No. 05-10219

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	D.C. No. CR-S 03-363-WBS
	)	(E.D. Cal.)
v.	)	
	)	
ANTONIO STARKS,	)	
	)	
Defendant-Appellant.	)	
	)	
_____	)	

On Appeal From The United States District Court
For The Eastern District of California

BRIEF OF APPELLANT

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	)	**BRIEF OF APPELLANT**
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	)	
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	)	
_____	)	

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN BELIEVING IT DID NOT HAVE AUTHORITY TO IMPOSE A SENTENCE OUTSIDE THE GUIDELINE RANGE AFTER UNITED STATES V. BOOKER, 125 S. Ct. 738 (2005).

II. STATEMENT OF THE CASE

A. Nature of the Case

1. Basis for Subject Matter Jurisdiction in District Court

This appeal is from the criminal conviction imposed on Mr. Starks, on March 23, 2005, by the United States District Court in the Eastern District of California. Mr. Starks was convicted of possessing cocaine base with intent to distribute it in violation of 21 U.S.C. § 841(a)(1). The district court had original jurisdiction for this offense against the United States under 18 U.S.C. § 3231.

2. Basis for Jurisdiction in the Court of Appeals

a. The judgment is appealable

This Court has jurisdiction over a timely appeal, see Fed. R. App. P. 4(b), from a final order entered within the Ninth Circuit's geographical jurisdiction, 28 U.S.C. §§ 1291 and 1294(1). The Eastern District of California is within the Ninth Circuit's geographical jurisdiction. 28 U.S.C. §§ 41 and 84.

b. The notice of appeal was timely filed

The Notice of Appeal in a criminal case must be filed within ten days after the entry of judgment. Fed. R. App. P. 4(b). The final judgment and commitment order in this case was filed on March 29, 2005, and entered on the court's docket on March 30, 2005. Excerpts of Record (ER) at 71. The Notice of Appeal was timely filed on March 29, 2005. ER 71; see also Fed. R. App. P. 4(b)(2) ("A notice of appeal filed after the court announces a decision, sentence, or order—but before entry of the judgment or order—is treated as filed on the date of and after entry of judgment.").

3. Bail Status

Mr. Starks is currently serving a term of 151 months incarceration. Allowing for "good time" adjustments to his sentence, Mr. Starks is scheduled to be released from prison on or about July 15, 2015.

B. Proceedings and Disposition in the District Court, Including Statement of Relevant Facts

On August 7, 2003 the government filed a four count indictment alleging that Mr. Starks possessed cocaine base with the intent to distribute it in violation of 21 U.S.C. § 841(a)(1) ER 1-7. On August 25, 2004, Mr. Starks pled guilty to one count of possession with intent to distribute. ER 69 (dkt entry #59). At sentencing, the district court, after objections and briefing by the parties, found Mr. Starks was in a Criminal History Category IV and had a final Offense Level of 31. ER 28. The resulting guideline range was 151-188 months. The court imposed a sentence at the bottom of the guideline range of 151 months. ER 28. The court indicated that it would have departed from the guideline range if it believed it had the authority to do so. ER 20-22. A timely appeal was filed.

III. SUMMARY OF ARGUMENT

As the district court was aware, the Supreme Court decision in United States v. Booker, 125 S. Ct. 738 (2005) was issued on the morning Mr. Starks was scheduled to be sentenced. The parties requested additional time to brief the matter. Mr. Starks had requested a downward departure from the prescribed guideline range based on the fact that the penalties for possessing cocaine base were unduly severe and disproportionate

to the penalties for possessing powder cocaine. The penalties for cocaine base are 100 times more severe than the penalties for powder cocaine. The government urged the court to follow the 100:1 disparity, despite Booker, and sentence Mr. Starks to 151 months. The court was reluctant to do so. ER 11-13 & 20-22. Relying on United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005) (adopting a 20:1 ratio) the district court indicated that it was persuaded that a sentence of less than 100:1, and therefore less than the prescribed guideline range, was appropriate in this case. ER 11-13. However, the district court did not believe that it had the authority to impose a lower sentence than the guidelines called for. ER 20-22. The district court indicated that if it did have such authority, it would issue a lower sentence. ER 20. Because the district court's decision that it lacked the authority to impose a sentence outside of the guidelines violates Booker, the Court must reverse and remand for resentencing.

IV. ARGUMENT

BECAUSE THE DISTRICT COURT ERRED IN BELIEVING IT DID NOT HAVE AUTHORITY TO IMPOSE A SENTENCE OUTSIDE THE GUIDELINE RANGE AFTER UNITED STATES V. BOOKER, 125 S. CT. 738 (2005), THE COURT SHOULD REVERSE AND REMAND FOR RESENTENCING.

A. Booker provides district courts with the authority to sentence outside the guidelines in cocaine base cases.

Since the sentencing in this case, the post-Booker landscape is now littered with cocaine base cases. See, e.g. Ryan S. King and Marc Mauer, "Sentencing with Discretion: Crack Cocaine Sentencing After Booker," January 2006, (report of The Sentencing Project available at www.sentencingproject.com and included in Excerpts of Record at 40-63). A review of the district court cases to date indicates that a sentence lower than that called for by the guideline range has been issued in the vast majority of cocaine base cases. ER 45-46. The United States Sentencing Commission itself recommended that the penalties for cocaine base be lowered. See United States v. Smith 359 F. Supp. 2d 771, 781 (E.D. Wis. 2005). The Commission did an in depth study analyzing the 100:1 penalty scheme. Three times since its inception, the Commission has recommended lowering the penalties for cocaine base keeping them on parity with the penalties for powder cocaine. Initially, the Commission recommended that penalties for cocaine base and powder be equivalent or a 1:1 ratio. This recommendation was rejected by Congress. The Commission did a later study

recommending that the penalty scheme follow a 20:1 ratio for cocaine base ("crack") to powder. Id.

The Commission analyzed the issue from penological, scientific, sociological and historical perspectives and decided that a reduction in the crack guidelines was essential to fair sentencing, and thus recommended a much reduced penalty scheme for crack offenses. Prior to Booker district courts were bound by the mandatory crack guidelines, despite the expressed severity of those guidelines. After Booker at least 21 district courts around the country have issued lower sentences than those called for by the crack guidelines. ER 45-46.

In the instant case, the district court appeared persuaded by the reasoning in Smith that the 100:1 ratio was not based on reason or fairness. The court indicated that the reasoning in United States v. Wilson, 350 F.Supp.2d 910 (D. Utah 2005), weighed in favor of not applying the crack guidelines. ER 13. Wilson, a post-Booker case arguing in favor of deference to the Sentencing Commission led the district court here to observe: "[i]f we want to defer to the Sentencing Commission . . . then the guidelines are not the best indication of what the Sentencing Commission in its wisdom, with all its expertise, has suggested." ER 13. It is the very Commission itself that has deemed the crack guidelines unreasonable.

The government argued, in the instant case, that the

district court could only depart for individualized reasons in a particular case. ER 14. The court queried how that was any different than a pre-Booker departure. The government persisted in arguing that the disparity between the crack and powder guidelines was not a proper basis for departure. ER 14-15. The court plainly stated: "I feel that I don't have authority to go outside the guidelines on the facts of this case, but if I did I would follow Judge Adelman's decision in the Smith case." ER 20. "And then if the Ninth Circuit agrees, they can remand it and let me do that." Id.

Booker not only allows a sentence outside the guideline range, but requires the district court to make an independent analysis of a fair and reasonable sentence taking into account not only the guidelines, but the factors set out in 18 U.S.C. § 3553(a). The district court erred in reading the guidelines as mandatory after Booker. The Supreme Court made clear that the guidelines, in order to pass constitutional muster, are advisory only. The guidelines are a starting point in the sentencing analysis, but not the final word. This Court in United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc), set out procedures for post-Booker sentencing courts to follow. The district court mistakenly believed it had no authority to consider the reasonableness of the crack guidelines, in light of this Commission's study, report and recommendation as well as

other district court cases on point.

The district court here relied on Smith in finding the crack guidelines unreasonable. The Smith court held it need not actually depart from a guideline range because such range is advisory. It need only impose a reasonable sentence, taking into account the guidelines and the sentencing factors set forth in 18 U.S.C. § 3553(a). In reaching its conclusion that the crack/powder disparity was unreasonable, the Smith court noted that "courts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing." 359 F.Supp.2d at 777. The Smith court described the "frenzied" atmosphere that surrounded the passage the 100:1 ratio in the wake of the death of basketball star Len Bias. Id. at 778. There was a perception of a "crack epidemic." After extensive study, the Commission acknowledged that the prevalence of violence or other aggravating factors were no more associated with crack than with powder cocaine. Id. Crack is made from powder cocaine. Large scale traffickers deal in powder, while street level dealers sell crack. This anomaly results in stiffer sentences for low level, less culpable defendants than their higher ups. Moreover, the racially disparate impact of the crack guidelines has had a searing effect on the public's perception of justice. The Smith

court observed "Perhaps most troubling, however, is that the unjustifiably harsh crack penalties disproportionately impact on black defendants." Id. at 780. The Smith court concluded that "none of the previously offered reasons for the 100:1 ratio withstand scrutiny." Id. Finally, the Smith court noted that while "only Congress can correct the statutory problem . . . after Booker district courts need no longer blindly adhere to the 100:1 guideline ratio." Id. at 781.

The district court here also agreed with the reasoning in United States v. Simon, 361 F.Supp.2d 35 (E.D. N.Y. 2005), where Judge Sifton applied a similar analysis. More recently, the court in United States v. Fisher, 2005 U.S. Dist. Lexis 23184 (S.D. N.Y. 2005), faced with precisely the same guideline range as here, 151-188 months, decided to apply a 10:1 ratio, noting that the same offense with powder would result in a 63-78 month guideline range. See also United States v. Perry, 389 F.S.2d 278 (D. R.I. 2005) (applying 20:1 ratio).

B. Statutory Considerations

The constitutionality of the guidelines rests on the fact that they are advisory. If the guidelines were mandatory they would fail under Booker. The district court here made plain its agreement with its sister courts in Smith and Simon, but unlike those courts, this district court felt without authority to issue a sentence outside the guideline range. In so doing, the

district court adopted a mandatory range in violation of Booker. Before Booker the sentencing court was bound by the guidelines. After Booker if the sentencing court feels itself bound by the guidelines and imposes a sentence it does not deem reasonable, the sentence is in constitutional peril. Not only can the district court consider other factors, outside the guideline range in imposing sentence, the district court must do so as required by 18 U.S.C. § 3553(a). "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" set forth in this section. Under § 3553(a), the court shall consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence to: (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;
>
> (3) the kinds of sentences available; . . .
>
> (6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.

These statutory considerations are particularly significant in crack/powder cases. The penalty must be **sufficient, but not greater than necessary.** By this standard the crack guidelines

appear to fail by the Commission's own review, since it found the crack guidelines greater than necessary and recommended reducing them accordingly. The crack guidelines overstate the "seriousness" of the offense relative to powder. They do not "promote respect for the law" due to the perceived unfairness of the 100:1 ratio and they plainly, in the view of the Sentencing Commission and a majority of district courts do not provide "just punishment" for the offense. The powder guidelines provide adequate deterrence and protect the public to the same extent as the crack guidelines do. Perhaps most significantly the crack guidelines do not "avoid unwarranted sentence disparities" because the 100:1 ratio embodies and codifies disparities the Sentencing Commission itself found to be unwarranted. A reasonable § 3553(a) sentence would not be a crack guidelines sentence.

C. The Need For Remand

The district court here stated:

> If called upon to make an independent determination as to the reasonableness of the 100-to-1 ratio that Congress has imposed based upon what has been presented to this Court, I would conclude, as did Judge Adelman [in Smith] and Judge Sifton [in Simon], that **the 100-to-1 ratio is not reasonable.** That conclusion would be based upon everything you have brought to my attention from the Sentencing Commission, the commentators, and the judges who have considered the issue. Therefore, **if I believed that it was appropriate and lawful for a judge to impose outside the sentencing guidelines simply because the judge felt the guidelines were unreasonable** and/or that the reasons given for those guidelines having been imposed by Congress were

> themselves unreasonable, **I would deviate from the guidelines** ad did Judge Adelman and Judge Sifton.

ER 21-22 (emphasis added).

After Booker, the guidelines are advisory and the sentence must be **reasonable** in light of all the factors enumerated in § 3553(a). The district court made it clear it would have sentenced differently if it believed it had the authority to do so. The district court felt constrained to impose what it felt was an unreasonable sentence because of a guideline range the court treated as mandatory, something the court is no longer permitted to do. There is no question the court did not believe it had authority to impose a sentence outside the range. The court plainly stated: "If the Ninth Circuit concludes that this Court would have that authority, then I would state at this time that I would deviate from the guidelines in this case for that reason." ER 22. Since the court has that authority and would use it to impose a reasonable sentence, a remand is necessary.

D. The First Circuit Pho case is distinguishable and incorrectly decided.

The First Circuit in United States v. Pho, 2006 U.S. App. Lexis 153 (1st Cir. Jan. 5, 2006), reversed a district court for imposing a 20:1 ratio for crack to powder in place of 100:1. The Pho court does not appear to disagree with the fundamental teaching of Booker that a district court has authority to impose a sentence outside the now non-binding guideline range, but that

Court concludes that district courts may not adopt an across the board ratio change, such as 20:1, because in that court's view, a new ratio reflects a "policy change" that a legislature must adopt. Pho is distinguishable from the case at bar because the district court judge here felt he did not have authority to go outside the guideline range – an authority bestowed on him by Booker. The district court here did not indicate that it would adopt a new crack/powder ratio and impose it in every single case (though there is nothing in Booker inherently prohibiting this). The problem with the Pho analysis is that even if the legislature adopted a 20:1 or 10:1 or 1:1 ratio, it would still not be binding, across the board, in every case because the guidelines themselves are no longer binding. If a new guideline were enacted it would still be advisory and a district court could still impose a sentence outside that range. Certainly, that being the case, a single district court decision imposing a 20:1 ratio is not binding on even that court's decision in a later case. The district court in Pho found the 20:1 ratio, recommended by the Sentencing Commission in 2002 and adopted by various district courts after Booker, to be reasonable and imposed a sentence accordingly. By adopting that ratio, the Pho district court did not usurp the legislature, but performed its judicial duty as required under Booker and 3553. We urge this Court not to follow Pho, but even if this Court chose to do so a

remand in this case would still be required because this district court did not believe it had the authority to issue a non-guidelines sentence despite its view that blindly following the guidelines was unreasonable here.

V. CONCLUSION

For the reasons provided herein, this Court must reverse and remand Mr. Starks's case for re-sentencing by the district court.

Dated: January 12, 2006

Respectfully submitted,

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SHARI G. RUSK

Attorney for Defendant-Appellant
ANTONIO STARKS

UNITED STATES COURT OF APPEALS

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Defendant-Appellant.	)	
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_____	)	

BRIEF FORMAT CERTIFICATION PURSUANT

TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit rule 32(e)(4), I certify that this brief is in courier monospaced typeface, has 10.5 or less characters per inch, is double-spaced and contains 3,232 words.

DATED: January 12, 2006

SHARI G. RUSK
Attorney for ANTONIO STARKS
Defendant-Appellant

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