NO. 2002-1850

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT CHAMPAGNE

Defendant/Appellant

SUPPLEMENTAL BRIEF OF DEFENDANT

ON REMAND FROM THE UNITED STATES SUPREME COURT

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SUMMARY OF ARGUMENT

At the invitation of this court, Mr. Champagne requests remand to the district court in this *Booker* pipeline case.

Mr. Champagne first specifies the guidelines under which he was mandatorily sentenced, and notes the various standards of review for preserved and unpreserved *Booker* errors.

He then goes through the five sentencing errors revealed by *Booker*: 1) the drug quantity for which he was held responsible was found by a mere preponderance of the evidence based on conversion of cash that was not proven to be his by a method that took into account unproven facts, and which failed to account for the well-documented cocaine crack/powder disparity, 2) a circular saw which the court found was a dangerous weapon by a mere preponderance under a standard which *Booker* demands to be borne by the government and not by the defendant, 3) he was sentenced for having played a managerial role in the crime, the facts for which were not proven by an adequate measure, 4) Mr. Champagne was sentenced with regard to his criminal history, the basis for which was not adequately proven in light of *Booker* and other even more recent Supreme Court authority, and 5) part of his sentence involved forfeiture of money that was not sufficiently proven to be connected to his crime.

Mr. Champagne then lists the various factors resurrected by *Booker* which courts must now consider when sentencing. He goes on to proffer record and some non-record facts which, when measured against the factors, provide a reasonable probability that he might have been sentenced more leniently had the guidelines not been mandatory.

Mr. Champagne then identifies several issues with this court's post-*Booker* remand policy. He argues that not remanding creates a tautology that can only be solved by remanding, and that the task this court has set for itself – making the decision whether to remand – involves speculation into facts which are incapable of resolution without remand. He also argues that *Booker* identified a structural error that requires the presumption of prejudice when applying either harmless error or plain error analyses, and which should therefore produce virtually automatic remand.

STATEMENT OF THE CASE

Robert Champagne plead guilty in January 2002 to possession of and conspiracy to distribute cocaine after the New Hampshire Federal District Court held that the search of his hotel room did not violate his constitutional rights.

Mr. Champagne was sentenced in July 2002 under the then-current mandatory sentencing guidelines as follows:

• Base offense level for violation of 21 U.S.C. § 841, based on a quantity of crack cocaine of between 50 and 150 grams pursuant to U.S.S.G. §2D1.1(c)(4):	+32
• Increase for possession of a circular saw, considered by the district court to be a dangerous weapon in connection with the crime, pursuant to U.S.S.G. § 2D1.1(b)(1):	+2
• Increase for playing a managerial role in the crime, pursuant to U.S.S.G. § 3B1.1(a):	+2
• Adjustment for acceptance of responsibility pursuant to U.S.S.G. §§ 3E1.1(a) and (b):	-3
• Adjustment for cooperation with the government, pursuant to U.S.S.G. § 5K1.1:	-2
• **Total offense level:**	**31**
• Using the guidelines table, available range:	151-188 months (12 years, 7 months to 15 years, 8 months)
• Court sentenced at lowest end of range.	151 months (12 years, 7 months)

Mr. Champagne appealed to this Court, which upheld the sentence, and over a dissent also upheld the search. *United States v. Beaudoin*, 362 F.3d 60 (1st Cir. 2004) (rehearing and suggestion for rehearing *en banc* denied).

Mr. Champagne appealed that decision on both grounds. In January 2005, the United States Supreme Court granted certiorari, vacated the judgment, and remanded to this Court "for further consideration in light of United States v. Booker," which was decided while Mr. Champagne's case was on direct appeal. *Champagne v. United States*, 73 U.S.L.W. 3438, 125 S.Ct. 1025 (Jan 24, 2005).

On March 7, 2005, this Court invited Mr. Champagne to file a supplemental brief.

SUPPLEMENTAL BRIEF

Robert Champagne respectfully requests a remand to the district court for re-sentencing in light of *United States v. Booker*, 543 U. S. __, 125 S. Ct. 738 (2005), and *United States v. Antonakopoulos*, 399 F.3d 68, (1st Cir. 2005).

I. Harmless Error for Preserved, and Plain Error for Unpreserved, *Booker* Claims

In determining whether *Booker* cases should be remanded, this Court must appropriately apply the doctrines of harmless error to preserved, and plain error to unpreserved, claims. *United States v. Booker*, 543 U.S. __, __, 125 S.Ct. 738, 769 (2005).

Harmless errors are those "small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967). In order to be harmless, the error must be "unimportant and insignificant," *id.* at 243, and not capable of "affect[ing] substantial rights." FED. R. CRIM. P. 52(a); *see also* 28 U.S.C. § 2111. If the judgment was "substantially swayed by the error," it is not harmless. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *United States v. Haidley*, __ F.3d __, 2005 WL 600358 (8th Cir. Mar. 16, 2005) (harmless error inapplicable in *Booker* remand). The government has the burden of proving harmless error. *Chapman*, 386 U.S. at 18.

Plain errors are those where there is 1) an error 2) that is plain, 3) which affects substantial rights, and 4) "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005), *quoting United States v. Olano*, 507 U.S. 725 (1993); FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

The first two prongs of the plain error test are met whenever the district court, as it did here, treated the Guidelines as mandatory.

The third prong is met when the record shows a "likelihood that the district court might have sentenced the defendant more leniently in a post-*Booker* world." *United States v. González-Mercado*, __ F.3d __ (1st Cir. decided April 1, 2005).

The fourth prong is met when, even if the evidence for sentence augmentation is "overwhelming and essentially uncontroverted" this Court "cannot know the length of imprisonment that the district judge would have imposed pursuant to this evidence following *Booker*." This is because the Court "would be usurping the discretionary power" of the district court to "assume that [it] would have given the defendant the same sentence post-*Booker*. A failure to remand . . . would therefore seriously affect the fairness and integrity of our judicial

proceedings." *United States v. McDaniel*, 398 F.3d 540, 550 (6th Cir. 2005), *quoting United States v. Oliver*, 397 F.3d 369, 381 (6th Cir. 2005).

In *United States v. Heldeman*, __ F.3d __, 2005 WL 708397 (1st Cir. Mar. 29, 2005), this court appears to have mixed the third and fourth prongs together into a single standard – "we are inclined not to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines."

II. Mr. Champagne's Case Should Be Remanded Because His Sentence Was Unconstitutionally Augmented Regarding Drug Quantity, Presence of a Dangerous Weapon, Managerial Role in the Offense, Calculation of Criminal History, and Forfeiture of Money

There are five sentencing issues now relevant: (A) whether the quantity of drugs for which Mr. Champagne is alleged to have been responsible was sufficiently proved, (B) whether a circular saw found in his hotel room may be used to augment his sentence, (C) whether his role in the crimes was managerial and thus may be used to augment his sentence, (D) whether his criminal history was sufficiently proved so that it may be used to augment his sentence, and (E) whether the money the court ascribed to Mr. Champagne's criminal activities (and which was thus forfeited) was sufficiently connected.

A. Mr. Champagne's Sentence Was Unconstitutionally Augmented Using Drug Quantities Not Found by a Jury Beyond a Reasonable Doubt

1. Weight of Drugs Determined by Only a Preponderance of the Evidence

Upon the police entering Mr. Champagne's hotel room, they searched him and found in his pockets, along with his pipe, a "rather minor amount," *Pre-Sent. Rpt*. ¶12, of crack cocaine – a bag roughly the size of a golf ball, *Suppression Trn.* at 45 – estimated at no more than a few grams. *Pre-Sent. Rpt*. ¶12. Pursuant to a

subsequent warrant, the room and Mr. Champagne's belongings were searched; no other drugs were found.

During the initial search and later investigation, however, Mr. Champagne was found to be in possession of $12,483 in cash. *Pre-Sent. Rpt*. ¶12. A calculation was made in the Pre-Sentence Report converting the cash to an estimated weight of cocaine, by valuing a 0.20 gram rock of crack at $100. "Based on that calculation, the $12,483 would have bought Champagne 720 rocks, yielding a total weight of 144 grams." *Pre-Sent. Rpt*. ¶12. The government proffered and the court adopted this calculation in finding Mr. Champagne responsible for between 50 and 150 grams (between 1.8 and 5.3 ounces); he was accordingly sentenced pursuant to the mandatory guidelines.

Under the guidelines regime, this was standard practice. USSG § 2D1.1, *comment n.12* ("Where ... the amount [of contraband] seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance."); *United States v. Sepulveda*, 15 F.3d 1161, 1201 (1st Cir.1993) ("When it is reasonably probable that confiscated cash represents either drug profits or money dedicated to the upcoming purchase of contraband, a sentencing court may convert the cash into equivalent amounts of narcotics for 'relevant conduct' purposes.").

There are several Sixth Amendment *Booker* violations in the conversion calculation. First, there was no proof beyond a reasonable doubt that the money was connected with the drugs, and was not in Mr. Champagne's possession for legitimate purposes; the court made the connection only on a preponderance of the evidence based on the pre-sentence report. Second, the conversion factors – that a rock of crack weighs 0.20 grams, that a rock is worth $100 – also were not proved beyond a reasonable doubt. Third, the ultimate fact that Mr. Champagne was responsible for between 50 and 150 grams was also based on merely a preponderance. These three separate findings, all based on insufficient proofs, constitute three separate *Booker* violations.

In his plea agreement and as part of his plea hearing colloquy, Mr. Champagne admitted to the weight. *Plea Hrg*. at 15. Given the guidelines' extremely low standard of proof, however, he had no reason to dispute it; and but for that low burden, he would not have acknowledged the weight. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL.L.REV. 1471 (1993). Post-*Booker*, Mr. Champagne would have put the government to its test to prove the weight beyond a reasonable doubt. *Antonakopoulos*, 399 F.3d at 78 ("reasonable probability that but for the error, he would not have entered the plea").

Moreover, during his plea colloquy, Mr. Champagne answered "Yes" to the court's question: "Are you pleading guilty to these charges because you are guilty?" *Plea Hrg.* at 11. But the court did not ask Mr. Champagne anything about the specific weight for which he was charged. The court also did not ask him, as sometimes occurs, whether the defendant's plea was because all the facts stated in the government's proffer were true. Although Mr. Champagne acknowledged his guilt for the crimes of conspiracy, possession, and intent to sell, he did not specifically acknowledge any particular weight of drugs. Thus it cannot be argued that he waived his *Booker* claim.

2. Crack and Powder Cocaine Disparity

Finally, Mr. Champagne's crimes concerned crack, rather than powder, cocaine. As has been well reported, there is a 100:1 sentencing disparity between crack and powder, yet "none of the . . . offered reasons for the 100:1 ratio withstand scrutiny." *United States v. Smith*, __ F.Supp.2d __, 2005 WL 549057 (E.D.Wis. Mar. 3, 2005) (see legislative, judicial, and secondary sources cited therein). Under mandatory guidelines sentencing, a district court cannot issue a sentence that ignores the ratio, but under post-*Booker* sentencing it can. Thus, in *Smith*, the court employed a 20:1 ratio.

Prior to *Booker* the courts had repeatedly upheld the sentencing disparity between crack and powder cocaine. *See e.g., United States v. Sanchez*, 81 F.3d 9, 11 (1st Cir. 1996); *United States v. Camilo*, 71 F.3d 984, 990 (1st Cir. 1995). So Mr. Champagne had no cause to raise the issue. But after *Booker*, courts are free to sentence without regard to the ratio, or with regard to some other ratio. There is no way to know what the district court might have done had it had the freedom to chose. It might have found by a preponderance of the evidence that a 100:1 ratio was justified, but more likely it would have taken notice of the considerable evidence on the subject, virtually none of which supports such a great disparity, and would have sentenced Mr. Champagne to something less than it did. Thus, there is a *Booker* error here.

3. Review of Drug Weight is for Harmless Error

Concerning the weight of drugs for which Mr. Champagne was sentenced, there was repeated mention of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) by the parties. *See Plea Hrg.* at 2-3. The *Booker* issue was therefore preserved, *United States v. Antonakopoulos*, 399 F.3d at 68, making harmless error the standard for this court's review.

The district court erred in 1) believing without proof that the money belonged to Mr. Champagne, 2) assuming the money was connected with the crime

and using it to calculate the supposed drug weight, 3) using unproved conversion factors to translate money into weight, 4) sentencing Mr. Champagne for weight that was not sufficiently proved, and 5) applying the 100:1 crack/powder ratio.

These *Booker* violations are not a "small error" that are"unimportant" or "insignificant." The errors affect "substantial rights." Had Mr. Champagne been sentenced for either the amount of crack he actually had on his person – a golf ball size bag – or for the entire amount but without the crack/powder disparity, his sentence would have been far shorter. Thus, the errors were not harmless, and this case should be remanded for re-sentencing.

B. Mr. Champagne's Sentence Was Unconstitutionally Augmented For Possession of a Circular Saw Not Found by a Jury Beyond a Reasonable Doubt

Upon entering his hotel room, the police found a circular saw with its blade safety device duct-taped out of the way. The district court considered the saw a dangerous weapon, and increased Mr. Champagne's Guidelines sentencing calculation by 2 points. U.S.S.G. § 2D1.1(b)(1). The available incarceration range without the saw would be 121 to 151 months (10 years, 1 month to 12 years, 7 months). The available incarceration range with the saw was 151 to 188 months (12 years, 7 months to 15 years, 8 months). Thus the saw added two to three years to Mr. Champagne's sentence.

1. Findings Made by a Preponderance of the Evidence

In augmenting Mr. Champagne's sentence for possession of the saw, the court made a number of findings based on only a preponderance of the evidence – that the saw was a weapon, that it did not have some other lawful purpose, and that it was present in connection with the offense.

Mr. Champagne's drug sales consisted of driving to Boston during the day to buy cocaine and then sitting in Manchester bars to sell it at night. *Plea Trn.* at 8-10; *Pre-Sent. Rpt.* at 5; *Sent. Trn.* at 34-35. There was no evidence that Mr. Champagne ever sold drugs in his Hooksett motel room, that he had any significant quantity of drugs in the room beyond the small amount for personal use, that any drug customer ever visited him there, or that he ever intended the saw as a weapon. Nonetheless, the court assumed that the saw was used to intimidate buyers. *Sent. Hrg.* at 21, 24.

The hotel room was Mr. Champagne's home – he was living there. Naturally all his belongings, including his tools, were there. A look at Mr. Champagne's aged Mazda car, *Pre-Sent. Rpt.* ¶ 89, which was parked in the hotel lot, would have revealed pieces of lumber which Mr. Champagne had cut in order to shore up rusted portions of the car's frame and floor. *Sent. Trn.* at 20.

The saw could not as a practical matter be used by Mr. Champagne as weapon. Anyone who has used a circular saw knows they are unwieldy machines unless resting on the item to be cut, and too heavy to hold at arms length for more than the briefest period of time. Circular saws cannot be easily brandished by a strong person, and certainly not by a 117-pound, 53-year-old emaciated man in Mr. Champagne's poor health. *Pre-Sent. Rpt.* at p. 2 and at ¶¶ 78-79.

As a weapon, a circular saw without electricity would be useless. The only evidence that the saw was plugged-in came unsworn from the prosecutor who, upon being asked by the court said, "I believe it was, your Honor, I'd have to check with the law enforcement officers." *Sent. Trn*. at 18. The detail, if ever assayed, was not reported to the court.

There is no evidence as to how long the saw's wire was. A casual viewing of wires on circular saws at the local hardware store reveals they generally run about six feet. Assuming the saw was plugged into an outlet placed at the standard 18 inches above the floor, that would barely give an averaged-size man the ability to hold the saw at arm's length (if he could effectively heft it), making it a poor weapon. There was no evidence that the outlet the saw was plugged into was electrically live – outlets in many motel rooms go off with a switch on the wall.

Moreover, using the saw would wake everybody up. The court recognized the it would be too noisy to make a good weapon, *Sent. Trn.* at 20, and took judicial notice of the shoddy nature of the Kozy 7 Motel. *Sent. Trn*. at 18, 25.

2. Plain Error Standard for Remand is Met

Although Mr. Champagne repeatedly objected to a sentence augmentation due to the saw, *Sent. Hrg*. at 10-11, 22, he did not raise an *Apprendi* issue. Thus the *Booker* issue was not preserved in this context, and plain error analysis applies.

The first two *Olano* prongs are met here because the court employed the mandatory guidelines sentence enhancement. The third prong is met because it is unlikely that a jury would find beyond a reasonable doubt that the saw was a intended as a weapon, was used as a weapon, or even that it was reasonably capable of being used as a weapon, and therefore there is a reasonable probability that Mr. Champagne would be sentenced more favorably under the *Booker* regime. The fourth *Olano* prong is met because this court cannot assume that Mr. Champagne would get the same sentence post-*Booker*, and therefore the fairness and integrity of judicial proceedings is being compromised. Plain error is particularly pointed in regard to the saw because the district court made findings of fact leading to the augmented sentence. *See United States v. González-Mercado*, __ F.3d __, __ n.6 (1st Cir. decided April 1, 2005).

Accordingly this case should be remanded for re-sentencing. *See United States v. Hines* 398 F.3d 713, 720-22 (6th Cir. 2005) (on plain error review, even though district court' s well-supported factual finding that gun was weapon used in connection with offense, remand necessary because fact not established by guilty plea or by jury beyond reasonable doubt and because "appellate court's presumption that re-sentencing would result in the same, or a substantially similar sentence, 'would be tantamount to performing the sentencing function ourselves'"); *United States v. McKee* 389 F.3d 697, 701 (7th Cir. 2004) (decided before *Booker*, but anticipating its holding, and remanding for re-sentencing where "district court made factual findings that went beyond the jury's findings and [defendant's] admitted conduct when it determined that [defendant] possessed a firearm in connection with the drug conspiracy").

3. "Clearly Improbable" Standard Violates *Booker*

In both the sentencing court and on direct appeal, Mr. Champagne was unsuccessful in establishing that it was "clearly improbable" that the saw was a weapon used in connection with his offense. That standard, however, is void after *Booker*.

The clearly improbable standard, U.S.S.G. § 2D1.1 *comment* 3, provides that the *defendant* has the burden of proof. *United States v. Gonzalez-Vazquez*, 34 F.3d

19 (1st Cir. 1994). "It has been settled throughout our history 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.'" *Booker*, 543 U.S. at __, 125 S.Ct. at 748, *quoting In re Winship*, 397 U.S. 358, 364 (1970). It is clear also that the *government* bears the burden of proof in criminal cases. *Jackson v. Virginia*, 443 U.S. 307, 313 (1978). Now that the Supreme Court in *Booker* has made clear that the sixth amendment does not allow the burden of proving essential elements to be anyone's but the government's, the burden-shifting nature of the clearly improbable standard – as well as the standard itself because it is less than beyond a reasonable doubt – is necessarily unconstitutional.

Mr. Champagne intends to put the government to its proof if it wants to sentence him with regard to the saw. The inability of this court to predict the outcome makes remand necessary under this court's *Antonakopoulos* plain error standard.

C. Mr. Champagne's Sentence Was Unconstitutionally Augmented For Having Played a Managerial Role in the Offense Not Found by a Jury Beyond a Reasonable Doubt

Mr. Champagne's crimes comprised driving to Boston to buy cocaine by day, and sitting in Manchester bars to sell it by night. Because other people were

involved – sometimes doing the diurnal drives; often making the nocturnal sales – the district court found that Mr. Champagne played a managerial role in the conspiracy. The court thus added two offense levels to its guidelines calculation pursuant to U.S.S.G. 3B1.1, and Mr. Champagne's sentence was augmented accordingly. The finding was based on a preponderance of the evidence, raising the *Booker* issue.

The government initially sought a four-level increase. Sentence-bargaining took place on the record, however, and Mr. Champagne agreed to a two-level increase in exchange for the government forgoing its plan to hold him responsible for a greater quantity of drugs. The court warned that the total number of added points would be the same, that making the deal would delay the sentencing hearing, and that holding the delayed hearing would be uncomfortable for Mr. Champagne because it might involve testimony by people who were potentially jeopardized by his cooperation with the government. *Sent. Hrg.* at 29-41.

Mr. Champagne reluctantly made the deal, recognizing that under the then-prevailing preponderance standard, he had little choice. *Sent. Hrg.* at 39-41. This was not an acknowledgment or a plea for *Booker* purposes; it was a recognition that the guidelines system gave him no room to maneuver. *Antonakopoulos*, 399 F.3d at 78 ("reasonable probability that but for the error, he would not have entered

the plea"). In the post-*Booker* world, however, in which the government would have to prove both weight and managerial role to a jury beyond a reasonable doubt, Mr. Champagne believes he would make a different calculation and put the government to its proof.

Although Mr. Champagne contested the managerial role augmentation, he did not mention *Apprendi*, or otherwise preserve the sixth amendment issue. Thus plain error analysis applies.

The first two *Olano* prongs are met here because Mr. Champagne was sentenced under the mandatory guidelines regime. The third prong is met because had Mr. Champagne been sentenced post-*Booker*, he would have exercised his right to have the government prove the facts for the augmentation to a jury beyond a reasonable doubt and there is thus a "reasonable probability that the district court would impose a different sentence more favorable to the defendant." *Antonakopoulos*, 399 F.3d at 75. The fourth *Olano* prong is met because this court cannot know what the district court would have done, and not remanding would usurp its power to sentence within its discretion. *See United States v. McDaniel*, 398 F.3d 540, 548-50 (6th Cir. 2005) (remanding for resentencing where unpreserved *Booker* error was preponderance-based finding that defendant operated in managerial role).

Accordingly, Mr. Champagne's case should be remanded for re-sentencing.

D. Mr. Champagne's Sentence Was Unconstitutionally Augmented For His Criminal History Not Found by a Jury Beyond a Reasonable Doubt

Mr. Champagne has a long criminal history. The district court, in accord with the sentencing Guidelines, found that it was sufficient to place him in criminal history category IV. The history was thus used to augment his sentence beyond what it would have been had it not been counted, or counted differently as Mr. Champagne argued to the district court. *Sent. Hrg.* at 42-43.

In 1998 the United States Supreme Court decided *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). It held that prior convictions are sentencing factors, and as a matter of due process were not elements of Mr. Almendarez-Torres's immigration-related crime that needed to be proved to a jury beyond a reasonable doubt. Subsequently, the Court issued its opinions in the *Apprendi* line of cases, which held that pursuant to the sixth amendment, any factor increasing a sentence must be either found by a jury beyond a reasonable doubt, or admitted by the defendant. Relying on *Almendarez-Torres*, *Booker* repeatedly excepted prior convictions from its holding.

A few weeks after *Booker*, however, the Supreme Court decided *Shepard v. United States*, __ U.S. __, 125 S.Ct. 1254 (Mar. 7, 2005). There the government attempted to prove the defendant's prior conviction by reference to police reports

and other non-jury documents. Justice Souter wrote the majority opinion, which held that consideration of these documents was improper.

Part III of the *Shepard* opinion, however, was not joined by Justice Thomas, and was thus not written for the majority. In part III Justice Souter offered additional reasons for the court's decision – including the sixth amendment issues noted in the *Apprendi* line of cases. He wrote that where the facts are not necessarily established by the record of conviction, and the judge has to "make a disputed finding of fact about what the defendant and [prior] judge must have understood as the prior plea's factual basis, the dispute raises the concern underlying *Jones* and *Apprendi*," that is, "the Sixth and Fourteenth Amendments guarantee a jury's standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase a potential sentence's ceiling." *Shepard*, __ U.S. at __, 125 S.Ct. at 1256.

Although Justice Thomas concurred in the opinion, he did not join part III because it did not go far enough. Rather than finding a constitutional doubt concerning the continued viability of *Almendarez-Torres* after *Booker*, he found constitutional error: "*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard*, __ U.S. at __,

125 S.Ct. at 1264 (Thomas, J, dissenting). Thus Justice Thomas would specifically find that consideration of police reports and the other documents would be unconstitutional.

Based on *Shepard*, it appears that the prior conviction exception to *Booker* has been undermined. Justice Thomas noted: "The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Id.*

Mr. Champagne now presses the issue. His prior convictions were found by the district court judge by a mere preponderance of the evidence. He didn't plea to facts supporting the finding, nor acknowledge the convictions. A jury didn't find them beyond a reasonable doubt. The court nonetheless found that Mr. Champagne's criminal history placed him in category IV. Without the very old or very minor convictions, he would have been in category III, *Sent. Hrg.* at 42, and his incarceration would be far shorter. Without the mandatory guidelines table, it is impossible to guess what sentence the district court might have imposed.

Although Mr. Champagne objected to the use of some of the convictions to support to court's finding, he did not raise the *Apprendi* issue below. This court thus reviews for plain error. *Olano*'s first two prongs are met because there was error that is now plain. Prong three is met because not using some of the criminal

history might have netted Mr. Champagne a more favorable sentence. Prong four is met because this court cannot assume that Mr. Champagne would get the same sentence, and therefore the fairness and integrity of judicial proceedings is being compromised.

Mr. Champagne's case should accordingly be remanded for re-sentencing based only on convictions that are adequately proved.

E. Mr. Champagne's Sentence Was Unconstitutionally Augmented by Having to Relinquish His Interest in Cash Not Found by a Jury Beyond a Reasonable Doubt

During the arrest and subsequent investigation of Mr. Champagne's crimes, the police found $12,483 in cash. Some of the money was on his person at the time of his arrest; the rest was found in a bank safety deposit box after the police found deposit box receipts in his car.

Although the exact measure of proof required by the criminal forfeiture statute may be unclear, *see United States v. White*, 116 F.3d 948 (1st Cir. 1997), the court here connected the money to Mr. Champagne's crimes by proof far less than beyond a reasonable doubt; from the record it appears that the court did no more than assume the money was connected to the crime.

The forfeiture of Mr. Champagne's money was "imposed at the culmination of a criminal proceeding and require[d] conviction of [the] underlying felony." *See United States v. Heldeman*, __ F.3d __, 2005 WL 708397 (1st Cir. Mar. 29, 2005).

Because the forfeiture was therefore punishment, the facts regarding the amounts to be forfeited are sentencing issues, and *Booker* applies.

As part of Mr. Champagne's plea, he was required to relinquish any interest in the money. *Plea Hrg.* at 13. He would not have done so had he then had the *Booker* right to have the issue proven to a jury beyond a reasonable doubt. *Antonakopoulos*, 399 F.3d at 78 ("reasonable probability that but for the error, he would not have entered the plea").

The *Booker* issue was unpreserved, thereby requiring plain error analysis. Because the relinquishment was part of the mandatory guidelines, U.S.S.G. § 5E1.4 ("Forfeiture is to be imposed upon a convicted defendant as provided by statute."); 21 U.S.C. § 853(a), the first two *Olano* prongs are met. The third prong is met because had Mr. Champagne been sentenced post-*Booker*, he would have exercised his right to have the government prove the connection between his crime and the money to a jury beyond a reasonable doubt, and there is thus a reasonable probability that the outcome might have been more favorable to him. The fourth *Olano* prong is met because this court cannot know what the district court would have done, particularly with the money found not on his person. Not remanding would thus usurp the district court's power to sentence within its discretion. Mr. Champagne's case should accordingly be remanded for re-sentencing on this issue.

III. Traditional Sentencing Considerations, Dormant During Guidelines Regime, Are Now Relevant

After *Booker*, the sentencing Guidelines are advisory. Now other statutory and traditional sentencing considerations, dormant during the Guidelines regime, are relevant. *See e.g., United States v. Jaber*, __ F.Supp.2d __, 2005 WL 605787 (D.Mass. Mar. 16, 2005).

Sentencing courts are now required to explore non-incarceration sentences. Federal law "recogniz[es] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582. Although under the pre-*Booker* regime the Guidelines were deemed to have taken this provision into account, *see United States v. Lively*, 20 F.3d 193 (6th Cir. 1994), without the mandatory Guidelines, the statute is resurrected. Thus, sentencing courts are required to explore a non-incarceration sentence, and view incarceration as last worst alternative. The district court in Mr. Champagne's case made no effort to explore a non-incarceration sentence.

Whether a sentence includes incarceration or not, resurrected federal law requires that "[t]he court shall impose a sentence sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). The twelve-and-one-half year period of incarceration imposed here, for selling a few ounces of cocaine, is far greater than necessary. The district court in this case, however, did not consider this matter.

"[I]n determining the particular sentence to be imposed, [the court] shall consider" a list of legislative purposes. 18 U.S.C. § 3553(a). These include:

- the nature and circumstances of the offense,
- the history and characteristics of the defendant,
- the seriousness of the offense,
- promotion of respect for the law,
- providing just punishment,
- affording deterrence to criminal conduct,
- protecting the public from recidivism,
- providing the defendant with needed educational or vocational training,
- providing the defendant with needed medical care,
- the kinds of sentences available,
- the sentencing Guidelines,
- avoiding unwarranted sentence disparities, and
- providing restitution to victims.

Id. Except for the sentencing Guidelines, the district court took none of these into account. Mr. Champagne was sentenced only for "punishment," *Sent. Hrg*. at 47, which is just one among the statute's many purposes. There were no victims of Mr. Champagne's crime. *Pre-Sent. Rpt.* ¶ 15.

The sentencing Guidelines are only one of the statutory considerations, and deserve no more weight than any other. *Jackson v. United States*, __ F.Supp.2d __, 2005 WL 711916 *4 (E.D. N.Y. Mar. 17, 2005) ("the greater the weight given to the Guidelines, the closer the Court draws to committing the act that *Booker* forbids – a Guideline sentence based on facts found by a preponderance of the evidence by a judge"); *see United States v. Biheiri*, __ F.Supp.2d __, 2005 WL

350585 (E.D. Va. Feb. 9. 2005); *United States v. Huerta-Rodriguez*, __ F.Supp. 2d __, 2005 WL 318640 (D. Neb. Feb. 1, 2005).

In meeting these purposes, courts are required to consider all relevant data. In the broadest of language Congress has directed that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661. Here, by mechanically applying the sentencing Guidelines, the district court limited the information it considered to only Mr. Champagne's criminal history and the nature of his crime.

Although the Guidelines are now advisory, the list of factors in §5H of the Guidelines provide useful examples of what sorts of facts courts should consider in sentencing. *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005). These include:

- old age and infirmity,
- mental and emotional factors,
- education,
- health,
- history of drug abuse,
- employment history,
- role of the defendant in the offence,
- family ties,
- criminal history,
- criminal livelihood,
- socio-economic status,
- military service, civic and charitable involvement, public service, and record of prior good works,
- lack of guidance as a youth.

U.S.S.G. § 5H1. The district court took few or none of these factors into consideration.

IV. The Facts Support a More Lenient or Non-Incarceration Sentence

Under the mandatory guidelines, the court had available to it a 37-month range of imprisonment – between 151 and 188 months (12 years, 7 months to 15 years, 8 months). The court chose the *lowest* possible period of incarceration. *C.f. United States v. González-Mercado*, __ F.3d __, __ (1st Cir. decided April 1, 2005) ("When, under a mandatory guidelines regime, a sentencing court has elected to sentence the defendant substantially above the bottom of the range, that is a telling indication that the court, if acting under an advisory guidelines regime, would in all likelihood have imposed the same sentence.")

In choosing the lowest sentence then possible, the court noted that it "adequately punishes the defendant." *Sent. Hrg.* at 47. The district court's comments, while not as favorable as in *United States v. MacKinnon*, __ F.3d __, 2005 WL 605031 (1st Cir. Mar. 16, 2005) ("It is an obscene sentence that has to be imposed."), are not so obviously harmful as in *United States v. Carpenter*, __ F.3d __, 2005 WL 708335 (1st Cir. Mar. 29, 2005) ("I give him the longest sentence I can."). Nonetheless, like in *United States v. Heldeman*, __ F.3d __, 2005 WL 708397 (1st Cir. Mar. 29, 2005), there is the possibility that had a lighter sentence been available, Mr. Champagne might have enjoyed a shorter term.

Other facts support a more lenient sentence.[1] Mr. Champagne, in 2002 at the time of sentencing, was 54 years old, *Sent. Hrg*. at 42, with a multitude of medical issues. *Pre-Sent. Rpt.* ¶ 79. He was emaciated, weighing just 117 pounds at the time of arrest. *Id*. ¶ 78.

Although Mr. Champagne did not admit of any mental illness to the court, *Plea Hrg*. at 6, as a child he suffered sexual abuse by a parish priest, and also during a period of his childhood when he was placed at the New Hampshire Hospital, and also during a period when he lived in a Manchester, New Hampshire orphanage. *Pre-Sent. Rpt.* ¶¶ 75, 81, 82. He has been prescribed antidepressant medication, *id.* ¶ 80, and carries the scars of his several attempts at suicide. *Id.* at 78, 80.

Mr. Champagne's formal education ended in eighth grade, *Plea Hrg*. at 5, although later during a period of incarceration he acquired a GED, *Pre-Sent. Rpt.* ¶¶ 49, 86, 87, an associate's degree, and a certificate in tailoring. *Id.*

Mr. Champagne's life has been sprinkled with drug abuse, *id.* ¶ 83, which he admits has driven him to his crimes. *Id.* ¶ 84. He has made attempts to be sober,

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[1]Mr. Champagne believes that, for reasons stated *infra*, it is problematic for this court to rely on the adequacy of a factual proffer of off-record facts to determine whether to remand. He nonetheless attempts a proffer, necessarily constrained however, by Mr. Champagne's incarceration, and by the insufficient time and resources available for adequate independent investigation of non-record facts.

id. ¶ 85, and at sentencing requested to be placed in Otisville, New York because of the drug program there. *Sent. Hrg*. at 46.

Mr. Champagne has been steadily employed for his adult life, *Pre-Sent. Rpt.* ¶ 88, and has never been on public assistance. *Id.* ¶ 88. He has ties to his several siblings. Mr. Champagne was not allowed into the military because of his hearing problems, *id*., and has been a volunteer literacy aid in jail. *Id.* ¶ 49.

For these reasons, Mr. Champagne and society would benefit from non-incarceration sentencing. Mr. Champagne is a hard worker, but obviously needs and wants sobriety and vocational assistance. His crime was not violent. As all his transactions took place in bars, the drug sales were to consenting adults, thus making his crime victimless. *Pre-Sent. Rpt.* ¶ 15.

Given these facts, it is not possible to predict how the district court might have sentenced Mr. Champagne. Accordingly, this case should be remanded so that the court can consider having Mr. Champagne evaluated for mental health and drug abuse problems, and so it can consider providing comprehensive non-incarceration services to address them.

V. Mr. Champagne's Case Should be Automatically Remanded for Re-Sentencing

Booker suggested the application of plain error and harmless error analyses. This court's approach to those doctrines is insufficient to protect Mr. Champagne's sixth amendment rights.

To discover the relevant facts, a new sentencing hearing would have to be held, which is the relief being sought.

The record is inadequate for this court to conduct a review of the impact of the (non-existent) facts. Mr. Champagne's case should be remanded so that facts now necessary for sentencing can be established.

Harmless error has 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." *Fulminante*, 499 U.S. at 307-308; *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). As "[t]he sixth amendment requires more than appellate speculation about a hypothetical jury's action," *id.*, it also requires more than speculation about a district court's hypothetical sentence under a non-guidelines regime.

In the context of plain error, there may exist "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Olano*,

507 U.S. at 735. There is now an array of factors that were not previously relevant, were prohibited, and now appear in a different context. 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." *United States v. Crosby*, 397 F.3d 103, 115 (2nd Cir. 2005).

When a structural error has been made, prejudice is presumed. *Fulminante*, 499 U.S. at 310. Because structural errors render the proceedings fundamentally unfair and "the inherent nature" of errors make it "exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different." *Barnett*, 398 F.3d at 526-27. *Antonakopoulos*, 399 F.3d at 68, ignores the structural error.

CONCLUSION

In light of the foregoing, Mr. Champagne requests that this honorable court remand his case for re-sentencing in light of *United States v. Booker*, 543 U. S. __, 125 S. Ct. 738 (2005). Because he alleges that this court's approach to *Booker* remands established in *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005), is wanting, yet is mindful that panels are required to defer to earlier-decided cases, he also requests *en banc* hearing of this case.

Mr. Champagne requests his attorney be allowed to present oral argument.

Respectfully submitted,
Robert Champagne,
By his Attorney,
Law Office of Joshua L. Gordon

Dated: March 18, 2011

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I hereby certify that on March 18, 2011, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Terry Ollila, Assistant United States Attorney.

Dated: March 18, 2011

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version 11, and that it contains no more than 6,956 words, exclusive of those portions of the brief which are exempted, within the 7, 000 words specified in the rule for a 15-page reply brief.

Dated: March 18, 2011

Joshua L. Gordon, Esq.