NO. 2004-1500

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MONROG a/k/a JOSE GONZALEZ

Defendant/Appellant

SUPPLEMENTAL BRIEF OF DEFENDANT

ON INVITATION BY THE FIRST CIRCUIT COURT OF APPEALS

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SUMMARY OF ARGUMENT

At the invitation of this court, Mr. Monroig requests remand to the district court in this *Booker* pipeline case.

Mr. Monroig first specifies the guidelines under which he was mandatorily sentenced, and notes the standard of review for unpreserved *Booker* errors. He then argues that because he was sentenced under the mandatory guidelines for causing the death of another based on facts to which he did not admit and were not proven to a jury beyond a reasonable doubt, his case should be remanded for re-sentencing.

Mr. Monroig lists the some factors resurrected by *Booker* which courts must now consider when sentencing. He proffers record and non-record facts which, when measured against the factors, provide a reasonable probability that he might have been sentenced more leniently had the guidelines not been mandatory.

Mr. Monroig then identifies issues with this court's post-*Booker* remand policy. He argues that the task this court has set for itself – making the decision whether to remand – involves speculation into facts which are incapable of resolution without remand. He also argues that *Booker* involves a structural error that requires the presumption of prejudice when applying plain error analysis, and which should therefore produce virtually automatic remand.

SUPPLEMENTAL BRIEF

Both the defendant and government have already filed briefs in this direct appeal from the Federal Court for the District of New Hampshire. During its pendency, the United States Supreme Court's issued *United States v. Booker*, 543 U. S. __, 125 S. Ct. 738 (2005). Consequently, this Court invited Mr. Monroig to file a supplemental brief. Joseph Monroig respectfully requests a remand to the district court for re-sentencing in light of *Booker* and *United States v. Antonakopoulos*, 399 F.3d 68, (1st Cir. 2005).

I. Mr. Monroig's Sentence Was Unconstitutionally Augmented by the Court's Finding by a Preponderance that a Death Resulted

Mr. Monroig was initially charged with two crimes. Count 1: Distribution of cocaine, death resulting, in violation of 21 U.S.C. § 841(a)(1). Count 2: Distribution of Heroin, in violation of 21 U.S. C. § 841(a)(1). During his plea hearing, the Government withdrew from Count 1 the "death resulting" language.

Accordingly, Mr. Monroig specifically did not admit to causing the death of one Carl Connor. *Plea Trn.* at 16 (government acknowledging dispute regarding who injected fatal drugs); *Plea Trn*. at 13 (defendant admitting to distribution of cocaine and heroin, but no admission of causing death); *Sent. Trn.* at 4, 7 (defendant's understanding that although Government believed causation of death could be proved, defendant did not admit causation); *Pre-Sent. Rpt.* ¶ 13.

Based on the small amount of drugs Mr. Monroig distributed, the United States Sentencing Guidelines sentencing range is 24 to 30 months. *Pre-Sent. Rpt.* ¶ 71; *Sent. Trn.* at 7-8. Due to the death, however, Mr. Monroig's sentence was departed upward pursuant to the then-mandatory sentencing guidelines. U.S.S.G. 5K2.1 ("If death resulted, the court may increase the sentence above the authorized guideline range."); *see Sent. Trn.* at 5-6. Based on a plea agreement, Mr. Monroig was sentenced to a term of 120 months. *Sent. Trn.* at 9-10.

In his initial brief, Mr. Monroig noted argued that *Blakely v. Washington*, 542 U.S. __ , 124 S.Ct. 2531 (2004), should apply because the Supreme Court held there that a sentence cannot be augmented on facts that were not either found by a jury nor admitted by the defendant.

It is believed that any witnesses to the ingestion of drugs by the dead man are either unavailable or unreliable. There is no forensic evidence. *Pre-Sent. Rpt.* ¶ 12 (no fingerprints discerned on needle). Numerous other people were present who may have been responsible for the ingestion of drugs by the dead man. *Pre-Sent. Rpt.* ¶ 5-10. There is no known way the government would be able to connect the drugs that Mr. Monroig distributed to those that may have been a factor in the death. The man had been on a several-day drug binge immediately prior to his death. *Id.* The medical examiner found that alcohol may have contributed. *Plea Hrg.* at 14. Mr. Monroig did not admit to causing the death.

The district court nonetheless made a finding, by a mere preponderance of the evidence, that he did. *Sent. Trn.* at 7.

Although Mr. Monroig objected to a sentence augmentation based on causation of death, *Sent. Hrg*. at 7, he did not raise any issues based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) or its progeny. Thus the *Booker* issue was not preserved, and plain error analysis applies.

The first two *Olano* prongs are met here because the court employed the mandatory guidelines sentence enhancement. The third prong is met because there is a reasonable probability that a jury would not find beyond a reasonable doubt that Mr. Monroig caused the death. The fourth *Olano* prong is met because this court cannot assume that Mr. Monroig would get the same sentence post-*Booker*, and therefore the fairness and integrity of judicial proceedings is being compromised.

Accordingly this case should be remanded for re-sentencing.

II. Mr. Monroig's Sentence Was Unconstitutionally Augmented For His Criminal History Not Found by a Jury Beyond a Reasonable Doubt

Mr. Monroig has a long criminal history. The district court, in accord with the sentencing Guidelines, found that it was sufficient to place him in criminal history category VI. The history was thus used to augment his sentence beyond what it would have been had it not been counted, or counted differently.

In 1998 the United States Supreme Court decided *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). It held that prior convictions are sentencing factors, and as a matter of due process were not elements the crime that had to be proved to a jury beyond a reasonable doubt. Subsequently, the Court issued its opinions in the *Apprendi* line of cases, which held that under the sixth amendment, any factor increasing a sentence must be either found by a jury beyond a reasonable doubt or admitted by the defendant. Relying on *Almendarez-Torres*, *Booker* repeatedly excepted prior convictions from its holding.

A few weeks after *Booker*, however, the Supreme Court decided *Shepard v. United States*, __ U.S. __, 125 S.Ct. 1254 (Mar. 7, 2005). There the government attempted to prove the defendant's prior conviction by reference to police reports and other non-jury documents. Justice Souter wrote the majority opinion, which held that consideration of these documents was improper.

Part III of the *Shepard* opinion, however, was not joined by Justice Thomas, and was thus not written for the majority. In part III Justice Souter offered additional reasons for the court's decision – including the sixth amendment issues noted in the *Apprendi* line of cases. He wrote that where the facts are not necessarily established by the record of conviction, and the judge has to "make a disputed finding of fact about what the defendant and [prior] judge must have understood as the prior plea's factual basis, the dispute raises the concern underlying *Jones* and *Apprendi*," that is, "the Sixth and Fourteenth Amendments guarantee a jury's standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase a potential sentence's ceiling." *Shepard*, __ U.S. at __, 125 S.Ct. at 1256.

Although Justice Thomas concurred in the opinion, he did not join part III because it did not go far enough. Rather than finding a constitutional doubt concerning the continued viability of *Almendarez-Torres* after *Booker*, he found constitutional error: "*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard*, __ U.S. at __, 125 S.Ct. at 1264 (Thomas, J, dissenting). Thus Justice Thomas would specifically

find that consideration of police reports and the other documents would be unconstitutional.

Based on *Shepard*, it appears that the prior conviction exception to *Booker* has been undermined. Justice Thomas noted: "The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Id.* Mr. Monroig now presses the issue. His prior convictions were found by the district court judge by merely a preponderance. He didn't plea to facts supporting the finding, nor acknowledge the convictions. A jury didn't find them beyond a reasonable doubt. The court nonetheless found that Mr. Monroig's criminal history placed him in category VI. Without some old or minor convictions, he may have been placed in a lower category, resulting in a concomitantly shorter period of incarceration. Without the mandatory guidelines table, it is impossible to guess what sentence the district court might have imposed.

Mr. Monroig he did not raise the *Apprendi* issue below; thus plain error applies. *Olano*'s first two prongs are met because there was error that is now plain. Prong three is met because not using some of the criminal history might have netted Mr. Monroig a more favorable sentence. Prong four is met because this court cannot assume that Mr. Monroig would get the same sentence, and therefore the fairness and integrity of judicial proceedings is being compromised.

Mr. Monroig's case should accordingly be remanded for re-sentencing based only on convictions that are adequately proved.

III. Traditional Sentencing Considerations, Dormant During Guidelines Regime, Are Now Relevant

After *Booker*, the sentencing Guidelines are advisory. Now other statutory and traditional sentencing considerations, dormant during the Guidelines regime, are relevant. *See e.g., United States v. Jaber*, __ F.Supp.2d __, 2005 WL 605787 (D.Mass. Mar. 16, 2005).

Sentencing courts are now required to explore non-incarceration sentences. Federal law "recogniz[es] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582. Although under the pre-*Booker* regime the Guidelines were deemed to have taken this provision into account, *see United States v. Lively*, 20 F.3d 193 (6th Cir. 1994), without the mandatory Guidelines, the statute is resurrected. Thus, sentencing courts are required to explore non-incarceration sentences, and view incarceration as last worst alternative. The district court in Mr. Monroig's case made no such effort.

Whether a sentence includes incarceration or not, resurrected federal law requires that "[t]he court shall impose a sentence sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). The twelve year period of incarceration imposed here, for distributing a minuscule amount of cocaine and heroin, is far greater than necessary. The district court in this case, however, did not consider this matter.

"[I]n determining the particular sentence to be imposed, [the court] shall consider" a list of legislative purposes. 18 U.S.C. § 3553(a). These include the nature and circumstances of the offense, the history and characteristics of the defendant, the seriousness of the offense, promotion of respect for the law, providing just punishment, affording deterrence to criminal conduct, protecting the public from recidivism, providing the defendant with needed educational or vocational training, providing the defendant with needed medical care, the kinds of sentences available, the sentencing Guidelines, avoiding unwarranted sentence disparities, and providing restitution to victims. *Id.* Except for the sentencing Guidelines, the district court took none of these into account.

The sentencing Guidelines are only one of the statutory considerations, and deserve no more weight than any other. *Jackson v. United States*, __ F.Supp.2d __, 2005 WL 711916 *4 (E.D. N.Y. Mar. 17, 2005) ("the greater the weight given to the Guidelines, the closer the Court draws to committing the act that *Booker* forbids – a Guideline sentence based on facts found by a preponderance of the evidence by a judge"); *see United States v. Biheiri*, __ F.Supp.2d __, 2005 WL 350585 (E.D. Va. Feb. 9. 2005); *United States v. Huerta-Rodriguez*, __ F.Supp. 2d __, 2005 WL 318640 (D. Neb. Feb. 1, 2005).

In meeting these purposes, courts are required to consider all relevant data. In the broadest of language Congress has directed that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661. Here, by mechanically applying the sentencing Guidelines, the district court limited the information it considered to only Mr. Monroig's criminal history and the nature of his crime.

Although the Guidelines are now advisory, the list of factors in §5H of the Guidelines provide useful examples of what sorts of facts courts should consider in sentencing. *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005). These include: old age and infirmity, mental and emotional factors, education, health, history of drug abuse, employment history, role of the defendant in the offence, family ties, criminal history, criminal livelihood, socio-economic status, military service, civic and charitable involvement, public service, and record of prior good works, and lack of guidance as a youth. U.S.S.G. § 5H1. The district court took none of these into consideration. No facts supporting them were brought to the court's attention because at the time of sentencing, none of were relevant.

IV. The Facts Support a More Lenient or Non-Incarceration Sentence

Mr. Monroig, at the time of sentencing, was 39 years old, *Plea Hrg*. at 4. His formal education ended in eleventh grade, though he acquired a GED. *Id.* He has had drug and alcohol abuse problems for much of his life, *id*. at 5, and has tried counseling for them. *Id.* Mr. Monroig's vocation is plumbing and heating. *Id.* at 4. His drug sales were among consenting adults. For these reasons, Mr. Monroig and society might benefit from a non-incarceration sentence, and from additional sobriety counseling. Given this, it is not possible to predict how the district court might have sentenced Mr. Monroig. Accordingly, this case should be remanded so that the court can consider having Mr. Monroig evaluated for mental health and drug abuse problems, and so it can consider providing comprehensive non-incarceration services to address them.

V. Mr. Monroig's Case Should be Automatically Remanded for Re-Sentencing

Booker suggested the application of plain error for cases on direct appeal. This court's plain error approach announced in *Antonakopoulos*, even with the slight subsequent softening in *United States v. Heldeman*, __ F.3d __, 2005 WL 708397 (1st Cir. Mar. 29, 2005) (court "inclined not to be overly demanding as to proof of probability"), is insufficient to protect Mr. Monroig's rights.

Mr. Monroig is incarcerated far away from counsel, making it difficult for him to learn and communicate non-record facts as suggested by this court's invitation. There also is insufficient time and resources to develop facts that might be helpful in persuading this court that a remand is necessary. It's a tautology – to discover the relevant facts, a new sentencing hearing would have to be held, which is the relief being sought. Remanding solves the problem.

Mr. Monroig was sentenced under a regime that made irrelevant many of the factors that are now a central part of the federal sentencing scheme. He simply had no reason to bring to the court's attention the multitude of sentencing facts that might exist. Thus the record is inadequate for this court to conduct a review of the impact of the (non-existent) facts.

Generally this court declines to review issues that depend upon non-record facts until an adequate record has been established in the district court. In *United*

States v. Shay, 57 F.3d 126 (1st Cir. 1995), for example, the government argued that the district court's exclusion of evidence should be upheld on grounds that had not been previously addressed. Thus this court wrote that "[w]e are unable to address these arguments on the present record," *Shay*, 57 F.3d at 134, and remanded for a hearing and finding on the alternative grounds.

This court routinely declines to hear ineffective assistance of counsel claims brought on direct appeal because "[o]ften the record is not sufficiently developed to allow adequate consideration of the issue on appeal, and district courts are in a better position to adduce the relevant evidence." *United States v. Colon-Torres*, 382 F.3d 76, 85 (1st Cir. 2004). This court remands for an evidentiary hearing where the record is insufficiently developed but contains "indicia of ineffectiveness." *Unites States v. Theodore*, 354 F.3d 1, 3 (1st Cir.2003). *See also*, *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 478 (1st Cir. 2000) (declining to review due process issue because record insufficiently developed).

As in these examples, Mr. Monroig's case should be remanded so that facts now necessary for sentencing can be established.

The Supreme Court has recognized that in the context of plain error there may exist "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *United States v. Olano*, 507 U.S. 725, 735

(1993). This Court has recognized the presumption of prejudice in a variety of contexts. *See, e.g.,United States v. De Alba-Pagan*, 33 F.3d 125, 130 (1st Cir. 1994) (denial of right to allocution required remand without inquiry into prejudice because impact of omission on discretionary decision "is usually enormously difficult to ascertain"); *United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002) (prejudice presumed where court violated defendant's right to be present).

The *Booker* "pipeline" cases present a conundrum such that Mr. Monroig is not able to make a showing of prejudice. There is now an array of factors that were not previously relevant, that were heretofore prohibited, and that now appear in a different context because they now carry a different weight. Thus, it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-guidelines sentence." *United States v. Crosby*, 397 F.3d 103, 115 (2nd Cir. 2005); *United States v. Barnett*, 398 F.3d 516 (6th Cir. 2005).

Although Mr. Monroig has made a plain error argument, remand is better than speculating about what prejudice he might be able to show post-*Booker.*

When a structural error has been made, there is no need for an appellate court to assess the prejudice to the defendant – prejudice is presumed and reversal is automatic. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). This is because

structural errors render the proceedings in which they occur fundamentally unfair regardless of the effect on the defendant, and because the "the inherent nature" of such errors make it "exceptional.ly difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different." *United States v. Barnett*, 398 F.3d at 526-27.

In *Sullivan v. Louisiana*, 508 U.S. at 275, the trial court gave a reasonable-doubt instruction that was identical to one that had been previously held unconstitutional. The Supreme Court found that the error was presumptively prejudicial because the defendant was effectively denied his right to a jury trial; the improper instructions were "structural defects" which "defy analysis by 'harmless error' standards" *id*. at 281, because they cause "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 282.

Likewise, the sixth amendment violation that *Booker* identified eclipsed Mr. Monroig's right to a finding of the facts necessary for his confinement by a jury beyond a reasonable doubt. He was effectively denied his right to a jury trial. The error was thus structural, and carries with it the feature that its consequence is not capable of being predicted.

Although this court is correct to apply the *Olano* plain error test, its requirement that the defendant prove prejudice, *Antonakopoulos*, 399 F.3d at 68,

ignores the structural error. Mr. Monroig thus urges this court to adopt the view taken by the dissent in *United States v. Serrano-Beauvaix*, __ F.3d __, 2005 WL 503247 (1st Cir. Mar. 4, 2005), and to remand his case for re-sentencing without further examination.

Because *Booker* identified a structural error for which prejudice must be presumed, remand should be virtually automatic in every *Booker* pipeline case except where – unlike here – a change of sentence is demonstrably impossible.

CONCLUSION

In light of the foregoing, Mr. Monroig requests that this honorable court remand his case for re-sentencing in light of *United States v. Booker*, 543 U. S. __, 125 S. Ct. 738 (2005). Because he alleges that this court's approach to *Booker* remands established in *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005), is wanting, yet is mindful that panels are required to defer to earlier-decided cases, he also requests *en banc* hearing of this case.

Mr. Monroig requests his attorney be allowed to present oral argument.

Respectfully submitted,
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By his Attorney,
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Dated: April 25, 2005

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I hereby certify that on June 4, 2009, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Mark E. Howard, Assistant United States Attorney.

Dated: April 25, 2005

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version 11, and that it contains no more than 3,739 words, exclusive of those portions of the brief which are exempted, well within the 7,000 words specified by the rule for a 15-page reply brief.

Dated: April 25, 2005

Joshua L. Gordon, Esq.