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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

August 26, 2005, Decided

Before Hon. ILANA DIAMOND ROVNER, *Circuit Judge*, Hon. TERENCE T. EVANS, *Circuit Judge*, Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*.

ORDER

After our limited remand under *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005), the district judge concluded, unequivocally, that knowledge about the advisory status of the sentencing guidelines would not have affected her decision. She would have imposed the same sentence as originally imposed on both Robert Mitrione and Maria DeVore. Those sentences, we conclude, could not be viewed as unreasonable. Accordingly, the defendants' objections to their sentences are rejected, and the judgments under appeal are **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 00-30021

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT T. MITRIONE and MARLA DEVORE,
Defendants.

OPINION

JEANNE E. SCOTT, U.S. *District Judge:*

This matter is before the Court on limited remand from the United States Court of Appeals for the Seventh Circuit. The Court is directed to consider Defendants Robert T. Mitrione and Marla DeVore's sentences pursuant to *United States v. Paladino* and to inform the Court of Appeals "whether the additional discretion afforded by *Booker* would affect the defendants' sentences." *USCA Order*, May 19, 2005 (d/e 314); *see also United States v. Booker*, 125 S.Ct. 738 (2005); *Paladino*, 401 F.3d 471 (7th Cir. 2005). All parties have submitted position statements. *Defendant, Robert T. Mitrione's Suggestions on Remand (d/e 315); Position on Previously Imposed Sentence (d/e 316); DeVore's Statement of Position for Re-Sentencing (d/e 317)*. For the reasons set forth below, the Court finds that it would have imposed the same sentences under a system in which the United States Sentencing Guidelines (U.S.S.G.) were advisory, rather than mandatory.¹

¹ The Court determines that a hearing on this issue is unnecessary. *See Paladino*, 401 F.3d at 484.

On September 13, 2001, a jury found Mitrione guilty of Counts 1-6, 9-12, 14 and 15 of the Indictment and DeVore guilty of Counts 1, 3-5, 9-12, 14 and 15. Count 13 was voluntarily dismissed by the Government. Mitrione was acquitted on Counts 7 and 8, and DeVore was acquitted on Counts 2 and 6-8. On August 23, 2002, upon Defendants' Motion for a New Trial, this Court vacated the conviction on Counts 1-6, 9-11 and 15 as to Mitrione and Counts 1, 3-5, 9-11, and 15 as to DeVore. The counts were vacated on the grounds that the jury might have been influenced by the false testimony of a witness for the Government. The Government elected not to retry the vacated counts. The Motion for a New Trial was denied as to each Defendant for Counts 12 and 14. The matter then proceeded to sentencing on these counts.

Count 12 alleged Mail Fraud, in violation of 28 U.S.C. § 1341, and Count 14 alleged False Claims for Medical Services, in violation of 18 U.S.C. § 287. In preparation for sentencing, the United States Probation Office prepared a second revised Presentence Report (PSR) dated October 7, 2002, for each Defendant. At the sentencing hearing on October 31, 2002, the Court, using the November 2001 version of the U.S.S.G., determined that Defendant Mitrione had a base offense level of 6. *U.S.S.G.*, § 2B 1.1(a). His offense level was increased by four levels, over objection, based on the Court's finding of an amount of loss of \$11,255.65. *U.S.S.G.*, § 2B1.1(b)(1)(C). Again over defense objection, the Court imposed a two-level enhancement in offense level based on a finding of vulnerable victims pursuant to U.S.S.G. § 3A1.1(b)(1). The Court increased Mitrione's offense level by two levels under U.S.S.G. § 3B1.3 over objection after finding that he abused a position of trust. Finally, the Court applied a two-level enhancement in offense level for obstruction of justice, again over objection. *See U.S.S.G.* § 3C1.1.

Mitrione, therefore, had a total offense level of 16. He had zero criminal history points, placing him into criminal history

category I. With a total offense level of 16 and a criminal history category of I, Defendant Mitrione's U.S.S.G. range was 21 to 27 months imprisonment. The Court sentenced Mitrione to 23 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently, restitution in the amount of \$11,255.65 to be paid jointly and severally with Defendant DeVore, a \$200 special assessment, and no fine.

The Court, using the November 2001 version of the U.S.S.G., determined that Defendant DeVore had a base offense level of 6. Her offense level was increased by four levels, over objection, based on the Court's finding of an amount of loss of \$11,255.65. *U.S.S.G.* § 2131.1(b)(1)(C). Again over defense objection, the Court imposed a two-level enhancement in offense level based on a finding of vulnerable victims, pursuant to *U.S.S.G.* § 3A1.1(b)(1). Finally, the Court applied a two-level enhancement in offense level for obstruction of justice, again over objection. *See U.S.S.G.* § 3C1.1.

DeVore, then, had a total offense level of 14. She had no criminal history, placing her in criminal history category I. This resulted in a U.S.S.G. range of 15 to 21 months imprisonment. The Court recognized as mitigating factors that DeVore had legitimate health problems and also that she was assisting family members who had serious health problems. The Court sentenced DeVore to 15 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently, restitution in the amount of \$11,255.65 to be paid jointly and severally with Defendant Mitrione, a \$200 special assessment, and no fine.

The Court on remand turns first to Defendant Mitrione. Mitrione contends that the procedure designated by the Seventh Circuit in *Paladino* does not adequately address the

constitutional violations that have occurred. *See Paladino*, 401 F.3d at 471. This argument, however, is outside the scope of the limited remand, and the Court will not address it. *See United States v. White*, 406 F.3d 827, 831 (7th Cir. 2005) (“The scope of a district court’s power on remand is determined by the language of the order of remand.”). Mitrione’s arguments questioning the constitutionality of the application of Justice Breyer’s majority opinion in *Booker* are similarly outside the scope of this Court’s authority on remand.

For purposes of reexamining Mitrione’s sentence, Mitrione draws the Court’s attention to DeVore and her family’s health problems, arguing that he needs to be with his wife to provide support and care. The Court will consider this factor in reexamining his sentence.

After *Booker*, the U.S.S.G. are no longer binding on the Court, yet they remain a factor for the Court to consider in sentencing. *United States v. Williams*, 410 F.3d 397 (7th Cir. 2005). The Court, therefore, must determine Mitrione’s advisory U. S. S.G. range. Mitrione asks the Court to remove any sentencing enhancements that were added based on “judge found facts.” *Defendant Robert T. Mitrione’s Suggestions on Remand*, p. 5. However, under the advisory guideline system set out in *Booker*, which is binding on this Court, the enhancements were properly determined. *See Booker*, 125 S.Ct. at 769.

Mitrione further asserts that the Court should reduce the \$11,255,65 amount of loss by \$2,580.27 for amounts not related to the counts of conviction. The Court included \$2,580.27 in the amount of loss for “claims for which there was no support in the file substantiated.”² *Transcript of Sentencing Hearing. October 31, 2002 (d/e 230)*, p. 162-63. The Court found this amount to be verifiably free of the

² The Court was referring to billings for which no services were reflected in the patients’ files.

testimony of the Government witness who testified falsely. The Court further found this amount could properly be included in the amount of loss. *See Transcript, Vol. 24*, pp. 160-161. In reexamining Mitrione's sentence, the Court reaches the same conclusion. The Court further notes that on direct appeal the Court of Appeals affirmed this Court's inclusion of this amount in the order of restitution. *United States v. Mitrione*, 357 F.3d 712, 721 (7th Cir. 2004).

Additionally, Mitrione submits a letter, dated December 10, 2004, from the U.S. Department of Health and Human Services that states that the Department intended to retain \$4,575.45 for claims submitted by Mitrione that it would have paid during the time payment to him was suspended. If retained, this amount must be credited as payment on the ordered restitution, but it does not alter the Court's determination of amount of loss or necessitate a new restitution order. Mitrione's challenges to the amount of loss fail. Therefore, the Court adopts the U.S.S.G. calculations set forth above in reconsidering Mitrione's sentence.

Considering the case file, the parties' position statements, Mitrione's PSR, the statements of counsel and the evidence submitted at the sentencing hearing, the evidence from trial, the applicable sentencing guidelines, and the sentencing factors set forth in 18 U.S.C. § 3553(a), the Court finds that, if it were required to resentence Defendant Mitrione, the Court would again sentence him to 23 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently. The Court would impose restitution in the amount of \$11,255.65 to be paid jointly and severally with Defendant DeVore, a \$200 special assessment, and no fine. In light of the Court's view of the evidence and the characteristics of Defendant Mitrione (set forth in detail on the record at the original sentencing hearing), the Court finds that a lower sentence would create unwarranted sentencing

disparities and be inconsistent with the ends of justice. Even when the Court considers the Guidelines as advisory and also weighs the other factors set forth in 18 U.S.C. § 3553(a), the Court is of the opinion that the sentence previously imposed is necessary and appropriate for Defendant Mitrione.

The Court turns next to Defendant DeVore. DeVore also challenges the constitutionality of the application of Justice Breyer's majority opinion in *Booker* to her case. Again, this argument is outside the scope of this Court's authority on remand, and the Court will not consider it. This Court is bound to apply both portions of *Booker*. See *Booker*, 125 S.Ct. at 769. After *Booker*, the U.S.S.G. are no longer binding on the Court, yet they remain a factor for the Court to consider in sentencing. *Williams*, 410 F.3d at 397. The Court, therefore, must determine DeVore's advisory U.S.S.G. range. DeVore joins in Defendant Mitrione's argument seeking to reduce the amount of loss and restitution by \$4,575.45. This argument is rejected for the reasons set forth above. Therefore, the Court adopts the U.S.S.G. calculations set forth above in reconsidering DeVore's sentence.

DeVore draws the Court's attention to her current employment situation, as well as the serious medical problems of her family members. The Court considers this in reexamining DeVore's sentence. The Court notes that it considered the health conditions of DeVore and her family as mitigating factors in imposing her original sentence.

Considering the case file, the parties' position statements, DeVore's PSR, the statements of counsel and the evidence submitted at the sentencing hearing, the evidence from trial, the applicable sentencing guidelines, and the sentencing factors set forth in 18 U.S.C. § 3553(a), the Court finds that, if it were required to resentence Defendant DeVore, the Court would again sentence her to 15 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run

concurrently. The Court would also order restitution in the amount of \$11,255.65 to be paid jointly and severally with Defendant Mitrione, a \$200 special assessment, and no fine. A lower sentence would create unwarranted sentencing disparities and be inconsistent with the ends of justice. Again, even when the Court considers the Guidelines as advisory and also weighs the other factors set forth in 18 U. S.C. § 3553(a), the Court is of the opinion that the sentence previously imposed is necessary and appropriate for Defendant DeVore.

THEREFORE, if this Court were required to resentence Defendant Mitrione, under a system in which the U.S.S.G. were advisory rather than mandatory, the Court would sentence him to 23 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently. The Court would impose restitution in the amount of \$11,255.65 to be paid jointly and severally with Defendant DeVore and a \$200 special assessment, but would not order a fine. This is the same sentence that the Court previously imposed on Mitrione. *Order, November 25, 2002 (d/e 238)*. If this Court were required to resentence Defendant DeVore, under a system in which the U.S.S.G. were advisory rather than mandatory, the Court would sentence her to 15 months imprisonment on each of Counts 12 and 14 to run concurrently, followed by a 3 year term of supervised release on each of Counts 12 and 14 to run concurrently. The Court would impose restitution in the amount of \$11,255.65 to be paid jointly and severally with Defendant Mitrione, a \$200 special assessment, and no fine. This is the same sentence that the Court previously imposed on DeVore. *Id.* The Clerk is directed to return the case, including a copy of this Opinion, to the Court of Appeals.

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IT IS THEREFORE SO ORDERED.

ENTER: July 20, 2005.

FOR THE COURT:

/s/ Jeanne E. Scott
JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

DOCKET ENTRY

DATE	PROCEEDINGS
5/19/05	ORDER: The Supreme Court has remanded this case to us for reconsideration in light of <i>United States v. Booker</i> , 125 S. Ct. 738 (2005). The defendants, Robert Mitrione and Marla DeVore, were convicted of Medicare and Medicaid fraud. The district court sentenced Mitrione to 23 months in prison, while DeVore received 15 months. The court applied the sentencing guidelines and calculated the defendants' sentences based on factual findings that were not proven to a jury beyond a reasonable doubt. When the court imposed these sentences, the guidelines were mandatory, which is no longer the case after <i>Booker</i> . Because neither defendant objected to the district court's use of the guidelines, we review under the plain error test. The sentences imposed, under the old mandatory regime, satisfy the first two prongs of the four-prong test for plain error. <i>See United States v. Paladino</i> , 401

F.3d 471, 481 (7th Cir. 2005). But we cannot determine whether these errors harmed the defendants, i.e., whether the court would have imposed the same sentences under an advisory guideline regime. Thus, we order a limited remand under the terms of *Paladino* so the district court may tell us whether the additional discretion afforded by *Booker* would affect the defendants' sentences. [1629491-1] [02-4222, 02-4224] (nath) [02-4222 02-4224]