

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

No. XX-XXXX

UNITED STATES OF AMERICA,  
Appellee,

v.

XXXXXXXXXXXX,  
Defendant-Appellant.

---

**APPELLANT’S MOTION FOR SUMMARY REMAND FOR RESENTENCING**

Appellant XXXXXXXX respectfully moves this Court to vacate the sentence and remand for resentencing under the standards announced in United States v. Booker, 543 U.S. \_\_\_, 125 S. Ct. 738 (2005). This Court has authority to remand this matter for resentencing, pursuant to 18 U.S.C. §3742(f)(1) (when a sentence is imposed “in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate”), 28 U.S.C. §2106 (any “court of appellate jurisdiction may . . . vacate, set aside or reverse any judgment . . . of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances,” and Rule 27(c) of the Local Rules for the First Circuit, which authorizes summary remands.

At issue in this motion is whether Mr. XXXXXXXX is entitled to a summary remand and resentencing, at which he would still apparently face the trial court’s

application of a statutory mandatory minimum of 15 years' imprisonment (rather than the 20-years' imprisonment that he received), with the consideration of all relevant statutory sentencing factors under 18 U.S.C. §3553, and the use of the sentencing guidelines on an *advisory* basis, rather than the *erroneous mandatory* imposition of a sentence in a higher guideline range than is required by statute.

The reasons for this motion are the following:

**Booker**

1. On January 12, 2005, the Supreme Court decided United States v. Booker, 543 U.S. \_\_\_, 125 S. Ct. 738 (2005). The Booker Court held that sentencing under the federal sentencing guidelines based on judicial factfinding by a preponderance of the evidence violated the Sixth Amendment right to jury trial because it mandated sentences that exceeded the maximum authorized by the facts established by a plea of guilty or a jury verdict. Id. at 750, 756. In a remedial interpretation of the Sentencing Reform Act, the Booker Court excised 18 U.S.C. § 3553(b)(1) (which “makes the Guidelines mandatory”), and 18 U.S.C. § 3742(e) (a standard of review which “depends upon the Guidelines’ mandatory nature”), in order to adhere to the constitutional requirements. See Booker, 125 S. Ct. at 756-57, 764.

2. The Booker decision makes clear that sentencing courts must now consider not only a guidelines range, but also all of the other factors set forth in 18 U.S.C. § 3553(a). Booker, 125 S. Ct. at 757, 764, 766, 767, 768; United States v. Crosby, 2005 WL 240916, at \*7, 397 F.3d 103 (2d Cir. Feb. 2, 2005); United States v. Hughes, 396 F.3d 374, 385 (4<sup>th</sup> Cir. Jan. 24, 2005). The sentence therefore must be “sufficient, but not greater than necessary,” to fulfill “(2) the need for the sentence imposed -- (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,” 18 U.S.C. § 3553(a)(2), and in making that decision, the court must consider, in addition to the guidelines range and policy statements including departures, 18 U.S.C. § 3553(a)(4), (5), “(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 sentence 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.”

3. Before Booker, courts could not consider all of the factors listed in §3553(a) because § 3553(b)(1) required a sentence within the guidelines range unless specific standards for departure were met. Crosby, 2005 WL 240916, at \*5. Even those sentencing courts anticipating Booker were not likely to have anticipated the excision of §3553(b)(1) and therefore did not consider all of the §3553(a) factors. Id. at \*11 n.18. Similarly, many courts, like the court below, had presumed that Blakely did not impact a sentencing court’s obligation to apply the guidelines based on judicial factfinding related to prior convictions. Cf. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (apparently carving out from Sixth Amendment analyses proof of “the fact of a prior conviction”). The Booker holding proved those presumptions incorrect because the federal sentencing guidelines, in their entirety, are now advisory rather than mandatory.

4. The Booker Court’s remedial interpretation of the statute is applicable to all cases on direct review. Booker, 125 S. Ct. at 769. The Booker decision requires sentencing courts to impose a “reasonable” sentence that takes into account all of the factors set forth in section 3553(a). Id. at 766 (“Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”); id. at 765 (sentencing decisions are appealable “irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under §3553(a)”).

**Booker Violation at the Sentencing of Mr. XXXXXXXXX**

5. At sentencing, the trial court focused scrupulously on guidelines calculations and sentenced Mr. XXXXXXXXX within what it perceived as the mandatory guideline range. In United States v. Antonakopoulos, 2005 WL 407365 (1<sup>st</sup> Cir. Feb. 22, 2005), this Court held that “[t]he error under *Booker*, is, as we have said, that the defendant was sentenced under a *mandatory* Guidelines system.” Id. at \*6.<sup>1</sup>

6. Facing a variety of arguments and approaches that had developed after the Supreme Court decided Blakely v. Washington, 542 U.S. \_\_\_, 124 S. Ct. 2531 (2004), but before it decided Booker, the Antonakopoulos Court announced a rule that construes the record below leniently (but not automatically, as in certain other circuits) in favor of finding Booker issues preserved: “The argument that a *Booker* error occurred is preserved if the defendant below argued *Apprendi* or *Blakely* error or that the Guidelines were unconstitutional.” Id. This Court did not require that a defendant make the specific

---

<sup>1</sup> On a full appeal, Mr. XXXXXXXXX would present other objections to the lower court’s findings, but for purposes of this motion, Mr. XXXXXXXXX limits his argument to the lower court’s erroneous treatment of the federal sentencing guidelines as mandatory.

argument that the Supreme Court ultimately adopted in Booker, so long as the record reflected an adequate development of Blakely-type issues in the trial court. Id. (finding that Booker issues will be deemed preserved based on Blakely discussions in the trial court, even if “broader in scope than the argument that the mandatory Guidelines system was unconstitutional”).

7. In the present case, the trial court accepted a plea of guilty by Mr. XXXXXXXXX on February 9, 2004, before the Supreme Court’s decision in Blakely v. Washington, 542 U.S. \_\_\_, 124 S. Ct. 2531 (2004).

8. After multiple hearings and briefing, on August 2, 2004, the trial court reaffirmed its belief in the mandatory application of the armed career offender guidelines provisions and erroneously rejected any impact arising from Blakely on sentencing guidelines provisions that depend on prior criminal convictions:

THE COURT: I want to address and make it clear for the record any issues that may be presented under Blakely v. Washington. The court has reviewed the superseding indictment dated October 9, 2003, and the government’s revised version of the offense dated February 9, 2004, with a view to determine whether any enhancements under the guidelines have been set forth in the indictment and admitted to by the defendant.

I would first note that the calculation of the base offense level under Section 2K2.1(a)(1) relies on prior convictions, which are an exception under Blakely and also have been the subject of the court’s August 2, 2004 ruling.

\* \* \* \*

The court determines that, to the extent it’s applicable, Blakely has been fully complied with regarding his armed career criminal status and his possession of a firearm, which is the highest guideline calculation. Blakely is not applicable since it’s a function of his criminal history.

8/11/04 Transcript at 7:12 – 8:21.

9. By so doing, the trial court applied literally, but erroneously, the language in Blakely derived from Apprendi, in which the Supreme Court held that, under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490 (emphasis added). Because the Booker Court ultimately adopted a remedy that transformed *mandatory* guidelines into *advisory* guidelines, in their entirety, the prior dicta that carved out “the fact of a prior conviction” does not save U.S.S.G. §4B1.4 from the ramifications of Booker. See United States v. Gonzalez, No. 03-4279, 2005 WL 415957 (6<sup>th</sup> Cir. Feb. 22, 2005) (Even though the career criminal sentence enhancement may be based on judicial factfinding without violating the Sixth Amendment, “the Guidelines are now advisory as to all sentences,” and the sentencing court may impose a different sentence “if not bound by the career criminal provisions of the Guidelines.”).

10. The trial court had previously issued an order, dated August 2, 2004, in which it analyzed each of the following events that appeared in the criminal history at issue: a simple assault, an assault, the possession of a class B controlled substance, and a larceny. 8/2/04 Order at 6-10. The trial court concluded that these items triggered the application of 18 U.S.C. § 924(e) (imposing statutory 15-year minimum) and U.S.S.G. §4B1.4 (triggering guideline levels that led to actual sentence of 20-years’ imprisonment).

11. Because the trial court imposed an actual sentence of 20-years’ imprisonment, more than the statutory mandatory minimum of 15-years’ imprisonment, Booker requires resentencing. Antonakopoulos, 2005 WL 407365, at \* 6 (“Generally,

there is no *Booker* argument if the sentence imposed was a statutory mandatory minimum sentence resulting from facts found by a jury or admitted by the defendant.”).

12. Here, the error below is compounded by the particular background of the defendant, his family circumstances, and the disparity of sentences among co-defendants, each of which can play a much more significant role at resentencing since Booker reinstated the importance of factors, other than the guideline range, found in 18 U.S.C. §3553(a). As Mr. XXXXXXXX explained at sentencing:

I’ve had a drug and alcohol problem my entire life, which has caused me to make some terrible decisions due to impaired judgment. I accept full responsibility for the role I played in these crimes. I am overwhelmed with same for my actions in these most irresponsible events where I was thoughtless and even allowed safety of others to be jeopardized.

I am a caring, loving father to my son, Anthony, and daughter, Chelsea, who are 12 and 10 years old, respectively, and I am also a good son, as well as a hardworking, responsible person involved in the community when I am clean and sober. Judge, whatever sentence you impose on me, I hope it gives me the opportunity to rehabilitate myself and possibly further my education and hopefully be a part of my children’s future, you know, their young adult lives. I’m hoping for it.

And, you know, I had a lot of things happen to me when I was a child, and I turned to drugs and alcohol. And I – it was a shame that – the way that the Massachusetts system worked. You know, I never got any drug or alcohol treatment. You know, it was jail, jail, 30 days, 90 days, a year, a year and a half. You know, it was just – it was a vicious cycle I was caught in, and the drug use continued right along in the jails and prisons.

8/11/04 Transcript at 18:4 - 19:2. In addition, the main offender in this prosecution received a sentence of only 151 months’ imprisonment, arguably creating unwarranted disparity between Mr. XXXXXXXX and a more culpable offender. See 18 U.S.C. §

3553(a)(6). These matters give rise to post-Booker grounds for reasonable leniency under §3553(a) that did not previously exist.

13. Under the circumstances, even had he not adequately preserved the Blakely issues, Mr. XXXXXXXXX could meet his burden of establishing plain error on appeal. The Antonakopoulos Court applied a plain error review and still found as follows:

There is another type of *Booker* argument available but which Antonakopoulos has not made: that there is a reasonable probability that the district court, freed of mandatory guidelines, would have given him a lower sentence. Because this case establishes the standard for such a claim, we think it fairer to give Antonakopoulos and his counsel time to consider whether he wishes to advance the argument.

Antonakopoulos, 2005 WL 407365, at \*12. Here, the guidance from Booker regarding previously unavailable sentencing factors, under §3553(a), and the facts raised by Mr. XXXXXXXXX at sentencing establish a reasonable probability that the district court, freed of mandatory guidelines, would have given him a lower sentence, closer to the 15-year statutory mandatory minimum in 18 U.S.C. §924(e).

**Absence of Knowing and Intelligent Waiver**

14. The government cannot establish a knowing and intelligent waiver of Blakely or Booker rights because those rights were unknown to Mr. XXXXXXXXX when he entered his guilty plea and were foreclosed by the firm decision of the trial court rejecting the application of Blakely to the guidelines issues that Mr. XXXXXXXXX faced, see 8/11/04 Transcript at 7:12 – 8:21. Indeed, because sentencing in the present matter depended so heavily on drastic career offender guidelines calculations, which are no longer mandatory, the Booker holding changes the entire sentencing landscape for Mr.

XXXXXXXX. Counsel below<sup>2</sup> guided the defense, at the plea and sentencing stages, based on *mistaken assumptions of material facts regarding the mandatory application of the guidelines*, which had only been fortified before sentencing by dicta in Blakely, which purported to carve out facts regarding prior convictions from any Apprendi-type analysis. See United States v. Teeter, 257 F.3d 14, 28 n. 12 (1<sup>st</sup> Cir. 2001) (mutual mistakes can justify reformation of plea terms); United States v. Bradley, 381 F.3d 641, 648 (7<sup>th</sup> Cir. 2004) (holding that “mutual mistake” as to nature of particular charge “invalidated” a plea agreement).

15. Given the dramatic change in sentencing laws and the severe potential effect on Mr. XXXXXXXX’s exposure, in the absence of a detailed colloquy between the lower court and Mr. XXXXXXXX regarding the waiver of Blakely-type rights, the government should not be able to establish a knowing and intelligent waiver by Mr. XXXXXXXX of his rights to raise Booker issues on appeal and obtain a resentencing in a post-Booker system. See generally Johnson v. Zerbst, 304 U.S. 458 (1938) (waivers of constitutional rights must be knowing and intelligent); see also United States v. De-la-Cruz Castro, 299 F.3d 5, 15 (1<sup>st</sup> Cir. 2002) (to support waivers of constitutional rights in connection with a guilty plea, government must show “knowing and voluntary” waiver and adequate “inquir[y] at the change of plea hearing” regarding the specific right at issue).

16. A waiver of pre-Booker error should not be found as readily when a defendant, such as Mr. XXXXXXXX, seeks to vacate the entire sentence rather than a selective reduction of portions of a sentence. See United States v. Sahlin, 2005 WL

---

<sup>2</sup> The undersigned counsel did not appear below, but rather was appointed by this Court, under the Criminal Justice Act, after Mr. XXXXXXXX filed his notice of appeal.

407407 at \*4 (1<sup>st</sup> Cir. Feb. 22, 2005) (skeptically addressing claim of pre-Booker error where a defendant “does not seek to vacate the entire sentence and send it back for resentencing in a post-Booker non-mandatory guidelines sentencing regime,” but instead seeks to vacate only a portion of a sentence arising from a particular enhancement).

17. The Booker decision also empowers this Court to review all sentences for reasonableness. Resort to pre-Booker cases involving the reasonableness of a sentence is inappropriate because the mandatory nature of the guidelines is no more, and section 3553(a) provides the correct sentencing framework, which requires that trial courts utilize the guidelines only on an advisory basis while paying attention to all of the factors listed in section 3553(a).

18. The Rule of Lenity should favor the preservation of close-call issues for appeal and a remand for resentencing with the benefits of a post-Booker system. See United States v. R.L.C., 915 F.2d 320, 325 (8<sup>th</sup> Cir. 1990) (citing Ladner v. United States, 358 U.S. 169, 178 (1958)), aff’d, 503 U.S. 291 (1992)). The rule of lenity “applies to sentencing provisions as well as to substantive criminal statutes.” R.L.C., 915 F.2d at 325 (citing to Bifulco v. United States, 447 U.S. 381, 387 (1980)). “The rule of lenity favors the statutory construction that yields the shorter sentence.” R.L.C., 915 F.2d at 325 (curing ambiguity by limiting criminal penalties faced by minors); see United States v. Diaz, 989 F.2d 391, 393 (10<sup>th</sup> Cir. 1993) (applying rule of lenity because “[a] sentence of imprisonment amounting to twice the amount of time permissible under the maximum sentence at the time the offense was committed is harsh” and “not clearly mandate[d]”); see also United States v. Oliver, 2005 WL 233779, at \*8-9 n.3, 397 F.3d 369 (6<sup>th</sup> Cir. Feb. 2, 2005) (“we cannot know the length of imprisonment that the district court judge

would have imposed pursuant to this evidence following Booker,” and “would be usurping the discretionary power granted to the district courts by Booker if we were to assume that the district court would have given Oliver the same sentence post-Booker.”); Hughes, 396 F.3d at 381 n.8 (“We simply do not know how the district court would have sentenced Hughes had it been operating under the regime established by Booker.”).

19. Here, without a post-Booker resentencing, a manifest injustice arises because Mr. XXXXXXXXX deserves his constitutional-based opportunity to present to a sentencing court all those factors that could favor the imposition of a term of imprisonment closer to a statutory mandatory minimum (e.g., 15-years’ imprisonment based on the lower court’s findings), than what he received (20-years’ imprisonment).

### **Conclusion**

Based on the foregoing, Mr. XXXXXXXXX respectfully requests that this Court vacate the sentence previously imposed and remand for resentencing, so that the district court can consider facts and arguments relevant to the proper standards under Booker, and explain the reasons for its sentence in terms of the proper standard and relevant facts and arguments.

Dated: March 3, 2005

Respectfully submitted,

By his attorney,

---

XXXXXXXXXX