Docket No. 05-1268

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
Appellee,

v.

LENNY JIMENEZ-BELTRE,
Defendant-Appellant

_____

On Rehearing En Banc of Appeal from the District of Massachusetts

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CRIMINAL JUSTICE ACT BOARD FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS AS *AMICI CURIAE* ON REHEARING EN BANC IN SUPPORT OF DEFENDANT-APPELLANT

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL), is a District of Columbia nonprofit corporation founded over 45 years ago, whose membership now includes more than 12,500 attorneys, including citizens of every state. The NACDL has some 90 local, state and international affiliates which permit it to speak on behalf of over 35,000 professional defenders. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is adherence to laws restraining the imposition of excessive and arbitrary punishments.

NACDL often files amicus briefs before the Supreme Court of the United States. NACDL has appeared as amicus curiae in this Court in several cases, including United States v. Thompson, 234 F.3d 34 (1st Cir. 2000), and Goldings v. Wynn, 383 F.3d 17 (1st Cir. 2004). The NACDL national amicus curiae committee requested and authorized the undersigned to file this brief.

The Criminal Justice Act Board for the United States District Court for the District of Massachusetts ("CJA Board"),

was created pursuant to the Criminal Justice Act Plan of the United States District Court for the District of Massachusetts in 1993. It consists of ten attorneys appointed by the district court. The CJA Board advises the district court on issues relating to the implementation of the CJA Plan. It also presents educational programs on federal criminal defense practice. From time to time, the CJA Board expresses its views on issues of concern to the indigent defense bar, the defense bar as a whole, and indigent defendants. The CJA Board has appeared as amicus curiae in this Court in several cases, including Goldings v. Wynn, 383 F.3d 17 (1st Cir. 2004).

By order dated February 17, 2006, this Court granted leave for the filing of this brief.

STATEMENT OF THE ISSUES

1. What is the proper approach to determining a post-Booker sentence in the district court, including the relationship of the United States Sentencing Guidelines to that determination?

2. What is the proper approach to be taken on appeal in reviewing a post-Booker sentence?

SUMMARY OF ARGUMENT

1. The proper approach to determining a sentence in the United States District Court after United States v. Booker, 543 U.S. 220 (2005), is set forth in the clear language of a detailed, binding statute, the Sentencing Reform Act of 1984, as it stands following severance by the Supreme Court in Booker. The Supreme Court in Booker did not strike down the statute (or the Guidelines) and substitute a judicially-designed system. Thus, the answers to this Court's questions are to be found in the statute, not primarily in case law, and the case law that exists from other courts is persuasive (or not) in precise relation to the extent to which it grapples with statutory language. Under this approach, the district court cannot treat the U.S. Sentencing Guidelines, explicitly or implicitly, as establishing a presumptively correct range of reasonable sentences. The Act plainly states that the properly computed guideline range is one of approximately a dozen factors that the sentencing judge is obligated to "consider" under 18 U.S.C.

§ 3553(a). Nothing in the statute, as it stands after Booker, makes the guidelines primary or central to that process.

There was formerly a statutory provision making a Guideline sentence presumptively the appropriate punishment in each case -- 18 U.S.C. § 3553(b). But § 3553(b) is the principal section that was excised by the Supreme Court in Booker in order to save the statute as a whole from a determination of unconstitutionality under the Fifth and Sixth Amendments, as interpreted in Blakely v. Washington, 542 U.S. 296 (2004). The Act following severance no longer contains a directive to follow the Guidelines, and none can be supplied by judicial action without recreating the very constitutional problem that Booker remedied. Instead, the law now states in plain language what the judge is to do at sentencing: After considering those dozen factors, the district court must impose a sentence which is "sufficient but not greater than necessary" to accomplish the four principal purposes of punishment, as set forth in § 3553(a)(2). Depending on the "nature and circumstances of the offense," the "history and characteristics of the defendant," and other factors, and within the parameters of the kinds of sentences which are legally "available," id. § 3553(a)(3), that punishment may or may not fall within the guideline range.

2. a. The first question for the court of appeals is always an examination of its own jurisdiction. The United States, in its en banc brief, launches a frivolous challenge to the Court's "jurisdiction" to review the district court's exercise of discretion if it has imposed sentence within a

correctly calculated guideline range. To the contrary, it is plain that this Court has jurisdiction over a defendant's appeal from the final judgment in a criminal case under 28 U.S.C. § 1291. The issue of whether the sentence imposed complies with the Act, including its compliance with the mandate of § 3553(a) that the district court impose no sentence "greater than necessary" is then cognizable on appeal under 18 U.S.C. § 3742(a). There is no legitimate question of jurisdiction here.

b. On appeal, the Court applies a standard of review of "reasonableness" to the district court's sentencing decision. But what is it that the appellate court is reviewing under this standard? Amici suggest that what the Court of Appeals reviews is the question of compliance with the law governing the sentencing court's actions. It cannot be "reasonable" for a court to fail to follow a binding statute which the Supreme Court has recently held constitutional. The "reasonableness" of the sentence itself can be reviewed only in light of the § 3553(a) factors and the arguments and evidence presented at the time of sentencing.

The question is not really whether the sentence is reasonable in some abstract or subjective sense, but rather: (a) whether the district judge correctly understood and followed the required procedures and statutory standard, (b) whether the judge's balancing of the § 3553(a) factors, some of which are very general and potentially double-edged, was reasonable, and (c) (on a defendant's appeal under 18 U.S.C. § 3742(a)) whether the ultimate judgment that the sentence was "not greater than

necessary" itself falls within the range of reason. (On a government appeal under 18 U.S.C. § 3742(b), the issue would be whether the district court's judgment that the sentence was "sufficient" was a reasonable one.)

In this appellate process the court of appeals must not apply any presumption that a sentence within the guideline range is "reasonable." To do so would be to say that the answer to all of the questions framed above is presumed to be yes, which plainly it cannot be. As discussed in this Brief, the Commission was directed by Congress in 28 U.S.C. § 991(b)(1)(A), § 994(g), and § 994(m) to attempt to integrate the § 3553(a)(2) considerations (purposes of sentencing) into the Guidelines, and by § 994(a)(2) to implement § 3553(a)(2) through "policy statements" as well. But nowhere in the Act is the Commmission assigned the task of dealing with the additional factors which § 3553(a) of title 18 directs the district court to consider in each case, particularly those under subsections (a)(1) (individual offense and offender characteristics) and (a)(6) (avoidance of unwarranted disparity).

The presumption of reasonableness that some of the other circuits have adopted -- and which the government advocates -- has no basis in the statutory language and is contrary to the constitutional principle that underlies Booker. A judge-made, mandatory, rebuttable presumption of the kind that the government seeks would violate Sandstrom v. Montana, 442 U.S. 510 (1979). Only if the burden of proof at sentencing for facts which raise the top of a guideline range were elevated to

"beyond a reasonable doubt" could a presumption for guideline sentencing survive constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979).

Applying these principles of appellate review to the district court's action in the instant case, amici suggest that the judgment of sentence be vacated and the case remanded for further sentencing proceedings. 18 U.S.C. § 3742(f)(1).

INTRODUCTORY STATEMENT

Appellant Jimenez-Beltre was convicted on his plea of guilty to an indictment charging him with illegal re-entry by a deported alien. 8 U.S.C. § 1326. There was no plea agreement. About one month after the Supreme Court decided United States v. Booker, 543 U.S. 220 (2005), Mr. Jimenez came before the district court for sentencing. The court heard argument from the parties on their views of the relevant sentencing considerations. The court then determined a Guideline score of Offense Level 21 and Criminal History Category III, which is associated with a sentencing range of 46 to 57 months' imprisonment. The district judge stated that he considered the guideline range a starting point, and that he would impose a "non-Guidelines sentence" only if there were "clearly identified and persuasive reasons why I should not impose a Guidelines sentence ...." G.Add. 9.

Although the court stated that it had "considered the factors of 18 U.S.C. § 3553(a)" it chose to impose a sentence within the guidelines, which it described as "part advisory,"

G.Add. 44, albeit at the lowest end. G.Add. 46. The court stated, "I believe ... a higher sentence is not necessary to achieve the goals of sentencing." Id. The district court analyzed each of the separate reasons advanced by the defense for a lower sentence in terms of whether that fact provided a "clearly identified and persuasive" basis or justification "for a non-guidelines sentence." Id. In short, the court explicitly treated the guideline range both as a starting point and as defining a presumptively correct range of sentences. This methodology did not comply with the mandate of § 3553(a). The court's legal error renders the sentence imposed "unreasonable" as a matter of law. Resentencing is required.

ARGUMENT FOR AMICI CURIAE

I. THE PROPER APPROACH TO DETERMINING A POST-*BOOKER* SENTENCE IN THE DISTRICT COURT, INCLUDING THE RELATIONSHIP OF THE UNITED STATES SENTENCING GUIDELINES TO THAT DETERMINATION, IS CLEARLY SET FORTH IN THE PLAIN AND DETAILED LANGUAGE OF THE SENTENCING REFORM ACT; THERE IS NO NEED TO DEVISE ANY NEW JUDGE-MADE VOCABULARY, RULES, "STARTING POINTS" OR PRESUMPTIONS.

The answers to the questions posed by this Court in its order inviting amicus briefing are found in the plain language of the Sentencing Reform Act, as it stands after Booker. The Act obligates the district court, in every case, to select a punishment which is "sufficient, but not greater than necessary" to accomplish the purposes of criminal punishment. 18 U.S.C. § 3553(a). Before selecting that sentence, the 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. Fourth of the seven is the guideline range; fifth is the Commission's "policy statements," also found in the Guidelines Manual. Nothing in the statute leads to the conclusion that either of these factors constitutes a "starting point," and the statutory language and structure preclude any inference that the appropriate sentence in each case should be presumed to fall within the guidelines range.

Through the introductory directive in § 3553(a) to impose a sentence which is "sufficient, but not greater than necessary," 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."[1] Under this rule, a person must be given the sentence which is sufficient but not greater than is necessary for the protection of society. The sentence which is lawful is the sentence which is "minimally sufficient." See United States v. Kikumura, 918 F.2d 1084, 1111 (3d Cir. 1990) (per Becker, J). Instead of complying with that Congressional mandate, the court below announced its own intention to follow the Guidelines in the absence of "cleary identified and persuasive reasons." These comments reflected an error of law.

Some other courts have similarly suggested that the Guidelines sentence may (or even must) still be given presumptive weight after Booker -- notably, United States v. Wilson, 350 F.Supp.2d 910 (D.Utah 2005), on reconsideration, 355 F.Supp.2d 1269 (Cassell, J.); see also United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005). At bottom, those cases are predicated on nothing but ipse dixit. Worse, critical analysis shows that implementation of such a presumption recreates the same constitutional flaw which the Supreme Court

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[1] See, e.g., Richard S. Frase, *Punishment Purposes*, 58 STANFORD L.REV. 67, 77 & n.24, 78 & n.29 (2005); Testimony of Mary Price, Gen'l Counsel, FAMM, before U.S. Sentencing Comm'n, http://www.ussc.gov/hearings/02-15-05/price_testimony.pdf (Feb. 15, 2005), at 3 (citing Cesare Beccaria's pathbreaking 1764 work on Crime and Punishment). See United States v. Carey, 368 F.Supp. 891, 895 n.4 (E.D.Wis. 2005); United States v. Wilson, 350 F.Supp. 910, 922-23 (D.Utah 2005) (citing scholarly literature).

found in Booker. Most circuits -- even those which in our view demand that the Guideline be given undue weight through a rebuttable presumption or otherwise -- have properly rejected the claim that a sentence within the properly calculated Guideline range is "per se reasonable." See United States v. Talley, 431 F.3d 784, 786-87 (11th Cir. 2005) (per curiam; Tjoflat, Dubina & Pryor, JJ.). Yet even a rebuttable presumption has no basis in the statute.

Booker held (as expressed in an opinion by Justice Stevens) that the operation of the U.S. 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, violated a defendant's Sixth Amendment right to jury trial, as interpreted in cases from Apprendi v. New Jersey, 530 U.S. 466 (2000), through Blakely v. Washington, 542 U.S. 296 (2004). As a remedy for this constitutional defect, in the part of the decision authored by Justice Breyer, the Court severed and excised 18 U.S.C. § 3553(b)(1) (the provision making application of the guidelines mandatory) from the SRA, leaving the rest of that Act (other than the standards of appellate review in § 3742(e)) intact, as well as all of the sentencing guidelines and policy statements. The Court held that applying severability analysis to strike these two statutory sections from the Act was necessary to achieve as closely as possible the intent of Congress in enacting the Sentencing Reform Act. See generally United States v. Antonakopoulos, 399 F.3d 68, 75-76 (1st Cir. 2005).

The reasoning of the court below adopted the government's view and ignored the statutory language. In effect, it adopted a judge-defined public policy in lieu of the balanced rule established by Congress. The selection of a fair and consistent sentencing scheme is a matter for Congress, not any judge or group of judges to decide. The Supreme Court in Booker, by exercising the judicial power to sever a particular unconstitutional provision from a complex statutory scheme, preserved the statute as a whole, leaving it to work as designed by Congress. The Court did not, as some district judges seem to think, strike down the Sentencing Reform Act generally and substitute out of whole cloth an "advisory guideline" system as a sort of judicial policy choice.

After excising § 3553(b)(1) and § 3742(e), the remainder of the Act is constitutional, the Court held. Examination of the remaining provisions of the Sentencing Reform Act discloses that one key provision commands judicial action post-severance: the actual sentence imposed must never be "greater than necessary" -- although it must also be "sufficient" -- to achieve the purposes of sentencing listed in § 3553(a)(2)(A-D). It is also mandatory under the Act that the sentencing court "consider" a number of factors before choosing that sentence. After Booker, in other words, 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 ("The court shall impose ...") not just a "reasonable" sentence, but one which is "sufficient" to achieve these four objectives, without being "greater than necessary."

The sentence thus selected may then be reviewed on appeal, but will be reversed only if found "unreasonable." See Point II.B. post. At the same time, it must be emphasized that "reasonableness" is not the criterion for judgment or "rule of decision" in the district court.

> [The] district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)(2). Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished its task.

United States v. Foreman, 2006 WL 287365, *5 n.1 (6th Cir., filed Feb. 8, 2006). A district court, when selecting a sentence, cannot skip the step of complying with 18 U.S.C. § 3553(a) and be affirmed on the basis that the resulting punishment was "reasonable." See Koon v. United States, 518 U.S. 81, 100 (1996) (a "court by definition abuses its discretion when it makes an error of law").[2]

The Act also requires that the district court state reasons "at the time of sentencing, ... in open court," for "its imposi-

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[2] Not all decisions in other circuits have recognized this essential point. See, e.g., United States v. Talley, 431 F.3d at 786 (describing process as calling upon judge first to determine guideline range, then to "consider several factors," and finally to "determine a reasonable sentence," disregarding statutory mandate for parsimony).

tion of the particular sentence." 18 U.S.C. § 3553(c). Unlike § 3553(b), this provision was not excised from the Sentencing Reform Act by the Supreme Court in Booker, nor is it inconsistent with the post-Booker regime. The cases to date agree that the district court must still state reasons for its sentence. United States v. Webb, 403 F.3d 373, 385 n.8 (6th Cir. 2005); United States v. Crosby, 397 F.3d 103, 116 (2d Cir. 2005).[3] In light of the Booker opinion, which elevated the parsimony directive of 18 U.S.C. § 3553(a) to the level of controlling statutory mandate, section § 3553(c) should be understood to require a statement of reasons attempting to explain -- or at least suggest -- why the judge thought the sentence selected was "not greater than necessary," while still being "sufficient" to achieve the Congressional goals set forth in subsection § 3553(a)(2), since that -- as discussed above -- is now the statutory touchstone and is therefore the decision which requires justification.[4] Anything else is not really a reason

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[3] For any sentence outside the guideline range, the Court must place its specific reasons in writing and make them part of the judgment. 18 U.S.C. § 3553(c)(2). See United States v. Hughes, 401 F.3d 540, 546 n.5 (4th Cir. 2005). That particular provision does not apply in this case. Its post-Booker viability therefore need not be addressed.

[4] If the sentence selected falls within the Guideline range, and that range spans more than 24 months, then it is the court's for stringent duty to "state in open court ... the reason for imposing a sentence at a particular point within the [Guideline] range." 18 U.S.C. § 3553(c)(1). United States v. Vazquez-Molina, 389 F.3d 54, 58 (1st Cir. 2004). Again, that provision does not apply here, so there is no occasion to consider the viability, after Booker, of the distinction it draws between in-range and out-of-range sentences.

"for imposing [that] sentence." 18 U.S.C. § 3553(c)(1).

The requirement of stating reasons is not a formality; it was one of the principal features of the 1984 Sentencing Reform Act. Mistretta v. United States, 488 U.S. 361, 367-68 (1989). The legislative history emphasizes as a "glaring defec[t] in current sentencing law" the "fact that the sentencing judge is not required to state his reasons for imposing a particular sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 74-75 (1983).[5] The requirement for stating reasons serves at least two important functions: it promotes careful thought and reasoned decisionmaking by the sentencing judge, and it facilitates later appellate review of the "reasonableness" of the sentence. Its importance is thus enhanced, if anything, by the more discretionary and more subjective nature of post-Booker sentencing. After Booker, "the district court may justify a sentence below the guideline level based upon a broader

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[5] Panels of this Court have occasionally conflated the reasons requirement with the obligation to make findings on contested factual issues. Thus, citing 18 U.S.C. § 3553(c), the Court has reiterated, "A defendant in the dock, awaiting imposition of sentence, is entitled to reasoned findings, on a preponderance standard, not to an appellate court's assumptions drawn free-form from an inscrutable record." United States v. Catano, 65 F.3d 219, 230-31 (1st Cir. 1995) (quoting United States v. McDowell, 918 F.2d 1004, 1012 n.8 (1st Cir. 1990)). The panels in those cases invoked § 3553(c), which governs selection of the particular sentence after the guideline range has been calculated, when the Court perhaps should have relied on what is now Fed.R.Crim.P. 32(i)(3)(B) (former Rule 32(b)(1)(C)), which requires express rulings on objections to the PSI's guideline calculation. Catano focused on findings inadequate to support a role enhancement; in McDowell, there was a complete lack of findings on the same subject.

appraisal." United States v. Gorsuch, 404 F.3d 543, 548 (1st Cir. 2005) (on rehearing).

Listed in § 3553(a) are a dozen or so factors (in seven numbered subsections) which the court, "in determining the particular sentence, shall consider." In addition to the six objectives found in the four clauses of subsection (a)(2),[6] 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) and listed in the previous footnote]; (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 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." If any of these wide-ranging factors would seem to be a logical "starting point," it would not be (a)(4), the guidelines, but rather (a)(3) -- determination of the kinds of sentence lawfully available.[7]

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[6] These are: (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).

[7] If the district judge does choose to calculate the

Thus, sentencing judges must still consider the guidelines, see 18 U.S.C. § 3553(a)(4), but 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. See United States v. Menyweather, 431 F.3d 692, 701 (9th Cir. 2005); United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005), explaining United States v. Crosby, 397 F.3d 103, 111-13 (2d Cir. 2005).[8]

In this case as in any other, the sentencing court was obligated to consider all of the seven or more § 3553(a) factors, as applied to the particular defendant being sentenced. The contention proposed by the government in its en banc brief here -- that the guideline sentence inherently incorporates all the other § 3553(a) factors -- is wrong as a matter of statutory construction, as well as of historical fact. The directives by Congress to the Commission for the design of the guidelines, as found in 28 U.S.C. §§ 991(b)(1)(A) and 994(b), (g) and (m), proves the point. In those provisions, Congress repeatedly advised the Commission to design the Guidelines to take account

_____(footnote continued)

Guideline range first, which might seem convenient or efficient, it will be particularly important not the let the result of that mechanical but important exercise create a pyschological incentive to give that initial, more quantifiable calculation undue weight. 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 thus avoid the more difficult and sensitive process of weighing other, less tangible factors in the manner required by the balance of the statute.

[8] The contrary decision in Mykytiuk, 415 F.3d at 608, cites no statutory language in support of its conclusion.

of the policies and purposes described in § 3553(a)(2) only[9]; tellingly, Congress thus recognized that reliance on the Guidelines alone in any given case cannot be expected to take account, for example, of the multifarious facts covered by subsection (a)(1) (that is, the "history and characteristics of the defendant" are not expected to be covered nor are all "the nature and circumstances of the offense"). Nor will a Guideline sentence necessarily address "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," as mandated by subsection (a)(6).[10]

It is surely incorrect to read a statute requiring 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 (the Guidelines), or perhaps those listed fourth and fifth (the Commission's policy statements). To the contrary, the strong assumption is that Congress means to require something additional by each separate clause of the statute. See Jones v. United States, 529 U.S. 848, 857 (2000);

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[9] As characterized by Judge Becker, "the four purposes of sentencing set forth in subsection 3553(a)(2)" are "retribution, deterrence, incapacitation, and rehabilitation." United States v. Denardi, 892 F.2d 269, 276 (3d Cir. 1989) (separate opinion).

[10] The contention that sentencing within the Guidelines is necessary to avoid disparity is thus rejected by the statute itself, which identifies a form of disparity that can exist outside of and apart from those reconciled by a guidelines calculation.

Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994) (criminal statutes should not be construed so that an element is rendered superfluous). Thus, as Chief Judge Scirica wrote for the Third Circuit last week, "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." United States v. Cooper, 2006 WL 330324, *3 (3d Cir., filed Feb. 14, 2006).

To the limited extent that this Court has addressed the controversy about the weight to be given the guidelines after Booker, the approach advanced in this brief is consistent with those comments. Thus, Judge Howard has carefully noted that "the district court must consider the sentence guidelines -- but only on an advisory basis -- and also must consider the other statutory factors set forth in 18 U.S.C. § 3553(a) ...." United States v. Gorsuch, 404 F.3d 543, 545 (1st Cir. 2005) (on rehearing) (emphasis added). This acknowledges that consideration of the guidelines occurs, not apart from the "§ 3553(a) factors," but as part of that consideration, since the guidelines are listed in § 3553(a)(4) as one of the factors for "consider[ation]" under the law. Similarly, another panel, in an opinion by Judge Cyr, has pointed out that "the district court must still consult the guidelines as one among several factors in resentencing ...." United States v. Green, 426 F.3d 64, 65 (1st Cir. 2005).

There are two other reasons why the Court must not announce a presumption that the district court should impose sentence within the guideine range, both involving avoidance of constitutional problems. First, this Court has long held that when a statutory scheme requires the sentencing judge to exercise individualized discretion, the imposition of judgment under a "mechanistic" approach constitutes error requiring resentencing. United States v. Pasarell, 727 F.2d 13, 17 (1st Cir. 1984), citing United States v. Foss, 501 F.2d 522, 527 (1st Cir. 1974), and United States v. Wardlaw, 576 F.2d 932, 937-38 (1st Cir. 1978). Because adherence to the Guidelines when the statute calls for individualized discretion would appear to be just that, the Court should resolve any doubt against using the Guidelines as a presumptive starting point.

Second, even a mandatory rebuttable presumption that the Guidelines should be followed would be unconstitutional under the Due Process Clause. See Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidated rebuttable presumption of intent). As the first part of the Booker opinion recognizes, each guideline range functions as a statutory maximum until another fact is found to increase that range. See Blakely v. Washington, 542 U.S. 296 (2004), applying Apprendi v. New Jersey, 530 U.S. 466 (2000). The process of calculating a guideline range is therefore unconstitutional if use of the guidelines is mandatory, the Court held. The same is true when compliance is presumptive, under Sandstrom. It follows that only if the burden of proof at sentencing for facts which raise the top of a guideline range

were elevated to "beyond a reasonable doubt," and a jury trial were afforded, could a presumption for sentencing within the guideline range survive constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979).[11]

Because the district court failed to follow the statutory plan and instead treated the guideline range as presumptively establishing the correct sentence, this Court must remand for further setnencing proceedings. 18 U.S.C. § 3742(f)(1).

II. APPELLATE REVIEW FOR "REASONABLENESS" IS AVAILABLE WHETHER OR NOT THE SENTENCE FALLS WITHIN THE GUIDELINE RANGE, AND SHOULD FOCUS ON BOTH THE PROCEDURAL AND SUBSTANTIVE ASPECTS OF STATUTORY COMPLIANCE.

A. This Court Does Not Lack "Jurisdiction" to Review the Reasonableness of a Sentence Imposed Within the Guideline Range.

The United States argues that this Court lacks "jurisdiction" to consider the appellant's argument that his sentence is

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[11] Although not presented here, there is another constitutional issue which the Court may wish to note if it proposes to use this case as a vehicle for general guidance to district courts. While § 3553(a) does generally allow sentences outside the guideline range on a lower standard of justification than the former but now invalidated regime of departures, for offenses committed before January 12, 2005 (the date of decision in Booker) above-range sentences cannot be imposed on the new, more lenient standard. Otherwise, the court would be committing a Due Process violation by disregarding the Ex Post Facto principle. See Lindsey v. Washington, 301 U.S. 397 (1937) (changes in scope of sentencing discretion unfavorable to defendant violate Ex Post Facto); see generally Rogers v. Tennessee, 532 U.S. 451 (2001) (due process restricts unforeseeable retroactive judicial interpretations that would violate Ex Post Facto Clause if done by legislation); United States v. Martin, 363 F.3d 25, 45-46 (1st Cir. 2004); United States v. Thurston, 358 F.3d 51, 70-72 (1st Cir. 2004); compare United States v. Angiulo, 847 F.2d 966 (1st Cir. 1988) (change in interpretation of RICO law was foreseeable).

"unreasonable," on the basis that 18 U.S.C. § 3742(a) does not authorize such appeals when the sentence falls within the Guideline range. Every Circuit to have considered this argument has rejected it. See, most recently, United States v. Cooper, 2006 WL 330324, *2 (3d Cir., filed Feb. 14, 2006); see also United States v. Martinez, 2006 WL 39541 (11th Cir., Jan. 9, 2006); United States v. Mickelson, 2006 WL 27687 (8th Cir., Jan. 6, 2006). The government's contention cannot be reconciled with Justice Breyer's statement for a majority of the Supreme Court, that "the Act 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)." United States v. Booker, 543 U.S. 220, 125 S.Ct. at 765 (2005). It is contrary to 28 U.S.C. § 1291, which confers appellate jurisdiction over appeals from "final decisions" -- which includes all judgments of sentence in federal criminal cases.

What the government really means is that the reasonableness of the district court's decision is not cognizable within any language of 18 U.S.C. § 3742(a), when the sentence falls within the range. But that argument is based on the same fallacy as its position on the merits. It is not "reasonableness" that is being appealed. What the defendant appeals is the district court's compliance vel non with the mandates of the statute which governs the sentencing process. As Judge Becker elaborated soon after the Guidelines became effective, discussing the scope of jurisdiction under 18 U.S.C. § 3742(a)(1):

> Section 3553(a) *requires* -- as a matter of law -- that district courts impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2) -- retribution, deterrence, incapacitation, and rehabilitation. Imposition of a sentence greater than necessary to meet those purposes is therefore a violation section 3553(a) .... The question then becomes whether a sentence imposed pursuant to applicable guidelines could ever be greater than necessary to meet the four statutory purposes. I believe that it could.

United States v. Denardi, 892 F.2d 269, 276 (3d Cir. 1989) (Becker, J., concurring and dissenting) (emphasis original). Such appeals are squarely authorized by § 3742(a)(1). "Reasonableness," as discussed above, is merely this Court's standard of review for undertaking the decision of that appeal. The government's jurisdictional argument has no merit.

B. Appellate Review Should Focus on Whether the District Court Exercised Its Discretion in Keeping with the Governing Rules of Procedure and Substantive Statutory Mandates.

What this Court is to review for "reasonableness," as in any appeal, is the sentencing court's compliance with the law governing that court's actions. Thus, in sentencing appeals, the Court of Appeals must review the district judge's sentencing decision for compliance with the provisions of the Sentencing Reform Act which speak to that court, particularly section 3553(a) and 3553(c). It cannot be "reasonable" for a court to fail to follow a binding statute which the Supreme Court has recently held constitutional. The "reasonableness" of the sentence itself sensibly can only be reviewed in light of the § 3553(a) factors and the arguments and evidence presented at the time of sentencing.

The question before the Court of Appeals cannot be whether the sentence, as such, is reasonable in some abstract or subjective sense. There is no benchmark for such review. Rather, the Court must look at: (a) whether the district judge correctly understood and followed the required procedures and statutory standard, (b) whether the judge's balancing of the § 3553(a) factors, some of which are very general and potentially double-edged, was within the range of reasonable judgment, and (c) (on a defendant's appeal under 18 U.S.C. § 3742(a)) whether the ultimate judgment that the sentence was "not greater than necessary" itself falls within the range of reason. (On a government appeal under 18 U.S.C. § 3742(b), the issue would be whether the district court's assessment that the sentence was "sufficient" was a reasonable one.)

When the Supreme Court confirmed "reasonableness" as the standard of review for criminal sentences appealed after Booker, it was not assigning to this Court the task of reassessing all sentences according to its own subjective ideas of appropriate punishment. Like any other standard of appellate review, the "reasonableness" test must be applied with reference to the nature of the legal decision that was to be made by the court below. Where the discretion of the lower court, as here, is to be exercised according to some substantive criterion for judgment, then it is the reasonableness of the district judge's application of that rule of decision which this Court must assess. "In other words, the [pre-2003] text [of 18 U.S.C. § 3742(e)] told appellate courts to determine whether the

sentence 'is unreasonable' with regard to § 3553(a)." Booker, 125 S.Ct. at 765 (emphasis added). And that is the test which the Supreme Court then determined should be applied now, after holding § 3553(b) unconstitutional and excising it (along with § 3742(e), as amended in 2003) from the statute, for the review of all sentences appealed under § 3742(a) or § 3742(b). See Booker, 125 S.Ct. at 766.

In this appellate process the court of appeals must not apply any presumption that a sentence within the guideline range is "reasonable." To do so would be to say that the answer to all of those questions is presumed to be yes, which plainly it cannot be. After all, the Commission was directed by Congress in 28 U.S.C. § 991(b)(1)(A), § 994(g), and § 994(m) to attempt to integrate the § 3553(a)(2) considerations into the Guidelines, and by § 994(a)(2) to implement § 3553(a)(2) through "policy statements" as well. But nowhere in the Act is the Commmission tasked to deal with the additional factors which § 3553(a) of title 18 directs the district court to consider in each case, particularly those under subsections (a)(1) (individual offense and offender characteristics) and (a)(6) (avoidance of unwarranted disparity). The statutory language thus refutes the government's assertion that the guideline range itself "takes into account" the rest of the § 3553(a) factors. U.S. Br. 10-11. It was not intended to do so, it does not do so, and it cannot do so.

As already discussed under Point I, the presumption of reasonableness that some of the other circuits have adopted --

and which the government advocates -- has no basis in the statutory language and is contrary to the constitutional principle that underlies Booker. It raises a substantial constitutional question under Sandstrom v. Montana, 442 U.S. 510 (1979), and its progeny. For both reasons, it must be rejected.

Here, the rule governing the district judge's decision at the time of sentencing was the principle of parsimony, applied after consideration of a list of statutory factors, as stated in 18 U.S.C. § 3553(a). See United States v. Vázquez-Rivera, 407 F.3d 476, 490 (1st Cir. 2005). "The courts of appeals [are now to] review sentencing decisions for unreasonableness." Booker, 125 S.Ct. at 767.

The process of choosing a reasonable sentence will, as the statute suggests, must include identifying "the nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). Most of the matters which the district court here discounted fell within that rubric, or were part of the "history and characteristics of the defendant." Id. Similarly, the defense in the court below invoked 18 U.S.C. § 3553(a)(6) (unwarranted disparity in the disposition of those with "similar records" who were "convicted of similar conduct"). He asked that the court consider the availability of "fast track" programs for immigration offenses in other districts outside of Massachusetts. This was a proper consideration and should be addressed on remand.

The same questions arise when the significant factor of protection of the public is considered objectively, as the reasonableness standard requires. This factor has mostly to do

with commission of further crimes. Thus, in considering the statutory factor in § 3553(a)(2)(C), it is appropriate and illuminating to look at the defendant's inevitable deportation, even in an immigration case.

For these reasons as well, the judgment must be vacated and the case remanded for resentencing.

CONCLUSION

For the reasons set forth above, and in the briefs filed on behalf of the appellants, the National Association of Criminal Defense Lawyers and the CJA Board of the District of Massachusetts suggest that the judgment be reversed and the case remanded for further sentencing proceedings.

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Respectfully submitted,

s/Peter Goldberger

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (XyWrite vers. 4.07), that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), in that the brief is prepared in a 12-point, monospaced format (containing fewer than 10.5 characters per inch) and contains fewer than 7000 words, to wit, no more than 6603 words.

_s/Peter Goldberger_____

CERTIFICATE OF SERVICE

On February 24, 2006, I served two copies of the foregoing Brief on the attorneys for the parties, and one copy on the attorneys in the related case and for the other amicus, by electronic mail and by first class or priority mail, postage prepaid, addressed as follows:

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On February 24, 2006, I also filed the brief and appendix by causing to be delivered overnight, via FedEx, to the Clerk of this Court ten copies of this Brief (one on disk in RTF format).

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