IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. GARFIELD ANTHONY ANDERSON, Appellant.	No. 04-4621

PETITION FOR REHEARING
and
SUGGESTION FOR REHEARING EN BANC

GARFIELD ANTHONY ANDERSON, the appellant in the above-captioned case, respectfully petitions for a rehearing of the decision rendered in this case on March 31, 2005. Fed. R. App. P. 40. Alternatively, Mr. Anderson requests that, pursuant to Fed. R. App. P. 35, a rehearing *en banc* be granted.

Statement of Purpose

A mistake in copying the Joint Appendix caused the panel to be unaware of a material factual and legal matter. Additionally, the panel decision affirming the district court's sentence of Mr. Anderson is in conflict with both a decision of the United States Supreme Court and with two published opinions from this Circuit. Finally, this petition involves a question of exceptional importance.

1. The Record Demonstrates the District Court's Announced Alternative Sentence Was a De Facto Mandatory Guideline Sentence that Did Not Incorporate the Factors of 18 U.S.C. § 3553(a), a Material Factual and Legal Matter Overlooked by the Panel as a Result of a Copying Error in the Joint Appendix.

It is important to emphasize to the Court the context of Mr. Anderson's sentencing hearing. On August 2, 2004, the same day this Court announced its order in *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004) (order), *opinion issued by* 381 F.3d 316 353-54 (4th Cir. 2004) (en banc), *vacated and remanded*, ___ U.S. ___, 125 S. Ct. 1051 (2005), the district court had declared *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), applicable to the sentencing guidelines and held them unconstitutional. (J.A. 43). At Mr. Anderson's sentencing hearing, conducted the next day, August 3, the judge, referencing the *Hammoud* order, noted, "I was reversed before the end of the evening." (J.A. 43).

Prior to conducting *any* sentencing hearings on August 3, the court announced, "I am going to impose sentences in accordance with the guidelines, but also want to state that any sentence that I will impose will also be imposed pursuant to statutes under which the defendant was convicted[.]" (J.A. 44). The court then cited a number of statutes, pursuant to which the sentences would be entered. (J.A. 44). The court then explained, "Now, in other words, *the sentence will be the same in either event*." (J.A. 44) (emphasis added). After discussing it would give notice of any departures, the court repeated, "I think it's fair to say that my sentence will be the same in either event." (J.A. 45).

The fifth page of the sentencing transcript, through a copying error, was not included in the Joint Appendix filed with Mr. Anderson's appeal. It is attached to this petition as an Appendix and is numbered "J.A. 45A." There, the court said, [T]he only thing I can say in order

to give some certainty as far as your advising your clients, I will impose a sentence in accordance with the guidelines, and it's going to be exactly the same sentence I would impose if I *were* exercising my discretion." (Appendix, J.A. 45A)(emphasis added). The court believed identical sentences would "give both certainty and finality to your client's case, which I think is in the interest of his justice and in the justice--and accordingly to the United States." (J.A. 46). The court then instructed the assembled attorneys to advise their clients "what I have just pronounced[.]" (J.A. 46). Thus, the Court had determined that the guideline sentence and the alternative sentence would be identical, in every case, even before it had conducted its first sentencing hearing. (J.A. 46).

The district court's comments demonstrate that it treated the "advisory guidelines" as mandatory. *See* (J.A. 45) ("I think if the Guidelines were unconstitutional this court would probably be departing downwardly far more than any other act"); (J.A. 61) ("Yesterday I was agreeing with you [defense counsel] but I was reversed overnight"). Recommending identical alternative sentences in every single case simply is not what § 3553(a) contemplates. None of the seven factors listed under subsection (a) states that any factor is to be given precedence over, nor greater weight than, any other factor. Nor does Justice Breyer's remedial opinion in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), say, anywhere, that the guidelines are the preeminent factor among the seven listed in § 3553(a). Rather, *Booker* says that a district court must "consider Guidelines ranges," but also that sentencing court may "tailor the sentencing in light of other statutory concerns as well." 543 U.S. at ___, 125 S. Ct. at 757 (Opinion for the Court by Breyer, J., hereinafter "Breyer Opinion"). A sentence cannot be "tailored" when a court takes the position that, with respect to every case that will come before it, it will use the

guidelines as *the* factor that dictates the recommended alternative sentence. Accordingly, what the district court did with respect to its alternative sentence--in Mr. Anderson's case and in every other--was to use a *de facto* mandatory guideline system.

What *is* preeminent in § 3553(a) is its prefatory clause, which mandates that a sentence be no greater than necessary to promote the four purposes of sentencing set forth at § 3553(a)(2). It is that prefatory clause that limits the sentence a court may impose under subsections (a)(1)-(7). Finally none of the subsection (a)(2) factors, nor any of the other § 3553(a) factors, include the need to afford defense lawyers certainty when advising their clients of the sentences the latter will receive, one of the principal reasons the district court cited for making the alternative sentence mirror the guideline sentence. (J.A. 45A-46).

2. The Summary Afirmance of an Alternative Sentence Under Harmless Error Review Conflicts with the Supreme Court's Decision in *United States v. Booker*.

The panel decision affirmed the district court sentence on harmless-error grounds because the alternative sentence recommended by the district court coincided with the mandatory-guideline sentence. ***Booker*,** though, requires a remand in cases involving Sixth Amendment violations, the very violation Mr. Anderson raised both before the district court and in this Court. *See id*. at ___, 125 S. Ct. at 769 (Breyer Opinion). Because the district court in Freddie Booker's case "imposed a sentence higher than the maximum authorized solely by the jury's verdict," *Booker* affirmed the Seventh Circuit's remand for a new sentencing hearing. *Id*. Harmless-error determinations arise in cases "*not* involving a Sixth Amendment violation[.]" *Id*. (emphasis added). In those instances, the Court said, [W]hether resentencing is warranted, or

whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless error doctrine." *Id*.

Mr. Anderson argued that the district court gave him a 4-level enhancement and imposed three "recency points" based upon facts not alleged in the indictment, not otherwise admitted by him, and not proven beyond a reasonable doubt. (Brief for Appellant at, *e.g*., 13). Mr. Anderson's Sixth-Amendment claim, which he preserved at sentencing, thus forecloses application of the harmless-error doctrine, the basis for the panel's affirmance of his sentence. *See* (J.A. 50).

3. The Summary Affirmance of the Alternative Sentence Announced by the District Court Conflicts with this Court's Explanation, in *United States v. Hammoud*, of the Nature and Purpose for Announcing Alternative Sentences.

Hammoud, the case upon which the panel opinion affirming Mr. Anderson's sentence rests, does not support a presumption that the mere announcement of an alternative sentence can serve as a proxy for a sentencing hearing conducted pursuant to 18 U.S.C. § 3553(a). In *Hammoud*, this Court explained that "announcing-- not imposing--a non-guidelines sentence at the time of sentencing will serve judicial economy[.]" 381 F.3d at 353. Acknowledging the determination of an alternative sentence could require additional time to resolve "issues not generally pertinent in guideline sentencing," this Court reasoned that if the Supreme Court found *Blakely* applicable to the guidelines, "the district court and the parties will have made at least substantial progress toward the determination of a non-guideline sentence." *Id.* Importantly, this "substantial progress" hinges upon the actual resolution of these "non-guidelines" issues. *Id.* at 353-354 (anticipating that "the district court and the parties will need to spend far less time preparing because the issues will already have been resolved"). The *Hammoud* Court recognized

that even with such resolution, "a new hearing may have to be convened in order to impose the previously determined and announced non-guidelines sentence." *Id.* at 353.

In this case, the panel based its harmless error conclusion upon the district court's announcement of an alternative sentence equal to the mandatory guidelines sentence. However, as demonstrated above, the record shows conclusively that the district court did not announce this identical alternative sentence after an individualized determination and resolution of the applicable "non-guidelines issues," as required by *Hammoud*. Even had the court addressed these issues, *Hammoud* indicates that the resolution of non-guidelines issues simply would shorten, not entirely replace, a subsequent sentencing hearing conducted pursuant to 18 U.S.C. § 3553(a).

4. The Summary Affirmance of the Alternative Sentence Conflicts with this Court's Clarification, in *United States v. Hughes*, of What Constitutes an Error Affecting "Substantial Rights" and thus Eliminates the Government's Burden to Demonstrate Harmless Error.

Even if, *arguendo*, harmless-error analysis did apply in this case, the panel opinion's rationale is not consistent with this Court's clarification of the correct inquiry for determining whether a *Booker* error affects a defendant's "substantial rights." In *United States v. Hughes*, ___ F.3d __, No. 03-4172 2005 WL 628224 (4th Cir. Mar. 16, 2005) (*petition for reh'g en banc denied* Apr. 8, 2005), a case which discussed plain-error review of a *Booker* issue, this Court emphasized that "in determining whether an error affected a defendant's substantial rights, the question is *not* whether an error-free proceeding would have produced *the same result*." *Id.* at ___, 2005 WL 628224 at *6 (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)) (emphasis added). Rather, the proper "substantial rights" inquiry asks whether "the sentence imposed by the district court as a result of the Sixth Amendment violation was longer than that to which [the

defendant] would otherwise be subject." *Id.* (internal quotation and citation omitted). In rejecting the "same result" inquiry, this Court explained, "Considering the *Booker* remedy in determining whether a defendant has established an effect on substantial rights from a pre-*Booker* Sixth Amendment violation would essentially require us to disregard the Sixth Amendment violation altogether." *Id.* at ___, 2005 WL 628224 at *8.

In Mr. Anderson's case, the panel grounded its conclusion of harmless error upon the district court's pronouncement of a *Hammoud* alternative sentence identical to the mandatory guideline sentence that the court imposed and that Mr. Anderson argued violated the Sixth Amendment. This conclusion necessarily assumes that a hypothetical "*Booker*" sentence, announced five months before the decision even issued, represents the sentence the district court would have imposed after considering the *Booker* opinion and this Court's application of *Booker* in *Hughes*. It also assumes the district court addressed and resolved all the "non-guidelines" issues contained in 18 U.S.C. § 3553(a), an assumption flatly contradicted by the sentencing transcript.

An additional conflict between the panel decision and *Hughes* is that the former opinion's rationale shifts the burden of proving harmless error from the government to the defendant. Rather than require the government to demonstrate that a general pronouncement that all alternative sentences would match the imposed sentences renders harmless a particular guideline sentence that violated the Sixth Amendment (as Mr. Anderson's did), the panel's opinion requires Mr. Anderson to disprove that the announced alternative sentence remedied the mandatory sentence actually imposed. This shift eliminates the key distinction between harmless-error and plain-error review, *i.e.*, the party upon whom falls the burden to demonstrate

whether an error affected the defendant's "substantial rights." *See United States v. Olano*, 507 U.S. 725, 734-35 (1993); *Hughes*, ___F.3d at ___, 2005 WL 628224 at *5 (noting that "[t]he substantial rights inquiry conducted under Rule 52(b) is the same as that conducted for harmless error under Rule 52(a), with the important difference being that the burden rests on the defendant, rather than the government, to prove that the error affected substantial rights").

5. The Panel Summarily Decided a Question of Exceptional Importance, the Validity of Alternative Sentences Recommended Under *Hammoud*, A Question More Properly Resolved After Full Briefing, Oral Argument, and in a Published Opinion.

The panel has decided, in an unpublished opinion and with little substantive discussion, a question of exceptional importance--that is, the validity of the alternative sentences recommended under *Hammoud*. The United States Supreme Court has vacated the judgment *and remanded* the case to this Court "for further consideration in light of *United States v. Booker* [citation omitted]." ___ U.S. ___, 125 S. Ct. 1051 (2005). To date, this Court has issued no decision in *Hammoud* following the Supreme Court's remand. In Mr. Anderson's case, the panel opinion summarily decides a question currently pending before the full Court, that being the extent, in any, to which *Hammoud* survives *Booker*.

Additionally, because the sentence Mr. Anderson received involved the then-mandatory guidelines, defense counsel could not argue certain mitigating factors that, following *Booker*, a defense attorney may now argue, what *Hammoud* called "issues not generally pertinent in guideline sentencing." 381 F.3d at 353. The attorney could not argue, for example, that the sentence be "sufficient, but not greater than necessary" to comply with the four purposes of sentencing set forth in 18 U.S.C. § 3553(a). Additionally, the guidelines included a number of "not relevant" and "not ordinarily relevant" factors that district courts could not consider under

mandatory guidelines that now, under § 3553(a), they may consider. *Compare* U.S.S.G. § 5H1.1 (age), § 5H1.5 (employment record), § 5H1.6 (family ties and responsibilities), § 5H1.11 (record of prior good works), and § 5H1.12 (lack of guidance as a youth) *with* 18 U.S.C. § 3553(a)(1) ("the nature and circumstances of the offense and the *history and characteristics of the defendant*") (emphasis added). Moreover, the guidelines mandated imprisonment or a sentence including imprisonment when a person fell within a particular "zone," thus making it impossible for defense counsel to argue for a non-custodial sentence in an otherwise appropriate case. *Compare* U.S.S.G. §§ 5B1.1, 5C1.1 *with* 18 U.S.C. § 3553(a)(2) ("the kinds of sentences available").

Last, the government already is using the *Anderson* decision to argue that every time there is an alternative sentence that matches the guideline sentence, the error is harmless and the sentence must be affirmed. *See United States v. Thomas Kendrick Wilson*, No. 04-4984, Brief for Appellee at 9. If this is what the Court means to say, then the issue should be briefed thoroughly, oral argument granted, and the opinion published.

Suggestion for Rehearing En Banc

Mr. Anderson further suggests that this Court consider rehearing this case *en banc* given the importance of the questions presented in this appeal, as well as the need to maintain conformity with the Supreme Court's decision in *United States v. Booker* and with this Court's decisions in *United States v. Hammoud* and *United States v. Hughes*. Fed. R. App. P. 35(b)(1)(A) and (B). This case presents exceptionally important issues regarding the validity of the alternative sentences recommended under *Hammoud* and the consistent application of a "substantial rights" standard in both harmless and plain error reviews. As argued above, the

panel's summary affirmance of a mandatory guideline sentence that exceeded Sixth Amendment limitations conflicts with the Supreme Court's guidance in *Booker* that such sentences are not subject to harmless error review. Moreover, the panel's opinion cannot be reconciled with this Court's explanation, in *Hammoud*, of the nature and purpose for recommending alternative sentences, nor with this Court's explanation in *Hughes* of the proper standard for determining whether an error affects substantial rights. Finally, the panel opinion summarily decides an issue currently pending before the full Court, that question being the extent to which *Hammoud* survives *Booker*.

In Mr. Anderson's case, the record demonstrates the district court's announcement of an identical alternative sentence resulted from a policy decision applicable to all defendants. The alternative sentence did not result from individualized consideration and resolution of all applicable "non-guidelines issues," as contemplated by this Court in *Hammoud*; nor did it incorporate all the factors from 18 U.S.C. § 3553(a), as required by the Supreme Court in *Booker*.

Although *Hammoud*'s recommendation that district courts announce alternative sentences demonstrated this Court's prescience, even *Hammoud* did not presume that the announced alternative sentence would supplant a § 3553(a) sentencing hearing in the event the Supreme Court found mandatory application of the guidelines unconstitutional. However, the panel decision affirming Mr. Anderson's mandatory guideline sentence makes just such a presumption.

For the foregoing reasons, Mr. Anderson respectfully suggests that this Court grant a rehearing *en banc*.

Conclusion

For the reasons stated herein, Mr Anderson respectfully requests that the panel rehear this matter. In the alternative, Mr. Anderson suggests that this matter be heard en banc.

This the 11th day of April, 2005.

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