IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-10067, 03-10071

UNITED STATES OF AMERICA,

Appellee

v.

JOSE RAMON GARCIA;
EDWARD MICHAEL POWERS,

Defendants-Appellants

APPELLEE UNITED STATES' RESPONSE TO APPELLANTS' (1) MOTION TO FILE SECOND PETITION FOR REHEARING, (2) SECOND PETITION FOR REHEARING, AND (3) REQUEST FOR STAY OF MANDATE

The United States submits this response pursuant to the Court's order of January 31, 2005. The Court should deny the second petition for rehearing filed by defendants Edward Michael Powers and Jose Ramon Garcia. As explained below, defendants are not entitled to resentencing under *United States* v. *Booker*, 125 S. Ct. 738 (2005), because they have not met their burden under the plain-error standard of review.

Although the United States opposes the second petition on the merits, the government does not object to defendants' motion to file such a petition or their request for a stay of the mandate pending a ruling on the petition.

STATEMENT

1. Sentencing

At sentencing, the district court first calculated defendants' combined offense levels under the November 1991 version of the federal Sentencing Guidelines. The court determined that Powers' combined offense level was 36, Sent. RT 29,[1] which resulted in a sentencing range of 188 to 235 months. See U.S.S.G. Ch. 5, Pt. A (Sentencing Table) (1991). Because this range exceeded the statutory maximum, the district court reverted to offense level 30, which provided for a sentencing range of 97-121 months and thus encompassed the maximum 120-month sentence authorized by statute. See Sent. RT 29. The court determined that Garcia's combined offense level also was 30. *Id.* at 30.

The court next considered defendants' requests for downward departures. With regard to both defendants, the district court departed two levels due to susceptibility to abuse in prison. Sent. RT 55. The court also departed one

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[1] "Sent. RT __" refers to the page number of the transcript of the sentencing hearing held February 6, 2003. See Docket Entry Nos. 479 and 501.

additional level for Garcia, based on the combination of his health and his previous prosecution in state court. *Ibid.* The court refused defendants' requests to depart downward on the ground of aberrant behavior. *Id.* at 50-52. As a result of the two-level downward departure, Powers' offense level was reduced to 28, which translated into a sentencing range of 78 to 97 months. *Id.* at 56; see U.S.S.G. Ch. 5, Pt. A (Sentencing Table) (1991). The three-level downward departure for Garcia resulted in an offense level of 27, which produced a sentencing range of 70 to 87 months. Sent. RT 56.

The district court then exercised its discretion to select the appropriate sentences within these ranges. Sent. RT 56-64. Although both defendants argued that their individual circumstances warranted a sentence at the bottom of the Guidelines range, *id.* at 57-58, the court disagreed. *Id.* at 60-62. Instead, the district court sentenced Powers to 84 months and Garcia to 76 months in prison. *Id.* at 62. In each case, the term of imprisonment was six months longer than defendants would have received had the court sentenced them at the bottom of their respective Guidelines ranges. The court explained that in exercising its discretion it had balanced the factors set forth in 18 U.S.C. 3553(a), and had concluded that the sentences imposed were fair both to defendants and their victims. *Id.* at 62-63.

Defendants did not argue in the district court that their sentences violated the Sixth Amendment.

2. Defendants' Appeals

On appeal, Powers and Garcia initially challenged only their convictions. They did not attack their sentences in either their opening briefs (filed with this Court in November 2003) or reply briefs (filed in May 2004).

After regular briefing was completed, however, defendants filed a motion seeking leave to submit a supplemental argument challenging their sentences under *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). In their motion, defendants argued that their sentences violated their Sixth Amendment right to a jury trial because some of the sentencing calculations were based on facts found by the district judge, rather than by the jury. See Motion For Leave To File A Supplemental Joint Argument On Appeal Pursuant to *Blakely* v. *Washington*, 3-9 (filed July 19, 2004). Defendants conceded that they had not raised a Sixth Amendment objection to their sentences in the district court. *Id.* at 1-2. The Court denied defendants' motion without prejudice to refiling "at a subsequent time when the significance of *Blakely* and *United States* v. *Ameline*, [376 F.3d 967] (9th Cir. July 21, 2004), has been clarified." Order at 1 (filed Aug. 18, 2004).

On October 29, 2004, the Court affirmed defendants' convictions in an unpublished memorandum. Defendants filed a joint petition for panel rehearing and rehearing en banc on December 13, 2004. That petition did not raise any sentencing issues. This Court denied defendants' petition on January 18, 2005.

After the Supreme Court's decision in *Booker*, defendants filed a motion on January 20, 2005, seeking permission to file a second petition for rehearing.

ARGUMENT

THE COURT SHOULD DENY THE SECOND PETITION FOR REHEARING

Neither Powers nor Garcia is entitled to resentencing under *United States* v. *Booker*, 125 S. Ct. 738 (2005). Defendants have failed to demonstrate that their sentences should be overturned under the plain-error standard of review.

A. The Supreme Court's Decision In Booker

In *Booker*, the Supreme Court issued two rulings regarding the federal Sentencing Guidelines. First, the Court held that the Sixth Amendment is violated when a sentence imposed under the Guidelines is increased based upon the district judge's finding of a fact, other than a prior conviction, that was not found by the jury or admitted by the defendant. *Booker*, 125 S. Ct. at 748-756 (opinion of Stevens, J., for the Court). The Court noted that it had held in *Blakely* v.

Washington, 124 S. Ct. 2531 (2004), that a defendant has a right under the Sixth Amendment "to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *Booker*, 125 S. Ct. at 749 (quoting *Blakely*, 124 S. Ct. at 2536). The Court found "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in" *Blakely*. 125 S. Ct. at 749.

The Court explained that it is the mandatory nature of the Guidelines that implicates the Sixth Amendment:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges. * * * For *when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant*.

125 S. Ct. at 750 (emphasis added).

Second, the Court held that the remedy for this constitutional deficiency was the severance and excision of the two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq*., that make application of the Guidelines mandatory.

125 S. Ct. at 756-769 (opinion of Breyer, J., for the Court).[2] The Court concluded that this approach would best achieve congressional intent, by "mak[ing] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve." *Id*. at 757.

Under the remedy that *Booker* adopted, district courts must consider the factors listed in 18 U.S.C. 3553(a), including the sentencing ranges set forth in the Guidelines. *Booker*, 125 S. Ct. at 764-765. Thus, while the Guidelines will no longer be mandatory, district courts "must consult those Guidelines and take them into account when sentencing." *Id.* at 767.

The courts of appeals are to review sentencing decisions for "unreasonableness." 125 S. Ct. at 767. The Supreme Court did not define "unreasonableness," but stated that the factors listed in 18 U.S.C. 3553(a) "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Id.* at 766.

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[2] The Court excised 18 U.S.C. 3553(b)(1), which requires the court to impose a sentence within the Guideline range, in the absence of a departure, and 18 U.S.C. 3742(e), which sets forth the standards of review on appeal. 125 S. Ct. at 764.

B. Defendants' Sentences Should Be Upheld Under A Plain-Error Standard

Defendants' sentences can be reviewed only for plain error because neither Powers nor Garcia raised a Sixth Amendment objection to their sentences in the district court. See *Booker*, 125 S. Ct. at 769 (although *Booker* holdings apply to all cases on direct review, not every appeal will lead to a new sentencing hearing "because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test"); *United States* v. *Cotton*, 535 U.S. 625, 633 (2002) (applying plain error standard in reviewing sentence for alleged Sixth Amendment error).

Plain error review should be exercised "sparingly." *Jones* v. *United States*, 527 U.S. 373, 389 (1999). Reversal is warranted under this standard only if there is

> (1) error, (2) that is plain, and (3) that affect[s] substantial rights. * * * If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. *United States*, 520 U.S. 461, 467 (1997) (citations and internal quotation marks omitted). Powers and Garcia bear the burden of proving that these requirements have been satisfied. See *United States* v. *Dominguez Benitez*,

124 S. Ct. 2333, 2340 (2004). An error usually will not affect "substantial rights" unless it is "prejudicial," in the sense that it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). This determination is similar to the "harmless error" inquiry, but "with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.*

Defendants have not met their burden under the plain error standard. Even assuming that defendants have satisfied the first two prongs of this test, they have not shown that the sentencing procedures applied by the district court affected their substantial rights or had a serious impact on the fairness, integrity or public reputation of the judicial proceedings.

Defendants cannot show that they would have received a different sentence if, at the time of sentencing, the court had treated the Guidelines as merely advisory. See *United States* v. *Rodriguez*, No. 04-12676, 2005 WL 272952, at *8 (11th Cir. Feb. 4, 2005) (affirming sentence under plain-error standard where defendant failed to show that sentence would likely have been different if Guidelines were not mandatory). Indeed, the record indicates that Powers and Garcia would not have received more lenient sentences.

1. At the time of sentencing, the Guidelines gave the district judge discretion to choose a sentence anywhere within the range of 78 to 97 months for Powers and within the range of 70 to 87 months for Garcia. The judge rejected defendants' requests that they be sentenced at the bottom of the applicable Guidelines range and, instead, imposed a sentence of 84 months on Powers and 76 months on Garcia.

This refusal to sentence defendants at the bottom of the applicable ranges indicates that the court would not have imposed shorter sentences if it had conducted the proceedings under the remedial scheme mandated by *Booker*. See *United States* v. *Sanchez*, 914 F.2d 1355, 1363-1364 (9th Cir. 1990) (rejecting argument that district judge failed to impose a shorter sentence out of a mistaken belief that he lacked discretion to depart from the Guidelines; if judge believed a shorter sentence was appropriate he would have sentenced at the bottom of the Guidelines range (51 months), instead of imposing a sentence of 57 months). "Surely, if the district court was not inclined to impose a shorter sentence despite its power to do so within the guidelines' mandatory sentencing scheme, it would not have elected to reduce Defendant's sentence under a more open-ended advisory system." *United States* v. *Bruce*, No. 03-3110, 2005 WL 241254, at *18

(6th Cir. Feb. 3, 2005) (affirming sentence under fourth prong of plain-error standard despite *Booker* error).

2. Moreover, the district court considered the sentencing factors set forth in 18 U.S.C. 3553(a), the very factors identified in *Booker*, in exercising its discretion to reject shorter sentences for defendants:

> I note under 3553 the court is to consider * * * the nature and circumstances of the offense, it is to consider the history and characteristics of the defendants, it is to consider the seriousness of the offense, the necessity for promoting respect for the law, adequate deterrence, public protection, and need for education and [vocational] training. *I have considered all these factors in providing the appropriate sentence* for today.

Sent. RT 60 (emphasis added). Alluding to these factors, the court expressed its belief that the sentence imposed on each defendant "best promotes issues of deterrence, education, vocational rehabilitation and protection of the public." *Id.* at 62. The court further emphasized that, in its view, the sentences "approximate what is fair both with respect to the defendants and what is fair with respect to the individuals, the multiple individuals that were harmed by their conduct." *Id.* at 62-63.

Simply put, the district court in this case already has explicitly performed the analysis that would be required of it in a post-*Booker* world. Given the district

court's prescient discussion of the Section 3553(a) factors in explaining the exercise of its sentencing discretion, a remand would serve no useful purpose.

Defendants' case is thus distinguishable from the recent decision in *United States* v. *Ameline*, No. 02-30326, 2005 WL 350811 (9th Cir. Feb. 5, 2005),[3] which vacated a sentence under the plain-error standard in light of *Booker*. In rejecting the argument that it should allow the defendant's sentence to stand "simply because it may happen to fall within the range of reasonableness," the *Ameline* panel noted that doing so "would be tantamount to performing the sentencing function ourselves." 2005 WL 350811, at *6. There is no indication in the *Ameline* opinion that the district court in that case had explicitly weighed the Section 3553(a) factors in explaining why it chose the sentence it imposed. But where, as here, the district court has already explicitly discussed those factors in explaining its refusal to select a more lenient sentence, the concerns of the *Ameline* panel about usurping the sentencing role of the district judge are inapplicable.

3. The present case also differs from *Ameline* in another fundamental respect. The panel in *Ameline* concluded that the district court had "erroneously

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[3] The United States filed petitions for panel rehearing and rehearing en banc in *Ameline* on February 17, 2005.

placed the ultimate burden of proof on Ameline" at sentencing, 2005 WL 350811, at *8, "[b]y treating the factual statements in the [Presentence Report] as presumptively accurate, and placing the burden on Ameline to disprove them." *Id.* at *7; see also *id.* at *2 & n.1. The defendant in *Ameline* "vigorously challenged" key allegations in the Presentence Report, arguing that they were based on unreliable hearsay and were "false." *Id.* at *2-*3, *6, *8. Under these circumstances, the *Ameline* panel found the burden-shifting significant because "[a]lthough the final Sentencing Guidelines range is nonbinding under *Booker*, there are serious sentencing ramifications to the district court's factual findings." *Id.* at *8.

No such flaw exists in the factfinding procedures used by the district judge in the present case. Unlike the defendant in *Ameline*, neither Powers nor Garcia has argued on appeal that the district court improperly shifted the burden of proof to the defense at sentencing. Indeed, defendants did not raise *any* sentencing issues in their opening or reply briefs and, aside from their belated Sixth Amendment claim, have not argued on appeal that the district judge committed any errors at sentencing. Defendants have failed to identify any flaw in the original sentencing proceedings that would suggest that the district judge would make different factual findings if the case were remanded.

Under the remedy imposed by *Booker*, a judge can continue to base a sentence on facts that are neither found by a jury nor established beyond a reasonable doubt. As long as the judge does not treat the Guidelines as mandatory, such factfinding by a judge at sentencing will not violate the Sixth Amendment. See *Booker*, 125 S. Ct. at 750. Because the identity of the factfinder and the evidentiary burden on the government has not changed under the *Booker* remedial scheme, there is no basis for believing that a remand would produce a different outcome in this case.

For these reasons, defendants have failed to demonstrate that the sentencing procedures followed by the district court either caused them prejudice or seriously affected the fairness, integrity or public reputation of the proceedings. The Court therefore should uphold their sentences under the plain-error standard of review.

CONCLUSION

The Court should deny defendants' second petition for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2005, a copy of the foregoing APPELLEE UNITED STATES' RESPONSE TO APPELLANTS' (1) MOTION TO FILE SECOND PETITION FOR REHEARING, (2) SECOND PETITION FOR REHEARING, AND (3) REQUEST FOR STAY OF MANDATE was served by Federal Express, next business day delivery, on each of the following counsel of record:

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