

**U.S. Department of Justice**

Civil Rights Division

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March 24, 2005

Thomas K. Kahn, Clerk  
U.S. Court of Appeals  
for the Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: *United States v. Wallace Wayne Hooks*, No. 04-10825

Dear Mr. Kahn:

The United States submits this response pursuant to your letter of March 17, 2005, directing parties in the above-captioned case to address the effect of *United States v. Booker*, 125 S. Ct. 738 (2005), on the issues presented by the government's cross-appeal in this case. As explained below, if the defendant's conviction is upheld on appeal, this Court should remand the case to the district court for resentencing after it resolves the parties' dispute over the appropriate offense level applicable to this case.

1. Hooks, the former Sheriff of Treutlen County, Georgia, was fined and sentenced to six months' home confinement and five years' probation after he was

convicted on two counts of violating 18 U.S.C. 242.<sup>1</sup> Hooks's conviction arose from one assault each on two pre-trial arrestees who were handcuffed and awaiting booking inside the County jail. The Probation Office set Hooks's base offense level at 10 because his two counts of conviction involved the use of force. See Federal Sentencing Guidelines (U.S.S.G. or Guidelines) § 2H1.1(a)(3). The offense level was increased by six levels because Hooks committed the offenses under color of law, see U.S.S.G. § 2H1.1(b)(1), and an additional two levels because the victims were handcuffed at the time of the assaults, see U.S.S.G. § 3A1.3. This resulted in an offense level of 18 for both counts; Hooks's final offense level came to 20 after an additional two levels were added through the multiple-counts adjustment. See U.S.S.G. § 3D1.4. Given his Criminal History category of I, Hooks's recommended sentence under the Guidelines was between 33 and 41 months' imprisonment. Hooks objected to the presentence report, arguing he was entitled to an adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. Hooks also moved for a downward departure on several grounds. At sentencing, over the government's objection, the district court granted Hooks a two-level adjustment downward for accepting responsibility, and

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<sup>1</sup> For a more detailed recitation of the facts, please refer to the Brief For The United States As Appellee/Cross-Appellant at 3-12.

then granted Hooks a ten-level downward departure, primarily on the ground that Hooks's victims provoked the criminal assault (see U.S.S.G. § 5K2.10) and that Hooks's case fell outside the heartland of U.S.S.G. § 2H1.1 (offenses involving individual rights).

The government appealed Hooks's sentence, arguing that an adjustment under U.S.S.G. § 3E1.1 was clearly erroneous given this Court's precedent, and that a ten-level downward departure was unsupported by the facts of the case. Brief For The United States As Appellee/Cross-Appellant at 25-35. In his response to the government's cross-appeal (Reply Brief Of Appellant/Cross-Appellee at 8-9), Hooks raised for the first time an objection to the two-level enhancement under U.S.S.G. § 3A1.3, citing the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531, 2536 (2004), which held that under a state sentencing system similar to the federal Guidelines, any fact (other than a prior conviction) that increases a defendant's sentence above the statutory maximum must be found by a jury or admitted by the defendant. *Ibid.*

2. In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court issued two rulings regarding the Guidelines. First, the Court held that the Sixth Amendment is violated when a sentence imposed under the Guidelines is increased based upon a district court judge's finding of a fact, other than a prior

conviction, that was not found by the jury or admitted by the defendant. *Booker*, 125 S. Ct. at 748-756 (opinion of Stevens, J., for the Court). The Court noted that it had held in *Blakely* that a defendant has a right under the Sixth Amendment “to have the jury find the existence of ‘any particular fact’ that the law makes essential to his punishment.” *Booker*, 125 S. Ct. at 749 (quoting *Blakely*, 124 S. Ct. at 2536). The Court found “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in” *Blakely*. *Ibid.* Moreover, the Court explained, it is the mandatory nature of the Guidelines that implicates the Sixth Amendment. *Id.* at 750. “[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges. \* \* \* For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” *Ibid.*

Second, the Court held that the remedy for this constitutional deficiency was the severance and excision of the two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, that make application of the Guidelines mandatory.

125 S. Ct. at 756-769 (opinion of Breyer, J., for the Court).<sup>2</sup> The Court concluded that this approach would best achieve Congressional intent by “mak[ing] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.” *Id.* at 757.

In imposing sentences, district courts must consider the factors set out in 18 U.S.C. 3553(a), including the sentencing ranges set forth in the Guidelines. *Booker*, 125 S. Ct. at 764-765. Thus, while the Guidelines are no longer mandatory, district courts “must consult those Guidelines and take them into account when sentencing.” *Id.* at 767. On appeal, the courts of appeals are to review sentencing decisions for “unreasonableness.” *Ibid.* And while not defining “unreasonableness,” the Court stated that factors listed in 18 U.S.C. 3553(a) “will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.” *Id.* at 766.

3. *Booker* requires a district court “to consult th[e] Guidelines and take

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<sup>2</sup> The Court excised 18 U.S.C. 3553(b)(1), which requires sentencing courts to impose a sentence within the Guidelines range, in the absence of a departure, and 18 U.S.C. 3742(e), which sets forth the standards for review on appeal. 125 S. Ct. at 764.

them into account when sentencing.” 125 S. Ct. at 767. To do this, a court must first correctly calculate the Guidelines range that would apply. *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005) (explaining that the error identified in *Booker* “is the mandatory nature of the guidelines *once the guidelines range has been determined.*”) (emphasis added); see also *United States v. Hughes*, No. 03-4172 (4th Cir. March 16, 2005), Slip op. at 22 (“[T]he first step for sentencing courts is to determine the range prescribed by the guidelines after making such findings of fact as are necessary.”). Indeed, in deciding *Rodriguez*, this Court resolved issues regarding the correct application of the Guidelines *before* addressing the effect of *Booker* on the defendant’s sentence. *Id.* at 1296-1297. As in *Rodriguez*, this Court should therefore resolve the parties’ dispute over the appropriate offense level applicable to this case, including the propriety of any applicable departures, before remanding to the district court for resentencing under *Booker*. *Ibid.*; see also *Hughes*, Slip op. at 22 (“Because the district court must consider the correct guidelines range before imposing a sentence on remand, the same calculation issues already raised by [the defendant] are likely to arise again. We therefore take this opportunity to address them.”); *United States v. Oliver*, 397 F.3d 369, 377-382 (6th Cir. 2005) (finding plain error in pre-*Booker* application of Guidelines, but resolving issue regarding

interpretation of Guidelines before remanding for resentencing).

4. The government contends that the district court misapplied the Guidelines when it granted Hooks a two-level adjustment downward for acceptance of responsibility under U.S.S.G. § 3E1.1. See Brief For The United States As Appellee/Cross-Appellant at 25-28. This Court must therefore resolve this aspect of the government's cross-appeal before this case can be remanded for resentencing under *Booker*. See *Rodriguez*, 398 F.3d at 1296-1297, 1301; see also *United States v. Shelton*, 2005 WL 435120, at \*6 n.9 (11th Cir. Feb. 25, 2005) (explaining that “[a] sentencing court under *Booker* still must consider the Guidelines, and, such consideration necessarily requires the sentencing court to calculate the Guidelines sentencing range in the same manner as before *Booker*”).

The government also contends that the district court misapplied the Guidelines when it granted a ten-level downward departure, from offense level 18 to offense level 8, based primarily upon the victims' conduct (see U.S.S.G. § 5K2.10), and its finding that the facts of this case were outside the heartland of cases the Sentencing Commission intended to be covered by U.S.S.G. § 2H1.1. For the reasons provided in our brief, the facts of this case do not support departures on these grounds. See Brief For The United States As Appellee/Cross-Appellant at 28-34. This Court must therefore consider the propriety of these

departures in determining the applicable offense level, and corresponding advisory Guidelines range, before this case can be remanded for resentencing. See *Rodriguez*, 398 F.3d at 1296-1297, 1301; see also *Shelton*, 2005 WL 435120, at \*6 n.9.

Hooks argued in response to the government's cross-appeal that the two-level enhancement under U.S.S.G. § 3A1.3 (restrained victim) was based on facts that were not found by a jury or admitted by Hooks, and was therefore impermissible under the Supreme Court's *Blakely* decision and should not apply on resentencing. Reply Brief Of Appellant/Cross-Appellee at 8-10. Hooks is incorrect. Although the district court imposed a two-level enhancement pursuant to U.S.S.G. § 3A1.3 based on facts that were not found by a jury or admitted by Hooks,<sup>3</sup> doing so was – and remains – constitutionally permissible. As this Court explained in *Rodriguez*, the constitutional error identified in *Booker* is “the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge,” not the use of extra-verdict enhancements themselves. 398 F.3d at 1301; see also *United States v. Duncan*, 2005 WL 428414, at \*4 (11th Cir. Feb. 24, 2005). Indeed, “[t]he same extra-verdict enhancement provisions apply

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<sup>3</sup> Hooks states in his briefs, however, that both of his victims were in handcuffs when he assaulted them. Hooks's Opening Brief at 5; Hooks's Reply Brief at 8-9.

after *Booker* as before. \* \* \* All that has changed is that the guidelines range is now advisory; it no longer dictates the final sentencing result but instead is an important factor that the sentencing court is to consider along with the factors contained in § 3553(a) in reaching the sentencing result.” *Rodriguez*, 398 F.3d at 1300-1301. Thus, on remand, the district court should include the two-level enhancement provided for in U.S.S.G. § 3A1.3 when calculating Hooks’s offense level. *Id.* at 1301 (“Extra-verdict enhancements are to be determined and used in the post-*Booker* world.”).

5. The substantive issue raised in the government’s cross-appeal – the correct calculation of Hooks’s offense level and corresponding sentencing range under the Guidelines – is relatively unchanged post-*Booker*. Although application of the Guidelines is no longer mandatory, a sentencing court must still consult the Guidelines and consider them in sentencing a defendant. *Booker*, 125 S. Ct. at 767; *Rodriguez*, 398 F.3d at 1300-1301. To do so, a sentencing court must correctly apply the Guidelines in the first instance. This Court must therefore resolve the parties’ dispute over the calculation of the offense level applicable to this case, and remand the case to the district court for resentencing. On remand, after the district court properly calculates Hooks’s offense level and consults the Guidelines range associated with it, the district court must consider the factors set

forth in 18 U.S.C. § 3553(a) and reach a sentence that is reasonable.<sup>4</sup>

Sincerely,

Jessica Dunsay Silver  
Principal Deputy Chief

/s/ Angela M. Miller  
Angela M. Miller  
Attorneys  
Department of Justice

cc: Counsel of Record

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<sup>4</sup> The government acknowledges that the district court may again be inclined to sentence Hooks below the recommended Guidelines range of 33-41 months' imprisonment. Neither the government nor this Court, however, can predict "exactly what sentence it will impose after consulting the § 3553(a) factors" and, more importantly, the appropriate offense level. See *Shelton*, 2005 WL 435120, at \*6 n.11. Until Hooks is resentenced, then, this Court should "not attempt to decide whether a particular sentence below the Guidelines range might be reasonable in this case." *Ibid.*

## CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2004, a copy of the foregoing supplemental letter brief was served by Federal Express, next business day delivery, and electronic mail transmission, to the following counsel of record.

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