

No. 04-\_\_\_\_\_

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

vs.

ALLEN M\_\_\_\_\_,  
Defendant-Appellant.

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On appeal from the United States District Court  
for the Eastern District of Wisconsin (Green Bay)  
Case No. 03-CR-\_\_\_\_

Honorable William C. Greisbach, United States District Judge, Presiding.

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**APPELLANT'S BRIEF AND REQUIRED SHORT APPENDIX**

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## DISCLOSURE STATEMENT

The undersigned, counsel for Defendant-Appellant, furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party or amicus the attorneys represent in the case: Allen M \_\_\_\_\_

2. Said party is not a corporation.

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Dated: March 4, 2005

TABLE OF CONTENTS

PAGE

DISCLOSURE STATEMENT . . . . . ii

TABLE OF AUTHORITIES . . . . . vi

CASES . . . . . vi

STATUTES . . . . . vii

OTHER AUTHORITIES . . . . . viii

JURISDICTIONAL STATEMENT . . . . . 1

ISSUES PRESENTED . . . . . 3

1. Should Mr. M\_\_\_\_\_’s case be remanded for resentencing, in light of *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory? . . . . . 3

2. Did the district court improperly base its finding that Mr. M\_\_\_\_\_ touched the victim underneath her clothes on the victim’s statement to an investigator which was unreliable because it was: 1) given with government involvement; (2) described past events; and (3) was not subjected to adversarial testing? Should Mr. Perry’s case be remanded in light of *Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (Jan. 12, 2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory? . . . . . 3

STATEMENT OF THE CASE . . . . . 4

STATEMENT OF FACTS . . . . . 6

I. Facts of the offense. . . . . 6

II. Guilty plea . . . . . 7

III. Sentencing . . . . . 8

A.	Presentence report and pleadings. ....	8
B.	Sentencing hearing .....	11
	SUMMARY OF ARGUMENT .....	13
	ARGUMENT .....	14
I.	Mr. M_____’s case should be remanded for resentencing, in light of <i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory. ....	14
A.	Standard of Review .....	14
B.	Argument .....	15
	The district court plainly erred when sentencing Mr. M_____, in light of <i>Booker</i> . ....	15
1.	There was error under <i>Booker</i> . ....	15
2.	The error was plain. ....	16
3.	The error affected Mr. M_____’s substantial rights. ...	17
4.	The <i>Booker</i> error seriously affects the fairness, integrity, and public reputation of judicial proceedings. ....	20

II. The district court improperly based its finding that Mr. M\_\_\_\_\_ touched the victim underneath her clothes on the victim's statement to an investigator which was unreliable evidence because it was 1) given with governmental involvement; 2) described past events; and 3) was not subject to adversarial testing. . . . . 22

A. Standard of Review . . . . . 22

B. Argument . . . . . 23

CONCLUSION . . . . . 27

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(a)(7)(C) . . . . . 28

CIRCUIT RULE 31(e) CERTIFICATION . . . . . 28

## TABLE OF AUTHORITIES

CASES	PAGE
<i>Blakely v. Washington</i> , ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) . . . .	15
<i>Emezuo v. United States</i> , 357 F.3d 703 (7th Cir. 2004) . . . . .	18
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990) . . . . .	24
<i>Johnson v. United States</i> , 520 U.S. 461 (1997) . . . . .	14,22
<i>Lilly v. Virginia</i> , 527 U.S. 116 (1999) . . . . .	24
<i>State v. Michaels</i> , 264 N.J. Super. 579; 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993) . . . . .	24
<i>United States v. Ameline II</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) . . . . .	21
<i>United States v. Barnett</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 2644 (6th Cir. Feb. 16, 2005) . . . . .	20
<i>United States v. Booker</i> , 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005) . . . . .	3,13-17,20-21,23,26
<i>United States v. Coffman</i> , 94 F.3d 330 (7th Cir. 1996) . . . . .	23
<i>United States v. Hughes</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 1189 (4th Cir. Jan. 24, 2005) . . . . .	21
<i>United States v. Jones</i> , 371 F.3d 363 (7th Cir. 2004) . . . . .	13,24-26
<i>United States v. LaBastida-Segura</i> , 2005 U.S. App. LEXIS 1835 (10th Cir. Feb. 4, 2005) . . . . .	15,21
<i>United States v. Milan</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 2161 (6th Cir. Feb. 10, 2005) . . . . .	19

<i>United States v. Ochoa</i> , 229 F.3d 631 (7th Cir. 2000) . . . . .	24
<i>United States v. Olano</i> , 507 U.S. 725 (1993) . . . . .	14
<i>United States v. Oliver</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 1623 (6th Cir. Feb. 2, 2005) . . . . .	21
<i>United States v. Paladino</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) . . . . .	14,16,18,19,21,22
<i>United States v. Ranum</i> , ___ F.Supp.2d ___, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005) . . . . .	17
<i>United States v. Saunders</i> , 129 F.3d 925 (7th Cir. 1997) . . . . .	22
<i>United States v. Shelton</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 3290 (11th Cir. Feb. 25, 2005) . . . . .	15
<i>United States v. Solis</i> , 923 F.2d 548 (7th Cir. 1991) . . . . .	22
<i>United States v. Westbrook</i> , 986 F.2d 180 (7th Cir. 1993) . . . . .	24,25
<i>United States v. Williams</i> , 3__ F.3d ___, 2005 U.S. App. LEXIS 3198 (2nd Cir. Feb. 23, 2005) . . . . .	20

**STATUTES**

18 U.S.C. § 1153(a) . . . . .	1,4
18 U.S.C. § 2244(a)(1) . . . . .	1,4
18 U.S.C. § 2244(c) . . . . .	1,4
18 U.S.C. § 3231 . . . . .	1
18 U.S.C. § 3553(a) . . . . .	15,17
18 U.S.C. § 3553(b)(1) . . . . .	15

18 U.S.C. § 3742(a)(1) .....	1
18 U.S.C. § 3742(a)(2) .....	1
18 U.S.C. § 3742(e) .....	15
28 U.S.C. § 1291 .....	1
28 U.S.C. § 1294 .....	1

**OTHER AUTHORITIES**

Federal Rule of Appellate Procedure 4(b) .....	5
Federal Rule of Criminal Procedure 18 .....	1
U.S.S.G. § 4B1.5 .....	4,7,8
Nancy E. Walker, <i>Children as Victims and Witnesses in the Criminal Trial Process: Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility</i> , 65 Law & Contemp. Prob.149 (2002) .....	24

## JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to Title 18 U.S.C. Section 3231, which provides exclusive jurisdiction of offenses against the United States, and Fed.R.Crim.P. 18. The information charged: appellant, Allen M\_\_\_\_\_, with one count of being a Native American who knowingly engaged in sexual contact with a minor who was less than 12 years old. (18 U.S.C. 2244(a)(1) & (c), 1153(a).)

This appeal is from a final judgment of conviction and sentence. The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction pursuant to 28 U.S.C. sections 1291 and 1294 and 18 U.S.C. sections 3742(a)(1) and (2) and is based on the following particulars:

- i. Date of entry of judgment sought to be reviewed: judgment of conviction and sentence imposed in this case on January 30, 2004 (CR 24, App. 16-21<sup>1</sup>.)
- ii. Filing date of motion for new trial: N/A
- iii. Disposition of motion and date of entry: N/A

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<sup>1</sup> CR is used as an abbreviation for the district court clerk's record of Mr. M\_\_\_\_\_ case. PT is used as an abbreviation for the reporter's transcript of Mr. M\_\_\_\_\_ Rule 11 or plea hearing. ST is used as an abbreviation for the reporter's transcript of the sentencing hearing. PSR is used as an abbreviation for the probation officer's presentence report. App. is used as an abbreviation for the appendix to this brief.

iv. Filing date of notice of appeal: February 4, 2004. (CR 25, App. 1-2.)

## ISSUES PRESENTED

1. Should Mr. M\_\_\_\_\_’s case be remanded for resentencing, in light of *United States v. Booker*, 5\_\_ U.S. \_\_\_, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory?
2. Did the district court improperly base its finding that Mr. M\_\_\_\_\_ touched the victim underneath her clothes on the victim’s statement to an investigator which was unreliable because it was: 1) given with government involvement; (2) described past events; and (3) was not subjected to adversarial testing?

## STATEMENT OF THE CASE

This is a direct appeal of a criminal conviction and sentence.

On August 12, 2003, a grand jury in the Eastern District of Wisconsin returned an indictment charging appellant, Allen M\_\_\_\_\_, with one count of being a Native American who knowingly engaged in sexual contact with a minor who was less than 12 years old. (18 U.S.C. 2244(a)(1) & (c), 1153(a); CR 5.)

On October 9, 2003, Mr. M\_\_\_\_\_ pled guilty, pursuant to a plea agreement. He did not waive his right to appeal. (CR 20; PT 2-15; App. 3-15.)

In his presentence report, the probation officer recommended that Mr. M\_\_\_\_\_’s base offense level be 32, based on a finding that he was a repeat and dangerous sex offender within the meaning of U.S.S.G. 4B1.5. He also recommended that Mr. M\_\_\_\_\_ be given a three-level reduction for acceptance of responsibility. (PSR 5-6.) The probation officer found that Mr. M\_\_\_\_\_ would have been in criminal history category three, but the application of 4B1.5 meant that he was in category five. (PSR 6-10.)

On January 22, 2004, the district court held a sentencing hearing. The court adopted the facts and offense level calculation in the presentence report because there were no objections to them. (ST 3-5.) Mr. M\_\_\_\_\_’s trial counsel then

argued for a sentence at the low end of the guidelines range. (ST 7-16.) The court then sentenced Mr. M\_\_\_\_\_ to a term of 164 months and 19 days imprisonment, concurrent with his remaining tribal court sentence for the same offense. The court also sentenced him to a term of three years of supervised release, following his incarceration. In addition, the court ordered Mr. M\_\_\_\_\_ to pay a \$100 special assessment. (CR 24; ST 21-25; App. 16-21, 33-37.)

Mr. M\_\_\_\_\_ filed a timely notice of appeal on February 4, 2004, pursuant to F.R.A.P. 4(b). (CR 25, App. 1-2.)

## STATEMENT OF FACTS

### I. Facts of the offense.

In September, 2002, Mr. M\_\_\_\_\_ needed a place to stay and moved in with his sister-in-law, Theresa. Around the end of October, Theresa began to suspect that her eight year old daughter, Jane Doe, was being abused by Mr. M\_\_\_\_\_. She asked Jane about this and Jane denied it. Theresa then confronted Mr. M\_\_\_\_\_ with her suspicions. He did not admit or deny her allegations. Mr. M\_\_\_\_\_ moved out of Theresa's home the same day. (CR 20 p. 2; PT 13-15; App. 4, 23-25.)

In late November, Jane's father, Robert, called Menominee County Social Services and said that his sixteen year old daughter told him that Mr. M\_\_\_\_\_ assaulted Jane. Menominee Tribal Police Investigator Scott Wouters then interviewed Jane. Jane told Wouters that Mr. M\_\_\_\_\_ had been drinking and came to tuck her into bed. She said that he began to rub her ~potty™ and tried to put his finger inside her. Jane said that she yelled at him to stop and then ran to tell her Mom. She said that her mother then kicked Mr. M\_\_\_\_\_ out of the house. Jane also said that Mr. M\_\_\_\_\_ had done this about five times before at various places in the home. The results of a medical examination on December 12, 2002 were ~consistent with, although not

diagnostic of abuse.<sup>TM</sup>(CR 20 pp. 2-3; PT 13-14; App. 4-5, 23-24.)

Mr. M\_\_\_\_\_ told an F.B.I. agent that he touched Jane on her vagina and buttocks on four separate occasions. He said that normally this occurred over her outer clothing, but one time he rubbed his fingers over her panties and may have made a very slight penetration. (CR 20 p. 3; PT 13-14; App. 5, 23-24.)

## **II. Guilty plea.**

On October 9, 2003, Mr. M\_\_\_\_\_ pled guilty, pursuant to a plea agreement. The parties disagreed about the guideline that would apply to Mr. M\_\_\_\_\_’s offense, without consideration of his criminal history. However, they agreed that U.S.S.G. § 4B1.5 would apply to increase Mr. M\_\_\_\_\_’s sentence. The government also agreed to recommend a three level reduction for acceptance of responsibility. In addition, the government agreed to recommend a sentence within the guideline range. (CR 20; PT 2-15; App. 3-15.)

### III. Sentencing

#### A. Presentence report and pleadings.

In his presentence report, the probation officer recommended that Mr. M\_\_\_\_\_’s base offense level be 32, based on a finding that he was a repeat and dangerous sex offender within the meaning of U.S.S.G. § 4B1.5 because he had a previous conviction for the same offense. He also recommended that Mr. M\_\_\_\_\_ be given a three-level reduction for acceptance of responsibility. (PSR 5-6.) The probation officer found that Mr. M\_\_\_\_\_ would have been in criminal history category three, but the application of § 4B1.5 meant that he was in category five. (PSR 6-10.)

Mr. M\_\_\_\_\_ was initially sentenced to 18 months federal imprisonment, on October 9, 1996, for a previous sexual contact offense. In that case, Mr. M\_\_\_\_\_ touched the victim’s buttocks over her clothes. (PSR 8.) On December 18, 1998, Mr. M\_\_\_\_\_’s supervised release was revoked for: missing urine tests; testing positive for marijuana; failing to comply with mental health treatment; and failing to report to his probation officer on a weekly basis. (PSR 9.) The court sentenced Mr. M\_\_\_\_\_ to an additional 19 months imprisonment for these violations. (PSR 8.) During his second term of supervised release, Mr. M\_\_\_\_\_ had trouble coming up with a viable home

plan. He spent a lot of time living in halfway houses. He was even living at Rock Valley Community Correctional Center because he was unable to find a residence. He received several discipline reports there for infractions that included: failing to attend weekly counseling sessions, possession of a widget, and possession of sexually explicit magazines. These infractions formed the basis for another revocation of supervised release on July 13, 2000. The court imposed an additional five months of imprisonment with no remaining supervised release after this revocation. (PSR 8-9.)

Mr. M\_\_\_\_\_ was 36 years old at the time of this offense. He had lived with his parents most of his life before they died. (PSR 12.) He had also lived on the Menominee Indian Reservation for most of his life. (PSR 13.)

Mr. M\_\_\_\_\_’s father was accused of sexually abusing his grandchildren. The children were then removed from the home. (PSR 12.) One of Mr. M\_\_\_\_\_’s brothers, Robert, was convicted of sexually abusing his step-children and was on federal supervised release. Robert is the father of the victim in this case. (PSR 13.)

Prior to his arrest by tribal police, Mr. M\_\_\_\_\_ was living with friends and moving from house to house throughout the week. (PSR 14.)

Mr. M\_\_\_\_\_ had a bad motorcycle accident in 1991. His hip, pelvis, and spine were broken. He was also treated for neurogenic bowel and bladder, which required intermittent catheterizations, in addition to a condom catheter placement. In March, 1994. Mr. M\_\_\_\_\_ reported constant pain in his back and intermittent pain in his hips and knees. He also stated that he did not have any urinary control and had difficulty with defecation. He was wearing a urinary bag at that time. (PSR 14.) Mr. M\_\_\_\_\_ wore a urinary bag until 2001 and now has to catheterize himself to urinate. (ST 8.)

Mr. M\_\_\_\_\_ received his GED in 1983. He completed college carpentry courses in 1995 and earned a 3.43 grade point average. (PSR 16.)

Mr. M\_\_\_\_\_ filed a sentencing memorandum in which he argued for a sentence at the low end of the guideline range and asked the court to recommend that he be placed at a Federal Medical Center. He argued that his medical condition would make life in prison more difficult for him. In addition, he argued that his sentence should be concurrent with his tribal sentence for the same offense and his sentence should be adjusted to account for the time that he had already served in the tribal jail. (CR 22.)

**B. Sentencing hearing**

On January 22, 2004, the district court held a sentencing hearing. The court adopted the facts and offense level calculation in the presentence report because there were no objections to them. (ST 3-5.) Mr. M\_\_\_\_\_ & trial counsel then argued that the court should impose a sentence of 140 months, which was the low end of the guideline range, because it was ~ sufficient, but not greater than necessary. <sup>TM</sup>Counsel reiterated the arguments that he made in his sentencing memorandum. (ST 7-16.) He also argued that the fact Mr. M\_\_\_\_\_ touched the victim over her clothes without any apparent advance planning meant the offense was less serious than other offenses of the same type. (ST 11-12, App. 27-28.)

However, the court concluded that a sentence toward the high end of the guideline range was appropriate. It read the child & statement in the presentence report as saying that Mr. M\_\_\_\_\_ touched her directly, rather than over her clothing. Therefore, the court found that this was an aggravated offense. (ST 17-18, App. 29-30.) For the same reason, the court found that this was a more aggravated offense than Mr. M\_\_\_\_\_ & prior sexual contact offense. (ST 19-20, App. 31-32.) So, the court said it was imposing a higher sentence to emphasize the seriousness of the offense and protect the public. It then

sentenced Mr. M\_\_\_\_\_ to a term of 164 months and 19 days imprisonment, concurrent with his remaining tribal court sentence for the same offense.<sup>2</sup> (ST 21, App. 33.) The court also sentenced him to a term of three years of supervised release, following his incarceration. In addition, the court ordered Mr. M\_\_\_\_\_ to pay a \$100 special assessment. (CR 24; ST 21-25; App. 16-21, 33-37.)

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<sup>2</sup> This sentence accounted for the time that Mr. M\_\_\_\_\_ had already served on his tribal sentence. (ST 21, App. 33.)

## SUMMARY OF ARGUMENT

Mr. M\_\_\_\_\_ was sentenced under a mandatory set of Sentencing Guidelines. The Supreme Court has now made those Guidelines advisory, in order to comply with the Constitution, in *United States v. Booker*, 5\_\_ U.S. \_\_\_\_, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). Therefore, Mr. M\_\_\_\_\_ was sentenced under an illegal sentencing scheme. As a result, this Court should, at least, order a limited remand for the district court to indicate whether it would impose a lower sentence in a new sentencing hearing. However, the better course would be to order a full remand Mr. M\_\_\_\_\_ & case to the district court for resentencing.

In addition, the district court based its finding that Mr. M\_\_\_\_\_ touched the victim & skin on the victim & statement to an investigator that was contained in the presentence report and the plea agreement. This evidence was presumptively unreliable because it was ~ 1) given with government involvement; (2) describe[d] a past event; and (3) ha[d] not been subjected to adversarial testing.<sup>TM</sup> *United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004). Therefore, the court & erroneous reliance on this evidence made the resulting sentence unreasonable.

## ARGUMENT

I. **Mr. M\_\_\_\_\_’s case should be remanded for resentencing, in light of *United States v. Booker*, 5\_\_ U.S. \_\_\_\_, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because he was sentenced under a mandatory Guidelines scheme which the Supreme Court has now made advisory.**

A. **Standard of Review**

Mr. M\_\_\_\_\_ did not argue to the district court that it should have treated the Sentencing Guidelines as advisory. Therefore, this Court will only review his argument for plain error. *Johnson v. United States*, 520 U.S. 461, 465-466 (1997); *United States v. Paladino*, 3\_\_ F.3d \_\_\_\_, 2005 U.S. App. LEXIS 3291, \*23 (7th Cir. Feb. 25, 2005). This means that, unless the district court’s error should be presumed prejudicial, Mr. M\_\_\_\_\_ must show: (1) that there was an error; (2) that the error was plain or obvious; (3) that the error affected his substantial rights; and (4) that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 733-736 (1993).

In addition, the Supreme Court stated that, ~ in cases not involving a Sixth Amendment violation, whether 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.<sup>TM</sup> *United States v. Booker*, 125 S.Ct. at

769. Thus, the Court envisioned that some cases would require resentencing, as a result of this illegality, even though there was no Sixth Amendment violation.

*See also United States v. LaBastida-Segura*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1835 (10th Cir. Feb. 4, 2005) (remanding for resentencing even though there was no Sixth Amendment violation); *United States v. Shelton*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 3290 (11th Cir. Feb. 25, 2005) (remanding for resentencing, under plain error standard, after finding no Sixth Amendment violation).

## **B. Argument**

**The district court plainly erred when sentencing Mr. M\_\_\_\_\_, in light of *Booker*.**

### **1. There was error under *Booker*.**

In *United States v. Booker*, 125 S.Ct. 738, the Supreme Court held that the rule it stated in *Blakely* applies to the Federal Sentencing Guidelines. *United States v. Booker*, 125 S.Ct. at 746.

A separate majority of the Court then held that the solution to this problem was to sever and excise 18 U.S.C. 3553(b)(1) and 3742(e) from the remainder of the Sentencing Reform Act. *Id.* at 764. This means that sentencing courts are no longer bound by the Guidelines. Instead, [t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account.<sup>TM</sup>*Id.* at 767. In addition, courts must also consider the purposes of

sentencing set forth in 18 U.S.C. § 3553(a), including the need to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.<sup>TM</sup>*Id.* at 764-765.

Mr. M\_\_\_\_\_’s Guideline range was solely based on the elements of his current offense and one of his prior convictions. (PSR 5-6, ST 3-5.) Therefore, his sentence did not violate his rights under the Fifth and Sixth Amendments. However, the Court’s opinion in *Booker* shows that Mr. M\_\_\_\_\_ was sentenced under an illegal sentencing system when he was sentenced under mandatory Sentencing Guidelines. That was error. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*23.

**2. The error was plain.**

The district court’s error in sentencing Mr. M\_\_\_\_\_ is plain. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*23.

**3. The error affected Mr. M\_\_\_\_\_’s substantial rights.**

The district court’s error affected Mr. M\_\_\_\_\_’s substantial rights by depriving him of his right to be sentenced under a Constitutional sentencing scheme.

As noted above, under *Booker*, courts must still consider the Guidelines. However, they must also consider all of the purposes of sentencing set forth in 18 U.S.C. § 3553(a). *United States v. Booker*, 125 S.Ct. at 764-765, 767. “[W]here the guidelines conflict with other factors set forth in § 3553(a), courts will have to resolve the conflicts.” *United States v. Ranum*, \_\_\_ F.Supp. 2d \_\_\_, 2005 WL 161223, \*2 (E.D. Wis. Jan. 19, 2005). Thus, factors which mitigate a defendant’s culpability for a crime now have much greater importance to the determination of an appropriate sentence. Therefore, if the district court had been allowed to fully consider factors such as Mr. M\_\_\_\_\_’s physical condition and background it may have found that a shorter sentence was sufficient, but not greater than necessary to achieve the purposes of sentencing. (18 U.S.C. § 3553(a).)

This Court has now held that, in most cases, the appropriate way to determine if a defendant’s substantial rights were affected is to issue a limited remand of a case to a district court and ask it to make that determination by

saying whether it would reimpose the original sentence if it resentenced the defendant. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*32-\*34. This case falls under that procedure because the district court did not say that it would have imposed the same sentence even if the guidelines were merely advisory. Therefore, the court might have imposed a lower sentence if it did not think it was bound by the Guidelines. *Id.* at \*27-\*28. This would be especially true on remand, since as Mr. M\_\_\_\_\_ argues below (*infra*, pp. 22-26), the court should not have relied on the child's statement to the investigator as a reason to impose a higher sentence.

However, this Court should go further and fully remand Mr. M\_\_\_\_\_’s case to the district court for resentencing. This Court’s view of plain error in *Paladino* conflicts with its former rule that a sentence which is based on an incorrect guideline range is an error affecting substantial rights even when the district court might have imposed the same sentence under the correct range. *Emezuo v. United States*, 357 F.3d 703, 711 (7th Cir. 2004); *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*41-\*42 (Ripple, J., dissenting from denial of rehearing *en banc*).

In addition, this Court's procedure fails to assure that all of the factors which are now relevant to a district court's determination of a sentence will come to light before a district court makes its decision about whether resentencing is warranted. The evidence regarding those factors will usually be incomplete if a district court chooses not to conduct a new sentencing hearing. As a result, without a new sentencing hearing, the record will also be insufficient for this court to review the reasonableness of a sentence on appeal. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*45-\*46 (Kanne, J. dissenting from denial of rehearing *en banc*); *Id.* at \*38-\*39 (Ripple, J., dissenting from denial of rehearing *en banc*).

Moreover, this Court's solution to evaluating plain error improperly delegates its responsibility to independently evaluate plain error to the district court. *Id.* at \*42 (Ripple, J., dissenting from denial of rehearing *en banc*); *United States v. Milan*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2161, \*24-\*25 (6th Cir. Feb. 10, 2005).

The *Paladino* decision also ignores the fact the reasonableness of a sentence depends on the process by which the sentence is obtained, as well as the length of the sentence. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*45 (Kanne, J., dissenting from denial of rehearing *en banc*).

In contrast, the Sixth Circuit came to a better reasoned decision, than this Court, when it held that the deprivation of the right to be sentenced under a Constitutional sentencing scheme affected a defendant's substantial rights. *United States v. Barnett*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2644, \*24-\*36 (6th Cir. Feb. 16, 2005). *Barnett* held that courts should apply a rebuttable presumption of prejudice to *Booker* errors on appeal. *United States v. Barnett*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2644, \*26-\*34.

Therefore, the district court's error affected Mr. M\_\_\_\_\_ 's substantial rights by depriving him of his right to be sentenced under a Constitutional sentencing scheme.

**4. The *Booker* error seriously affects the fairness, integrity, and public reputation of judicial proceedings.**

Sentencing Mr. M\_\_\_\_\_ under an unconstitutional system also affected the fairness, integrity, or public reputation of judicial proceedings.

This Court has found that if the district court says, on limited remand, that it would impose a lower sentence then this satisfies the fourth, as well as the third, prong of plain error review. *Id.* at \*29-\*30, \*33-\*34. *See also United States v. Williams*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 3198, \*28 (2nd Cir. Feb. 23, 2005).

However, it would not be enough for this Court to say that the sentence imposed by the district court is reasonable irrespective of the error. That determination depends on the sentencing process as well as the length of the sentence. ~ Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to [this Court] performing the sentencing function [itself].<sup>TM</sup>*United States v. Hughes*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1189, \*17 fn. 8 (4th Cir. Jan. 24, 2005). See also *United States v. Oliver*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 1623, \*23 fn. 3 (6th Cir. Feb. 2, 2005); *United States v. LaBastida-Segura*, 2005 U.S. App. LEXIS 1835, \*6; *United States v. Ameline II*, 3\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 2032, \*20 (9th Cir. Feb. 9, 2005). This Court even noted the importance of the process when it said that, before *Booker*, ~ [a] conscientious judge--one who took the guidelines seriously whatever his private views--would pick a sentence relative to the guideline range.<sup>TM</sup>*United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*28.

Yet, this Court leaves open the possibility that a sentence which was imposed under an illegal process will be allowed to stand because a busy district judge says that the process did not affect the outcome.

Therefore, this Court should remand Mr. M\_\_\_\_\_’s case for resentencing under the now-advisory Guidelines. If this Court disagrees with Mr. M\_\_\_\_\_’s argument against its decision in *Paladino*, it should follow the limited remand procedure set forth in that case. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, \*32-\*34. First, however, this Court should decide Mr. M\_\_\_\_\_’s remaining issue for the guidance of the district court on remand.

**II. The district court improperly based its finding that Mr. M\_\_\_\_\_ touched the victim underneath her clothes on the victim’s statement to an investigator which was unreliable evidence because it was 1) given with governmental involvement; 2) described past events; and 3) was not subject to adversarial testing.**

**A. Standard of Review**

Mr. M\_\_\_\_\_ did not argue, in the district court, that the court could not base its factual finding on the victim’s statement to an investigator.

Therefore, this Court will only review his argument for plain error. *Johnson v. United States*, 520 U.S. at 465-466.

This Court has generally said that it can not review sentences within a guideline range. *See United States v. Solis*, 923 F.2d 548, 551-552 (7th Cir. 1991). However, the Court has also implied that an error which affected the district court’s choice of sentence within the range would still be appealable. *See United States v. Saunders*, 129 F.3d 925, 932-933 (7th Cir. 1997) (noting that district court

imposed the minimum sentence, in spite of error); *United States v. Coffman*, 94 F.3d 330, 337 (7th Cir. 1996) (finding that it was unreasonable to assume a judge's error in classifying other conduct as related affected the choice of sentence within the range). More importantly, sentences must now be reasonable irrespective of the Guidelines. *United States v. Booker*, 125 S.Ct. at 765-767. A sentence that is based on an unreliable factual determination is unreasonable. Therefore, if this Court reviews the reasonableness of the sentence in the first instance without first remanding this case for the district court to do so, it must also review the district court's findings in support of the sentence.

## **B. Argument**

Mr. M\_\_\_\_\_ 's plea agreement and pre-sentence report recited that the victim told an investigator that Mr. M\_\_\_\_\_ ~ began to rub her `potty -and tried to put his finger inside her.<sup>TM</sup> She did not explicitly say whether this touching occurred over or underneath her clothes. Mr. M\_\_\_\_\_ told an agent that he only touched the victim over her outer clothing or her panties. (CR 20 pp. 2-3; PT 13-14; PSR 2-3; App. 4-5, 23-24.) However, the court read the child 's statement as saying that Mr. M\_\_\_\_\_ touched her directly, rather than over her clothing. As a result, the court found that this was an aggravated offense and was a more serious offense than Mr. M\_\_\_\_\_ 's prior offense of

touching a child over her clothing. (ST 17-20, App. 29-32.) The court relied on this finding to support its decision to impose a sentence near the high end of the guideline range. (ST 21, App. 33.)

However, "[a] defendant has a due process right to be sentenced on the basis of accurate information." *United States v. Westbrook*, 986 F.2d 180, 182 (7th Cir. 1993). That did not happen in this case. This Court recently reiterated that "a 'very strong presumption of unreliability' attaches to statements that are: (1) given with government involvement; (2) describe past events; and (3) have not been subjected to adversarial testing." *United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004) (citing and quoting *United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000) and citing *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)). This danger is increased in the case of child witnesses. The possibility of false answers as the result of an interviewer's leading or suggestive questions, the child's confabulation, or other factors has been well documented. See *Idaho v. Wright*, 497 U.S. 805, 826-827 (1990) (finding, in Confrontation Clause context, that Idaho Supreme Court properly relied on presumptive unreliability of out-court statements and suggestive manner in which a doctor conducted the interview); *State v. Michaels*, 264 N.J. Super. 579; 625 A.2d 489, 511-515 (N.J. Super. Ct. App. Div. 1993) (citing cases and research); Nancy E. Walker, *Children as Victims and Witnesses in the*

*Criminal Trial Process: Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 Law & Contemp. Prob.149 (2002) (discussing problems with the reliability of child statements). The potential unreliability of the child's statement is further highlighted by the fact the part of her statement in which she said that she ran to her mother and told her what happened is inconsistent with her mother's statement. (CR 20 p. 2; PSR 2; App. 4.)

The report of the child's statement to the investigator falls into the category of presumptively unreliable statements. First, it was made with government involvement, since it was made during an interview with a tribal investigator. Second, the factual statements in the investigator's report described past events. Third, the child's statements in the report were not subject to adversarial testing. Therefore, the district court should have presumed that the child's statements to the investigator were unreliable. There was no evidence to rebut that presumption in this case. As a result, the court should not have considered the child's statements to the extent they contradicted Mr. M\_\_\_\_\_s own statements.

The error in this case was plain or obvious. Even before *Jones*, there was a requirement that evidence that was considered by a district court at sentencing be reliable. *United States v. Westbrook, supra*, 986 F.2d at 182. Therefore, the error

was plain at the time of Mr. M\_\_\_\_\_’s sentencing hearing. *Jones* simply makes the error even more obvious now.

The district court’s consideration of the child’s statement to the investigator also affected Mr. M\_\_\_\_\_’s substantial rights. Mr. M\_\_\_\_\_ had a substantial right to be sentenced only on the basis of reliable information. That did not happen when the court relied on the child’s statement to the investigator in support of its factual finding . (ST 17-21, App. 29-33.)

The use of the child’s statement to the investigator also seriously affects the fairness, integrity, and public reputation of judicial proceedings. It is unfair to sentence a defendant on the basis of evidence that is presumptively unreliable. Such a procedure also impugns the integrity and public reputation of judicial proceedings.

Therefore, this Court should reverse Mr. M\_\_\_\_\_’s sentence due to the district court’s improper reliance on the child’s statement to the investigator, even if it rejects his primary *Booker* argument. In addition, the court’s reliance on a presumptively unreliable statement as a reason for imposing a higher sentence makes Mr. M\_\_\_\_\_’s sentence unreasonable.

## CONCLUSION

For the reasons stated above, this Court should reverse Mr. M\_\_\_\_\_’s sentence and remand his case to the district court for resentencing.

Respectfully submitted  
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