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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

STEPHEN ANDREW BENSON,	)	No. CV-F-06-249 REC
	)	(No. CR-F-04-5315 REC)
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S
	)	MOTION TO VACATE SENTENCE
vs.	)	PURSUANT TO 28 U.S.C. § 2255
	)	AND DIRECTING CLERK TO ENTER
	)	JUDGMENT FOR RESPONDENT
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	
	)	

On March 3, 2006, petitioner Stephen Andrew Benson timely filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255.<sup>1</sup>

Petitioner was charged with one count of bank robbery in violation of 18 U.S.C. § 2113(a). Petitioner, who was represented by Assistant Federal Defender Ann Voris, pleading guilty pursuant to a written Plea Agreement on November 19, 2004. The Plea Agreement provided in pertinent part:

<sup>1</sup>Although the motion was filed with this court on March 3, 2006, the proof of service establishes that the motion was mailed from the federal prison on February 19, 2006.

1           **B. Blakely Waiver:** To the extent that  
2 defendant may have a right to have any facts  
3 that will be used to determine his sentence  
4 charged in the indictment and found at trial  
5 by a jury, pursuant to Blakely v. Washington,  
6 124 S.Ct. 2531 (2004), the defendant waives  
7 those rights and consents to have the  
8 district court determine any facts necessary  
9 for the imposition of sentence under the  
10 standard of proof described below. The  
11 defendant also agrees to waive any  
12 constitutional challenge to the validity of  
13 the federal sentencing guidelines and their  
14 application to his case.

15           ...

16           **A. Statutory Authority:** The defendant  
17 understands that a sentencing guideline range  
18 for this case will be determined by the Court  
19 pursuant to the Sentencing Reform Act of 1984  
20 (18 U.S.C. §§ 3551-374 and 28 U.S.C. §§ 991-  
21 998). The defendant further understands that  
22 the Court will impose a sentence within that  
23 guideline range, unless the Court finds that  
24 there is a basis for departure (either above  
25 or below that range) because there exists an  
26 aggravating or mitigating circumstance of a  
kind, or to a degree, not adequately taken  
into consideration by the Sentencing  
Commission in formulating the guidelines.

...

18           **B. Waiver of Appeal and Collateral Attack:**  
19 The defendant understands that the law gives  
20 him a right to appeal his conviction and  
21 sentence. He agrees as part of his plea,  
22 however, to give up this right as long as his  
23 sentence is consistent with the agreement set  
24 forth above.

25           The defendant also gives up any right he may  
26 have to bring a post-conviction attack on his  
conviction or his sentence. He specifically  
agrees not to file a motion under 28 U.S.C. §  
2255 or § 2241 attacking his conviction or  
sentence.

...

1           **2. Sentence Recommendation:** The government  
2           agrees to recommend that the defendant be  
3           sentenced to the low end of the applicable  
4           sentencing guideline range.

5           The Presentence Investigation Report calculated petitioner's  
6           guideline range under the Sentencing Guidelines (based on offense  
7           level of 29 with a Criminal History Category of IV) as 151 to 188  
8           months. The Presentence Investigation Report notes that the  
9           instant conviction is petitioner's sixth conviction for bank  
10          robbery in six years, that he committed the instant offense while  
11          on supervised release, and that he is a career offender subject  
12          to an enhanced penalty. The Presentence Investigation Report  
13          acknowledges that the Plea Agreement provides for a  
14          recommendation at the low end of the guideline range, but  
15          recommended that the court sentence petitioner at the high end of  
16          that range because of petitioner's criminal history.

17          Prior to petitioner's sentencing, Ms. Voris filed a  
18          Sentencing Memorandum. In her Sentencing Memorandum, Ms. Voris  
19          states in pertinent part:

20                 The plea agreement made a recommendation for  
21                 low-end of the sentencing guideline range.  
22                 After some discussion with the Assistant  
23                 United States Attorney and Hubert Alvarez,  
24                 the probation officer, at Mr. Benson's  
25                 request, the probation officer agreed that it  
26                 would change his Supervised Release Violation  
                Form 12 and recommend concurrent time so long  
                as Mr. Benson did not dispute the application  
                of the guidelines and particularly the career  
                offender status. The United States Supreme  
                Court recently held that the Sentencing  
                Guidelines are no longer mandatory and that  
                prior to imposing any sentence, a court must  
                take into consideration seven factors  
                outlined in 18 U.S.C. § 3553(a). United

1 States v. Booker, 125 S.Ct. 738 ... (2005).  
2 As the Court in noted in Booker, 18 U.S.C. §  
3 3553(a) (1984) lists the U.S.S.G. as one of  
4 several factors for this Court to consider in  
5 imposing sentence. Section 3553(a) states  
6 that, in addition to the U.S.S.G., this Court  
7 'shall consider,' the nature and  
8 circumstances of the offense, the history and  
9 characteristics of the defendant, and the  
10 need for the sentence to reflect the  
11 seriousness of the offense, and to provide  
12 just punishment for the offense.

13 In the wake of Booker, this Court has had its  
14 full judicial power restored to it and now  
15 can and must consider the other statutory  
16 factors delineated by § 3553(a). The  
17 Guidelines are no longer mandatory, they no  
18 longer trump consideration of other statutory  
19 sentencing factors. Where reasonable, this  
20 Court may fashion an appropriate sentence  
21 balancing equities in a particular case  
22 without the gymnastics of mandatory guideline  
23 system for downward departures. Therefore,  
24 this Court is no longer required to disregard  
25 any relevant mitigating circumstances that  
26 fall within the broad parameters of §  
27 3553(a), including a consideration of  
28 fundamental fairness.

29 Mr. Benson is not requesting any special  
30 consideration. He is requesting that the  
31 court consider the guidelines as well as the  
32 plea agreement. He asks that his time run  
33 concurrent to the time recommended on his  
34 violation and that his restitution be listed  
35 on the judgment so that he can continue to  
36 pay his restitution while incarcerated. He  
37 is not objecting to the career offender  
38 designation.

39 ...

40 It is requested that the court follow the  
41 plea agreement and sentence Mr. Benson to 151  
42 months in custody, to run concurrent to any  
43 supervised release violation.

44 Petitioner was sentenced on February 28, 2005 to 151 months  
45 incarceration and 36 months of supervised release. No appeal was  
46

1 filed.

2 In his Section 2255 motion, petitioner contends that he was  
3 denied the effective assistance of counsel "when she failed to  
4 argue at sentencing that this Court had the discretion to depart  
5 below the 151 month sentence pursuant to the principles of  
6 Booker."

7 The threshold issue in this motion is the effectiveness of  
8 the waiver of the right to file a Section 2255 motion set forth  
9 in the Plea Agreement.

10 A defendant may waive the statutory right to bring a Section  
11 2255 motion challenging the length of his sentence. United  
12 States v. Pruitt, 32 F.3d 431, 433 (9<sup>th</sup> Cir. 1994); United States  
13 v. Abarca, 985 F.2d 1012, 1014 (9<sup>th</sup> Cir. 1992), cert. denied sub  
14 nom. Abarca-Espinoza v. United States, 508 U.S. 979 (1993).

15 Recently, the Ninth Circuit held that a claim of ineffective  
16 assistance of counsel that challenges the voluntariness of the  
17 waiver does not preclude jurisdiction over a habeas action  
18 pursuant to 28 U.S.C. § 2254. Washington v. Lambert, 422 F.3d  
19 864 (9<sup>th</sup> Cir. 2005).

20 Here, however, petitioner does not claim ineffective  
21 assistance of counsel in connection with the Plea Agreement or  
22 otherwise contend he did not knowingly and voluntarily enter into  
23 the Plea Agreement. Rather, his claim of ineffective assistance  
24 of counsel relates solely to sentencing and is based on the  
25 issuance of Booker between the time petitioner pleaded guilty and  
26 he was sentenced. Therefore, the court concludes that petitioner

1 is barred by the express waiver in the Plea Agreement from  
2 proceeding with his claim pursuant to Section 2255.

3 Furthermore, even if petitioner had not waived his right to  
4 bring this claim in a Section 2255 motion, he is not entitled to  
5 relief.

6 The standards governing an assertion of ineffective  
7 assistance of counsel are set forth in Strickland v. Washington,  
8 466 U.S. 668 (1984). As explained in United States v. Quintero-  
9 Barraza, 78 F.2d 1344, 1348 (9th Cir. 1995), cert. denied, 519  
10 U.S. 848 (1996):

11 According to Strickland, there are two  
12 components to an effectiveness inquiry, and  
13 the petitioner bears the burden of  
14 establishing both ... First, the  
15 representation must fall 'below an objective  
16 standard of reasonableness.' ... Courts  
17 scrutinizing the reasonableness of an  
18 attorney's conduct must examine counsel's  
19 'overall performance,' both before and at  
20 trial, and must be highly deferential to the  
21 attorney's judgments ... In fact, there  
22 exists a 'strong presumption that counsel  
23 "rendered adequate assistance and made all  
24 significant decisions in the exercise of  
25 reasonable professional judgment."' ... In  
26 short, defendant must surmount the  
presumption that, 'under the circumstances,  
the challenged action "might be considered  
sound trial strategy."' ... Thus, the proper  
inquiry is 'whether, in light of all the  
circumstances, the identified acts or  
omissions were outside the wide range of  
professionally competent assistance.' ....

If the petitioner satisfies the first prong,  
he must then establish that there is 'a  
reasonable probability that, but for  
counsel's unprofessional errors, the result  
would have been different ....

The Sentencing Memorandum filed by Ms. Voris prior to

1 sentencing argued that the Court was not bound by the Sentencing  
2 Guidelines because of Booker. Therefore, Ms. Voris was aware of  
3 the effect of Booker on petitioner's sentence and argued to the  
4 court that the court was not bound to follow the recommendation  
5 in the Presentence Investigation Report calculated pursuant to  
6 the Sentencing Guidelines. Although petitioner contends that Ms.  
7 Voris was ineffective in failing to argue for a downward  
8 departure less than 151 months, petitioner points to no factor  
9 that would support a downward departure from the imposed  
10 sentence. While petitioner contends that the "Court may very  
11 well have sentenced Petitioner to less than 151 months" if Ms.  
12 Voris had argued for a sentence less than the low end of the  
13 guideline range, petitioner points to nothing upon which such a  
14 departure could be based, especially given petitioner's criminal  
15 history detailed in the Presentence Investigation Report.  
16 Therefore, petitioner has not demonstrated a reasonable  
17 probability that his sentence would have been different if Ms.  
18 Voris had argued for a sentence less than the low end of the  
19 guideline range.

20 ACCORDINGLY:

21 1. Petitioner Stephen Andrew Benson's Motion to Vacate  
22 Sentence Under 28 U.S.C. § 2255 is denied.

23 2. The Clerk is directed to enter judgment for respondent.

24 IT IS SO ORDERED.

25 **Dated: March 9, 2006**  
26 668554

**/s/ Robert E. Coyle**  
UNITED STATES DISTRICT JUDGE