

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-3729 - EMSL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARNOLD DARRELL BALL,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri
District Court No. 4:03 CR 729 CEJ

The Honorable Carol E. Jackson
United States District Court, Chief Judge Presiding

SUPPLEMENTAL BRIEF OF DEFENDANT - APPELLANT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Arnold Ball appealed his sentence for the possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). In his appeal, Mr. Ball contended that the district court erred by imposing an enhanced sentence based on the application of “career offender” status. He argued these findings were made by a preponderance of the evidence by the district court in violation of the Supreme Court’s holding in *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

In light of the Supreme Court’s decision in *United States v. Booker*, 2005 WL 50108 and *United States v. Coffey*, No. 04-2176 (8th Cir. Jan. 21, 2005), Mr. Ball requests this Court to remand to the district court for resentencing. There is no indication that the sentencing judge would have sentenced Mr. Ball as a career offender had she not been required under the previously mandatory Guidelines. Appellant requests fifteen minutes for oral argument to explore the proper remedy under *Booker*.

TABLE OF CONTENTS

	<u>PAGE(S)</u>
SUMMARY AND REQUEST FOR ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	v
STATEMENT OF ISSUE	vi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
STANDARD OF REVIEW	4
ARGUMENT	
THE PROPER REMEDY FOR THE <i>BLAKELY</i> VIOLATION IN MR. BALL’S CASE IS TO VACATE HIS SENTENCE AND REMAND TO THE DISTRICT COURT FOR RESENTENCING	5
CONCLUSION	8
PROOF OF SERVICE	9
CERTIFICATION	9
ADDENDUM	10

TABLE OF AUTHORITIES

PAGE(S)

CASES CITED

Blakely v. Washington, 124 S.Ct. 2531 (2004) i, 1

Griffith v. Kentucky, 479 U.S. 314 (1987) 5

United States v. Booker, 2005 WL 50108 i, vi, 1 - 3, 5, 6

United States v. Campo, 140 F.3d 415 (2nd Cir. 1998) vi, 5

United States v. Coffey, No. 04-2176 (8th Cir. Jan. 21, 2005) i, vi, 2, 6

United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992) vi, 5

United States v. Speakman, 330 F.3d 1081 (8th Cir. 2003) 4

STATUTES CITED

18 U.S.C. § 3553(a) 3, 6, 7

21 U.S.C. § 841(a)(1) v, 1

28 U.S.C. § 1291 v

U.S.S.G. § 5H.1 7

U.S.S.G. § 5H1.2 7

U.S.S.G. § 5H1.3 7

U.S.S.G. § 5H1.4 7

U.S.S.G. § 5H1.5 7

U.S.S.G. § 5H1.6	7
U.S.S.G. § 5H1.10	7
U.S.S.G. § 5H1.11	7
U.S.S.G. § 5H1.12	7

MISCELLANEOUS

Miscellaneous Orders, CERTIORARI - SUMMARY DISPOSITIONS, 543 U.S. _____ (January 24, 2005)	5
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JURISDICTIONAL STATEMENT

This case is an appeal from the judgment and sentence entered by the Honorable Carol E. Jackson, Chief Judge, Eastern District of Missouri.

Appellant pleaded guilty to one count of possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1). On October 28, 2004 he was sentenced to 188 months and four years of supervised release.

On November 5, 2004, a Notice of Appeal was timely filed. To Appellant's knowledge, none of the proceedings below have been reported. Mr. Ball filed his appeal with this Court on January 5, 2005.

Appellant invokes this Court's jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUE

THE PROPER REMEDY FOR THE *BLAKELY* VIOLATION IN MR. BALL'S CASE IS TO VACATE HIS SENTENCE AND REMAND TO THE DISTRICT COURT FOR RESENTENCING.

United States v. Booker, 2005 WL 50108

United States v. Campo, 140 F.3d 415 (2nd Cir. 1998)

United States v. Coffey, No. 04-2176 (8th Cir. Jan. 21, 2005)

United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992)

STATEMENT OF THE CASE

Mr. Ball pleaded to one count of possession with intent to distribute 500 or more grams of cocaine in violation of 21 U.S.C. § 841 (a)(1). There was no allegation that he was subject to sentencing as a “career offender.” (Appendix, Exhibit 1). According to the plea agreement the parties agreed to a base offense level of 30, a two level reduction pursuant to § 3B1.2(b), and a three level reduction under § 3E1.1. The recommended offense level was 25. The parties agreed that the defendant did not appear to be a career offender. (Plea Agreement, Para. E, p. 5).

The Presentence Report concluded that Mr. Ball was subject to sentencing as a “career offender.” Prior to sentencing appellant filed objections to the Presentence Report based on *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (Appendix, Exhibit 3). The government filed a response to the objections.

On October 28, 2004, the district court sentenced Mr. Ball to 188 months and four years of supervised release. (Appendix, Exhibit 2). This was based on a finding by the preponderance of the evidence that he qualified as a career offender with a sentencing range of 188 to 235 months. Absent this finding the sentencing range would have been 110 to 137 months.

On January 12, 2005 the Supreme Court decided *United States v. Booker*, 2005 WL 50108. The opinion held that the mandatory aspect of the Sentencing Guidelines with respect to enhancements based on facts found by a preponderance of the evidence rather than beyond a reasonable doubt, violates a defendant's Sixth Amendment right to a jury trial. *Id.* at *5. Mr. Ball was sentenced as a career offender, the type of enhancement that the Supreme Court found to violate a defendant's Sixth Amendment right. Appellant files this supplemental brief to request this Court to vacate his sentence in light of *United States v. Booker* and *United States v. Coffey* and remand to the district court for resentencing.

SUMMARY OF ARGUMENT

Pursuant to the Supreme Court's holding in *United States v. Booker*, 2005 WL 50108, the United States Sentencing Guidelines are now advisory instead of mandatory. The district courts are now required to consider not only the guidelines when fashioning a sentence, but also a host of other factors set forth in 18 U.S.C. § 3553(a). The Supreme Court stated that in cases such as Mr. Ball's, the proper remedy is for his sentence to be vacated and remanded to the district court for resentencing so that the sentencing judge can consider all the required factors and impose a sentence that is sufficient, but not greater than necessary to comply with the purposes set forth in the § 3553(a).

STANDARD OF REVIEW

The standard of review in a district court's interpretation of a sentencing enhancing statute is *de novo*. *United States v. Speakman*, 330 F.3d 1081 (8th Cir. 2003).

ARGUMENT

THE PROPER REMEDY FOR THE *BLAKELY* VIOLATION IN MR. BALL'S CASE IS TO VACATE HIS SENTENCE AND REMAND TO THE DISTRICT COURT FOR RESENTENCING.

The Supreme Court held that the United States Sentencing Guidelines are now advisory. *United States v. Booker*, 2005 WL 50108. This holding and the remedial interpretation of the Sentencing Act, must be applied to all cases on direct review. *Booker* at *30, citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Although the Supreme Court did not envision all cases to require a new sentencing hearing, the Court noted that those cases that raised the issue below and that involved a Sixth Amendment violation would warrant a remand. *Id.* The Court notably granted several hundred petitions for certiorari and remanded for further consideration based on *Booker*. See Miscellaneous Orders, CERTIORARI - SUMMARY DISPOSITIONS, 543 U.S. ____ (January 24, 2005). At least twenty-six of the petitioners in those cases received certiorari to this court. The Court's omnibus ruling reflects the magnitude of the constitutional violations declared in *Booker* and the importance of resentencing.

The situation in this case is similar to those in the past where the judge incorrectly believed he could not depart from the guidelines. See *United*

States v. Whitetail, 965 F.2d 857, 863 (8th Cir. 1992)(resentencing required based on record suggesting the trial court erroneously believed it could not grant lower sentence based on battered woman syndrome if jury had not accepted that concept as a defense). The remedy now, as it was then, is to vacate the sentence and remand for resentencing. See *United States v. Campo*, 140 F.3d 415, 419 (2nd Cir. 1998)(responsibility of Appeals Court is to ensure the judge makes the discretionary judgments the law expects without instructing on how that discretion should be exercised). A panel of this Court confirmed this remedy in *United States v. Coffey*, No. 04-2176 (8th Cir. Jan. 21, 2005). The Court held that “defendants who have preserved the issue are entitled to new sentencing proceedings.” *Id.* at *7.

In this case, Mr. Ball objected to his status as a career offender both at sentencing and on direct appeal. As required by the previously mandatory guidelines he received an enhanced sentence of 188 months, taken from the guideline range of 188 to 235 months. The fact that the judge chose a sentence at the lowest end of the enhanced penalty range supports the inference that she would not have chosen a sentence that high had she known she had the discretion to impose a lower sentence.

The remedy for this Sixth Amendment violation is to excise the “mandatory” provision of the guidelines making them merely advisory. *Booker* at *16. The district courts must still *consider* the sentence guidelines, but must also consider the other directives set forth in 18 U.S.C. § 3553(a). The result is that under *Booker*, courts must treat the sentencing guidelines as just one of a number of sentencing factors.

The main directive in section 3553(a) requires the sentencing court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.” Those 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.

18 U.S.C. § 3553(a)(2). Section 3553(a) further directs sentencing courts to consider the kinds of sentences available; the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; the need to provide restitution to any victims of the offense; and the nature and circumstances of the offense and the history and characteristics of the defendant.

In regard to the characteristics of the defendant, prior to *Booker* the courts were generally forbidden to consider the defendant's age (§ 5H1.1), his education and vocational skills (§ 5H1.2), his mental and emotional condition (§ 5H1.3), drug or alcohol dependence (§ 5H1.4), employment record (§ 5H1.5), family ties and responsibilities (§ 5H1.6), socio-economic status (§ 5H1.10), civic and military contributions (§ 5H1.11) and his lack of guidance as a youth (§ 5H1.12). Pursuant to the Supreme Court's remedy in *Booker*, courts must now consider all these factors when fashioning a sentence for the defendant that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a).

In the present case, the sentencing judge was not allowed to consider most of the factors discussed above and was required to impose a sentence within the enhanced penalty range. The remedy for this Sixth Amendment violation is to vacate the sentence and remand to the district court, providing the judge with additional factors she needs to consider and allowing her the discretion to impose a sentence that is reasonable and tailored to the defendant.

CONCLUSION

WHEREFORE, for the reasons stated above, this sentence should be vacated and the case remanded to the district court for resentencing.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned attorney hereby certifies that he has caused a true and correct copy of the foregoing to be served upon James Delworth, Assistant United States Attorney for the Eastern District of Missouri, 111 South 10th Street, St. Louis, Missouri 63101 by hand-delivery this _____ day of January, 2005.

LEE T. LAWLESS

CERTIFICATION

The undersigned hereby certifies that the diskette submitted herewith has been scanned for viruses and that it is virus-free.

LEE T. LAWLESS

