different from the sentence without the two point enhancement. Thus,
the question of the constitutionality of the two point enhancement is
moot.

1 those charged in the indictment. Cf. Ameline 2004 U.S. App. LEXIS
2 15031 at *42 (sentencing jury may appropriately determine the amount
3 of drugs involved in the crime to which the defendant pled guilty).³
4

5 **CONCLUSION**

6 For the forgoing reasons, the Court will sentence Defendant as
7 scheduled on September 13, 2004 based on an eight point offense
8 level without the aid of a sentencing jury. Additionally, the Court
9 recognizes that the Supreme Court granted certiorari on United
10 States v. Booker, 2004 WL 1535858 (7th Cir. July 9, 2004) and United
11 States v. Fanfan, No. 03-47-P-H (D. Me. June 28, 2004), which raise
12 the same issues as Ameline, and thus the Court will exercise its
13 inherent authority to pronounce an alternative, indeterminate
14 sentence. The Court requests that the probation officer prepare a
15 revised pre-sentence report that reflects this ruling.
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17 IT IS SO ORDERED.

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19 DATED: August 13, 2004
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21 _____
22 WILLIAM J. REA
23 United States District Judge
24

25 _____
26 ³U.S. v. Williams, 217 F.3d 751, 754 (9th. Cir. 2000). See U.S.
27 Supplemental Opposition Brief to Defendant's Blakely Motion at 2.
28 Williams involved merely "relevant conduct" as opposed to 82 distinct
criminal acts, as evidenced here. Further, to the extent that Williams
could apply to the instant case, the Court finds that the reasoning in
Blakely forbids it.