

No. 03-2915

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

vs.

GREGORY DAVIS,  
Defendant-Appellant.

---

On appeal from the United States District Court  
for the Northern District of Illinois (Chicago)  
Case No. 01-CR-1

Honorable Charles R. Norgle, Sr., United States District Judge, Presiding.

---

**APPELLANT'S REPLY BRIEF**

---

FEDERAL PUBLIC DEFENDER  
CENTRAL DISTRICT OF ILLINOIS  
401 Main Street, Suite 1500  
Peoria, Illinois 61602  
Phone: (309)671-7891  
Fax: (309)671-7898

RICHARD H. PARSONS  
CHIEF FEDERAL PUBLIC  
DEFENDER

JONATHAN E. HAWLEY  
APPELLATE DIVISION CHIEF

KENT V. ANDERSON  
SENIOR STAFF ATTORNEY

COUNSEL FOR DEFENDANT-  
APPELLANT, GREGORY DAVIS

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	iv
CASES .....	iv
STATUTES .....	v
OTHER AUTHORITIES .....	v
 ISSUES PRESENTED .....	 1
1. Does <i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), require that Mr. Davis be resentenced because the trial court improperly based his sentence on facts that were not either proven to a jury beyond a reasonable doubt or admitted by him? .....	1
2. Did the district court improperly base its findings of drug type and quantity and Mr. Davis’ role in the offense on plea agreements for other defendants which were unreliable because they were: 1) given with government involvement; (2) described past events; and (3) were not subjected to adversarial testing? .....	1
 INTRODUCTION .....	 2
 ARGUMENT .....	 5
I. Mr. Davis’ sentence must be reversed, in light of <i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because his sentence was increased on the basis of facts that were not proven to a jury beyond a reasonable doubt or admitted by him. ....	5
The district court plainly erred when sentencing Mr. Davis, in light of <i>Booker</i> . ....	5
A. There was error under <i>Booker</i> . ....	5

B.	The error was plain. ....	6
C.	The error affected Mr. Davis’ substantial rights. ....	6
D.	The <i>Booker</i> error seriously affects the fairness, integrity, and public reputation of judicial proceedings. ....	12
II.	The district court improperly based its findings of drug quantity and amount and Mr. Davis’ role in the offense on plea agreements which were unreliable evidence because they were 1) given with governmental involvement; 2) described past events; and 3) were not subject to adversarial testing. ....	14
	CONCLUSION .....	18
	CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(a)(7)(C) .....	19
	CIRCUIT RULE 31(e) CERTIFICATION .....	19

## TABLE OF AUTHORITIES

CASES	PAGE
<i>Blakely v. Washington</i> , ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) . . . . .	5
<i>Emezuo v. United States</i> , 357 F.3d 703 (7th Cir. 2004) . . . . .	10
<i>Lilly v. Virginia</i> , 527 U.S. 116 (1999) . . . . .	15
<i>United States v. Ameline II</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) . . . . .	13
<i>United States v. Barnett</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 2644 (6th Cir. Feb. 16, 2005) . . . . .	11
<i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005) . . . . .	1,3,5,6,9,11-13,17
<i>United States v. Burke</i> , 148 F.3d 832 (7th Cir. 1998) . . . . .	15
<i>United States v. Hughes</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 1189 (4th Cir. Jan. 24, 2005) . . . . .	12
<i>United States v. Jones</i> , 371 F.3d 363 (7th Cir. 2004) . . . . .	16
<i>United States v. LaBastida-Segura</i> , 2005 U.S. App. LEXIS 1835 (10th Cir. Feb. 4, 2005) . . . . .	12
<i>United States v. Milan</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 2161 (6th Cir. Feb. 10, 2005) . . . . .	11
<i>United States v. Oliver</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 1623 (6th Cir. Feb. 2, 2005) . . . . .	12
<i>United States v. Paladino</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) . . . . .	4,6,9-13

<i>United States v. Ranum</i> , ___ F.Supp.2d ___, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005) .....	6
<i>United States v. Szakacs</i> , 212 F.3d 344 (7th Cir. 2000) .....	15,16
<i>United States v. Williams</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 3198 (2nd Cir. Feb. 23, 2005) .....	12
<i>Williamson v. United States</i> , 512 U.S. 594 (1994) .....	14,15

**STATUTES**

18 U.S.C. §3553(a) .....	6,8,10
18 U.S.C. §3553(b)(1) .....	5
18 U.S.C. §3742(e) .....	5

**OTHER AUTHORITIES**

U.S.S.G. §3B1.1(b) .....	2
U.S.S.C., Fifteen Years of Guidelines Sentencing (2004) .....	7,8

## ISSUES PRESENTED

1. Does *United States v. Booker*, 5\_\_ U.S. \_\_\_\_, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), require that Mr. Davis be resentenced because the trial court improperly based his sentence on facts that were not either proven to a jury beyond a reasonable doubt or admitted by him?
2. Did the district court improperly base its findings of drug type and quantity and Mr. Davis' role in the offense on plea agreements for other defendants which were unreliable because they were: 1) given with government involvement; (2) described past events; and (3) were not subjected to adversarial testing?

## INTRODUCTION

About June 27, 2000, appellant, Gregory Davis, obtained approximately 250 grams of cocaine from Clarence Hankton, which he intended to redistribute. (CR<sup>1</sup> 248 pp. 2-3; PT 9-11, App. 15-16, 31-33.) This offense was charged in count six of the superseding indictment against Mr. Davis and other defendants. (CR 222, App. 2-13.)

On November 22, 2002, Mr. Davis pled guilty to count six of the indictment, pursuant to a plea agreement. The parties agreed to dispute the amount and type of cocaine for which Mr. Davis was responsible and his role in the offense. (CR 248, 249; PT 2-14; App. 14-23.)

In her presentence report, the probation officer recommended that Mr. Davis' base offense level be 32, based on a finding that he was a career offender. She found that Mr. Davis' criminal history category would be four, if he were not a career offender. (PSR 13-14.) She also recommended that his sentence be enhanced by three levels for being a manager or supervisor, pursuant to U.S.S.G.

---

<sup>1</sup> CR is used as an abbreviation for the district court clerk's record of Mr. Davis' case. PT is used as an abbreviation for the reporter's transcript of Mr. Davis' Rule 11 or plea hearing. 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. AOB is used as an abbreviation for appellant's opening brief. App. is used as an abbreviation for the appendix to appellant's opening brief. RB is used as an abbreviation for the respondent's brief.

§3B1.1(b). (PSR 6.)

Mr. Davis objected to the probation officer's determination that he was a manager or supervisor in a conspiracy involving five or more participants. He also stated that he was only admitting responsibility for 250 grams of powder cocaine. (CR 263.)

At the sentencing hearing, the government presented evidence in support of the manager/supervisor enhancement and in support of its theory that Mr. Davis was responsible for between 50 and 150 grams of crack cocaine. (ST 4-32.) This evidence included plea agreements for other defendants who were originally charged with Mr. Davis and pled guilty. (ST 31-32.) The court then agreed with the government and found that Mr. Davis was responsible for between 50 and 150 grams of crack. (ST 36, 38; App. 37, 39.) It then found that he was a manager or supervisor. (ST 39, App. 40.) The court cited the co-defendants' plea agreements in support of its findings. (ST 37-38, App. 38-39.) It then sentenced Mr. Davis to a term of 210 months imprisonment. (CR 285; ST 53,55; App. 24-29, 42.)

The district court erred when sentencing Mr. Davis by treating the Sentencing Guidelines as mandatory and basing his sentence on facts which were not found by a jury beyond a reasonable doubt or admitted by Mr. Davis. *United*

*States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). The government concedes that this was error, but argues that it was not plain error. However, the government is mistaken.

At the very least, this Court must order a limited remand to the district court for it to determine whether its error affected substantial rights. *United States v. Paladino*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 3291, \*32-\*34 (7th Cir. Feb. 25, 2005). However, this Court should go further and order a full remand of Mr. Davis' case to the district court for resentencing.

In addition, the district court erred when it partially based its findings on the plea agreements of some of Mr. Davis' former co-defendants because such evidence was presumptively unreliable. This was also plain error, contrary to the government's position.

## ARGUMENT

- I. **Mr. Davis' sentence must be reversed, in light of *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because his sentence was increased on the basis of facts that were not proven to a jury beyond a reasonable doubt or admitted by him.**

**The district court plainly erred when sentencing Mr. Davis, in light of *Booker*.**

- A. **There was error under *Booker*.**

Mr. Davis argued, in his opening brief, that his sentence was unconstitutional under *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004). (AOB 13-23.) As the government concedes the Supreme Court has now agreed with Mr. Davis' argument. *United States v. Booker*, 125 S.Ct. at 755-756. (RB 17.)

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), including the need “to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.” *Id.* at 764-765.

**B. The error was plain.**

The government has now conceded, and this Court has found, that the error is plain or obvious, as well. (RB 17.) (See also AOB 19.) *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*23.

**C. The error affected Mr. Davis’ substantial rights.**

The district court’s error affected Mr. Davis’ substantial rights by depriving him of his Fifth and Sixth Amendment rights at sentencing and depriving him of his right to be sentenced under a Constitutional sentencing scheme.

As noted above, under *Booker*, courts must still consider the Guidelines. However, they must also consider all of the purposes of sentencing set forth in 18 U.S.C. §3553(a). *United States v. Booker*, 125 S.Ct. at 764-765, 767. “[W]here the guidelines conflict with other factors set forth in §3553(a), courts will have to resolve the conflicts.” *United States v. Ranum*, \_\_\_ F.Supp.2d \_\_\_, 2005 WL 161223, \*1 (E.D. Wis. Jan. 19, 2005). Thus, factors which mitigate a defendant’s

culpability for a crime now have much greater importance to the determination of an appropriate sentence.

In this case there are mitigating factors apparent from the record that could not be considered before. For example, Mr. Davis had a long-term substance abuse problem. He had quit using cocaine, but was still drinking alcohol heavily and using marijuana up to the time of his arrest in this case. (PSR 22.) As the district court noted, there were times when Mr. Davis had held legitimate employment and tried to help his friends and family. (ST 53, App. 42.) However, as his counsel noted he became involved in the instant offense because he was desperate for money to pay bills after he was laid off from his job. (ST 42.)

The district court could also now consider the effect of the disparity between guideline ranges for crack and powder cocaine. The Sentencing Commission “reported that the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.” U.S.S.C., *Fifteen Years of Guidelines Sentencing* xvi,132 (2004). The crack/powder quantity ratio “contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. Revising the crack cocaine thresholds would better

reduce the gap [caused by higher sentences for African-Americans] than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.” *Id.* at 132.

In addition, the Commission reported that “preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI.” “The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the Guidelines Manual.” *Id.* at 134 (emphasis in original). The inclusion of drug offenses in the career offender guideline also disproportionately affects African-Americans. *Id.* at 133.

There may also be other mitigating factors that were not brought out in Mr. Davis’ original sentencing hearing because they would not have affected the calculation of the Guidelines range.

If the district court had been allowed to fully consider the above factors and, possibly, others it may have found that a shorter sentence was “sufficient, but not greater than necessary” to achieve the purposes of sentencing. (18 U.S.C. §3553(a).)

This Court has now held that the appropriate way to determine if a defendant's substantial rights were affected is to issue a limited remand of a case to a district court and ask it to make that determination by saying whether it would reimpose the original sentence if it resentenced the defendant. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*32-\*34.

The government argues that the district court stated that it would not impose a lower sentence in this case. (RB 18.) That is not true. The court did not speculate about what it would do if it had the authority to impose a lower sentence. It did say that "a lesser sentence would deprecate the seriousness of what [Mr. Davis] had done and would not serve as a deterrent to others." (ST 53, App. 42.) However, such a statement does not mean much when a court is imposing a sentence at the low end of the Guidelines range and has not been presented with permissible grounds for a departure. In addition, the court was not allowed to consider the mitigating circumstances mentioned above prior to *Booker*. Therefore, this is not a case in which this Court can feel confident that the district court would have imposed the same sentence if it had been aware of the extent of its discretion. See *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*27-\*29.

In addition, this Court should order a full remand for resentencing in this case, especially if it agrees with Mr. Davis' argument that the district court's findings at sentencing were based on unreliable evidence. (AOB 35-39, *Infra* at 14-17.)

This Court's view of plain error in *Paladino* conflicts with its former rule that a sentence which is based on an incorrect guideline range is an error affecting substantial rights even when the district court might have imposed the same sentence under the correct range. *Emezuo v. United States*, 357 F.3d 703, 711 (7th Cir. 2004); *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*41-\*42 (Ripple, J., dissenting from denial of rehearing *en banc*).

In addition, this Court's procedure fails to assure that all of the factors which are now relevant to a district court's determination of a sentence under 18 U.S.C. §3553(a) will come to light before a district court makes its decision about whether resentencing is warranted. The evidence regarding those factors will usually be incomplete if a district court chooses not to conduct a new sentencing hearing. Therefore, the record will also be insufficient for this court to review the reasonableness of a sentence on appeal. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*45-\*46 (Kanne, J. dissenting from denial of rehearing *en banc*); *Id.* at \*38-\*39 (Ripple, J., dissenting from denial of rehearing *en banc*).

Moreover, this Court's solution to evaluating plain error improperly delegates its responsibility to independently evaluate plain error to the district court. *Id.* at \*42 (Ripple, J., dissenting from denial of rehearing *en banc*); *United States v. Milan*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2161, \*24-\*25 (6th Cir. Feb. 10, 2005).

The *Paladino* decision also ignores the importance of the principle that a Defendant can only be sentenced under a legal process. The reasonableness of a sentence depends on the process by which the sentence is obtained, as well as the length of the sentence. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*45 (Kanne, J., dissenting from denial of rehearing *en banc*).

In contrast, the Sixth Circuit came to better reasoned decision, than this Court, when it held that the deprivation of the right to be sentenced under a Constitutional sentencing scheme affected a defendant's substantial rights. *United States v. Barnett*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2644, \*24-\*36 (6th Cir. Feb. 16, 2005). *Barnett* held that courts should apply a rebuttable presumption of prejudice to *Booker* errors on appeal. *United States v. Barnett*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2644, \*26-\*34.

Therefore, the district court's error affected Mr. Davis' substantial rights by depriving him of his right to a Constitutional sentence.

**D. The *Booker* error seriously affects the fairness, integrity, and public reputation of judicial proceedings.**

Sentencing Mr. Davis under an Unconstitutional system also affected the fairness, integrity, or public reputation of judicial proceedings. The government argues that an Unconstitutional sentence does not meet this prong of the plain error test.

However, this Court has rejected the government's position that any sentence within the Guidelines should be affirmed because it is reasonable. (RB 20-22.) *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*23-\*31. It has also found that if the district court says, on limited remand, that it would impose a lower sentence then this satisfies the fourth, as well as the third, prong of plain error review. *Id.* at \*29-\*30, \*33-\*34. See also *United States v. Williams*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 3198, \*28 (2nd Cir. Feb. 23, 2005).

In addition, it would not be enough for this Court to say that the sentence imposed by the district court is reasonable irrespective of the error. "Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to [this Court] performing the sentencing function [itself]." *United States v. Hughes*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1189, \*17 fn. 8 (4th Cir. Jan. 24, 2005). See also *United States v. Oliver*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1623, \*23 fn. 3 (6th Cir. Feb. 2, 2005); *United States v. LaBastida-*

*Segura*, 2005 U.S. App. LEXIS 1835, \*6; *United States v. Ameline II*, 3\_\_ F.3d \_\_, 2005 U.S. App. LEXIS 2032, \*20 (9th Cir. Feb. 9, 2005). This Court even noted the importance of the process when it said that before *Booker* “[a] conscientious judge--one who took the guidelines seriously whatever his private views--would pick a sentence relative to the guideline range.” *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*28.

Yet, this Court leaves open the possibility that a sentence which was imposed under an illegal process will be allowed to stand because a busy district judge says that the process did not affect the outcome.

Therefore, this Court should remand Mr. Davis’ case for resentencing under the now-advisory Guidelines. If this Court disagrees with Mr. Davis’ argument against its decision in *Paladino*, it should follow the limited remand procedure set forth in that case. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*32-\*34. First, however, this Court should decide Mr. Davis’ remaining issue for the guidance of the district court on remand.

**II. The district court improperly based its findings of drug quantity and amount and Mr. Davis' role in the offense on plea agreements which were unreliable evidence because they were 1) given with governmental involvement; 2) described past events; and 3) were not subject to adversarial testing.**

The district court relied on plea agreements from some of Mr. Davis' former co-defendants to support its findings that Mr. Davis was responsible for between 50 and 150 grams of crack cocaine and that he was a manager or supervisor of the criminal activity. (ST 31-32, 37-38; App. 35, 38-39.)

The government argues that this was permissible because the statements in the plea agreements were statements against penal interest. (RB 26.) However, only the self-inculpatory parts of the plea agreements qualified as statements against penal interest. The parts of the agreements that implicated Mr. Davis were not statements against penal interest and would not have been admissible, under that doctrine, at a trial even if they did not violate the Confrontation Clause. *Williamson v. United States*, 512 U.S. 594, 599-600 (1994). "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Ibid.* The Supreme Court later found that:

It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice -- that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

*Lilly v. Virginia*, 527 U.S. 116, 137 (1999).

While both *Williamson* and *Lilly* involved evidence that was introduced at trials, the reliability of evidence does not depend on the proceeding in which it is introduced.

The government relies on two cases in which accomplice statements were admitted at sentencing. *United States v. Burke*, 148 F.3d 832, 836-837 (7th Cir. 1998); *United States v. Szakacs*, 212 F.3d 344, 352-353 (7th Cir. 2000). However, both cases are distinguishable. In *Burke* the key witnesses actually testified during the sentencing hearing in that case. Some of what they testified to was hearsay, but there is no indication that the hearsay statements were made with government involvement. *United States v. Burke*, 148 F.3d at 836-837. In *Szakacs*, an agent testified about statements from a co-defendant and other witnesses. This Court relied, in part, on the exception for statements against penal interest when finding that the admission of the hearsay statements was not plain error. However, there is no indication whether the co-defendant's statement actually

implicated Mr. Szakacs or was a genuine statement against penal interest that merely corroborated other evidence. In addition, this Court did not consider the Supreme Court's statements about the reliability of accomplice confessions which later supported this Court's concern in *United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004). *United States v. Szakacs*, 212 F.3d at 352-353. Therefore, neither case fully supports the government's position.

The government also relies on the fact the district court found that the plea agreements were reliable and corroborated. (RB 26, ST 32, App. 35.) However, the court did not explain its finding. It also did not consider the presumptive unreliability of accomplice confessions that implicate someone else. In addition, the court failed to consider the fact, the plea agreements were drafted by the government. (ST 32, App. 35.) Therefore, they could have been drafted in order to corroborate other evidence or statements.

The government also notes that the district court relied on the wiretap tapes to support its findings. (RB 30.) However, that was not the only evidence that the court relied on. In addition, the conversations that were recorded from the wiretap were ambiguous, as shown by the need to have an agent testify about their meaning. (ST 5-24.) Therefore, they may not have been enough to convince the court, without more. The court did not find that the evidence in support of

most of its findings was overwhelming. It only made that finding with respect to the scope of the activities of the narcotics organization for which it found Mr. Davis was a manager or supervisor. (ST 37-39, App. 38-40.) In addition, the court specifically cited the plea agreements in support of its findings. (ST 37-38, App. 38-39.)

The issue is not whether the evidence was sufficient to support the court's findings, but whether the findings were reliable when they were partially based on unreliable evidence. Common sense tells one that a conclusion is only as reliable as the evidence upon which it was based. Therefore, the court's findings of drug quantity and type and Mr. Davis' role in the offense were unreliable.

As a result, thus Court should reverse Mr. Davis' sentence due to the district court's improper reliance on the plea agreements of his former co-defendants even apart from his *Booker* argument.

## CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Davis' sentence and remand his case to the district court for resentencing.

Respectfully submitted  
RICHARD H. PARSONS  
Chief Federal Public Defender

---

JONATHAN E. HAWLEY  
Appellate Division Chief  
Office of the Federal Defender  
401 Main Street, Suite 1500  
Peoria, Illinois 61602  
Phone: (309)671-7891

By: \_\_\_\_\_  
Kent V. Anderson  
Staff Attorney  
Office of the Federal Defender  
401 Main St., Suite 1500  
Peoria, IL 61602  
Telephone: (309)671-7891

COUNSEL FOR DEFENDANT-APPELLANT

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)**

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains \_\_\_\_\_ words as shown by Word Perfect 9.0 used in preparing this brief.

---

JONATHAN E. HAWLEY  
Appellate Division Chief  
Office of the Federal Defender  
401 Main Street, Suite 1500  
Peoria, Illinois 61602  
Phone: (309)671-7891

**CIRCUIT RULE 31(e) CERTIFICATION**

The undersigned, counsel for Defendant-Appellant, hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

BY: \_\_\_\_\_  
JONATHAN E. HAWLEY  
Appellate Division Chief  
Office of the Federal Defender  
401 Main Street, Suite 1500  
Peoria, Illinois 61602  
Phone: (309)671-7891

Dated: March 4, 2005



No. 03-2915

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

UNITED STATES OF AMERICA,	)	On appeal from the United
	)	States District Court for the
Plaintiff-Appellee,	)	Northern District of Illinois (Chicago).
	)	
	)	
vs.	)	No. 01-CR-1
	)	
GREGORY DAVIS,	)	Honorable Charles R. Norgle, Sr.
	)	United States District Judge,
Defendant-Appellant.	)	Presiding.

---

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: Mr. Gino Agnello, Clerk, United States Court of Appeals, 219 S. Dearborn St., Chicago, IL 60604

Thomas D. Shakeshaft, Office of the United States Attorney, 219 S. Dearborn St., Chicago IL 60604.

Gregory Davis, Reg.No. 13900-424, FCI - Cumberland, P.O. Box 1000, Cumberland, MD 21501

Erika Cunliffe, Attorney at Law, 2223 S. Overlook Road, Cleveland Heights, OH 44106

Steven Mark Mondry, Mondry & Mondry, 2714 West North Ave., Chicago, IL, 60647

PLEASE TAKE NOTICE that on March 4, 2005, the undersigned attorney filed fifteen (15) copies of Appellant's Reply Brief in digital media, formatted in WordPerfect 9.0 for Windows, with the Clerk of the United States Court of Appeals

for the Seventh Circuit; and served two copies of said Brief and one copy in digital media, upon all counsel of record, by enclosing said copies and disks in mailing packages addressed as indicated above with postage prepaid, and by depositing said packages in the United States Mail in Peoria, Illinois, on March 4, 2005.

BY: \_\_\_\_\_

KENT V. ANDERSON

Senior Staff Attorney

Office of the Federal Public Defender

401 Main Street, Suite 1500

Peoria, Illinois 61602

Phone: (309) 671-7891

COUNSEL FOR DEFENDANT-APPELLANT