

2005 WL 487735 (11th Cir.(Ga.))
 --- F.3d ---

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United States Court of Appeals,
 Eleventh Circuit.
 UNITED STATES of America, Plaintiff-Appellee,
 v.
 Garry DOCKERY, Defendant-Appellant.
 No. 03-16388
 Non-Argument Calendar.
 March 3, 2005.

Background: Defendant was convicted, in the United States District Court for the Northern District of Georgia, No. 03-00011-CR-JTC-3, Jack T. Camp, J., of transporting child pornography through Internet, and he appealed sentence. The Court of Appeals, [120 Fed.Appx. 785](#), affirmed, and certiorari was sought. The Supreme Court, [125 S.Ct. 1101](#), vacated and remanded for reconsideration in light of [Booker](#).

Holding: On remand, the Court of Appeals held that defendant had abandoned [Booker](#) issue by not previously raising any constitutional challenge to his sentence. Opinion reinstated in part; sentence affirmed.

[170B](#) Federal Courts

[170BVII](#) Supreme Court

[170BVII\(B\)](#) Review of Decisions of Courts of Appeals

[170Bk462](#) k. Determination and Disposition of Cause. [Most Cited Cases](#)

Remand by Supreme Court to reconsider case in light of [Booker](#) did not require Court of Appeals to treat case as though constitutional challenge to sentence had been timely raised before it, and thus did not preclude Court of Appeals from considering issue to have been abandoned.

Mildred Geckler Dunn, Stephanie Kearns and Vionnette Reyes, Federal Public Defenders, Federal Defender Program, Inc., Atlanta, GA, for Defendant-Appellant.

[Randy S. Chartash](#), [Amy Levin Weil](#), U.S. Atty., Atlanta, GA, for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before [BIRCH](#), [DUBINA](#) and [MARCUS](#), Circuit Judges.

PER CURIAM:

*1 This case is before the Court for consideration in light of [United States v. Booker](#), --- U.S. ----, [125 S.Ct. 738](#), --- L.Ed.2d ---- (2005). We previously affirmed Appellant's sentence. See [United States v. Dockery](#), [120 Fed.Appx. 785](#) (11th Cir.2004) (unpublished). The Supreme Court vacated our prior decision and remanded the case to us for further consideration in light of [Booker](#).

On appeal, Appellant challenges his 87-month sentence, imposed pursuant to his guilty plea, for knowingly transporting child pornography through the Internet by computer, in violation of [18 U.S.C. § 2252A\(a\)\(1\)](#). In his initial brief, Dockery argued that the district court erred by enhancing his sentence, pursuant to [U.S.S.G. § 2G2.2\(b\)\(4\)](#), because he did not engage in a pattern of activity involving the attempted sexual abuse or exploitation of a minor, within the meaning of [§ 2G2.2\(b\)\(4\)](#). More specifically, Appellant asserted that because he did not show up for Internet-arranged meetings with the minors, he took no "substantial step" toward the alleged criminal conduct. Appellant did not raise a constitutional challenge to his sentence, nor did he assert error based on [Apprendi v. New Jersey](#), [530 U.S. 466](#), [120 S.Ct. 2348](#), [147 L.Ed.2d 435](#) (2000), or any other case extending or

applying the *Apprendi* principle.

In *United States v. Ardley*, 242 F.3d 989 (11th Cir.), cert. denied, 533 U.S. 962, 121 S.Ct. 2621, 150 L.Ed.2d 774 (2001), after the Supreme Court's remand with instructions to reconsider our opinion in light of *Apprendi*, we observed the following:

Nothing in the *Apprendi* opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us. Nor is there anything in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the *Apprendi* issue had been timely raised in this Court. In the absence of any requirement to the contrary in either *Apprendi* or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Id. at 990 (citations omitted); see also *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir.2000) ("Defendant abandoned the [*Apprendi*] indictment issue by not raising the issue in his initial brief."). In the initial brief in this case, Appellant likewise asserted no such *Apprendi* (or its progeny) challenge to his sentence.

Accordingly, we reinstate our previous opinion in this case and affirm, once again, Appellant's sentence after our reconsideration in light of *Booker*, pursuant to the Supreme Court's mandate.

***2** OPINION REINSTATED IN PART; SENTENCE AFFIRMED.

C.A.11 (Ga.),2005.

U.S. v. Dockery

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