

No. 03-_____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ADAM C. C_____,
Defendant-Appellant.

On appeal from the United States District Court
for the Southern District of Indiana (Indianapolis)
Case No. 02-CR-123
Honorable David F. Hamilton, United States District Judge, Presiding.

APPELLANT'S SUPPLEMENTAL BRIEF

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ISSUE PRESENTED

Does *United States v. Booker*, 5__ U.S. ____, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), require that Mr. C_____ be resentenced because the trial court improperly based his sentence on facts that were not either proven to a jury beyond a reasonable doubt or admitted by him?

STATEMENT OF THE CASE

The statement of the case is fully set forth in appellant, Adam C_____’s opening and first supplemental briefs.

On February 9, 2005, this Court ordered Mr. C_____ to file a supplemental brief addressing the Supreme Court’s decision in *United States v. Booker*, 5__ U.S. ____, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), by February 23, 2005.

STATEMENT OF FACTS

Many of the facts are contained in the statement of facts in Mr. C_____’s initial opening brief. The additional relevant facts are set forth below.

I. Pre-sentence pleadings and facts regarding Mr. C_____’ background.

Mr. C_____ was born on July 3, 1978. (PSR¹ 2.)

His mother frequently abused him as a child. She hit him with many objects. This included one time when she beat him with an extension cord, when he was seven years old, so bad that it left bruises and lumps on his back, buttocks, arm, and side. Adam did not know his father. (PSR 13.)

¹ CR is used as an abbreviation for the district court clerk’s record of Mr. C_____’s case. 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. AOB is used as an abbreviation for appellant’s opening brief. App. is used as an abbreviation for the appendix to appellant’s opening brief.

In 1985, Adam's mother left the apartment she shared with her boyfriend after an argument. She took Adam and his sister, Amanda, with her. The boyfriend then hit all three of them with his car. (PSR 13.)

In January, 1986, the Marion County, Indiana Welfare Department filed a petition alleging that Adam was a child in need of services. In April, 1986, a juvenile court ordered Adam to remain in a children's home. The court later made him a ward of the state because his mother continually missed court hearings. (PSR 13.)

Adam reported that he was sexually abused by an older boy while he was in foster care. He beat his foster-parents with a broom, while they were sleeping because they did not believe that he had been abused. (PSR 13.)

Adam was then sent to live with an aunt and uncle. He reported being abused by his aunt. His mother had visitation rights, but rarely visited. Adam's aunt and uncle reported that, when she did visit, she was mentally and emotionally abusive to Adam. (PSR 14.)

A December 31, 1986 mental health report indicated that Adam suffered from ~longstanding severe and inappropriate parental mismanagement and discipline, including physical abuse, and outright parental rejection.TM He also suffered from the lack of an appropriate male adult figure in his home. In

addition, he suffered emotional difficulties from being separated from his family and not knowing where they were. The doctors stated that Adam was a boy who viewed ~ himself as basically a bad person and as one who [was] unloveable.TM His displays of inadequacy and misguided attempts to gain attention appeared to be his way of confirming his distorted self-view. (PSR 17.) These attempts included many discipline problems in school. (PSR 17,19.)

The pattern with Mr. C_____ -mother continued even up to the sentencing proceedings in this case. She refused to be interviewed by the probation officer. She simply stated that his childhood had nothing to do with the type of person he had become or where he was at. (PSR 11.)

Adam moved back in with his mother and sister when he was 14 years old. He told the probation officer that he then became involved with a gang and selling drugs. However, Adam's wife, Tina, reported that he joined a gang for protection when he was eight years old. She said that before that he was constantly assaulted by kids who wanted to rob him of the money he earned delivering newspapers. (PSR 14.) Adam and his wife both reported that he left the Gangster Disciples in August, 2000. (PSR 11.)

Mr. C_____ told the probation officer that he had heard voices since he was six years old. He sees them as God leading him in his life. Mr. C_____ also reported fairly regular visions, with the last one being in late, 2002. He said that he hears voices and sees visions about five to ten times per year. However, they do not tell him what to do. (PSR 18.)

Mr. C_____ also contemplated suicide a few times. The most recent time was in late 2000 or early 2001 when Tina found him in their bathroom with a loaded gun in his mouth. At that time, he was distraught because he could not obtain employment and was not able to help pay for the couple's upcoming wedding. (PSR 18.)

Mr. C_____ abused Stelazine, which is a powerful anti-psychotic drug, often from 1995 to April, 2002. Mr. C_____ said that Stelazine calmed him. He started using ecstasy daily in 1999. (PSR 19; Forensic psychiatric report p. 3.)

Tina thought Mr. C_____ was in serious need of mental health treatment. She felt that he was often in a child's or adolescent's state of mind, more like a fourteen year old than a 24 year old. (PSR 18.) Tina also said that Mr. C_____ still had very low self-esteem and, as a result, tried to look "hard." (PSR 19.)

In about April, 2002, Tina noticed Mr. C_____ becoming more distant. He often sat in their living room without speaking for three or four hours. Then he would suddenly notice that Tina was in the room and ask her how she was doing. (PSR 19.)

However, Tina, reported that Mr. C_____ was a good husband and father. His current legal problems affected her such that stress and depression caused her to give premature birth to their daughter.² (PSR 15.)

Kafi Johnson dated Mr. C_____ for about a year and had a child with him. She said that she always had some suspicion about his mental health, as well. (PSR 15.)

Mr. C_____ recorded an independent rap album, titled DRACULLAH, in early, 2002. ~DRACULLAH is an acronym for Depressed, Radical, Abominable, Cursed, Uncivilized, Lunatic, Loonie, Adam Hurts.TMThe probation officer reported that the cd includes both very violent and dark songs and Bible stories. (PSR 20.)

In his addendum to the presentence report, the probation officer noted that he was concerned about Mr. C_____’s mental health when interviewing him. As a result, he suggested that Mr. C_____’s trial counsel request a mental health

² She also had a daughter from a previous relationship. (PSR 15.)

evaluation. (Addendum to PSR.) This request was made and the court ordered an examination. (CR 37, 38.) During the evaluation period, Mr. C_____ was discovered smearing feces on his body and ingesting feces. He explained that he wanted ~ to kill [himself] before they did.TM He insisted that others were plotting to kill him, but would not say who they were. As a result, Mr. C_____ was placed on emergency psychiatric medication. (Forensic psychiatric report p. 6.)

Mr. C_____ was diagnosed with psychiatric disorder, not otherwise specified, in remission with medication. This diagnosis is made for a person who displays psychotic symptoms, but for whom there is inadequate information to make a specific diagnosis. In Mr. C_____ -case, it was uncertain whether he suffered from major depression with psychotic features, or paranoid schizophrenia. (Forensic psychiatric report p. 8.)

Mr. C_____ was under severe financial stress before committing the robbery. He was unable to find a job and the family bills were excessively delinquent. (PSR 5.)

Mr. C_____ only attended high school sporadically. He failed every class, except physical education. (PSR 19.) Mr. C_____ had dropped out of school permanently and was living on his own by the time he was 17 years old. (PSR 14.) However, he did obtain his G.E.D. while he was incarcerated for a previous

offense. (Forensic psychiatric report p. 3.)

Mr. C_____ filed a motion for downward departure due to: extreme mental and physical abuse, neglect, and total lack of guidance as a child. (CR 48.)

II. Sentencing hearing

At the sentencing hearing, Mr. C_____ trial counsel argued in support of his motion for departure. He acknowledged that the sort of ~ extremely deprived and abusive background™ that Mr. C_____ had was a discouraged factor, but argued that the facts of Mr. C_____ background were sufficient to overcome the discouragement of the Sentencing Commission. (ST 8-10.)

When imposing sentence, the court listed the factors in 18 U.S.C. 3553(a). However, it then said that it ~ must focus on the nature and circumstances of the offense, and then on the history and characteristics of the individual offender.™ When considering Mr. C_____ history, the court focused on his prior record, including uncharged offense allegations, and found that protection of the public overrode or took precedence over other considerations. (ST 19-23, App. 20-24.)

SUMMARY OF ARGUMENT

Mr. C_____ –Guidelines range and resulting sentence was increased based on facts which were not found by a jury beyond a reasonable doubt or admitted by him. This violated the Fifth and Sixth Amendments. *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). Mr. C_____ did not object to his sentence on this basis in the district court. However, his sentence is plain error. Mr. C_____ was sentenced under an illegal sentencing scheme which allowed the judge to go beyond the jury’s verdict, but did not allow him to fully consider the mitigating factors in Mr. Collins’s personal history. As a result, the district court did not decide whether, in light of those factors, the sentence it imposed was ~sufficient, but not greater than necessary™ to achieve the purposes of sentencing in 18 U.S.C. 3553(a). Therefore, this Court should remand Mr. C_____’s case to the district court for resentencing in order for the district court to make that determination after considering all of the relevant factors.

ARGUMENT

Mr. C_____’ sentence must be reversed, in light of *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because his sentence was increased on the basis of facts that were not proven to a jury beyond a reasonable doubt or admitted by him.

Mr. C_____ argued, in his opening brief, that his sentence was unconstitutional under *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004). (AOB 10-19.)

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. The Court reaffirmed its previous holdings in *Apprendi* and *Blakely* stating that,

"Any 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."

United States v. Booker, 125 S.Ct. at 756.

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.TM*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.TM*Id.* at 764-765.

A. Standard of Review

Mr. C_____ conceded, in his opening brief that plain error was the appropriate standard of review. (AOB 10.) The Supreme Court has now said the same thing in *Booker*. *Id.* at 769

B. Argument

The district court plainly erred when sentencing Mr. C_____, in light of *Booker*.

1. There was error under *Booker*.

The Supreme Court has now agreed with Mr. C_____’s argument in his opening brief that he was sentenced in violation of the Fifth and Sixth Amendments. *United States v. Booker*, 125 S.Ct. at 755-756. (AOB 11-16.)

2. The error was plain.

The district court's error in sentencing Mr. C_____ is plain. It was not obvious at the time of sentencing. However, it is enough that the error be plain at the time of appellate consideration. *Johnson v. United States*, 520 U.S. 461, 468 (1997).

3. The error affected Mr. C_____ ' substantial rights.

The error in sentencing Mr. C_____ affected his substantial rights. This Court has held that a sentence which is based on an incorrect guideline range is an error affecting substantial rights. *Emezuo v. United States*, 357 F.3d 703, 711 (7th Cir. 2004), quoting *United States v. Wallace*, 32 F.3d 1171, 1174-75 (7th Cir. 1994).

The question for purposes of determining whether [Mr. C_____] was prejudiced is not what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to 3553(a). [Mr. C_____] does not argue [only] that the district court erred by failing to regard the guidelines as advisory in sentencing him. Rather, [Mr. C_____, primarily] argues that the district court erred by imposing a sentence that was greater than the maximum authorized by the facts [which he admitted] alone. Therefore, the prejudice inquiry concerns what sentence the court would have imposed had it not committed the error of going beyond the facts found by the jury in imposing a sentence under the mandatory guideline regime then in existence. This case does not present the [sole] question of whether a defendant suffers prejudice because a sentencing court fails to treat the guidelines as advisory in determining the sentence.

United States v. Hughes, 3__ F.3d ___, 2005 U.S. App. LEXIS 1189, *15 fn. 6 (4th Cir.

Jan. 24, 2005). *See also United States v. Oliver*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1623, *22-*23 (6th Cir. Feb. 2, 2005) (finding that Defendant's substantial rights were affected because the Sixth Amendment violation caused him to receive a longer sentence than he would have without it); *United States v. Ameline II*, 3__ F.3d ___, 2005 U.S. App. LEXIS 2032, *18 (9th Cir. Feb. 9, 2005) (finding that Defendant's substantial rights were affected because the sentence exceeded what his admissions alone would have supported).

The Eleventh Circuit disagreed with *Hughes* and *Oliver*. *United States v. Rodriguez*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1832, *27-*38 (11th Cir. Feb. 4, 2005). It found that a defendant's substantial rights were only affected if he could show that he would have received a lower sentence under the now-advisory Guidelines. The Eleventh Circuit is mistaken. Its view conflicts with the Supreme Court's affirmance of this Court's decision in *Booker* and remand to the district court for resentencing. *United States v. Booker*, 2005 U.S. LEXIS 628, *91-*92. The Court would not have affirmed this Court's decision if Mr. Booker's substantial rights were not affected by the Constitutional violation.

Accordingly, the Sixth Circuit found that:

In our judgment, a critical aspect of *Booker* has escaped the Eleventh and Second Circuits' thinking on these matters - namely, that the Supreme Court remanded Booker's case for resentencing. It is certainly our obligation as courts of appeal to carefully consider

what the Supreme Court said in *Booker*. Nevertheless, we cannot ignore what the Court did. At the very least, a remand for resentencing of Booker must rest on a decision that the error in his case was reversible, i.e., was not harmless and affected Booker's substantial rights. See FED. R. CRIM. P. 52(a) ("Any error . . . that does not affect substantial rights must be disregarded."). In fact, as our colleagues observed in *Oliver*, we can safely conclude that, in the ordinary case, a *Booker*-type Sixth Amendment violation affects substantial rights. But the Supreme Court's treatment of Booker's case may suggest something more. It turns out that *Booker* did not make a Sixth Amendment objection to his sentence in the district court. In fact, Booker's Sixth Amendment challenge first appeared in a supplemental brief to the Seventh Circuit, which he filed soon after the Supreme Court's decision in *Blakely*. The Government pointed this out in its petition for *certiorari*, see Pet. for Cert., 2004 WL 1638204, at *3-4, but, inexplicably, the Supreme Court did not address whether Booker's sentence was plain error. Yet the most reasonable reading of the Court's disposition of Booker's case suggests that the Court thought it was. After all, in *Booker*, the Supreme Court quite explicitly instructs reviewing courts to determine whether an appealing defendant made a Sixth Amendment argument in the district court and to review for plain error if he did not. See *Booker*, 125 S. Ct. at 769. We cannot fathom why the Court would not follow its own instruction, although it may be for the simple, and strange, reason that the Seventh Circuit declined to address the question of plain error because the Government apparently did not raise the issue.

United States v. Milan, 3__ F.3d ___, 2005 U.S. App. LEXIS 2161, *21-*23 (6th Cir. Feb. 10, 2005). At the very least, the Court's decision to remand in *Booker* amounts to a finding that the Sixth Amendment violation affected Booker's substantial rights. *Id.* at *23.

Rodriguez also conflicts with this Court's 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 at 711.

Finally, the *Rodriguez* decision also ignores the importance of the principle that a Defendant can only be sentenced under a legal process. Taking the *Rodriguez* court's view to the extreme would require a finding that a Defendant's substantial rights were not affected if he was convicted and sentenced without being afforded the right to counsel because he could not prove that he would have received a better result if he had an attorney. *Gideon v. Wainwright*, 372 U.S. 335 (1963), is just one example of the prevailing view that the legitimacy of the process by which a result is obtained is just as important as the result itself.

If the district court had sentenced Mr. C_____ based only on the facts which the jury found and his prior convictions, his Guidelines range would have been a maximum of 57 to 71 months for count one and 84 months for count two, rather than the 84 to 105 month range for count one and 118 months for count two to which the district court upwardly departed. (AOB 6-7, 13-14.) That means that Mr. C_____—sentence would have been at least 68 months less, than the 223 months he received under the mandatory Guidelines, without a

Constitutional violation. As a result, the error affected his substantial rights. *United States v. Hughes*, 2005 U.S. App. LEXIS 1189, *15; *United States v. Oliver*, 2005 U.S. App. LEXIS 1623, *22-*23; *United States v. Ameline II*, 2005 U.S. App. LEXIS 2032, *18 .

The district court's error also affected Mr. C_____—substantial rights by depriving him of his right to be sentenced under a Constitutional sentencing scheme. The Sixth Circuit held that the violation of this right affected a defendant's substantial rights, even without a Sixth Amendment violation. *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. The Court held that this was one of those situations mentioned in *United States v. Olano*, 507 U.S. 725 (1993), in which a presumption of prejudice was appropriate. This is because ~ the inherent nature of the [*Booker*] error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred.TM *United States v. Barnett*, 3__ F.3d ___, 2005 U.S. App. LEXIS 2644, *26-*34.

This is true in part because of the fundamental alteration of the sentencing process brought about by *Booker*'s remedial holding. Under the new post-*Booker* framework, the district court is empowered with greater discretion to consider the factors provided

in 18 U.S.C. § 3553(a) in determining a proper sentence. This discretion was not present at the time Barnett was sentenced under the mandatory Guidelines. As the Second Circuit recently observed, 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.TM *United States v. Crosby*, 3__ F.3d 2005 U.S. App. LEXIS 1699, *30-*31. Under the new post-*Booker* framework, counsel are now able to present aggravating and mitigating circumstances that existed at the time [of pre-*Booker* sentencing] but were not available for consideration under the mandatory Guidelines regime.TM *Id.* at *39.

Id. at *31.

Thus, the error in sentencing Mr. C_____ affected his substantial rights.

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

The government will probably argue that the district court's sentence was reasonable. Even if that is true, it is not the point. "A sentencing error that leads to a violation of the Sixth Amendment by imposing a more severe sentence than is supported by the jury verdict [or the defendant's admission] would diminish the integrity and public reputation of the judicial system [and] also would diminish the fairness of the criminal sentencing system."³ *United States v. Oliver*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1623, *23 (6th Cir. Feb. 2, 2005) (citation omitted).

³ Of course, some such circumstances are known in this case, as noted above. However, there may be others or more detail for the known circumstances.

The Sixth Circuit distinguished this type of case from the Supreme Court's refusal to find plain error in *United States v. Cotton*, 535 U.S. 625 (2002) because the evidence was "overwhelming and essentially uncontroverted." The Court of Appeals found that:

Thus, the [Supreme] Court posited that a "real threat" to "fairness, integrity, and public reputation of judicial proceedings" existed if it permitted such cases to be remanded under "plain error" review as defendants "involved in large-scale drug operations" would receive less severe punishments than "the overwhelming and uncontroverted evidence" supported. In this case such concerns are unwarranted as the district court judge may still consider the evidence of flight during re-sentencing. The district court must simply consider this evidence in a manner consistent with *Booker*. There is no concern that Oliver will be granted a windfall if we permit "plain error" review. Given that primary concern of the Supreme Court in *Cotton* is not present here, we conclude that its analysis of the fourth prong of the "plain error" test is distinguishable and inapplicable.

United States v. Oliver, 2005 U.S. App. LEXIS 1623, *23 fn. 3 (citations omitted);

Contra United States v. Bruce, 3__ F.3d ___, 2005 U.S. App. LEXIS 1712, *55-*57 (6th Cir. Feb. 3, 2005) (finding fourth prong not satisfied when Defendant did not contest facts, but only disputed their legal significance)⁴.

⁴ Other panels of the Sixth Circuit have since pointed out that they are bound to follow *Oliver* because it was decided before *Bruce*. *United States v. Milan*, 2005 U.S. App. LEXIS 2161, *19 fn. 3; *United States v. Davis*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1204, *29 fn. 7 (6th Cir. Jan. 21, 2005).

In addition, *Cotton* only addressed the question of whether failure to include enhancing facts in an indictment was reversible error. It did not address the Sixth Amendment right to a jury finding, absent an admission, or the Fifth Amendment right to a finding beyond a reasonable doubt before a sentence can be enhanced. *United States v. Cotton*, 535 U.S. 625. Therefore, even if this were a case in which the evidence was uncontroverted, *Cotton* would not apply.

Of course, the evidence in support of the district court's departures was not overwhelming. There was no evidence in support of the departures outside of the recitations in the presentence report, most of which were at least double hearsay. (PSR 6-12.)

Moreover, 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.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2."

Section 3553(a)(2) states that such purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

United States v. Ranum, ___ F.Supp.2d ___, 2005 WL 161223, *1 (E.D. Wis. Jan. 19, 2005).

This means that sentencing courts must now consider several factors which they were formerly forbidden to consider.

For example, under 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, U.S.S.G. 5H1.1, his education and vocational skills, 5H1.2, his mental and emotional condition, 5H1.3, his physical condition including drug or alcohol dependence, 5H1.4, his employment record, 5H1.5, his family ties and responsibilities, 5H1.6, his socio-economic status, 5H1.10, his civic and military contributions, 5H1.11, and his lack of guidance as a youth, 5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history.

Ibid.

~ [W]here the guidelines conflict with other factors set forth in 3553(a), courts will have to resolve the conflicts.TM *United States v. Ranum*, 2005 WL 161223,

*2. Thus, factors which mitigate a defendant's culpability for a crime now have much greater importance to the determination of an appropriate sentence.

Therefore, it is not enough for this Court to say that the sentence imposed by the district court is reasonable irrespective of the error. ~ [I]t would be fundamentally unfair to allow [Mr. C_____]'s sentence, imposed under a mandatory Guidelines regime, to stand in light of this substantial development in, and alteration of, the applicable legal framework. *United States v. Barnett*, at *36-*37.

The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory. To leave standing this sentence simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings. Indeed, the determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it.

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]. This is so because the district court was never called upon to impose a sentence in the exercise of its discretion. That the particular sentence imposed here might be reasonable is not to say that the district court, now vested with broader sentencing discretion, could not have imposed a different sentence that might also have been reasonable. [This Court] simply do[es] not know how the district court would

have sentenced [Mr. C_____] had it been operating under the regime established by *Booker*.

United States v. Hughes, 2005 U.S. App. LEXIS 1189, *17 fn. 8. See also: *United States v. Oliver*, 2005 U.S. App. LEXIS 1623, *23 fn. 3 (finding that Court of Appeals would be "usurping the discretionary power granted to the district courts by *Booker* if [it] were to assume that the district court would have given Oliver the same sentence post-*Booker*TM"); *United States v. LaBastida-Segura*, 2005 U.S. App. LEXIS 1835, *6 (~ Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion.TM).

Before *Booker*, district courts were not free to fully consider the background of someone like Mr. C_____. As this Court noted and instructed district courts, childhood abuse was not generally considered an adequate ground for departure. Courts were forbidden to depart based on lack of youthful guidance. In addition, diminished mental capacity was also a forbidden ground for departure in cases involving violent offenses. *United States v. Pullen*, 89 F.3d 368, 370-372 (7th Cir. 1996). This Court also told district courts that such factors were not to be used to mitigate a defendant's criminal history. *Id.* at 372. However, if the district court had been allowed to fully consider the facts of Mr. C_____ — mental health problems and terrible childhood (PSR 11, 13-20; (Forensic

psychiatric report), it may have found that a shorter sentence, with appropriate mental health treatment, was ~sufficient, but not greater than necessary™to achieve the purposes of sentencing. (18 U.S.C. ~3553(a).)

In addition, if this Court agrees with Mr. C_____ -arguments that the district court misapplied the Guidelines when deciding to depart upward (AOB 24-32), that may also affect the exercise of the district court's discretion on remand.

The government may disagree with the result in *Hughes*. However, if it does so, it will also be disagreeing with the result in *Booker* itself. In *Booker*, the Supreme Court did not perform the reasonableness inquiry in the first instance or order this Court to do so. Instead, it simply affirmed this Court's decision and remanded the case to the district court for resentencing. *United States v. Booker*, 125 S.Ct. at 769; *United States v. Milan*, 2005 U.S. App. LEXIS 2161, *21-*23. Therefore, this Court should do the same thing in this case.

This Court should also refuse to follow the limited remand procedure for a district court to indicate whether it wants to resentence a defendant that was adopted by the Second Circuit in *United States v. Crosby*, 2005 U.S. App. LEXIS 1699, *41-*42, *44-*46. As the Sixth Circuit noted, that procedure is also inconsistent with the unlimited remand for resentencing which the Supreme

Court ordered in *Booker*. *United States v. Milan*, 2005 U.S. App. LEXIS 2161, *24-*25. It is even inconsistent with the remand that the Court ordered in *Fanfan*. In *Fanfan*, the Court remanded the case to the district court and gave the parties the opportunity to seek resentencing. It did not leave that decision up to the district court. *United States v. Booker*, 125 S.Ct. at 769.

Therefore, this Court should remand Mr. C_____ -case for resentencing under the now-advisory Guidelines.

CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. C_____ ' sentence and remand his case to the district court for resentencing.

Respectfully submitted
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