

2005 WL 387974 (2nd Cir.(N.Y.))  
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THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

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United States Court of Appeals, Second Circuit.  
UNITED STATES OF AMERICA, Appellee,  
v.  
James MITCHELL, also known as Mailman, Defendant-Appellant.  
No. 04-3367.  
Feb. 18, 2005.

Appeal from the United States District Court for the Southern District of New York ([Griesa, J.](#)).  
[James Mitchell](#), Otisville, NY, for Defendant-Appellant, pro se.  
[David N. Kelley](#), United States Attorney for the Southern District of New York (Vincent Tortorella,  
[Celeste L. Koeleveld](#), Assistant United States Attorneys), New York, NY, for Appellee, of counsel.

PRESENT: Hon. [JOSEPH M. MCLAUGHLIN](#), Hon. [PETER W. HALL](#) and Hon. [JOHN R. GIBSON](#), [\[FN\\*\]](#)  
Circuit Judges.

[FN\\*](#) The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit,  
sitting by designation.

#### SUMMARY ORDER

**\*1** THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 18th day of February, two thousand and five.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

James Mitchell appeals from an order entered on May 11, 2004, in the United States District Court for the Southern District of New York ([Griesa, J.](#)) denying Mitchell's motion pursuant to [18 U.S.C. § 3582\(c\)\(2\)](#) for a reduction of sentence. On appeal, Mitchell argues that (a) the district court erred in calculating his base offense level pursuant to [U.S.S.G. § 2A1.1](#); (b) [U.S.S.G. § 2A1.1](#) did not apply because he did not commit murder with "malice aforethought" as required by [18 U.S.C. § 1111](#); and (c) the Supreme Court's decision in [Blakely v. Washington, 124 S.Ct. 2531 \(2004\)](#) "clearly impacts" his argument for a reduced sentence. Familiarity with the facts and the proceedings below is assumed. We affirm.

For substantially the same reasons set forth in the district court's May 11, 2004 order, we deny Mitchell's first claim. The district court properly found that Mitchell's guideline calculation remains the same. Amendment 591 to the Sentencing Guidelines, applicable by the terms of [18 U.S.C. § 3582\(c\)\(2\)](#), does not change the calculation of Mitchell's sentence. The guideline for his offense of conviction, [U.S.S.G. § 2B3.1](#) (Robbery), applies the [U.S.S.G. § 2A1.1](#) (First Degree Murder) offense guideline to a robbery conviction in which a victim was killed under circumstances that would have constituted

murder under [18 U.S.C. § 1111](#) had it occurred within the territorial or maritime jurisdiction of the United States.

Mitchell's second contention that he did not commit murder with malice aforethought also fails because malice aforethought can be demonstrated by showing that the homicide occurred during the commission of a robbery. [18 U.S.C. § 1111\(a\)](#); [United States v. Thomas, 34 F.3d 44, 48-49 \(2d Cir. 1994\)](#).

Finally, Mitchell's bare assertion that *Blakely* somehow has an impact that supports his argument is also unavailing. In *Blakely*, the Supreme Court held that the Washington state sentencing procedures violated the Sixth Amendment, but declined to opine on the constitutionality of the United States Sentencing Guidelines. [Blakely, 124 S.Ct. at 2538 n. 9](#). Recently, the Supreme Court addressed that issue in *United States v. Booker*, 125 S.Ct. 728 (2005). At best, Mitchell's effort somehow to import *Blakely* and, by extension, *Booker* into a recalculation of his sentence under [18 U.S.C. § 3582\(c\)\(2\)](#) is a collateral attack on the original judgment. This court has held, however, that *Booker* does not apply retroactively to cases on collateral review. [Green v. United States, No. 04-6564, 2005 WL 237204 at \\*1 \(2d Cir. Feb. 2, 2005\)](#).

**\*2** We have carefully considered all of Mitchell's arguments and find them to be without merit. The judgment of the district court is hereby AFFIRMED.

C.A.2 (N.Y.), 2005.

U.S. v. Mitchell

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