

STATEMENT OF JURISDICTION

This is a direct appeal from a judgment in a criminal case entered by the United States District Court for the District of Massachusetts. Sentence was imposed on July 8, 2004 and judgment was entered on July 22, 2004 (D.E.101; Add.1)¹. A notice of appeal was filed on July 13, 2004 (D.E.100). This Court has jurisdiction pursuant to 28 U.S.C. §1291, 18 U.S.C. §3742 and Rule 4 of the Federal Rules of Appellate Procedure.

ISSUE PRESENTED FOR REVIEW

1. Whether the imposition of a mandatory Guidelines sentence in which the base offense level was increased over defendant's objection based on judicial fact finding by a preponderance of the evidence, violated his Sixth Amendment rights (as well as other newly instituted statutory rights) as set forth in *United States v. Booker*, ___U.S.___, 125 S.Ct. 738 (2005) and requires vacation of the sentence and a remand for resentencing?

STATEMENT OF THE CASE

A. Prior Proceedings

On August 9, 2001, a federal grand jury sitting in the District of Massachusetts returned a 16 count Indictment charging Morris Ware with three

¹ "D.E." refers to the District Court docket entries. "Add." refers to the Addendum to appellant's brief.

counts of making and subscribing false tax returns for the years 1995-1997 in violation of 26 U.S.C. §7206(1) (counts 1-3) and thirteen counts of aiding or assisting in the preparation and presentation of false tax returns for the years 1995-1997 in violation of 26 U.S.C. §7206(2) (counts 4-16) (D.E.1, pp.2-4). Ware pled not guilty.

On December 9, 2003, the district court (Tauro, J.) accepted a plea from Ware pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) (D.E.83). Ware was sentenced on July 8, 2004 under the Federal Sentencing Guidelines (Add.6; D.E.107). The District Court denied defendant's motion to limit their applicability pursuant to *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004) (Add.9-12,14; D.E.107, pp.4-7,9). He received a sentence of 21 months incarceration and a term of supervised release of one year (Add.2-3; D.E.101), although the court suggested that were it not constrained by the guidelines it would have imposed a lesser term of incarceration (Add,20; D.E.107, p.15).

A notice of appeal was timely filed (D.E.100).

B. Relevant Facts

The District Court agreed to accept an *Alford* plea on December 9, 2003 (D.E.83, pp.6-7). Judge Tauro engaged in a colloquy with Mr. Ware, setting out the statutory maxima for the charges, advising defendant of his Fifth Amendment

rights, the presumption of innocence and requirement of proof beyond a reasonable doubt, the right to a jury trial and the right to counsel who would have the opportunity to offer evidence and cross-examine witnesses at trial (*id.*, pp.7-13). The court then inquired into Mr. Ware's ability to think normally and whether he had had any alcohol that day (*id.*, pp.13-15). Mr. Ware consented to the entry of an *Alford* plea on all counts (*id.*, pp.15-16). He denied any promises or threats (*id.*, p.16).

The government presented a factual proffer, asserting that it would have proved at trial that defendant owned and operated a tax preparation business and filed (counts 1-3) or prepared (counts 4-16) returns containing material falsities in stating that certain amounts had been withheld for federal withholding or in inflating the amounts of federal withholding reported (*id.*, pp.17-19). The government made no proffer as to dollar amounts. Ware made no specific factual admissions of any kind. Indeed, the amount of the "loss" was not admitted, mentioned or discussed by any person at the hearing (*See id.*).

Ware was sentenced after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S.____, 124 S.Ct. 2531 (2004). He argued that *Blakely* applied to the Federal Sentencing Guidelines and that since amount of loss was not an element of the statutory offense and there had been no admission to, or finding of,

loss at the change of plea hearing, the court should follow one of two courses. Either the court could sentence defendant at the base offense level for the 26 U.S.C. §7206 offenses (using U.S.S.G. §2T1.1) with a two point upward adjustment because defendant was a tax preparer (see U.S.S.G. §2T1.4) or the court could conclude that without judicial fact finding the guidelines should be held inapplicable and the court could impose a sentence within the 26 U.S.C. §7206 statutory range of up to three years imprisonment on each count (Add.9-12; D.E.107, pp.4-7). The court declined to hold that *Blakely* applied to the sentencing guidelines, stating that he would “wait for the Supreme Court to make that pronouncement” (Add. 14; D.E.107, p.9).

The court concluded that it would adjust the offense upward by the amount of tax loss calculated from the figures alleged in the indictment (Add.15; D.E.107, p. 10). Defendant objected to consideration of the amount of loss alleged in the indictment as requiring judicial fact finding proscribed by *Blakely (id.)*. The court disagreed that it was engaged in fact finding because it saw no dispute on the record (Add.15-16; D.E.107, pp. 10-11). Defendant responded that it was an improper factual determination under *Blakely* because there had been no discussion of amount of loss or consent to any fact concerning loss at the time of the *Alford* plea (Add.16; D.E.107, p.11). The court rejected that argument. It also rejected

the government's contention that uncharged, allegedly relevant conduct should increase the amount of loss, stating that he had not "been persuaded by even a preponderance on that." (*id.*).

Counsel further argued that Ware's long history of mental health problems coupled with his substance abuse problem, his lack of criminal history prior to this case (defendant was 58) and the circumstances surrounding the investigation and prosecution of the case took his case outside the heartland of the typical tax return preparation case and supported a downward departure to a sentence of 5-10 months incarceration to be followed by appropriate treatment on supervised release (Add.17-19; D.E.107, pp.12-14).

Although denying that motion, the court did state that "if things were different [if the sentencing era were different] I'd probably give him a year and three years of supervised release....I wish we were still in an era that I had lived through, which I think is a better era." (Add.20; D.E.107, p.15). After defendant's allocution, the court imposed a sentence of 21 months incarceration and a year of supervised release, the low end of the guidelines range he had calculated.

SUMMARY OF ARGUMENT

Morris Ware was sentenced under the mandatory Federal Sentencing Guidelines regime after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004) but before its decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). Over his *Blakely* objections, the district court imposed a sentence based, in part, on the use of judicial fact finding by a preponderance of the evidence to arrive at an offense level higher than that established by the facts admitted by the defendant. Under *Booker*, that process violated the Sixth Amendment to the United States Constitution.

The preserved Sixth Amendment error requires this Court to vacate defendant's sentence and remand the case for resentencing. First, the language in the *Booker* remedy majority opinion² addressing the applicability of the decision to cases on direct review, as well as the concepts of structural error, the presumption of prejudice for certain types of error, and harmless error, show that a Sixth Amendment *Booker* error is a structural error or one in which prejudice should be

² *Booker* produced two majorities : One (Justices Stevens, Scalia, Souter, Thomas and Ginsburg) addressed the Sixth Amendment violation (hereafter referred to as the rights majority); the other (Justices Breyer, O'Connor, Kennedy, Ginsburg and Chief Justice Rehnquist) addressed the remedy for the violation (hereafter the remedy majority). Justice Stevens wrote for the rights majority; Justice Breyer for the remedy majority.

presumed. The Sixth Amendment error affected the sentencing framework, resulting in a fundamental change in the sentencing process, both as to factors to be considered and the analysis to be employed with the remedial interpretation of the Sentencing Act. Prejudice cannot fully be determined on the existing record. Accordingly, the case should be remanded for resentencing under the new statutory sentencing/advisory Guidelines regime established in *Booker*.

Alternatively, if harmless error review is to be employed, the error here cannot be found to be harmless beyond a reasonable doubt. At sentencing, the district court indicated that it would likely have imposed a different sentence were it not for the mandatory Guidelines regime and imposed sentence at the low end of the guidelines range he felt bound to employ. Moreover, defendant sought a downward departure on the basis of a number of factors which the mandatory Guidelines regime viewed as not ordinarily relevant or prohibited. That is no longer the case and, under the new sentencing regime, those factors could be both presented and evaluated differently. Accordingly, the case should be remanded for resentencing even under a harmless error standard.

ARGUMENT

I. The Imposition of a Mandatory Guidelines Sentence, in Which the Base Offense Level Was Increased Based on Judicial Fact Finding by a Preponderance of the Evidence, Over Defendant’s Objection, Violated His Sixth Amendment Rights (as Well as Other Newly Instituted Statutory Rights) as Set Forth in *United States v. Booker*, 125 S.Ct. 738 (2005) and Requires Vacation of the Sentence and a Remand for Resentencing

A. The Sixth Amendment Violation Recognized in *United States v. Booker*

In *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), the Supreme Court held that mandatory application of the Federal Sentencing Guidelines as required under 18 U.S.C. §3553(b) violates the Sixth Amendment to the United States Constitution “because the proposed sentences were based on additional facts [beyond those found by a jury] that the sentencing judge found by a preponderance of the evidence” (*id.*, at 746). The Court reaffirmed its prior holdings that:

[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

(*id.*, at 756). *Booker* followed *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004) (in which the Court had found that application of a guidelines system in the State of Washington similar to the Federal Sentencing Guidelines violated a defendant’s Sixth Amendment right to have the statutory maximum sentence

determined solely by facts admitted by the defendant or reflected in a jury verdict) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (which had provided the predicate for *Blakely*).

These decisions, the Court stated, were based on two “basic precepts, firmly rooted in the common law”: 1) “...that the Constitution protects every criminal defendant ‘against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’” (*quoting In re Winship*, 397 U.S. 358, 364 (1970)) and 2) “that the ‘Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.’” (*quoting United States v. Gaudin*, 515 U.S. 506, 511 (1994))(*id.*, 125 S.Ct. at 748). Thus, in *Booker*, the district court’s reliance on judicial findings by a preponderance of the evidence as to relevant conduct to elevate the applicable guideline range above that determined by the jury’s verdict and its use of that higher range in imposing sentence under the mandatory Guidelines regime violated the Sixth Amendment to the United States Constitution.

B. The *Booker* Violation in This Case

Mr. Ware entered an *Alford* plea³ to charges of filing false tax returns and assisting in the preparation of false tax returns in violation of 26 U.S.C. §§7206(1) and (2). Monetary loss to the government is not an element of those offenses. *See, e.g., United States v. Boulerice*, 325 F.3d 75, 79-80 (1st Cir. 2003) (elements of offense under 26 U.S.C. §7206(1) are: 1) making federal income tax return for year in question which defendant verified to be true; 2) tax return was false as to material matter; 3) defendant signed return willfully, knowing it was false; and 4) return contained written declaration it was made under penalty of perjury); *United States v. Monteiro*, 871 F.2d 204, 208 (1st Cir. 1989) (elements of offense under 26 U.S.C. §7206(2) are: 1) aiding/assisting the preparation/presentation of false or fraudulent tax documents; 2) doing the act with the knowledge that the document was false or fraudulent; and 3) doing the acts willfully⁴); *United States v. Cohen*, 617 F.2d 56, 58 (4th Cir. 1980) (“The statute does not require loss of revenue as a an element of proof of violation of §7206(2)”).

³ An *Alford* plea is a variant of a guilty plea in which the defendant does not contest the entry of a guilty finding by the court, although he does not admit guilt. *See, e.g., North Carolina v. Alford*, 400 U.S. 25, 33-38 (1970); *United States v. Morrow*, 914 F.2d 608 (4th Cir. 1990)

⁴ There may also be a filing requirement.

Mr. Ware did not admit to any amount of loss at the change of plea hearing (*see*, D.E.83). The government's proffer of the facts it would prove if the case proceeded to trial did not even mention any amount of loss (*id.*, pp.17-19). Since a defendant who enters an *Alford* plea is not required to admit guilt (*United States v. Bierd*, 217 F.3d 15, 17, n.1 (1st Cir. 2000)), he is certainly not required to admit to facts not constituting elements of the offense. Accordingly, the court's entry of a guilty finding without objection from the defendant cannot be viewed as a finding of, or an admission to, any amount of loss. In sum, there was nothing at the change of plea hearing that could be construed as an express or tacit admission by the defendant to any amount of loss, much less an amount which could be calculated from the allegations in the indictment.

The court below viewed the Guidelines as mandatory (Add.14; D.E.107, p.9) and determined the applicable offense level by upwardly adjusting the base offense level for amount of loss and for defendant's status as a tax preparer⁵ (Add.15; D.E.107, p.10). While the court stated that it was not engaging in fact finding in determining the amount of loss for upward adjustment purposes because its calculations were based on the numbers in the indictment (Add.15-16; D.E., pp.10-

⁵ There was no objection to the adjustment for Ware's status as a tax preparer. There was an objection to the adjustment for amount of loss.

11), Ware maintains that the court did engage in such an enterprise since there was no admission to those numbers. Indeed, he objected to the adjustment on that basis in both his sentencing memorandum and at sentencing (see, D.E. 97; Add.15-16; D.E.107, pp.10-11).

Applying the rights majority opinion in *Booker*, the sentence in this case, imposed under the mandatory Guidelines regime based on judicial fact finding by a preponderance of the evidence which resulted in a sentence higher than that justified by facts admitted to by the defendant, violated the Sixth Amendment. A sentence consonant with the Sixth Amendment would have been limited to one within the Guidelines range generated by offense level 8 and criminal history level I (Ware had no prior criminal convictions) or a range of 0-6 months. Instead, the court used an offense level 16 with a range of 21- 27 months and defendant received a sentence of 21 months - the bottom of that range.

C. The Preserved Sixth Amendment Violation Requires Remand For Resentencing

1. The Sixth Amendment Violation Was Preserved

As this Court stated in *United States v. Antonakopoulos*, ___F.3d___, 2005 WL 407365 *6 (1st Cir. 2005) (addressing effect of unpreserved *Booker* error), a *Booker* error is preserved “if the defendant below argued *Apprendi* or *Blakely* error or that the Guidelines were unconstitutional.” Here, defendant objected to judicial

fact finding by a preponderance of the evidence to increase the Guidelines offense level above that justified by the facts admitted by the defendant or, alternatively, to the use of the Guidelines if the court were to engage in fact finding, as unconstitutional under *Blakely* (D.E.107, pp.2-7, 10-11). Accordingly, Ware's claim of Sixth Amendment error is preserved . He submits that whether this error is viewed as structural error, error to which a presumption of prejudice should be applied, or error which should be reviewed for harmless error, this Court should vacate his sentence and remand the case for resentencing under the new statutory sentencing/advisory Guidelines regime announced by the Supreme Court in its remedial interpretation of the Sentencing Act in *United States v. Booker, supra*.

2. The Sixth Amendment Error Recognized in *Booker* is a Structural Error or One in Which Prejudice Should be Presumed

Booker created a sea change in federal sentencing through its selection of a remedy for the Sixth Amendment violation arising from the use of judicial fact finding under the Guidelines to increase a sentence above that authorized by jury findings or a defendant's admission. The remedy majority chose to sever and excise the statutory provision making the Guidelines mandatory (18 U.S.C. §3553(b)(1)) and another with critical cross references to it (18 U.S.C. §3742(e)). The modified statute "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, *see* 18 U.S.C.A.

§3553(a)(4)(Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* §3553(a)(Supp. 2004)” (*Booker, supra*, 125 S.Ct. at 756-757).

The remedy majority concluded that “both the Sixth Amendment holding and [the] remedial interpretation of the Sentencing Act” apply to all cases on direct review (*id.*, at 769). It recognized that not every sentence gives rise to a Sixth Amendment violation and suggested that not every appeal would lead to a new sentencing hearing (*id.*, at 769). It further explained 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.”(*id.*, at 769)(emphasis added). Implicit in this statement is the recognition that harmless error review does *not* apply to cases that *do* involve a Sixth Amendment *Booker* violation; rather, in such cases there is either structural error or a presumption of prejudice.⁶ Indeed, after

⁶ Defendant recognizes that this Court in *Antonakopoulos* concluded that *Booker* error was not structural (2005 WL 407365 *9, fn.11). However, he suggests that this conclusion should be reconsidered in light of the analysis set forth in the body of this brief and in light of the following. First, the *Booker* error is not simply sentencing under a mandatory rather than an advisory Guidelines system, but judicial fact finding by a preponderance of the evidence to establish a mandatory guidelines range above that authorized by a jury’s findings or defendant’s admission. The interpretation of the Sentencing Act effectively transforming the Guidelines from mandatory to advisory is a remedy for the

affirming the conclusion that Booker’s sentence violated the Sixth Amendment because “the District Court applied the Guidelines as written and imposed a sentence higher than the maximum authorized solely by the jury’s verdict” the Court affirmed the remand to the District Court for resentencing without analysis for prejudice.⁷

Analysis of the concepts of structural error, the presumption of prejudice for

constitutional flaw found in the mandatory Guidelines regime; it is not the flaw itself. Second, the decision did not discuss Justice Breyer’s limitation of the application of harmless error analysis to cases not involving a Sixth Amendment violation, a limitation which supports the conclusion that a Sixth Amendment *Booker* violation (as distinct from a remedial interpretation violation) is an error where prejudice need not be shown or is presumed. Third, while the denial of the Sixth Amendment rights recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Faretta v. California*, 422 U.S. 806 (1975) are both now understood as structural errors, there was no discussion in those cases of whether a showing of prejudice was required for reversal.

⁷ While most of the reported post-*Booker* cases to date have evaluated sentencing issues under the plain error standard of review, courts that have addressed preserved claims have deemed a remand for resentencing necessary. Preserved Sixth Amendment claims have simply been remanded with no discussion of prejudice. See, e.g., *United States v. Coffey*, 395 F.3d 856,861(8th Cir. 2005) (“...defendants...who have preserved the issue are entitled to new sentencing proceedings.”; no analysis of prejudice); *United States v. Fox*, 396 F.3d 1018 (8th Cir. 2005); *United States v. Sdoulam*, ___F.3d___, 2005 WL 474337 (8th Cir.2005); *United States v. Ordaz*,___F.3d___, 2005 WL 418533 (3rd Cir. 2005); *United States v. Jones*, ___F.3d___, 2005 WL 486675 (6th Cir. 2005). A preserved claim without a Sixth Amendment violation was remanded for resentencing where the court could not find the error in using the guidelines as mandatory to be harmless. *United States v. Labastida-Segura*, 396 F.3d 1140 (10th Cir. 2005).

certain types of error and harmless error further supports the conclusion that remand is necessary without a showing of prejudice where, as here, a Sixth Amendment *Booker* violation has been preserved. The Supreme Court has recognized that in cases presenting a limited class of errors – a “structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself” – assessment of prejudice is not necessary; reversal is automatic (*Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Such structural errors render the proceedings in which they occur fundamentally unfair and often result in a situation where precise prejudice cannot be readily assessed or quantified.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the provision of an unconstitutional reasonable doubt instruction resulting in the denial of the right to a jury verdict of guilt beyond a reasonable doubt was held to be in the class of “structural defects in the constitution of the trial mechanism, which defy analysis by “harmless-error” standards,” (*id.*, at 281), thereby requiring reversal without consideration of prejudice. The error effectively resulted in the deprivation of the right to a jury trial “with consequences that are necessarily unquantifiable and indeterminate, [which] unquestionably qualifies as ‘structural error.’” (*id.*, at 282).

Here, the Sixth Amendment error and the remedial interpretation of the

Sentencing Act employed affect the entire framework within which sentencing occurs and the error should be viewed as structural. The pre-*Booker* mandatory Guidelines sentencing regime not only attached determinate consequences to particular judicial fact finding, but precluded and/or severely limited consideration of a number of factors which may be considered in the post-*Booker* §3553(a) statutory sentencing/advisory Guidelines regime.⁸ Moreover, that wider array of factors is now evaluated in a broader context. For example, §3553(a) directs the district court to impose a sentence “sufficient but not greater than necessary to comply with the purposes set forth in paragraph 2 [of the statute]”. Mandatory use of the Guidelines might have precluded a judge from giving that provision full effect.

With the sweeping changes in the sentencing regime, a defendant, the government and a court of appeals can, in most instances, do no more than

⁸ For example, under the more holistic remedial interpretation sentencing regime imposed by the *Booker* remedy majority, factors such as the age of the defendant, education, vocational skills, mental and emotional condition, physical condition, drug or alcohol dependence, gambling addiction, employment record, family ties and responsibilities, socio-economic status, military, civic, charitable or public service, prior good works, disadvantaged upbringing – all of which are either not ordinarily relevant to or precluded from consideration in sentencing under the guidelines (see U.S.S.G. §5H1.1-§5H1.12) – may be considered in determining the appropriate sentence to be imposed under 18 U.S.C. §3553(a) as well as the other factors specifically set forth in the statute.

speculate as to what a district court would have done had it imposed a sentence after a full presentation of all facts now relevant to sentencing under §3553(a) but not previously presented to a court operating under the mandatory Guidelines regime and after evaluation of that more fulsome presentation employing all of the sentencing standards set forth in the statute. The sentencing regime change also means that in most instances the district court record will not be adequate for this Court to conduct an appropriate review of its impact.

In other instances where district court records have been inadequate, this Court has declined to review an issue until an appropriate record has been established in the district court. For example, in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995), the government argued that the district court's exclusion of evidence on one ground should be upheld on grounds not previously addressed in the district court. Stating "[w]e are unable to address these arguments on the present record" (*id.*, at 134), this Court remanded the case to the district court for a hearing and findings on the issues. As discussed in *United States v. Colon-Torres*, 382 F.3d 76, 84-85 (1st Cir. 2004), this Court generally declines to consider ineffective assistance of counsel claims brought on direct appeal because "[o]ften the record is not sufficiently developed to allow adequate consideration of the issue on appeal, and district courts are in a better position to adduce the relevant

evidence [in a proceeding under 28 U.S.C. §2255]”. In other instances, this Court remands to the district court for an evidentiary hearing where the record is insufficiently developed but contains “indicia of ineffectiveness”. *See also, Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472 (1st Cir. 2000) (Court declined to address a due process issue because the record was not sufficiently developed and remanded the case on other grounds). Similarly, here, remand rather than speculation is appropriate.

The Supreme Court has also recognized without specifying that, even in the context of plain error, there are “errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice” (*United States v. Olano*, 507 U.S. 725, 735 (1993)). This Court has also recognized such a presumption. *See, e.g., United States v. Alba-Pagan*, 33 F.3d 125,130 (1994) (denial of the right to allocution required remand without an inquiry into prejudice because the impact of the omission on a discretionary decision “is usually enormously difficult to ascertain.”); *United States v. Burgos-Andujar*, 275 F.3d 23 (1st Cir. 2001) (recognizing same point) . *See also, United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002) (presumptive prejudice from violation of F.R.Cr.P. 43(b)).

If a presumption of prejudice is required because of the difficulty of determining the impact of the right to allocution on a discretionary decision, the

same presumption of prejudice must be employed here. The right to present an array of factors not previously presented because not previously relevant or outright prohibited, or to present factors in a different context because they now carry different weight certainly possesses at least the same potential for impact on a discretionary decision as the right to allocute. As the court stated in *United States v. Crosby*, 2005 WL 240916 *28-29 (2nd Cir. 2005), it is “impossible to tell what considerations counsel for both sides might have brought to the sentencing judge’s attention had they known that they could urge the judge to impose a non-Guidelines sentence.” See also, *United States v. Barnett*, 2005 WL 357015 (6th Cir. 2005) (remanding a plain error, remedial interpretation violation for resentencing in light of *Booker*, because the use of guidelines as mandatory rather than advisory required application of a presumption of prejudice even in the absence of a Sixth Amendment violation). Recognizing the “fundamental alteration of the sentencing process brought about by *Booker*’s remedial holding” (*id.*, at 357015 *10), and the difficulties inherent in attempting to demonstrate that the sentence would have been different under an advisory framework where the defendant could have presented and the court could have considered facts and circumstances not relevant or carrying different potential impact in the mandatory guidelines regime (*id.*, at 357015 *10-11), the *Barnett* court concluded that the

affect on substantial rights required by the third prong of the *Olano* plain error test could be met by a presumption of prejudice.⁹

Review for harmless error, in contrast, has generally been employed in cases involving “error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” (*Arizona v. Fulminante, supra*, 499 U.S. at 307-308). *See, e.g., Chapman v. California*, 386 U.S. 18 (1967)(constitutionally flawed introduction of coerced confession). *See also*, the discussion in *Sullivan v. Louisiana, supra*, rejecting the application of harmless error analysis because, in the absence of a jury verdict of guilty beyond a reasonable doubt the requisite comparative analysis could not be made; “the question whether the *same* verdict of guilty beyond a reasonable doubt would have been rendered absent the constitutional error is utterly meaningless.” It would not be sufficient for an appellate court to conclude that a jury would surely have found the defendant guilty beyond a reasonable doubt. “The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action...” (*Sullivan, supra*, 508

⁹ The court noted that this was not an irrebuttable presumption (2005 WL 357015 *12), but found nothing to rebut the presumption in the case before it.

U.S. at 280). Similarly here, in the absence of a constitutionally valid sentence, it is not sufficient for this Court to speculate that the district court would have imposed the same sentence in a constitutionally valid sentencing proceeding of a substantially different nature.

D. Even if Subject to Harmless Error Review, Under the Facts and Circumstances of This Case, The Preserved *Booker* Sixth Amendment Violation Cannot Be Found Harmless

Remand for resentencing is required under the facts and circumstances of this case even if this Court concludes that the nature of the error does not require either automatic remand or a presumption of prejudice. The error here is a Sixth Amendment error as well as a remedial interpretation error. Ware presented his claim of Sixth Amendment error in the district court, preserving it for review in this Court. In *Chapman v. California*, 386 U.S. 18, 22 (1967) the Supreme Court recognized that, while “there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction”, “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” (*id.*, at 24).

That heavy burden cannot be met here. In this case, the statements of the

district court at sentencing indicate that it would likely have imposed a different sentence were it not for the mandatory Guidelines regime (Add.20; D.E.107, p.15).

As this Court stated in *United States v. Antonakopoulos, supra*, 2005 WL at 407365 *10, a district court's statement that but for the guidelines he/she would have sentenced differently "is a powerful argument for remand" even under the less defendant-friendly plain error standard of review. Mr. Ware was sentenced at the low end of the guidelines range deemed applicable by the district court, a fact also held to support a remand under a plain error standard of review. *See, e.g., United States v. Labastida-Segura, supra*, 396 F.3d at 1143.

While defendant moved for an "outside the heartland" downward departure on the basis of mental health problems, substance abuse problems, lack of criminal history at the age of 58, and circumstances surrounding the investigation and prosecution of the case (*see*, Add.17-19; D.E.107, pp.12-14), the guidelines severely circumscribed the court's ability to consider those factors. Under the new statutory sentencing scheme with advisory guidelines, the court could well assess those facts and circumstances differently. Defendant might also present them differently and/or add to them. The potential for assessing certain circumstances in a manner different than that available under the mandatory Guidelines regime has also been recognized as supporting remand for resentencing under the plain

error standard of review. *See, e.g., United States v. Antonakopoulos, supra;*
United States v. Crosby, supra; United States v. Barnett, supra.

CONCLUSION

For the foregoing reasons, defendant submits that this Court should vacate his sentence and remand the case to the district court for resentencing under the appropriate legal standards.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Judith H. Mizner, hereby certify that I have this date served Appellant Morris Ware's Brief upon the United States by mailing copies thereof, first class postage prepaid, to AUSA Dina Chaitowitz, United States Attorney's Office, John Joseph Moakley Courthouse, Suite 9200, 1 Courthouse Way, Boston, MA 02110 and Brian D. Galle, Esq., Criminal Appeals and Tax Enforcement Policy Section, Tax

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Dated: March 4, 2005