

No. 05 3454-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

JUAN CASTILLO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR
THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION DRUG LAW
REFORM PROJECT, DOUGLAS A. BERMAN, MICHAEL M. O'HEAR,
DAVID N. YELLEN, AND DAVID M. ZLOTNICK
AS AMICI CURIAE IN SUPPORT OF APPELLEE CASTILLO
AND IN FAVOR OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation (“ACLUF”) is a corporation with no parent corporation. No publicly held company owns 10% or more of the stock of ACLU.

STATEMENT OF AMICI

Amicus American Civil Liberties Union Foundation (“ACLUF”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. The ACLUF’s Drug Law Reform Project (“DLRP”) is a project of the ACLUF’s national legal department. The DLRP’s mission is to end punitive drug policies that cause the widespread violation of constitutional and human rights, as well as unprecedented levels of incarceration.

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BASIS FOR FILING AND REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(b), Amici seek the leave of this Court to file this brief. A motion for leave to file amicus brief accompanies this brief.

Because of the importance and complexity of the issues presented and the specialized expertise of Amici in the area of federal sentencing, Amici request the opportunity for oral argument in this case.

CERTIFICATE OF COMPLIANCE

Amici certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003, Times New Roman type style and font size 14.

SUMMARY OF ARGUMENT

This Court should decline the government’s invitation to create new law contrary to statutory requirements and Supreme Court precedent. The sentencing court, relying on the guidance of the sentencing commission, concluded that the guidelines overstate the seriousness of crack offenses relative to powder cocaine offenses, then acted on that conclusion. While the government is unhappy with the outcome, the sentencing court committed no error in following the relevant statute and the plain meaning of the Supreme Court in Booker v. United States, 125 S. Ct. 738 (2005).

The government wrongly construes the standard of reasonableness to require elevating the perceived intent of Congress over the plain text of 18 U.S.C. § 3553(a), which the Booker Court identified as the guide for district court sentencing decisions and for circuit court review of whether a sentence is reasonable. A careful examination of 18 U.S.C. § 3553(a) makes clear that the statute not only allows, but requires an independent judicial evaluation of the guidelines’ assessment of the “seriousness of the offense” and also requires district judges to take steps to “avoid unwarranted sentencing disparities.” That is exactly what Judge Sweet did in this case.

The government warns of the danger of inter-judge disparities unless discretion is restricted. However, now that Booker has struck down 18 U.S.C. § 3553(b), no controlling law requires promoting concerns about uniformity over the other constitutional and statutory concerns reflected in Booker and 18 U.S.C. § 3553(a).

Very simply, discretion and uniformity are in tension. Booker, on its face, increased discretion. The Booker court anticipated the concerns expressed by the government, recognized that uniformity would probably decrease with advisory guidelines, and made it very clear that a system mandating strict uniformity must give way to a system granting judges wider discretion.

The government asks this Court to expand the ambit of reasonableness review to create a universal and broad rule stating that it is improper for district courts to countenance a particular sentencing consideration (seriousness of crack cocaine offenses relative to powder cocaine offenses). Accepting the government's invitation to turn reasonableness review into a debate over sentencing policy would fly in the face of the Supreme Court's admonition to the Courts of Appeal not to make such broad rulings, and would risk a *de facto* recurrence of the circumstances which caused the Supreme Court to strike down mandatory sentencing guidelines in the first place.

ARGUMENT

I. THE SENTENCING COURT PROPERLY IMPOSED A REASONABLE SENTENCE, FOLLOWING THE STATUTES AND PROCEDURES APPLICABLE TO SENTENCING AFTER BOOKER.

A. The Government Seeks to Vacate Castillo’s Sentence Based on a “Policy” it Prefers, Not a Statutory Requirement or Binding Precedent.

This case presents an example of the change to federal sentencing wrought by Booker v. United States, 125 S. Ct. 738 (2005). The judge below acknowledged his discretion to vary from the guidelines, considered and weighed the factors listed in 18 U.S.C. § 3553(a), and issued a sentence outside of the guideline range because he thought the guidelines overstated the seriousness of the offense. In doing so, he scrupulously followed the directives of the Supreme Court and the controlling statute. So, how can the government claim error?

In short, the government argues that the sentencing judge lacked the discretion to deviate from the guidelines in this case because no factors unique to Castillo’s case (in the government’s view) supported a departure or variance. What they want is to create a limitation on discretion which simply does not exist in the law. This view ignores the central premise of the remedial holding in Booker: That sentencing within the relevant guideline range is no longer mandatory, and a sentencing court will need only to consider that range (and the 100-to-1 powder/crack ratio that is part of the calculation of that range) as one of

many factors. See 125 S. Ct. at 764-765. The government’s construction of Booker would equate “considering” the range to “following” the range but for individualized considerations. This conclusion simply fails to recognize that Booker occurred at all, given that individualized aspects of a case were considered pre-Booker as the basis for departures. Nothing in Booker suggests that the holding there merely allows the judge to consider unusual factors particular to that crime or defendant—quite the opposite, as is argued in parts (B) and (C) of this section. Rather, Booker, read together with the governing statute, expressly directs that such a limitation based on unusual circumstances does not exist. Courts are instead directly charged with evaluating the seriousness of this type of offense independent of the conclusions the guidelines make, including the 100-to-1 powder-to-crack ratio set forth in the guidelines.

B. The District Court Properly Considered the Factors Listed in 18 U.S.C. § 3553(a), Which Not Only Allow but Require an Independent Judicial Determination of the Seriousness of the Offense.

Having an inclination to sentence outside the guideline range, the sentencing judge turned to an analysis of 18 U.S.C. § 3553(a) to inform him on that decision. As explained by the Supreme Court in Booker, the instructions set forth in § 3553(a) are central to the sentencing work of both circuit courts and district courts: “Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts as they have in

the past, in determining whether a sentence is unreasonable.” Booker, 125 S. Ct. at 766.

The statutory mandates of 18 U.S.C. § 3553(a) begin with an initial command that the sentencing court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” It then states that a sentencing court “shall consider” a number of listed factors when sentencing, including “the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” and “the sentencing range ... as set forth in the guidelines” as well as “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

It is 18 U.S.C. § 3553(a)(2)(A) which explicitly requires that the court consider the “seriousness of the offense.” This task is distinct from the requirement to consider the effect of the guidelines (§ 3553(a)(4)) and the individual circumstances of the defendant and the crime (§ 3553(a)(1)). Thus, the plain language of the statute directs the judge to independently evaluate and consider not only the individual circumstances of the case and the guidelines which apply, but to make and consider an independent evaluation of the seriousness of the type of offense at issue.

C. The Rule of Avoiding Redundancy Dictates That 18 U.S.C. § 3553(a)(2)(A) be Construed to Mean That a Sentencing Judge Must Consider His Own Evaluation of the Seriousness of the Type of Offense, Independent of the Guidelines and Individual Characteristics of the Defendant and the Crime.

If, as the government will probably urge, § 3553(a)(2)(A)'s directive to consider the "seriousness of the offense" is simply an instruction to follow the seriousness of the offense contained in the guidelines (through the offense score, which includes the 100-to-1 ratio), the instruction is redundant of 18 U.S.C. § 3553(a)(4), which requires consideration of exactly those guidelines. Similarly, if this Court accepts the government's claim that this is an instruction merely to consider the seriousness of the offense only as to the individual characteristics of the criminal and the crime, that would make § 3553(a)(2)(A) redundant of § 3553(a)(1), which requires the consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant."

Thus, the unique meaning left to attach to 18 U.S.C. § 3553(a)(2)(A) is that the judge must consider the seriousness of that type of offense, independent of the guideline range and the individual aspects of the case.

Reading the language of 18 U.S.C. § 3553(a)(2)(A) as a nullity in the manner urged by the government, rather than requiring an independent evaluation of the seriousness of that type of offense by the sentencing court, runs contrary to the Supreme Court's instructions regarding statutory construction, which direct

that statutes should not be construed so as to render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 392 (1979).

Congress' intent as expressed through the sentencing laws, excised of the unconstitutional language of 18 U.S.C. § 3553(b), tells a judge to do what Judge Sweet did: independently evaluate the seriousness of the type of offense before him. His actions, in following current law, cannot be error.

II. THE GOVERNMENT SEEKS TO HAVE THE AVOIDANCE OF DISPARITIES TRUMP THE OTHER CO-EQUAL FACTORS DESCRIBED IN 18 U.S.C. § 3553(a).

The government expresses great concern about sentencing disparities which might result should courts take seriously their duty under 18 U.S.C. § 3553(a)(2) to independently evaluate the seriousness of a particular type of crime. Certainly, pursuant to 18 U.S.C. § 3553(a)(6), unwarranted disparities are to be considered, but the government seeks to place this concern above all the other factors listed co-equally in § 3553(a). Congress, in promulgating § 3553(a), did not elevate that factor above the others, leaving the weighting of the listed factors to the judge who is issuing a sentence. Given that Congress did not choose to rank-order the importance of the various factors in § 3553(a), this Court should decline the government's invitation to do so.

The Supreme Court in Booker predicted this debate, and refuted preemptively the idea that concern for disparities should skew post-Booker sentencing

governed by all the provisions of 18 U.S.C. § 3553(a). Contrary to the government's view that concern for disparities is a trump card over other § 3553(a) considerations under the broad banner of review for reasonableness, the Supreme Court knew that the changes wrought in Booker likely would impact the pursuit of strict uniformity, and forged ahead with those changes anyways. In his majority opinion in Booker, Justice Breyer anticipated exactly the "reasonableness" argument made by the government here:

Regardless, in this context, we must view fears of a "discordant symphony," "excessive disparities," and "havoc" (if they are not themselves "gross exaggerations") with a comparative eye. We cannot and do not claim that use of a "reasonableness" standard will provide the uniformity that Congress originally sought to secure.

125 S. Ct. at 766-767.

It is also critical to appreciate that the sentencing judge here was himself motivated by the need to avoid unwarranted sentencing disparities when he decided, as instructed by the considered analysis of the U.S. Sentencing Commission, that a 20:1 ratio better serves the goals set forth in 18 U.S.C. § 3553(a). Section 3553(a)(6) required Judge Sweet to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Judge Sweet concluded, in light of the Sentencing Commission's expert analysis that the 100:1 ratio produces

unwarranted disparity between crack and powder offenses and that a different sentencing ratio was appropriate. Slip Op. at 5.

III. THE GOVERNMENT SEEKS TO CREATE NEW LAW AND RE-IMPOSE A SENTENCING SYSTEM CONTAINING THOSE ELEMENTS ALREADY REJECTED BY THE SUPREME COURT.

A. It Would be Improper to Create New Law Restricting Judicial Discretion.

As set out above, the plain text of 18 U.S.C. § 3553(a) and Supreme Court precedent do not support the rule restricting judicial discretion which the government seeks. Moreover, a restrictive approach to § 3553(a) would violate a precept set out by the Supreme Court in Koon v. United States, 518 U.S. 81 (1996) -- that only Congress and the Sentencing Commission, and not the Courts of Appeal, should devise limits on the discretion of District Courts in sentencing.

In warning appellate courts against placing undue restrictions on sentencing courts, the Supreme Court in Koon flatly stated that “Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance.” 518 U.S. at 106. Nevertheless, the government now asks this Court to exercise exactly that authority and rule that a sentencing consideration which rejects the guideline range as overstating the seriousness of that category of offense is inappropriate in every circumstance.

Of course, Amici agree with the government's general assertion that Congress' will should be respected, but the discernment of that will must be drawn from and limited to what is duly and currently expressed through statute. In short, we ask that this Court not rewrite statutes where the existing law is unambiguous, but does not give the government all that it wants. Deference to the perceived intent of Congress not reflected in current law should not transform the application of the Supreme Court's Booker decision; rather, review for reasonableness must be focused on the provisions of 18 U.S.C. § 3553(a).

B. The Government Seeks to Re-introduce Precisely Those Factors Already Rejected by the Supreme Court in Booker.

The government claims that a court cannot refuse to follow a guideline range based primarily or only upon the harshness of that guideline. To accept their position would return us to a system of sentences devoid of significant judicial discretion outside of the determination of individualized factors relating specifically to that crime and that defendant. This is exactly the construct that was overturned in Booker.

If this Court bans seriousness of the offense as a reason to vary from the guidelines, the underlying problem raised in Booker would arise again -- a case would occur where a sentence was enhanced based on a judge determined factor (such as the amount of narcotics at issue), and the judge was then locked into the

guideline range because the only possible basis for departure or variance would be the seriousness of the offense relative to the offense score. The precise scenario found to offend the Sixth Amendment in Booker would arise: a judge would be forced to sentence within the guidelines, against her weighing of the 18 U.S.C. § 3553(a) factors, having raised the sentence above the presumptive range without proper jury findings. “But wait!” the government may cry, “there are other factors that could lead to a variance that just are not present here, thus it is not a mandatory system!” Such logic is unavailing. In Booker, Justice Stevens’ majority opinion shot down an analogous claim that the ability to depart from the guidelines made them something other than a mandatory system:

The availability of a departure in specified circumstances does not avoid the constitutional issue.... At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most.

125 S. Ct. at 750.

Therein lies the rub: if this Court grants the government’s wish and finds that a court’s own judgment of the seriousness of the offense cannot outweigh the guidelines’s offense score, it re-introduces into the system precisely the element that was expelled in Booker, even without making the system fully mandatory.

Unless the full range of discretion to consider and weigh the § 3553(a) factors is preserved, constitutional infirmity will recur.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae in Support of Appellee and in Favor of Affirmance was served upon counsel for Appellant and Appellee, as listed below, via delivery to Federal Express for overnight delivery service on February 17, 2006. The foregoing Brief of Amici Curiae was also filed with the Clerk of the Court via delivery to Federal Express for overnight delivery service on February 17, 2006.

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