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Citation: **2005 U.S. App. LEXIS 1922**

*2005 U.S. App. LEXIS 1922, **

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. WALTER M. STEWART, JR., Defendant - Appellant.

No. 04-30005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2005 U.S. App. LEXIS 1922

December 7, 2004 **, Submitted, Seattle, Washington; December 9, 2004, Submission Vacated; February 7, 2005, Resubmitted

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
February 7, 2005, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Montana. D.C. No. CR-02-00102-RFC. Richard F. Cebull, District Judge, Presiding.

DISPOSITION: CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Klaus P. Richter, Esq., USBI - OFFICE OF THE U.S. ATTORNEY, Billings, MT.

For WALTER M. STEWART, JR., Defendant - Appellant: Brian Kohn, Billings, MT.

JUDGES: Before: HAWKINS, THOMAS, and McKEOWN, Circuit Judges.

OPINION: MEMORANDUM *

----- Footnotes -----

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [Ninth Circuit Rule 36-3](#).

----- End Footnotes-----

The district court did not abuse its discretion by denying Stewart's motion for a new trial. Stewart's claim of ineffective assistance of counsel is inappropriate for resolution on direct appeal. **[*2]** See [United States v. Daychild, 357 F.3d 1082, 1095 \(9th Cir. 2004\)](#).

The district court's upward adjustments pursuant to [U.S.S.G. §§ 4A1.3](#) and [5K2.14](#) were based on findings not made by the jury and, thus, violate the [Sixth Amendment](#) per [United](#)

[States v. Booker, 160 L. Ed. 2d 621, 125 S. Ct. 738 \(2005\)](#). We therefore vacate Stewart's sentence and remand for resentencing.

Because under Booker the district court may still consider the correct guideline range before imposing a sentence on remand, we take this opportunity to note that the district court misapplied [Section 5K2.14](#). This enhancement should not be based on a defendant's criminal history or likelihood of recidivism; rather, the district court may increase the sentence "to reflect the nature and circumstances *of the offense*." [U.S.S.G. § 5K2.14](#) (emphasis added). Moreover, because drunk driving will always involve endangering the public to some degree, an increase is only appropriate in exceptional circumstances. See, e.g., [United States v. Semsak, 336 F.3d 1123, 1126-27 \(9th Cir. 2003\)](#) [***3**].

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

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