

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. ) Case No. 03 CR 351  
)  
DEMETRIUS DAVIS, )  
)  
Defendant. )

**RESPONSE TO THE GOVERNMENT’S BRIEF REGARDING  
THE *PALADINO* LIMITED REMAND**

Now comes Richard H. Parsons, Chief Federal Public Defender for the Central District of Illinois, and Kent V. Anderson, Senior Staff Attorney, Office of the Federal Defender, and moves this Court for the entry of an Order indicating that it would impose a different sentence on defendant, Demetrius Davis, if his case is fully remanded to this Court for resentencing, and in support thereof, states as follows:

## I. Introduction

The Court of Appeals has sent this case back to this Court, on a limited remand, for this Court to determine whether it would sentence Mr. Davis differently under *United States v. Booker*, 5\_\_ U.S. \_\_\_\_, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). *United States v. Davis*, No. 03-3988, slip opn. (7th Cir. April 26, 2005) (unpub.).

There are mitigating facts in this case which warrant resentencing. Mr. Davis has a long history of substance abuse that has undoubtedly contributed to his criminal history and the instant offense. He has never been treated for substance abuse. However, he expressed a desire for treatment during his presentence interview with the probation officer. Treatment would probably enable Mr. Davis to become a contributing, law-abiding member of society.

In addition, U.S.S.G. §2K2.1 is an unusual Guideline in the sense that it requires a defendant's prior convictions to be used to increase his offense level, as well as his criminal history category. There does not appear to be any reason why a defendant's sentence should be increased twice on the basis of his prior convictions.

Therefore, a much shorter sentence than Mr. Davis' current sentence of 120 months in prison would be sufficient to fulfill the statutory goals of sentencing. In contrast, Mr. Davis' current sentence is greater than necessary to fulfill those purposes.

## **II. Facts of the offense.**

Police officers saw Mr. Davis in possession of a pistol at about 4:00 a.m. on June 5, 2002. (07/07/03 RT<sup>1</sup> 38, 41-45, 47,53, 87-90, 96-98, 119-121, 125-126; 07/08/03 RT Vol. 2-A 16-17, 19-20, 23-24.) The parties stipulated that Mr. Davis has previously been convicted of a felony. They also stipulated that the gun had previously traveled in interstate commerce. (07/08/08 RT Vol. 2-A 3.) However, there was no evidence that Mr. Davis was responsible for the gun moving in interstate commerce.

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<sup>1</sup> CR is used as an abbreviation for the this court's clerk's record of Mr. Davis' case. RT with a date is used as an abbreviation for the reporter's transcript of Mr. Davis' second trial. 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. App. is used as an abbreviation for the appendix to Mr. Davis' opening brief in the Court of Appeals.

### **III. Prior Proceedings in this Court**

On April 3, 2003, the grand jury of the Northern District of Illinois returned an indictment charging appellant, Demetrius Davis, with one count of being a felon in possession of a firearm on June 5, 2002. (18 U.S.C. §922(g), CR 1, App. 2.)

A trial was held from June 30th to July 2, 2003. This trial ended in a mistrial, when the jury was unable to reach a verdict. (CR 27, 32, 34, 35.) A second trial was held on July 7th and July 8, 2003. The second jury found Mr. Davis guilty as charged. (CR 36, 38, 40-41; 07/08/03 RT Vol. 2-A 105.)

In his presentence report, the probation officer recommended that Mr. Davis' offense level be 24 based on the instant offense and a finding that he had two prior armed robbery convictions, which counted as crimes of violence. (PSR 3.) The officer found that Mr. Davis' criminal history category was six, based on a finding that he had four prior convictions and a finding that he committed the instant offense less than two years after he was last released from prison. (PSR 4-6).

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 8.)

On November 4, 2003, this Court held a sentencing hearing for Mr. Davis. Mr. Davis did not object to the probation officer's calculations. (ST 15-16.) Therefore, the Court adopted the probation officer's recommended offense level and criminal history category. (ST 16, App. 11.) The Court then sentenced Mr. Davis to the statutory maximum term of 120 months imprisonment. The Court also sentenced him to a term of two years of supervised release, following his incarceration. In addition, the Court ordered Mr. Davis to pay a \$1,500 fine and a \$100 special assessment. (CR 50; ST 23-28; App. 5-9, 12-17.)

Mr. Davis filed a timely notice of appeal on November 14, 2003, pursuant to F.R.A.P. 4(b). (CR 51, App. 1.)

#### **IV. Proceedings in the Court of Appeals and later proceedings in this Court.**

On October 1, 2004, appellate counsel filed a brief in the Court of Appeals. He argued that 18 U.S.C. §922(g)(1) was unconstitutional as applied to Mr. Davis' purely intrastate possession of a gun because it does not require that his possession had a substantial affect on interstate commerce. Counsel also argued that this Court improperly based Mr. Davis' sentence on prior convictions that were not: contained in the charge in the indictment for which he was convicted;

proven to a jury beyond a reasonable doubt; or admitted by him. Counsel raised these issues simply to preserve them for possible Supreme Court review. On February 7, 2005, counsel filed a supplemental brief, in which he argued that Mr. Davis' case should be remanded for resentencing, pursuant to *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005), because this Court considered the Guidelines to be mandatory when sentencing Mr. Davis.

On April 26, 2005, the Court of Appeals ordered a limited remand of Mr. Davis' case to this Court, pursuant to *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005). The Court of Appeals rejected Mr. Davis' other arguments. *United States v. Davis*, No. 03-3988, slip opn..

On June 9, 2005, the government filed a brief urging this Court to decline the opportunity to resentence Mr. Davis. (CR 67-71.) This Court ordered counsel to file a response to the government's brief by July 13, 2005. (CR 70-71.)

**V. Additional facts relevant to sentencing.**

Mr. Davis has participated in a 40 hour drug education program in prison. He is also expected to obtain his G.E.D. soon. In addition, he has received good work evaluations in his position as a unit orderly. (See attached Bureau of Prisons' Progress Report.)

## VI. Sentencing principles after *Booker*.

In *United States v. Booker*, 125 S.Ct. 738, the Supreme Court held that the rule it stated in *Blakely* applies to the Federal Sentencing Guidelines. *United States v. Booker*, 125 S.Ct. at 746.

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 764. 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 767. In addition, courts must also consider the purposes of sentencing set forth in 18 U.S.C. §3553(a). *Id.* at 764-765.

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 unwarranted 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*, 353 F.Supp.2d 984, 985 (E.D. Wis. 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 986. Thus, factors which mitigate a defendant's culpability for a crime now have much greater importance to the determination of an appropriate sentence.

“Courts need not strictly justify sentences by reference to the guidelines or identify non-heartland factors to justify sentences above or below the guidelines range. However, in exercising discretion, courts can use the guidelines recognizing their comprehensive nature and quantification of many relevant factors.” *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 964 (E.D. Wis. 2005). This Court is “free to disagree . . . with the actual range proposed by the guidelines, so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the §3553(a) factors.” *United States v. Ranum*, 353 F. Supp. 2d at 987.

The government argues that the Guidelines should still be given substantial weight when defendants are sentenced. (Gov’t. *Paladino* brief pp. 6-10.) However, the government is incorrect.

Last week, the Seventh Circuit stressed the mandatory nature of 18 U.S.C. §3553(a) and the advisory nature of the Guidelines. It noted that:

the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for such a variant sentence to be reasonable and thus within the sentencing judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by section 3553(a), which as we have stressed is mandatory.

*United States v. Dean*, 4\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 13510, \*14-\*15 (7th Cir.

July 7, 2005). Immediately after that statement, the Court cited, with approval, three district court opinions that rejected the government's position that the Guidelines are entitled to presumptive or heavy weight. *Id.*, citing *United States v. Ranum*, 353 F.Supp.2d 984, 985-986 (finding that, under *Booker*, the Guidelines are just one of a number of sentencing factors); *United States v. Kelley*, 355 F.Supp.2d 1031, 1035-1037 (D. Neb. 2005) (refusing to afford the Guidelines a presumption of reasonableness in every case); *Simon v. United States*, 361 F.Supp.2d 35, 39-41 (E.D. NY 2005) (adopting the view that the Guidelines are entitled to the same weight as other §3553(a) factors). Therefore, the Seventh Circuit effectively rejected the government's position in *Dean*.

In contrast, in another opinion that was issued the same day as *Dean*, a different panel of the Seventh Circuit held that a Guidelines sentence is entitled to a rebuttable presumption of reasonableness. The second panel found that "[t]he defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a)." *United States v. Mykytiuk*, 4\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 13508, \*3-\*5 (7th Cir. July 7, 2005). Perhaps, the panel did not intend to make such a strong statement in *Mykytiuk*. However, if the language in *Mykytiuk* is taken literally, the Court has created an intra-circuit conflict.

In addition, a literal reading of *Mykytiuk* would conflict with *Booker*. Such a reading would have the effect of making the Guidelines mandatory, unless the defendant can show that his sentence should be outside the Guidelines. That is no different than the pre-*Booker* situation of the Guidelines being mandatory with narrow exceptions for departures. As noted above, the merits majority in *Booker* found that sentencing scheme unconstitutional. *United States v. Booker*, 125 S.Ct. at 746.

Of course, this Court is bound by Seventh Circuit authority. However, when there is a conflict between two recent Seventh Circuit decisions this Court must decide which one to follow. In this case, this Court should follow the *Dean* decision, because it does not conflict with *Booker*. If this Court were to follow a literal reading of the *Mykytiuk* decision, this Court's decision would conflict with the Supreme Court's decision in *Booker*, which is paramount.

The government has also argued that this Court should not consider any additional evidence when deciding whether it would still impose the same sentence, under *Booker*, that it imposed previously. However, this Court has previously found that it is appropriate to consider new information on a *Paladino* limited remand. *United States v. Henry*, No. 01-CR-1098-3, slip opn. pp. 13-14 (N.D. IL June 7, 2005).

## **VII. Application of the §3553(a) factors to Mr. Davis' case.**

Mr. Davis has modeled the following argument on the approach to sentencing taken by Judge Adelman in *United States v. Galvez-Barrrios*, 355 F. Supp. 2d at 960-964.

### **A. Nature and Circumstances of the Offense.**

Mr. Davis has recounted the nature and circumstances of his offense above and the government has also done so in its submission. There are no particularly aggravating or mitigating circumstances apparent from the manner in which Mr. Davis possessed the gun. Any conjecture as to the reason Mr. Davis made the unfortunate choice to illegally possess and carry a gun would be mere speculation.

So, the nature of Mr. Davis' offense does little to suggest an appropriate sentence within the statutory range.

### **B. Mr. Davis' history and characteristics.**

As noted above, Mr. Davis has a serious substance abuse problem. In fact, he was getting drunk every day before his arrest. (PSR 8.) That undoubtedly contributed greatly to his criminal history and the instant offense. Alcohol, in particular, impairs judgment and lowers inhibitions, especially when someone drinks to the point of intoxication. All too often this results in people doing things that they would not otherwise do. Of course, there is also the need for

money to buy alcohol and other drugs. That often causes someone to commit crimes when their substance abuse interferes with the ability to hold legitimate employment.

Mr. Davis has never been treated for his apparent alcoholism and drug addiction. He told the probation officer that he wants to receive treatment in order to change his life. (PSR 8.) This desire is born out by the fact Mr. Davis has participated in a 40 hour drug education program in prison. (Attached progress report.) That is probably the only substance abuse program available to him until he is eligible for the residential drug abuse program (RDAP).

The facts Mr. Davis is close to obtaining his G.E.D. and is obtaining good work reports are further evidence of his capacity for and desire to change. (Progress report.)

**C. Purposes of imposing a sentence.**

At the time this Court originally sentenced Mr. Davis it could not fully consider his history of substance abuse and the likely relationship between that problem and his criminal activity. The mandatory guidelines discouraged consideration of such aspects of a defendant's history. (U.S.S.G. §5H1.1 - §5H1.12.)

However, under *Booker*, this Court can and must now consider substance abuse and other factors when sentencing a defendant. *United States v. Fagans*, 406 F.3d 138, 141 fn. 1 (2nd Cir. 2005); *United States v. Ranum*, 353 F.Supp.2d at 985.

**D. Needs of the public.**

Congress has determined that the public has a need to punish convicted felons who possess guns. However, this Court could still impose a substantial punishment that is less than the maximum sentence. In addition, the public will be better served by Mr. Davis becoming and staying sober and free of drugs than by an overly long prison sentence. That will do more than a long period of imprisonment to ensure that Mr. Davis will not reoffend and will become a contributing member of society. Unfortunately, instead of allowing prisoners to get substance abuse treatment early in a long sentence, they usually must be within 36 months of release before they can enter the RDAP. (BOP Program Statement 5330.010 §5.4.1(4).)

**E. The advisory Guidelines.**

The range for Mr. Davis' offense and criminal history, under the advisory Guidelines, is 100 to 120 months. (PSR 9.)

As noted above, the advisory Guidelines do not fully account for cases like Mr. Davis'. They do not allow this Court to fully take into account the mitigating circumstances about Mr. Davis.

In addition, the Guidelines required that Mr. Davis' sentence be enhanced twice on the basis of his prior record. His offense level was enhanced under U.S.S.G. §2K2.1(a)(2) and his criminal history was also increased based on the same prior convictions. (PSR 3-5.) "Although it is sound policy to increase a defendant's sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis." *United States v. Galvez-Barrios*, 355 F. Supp. 2d at 963 (discussing the same type of calculation for 8 U.S.C. §1326 offenses).<sup>2</sup> This Court can and should now ameliorate the effects of this double-counting that does not occur in the Guidelines for most other offenses.

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<sup>2</sup> If Mr. Davis' offense level had been increased on the basis of two of his prior convictions and those convictions were not included in his criminal history category, he would have had an offense level of 24 and criminal history category of four, resulting in a Guidelines range of 77 to 96 months. If all of his prior convictions only affected his criminal history category he would have had an offense level of 12 and criminal history category of six, resulting in a Guidelines range of 30 to 37 months. (U.S.S.G. §5A.)

Furthermore, a lesser sentence would likely be just as effective in fulfilling the statutory goal of providing adequate deterrence to criminal conduct. (18 U.S.C. §3553(a)(2)(B).) For example, a felon who is not deterred from possessing a gun by the fact someone else was given a six or seven year sentence for that offense will not be deterred by a ten year sentence either. On the other hand, a six or seven year sentence would be sufficient to deter those who can be deterred.

In addition, a lesser sentence with substance abuse treatment and intensive supervision while on supervised release would probably be sufficient to further the statutory goal of protecting the public from further crimes of Mr. Davis. (18 U.S.C. §3553(a)(2)(C).)

It does not appear that a reduced sentence would have any impact on the statutory goal of providing Mr. Davis with needed medical care, or other correctional treatment in the most effective manner. (18 U.S.C. §3553(a)(2)(D).) Mr. Davis is certainly in need of substance abuse treatment. However, he can get that in much less time than his current 120 month sentence. It will also help if Mr. Davis is able to continue to increase his education and learn a trade in prison that he can do on the outside. However, a lesser sentence would still give him enough time to do those things.

Even if two sufficient and reasonable sentences are potentially applicable, the parsimony provision of 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.") requires a district court to choose the lesser sentence. *United States v. Carey*, 3\_\_ F.Supp.2d \_\_\_, 2005 U.S. Dist. LEXIS 8201, \*8 fn. 4 (E.D. Wis. April 25, 2005). In this case, it is clear that a lesser sentence would be sufficient to fulfill the purposes of sentencing.

**VIII. Conclusion.**

Therefore, Mr. Davis, respectfully requests that this Court answer the question posed by the Court of Appeals by saying that it would impose a different sentence if it were given the opportunity to resentence Mr. Davis, under *Booker*.

Dated: July 12, 2005.

DEMETRIUS DAVIS,  
Defendant-Appellant

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UNITED STATES DISTRICT COURT FOR THE  
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**NOTICE OF FILING AND PROOF OF SERVICE**

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PLEASE TAKE NOTICE that on July 12, 2005, the undersigned attorney  
filed the original and one copy of Defendant-Appellant's Counsel's Response to  
the Government's Brief Regarding the *Paladino* Limited Remand with the Clerk of  
the United States District Court for the Northern District of Illinois and served  
one copy thereof upon all counsel of record, by enclosing said instruments in

envelopes addressed as indicated above with postage prepaid, and by depositing said envelopes with the United States Postal Service in Peoria, Illinois, on July 12, 2005.

RICHARD H. PARSONS,  
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