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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

STEVEN LAVINSKY, AKA amhari99,
AKA amhari99@yahoo.com, AKA
Chabon,

Defendant-Appellee.

No. 16-50428

D.C. No. 2:16-cr-00161-R-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted February 16, 2018**
Pasadena, California

Before: McKEOWN and WARDLAW, Circuit Judges, and MENDOZA,^{***}
District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Salvador Mendoza, Jr., United States District Judge for the Eastern District of Washington, sitting by designation.

The government appeals Steven Lavinsky’s 48-month sentence of imprisonment, which is below the 60-month minimum mandated by statute. We have jurisdiction pursuant to 28 U.S.C. § 1291. We vacate Lavinsky’s sentence and remand to the district court for resentencing.

Lavinsky’s statute of conviction provides that “[w]hoever violates” that provision “*shall be . . . imprisoned not less than 5 years and not more than 20 years.*” 18 U.S.C. § 2252A(b)(1) (emphases added). “It is axiomatic that a statutory minimum sentence is mandatory.” *United States v. Sykes*, 658 F.3d 1140, 1146 (9th Cir. 2011). That is, “[w]here ‘no exception to the statutory minimum applies . . . , the court lack[s] the authority to refuse to impose’” the mandatory minimum. *Id.* (quoting *United States v. Haynes*, 216 F.3d 789, 799–800 (9th Cir. 2000)). No exception applies here, but the district court sentenced Lavinsky to a below-minimum term of imprisonment nevertheless, explaining only that the circumstances of lifetime supervision made that sentence sufficient. That was error.

Lavinsky’s sole contention on appeal is that statutory mandatory minimum sentences are unconstitutional under *United States v. Booker*, 543 U.S. 220 (2005), but our precedent forecloses that argument. *See United States v. Ching Tang Lo*, 447 F.3d 1212, 1234 n.15 (9th Cir. 2006) (“There is nothing in *Booker* to suggest

that statutorily mandated minimum sentences are merely advisory if the sentence is based on facts found by a jury by a preponderance of the evidence.”).

We therefore vacate and remand for resentencing. On remand, the district court shall sentence Lavinsky within the range mandated by 18 U.S.C.

§ 2252A(b)(1).¹

Sentence VACATED and REMANDED for resentencing.

¹ We decline Lavinsky’s invitation to strike the government’s opening brief and to dismiss the appeal for failure to prosecute. *See* 9th Cir. R. 31-2.3.