

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MAGDALENA CORREA,

Defendant.  
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ORDER

02-CR-0092-C-04

Defendant Magdalena Correa has moved for reconsideration of this court's April 27, 2005 decision advising the court of appeals that it would impose the same sentence on her as it did when the Sentencing Guidelines were believed to be mandatory. Defendant argues that imposing the same sentence at this time would mean imposing a sentence exceeding the statutory maximum. If I believed that defendant's motion had merit, I would vacate the earlier order advising the court of appeals that I would impose the same sentence upon defendant now that the guidelines are advisory. However, I am not persuaded that the motion requires a second review of the sentence.

According to defendant, imposing the same sentence on her after United States v. Booker, 125 S. Ct. 738 (2005), was decided violates the ex post facto clause of the United

States Constitution. This follows because Booker eliminated the mandatory nature of the guidelines, effectively raising the maximum penalty that could be imposed for federal offenses. Before Booker was decided, Blakely v. Washington, 124 S. Ct. 2531 (2004), had held that the maximum sentence a judge could impose was limited to the facts found by the jury or admitted by the defendant.

It is not clear to me exactly what defendant's argument is. It might be that Booker violates the ex post facto clause because defendants who committed crimes before it was decided would have believed reasonably that their sentences would be capped by the guidelines; now that Booker has held that the guidelines are only advisory, a defendant could get the maximum sentence under the statute. This reading of the argument does not account for the discussion of Blakely. Perhaps defendant is arguing that once Blakely changed the law to say that sentences could be based only on facts found by a jury or admitted by the defendant, courts could not return to the use of judge-found facts even for advisory purposes.

Whatever defendant's argument is, it does not persuade me to take a third look at her sentence. First, Booker did not hold that courts could not impose sentences greater than the sentence that would be available under the guidelines if no enhancements were applied that would require jury fact-finding. To the contrary, Justice Breyer's opinion made it plain that courts could rely on enhancements based on facts the jury had not found if the guidelines were used for advisory purposes only. Booker, 125 S. Ct. at 750. Second, defendant has

failed to show that she lacked the essential fair warning that the ex post facto clause protects. In fact, she had fair warning of the maximum possible sentence when she committed her crime. A look at the applicable law would have informed her that the maximum term for conspiring to possess more than 500 grams of cocaine and possession with intent distribute more than 500 grams of cocaine was 40 years. The sentence she received under the mandatory guidelines and under the advisory guidelines was 121 months, far short of the mandatory sentence to which she was subject. United States v. Duncan, 400 F.3d 1297, 1307 (11th Cir. 2005) (when defendant committed offense, U.S. Code informed him that he was subject to sentence of life if convicted of possessing at least 5 kilograms of powder cocaine; this was ample warning of consequence of his actions).

#### ORDER

IT IS ORDERED that defendant Magdalena Correa's motion for reconsideration of the court's April 27, 2005 decision to impose the same sentence under the advisory guidelines as it imposed under the mandatory guidelines is DENIED.

Entered this 10th day of May, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

