

finding after receiving out-of-court statements by a non-testifying witness, over the defendant's objections that this violated his right to confrontation (Sentencing T. 18) and that the out-of-court statements were too unreliable to support a finding that he used a firearm to commit another felony (Sentencing T. 12-13).

3. In his original brief filed May 10, 2004, Mr. Wallace challenged the district court's admission of unreliable hearsay as the sole basis for enhancing the Guidelines range by four levels under U.S.S.G. §2K1.2.1(b)(5)

4. Mr. Wallace then asked to file a supplemental brief based on the Supreme Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), that a state sentencing guidelines scheme violated the constitution insofar as it provided for sentencing above the "statutory maximum" based on facts not found by a jury beyond a reasonable doubt or admitted by the defendant. The "statutory maximum" to which this rule refers is the maximum sentence a judge may impose solely on the basis of the facts reflected in a jury verdict or admitted by the defendant. 124 S.Ct. at 2537. Mr. Wallace argued that in light of *Blakely*, the trial court's use of hearsay to find facts that were the functional equivalent of elements violated the Sixth Amendment right of confrontation. He also argued that the court's application of a mandatory penalty range based on its own factfinding was unconstitutional according to *Blakely*.

5. On September 9, 2004, this court took Mr. Wallace's motion to file his

supplemental brief with the case.

6. On September 27, 2004, the Eighth Circuit issued an administrative order indicating that panels may permit supplemental briefing based on the Supreme Court's resolution of *United States v. Booker*, No. 04-104, after an opinion in that case issued.

7. At the oral argument of this case on December 14, 2004, the Court declined to hear argument on issues under *Blakely* or *Booker*.

8. Mr. Wallace files this Second Supplemental Brief based on the Supreme Court's ruling in *United States v. Booker*, 2005 WL 50108 (2005), that the sentencing enhancements the Federal Sentencing Guidelines mandated based on facts not admitted by a defendant or found by a jury beyond a reasonable doubt violated the Sixth Amendment and compels resentencing at which the guidelines are advisory only.

9. The Supreme Court notably granted several hundred petitions for certiorari and remanded for further consideration based on *Booker*, including many cases where no *Blakely* issue was raised in the original briefs. See Miscellaneous Orders, CERTIORARI – SUMMARY DISPOSITIONS, 543 U.S. ____, (January 24, 2005).¹

¹The lengthy list of cases for which certiorari was summarily granted is accessible online at <http://www.supremecourtus.gov/orders/courtorders/012405pzor.pdf>.

At least twenty-six of the petitioners in those cases received certiorari to this court. *E.g.*, *United States v. Smith*, 363 F.3d 811 (8th Cir. 2004), *certiorari granted, judgment vacated and remanded for reconsideration in light of Booker*, 543 U.S. ____ (2005); *United States Red Elk*, 368 F.3d 1047 (8th Cir. 2004), *same*. The Supreme Court's omnibus ruling demonstrates the magnitude of the constitutional violations found in *Booker*, and the importance of addressing the issue on appeal, even where it was not raised in the original briefs filed on appeal. *See United States v. Smith, supra; United States v. Martinez-Figueroa*, 363 F.3d 679 (8th Cir. 2004).

10. The *Booker* decision applies to defendants whose cases are pending on direct appeal, 2005 WL 50108, at *26.

WHEREFORE, appellant respectfully requests that the Court enter its Order granting appellant leave to file his second supplemental brief concerning the issues raised by *United States v. Booker*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copies of the foregoing have been delivered to Allison Behrens, Assistant United States Attorney's office, Room 20-333, 111 South 10th St., St. Louis, Mo. 63102 on this 26th day of January, 2005.

Counsel for Appellant Wallace