NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 5, 2021*
Decided January 6, 2021

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

Nos. 20-1444 & 20-1536

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOUGLAS D. JACKSON,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:15CR06-001

Robert L. Miller, Jr.,
Judge.

ORDER

Douglas Jackson stands convicted of sexually trafficking an underage girl. He brings two appeals, which we have consolidated for decision. First, in appeal No. 20-1536, he seeks a certificate of appealability for a collateral challenge to his conviction, arguing that his trial counsel was ineffective for not seeking a judgment of acquittal based on improper venue. Second, in No. 20-1444, Jackson directly appeals his sentence, repeating his objection to venue and also arguing that the district court

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Appendix A

impermissibly calculated the advisory guidelines range based on facts not found by a jury. We deny his request for a certificate of appealability because venue was proper, and we affirm his sentence because the court correctly computed his guidelines range.

A jury convicted Jackson in 2014 of sexually trafficking a minor, *see* 18 U.S.C. § 1591(a), trafficking her across state lines, *see id.* § 2423(a), and carrying a firearm during the offense, which the prosecution charged as a "crime of violence" under the residual clause of 18 U.S.C. § 924(c). At trial, the victim testified that she met Jackson at a party in South Bend, Indiana, where he enticed her to engage in prostitution. He then drove her from South Bend to Georgia, Kentucky, and Michigan, for her to engage in illicit sex. At sentencing, the court calculated a guidelines range (of 235 to 293 months in prison) that included enhancements for obstructing justice, *see* U.S.S.G. § 3C1.1, and supervising the offense, *see id.* § 3B1.1(c). The firearm charge also carried a mandatory 60-month prison term to run consecutively. The district court sentenced Jackson to 295 months in prison, the bottom of the advisory guideline range plus the mandatory term.

Jackson attacked his conviction and sentence in three ways. First, he directly appealed on limited grounds. He challenged the residual clause of the firearm provision as unconstitutionally vague, and he contested the factual basis of the supervisor and obstruction-of-justice enhancements. We vacated the firearm conviction, remanded for resentencing without the supervisor enhancement, and upheld the increase for obstructing justice. *United States v. Jackson*, 932 F.3d 556, 558 (7th Cir. 2019); *United States v. Jackson*, 865 F.3d 946, 956 (7th Cir. 2017), *vacated*, 138 S. Ct. 1983 (2018).

Second, while the first appeal was pending, Jackson sought collateral relief to his conviction and sentence. *See* 28 U.S.C. § 2255. He argued that his trial counsel was ineffective for failing to seek a judgment of acquittal based on improper venue. The district court denied this request because, it reasoned, under 18 U.S.C. § 3237(a), venue in a trafficking crime that involves several states is proper where the victim is trafficked from. Jackson transported his victim from South Bend (part of the Northern District of Indiana) to be prostituted in other states. Because counsel could not have successfully attacked venue, the district court concluded that counsel was not deficient.

Third, at resentencing after our remand from the direct appeal, Jackson reiterated his venue objection and added new arguments. Invoking *Booker v. United States*, 543 U.S. 220, 232 (2005), Jackson contended that the six-level adjustment for using a computer, *see* U.S.S.G. § 2G1.3(b)(3), committing a commercial sex act, *see id.* § 2G1.3(b)(4), and obstructing justice, *see id.* § 3C1.1, violated the Sixth Amendment. He believed that the

district court impermissibly based those enhancements on facts not found beyond a reasonable doubt by a jury. The district court declined to rule on his venue objection because it had already denied his 28 U.S.C. § 2255 motion and a venue attack is not a ground for contesting a sentence. For the *Booker*-based arguments, the court concluded that Jackson had likely waived them by failing to raise them in his first appeal; in any case, because the enhancements did not affect his maximum sentence of life imprisonment, the Sixth Amendment was respected. Once it resolved these objections, the court imposed its sentence: Based on an advisory guidelines range of 188 to 235 months, the court sentenced Jackson to a below-guidelines prison term of 168 months.

We first address appeal No. 20-1536 in which, to proceed with his collateral attack, Jackson must receive a certificate of appealability. To obtain that certificate, Jackson has to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He argues that, because the prostitution occurred outside of Indiana, his counsel was constitutionally ineffective for failing to seek a judgment of acquittal based on improper venue. But, as the district court observed, where criminal acts occur in more than one place—like the trafficking offenses here—venue is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a); *see United States v. Muhammad*, 502 F.3d 646, 654 (7th Cir. 2007). Jackson's crimes began in the Northern District of Indiana, in South Bend, where he met a minor at a party, enticed her to engage in prostitution, and then drove her to perform illicit sex acts in other states. Because venue was proper in the Northern District of Indiana, Jackson cannot present a substantial question that his counsel was ineffective for not seeking acquittal based on improper venue. *See Warren v. Baenen*, 712 F.3d 1090, 1104 (7th Cir. 2013) (counsel is not ineffective by not raising a meritless claim).

Next, we consider No. 20-1444, Jackson's appeal of his below-guidelines sentence after remand. Jackson first maintains that the district court unconstitutionally enhanced his offense level by six levels based on facts that were not found beyond a reasonable doubt by a jury. The government responds that Jackson waived this argument by not raising it in his first appeal. And regardless of waiver, it continues, the enhancements were consistent with the Sixth Amendment and *Booker*.

Putting the waiver argument to the side, we conclude that Jackson must lose. As we have repeatedly held, because *Booker* rendered the guidelines advisory, district courts may, in computing the guidelines range, enhance offense levels based on facts that it, rather than a jury, has found. *See United States v. Valdez*, 739 F.3d 1052, 1054 (7th Cir. 2014) (Sixth Amendment allows a district court to calculate its advisory

guidelines range based on a drug quantity that the court determines); *United States v. Glover*, 479 F.3d 511, 521–22 (7th Cir. 2007) (district court's finding that the career-offender enhancement applied to the guideline calculation is compatible with *Booker*). Under *Booker*, a constitutional violation occurs only "where the sentence exceeds the statutory maximum for the charged crime or is imposed under a mandatory sentencing scheme." *United States v. White*, 443 F.3d 582, 592 (7th Cir. 2006). It does not occur where the district court finds facts to support a sentencing enhancement under an advisory guidelines range. *Id.* Although the enhancements increased Jackson's advisory range, that range and Jackson's eventual 168-month prison sentence both fell below the statutory maximum of life in prison. *See* 18 U.S.C. §§ 1591(b)(2), 2423(a). Because Jackson does not suggest that the court treated the guidelines as mandatory, no Sixth Amendment violation occurred.

Finally, Jackson also reprises his improper-venue arguments on appeal. But as we concluded in denying his certificate of appealability, that claim is meritless. We have considered Jackson's remaining arguments, and none warrants relief.

We thus DENY Jackson's certificate of appealability in appeal No. 20-1536 and AFFRIM his sentence in appeal No. 20-1444.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

January 6, 2021

Before: DIANE S. SYKES, Chief Circuit Judge
ILANA DIAMOND ROVNER, Circuit Judge
MICHAEL B. BRENNAN, Circuit Judge

No. 20-1444	UNITED STATES OF AMERICA, Plaintiff - Appellee v. DOUGLAS D. JACKSON, Defendant - Appellant
No. 20-1536	DOUGLAS D. JACKSON, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee

Originating Case Information:

District Court No: 3:15-cr-00006
Northern District of Indiana, South Bend Division
District Judge Robert L. Miller

We thus **DENY** Jackson's certificate of appealability in appeal No. 20-1536 and **AFFRIM**, with costs, his sentence in appeal No. 20-1444.

form name: **c7_FinalJudgment**(form ID: **132**)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA **Plaintiff,**	**CASE NUMBER: 3:15CR06-001** **USM Number: 13961-027**
vs. **DOUGLAS D JACKSON** **Defendant.**	**NICHOLAS T OTIS** **DEFENDANT'S ATTORNEY**

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on counts 1-6 of the Indictment after a plea of not guilty on 7/16/2015.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

Title, Section & Nature of Offense	Date Offense Ended	Count Number(s)
18:2423(a) TRANSPORTATION OF A MINOR WITH INTENT TO ENGAGE IN CRIMINAL SEXUAL ACTIVITY AND FORFEITURE ALLEGATION	June 7, 2014	1
18:1591(a) SEX TRAFFICKING OF A MINOR AND FORFEITURE ALLEGATION	June 7, 2014	2
18:2423(a) TRANSPORTATION OF A MINOR WITH INTENT TO ENGAGE IN CRIMINAL SEXUAL ACTIVITY AND FORFEITURE ALLEGATION	June 9, 2014	3
18:1591(a) SEX TRAFFICKING OF A MINOR AND FORFEITURE ALLEGATION	June 9, 2014	4
18:2423(a) TRANSPORTATION OF A MINOR WITH INTENT TO ENGAGE IN CRIMINAL SEXUAL ACTIVITY AND FORFEITURE ALLEGATION	June 14, 2014	5
18:1591(a) SEX TRAFFICKING OF A MINOR AND FORFEITURE ALLEGATION	June 14, 2014	6

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Final order of forfeiture filed on 3/15/2016.

Appendix B

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances.

March 17, 2020
Date of Imposition of Judgment

s/ Robert L. Miller, Jr.
Signature of Judge

Robert L. Miller, Jr., United States District Judge
Name and Title of Judge

March 18, 2020
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **168 months** on each of counts 1-6 to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the Bureau of Prisons designate as the place of the defendant's confinement, consistent with the defendant's security classification as determined by the Bureau of Prisons, a facility close to South Bend, Indiana, and where he might participate in a substance abuse treatment program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

No term of supervised release is imposed.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$600.00	NONE	NONE

The defendant shall make the special assessment payment payable to Clerk, U.S. District Court, 102 Robert A. Grant Courthouse, 204 South Main Street, South Bend, IN 46601. The special assessment payment shall be due immediately.

FINE

No fine imposed.

RESTITUTION

No restitution imposed.

FORFEITURE

The defendant shall forfeit the defendant's interest in the following property to the United States:

- **Hi Point .380 caliber handgun, with one magazine**
- **Eight .380 caliber rounds (recovered from handgun)**
- **One Hewlett Packard HP Lap Top Computer**
- **One Samsung Boost Mobile cell phone**
- **One Samsung flip phone (SCH-U365).**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DOUGLAS D. JACKSON,	)	
Petitioner,	)	
vs.	)	CAUSE NO. 3:15-CR-6 RLM (Arising from 3:17-CV-885 RLM)
UNITED STATES OF AMERICA,	)	
Respondent.	)	

OPINION AND ORDER

Douglas Jackson was convicted of three counts of transporting a minor in interstate commerce with the intent that she engage in illegal sexual activity, see 18 U.S.C. § 2423(a), three counts of sex trafficking of a minor, see 18 U.S.C. § 1591(a), and one count of possessing a firearm in furtherance of a crime of violence (sex trafficking of a minor), see 18 U.S.C. § 924(c). This Court sentenced Mr. Jackson to a term of 295 months' imprisonment. Mr. Jackson appealed his sentence and his conviction regarding the one count of possessing a firearm in furtherance of a crime of violence. That appeal process is still pends, but Mr. Jackson now asks that the court vacate the entirety of his conviction and sentence under 28 U.S.C. § 2255. [Doc. No. 109]. For the following reasons, Mr. Jackson's motion is denied.

I. BACKGROUND

Appendix B .... continued

In May 2014, Mr. Jackson met J.T., a minor, at a high school party in South Bend, Indiana. J.T. was fifteen and Mr. Jackson was twenty-five. Mr. Jackson asked J.T. if she was interested in making some money, but he didn't say how. Shortly thereafter, on June 6, 2014, Mr. Jackson drove J.T. from South Bend, Indiana to Atlanta, Georgia. When in Atlanta, Mr. Jackson used his cell phone and a prepaid credit card to post an ad in the Atlanta section of the classified advertising website "Backpage.com," which contained an adult section advertising different categories of sex work.

The Backpage.com ad "displayed the title, 'Sexy star beautiful mixed puerto rican in town looking for a great time.'" The phone number listed on the ad was connected to a prepaid flip phone that Jackson had bought. He used this number to text customers, and J.T. engaged in sex acts for money with these customers while in Atlanta. Mr. Jackson and J.T. made similar trips from South Bend to Louisville, Kentucky and Grand Rapids, Michigan.

While in Grand Rapids, Mr. Jackson and J.T. were arrested in a motel parking lot. During the arrest, police identified a box of condoms and a firearm for which Mr. Jackson had an Indiana permit. After their arrest, J.T. "admitted that she was in Grand Rapids for prostitution." At a jury trial, Mr. Jackson was convicted three counts of transporting a minor in interstate commerce with the intent that she engage in illegal sexual activity, see 18 U.S.C. § 2423(a), three counts of sex trafficking of a minor, see 18 U.S.C. § 1591(a), and one count of possessing a firearm in furtherance of a crime of violence (sex trafficking of a

minor), see 18 U.S.C. § 924(c). The court sentenced Mr. Seay to an aggregate term of 295 months' imprisonment.

The court of appeals vacated Mr. Jackson's conviction under 18 U.S.C. § 924(c). United States v. Jackson, 865 F.3d 946 (7th Cir. 2016). The United States appealed the court of appeals' decision and petitioned for a writ of certiorari from the United States Supreme Court. United States v. Jackson, No. 15-3693 (7th Cir. 2017). On May 14, 2018, the Supreme Court remanded the case to the Seventh Circuit for further consideration considering its decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). United States v. Jackson, 138 S. Ct. 1983 (2018). The case was briefed and reargued in the court of appeals, but disposition of the appeal was later stayed pending the Supreme Court's decision in United States v. Davis, 588 U. S. ____ (2019). Id. at R. 82.

II. Discussion

Notwithstanding the appellate procedings regarding the single count of possessing a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c), Mr. Jackson now attacks his sentence and conviction by alleging that his venue was improper as the acts connected to his sentence and conviction occurred outside of the Northern District of Indiana. Mr. Jackson also alleges that counsel provided ineffective assistance by not objecting to the improper venue.

The rules governing petitions filed under 28 U.S.C. § 2255 provide that once a motion is filed:

> The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified.

Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Mr. Jackson's petition can be resolved without a hearing. *See* Bruce v. United States, 256 F.3d 592, 597 (7th Cir. 2001); Daniels v. United States, 54 F.3d 290, 293 (7th Cir. 1995).

Mr. Jackson argues that the court should vacate his conviction because venue was improper. He says that since the acts of prostitution occurred outside the Northern District of Indiana the only proper venue would be districts where the prostitution occurred. Because Mr. Bishop didn't challenge venue before trial and didn't raise this issue on direct appeal or provide cause for not doing so, the court can't reach the merits of a collateral attack.

If Mr. Jackson believed that venue was improper, he was required to challenge the indictment before trial. *See* Fed. R. Crim. P. 12(b). Because he didn't challenge the indictment before trial, he waived any suppression argument unless he can show good cause. Fed. R. Crim. P. 12(c)(3); United States v. Cardena, 842 F.3d 959, 988 (7th Cir. 2016). And because Mr. Jackson didn't pursue an appeal on this issue, he can't raise it "on collateral review unless [he] shows cause and prejudice," Massaro v. United States, 538 U.S. 500, 504 (2003), or actual innocence. Delatorre v. United States, 847 F.3d 837, 843 (7th Cir. 2017). Since Mr. Jackson offers no cause for not moving to challenge venue

before trial or pursuing an appeal on that issue, so he is barred from raising a claim that his conviction was obtained unconstitutionally. *See* Massaro v. United States, 538 U.S. at 504; Delatorre v. United States, 847 F.3d at 843; United States v. Cardena, 842 F.3d at 988.

Mr. Jackson's only other avenues of collateral attack is to argue that his attorneys provided him ineffective assistance of counsel by not challenging venue. To prevail on an ineffective assistance of counsel claim, Mr. Jackson must show both that his attorneys' performance "fell below an objective standard of reasonableness" and that there is a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-693 (1984).

This is a difficult standard to meet. To prevail, Mr. Jackson must show both "that counsel made errors so serious that 'counsel' was not functioning as the counsel guaranteed the defendant by the Sixth Amendment" and "that counsel's errors were so serious as to deprive [Mr. Jackson] of a fair [result]." Strickland v. Washington, 466 U.S. at 687. Mr. Jackson "bears a heavy burden" in proving that his counsel was consitutionally ineffective. Barker v. United States, F.3d 629, 633 (7th Cir. 1993).

There is a strong presumption that counsel performed effectively. *See* Berkey v. United States, 318 F.3d 768, 772 (7th Cir. 2003). "A court's scrutiny of an attorney's performance is 'highly deferential' to eliminate as much as possible the distorting effects of hindsight, and we 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance.' " Vinyard v. United States, 804 F.3d at 1225 (quoting Strickland v. Washington, 466 U.S. at 687). Because reviewing courts shouldn't second-guess counsel's strategic choices, the burden of showing that counsel's decisions fell outside the wide range of reasonable strategic choices "rest[s] squarely on the defendant." Burt v. Titlow, 571 U.S. 12, 22–23 (2013).

"Even if counsel's performance was deficient, a petitioner must also show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' meaning 'a probability sufficient to undermine confidence in the outcome.'" Eckstein v. Kingston, 460 F.3d 844, 848 (7th Cir. 2006) (quoting Strickland v. Washington, 466 U.S. at 694).

Mr. Jackson argues that his counsel was ineffective because his attorney didn't raise any objection to venue of the trial. Mr. Jackson reasons that because testimony showed that none of the crimes were "committed within any judicial district of the State of Indiana", it was improper for him to be tried in the Northern District. Furthermore, in failing to move for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, his counsel fell below Strickland's objectively reasonable level of performance. And lastly, because of his constitutionally ineffective representation, Mr. Jackson was prejudiced. If his counsel had raised the issue of venue, Mr. Jackson argues, "the outcome of [his] trial proceeding would have been different."

If a defendant is unable to satisfy either prong of the Strickland test, then the court does not need to address the matter further. Strickland, 466 U.S. at

697 ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). "The Seventh Circuit has long held that '[c]ounsel is not ineffective for failing to raise meritless claims.'" United States v. Volpentesta, No. 14 C 50343, 2015 WL 4545215, at *5 (N.D. Ill. July 27, 2015) (citing Warren v. Baenen, 712 F.3d 1090, 1104 (7th Cir. 2013)). "In turn, there can be no resulting prejudice from a failure to raise a meritless issue on appeal." Id. (citing Martin v. Evans, 384 F.3d 848, 852 (7th Cir.2004)).

While the constitution guarantees a right to be tried in the state and district where the alleged crime was committed, *see* U.S. Const. amend. VI, "where the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue." United States v. Muhammad, 502 F.3d 646, 654 (7th Cir. 2007) (quoting United States v. Reed, 773 F.2d 477, 480 (2d Cir.1985)). In fact, for continuing crimes, venue is proper where the crimes began, continued, or were completed. United States v. Tingle, 183 F.3d 719, 726-727 (7th Cir. 1999).

18 U.S.C. §§ 1591(a) and 2423(a) are continuing offenses as defined in Section 3237(a), as they each implicate the transportation of a person in interstate commerce. *See, e.g.*, United States v. Cole, 262 F.3d 704 (8th Cir. 2001) (holding that, under 18 U.S.C. § 3237(a), venue was proper in the federal district from which the victim was transported with the intent to engage her in illegal sexual activity). Because Congress hasn't expressly enacted legislation stating that the only proper venue for these crimes rests where the illegal sex

activities occur, Section 3237(a) controls, and prosecution under Sections 1591(a) and 2423(a) is proper in "any district from, through, or into which" the victim was transported. 18 U.S.C. § 3237(a).

Mr. Jackson transported J.T. across state lines for the purposes of prostitution. Though the sex acts didn't take place in northern Indiana, every episode of the illicit activity involved the Northern District of Indiana. Mr. Jackson for met J.T. in South Bend. It was in South Bend that he first convinced J.T. to travel with him for purposes of prostitution. On three separate occasions, Mr. Jackson transported J.T. from South Bend with the intent that she engage in illegal sexual activity, and he twice took her back to South Bend after the crimes had been committed. For these reasons, the Northern District of Indiana was a proper venue for his prosecution under 18 U.S.C. § 3237(a). Mr. Jackson's attorney's decision to not move for acquittal under these grounds not trigger the performance prong of Strickland's ineffective assistance test. Because Mr. Jackson fails the performance prong, there is no need to investigate the claim further, Strickland, 466 U.S. at 697, and the court denies the ineffective assistance claim.

III. CONCLUSION

Based on the foregoing, the court DENIES the motion to vacate. [Doc. No. 109.]

SO ORDERED.

ENTERED: July 29, 2019

/s/ Robert L. Miller, Jr.

Judge, United States District Court

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 12, 2021

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

Nos. 20-1444

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOUGLAS D. JACKSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana South Bend Division.

No. 3:15CR06-001

Robert L. Miller, Jr.
Judge.

ORDER

On consideration of the petition for rehearing filed by Defendant-Appellant on February 5, 2021, the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

Appendix C

1 and it's the same analysis that I have to make this time.
2 Obviously, we're not taking up the question about whether you
3 were a manager of another person. The Court of Appeals settled
4 the law on that and disagreed with me, and that's fine. That's
5 their job, and my job is to follow it. You're not going to
6 hear anything about the possession of a firearm in furtherance.
7 That they finally have straightened out. And, again, the law
8 turned out to favor you, and that's fine.
9 **THE DEFENDANT:** (Indicating.)
10 **THE COURT:** Your hand's up. Yes, sir.
11 **THE DEFENDANT:** Can I address the Court before you
12 make a ruling on the objections?
13 **THE COURT:** Normally -- on venue?
14 **THE DEFENDANT:** On the objections and venue, yeah, on
15 just **Booker** specifically.
16 **THE COURT:** You can go ahead, briefly. I'm not sure
17 it's proper, but I'll let you do it.
18 You can do it right there from your place. Just tip
19 the microphone up. No, go ahead and stand. I'm sorry. I'm
20 not doing this well today. Stand, tip the microphone up. And
21 if you just keep your voice up, it will pick up.
22 **THE DEFENDANT:** All right. First and foremost, I
23 want to make myself perfectly clear before the Court and on the
24 record. I am relying on the **Booker** error objection, which is
25 slightly different from **Apprendi**. **Apprendi** deals with

Appendix D

1 statutory maximums, while **Booker** deals with the holding in
2 **Apprendi** being applied to the federal sentencing guidelines.
3 Now, if Booker's case was referring to the statutory
4 maximum, which is a common misinterpretation, his case would
5 not be law because 360 months is below his statutory maximum of
6 life.
7 Now, what Booker's case did was made the guidelines
8 advisory instead of mandatory. The guidelines' enhancements
9 used to be mandatory, if the judge saw that they fit, but now
10 they are advisory.
11 Case law, **United States versus Dunnigan**, states:
12 Even though the district judge might find that the enhancements
13 is warranted, yet you still must sentence the defendant within
14 the range authorized by the jury.
15 Now, if we turn our attention to the case at hand,
16 the jury verdict, criminal history is Category 30, Level 0,
17 which amounts to 97 to 121 months. 121 months is the maximum
18 based off of jury fact finding alone. The enhancements in the
19 PSR are facts I was not found guilty of by the jury and they
20 would increase the maximum guidelines over 121 months if they
21 were adopted. Anything over 121 months will result in me being
22 erroneously sentenced under the now unlawful mandatory scheme.
23 It would be a Sixth Amendment violation under **Booker**. And
24 since my **Booker** error is properly preserved, the Appeals Court
25 will review for harmless error. And if my substantial rights

1 are affected, this case will be remanded, and this case will
2 affect my substantial rights if the sentence is longer than it
3 would have been without the violation. So the only way not to
4 affect my substantial rights is to sentence me to 121 months or
5 lower. Anything above that would be unconstitutional judicial
6 fact finding.
7 Now, in terms of venue, the case I'm relying on is
8 called **Rodriguez-Moreno versus United States**, and his decision
9 reads --
10 **THE COURT:** Do you have the citation for that as to
11 the Reporter?
12 **THE DEFENDANT:** I have 526 U.S., Third Circuit. It's
13 a Supreme Court case, though.
14 **THE COURT:** Yeah.
15 526 U.S. what?
16 **THE DEFENDANT:** Third Circuit, I just have.
17 **THE COURT:** Okay. You don't have the page number,
18 just the 526?
19 **THE DEFENDANT:** No.
20 **THE COURT:** Okay.
21 **THE DEFENDANT:** And in it, it say: If the statute
22 lacks an express venue provision, venue goes by a two-prong
23 test set forth in Supreme Court's **Rodriguez-Moreno**.
24 The first prong is identify the conduct. The second
25 prong is discern where the location of the -- the location of

1 the -- constituting the offense occurred. So the Court must
2 inquire to the nature of the offense.
3 And the conduct in this case is prostitution, and
4 these illegal sex acts were not performed in Indiana, nor were
5 they intended to have any effects on Indiana or in the state or
6 district of Indiana or South Bend.
7 In **Rodriguez-Moreno**, venue was only proper where the
8 acts constituting the offense occurred.
9 Now, the Court and the government relied on a case,
10 **Cole versus United States**, 262 F.3d 704, Eighth Circuit, 2001,
11 to deny my argument, but this case has been clearly undermined
12 by **Rodriguez-Moreno** because it doesn't satisfy the two-prong
13 test, and nor does this case satisfy the two-prong test, and
14 that's it.
15 **THE COURT:** Thank you, sir.
16 I'll get to the points that you just made as I go
17 along.
18 But step one in the sentencing process is to figure
19 out what the sentencing guidelines recommend. We do that not
20 because they're always right because they're not, but that
21 gives us a start, trying to get to the point where, it doesn't
22 matter what court a person was sentenced in, in front of what
23 judge or anything else, people who do similar crimes -- similar
24 people, who do similar crimes, should get similar sentences,
25 and the guidelines give us our best hope, so we start from

1 A. Yes.
2 Q. Okay. And when you met him, did you tell him -- did
3 Mr. Jackson ask you how old you were?
4 A. Yes.
5 Q. And what did you tell him?
6 A. Fifteen.
7 Q. And, at that time, what grade were you finishing up in
8 school?
9 A. Freshman.
10 Q. In other words, ninth, ninth grade?
11 A. Yes.
12 Q. Okay. And, this fall, you will be going into what grade?
13 A. Junior.
14 Q. Junior year?
15 A. Yeah.
16 Q. Okay. Now, did Mr. Jackson tell you anything about how
17 old he was at that party?
18 A. Yes.
19 Q. What did he tell you?
20 A. Seventeen.
21 Q. Okay. And did he tell you whether or not he was a high
22 school student?
23 A. No.
24 Q. You don't recall him telling you that he was a high school
25 student?

Appendix E

1 A. No.
2 Q. Okay. And was there a name that he used at the time to
3 refer to himself, other than "Douglas Jackson"?
4 A. Yes.
5 Q. What was that?
6 A. Levell.
7 Q. Levell?
8 A. Uh-huh.
9 Q. Now, did you have any mutual friends with Mr. Jackson?
10 A. No.
11 Q. Did your sister know him?
12 A. Yes.
13 Q. Okay. At that party, did Mr. Jackson ask you anything
14 about making -- about a way to make money?
15 A. Yes.
16 Q. And what did he say to you about that?
17 A. Do I know how to make money.
18 Q. Pardon me?
19 A. Do I know how to make money.
20 Q. Okay. And what did you say to him? What was your
21 response?
22 A. "No."
23 Q. Okay. Did he ask you if you wanted to make some money?
24 A. Yes.
25 Q. Okay. And what did he -- did he have a suggestion as to

Appendix E

1 how to make money?

2 A. No.

3 Q. All right. So he asked you if you wanted to make some

4 money; you said, "Yes;" but he didn't have any suggestion about

5 that; is that what you're saying now?

6 A. Uh-huh

7 Q. Okay. Now, at some time after that did you and

8 Mr. Jackson go on a trip to Atlanta, a trip to Louisville, and

9 a trip to Grand Rapids?

10 A. Yes.

11 Q. All right. And what was the purpose of you going to

12 Atlanta, Louisville, and Grand Rapids?

13 A. Prostitution.

14 Q. Okay. And whose idea was it to go to Atlanta?

15 A. Mine.

16 Q. Okay. Did Mr. Jackson have anything to do with that

17 decision to take you there?

18 A. Yes.

19 Q. Okay. Why did you -- why did you decide to -- what was it

20 about Atlanta that you wanted to do there?

21 A. I liked Atlanta.

22 Q. Huh?

23 A. I liked Atlanta.

24 Q. You said the purpose was prostitution; is that right?

25 A. Yeah, that, too. Uh-huh.

venue establish

over 1 month later

1 Q. All right. Now, did you -- you said it was your idea to
2 go there?
3 A. Uh-huh.
4 Q. Did you talk to Mr. Jackson about that?
5 A. Yes.
6 Q. Did he understand why you were going to go there?
7 A. Yes.
8 Q. And who suggested to you that Atlanta might be a good
9 place to go for prostitution?
10 A. He did. We both did.
11 Q. You both did?
12 A. Uh-huh.
13 Q. Okay. So did you go to Atlanta? Count 1-2
14 A. Yes.
15 Q. With Mr. Jackson?
16 A. Yes.
17 Q. And how did you get there?
18 A. In the car.
19 Q. Okay. In whose car?
20 A. His car.
21 Q. And was it -- what kind of car was that?
22 A. A rental, Infiniti, white.
23 Q. A rental, Infiniti?
24 A. White.
25 Q. What color?

1 that means?
2 A. Yes.
3 Q. So it involves sex?
4 A. Yes.
5 Q. And what was the response to that text that you sent?
6 A. "Bitch its a time limit not that he got to go now or I'm
7 comin in."
8 Q. Okay. Do you know what "bitch its a time limit" meant?
9 A. Means time's up.
10 Q. In other words, that -- what does that mean?
11 A. That means time's up.
12 Q. Okay.
13 A. That he's done.
14 Q. The time the customer had paid for was up?
15 A. Yes.
16 Q. Okay. And what were you doing -- well, okay.
17 And what was your response to that, the next line
18 down?
19 A. "Alright."
20 Q. And you got a message in response to your response?
21 A. "Dnt play wit me."
22 Q. Okay. And then, a few minutes later, there's a text, and
23 you respond, "Ok," right?
24 A. Right.
25 Q. A few minutes later, there's a text from -- or to the

1 minute phone number, and it says what?
2 A. "He gon."
3 Q. Okay. How would -- this is an interchange with the
4 defendant, Mr. Jackson, right?
5 A. Yes.
6 Q. How would Mr. Jackson know that the customer was gone?
7 A. Oh, he was asking me, "Is he gone."
8 Q. Okay. Okay. And what was your response?
9 A. "Yea he left."
10 Q. Okay. Now, you were at a -- when you were in Louisville,
11 did you stay -- how many nights did you stay there in
12 Louisville?
13 A. I don't remember.
14 Q. Okay. Do you remember whether or not you stayed at one
15 hotel or two?
16 A. One.
17 Q. Okay. Did you stay at any hotels across the river in
18 Indiana?
19 A. I don't remember.
20 Q. You don't remember?
21 A. Huh-uh.
22 Q. Okay. Were you with the defendant, Mr. Jackson, the whole
23 time that you were there?
24 A. Yes.
25 Q. Okay. And after you were done in that area, after however

only time Jordan's mentioned

1 many days you stayed there, where did you go from there?

2 A. South Bend.

3 Q. Back to South Bend?

4 A. Yes.

5 Q. Okay. Now, after that, I think you said you also went on

6 a trip to Grand Rapids, right?

7 A. Yes.

8 Q. Okay. Now, how did that trip to Grand Rapids come up?

9 What was the -- was this trip, also, for prostitution purposes?

10 A. Yes.

11 Q. How did the idea to go to Grand Rapids come up?

12 A. My brother wanted to go.

13 Q. Your brother wanted to go to Grand Rapids?

14 A. Yes.

15 Q. Okay. Did you want to go to Grand Rapids?

16 A. Yeah.

17 Q. Okay. And so how did you end up with -- well, who did you

18 go to Grand Rapids with?

19 A. Him, Jordan, and me.

20 Q. When you say "him," are you talking about --

21 A. Doug.

22 Q. -- Douglas Jackson?

23 A. Yes.

24 Q. And when you went to Grand Rapids, who drove?

25 A. He did.

1 Q. Who paid for the gas?
2 A. He did.
3 Q. Who provided food?
4 A. He did.
5 Q. All right. What kind of food did you get in Grand Rapids?
6 A. Pizza.
7 Q. A pizza?
8 A. Yes.
9 Q. Was the pizza -- do you know who provided the pizza?
10 Where did you get it from?
11 A. No, I don't remember.
12 Q. You don't remember?
13 A. No.
14 Q. Okay. And once you got to Grand Rapids, was there --
15 well, do you recall where you stayed there?
16 A. Huh?
17 Q. What kind of hotel you stayed at in Grand Rapids?
18 A. Super 8, I think.
19 Q. A Super 8?
20 A. Yeah.
21 Q. Who paid for that room?
22 A. He did.
23 Q. Mr. Jackson?
24 A. Yes.
25 Q. Now, was there a Backpage ad posted in Grand Rapids?

Additional material from this filing is available in the Clerk's Office.