

Roger Tucker  
Presentence Report

## SECOND 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

1. The probation officer certifies that the presentence investigation report, including any revisions thereof, and this second addendum, have been disclosed to the defendant, his stand by counsel and to counsel for the Government. This second addendum is being submitted after a hearing which was held before the Court on May 23, 2005. At that time this second addendum was ordered to be completed by the Court.

### OBJECTIONS

#### By the Government

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

#### By the Defendant

3. **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 6<sup>th</sup> Amendment Jury trial and 5<sup>th</sup> Amendment due process beyond reasonable doubt standard rights have been violated."
4. **2<sup>nd</sup> Response by the U.S. Probation Officer:** With regard to this objection, the probation officer responds in the same manner as in the initial addendum. That response is as follows:
5. 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).

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6. 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' ").

7. It is recommended this objection be overruled.

8. **The Court Finds:**

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

10. **2<sup>nd</sup> Response by the U.S. Probation Officer:** The defendant states that these cases arose from the same incident and therefore are related under U.S.S.G. § 4A1.2 - Application Note 3. If deemed to be related cases this would result in the reduction in two criminal history points making the total of his criminal history points 23. Twenty-three criminal history points still results in criminal history category VI. The cases set forth in Paragraphs 51 and 52 are not related. They are not the same case nor did they originate from the same incident.

11. The complaint related to the offense in Paragraph 51 (Docket No.: 02CM13651) charged that on October 3, 2002, Roger D. Tucker obtained unauthorized control over a 2002 Ford, VIN # 1FMZU74W42ZA65513 with the intent to deprive Kelley M. Pitts of the temporary use thereof and without his consent, but not with the intent of depriving him of the possession, uses or benefit of such property.

12. The complaint related to the offense in Paragraph 52 (Docket No.: 02CM12245) charged that on October 4, 2002, Roger Tucker obtained unauthorized control over a silver 1991 Chevrolet Caprice, with intent to deprive the owner of the temporary use, without the owner's consent, but not with the intent of depriving the owner of permanent possession.

13. The Docket Sheets of sentencing and Complaints related to both cases are attached. The presentence report correctly assigns two (2) criminal history points to each case.

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14. It is recommended that this objection be overruled. However, the Court could also find that a ruling on this objection is unnecessary if it is determined that the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B). Again, the subtraction of two (2) criminal history points would not reduce the defendant's criminal history category.
15. **The Court Finds:**  
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16. **Defendant's Objection No. 3:** "Object to Paragraph 41 robbery conviction was not for gun."
17. **2<sup>nd</sup> Response by the U.S. Probation Officer:** The Complaint/Information in this case charged that on December 23<sup>rd</sup> 1988, Roger D. Tucker committed aggravated robbery by taking property, to-wit: United States moneys and car keys from Rene Retkofsky while armed with an unknown caliber handgun.
18. The Journal Entry of Judgement notes the following: "Thereupon, the State makes oral application to the Court to amend the Information filed herein by striking therefrom all words, phrases and allegations pertaining to Aggravated Robbery, contrary to K.S.A. 21-3427, a Class B Felony, and inserting in lieu thereof words, phrases and allegations charging the defendant with Robbery, contrary to K.S.A. 21-3426, a Class C felony, which motion was by the Court sustained."
19. The presentence report in Paragraph 41 reflects the defendant was convicted of Robbery and not Aggravated Robbery. Whether it be Robbery or Aggravated Robbery the offense of conviction is a crime of violence and based on the sentence imposed must receive three (3) criminal history points under U.S.S.G. § 4A1.1(a).
20. The Complaint/Information and Journal Entry of Judgement related to this case are attached.
21. It is recommended that this objection be overruled. However, the Court could also find that a ruling on this objection is unnecessary if it is determined that the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).
22. **The Court Finds:**  
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23. **Defendant's Objection No. 4:** "Object to page 2, re: number of aliases."
24. **2<sup>nd</sup> Response by the U.S. Probation Officer:** The alias names listed in the presentence report were obtained from NCIC, KBI, Wichita Police Department records and the Kansas Department of Corrections.
25. It is recommended that this objection be overruled. However, the Court could also find that a ruling on this objection is unnecessary if it is determined that the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).
26. **The Court Finds:**  
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27. **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."
28. **2<sup>nd</sup> Response by the U.S. Probation Officer:** The defendant contends that it is improper to double count convictions as both predicate felonies for his violation of 18 U.S.C. 922(g) and as a prior conviction(s) supporting an increase in his criminal history points/category. The 10<sup>th</sup> Circuit has held that predicate felonies are not part of the instant 922(g) offense and can be considered in sentencing a defendant for a violation of 18 U.S.C. § 922(g) when calculating both the criminal history category and offense level under the Sentencing Guidelines. U.S. v. Alessandroni, 982 F.2d 419 (10<sup>th</sup> Cir. 1992). (Opinion attached).
29. The U.S. Probation Office further notes that 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)." Mr. Tucker's base offense level was determined under subsection (a)(2) of U.S.S.G. § 2K2.1.
30. It is recommended this objection be overruled based on 10<sup>th</sup> Circuit case law and the guidance provided by the application notes to the guideline applicable to the offense of conviction.

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31. **The Court Finds:** \_\_\_\_\_  
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32. **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 5<sup>th</sup> Amendment double jeopardy clause."

33. **2<sup>nd</sup> Response by the U.S. Probation Officer:** The defendant contends that it is improper to double count convictions as both predicate felonies for his violation of 18 U.S.C. 922(g) and also use those convictions to increase his base offense level. The 10<sup>th</sup> Circuit has held that predicate felonies can be considered in sentencing a defendant for a violation of 18 U.S.C. § 922(g) when calculating both the criminal history category and offense level under the Sentencing Guidelines. U.S. v. Alessandroni, 982 F.2d 419 (10<sup>th</sup> Cir. 1992).

34. It is recommended this objection be overruled based on 10<sup>th</sup> Circuit case law and the guidance provided by the application notes to the guideline applicable to the offense of conviction.

35. **The Court Finds:** \_\_\_\_\_  
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36. **Defendant's Objection No. 7:** "Object to false reports and/or complaints used in Paragraph 43 and 45."

37. **2<sup>nd</sup> Response by the U.S. Probation Officer:** The Complaints and police reports relating to paragraphs 43 and 45 are attached. Those documents support the information reflected in the presentence report. This objection does not impact the guideline calculations as set forth in the presentence report.

38. It is recommended that this objection be overruled. However, the Court could also find that a ruling on this objection is unnecessary if it is determined that the matter will not affect sentencing, or because the Court will not consider the matter in sentencing. Rule 32(i)(3)(B).

39. **The Court Finds:** \_\_\_\_\_  
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40. **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 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."
41. **2<sup>nd</sup> Response by the U.S. Probation Officer:**
42. The probation officer responds in the same manner as in the initial addendum. That response is as follows:
43. 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

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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.

44. It is recommended the Court consider the defendant's request for downward departure but not grant the request since U.S.S.G. § 5K2.11 and U.S.S.G. § 5K2.12 do not appear to apply in this case. The probation officer is also unaware of any other factors that would warrant a departure or variance from the advisory guidelines as calculated in the presentence report. A sentence within the advisory guidelines is necessary in order to address each of the sentencing factors set forth under 18 U.S.C. § 3553(a).

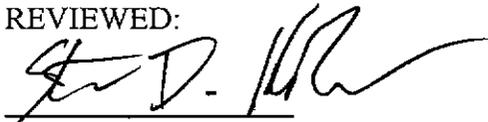
45. **The Court Finds:** \_\_\_\_\_  
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Respectfully submitted,



Steven D. Kohman  
Supervising U.S. Probation Officer

REVIEWED:



Steven D. Kohman  
Supervising U.S. Probation Officer