No. 05-10200, No. 05-30120

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ALPHONSO KINZAR CARTY,
Defendant-Appellant

and v.

JUAN ANTONIO ZAVALA,
Defendant-Appellant

Brief of *Amici Curiae* Federal Public Defenders for the District of Alaska; Central, Eastern and Northern Districts of California; District of Hawaii; District of Nevada; District of Oregon; Western District of Washington; Federal Defenders of Eastern Washington and Idaho; Federal Defenders of Montana, Inc.; and Federal Defenders of San Diego, Inc.; in Support of Defendant-Appellants *en banc*

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are all of the Federal Public and Community Defenders in the judicial districts of this Circuit. Federal Public and Community Defenders represent thousands of individuals each year who are sentenced under the Federal Sentencing Guidelines. The issues presented in this consolidated appeal are of obvious importance to our work and the welfare of our clients. We appear as *amici curiae* pursuant to this Court's invitational order of August 25, 2006.

II. INTRODUCTION

The Court has invited the parties in this consolidated appeal to address a number of questions on the role of the Federal Sentencing Guidelines in sentencing decisions after *United States v. Booker*, 543 U.S. 220 (2005). Among the questions posed is whether within-Guideline sentences are entitled to a presumption of reasonableness on appeal. This brief addresses that question and demonstrates such a presumption violates principles of statutory construction and, in those cases that have found a presumption, the reasoning is demonstrably incorrect.

As to those cases that have adopted a presumption of reasonableness, we emphasize at the outset that, at bottom, they are predicated on nothing but *ipse dixit*. The premise of the reincarnation of presumptive guidelines is the fiction that the guidelines incorporate the sentencing purposes and 18 U.S.C. § 3553(a) factors. This notion first appeared in a district court decision issued the day after *Booker* was decided,[1] next appeared in the Sentencing Commission's testimony

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[1] *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

before Congress,[2] was then disseminated by the Commission to judges, probation officers and prosecutors across the country in training presentations and written materials,[3] and was soon repeated verbatim in judicial opinions.[4] Courts of appeals that had originally adopted a presumption of reasonableness without

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[2] *See* Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005) ("During the process of developing the initial set of guidelines and in refining them throughout the ensuing years, the Sentencing Commission has considered the factors listed at section 3553(a) and cited with approval in Booker. . . . In short, the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.") (hereinafter "2/10/05 Commission Testimony"), http://www.ussc.gov/Blakely/bookertestimony.pdf. *See also* Prepared Testimony of Judge Ricardo H. Hinojosa before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (March 16, 2006) ("The guidelines embody all of the applicable sentencing factors for a given offense and offender.") (hereinafter "3/16/06 Commission Testimony"), http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf.

[3] *See* U.S. Sentencing Commission, *Post-Booker Guidelines Training 2006*, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing 2/10/05 Commission Testimony), on file with the author; U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (March 2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the S[entencing] R[eform] A[ct] and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*") (hereinafter "Booker Report"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

[4] *See United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005); *United States v. Peach*, 356 F. Supp. 2d 1018, 1021 (D.N.D. 2005).

giving a reason[5] later justified the presumption with the assertion that the guidelines already incorporate the sentencing purposes and factors set forth in 18 U.S.C. § 3553(a).[6]

As argued below, these cases ignore the plain language of § 3553(a) and rely on hortatory language that is refuted by the Commission's own reports, the guidelines manual, and reliable historical sources, including Justice Breyer.

III. THE SENTENCING GUIDELINES DO NOT INCORPORATE THE PURPOSES AND FACTORS SET FORTH IN § 3553(a)[7]

In the Sentencing Reform Act, Congress charged the Sentencing Commission with certain specific tasks: to ensure that the purposes of sentencing set forth in § 3553(a)(2) were met, to ensure that the guidelines were effective in meeting those purposes, to reflect advancement in knowledge of human behavior, to minimize the likelihood of prison overcrowding, and to avoid unwarranted

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[5] *See United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005).

[6] *See United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006).

[7] Arguments and information in this section are excerpted in large part from a remarkable and comprehensive article by Amy Baron-Evans, Sentencing Resource Counsel for Federal Defenders. The article is entitled *The Continuing Struggle for Fair, Effective and Constitutional Sentencing After* United States v. Booker, available at http://sentencing.typepad.com/sentencing_law_and_policy/2006/08/extraordinary_p.html.

disparities while ensuring sufficient flexibility to permit individualized sentences.[8] Had the guidelines been developed according to congressional directives, there might have been substantial overlap in many cases between the guidelines and § 3553(a). As matters stand, however, given the way in which the guidelines were actually developed, only occasionally does a sentence within the guideline range (much less one above it), meet § 3553(a)'s requirements.

A. Abandonment of Sentencing Purposes and Past Practice in Favor of Trade-Offs Among Commissioners with Different Viewpoints

The Commission claims that it "considered the factors listed in section 3553(a) and cited with approval in *Booker* . . . in developing the initial set of guidelines and refining them throughout the ensuing years."[9] Historical sources tell a different story.

Congress expected that the Commission would consider all four statutory purposes in developing the guidelines and that judges would decide what impact, if any, each purpose should have on the sentence in each case.[10] The original Commissioners, however, "considered" only "just deserts" and "crime control," then expressly abandoned those two purposes when they could not agree on which should predominate.[11] They solved their "philosophical dilemma" by adopting an "empirical approach that uses data estimating the existing sentencing system as a starting point,"[12] but did not follow that approach either. They implemented

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[8] 28 U.S.C. §§ 991(b), 994(g).

[9] 2/10/05 Commission Testimony, *supra* note 2.

[10] *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 77 (1984).

[11] *See* U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

[12] *Id.*

sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including fraud, drug trafficking (above even what the mandatory minimum laws required), immigration offenses, robbery of an individual, murder, aggravated assault, and rape.[13] These deviations from past practice resulted from "'trade-offs' among Commissioners with different viewpoints," said then Judge and Commissioner Breyer.[14] In response to complaints that the original guidelines were "too harsh," he said that "once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad" and the "resulting compromises do not seem too terribly severe." He argued, the system was "evolutionary" and would be improved based on information from actual practice under the guidelines.[15] In fact, the opposite occurred. Since 1987 the Commission has produced nearly 700 guideline amendments, resulting in a steady increase in sentence lengths. Prison population has quadrupled since inception of the guidelines.[16] As of 2004, federal

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[13] *See* U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004) (hereinafter "Fifteen Year Report"), available at http://www.ussc.gov/15_year/15year.htm.

[14] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988).

[15] *Id.* at 18-20, 23.

[16] The federal prison population was 44,408 in 1986, 48,300 in 1987, *see* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics - 1988* Table 6.34, Department of Justice, Bureau of Statistics, Washington, DC: USGPO, 1989, and is more than 190,000 today. *See* http://www.bop.gov/news/quick.jsp#1.

prison population was 40% over capacity[17] despite the congressional directive that the guidelines "minimize the likelihood that . . . prison population will exceed the capacity of federal prisons."[18] Commission staff reported that lengthy prison terms were being served by offenders with little risk of recidivism and recommended an evaluation of whether prison resources were being used effectively.[19] The Commission's work runs counter to congressional directives and cannot be said to embody the objectives of the Sentencing Reform Act.

B. Rejection of Relevant Mitigating Factors

The Commission's present assertion that the "guidelines embody all of the applicable sentencing factors for a given offense and offender,"[20] is contradicted by its repeated previous acknowledgments that it is not possible to write a single set of guidelines that take into account all factors that are potentially relevant to sentencing decisions.[21] Further, the Commission has affirmatively rejected most relevant mitigating factors, factors clearly within the reach of § 3553(a)(1) and (2) and the directive that the guidelines "permit" individualized sentences.[22]

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[17] U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf.

[18] 28 U.S.C. § 994(g).

[19] *See* Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. R. 12 (July/August 1999).

[20] 3/16/06 Commission Testimony, *supra* note 2, at 18.

[21] *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b); U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* at 3-4 (October 2003) (hereinafter "2003 Downward Departure Report"), available at http://www.ussc.gov/departrpt03/departrpt03.pdf.

[22] 28 U.S.C. §§ 991(b), 994(g).

The only offender characteristic included in the calculation of the guideline range is the aggravating one of criminal history. Yet the principal source of legislative history for the Sentencing Reform Act suggests numerous situations in which offender characteristics should be relevant, and emphasizes that "the Committee decided to describe [some of] these factors as 'generally inappropriate,' rather than always inappropriate, . . . in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration."[23] As then Judge and Commissioner Breyer explained, some Commissioners argued that mitigating factors such as age, employment history, and family ties should be included. They were not because, once again, the Commissioners could not agree. Again, this was intended to evolve based on experience.[24] No mitigating offender characteristics have been added to the guidelines – even though the Commission's own research demonstrates that a number of factors predict a reduced risk of recidivism.[25]

For example, the Commission has found that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced

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[23] S. Rep. No. 98-225, 98th Cong., 1st Sess. 172-175 (1984).

[24] *See* Breyer, *supra* note 14 at 19-20; Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999).

[25] *See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "Measuring Recidivism"), available at http://www.ussc.gov/publicat/Recidivism_General.pdf; *Recidivism and the First Offender* (May 2004) (hereinafter "First Offender"), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) (hereinafter "Salient Factor Score"), http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf.

likelihood of recidivism. Congress recognized as much and directed the Commission twenty-two years ago to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[26] The Commission understands the need to act on this directive, but has not done so.[27] Further, first offenders are more likely to be involved in less dangerous offenses, and their offenses involve fewer indicia of culpability (such as no use of violence or weapons, no bodily injury, a minor role, or acceptance of responsibility).[28] They are also more likely than offenders with criminal histories to have a high school education, to be employed, or to have dependents.[29] Further supporting alternatives to prison for this group is the finding that offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.[30] Despite clear evidence supporting the congressional directive of lower sentences for first time offenders, the Commission has not acted.

Commission studies recognize an additional array of client-specific information that is relevant to sentencing decisions. These factors should *require* sentences below current Guideline ranges and include:

- Age: Age is a powerful component of recidivism prediction that the

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[26] 28 U.S.C. § 994(j).

[27] *See First Offender*, *supra* note 25, at 1-2.

[28] *See Id.* at 9-10.

[29] *See Id.* at 6-11.

[30] *See Measuring Recidivism, supra* note 25 at 13.

guidelines do not take into account.[31] "Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.[32]

• Employment: Stable employment in the year prior to arrest is associated with a lower risk of recidivism.[33]

• Education: Recidivism rates decrease with increasing educational level (from no high school to high school to some college to a college degree).[34]

• Family: Recidivism rates are lower for defendants who are or were ever married, even if they are now divorced.[35]

• Gender: Women recidivate at a lower rate than men.[36]

• Abstinence from drug use: Recidivism rates are lower for those who did not use illicit drugs in the year before the offense.[37]

• Rehabilitation and Education: Drug treatment programs and educational opportunities would have a high cost-benefit value.[38]

• Non-Violent Offenders: Offenders sentenced under the fraud, larceny,

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[31] *See Salient Factor Score, supra* note 25, at 8, 13-15.

[32] *See Measuring Recidivism, supra* note 25, at 12.

[33] *See Id.* at 12.

[34] *See Id.*

[35] *See Id.*

[36] *See Id.* at 11.

[37] *See Id.* at 13.

[38] *See Id.* at 15-16.

and drug guidelines are the least likely to recidivate.[39]

• Uncounted crimes of violence: The predictive power of U.S.S.G. § 4A1.1(f) is statistically insignificant.[40]

• Minor offenses: Inclusion of non-moving traffic violations in the criminal history score may adversely affect minorities "without clearly advancing a purpose of sentencing" (regardless of the defendant's race) and "there are many other" such possibilities.[41] Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers – offenses that are often called, with bitterness, "driving while black."[42]

• Increased Recidivism with Straight Prison Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.[43]

Instead of permitting, or encouraging, judges to take these factors into

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[39] *See id.*, note 25, at 13.

[40] *See Salient Factor Score, supra* note 25, at 7, 11, 15.

[41] Fifteen Year Report, *supra* note 13, at 134.

[42] See, *e.g., Bingham v. City of Manhattan Beach*, 341 F.3d 939, 954 (9th Cir. 2003); *Washington v. Lambert*, 98 F.3d 1181, 1182 n.1 (9th Cir. 1996); *Smith v. City of Gretna Police Dept.*, 175 F. Supp. 2d 870, 874 (E.D. La. 2001); *Martinez v. Village of Mount Prospect*, 92 F. Supp. 2d 780, 782 (N.D. Ill. 2000); *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998); *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami. L. Rev. 425 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-52 (1998); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & Pol'y 291, 296 (1997).

[43] *See Measuring Recidivism, supra* note 25, at 13.

account, the Commission has prohibited, discouraged, or restricted the use of most offender characteristics even as grounds for downward departure – contrary to past practice,[44] beyond what Congress directed,[45] and beyond what the original Commission intended.[46] Not surprisingly, most judges surveyed in 2002 said that

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[44] *See* Breyer, *supra* note 14, at 19.

[45] Congress directed the Commission to assure that the guidelines were "entirely neutral" as to race, sex, national origin, creed, and socioeconomic status, and to reflect the "general inappropriateness" of education, vocational skills, employment record, family ties, community ties. *See* 28 U.S.C. §§ 994(d), (e). The Commission has prohibited consideration of drug or alcohol dependence and gambling addiction, §5H1.4, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, § 5H1.12, personal financial difficulties or economic pressures on a trade or business, § 5K2.12, diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, § 5K2.13, post-sentencing rehabilitation, § 5K2.19, a single aberrant act if the defendant had any "significant prior criminal behavior" even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum, § 5K2.20; has strictly discouraged consideration of age, § 5H1.1, education and vocational skills, § 5H1.2, mental and emotional conditions, § 5H1.3, physical condition or appearance, § 5H1.4, employment record, § 5H1.5, family ties and responsibilities, § 5H1.6, and military, civic, charitable or public service, good works, § 5H1.11; and has erected multiple detailed requirements for consideration of victim's conduct, § 5K2.10, lesser harms, § 5K2.11, coercion and duress, § 5K2.12, diminished capacity, § 5K2.13, voluntary disclosure, § 5K2.16, and aberrant behavior, § 5K2.20.

[46] *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (1988) ("With [the] specific exceptions" of § 5H1.10 (race, sex, national origin, creed, religion, socio-economic status), the third sentence of § 5H1.4 (drug dependence or alcohol abuse), and the last sentence of § 5K2.12 (personal financial difficulties and economic pressures on a trade or business), "the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the

the guidelines infrequently met the goal of maintaining sufficient flexibility to permit individualized sentences, or of providing needed training, care or treatment in the most effective manner.[47]

On the other hand, the guidelines require rigid arithmetic increases for a vast and complicated array of aggravating offense characteristics. They purport to make relevant distinctions based on quantifiable "harms," while disregarding, restricting, or prohibiting consideration of factors that bear on personal culpability, such as *mens rea*, motive, mistake, and mental and emotional problems.[48] Further, intended "harms" increase the sentence whether or not they occurred,[49] and "harms" that were unintended, unknown, fortuitous, or arranged by law enforcement are often counted.

The Commission "has never explained the rationale underlying any of its

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guidelines) that could constitute grounds for departure in an unusual case.").

[47] *See* U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapter II, available at http://www.ussc.gov/judsurv/judsurv.htm.

[48] *See, e.g.*, §§ 5H1.4, 5H1.12, 5K2.12, 5K2.13; § 2K2.1, comment. (n.16) (enhancement for stolen firearm or obliterated serial number regardless of knowledge or reason to believe the firearm was stolen or had an obliterated serial number); § 2J1.2 (12 level increase for false or misleading statement in connection with terrorism investigation regardless of whether the defendant knew it was a terrorism investigation).

[49] *See* § 1B1.3(a)(3); § 2D1.1, comment. (n.12).

identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic."[50]

Judges, past Commissioners, Commission staff, former prosecutors, and academics have persistently criticized the guidelines' disproportionate severity, ineffectiveness, and inefficiency.[51] Most recently, the Justice Kennedy Commission, Justice Kennedy himself, and the Constitution Project's bipartisan Sentencing Initiative have called upon the Commission to reduce guideline

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[50] Jose Cabranes & Kate Stith, Fear of Judging: Sentencing Guidelines in the Federal Courts 69 (1998).

[51] *See, e.g.,* Fifteen Year Report, *supra* note 13, at 50, 52, 55, 82, 137; Frank O. Bowman III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 165-66 & nn. 105-06 (2005); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 24, 33-35, 68-73 (2003); Breyer, *supra* note 14 at 10-11; Michael Tonry, Sentencing Matters 78-79 (Oxford 1996); U.S. Sentencing Commission, *White Collar Working Group Report* 8 (April 1993); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992); U.S. Sentencing Commission, *Report of the Drugs/Role/Harmonization Working Group* 60 (Nov. 10, 1992); United States General Accounting Office, *Report to Congressional Committees, Sentencing Guidelines: Central Questions Remain Unanswered* at 151-52 (August 1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 921 (1991).

sentences because they are unjust, ineffective, and inefficient.[52] This chorus of criticism is the result of the plain fact that the guidelines do not incorporate congressional directives, § 3553(a) factors and the frequently ameliorative effect of offender characteristics.

C. Unwarranted Disparity and Excessive Uniformity Fostered by the Guidelines

Since the Supreme Court's decision in *Booker*, the government and many courts have cited the need for "uniformity" to justify *de facto* mandatory guidelines. This premise overlooks *Booker*'s ruling that "the uniformity that Congress originally sought to secure . . . is no longer an open choice" under the Sixth Amendment.[53] More relevant here, in the context of the historical development of guidelines, is that many courts appear to believe that the guidelines actually reflect the kind of uniformity that the original Congress sought to secure, and that the guidelines actually avoid unwarranted disparity. In fact, however, the guidelines reflect an excessive uniformity and rigidity that Congress

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[52] *See* Report of the ABA Justice Kennedy Commission, Summary of Recommendations, http://www.abanet.org/media/kencomm/summaryrec.pdf; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005).

[53] *Booker*, 543 U.S. at 263-64.

did not intend, and have fostered unwarranted disparity. That presumably is why, in *Booker*, Justice Breyer urged the Commission to "modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices," in order to "thereby promote uniformity in the sentencing process."

The Commission acknowledges that it has "only partially achieved" the goal of avoiding unwarranted disparities while maintaining sufficient flexibility to permit warranted differences.[54] Many observers say it has utterly failed.[55]

The Commission itself has found that some rules produce racial disparity without serving sentencing purposes. According to the Fifteen Year Report, racial disparity is

> built into the sentencing rules themselves rather than a product of . . . discrimination on the part of judges. . . . [The] increasingly severe treatment of . . . particularly, drug offenses and repeat offenses, has widened the gap. . . . Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.[56]

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[54] *See* Fifteen Year Report, *supra* note 13, at 142-143.

[55] *See, e.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005); Michael O'Hear, *The Myth of Uniformity*, 17 Fed. Sent. R. 249 (April 2005).

[56] *See* Fifteen Year Report, *supra* note 13, at 135.

The sentencing disparity between white and minority offenders, which was small in the pre-guideline era, has widened considerably since the guidelines went into effect.[57]

Rules identified by the Commission that create racial disparity but are not a "necessary and effective means to achieve the purposes of sentencing" are mandatory minimum penalties, 924(c) enhancements, the drug trafficking guidelines, the relevant conduct rules, the 100:1 powder to crack ratio, the career offender guideline, and the inclusion of non-moving traffic violations and other minor offenses in the criminal history score.[58] Yet little, if anything has been done to correct this sentencing imbalance.

Further, regional disparity persists under the guidelines, resulting from "uneven charging and plea bargaining" in the filing of 21 U.S.C. § 851 notices, § 924(c) charges, and mandatory minimum charges, the use of fast track

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[57] *See Id.* at 115-16, 120-27.

[58] *Id.* at 47-55, 76, 113-14, 131-134, 141. *See also* U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* (May 2002); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 29, 1997); *U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy* (February 1995), all available at http://www.ussc.gov/reports.htm; U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991) (hereinafter "1991 Mandatory Minimum Report"), http://www.ussc.gov/r_congress/MANMIN.PDF.

dispositions, and motions under U.S.S.G. § 5K1.1, § 3E1.1(b), 18 U.S.C. § 3553(e) and Rule 35(b).[59] These prosecutorial "charging decisions disproportionately disadvantage minorities."[60]

Thus, the current guideline system perpetuates, and in some areas even increases, unwarranted disparity, contrary to § 3553(a)(6) and congressional intent.

D. Summary

Just three months before the Commission announced that the guidelines are a "mirror image" of 18 U.S.C. § 3553(a), its Fifteen Year Report acknowledged that much of the ever-increasing severity of the guidelines was due to real or perceived political pressure, admitted that it *still* had not determined whether the guidelines' increased severity achieves sentencing purposes, and suggested that penalties *could be* reduced to better achieve sentencing purposes and to relieve prison overcrowding.[61] These admissions and abundant historical and objective

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[59] *Id.* at 84-85, 89-92, 102, 103, 106, 111-12, 141-42.

[60] *Id.* at 91.

[61] *See* Fifteen Year Report , *supra* note 13, at 77, 137-140, Executive Summary at vi, xvii. *See also* the following articles cited in the Fifteen Year Report at 138, which recount a history of the Commission acting in response to pressure from law-and-order interests within and outside the Commission, rather than data and the purposes of sentencing. *See* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am.

information evidences that the guidelines do not adequately take into account § 3553(a) factors. If anything, the guidelines discourage courts from considering the individual characteristics of a defendant in reaching a sentencing decision.

IV. A PRESUMPTION OF REASONABLENESS VIOLATES PRINCIPLES OF STATUTORY CONSTRUCTION.

The plain language of the Sentencing Reform Act no longer provides support for a presumption in favor of the sentencing guidelines. Rather than mandating, either softly or strongly, that a sentence be within a defendant's guideline range, the Act, as it exists after *Booker*, mandates – absolutely – that a sentence be the least punitive necessary to achieve the goals of criminal punishment. The sentencing court's consideration of the guidelines is subordinate to that mandate; the need for the sentence to avoid unwarranted disparity is subordinate to that mandate; and that mandate is what animates the district court's obligation to put on the record the reasons that it has chosen the sentence it has. It is that mandate that should guide this Court's decision making in this case.

Crim. L. Rev. 289 (1989); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001); Aaron Rappaport, *The State of Severity*, 12 Fed. Sent. R. 3 (July/August 1999); Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines, Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001).

A. The Excision of § 3553(b) Means the Excision of Any Presumption in Favor of a Guideline Sentence.

The merits opinion in *Booker* holds that the Sentencing Guidelines, when implemented in the manner prescribed in the Sentencing Reform Act, the Commission's policy statements, and the Federal Rules of Criminal Procedure, violates a defendant's Sixth Amendment right to jury trial. As a remedy for this constitutional defect, the Court severed and excised from the Sentencing Reform Act both 18 U.S.C. § 3553(b)(1) (the provision making application of the guidelines mandatory) and 18 U.S.C. § 3742(e) (mandating particular standards of appellate review), leaving intact the rest of the Act and all of the sentencing guidelines and policy statements. The Court held that severing these two statutory sections from the Act was necessary to achieve as closely as possible the intent of Congress in writing the Act.

Put another way, the whole exercise of the *Booker* remedial opinion was to determine what congressional intent would have been had Congress known that judicial fact finding was unconstitutional under § 3553(b). Determining that Congress would have preferred judicial fact finding under § 3553(a) over jury fact finding under § 3553(b), the Court excised § 3553(b). As the Court explained,

"that mandatory system [embodied in § 3553(b)] is no longer an open choice."[62]

Thus, courts may no longer look to the congressional intent that animated § 3553(b). Yet many courts continue to follow congressional intent as expressed in § 3553(b). They do this in one of three ways: (1) explicitly,[63] (2) by assuming that the guidelines achieve what Congress had in mind when it sought to avoid unwarranted disparity,[64] or (3) by asserting that the guidelines incorporate § 3553(a).[65] This short trip back to § 3553(b) began with the assertion that the *Booker* Court did not say how much weight to give the guidelines, so the lower courts must make that determination.[66]

But what weight to accord the guidelines was never an open question. By excising § 3553(b), the Court made § 3553(a) the governing law in the district court, "mak[ing] the guidelines effectively advisory."[67] That was also the intent of the original version of the Sentencing Reform Act. As the Sentencing

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[62] *Booker*, 543 U.S. at 263.

[63] *See supra* note 4.

[64] *See, e.g., United States v. Mykytiuk*, 415 F.3d at 606, 608 (7th Cir. 2005).

[65] *See, e.g., Johnson*, 445 F.3d at 343.

[66] *See, e.g.*, 2/10/05 Commission Testimony, *supra* note 2; *Wilson*, 350 F. Supp. 2d at 912.

[67] *Booker*, 543 U.S. at 345.

Commission has explained:

> Sentencing guidelines systems . . . range along a continuum from "voluntary" or "advisory," to "presumptive," to "mandatory." The differences among them are marked by the standards governing when a judge may depart from the recommended guideline range, and the extent of appellate review of those departures. The original federal legislation called for advisory guidelines with limited appellate review. During Senate debates in 1978 however a standard was added requiring that judges sentence within the prescribed guideline range unless "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the guidelines and that should result in a different sentence." This was intended to ensure that the guidelines were treated as "presumptive" rather than "voluntary."[68]

That is, the original version of the Act would have made the guidelines "advisory" in language much like § 3553(a). Section 3553(b) was added to make the guidelines "presumptive" rather than "advisory."[69] With § 3553(b) gone, presumptive guidelines are no longer an option under the plain language of § 3553(a) or the Sixth Amendment.

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[68] *See* Fifteen Year Report, *supra* note 13, at 7.

[69] *See Booker*, 543 U.S. at 293 & n.12 (Stevens, J., dissenting in part); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993); 124 Cong. Rec. 209, 382-83 (1978); S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983).

B. The Sentencing Reform Act Embodies the Command that the Sentence Be No Greater than Necessary to Achieve the Purposes of Punishment

Examination of the remaining provisions of the Sentencing Reform Act discloses that one key provision commands judicial action post-severance: The district court is obligated, in every case, to select a punishment that is "sufficient, but not greater than necessary" to accomplish the purposes of criminal punishment listed in § 3553(a)(2)(A-D). 18 U.S.C. § 3553(a). Through this directive, Congress embedded in federal sentencing legislation the moral imperative to impose on any individual the least suffering that is demanded by the general welfare – a concept known in the sentencing literature as the "principle of parsimony."[70] This principle dates back to the 1800s, influenced the Founding Fathers in their views about punishment,[71] is implicit or explicit in the guideline

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[70] *See, e.g.*, Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 77 & n.24, 78 & n.29 (2005). *See also United States v. Carey*, 368 F. Supp. 2d 891, 895 n.4 (E.D. Wis. 2005); *Wilson*, 350 F. Supp. 2d at 922-23 (citing scholarly literature).

[71] *See* Garry Wills, Inventing America 94 (1979); David McCullough, John Adams 66-67 (2001); Jeremy Bentham, The Rationale of Punishment 23 (1830) ("All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

systems of most states[72] and the Model Penal Code,[73] and is clearly stated in 18 U.S.C. § 3553(a), which now governs sentencing. Under this rule, a person must be given the sentence that is "minimally sufficient"[74] for the protection of society. The rationale for this is that severe penalties are costly to the public, are usually harmful to offenders, and have uncertain and limited deterrent value, so the preference is for the least punishment necessary for the public welfare.[75]

1. The Guidelines Are Subordinate to the Sentencing Reform Act's Overarching Command to Impose a Minimally Sufficient Sentence.

It is also mandatory under the Act that the sentencing court "consider," before choosing that sentence, a number of factors pertinent to the case, of which the guidelines are one.[76] Not only does the statute say nothing about giving special weight to the guidelines, it makes the guidelines subordinate to the overarching mandate to impose a sentence minimally sufficient to satisfy the

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[72] *See* Frase, *supra*, note 70, at 68.

[73] Model Penal Code: Sentencing § 1.02(2)(a)(iii) (Preliminary Draft No. 3 2004).

[74] *See United States v. Kikumura*, 918 F.2d 1084, 1111 (3d Cir. 1990).

[75] *See* Frase, *supra* note 70, at 68; Norval Morris, The Future of Imprisonment 59-62 (1974).

[76] *See Booker*, 543 U.S. at 259-60.

purposes of sentencing, which is itself the overarching sentencing mandate.[77]

After *Booker*, a sentence within the guideline range may not be "necessary," in the case at hand, to achieve the congressionally defined purposes – (A) "just punishment" in light of "the seriousness of the offense"; (B) "deterrence," both general and specific; (C) incapacitation "to protect the public"; and (D) any "needed" rehabilitation and "correctional treatment" of the offender. 18 U.S.C. § 3553(a)(2). The district court's duty is to impose a sentence, one that is "sufficient" to achieve these four objectives, without being "greater than necessary." The guideline range is subordinate to that duty. The sentence that is minimally sufficient to achieve sentencing purposes must be "imposed," while the guideline range must only be "considered." Courts must now follow the plain language of § 3553(a). When the language of a statute is plain, courts may not look to statutory policies or legislative history to construe the statute in a manner that is not clearly warranted by the text.[78] The text here commands that a sentencing court follow the parsimony principle. To read the Sentencing Reform

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[77] *See United States v. Foreman*, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006) (district court must follow the "statutory mandate to 'impose a sentence sufficient, but not greater than necessary' to comply with the purposes of sentencing in section 3553(a)(2)"); *United States v. Cawthorn*, 429 F.3d 793, 802 (8th Cir. 2005) ("district court's duty" is to "impose a sentence sufficient but not greater than necessary").

[78] *Crandon v. United States*, 494 U.S. 152, 160 (1997).

Act differently – for example, to read it to elevate the guidelines over all other sentencing considerations – is to render most of the statute inoperative, superfluous, or insignificant.[79]

2. The Statutory Structure Grants No Primacy to the Guidelines Among the Other § 3553(a) Factors.

The statutory language that now governs sentencing, then, requires the district court to choose the lowest sentence necessary to achieve the goals of punishment. Again, before selecting that sentence, the Sentencing Reform Act further directs the district court to "consider" a number of factors. Although numbered from (1) through (7), the inclusion of several issues under some of these subsections means that there are actually about a dozen factors to consider. In addition to the six objectives found in the four clauses of subsection (a)(2), those mandatory points for consideration are: (1) "the nature and circumstances of the offense," and "the history and characteristics of the offender"; (2) the general purposes of sentencing (identified in subsections (A) through (D)); (3) the "kinds of sentences available"; (4) whatever sentence types and ranges are called for by the guidelines (this is where the guidelines are made "advisory" only); (5) "any

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[79] *See United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (court construing statute must give each section full meaning); *Zedner v. United States*, 126 S. Ct. 1976, 1990-91 (2006) (Scalia, J. concurring) (same).

pertinent policy statement" of the U.S. Sentencing Commission (these include most definitions of grounds for departure); (6) "the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victim."

The fourth of these seven numbered factors is, of course, the defendant's guideline range. The fifth is the Commission's "policy statements," which are also found in the Guidelines Manual. Nothing in the statute leads to the conclusion that either of these factors constitutes a "starting point."[80] The statutory language and structure preclude any inference that the appropriate sentence in each case should be presumed to fall within the guidelines range. It is surely incorrect to read a statute that requires a court to consider seven different enumerated factors as establishing an unexpressed presumption that all significant aspects of the other five of those factors are incorporated into the considerations listed fourth. To the contrary, the strong assumption is that Congress means to require something

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[80] If the district judge calculates the guideline range first, *United States v. Cantrell*, 433 F.3d 1269, 1279-80 (9th Cir. 2006), it will be particularly important not to give undue weight to the outcome of that mechanical but important exercise just because it yields a quantifiable result. While the statute does not require the court to proceed through the factors in lock-step fashion, it must not treat the initial calculation as an excuse to avoid the more difficult and sensitive process of weighing other, less tangible factors in the manner required by the balance of the statute.

additional by each separate clause of the statute.[81] Thus, as Chief Judge Scirica has written for the Third Circuit, "Although a within-guidelines sentence demonstrates the court considered one of the § 3553(a) factors – namely, the guidelines range itself, 18 U.S.C. § 3553(a)(4) – it does not show the court considered the other standards reflected in that section, assuming they were raised."[82]

While sentencing judges must still consider the guidelines, nothing in the statute affords any reason to treat those rules as more controlling of the final sentencing decision than any of the many other factors the court must "consider" under § 3553(a) as a whole.[83] In the cases now before this Court, then, as in any other case, the sentencing judges were obligated to consider *all* of the seven or more § 3553(a) factors, as applied to the particular defendant being sentenced.

To the extent that this Court has addressed the controversy about the weight to be given the guidelines after *Booker*, it has stated, consistent with the approach

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[81] *Jones v. United States*, 529 U.S. 848, 857 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (criminal statutes should not be construed so that an element is rendered superfluous).

[82] *United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006).

[83] *See United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2006); *United States v. Lake*, 419 F.3d 111, 114 (2d Cir. 2005). The contrary decision in *Mykytiuk*, 415 F.3d at 608, cites no statutory language in support of its conclusion.

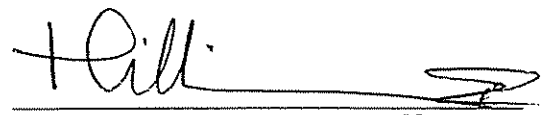
advanced in this brief, that "18 U.S.C. § 3553(a) is still operative, and requires district courts to take the applicable Guidelines range into consideration when sentencing, along with other sentencing factors enumerated by Congress."[84]

V. CONCLUSION

For the above reasons, and for the reasons in the briefs filed in support of the appellants, the Ninth Circuit Federal Public Defenders respectfully suggest that the Court affirm the judgment in the two cases before it.

Respectfully submitted this 22nd day of September, 2006.

Thomas W. Hillier, II
Federal Public Defender



Counsel for *Amici Curiae*[85]

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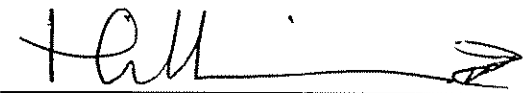
[84] *Cantrell*, 433 F.3d at 1279.

[85] Amici gratefully acknowledge the assistance of Elizabeth Newman, AFPD California Central, and Amy Baron-Evans, Esq., in the preparation of its brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)(I), and Ninth Circuit Rule 32-1, the attached Brief of Amici Curiae is proportionately spaced, has a typeface of 14 point, and contains 6, 925 words.

DATED this 22nd day of September, 2006.



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, vs. ALPHONSO KINZAR CARTY, Defendant-Appellant.	)	COA No. 05-10200 CERTIFICATE OF FILING AND SERVICE BY FEDEX PURSUANT TO FRAP 25(d)
UNITED STATES OF AMERICA Plaintiff, Appellee, vs. JUAN ANTONIO ZAVALA, Defendant-Appellant.	)	COA No. 05-30120

I hereby certify that on September 22, 2006, I caused to be delivered by Federal Express an original and fifty copies of Brief of Amici Curiae Federal Public Defenders for the District of Alaska; Central, Eastern and Northern Districts of California; District of Hawaii; District of Nevada; District of Oregon; Western District of Washington; Federal Defenders of Eastern Washington and Idaho; Federal Defenders of Montana, Inc; and Federal Defenders of San Diego,

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