No. 04-10825

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

WALLACE WAYNE HOOKS,

Defendant-Appellant/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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United States v. *Hooks*
No. 04-10825

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

I certify that, in addition to the persons listed in the certificate of interested persons in appellant's opening brief, the following person has an interest in the outcome of this case:

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Department of Justice

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ARGUMENT

I

HOOKS IS INELIGIBLE FOR AN ADJUSTMENT BASED ON ACCEPTANCE OF RESPONSIBILITY

In his response to the government's cross-appeal, Hooks insists that he is eligible for an adjustment to his base offense level under U.S.S.G. § 3E1.1 (Acceptance of Responsibility) because he admitted to striking Tanner and King at the jail and acknowledged that it was wrong. Hooks attempts to distinguish his case from *United States* v. *Starks*, 157 F.3d 833 (11th Cir. 1998), on grounds that only his lawyer, not Hooks himself, presented the argument that Hooks lacked the specific intent necessary for a conviction under 18 U.S.C. 242. (Def. Rep. Br. at

3).[1] The record, however, plainly shows that Hooks, through both his own testimony and trial strategy, denied having the requisite intent to sustain a conviction under 18 U.S.C. 242. On direct examination, Hooks admitted to assaulting Tanner and King at the jail, but denied any intent to violate their rights:

> Attorney: At any time on that evening did you intend to violate the civil rights of anybody?
>
> Hooks: No, sir, I did not.

Doc. 90 at 710-711. Moreover, Hooks sought and received the following jury instruction to support his defense of diminished capacity:

> Defendant Hooks has raised the issue of his diminished capacity also known as diminished responsibility as a result of fatigue and sleep deprivation. Although diminished capacity will never provide a legal excuse for the commission of a crime, the fact that a person may have been suffering from a condition such as sleep deprivation and fatigue, *may negate the existence of the element of specific intent to deprive Steven DeWayne Tanner and Tony King of the constitutional right not to be subjected to excessive or unreasonable force*.
>
> Accordingly, evidence that Defendant Hooks acted while in a state of diminished capacity is to be considered only in determining *whether or not the Defendant acted with the specific intent of depriving Steven DeWayne Tanner or Tony King of their constitutional rights*.
>
> If the evidence leaves you with a reasonable doubt that the Defendant was capable of forming this *specific intent to commit the crime charged* because of diminished capacity, then you should acquit the Defendant.

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[1] "Def. Rep. Br." refers to the defendant-appellant's reply/response brief in this appeal. "Doc. ___" refers to documents in the Record as numbered on the district court docket sheet.

Transcript Exhibit 1., pages 15-16; see also Doc. 91 at 1067. Thus, as is clear from his own testimony and trial strategy, Hooks contested the element of specific intent. By denying "an essential element of the charges on which he was convicted," Hooks's case is indistinguishable from *Starks*. *Starks*, 157 F.3d at 840. As such, the district court's decision to reduce Hooks's offense level by two points under Section 3E1.1 was clearly erroneous.[2]

II

THE FACTS DO NOT SUPPORT A DOWNWARD DEPARTURE BASED ON VICTIM CONDUCT

A court may reduce a defendant's sentence below the guideline range if the victim's wrongful conduct "contributed significantly to provoking the offense behavior." U.S.S.G. § 5K2.10. Such a decision is reviewed de novo.[3] *United*

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[2] Hooks incorrectly asserts that the government omitted from its brief the applicable standard of review for this issue. (Def. Rep. Br. at 1). Page 26 of the government's opening brief, however, clearly states that a district court's decision to grant or deny an adjustment for acceptance of responsibility is reviewed for clear error.

[3] Hooks, relying on *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996), mistakenly asserts that such a departure is reviewed for abuse of discretion. (Def. Rep. Br. at 3). Rather, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, effective April 30, 2003, overruled *Koon* insofar as *Koon* set forth an abuse of discretion standard of review. Under the PROTECT Act, appellate courts are directed to evaluate de novo whether a district court's departure from the Guidelines is predicated on a factor that is not justified by the facts of the case. See 18 U.S.C. 3742(e)(3)(B)(iii).

States v. *Orrega*, 363 F.3d 1093, 1096 (11th Cir. 2004) ("Our review of a district court's grant of a departure from the Sentencing Guidelines is de novo.").

Hooks argues that the district court's departure under Section 5K2.10 is fully supported by *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996). Hooks is incorrect. First, Hooks asserts that, because "a defendant may receive a downward departure under § 5K2.10 regardless of whether his or her actions immediately follow victim conduct that is provoking in nature," the district court's decision to grant Hooks a departure should not be disturbed. (Def. Rep. Br. at 4). While the Supreme Court did acknowledge, in dicta, that a defendant's "response need not immediately follow an action in order to be provoked by it," *Koon*, 518 U.S. at 104, 116 S. Ct. at 2049, the Court offered as support the Sentencing Commission's policy statement that a prolonged course of provocative behavior by a victim toward a defendant may serve as a basis for departure in rare, non-violent cases. For example, "an *extended course* of provocation and harassment might lead a defendant to steal or destroy property in retaliation." U.S.S.G. § 5K2.10 (emphasis added).

Here, Tanner and King did not engage in an extended course of provocation and harassment directed toward Hooks. They fled an accident scene after participating in a short-lived, high-speed pursuit on a mostly deserted road late at night while Hooks was home in bed, asleep. And Hooks did not steal or destroy his victims' property in retaliation. He hit them.

Second, Hooks suggests that the victim's misconduct in *Koon* was similar to the victims' conduct here, thus warranting a downward departure under Section 5K2.10 of the Guidelines. True, both Rodney King and Tony King led police on a high-speed chase prior to being criminally assaulted by a police officer. *Koon*, 518 U.S. at 86, 116 S. Ct. at 2041. But that is where the similarities end. In fact, Rodney King's high-speed chase was *not* the focus of the sentencing court's justification for granting the *Koon* defendants a downward departure based on victim misconduct. The sentencing court in *Koon* focused primarily on Rodney King's efforts to resist arrest and his refusal to obey police commands. *United States* v. *Koon*, 883 F. Supp. 769, 786 (C.D. Cal. 1993) (noting that King was "slow to comply with police orders to exit his car," "failed to remain prone on the ground," "resisted officers," "attempted to escape," and "ran in the direction" of one of the officers). The Supreme Court's decision in *Koon*, which credited the district court's reasoning, does not at all suggest that a downward departure would have been appropriate for the defendant officers if they had assaulted Rodney King at the jail an hour or two after he was secured in handcuffs, no longer resisting, no longer posing a threat, and compliant with the officers' commands.

Third, unlike here, the factors a sentencing court is directed to consider when deciding whether to grant a downward departure based on victim misconduct weighed heavily in favor of the *Koon* defendants receiving the

departure.[4] Rodney King was "appreciably larger" than both defendants, he "resisted and evaded arrest, persistently failed to comply with police commands, and had not been searched for weapons." 883 F. Supp. at 787. As such, the *Koon* defendants' initial assessment of Rodney King as dangerous was reasonable. *Ibid.* This initial assessment was then reinforced when Rodney King "rose from a prone position on the ground and attempted to escape, running toward" one of the defendants. *Ibid.* Indeed, the sentencing court explained that from "the time of that first baton blow until 1:07:28, when the defendants' conduct crossed the line to illegality, Mr. King persisted in his failure to obey the police." *Ibid.* Tanner and King, conversely, were smaller than Hooks, presented absolutely no danger to him while they were handcuffed and sitting in the booking room of the County jail, and were not resisting Hooks or disobeying his commands in any way.

Fourth, the Supreme Court credited the district court's reasoning that a downward departure was warranted in *Koon* because where "an officer's initial use of force is *provoked and lawful*, the line between a legal arrest and an unlawful deprivation of civil rights is relatively thin." *Koon*, 518 U.S. at 102-103,

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[4] Section 5K2.10 directs a court to consider: "the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant"; "the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation"; "the danger reasonably perceived by the defendant, including the victim's reputation for violence"; "the danger actually presented to the defendant by the victim"; "any other relevant conduct by the victim that substantially contributed to the danger presented"; and, "the proportionality and reasonableness of the defendant's response to the victim's provocation." U.S.S.G. § 5K2.10.

116 S. Ct. at 2049 (citing *Koon*, 833 F. Supp. at 787). In *Koon*, what began as lawful force changed into unlawful force in a matter of minutes. Here, Hooks's unlawful use of force did not begin as a measured and reasonable response to a victim's provocative behavior and then escalate into unlawful force. Hooks's use of force against the victims in the jail was unlawful from the beginning. The two cases could not be more dissimilar.

Finally, Hooks's argument would lead to absurd results. Hooks essentially argues that he is entitled to a downward departure for victim misconduct because, earlier in the evening, Tanner and King engaged in illegal activity. If Hooks's downward departure is upheld on this ground, then *every* officer who assaults an arrestee who has committed a crime would be entitled to a downward departure based on victim misconduct.

III

NONE OF THE ADDITIONAL FACTORS RELIED UPON BY THE DISTRICT COURT SUPPORTS A DOWNWARD DEPARTURE

Hooks argues that the district court's ten-level downward departure was based entirely upon Section 5K2.10 of the Sentencing Guidelines, and that the court's consideration of other factors merely informed the court's sentencing decision within the "new" Guidelines range established by the Section 5K2.10 departure. (Def. Rep. Br. at 7-8). The record, however, makes clear that the district court did not assign departure points to any particular departure ground. The court instead discussed a number of factors, all of them either unsupported

(see *supra*, II discussing Section 5K2.10), discouraged, or prohibited grounds for departure, and then departed downward – erroneously – from offense level 18 to 8.

As is clear from the sentencing transcript, the district court began its sentencing discussion by summarizing a number of 18 U.S.C. 242 cases. With these cases as a "backdrop," the court proceeded to discuss the civil case filed by the victims (Doc. 95 at 92-93), Hooks's fatigue and concern for Griner's safety (Doc. 95 at 94-95), the victims' conduct (Doc. 95 at 97), and the jury's findings (Doc. 95 at 97-98). The court then compared this case to civil cases brought pursuant to 42 U.S.C. 1983 (Doc. 95 at 98-103), declared that the victims' conduct in this case was not "minimal," and noted that Hooks could have hurt his victims more than he did (Doc. 95 at 103-106). The court followed these observations with a discussion of whether Criminal History Category I sufficiently captured Hooks' previous law-abiding life and public service (Doc. 95 at 106-108). The court reiterated that the victims engaged in illegal activity earlier in the evening, that Hooks was tired, and that he had admitted to assaulting Tanner and King (Doc. 95 at 108-110). The court compared Hooks's size to that of his victims, and again noted that Hooks could have inflicted much greater injuries upon the victims (Doc. 95 at 110-112).

Finally, the court concluded:

> *With all of these things under consideration*, acknowledging the existence of a federal felony conviction, I am unable to impose a sentence of confinement which would respond to the definition of a federal felony and offer any aspect of custody in a federal facility. In my view to do that, in addition to what has already been done, would be

> more of an injustice than Mr. Hooks might have inflicted upon Tanner and King. Accordingly, I will depart from the sentencing range called for by the guidelines. *The reasons for my departure are those expressed in the discourse that I have put in this record for probably more than an hour*.

Doc. 95 at 112 (emphasis added). Thus, it is clear that the district court did not base its departure solely upon Section 5K2.10 of the Sentencing Guidelines.

IV

THE SUPREME COURT'S *BLAKELY* DECISION HAS NO EFFECT ON HOOKS'S SENTENCE

Hooks argues that, in the event his case is remanded for re-sentencing, the district court should recalculate his offense level without an enhancement under Section 3A1.3 of the Sentencing Guidelines because doing so would violate his Sixth Amendment right to trial by jury. Hooks relies on the Supreme Court's recent decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004).

In *Blakely*, the Supreme Court applied the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), 120 S. Ct. 2348, 2362-2363, to invalidate a sentencing enhancement, imposed pursuant to state law, that increased the sentence beyond the range authorized by Washington state's statutory sentencing scheme. The Court explained that, because the facts supporting the enhancement were "neither admitted by [the defendant] nor found by a jury," the sentence violated the Sixth Amendment right to trial by jury. 124 S. Ct. at 2537.

Blakely did not invalidate the federal sentencing Guidelines, nor did it hold that its rule applies to the Guidelines. See 124 S. Ct. at 2538 n.9 ("The Federal

Guidelines are not before us, and we express no opinion on them."); see also *Apprendi*, 530 U.S. at 497 n.21, 120 S. Ct. at 2366 n.21 (same). In *Apprendi* itself, the Court expressed no view on the Guidelines beyond "what this Court has already held." *Ibid.* (citing *Edwards* v. *United States*, 523 U.S. 511, 515, 118 S. Ct. 1475, 1477-1478 (1998)).

What the Supreme Court has "already held" about the Guidelines therefore continues to provide the governing principle for this Court – and Supreme Court rulings have consistently upheld the Guidelines against constitutional attack and underscored their unique status within the nation's constitutional scheme. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 109 S. Ct. 647 (1989). In fact, the Court has found that so long as a sentence does not exceed the statutory maximums established by Congress for the offense of conviction, a Guidelines sentence can (in fact, sometimes must) be based on judge-found conduct not proved to a jury, see *Edwards*, 523 U.S. at 514-515, 118 S. Ct. at 1477-1478; conduct not charged in the indictment, see *Witte* v. *United States*, 515 U.S. 389, 399-401, 115 S. Ct. 2199, 2206-2207 (1995); and conduct of which a defendant is acquitted but is established by a preponderance of the evidence, see *United States* v. *Watts*, 519 U.S. 148, 156-157, 117 S. Ct. 633, 637-638 (1997) (per curiam). Moreover, the Court has explicitly held that courts are not only bound by the Guidelines, but by their policy statements and commentary as well. See *Stinson* v. *United States*, 508 U.S. 36, 42, 113 S. Ct. 1913, 1917 (1993).

This Court is required to follow these precedents, and in the event of a remand, the district court is required to follow these precedents as well. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 284 (1997) ("[I]t is [the Supreme Court's] prerogative alone to overrule one of its precedents."); *Agostini* v. *Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) (courts of appeals must leave to "this Court the prerogative of overruling its own decisions," even if such a decision "appears to rest on reasons rejected in some other line of decisions") (quotations and citations omitted). Indeed, this Court has recognized that it is obliged to follow Supreme Court precedent, even when that precedent may appear to be undermined by subsequent Supreme Court decisions. See *Florida League of Prof'l Lobbyists* v. *Meggs*, 87 F.3d 457, 462 (11th Cir.) ("We are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court."), cert. denied, 519 U.S. 1010, 117 S. Ct. 516 (1996).

In addition, this Court, like every other court of appeals, has expressly held that the federal Guidelines do not violate the rule of *Apprendi*. See *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003). This decision binds both the district courts in this Circuit and the individual panels of this Court. See *Cargill* v. *Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) ("[O]nly the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision."), cert. denied, 523 U.S. 1080, 118 S. Ct. 1529 (1998). This Court may therefore not take it upon itself to cast aside the Guidelines system and the integrated sentencing process it

mandates. Accordingly, if this Court should decide that the district court erred in departing downward in this case, this Court should direct the district court to apply the Guidelines on remand. In the event this Court holds, in this or another case, that *Blakely* has rendered the Guidelines unconstitutional, then this Court should remand the case to the district court for discretionary sentencing. On remand, the district court should be instructed to give due regard to the most closely analogous applicable Guidelines range when determining an appropriate sentence.

CONCLUSION

This Court should vacate the sentence imposed by the district court and remand the case to the district court with instructions to impose a sentence that conforms to the Sentencing Guidelines.

Respectfully submitted,

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_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 2979 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____
ANGELA M. MILLER
Attorney

Date: July 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2004, two copies of the REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT were served by overnight delivery on the following counsel of record:

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