IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. NO. 04-10453
	)	
Plaintiff-Appellee,	)	D.C. NO. 03-00140- HG
	)	(District of Hawai'i)
	)	
vs.	)	DEFENDANT-APPELLANT'S
	)	OPENING BRIEF;
	)	CERTIFICATE OF COMPLIANCE;
	)	CERTIFICATE OF SERVICE.
ALPHONSO PALMER,	)	
	)	
Defendant-Appellant.	)	
	)	

DEFENDANT-APPELLANT'S OPENING BRIEF;
CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

The Honorable Helen Gillmor
United States District Judge

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JURISDICTIONAL STATEMENT

On November 3, 2003, the Defendant-Appellant Alphonso Palmer (Palmer) pled guilty in the United States District Court Hawaii (district court or court) to Count 1 of the Indictment, Filing a False Federal Income Tax Return for the calendar year 1996, in violation of 26 U.S.C. § 7206(1). [*See*, Excerpts of Record (ER), 16 - 25; 26 - 47]. The district court had jurisdiction of this matter pursuant to 18 United States Code (U.S.C.) § 3231.[1] The United States Court of Appeals for the Ninth Circuit has jurisdiction on appeal pursuant to 28 U.S.C. § 1291[2] because this is an appeal from a final judgment. That final judgment was imposed on June 24, 2004 (ER 54 - 72), and filed on July 1, 2004, in the form of the "Judgment in a Criminal Case". [ER 154 - 159].

As to timeliness, on June 24, 2004, the district court imposed judgment and sentence. [ER 54 - 71]. On July 1, 2004, the district court entered the Judgment in a Criminal Case. [ER 154 - 159]. On July 22, 2004, Palmer filed a letter in district court [ER 160 - 162], which letter the court construed on August 11, 2004 as a

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[1] "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231.

[2] "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . " 28 U.S.C. § 1291.

Motion for Reconsideration of Sentence or for Extension of Time to Appeal. [ER 166].

On August 11, 2004, the district court issued an order denying Palmer's Motion for Reconsideration of Sentence on the ground that it lacked jurisdiction under Rule 35(a) of the Federal Rules of Criminal Procedure. [ER 166]. The court granted Palmer's Motion for Extension of Time to Appeal under Rule 4(b)(4)[3] of the Federal Rules of Appellate Procedure and Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (2004) and United States v. Ameline, 376 F.3d 967, 980 (9th Cir. 2004). [ER 167 - 169]. The court construed Palmer's letter as a Notice of Appeal pursuant to Andrade v. Attorney General of State of California, 270 F.3d 743, 750-52 (9th Cir. 2001), *overruled on other grounds*, Lockyer v. Andrade, 538 U.S. 63 (2003). [ER 169]. Thus, Palmer timely filed the Notice of Appeal on July 22, 2004.

[3] "Upon a finding of excusable neglect or good cause, the district court may -- before or after the time has expired, with or without motion and notice -- extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Fed. R. App. P. 4(b)(4).

STATEMENT OF ISSUE PRESENTED

Whether the district court violated the Sixth Amendment by imposing a sentence exceeding the maximum authorized by the facts established in the Plea Agreement and admitted by Palmer, and thus requiring that this Court of Appeals vacate the sentence and remand for resentencing under the United States Sentencing Guidelines as modified by the Supreme Court in United States v. Booker? 543 U.S. ___ , 125 S. Ct. 738 (2005).

STATEMENT OF THE CASE

A. The Indictment.

On March 27, 2003, the plaintiff-appellee United States of America (Government) filed an Indictment against Palmer alleging two counts of Filing False Income Tax Returns, in violation of 26 U.S.C. § 7206(1).[4] [ER 1 - 3]. Count One alleged that in 1997 Palmer filed a false personal income tax return for the

[4] "Any person who—
(1) Declaration under penalties of perjury
Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution." 26 U.S.C. § 7206(1).

calendar year 1996, stating that he had an income of approximately $16,976.00 in 1996 when "he . . . knew and believed his true income for the calendar year 1996 was approximately $470,556.55" -- all in violation of 26 U.S.C. § 7206(1) a Class E felony. [ER 1 - 2; *see* Presentence Investigation Report[5] (PSR), p. 1].

Count Two alleged that in 1998 Palmer filed a false income tax return for the calendar year 1997, stating that he had a taxable income of approximately $31,787.00 in 1997, when "he . . . knew and believed his true income for the calendar year 1997 was approximately $311,832.19" -- in violation of 26 U.S.C. § 7206(1). [ER 2 -3].

On April 30, 2003, Palmer appeared before the Honorable Leslie E. Kobayashi, United States Magistrate Judge, and pled not guilty on both counts. [ER 5].

B. The Plea Agreement and Change-of-Plea Hearing.

On November 3, 2003, Palmer and the Government entered into a Memorandum of Plea Agreement (the Plea Agreement) (ER 16 - 25) in which Palmer agreed to plead guilty to Count One of the Indictment [ER 17] in exchange for the Government's agreement to move to dismiss after sentencing Count Two.

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[5] Filed simultaneously with the Opening Brief and Excerpts of Record, and under seal pursuant to Ninth Circuit Rule 30 - 1.9.

[ER 17].

Specifically, Palmer admitted the following facts in the Plea Agreement:

"8. Defendant admits the following facts and agrees that they are not a detailed recitation, but merely an outline of what happened in relation to the change to which Defendant is pleading guilty:

a. On or about April 15, 1997 in the District of Hawaii, the Defendant who was then a resident of Honolulu subscribed to an IRS Form 1040, Personal Income Tax Return for the Calendar Year 1996.

b. At the time that a return was signed, the Defendant affixed his signature below the jurat which stated that he was signing under the penalty of perjury.

c. The Defendant willfully reported that he had a taxable income of approximately $6,976.00 whereas as [sic] he then and there well knew and believed his true income for that calendar year was approximately $470,556.00."

[ER 18 - 19].

As to facts in dispute, the Plea Agreement states:

"12. Pursuant to Section 6B1.4 of the sentencing Guidelines, the parties identify the following facts that are in dispute for the purpose of sentencing the Defendant in connection with this matter:

a. The parties have been unable to determine the actual tax loss in regard to the materially false tax returns filed by the Defendant in 1996 and 1997.

b. The parties have agreed to meet and confer concerning the actual tax loss suffered by the United States, due to the returns the Defendant filed for the calendar years 1996 and 1997, in the hope of arriving at a stipulated figure to be used at the time of sentencing.

c. If the parties are unable to agree as to the actual tax loss, then the Defendant has reserved the right to litigate that issue at the time of sentencing."

[ER 20 - 21].

As to the adequacy of Palmer's change-of-plea, the Plea Agreement states:

> "... [T]he parties agree that the charges to which the Defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior and that accepting this Agreement will not undermine the statutory purposes of sentencing."

[ER 19].

In addition to agreeing to move to dismiss Count Two of the Indictment after sentencing, the Government agreed:

> "The United States Attorney agrees that Defendant's agreement herein to enter into a guilty plea(s) constitutes notice of intent to plead guilty in a timely manner, so as to permit the government to avoid preparing for trial as to Defendant. Accordingly, the United States Attorney anticipates moving in the Government's Sentencing Statement for a one-level reduction in sentencing offense level pursuant to Guideline § 3E1.1(b)(2), if defendant is otherwise eligible."

As to appealing the sentence, Palmer agreed to a limited appeal waiver, whereby he waived the right to appeal his sentence except based on a claim of ineffective assistance of counsel. [ER 21]. And, he waived his right to appeal his sentence except:

> "If the Court in imposing sentence departs (as that term is used in Part K of the Sentencing Guidelines) upward from the guideline range determined by the Court to be applicable to the Defendant, the Defendant retains the right to appeal the upward departure portion of his sentence and the manner in which that portion was determined under Section 3742 and to challenge that portion of his sentence in a collateral attack." [ER 21 - 22].

As to the governing law, the Plea Agreement stated: "14. The Defendant

understands that the District Court in imposing sentence will be bound by the provisions of the Sentencing Guidelines." [ER 22].

On November 3, 2003, Palmer appeared before United States Magistrate Judge Kevin S.S. Chang at a change-of-plea hearing. Palmer consented to enter his plea before a United States Magistrate Judge. [ER 30 -31]. Palmer affirmed that he signed the Plea Agreement, understood its terms and that it represented the entirety of the parties' agreement. [ER 32].

The Government confirmed that Palmer was pleading guilty to Count One, only. [ER 34]. The Government noted:

> "There is some conflict between the parties as to the actual tax loss which will determine the sentence. The parties have agreed to meet and attempt to resolve the figure as to the actual tax loss. If they are unable to resolve it, then the defendant reserves his right to have a hearing at the time of sentencing on that one issue, the amount of the tax loss." [ER 34; *and see*, ER 39].

The court confirmed Palmer's understanding that he was pleading guilty only to Count One, and what penalties could include:

> THE COURT: Do you full understand the charges covered by the plea agreement, Mr. Palmer?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: What are the maximum possibly penalties, Mr. Osborne [Assistant United States Attorney for the Government] with regards to Count I?

MR. OSBORNE: Up to three years imprisonment, a fine of up to $100,000.00, a term of supervised release of one year, and the special assessment of $100.00.

THE COURT: Mr. Gillin [Palmer's trial counsel], do you agree with that summary as to the possible penalties?

MR. GILLIN: I do, your Honor.

THE COURT: Mr. Palmer, do you understand that these are the possible penalties which would apply if you enter a guilty plea to the change in this case?

THE DEFENDANT: Yes, your Honor." [ER 35].

The court told Palmer that the United States Sentencing Guidelines (the Guidelines) would control the sentence in his case: "The United States Sentencing Commission has issued guidelines for judges to use in determining the sentence in a criminal case." [ER 36].

As to Palmer's factual admissions, the court confirmed that the facts set forth in paragraph eight of the Plea Agreement were "all true in every respect". [ER 40]. Palmer's trial attorney told the court:

> "... [A]s far as paragraph eight, subparagraph C... the dollar figure contained therein of $470,556.00 is the amount in controversy, which my client is going to be working on together with Mr. Kong [of the IRS]. So he... admits that there's some... amount, but ... what that sum amount is, is going to perhaps be subject to change."

[ER 40 -41].

The Government affirmed:

> "... [W]e're almost in agreement. They've ordered the $70,556.00 [sic] is the gross income figure that was reported by the defendant, as it does not take into account those deductions and other expenses of doing his business, and that's – the deductions and other expenses of doing the business is what is in dispute, because that causes the true taxable income, and that's what will be resolved."

[ER 41].

Palmer pled guilty in open court to Count One of the Indictment. [ER 43]. The court signed the report and recommendation concerning the guilty plea. [ER 43]. The court recommended that Palmer be adjudged guilty and that sentence be imposed. [ER 44; *see*, ER 49 - 50]. On December 3, 2003, the district court, the Honorable Helen Gillmor, signed the Acceptance of Plea of Guilty, Adjudication of Guilt and Notice of Sentencing. [ER 48].

C. The Presentence Investigation Report and Sentencing.

On March 16, 2004, the United States Probation Department Hawai'i (Probation) submitted the draft Presentence Investigation Report (PSR). As to the amount of money at issue in Count One, the PSR states:

> "IRS records reflected that the defendant signed Form 1040 U.S. Individual Income Tax Return on 4/14/97 which reported a taxable income of $16,976 for calendar year 1996. The taxable income reported included the defendant's U.S. Air Force income and his spouse's income as MCA's [Mobile Car Audio, Palmer's previous business entity] car audio equipment installer. Regarding MCA's gross receipts, the tax return reflected gross

> receipts of $189,926 for calendar year 1996. However, investigators determined that the defendant failed to report his true taxable income for calendar year 1996. The CID [Criminal Investigation Division of the IRS], using the bank deposit method, reviewed the defendant's bank accounts at First Hawaiian Bank and Hickam Federal Credit Union. The investigation revealed that the defendant deposited most of MCA's income into these bank accounts and that the true gross receipts amounted to $636,452. This resulted in a difference of $446,526. Therefore, the corrected taxable income for calendar year 1996 was $470,556, and the additional taxes due and owing were $176,175."

[PSR ¶ 12].

Pertaining to Count Two of the Indictment - which the Government had agreed to dismiss after sentencing - Probation set forth that for the calendar year 1997: "the CID determined that the true gross receipts amounted to $765,406, resulting in a difference of $274,017. Therefore, the corrected taxable income for calendar year 1997 was $311,832, and the additional taxes due and owing were $103,819." [PSR ¶13].

Pertaining to Palmer's State of Hawai'i joint income tax returns for the calendar years 1996 and 1997, the PSR stated that his state tax liability as determined by CID was a total of $98,907.43, with $61,662.91 due and owing for 1996, and $37,244.52 due and owing for 1997. [PSR ¶16].

As to offense level computations, pursuant to U.S.S.G. § 1B1.11(b)(1): "the sentencing guidelines in effect at the time the offense occurred have been utilized

for computation purposes because use of those guidelines is more advantageous to the defendant." [PSR ¶ 22].

Pursuant to U.S.S.G. § 1B1.3(a)(2), Probation added together the amounts due and owing for: a) the 1996 federal tax returns for which Palmer pled guilty; b) the 1997 federal returns for which Palmer **did not** plead guilty; c) the State of Hawai'i joint income tax returns for both 1996 and 1997, which were **never even mentioned in the Indictment**. [PSR ¶ 23]. As a result, Probation found a total tax loss of $378,901.60. [PSR ¶ 23].

Pursuant to U.S.S.G. § 2T1.1, § 2T4.1 and § 2T4.1(L), Probation found a base offense level of 17. [PSR ¶ 24]. Pursuant to U.S.S.G. § 3E1.1(a), Probation provided a two-level reduction for Palmer's acceptance of responsibility. [PSR ¶ 30]. Pursuant to U.S.S.G. § 3E1.1(b), Probation provided a one-level reduction for Palmer's assistance to authorities. [PSR ¶ 31]. With these reductions, the total offense level was 14. [PSR ¶ 34].

As to Palmer's criminal history, on June 15, 2000, Palmer was convicted and sentenced under the Uniformed Code of Military Justice to 30 months confinement on one count of Conspiracy to Commit Larceny and one court of Larceny, for conduct which occurred between January 1999 and May 1999. [PSR ¶ 37]. Pursuant to U.S.S.G. § 4A1.1(a), § 4A1.2(e)(1) and § 4A1.2(g), a guideline

criminal history score of 3 was determined. [PSR ¶ 37]. According to the Guideline Sentencing Table (U.S.S.G. Chapter Five, Part A) a criminal history score of 3 established a criminal history category of II. [PSR ¶ 38].

Based on a total offense level of 14 and a criminal history category of II, pursuant to U.S.S.G. Chapter Five, Part A, the Guideline range for imprisonment was determined to be 18-to-24 months. [PSR ¶ 58]. Since the applicable guideline range was in Zone D of the Sentencing Table, the minimum term had to be satisfied by a sentence of imprisonment pursuant to U.S.S.G. § 5C1.1(f). [PSR ¶ 59].

On May 19, 2004, Palmer filed objections to the draft PSR. [*See*, PSR, Addendum No. 2, page 1A]. As to Count One and the calendar year 1996, Palmer objected to the PSR's allegation: that he knew his true income to have been $470,556.55; that his cooperation with the IRS produced receipts and canceled checks proving that his business expenses amounted to $665,397.88; and, therefore, that amount of taxes due and owing for 1996 was $176,175. [PSR, Addendum No. 2, 1A].

As to Count Two and the calendar year 1997, Palmer objected to inclusion:

- of the alleged amount due on the federal income tax return for the calendar year 1997 on the ground that the Government agreed to dismiss this count;

- of the alleged amount due on State of Hawai'i joint tax returns for 1996 and 1997 on the ground that such information was not pertinent for the purpose of imposing a sentence.

[Id., *and see*, Defendant's Objections to Presentence Report, filed May 19, 2004, attached to PSR].

Relying on U.S.S.G. § 1B1.3(a)(2) and § 2T1.1, Application Note 2, Probation argued that Palmer was accountable for all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction and made no changes to the PSR. [PSR, Addendum No. 2, 1A].

On June 18, 2004, Probation submitted "Addendum No. 3 to the Presentence Report". Relying on new tax computations for the Government, the tax due and owing for 1996 was set at $17,564, and for 1997 allegedly $30,420. [PSR, Addendum No. 3, 1A]. As to the State of Hawai'i tax for 1996 and 1997, the PSR set the new total amount allegedly due of $41,919.15 for both years. Id. The total offense amount allegedly due was $89,903.15, which correlated with an offense level of 11. [PSR, Addendum No. 3, 2A]. Coupled with the criminal history category of II, the guideline imprisonment range was 10-to-16 months. [Id.].

On June 23, 2004, Palmer objected to Addendum No. 3. He argued again that tax losses for tax year 1997 could not be included in computing his total

offense level because the Government had agreed to dismiss Count Two of the Indictment. [PSR, Addendum No. 4, 1A; *and see*, Defendant's Second Objection to Presentence Report, filed June 23, 2004, attached to PSR]. Further, he objected to the inclusion of State of Hawai'i taxes as relevant conduct. Id. Probation refused to change the PSR pursuant to U.S.S.G. § 2T1.1, Application Note 2,. [PSR, Addendum No. 4, 2A].

The sentencing hearing took place on June 24, 2004. [ER 54 - 72]. Palmer reiterated his opposition to the PSR offense level on the ground that it included an alleged amount of tax liability for the 1997 in Count Two, which offense the Government had agreed to move to dismiss. And, further, that the State of Hawai'i alleged liabilities should not have been included on the grounds that Palmer had not been proven guilty of violations of Hawai'i State tax laws. [ER 63].

While at the sentencing hearing the Government raised the hours-old case issued that very day by the United States Supreme Court entitled, Blakely v. State of Washington. [ER 57]. The following colloquy occurred, commencing with the Government telling the court:

> "As a total aside, your Honor, but of some importance, the Supreme Court of the United States this morning decided a case, Blakely versus the State of Washington. And in that case a minority of the Justices have cast great

doubt on the – on the sentencing guidelines themselves, but it is a minority opinion and the Department of Justice today –

THE COURT: If it's part of the opinion I find it interesting that you start with the minority opinion.

MR. OSBORNE: – well obviously the – the Department of Justice not – not surprisingly has already issued a memorandum in which they have said that it is the position of the Department of Justice that the four person minority opinion regarding enhancements in no way changes the finding of enhancements by the Judge. And so I'm just letting you know that's out there.

THE COURT: Well Blakely –

MR. OSBORNE: If the Court would like I have a copy of the opinion here.

THE COURT: -- well I -- I am interested.

MR. OSBORNE: It's – it's a very interesting thing.

THE COURT: Okay. Thank you. Is this one of the ones having to do with the challenge to the sentencing guidelines?

MR. OSBORNE: Yes, your Honor. Factually what happened it came out of a State Court in Washington. There – I think it was a personal assault, I believe, and the Judge conducted a three day long hearing calling witnesses to determine whether or not the Washington State enhancement for brutality, I believe it was, should be applied in this situation even though the State of Washington had not asked for it. And the defendant had not, at his plea, said anything about it.

And the Supreme Court did not address the Federal guidelines five to four. They said they're just fine, but, in fact, they found that enhancement improper.

THE COURT: But that was in a State proceeding.

MR. OSBORNE: Yes, your Honor.

THE COURT: Yeah. Yeah.

MR. OSBORNE: Yeah, and that's why – that's why but four of the Justices filed a concurring dissenting opinion saying that the Federal guidelines are clearly unconstitutional.

THE COURT: Oh, huh.

MR. OSBORNE: So you'll find that very interesting. But we do not believe, pursuant to the memo received from Washington today, that that opinion affects these proceedings.

THE COURT: And it's still four no matter how vociferously it's written it's still four Justices.

MR. OSBORNE: That's correct, your Honor.

THE COURT: Okay. Well that is very interesting. Thank you. The matters before the Court involve the objections to the presentence report, factual statements, and conclusions from the factual statements. And what you are asking me to do, Mr. Gillin, is to basically not apply the sentencing guidelines?

[ER 57 - 59].

The court went on to address Palmer's objections to the sentencing enhancements for alleged tax amounts due and owing on the federal 1997 income tax, and the State of Hawai'i income tax for 1996 and 1997:

"[t]he fact that he only has a plea to one year does not mean that the related conduct isn't counted. It is. We routinely court it. That's just the way these things are constructed in the sentencing guidelines. And it's probably one of the reasons that the sentencing guidelines are a source of such

> controversy, but they have been held constitutional by the United States Supreme Court, and the guidelines are promulgated by a commission that was authorized by law by the Legislature. And the United States Supreme Court has said that the original authorization with respect to that commission and the – the regulations coming out of it are lawful. So until the Supreme Court of the United States says differently I have to apply those, and I believe that the addendum is clear as to how they apply here."

[ER 60 - 61].

Palmer made an oral motion for a downward departure. [ER 61]. The district court denied the motion on the ground that Palmer "isn't outside the Heartland" of the Guidelines to warrant such a departure. [ER 62].

The district court adopted the PSR's factual statements to which there were no objections. [ER 64]. The court adopted the PSR's Addenda and the Plea Agreement. [ER 64].

The court determined that the total offense level was 13 (in contrast to offense level 11, set forth in PSR, Addendum No. 3, 2A). [ER 65]. The court imposed a sentence at the low end of the applicable range of 15-to-21 months, with incarceration for 15 months, supervised release of one year, and the court imposed no fine. [ER 67]. The Government moved to dismiss Count Two of the Indictment, which motion the Court granted. [ER 70].

After the Court had imposed the sentence, the Probation officer attending the sentencing hearing (Mr. Yoshihara) told the court:

"MR. YOSHIHARA: Your Honor, although I mentioned to all the parties that the total offense level was different from the last addendum that was submitted to the Court's findings, there was a two level increase that is applicable, because the defendant derived more than $10,000.00 from criminal activity that was not reported n his income tax returns. And that's why the Court's finding that the total offense level is 13 rather than 11 as previously reflected in addendum number two.

THE COURT: Okay. Is this part – is this sheet part of the addendum?

MR. YOSHIHARA: No, your Honor. I prepared that immediately before sentencing at the time that we realized that we had omitted the two level increase.

THE COURT: Perhaps we should make it – perhaps we should make it part of the addendum. What do you think?

MR. YOSHIHARA: Very well, you Honor. I can – I can change that.

THE COURT: Well I'm just thinking we could – we could just file it fi you wanted to sign it.

MR. YOSHIHARA: Very well, your Honor.

THE COURT: Rather than have to go through any more preparation. But I think it would be good to have it in the record. Okay, and I'll just leave it here, and you can deal with Mr. Hisashima in putting it into the proper form. If there's nothing further then we stand in recess. Thank you."

[ER 70 - 71].

This colloquy relates to, and explains, a one-page, undated document entitled "Guideline Computations" attached to PSR, Addendum No. 4. That document -- carrying the signature of Mr. Yoshihara -- enhanced by two levels

Palmer's offense level pursuant to U.S.S.G. § 2T1.1(b)(1), on the ground that, "because the defendant failed to report or correctly identify the source of income exceeding $10,000 from criminal activity." [*See*, PSR, Addendum No. 4, "Guideline Computations"].

There is no indication in the record that Probation filed this document with the court, or served the parties. [*See*, United States District Court Docket attached to ER (USDC)]. The above-quoted colloquy suggests that on the day of sentencing Probation told Palmer he would be subject to **new computations, adding two levels: "**I [Mr. Yoshihara] mentioned to all the parties that the total offense level was different from the last addendum that was submitted[ ]", and "I [Mr. Yoshihara] prepared that [the Guideline Computations] immediately before sentencing at the time that we realized that we had omitted the two level increase." [ER 70].

There is no discussion in the June 24, 2004 sentencing transcript regarding facts supporting the two-level enhancement pursuant to U.S.S.G. § 2T1.1(b)(1). [*See*, ER 54 - 72]. There is no indication in the transcript that Palmer's attorney was aware of the two-level enhancement, or agreed to the same. [Id.].

On the day of sentencing, June 24, 2004, Palmer voluntarily surrendered to the U.S. Marshals to commence the custodial portion of his sentence. [ER 69].

The Judgment in a Criminal Case was filed on July 1, 2004, reflecting the guilty plea to Count One of the Indictment, and the sentence imposed by the court at the June 24, 2004 sentencing hearing. [ER 154 - 159].

On July 22, 2004, Palmer filed a letter with the district court dated July 19, 2004, in which he told the court that,

> "[a]fter careful consideration I have found that the sentence imposed upon me is not acceptable. The sentencing procedure deprived me of my federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to my sentence."

[ER 160 - 163],

Palmer told the court that he accepted wrongdoing as to Count One; however, such acceptance did not encompass the alleged federal taxes due and owing for the calendar year 1997, or the State of Hawai'i joint taxes allegedly due and owing for 1996 and 1997. [ER 161]. Palmer moved:

> "to be re-sentenced at the correct lower level & sentencing guideline [ ] for 1996's federal tax case only. Which was my original plea agreement. . . . If this is not permissible, I would like to kindly request that a (30) days extension be granted to file an appeal of Sentence. At which time I would kindly request that a clerk of court to file a notice of appeal on my behalf [ ] and issue a court appointed attorney for appeal purposes."

[ER 161 - 162].

The Government opposed the motion. [USDC No. 29]. The district court construed Palmer's letter as a Motion for Reconsideration of Sentence or for

Extension of Time to Appeal. [ER 169]. On August 11, 2004, the court issued an order denying Palmer's Motion for Reconsideration of Sentence on the ground that it lacked jurisdiction under Rule 35(a) of the Federal Rules of Criminal Procedure. [ER 166]. The court granted Palmer's Motion for Extension of Time to Appeal under Rule 4(b)(4) of the Federal Rules of Appellate Procedure and Blakely, 542 U.S. ___, 124 S. Ct. 2531 and Ameline, 376 F.3d at 980. [ER 167 - 169].

In discussing the constitutional grounds Palmer had relied upon in his July 22, 2004 letter/motions, the court stated in its order:

> "In Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (2004), the United States Supreme Court, in reviewing a Washington state case, determined that "the relevant 'statutory maximum' (for sentencing) is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any addition findings." 124 S.Ct. at 2537 (emphasis in original). If the judge "inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." Id. (Internal citations and quotations marks omitted).
>
> In United States v. Ameline, ___ F.3d ___, 2004 WL 1635808 (July 21, 2004), a Ninth Circuit Court of Appeals panel determined that Blakely applies to sentences imposed pursuant to the Federal Sentencing Guidelines, see id. at * 8, and held that a district judge's imposition of an increased sentence after determining the material sentencing facts by a preponderance of the vidence standard violated the defendant's Sixth Amendment rights, see id. at *10.
>
> In light of Blakely and Ameline, the Court finds that Defendant has

established good cause for extending his time to file a notice of appeal. In sentencing Defendant, the Court relied on facts in the presentence report that were not determined by a jury beyond a reasonable doubt. Specifically, the Court determined Defendant's base offense level, in part, on the report's determination of his tax liabilities to the State of Hawaii for calendar years 1996 and 1997, and his allegedly false federal tax return for calendar year 1997.

The United States claims that, before Defendant was sentenced on June 24, 2004, the United States apprised Defendant's counsel of the then hours-old holding in Blakely. The United States contends that, because Defendant was made aware of the holding in Blakely and was represented by counsel, his failure to appeal his sentence within ten days of the judgment in his case was not based on either excusable neglect.

The United States' argument is undermined by the fact that, according to the case docket, Defendant terminated his counsel on the date of his sentencing, June 24, 2004. After sentencing, Defendant did not have an attorney to advise him of the potential ramifications of Blakely and later, Ameline. Defendant's failure to file a notice of appeal within ten days of his judgment is excusable.

In summary, the Court finds that Defendant has established bother excusable neglect and good cause for granting his motion for an extension of time to file a notice of appeal." [ER 167 - 169].

Further, pursuant to Andrade, 270 F.3d at 750-52, the court construed Palmer's Motion for Extension of Time to Appeal as a Notice of Appeal. [ER 169].

On August 25, 2004, Palmer filed a Financial Affidavit. [USDC No. 33]. The district court did not appoint appellate counsel until October 26, 2004. [USDC No. 35]. Now in default of the September 3, 2004 due date to designate

transcripts, and the October 4, 2004 due date to file the transcripts, on November 1, 2004 Palmer filed in this Court of Appeals a Motion for Relief from Default and to File the Designation of Transcript, and to Set a New Briefing Schedule. [*See*, Court of Appeals Docket attached to ER (C.A.), at 11/1/04].

Palmer also filed a Motion to Stay Sentence Pending Appeal and for Release Pending Appeal (Motion to Stay Sentence). [USDC No. 36]. The court stayed the motion pending the Supreme Court's resolution of United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (No. 04-104, 2004 term) and Fanfan v. United States, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 125 S. Ct. 12 (No. 04-105, 2004 Term). [USDC No. 43]. Palmer filed a Motion for Reconsideration [USDC No. 45], which motion the court denied. [USDC No. 46].

On November 16, 2004, this Court granted the Motion for an Extension of Time to Designate the Transcripts. Moreover, the order stated, "[i]n view of the apparent brevity of Defendant's sentence, the Clerk sua sponte expedites this appeal." [C.A., 11/16/04]. This opening brief is now due on or before February 11, 2005. [Id.].

BAIL STATUS

Palmer is currently serving the custodial portion of his sentence at FDC Honolulu, located at 351 Elliot Street, Honolulu, HI, 96819. According to the Federal Bureau of Prisons' website (www.bop.gov) his projected date of release is July 23, 2005.

STATEMENT OF RELEVANT FACTS

As to Count One of the Indictment to which Palmer pled guilty, these are the facts he admitted in the Plea Agreement, and, as argued fully below, the only facts upon which his sentence may be based:

> "8. Defendant admits the following facts and agrees that they are not a detailed recitation, but merely an outline of what happened in relation to the change to which Defendant is pleading guilty:
>
> a. On or about April 15, 1997 in the District of Hawaii, the Defendant who was then a resident of Honolulu subscribed to an IRS Form 1040, Personal Income Tax Return for the Calendar Year 1996.
>
> b. At the time that a return was signed, the Defendant affixed his signature below the jurat which stated that he was signing under the penalty of perjury.
>
> c. The Defendant willfully reported that he had a taxable income of approximately $6,976.00 whereas as [sic] he then and there well knew and believed his true income for that calendar year was approximately $470,556.00."

[ER 18 - 19].

On June 18, 2004, Probation submitted "Addendum No. 3 to the

Presentence Report". Relying on new tax computations for the Government, the alleged tax due and owing for 1996 was set at $17,564. [PSR, Addendum No. 3, 1A].

SUMMARY OF THE ARGUMENT

Pursuant to the Supreme Court's holdings in the Apprendi, Blakely and Booker cases, the prison sentence authorized by Palmer's guilty plea on Count One of the Indictment should have been 4-to-10 months - as explained fully below. At the sentencing hearing, the district court found additional facts by a preponderance of the evidence. Because the Guidelines as written mandated a sentence between 15-to-21 months based upon those findings, the court imposed a sentence of 15 months, instead of a 4-to-10 month sentence the court should have imposed based on the facts to which Palmer pled guilty.

The district court's application of the Guidelines conflicted with Apprendi v. New Jersey, 530 U.S. 466 (2000), wherein the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." And it conflicted with Blakely, 542 U.S. ___, 124 S. Ct. 2531, where the Court held, "that the 'statutory maximum' for Apprendi

purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S., at ___(slip op., at 7).

Recently in Booker, 543 U.S. ___ , 125 S. Ct. 738, the Supreme Court reaffirmed the Court's holding in Apprendi: "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." 543 U.S., at ___ (Justice Stevens, slip op., at 20). In light of this determination, the Court modified the Sentencing Reform Act of 1984, severing and excising 18 U.S.C. § 3553(b)(1) which makes the Guidelines mandatory, and 18 U.S.C. § 3742(e) which depends upon the Guidelines' mandatory nature. Now, in the post-Booker world, the Guidelines require the district to consider Guidelines ranges pursuant to 18 U.S.C. § 3553(a)(4), but permit the court to tailor the sentence in light of other statutory concerns pursuant to 18 U.S.C. § 3553(a). As fully argued below, Palmer submits that application of the holding in Booker to his sentence requires that this Court vacate his sentence and remand the case to the district court for resentencing in conformity with the opinions of that case.

ARGUMENT

In Violation of the Sixth Amendment, the District Court Imposed a Sentence Exceeding the Maximum Authorized by the Facts Established in the Plea Agreement and Admitted to by Palmer, Thus Requiring Reversal and Remand for Resentencing According to the Sentencing Guidelines as Modified by the Supreme Court in United States v. Booker.

A. Standard of Review.

The Plea Agreement retained Palmer's right to appeal his sentence: "if the Court in imposing sentence departs (as that term is used in Part K of the Sentencing Guidelines) upward from the guideline range determined by the Court to be applicable to the Defendant . . . " [ER 35]. "Depart" as that term is used under U.S.S.G. § 5K2.0, refers for definition back to § 1B1.1. There the Application Note says, "'[d]epart' means grant a departure." U.S.S.G. § 1B1.1, Application Note 1 (E). "'Upward departure' means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. 'Depart upward' means grant an upward departure." Id.

Palmer submits that the district court applied an upward departure to the applicable Guideline range, 4-to-10 months, in violation of the Sixth Amendment and based upon facts Palmer never admitted in the Plea Agreement. Therefore, the

Plea Agreement's limited waiver of appeal does not bar this appeal.

Furthermore, Palmer objected to his sentence:

> "The reference to any tax due for taxable year 1997 is inappropriate as the Government has already dismissed Count II. Further, the Defendant objects Addendum 3 and to any reference to any tax liability owed to the State [of] Hawaii or any other than Federal Taxing Authority as this Honorable Court lacks jurisdiction over the subject matter. Accordingly this Honorable Court should only consider the pertinent information of Court I for purposes of imposition of sentence."

[Defendant's Second Objection to Presentence Report, filed on June 23, 2004, ¶ 2, attached to PSR].

At the sentencing hearing on June 24, 2004, Palmer reiterated his opposition to the PSR offense level on the ground that it included the alleged federal tax liability for the 1997 in Count Two, which offense the Government had agreed to move to dismiss. [ER 63]. And, further, that the alleged Hawai'i State taxes should not have been included on the ground that Palmer had not been proven guilty of violations of Hawai'i State tax laws. [ER 63].

These objections preserved the issue presented for review, inasmuch as they are objections to Palmer's sentence on the ground that the material sentencing facts were not alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt, or admitted by the defendant. *See*, Ameline, 376 F.3d at 980, *citing* United States v. Cotton, 535 U.S. 625, 628-29 (2002).

The district court had the opportunity to rule on the objections. While at the sentencing hearing the Government raised the hours-old case decided that day in the United States Supreme Court, Blakely v. State of Washington. [ER 57]. The Government told the court that the Washington State court found Washington state sentencing enhancements "improper" [ER 58], in a personal assault case. [ER 58]. The Government told the district court that four of the Justices in the Blakely case filed a "concurring dissenting opinion saying that the Federal guidelines are clearly unconstitutional." [ER 59].

Rather than continue the hearing at another time in order to review Blakely, which case the court deemed "interesting" [ER 58], the court forged ahead. As to Palmer's objections, the court said:

> "[t]he fact that he only has a plea to one year does not mean that the related conduct isn't counted. It is. We routinely court it. That's just the way these things are constructed in the sentencing guidelines. And it's probably one of the reasons that the sentencing guidelines are a source of such controversy, but they have been held constitutional by the United States Supreme Court, and the guidelines are promulgated by a commission that was authorized by law by the Legislature. And the United States Supreme Court has said that the original authorization with respect to that commission and the – the regulations coming out of it are lawful. So until the Supreme Court of the United States says differently I have to apply those, and I believe that the addendum is clear as to how they apply here."

[ER 60 - 61]. The district court's interpretation and application of the Guidelines are reviewed de novo. *See*, United States v. Nielsen, 371 F.3d 574, 582 (9th Cir.

2004). Under de novo review appellate review is "independent," *see* Agyeman v. INS, 296 F.3d 871, 876 (9th Cir. 2002), and no deference is owed to the district court. *See* Rabkin v. Oregon Health Sciences Univ., 350 F.3d 967, 971 (9th Cir. 2003); and United States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998).

B. Discussion

1. Background.

On January 12, 2005, the United States Supreme Court issued the much anticipated decisions in the cases United States v. Booker (04-104) and United States v. Fanfan (04-105), 543 U.S. ___ , 125 S. Ct. 738. The Court's decision was issued in two opinions with the first addressing the question of whether application of the Guidelines violates the Sixth Amendment.[6] S*ee,* Booker (04-104), 543 U.S. at ___ (Justice Stevens' slip op. at 1). The Court answered the question in the affirmative. Id. (Justice Stevens' slip op. at 20).

In light of the first opinion, the second opinion addressed the issue of severability and found that the two sections of the federal sentencing statute that

[6] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const., amend. VI.

make the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e), must be severed and excised:

> "thus mak[ing] 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)."

Id. (Justice Breyer's slip op. at 2).

As noted by the Court, "we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." Id. (Justice Breyer slip op. at 25). This case is on direct review, and therefore the Court's holdings apply.

Palmer pled guilty pursuant to 26 U.S.C. § 7206(1) to filing a materially false federal tax return for the calendar year 1996. [ER 17]. In particular, Palmer admitted in the Plea Agreement:

> "8. Defendant admits the following facts and agrees that they are not a detailed recitation, but merely an outline of what happened in relation to the change to which Defendant is pleading guilty:
>
> a. On or about April 15, 1997 in the District of Hawaii, the Defendant who was then a resident of Honolulu subscribed to an IRS Form 1040, Personal Income Tax Return for the Calendar Year 1996.
>
> b. At the time that a return was signed, the Defendant affixed his signature below the jurat which stated that he was signing under the penalty of perjury.
>
> c. The Defendant willfully reported that he had a taxable income of approximately $6,976.00 whereas as [sic] he then and there well knew and believed his true income for that calendar year was

approximately $470,556.00."

[ER 18 - 19].

At the change-of-plea hearing on November 3, 2003, the parties told the court that amount of $470,556 reflected gross receipts:

> "it does not take into account those deductions and other expenses of doing his business, and that's – the deductions and other expenses of doing the business is what is in dispute, because that causes the true taxable income, and that's what will be resolved."

[ER 41]. On June 18, 2004, Probation submitted "Addendum No. 3 to the Presentence Report". Relying on new tax computations, the tax due and owing for 1996 was set at $17,564. [PSR, Addendum No. 3, 1A]. As to the revised amount of $17,564 due and owing for 1996 under Count One, the Guidelines tax table required the district court to select a "base" offense level of 11. *See,* U.S.S.G. § 2T4.1(F).

Probation deducted from Palmer's base offense level, two levels for acceptance of responsibility [PSR ¶ 30] and one level for assistance to law enforcement. [PSR ¶ 31]. These deductions should have rendered a subtotal offense level of 8. Based upon Palmer's criminal history category of II [*see,* PSR ¶ 38] and the subtotal offense level of 8, the applicable Guideline range of imprisonment was within Zone B of the Guideline Sentencing Table, and 4-to-10

months. *See*, U.S.S.G. Chapter 5, Part A, Sentencing Table.

The Guidelines as written, however, required that the district court adopt Probation's tax computations, submitted in PSR Addendum No. 3, wherein Probation added to the 1996 tax amount due ($17,564.00):

- the alleged amount for the calendar year 1997 of $30,420.00; and
- the alleged State of Hawai'i amount for the calendar years 1996 and 1997 at a total of $41,919.15;
- with an alleged federal and state tax due for calendar years 1996 and 1997 of $89,903.15.

[PSR, Addendum No. 3, 1A - 2A].

The PSR set forth a total offense level 11, with the criminal history category of II, resulting in a guideline range of 10-to-16 months. [*See*, id., at 2A]. At sentencing the district court adopted the factual statements in the PSR to which there were no objections, the PSR Addenda [ER 64] and Probation's conclusions as to the Guidelines. [ER 65]. The court also relied upon a post-sentence, last-minute attachment to the PSR which added two offense levels to Palmer's sentence pursuant to U.S.S.G. § 2T1.1(b)(1). [*See*, PSR, Addendum No. 4, "Guideline Computations"].

Considering the alleged total taxes due and owing for both federal and State of Hawai'i returns for 1996 and 1997 ($89,903.15), adding the two-level (+2)

enhancement pursuant to U.S.S.G. § 2T1.1(b)(1), and subtracting the downward adjustments for acceptance of responsibility (-2) and assistance to law enforcement (-1), the district court found a total offense level of 13. Applying the offense level of 13 to the criminal history category of II, the Guideline imprisonment range was 15-to-21 months, with the court imposing incarceration for 15 months, supervised release of one year, and imposed no fine. [ER 67].

2. Apprendi/Blakely/Booker.

In Apprendi, 530 U.S. 466, the defendant pled guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term of five-to-ten years. Thereafter, the trial court found that his conduct had violated New Jersey's "hate crime" law because it was racially motivated, and, therefore, imposed a 12-year sentence. In setting aside the enhanced sentence, the Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490.

In Blakely, 542 U. S. ___ , the defendant pled guilty to kidnaping under a determinate sentencing scheme similar to the Federal Guidelines. Provisions of Washington State law, comparable to the Federal Guidelines, mandated a "standard" sentence of 49 to 53 months unless the judge found aggravating facts

justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that the defendant had acted with "deliberate cruelty" and sentenced him to 90 months. Blakely, 542 U.S., at ___ (slip op., at 3).

The Supreme Court found that the application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of "any particular fact" that the law makes essential to his punishment. 542 U. S., at ___ (slip op., at 5). That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." Id., at ___ (slip op., at 7) (emphasis deleted). The Court rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for Class B felonies, noting that under Washington law, the judge was required to find additional facts in order to impose the greater 90-month sentence. The Supreme Court stated that its precedents made clear, "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."* Id. (slip op., at 7) (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in Apprendi that the defendant acted with racial malice,

increased the sentence that the defendant could have otherwise received. Since that fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights.

In Booker the Court held, "that both lower courts [the United States Court of Appeals for the Seventh Circuit in Booker; the United States District Court in Fanfan] correctly concluded that the Sixth Amendment as construed in Blakely does apply to the Sentencing Guidelines." Booker, 543 U.S. at ___ (Justice Stevens' slip op. at 2). In Booker, a jury found the defendant guilty of possession with intent to distribute 93.5 grams of a cocaine base (crack). Id. (Justice Stevens' slip op at 2). Based on the defendant's criminal history and the 92.5 grams of drugs the Guidelines required a base sentence of between 210 and 262 months. Id.

The sentencing court held a post-trial proceeding, however, and found by a preponderance of the evidence that defendant possessed an additional 566 grams of crack, and that he was guilty of obstructing justice. Id. With these findings, the Guidelines mandated a sentence of between 360 months to life. Id. In reliance upon Blakely, the Seventh Circuit held that this application of the Guidelines conflicted with Apprendi. Id. (Justice Stevens' slip op. at 3).

In Fanfan, a jury found that the defendant conspired to distribute and to possess with intent to distribute at least 500 grams of cocaine, which finding under

the Guidelines resulted in a maximum sentence of 78 months. Id. The trial judge conducted a sentencing hearing and found by a preponderance of the evidence that the defendant was responsible for an additional 2.5 kilograms of cocaine powder, and an additional 261.6 grams of crack cocaine. Id. And he found that the defendant was an organizer, leader in the criminal activity. Id.

Under the Guidelines, the additional findings required an enhanced sentence of 15 to 16 years. Id. (Justice Stevens' slip op. at 4). In reliance upon Blakely, the sentencing judge followed those provisions of the Guidelines that **did not** implicate the Sixth Amendment and imposed a sentence **based only the jury's guilty verdict**. Id. Following the denial of the government's motion to correct sentence, the Government filed both a Notice of Appeal in the First Circuit, and a petition for a writ of certiorari before judgment in the Supreme Court.

As to Booker (04-104) the Supreme Court affirmed the Seventh Circuit's judgment, and remanded the case. Id. (Justice Breyer slip op. at 25). "On remand the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in this opinion." Id.

As to Fanfan (04-105), the Supreme Court noted that the sentencing court imposed a sentence authorized by the jury's verdict which did not violate the Sixth

Amendment, but was lower than the sentence authorized by the Guidelines as written at the time. Since the Government and the defendant might seek resentencing based on the Court's Booker opinions, the Supreme Court vacated the judgment of the district court in Fanfan and remanded the case for further proceedings consistent with their opinions. Id.

Booker reaffirmed the Court's holding in Apprendi: "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." (Justice Stevens, slip op., at 20).

3. Application of Booker.

The Plea Agreement states: "The Defendant understands that the District Court in imposing sentence will be bound by the provisions of the Sentencing Guidelines." [ER 22, *and see* ER 36]. Since the sentence imposed under the Plea Agreement is expressly governed by the Guidelines, and the Guidelines as written at the time have been rendered unconstitutional under the Sixth Amendment in Booker, Palmer's sentence must be vacated and the case remanded for resentencing.

Otherwise, Palmer submits that the facts admitted to in the Plea Agreement

do not support the court's enhancement of his sentence pursuant to U.S.S.G. § 1B1.3(a)(2) and pursuant to U.S.S.G. § 2T1.1(b)(1).

As to section 1B1.3(a)(2), that section states:

> "(a) Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross reference in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> > (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant;
> > * * *
> > (2) solely with respect of offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) . . . above that were part of the same course of conduct or common scheme or plan as the offense of conviction;"

U.S.S.G. § 1B1.3(a)(2).

Section 3D1.2(d) states:

> "All counts involving substantially the same harm shall be grouped together into a single group. Counts involve substantially the same harm within the meaning of this rule: * * * (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or it the offense behavior is on going or continuous in nature and the offense guideline is written to cover such behavior."

U.S.S.G. § 3D1.2(d).

In this regard, Probation wrote in the PSR:

> "In addition, pursuant to U.S.S.G. § 1B1.3(a)(2), the defendant is

> accountable for all acts and omissions that occurred as part of the same course of conduct or common scheme or plan as the offense of conviction. Therefore, he is also accountable for filing a false tax return for calendar year 1997, for which the additional tax due and owing is $103,819.17. In addition, the defendant is accountable for $98,907.43 owed to the State of Hawaii Department of Taxation for additional state income tax due and owing for calendar years 1996 and 1997. Consequently, the total tax loss in this case is $378,901.60."

[PSR ¶ 23].

In response to Palmer's objection to including alleged amounts for 1997 federal taxes, and for State of Hawai'i taxes, PSR Addendum No. 2 states in pertinent part:

> "Regarding the inclusion of the tax loss for calendar year 1997 and the tax liability owed to the State of Hawaii, pursuant to U.S.S.G. § 1B1.3(a)(2), the defendant is accountable for all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. In addition, U.S.S.G. § 2T1.1, Application Note 2, provides that all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan, unless the evidence demonstrates that the conduct is clearly unrelated. Examples illustrative of conduct that is part of the same course of conduct or common scheme or plan include: a) there is a continuing pattern of violations of the tax laws by the defendant; b) the defendant uses a consistent method to evade or camouflage income; c) the violations involve the same or a related series of transactions; and d) the violations in each instance involve a failure to report or an understatement of a specific source of income. In this case, the defendant filed a false tax return for calendar year 1997 and falsified his income on his State of Hawaii joint income tax returns for calendar years 1996 and 1997. Therefore, this conduct is considered relevant conduct to Count 1. As a result, no changes have been made to paragraph 23."

[Addendum No. 2, at 1A - 2A, *and see*, Addendum No. 4, at 1A].

In Addendum No. 3 Probation amended PSR paragraph 23 again, to reflect that the alleged total federal and State of Hawai'i tax loss was $89,903.15. [PSR, Addendum 3, at 2A].

The facts admitted by Palmer in the Plea Agreement do not support Probation's findings. Palmer admitted in the Plea Agreement:

> "8. Defendant admits the following facts and agrees that they are not a detailed recitation, but merely an outline of what happened in relation to the change to which Defendant is pleading guilty:
>
> a. On or about April 15, 1997 in the District of Hawaii, the Defendant who was then a resident of Honolulu subscribed to an IRS Form 1040, Personal Income Tax Return for the Calendar Year 1996.
>
> b. At the time that a return was signed, the Defendant affixed his signature below the jurat which stated that he was signing under the penalty of perjury.
>
> c. The Defendant willfully reported that he had a taxable income of approximately $6,976.00 whereas as [sic] he then and there well knew and believed his true income for that calendar year was approximately $470,556.00."

[ER 18 - 19].

At the change-of-plea hearing on November 3, 2003, the parties told the court that the amount of $470,556 reflected gross receipts, and "it does not take into account those deductions and other expenses of doing his business, and that's – the deductions and other expenses of doing the business is what is in dispute, because that causes the true taxable income, and that's what will be resolved." [ER 41]. Relying on new tax computations Probation found the new amount of

tax due and owing for 1996 was $17,564. [PSR, Addendum No. 3, 1A].

Booker held that, "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty . . . must be admitted by the defendant. . . . " (Justice Stevens, slip op., at 20). Palmer's admission in the Plea Agreement to the facts underlying Count One and the subsequent computation of the amount due and owing for 1996 ($17,564), do not support the court's adoption of the facts pertaining to Count Two and the 1997 federal taxes, and the State of Hawai'i taxes for 1996 and 1997.

As to U.S.S.G. § 2T1.1(b)(1), this Guideline states: "If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12." Again, Palmer's admission in the Plea Agreement to the facts underlying Count One and the subsequent computation of the amount due and owing for 1996 ($17,564), do not support the court's adoption of the two-level increase. Nothing in the admissions or computations of tax due and owing under Count One speak to a "criminal activity".

Booker requires eliminating both the two-level enhancement, and the enhancements based upon the judge-found facts concerning the 1997 federal taxes and the State of Hawai'i taxes for 1996 and 1997. Without considering the

downward deductions, and having removed the enhancements, Palmer's offense level based on the 1996 tax loss of $17,564 should have been level 11, which applies to tax losses of more than $13,500 and less than $23,500. U.S.S.G. § 2T4.1(F).

As to the downward deductions, Palmer submits that the adjustment concerning acceptance of responsibility (-2) and assistance to law enforcement (-1) must be maintained on remand because the Plea Agreement itself points to their preservation as an integral part of the parties' agreement. The Plea Agreement acknowledges that Palmer's guilty plea alone adequately reflect the seriousness of the offenses: "the parties agree that the charges to which the Defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior and that accepting this Agreement will not undermine the statutory purposes of sentencing." [ER 19, ¶ 9].

And, the Government acknowledged in the Plea Agreement that Palmer was eligible for the deductions based upon acceptance of responsibility:

> "a. The United States Attorney agrees that Defendant's agreement herein to enter into a guilty plea(s) constitutes notice of intent to plead guilty in a timely manner, so as to permit the government to avoid preparing for trial as to Defendant. Accordingly, the United States Attorney anticipates moving in the Government's Sentencing Statement for a one-level reduction in

sentencing offense level pursuant to Guideline § 3E1.1(b)(2)[7], if defendant is otherwise eligible."

[ER 33 - 34].

Moreover, the downward adjustments do not implicate the Sixth Amendment, as do the sentencing enhancements. Booker held that, "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty . . . must be admitted by the defendant . . . " (Justice Stevens, slip op., at 20). The facts supporting the downward adjustments do not support a sentence exceeding the maximum authorized by the facts established by Palmer's guilty plea. Rather, they go in the opposite direction, supporting an offense level below the base level offense of 11. There is no conflict between maintaining the downward adjustments, the Sixth Amendment and the Supreme Court's opinions in Booker.

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[7] "(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a) , the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level." U.S.S.G. § 3E1.1.

Therefore, taking the base level offense of 11 and applying the Plea Agreement provisions concerning the downward adjustments and the actual downward adjustments for acceptance of responsibility (-2) and assistance to law enforcement (-1), **the Guidelines as they now stand post-Booker specify an offense level of 8**. *See*, Booker, (Justice Breyer, slip op. at 2); 18 U.S.C. § 3553(a)(4). Given Palmer's criminal history category of II, the Guidelines authorize a sentence of 4-to-10 months. This range puts Palmer in Zone B of the Sentencing Table. Under Zone B, a sentence of probation is authorized if:

> "the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) or § 5C1.1 (Imposition of a term of Imprisonment)."

U.S.S.G. § 5B1.1(a)(2).

Palmer's actual sentence was 15 months, five months longer than the high-end of the post-Booker Guideline range supported by the Plea Agreement, i.e., 10 months. To reach this 15-month sentence, the district court found facts by a preponderance of the evidence[8] concerning Count Two of the Indictment for

[8] "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3 , Commentary.

which Palmer did not plead guilty and which was eventually dismissed. And the district court found facts by a preponderance of the evidence concerning Palmer's 1996 and 1997 State of Hawai'i tax returns, which returns were never a part of the indictment. Palmer never admitted the alleged facts relating to the State of Hawai'i taxes, or to 1997 federal taxes. Palmer never admitted facts supporting the two-level enhancement under U.S.S.G. § 2T1.1(b)(1).

Applying the de novo standard of review, Palmer submits that in light of the Supreme Court's holding in Booker, the district court's application of the Guidelines and imposition of the 15-month sentence was clearly an error which violated his rights under the Sixth Amendment. Ameline, 376 F.3d at 980.

CONCLUSION

In Booker, the Supreme Court reaffirmed its holding in Apprendi: "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 . . . must be admitted by the defendant . . . " Booker, 543 U.S., at ___ (Justice Stevens, slip op., at 20). Because the facts supporting the district court's imposition of the 15-month sentence were not admitted by Palmer, error is manifest. Palmer

respectfully requests that this Court vacate the sentence imposed, and remand the case for resentencing in conformity with the Supreme Court's opinions as set forth in Booker.

DATED: Maui, Hawai'i, February 11, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. Appl. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14-points, Times New Roman, and contains 11,168 words, with an average of 237 words per page.

DATED: Maui, Hawai'i, February 11, 2005.

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Upon information and belief, there are no other cases in this Circuit, or elsewhere, relating to the defendant-appellant Alphonso Palmer and the matters discussed herein.

DATED: Maui, Hawai'i, February 11, 2005.

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GEORGIA K. MCMILLEN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Opening Brief, Certificate of Compliance was duly served on the following, by placing said copy in the U.S. mail, postage prepaid, addressed as set forth below:

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