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## STATEMENT OF JURISDICTION

The district court had jurisdiction over this case by virtue of 18 U.S.C. §§ 922(g)(1) and 924. This Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Mr. filed a timely notice of appeal on October 25, 2004. This appeal is from a final order.

## ISSUES PRESENTED FOR REVIEW

I. Whether the United States Supreme Court's decision in *United States v. Booker* and this Court's decision in *United States v. Hughes* require that Mr. 's sentence be vacated and remanded for resentencing because the district court treated the federal sentencing guidelines as mandatory when it sentenced him.

II. Whether the appeal-wavier provision entered into by Mr. is unenforceable because all of the parties, without the benefit of *Booker*, contemplated sentencing under mandatory guidelines, a sentencing scheme that is now unconstitutional, thereby rendering Mr. 's appeal waiver unknowing.

## STATEMENT OF THE CASE

On March 25, 2004, a federal grand jury named the appellant, Mr. , in a one-count indictment that charged him with being a felon in possession of a firearm. 18 U.S.C. §§ 922(g)(1) and 924. (J.A. 8 ). On May 27, 2004, pursuant to a plea agreement with the government, Mr. pled guilty to the indictment. (J.A. 10, 18, 30). On October 20, 2004, the district court sentenced Mr. to imprisonment for 30 months. (J.A. 44, 50, 55). The court recommended an identical alternative sentence. *See United States v. Hammoud*, 381 F.3d 316, 354 (2004)(en banc), *vacated and remanded*, \_\_\_ F.3d \_\_\_, No. 04-193, 2005 U.S. LEXIS 1012 (U.S. Jan. 24, 2005). (J.A. 51-52, 56). Mr. filed a timely notice of appeal on October 25, 2004. (J.A. 61).

## STATEMENT OF FACTS

According to the government, on March 18, 2003, officers with the Robeson County, North Carolina, Sheriff's Department stopped the appellant, Mr. , for outstanding arrest warrants. (J.A. 66). Officers found a revolver in Mr. 's pants pocket. (J.A. 66).

On March 25, 2004, a federal grand jury sitting in the Eastern District of North Carolina named Mr. in a single-count indictment that charged him with possession of a firearm by a convicted felon. 18 U.S.C. §§ 922(g)(1) and 924. (J.A. 8). On May 27, 2004, pursuant to an agreement with the government, Mr. pled guilty to the charge. (J.A. 10, 18, 30). The plea agreement waived, among other things, Mr. 's right to appeal his conviction and all sentencing issues except upward departures from the guidelines range established at sentencing. (J.A. 10-11). The agreement further specified that sentencing would be "in accordance with the United States Sentencing Guidelines[.]" (J.A. 14). At his arraignment, the district court informed Mr. , "[Y]ou will be sentenced on the basis of your guilty

plea under Guidelines issued by the United States Sentencing Commission.” (J.A. 21).

On June 24, 2004, subsequent to Mr. ’s plea, the United States Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. \_\_\_, 159 L. Ed. 2d 403 (2004). Mr. ’s case came on for sentencing on October 20, 2004. (J.A. 44).

Prior to sentencing, the probation office conducted a presentence investigation. The probation officer assigned Mr. a base offense level of 20 because the latter had a prior conviction of either a crime of violence or a controlled substance offense. USSG §2K2.1(a)(4)(A). (J.A. 75). Mr. ’s criminal history points, 4, increased to 6 because the probation officer determined Mr. committed the instant offense while under supervised probation. USSG §4A1.1(d). (J.A. 70). With a total offense level of 17, and a criminal history category of III, Mr. faced a guideline range of imprisonment of 30-37 months. (J.A. 76).

Mr. objected, under *Blakely*, to the increase of his base offense level.

(J.A. 78). He argued that he did not admit, nor did a jury find, that he had a prior controlled substance offense to qualify him for an increase under §2K2.1(a)(4)(A). (J.A. 78). Mr. contended his base offense should have been 14, and his total offense level 12, equating to a 15 to 21-month range of imprisonment. (J.A. 78).

At sentencing, the district court overruled Mr. 's *Blakely*-based objection and adopted the findings of the probation officer. (J.A. 46, 49, 79). The court sentenced Mr. to imprisonment for 30 months. (J.A. 49-50, 55). The court recommended an alternative sentence of the same term. *See United States v. Hammoud*, 381 F.3d 316, 354 (4th Cir. 2004)(en banc), *vacated and remanded*, \_\_\_ F.3d \_\_\_, No. 04-193, 2005 U.S. LEXIS 1012 (U.S. Jan. 24, 2005). (J.A. 51-52, 556)

Mr. timely appealed. (J.A. 61).

## SUMMARY OF ARGUMENTS

I. *United States v. Booker*, 543 U.S. \_\_\_, 160 L. Ed. 2d 621 (2005), Nos. 104-105, 2005 U.S. LEXIS 628 (U.S. Jan. 12, 2005) and *United States v. Hughes*, \_\_\_ F.3d \_\_\_, No. 03-4172, 2005 U.S. App. LEXIS 1189 (4th Cir. Jan. 24, 2005) resolve this appeal. Mr. received a sentence under a mandatory guideline scheme which the Supreme Court held in *Booker* is unconstitutional. Mr. 's sentence must be vacated and the matter remanded for resentencing.

II. The appeal-waiver provision in the plea agreement does not foreclose Mr. from pursuing relief in this Court as Mr. did not knowingly enter into that waiver. The waiver provision contemplated sentencing under mandatory guidelines, and Mr. received a sentence under the now-unconstitutional 18 U.S.C. § 3553(b)(1). Plea agreements are construed against the government, and Mr. is entitled to have any ambiguities therein resolved in his favor. This Court must view the agreement as contemplating an unconstitutional sentencing scheme, and thus Mr. could

not have entered into a knowing waiver of his right to appeal the sentence that resulted from it.

Accordingly, the appeal waiver is not enforceable in this case.

## ARGUMENTS

I. The District Court Erred by Sentencing Mr. under a Mandatory Guideline Scheme.

### *Standard of Review*

Whether the Supreme Court's decision in *United States v. Booker* requires the vacating of Mr. 's sentence presents a question of law which this Court reviews *de novo*. See *United States v. Kinter*, 235 F.3d 192, 195 (4th Cir. 2000).

### *Argument*

On January 12, 2005, the United States Supreme Court held that its decision in *Blakely v. Washington*, 542 U.S. \_\_\_, 159 L. Ed. 2d 403 (2004), applies to the federal sentencing guidelines. *United States v. Booker*, 543 U.S. \_\_\_, 160 L. Ed. 2d 621 (2005), Nos. 104-105, 2005 U.S. LEXIS 628 at \*17 (Opinion of Stevens, J); *id.* at \*51 (Opinion of Breyer, J.) and *id.* at \*52 ("We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) . . . incompatible with today's constitutional holding.") The

Court held that the “modified” Sentencing Reform Act made the guidelines “effectively advisory.” *Id.* at \*52 (Opinion of Bryer, J.) The modification thus “requires a sentencing court to consider Guidelines ranges [citation omitted], but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* § 3553(a)[.]” *Id.*

In *United States v. Hughes*, \_\_\_ F.3d \_\_\_, No. 03-4172, 2005 U.S. App. LEXIS 1189 at \*6 (4th Cir. Jan. 24, 2005), this Court vacated and remanded a sentence for “resentencing consistent with the remedial scheme in Justice Breyer’s opinion for the Court in *Booker*” -- in other words, for a sentencing hearing conducted pursuant to 18 U.S.C. § 3553(a). As this Court recognized in *Hughes*, in the context of a plain-error analysis but nonetheless applicable here, “The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory.” *Hughes, supra*, at n.8. This Court then clarified that the mere fact that a sentence falls “within the range of reasonableness” does not counsel against reversal, because “the determination of reasonableness depends not

only on an evaluation of the actual sentence imposed but also the method employed in determining it.” *Id.*

*Booker* and *Harris* dictate the result that must obtain in this case. The district court imposed a sentence under a mandatory guideline scheme which *Booker* has held unconstitutional. Accordingly, Mr. is entitled to be resentenced.

## II. Mr. Has Not Waived His Right to Contest the Unconstitutional Sentence He Received.

### *Standard of Review*

This Court reviews the validity of an appeal waiver *de novo*. *United States v. Brown*, 232 F.3d 399, 402-403 (4th Cir. 2000).

### *Argument*

Mr. entered into a plea agreement that waived his right to appeal his conviction and sentence. Although this Court holds such agreements to be enforceable, the agreement contemplated sentencing under a mandatory guideline scheme, and Mr. in fact received a sentence determined exclusively by the then-mandatory guidelines. For this reason, the waiver

provision is not enforceable.

This Court recognizes that a plea agreement “is not simply a contract between two parties.” *United States v. Wood*, 378 F.3d 342, 348 n.2 (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). Consequently, this Court holds “the Government to a greater degree of responsibility than the defendant for . . . imprecisions or ambiguities in plea agreements.” *Id.* (quoting *Harvey*, 791 F.2d at 300). This Court therefore must view the plea agreement as contemplating a mandatory guideline sentencing scheme, a scheme Mr. could not know would be held unconstitutional when he waived his appellate rights.

Specifically, Mr. , in the agreement he entered on May 17, 2004, agreed to waive “whatever sentence is imposed, including any issues that relate to the establishment of the Guideline range, reserving only the right to appeal from an upward departure from the Guideline range that is established at sentencing[.]” (J.A. 10). The plea agreement further specified that “sentencing will be in accordance with the United States

Sentencing Guidelines . . . and that the Court may depart from those guidelines under some circumstances.” (J.A. 14-15). The parties also stipulated that “[a] downward adjustment of 3 levels for acceptance of responsibility is warranted under U.S.S.G. §3E1.1.” (J.A. 17). Moreover, as noted previously, at the plea hearing, the district court told Mr. , “[Y]ou will be sentenced on the basis of your guilty plea under Guidelines issued by the United States Sentencing Commission.” (J.A. 21).

All of the foregoing demonstrates that Mr. , the government, and the district court--understandably, given that *Booker* had not been decided--contemplated that Mr. 's sentence would be determined by 18 U.S.C. § 3553(b)(1), the statute held unconstitutional in *Booker*. Nowhere does the plea agreement state that the guidelines will be but one factor among those enumerated at § 3553(a). Nowhere does the plea agreement state that the guidelines will be treated as advisory only. See *United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991)(“a waiver . . . is effective only insofar as it is the result of a knowing and intelligent decision to forego the right to appeal.”)

A *knowing* waiver must equate with an *informed* waiver. At the plea hearing, the district court, without the benefit of *Booker*, never informed Mr. that he was agreeing to be sentenced under an unconstitutional sentencing scheme. Under *Wessels*, Mr. 's uninformed waiver could not be, therefore, knowing and intelligent.

Mr. could not have understood that he was agreeing to receive an unconstitutional sentence under 18 U.S.C. § 3553(b)(1). As this Court stated in *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994), “[A] defendant can[not] fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right[s].” *Id.* at 732 (emphasis added). This is because “a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.” *Id.*

Accordingly, the uninformed waiver of a sentence imposed pursuant

to an unconstitutional sentencing regime does not bar Mr. from appealing the *Booker* error he raises here.

## CONCLUSION

For the foregoing reasons, the appellant, Mr. , respectfully requests that his sentence be vacated and the matter remanded for resentencing.

## REQUEST FOR ORAL ARGUMENT

Because of the significance of the issues presented in this appeal, Mr. respectfully requests that oral argument be granted in this case.

Respectfully submitted this 14th day of February, 2005.

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