

No. 03-3988

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

vs.

DEMETRIUS DAVIS,  
Defendant-Appellant.

---

On appeal from the United States District Court  
for the Northern District of Illinois (Chicago)  
Case No. 03-CR-351

Honorable James F. Holderman, United States District Judge, Presiding.

---

**APPELLANT'S SUPPLEMENTAL BRIEF**

---

FEDERAL PUBLIC DEFENDER  
CENTRAL DISTRICT OF ILLINOIS  
401 Main Street, Suite 1500  
Peoria, Illinois 61602  
Phone: (309)671-7891  
Fax: (309)671-7898

RICHARD H. PARSONS  
CHIEF FEDERAL PUBLIC  
DEFENDER

JONATHAN E. HAWLEY  
APPELLATE DIVISION CHIEF

KENT V. ANDERSON  
SENIOR STAFF ATTORNEY

COUNSEL FOR DEFENDANT-  
APPELLANT, DEMETRIUS DAVIS

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	iv
CASES .....	iv
STATUTES .....	iv
OTHER AUTHORITIES .....	v
 ISSUE PRESENTED .....	 1
Should Mr. Davis' case be remanded for resentencing, in light of <i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (Jan. 12, 2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory? .....	         1
 STATEMENT OF THE CASE .....	 2
 STATEMENT OF FACTS .....	 2
 SUMMARY OF ARGUMENT .....	 3
 ARGUMENT .....	 4
Mr. Davis' case should be remanded for resentencing, in light of <i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory. ....	         4
A.    Standard of Review .....	6
B.    Argument .....	7
The district court plainly erred when sentencing Mr. Davis, in light of <i>Booker</i> . ....	 7
1.    There was error under <i>Booker</i> . ....	7

2.	The error was plain. . . . .	9
3.	The error affected Mr. Davis' substantial rights. . . . .	9
4.	The <i>Booker</i> error seriously affects the fairness, integrity, and public reputation of judicial proceedings. . . . .	10
CONCLUSION . . . . .		12
CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(a)(7)(C) . . . . .		13
CIRCUIT RULE 31(e) CERTIFICATION . . . . .		13

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998) .....	4
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000) .....	4
<i>Blakely v. Washington</i> , 5__ U.S. ____, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004) .....	4
<i>Johnson v. United States</i> , 520 U.S. 461 (1997) .....	9
<i>Shepard v. United States</i> , 2004 U.S. LEXIS 4395, 124 S. Ct. 2871 (June 21, 2004) ..	12
<i>United States v. Booker</i> , 5__ U.S. ____, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (Jan. 12, 2005) .....	1, 2-7, 9-11
<i>United States v. Hughes</i> , 3__ F.3d ____, 2005 U.S. App. LEXIS 1189 (4th Cir. Jan. 24, 2005) .....	11
<i>United States v. LaBastida-Segura</i> , 3__ F.3d ____, 2005 U.S. App. LEXIS 1835 (10th Cir. Feb. 4, 2005) .....	6,11
<i>United States v. Oliver</i> , 3__ F.3d ____, 2005 U.S. App. LEXIS 1623 (6th Cir. Feb. 2, 2005) .....	11
<i>United States v. Ranum</i> , 2005 WL 161223 (E.D. Wis. Jan. 19, 2005) .....	8

**STATUTES**

18 U.S.C. §3553(a) .....	3,5,7-10
18 U.S.C. §3553(a)(1) .....	8
18 U.S.C. §3553(a)(2) .....	7
18 U.S.C. §3553(a)(3) .....	8

18 U.S.C. §3553(a)(6) .....	8
18 U.S.C. §3553(a)(7) .....	8
18 U.S.C. §3553(b)(1) .....	5
18 U.S.C. §3742(e) .....	5

**OTHER AUTHORITIES**

United States Constitution, amendment five .....	7
United States Constitution, amendment six .....	7
U.S.S.G. §5H1.1 .....	8,10
U.S.S.G. §5H1.2 .....	8
U.S.S.G. §5H1.3 .....	8
U.S.S.G. §5H1.4 .....	8
U.S.S.G. §5H1.5 .....	8
U.S.S.G. §5H1.6 .....	8
U.S.S.G. §5H1.10 .....	8
U.S.S.G. §5H1.11 .....	8
U.S.S.G. §5H1.12 .....	8,10

## ISSUE PRESENTED

Should Mr. Davis' case be remanded for resentencing, in light of *United States v. Booker*, 5\_\_ U.S. \_\_\_\_, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (Jan. 12, 2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory?

## STATEMENT OF THE CASE

The statement of the case is fully set forth in appellant, Demetrius Davis', opening brief.

On January 26, 2005, this Court ordered the parties to file supplemental briefs addressing the Supreme Court's decision in *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (Jan. 12, 2005), by February 7, 2005.

## STATEMENT OF FACTS

Most of the facts are contained in the statement of facts in Mr. Davis' opening brief. The additional relevant facts are set forth below.

Mr. Davis got drunk everyday before his arrest. He also used as much as \$100 worth of heroin in a day off and on from 1993 to 2001. He used cocaine daily in 1988 and 1989. In addition, he used marijuana daily from about 1984 to 1986. Mr. Davis admitted that he had a substance abuse problem and wanted to receive treatment. He had never been treated for his substance abuse problem before. (PSR<sup>1</sup> 8.)

---

<sup>1</sup> ST is used as an abbreviation for the reporter's transcript of the sentencing hearing. PSR is used as an abbreviation for the probation officer's presentence report. AOB is used as an abbreviation for appellant's opening brief. App. is used as an abbreviation for the appendix to Mr. Davis' opening brief.

## SUMMARY OF ARGUMENT

Mr. Davis was sentenced under a mandatory set of Sentencing Guidelines. The Supreme Court has now made those Guidelines advisory, in order to comply with the Constitution, in *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005). Therefore, Mr. Davis was sentenced under an illegal sentencing scheme which did not allow full consideration of mitigating factors in his personal history. As a result, the district court did not decide whether, in light of those factors, the sentence it imposed was “sufficient, but not greater than necessary” to achieve the purposes of sentencing in 18 U.S.C. §3553(a). Therefore, this Court should remand Mr. Davis’ case to the district court for resentencing in order for the district court to make that determination after considering all of the relevant factors.

## ARGUMENT

**Mr. Davis' case should be remanded for resentencing, in light of *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory.**

In his opening brief, Mr. Davis argued that his sentence was unconstitutional because it was enhanced based on the district judge's findings that he had more than one prior felony conviction and that two of his convictions were for violent felonies. (AOB 17-22.) He acknowledged the Supreme Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). (AOB 18.) He did not specifically argue that his sentence was unconstitutional under *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004), except to the extent that *Blakely* weakened the rationale for *Almendarez-Torres*. (AOB 20.) This was due to the *Blakely/Apprendi* exception for prior convictions.

In *United States v. Booker*, 2005 U.S. LEXIS 628, the Supreme Court held that the rule it stated in *Blakely* applies to the Federal Sentencing Guidelines. *United States v. Booker*, 2005 U.S. LEXIS 628, \*15-\*16. The Court reaffirmed its previous holdings in *Apprendi* and *Blakely* stating that,

"Any fact (other than a prior conviction) 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."

*United States v. Booker*, 2005 U.S. LEXIS 628, \*45-\*46.

A separate majority of the Court then held that the solution to this problem was to sever and excise 18 U.S.C. §§3553(b)(1) and 3742(e) from the remainder of the Sentencing Reform Act. *Id.* at \*82. This means that sentencing courts are no longer bound by the Guidelines. Instead, “[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account.” *Id.* at \*80. In addition, courts must also consider the purposes of sentencing set forth in 18 U.S.C. §3553(a), including the need “to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.” *Id.* at \*72.

**A. Standard of Review**

Mr. Davis conceded, in his opening brief that plain error was the appropriate standard of review for the related argument that he made. (AOB 17.) That is also the appropriate standard of review for an argument based on *Booker*. *Id.* at \*93.

In addition, the Supreme Court stated that, “in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.” *Id.* at \*87. Thus, the Court envisioned that some cases would require resentencing, as a result of this illegality, even though there was no Sixth Amendment violation. *See also United States v. LaBastida-Segura*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1835 (10th Cir. Feb. 4, 2005) (remanding for resentencing even though there was no Sixth Amendment violation).

## B. Argument

**The district court plainly erred when sentencing Mr. Davis, in light of *Booker*.**

### 1. There was error under *Booker*.

Mr. Davis' Guideline range was solely based on the elements of his current offense of conviction and his prior convictions. (PSR 3-6, ST 16, App. 11.) Therefore, his sentence did not violate his rights under the Fifth and Sixth Amendments, under the current state of the law. However, the Court's opinion in *Booker* shows that Mr. Davis was sentenced under an illegal sentencing system when he was sentenced under mandatory Sentencing Guidelines.

As noted above, under *Booker*, courts must still consider the Guidelines. However, they must also consider all of the purposes of sentencing set forth in 18 U.S.C. §3553(a). *Id.* at \*72, \*80.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2."

Section 3553(a)(2) states that such purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational

training, medical care, or other correctional treatment in the most effective manner.

Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

*United States v. Ranum*, 2005 WL 161223, \*1 (E.D. Wis. Jan. \_\_, 2005).

This means that sentencing courts must now consider several factors which they were formerly forbidden to consider.

For example, under §3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, U.S.S.G. §5H1.1, his education and vocational skills, §5H1.2, his mental and emotional condition, §5H1.3, his physical condition including drug or alcohol dependence, §5H1.4, his employment record, §5H1.5, his family ties and responsibilities, §5H1.6, his socio-economic status, §5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, §5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the §3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history.

*Ibid.*

“[W]here the guidelines conflict with other factors set forth in §3553(a), courts will have to resolve the conflicts.” *Id.* at \*2. Thus, factors which mitigate a defendant’s culpability for a crime now have much greater importance to the determination of an appropriate sentence.

Therefore, the district court erred when sentencing Mr. Davis, by failing to treat the Guidelines as advisory and considering all of the factors which Congress has directed courts to consider when imposing sentence.

**2. The error was plain.**

The district court’s error in sentencing Mr. Davis is plain. It was not obvious at the time of sentencing. However, it is enough that the error be plain at the time of appellate consideration. *Johnson v. United States*, 520 U.S. 461, 468 (1997). The Supreme Court specifically noted that its holding in *Booker* applies to all cases on direct review. *United States v. Booker*, 2005 U.S. LEXIS 628, \*92-\*93.

**3. The error affected Mr. Davis’ substantial rights.**

The district court’s error affected Mr. Davis’ substantial rights by depriving him of his right to be sentenced under a Constitutional sentencing scheme. The Court does not appear to have considered the effect of Mr. Davis’ history of substance abuse on his culpability for committing his current and past crimes. It appears that the only thing the district court considered when

sentencing Mr. Davis was his offense conduct and prior convictions. (ST 16, 23-28; App. 11-17.) That was perhaps understandable under the mandatory guidelines which discouraged consideration of any other aspects of a defendant's history. (U.S.S.G. §5H1.1 - §5H1.12.) However, not having his sentence based on all of the factors in 18 U.S.C. §3553(a), rather than just offense conduct, affected Mr. Davis' substantial right to a sentence imposed under a legal sentencing scheme. The district court did not give serious consideration to the effect of Mr. Davis' history of drug and alcohol addiction. If the district court had seriously considered this and perhaps other factors, it may have found that a shorter sentence was "sufficient, but not greater than necessary" to achieve the purposes of sentencing. (18 U.S.C. §3553(a).)

**4. The *Booker* error seriously affects the fairness, integrity, and public reputation of judicial proceedings.**

Sentencing Mr. Davis under an unconstitutional system also affected the fairness, integrity, or public reputation of judicial proceedings.

It is not enough for this Court to say that the sentence imposed by the district court is reasonable irrespective of the error.

The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory. To leave standing this sentence simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings. Indeed, the

determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it.

Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to [this Court] performing the sentencing function [itself]. This is so because the district court was never called upon to impose a sentence in the exercise of its discretion. That the particular sentence imposed here might be reasonable is not to say that the district court, now vested with broader sentencing discretion, could not have imposed a different sentence that might also have been reasonable. [This Court] simply do[es] not know how the district court would have sentenced [Mr. Davis] had it been operating under the regime established by *Booker*.

*United States v. Hughes*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1189, \*17 fn. 8 (4th Cir. Jan. 24, 2005). See also *United States v. Oliver*, 2005 U.S. App. LEXIS 1623, \*23 fn. 3 (finding that Court of Appeals would be "usurping the discretionary power granted to the district courts by *Booker* if [it] were to assume that the district court would have given Oliver the same sentence post-*Booker*"); *United States v. LaBastida-Segura*, 2005 U.S. App. LEXIS 1835, \*6 ("Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion.").

Therefore, this Court should remand Mr. Davis' case for resentencing under the now-advisory Guidelines.

In addition, as Mr. Davis noted in his opening brief, his case may be affected by the Supreme Court's holding in *Shepard v. United States*, 2004 U.S. LEXIS 4395, 124 S. Ct. 2871 (June 21, 2004) (order granting petition for a writ of *certiorari*). (See AOB 20-21.)

### CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Davis' sentence and remand his case to the district court for resentencing.

Respectfully submitted  
RICHARD H. PARSONS  
Chief Federal Public Defender

---

JONATHAN E. HAWLEY  
Appellate Division Chief  
Office of the Federal Defender  
401 Main Street, Suite 1500  
Peoria, Illinois 61602  
Phone: (309)671-7891

By: \_\_\_\_\_

Kent V. Anderson  
Staff Attorney  
Office of the Federal Defender  
401 Main St., Suite 1500  
Peoria, IL 61602  
Telephone: (309)671-7891  
COUNSEL FOR DEFENDANT-APPELLANT