

401 F.3d 497, 2005 WL 627077 (D.C.Cir.)

[Briefs and Other Related Documents](#)

United States Court of Appeals,
District of Columbia Circuit.
UNITED STATES of America, Appellee
v.
Arnett C. SMITH, Appellant
No. 03-3087.
March 18, 2005.

Background: Defendant was convicted in the United States District Court for the District of Columbia, [Royce C. Lamberth](#), J., of conflict of interest and conspiracy, and defendant appealed. The Court of Appeals affirmed defendant's conviction, vacated his sentence, and remanded for resentencing, [267 F.3d 1154](#). On remand, the District Court, Lamberth, J., sentenced defendant to 21 months in prison, and defendant appealed. The Court of Appeals, [John G. Roberts, Jr.](#), Circuit Judge, affirmed, [374 F.3d 1240](#). Defendant petitioned for rehearing.

Holdings: The Court of Appeals held that:

- (1) defendant failed to preserve Sixth Amendment claim for appellate review, and
(2) defendant was not prejudiced by sentence.

Petition denied.

West Headnotes

[1] [KeyCite Notes](#)

- 🔗 [110](#) Criminal Law
- 🔗 [110XXIV](#) Review
 - 🔗 [110XXIV\(E\)](#) Presentation and Reservation in Lower Court of Grounds of Review
 - 🔗 [110XXIV\(E\)1](#) In General
 - 🔗 [110k1035](#) Proceedings at Trial in General
 - 🔗 [110k1035\(1\)](#) k. In General. [Most Cited Cases](#)

Defendant failed to preserve claim for appellate review, that his sentence was unconstitutional under Sixth Amendment, by arguing at his initial sentencing that enhancements and upward departures under federal Sentencing Guidelines violated his Sixth Amendment right to jury trial, since Court of Appeals vacated and remanded that sentence on other grounds, defendant failed to raise constitutional challenge anew on remand, and Court of Appeals eventually affirmed his sentence.

[2] [KeyCite Notes](#)

- 🔗 [110](#) Criminal Law
- 🔗 [110XXIV](#) Review
 - 🔗 [110XXIV\(E\)](#) Presentation and Reservation in Lower Court of Grounds of Review
 - 🔗 [110XXIV\(E\)1](#) In General
 - 🔗 [110k1035](#) Proceedings at Trial in General
 - 🔗 [110k1035\(1\)](#) k. In General. [Most Cited Cases](#)

Defendant was not prejudiced by sentence that exceeded United States Sentencing Guidelines, for purpose of his challenge under Sixth Amendment on plain error review that judge did not appreciate that he was not bound by Guidelines, where judge, on each of prior two sentencings, imposed

sentence beyond what Guidelines required even though government had not requested upward departure on resentencing and defendant implicitly recognized that giving district judge wider latitude could have resulted in even longer sentence. [Fed.Rules Cr.Proc.Rule 52\(b\)](#), [18 U.S.C.A.](#)


***498** On Petition for Rehearing.


[Barbara J. Valliere](#), Assistant U.S. Attorney, [John Robert Fisher](#), Assistant U.S. Attorney, David Brian Goodhand, Assistant U.S. Attorney, [Mark H. Dubester](#), Assistant U.S. Attorney, U.S. Attorney's Office, Washington, DC, for Plaintiff-Appellee.

[Roscoe Conklin Howard, Jr.](#), U.S. Attorney, U.S. Attorney's Office, [Charles Bennett Klein](#), Winston & Strawn LLP, Washington, DC, for Defendant-Appellant.

Before: [ROGERS](#), [GARLAND](#), and [ROBERTS](#), Circuit Judges.

PER CURIAM.

****1** [1]  Appellant Arnett C. Smith petitions for rehearing of our decision affirming his sentence for conspiracy and conflict of interest. He contends that his sentence is unconstitutional under the Sixth Amendment in light of [United States v. Booker](#), --- U.S. ---, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Smith did not raise any Sixth Amendment claim when the sentence at issue was imposed by the district court, and accordingly our review is limited to plain error. Because Smith has not shown any prejudice he cannot satisfy the test for plain error, and we deny the petition. See *id.* at 769 (in applying [Booker](#), "we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test"). At his initial sentencing, Smith did argue that enhancements and upward departures under the Federal Sentencing Guidelines violated his Sixth Amendment right to a jury trial. We vacated and remanded that sentence on other grounds not relevant here. [United States v. Smith](#), 267 F.3d 1154 (D.C.Cir.2001). At resentencing, Smith failed to raise the constitutional challenge anew, and we eventually affirmed his sentence. [United States v. Smith](#), 374 F.3d 1240 (D.C.Cir.2004). As it is this latter disposition that Smith now asks us to revisit, and as that disposition dealt only with the proceedings on remand, Smith's election not to re-raise the challenge ***499** below means that he has failed to preserve it for appellate review. Smith's alternate argument, that circuit precedent at the time of remand rendered any objection futile, lacks merit. See [Johnson v. United States](#), 520 U.S. 461, 464, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (intervening change in law no excuse for failure to object).

[2]  Accordingly, we review the sentence only for plain error. [FED. R. CRIM. P. 52\(b\)](#). Smith fails the plain error test because he cannot show that the constitutional error in this case had a prejudicial effect. See [United States v. Dominguez Benitez](#), 542 U.S. 74, 124 S.Ct. 2333, 2339, 159 L.Ed.2d 157 (2004). The district judge, on each of the prior two sentencings, imposed a sentence beyond what the Guidelines require. The first time, he departed upward and sentenced Smith to 46 months, adding that "I believe, in my view, that you deserve the sentence that will be imposed here." On remand, the judge was forced to impose a shorter sentence--21 months--but again reached the figure by departing upward, even though the government had not requested an upward departure on resentencing.

[Booker](#)'s requirement that the sentencing judge appreciate that he is not bound by the Guidelines thus plainly cannot help Smith. Smith implicitly acknowledges this in the relief he seeks--resentencing with an instruction precluding the trial court from imposing a sentence higher than 21 months. He recognizes that giving the district judge wider latitude in this case could very well result in a longer sentence. Smith was not prejudiced by the impermissibly mandatory nature of the Guidelines; if anything, he benefitted from it.







****2** The petition for rehearing is denied.

C.A.D.C., 2005.

U.S. v. Smith

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- [2005 WL 257461](#) (Appellate Brief) Appellant's Supplemental Brief Addressing United States v. Booker and United States v. Fanfan (Jan. 28, 2005)[Original Image of this Document \(PDF\)](#) 
 - [2004 WL 390262](#) (Appellate Brief) Reply Brief for Appellant (Mar. 01, 2004)[Original Image of this Document \(PDF\)](#) 
 - [2004 WL 730360](#) (Appellate Brief) Reply Brief for Appellant (Mar. 01, 2004)[Original Image of this Document \(PDF\)](#) 
 - [2004 WL 288790](#) (Appellate Brief) Brief for Appellee (Feb. 06, 2004)[Original Image of this Document \(PDF\)](#) 
 - [2004 WL 553019](#) (Appellate Brief) Brief for Appellee (Feb. 06, 2004)[Original Image of this Document with Appendix \(PDF\)](#) 
 - (Appellate Brief) Brief for Appellant (Dec. 19, 2003)[Original Image of this Document with Appendix \(PDF\)](#) 
 - [03-3087](#) (Docket) (Jul. 30, 2003)
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