Ninth Circuit Court of Appeals No. 05-30070
District Court No. CR 01-63-M-DWM

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEONA CRILL, a.k.a. LEONA CUNNINGHAM,

Defendant-Appellant.

OPENING BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

HONORABLE DONALD W. MOLLOY
CHIEF JUDGE UNITED STATES DISTRICT COURT, PRESIDING

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SUBMITTED: April 12, 2005

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-vs-

LEONA CRILL, a.k.a. LEONA CUNNINGHAM,

Defendant-Appellant.

OPENING BRIEF OF DEFENDANT-APPELLANT

I. <u>JURISDICTION</u>

A. STATUTORY BASIS OF SUBJECT MATTER JURISDICTION OF THE DISTRICT COURT

The United States District Court for the District of Montana had jurisdiction over the original criminal action under Article III, Section 2, Clause 1 of the United States Constitution and 18 U.S.C. § 3231, because the United States charged Defendant-Appellant Leona Crill ("Ms. Crill") by indictment in the District of Montana with misappropriation of federal health care funds, in violation of 18 U.S.C. § 699(a). (CR 1; ER 1.) Ms. Crill later pled guilty to a mail fraud superseding

information for violating 18 U.S.C. § 1341. (CR 16; ER 8.) Following sentencing on that conviction, Ms. Crill served 12 months in a prerelease center and began serving her three year term of supervised release. (CR 26.) On February 4, 2005, the district court revoked her supervision and sentenced Ms. Crill to a second prison term of 6 months, to be followed by 30 months of supervised release. (CR 48; ER 125.)

B. STATUTORY BASIS OF JURISDICTION OF THE COURT OF APPEALS

This Court has appellate jurisdiction over this case, pursuant to 28 U.S.C. § 1291 and Rule 32 of the Federal Rules of Criminal Procedure, because Ms. Crill appeals her revocation sentence. (CR 41; ER 141-143.)

C. APPEALABILITY

The district court revoked Ms. Crill's supervised release and imposed a revocation sentence on February 4, 2005. (CR 48; ER 108-134) The sentencing court filed its written judgment on February 7, 2005. (CR 40; ER 135-140.) Ms. Crill filed her notice of appeal on February 8, 2004. (CR 41; ER 141-143.) Ms. Crill, therefore, timely appealed in compliance with Rule 4(b) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUE

Whether the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), establishes the maximum term of imprisonment for purposes of determining the maximum term of supervised release?

III. STATEMENT OF THE CASE

A. NATURE OF THE APPEAL

Ms. Crill appeals her revocation sentence. Specifically, she challenges the term of supervised release imposed by the district court, based upon *Booker's* definition of "maximum sentence."

B. COURSE OF THE PROCEEDINGS

On December 6, 2001, the United States obtained an indictment against Ms. Crill, charging misappropriation of federal health care funds, in violation of 18 U.S.C. § 669(a). (CR 1; ER 1.) On January 8, 2002, Ms. Crill pled not guilty to that charge before a United States Magistrate Judge. (CR 4.)

Following a motion to dismiss filed by Ms. Crill, the government filed an information against Ms. Crill, charging mail fraud in violation of 18 U.S.C. § 1341. (CR 12 and 16.) Ms. Crill pled guilty to that charge on March 19, 2002. (CR 47; ER 11-45.)

On June 21, 2002, the district court imposed a term of 12 months imprisonment and recommended that it be served at a prerelease center. (CR 26; ER 79.) It further ordered supervised release for three years, including numerous standard and special conditions. (CR 26; ER 80-84.) The district court entered its written judgment on July 2, 2002. (CR 23; ER 90-97.) The United States appealed that sentence but later withdrew its appeal. (CR 24 and 30.)

On January 11, 2005, Ms. Crill appeared before a United States Magistrate Judge on allegations that she violated conditions of her supervised release. (CR 35.) The district court convened her revocation hearing on February 4, 2005. (CR 48; ER 108-134.) The district court determined that Ms. Crill violated the conditions of her supervised release and imprisoned her for 6 months to be followed by 30 months of supervised release. (CR 48; ER 125.) Ms. Crill objected to the supervised release component of that sentence pursuant to *Booker*. She filed her notice of appeal on February 8, 2005. (CR 41; ER 141-143.)

C. DISPOSITION IN THE DISTRICT COURT

Following revocation of her supervised release, the district court sentenced Ms. Crill to six months imprisonment, to be followed by 30 months of supervised release. (CR 48; ER 125.)

D. BAIL STATUS

Ms. Crill is presently incarcerated at FCI Dublin serving a six month term of revocation imprisonment. Her full address is set forth in the certificate of service.

IV. STATEMENT OF FACTS

The government initially charged Ms. Crill with misappropriation of federal health care funds, in violation of 18 U.S.C. § 669(a). (CR 1; ER 1.) In exchange for agreeing to dismiss that charge, Ms. Crill pled guilty to an information charging mail fraud, in violation of 18 U.S.C. § 1341, on March 19, 2002. (CR 16 and 47; ER 8 and 21.)

The United States Probation Office prepared a Presentence Investigation Report ("PSR"). The PSR recommended a Total Offense Level 16, which, coupled with a Criminal History Category I, resulted in a sentencing range of 21-to-27 months. (CR 26; ER 57). Reflecting the acceptance of responsibility credit per U.S.S.G. § 3E1.1, the Total Offense Level resulted from a base offense level of six, pursuant to U.S.S.G. § 2F1.1, a seven-level enhancement for the loss amount exceeding $120,000 (U.S.S.G. § 2F1.1(b)(1)(H)), a two-level increase for more than minimal planning (U.S.S.G. § 2F1.1(b)(2)), a two-level enhancement for abuse of position of trust, and a two-level increase for a vulnerable victim (U.S.S.G. § 3A1.1(b)(1)). (CR 26; ER 56-57.) At the June 21, 2002 sentencing hearing, the district court adopted these calculations,

including imposing the abuse of trust enhancement over Ms. Crill's objection. (CR 26; ER 55-57.)

After the district court resolved the mandatory Guidelines calculations, the sentencing hearing focused on Ms. Crill's request for a downward departure based upon diminished capacity due to her gambling addiction. (CR 26; ER 59-69.) The government conceded that the district court had the legal authority, but urged it not to, so depart. (CR 26; ER 69.) The district court departed downward three offense levels, reducing the sentencing range to 12-to-18 months. (CR 26; ER 74.)

The district court imposed a sentence of 12 months and one day, recommending placement at prerelease center. (CR 26; ER 79.) It further imposed three years of supervised release with numerous standard and specific conditions of release and restitution of $137,667.37 (with interest waived) . (CR 26; ER 80.)

The government initially appealed this sentencing decision but then withdrew the appeal. (CR 24 and 30.)

Ms. Crill served her term of incarceration and began serving her supervised release term. On December 16, 2004, a Supplemental Petition For Warrant Or Summons For Offender Under Supervision was filed against Ms. Crill.[1] (CR 31; ER 98.) A second petition was filed on December 29, 2004. (CR 33; ER 102.) She

[1] The initial revocation petition appears to have been mistitled "Supplemental Petition."

initially appeared before a United States Magistrate Judge on those petitions on January 11, 2005. (CR 35.)

The district court convened Ms. Crill's revocation hearing on February 4, 2005. (CR 48; ER108.) Ms. Crill admitted the revocation allegations. (CR 48; ER 113-118.) The district court then turned to allocution and the revocation sentence. (CR 48; ER 118.) Having previously objected to revocation sentences before this same judge, defense counsel referenced the previously raised objection under the Sixth Amendment, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 125 S.Ct. 738 (2005). (CR 48; ER 124.)

The district court imposed a revocation sentence of 6 months imprisonment followed by 30 months of supervised release. (CR 48; ER 125.) Ms. Crill reiterated her *Booker* objection, detailing that she specifically "oppose[d] the supervised release term imposed by the Court." (CR 48; ER 129.)

The district court filed its written judgment on February 7, 2005. (CR 40; ER 135.) Ms. Crill appealed on February 8, 2005. (CR 41; ER 141.)

V. <u>SUMMARY OF ARGUMENT</u>

Blakely and *Booker* clarified that under *Apprendi*, the "prescribed statutory maximum" is "the maximum sentence a judge may impose solely <u>on the basis of the facts reflected in the jury verdict or admitted by the defendant</u>." *Blakely*, 124 S.Ct. at 2537 (emphasis in original). In the context of the formerly mandatory Sentencing Guidelines, the statutory maximum sentence is the high-end of the Guidelines sentencing range that corresponds to the facts found by a jury or admitted by the defendant beyond a reasonable doubt. The maximum sentence not only delineates the available term of incarceration, it also determines the maximum term of supervised release as explained in 18 U.S.C. § 3583(b). Similarly, per 18 U.S.C. §§ 3583(e) and (h), upon revocation of supervised release, the original maximum sentence establishes the maximum revocation term and the available term of supervised release following revocation imprisonment.

At Ms. Crill's original sentencing, her "maximum sentence" (under the then mandatory Guidelines) was 27 months, the high-end of her sentencing range. That maximum sentence authorizes a supervised release term of one year. 18 U.S.C. § 3583(b). Upon revocation of her supervised release, the maximum sentence authorized a revocation sentence of one year followed by supervision of one year reduced by the term of revocation incarceration. 18 U.S.C. §§ 3583(e)(3) and (h).

Here, the district court properly imposed a revocation sentence of less than one year. It improperly imposed a term of supervised release that exceeded the § 3583(h) maximum of six months (one year minus the six months of revocation imprisonment). This Court should therefore vacate the term of supervised release and limit the supervised release term to a maximum of six months.

VI. ARGUMENT

Under *Booker,* Ms. Crill's revocation supervised release term of 30 months exceeds the maximum term permitted by 18 U.S.C. § 3583.

Standard of Review

Constitutional challenges to a sentence are reviewed de novo. See, e.g., *United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002).

Reviewability

In district court, Ms. Crill argued that her revocation sentence, specifically the supervised release term, violated *Booker*, (CR 48; ER 129), thus preserving de novo review.

Argument

A. *Booker* applied *Apprendi* and *Blakely* to the Sentencing Guidelines.

In *Booker*, the Supreme Court confirmed that its decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 124 S.Ct. 2531(2004), apply to the United States Sentencing Guidelines. *Blakely* established that under *Apprendi*, the "prescribed statutory maximum" is "the maximum sentence a judge may impose

solely <u>on the basis of the facts reflected in the jury verdict or admitted by the defendant</u>." *Blakely*, 124 S.Ct. at 2537 (emphasis in original). *Booker* applied *Blakely's* prescripts to federal sentencing: "We hold that both courts correctly concluded that the Sixth Amendment as as construed in *Blakely* does apply to the Sentencing Guidelines." 125 S.Ct. at 746.

Booker "reaffirm[ed the Court's] holding in *Apprendi*: Any fact ... which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 125 S. Ct. at 756. Under mandatory Guidelines, *Booker* defines "maximum sentence" as the high-end of the Guidelines range that corresponds to facts admitted by the defendant or found by a jury beyond a reasonable doubt. *Booker*, 125 S.Ct. at 749.

Booker is clear: a federal defendant's maximum sentence is the maximum guideline range that a judge may impose under the mandatory United States Sentencing Guidelines on the basis of the facts that the defendant either stipulated to when pleading guilty or a jury found beyond a reasonable doubt in convicting the defendant. *Id.* at 753 ("*Apprendi* principles are unquestionably applicable to the Guidelines."). This appeal focuses on *Booker's* definition of "maximum sentence," what *Blakely* and *Booker* labeled the "statutory maximum." *Blakely*, 124 S.Ct. at

2537; *Booker* 125 S.Ct. at 749.

B. The maximum incarceration sentence determines the maximum term of supervised release.

Supervised release is a statutory creation set forth in 18 U.S.C. § 3583. It permits a "court, in imposing sentence to a term of imprisonment [to] include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]" 18 U.S.C. § 3583(a). The maximum term of supervised release corresponds to the "class" of the conviction at issue.

> (b) Except as otherwise provided, the authorized terms of supervised release are-
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

18 U.S.C. § 3583(b). See also *United States v. Rodriguez-Martinez*, 329 F.3d 419, 420 (5th Cir. 2003) (reducing term of supervised release to maximum permitted by statute); *United States v.* Stokes, 998 F.2d 279, 282 (5th Cir. 1993) (same); *United States v. Bauers*, 47 F.3d 535, 539 (2nd Cir. 1995) (remanding for resentencing where supervised release term exceeded maximum term permitted by statute).

18 U.S.C. § 3559(a) defines the classification of offenses (referenced in § 3583 (b) above), based upon the following maximum terms of imprisonment:

> (a) An offense that is not specifically classified by a letter grade in the section defining it, is classified if <u>the maximum term of imprisonment</u> authorized is–
>
> (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
>
> (2) Twenty-five years or more, as a Class B felony;
>
> (3) less than twenty-five years but ten or more years, as a Class C felony;
>
> (4) less than ten years but five or more years, as a Class D felony;
>
> (5) less than five years but more than one year, as a Class E felony;
>
> (6) one year or less but more than six months, as a Class A misdemeanor;
>
> (7) six months or less but more than thirty days, as a Class B misdemeanor;
>
> (8) thirty days or less but more than five days, as a Class C misdemeanor; or
>
> (9) five days or less, or if no imprisonment is authorized, as an infraction.

18 U.S.C. § 3559(a)(1-9) (emphasis added).

Previously, before *Blakely* and *Booker*, and even after *Apprendi*, the courts understood the maximum term of imprisonment to be defined by the United States Code, not the high-end of the Guidelines sentencing range. See, e.g., *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1027 (9th Cir. 2000). *Booker,* at least under the mandatory Guidelines which dictated Ms. Crill's sentence, defines "maximum sentence" as the high-end of the Guidelines range that corresponds to facts admitted by the defendant or found by a jury beyond a reasonable doubt. *Booker*, 125 S.Ct. at 749.

In this regard, 18 U.S.C. § 3559 must be reexamined. Subsection (b) provides:

> Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense.

18 U.S.C. § 3559(b). Under this provision, pre-*Booker*, "[t]he effect of classification is thus to use the statute describing the offense term in order to determine the maximum term of punishment." *United States v. Avery*, 15 F.3d 816, 819 (9th Cir. 1993). That reasoning, however, reflects an overruled, unconstitutional paradigm, in which the maximum sentence was defined by statute.

Blakely and *Booker* recalibrated the "'statutory maximum' for *Apprendi* purposes." *Booker*, 125 S.Ct. at 749 (quoting *Blakely*, 124 S.Ct. 2531 (slip. op. at 7)). *Booker* held "that the Sixth Amendment as construed in *Blakely* does apply to the

Sentencing Guidelines." *Id.* at 746. Therefore, it is "clear 'that the "statutory maximum" for *Apprendi* purposes 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.'" *Id.* at 749 (quoting *Blakely*, 124 S.Ct. 2531 (slip. op. at 7) (emphasis in *Blakely*). As *Blakely* explained, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely*, 124 S.Ct. at 2537 (emphasis in original).

Thus, according to the Supreme Court in *Blakely* and *Booker*, under mandatory guidelines, the "statutory maximum sentence" is not defined by the United States Code, but instead is limited to "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 749 (quoting *Blakely*, 124 S.Ct. 2531 (slip. op. at 7) (emphasis in *Blakely*). In the context of the mandatory Sentencing Guidelines, the statutory maximum sentence is the high-end of the Guidelines sentencing range that corresponds to the facts found by a jury or admitted by the defendant beyond a reasonable doubt. *Id.* at 753 ("*Apprendi* principles are unquestionably applicable to the Guidelines.").

Getting back to classifying the conviction, under *Booker*, with a mandatory Guidelines system, the high-end of the original Guidelines range – here 27 months –

must be consulted. Section 3559(a)(5) classifies a 27 months maximum sentence as a Class E felony.[2] A Class E felony carries a maximum term of supervised release of one year. 18 U.S.C. § 3583(b)(3). That fact limits Ms. Crill's revocation sentence.

C. Ms. Crill's revocation term of supervised release exceeds the term permitted by her maximum sentence.

Statutorily, like the term of supervised release, the maximum revocation imprisonment corresponds to the "class" of the underlying conviction. 18 U.S.C. § 3583(e)(3). As detailed above, the "class" depends on the maximum sentence for the underlying offense. 18 U.S.C. § 3559(a).

With respect to the maximum revocation sentence, 18 U.S.C. § 3583(e)(3) provides, in pertinent part:

> a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

18 U.S.C. § 3559, in turn, defines the classes of offenses, as detailed above.

Before *Blakely* and *Booker*, the United States Code provided the maximum

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[2]Section 3559's classification controls because the underlying offense, 18 U.S.C. § 1341, "is not specifically classified by a letter grade in the section defining it." Thus, the class of felony is contingent, per § 3559, on "the maximum term of imprisonment authorized."

sentence for *Apprendi* purposes. See, e.g., *Hernandez-Guardado*, 228 F.3d at 1027. Thus, for instance, here, Ms. Crill's statute of conviction, 18 U.S.C. § 1341, provided a five year statutory maximum sentence, (CR 16, ER 8), which previously was a Class D felony. 18 U.S.C. § 3559(a)(4).

Now, however, under *Blakely* and *Booker*, the maximum term of imprisonment for Ms. Crill's original offense was (at most) 27 months, the high-end of her mandatory Guidelines sentencing range. 18 U.S.C. § 3559(a)(5) classifies a felony with a maximum sentence of less than five years as a Class E felony.[3] 18 U.S.C. § 3583(e) limits the maximum revocation imprisonment for a Class E felony to one year. Ms. Crill's 6 months revocation sentence is less than one year, so she cannot challenge that imprisonment term. She does contest, however, her revocation term of supervised release.

18 U.S.C. § 3583(h) authorizes supervised release following revocation.

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after the imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of

[3] 18 U.S.C. § 3559(a) defines the class of offense because the offense statute at issue, 18 U.S.C. § 1341, was not classified by letter grade within the offense statute.

> imprisonment that was imposed upon revocation of supervised release.

18 U.S.C. § 3583(h). Where, as here, the original maximum sentence was less than five years, 3583(h) constrains a district court from imposing, upon revocation, a term of supervised release that is longer than one year "less any term of imprisonment ... imposed upon revocation of supervised release." Put simply, in Ms. Crill's case, the district court had one year of imprisonment and/or supervision with which to fashion a revocation sentence. Therefore, Ms. Crill's revocation sentence of six months imprisonment can be followed by a maximum of 6 months of supervised release. Consequently, the 30 months term of supervised release imposed by the district court violates the Sixth Amendment as interpreted by *Blakely* and *Booker*.

VII. CONCLUSION

This Court should vacate the term of supervised release imposed by the district court and limit the supervised release term to a maximum of six months.

Respectfully submitted April 12, 2005.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed.R.App.P.32(a)(7)(C) and Ninth Circuit Rule 32-1, this Opening Brief complies with the type-volume limitations of Fed.R.App.P.32(a)(7)(B) because it contains 3,508 words, excluding parts of the brief exempted by Fed.R.App.P.32(a)(&)(B)(iii). (An Opening Brief must not exceed 14,000 words, excluding tables and certificates).

This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word Perfect, Version 9, in Times New Roman 14.

DATED this 12th day of April, 2005.

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Defendant-Appellant, certifies pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, that the following related cases are pending in this Court: *United States v. Low*, No. 04-30440, *United States v. Warden*, No. 04-30621, *United States v. Heavy Runner*, No. 05-30006, and *United States v. Ray*, No. 04-30520.

DATED this 12th day of April, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 12, 2005, a copy of the foregoing Opening Brief have been placed in the United States Mail, postage prepaid, addressed to the following:

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