

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 05-1268

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UNITED STATES OF AMERICA,  
Appellee,

v.

LENNY JIMENEZ-BELTRE,  
Defendant/Appellant.

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On Appeal From a Judgment of the United States District Court  
for the District of Massachusetts

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BRIEF AMICUS CURIAE OF  
FEDERAL PUBLIC DEFENDERS FOR THE DISTRICTS OF  
MASSACHUSETTS, NEW HAMPSHIRE AND RHODE ISLAND, THE DISTRICT  
OF PUERTO RICO AND THE DISTRICT OF MAINE  
ADDRESSING QUESTIONS IN COURT ORDER OF JANUARY 25, 2006

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## **INTEREST OF THE AMICI CURIAE**

The Federal Public Defenders of the Districts of Massachusetts, New Hampshire and Rhode Island, the District of Puerto Rico and the District of Maine submit this brief to respond to the questions raised in this Court’s Order of January 25, 2006 addressing the post-*Booker* framework of sentencing in the district court and review of sentences by this Court: “(1) the proper approach to determining a post-*Booker* sentence in the district court and the relationship of the guidelines to that determination; and (2) the proper approach to be taken on appeal in reviewing a post-*Booker* sentence.” These issues affect almost all of the clients of these offices, as well as a significant number of other individuals. Amici submit this brief to provide our institutional perspective on these issues.

## **INTRODUCTION**

*United States v. Booker*, 543 U.S. 220 (2005), has generated a major reassessment of sentencing practices throughout the federal judicial system. A majority of the Supreme Court held that certain judicial fact finding under the mandatory guideline system instituted by the Sentencing Reform Act in 1987 violated the Sixth Amendment to the United States Constitution; a different majority held that the appropriate remedy for that constitutional violation was to sever and excise 18 U.S.C. § 3553(b)(1) and 18 U.S.C. §3742(e), thereby making

the guidelines “effectively advisory”. *Booker, supra*, at 245.<sup>1</sup>

Courts have taken varying approaches to fleshing out the Supreme Court’s somewhat spare guidance for the methodology the district court should employ in imposing a post-Booker sentence and the court of appeals should use in reviewing sentences. Amici submit that the following framework complies with both constitutional and statutory mandates and enhances the reliability of the district court’s sentencing determinations.

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<sup>1</sup> Additional excisions may be necessary to achieve the advisory guidelines status required for a constitutional system. *See, e.g., United States v. Selioutsky*, 409 F.3d 114,116-117 (2<sup>nd</sup> Cir. 2005) (*Booker* rationale requires excision of §3553(b)(2)). 18 U.S.C. §§3742(f) and (g) may also be inconsistent with *Booker*. *See, e.g.*, discussion in *Booker, supra* at 307, n.6 (Scalia, J., dissenting). *See also, United States v. Thurston*, 358 F.3d 51,74 (1<sup>st</sup> Cir. 2004), vacated and remanded for further consideration in light of *Booker*, 125 S.Ct. 984 (2005).

## **I. THE FRAMEWORK FOR DISTRICT COURT SENTENCING**

**A. The District Court Must Impose a Sentence Minimally Sufficient to Achieve the Statutory Purposes of Sentencing in 18 U.S.C. §3553(a)(2) After Consideration of All the Statutory Factors, Including the Properly Calculated Advisory Guideline Range. The Guideline Range Should Not Automatically Receive Greater Weight Than Any Other Factor; Each Factor Should be Given the Weight Deemed Appropriate for the Facts and Circumstances of the Particular Case. The District Court Must Provide Reasons for the Sentence Imposed That Are Sufficiently Detailed to Allow This Court to Review the Sentence for Statutory Compliance.**

### **1. Consulting The Statutory Factors**

Analysis begins with the language of 18 U.S.C. §3553(a). The overarching directive of the statute is set out at its beginning: “The court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” (emphasis added). This has been referred to as the parsimony clause. *See, e.g.,* Richard S. Frase, *Punishment Purposes*, 58 Stan.L.Rev. 67, 82-83 (2005) for discussion of purposes of §3553(a). Those purposes are (18 U.S.C. §3553(a)(2)):

(2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The statute also provides a framework for achieving that primary sentencing mandate, instructing that: “The court, in determining the particular sentence to be imposed, *shall* consider - ...” (emphasis added) seven listed factors in arriving at a sentence “sufficient but not greater than necessary” to achieve the purposes of sentencing set out in §3553(a)(2). Section 3553(a) does not provide that presumptive weight or any primacy be given to the Guideline sentencing range. Rather, the guideline sentencing range is listed as the fourth of the seven factors to be considered and, for reasons which shall be set forth in Argument I.B, *infra*, should receive the same weight as all other factors – a weight which may vary from case to case. Indeed, if any factor is emphasized in §3553(a), it is §3553(a)(2) – the purposes of sentencing, which are also included in the primary sentencing mandate; the sentence is to be sufficient but not greater than necessary to achieve those purposes.

Neither the statute nor *Booker* suggests that the district court is to impose sentence based on its assessment of “reasonableness”. The district court is charged with imposing a sentence in accordance with the statute’s “sufficient but not greater than necessary” directive. *See, United States v. Foreman*, \_\_\_ F.3d \_\_\_, 2006 WL 287365, \*6 n.1 (6th Cir. 2006). The court of appeals employs “unreasonableness” review to determine whether the district court has complied

with the statute. *See, Booker, supra* at 260-261.

In arriving at the statutorily required sentence, the district court should afford the weight it deems appropriate under the facts and circumstances of the particular case to each of the factors it must consider. No one factor will always predominate, even with respect to the same kind of offense. For example, in some instances the court may determine that the term of imprisonment in the advisory guideline range makes a greater contribution to determining a sentence sufficient but not greater than necessary to meet the purposes of sentencing than the need to provide restitution (e.g., defendant is a major player in a large bank robbery; as a relatively young person with no strong family ties, his risk of recidivism is greater than that of an older person with strong family ties; he is not employable and there is little likelihood he can make significant restitution). In other cases, the court may reach the opposite conclusion (e.g., defendant is a small player in a large bank robbery but held responsible for the entire loss; as an older person with strong family ties, his risk of recidivism is lower than that of a younger person without strong family ties; he has substantial employment and is likely able to make significant restitution). Achieving the same objective in both cases -- imposition of a sentence sufficient but not greater than necessary to meet the purposes of sentencing -- may require a different balance.

In order to “consult” and “take account of” the guidelines, along with all of the other factors set forth in 18 U.S.C. §3553(a) at sentencing (*see, e.g., Booker, supra*, at 264, 259; 18 U.S.C. §3553(a)(4)), the district court must correctly calculate the applicable advisory guideline range, including calculation of appropriate departures, in the same manner as was done prior to *Booker*. *See, e.g., United States v. Robinson*, 433 F.3d 31, 35 (1<sup>st</sup> Cir. 2005) (“...so far as the Guidelines bear upon the sentence imposed, the court’s calculation must be correct, subject...to the limitations of plain error or harmless error review.”); *United States v. Selioutsky*, 409 F.3d 114, 118 (2<sup>nd</sup> Cir. 2005); *United States v. Cooper*, \_\_ F.3d \_\_, 2006 WL 330324, \*4 (3<sup>rd</sup> Cir. 2006); *United States v. Hazelwood*, 398 F.3d 792, 800-801 (6<sup>th</sup> Cir. 2005); *United States v. Dean*, 414 F.3d 725, 727 (7<sup>th</sup> Cir. 2005); *United States v. Haack*, 403 F.3d 997, 1002-03 (8<sup>th</sup> Cir. 2005); *United States v. Menyweather*, 431 F.3d 692, 696-697 (9<sup>th</sup> Cir. 2005); *United States v. Talley*, 431 F.3d 784, 786 (11<sup>th</sup> Cir. 2005)<sup>2</sup>. However, the plain language of the statute does not accord the advisory guidelines presumptive

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<sup>2</sup> This encompasses resolution of factual disputes relevant to a guideline determination or to the court’s choice of sentence. *United States v. Dean, supra*, 414 F.3d at 730.

weight or special consideration beyond that afforded to other factors<sup>3</sup>.

The Sentencing Reform Act also requires that the court consult and take into account the other specified factors relevant to both the offense and the offender. Where a defendant argues that a particular circumstance requires a certain consideration in determining the appropriate sentence to be imposed, and that circumstance is relevant, the district court must address that factor. *See, e.g., United States v. Cunningham*, 429 F.3d 673 (7<sup>th</sup> Cir. 2005) (remanding for resentencing where the district court failed to address significant mental health concerns raised by defendant). *See also, United States v. Cooper, supra.*

## **2. Reasons for Sentencing**

If appellate review for unreasonableness is to be meaningful, the district court must provide a sufficiently detailed record and rationale for the sentence imposed to enable this Court to assess compliance with all of the directives of 18 U.S.C. §3553(a). 18 U.S.C. §3553(c) requires that the court state in open court “the reasons for its imposition of the particular sentence” at sentencing. It also

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<sup>3</sup> For the reasons set forth below, amici submit that even though the Sentencing Commission was charged with establishing policies and practices to meet the statutory purposes of sentencing and directed to develop guidelines to meet that goal (*see*, 28 U.S.C. §991(b) and §994), neither those statutes nor the guidelines, as constructed and developed, are fully congruent with the statutory mandate of 18 U.S.C. §3553(a).

provides that if the sentence is within a guideline range exceeding 24 months the court must state orally the reason for the particular point chosen ((c)(1)); if outside the guideline range, it must also state reasons with specificity in the written order of judgment ((c)(2))<sup>4</sup>.

Post-*Booker*, the detail required has been described in different ways. While courts have stated that the district court need not expressly articulate the details of its consideration of each of the §3553(a) factors, courts have also stated that simple recitation of the content of the §3553(a) factors at sentencing is insufficient (*United States v. Castro-Juarez*, 425 F.3d 430 (7<sup>th</sup> Cir. 2005)) and that rote statement of consideration of all relevant factors is not always sufficient (*United States v. Cunningham*, 429 F.3d 673, 679 (7<sup>th</sup> Cir. 2005), particularly “if at sentencing either the defendant or the prosecution properly raises ‘a ground of recognized legal merit (provided it has a factual basis)’ and the court fails to

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<sup>4</sup> While the statute imposes the obligation to provide reasons in different forms for different types of sentences, it does not require more compelling justification for any particular type of sentence. The nature of the obligation remains the same; to provide the reasons for the choice of sentence. As described in S.Rep. 98-225 accompanying the Comprehensive Crime Control Act of 1984, the statement of reasons was intended to assist appellate courts in reviewing sentences, probation or prison officials working with the defendant in achieving the goals of the sentencing judge, and researchers and the Commission in evaluating sentencing and the guidelines. See, 1984 U.S.C.C.A.N. 3182 at 3243, 3262-3263.

address it.” (*United States v. Cooper, supra*, 2006 WL 330324, \*3). The court must “articulate the factors that determined the sentence that he has decided to impose.” *Dean, supra*, 414 F.3d at 729. It “maintains a duty to explain its reasons for the sentence imposed with some degree of specificity.” *United States v. Denton*, \_\_\_ F.3d \_\_\_, 2006 WL 162990 \*3 (8<sup>th</sup> Cir. 2006) (remand for resentencing with “more explicit and thorough consideration of all factors enumerated in §3553(a)”). *See also, United States v. McBride*, 434 F.3d 470, 474 (6<sup>th</sup> Cir. 2006). The court “must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review.” *United States v. Williams*, \_\_\_ F.3d \_\_\_, 2006 WL 224067, \*2 (6<sup>th</sup> Cir. 2006).

Before *Booker*, this Court addressed the nature of the explanation required by §3553(c) in *United States v. Vazquez-Molina*, 389 F.3d 54 (1<sup>st</sup> Cir. 2004), a plain error challenge to the district court’s explanation for imposing a sentence within a 121-151 month guideline range. This Court held that the court’s specific identification of some discrete aspects of defendant’s behavior (second offender status) and linking it to goals of sentencing (punishment and deterrence), while bareboned, was sufficient to survive plain error review (*id.*, at 58-59) and was “marginally adequate” (*id.*, at 60). However, this Court advised:

The test under §3553(c)(1) must center not only on whether the

explanation meets the identification and linkage requirements but also whether it sufficiently shows a thoughtful exercise of the court's sentencing responsibility and a degree of care and individualized attention appropriate to the solemnity of the sentencing task.

(*id.*, at 59). In *United States v. Catano*, 65 F.3d 219, 229-231 (1<sup>st</sup> Cir. 1995), this Court also held that a district court did not meet its obligation under 18 U.S.C. §3553(c) to adequately articulate the reasons for imposing an “organizer/leader” upward adjustment under the guidelines by checking the box on the judgment adopting the factual findings and guideline application in the presentence report, or by stating that by a fair preponderance of the evidence defendant was the principal figure and that the role adjustment was appropriate. Noting that while the PSR contained a lengthy recitation of offense conduct, it did not specifically address facts supporting its conclusion as to defendant's role or focus on the considerations necessary to reach its conclusion, this Court remanded “for further articulation of the reasons for imposing the adjustment ...”. *Id.*, at 231.

The court in *United States v. Lewis*, 424 F.3d 239 (2<sup>nd</sup> Cir. 2005) found the district court's failure to provide a statement of reasons violated the defendant's substantial rights because “[s]ection 3553(c) bestows on defendants the right to argue more effectively that - and enables us to decide more effectively whether - a sentence is ‘reasonable’.”. *Id.*, at 247.

**B. The Advisory Guideline Range Does Not Warrant Elevated Status in the Consideration of the 18 U.S.C. §3553(a) Sentencing Factors**

The government's contentions that the guidelines should be given elevated status in the panoply of §3553(a) factors evaluated by the district court, or viewed as presumptively reasonable on appeal, are predicated on the assumptions that 1) the sentencing directives to the district court in 18 U.S.C. §3553(a) and the statutory directives to the Sentencing Commission in 28 U.S.C. §§991 and 994 for the formulation of guidelines are congruent and were effectuated in the guidelines promulgated and 2) affording substantial weight to the guidelines is necessary to avoid unwarranted disparity. Examination of the relevant statutes, the guidelines, the Commission's own reports and other critiques demonstrates that these assumptions are unfounded; the guidelines and §3553(a) are not congruent and do not avoid unwarranted disparity.

If the guidelines incorporated all the sentencing requirements of 18 U.S.C. §3553(a), those requirements would not have been set out separately in the statute. It is a basic canon of statutory construction that every part of a statute has meaning and no provision should be construed as inoperative, superfluous or insignificant. *See, Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994); *Liberty Cablevision of Puerto Rico, Inc. v. Municipality*

*of Caguas*, 417 F.3d 216, 222 n.8 (1<sup>st</sup> Cir. 2005); *Herman v. Hector I. Nieves Transp., Inc.*, 244 F.3d 32, 36 (1<sup>st</sup> Cir. 2001).

While the purposes of sentencing were intended to play a central role both in a district court's sentencing and in the Sentencing Commission's formulation of guidelines,<sup>5</sup> the Commission never articulated a philosophy of sentencing prioritizing the purposes of sentencing because the initial Commissioners could not agree on one. U.S.S.C., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (November 2004) (available at [www.ussc.gov](http://www.ussc.gov)), p.14 (hereafter referred to as "Fifteen Year Report"). In the absence of a sentencing philosophy there can be no assurance that all the purposes of sentencing and appropriate weight of those purposes played a central role in the Commission's formulation of the guidelines.<sup>6</sup>

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<sup>5</sup> Those purposes are referred to in the following provisions of the Sentencing Reform Act: 18 U.S.C. §§3551(a), 3553(a), 3563(b), 3565(a), 3582(a) and (c) and 3583(c); 28 U.S.C. §§991(b)(1)(A) and (b)(2), 994(a)(2), (f), (g) and (m).

<sup>6</sup> For critiques of the Commission's failure to design or apply the guidelines to achieve the specific purposes of sentencing, *see*, Paul Hofer and Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am.Crim.L.Rev.19, 26 (2003); Andrew Von Hirsch, "Federal Sentencing Guidelines and do They Provide Principled Guidance?" 27 Am. Crim. L. Rev. 367, 371(1990); Marc Miller, *Purposes of*

The absence of a philosophy has also perhaps contributed to the tensions between the guidelines and the process now required under 18 U.S.C. §3553(a).<sup>7</sup>

**1. The Differences Between the Statutory Directive to the District Court and the Statutory Directives to the Sentencing Commission**

28 U.S.C. §991 establishes the Sentencing Commission and sets out its purposes, one of which is to “establish sentencing policies and practices for the Federal criminal justice system that” achieve certain goals, including to:

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*Sentencing*, 66 S.Cal.L.Rev. 413, 419 (1992).

Even hypothesizing the guidelines’ sentencing philosophy as a hybrid giving primary weight to matching severity of punishment to seriousness of offense and secondary weight to increased incapacitation of those most likely to reoffend if free – a modified just desert philosophy (Hofer & Allenbaugh, *supra*, 40 Am.Crim.L.Rev. at 51 et seq.), raises questions as to whether the guidelines have effectively met these purposes. In drug cases, for example, the guidelines assign an unwarranted significance and exactitude to quantity, which is not “a foolproof measure of offense seriousness” and neglect gradations in moral culpability without enhancing deterrence (*id.*, at 24, 33-35, 69-72, 78). Drug cases have been the largest proportion of the federal criminal docket for over three decades. The Commission itself has acknowledged problems with the drug guidelines. *See, e.g.*, Fifteen Year Report, *supra* at 47-55.

<sup>7</sup> The Commission’s Criminal History Reports also illustrate the guidelines’ failure to effectively satisfy the purposes of sentencing in that factors relevant to predicting recidivism are not included in the criminal history rules. *See, e.g.*, U.S.S.C. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), pp.12,28 (age); 12,29 (employment, educational level, marital status); 11,28 (gender) (available at [www.ussc.gov](http://www.ussc.gov)).

A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; [and to] B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

28 U.S.C. §991(b)(1)(A) and (B).

Where 18 U.S.C. §3553(a) differs from that general directive to the Commission is in its instruction that the district court impose a sentence sufficient but not greater than necessary to achieve the purposes of §3553(a)(2) in the particular case. A guidelines system developed in accordance with 28 U.S.C. §§991 and 994 may address the §3553(a)(2) purposes of sentencing without meeting the limitations of the parsimony clause. It may require additional considerations to ensure that the sentence imposed is not greater than necessary.<sup>8</sup>

28 U.S.C. §994 sets out criteria to be used by the Sentencing Commission in formulating national guidelines, not directives to the district court for sentencing an individual in a particular case. Reviewing its provisions reveals additional

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<sup>8</sup> At the time of the enactment of the Sentencing Reform Act, the departure authority was intended to be less restrictive than the system ultimately developed. *See, e.g.*, U.S.S.G. §1A1.1 Editorial Note, Part A, Par. 4(b)(pre-1990 amendments). A more relaxed departure scheme might have been one of the mechanisms for using the guidelines consonant with the full mandate of §3553(a).

differences between the Sentencing Commission’s guidelines directives and the district court’s 18 U.S.C. §3553(a) sentencing directive. 28 U.S.C. §994(d) directed the Commission to ensure that the guidelines are entirely neutral as to race, gender, national origin, creed and socioeconomic status; the Commission prohibited use of those factors. U.S.S.G. §5H1.10. A district court, sentencing an individual rather than a system, may deem socioeconomic status relevant to the appropriate statutory sentence; socioeconomic status is part of the history and characteristics of the offender which a district court must consider under 18 U.S.C. §3553(a)(1). In determining the appropriate sentence under §3553(a) for a person who steals, a court may consider that the purposes of sentencing are best met by treating a person who steals to feed his/her family because he/she has no job and no money differently from a person who has assets but steals to harass a shop owner.

28 U.S.C. §994(d) directed the Commission to consider the relevance of listed factors and to “take them into account only to the extent that they do have relevance--”.<sup>9</sup> The Commission responded by prohibiting consideration of drug

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<sup>9</sup> These include age; education; vocational skills; mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant; physical condition, including drug dependence; previous employment record; family ties and responsibilities; community ties; role in the offense; criminal history; and, degree

or alcohol dependence or abuse; lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing; coercion or duress related to personal financial difficulties and economic pressures upon a trade or business; diminished capacity in violent crimes or resulting from voluntary intoxication; and aberrant behavior in connection with, *inter alia*, drug trafficking charges.

U.S.S.G. §§5H1.4, 5H1.12, 5K2.0, 5K2.12, 5K2.13, 5K2.20.

28 U.S.C. §994(e) instructs the Commission to “assure that the guidelines and policy statements ...reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant” (some of the factors in §994(d)). In response, the Commission severely limited consideration of those factors, as well as age, mental and emotional conditions, physical condition or appearance, military, civic, charitable or public service; and employment-related contributions and similar prior good works, classifying all as “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”.

U.S.S.G. §5H1.1- §5H1.6, §5H1.11- §5H1.12. Departures based on criminal history have also been significantly constrained. U.S.S.G. §4A1.3(b).

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of dependence upon criminal activity for a livelihood. 28 U.S.C. §§994(d)(1) - (d)(11).

These proscriptions and limitations are not consistent with the individualized sentencing required by 18 U.S.C. §3553(a). As this Court has recognized in a number of post-*Booker* decisions, a district court may view those prohibited and discouraged guidelines factors as relevant to imposing a sentence complying with the statutory mandate. *See, e.g., United States v. Antonakopoulos*, 399 F.3d 68 (1<sup>st</sup> Cir. 2005); *United States v. Heldeman*, 402 F.3d 220 (1<sup>st</sup> Cir. 2005); *United States v. Bisanti*, 414 F.3d 168 (1<sup>st</sup> Cir. 2005) (all recognizing that mitigating factors had been presented at sentencing which, although not warranting departure under the stringent standards employed in a guidelines departure analysis, might result in a lower sentence when evaluated under 18 U.S.C. §3553(a)); *United States v. Lata* 415 F.3d 107, 113 (1<sup>st</sup> Cir. 2005) (factors discouraged as bases for guidelines departure may receive more weight under §3553(a)); *United States v. Wilkerson*, 411 F.3d 1, 10 (1<sup>st</sup> Cir. 2005) (family background may have different impact under advisory guidelines); *United States v. Burhoe*, 409 F.3d 5 (1<sup>st</sup> Cir. 2005) (court may view grounds asserted as basis for departure differently in advisory guidelines regime); *United States v. Meada*, 408 F.3d 14 (1<sup>st</sup> Cir. 2005) (court may attach different sentencing consequences to fact in advisory system); *United States v. Lewis*, 406 F.3d 11 (1<sup>st</sup> Cir. 2005) (same); *United States v. Gorsuch*, 404 F.3d 543 (1<sup>st</sup> Cir. 2005) (certain factors “may be

more relevant [post-*Booker*] than under the pre-*Booker* regime of mandatory guidelines”); *United States v. Morin*, 403 F.3d 41 (1<sup>st</sup> Cir. 2005) (advisory guidelines permitted defendant to raise previously precluded arguments); *United States v. MacKinnon*, 401 F.3d 8,11 (1<sup>st</sup> Cir. 2005) (grounds not appropriately considered under mandatory Guidelines system supported remand for resentencing under advisory guidelines).

These cases illustrate the conflict between 18 U.S.C. §3553(a), directing the sentencing judge to evaluate the history and characteristics of the offender (buttressed by 18 U.S.C. §3661, providing that no limitations shall be placed on the information available to the court for sentencing), and the guidelines promulgated pursuant to 28 U.S.C. §§994(d) and (e) limiting or precluding consideration of certain offender characteristics in determining the guideline sentencing range.

There are other statutory divergences. 28 U.S.C. §994(j) provides that the guidelines are to reflect the general appropriateness of a sentence other than imprisonment for a first offender committing an offense that is not violent or otherwise serious. As promulgated, the guidelines impose incarceration on virtually all offenders, creating another source of tension between the guidelines and 18 U.S.C. §3553(a). The Commission has recognized the need to act on the

statutory directive, but has not yet done so. *See*, U.S.S.C., *Recidivism and the “First Offender”* (May 2004), available at [www.ussc.gov](http://www.ussc.gov).

28 U.S.C. §994(n) directs that the guidelines reflect the general appropriateness of a lower sentence for individuals providing substantial assistance. The guidelines limit that opportunity to the situation where the government files a motion permitting judicial consideration (U.S.S.G. §5K1.1).<sup>10</sup> This not only limits the scope of the statutory directive, but may have precluded the district court from considering relevant information in its evaluation of the offender and assessment of the severity of the sentence needed to meet the purposes of sentencing in the 18 U.S.C. §3553(a).

Finally, the *Booker* Court did not state that the guidelines should receive elevated status in determining a statutory sentence.

## **2. Substantial Reliance on the Advisory Guidelines Will Not Avoid Unwarranted Disparity**

The government also suggests that affording substantial weight to the guidelines is needed to avoid unwarranted disparity. The Commission has defined unwarranted disparity as “different treatment of *individual* offenders who are

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<sup>10</sup> While 18 U.S.C. §3553(e) requires a government motion for a sentence below a statutory mandatory minimum based on substantial assistance, a government motion is not a prerequisite in 28 U.S.C. §994(n).

similar in relevant ways or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.” Fifteen Year Report, *supra*, at 113 (emphasis in original). Yet, the Commission itself has recognized that the guidelines do not always avoid unwarranted disparity and that, in some instances, disparity has increased rather than decreased. In discussing disparity arising from investigative techniques, charging decisions, plea bargaining, the pre-sentence report and the filing of notices and motions, it has recognized that “some of the components of guidelines implementation that were designed to ensure uniformity have proven inadequate to the task or have not worked as intended”. Fifteen Year Report, *supra* at 82. It further stated that “a variety of evidence suggests that disparate treatment of similar offenders is common at presentencing stages” (*id.*, at 92), and concludes that “several lines of evidence suggest that uneven charging and plea bargaining remain a source of unwarranted sentencing disparity”. *Id.*, at 141.

The Commission also recognized that departures based on substantial assistance accounted for the greatest amount of variation in sentences. *Id.* As Judge Saris has stated: “...downward departures based on substantial assistance motions are an invitation to unwarranted secret disparity.” Hon Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity?*

*One Judge's Perspective*, 30 Suffolk U.L.Rev. 1027, 1049 (1997).

Fast track dispositions create geographical disparities which the Commission has noted “appear to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly situated defendants.” U.S.S.C., *Report to Congress: Downward Departures From the Federal Sentencing Guidelines* (October 2003) (available at [www.ussc.gov](http://www.ussc.gov)), 66-67.

The guidelines may also create, rather than avoid, unwarranted disparity in some areas by over-reliance on readily quantifiable characteristics such as drug weight or amount of loss as proxies for harm and giving inadequate consideration to factors relevant to individual culpability. Drug sentencing, with its emphasis on type and quantity, has produced troubling results and is one area where the guidelines cannot be deemed to have avoided unwarranted disparity. Actions by both Congress and the Commission have resulted in drug offense sentencing guidelines containing sources of both disparity and inappropriate uniformity. *See, e.g.*, Fifteen Year Report, *supra* at 50-52, 130-134, 141-142. *See also*, Hofer & Allenbaugh, *supra*, 40 Crim.L.Rev. at 24, 33-35 (criticizing the guidelines implementation in the area of drug sentencing).

Relevant conduct rules, which the Commission has characterized as “an

admitted policy compromise that treats some offenses involving quantifiable amounts ... differently from other offenses...” (Fifteen Year Report, *supra* at 144), may exacerbate some of the inequalities. *Id.*, at 50. *See also*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1714-1715 (1992) (discussing disparity arising from use of relevant conduct).<sup>11</sup>

Further, the Commission has also concluded that under the guidelines “regional disparity may have *increased* significantly for drug trafficking offenses...”(emphasis in original). Fifteen Year Report, *supra* at 140.

The guidelines may also foster unwarranted disparity through so-called “factor creep” – the Commission’s recognition that the cumulative effect and interactions of new adjustments added over time may distort the assessment of the seriousness of the offense subject to those new adjustments and result in its

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<sup>11</sup> Such rules may also result in sentences inconsistent with Congressional intent. H.R.Rep. No. 99-845 (Background) (1986), accompanying H.R. 5394, Narcotics Penalties and Enforcement Act of 1986, sets out Congressional intent to focus primarily on major traffickers and secondarily on managers. Yet, the mechanism, tying punishment to quantity, enhanced by the guidelines’ methods of quantity attribution, often treats low level offenders as harshly as kingpins and may create further unwarranted disparities. *See, e.g.*, Fifteen Year Report, *supra*, at 48-55, 132.

overstatement.<sup>12</sup> *Id.*, at 137. *See also*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *Stan.L.Rev.* 85 (2005) analyzing and evaluating disparities created by the guidelines and evaluating data generated by the Sentencing Commission. Alschuler concludes that “[w]hen viewed from any coherent normative perspective, the Federal Sentencing Guidelines have failed to reduce disparity and probably have increased it.” *Id.*, at 85.

Given the recognized unwarranted disparities arising from the guidelines system, focusing on judicial departure from an advisory guideline range is a poor measure. Moreover, if the guidelines are used as the measure of unwarranted disparity, they must, presumably, be strictly followed. That strict compliance is, *de facto*, the mandatory system held unconstitutional in *Booker*.

Finally, the government has placed undue weight on disparity avoidance. The remedial majority in *Booker*, *supra*, at 263, recognized that an advisory guidelines system with appellate review for reasonableness would not achieve the same degree of uniformity as the system held unconstitutional. And, not all disparity is unwarranted.

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<sup>12</sup> According to the Commission, the average time served has more than doubled since implementation of the guidelines (Fifteen Year Report, *supra*, at 46, 139).

While legislative history suggests that reducing unwarranted disparity was a significant purpose of the Sentencing Reform Act,<sup>13</sup> it is only one of the factors in 18 U.S.C. §3553(a) to be considered in arriving at a sentence sufficient but not greater than necessary to achieve the purposes of sentencing. It has no statutory primacy.<sup>14</sup> *See also, United States v. Morales-Chaires*, 430 F.3d 1124, 1131 (10<sup>th</sup> Cir. 2005), (stating that the §3553(a)(6) directive addressing unwarranted disparities “is but one of several factors for a court to consider in determining a reasonable sentence.”); *United States v. Winters*, 416 F.3d 856, 861 (8<sup>th</sup> Cir. 2005)

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<sup>13</sup> Senate Report No. 98-225, 1984 U.S.C.C.A.N. 3182, 3235, describes elimination of unwarranted sentencing disparity as “a primary goal”, not the only goal of sentencing reform. The report also envisions a system in which guidelines were not to be mechanistically imposed and sentences outside the guidelines were not automatically suspect. “The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.” *Id.*

<sup>14</sup> It is not, as the Supreme Court noted in *Koon v. United States*, *supra*, 518 U.S. at 113, the only purpose of sentencing:

This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.

*See also*, U.S.S.G. §1A1.1, Editorial Note, Part A, Par.3 (pre-1990 amendment).

(“We cannot isolate possible sentencing disparity to the exclusion of the (sic) all the other §3553(a) factors.”). In sum, while a tool for fostering uniformity, the guidelines are not a reliable benchmark against which to measure unwarranted disparity.<sup>15</sup> This Court should reject the government’s suggestion that the

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<sup>15</sup>In a post argument letter, the government has cited to post-*Booker* sentencing statistics compiled by the Sentencing Commission as evidence of guidelines variances in the District of Massachusetts requiring this Court’s attention. (The government relies upon statistics prepared by the Sentencing Commission on January 5. A more recent report, prepared February 14, 2006, shows a slightly lower percentage of below-guidelines sentences for the District of Massachusetts: 25.1 percent, as opposed to the earlier figure of 26.7 percent cited by the government. *U.S. Sentencing Commission Special Post-Booker Coding Project* found at [http://www.ussc.gov/Blakely/postbooker\\_021406.pdf](http://www.ussc.gov/Blakely/postbooker_021406.pdf).) Variance, however, is not unwarranted disparity. The relevant issue, not addressed by the statistics, is unwarranted disparity. As the General Accounting Office noted in a 2003 Report to Congress, departure differences among circuits and districts “may not, in and of themselves, indicate unwarranted sentencing departures or misapplications of the guidelines.” GAO, GAO-04-105, *Federal Drug Offenses, Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001*, p.4 (October 2003) (available at [www.gao.gov](http://www.gao.gov)). Moreover, the statistics cited by the government do not reflect whether there has been any degree of change in the length of sentences imposed in the District of Massachusetts pre- and post-*Booker*, which may be more relevant to measuring disparity.

The accuracy of the data compilation is also questionable. Accuracy depends on the quality of the information provided to the coders, as well as their categorizations. The category “otherwise below the guideline range” is defined as including cases mentioning only *Booker*, §3553 or related factors and cases with sentences below the guideline range that cannot be classified as either a guideline departure or based on *Booker*. It is not clear whether it also includes departures that should be classified as guideline departures. See, U.S.S.C. *U.S. Sentencing Commission Special Post-Booker Coding Project* (January 5, 2006), p.11 n.3 and n.2. Moreover, until November 2005 the Judgment and Commitment/Statement of

guidelines be afforded substantial weight in the district court in order to comply with 18 U.S.C. §3553(a)(6).

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Reasons form used in the District of Massachusetts did not require the degree of explanation needed for accurate coding. For a sentence that departed from the guideline range it provided only check-off boxes for substantial assistance or “the following specific reason(s)”. Nor did it require specification of departures supported by the government not predicated on substantial assistance. *See also*, GAO -04-105, *supra*, at 23 noting that the Statement of Reasons form “did not collect information on other downward departures [aside from substantial assistance] that are initiated by the prosecution.”

The form now in use requires much more detailed information specifically classifying and detailing types of guideline departures and types of sentences outside the guidelines system and setting out the facts justifying the sentence.

Thus, the differences in the statistics could be attributable to the manner in which district court judges were reporting data and could include as otherwise below the guideline range sentences that were, in fact, guideline system departures or departures supported by the government for reasons other than substantial assistance.

## **II. ALL SENTENCES ARE SUBJECT TO APPELLATE REVIEW FOR UNREASONABLENESS WITH NO PRESUMPTION OF REASONABLENESS BEING ACCORDED TO SENTENCES WITHIN THE ADVISORY GUIDELINE RANGE**

### **A. The Scope of Appellate Jurisdiction**

The government maintains that this Court has no jurisdiction to review a sentence imposed within the properly calculated advisory guideline range; in effect, that the guidelines are per se reasonable. This position must be rejected.

First, the *Booker* remedy majority expressly provided for appellate review of sentences within an advisory guideline range: 18 U.S.C. §3742(a) “continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under §3553(a)).” *Booker, supra*, 543 U.S. at 260.

Contrary to the government’s suggestion, this is not dicta. It is a considered, integral part of the Court’s remedy for the constitutional infirmities of the guidelines. Just as the remedy majority reinterpreted portions of the SRA, excising provisions to preserve the guidelines by making them advisory, so it interpreted 18 U.S.C. §3742(a) as encompassing appellate review of a sentence imposed pursuant to 18 U.S.C. §3553(a) in the new regime, even if that sentence

falls within the advisory guideline range calculated as part of the sentencing process.

Nor does calling statements dicta render them irrelevant. This Court recognized the weight of considered dicta in *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 18 (1<sup>st</sup> Cir. 1991): “We think that federal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly where, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.” *See also, Crowe v. Bolduc*, 365 F.3d 86 (1<sup>st</sup> Cir. 2004); *United States v. Melendez*, 228 F.3d 19,22 (1<sup>st</sup> Cir. 2000); *United States v. Santana*, 6 F.3d 1, 8 (1<sup>st</sup> Cir. 1993) (all recognizing the persuasive impact of considered dictum).

Second, to classify a sentence within the advisory guideline range as not reviewable for unreasonableness is to say that such a sentence is per se reasonable. As a number of courts have recognized, a holding of per se reasonableness “would effectively re-institute mandatory adherence to the Guidelines” in derogation of the *Booker* rights majority decision. *United States v. Webb*, 403 F.3d 373, 385, n.9 (6<sup>th</sup> Cir. 2005). *See also, United States v. Talley*, 431 F.3d 784, 786-787 (11<sup>th</sup> Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 607 (7<sup>th</sup> Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 115, *abrogated on other grounds by, United States v.*

*Fagans*, 406 F.3d 138, 142 (2<sup>nd</sup> Cir. 2005). In *United States v. Winters*, 416 F.3d 856, 861 (8<sup>th</sup> Cir. 2005), the court concluded that viewing “the range of reasonableness [as] essentially co-extensive with the Guidelines range, would effectively render the Guidelines mandatory.” This alone warrants rejection of the government’s position.

Prior to *Booker*, courts had not interpreted mandatory, properly calculated and applied guideline range sentences as subject to appellate review under 18 U.S.C. §3742(a)(1) (review of sentences imposed “in violation of law”).<sup>16</sup> The government argues that properly calculated guideline range sentences cannot be in violation of law *post-Booker*. However, abolition of the mandatory regime requires re-examination of the interpretation of the statute. The court is no longer reviewing a guideline sentence. It is reviewing a sentence that may fall within an advisory guideline range but was determined under broader statutory standards. To the extent it is examining the guideline calculations, those calculations are reviewed under the pre-*Booker* standards of appellate review. However, the overall sentence imposed pursuant to §3553(a) is, as the Supreme Court stated,

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<sup>16</sup> *United States v. Melendez-Torres*, 420 F.3d 45, 50 (1<sup>st</sup> Cir. 2005) is such a case. There, in evaluating challenges to a guideline sentence imposed prior to *Booker*, this Court stated that *Booker* did not change its jurisdiction to review Guidelines sentences. It did not address review of sentences imposed post-*Booker*.

reviewed for unreasonableness – including compliance with the provisions of the statute. It is certainly within the scope of the phrase “in violation of law” to include review of a sentence alleged to have been imposed without compliance with §3553(a), even if within the advisory guideline range.

In *United States v. Mickelson*, 433 F.3d 1050, 2006 WL 27687 (8<sup>th</sup> Cir. 2006), the court rejected the same government argument. Examination of the statutory language, changes to the statutory scheme effectuated by *Booker*, and legislative history require a different construction of §3742(a)(1). A sentence within the advisory guideline range may now be “in violation of law” even if the range has been properly calculated and there are no constitutional problems. A post-*Booker* sentence must not simply be within the range; it must comply with the primary mandate of §3553(a). The Eighth Circuit is not alone. See, *United States v. Cooper, supra*, 2006 WL 330324 \*2 (3<sup>rd</sup> Cir. 2006) (“We believe an unreasonable sentence is ‘imposed in violation of law’ under 18 U.S.C. §3742(a)(1)”); *United States v. Martinez*, 434 F.3d 1318, 2006 WL 39541(11<sup>th</sup> Cir. 2006) (“post-*Booker* appeal based on the ‘unreasonableness’ of a sentence, whether within or outside the advisory guideline range, is an appeal asserting that the sentence was imposed in violation of law pursuant to §3742(a)(1)”); *United States v. McBride*, 434 F.3d 470, 474-477 (6<sup>th</sup> Cir. 2006) (guidelines component of

post-*Booker* sentence is reviewed as it was pre-*Booker*; sentence is then reviewed for reasonableness with focal point on §3553(a); “to preclude our review of a district court’s decision not to sentence below the applicable Guideline range—would run completely contrary to *Booker*’s mandate and is irreconcilable with reasonableness review...”); *United States v. Vaughn*, 433 F.3rd 917, 924 (7<sup>th</sup> Cir. 2006)(“Post-*Booker*, because we must review all sentences for reasonableness in light of the factors specified in §3553(a), we necessarily must scrutinize, as part of that review, the district court’s refusal to depart from the advisory sentencing range.”).<sup>17</sup>

**B. The Standard of Appellate Review for Unreasonableness is a Deferential One, With No Presumption of Reasonableness or Substantial Weight Accorded to a Sentence Within the Advisory Guideline Range**

*Booker, supra*, 543 U.S. at 261-262, describes the standard of review to be used by courts of appeals in reviewing sentences for “unreasonableness” as that employed to review guidelines departures and imprisonment after revocation of supervised release. In *Koon v. United States*, 518 U.S. 81 (1996), the Court employed an abuse of discretion standard to review a district court’s departure

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<sup>17</sup> Review of a sentence within the advisory guideline range may also fall within §3742(a)(4) since, following the rejection of mandatory guidelines, there is no sentencing guideline for any specific offense. Jurisdiction may also be provided by 28 U.S.C. §1291.

decision. This Court has done the same in reviewing supervised release revocation sentences. *See, United States v. Ramirez-Rivera*, 241 F.3d 37, 40 (1<sup>st</sup> Cir. 2001); *United States v. McInnis*, 429 F.3d 1, 4 (1<sup>st</sup> Cir. 2005). Amici submit that this is the general standard to be used for post-*Booker* appellate review, with no presumption of reasonableness or substantial weight given to a sentence simply because it is within the advisory guideline range.

While affording deference to a district court's determination, an abuse of discretion standard is not toothless. *See, e.g., Jodoin v. Toyota Motor Corp.*, 284 F.3d 272,279 (1<sup>st</sup> Cir. 2002). As the Supreme Court stated in *Koon v. United States*, *supra* at 100, “[a] district court by definition abuses its discretion if it makes an error of law” and “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” Panels of this Court have used similar standards in reviewing post-*Booker* sentences. In *United States v. Pho*, 433 F.3d 53, 60 (1<sup>st</sup> Cir. 2006), a panel of this Court suggested that “[t]he reasonableness standard and the familiar abuse of discretion standard bear a strong family resemblance to each other”, and held that “a sentence based on an error of law is per se unreasonable.” The panel further held that errors of law are reviewed *de novo*. *Id.*, at 60-61. In *United States v. Robinson*, 433 F.3d 31 (1<sup>st</sup> Cir. 2005), a panel of this Court held that “a sentence

will be vacated as unreasonable after *Booker* if it is predicated on a clearly erroneous view of material facts.” *Id.*, at 38. *Robinson* also addressed two subsidiary questions: the post-*Booker* standard of review for a legal interpretation of a guidelines provision and the standard for reviewing district court findings of fact. In both instances, this Court determined that *Booker* worked no change. First, “...*Booker* did not disturb the standard of review that we apply to a district court’s interpretation of the Guidelines. We will continue to determine the legal meaning of the Guidelines provisions *de novo*.” *Id.*, at 35. Second, “nothing in *Booker* suggests that our review of district court fact-finding [clear error standard] need change...” *Id.*, at 38.

These standards of review are appropriate. This Court should continue to review findings of fact for clear error, questions of law *de novo* and the reasonableness/unreasonableness of the sentence imposed by the district court for abuse of discretion.

These standards are consistent with those adopted by other courts. In *United States v. Haack*, 403 F.3d 997, 1004 (8<sup>th</sup> Cir. 2005), the court defined a tripartite abuse of discretion standard for post-*Booker* appellate review. A district court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or

irrelevant factor; or, (3) considers only appropriate factors but makes a clear error of judgment in weighing them.

Courts have also recognized that review for unreasonableness is not limited to review of the length of the sentence. The procedures employed by the district court and the factors upon which it relied are part of the process and may render a sentence unreasonable. *See, e.g., United States v. Webb*, 403 F.3d 373, 383 (6<sup>th</sup> Cir. 2005); *United States v. Crosby, supra*, 397 F.3d at 114-115 (describing an error of law or clearly erroneous findings of fact as factors which may render a sentence unreasonable; included within errors of law are mandatory application of guidelines, mandatory sentencing enhancements based on judicial fact finding, and failure to consider §3553(a) factors); *United States v. Selioutsky, supra*, 409 F.3d at 118 (error in determining applicable guideline range or availability of departure authority are types of procedural error that could render sentence unreasonable under *Booker*). As the court stated in *United States v. Williams*, \_\_ F.3d \_\_, 2006 WL 68559 \*4 (11<sup>th</sup> Cir. 2006), review for reasonableness requires consideration of “both the §3553(a) factors and the reasons given by the district court.”

These standards of appellate review should not provide either a presumption of reasonableness for a sentence within the advisory guideline range or substantial weight to the advisory guideline range. *Booker* does not state that a sentence

within the advisory guideline range should be given presumptive weight. *See also, United States v. Cooper, supra*, 2006 WL 330324, \*5 (3<sup>rd</sup> Cir. 2006); *United States v. Crosby, supra*, 397 F.3d at 115 (declining to adopt rebuttable presumption of reasonableness for sentence within advisory guideline range).

While some courts have concluded that a sentence within the advisory guideline range should be viewed as presumptively reasonable on appellate review, most offer scant support for their conclusion and the rationales expressed are flawed. They should not be adopted here.

In the case providing the most extensive rationale, *United States v. Mykytiuk*, 415 F.3d 606, 607 (7<sup>th</sup> Cir. 2005), the court afforded presumptive reasonableness to a guideline sentence because:

The Sentencing Guidelines represent at this point eighteen years worth of careful consideration of the proper sentence for federal offenses. When the Supreme Court directed the federal courts to continue using the Guidelines as a source of advice for proper sentences, it expected that many (perhaps most) sentences would continue to reflect the results obtained through an application of the Guidelines.

This assessment assumes that the guidelines are congruent with the sentencing directives to the district court in 18 U.S.C. §3553(a) and, for the reasons set forth above (pp. 11-19), they are not. It also relies on a void. Had the Supreme Court wished to instruct courts of appeals to afford a presumption of

reasonableness to a sentence within an advisory guideline range, it could have done so. It did not. This Court should not fill that void based simply on speculation. Nor should this Court set out on the slippery slope to *de facto* mandatory guidelines in derogation of the Sixth Amendment rights recognized in *Booker*.

In *United States v. Green*, \_\_F.3d \_\_, 2006 WL 267217 \*5 (4<sup>th</sup> Cir. 2006) the Fourth Circuit simply agreed with the Seventh Circuit without analysis. Similarly, the Fifth Circuit has adopted the presumption without explanation beyond its adoption by other courts. *United States v. Alonzo*, 2006 WL 39119 (5<sup>th</sup> Cir. 2006). *See also, United States v. Kristl*, 2006 WL 367848 (10<sup>th</sup> Cir. 2006 (adopting presumption)).

The Third Circuit has sent mixed signals. In a published opinion, a panel of the Third Circuit expressly declined to adopt such a presumption. *United States v. Cooper, supra*. However, in an unpublished, not precedential opinion cited in published opinions in other circuits for the proposition that the Third Circuit had adopted a presumption of reasonableness, the panel simply conclusorily stated, without analysis, that sentences within the prescribed guideline range are presumptively reasonable. *United States v. Gonzalez*, 134 Fed.Appx. 595 (3<sup>rd</sup> Cir. 2005).

In *United States v. Williams*, \_\_\_ F.3d \_\_\_, 2006 WL 224067, \*1 (6<sup>th</sup> Cir. 2006), the court simply concluded that a rebuttable presumption of reasonableness “comports with the Supreme Court’s remedial decision in *Booker*.” However, in *United States v. Foreman*, \_\_ F.3d \_\_\_, 2006 WL 287365, \*5 (6<sup>th</sup> Cir. 2006), the court stated that *Williams*

does not mean that a Guidelines sentence will be found reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors [ and] does not mean that a sentence within the Guidelines is reasonable if there is no evidence that the district court followed its statutory mandate to “impose a sentence sufficient, but not greater than necessary” to comply with the purposes of sentencing in section 3553(a)(2).

While a panel of the Eighth Circuit concluded, without analysis, that a sentence within the advisory guideline range was presumptively reasonable (*United States v. Lincoln*, 413 F.3d 716 (8<sup>th</sup> Cir. 2005)), the en banc court in *United States v. Pirani*, 406 F.3d 543, 564 (8<sup>th</sup> Cir. 2005) stated that “[p]ost-*Booker* the correctly calculated guideline range presumably carries equal weight with the other §3553(a) factors”.

In sum, for the same reasons that the guidelines should not be given substantial weight in the district court (see pp. 11-26, *supra*) they should not be afforded substantial weight or a presumption of reasonableness in this Court. Rather, this Court should review the district court’s statement of reasons and the

record to ensure that the facts upon which the sentence was based were not clearly erroneous, that the court properly calculated the advisory guideline range, that the court considered all of the 18 U.S.C. §3553(a) factors in its sentencing calculus and that the court adequately explained why consideration of those factors led to its conclusion that the sentence imposed was sufficient but not greater than necessary to achieve the purposes of sentencing.

### CONCLUSION

For the foregoing reasons, this Court should adopt the frameworks for district court sentencing and appellate review set forth above.

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## CERTIFICATE OF SERVICE

I, Miriam Conrad, hereby certify that I have, this date, served copies of the foregoing brief Amicus Curiae of Federal Public Defenders for the Districts of Massachusetts, New Hampshire and Rhode Island, the District of Puerto Rico and the District of Maine by delivery to Assistant U.S. Attorney Cynthia Young, and by electronic mail to [Cynthia.Young@usdoj.gov](mailto:Cynthia.Young@usdoj.gov), and by first-class mail, postage pre-paid, to James Krasnoo, and by electronic mail to [James@Krasnoolaw.com](mailto:James@Krasnoolaw.com).

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Miriam Conrad

DATED: February 23, 2006

## CERTIFICATE OF COMPLIANCE REGARDING FRAP RULE 32(a)

I, Miriam Conrad, hereby certify that this brief has been prepared in a proportionally spaced typeface using Wordperfect 12 in 14 point Times New Roman.

The brief contains 8,744 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii)

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