

Roger D. Tucker
Presentence Report

ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS UNITED STATES V. TUCKER, ROGER D., DOCKET NO. 6:03CR10220-001

126. The probation officer certifies that the presentence investigation report, including any revisions thereof and this addendum, has been disclosed to the defendant's counsel for discussion with the defendant, and to counsel for the Government.

OBJECTIONS

By the Government

127. The Government has no objections to the presentence investigation report.

By the Defendant

128. **Defendant's Objection No. 1:** The defendant, "Objects to Paragraph 28, the (2) prior convictions being used as enhancement is unconstitutional because not charged in indictment and not proven to a jury beyond a reasonable doubt, so defendant's right to notice 6th Amendment Jury trial and 5th Amendment due process beyond reasonable doubt standard rights have been violated."
129. **The Government's Position:** The Government has not responded to the defendant's objections.
130. **Response by the U.S. Probation Officer:** The defendant argues that his 5th and 6th Amendment rights were violated because his prior criminal convictions were not charged in the Indictment or proven to a jury beyond a reasonable doubt. In Blakely, the Supreme Court applied the rule it expressed in Apprendi v. New Jersey, 530 U.S. 466 (2000), to Washington state's determinate sentencing regime. See Blakely, 124 S.Ct. at 2536. Recently, the Court extended Apprendi and Blakely to the Federal Sentencing Guidelines, holding that the Sixth Amendment requires "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." United States v. Booker, 125 S.Ct. 738, 756 (2005).

The defendant's prior convictions fall within the exception to the Blakely/Booker rule for the "fact of a prior conviction." Blakely, 124 S.Ct. at 2536. Although an indictment must set forth each element of the crime it charges, the Supreme Court has explicitly held that the

constitution does not require Congress to treat recidivism as an element of the offense. *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). Therefore, the fact that the defendant's prior convictions were not charged or proven to a jury does not constitute constitutional error. See *United States v. Moore*, 401 F.3d 1220, 1221 (10th Cir.2005) ("Booker ... do[es] not require the government to charge in an indictment or prove to a jury either the existence of prior convictions or their classification as 'violent felonies' ").

131. **The Court Finds:** _____

132. **Defendant's Objection No. 2:** "Object to Paragraphs 51 and 52 this is the exact same case and police report should show this."

133. **The Government's Position:** The Government has not responded to the defendant's objections.

134. **Response by the U.S. Probation Officer:** Wichita, Kansas Municipal Court records reflect the defendant's convictions in both Paragraphs 51 and 52 in two separate cases on two separate dates, 02CM13651 occurring on 10/03/02; and 02CM12245 occurring on 10/04/02. This objection does not impact the guideline calculations as set forth in the presentence report. The Court need not make a ruling on this objection if it is determined that a ruling is unnecessary either because the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).

135. **The Court Finds:** _____

136. **Defendant's Objection No. 3:** "Object to Paragraph 41 robbery conviction was not for gun."

137. **The Government's Position:** The Government has not responded to the defendant's objections.

138. **Response by the U.S. Probation Officer:** The Complaint filed in Sedgwick County District Court Case No.: 88CR2472 states as to Count 1, Aggravated Robbery, "Roger D. Tucker, did then and there unlawfully, willfully, take the property, to wit: United States monies and car keys from the person of or in the presence of Rene Retkofsky by threat of bodily harm to the person of Rene Retkofsky while said Roger D. Tucker was armed with a dangerous weapon to wit: an unknown caliber handgun." This objection does not impact the guideline calculations as set forth in the presentence report. The Court need not make a ruling on this

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objection if it is determined that a ruling is unnecessary either because the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).

139. **The Court Finds:** _____

140. **Defendant's Objection No. 4:** "Object to page 2, re: number of aliases."

141. **The Government's Position:** The Government has not responded to the defendant's objections.

142. **Response by the U.S. Probation Officer:** The alias names listed in the presentence report were obtained from NCIC, KBI, and Wichita Police Department records. This objection does not impact the guideline calculations as set forth in the presentence report. The Court need not make a ruling on this objection if it is determined that a ruling is unnecessary either because the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).

143. **The Court Finds:** _____

144. **Defendant's Objection No. 5:** "Objection to the use for criminal history purposes any of the prior convictions admitted at trial against the defendant as those convictions went to a necessary element of the instant offense of conviction, and therefore would not meet the definition of a 'prior sentence' because a 'prior sentence' under § 4A1.2 excludes any sentence for conduct that is part of the instant offense."

145. **The Government's Position:** The Government has not responded to the defendant's objections.

146. **Response by the U.S. Probation Officer:** The U.S. Probation Office is somewhat unclear as to the point of this objection. However, if the defendant is asserting that prior convictions are an element of the offense of conviction and cannot be used to determine the criminal history category, the U.S. Probation Office would respond as follows: U.S.S.G. § 2K2.1 Application Note 12 states, "Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History)."

147. **The Court Finds:** _____

148. **Defendant's Objection No. 6:** "Object to the use of prior conviction that was used to convict defendant in this case, for the use of enhancements as this is in violation of the 5th Amendment double jeopardy clause."

149. **The Government's Position:** The Government has not responded to the defendant's objections.

150. **Response by the U.S. Probation Officer:** The probation officer responds in the same manner as set forth in the response to objection #1.

151. **The Court Finds:** _____

152. **Defendant's Objection No. 7:** "Object to false reports and/or complaints used in Paragraph 43 and 45."

153. **The Government's Position:** The Government has not responded to the defendant's objections.

154. **Response by the U.S. Probation Officer:** The defendant does not state specific objections to Paragraphs 43 and 45. The U.S. Probation Office used the incident reports and complaints filed in the two cases and provided by the Wichita Police Department and Wichita Municipal Court for a synopsis of each case. This objection does not impact the guideline calculations as set forth in the presentence report. The Court need not make a ruling on this objection if it is determined that a ruling is unnecessary either because the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).

155. **The Court Finds:** _____

156. **Defendant's Objection No. 8:** "Defendant respectfully asks the Court to depart downward to reduce his sentence, that the mitigating circumstances surrounding his crime would even warrant a course of punishment other than imprisonment, to support the defendant's request

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he asks the Court to access 5K2.11 Lesser Harms. The second paragraph states: In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted. And language used in 5K2.12: And on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Also the PSR reflects the basis for defendant's request. Count 2 offense has no co-defendants, no related cases. Page 6, Paragraph 29, no specific offense characteristic. Paragraph 30, no victim-related adjustments. Paragraph 31, no adjustments for role in the offense. Paragraph 32, no adjustments for obstruction of justice. Paragraph 36, no chapter four enhancements. The Government cannot dispute the fact there's nothing in defendant's actions that's been presented to this Court to show defendant knew he was committing a crime by his possession of the ammunition, or that he even knew it was a crime to possess ammunition. For the Court should not just look to the fact it is a crime to possess ammunition when considering punishment for possession of ammunition nor is defendant stating the Government has to prove he knew it was a crime. But it is a miscarriage of justice for the Court to only look to justify harsher punishments solely on the fact that a crime has been committed and the accused has a lengthy criminal history, and defendant so states, and the PSR shows the only thing in which to base sentencing him to a harsh sentence is the fact that he has a lengthy criminal history. The defendant asks that being the fact all other sentencing matters, in which the Court and the PSR review to determine one sentence is in the defendant's favor. He asks that the Court grant his request for a downward departure in the interest of justice."

157. **The Government's Position:** The Government has not responded to the defendant's objections.
158. **Response by the U.S. Probation Officer:** The U.S. Probation Officer is unaware of any, "mitigating circumstances" regarding the defendant's conviction in the instant offense which would warrant a downward departure as he requests. Mr. Tucker has chosen a few sentences from U.S.S.G. § 5K2.11, Lesser Harms, and U.S.S.G. § 5K2.12, Coercion and Duress, which he believes apply to his case. The offense conduct for the count of conviction in the defendant's instant offense involved the defendant stealing items from Arturo Vigil's vehicle, then calling Mr. Vigil's niece and offering the stolen goods back to her for \$50. After taking the defendant into custody, officers subsequently performed a pat-down on the defendant and found the ammunition in his pocket. The U.S. Probation Officer is not aware of any perceived greater harm the defendant had for committing this offense, nor that he did not intend to use the ammunition to threaten or harm. It is not conceivable that the defendant possessed the ammunition for trophy or display purposes, such as he refers to in his objection. Further, the U.S. Probation Officer is not aware of any coercion, blackmail, or duress made against the defendant to cause him to commit the crime of felon in possession of ammunition. The U.S. Probation Officer does not believe a downward departure is warranted in this case.

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159. **The Court Finds:** _____

Respectfully submitted,



Lori Hase
U.S. Probation Officer

REVIEWED:



Steven D. Kohman
Supervising U.S. Probation Officer

