FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CHRISTOPHER WAYNE CHAPMAN, Defendant - Appellant.	No. 03-50276 D.C. No. CR-02-00247-ABC-1 MEMORANDUM*

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before: CANBY, KOZINSKI, and PAEZ, Circuit Judges.

The Supreme Court vacated our judgment entered May 14, 2004, and remanded for further consideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

As the parties agree, the district court violated Chapman's Sixth-Amendment rights under *Booker* by enhancing the sentence under a mandatory Sentencing Guidelines system based on a fact that was neither admitted by Chapman nor found by a jury.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Because the sentence was unconstitutional, the waiver of the right to appeal, which contained a condition that the sentence be constitutional, is inapplicable.

Because the *Booker* error is unpreserved,[1] and we cannot reliably determine from the record whether the district court would have imposed a materially different sentence under an advisory Guidelines system, we remand to the district court to answer that question and to proceed in accordance with *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc).

REMANDED.

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[1]Chapman did not preserve the *Booker* constitutional error by arguing at sentencing that the district judge should apply a "clear and convincing" evidence standard to find facts necessary for a sentence enhancement because the district judge, who imposed the sentence under the mandatory Guidelines system, would have committed *Booker* constitutional error even if she had employed the standard recommended by Chapman. *See Booker*, 125 S. Ct. 738, 756 (2005) ("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.").