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VIA FAX (212) 857-8516

Honorable Roseann B. MacKechnie
Clerk of the Court
United States Court of Appeals
for the Second Circuit
United States Court House
40 Centre Street
New York, New York 10007

Re: USA v. Melendez-Santos, Docket No. 03-1536

Dear Ms. MacKechnie:

I am counsel for appellant David Melendez-Santos in the above-entitled appeal. At the Court's request, I write to respond to two government letters dated January 18 and January 19, 2005.[1] I respectfully request that copies of this response be circulated to the members of the panel that heard oral argument in this appeal yesterday.

The time constraints for submitting the response prevent appellant from addressing each of the arguments articulated in the government's two submissions but he begins with its challenge to his observation, during oral argument, that the remedial majority's comments about plain error were mere dictum. See Gov't Letter with respect to USA v. Melendez-Santos, Docket No. 03-1536, dated January 19, 2005 ("Gov't Letter II"), at 1-2 & n.1 (citing United States v. Booker, -- U.S. --, slip op. at 25, 2005 WL 50108 (U.S. Jan. 12, 2005). No matter how the government tries to elevate the remedial majority's gratuitous

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[1] The first was submitted with respect to USA v. Perez, Docket No. 04-0232-cr, and is attached as an exhibit to the second, which is submitted with respect to this case. See Gov't Letter with respect to USA v. Perez, Docket No. 04-0232-cr, dated January 18, 2005 ("Gov't Letter I").

comments, the fact is that neither Booker nor Fanfan involved plain error, so there was no reason for that group of justices to speak about how plain-error analysis might conceivably apply in future cases.

Indeed, all the remedial majority indicated was that there was nothing about Booker claims that exempted them from standard appellate analysis. The brief mention of appellate courts' general and unquestioned duty to apply "ordinary prudential doctrines," Booker, slip op. at 25, in every appeal is, therefore, nothing short of unremarkable:

> Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the plain-error test.

Id. (emphasis added). This general reference to the fact that appellate courts must analyze the possible effect of ordinary, prudential, doctrines does not mean that the Supreme Court pre-ordained the result when the plain-error analysis was actually conducted, as the panel is now doing in this case.[2]

Although appellant does not suggest that there is any need for this panel to indicate when plain-error analysis in other cases might result in affirmance, it is easy to posit hypotheticals in which it might. If the guideline range in a given case had been zero to six months, for example, and a district court had elected to impose a jail sentence, it is much more appropriate to suggest the possibility of affirming under a

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[2] Nor, for that matter, did the remedial majority go as far as the government tries to suggest--through a subtle wording change in characterizing the Court's comments--in predicting what percentage of appeals would be affirmed under a plain-error analysis. Compare Booker, slip op. at 25 ("Nor do we believe that every appeal will lead to a new sentencing hearing"), with Gov't Letter II at 2-3 (claiming the remedial majority "recogniz[ed] that many Guidelines sentences would simply be affirmed on appeal") and Gov't Letter I at 3 (claiming that the remedial majority "plainly anticipated . . . that many sentences would simply be affirmed on appeal").

plain-error analysis, particularly if the district court had engaged in a detailed discussion about the defendant's history and characteristics and had also explained why a particular prison sentence satisfied each of the requirements and factors set forth in 18 U.S.C. §§ 3553(a), 3661 and 3582.

In such a case, this Court could reasonably question whether anything different could possibly occur in a re-sentencing. The critical difference between that type of hypothetical case and this one, for example, is that the district court in the hypothetical did not erroneously believe a prison term was mandated but elected to impose one as a matter of discretion--and had indicated that it had specifically considered and applied each of the statutory provisions cited above. Here, the district court erroneously believed a specific term of imprisonment was mandated and had no reason to discuss factors the guidelines had, for all intents and purposes, made immaterial. Accordingly, as the panel recognized during oral argument, there is simply no way of knowing what a district judge might do in a re-sentencing now that these other factors may be considered.

Equally important, under the mandatory guidelines regime, there was no reason for defense counsel to argue why a certain sentence would be "sufficient, but not greater then necessary," 18 U.S.C. § 3553(a), to serve the purposes identified in section 3553. Nor was there any reason for defense counsel to try to persuade the sentencing court that a particular sentence would "provide . . . needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Id. § 3553(a)(2)(D). Finally, there was no reason for counsel to stress language in 18 U.S.C. § 3582(a), requiring sentencing courts, in determining the length of any imprisonment, to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation".[3]

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[3] Considering the guidelines' severe restrictions on use of such information, there was no need for counsel to stress the language of 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person . . . for the purpose of imposing an appropriate sentence."

If defense counsel in this type of case had known that the district court was required to consider these controlling factors, they might have conducted more extensive investigations into their clients' backgrounds and history and would have weighted their presentations more along these lines. Particularly with respect to defendants with extensive criminal histories, like appellant Melendez-Santos, some analysis of how they had responded to later prison terms would have been critical to the district court's assessment of whether a particular prison term would be "sufficient, but not greater then necessary," 18 U.S.C. § 3553(a), to serve the specific objectives of punishment. No such investigation was conducted here by appellant's appointed counsel because the mandatory guidelines would have made the results of it completely immaterial. Thus, a remand for re-sentencing is necessary to provide defendant and his counsel the opportunity to develop a proper and sufficient record in these areas.

Whether the Court analyzes this case under its "modified" or standard plain error rule,"[4] it is simply

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[4] Where the source of an alleged error is a supervening judicial decision that alters "a settled rule of law in the circuit," this Circuit has held that it is the government that bears the burden of persuasion as to whether substantial rights have been affected. United States v. Santiago, 238 F.3d 213, 215 (2d Cir. 2001); accord United States v. Henry, 325 F.3d 93, 100 (2d Cir. 2003) (noting that the government bears burden of proving that error was harmless under modified plain error rule).

In particular, it has employed a relaxed plain-error analysis with respect to sentence claims. In United States v. Sofsky, 287 F.3d 122, 125-26 (2d Cir. 2002), for example, it explained that where the alleged error "relates only to sentencing" and no prior notice was provided, this Court "will entertain [appellant's] challenge without insisting on strict compliance with the rigorous standards of Rule 52(b)"); accord United States v. Gordon, 291 F.3d 181, 190-91 (2d Cir. 2002). Even before Sofsky, this Court had "reviewed unobjected-to sentencing errors in a more relaxed fashion when the party raising the error on appeal did not have prior notice of the possible application of the sentence imposed." Gordon, 291 F.3d at 191 (citing United States v. Pico, 966 F.2d 91 (2d Cir. 1992) and United States v. Alba, 933 F.2d 1117, 1120 (2d Cir. 1991)).

impossible to determine whether the district court would have imposed the same sentence under a discretionary guidelines scheme. The panel recognized during oral argument that the district court's explanations here as to why it believed the sentence imposed was appropriate under a mandatory guidelines scheme provides little or no guidance as to what sentence it might have imposed had it been operating under a purely advisory one. At the time, the sentence appeared to satisfy the guidelines' objectives and mandates (and the primary law-enforcement bias of that system).

As a book co-authored by another Judge of this Court details, the average length of prison time served by an immigration offender in the federal system essentially doubled after the Guidelines were enacted. See J.A. Cabranes and K. Stith, Fear of Judging: Sentencing Guidelines in the Federal Courts at 63, Table 1 (1998). Accordingly, it is far from clear, no matter what comments the district court made in that very different environment, how it would have acted in a different one, which places much more emphasis on specific offender characteristics and rehabilitative objectives.[5]

The government suggests that public confidence in the judicial system would be maintained only by affirming a sentence imposed under an unconstitutional scheme. Permitting appellant's sentence to stand, however, would actually damage the judicial system's public reputation for fairness, as it directly flouts the Supreme Court's finding in Booker that the guidelines mandating it violated a fundamental provision of the bill of rights. As the Eight Circuit remarked last summer in concluding that the plain-error standard had been met in a post-Blakely

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[5] The district court's comments about appellant's downward-departure motion concerning his criminal history are not inconsistent with this position. In one of the government's letters, it notes that the district court felt it could not, in good conscience, find that appellant's criminal history score overstated his criminal record. See Gov't Letter II at 7. While that may be true with respect to how the guidelines analyzed this issue, it does not mean the district court would similarly find that appellant's criminal history, weighed against his personal characteristics and the rehabilitative goals of sentencing, would justify a similarly severe sentence in an advisory-guidelines environment.

case, "where the Supreme Court has so forcefully vindicated the right to have a jury determine the actual or functional elements of an offense, we conclude [that] the [Guidelines] cross reference [provision, which violates the rule of Blakely] by directing the judge to usurp the role of the jury, casts doubt upon the fairness of the judicial proceeding." United States v. Pirani, No. 03-2871, slip op. at 22 (8th Cir. Aug. 5, 2004), vacated pending en banc determination, 2004 WL 1748930 (Aug. 16, 2004).

The government's basic argument that fairness, integrity and public reputation are served simply by ensuring that the original sentence is preserved, no matter the process by which it was imposed, also conflicts with the Booker merits majority's strong concluding statement that the vindication of constitutional rights must take precedence over mere notions of efficiency:

> We recognize, as we did in Jones, Apprendi, and Blakely, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial--a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment--has always outweighed the interest in concluding trials swiftly. Blakely, 542 U. S., at ___ (slip op., at 17). As Blackstone put it:
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> > [H]owever convenient these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns.

Booker, slip op. at 19-20 (citing 4 Commentaries on the Laws of England 343(C344 (1769)) (emphasis in Booker). This strong statement reinforces the notion that the vindication of a defendant's fundamental constitutional rights is far more important then the mere finality the Court would achieve here, for example, by affirming on plain-error grounds.

Moreover, in deciding whether affirmance or reversal would "affect the . . . public reputation of judicial proceedings," see Johnson v. United States, 520 U.S. 461, 467 (1997), appellant respectfully refers the Court to the very positive public response to the Booker Court's re-affirmance of the right to a jury and the value of judicial discretion. See links to articles in http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/more_praise_of_.html and http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/in_praise_of_em.html. Based on this anecdotal evidence, appellant respectfully submits that compliance with Booker would actually go a long way to supporting the fairness, integrity and public reputation of judicial proceedings, while evasion of its holding would not.

In its first submission, the government observes that the Booker remedial majority "expected the remaining sentencing system to 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." Gov't Letter I at 3 (quoting Booker at *27). From that, it baldly concludes that "[t]hat direction can be maintained if appellate review for 'reasonableness' uses as its guidepost the Sentencing Guidelines," id., explaining "in other words, sentences within the Guidelines range should be upheld as reasonable, whereas sentences that deviate from the Guidelines should be presumptively unreasonable," id.

This reasoning is similar to that of a decision from the District of Utah, United States v. Wilson, -- F. Supp. 2d --, 2005 WL 78552 (D. Utah, Jan. 13, 2005) (Cassell, J.). While the panel seemed to indicate during oral argument that the Wilson decision would not have any bearing on the outcome of this case, its comprehensive (yet flawed, appellant submits) reasoning is sufficiently similar to the above cursory conclusion by the government here that appellant believes some discussion of the Wilson opinion's flaws might be helpful in illustrating the similarly flawed government conclusion here.

One can't fault the Wilson opinion's general premise that Congress has clearly indicated that its primary concern is deterrence, incapacitation and promotion of respect for the law. That doesn't logically lead to its unsupportable conclusion that it and a centralized Sentencing Commission are much better equipped than district judges to decide what constitutes "just punishment."

There's certainly a superficial appeal to the Wilson opinion's observation that "the court is poorly suited to consider elasticities and other factors that would go into a sensible deterrence calculation," or its continuing observation that, "[o]n the other hand, the Sentencing Commission with its ability to collect sentencing data, monitor crimes rates, and conduct statistical analyses, is perfectly situated to evaluate deterrence arguments." Wilson, slip op. at 17. But the issue isn't that simple.

Of course, hearings and studies are the best method by which to assess whether certain types of sentences will produce general deterrence with respect to millions of possible perpetrators. But an assessment of the specific-deterrent value of a particular sentence to an particular defendant can be made only with the benefit of knowing that defendant's individual characteristics and circumstances.

Thus, to be accurate, the Wilson opinion should also have observed that while the Sentencing Commission may be "perfectly situated" to evaluate general deterrence issues, it was "poorly suited" to consider specific deterrence--and that district courts are, in fact, "perfectly suited" to make this type of individual assessment. By collapsing these two fundamental objectives of punishment, the Wilson opinion simply endorses the twenty-year-old--now discredited--assumption underlying mandatory guidelines that individual characteristics don't have any place in sentencing decisions.

The Wilson opinion is equally weak when it comes to conclusions about the relative weight to be given to the various objectives articulated in section 3553. Again, Congress has certainly indicated its belief that general deterrence and incapacitation are very important goals. Yet, appellant respectfully submits, independent Article III judges are part of a co-equal branch of government and have been given the responsibility--by common law and by virtue of 18 U.S.C.

§§ 3553(a), 3661 and 3582--of achieving individual justice by considering the individual before them. Accordingly, they simply cannot abdicate that responsibility, as the court in Wilson appeared to conclude they should, simply because a nationwide legislative body has indicated its desire that courts give law enforcement objectives serious consideration.

The Wilson opinion provides no justification for so heavily weighting law-enforcement objectives over individualized factors. Indeed, appellant respectfully submits, any such deference would conflict with the lifetime tenure the Framers provided district judges, which was intended to encourage them to use their independent judgment in the face of determined political pressure not to.

Finally, the Wilson opinion asserts that "the Guidelines are the only standard available to all judges around the country today." Id. at *12. Yet, appellant submits, any experienced judge or lawyer would easily be able to articulate the prevailing standards in their individual communities. What the Wilson opinion really means is that the Guidelines are the only nationwide standard available. Even if that's so, though, there is no explanation why the opinion concludes, in the very next sentence, that "[f]or that reason alone, the Guidelines should be followed in all but the most exceptional cases," id. (emphasis added), when it could just as logically have said "most" or "typical" ones, for example.

By choosing the narrowest adjective, "exceptional"--and fashioning a strict standard the Booker remedial majority never even suggested--the district court in Wilson concludes that district judges must abdicate the duties of an independent judiciary to incorporate individual factors and simply defer to the debatable "sense" of Congress that they are less important than general ones. Appellant respectfully submits that such a dramatic shift in responsibility cannot be based on the bald and unsupportable reasoning employed in that opinion or the government's letter here.[6]

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[6] Appellant notes that the district judge rushed the Wilson opinion out the day after Booker, without first giving counsel the opportunity to comment on its unilateral and dubious reasoning. See Wilson, slip op. at *18.

For all the above reasons, and those expressed during oral argument, appellant respectfully submits that the Court must vacate his sentence and remand the matter to the district court for resentencing.

Respectfully submitted,

Alexander E. Eisemann

cc: Harry Sandick, Esq.
Katherine Lemire, Esq.
U.S. Attorney's Office
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