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States Court of Appeals  
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5-17-2005

**USA v. Fishman**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

Case No: 03-3737

UNITED STATES OF AMERICA

v.

DAVID FISHMAN,  
Appellant

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On appeal from the United States District Court  
for the District of New Jersey  
District Judge: The Honorable William G. Bassler  
District Court No. 02-cr-00587

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Submitted Pursuant to Third Circuit LAR 34.1  
June 16, 2004

Before: ALITO and SMITH, *Circuit Judges*, and  
DUBOIS, *District Judge*\*

(Filed: May 17, 2005 )

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OPINION OF THE COURT

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SMITH, *Circuit Judge*.

David Fishman pled guilty on April 15, 2003 to count three of an information charging him with knowingly distributing pseudoephedrine in violation of 21 U.S.C. §

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\* The Honorable Jan E. Dubois, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

841(f)(1). The District Court sentenced him on August 28, 2003 to a term of sixty months. Fishman appeals, challenging only his sentence. He contends that the District Court erred by refusing to grant a downward departure under United States Sentencing Guidelines (“U.S.S.G.”) §§ 5K2.13, 5K2.0, and 5H1.4. According to Fishman, the District Court mistakenly believed it did not have the authority to depart under these guidelines.

Fishman’s sentence was imposed prior to the Supreme Court’s decision in *United States v. Booker*, 125 S.Ct. 738 (2005). There, the Supreme Court declared that the United States Sentencing Guidelines are only advisory. *Id.* at 757. As a result, Fishman’s sentence may have been affected by the District Court’s treatment of the guidelines as mandatory. Having determined that the sentencing issues Fishman raises are best determined by the District Court in the first instance, we will vacate Fishman’s sentence and remand for resentencing in accordance with *Booker*.

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