Briefs and Other Related Documents

United States Court of Appeals,Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellant,
v.
Sabrina CAGE, Defendant-Appellee.
**No. 05-2079.**

June 8, 2006.

**Background:** United States appealed from an order of the United States District Court for the District of New Mexico, which sentenced defendant to six days in prison and three years of supervised release for the crimes of conspiracy to distribute 500 grams or more of a mixture and substance containing methamphetamine and using a telephone to facilitate a drug trafficking offense.

**Holdings:** The Court of Appeals, Circuit Judge, held that:

2(1) time for government's appeal from order imposing conditional alternative sentence did not begin to run until after the district court found that the condition precedent it imposed actually had occurred and ordered execution of the alternative sentence, and

6(2) sentence was unreasonable.

Reversed and remanded.

Tymkovich, Circuit Judge, filed concurring opinion.

West Headnotes

**[1] Criminal Law 110 1081(4.1)**

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1081 Notice of Appeal
110k1081(4) Time of Giving
110k1081(4.1) k. In General. Most Cited Cases
Filing of a timely notice of appeal is a prerequisite to appellate court's jurisdiction. F.R.A.P.Rule 4(b)(1)(B), 28 U.S.C.A.

**[2] Criminal Law 110 1069(5)**

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1069 Time of Taking Proceedings
110k1069(5) k. Commencement of Period of Limitations. Most Cited Cases
Time for government's appeal from order imposing conditional alternative sentence did not begin to run until after the district court

found that the condition precedent it imposed actually had occurred and ordered execution of the alternative sentence. 18 U.S.C.A. § 3742(b).

**[3] Sentencing and Punishment 350H 661**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk655 Constitutional, Statutory, and Regulatory Provisions
350Hk661 k. Construction. Most Cited Cases
District court had authority to order application of an alternative sentence reflecting the sentence it would impose in the exercise of its discretion, and which it intended to apply if the Supreme Court in *Booker* afforded district courts such discretion under Sentencing Guidelines.

**[4] Sentencing and Punishment 350H 40**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk40 k. In General. Most Cited Cases
To be reasonable, a sentence must be "reasoned," or calculated utilizing a legitimate method; however, even if a sentence is calculated properly and court clearly considered the statutory factors and explained its reasoning, a sentence can yet be unreasonable. 18 U.S.C.A. § 3553(a).

**[5] Jury 230 33(1.1)**

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.1) k. Representation of Community, in General. Most Cited Cases
Right to a jury trial is not only the right to have a set of fact-finders consider the individual factors at issue in one's case, but also the right to have a democratic cross-section of society sit in judgment. U.S.C.A. Const.Amend. 6.

**[6] Sentencing and Punishment 350H 645**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(D) Disposition
350Hk645 k. Total Sentence Deemed Not Excessive. Most Cited Cases

**Sentencing and Punishment 350H 856**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk853 Offense-Related Factors
350Hk856 k. Defendant's Role in Offense. Most Cited Cases

**Sentencing and Punishment 350H 866**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk866 k. Family, Community or Business Ties and Obligations.
Most Cited Cases
Sentence of six days imprisonment and three years of supervised release for the crimes of conspiracy to distribute 500 grams or more of a mixture and substance containing methamphetamine and using a telephone to facilitate a drug trafficking offense was unreasonable; fact that defendant's role in the criminal conspiracy was not central and her status as a single mother did not justify such an extraordinary departure from the advisory Guidelines. 18 U.S.C.A. § 3553(a).

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Robert J. Gorence, Robert J. Gorence & Associates, P.C., Albuquerque, NM, for the Defendant-Appellee.

Before LUCERO, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and TYMKOVICH, Circuit Judge.
LUCERO, Circuit Judge.
This case asks us to determine the limits of reasonableness in the context of sentencing decisions. The United States appeals a district court decision sentencing Sabrina Cage to six days in prison and ***587** three years of supervised release for the crimes of conspiracy to distribute 500 grams or more of a mixture and substance containing methamphetamine and using a telephone to facilitate a drug trafficking offense. Although the district court properly calculated the sentence range under the Federal Sentencing Guidelines at 46-57 months imprisonment, it used its discretion under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to conclude that six days' imprisonment was sufficient, but not greater than necessary to meet the considerations enumerated in 18 U.S.C. § 3553(a). Under *Booker*, we review district court sentencing decisions for reasonableness. Because the facts of this case are not so dramatic as to justify such an extreme divergence from the advisory guidelines range, the district court's sentencing decision was unreasonable. As such, we **REVERSE** and **REMAND** for resentencing.

**I**

Conducting operations out of both California and New Mexico, the Cuevas family orchestrated a major methamphetamine distribution ring: Nelida Cuevas, the family matriarch, was deeply involved in the family's drug distribution enterprise and her four sons, Arturo, Francisco, Ricardo, and Jorge Cuevas were the ring leaders of the operation in New

Mexico. Their sister Veronica Cuevas, Nelida Cuevas's youngest child and only daughter, was frequently dispatched to pick up large quantities of methamphetamine from an uncle in California to be sold in New Mexico. Once the methamphetamine was transported to San Juan County, the Cuevas family distributed it to users through a distribution chain including Cuevas family members and outsiders.

In the course of investigating the Cuevas family criminal enterprise, the federal government obtained authorization to tap a cell phone to which Ricardo Cuevas subscribed and that Ricardo's girlfriend, Sabrina Cage, frequently used. Cage lived in Ricardo's home and was not employed during the time that she lived with him. They had a son together, who was an infant at the time of the investigation. Although not central to the conspiracy, Cage did substantially and knowingly assist the enterprise. Evidence obtained from the wiretap shows that Cage took orders for drug sales and helped facilitate drug transactions. Cage also relayed messages between Ricardo and other members of the Cuevas family about drug deals, vouched for the reliability of members of the family as drug couriers, and, on one occasion, tried unsuccessfully to convince a friend to rent a car under a false name for Cuevas family use.

On April 23, 2003, Nelida and Veronica were at Ricardo's house. Ricardo called Cage and instructed her to give $1,000 in cash to Nelida and $200 to Veronica. After Nelida and Veronica drove away, agents stopped and arrested them, and found $17,000 in Veronica's luggage and $3,815 in Nelida's luggage. Within an hour, agents began executing search warrants in various locations controlled by the Cuevas family. At Ricardo and Cage's residence, agents found 945 net grams of methamphetamine, over $2,000 in cash, a loaded handgun, and two gram-capable scales. In total, the searches of all Cuevas family properties uncovered well over two kilograms of methamphetamine and several firearms.

Cage pled guilty to one count of conspiracy to distribute 500 grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (B)(1)(a) & 846, and one count of using a telephone to facilitate a drug trafficking offense, in violation of ***588**21 U.S.C. § 843(b). She agreed that 1.5 kilograms or more of actual methamphetamine is attributable to her, which, she acknowledged, would place her at a base offense level of 38. With the parties' agreement that Cage should receive an adjustment for her mitigating role in the offense, and with the government's concession that Cage was a minor participant in the criminal activity and that she met the requirements of the "safety valve" provision, [FN1] Cage faced a total offense level of 23. Given that her criminal history placed her conduct in sentencing category I, Cage was exposed to a guidelines range of 46 to 57 months.

> FN1. The sentencing provision of the drug statutes to which Cage pleaded guilty contains a safety valve that allows for the court to depart downward from the statutory minimum sentence. 18 U.S.C. § 3553(f). The safety valve applies if "(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence ... or possess a firearm or other dangerous weapon ... in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense ... and was not engaged in a continuing criminal enterprise ...; and (5) ... the defendant has truthfully provided to the Government." *Id.; see also United States v. Tolase-Cousins,* 440 F.3d 1237, 1244 (10th Cir.2006).

Although she declined to object to the guidelines calculations in the Pre-Sentence Report, Cage did move for a downward departure. She argued that her incarceration would leave her infant son in the care of her mother, who was already raising three children under the age of five, thereby justifying a departure under U.S.S.G. § 5H1.6. Upon finding that "this is not a situation where the family ties and responsibilities fall outside the heartland of cases," the court denied the motion for downward departure.

The court then sentenced Cage at the bottom of the guidelines range to 46 months' imprisonment. Aware of the Supreme Court's pending decision in *Booker,* 543 U.S. at 220, 125 S.Ct. 738, the district court fashioned an alternative sentence that it would apply if the Sentencing Guidelines were found unconstitutional. The alternative sentence imposed by the district court was six days' imprisonment.

Cage began serving a 46 month term of imprisonment, but, on the day that *Booker* was decided, she filed a motion to apply the alternative sentence. In opposing the motion, the government argued that the court lacked jurisdiction to impose the alternative sentence, that the *Booker* decision did not meet the condition precedent to the alternative sentence because it did not hold that the Guidelines were unconstitutional in their entirety, and that the sentence of six days' imprisonment was unreasonable. After overruling the government's objections, the court issued an "Order Directing Bureau of Prisons to Apply Alternative Sentence and to Immediately Release Defendant Sabrina Cage from Custody," with which the Bureau of Prisons complied. The order explained that the district court had examined the evidence and calculated the proper sentencing range under the Guidelines and that the alternate sentence of six days' imprisonment was sufficient, but not greater than necessary, to meet the considerations enumerated in 18 U.S.C. § 3553(a). The government appeals and seeks reversal of this order.

**II**

Before determining the reasonableness of the alternative sentence, we must assure ourselves that we have jurisdiction to hear this appeal. Cage moves to dismiss the appeal, arguing that the government filed ***589** its notice of appeal late and that we thus lack jurisdiction. Under the unique circumstances of this case, we think that the government filed its appeal within the specified time limit. Cage's motion to dismiss, therefore, is denied.

[1][2] "The filing of a timely notice of appeal is an absolute prerequisite to our jurisdiction." *Parker v. Bd. of Pub. Utils.*, 77 F.3d 1289, 1290 (10th Cir.1996). The government must file its appeal within thirty days of the entry of the order being appealed. Fed. R.App. P. 4(b)(1)(B). Cage asserts that the government is appealing the initial judgment, which imposed a sentence of 46 months' imprisonment with an alternative sentence if the Sentencing Guidelines were found unconstitutional. Because this judgment was entered on September 2, 2004, and the government filed its appeal on March 23, 2005, Cage argues that the government filed its notice of appeal late. We disagree. What the government is appealing, instead, is the "Order Directing Bureau of Prisons to Apply Alternative Sentence and to Immediately Release Defendant Sabrina Cage from Custody," entered on February 24, 2005.

Pursuant to 18 U.S.C. § 3742(b), the government may appeal sentences: (1) imposed in violation of the law; (2) imposed as a result of an incorrect application of the Guidelines; (3) that are less than the minimum guidelines sentence; or (4) imposed for an offense for which there is no Guideline.

No statutory justification existed for appealing the 46 month sentence imposed on September 2, 2004.

Because of finality requirements, the government did not have statutory authority to appeal the six day sentence prior to February 24, 2005. The pertinent statute authorizes the government to "file a notice of appeal in the district court for review of an otherwise final sentence," 18 U.S.C. § 3742(b), and we conclude that the sentence of six days' imprisonment was not a "final sentence" within the meaning of the statute until the court entered the February 24th order that made the six day sentence enforceable. Until that date, Cage was serving a 46 month sentence, not a six day sentence, and accordingly the latter sentence was not final. *See, e.g.*, *United States v. Jackson*, 903 F.2d 1313, 1316 (10th Cir.1990) (discussing the "finality" of a sentence, where the district court attempted to anticipate the Supreme Court's decision in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)).

Moreover, the alternative sentence relied upon a condition precedent, which did not occur until well after the time lapsed for appealing the September 2nd order. Further, it was unclear to the parties whether the condition precedent ever occurred-they disputed whether the *Booker* decision met the condition listed in

the alternative sentence. Given this uncertainty, the government could not have appealed the conditional alternative sentence until after the district court found that the condition precedent it imposed actually had occurred and ordered execution of the alternative sentence. A ruling to the contrary would leave this court in the unacceptable position of either ruling on the legality of a sentence that a defendant may never suffer or withholding decision until an uncertain future date and then deciding for the district court whether conditions it imposed had or had not been met. Because the government appealed the district court's February 24th order within the statutory time period, we have jurisdiction to consider the government's challenge.

Further, we reject the government's position that the district court lacked jurisdiction to impose the alternative sentence in this case. The government readily concedes***590** that district courts have authority to impose alternative sentences. Although we generally disapprove of alternative sentences, and under certain circumstances-unlike like those present in this case-will find them procedurally unreasonable under *Booker,* we have affirmed alternative sentences in the past. *See United States v. Garcia,* 893 F.2d 250, 251, 256 (10th Cir.1989).

[3] Rather than quarrel with the district court's authority to impose alternative sentences in general, the government maintains that the court below conditioned application of the six day alternative sentence on circumstances that did not occur. The district court stated that the alternative sentence would apply "only in the event the United States Sentencing Guidelines and the Sentencing Reform Act of 1984 are determined to be unconstitutional." Because the Supreme Court in *Booker* did not hold that the Sentencing Guidelines were unconstitutional in their entirety, but rather held "that mandatory application of the Guidelines violates the Sixth Amendment when judge-found facts, other than those of prior convictions, are employed to enhance a sentence," *United States v. Gonzalez-Huerta,* 403 F.3d 727, 731 (10th Cir.2005), the government argues that the district court lacked authority to order application of the alternative sentence. The district court addressed this argument, stating: "The intent, when I said that the alternative sentence would apply in the event the guidelines sentence were determined to be unconstitutional, was that if the Court were to rule that the guideline sentence was not a mandatory sentence, but that a district judge would have discretion to apply, then the alternative sentence was the proper sentence." Upon review of the record, it appears plain that the district court fashioned an alternative sentence reflecting the sentence it would impose in the exercise of its discretion, and which it intended to apply if the Court in *Booker* afforded district courts such discretion. Because *Booker* held that a district court commits error "by applying the Guidelines in a mandatory fashion, as opposed to a discretionary fashion, even though the resulting sentence was calculated solely upon facts that were admitted by the defendant, found by the jury, or based upon the fact of a prior conviction," *Gonzalez-Huerta,* 403 F.3d

at 731-32, we conclude that the district court had jurisdiction to order application of the alternative sentence under the specific facts of this case. *See, e.g., United States v. Simpson*, 430 F.3d 1177, 1181 (D.C.Cir.2005) (approving alternative sentence that would apply "if the Guidelines were 'not controlling' but could be looked to 'for whatever assistance ... [the court] might be able to get from them' "). The February 24th order was not a new sentence, but rather a clarification of the original sentence that made the six day sentence enforceable, and hence appealable, under § 3742(b).

**III**

As noted, Cage pled guilty to one count of conspiracy to distribute 500 grams or more of a mixture and substance containing methamphetamine and one count of using a telephone to facilitate a drug trafficking offense. Under her plea agreement, the government agreed that Cage was a minor participant in the criminal activity, that she met the requirements of the safety valve provision, that she did not possess a firearm or other dangerous weapon, and that she accepted responsibility for her criminal conduct. Based on these stipulations, Cage's total offense level was 23. At criminal history category I, this corresponds to a guidelines range of 46 to 57 months and the district court sentenced her at the bottom of that range. ***591** It also imposed an alternative sentence, calculated without reference to the Guidelines, of six days' imprisonment.

After *Booker* was decided, the district court again considered the proper sentence for Cage. It evaluated the proper range under the Guidelines and the factors listed in 18 U.S.C. § 3553(a), and decided to impose the alternative sentence of six days' imprisonment and three years of supervised release. [FN2] The government appeals this sentencing decision on the grounds that such a short sentence is unreasonable given the gravity of the crimes committed.

FN2. Although the Sentencing Guidelines are now advisory following *Booker*, it has remained common among courts around the country to refer to sentencing decisions that enhance the recommended guideline range under Chapter 5 as "departures."

Courts now frequently refer to sentencing decisions that are outside the Guideline ranges under the district court's discretion in applying the § 3553(a) factors as "variances." *See, e.g., United States v. Hampton*, 441 F.3d 284, 287 (4th Cir.2006); *United States v. Gatewood*, 438 F.3d 894, 896-97 (8th Cir.2006). While recognizing the advisory nature of the Guidelines, this opinion uses this terminology.

**A**

Under *Booker*, we are required to review

district court sentencing decisions for "reasonableness." 543 U.S. at 261, 125 S.Ct. 738. Sentencing decisions must be reversed when a sentence is unreasonable considering the factors enumerated in 18 U.S.C. § 3553(a). *Id.*

[4] Reasonableness has both procedural and substantive components. *See United States v. Kristl,* 437 F.3d 1050, 1054-55 (10th Cir.2006). To be reasonable, a sentence must be "reasoned," or calculated utilizing a legitimate method. *Id.* As such, sentences based on miscalculations of the Guidelines are considered unreasonable because "the manner in which [they were] determined was unreasonable." *Id.* Even if a sentence is calculated properly, i.e. the Guidelines were properly applied and the district court clearly considered the § 3553(a) factors and explained its reasoning, a sentence can yet be unreasonable. *Id.* In this case, there is no allegation that the method by which the sentence was arrived at was improper. Rather, the government simply argues that a sentence of six days' imprisonment was unreasonably short given the gravity of the crimes and the proper understanding of the application of the § 3553(a) factors in this case.

In *Kristl,* we held that a sentence within the advisory guidelines range is presumptively reasonable. *Id.* In this case, we must address whether a sentence that is extremely light when compared to the applicable advisory guidelines range was reasonable. This is an issue of first impression for this court; we have neither explained what causes a sentence below the recommended guidelines range sentence to be unreasonable, nor how such decisions are treated on appeal.[FN3]

FN3. We have twice considered whether a below guideline range sentence is unreasonably high. *See United States v. Chavez-Diaz,* 444 F.3d 1223 (10th Cir.2006) (31 month sentence reasonable when the guideline range was 41 to 51 months); *United States v. Terrell,* 445 F.3d 1261, 1265 (10th Cir.2006) (63 month sentence not unreasonably high when the guidelines range was 92-115 months).

**B**

[5] Given *Booker's* confusing nature and seemingly internally inconsistent holdings, as well as the voluminous amount of case law it has created, it is easy to lose sight of the source of the Supreme Court's decision: The right to a jury trial enshrined in the Sixth Amendment. The right to a jury trial is not only the right to ***592** have a set of fact-finders consider the individual factors at issue in one's case, but also the right to have a democratic cross-section of society sit in judgment. *Compare Booker,* 543 U.S. at 244, 125 S.Ct. 738 ("[T]he interest in fairness and reliability protected by the right to a jury trial [is] a common-law right that defendants enjoyed for centuries and ... is now enshrined in the Sixth Amendment."); *with Blakely v.*

*Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("Our commitment [is] to ... the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); *see also* William Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L.Rev. 780, 820 (2006) ("Of course, the Sixth Amendment right to a jury trial embodies majoritarianism, by (apparently) guaranteeing local democratic control over the allocation of criminal punishment.").

Many commentators have noted a strong internal contradiction in the *Booker* decision. *See, e.g.,* M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L.Rev. 533, 564 (2006) ("While *Booker* A was a natural outgrowth of the Court's recent jurisprudence, *Booker* B produced a jarring result in attempting to salvage as many current features of the Guidelines as possible while effecting an end-run around the Sixth Amendment requirements *Booker* A recognized."); Frank O. Bowman III, *Punishment and Crime: Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 182 (The "mystery about the *Booker* remedial opinion is how it can possibly be squared with either the announced black-letter rule or the underlying theory of the *Blakely* opinion it purports to apply."); Douglas Bloom, *United States v. Booker and United States v. Fanfan: The Tireless March of Apprendi and the Intracourt Battle To Save Sentencing Reform*, 40 Harv. C.R.-C.L. L.Rev. 539, 556 (2005) (*Booker's* "split majority finds itself caught in the paradox it brought upon itself").

Part I of *Booker*, written by Justice Stevens on behalf of five justices, invalidated the judicial fact-finding that underpinned the Sentencing Guidelines because the Sixth Amendment requires facts to be proven beyond a reasonable doubt to a jury. 543 U.S. at 226, 125 S.Ct. 738. Part II, written by Justice Breyer on behalf of five justices-although only one who was in the majority for Part I-held that the Sentencing Guidelines maintained authority as an advisory source for sentencing decisions. *Id.* at 244, 125 S.Ct. 738 ("So modified, the Federal Sentencing Act ... makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges ... but it permits the court to tailor the sentence in light of other statutory concerns as well.") (citations omitted). Thus, a decision that struck down judicial fact-finding resulted in a system where judges had more rather than less discretion. "The most striking feature of the *Booker* decision is that the remedy bears no logical relation to the constitutional violation.... Trial by jury has no greater role in sentencing than it did before *Booker*." Michael McConnell, *The Booker Mess*, 83 Den. U.L.Rev. 665, 677 (2006).

Viewing the *Booker* decisions through the lens of the competing values underlying the Sixth Amendment provides a searching explanation for this seeming conflict. Part I requires individualized ***593** judgment: Sentencing must be done by either by a judge in the exercise of her discretion or by a jury that finds facts to enhance a sentence. *Booker*, 543 U.S. at 232-33, 125 S.Ct. 738. That is, without the individual attention of a jury to find facts, a defendant cannot constitutionally be sentenced by a judge without discretion to consider all relevant factors under the sentencing statutes. Part II honors the democratic spirit of the amendment by refusing to use the Sixth Amendment to nullify the entirety of Congress's purpose in passing the 1984 Sentencing Act that judicial discretion on sentencing should be limited by the decisions of a publicly accountable body, the Sentencing Commission. *See id.* at 246, 125 S.Ct. 738 ("The other approach, which we now adopt, would ... make the guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct-a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.").

When a district court makes a sentencing decision, it must interpret Congress's intentions in passing sentencing laws. The Sentencing Guidelines are an expression of that intent, albeit now in an advisory manner: It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the underlying congressional purposes [behind sentencing].

*United States v. Wilson*, 350 F.Supp.2d 910, 915 (D.Utah 2005). *Booker* II holds that the Sixth Amendment does not require invalidating the entirety of Congress's intent to use an insulated but ultimately politically responsive group to check judicial discretion. Further, it clearly provides that, although the Guidelines are listed as only one of the § 3553(a) factors, they are not just one factor among many. Instead, the Guidelines are an expression of popular political will about sentencing that is entitled to due consideration when we determine reasonableness. "[T]he Guidelines 'represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses.' " *Terrell*, 445 F.3d at 1265 (quoting *United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir.2005)). Because *Booker* represents a balance between the competing values of the Sixth Amendment, an appellate court reviewing a sentencing decision must take into account not only the individual factors that determine reasonableness listed in § 3553(a), but also should give particular advisory weight to the judgments made by the political process represented in the Guidelines.

This is why, in *United States v. Kristl*, 437 F.3d at 1054, we held that sentences within the guidelines range are presumptively

reasonable. This rule has been adopted by the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits; it is rejected by the First, Second, Third, and Ninth Circuits. *See United States v. Green*, 436 F.3d 449, 457 (4th Cir.2006); *United States v. Alonzo*, 435 F.3d 551, 555 (5th Cir.2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir.2006); *Mykytiuk*, 415 F.3d at 606 (adopting presumption in Seventh Circuit); *United States v. Lincoln*, 413 F.3d 716 (8th Cir.2005); *but see United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir.2006) (en banc); *United States v. Crosby*, 397 F.3d 103 (2d Cir.2005); *United States v. Cooper*, 437 F.3d 324 (3d Cir.2006); ***594***United States v. Cantrell*, 433 F.3d 1269 (9th Cir.2006).[FN4]

> FN4. The Eleventh Circuit's jurisprudence on whether sentences inside the applicable guidelines range are presumptively reasonable is less than clear. Its only published opinion on the matter, *United States v. Talley*, 431 F.3d 784 (11th Cir.2005), stated: "Although either a defendant or the government can appeal a sentence within the Guidelines range and argue that it is unreasonable, ordinarily we would expect a sentence within the Guidelines range to be reasonable." *Id.* at 787.

Our holding in *Kristl*, that within-the-guidelines sentences are entitled to a presumption of reasonableness, speaks to how we should consider sentences outside the guidelines range. We reject the concept that we, as judges, should determine "reasonableness" under § 3553(a) without reference to the fact that the Guidelines represent a critical advisory aspect of the § 3553(a) factors. "The continuing importance of the Guidelines in fashioning reasonable sentences ... simply reflect that the Guidelines are generally an accurate application of the factors listed in § 3553(a)." *Terrell*, 445 F.3d at 1265. *Booker* does not place original sentencing decisions entirely in the discretion of trial judges; the Guidelines-as an expression of the political will of Congress-continue to assert advisory influence on those decisions. Similarly, *Booker* should not be interpreted to exempt appellate courts from the influence of Congress's sentiments about reasonableness in sentencing.

**C**

[6] Cage received a sentence of six days' imprisonment. Under the Guidelines, the bottom of the applicable sentencing range would have been 46 months. This discrepancy between the advisory guidelines range and the actual sentence is both extraordinary and unreasonable for crimes of this level.

Several of our sister circuits have held that "[a]n extraordinary departure 'must be supported by extraordinary circumstances.' " *United States v. Kendall*, 446 F.3d 782, 784 (8th Cir.2006) (quoting *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005));

*see also* *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir.2006) ("However, when the variance is a substantial one, ... we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be."); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir.2005) ("However, the farther the judge's sentence departs from the guidelines sentence (in either direction-that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.").

Because this case presents such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines, it should be considered reasonable only under dramatic facts. Had the comparative difference been smaller but still outside the guidelines range, the district court's decision would not have been presumptively reasonable but an appropriate justification would suffice for this court to determine that it is reasonable. However, where as here, a district court effectively ignores the advice of the Guidelines that the crimes of conspiracy to distribute methamphetamine and using a telephone to facilitate drug trafficking merit a substantial term in prison, we should only treat the actual sentence as being a reasonable application of § 3553(a) factors if the facts of the case are dramatic enough to justify ***595** such a divergence from the politically-derived guideline range.[FN5]

FN5. The same rules of appellate review must apply to district court sentencing decisions that are above an advisory guidelines range as to those below an advisory guidelines range. *See Dean*, 414 F.3d at 729. Early evidence about appellate review of sentencing decisions for reasonableness creates concerns that below guidelines-range sentences are treated less deferentially by appellate courts than above guidelines-range sentences. According to the United States Sentencing Commission, nearly three times as many below guidelines-range sentences have been reversed for unreasonableness as have been affirmed as reasonable. *See Final Report on the Impact of United States v. Booker On Federal Sentencing,* United States Sentencing Commission (March 2006) at 30. In contrast, the same report states that close to seven times as many above guidelines-range sentences have been found reasonable than have been found unreasonable. *Id.* According to a leading academic chronicler of sentencing decisions, "it seems all post-*Booker* within-guideline sentences and nearly all above-guidelines sentences are being found reasonable, whereas many below-guideline sentences are being

> reversed as unreasonable." Professor Douglas A. Berman, *Sorting Through the Circuit Circus,* Sentencing Law and Policy, at http://sentencing.typepad.com/sentencing-law-and-policy/2006/04/tracking-reason.html (April 28, 2006).
>
> There have been more downward than upward variances since *Booker, see* McConnell, *The Booker Mess,* 83 Den. U.L.Rev. at 675. Even so, it is difficult to explain the magnitude of the differences in the rates of reversal. Although this case reverses a below guidelines-range sentence as unreasonable, nothing in it should be read as applying a higher standard to below guidelines-range sentences.

When the district court issued its order enforcing the application of the alternative sentence, it clarified its reasons for imposing a six day sentence under *Booker.* The reasons given were: (1) Cage has a son with medical problems, the son's father was jailed following his participation in the criminal conspiracy of which she was a part, and no one else could take care of the child; (2) Cage did not play a major role in the conspiracy and her background, education, work history, family responsibilities, and post-conviction behavior indicated that she was unlikely to commit further crimes; (3) Cage does not have a continuing drug problem and had no previous criminal history; and (4) the time spent in jail was sufficient to impress upon her the wrongfulness of her action.[FN6]

> FN6. The district court also said that it was "influenced" by some completely irrelevant commentary from an Assistant United States Attorney. During the original sentencing hearing, which took place before *Booker,* the AUSA was asked whether an alternative sentence proposed by the court was legal. In response, the AUSA stated, "Since Ms. Cage did serve some time in jail after her arrest, the Court [c]ould also sentence her to time served, plus five years supervised release, or however much supervised release was appropriate." This testimony only spoke to what was required and possible under the sentencing statute; the court and the AUSA were discussing what types of alternative sentences could apply if the Sentencing Guidelines were struck down. The statement has absolutely nothing to do with what the government thought was proper under § 3553(a). Any judicial reliance on this statement in determining a sentence under § 3553(a) is unreasonable.

It is beyond doubt that these factors are all properly considered under § 3553(a). *See* 18 U.S.C. § 3553(a)(1), (2)(A), (2)(C). The problem with the sentencing decision, however, is not in the consideration of these factors; it is in the weight the district court placed on them. Cage's role in the criminal conspiracy was not central, but neither was it

negligible. She repeatedly and knowingly aided in its operations, took orders and arranged for the delivery of methamphetamine, transmitted messages among members of the conspiracy, attempted to arrange for the false registration of vehicles for a drug courier and transferred cash among members of the ***596** conspiracy to aid its objectives. Although Cage has managed to avoid continuing drug use and did not have a criminal history, neither of these factors are particularly out of the ordinary.

Nor does her status as a single mother, because the father of her child is in jail, justify such an extreme variance. We are not insensitive to the problems of incarcerating a single mother; doing so creates enormous costs for an innocent child and for society at large. However, we cannot find reasonable a sentencing decision that would effectively immunize single mothers from criminal sanction aside from supervised release. Her situation is, unfortunately, not very uncommon. The district court noted this itself when it denied a downward departure on the basis of her family ties and responsibilities because it did not fall outside the heartland of cases. Although these facts may justify some discrepancy from the advisory guidelines range, they simply are not dramatic enough to warrant such an extreme downward variance. As such, the district court's sentencing decision was unreasonable.

**IV**

The district court had jurisdiction to impose its alternative sentence of six days' imprisonment on Sabrina Cage and the United States filed a timely appeal of this sentencing decision. That decision, however, was unreasonable. We **REVERSE** the district court's sentencing decision and **REMAND** for resentencing.

TYMKOVICH, J., concurring.

I concur in the opinion, but write separately to express my views about the district court's jurisdiction to enforce an alternative sentence.

This is an odd case. The district court imposed two sentences: a guidelines sentence of 46 months, and an alternative sentence of six days to be applied only if the Supreme Court found the Sentencing Guidelines unconstitutional in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which was pending at the time of sentencing. The Supreme Court did so, in part, ruling that the mandatory application of the guidelines violated the Sixth Amendment. Although Cage had begun to serve her 46-month sentence, since it violated *Booker*, the district court vacated the sentence and ordered enforcement of the six-day alternative sentence. Unfortunately, the alternative sentence, like the original sentence, was also unlawful: it failed to account for the reasonableness factors set forth in 18 U.S.C. § 3553(a).

The rub here is that Cage waived her right to appeal her sentence pursuant to a plea bargain. And the government had nothing to appeal either. The original sentence was within the

then-applicable mandatory sentencing guidelines range, and the alternative sentence was wholly speculative at the time it was pronounced. Ordinarily, either the government or Cage should have appealed her sentence within thirty days of the court's sentencing in September 2004. Neither did.

Now we are faced with a jurisdictional muddle: both the original and the alternative sentence are unlawful under *Booker*. That leaves us with the questions, when were the sentences final and when could they be appealed?

This conundrum arises from the use of alternative sentences. We first sanctioned them in the era surrounding *Mistretta* when the constitutionality of the sentencing guidelines were in doubt. Courts would announce two sentences, the alternative to be enforced if the sentencing guidelines were determined to be constitutional.***597** *See United States v. Smith*, 888 F.2d 720, 722 n. 2 (10th Cir.1989); *United States v. Garcia*, 893 F.2d 250, 252 n. 4 (10th Cir.1989); *United States v. Stokes*, 986 F.2d 1431 1431, 1993 WL 53093 at *4 (10th Cir. Feb.23, 1993) (unpublished); *United States v. Scott*, 16 F.3d 418, 1994 WL 35027 at *2 (10th Cir.Feb.7, 1994) (unpublished).

After a period of stability since *Mistretta*, recent years have taught us that uncertainty may instead be the new norm in federal sentencing law. Thus, prior to the Supreme Court's decision in *Booker*, many sentencing courts again announced alternative sentences. On appeal we relied on the alternative sentences in our plain or harmless error analysis. *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir.2005) (en banc).

In times of uncertainty, alternative sentencing appears tempting: if district courts are able to predict future legal developments, the interests of judicial efficiency are arguably served by announcing alternative sentences and avoiding the burdens of resentencing. Yet, we should not encourage alternative sentencing for a variety of reasons. First, the practice fundamentally conflicts with the rule that a court may enter only one final judgment. Second, alternative sentences undermine finality, by allowing the sentencing court to peer into the future and retain power over a defendant's fate based on developments at the Supreme Court, the sentencing commission, or perhaps even the Congress. Third, given the unsettled nature of sentencing law in our era, alternative sentences frustrate certainty for both the government and the defendant: who is to appeal what, and when are they to appeal it? Finally, alternative sentences can create jurisdictional difficulties, as in this case, because of the necessary legal fiction that they are "imposed" at the time of judgment even though they may never take effect unless the condition precedent is triggered.

Other courts have recognized these problems and concluded that alternative sentences are not worth the trouble, and are generally unenforceable. For example, in a recent case, *United States v. Booker*, 436 F.3d 238 (D.C.Cir.2006), the D.C. Circuit rightly held

that "an 'alternative sentence' is not really a 'sentence'.... Once the court pronounces a criminal sentence-which constitutes a 'judgment'-the court has no lawful authority to supplement that sentence with a second one." *Id.* at 245. The court went on to hold that a sentencing court, after a sentence has been announced, has no authority to pronounce a different alternative sentence. I think this reasoning is correct.

Our precedents, however, sanction the use of alternative sentences. We have used alternative sentences to guide the analysis in plain or harmless error as an indication of whether the court might impose a different sentence on remand. While these cases are not directly on point, our *Mistretta* era cases allowed district courts to enforce alternative sentence long after the time to appeal had run. *See United States v. Scott,* 16 F.3d 418 1994 WL 35027at *2 (10th Cir. Feb.7, 1994) (unpublished). Accordingly, our cases seem to allow district courts to enforce alternative sentences, and the government has not argued that courts lack the authority to do so. Given the Supreme Court's holding in *Booker,* however, Cage's sentence here has not been subject to the proper application of the § 3553 factors. Remand is thus the correct result. Nevertheless, the circumstances of this case well illustrate why alternative sentences should be eliminated.

C.A.10 (N.M.),2006.
U.S. v. Cage
451 F.3d 585

Briefs and Other Related Documents (Back to top)

- 2005 WL 3077307 (Appellate Brief) Appellant's Reply Brief -- Attachment in Digital form (Aug. 17, 2005) Original Image of this Document with Appendix (PDF)
- 2005 WL 2367668 (Appellate Brief) Appellant's Opening Brief -- Attachments in Digital form (Jun. 27, 2005) Original Image of this Document with Appendix (PDF)
- 05-2079 (Docket) (Mar. 29, 2005)

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Briefs and Other Related Documents

United States Court of Appeals,Fifth Circuit.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Delio Jesus CANDIA, also known as Big Mike, Defendant-Appellant.
**No. 05-30213.**

June 27, 2006.

**Background:** Defendant was convicted in the United States District Court for the Western District of Louisiana, Richard T. Haik, Sr., J., of conspiracy to distribute cocaine and cocaine base, and he appealed, challenging his sentence.

**Holdings:** The Court of Appeals, Carl E. Stewart, Circuit Judge, held that:

1(1) addressing an issue of first impression, consecutive nature of a properly calculated guidelines sentence is reviewed for unreasonableness;

11(2) District Court had authority to order defendant's sentence for conspiracy to distribute cocaine and cocaine base to run consecutively to his undischarged state sentence for cocaine possession; and

13(3) ordering that defendant's 280 month federal sentence run consecutively to his undischarged state sentence for cocaine possession was not unreasonable.

Affirmed.

West Headnotes

**[1] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
Under *Booker*, requiring sentence to be reviewed for reasonableness, the consecutive nature of a properly calculated guidelines sentence is reviewed for unreasonableness. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
When a district court imposes a sentence according to the applicable advisory guidelines for imposition of a consecutive sentence, and also imposes that sentence

within a properly calculated sentencing range, the sentence's consecutiveness enjoys a rebuttable presumption of reasonableness. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[3] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Court of Appeals reviews a district court's interpretation of the Sentencing Guidelines de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Criminal Law 110 1158(1)**

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(1) k. In General. Most Cited Cases
Court of Appeals accepts the district court's findings of fact at sentencing unless they are clearly erroneous.

**[5] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
A sentence is ultimately reviewed for unreasonableness.

**[6] Criminal Law 110 1144.17**

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.17 k. Judgment, Sentence, and Punishment. Most Cited Cases

**Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
A sentence imposed within a properly calculated guidelines range is presumptively reasonable and is accorded great deference on review. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[7] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
Although presumptively reasonable, sentence imposed within a properly calculated guidelines range is not reasonable per se; the presumption can be rebutted. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[8] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
For a sentence imposed within a properly calculated guidelines range, Court of Appeals' unreasonableness review under *Booker* infers that the district court has considered all the factors for a fair sentence set forth in the Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[9] Sentencing and Punishment 350H 547**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(B) Consecutive or Cumulative Sentences
350HIII(B)1 In General
350Hk547 k. Right to Have Sentences Run Concurrently. Most Cited Cases
The Constitution does not afford a defendant the right to have his state and federal sentences run concurrently.

**[10] Sentencing and Punishment 350H 545**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(B) Consecutive or Cumulative Sentences
350HIII(B)1 In General
350Hk545 k. In General. Most Cited Cases
Sentences for different offenses can be ordered to run consecutively, even if they are imposed upon a single trial.

**[11] Sentencing and Punishment 350H 635**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(C) Accommodation to Prior or Subsequent Sentence
350Hk632 Sentence in Other Jurisdiction
350Hk635 k. State and Federal Sentences. Most Cited Cases
District court had authority to order defendant's sentence for conspiracy to distribute cocaine and cocaine base to run consecutively to his undischarged state sentence for cocaine possession; advisory guideline applicable to the offense permitted consecutive sentences, as did the federal statute governing imposition of concurrent or consecutive sentences. 18 U.S.C.A. § 3584(a); U.S.S.G. § 5G1.3(c), 18 U.S.C.A.

**[12] Sentencing and Punishment 350H 56**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General

350Hk56 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
Defendant's 280 month sentence for conspiracy to distribute cocaine and cocaine base, was not unreasonable, as contrary to the district court's stated intent to sentence defendant within same range of imprisonment as codefendants; although sentences of two codefendants of 293 and 324 months imprisonment were later reduced to 160 months because of their substantial assistance, court's statement only indicated that it found codefendants' original sentences reasonable and that it wanted to impose a sentence in general range of their original sentences. 18 U.S.C.A. § 3553(a).

**[13] Sentencing and Punishment 350H 635**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(C) Accommodation to Prior or Subsequent Sentence
350Hk632 Sentence in Other Jurisdiction
350Hk635 k. State and Federal Sentences. Most Cited Cases
Ordering that defendant's 280 month federal sentence for conspiracy to distribute cocaine and cocaine base run consecutively to his undischarged state sentence for cocaine possession was not unreasonable; although defendant claimed that the state offense conduct was a minor, uncharged part of the charged conspiracy, the conspiracy occurred a year and a half before the conduct underlying the state conviction. 18 U.S.C.A. § 3584(a); U.S.S.G. § 5G1.3, 18 U.S.C.A.

**[14] Sentencing and Punishment 350H 635**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(C) Accommodation to Prior or Subsequent Sentence
350Hk632 Sentence in Other Jurisdiction
350Hk635 k. State and Federal Sentences. Most Cited Cases
Defendant sentenced for conspiracy to distribute cocaine under advisory guidelines had no right to have his sentence run currently to his undischarged state sentence for cocaine possession, even if the applicable guidelines provision required the sentence to run concurrently. U.S.S.G. § 5G1.3, 18 U.S.C.A.

**[15] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
*Booker*'s reasonableness inquiry for reviewing a guidelines sentence complements, but does not abrogate, the Court of Appeals' pre-*Booker* use of the abuse of discretion standard for reviewing imposition of a consecutive sentence under the guideline governing consecutive sentencing. U.S.S.G. § 5G1.3(c),

18 U.S.C.A.

**[16] Sentencing and Punishment 350H ⚿635**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(C) Accommodation to Prior or Subsequent Sentence
350Hk632 Sentence in Other Jurisdiction
350Hk635 k. State and Federal Sentences. Most Cited Cases
Ordering defendant's federal sentence for conspiracy to distribute cocaine and cocaine base to run consecutively to his undischarged state sentence for cocaine possession was not abuse of discretion under Sentencing Guideline governing consecutive; district court considered statutory sentencing factors, properly interpreted and applied the guidelines, and exercised its discretion to sentence defendant within the applicable guidelines range and according to the guidelines provisions for consecutive sentencing. 18 U.S.C.A. § 3553; U.S.S.G. § 5G1.3(c), 18 U.S.C.A.

***470** Camille Ann Domingue, Asst. U.S. Atty., Lafayette, LA, for U.S.
Christopher Albert Aberle, Mandeville, LA, for Candia.

Appeal from the United States District Court for the Western District of Louisiana.

Before HIGGINBOTHAM, DAVIS and STEWART, Circuit Judges.
CARL E. STEWART, Circuit Judge:
Delio Jesus Candia pled guilty to conspiracy to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846, and was sentenced within an applicable sentencing range properly calculated under the advisory U.S. Sentencing Guidelines ***471** Manual ("U.S.S.G.," "federal guidelines," or "guidelines") (2006). Candia appeals this post-*Booker*[FN1] advisory guidelines sentence as unreasonable and as an abuse of discretion because it was imposed consecutively to an undischarged state sentence.

FN1. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

[1][2] This appeal presents a question of first impression: When the district court imposes a sentence within a properly calculated advisory guidelines range, what is the standard applied to review its order that the sentence run consecutively to an undischarged state sentence? We hold that, under *Booker*, the consecutive nature of a properly calculated guidelines sentence is reviewed for unreasonableness. We further hold that when a district court imposes a sentence according to the applicable advisory guidelines for imposition of a consecutive sentence, and also imposes that sentence within a properly calculated sentencing range, the sentence's consecutiveness enjoys a rebuttable presumption of reasonableness.

The record reveals that the district court properly interpreted and applied advisory federal sentencing guidelines in its determination to run Candia's sentence consecutive to his state sentence as well as in its calculation of the applicable advisory sentencing range. Both the term of imprisonment and its consecutiveness were imposed within the applicable sentencing provisions. Candia does not cite *any* statutory or jurisprudential support for his argument that this sentence is unreasonable and does not challenge the district court's calculation of the applicable guidelines range. Accordingly, we affirm this consecutive sentence as not unreasonable.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2003, Candia pled guilty to conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846, the first count of his eight count indictment. The factual basis for Candia's plea stated that between January 1, 1988, and November 14, 2000, Candia conspired with Kenneth Leday and others to possess and distribute cocaine and cocaine base, and that Candia had possessed and distributed over ten kilograms of cocaine. The record reflects that Candia's was a voluntary plea and that the district court advised Candia that he could be sentenced anywhere within the statutory range of imprisonment-ten years to life. The district court ordered a presentence investigation report ("PSR").

Applying the federal guidelines, the PSR recommended a base offense level of 38 due to information that Candia had distributed more than 150 kilograms of cocaine. According to the PSR, Kenneth Leday stated that Candia began selling cocaine powder to Leday in late 1995. Leday indicated that he and Candia jointly trafficked cocaine and that, during the twenty-two month period ending in November 1997, Candia had supplied Leday with no less than ten kilograms per month. The PSR also indicated that Brian Lemelle, one of Leday's contacts in Atlanta, Georgia, estimated that of about one hundred fifty kilograms of powder cocaine he received from Candia and Leday, all but twenty-five to thirty kilograms belonged to Candia.

The PSR also recommended a two point reduction for acceptance of responsibility and a total offense level of 36. The PSR indicated that in January 2003 Candia had pled guilty to a Texas state possession of cocaine charge for offense conduct that occurred in May 2002. This conviction resulted in an eight year state sentence of imprisonment. The PSR reflected a total ***472** of four criminal history points comprised of three points for this state conviction and one point for a January 2003 state conviction for evading arrest on New Year's Eve in 1999-thus resulting in a Category III criminal history. The PSR's recommended sentencing range of 235 to 293 months imprisonment is the range provided in the sentencing table, U.S.S.G. Chapter Five, Part A., for a Category III criminal history at offense level 36.

Candia objected, inter alia, to the quantities of drugs attributed to him in the PSR, and the sentencing hearing took place in February 2005. In response to Candia's objections, the Government adduced evidence that included the following: Kenneth Leday testified that Candia had supplied him with 10 to 20 kilograms of cocaine per month over the course of two years, for a total of approximately 168 kilograms. Leday and other co-conspirators distributed the cocaine purchased from Candia in Lake Charles, Lafayette, and Baton Rouge, Louisiana, and in Atlanta, Georgia. Leday introduced Candia to Brian and Robert Lemelle, Leday's contacts in Atlanta, and Candia began to sell cocaine directly to them.

In light of *Booker*, the district court declined to address the individual objections to the PSR. Instead, the district court stated that it had considered all 18 U.S.C. § 3553(a) sentencing factors. The district court orally applied most of the factors, noting the absence of aggravating or mitigating factors that warranted a sentence outside the sentencing range applicable under the guidelines. The district court found the factual statements in the PSR to be "in harmony with the evidence presented," adopted those factual findings, and concluded that the sentencing range applicable under the advisory federal guidelines was between 235 and 293 months of imprisonment.

Candia requested a concurrent sentence. The Government did not oppose his request. Nevertheless, the district court sentenced Candia to serve 280 months imprisonment, to run consecutively to the undischarged 8 year Texas sentence, followed by a five year term of supervised release. Candia appeals this sentence and its consecutive nature as unreasonable.

## II. STANDARDS OF REVIEW

### A. General Standard of Review

[3][4] Even after *Booker*, we review a district court's interpretation of the Guidelines, de novo. *United States v. Duhon*, 440 F.3d 711, 714 (5th Cir.2006) (citing *United States v. Smith*, 440 F.3d 704, 705 (5th Cir.2006)). This court accepts the district court's findings of fact unless they are clearly erroneous. *Id.* (citing *United States v. Creech*, 408 F.3d 264, 270 n. 2 (5th Cir.2005)).

[5] A sentence is ultimately reviewed for "unreasonableness." *Smith*, 440 F.3d at 705; *Duhon* 440 F.3d at 714. The factors enumerated in 18 U.S.C. § 3553(a), a statute left undisturbed by *Booker*, "guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261, 125 S.Ct. 738.

### B. Specific Standard of Review

Prior to *Booker*, we reviewed for abuse of discretion the district courts' decisions about the § 5G1.3(c) imposition of consecutive or

concurrent sentences. *United States v. Richardson*, 87 F.3d 706, 709 (5th Cir.1996) (citing *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir.1991)); *United States v. Lynch*, 378 F.3d 445, 447 (5th Cir.2004) (citing *United States v. Rangel*, 319 F.3d 710, 714 (5th Cir.2003)). Under *Booker*, it is the sentence itself, including its consecutive nature, that is ultimately***473** reviewed for reasonableness. *See Smith*, 440 F.3d at 705; *Duhon*, 440 F.3d at 714.

[6][7][8] A sentence imposed within a properly calculated guidelines range is presumptively reasonable and is accorded great deference on review. *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir.2006). This court will rarely say that such sentence is unreasonable. *Id.* Nevertheless, although presumptively reasonable, the sentence is not "reasonable per se." *Id.* The presumption can be rebutted. *See id.* (observing that there is no practical difference between imposing upon a defendant "the burden [to] rebut[ ] a presumption of reasonableness afforded a properly calculated Guideline range sentence and the burden [to] overcom[e] the great deference afforded such a sentence," and concluding that a guidelines sentence is reasonable per se would ignore the requirement that the district court must consider all the § 3553(a) sentencing factors). Additionally, for a sentence imposed within a properly calculated guidelines range, our *Booker* unreasonableness review infers that the district court "has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Johnson*, 445 F.3d 793, 798 (5th Cir.2006) (citing *United States v. Mares*, 402 F.3d 511, 519 (5th Cir.2005), *cert. denied*, *Mares v. United States*, --- U.S. ----, 126 S.Ct. 43, 163 L.Ed.2d 76 (2005)).

The reasonableness of the consecutive nature of a sentence that was properly calculated under advisory federal guidelines is an issue of first impression in this circuit. We hold that a rebuttable presumption of reasonableness also applies to a consecutive sentence imposed within the parameters of the advisory federal guidelines. Although a consecutive sentence that conforms to the federal guidelines provisions is not "reasonable per se," the sentence is presumptively reasonable and is accorded great deference. A consecutive or concurrent sentence imposed contrary to the applicable federal guidelines provision is akin to a departure because it deviates from the recommended punishment and enjoys neither the presumption of reasonableness nor the deference accorded a consecutive or concurrent determination made pursuant to the guidelines.

## III. DISCUSSION

For the first time post-*Booker*, we are asked to review a properly calculated guidelines sentence that was imposed consecutively to an undischarged state sentence. Candia does not challenge the district court's calculation of the applicable sentencing range. Instead, he argues that the consecutive sentence he

received is unreasonable for three reasons.

First, he asserts that the sentence is unreasonable because it is contrary to the district court's stated intent to sentence him within the same range of imprisonment as others who were sentenced for the offense conduct alleged in his indictment. Second, Candia argues that his federal sentence should have been imposed concurrently and that imposition of a consecutive sentence was unreasonable because, essentially if not technically, the state offense conduct was a minor, uncharged part of the instant conspiracy. In his third argument, Candia contends that the consecutive 280 month sentence of imprisonment is also unreasonable because, having been used to increase the applicable range of sentence-thus enhancing the sentence imposed, this minor state offense conduct was partially considered in determining the instant sentence and also gave rise to ***474** the eight year state sentence.[FN2]

> FN2. The reasoning underlying this argument is as follows:
> (1) the Texas conviction increased his criminal history category from I to III;
> (2) at offense level 36, this increased the applicable sentencing range from the Category I range of 188-235 months to the Category III range of 235-293 months;
> (3) the imposed 280 sentence is almost eight years more than the bottom of the Category I range, and almost four years more than the top of the Category I range;
> (4) therefore his Texas conviction enhanced his federal sentence by several years; and
> (5) this enhancement means that running the federal sentence consecutively to the eight year state sentence requires that Candia remain in federal prison for twelve to sixteen years longer for conduct that had already been considered in determining the 280 month term of imprisonment.

Candia also argues that the district court abused its discretion when it relied on misinformation as the basis for its determination that this sentence is reasonable based on sentences of Candia's co-defendants and is within the range of those sentences. According to Candia, this sentence was an abuse of discretion "in light of the sheer severity of the resulting combined sentences and the increased disparity between [his] sentence and the sentences of [his co-defendants and others convicted for offense conduct charged in his indictment]."

The Government counters, arguing that the district court imposed a sentence that is within the advisory federal guidelines range and therefore the sentence is presumptively reasonable. It points out that Candia has not challenged the range of sentence computation.

The Government further argues that the sentences of two of Candia's co-conspirators were reduced pursuant to Federal Rule of Criminal Procedure 35 due to their substantial

cooperation with the Government. The Government contends that Candia should not receive the same benefit the co-conspirators received. Finally, the Government argues that, contrary to Candia's assertion, his Texas conviction (1) is unrelated to the instant conspiracy, having occurred two years after the instant indictment, and (2) was not considered as relevant conduct in determining his offense level and therefore did not enhance his sentence.

We have determined that unreasonableness is the standard of review applicable to a consecutive sentence imposed both within a properly calculated sentencing range and pursuant to the applicable guidelines for imposition of a consecutive sentence. Calculated in its entirety under properly interpreted and applied guidelines provisions, such sentence is presumptively reasonable. Here, the district court imposed such a sentence. Accordingly, the presumption of reasonableness, along with great deference and an inference that the district court considered the appropriate sentencing factors, are all applicable in our reasonableness review of this consecutive sentence.

A. Authority to Impose a Consecutive Sentence

[9][10][11] The Constitution does not afford a defendant the right to have his state and federal sentences run concurrently. *United States v. Dovalina*, 711 F.2d 737, 739 (5th Cir.1983). "Sentences for different offenses can be ordered to run consecutively, even if they are imposed upon a single trial." *Id.* Pursuant to the guidelines provision applicable to Candia's conviction, "the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment***475** to achieve a reasonable punishment for the instant offense." U.S.S.G. § 5G1.3(c) (1995).

Similarly, 18 U.S.C. § 3584(a)-a statute undisturbed by *Booker*-provides that Candia's federal term of imprisonment may run concurrently or consecutively to his undischarged Texas term of imprisonment. Thus, under the applicable advisory guideline and by statute, the district court was allowed to impose this sentence consecutively to Candia's state sentence. Moreover, if the district court had said nothing about the consecutiveness or concurrence of this sentence, the statutory presumption is that this sentence would run consecutively. 18 U.S.C. § 3584(a) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.").

B. The Unreasonableness Inquiry

1. *The 18 U.S.C. § 3553 Sentencing Factors*

[12] Candia challenges his 280 month sentence as unreasonable, arguing that it is contrary to the district court's stated intent to

sentence him within the same range of imprisonment as others who were sentenced for the offense conduct alleged in his indictment. He relies on a statement that the district court made at the sentencing hearing: The Court is taking into consideration all of the factors set forth in 18 U.S.C. § 3553, and finds that this sentence is a reasonable sentence based on the sentence of all the other co-defendants, especially Thomas Jermaine Beverly who received 262 months. Also Kenneth Leday who received 293 months. Mr. Semien who received 324 months. I think this adequately fits into that range.

Candia points out that his two co-defendants were initially sentenced to 293 and 324 months imprisonment, but later each sentence was reduced to 160 months. He asserts that the third co-defendant's 262 month sentence is the only one that, like Candia's, is "considerably longer" than the other sentences, yet even that sentence was imposed concurrently and therefore is less severe than his. Candia asserts that the actual sentences imposed upon his co-defendants were more than 100 months less than his sentence and/or were ordered to run concurrently rather than consecutively. According to Candia, his consecutive sentence is more severe than his co-conspirators' sentences and is therefore unreasonable, "particularly in light of the stated reasons for imposing sentence."

Candia singles out one of the § 3553(a) factors the district court considered as the basis for his assertion of unreasonableness, arguing that this sentence evidences an unwarranted disparity and is therefore unreasonable because the district court intended that Candia's sentence conform to those of some of his co-defendants and/or co-conspirators. Our unreasonableness review is guided by the § 3553(a) sentencing factors, not by the district court's statement about one such factor.[FN3] Accordingly, ***476** we review this presumptively reasonable consecutive sentence in light of the totality of sentencing factors rather than in light of a single factor.

FN3. Factors considered in imposing sentence include:
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(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;
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentences and sentencing range .... [set forth in the applicable guidelines];
(5) any policy statement ... issued by the Sentencing Commission ....;

> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.
> *See* 18 U.S.C.A. § 3553(a) (2004 & Supp. III).

At the sentencing hearing, the district court stated that it took into consideration all of the factors set forth in § 3553 and that it found this sentence reasonable "based on the sentence of all the other co-defendants." The district court also stated that it was imposing a sentence that adequately fit into the range of the co-defendants' sentences. The district court's reference to the co-defendants' terms of imprisonment does not render Candia's sentence unreasonable. The § 3553(a) disparity factor involves consideration of "the need to avoid disparity among similarly-situated defendants nationwide rather than disparity with [Candia]'s differently situated codefendant." *Duhon*, 440 F.3d at 721. Congress intended that certain disparities be caused by application of the federal guidelines, and "a sentencing disparity intended by Congress is not unwarranted." *Id.* at 720. Only *unwarranted* disparities are among the § 3553(a) sentencing factors. 18 U.S.C. § 3553(a)(6).

Candia asserts that this sentence is unreasonable because the sentences mentioned in the district court's statement were reduced and because the district court was misinformed about the length of their post-reduction sentences. There appears to be no dispute that the reductions in sentence occurred as a result of substantial assistance given by the co-defendants. This court has "h[e]ld that sentencing disparity produced by substantial assistance departures was intended by Congress and is thus not a proper sentencing consideration under section 3553(a)(6)." *Duhon*, 440 F.3d at 720. Candia does not argue, and the record does not show, that he is similarly situated to the two co-defendants whose sentences were reduced pursuant to Rule 35 because of their substantial assistance. Accordingly, it would have been improper for the district court to consider the co-defendants' reduced sentences in making the instant sentencing determination.

The district court stated that it would sentence Candia within the ten year to life statutory limits. It found that the PSR detailed the reasons for applying a higher guideline range than the range for the amount of cocaine stated in the guilty plea's factual basis, and it found credible the sentencing hearing testimony about Candia's involvement. The district court concluded the hearing with the following statement to Candia's counsel:

> You can object to all of it because Mr. Candia was a major drug player in this conspiracy, and I found that the credibility of those witnesses who testified under oath-under oath-I found them to be very credible. And I found their stories to be consistent, and consistent with the other information that was provided by the probation officer. And I think when you put all of that into perspective,

the fact is Mr. Candia is a serious-was a serious drug dealer and should be treated as such.

***477** The district court imposed Candia's 280 month sentence of imprisonment consecutively even though it noted that one co-defendant's 262 month sentence of imprisonment was imposed concurrently. On this record, the district court's statement of intent to impose a sentence in the range of Candia's co-defendants does not suggest that the district court wanted to impose a concurrent sentence or a sentence less than 280 months if the co-defendants' sentences were later reduced. Instead, the statement indicates that the district court found reasonable the original sentences of Candia's co-defendants and wanted to impose a sentence in the general range of their original sentences.

We reject Candia's disparity factor argument. On this record, neither the district court's statements nor Candia's argument about this single factor is sufficient to rebut the applicable presumption of reasonableness and associated inference that the appropriate factors were considered.

2. *The State Offense Conduct Was Not An Uncharged Part of the Instant Offense Conduct and Was Not Fully Considered in Determining This Sentence*

[13] Candia argues that his federal sentence should have been imposed concurrently and that imposition of a consecutive sentence was unreasonable because the state offense conduct was a minor, uncharged part of the instant conspiracy that both enhanced the instant sentence (via increasing his criminal history category), and gave rise to the eight year state sentence.

As we have noted, § 3584 favors imposition of a consecutive sentence when the sentences are imposed at different times. *See* discussion *supra* Part III.A. Candia was convicted in January 2003 for his May 2002 state offense, and was serving the eight year sentence of imprisonment for that conviction when sentenced in this case in February 2005. The instant conspiracy to distribute cocaine occurred between January 1988 and November 2000-a year and a half before the offense conduct underlying Candia's state conviction for possession of cocaine.

Candia concedes that the state offense conduct was not "technically" part of the federal conspiracy. Nevertheless, he asserts that because, in effect, it was the same as the instant offense conduct, this consecutive federal sentence is unreasonable. Candia also asserts that the sentence is unreasonable because the criminal history consideration of his state conviction yielded an enhancement to the federal sentence. As with his other arguments, Candia presents no statutory or jurisprudential support indicating that, even if his factual assertions are true, those facts lead to the conclusion that this consecutive sentence is unreasonable.

In *United States v. Izaguirre-Losoya*, 219 F.3d 437 (5th Cir.2000), the defendant argued that his sentence should have run concurrent with his undischarged state sentence because that sentence was considered in his criminal history category. We rejected that argument because "his criminal offense history is separate from and does not affect his offense level even if it does affect the range of potential punishment[,]" and because no other offense level calculation was based on his state offense. *United States v. Izaguirre-Losoya*, 219 F.3d 437, 439 (5th Cir.2000).

[14] The district court had statutory authority to impose this consecutive sentence under § 3584(a). Candia was sentenced under advisory guidelines and had no *right* to a concurrently imposed sentence even if the applicable guidelines provision said the sentence "shall run concurrently."***478** The mere fact that a sentence was imposed contrary to § 5G1.3 would not resolve the question of reasonableness. In such a scenario, our *Booker* unreasonableness inquiry would be the same, except that the consecutiveness of the sentence would not be presumptively reasonable.

C. A Discretionary Decision

[15] When *Booker* made the U.S.S.G. advisory rather than mandatory, the discretionary nature of the § 5G1.3(c) decision did not change: after *Booker*, the district court still has discretion to impose a reasonable sentence, consecutively or concurrently, by virtue of U.S.S.G. § 5G1.3(c) and 18 U.S.C. § 3584(a). Moreover, this advisory guideline specifically requires that the district court exercise its discretion "to achieve a reasonable punishment." U.S.S.G. § 5G1.3(c). This language suggests that a district court acts within its § 5G1.3(c) discretion only when it imposes a reasonable sentence. Our pre-*Booker* review of sentences imposed pursuant to 5G1.3 dovetails with our *Booker* reasonableness review, as both turn upon consideration of the § 3553 sentencing factors. *See* 18 U.S.C. § 3584 (requiring consideration of the § 3553(a) sentencing factors in determining whether terms imposed are to run consecutively or concurrently); *United States v. Richardson*, 87 F.3d 706 (5th Cir.1996) (discussing the district court's consideration of the § 3553(a) factors, as required by § 3584, in its abuse of discretion review of a consecutive sentence); *United States v. Londono*, 285 F.3d 348 (5th Cir.2002) (discussing the district court's consideration of § 3553(a) factors and of § 5G1.3). Accordingly, we hold that *Booker*'s reasonableness inquiry complements, but does not abrogate, this court's pre-*Booker* use of the abuse of discretion standard for reviewing imposition of a § 5G1.3(c) consecutive sentence.

In *United States v. Albarran-Moreno*, 145 Fed.Appx. 28 (5th Cir.2005) (unpublished), a panel of this court reviewed for plain error a consecutive sentence imposed under mandatory guidelines. The *Albarran-Moreno* court observed that the sentence was imposed "pursuant to a discretionary statute, 18 U.S.C.

§ 3584(a), and a guideline that was framed in discretionary terms, U.S.S.G. § 5G1.3(c)," and found "no indication in the record from the sentencing judge's remarks or otherwise, that the court wished to impose a concurrent sentence, either partially or completely." *United States v. Albarran-Moreno*, 145 Fed.Appx. 28, 29 (5th Cir.2005) (unpublished) (citation and internal quotation marks omitted).

[16] Unlike *Albarran-Moreno*, the instant case does not involve either mandatory guidelines or plain error review. Nevertheless, just as in *Albarran-Moreno*, Candia was sentenced pursuant to a discretionary statute, 18 U.S.C. § 3553, and a sentencing guideline framed in discretionary terms, U.S.S.G. § 5G1.3(c). The district court's statements at the sentencing hearing do not indicate that the district court wanted to impose a concurrent sentence. The record reveals that the district court considered the sentencing factors, properly interpreted and applied the guidelines, and exercised its discretion to sentence Candia within the applicable guidelines range and according to the guidelines provisions for consecutive sentencing. Post-*Booker*, review of a consecutive sentence is to determine whether it is unreasonable. On the narrow facts of this case, we find that the presumption of reasonableness has not been rebutted: the district court properly exercised its § 5G1.3(c) discretion to impose a reasonable sentence.

***479** D. Summary

Candia challenges as unreasonable a sentence that is within a properly calculated advisory federal guidelines range. This case is the first in this circuit to require that we review for unreasonableness a post-*Booker*, properly calculated federal guidelines sentence imposed consecutively to an undischarged state term of imprisonment. Where, as here, the term of imprisonment and the consecutiveness of that sentence were each imposed by proper interpretation and calculation of applicable guidelines provisions, the consecutiveness of the sentence enjoys a presumption of reasonableness similar to that applied to a within-guidelines term of imprisonment.

On the record before us, use of the state conviction to increase Candia's criminal history category does not render this consecutive sentence unreasonable; neither does Candia's unsupported assertion that his state sentence is "essentially, though not technically" uncharged conduct that was part of the instant conspiracy. Candia provides no support for his argument that this is an unreasonable sentence or for his argument that the consecutive nature of his sentence exacerbates its unreasonableness.

The record reveals that the district court exercised its discretion within the boundaries set by § 5G1.3(c), § 3553(a), and § 3584(a) to impose a consecutive sentence that is both within a properly calculated federal guideline range and in accord with U.S.S.G. § 5G1.3(c). We hold that neither presumption of reasonableness (i.e., neither reasonableness of

this sentence, nor reasonableness of its consecutive nature) has been rebutted.

IV. CONCLUSION

We review a post-*Booker* consecutive sentence that is imposed within a properly calculated U.S.S.G. sentencing range for reasonableness. Because this consecutive guidelines sentence is also in concert with U.S.S.G. § 5G1.3(c), § 3584, and § 3553, both the sentence and its consecutive nature are presumptively reasonable. Candia's unsupported argument and assertions do not rebut this presumption. Accordingly, we hold that Candia's sentence is not unreasonable and AFFIRM the sentence imposed by the district court.

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Briefs and Other Related Documents (Back to top)

• 05-30213 (Docket) (Feb. 28, 2005)

END OF DOCUMENT

United States Court of Appeals,Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellant,
v.
Anthony CHOTAS, Defendant-Appellee.
**No. 91-8206.**

Aug. 18, 1992.

Defendant was convicted in the United States District Court for the Northern District of Georgia, No. CR 88-560A, G. Ernest Tidwell, J., of possession with intent to distribute cocaine and aiding and abetting with intent to distribute cocaine, and he appealed. The Court of Appeals, 913 F.2d 897, affirmed in part, reversed in part and remanded for resentencing. On remand, the District Court reimposed the sentence of 28 months imprisonment under a different provision, and the government appealed. The Court of Appeals held that: (1) reasons cited on remand did not justify downward departure under provision authorizing downward departure for circumstances not adequately taken into consideration by sentencing commission in formulating guidelines, and (2) insufficient disparity in the sentences of codefendants was an improper ground for departure.

Remanded.

West Headnotes

**[1] Sentencing and Punishment 350H 806**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk803 Grounds for Departure
350Hk806 k. Atypical or Unusual Case in General. Most Cited Cases
(Formerly 110k1263)

A departure from the sentencing range prescribed by the applicable guidelines may be appropriate if the conduct in question falls outside the "heartland" of typical conduct described by each of the guidelines, even if the circumstances presented by the case vary only in degree from that embodied from the guideline. U.S.S.G. Ch. 1, Pt. A, intro., 4(b); § 5K2.0, p.s., 18 U.S.C.A.App.

**[2] Sentencing and Punishment 350H 941**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)1 In General
350Hk937 Pleadings and Motions
350Hk941 k. Necessity of Motion by Government. Most Cited Cases
(Formerly 110k1306)

Narcotics defendant's substantial assistance to the government by testifying in codefendant's trial, his exposure of himself to "meaningful degree of danger" by that testimony, and his provision of a benefit to the government and society by offering testimony that assisted in codefendant's conviction, were grounds for departure adequately comprehended by provision authorizing downward departure for substantial assistance, and thus could not be used for downward departure absent a motion for downward departure by the government. U.S.S.G. §§ 5K1.1, p.s., 5K1.1(a)(3, 4), p.s., 18 U.S.C.A.App.

**[3] Sentencing and Punishment 350H 654**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk654 k. Effect on Judicial Discretion. Most Cited Cases
(Formerly 110k1230)

**Sentencing and Punishment 350H 750**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)1 In General
350Hk750 k. In General. Most Cited Cases
(Formerly 110k1250)

Sentencing court is not free to ignore requirement for particular adjustment under the guidelines and may not simply circumvent sentencing commission's directive by departing under a separate guideline for the same mitigating circumstance. U.S.S.G. §§ 5K1.1, p.s., 5K2.0, p.s., 18 U.S.C.A.App.

**[4] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
(Formerly 110k1298)
Defendant's testimony in codefendant's trial was not an attempt to make amends for his crime which could warrant a downward departure from guideline sentencing range; defendant had denied all responsibility for the offense and had shown willingness to lie about his own role when testifying about codefendant's involvement, which was consistent with an attempt to qualify for downward departure for assistance rather than a desire to atone for his offense. U.S.S.G. §§ 5K1.1, p.s., 5K2.0, p.s., 18 U.S.C.A.App.

**[5] Sentencing and Punishment 350H 909**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(G) Dual or Duplicative Use
350Hk903 Particular Cases and Problems
350Hk909 k. Departures. Most Cited Cases
(Formerly 110k1240(3))
Supposed lesser danger that narcotics defendant posed to society than his codefendant was a factor addressed by the Sentencing Guidelines and could not be used to justify downward departure from Sentencing Guidelines range, particularly since defendant had already been placed in the lowest criminal history category classification. U.S.S.G. § 4A1.3, p.s., 18 U.S.C.A.App.

**[6] Sentencing and Punishment 350H 906**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(G) Dual or Duplicative Use
350Hk903 Particular Cases and Problems
350Hk906 k. Adjustments. Most Cited Cases
(Formerly 110k1240(1))
Greater relative danger posed to society by codefendant than by narcotics defendant did not justify downward departure in defendant's sentence; codefendant had already received upward departure in his sentence for his organizational role in the offense, and defendant was awarded downward adjustment in light of "minor" role in the crime. U.S.S.G. §§ 3B1.1, 3B1.2, 18 U.S.C.A.App.

**[7] Sentencing and Punishment 350H 909**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(G) Dual or Duplicative Use
350Hk903 Particular Cases and Problems
350Hk909 k. Departures. Most

Cited Cases
(Formerly 110k1240(3))
Fact that guidelines were structured to account for relative culpability in difference in prior records of defendants demonstrated that sentencing commission fully anticipated sentencing disparity between defendants involved in the same offense, and thus downward adjustment of sentences for difference in defendants' relative culpability could not be justified as a circumstance not adequately considered by the guidelines. U.S.S.G. § 5K2.0, p.s., 18 U.S.C.A.App.

**[8] Sentencing and Punishment 350H 804**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk803 Grounds for Departure
350Hk804 k. In General. Most Cited Cases
(Formerly 110k1263)
"Insufficient disparity" in the sentences of codefendants was an improper ground for departure from Sentencing Guidelines. U.S.S.G. § 5K2.0, p.s., 18 U.S.C.A.App.

***1194** Amy D. Levin, Asst. U.S. Atty., Atlanta, Ga., for plaintiff-appellant.
Rise Weathersby, Federal Defender Program, Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, JOHNSON [FN*] and BOWNES [FN**], Senior Circuit Judges.

FN* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

FN** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

PER CURIAM:
This appeal follows resentencing by the district court after a remand by a panel of this Court. *See United States v. Chotas*, 913 F.2d 897 (11th Cir.1990), *cert. denied*, 499 U.S. 950, 111 S.Ct. 1421, 113 L.Ed.2d 473 (1991). For the reasons that follow, we again vacate Chotas' sentence and remand for resentencing.

## I. STATEMENT OF THE CASE

Appellee Anthony Chotas was indicted on one count of possession with intent to distribute cocaine, in violation of 21 U.S.C.A. § 846 (West Supp.1992), and one count of aiding and abetting with intent to distribute cocaine, in violation of 21 U.S.C.A. § 841 (West 1981 & Supp.1992) and 18 U.S.C.A. § 2 (West 1969). On February 16, 1989, a jury convicted Chotas on both counts. Following his conviction but prior to sentencing, Chotas testified for the government in the trial of his former co-defendant, John Fickle.

At Chotas' sentencing hearing, the court determined the applicable offense level to be

22, yielding a sentencing range of 41 to 51 months for each count. The sentencing court then made a downward departure pursuant to U.S.S.G. § 5K1.1, finding over the government's objection that Chotas rendered "substantial assistance" to the government in its prosecution of Fickle. The court sentenced Chotas to concurrent sentences of 28 months imprisonment, followed by five years of supervised release.

Both Chotas and the government appealed. A panel of this Court affirmed the conviction but remanded the case for resentencing after finding that the district court had departed downward under section 5K1.1 absent a required government motion suggesting such departure. *See United States v. Chotas*, 913 F.2d 897 (11th Cir.1990), *cert. denied*, 499 U.S. 950, 111 S.Ct. 1421, 113 L.Ed.2d 473 (1991).

The district court on remand reimposed the sentence of 28 months imprisonment by basing the downward departure on section 5K2.0 rather than on section 5K1.1. The sentencing court tendered the following mitigating circumstances for its departure pursuant to section 5K2.0: (1) Chotas was substantially less responsible than Fickle for their crimes of conviction; (2) Chotas posed a lesser danger to society than Fickle;***1195** (3) Chotas provided testimony that was of substantial assistance to the government in its prosecution of Fickle; (4) absent a downward departure, there would be an "insufficient disparity" between Fickle's sentence of 78 months and Chotas' sentence of 41 months; (5) Chotas' testimony against Fickle demonstrated Chotas' attempt to "rehabilitate himself and make amends to society for his criminal conduct"; (6) Chotas in offering his testimony willfully exposed himself to a meaningful degree of danger; (7) by contributing to Fickle's conviction, Chotas provided a benefit to both the government and society.

The government again appeals the sentence, charging that the district court's unguided departure under section 5K2.0 "merely reflects an attempt to evade this [C]ourt's ruling on the government's appeal of the defendant's original sentence." The government argues that the departure remains unjustified because the "mitigating circumstances" cited by the district court are each contemplated by the Sentencing Guidelines.

## II. ANALYSIS

[1] A sentencing court may depart from the sentencing range prescribed by the applicable guidelines if the court determines that " 'there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.' " U.S.S.G. § 5K2.0 (quoting 18 U.S.C.A. § 3553(b)). A departure may be appropriate if the conduct in question falls outside of the "heartland" of typical conduct described by each of the guidelines. *See United States v. Ponder*, 963 F.2d 1506, 1509-10 (11th Cir.1992); *United States v.*

*Williams*, 948 F.2d 706, 709 & n. 3 (11th Cir.1991). A sentencing court therefore properly departs even if the circumstances presented by the case vary only in degree from that embodied by the guideline. *Ponder*, 963 F.2d at 1509; *Williams*, 948 F.2d at 709; *see also* U.S.S.G. Ch. 1, Pt. A 4(b).

This Court employs a three-step test to determine whether a sentencing court's departure from the guidelines was justified. *See United States v. Kramer*, 943 F.2d 1543, 1548-49 (11th Cir.1991); *United States v. Weaver*, 920 F.2d 1570, 1573 (11th Cir.1991). First, this Court must make a *de novo* determination of whether the guidelines adequately consider the district court's cited justification for the departure. *See Weaver*, 920 F.2d at 1573. The second step requires the appellate court to examine whether the sentencing court clearly erred in its assessment of the factual support for the departure. *Id.* Finally, if the departure has met the first two requirements of the test, this Court must ascertain whether the degree of the departure was reasonable. *Id.*

[2] Of the seven considerations cited by the district court to justify the downward departure under section 5K2.0, three directly relate to Chotas' assistance to the government in its prosecution of Fickle: (1) that Chotas provided substantial assistance to the government by testifying in Fickle's trial; (2) that Chotas, by testifying, exposed himself to a "meaningful degree of danger"; (3) that Chotas provided a benefit to the government and to society by offering testimony that assisted in the conviction of Fickle.

Section 5K1.1 addresses each of these three justifications. This section expressly provides that the sentencing court may make a downward departure for a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S.S.G. § 5K1.1. The sentencing court determines whether the defendant's assistance was substantial by assessing the "nature and extent of the defendant's assistance." U.S.S.G. § 5K1.1(a)(3). The court likewise considers "any danger or risk of injury to the defendant." U.S.S.G. § 5K1.1(a)(4). Finally, the sentencing court assesses the ultimate benefit of the testimony to the government and to society by weighing the "significance" and "value" of the defendant's assistance. U.S.S.G. § 5K1.1(a)(1), application note 3, and background commentary. We therefore find these three ***1196** grounds for the departure are adequately comprehended by section 5K1.1.

[3] Chotas alternatively argues that the sentencing court may still make a departure under section 5K2.0 for reasons contemplated by section 5K1.1 because his sentence otherwise will not reflect his assistance to the government. This argument is without merit. A sentencing court is not free to ignore a requirement for a particular adjustment under the guidelines: "[i]f the Commission *did* adequately consider a certain aggravating or mitigating circumstance, departure must be in accordance with the Commission's directive."

*Chotas*, 913 F.2d at 900. *A fortiori,* a sentencing court may not simply circumvent that directive by departing under a separate guideline for the same mitigating circumstance.[FN1] *Accord United States v. Agu*, 949 F.2d 63, 65-66 (2d Cir.1991) *cert. denied*, 504 U.S. 942, 112 S.Ct. 2279, 119 L.Ed.2d 205 (1992). We conclude that the district court improperly bypassed the prerequisite for a departure under section 5K1.1 for substantial assistance to the government by using the same mitigating circumstance to depart under section 5K2.0.

FN1. Chotas cites *United States v. Aimufua*, 935 F.2d 1199 (11th Cir.1991), for the proposition that the same underlying circumstance may trigger two separate provisions of the guidelines. The defendant in *Aimufua* had committed bank fraud while on bail for an offense to which he had pled guilty. The sentencing court properly declined to award a two-level reduction for acceptance of responsibility because this subsequent offense demonstrated that the defendant had not terminated his criminal conduct. *See* U.S.S.G. § 3E1.1 application note 1 (termination of criminal conduct relevant to determination of acceptance of responsibility). The court additionally departed upward under § 5K2.0 in order to account for the bank fraud defendant had committed. The *Aimufua* Court affirmed. *Aimufua*, 935 F.2d at 1201.
The instant case is easily distinguished. The *Aimufua* Court found that the commentary to section 3E1.1 specifically provides for consideration of conduct that may have triggered another guideline section. *Id.* More importantly, the sentencing court's application of both § 3E1.1 and § 5K2.0 was motivated by separate sentencing considerations, *see id.,* and thus employment of both sections did not undermine the requirements or goals of either section.

[4] The district court's next basis for departure concerned Chotas' purported attempt to "rehabilitate himself and make amends to society for his criminal conduct." This Circuit has recently declared that rehabilitative considerations are "irrelevant for purposes of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose." *United States v. Mogel*, 956 F.2d 1555, 1563 (11th Cir.1992).

Assuming *arguendo* that making amends to society is a consideration separate from rehabilitation and otherwise unaccounted for in the guidelines,[FN2] there is simply no indication that Chotas was attempting to make amends for his crime by testifying. Instead, the district court in its initial sentencing hearing found that Chotas persisted in "refus[ing] to accept responsibility" for his crime, and that during Fickle's trial Chotas had engaged in deceit regarding his own knowledge of and involvement in the offense.

In light of his denial of all responsibility for the offense and his willingness to lie about his own role when testifying about Fickle's involvement in the offense, we find that Chotas' testimony was not motivated by a desire to atone for his offense, but rather was entirely consistent with an attempt to qualify for a downward departure for assistance pursuant to section 5K1.1. The district court's departure under section 5K2.0 for reasons of rehabilitation and atonement was therefore improper.

> FN2. Insofar as Chotas' attempt to make amends encompasses a demonstration of remorse, such remorse is already reflected in section 3E1.1, which allows for a two-level reduction in the offense level for acceptance of responsibility. *See United States v. Brewer*, 899 F.2d 503, 509 (6th Cir.), *cert. denied,* 498 U.S. 844, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990); *see also United States v. Garlich*, 951 F.2d 161, 163 (8th Cir.1991) (departure beyond two-level reduction for acceptance of responsibility only justified in extraordinary circumstances).

[5] Yet another reason cited by the sentencing court to justify its departure was the supposed lesser danger Chotas posed to society than his co-defendant. We find that the guidelines cumulatively address ***1197** this factor by requiring increases in offense levels for aggravating circumstances related to a criminal's potential threat to society. *See, e.g.,* §§ 2D1.1(b)(1) (possession of dangerous weapon); 3A1.1 (praying upon vulnerable victim); 3B1.1 (role as organizer, leader, manager or supervisor of criminal activity); 3B1.3 (abuse of position of trust or special skill); 3C1.1 (obstruction of justice); 4A1.1 (prior criminal history).

Insofar as the district court intended "dangerousness to society" to account for defendant's likelihood of recidivism, the court had already placed Chotas in criminal history category I, a classification reserved for "a first offender with the lowest risk of recidivism." U.S.S.G. § 4A1.3, p.s. A downward departure from the category I guideline range for reasons relating to recidivism is therefore inappropriate. *Id.; see Mogel*, 956 F.2d at 1565-66; *United States v. Russell*, 917 F.2d 512, 517-18 (11th Cir.1990), *cert. denied,* 499 U.S. 953, 111 S.Ct. 1427, 113 L.Ed.2d 479 (1991).

[6] Assuming without deciding that the guidelines might not adequately consider the relative danger posed to society by all potential co-defendants, the sentencing court failed to enumerate any exceptional circumstances presented by the instant case. The district court's sole explanation for Fickle's supposed greater threat was his relative role in the offense. Fickle, however, had already received an upward departure pursuant to section 3B1.1 for his organizational role in the offense. Likewise, Chotas had been awarded a downward adjustment under section 3B1.2 in light of his

"minor" role in the crime. We thus find no basis in law or in fact for the sentencing court's departure for reason of Fickle's "greater danger to society."

[7][8] The district court's two final reasons for departure also present improper considerations for departure from the guidelines under section 5K2.0. The district court explained that the guidelines failed to account for the fact that Fickle was at least three times as culpable for the offense of conviction than Chotas. Later, in an apparently related point, the court objected to the "insufficient disparity" between the sentences of Fickle and Chotas absent a downward adjustment for Chotas.

This Court has not addressed whether a departure may be made for an apparent failure of the guidelines to consider adequately the varying degrees of culpability of co-defendants. Congress enacted the Sentencing Guidelines in large part to eliminate disparities in the sentences meted out to similarly situated defendants. *See* U.S.S.G., Ch. 1, Pt. A, at § 1.2-1.3; *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1235 (11th Cir.1991). Proper application of the guidelines, then, should yield correspondingly different sentences for defendants culpable in different degrees.

Congress has specifically instructed sentencing courts to consider "the need to avoid *unwarranted* sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.A. § 3553(a)(6) (West Supp.1992) (emphasis added). Chotas contends that this prescribed consideration, particularly as viewed within the context of the general goals of the sentencing guidelines, authorizes a court to readjust the sentences of defendants in an individual case to reflect their relative culpability. The Fourth and Tenth Circuits agree with this position and permit such departures. *See United States v. Daly*, 883 F.2d 313, 319 (4th Cir.1989), *cert. denied*, 498 U.S. 1116, 111 S.Ct. 1030, 112 L.Ed.2d 1111 (1991); *United States v. Sardin*, 921 F.2d 1064, 1067 (10th Cir.1990).

We believe that Chotas presents a simplistic view of the purpose of the guidelines and of proper sentencing considerations. The guidelines, structured to account for relative culpability and differences in prior records of defendants, demonstrate that the Sentencing Commission fully anticipated sentencing disparity between defendants involved in the same offense. Unless a sentencing court can identify a specific factor not adequately considered by the guidelines in either type or degree, the court's adjustment of sentences constitutes little more than the substitution of the court's own beliefs regarding proper sentencing***1198** considerations for those of the Commission.

"Insufficient disparity" in the sentences of defendants therefore represents an improper ground for departure. As the majority of circuit courts has recognized, to adjust the sentence of a co-defendant in order to cure an apparently unjustified disparity between

defendants in an individual case will simply create another, wholly unwarranted disparity between the defendant receiving the adjustment and all similar offenders in other cases. *See United States v. Mejia*, 953 F.2d 461, 468 (9th Cir.1991), *cert. denied*, 504 U.S. 926, 112 S.Ct. 1983, 118 L.Ed.2d 581 (1992); *United States v. LaSalle*, 948 F.2d 215, 218 (6th Cir.1991); *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir.), *cert. denied*, 502 U.S. 969, 112 S.Ct. 441, 116 L.Ed.2d 460 (1991); *United States v. Restrepo*, 936 F.2d 661, 670-71 (2d Cir.1991); *United States v. Carr*, 932 F.2d 67, 73 (1st Cir.), *cert. denied*, 502 U.S. 834, 112 S.Ct. 112, 116 L.Ed.2d 82 (1991); *see also United States v. Guerrero*, 894 F.2d 261, 269-70 (7th Cir.1990) (disparity of co-defendant's sentences not basis for challenge); *United States v. Boyd*, 885 F.2d 246, 248-49 (5th Cir.1989) (same).

## III. CONCLUSION

None of the grounds cited by the district court on remand justifies a downward departure from the sentencing guidelines under U.S.S.G. § 5K2.0. We therefore again REMAND the case to the district court for resentencing in accordance with the principles set forth above.

C.A.11 (Ga.),1992.
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Briefs and Other Related Documents

United States Court of Appeals,Eleventh Circuit.
UNITED STATES of America,
Plaintiff-Appellant,
v.
Michael A. CRISP, Defendant-Appellee.
**No. 05-12304.**

July 7, 2006.

**Background:** Defendant was convicted in the United States District Court for the Northern District of Alabama, No. 04-00403-CR-BE-S,Karon O. Bowdre, J., on her plea of guilty to making false statements to a financial institution. Government appealed sentence.

**Holdings:** The Court of Appeals, Carnes, Circuit Judge, held that:

5(1) statutory sentencing factor of need for restitution was not proper factor for court to consider in determining how much to depart on substantial assistance grounds, and

8(2) sentence which included only five hours of incarceration was unreasonable.

Vacated and remanded.

West Headnotes

**[1] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases

**Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
District court's interpretation of sentencing guidelines is reviewed *de novo*, but extent of any departure is reviewed only for abuse of discretion. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
Sentencing court's variance from post-departure guidelines is reviewed for reasonableness. 18 U.S.C.A. § 3553(a).

**[3] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
In meting out substantial assistance departure, court may consider factors outside those listed in guideline, but only if they are related to assistance rendered. U.S.S.G. § 5K1.1(a), p.s., 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
Sentencing court may not consider statutory sentencing factors when exercising its discretion in deciding whether and how much to depart for substantial assistance provided by defendant. 18 U.S.C.A. § 3553(a); U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

**[5] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures

350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
Statutory sentencing factor of need for restitution was not proper factor for court to consider in determining how much to depart on substantial assistance grounds. 18 U.S.C.A. § 3553(a)(7); U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

**[6] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
Court of Appeals' review of reasonableness of sentence in light of statutory sentencing factors is deferential. 18 U.S.C.A. § 3553(a).

**[7] Criminal Law 110 1134(3)**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases
In reviewing sentence, Court of Appeals evaluates whether sentence imposed serves purposes reflected in statutory sentencing factors. 18 U.S.C.A. § 3553(a).

**[8] Sentencing and Punishment 350H 66**

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk66 k. Nature, Degree or Seriousness of Offense. Most Cited Cases

**Sentencing and Punishment 350H 736**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(B) Offense Levels
350HIV(B)3 Factors Applicable to Several Offenses
350Hk736 k. Value of Loss or Benefit. Most Cited Cases

**Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
Sentence, following substantial assistance departure, which included only five hours of incarceration, for defendant who pled guilty to making false statements to financial institution, did not reflect seriousness of crime, promote respect for law, provide just punishment for offense, or afford adequate deterrence to criminal conduct, and thus was unreasonable; scheme was serious one, extending over period of nearly eight months,

crime was classified as Class B felony, and loss inflicted on small, family-owned bank totaled more than $480,000. 18 U.S.C.A. §§ 1014, 3553(a); U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

***1286** Joyce White Vance, Birmingham, AL, for U.S.
David S. Luker, Birmingham, AL, for Crisp.

Appeal from the United States District Court for the Northern District of Alabama.

Before BIRCH, CARNES and BRUNETTI[FN*], Circuit Judges.

FN* Honorable Melvin Brunetti, United States Circuit Judge for the Ninth Circuit, sitting by designation.

CARNES, Circuit Judge:
As the comptroller of a corporation, Michael Crisp participated in a fraudulent scheme that bilked a bank out of nearly half of a million dollars. After being caught, he pleaded guilty to making false statements to a financial institution and helped the government prosecute a co-conspirator. Grateful, the government moved for a substantial assistance departure. The district court exceeded the limits of the government's gratitude by departing to an offense level below the one that it had recommended.

The court then went even further, using its post-*Booker* authority to dip below the post-departure guidelines range, and sentenced Crisp to probation. The government objected, pointing out that given the offense of conviction the law requires incarceration. Persuaded of the legal correctness of the government's position, although not caught up in the spirit of it, the court modified the sentence to one of incarceration, or something meant to resemble it. The court sentenced Crisp to five hours in custody of the Marshals. Crisp had reason to be grateful. The government did not. This is its appeal. We reverse.

**I.**

Crisp was comptroller for Southern Pride Contractors, Inc., a construction company based in Birmingham, Alabama. He was supervised by John G. Grant, Jr., the company's president and principal owner. In late 2002 and early 2003, at Grant's direction, Crisp prepared false financial statements overstating the company's accounts receivable, and he provided them to Covenant Bank on six separate occasions. The bank, which had extended a $500,000 line of credit to Southern Pride, relied on those reports in continuing to extend credit to the company. Southern Pride did not repay the credit line, and the loss to the bank was over $480,000.

For his role in the scheme to defraud the bank, Crisp was charged with one count of violating 18 U.S.C. § 1014. He pleaded guilty to it. The United States Probation Office prepared a presentence investigation report that assigned Crisp a ***1287** criminal history

category of I and calculated his total offense level to be 17, resulting in a sentencing range of 24-30 months. *See* United States Sentencing Guidelines Ch. 5 Pt. A (Nov.2002). Crisp did not object to any part of the PSI.

The government filed a motion for a downward departure pursuant to U.S.S.G. § 5K1.1 based on Crisp's substantial assistance in its prosecution of Grant. The government's motion indicated that Crisp's assistance had included: confessing to his crime upon being confronted by the Federal Bureau of Investigation, agreeing to several interviews by FBI agents and government prosecutors, participating in a monitored telephone conversation with Grant "which materially aided the government's case against Grant," and testifying for the prosecution at Grant's trial about their scheme to defraud the bank. The government represented that "Crisp's testimony was crucial in the trial of Grant." It recommended "that the Court depart from the recommended range by 50%, which results in a guideline range of 12 to 15 months imprisonment," which it referred to as level 13, and "that the defendant be sentenced at the low end" of that range-to 12 months.

Crisp was sentenced on March 23, 2005. Hearing no objection to it, the court adopted the PSI's calculation of the applicable pre-departure guidelines range of 24-30 months. Crisp and his wife made statements to the court, and his counsel and the government discussed briefly the assistance Crisp had provided in the prosecution of Grant.

Before imposing its sentence, the court stated:
Let me say, Mr. Crisp, that I find that there is no excuse for your participation in this matter with Mr. Grant. It's obvious that you knew it was wrong from the beginning. And without your participation in this scheme, for lack of a better word, it could not have occurred.
So I certainly do not want to minimize the wrongful conduct in which you engaged.
However, I am, as is the government, appreciative of your cooperation with the government in bringing Mr. Grant to trial and to a conviction of him for his role in this scheme. But it certainly was for his benefit, not for yours.
I have taken all of those things into consideration.
I have also taken into consideration the amount of restitution that is due to this bank .... [T]he smaller banks really feel a loss such as this more so than larger banks.
And I am most concerned that justice really requires restitution in this case. And [18 U.S.C.] Section 3553(a)(7) directs the court to consider the need to provide restitution to any victims in coming up with the appropriate punishment, and I certainly am considering that in my determination as to the appropriate punishment.
With all of those factors taken into consideration, the court finds that the government's motion for downward departure pursuant to Section 5K1.1 and [18 U.S.C.] Section 3553(e), based on the defendant's substantial assistance to the government, should be granted.

As I said, in taking into account all of those various factors that the court has to consider, the court finds that the appropriate guideline level for consideration should be level ten, which when combined with the criminal history category of one, creates a guideline range of six to twelve months ....

After arriving at a post-departure range of 6-12 months, the court sentenced Crisp to five years probation with 12 months in-***1288** home confinement. There was to be no incarceration.

The court believed that its sentence of probation was "a reasonable one based upon all the factors contained in [18 U.S.C.] Section 3553(a)." It specifically stated "that the sentence reflects the seriousness of the offense, provides just punishment, affords adequate deterrence and adequately protects the public." The court weighed most heavily "the need to provide restitution to the bank," explaining that "[i]f the court were to impose even a short period of imprisonment, ... the goal of restitution would be thwarted because it would adversely affect [Crisp's] ability to earn a living so as to be able to make restitution payments."

The court then ordered Crisp to pay restitution in the amount of $484,137.38 and found that he would be jointly and severally liable with Grant for that amount if Grant were ordered to pay restitution. Crisp was instructed to pay the restitution amount "in full no later than the end of [his] term of probation." The court explained to Crisp that "the main reason" it had imposed the maximum term of probation was "to allow [him] that time to pay off the restitution amount." No fine was imposed, because the court found that Crisp was unable to pay both a fine and restitution and, in its words, "restitution takes priority over the imposition of a fine."

The government objected to the court's initial probationary sentence as illegal because probation may not be imposed for a Class B felony, and a violation of § 1014 is a Class B felony. *See* 18 U.S.C. §§ 1014, 3559(a)(2), 3561(a)(1). The court later reconvened and modified its sentence of Crisp as follows: "I am ordering the defendant to serve five hours in the custody of the United States Marshal, that term of custody preferably will be served today or you can work out a time with the marshal preferably some time this week." The court also imposed as part of the sentence a five-year term of supervised release. The government objected to the final five-hour sentence as unreasonable, labeling it "farcical."

## II.

[1] The district court arrived at the five-hour incarceration term of the sentence after following a two-step process. First, it granted the government's § 5K1.1 motion and departed from the PSI's sentencing guidelines range of 24-30 months to a range of 6-12 months, instead of the 12-15 months the government had recommended. We review *de novo* the district court's interpretation of

any part of the guidelines, including § 5K1.1, *United States v. McVay*, 447 F.3d 1348, 1352-53 (11th Cir.2006), but we review the extent of a departure only for abuse of discretion, *id.* at 1353.

[2] The second step in the court's sentencing decision was, after consulting the factors set out in 18 U.S.C. § 3553(a), to vary from the post-departure guidelines range of 6-12 months down to the final sentence of five hours. We review that aspect of the sentence, the only part at issue here, for reasonableness. *United States v. Booker*, 543 U.S. 220, 261, 125 S.Ct. 738, 765-66, 160 L.Ed.2d 621 (2005); *United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir.2005).

## III.

Section § 5K1.1 authorizes a court to depart from the sentencing guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S.S.G. § 5K1.1. That guideline contains a list of factors for sentencing***1289** courts to consider in making a substantial assistance departure, all of which relate to the assistance the defendant provided:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
(5) the timeliness of the defendant's assistance.

U.S.S.G. § 5K1.1(a)(1)-(5).

[3] Although that list of factors is preceded by language indicating that they are not exclusive, we have held that "[w]hen ... a district court grants a downward departure under U.S.S.G. § 5K1.1 ..., the sentence reduction may be based only on factors related to the defendant's substantial assistance." *United States v. Luiz*, 102 F.3d 466, 469 (11th Cir.1996). In other words, in meting out a substantial assistance departure the court may consider factors outside the § 5K1.1(a) list, but only if they are related to the assistance rendered. *See* U.S.S.G. § 5K1.1 cmt. backg'd (indicating that the focus is on the "nature, extent, and significance" of the defendant's assistance to the government).

[4] Because a substantial assistance departure is to be about assistance and nothing else, "the sentencing court [may] not permissibly consider the sentencing factors announced in 18 U.S.C. § 3553(a) when exercising its discretion in deciding whether and how much to depart" under § 5K1.1. *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir.2005). One of the § 3553(a) factors is restitution. *See* 18 U.S.C. § 3553(a)(7) ("The court, in

determining the particular sentence to be imposed, shall consider ... the need to provide restitution to any victims of the offense."). The reason that restitution, like the other § 3553(a) factors, may not be considered in determining the extent of a substantial assistance departure is that it, like the other § 3553(a) factors, has nothing to do with the assistance the defendant rendered.

[5] In deciding how much to depart on substantial assistance grounds, the district court not only considered the need for restitution, it gave that factor controlling weight. The court did not discuss any of the § 5K1.1(a) assistance-related factors-not the significance and usefulness of the assistance; not the truthfulness, completeness, or reliability of the information or testimony provided; not the nature and extent of the assistance; not any injury, danger, or risk to the defendant resulting from the assistance; and not the timeliness of it. Instead, after indicating that it had considered Crisp's cooperation, the court said that it had "also taken into consideration the amount of restitution that is due to this bank" and explained that it was "most concerned that justice really requires restitution in this case." The court noted that restitution is enumerated in § 3553(a)(7) as an appropriate factor to consider at sentencing. It is, of course, but it is not to be considered when calculating the extent of a § 5K1.1(a) departure. None of the § 3553(a) factors are. *Davis*, 407 F.3d at 1271.

The court's error in allowing the need for restitution to skew the substantial assistance calculation is by itself enough to require that we vacate the sentence and remand for resentencing. *See McVay*, 447 F.3d at 1355. There is another reason, as well. Even if the district court had not based the extent of the § 5K1.1(a) departure***1290** on an improper consideration, its leap from the post-departure guidelines range of 6-12 months down to five hours would still have to be corrected.

## IV.

[6][7] In deciding upon a sentence, a court is directed by 18 U.S.C. § 3553(a) to consider the factors listed in that subsection. Our review of the reasonableness of the sentence in light of those factors is deferential. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). There is, however, a difference between deference and abdication. We do review the sentence, and in doing so we evaluate whether the sentence imposed serves the purposes reflected in § 3553(a). *Id.* If it does not, the sentence is an unreasonable one. In any given case there will be a range of sentences that are reasonable and the district court gets to pick within that range. *Id.* But there are also sentences outside the range of reasonableness which the district court may not impose. *See id.*

[8] After pronouncing its initial sentence of probation, the district court indicated that it had considered several of the factors listed in § 3553(a). It said "that the sentence reflects the seriousness of the offense, provides just

punishment, affords adequate deterrence and adequately protects the public." However, the court's primary concern, above all others, was restitution. It explained its motivation: "If the court were to impose even a short period of imprisonment, ... the goal of restitution would be thwarted because it would adversely affect [Crisp's] ability to earn a living so as to be able to make restitution payments." Although the court did not say so, its reasoning behind the probationary sentence obviously carried over to the five-hour sentence it imposed after learning that 18 U.S.C. § 3561(a) required some incarceration.

In a burst of startled candor at the sentence hearing, the government "with all due respect" told the district court that the five-hour sentence was "farcical." Although we are sympathetic with that notion, we need not go that far to decide that the sentence is unreasonable. The district court obviously imposed the five-hour sentence, to be served at a convenient time, in order to evade the strictures of the law forbidding a probationary sentence for a crime as serious as the one Crisp had committed. While a five-hour sentence is not probation, neither is it a real sentence of incarceration. There is a point at which the length of the incarceration is short enough to cross the line into no incarceration, and we would be inclined to say that five hours crosses that line, if the government had argued that the sentence violated § 3561(a). Otherwise, courts could impose sentences of five minutes or five seconds, making a mockery out of the statutory command. Because the government does not advance the argument that the sentence violated § 3561(a), however, we will not decide that issue. Instead, we confine ourselves to the reasonableness issue the government has raised.

For a number of reasons, we do not share the district court's view that a five-hour sentence is reasonable in this case. The scheme that Crisp engaged in was a serious one. It extended over a period of nearly eight months. The crime he committed is classified as a Class B felony. The loss Crisp and his co-conspirator inflicted on the victim totaled more than $480,000. The victim was a small, family-owned bank which the district court acknowledged was particularly vulnerable: "[T]he smaller banks really feel a loss such as this more so than larger banks." The purpose of 18 U.S.C. § 1014 is to protect financial institutions, and the Federal Deposit Insurance Corporation, against the ***1291** risk of loss from frauds like this one. *See United States v. Stoddart*, 574 F.2d 1050, 1053 (10th Cir.1978); *United States v. Lentz*, 524 F.2d 69, 71 (5th Cir.1975); *United States v. Pavlick*, 507 F.Supp. 359, 362-65 (M.D.Pa.1980).

For such a serious offense, however, Crisp did not receive so much as a slap on the wrist-it was more like a soft pat. The sentence essentially converts a theft by fraud into a loan that is unlikely to ever be repaid. The court gave Crisp five hours for a crime that caused $484,137.38 in harm. That equates to $96,827.48 per hour or $1,613.79 per minute

served in custody. The sentence does not reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense, as § 3553(a)(2)(A) requires, nor does it afford adequate deterrence to criminal conduct, as § 3553(a)(2)(B) requires.

In deciding on a sentence, district courts should consider the policies behind the applicable guidelines provision. 18 U.S.C. § 3553(a)(5). The commentary to U.S.S.G. § 2B1.1, which applies to Crisp's 18 U.S.C. § 1014 felony violation, states:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, *loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.*

U.S.S.G. § 2B1.1 cmt. backg'd (emphasis added). The court's sentencing theory turned that policy on its head. The more loss a defendant has caused, the greater will be the amount of restitution due, and the greater the incentive for a court that places the need for restitution above all else to shorten the sentence in order to increase the time for the defendant to earn money to pay restitution. Therefore, the more loss a criminal inflicts, the shorter his sentence. That approach cannot be deemed reasonable.

We do not mean to imply that there is even a fanciful hope that Crisp can meet the restitution obligations imposed on him. The PSI indicated that Crisp's financial condition would prevent him from making much of a dent in his $484,137.38 obligation to the bank. At the time of sentencing, Crisp had a net worth of $6,973 and monthly cash flow, net of living expenses, of just $954. Applying all of Crisp's net worth to the restitution obligation and even assuming that his cash flow remains the same, and that he will devote all of it to restitution, it would take Crisp (age 46 at sentencing) 41 years to pay off the amount of restitution he owes. His five-hour sentence and five years of supervisory release will be over long before then.

As the Eighth Circuit recently said: "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005) (discussing a § 5K1.1 departure). The circumstances of this case are not out of the ordinary at all, much less extraordinary enough to justify the extremely lenient sentence the court imposed. *Cf. United States v. Dean*, 414 F.3d 725, 729 (7th Cir.2005) (adopting a rule that "the farther the judge's sentence departs from the guidelines sentence (in either direction-that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer"); *accord United States v. Smith*, 445 F.3d 1, 4 (1st Cir.2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir.2006); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir.2006);

***1292** *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir.2006).

Other courts have found that a district court's "unjustified reliance upon any one [§ 3553(a)] factor is a symptom of an unreasonable sentence." *United States v. Rattoballi*, 452 F.3d 127, 137 (2d Cir.2006); *accord United States v. Ture*, 450 F.3d 352, 358-59 (8th Cir.2006); *United States v. Hampton*, 441 F.3d 284, 288-89 (4th Cir.2006); *see also United States v. Cage*, 451 F.3d 585, ----, 2006 WL 1554674, at *9 (10th Cir.2006); *United States v. Givens*, 443 F.3d 642, 646 (8th Cir.2006). That is what happened in this case. The district court focused single-mindedly on the goal of restitution to the detriment of all of the other sentencing factors. An unreasonable approach produced an unreasonable sentence.

**V.**

For these reasons, we vacate Crisp's sentence and remand the case to the district court for resentencing in a manner consistent with this opinion.

VACATED AND REMANDED.

C.A.11 (Ala.),2006.
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454 F.3d 1285, 19 Fla. L. Weekly Fed. C 746

Briefs and Other Related Documents (Back to top)

- 2005 WL 4664974 (Appellate Brief) Reply Brief of Appellant (Aug. 29, 2005)
- 2005 WL 4664973 (Appellate Brief) Brief of Appellee Michael A. Crisp (Aug. 4, 2005)
- 2005 WL 4664972 (Appellate Brief) Brief of Appellant (Jun. 27, 2005)
- 05-12304 (Docket) (Apr. 25, 2005)

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Briefs and Other Related Documents

United States Court of Appeals,Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Lavell DEAN, Defendant-Appellant.
**No. 04-3172.**

Argued June 3, 2005.
Decided July 7, 2005.

**Background:** Defendant was convicted in the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, Chief Judge, for being a felon in possession of a firearm, and was sentenced to 120 months in prison. Defendant appealed, challenging his sentence.

**Holdings:** The Court of Appeals, Posner, Circuit Judge, held that:

1(1) defendant was entitled to have sentencing court make factual findings on issues of whether he possessed the firearm in connection with another felony offense and whether firearm was stolen, before imposing sentencing increases for that conduct, and

2(2) sentencing judge did not have a duty to make an explicit, articulated analysis of any of the statutory sentencing factors.

Vacated and remanded for resentencing.

West Headnotes

**[1] Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases
Defendant convicted for being a felon in possession of a firearm was entitled to have sentencing court make factual findings based upon testimony and other evidence, on issues of whether he possessed the firearm in connection with another felony offense and whether firearm was stolen, before imposing sentencing increases for that conduct, where defendant disputed that conduct. U.S.S.G. §§ 2K2.1(b)(5), 6A1.3, p.s., 18 U.S.C.A.

**[2] Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings

350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases

A sentencing judge does not have a duty to make an explicit, articulated analysis of any of the statutory sentencing factors, unless the defendant invokes a particular statutory factor or factors, or if a particular factor is decisive imposing a sentence. 18 U.S.C.A. § 3553(a).

**[3] Sentencing and Punishment 350H 996**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk996 k. Sufficiency. Most Cited Cases

Sentencing judges need not rehearse on the record all of the considerations that the sentencing statute lists; it is enough to calculate the Sentencing Guidelines range accurately and explain why, if the sentence lies outside it, the defendant deserves more or less. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases

Explicit factfinding of the statutory sentencing factors by a sentencing court is required only if contested facts are material to the judge's sentencing decision. 18 U.S.C.A. § 3553(a).

**[5] Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases

If a sentencing judge thinks that a particular contested statutory sentencing factor may be decisive to the choice of sentence, such as the defendant's mental or emotional state, he must resolve the factual issue in the usual way, that is, by making findings on the basis of evidence, just as he would have to do in applying the sentencing guidelines if the calculation of the guidelines sentence depends on the resolution of a factual dispute. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[6] Jury 230 34(6)**

230 Jury
230II Right to Trial by Jury

230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(6) k. In General. Most Cited Cases
(Formerly 230k34(1))
Only when factual determinations require a particular sentence does the Sixth Amendment right to jury trial come into play, imposing formalities on factual determinations, other than criminal history, that influence sentence length. U.S.C.A. Const.Amend. 6.

**[7] Sentencing and Punishment 350H 987**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk987 k. Scope of Inquiry. Most Cited Cases
A defendant must be given an opportunity by the sentencing court to draw the judge's attention to any statutory sentencing factor that might warrant a sentence different from the Sentencing Guidelines sentence. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.
West CodenotesRecognized as Unconstitutional18 U.S.C.A. § 3553(b).Limitation RecognizedU.S.S.G. §§ 2K2.1(b)(4), (5), 5G1.1(a), 6A1.3, 18 U.S.C.A.

***726** James L. Santelle (argued), Lisa A. Wesley, Michelle L. Jacobs, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.
Donald J. Chewning (argued), Radosevich, Mozinski & Cashman, Manitowoc, WI, for Defendant-Appellant.

Before CUDAHY, POSNER, and WILLIAMS, Circuit Judges.
POSNER, Circuit Judge.
A federal jury convicted Lavell Dean of being a felon in possession of a firearm, and the district judge sentenced him to 120 months in prison. The appeal, which challenges only the sentence, presents an important issue-the role of 18 U.S.C. § 3553(a) in sentencing-that was presented, but left unresolved, by *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

The Presentence Investigation (PSI) report on Dean recounted the following facts. A squad car rolled up in front of a house in Milwaukee that the police suspected of being the site of illegal drug dealing. Two men, one of them later identified as Dean, were standing in front of the house, and when they saw the police car they scurried onto the enclosed porch of the house. The policeman followed, and as he approached he noticed that Dean seemed to place something on the floor of the porch and something else under a book on a shelf; Dean then followed the other man into the house. When the policeman reached the porch, he noticed on the floor a loaded pistol (later discovered to have been stolen), on the shelf ammunition for the pistol, and in a flower pot near the gun crack cocaine in ziplock bags. Police arrested Dean and the other man. A

cellphone taken from Dean rang, and an officer answered it and heard the caller ask Dean for "two," which the officer thought meant two "rocks" of crack. More crack was found in the house, in a bedroom into which Dean's companion had run; but the house did not belong to Dean and, so far as appears, he did not live there.

The officer who had answered the phone was prepared to testify at the sentencing hearing about it and also about the crack found in the house, but the judge decided not to take testimony. Yet in computing Dean's sentence under the sentencing guidelines he upped the guidelines range four levels on the basis of the government's contention that Dean not only was the possessor of the pistol found by the policeman on the porch, but had possessed it "in connection with another felony offense," namely the sale of crack. U.S.S.G. § 2K2.1(b)(5). The judge imposed a further two-level increase on the basis of the ***727** government's argument that the pistol had been stolen. § 2K2.1(b)(4). The effect of these two boosts was to increase the sentencing range to 135 to 168 months. But as the statutory maximum for Dean's offense was only 120 months, that was the sentence the judge imposed.

The sentencing hearing was conducted after our decision in *Booker* that the Supreme Court later affirmed, and so the judge treated the guidelines as merely advisory. To decide whether the guidelines sentence of 120 months (when the sentence indicated by the guidelines exceeds the statutory maximum, the statutory maximum becomes the guidelines sentence, U.S.S.G. § 5G1.1(a)) was proper, the judge said he'd have "to consider the gravity of the offense, the character of the Defendant, the need to protect the community in this and any disposition," and "the elements of deterrence, punishment, rehabilitation, retribution, all of those factors that go toward assuring the safety of the community, and that an appropriate sentence is rendered." He proceeded to discuss those factors at some length, even to the extent of noting that "defendant has three siblings, and he has disappointed his sisters. His mother said he is a beautiful person. Nice, easygoing guy, although he has a quick temper. His two brothers are incarcerated at different institutions I believe in this State for various offenses. And-however, those [family members] that are not in prison seem to be supportive of the Defendant." The judge concluded that "the guidelines are not far off on this sentence. Fairly accurate."

[1] The Supreme Court's decision in *Booker* requires the sentencing judge first to compute the guidelines sentence just as he would have done before *Booker,* and then-because *Booker* demoted the guidelines from mandatory to advisory status-to decide whether the guidelines sentence is the correct sentence to give the particular defendant. The decision to add four levels to Dean's base offense level because he possessed the gun in connection with illegal drug dealing, and two additional levels because the gun was stolen, was a stage-one determination that brought the guidelines sentence up to the statutory

maximum (without those enhancements, the sentencing range would have been only 77 to 96 months), and Dean is right that the determination was made incorrectly. Rule 32 of the Federal Rules of Criminal Procedure, and in fact the guidelines themselves, require the judge to rule on any disputed portion of a PSI report, Fed.R.Crim.P. 32(i)(3)(B); U.S.S.G. § 6A1.3; *United States v. Sykes*, 357 F.3d 672, 674-75 (7th Cir.2004); *United States v. Cureton*, 89 F.3d 469, 472-74 (7th Cir.1996); *United States v. Ameline*, 409 F.3d 1073, 1085-86, 2005 WL 1291977, at *12 (9th Cir. June 1, 2005) (en banc), and the judge didn't do that. He treated the government's factual contentions (that Dean possessed the pistol in connection with drug dealing and that the pistol was stolen) as "arguments" that he could accept or reject, or factors to which he could give more or less weight, without having to determine whether the factual underpinnings of the government's arguments were true. And so he thought it unnecessary to hear testimony concerning the contested issue of the cellphone call, even though the call was the critical evidence that Dean was a drug dealer rather than merely a customer-for remember that it was not his house in which the drugs were found.

The government argues that the judge didn't have to take testimony from the officer because Dean presented no evidence that the PSI version of the call was incorrect. But his denial that the officer's version was correct would have been evidence if given under oath at the sentencing ***728** hearing, and it was bolstered by Dean's claim, for which he might have been able to present third-party evidence, that no one "on the street" calls him by his real name. He had no opportunity to present his own or third-party testimony because, as we said, the judge didn't think that *Booker* requires a sentencing judge to resolve a factual dispute in order to be permitted to give weight to a factual assertion.

So Dean must be resentenced. But we must also consider his other complaint because it bears on the scope of the resentencing hearing. The complaint is that the judge did not do an adequate job of considering the sentencing factors set forth in 18 U.S.C. § 3553(a). That statute reads, so far as bears on the issue, as follows:

**(a) Factors to be considered in imposing a sentence.**-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. The court, in determining the particular sentence to be imposed, shall consider-

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(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 ....
**(3)** the kinds of sentences available;

* * * * * *
**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
**(7)** the need to provide restitution to any victims of the offense.

Until *Booker,* the uses that a sentencing judge could make of the factors listed in section 3553(a) were severely circumscribed by the next subsection in order to preserve the mandatory character of the guidelines. 18 U.S.C. § 3553(b). But now that they are advisory, while section 3553(a) remains unchanged, judges will have to consider the factors that the section tells them to consider. "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing." *United States v. Booker, supra,* 125 S.Ct. at 766; see also *id.* at 764-65. "*Booker* suggests that the sentencing factors articulated in § 3553(a), which the mandatory application of the Guidelines made dormant, have a new vitality in channeling the exercise of sentencing discretion." *United States v. Trujillo-Terrazas,* 405 F.3d 814, 819 (10th Cir.2005).

[2] Dean insists that it is the duty of the sentencing judge, in every case and whether or not the defendant invokes any of the factors mentioned in section 3553(a), to make an explicit, articulated analysis of all of them a part of the sentencing process. This, he says, Chief Judge Randa failed to do. Dean also faults the judge for having listed "retribution" as a factor to be considered in sentencing. Dean points out that section 3553(a) doesn't mention retribution. That is true, but he has overlooked the reference in the section to "just punishment"; an influential body of thought teaches that retributive justice *is* justice in criminal punishments. E.g., ***729** Michael Tonry, "Sentencing: What's at Stake for the States?: Obsolescence and Immanence in Penal Theory and Policy," 105 *Colum. L.Rev.* 1233, 1240 (2005); Michele Cotton, "Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment," 37 *Am.Crim. L.Rev.* 1313, 1361-62 (2000).

Mention of "just punishment" brings to the surface the practical objection to Dean's submission. If in every federal criminal case the sentencing judge must touch all the bases in section 3553(a) even if not asked to do so by either side, the *Booker* decision will have unwittingly succeeded in doubling the amount of work involved in sentencing. The judge must, as we know, compute the guidelines sentence, just as he had to do before *Booker.* But in addition, according to Dean, the judge must state on the record how each of the factors in section 3553(a) figured in his deciding what sentence to give the defendant. It is not at all helpful that many of the factors are vague and, worse perhaps, hopelessly open-ended. How far, for example, is the

judge to delve into the "characteristics" of the defendant? How far is he to go in investigating the possibility of "unwarranted sentencing disparities"? Must he elaborate upon the meaning of "promote respect for law"? And must he discuss all the rival theories of "just punishment" (retributive, deterrent, rehabilitative, incapacitative)?

Section 3553(a), unlike the guidelines themselves after *Booker,* is mandatory. *United States v. Booker, supra,* 125 S.Ct. at 764-65. The sentencing judge cannot, after considering the factors listed in that statute, import his own philosophy of sentencing if it is inconsistent with them. And therefore he can, as a matter of prudence, unbidden by either party, do what Dean wants him to do-write a comprehensive essay applying the full panoply of penological theories and considerations, which is to say everything invoked or evoked by section 3553(a)-to the case before him.

[3] But that is not required; like Chief Judge Randa in the present case, the sentencing judge can discuss the application of the statutory factors to the defendant not in checklist fashion but instead in the form of an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant. *United States v. Hadash,* 408 F.3d 1080, 1084, 2005 WL 1250331, at *3 (8th Cir. May 27, 2005); *United States v. Mares,* 402 F.3d 511, 518-20 (5th Cir.2005). "Judges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less." *United States v. George,* 403 F.3d 470, 472-73 (7th Cir.2005). This shortcut is justified by the indeterminate and interminable character of inquiry into the meaning and application of each of the "philosophical" concepts in which section 3553(a) abounds.

However, the farther the judge's sentence departs from the guidelines sentence (in either direction-that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed. (Cf. *United States v. Dalton,* 404 F.3d 1029, 1033-34 (8th Cir.2005), reversing a 60-month sentence when the minimum guidelines sentence was four times as long.) But although the judge must therefore articulate the factors that determined the sentence that he has decided to impose, his duty "to consider" the statutory factors is not a duty to make ***730** findings, as we have held in dealing with the directive of the Victim and Witness Protection Act that the sentencing judge "shall consider" specified factors in deciding whether to order a criminal defendant to pay restitution. 18 U.S.C. § 3663(a)(1)(B)(i). Not only are findings not required (with a qualification noted below), but "lack of findings coupled with an award of full restitution implies that the defendant has failed to carry this burden." *United States v.*

*Ahmad*, 2 F.3d 245, 247 (7th Cir.1993).

[4][5] Explicit factfinding *is* required, however, if, though only if, contested facts are material to the judge's sentencing decision. A judge who thinks that a particular contested characteristic of a defendant may be decisive to the choice of sentence, such as the defendant's mental or emotional state, must resolve the factual issue in the usual way, that is, by making findings on the basis of evidence, just as he would have to do in applying the sentencing guidelines if, as in the present case, the calculation of the guidelines sentence depends on the resolution of a factual dispute.

[6] This does not mean trial by jury, proof beyond a reasonable doubt, consideration limited to evidence that satisfies the requirements of admissibility that are found in the Federal Rules of Evidence, or any other such formalities. U.S.S.G. § 6A1.3; *United States v. Polson*, 285 F.3d 563, 566-67 (7th Cir.2002); *United States v. Kroledge*, 201 F.3d 900, 908-09 (7th Cir.2000); *United States v. Hough*, 276 F.3d 884, 891 (6th Cir.2002); *United States v. Atkins*, 250 F.3d 1203, 1212-13 (8th Cir.2001); see also 18 U.S.C. § 3661. Only when factual determinations *require* a particular sentence does the Sixth Amendment come into play, imposing formalities on factual determinations (other than criminal history) that influence sentence length. *United States v. Booker*, *supra*, 125 S.Ct. at 750; see also *Shepard v. United States*, 544 U.S. 13, ---- - ----, 125 S.Ct. 1254, 1262-63, 161 L.Ed.2d 205 (2005); *United States v. Carter*, 410 F.3d 942, 954, 2005 WL 1367195, at *9 (7th Cir. June 10, 2005); *United States v. Iskander*, 407 F.3d 232, 242-43 (4th Cir.2005); *United States v. Mashek*, 406 F.3d 1012, 1014-15 (8th Cir.2005); *United States v. Coles*, 403 F.3d 764, 766 (D.C.Cir.2005). With the guidelines now merely advisory, factfindings that determine the guidelines sentence do not determine the actual sentence, because the sentencing judge is not required to impose the guidelines sentence; and so the Sixth Amendment is not in play.

[7] Our focus thus far has been on cases in which the sentencing judge is minded to impose a sentence outside the guidelines range. Recognizing that the guidelines are promulgated and continually revised by an agency staffed by experts (the Sentencing Commission), the court in *United States v. Mares*, *supra*, 402 F.3d at 519, said that "if the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines .... When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required." But the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for such a variant sentence to be reasonable and thus within the sentencing

judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by ***731** section 3553(a), which as we have stressed is mandatory. *Simon v. United States*, 361 F.Supp.2d 35, 39-41 (E.D.N.Y.2005); *United States v. Kelley*, 355 F.Supp.2d 1031, 1035-37 (D.Neb.2005); *United States v. Ranum*, 353 F.Supp.2d 984, 985-86 (E.D.Wis.2005).

The judgment is vacated and the case remanded to the district court for further proceedings concerning the two enhancements, and for resentencing on the basis of what those proceedings yield.

C.A.7 (Wis.),2005.
U.S. v. Dean
414 F.3d 725

Briefs and Other Related Documents (Back to top)

• 04-3172 (Docket) (Aug. 23, 2004)

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H
Briefs and Other Related Documents

United States Court of Appeals,Fifth Circuit.
UNITED STATES of America,
Plaintiff-Appellant,
v.
David Vincent DUHON,
Defendant-Appellee.
**No. 05-30387.**

Feb. 17, 2006.

**Background:** Defendant was convicted, upon a guilty plea, in the United States District Court for the Western District of Louisiana, Tucker L. Melancon, J., of possessing child pornography, and was sentenced to 60 months probation. Government appealed, challenging the sentence.

**Holdings:** The Court of Appeals, Benavides, Circuit Judge, held that:

10(1) sentence of 60 months probation was unreasonable;

11(2) District Court's failure to calculate correct Sentencing Guidelines range deprived the sentence imposed of great deference; and

15(3) disparity between defendant's and codefendant's sentences was not "unwarranted," and thus, could not be considered as relevant statutory sentencing factor.

Vacated and remanded for resentencing.

Emilio M. Garza, Circuit Judge, filed opinion, concurring in part, and concurring in the judgment.

West Headnotes

**[1] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
The district court's interpretation of the Sentencing Guidelines is reviewed *de novo*. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Criminal Law 110 1158(1)**

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(1) k. In General. Most Cited Cases

The Court of Appeals accept the district court's findings of fact at sentencing unless clearly erroneous.

**[3] Sentencing and Punishment 350H 30**

350H Sentencing and Punishment
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk30 k. In General. Most Cited Cases
The ultimate sentence is reviewed for unreasonableness with regard to the statutory sentencing factors. 18 U.S.C.A. § 3553(a).

**[4] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases

**Sentencing and Punishment 350H 800**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk800 k. In General. Most Cited Cases
Before imposing a sentence outside the relevant Sentencing Guidelines range, a district court must consider the Sentencing Guidelines, and calculate the Guidelines range. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[5] Sentencing and Punishment 350H 372**

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk369 Findings and Statement of Reasons
350Hk372 k. Necessity. Most Cited Cases
In imposing a sentence outside the applicable Sentencing Guidelines range, the court should articulate fact-specific reasons for its sentence. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[6] Sentencing and Punishment 350H 373**

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk369 Findings and Statement of Reasons
350Hk373 k. Sufficiency. Most Cited Cases
In imposing a sentence outside the applicable Sentencing Guidelines range, the court need not make a checklist recitation of the statutory sentencing factors. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[7] Sentencing and Punishment 350H 30**

350H Sentencing and Punishment
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk30 k. In General. Most Cited Cases
The farther a sentence varies from the applicable Sentencing Guidelines sentence, the more compelling the justification based on the statutory sentencing factors must be. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[8] Criminal Law 110 1134(3)**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases
In reviewing for reasonableness of a sentence imposed outside the applicable Sentencing Guidelines range, the appellate court assesses whether the statutory sentencing factors support the sentence. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[9] Sentencing and Punishment 350H 58**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk58 k. Manner and Effect of Weighing or Considering Factors. Most Cited Cases

**Sentencing and Punishment 350H 59**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk59 k. Effect of Applying Invalid Factor. Most Cited Cases
A sentence outside the applicable Sentencing Guidelines range is "unreasonable" where it (1) does not account for a statutory sentencing factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper statutory factor, or (3) represents a clear error of judgment in balancing the sentencing factors. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[10] Sentencing and Punishment 350H 863**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk863 k. Physical Illness or Infirmity. Most Cited Cases

**Sentencing and Punishment 350H 870**

350H Sentencing and Punishment
350HIV Sentencing Guidelines

350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk870 k. Other Particular Grounds. Most Cited Cases

**Sentencing and Punishment 350H 1859**

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(C) Factors Related to Offense
350Hk1859 k. Obscenity and Lewdness. Most Cited Cases
Imposition of sentence of 60 months probation was "unreasonable" for defendant convicted of possessing child pornography; sentence was outside the applicable Sentencing Guidelines range, probation was not available sentence for crime of conviction under advisory Guidelines, sentencing court relied on defendant's back injury, which was not ordinarily relevant to support downward departure from the Guidelines range, sentencing court failed to consider seriousness of offense, as reflected by its incorrect comments that defendant's offense was not harmful to children because he did not physically molest anyone, and court improperly considered disparity with codefendant's sentence, as sentence imposed for codefendant reflected his substantial assistance to the government. 18 U.S.C.A. § 3553(a); U.S.S.G. §§ 5B1.1, 5H1.4, p.s., 5K1.1, p.s., 18 U.S.C.A.

**[11] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
District Court's failure to calculate correct Sentencing Guidelines range before sentencing defendant convicted of possessing child pornography deprived the sentence imposed of great deference, and was factor to be considered in determining reasonableness of the sentence. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[12] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
A sentencing court cannot evade its duty under to correctly calculate the Sentencing Guideline range with the expedient of saying the Guidelines would not affect the result. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[13] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases

**Sentencing and Punishment 350H 2030**

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(I) Revocation
350HIX(I)3 Proceedings
350Hk2027 Findings of Fact and Conclusions of Law
350Hk2030 k. Sufficiency. Most Cited Cases
In a situation in which imposition of a probationary sentence varies from the applicable Sentencing Guidelines range and also from the kinds of sentences available under the Guidelines, the sentencing court, at a minimum, should acknowledge that it is aware that probation would not ordinarily be available under the Guidelines. 18 U.S.C.A. § 3553(a)(4); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[14] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
A sentencing court that relies on any factors which are deemed by the Sentencing Guidelines to be prohibited or discouraged should address the Guidelines provisions and decide what weight, if any, to afford them before imposing the sentence. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[15] Sentencing and Punishment 350H 56**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk56 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
Disparity between defendant's and codefendant's sentences imposed for possession of child pornography was not "unwarranted," and thus, could not be considered as relevant statutory sentencing factor, where codefendant's sentence reflected a downward departure from the Sentencing Guidelines range based on his substantial assistance to the government. 18 U.S.C.A. § 3553(a)(6); U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

**[16] Sentencing and Punishment 350H 39**

350H Sentencing and Punishment
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk39 k. Uniform and Disparate Treatment of Offenders. Most Cited Cases
A sentencing disparity intended by Congress is not "unwarranted," and thus, may not be considered as relevant statutory sentencing factor. 18 U.S.C.A. § 3553(a)(6).
West Codenotes Limitation Recognized U.S.S.G. §§ 2A3.1(a), (b)(2)(A), (b)(6), 2G2.2(b)(5), 2G2.4, 3E1.1, 5B1.1,

5H1.4, 5K1.1, 18 U.S.C.A.

***713** Camille Ann Domingue, Asst. U.S. Atty. (argued), Lafayette, LA, for U.S.
Rebecca L. Hudsmith, Fed. Pub. Def. (argued), Lafayette, LA, for Duhon.

Appeal from the United States District Court for the Western District of Louisiana.

Before REAVLEY, GARZA and BENAVIDES, Circuit Judges.
BENAVIDES, Circuit Judge:
The Government appeals the district court's post-*Booker*, non-Guideline sentence. We hold that the sentence is unreasonable with regard to the sentencing factors enumerated in 18 U.S.C. § 3553(a) (2000).

## I. Background

Appellee David Duhon pleaded guilty to one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(2000). Duhon submitted a factual stipulation in connection with his plea. He acknowledged that FBI agents found images of children engaged in sexually explicit activity on his computer. Duhon admitted that he had downloaded the pictures from the Internet.

### A. The Presentence Report and First Sentencing Hearing

The presentence report ("PSR") determined a base offense level of fifteen. U.S.S.G. § 2G2.4 (2002).[FN1] It recommended three two-level enhancements under section 2G2.4(b) because (1) the material involved minors under twelve, (2) the offense involved the possession of ten or more images, and (3) Duhon used a computer. The PSR also subtracted three levels for acceptance of responsibility. U.S.S.G. § 3E1.1. Thus, it arrived at an adjusted offense level of eighteen. Given Duhon's category I criminal history, the PSR calculated the Guideline range at twenty-seven to thirty-three months imprisonment.

FN1. All references to the Sentencing Guidelines are to the 2002 volume, which was in effect at the time of Duhon's offense. Both the PSR and the district court used the 2002 Guidelines to calculate Duhon's sentencing range because the newer Guidelines in effect at the time of Duhon's sentencing were less favorable to him. *See United States v. Domino*, 62 F.3d 716, 720 (5th Cir.1995).

Duhon objected to the PSR's suggested enhancements for the age of the children and number of images involved, citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). He argued that these facts had neither been admitted to nor found by a jury beyond a reasonable doubt. He also moved for a downward departure, claiming that a back injury he suffered in 1987 was an extraordinary physical impairment that

warranted ***714** a sentence below the applicable Guideline range. *See* U.S.S.G. § 5H1.4.

At a sentencing hearing on August 25, 2004, the district court denied Duhon's motion for a downward departure. Considering Duhon's *Blakely* motion, the court decided to stay sentencing until the Supreme Court issued its ruling in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Before adjourning, the court expressed hostility toward the Sentencing Guidelines, lamented Congress's criminalization of possessing child pornography, and promised that he would give Duhon "the lowest sentence I can give consistent with my oath."

B. The Post-*Booker* Sentencing Hearing

Following the *Booker* ruling, the sentencing was reconvened on February 28, 2005. Over the Government's objection, the district court ruled that *Booker* precluded it from using facts not admitted by Duhon to enhance his sentence, even under an advisory regime. The court calculated a Guideline range without using the enhancements for the age of the children or the number of images involved in the offense. This calculation resulted in an offense level of fourteen and an advisory term of imprisonment of fifteen to twenty-one months. The court announced, however, that it would not follow the Guidelines, characterizing them as "totally discretionary." It stated that it would use the discretion granted by *Booker* to "deviate from the United States Sentencing Commission Guidelines and impose a sentence that ... is appropriate based on the facts."[FN2] The court explained why it thought a lesser sentence was appropriate and sentenced Duhon to sixty months probation.

FN2. The district court used the term "deviation" to distinguish its sentence from sentences supported by "departures" made under authority of the Guidelines. In *United States v. Mares*, we adopted the phrase "non-Guideline sentence" to express this distinction. 402 F.3d at 519 n. 7 (5th Cir.2005).

The Government reiterated its objection to the court's calculation of the Guideline range. The court responded that it would have imposed the same sentence regardless of which advisory Guideline range was correct. The Government claims on appeal that the probationary sentence imposed by the district court is unreasonable.

II. Standard of Review

[1][2][3] The district court's interpretation of the Guidelines, even after *Booker*, is reviewed *de novo*. *See United States v. Smith*, 440 F.3d 704 at n. 2 (5th Cir.2006). We accept the district court's findings of fact unless clearly erroneous. *United States v. Creech*, 408 F.3d 264, 270 n. 2 (5th Cir.2005). The ultimate sentence is reviewed for "unreasonableness" with regard to the statutory sentencing factors

enumerated in section 3553(a). *Booker*, 125 S.Ct. at 765.[FN3]

> FN3. The relevant factors include:
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (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 ... medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for-
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ...;
> (5) any pertinent policy statement ...;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct ....
> 18 U.S.C. § 3553(a).

***715** [4][5][6][7] In an opinion filed concurrently with this one, we address non-Guideline sentences like that at issue here. *See Smith*, 440 F.3d 704. Before imposing a non-Guideline sentence, a district court must consider the Sentencing Guidelines. *Id.* at 707; *United States v. Mares*, 402 F.3d 511, 518-19 (5th Cir.2005). This consideration requires that the court calculate the appropriate Guideline range. *E.g., Smith*, 440 F.3d at 707. Additionally, the court should articulate fact-specific reasons for its sentence. *Mares*, 402 F.3d at 519. Those reasons should be "consistent with the sentencing factors enumerated in section 3553(a)." *Smith*, 440 F.3d at 707. The court need not make "a checklist recitation of the section 3553(a) factors." *Id.* at 707. However, "the farther a sentence varies from the applicable Guideline sentence, the more compelling the justification based on factors in section 3553(a) must be." *Id.* (internal quotation marks omitted).

[8][9] In reviewing for reasonableness, we assess whether the statutory sentencing factors support the sentence. *Id.* at 707; *see United States v. Long Soldier*, 431 F.3d 1120, 1123 (8th Cir.2005). A non-Guideline sentence is unreasonable where it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *Smith*, 440 F.3d at 707-08; *see Long Soldier*, 431 F.3d at 1123; *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.2005).

## III. Discussion

[10] The sentence at issue does properly take into account two section 3553(a) factors. First, under subsection (1), the sentence reflects the history and characteristics of the defendant. In imposing its sentence, the court emphasized Duhon's lack of criminal record and letters on his behalf from family and friends. It explained its belief that Duhon was unlikely to reoffend. Second, the court reasoned that Duhon's psychiatric rehabilitation would be best served with a probationary sentence that would allow him to continue treatment with his current psychologist. This was consistent with subsection (2)(D)'s mandate to consider the need to provide the defendant with medical care in the most effective manner.

Under section 3553(a), however, a sentence must be supported by the *totality* of the relevant statutory factors. *United States v. McBride*, 434 F.3d 470, 477 (6th Cir.2006). The sentence at issue fails to account for factors that should have received significant weight and accords significant weight to an improper or irrelevant factor. Specifically, the sentence (1) does not adequately take into account the Sentencing Guidelines, (2) fails to sufficiently reflect the seriousness of Duhon's offense, and (3) improperly gives weight to the Guideline sentence of a differently-situated codefendant. As a result, the sentence is unreasonable.

A. Failure to Adequately Account for Factors

*1. The Sentencing Guidelines*

a. The Guideline Range

[11] It is undisputed that the district court failed to determine the correct Guideline range. We have held that the applicable range "should be determined in the same manner as before *Booker*/*Fanfan*" and that a judge may still find all the ***716** facts supporting a sentence. *Mares*, 402 F.3d at 519. Thus, the court's conclusion that it could not adjust Duhon's Guideline range upwardly based on facts neither admitted by Duhon nor proven beyond a reasonable doubt was incorrect. The correct sentencing range was twenty-seven to thirty-three months imprisonment, not the fifteen to twenty-one months considered by the court.

Duhon argues that this error was harmless because the court stated that it would have imposed the same non-Guideline sentence regardless of the Guideline range. Duhon is correct that the sentence was imposed in spite of rather than "as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742(f). In *Villegas*, we recognized that section 3742(f) survives *Booker*. Under that statute, we review *de novo* and vacate a sentence imposed "as a result" of a Guidelines error without reaching the sentence's ultimate reasonableness. *Villegas*, 404 F.3d at 362. Because Duhon's non-Guideline sentence did not directly "result" from the Guidelines error, it need not be vacated under *Villegas* based

solely on the miscalculation.

But it does not follow from this that the error in calculating the Guideline range is irrelevant to our second-step review for reasonableness. *Mares* recognized that if the district court commits a "legal error" in required sentencing procedures, the sentence may not merit the "great deference" ordinarily accorded on reasonableness review. 402 F.3d at 520. Among those sentencing procedures required by *Mares* is that the district court calculate the Guideline range before imposing a non-Guideline sentence. *Id.* at 519; *United States v. Angeles-Mendoza*, 407 F.3d 742, 746 (5th Cir.2005).

[12] This requirement reflects *Booker*'s mandate that sentencing courts "take account" of the Guidelines along with other sentencing goals. *Booker*, 125 S.Ct. at 764-65 (emphasis added). In light of its duty to "account" for the Guidelines, the court's statement that it would impose the same sentence regardless of which range applied, makes the sentence more, rather than less, problematic. The court cannot reasonably impose the same sentence regardless of the correct advisory range anymore than it could reasonably impose the same sentence regardless of the seriousness of the offense. Both are sentencing factors that must be taken into account under section 3553(a). *See Smith*, 440 F.3d at 707 (holding that the Guideline range must be a "frame of reference" for a non-Guideline sentence). A sentencing court cannot evade its duty under *Booker* and *Mares* to correctly calculate the Guideline range with the expedient of saying the Guidelines would not affect the result. Accordingly, the miscalculation deprives the sentence of "great deference" and is a factor to be considered in assessing the reasonableness of the sentence.

b. Other Guidelines Provisions

Under *Booker*, a sentence must account for more than just the applicable Guideline range. Section 3553(a) requires the court to consider the "kinds of sentence" available under the Guidelines as well as "any pertinent policy statement." In the case at bar, the district court ignored Guidelines provisions relating to probation and physical injury.

[13] First, the sentence deviates from a relevant advisory Guideline disallowing probation in Duhon's case. The Guidelines do not authorize a sentence of probation where the applicable Guideline range is in Zone C or D of the Sentencing Table. *See* U.S.S.G. §§ 5B1.1 cmt. n. 2, 5C1.1(f). Both Duhon's correct Guideline range and the range incorrectly used by the district court fell within Zone D. *See* U.S.S.G. ***717** § 5A. Thus, the probationary sentence varies, not only from the applicable Guideline range, but also from the "kinds of sentence" available under the Guidelines. *See* 18 U.S.C. 3553(a)(4). In such a situation, the court, at a minimum, should acknowledge that it is aware that probation would not ordinarily be available under the advisory Guidelines.

[14] Second, the sentence diverges from a

policy statement prohibiting the consideration of physical condition. The district court considered Duhon's back injury in imposing its sentence. Section 5H1.4 of the Sentencing Guidelines states that "[p]hysical condition ... is not ordinarily relevant in determining whether a departure may be warranted." At the pre-*Booker* sentencing hearing, the court acknowledged that the Guidelines would not permit a downward departure for Duhon's physical condition. At the post-*Booker* hearing, however, the district court relied on Duhon's back injury without explaining its deviation from the advisory policy statement. We agree with the Sixth Circuit that a district court that "relies on any factors which are deemed by the Guidelines to be prohibited or discouraged ... [should] address these provisions and decide what weight, if any, to afford them in light of *Booker*." *Jackson*, 408 F.3d at 305 n. 3 (6th Cir.2005); *see also United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir.2005) (stating that the district court must consider the availability of departure authority before imposing a non-Guideline sentence). The court's reliance on Duhon's physical condition without addressing the relevant policy statement is especially troubling here since the court found that Duhon no longer sees a physician and does not take any prescription medications for his back injury.[FN4]

FN4. The court also noted that Duhon's disability payments would be suspended during his incarceration. It acknowledged that Duhon was married and had a nineteen-year-old son. To the extent that the court took into account that Duhon's family might suffer some financial hardship, it should have similarly addressed the policy statement discouraging this as a ground for departure. *See* U.S.S.G. § 5H1.6.

The court's failure to appropriately take into account the Sentencing Guidelines is significant. It is not necessary for us to decide, however, whether this alone is sufficient to render Duhon's sentence unreasonable. The sentence also fails to adequately reflect the seriousness of Duhon's offense and inappropriately gives weight to the Guideline sentence of Duhon's codefendant.

*2. Seriousness of the Offense*

Under section 3553(a)(2)(A)-(B), the sentence imposed must reflect the seriousness of the offense, promote respect for the law, and afford adequate deterrence. Our review of the sentencing transcript convinces us that the district court severely misjudged the seriousness of Duhon's possession of child pornography. As a result, the sentence fails to advance adequately the objectives of subsections (a)(2)(A)-(B).

The court's comments at Duhon's hearings are replete with criticism of child pornography laws and suggest that the court believed Duhon's offense was not harmful to children

because Duhon himself did not physically molest anyone. At Duhon's plea hearing, the district court stated:

There are those who think that the way Congress has reacted to child pornography is pretty much one size fits all .... [T]hey've got a lot of folks out there that ... will take advantage of young people in their day life [sic] or try to make contact with them. That's on the one hand. On the other hand, its my belief ***718** ... that everybody that does what you have admitted to doing here today doesn't fall in that category, but the law doesn't make much of a distinction, frankly, and that's unfortunate.

Similarly, at the first sentencing hearing, the court minimized the offense and suggested that prosecuting child pornography cases was a waste of time and resources:

[The Assistant United States Attorneys] work very hard for all of us. They do stuff like get really bad guys that are killing our society with drugs. They protect us against terrorists. And sometimes, because the Congress dictated to them, they go out and get people who get on the Internet and just screw up like what happened in this case in my view.

....

It would amaze you-all as taxpayers if you really understood what's going on inside the judiciary, inside all the government agencies right now ....

Mr. Duhon knows what I am going to do .... I am going to give him as little as I can because I think that's what it merits.

The Assistant United States Attorney objected, stating that he did not want to give the impression that he believed these cases should not be prosecuted. The court responded that they had "philosophical differences" on the issue:They've got people that ought to go to jail because they might be dangerous and they've got people that do stupid things. If we had a federal statute that says you're guilty of being stupid, Mr. Duhon might be guilty of that, but that's not the point.

At the close of hearing, the court explained to those in attendance that the prosecutors were just doing "their duty under the oath. We're all in this together, and *usually* these are the good guys putting away the bad guys." (Emphasis added).

At the post-*Booker* sentencing hearing, the court similarly stated,

If there was a federal statute that made it illegal to do dumb things, you would be guilty. I can only imagine how embarrassing this is for you today .... Nothing in this record indicates to me that you're one of those guys who are going out and trying to hurt young boys or girls, but we've got some sickos out there that are.

The district court's view of Duhon's child pornography offense was misguided for several reasons. The court stated that the law fails to distinguish between simple possession of child pornography and "try[ing] to make contact" with children to "take advantage" of and "hurt" them. The law, in fact, makes a

drastic distinction.
Congress established a series of distinctly separate offenses respecting child pornography, with higher sentences for offenses involving conduct more likely to be, or more directly, harmful to minors than the mere possession offense. Similarly, the guidelines clearly reflect consideration of whether and the degree to which harm to minors is or has been involved.

*United States v. Grosenheider*, 200 F.3d 321, 332-34 (5th Cir.2000) (collecting cases rejecting departures based on rationale that defendant had "not abused any child, and had no inclination, predisposition or tendency to do so"). Indeed, the applicable Sentencing Guidelines provide an offense level of thirty-three for soliciting minors under twelve for prohibited sexual conduct using a computer. *See* U.S.S.G. § 2A3.1(a), (b)(2)(A), (b)(6). Had Duhon solicited children for sex, rather than possessed child pornography, the sentencing range would have been 135-168 months, more than five times his actual Guideline ***719** sentence. *See* U.S.S.G. § 5A. Thus, the district court's view that a sentence *below* Duhon's Guideline range may have been warranted because the law "doesn't make much of a distinction" between possession of pornography and solicitation of children for sex was incorrect.[FN5]

FN5. We disagree with the concurring opinion's analysis of this issue on several grounds. First, it mischaracterizes the district court's comments. The concurrence states "that the district court ... observ[ed] that the 2003 version of the Guidelines do not distinguish between possessors of child pornography who engage in a pattern of non-internet based, intrastate molestation of children and those who do not." The court below painted with a broad brush and did not entertain the fine distinctions attributed to it by the concurrence.
Second, the concurrence fails to take into account that under the 2003 Guidelines a pornography defendant who has also molested children would either (a) be sentenced under the sexual abuse Guideline or (b) receive a higher sentence due to an increased criminal history score. *See, e.g., United States v. Lebovitz*, 401 F.3d 1263 (11th Cir.2005) (defendant was sentenced under 2003 child pornography and sexual abuse Guidelines and received 118 months imprisonment); *United States v. Sharpley*, 399 F.3d 123, 127 n. 4 (2d Cir.2005) (defendant's criminal history score was increased for prior state sexual abuse conviction). Third, the concurrence conflicts with our precedent. *See Grosenheider*, 200 F.3d at 333 (holding that the pre-2004 Guidelines "take into account the gravity of a possession offense as compared with more serious forms of exploitation").

More importantly, the court's judgment that

Duhon's offense was just a "dumb thing," a "stupid thing," and merely a "screw up" understates the harm caused by possessing child pornography. In *United States v. Norris*, this Court held that children are victims in the possession of child pornography. 159 F.3d 926, 929 (5th Cir.1998). *Norris* recognized that possessing the images is itself a form of abuse because it "inva[des] the privacy of the child depicted." *Id.* at 930. The possession perpetuates "a permanent record" of the original abuse that can "haunt[ ] those children in future years." *Id.* at 929-30. Additionally, "the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating [it]." *Id.* at 930. "[P]ossession of child pornography is not a victimless crime. A child somewhere was used to produce the images downloaded ..., in large part, because individuals like [the defendant] exist to download the images." *United States v. Yuknavich*, 419 F.3d 1302, 1310 (11th Cir.2005).

The severe molestation and young children involved in the images suggest that Duhon's offense could instigate violent abuse. According to the PSR, the pictures which Duhon downloaded were of prepubescent girls aged eight to ten years. These pictures "included photographs of a girl being raped by an adult man, forced to perform oral sex and placing foreign objects into her vagina." The PSR also states that Duhon distributed child pornography to at least one other individual, his codefendant Berne Life.[FN6]

FN6. The district court apparently adopted all the factual statements contained in the PSR with the exception of paragraph twenty-four. The adopted facts include paragraph five, to which Duhon concedes that he made no objection. That paragraph describes the graphic pictures found on a disc labeled "pics from Dave." Life stated that the disc was given to him by Duhon.
The court did not resolve a factual dispute regarding paragraph twenty-four because it concluded Duhon's Guideline range would not be affected. Paragraph twenty-four states that Duhon "admitted to investigators that he distributed child pornography to two or three friends." On remand, the district court should resolve all factual issues material to the sentence, whether or not they would affect the advisory range. *See Mares*, 402 F.3d at 519.

***720** Under the circumstances, the district court misjudged the seriousness of Duhon's offense. As a result, the sentence imposed fails to advance sufficiently the sentencing objectives enumerated in section 3553(a)(2)(A)-(B).

B. Consideration of Sentencing Disparity with Codefendant

[15] In imposing its non-Guideline sentence of sixty months probation, the district court took

into account that Duhon's codefendant Berne Life had received a Guideline sentence of sixty months probation. The court acknowledged that Life had obtained the benefit of a downward departure for "substantial assistance" to the Government under U.S.S.G. § 5K1.1. Because disparity between Duhon's and Life's sentences was not "unwarranted" within the meaning of section 3553(a)(6), the court erred in considering it. *See Long Soldier*, 431 F.3d at 1123 (stating that "a proper or relevant factor is one listed under § 3553(a)").

[16] We agree with the First and Eighth Circuits that a sentencing disparity intended by Congress is not unwarranted. *See United States v. Pho*, 433 F.3d 53, 64-65 (1st Cir.2006); *United States v. Sebastian*, 436 F.3d 915-17 (8th Cir.2006) (holding that it is "the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided"). In other words, "what counts is the uniformity in sentencing *sought by Congress*." *Pho*, 433 F.3d at 64-65 (emphasis in original).

Several statutory provisions convince us that Congress believes that defendants who provide substantial assistance should generally receive lower sentences than otherwise similarly-situated defendants. Congress has required that the Sentencing Commission "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed ... to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n). Additionally, Congress provides judges the authority to sentence below the statutory minimum where the Government moves for a substantial assistance departure. *See* 18 U.S.C. § 3553(e). Similarly, under 18 U.S.C. § 3559(d)(2), if a defendant renders substantial assistance, a judge may give a sentence less than the otherwise mandatory sentence of life imprisonment or death. Lastly, substantial assistance departures are provided for by the Sentencing Guidelines, and Congress has specified those Guidelines as a factor that must be taken into account in imposing a sentence. *See* 18 U.S.C. § 3553(a)(4)-(5).

Accordingly, we hold that sentencing disparity produced by substantial assistance departures was intended by Congress and is thus not a proper sentencing consideration under section 3553(a)(6). We note that this conclusion is consistent both with our pre-*Booker* jurisprudence and with the Seventh and Second Circuits' interpretation of section 3553(a)(6). *See United States v. Nichols*, 376 F.3d 440, 443 (5th Cir.2004) (holding that disparities resulting from departures for substantial assistance are "justified"); *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir.2006) (holding that "a sentencing difference based on one culprit's assistance to the prosecution is legally appropriate"); *United States v. Joyner*, 924 F.2d 454, 460-61 (2d Cir.1991) (explaining that Congress intended disparities caused by application of the Sentencing Guidelines); *United States v.*

*Toohey*, 132 Fed.Appx. 883 (2d Cir.2005) (unpublished) (holding that "*Joyner*'s construction of the role the Guidelines play in ***721** § 3553(a)(6) consideration" remains essentially unchanged in the wake of *Booker*). Because Life rendered substantial assistance, he was differently situated from Duhon in a way that Congress has deemed material. The district court should have considered the need to avoid disparity among similarly-situated defendants nationwide rather than disparity with Duhon's differently-situated codefendant.

We emphasize the limits of this holding. We hold only that the disparity at issue here-that between a codefendant who rendered substantial assistance and a defendant who did not-is warranted. A judge may still properly reduce a defendant's sentence for appropriate mitigating circumstances particular to that defendant.

## IV. Conclusion

The district court miscalculated the Guideline range. The sentence diverges from advisory Guidelines provisions relating to the kinds of sentence available and Duhon's physical condition. Furthermore, the sentence does not reflect sufficiently the seriousness of Duhon's offense. Lastly, the sentence improperly gives weight to the Guideline sentence of a differently-situated codefendant. On the particular circumstances of this case, the totality of the statutory sentencing factors fails to reasonably support the court's sentence. We therefore VACATE Duhon's sentence and REMAND for resentencing consistent with *Booker* and its progeny.

EMILIO M. GARZA, Circuit Judge, concurring in part and in the judgment:
I agree with the majority opinion except with respect to subsection III.A.2. I would avoid answering the difficult question of when a district court makes a "clear error of judgment" in assessing the seriousness of an offense. Nor do I agree that the district court erred in its observation that the 2003 version of the Guidelines do not distinguish between possessors of child pornography who engage in a pattern of non-internet based, intrastate molestation of children and those who do not. The Sentencing Commission subsequently remedied this oversight by providing for a five level enhancement where the possessor of child pornography "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." U.S.S.G. § 2G2.2(b)(5) (2004). Because the current version of the Guidelines draw this distinction, it was not unreasonable for the district court consider the prior version's deficiency.

I concur in the judgment, however, because the district court unreasonably failed to consider "the need for the sentence imposed to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). The district court discussed the need to protect the public from future crimes by Duhon, but it failed to explain how a sentence of probation would discourage others inclined to obtain child pornography. When the sentence

imposed is so far below the Guidelines range, general deterrence becomes a relevant factor that must be given significant weight. *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.2005) (a sentence is unreasonable where the "court fails to consider a relevant factor that should have received substantial weight"). The district court's failure to account for that important objective deprives this extraordinarily lenient sentence of the "compelling justification" required to render it reasonable. *See* *United States v. Dean*, 414 F.3d 725, 729 (7th Cir.2005) ("the farther the judge's sentence departs from the guidelines sentence ... the more compelling the justification based on factors in section 3553(a) that the judge must offer").

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Briefs and Other Related Documents (Back to top)

• 05-30387 (Docket) (Apr. 15, 2005)

END OF DOCUMENT

United States Court of Appeals, Eleventh Circuit.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Robert Leslie HENDRIETH,
Defendant-Appellant.
**No. 89-3672**
**Non-Argument Calendar.**

Jan. 30, 1991.

Defendant was convicted in the United States District Court for the Northern District of Florida, No. TCR 89-04021, William Stafford, Chief Judge, of conspiracy to pass counterfeit money and receipt of counterfeit money with intent to pass it. Defendant appealed. The Court of Appeals held that: (1) hearsay statement by unavailable witness allegedly exculpating defendant was inadmissible; (2) prosecutor's closing argument about defendant's failure to call witness other than police officer and lack of evidence of innocence did not entitle defendant to mistrial; and (3) defendant could be sentenced as organizer or leader of criminal activity involving more than minimal planning or scheme to defraud more than one victim.

Affirmed.

West Headnotes

**[1] Constitutional Law 92 ⚿221(4)**

92 Constitutional Law
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) k. Peremptory Challenges. Most Cited Cases

**Jury 230 ⚿33(5.15)**

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
(Formerly 230k33(5.1))

Black prospective juror's status as sister-in-law of defense witness, another black prospective juror's admitted bias against Government, and third black prospective juror's inattentiveness and rubbing and rolling of eyes during voir dire were credible and nondiscriminatory explanations for prosecutor's use of peremptory challenges against jurors, and, thus, use of peremptory challenges complied with equal protection clause. U.S.C.A. Const.Amends. 5, 14.

**[2] Criminal Law 110 ⚿417(15)**

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases

Unavailable witness' statements to stranger outside of courtroom that witness was cooperating with Government by setting up drug dealers and persons passing counterfeit money was inadmissible under hearsay exception for statements against penal interest in prosecution for conspiracy to pass counterfeit money and receipt of counterfeit money with intent to pass it; nothing corroborated stranger's recitation of witness' alleged story. 18 U.S.C.A. §§ 371, 473; Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

**[3] Criminal Law 110 ⚿417(15)**

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases

Hearsay tending to exculpate defendant may be admissible if declarant is unavailable, statement is against declarant's penal interest, and corroborating circumstances clearly indicate trustworthiness. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

**[4] Criminal Law 110 412.1(1)**

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(1) k. In General. Most Cited Cases

Defendant voluntarily told arresting officer that defendant wanted to make deal and voluntarily stated at police department that he was helping out friend and had "screwed up," and, thus, statements were admissible, even if defendant had previously invoked right to remain silent and to obtain assistance of counsel. U.S.C.A. Const.Amends. 5, 6.

**[5] Criminal Law 110 721(3)**

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k721 Comments on Failure of Accused to Testify
110k721(3) k. Nature of Comment or Reference in General. Most Cited Cases

Prosecutor's closing argument that defendant's only witness was police officer and that no evidence indicated defendant's innocence was not comment on defendant's failure to testify and, therefore, did not entitle defendant to mistrial. U.S.C.A. Const.Amend. 5.

**[6] Sentencing and Punishment 350H 725**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(B) Offense Levels
350HIV(B)3 Factors Applicable to Several Offenses
350Hk725 k. Planning. Most Cited Cases
(Formerly 110k1251)

**Sentencing and Punishment 350H 752**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk752 k. Organizers, Leaders, Managerial Role. Most Cited Cases
(Formerly 110k1251)

Defendant, who was convicted of conspiracy to pass counterfeit money and receipt of counterfeit money with intent to pass it, could be sentenced as organizer or leader of criminal activity involving more than minimal planning or scheme to defraud more than one victim, where defendant suggested to another person that the money be distributed in a certain city, made arrangements to sell substantial amount of currency in that city, and enlisted codefendant as accomplice to carry out plan. 18 U.S.C.A. §§ 371, 473; U.S.S.G. §§ 1B1.1 et seq., 1B1.1, comment. (n.1), 2F1.1(b)(2), 3B1.1, comment. (n.3), 18 U.S.C.A.App.

**[7] Sentencing and Punishment 350H**

**752**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk752 k. Organizers, Leaders, Managerial Role. Most Cited Cases
(Formerly 110k1251)
Guidelines sentence imposed on defendant as "organizer" of counterfeiting conspiracy was not excessive in relation to shorter sentence received by accomplice he enlisted, despite defendant's contention that both participated almost equally. U.S.S.G. § 3B1.1(a), 18 U.S.C.A.App.; 18 U.S.C.A. §§ 371, 473.

***749** Donald S. Modesitt, Tallahassee, Fla., for defendant-appellant.
Stephen S. Dobson, III, Asst. U.S. Atty., Tallahassee, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before JOHNSON and CLARK, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:
Appellant, Robert Leslie Hendrieth, appeals his conviction and sentence for conspiracy to pass counterfeit Federal Reserve notes, in violation of 18 U.S.C. § 371, and for receiving counterfeit Federal Reserve notes with intent to pass them as genuine, in violation of 18 U.S.C. § 473. The jury returned a verdict of guilty on both counts on April 27, 1989. Appellant was sentenced on August 1, 1989 to thirty-three months imprisonment on each count, with sentences to run concurrently. Because we find no error in the district court proceedings, we affirm.

FACTS

On February 24, 1989, Verbus Arthur Taylor arrived in Tallahassee, Florida with approximately $49,500 in counterfeit $10.00 Federal Reserve notes. Shortly after his arrival in Tallahassee, he met with the appellant, Robert Leslie Hendrieth, and asked if Hendrieth would accompany him to Canada.

When Taylor showed Hendrieth the counterfeit money, Hendrieth offered to distribute the money in Tallahassee instead of accompanying Taylor to Canada. Hendrieth received all of the counterfeit money and made arrangements to sell the money in Tallahassee.

Hendrieth enlisted the aid of Moses McFadden, Jr. to assist him in finding buyers for the currency. Hendrieth ultimately negotiated with individuals from Gadsden County, Florida who agreed to purchase some of the counterfeit currency. Taylor, who was not involved in these meetings, held Hendrieth responsible for negotiating the sale and giving Taylor his percentage of the receipts.

One of the individuals at the meeting to negotiate the sale of currency contacted and agreed to cooperate with the police. A

subsequent meeting between Hendrieth and the cooperating buyer ultimately led to Hendrieth's arrest, indictment, and conviction. $20,950.00 in counterfeit currency was recovered from Hendrieth's vehicle.

DISCUSSION

[1] Hendrieth raises five issues on appeal. First, during jury selection for his trial, the prosecution exercised three peremptory challenges, each to exclude a black juror. The jury selected had no black jurors. Hendrieth, who is black, challenges the prosecutor's use of peremptory challenges as a denial of Equal Protection.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that when, as here, the defendant establishes a prima facie case of discrimination, the prosecution must provide a specific and facially neutral explanation of its peremptory challenges. In this case, the district court excluded one juror because she was the sister-in-law of a defense witness, another because he admitted bias against the government, and a third because she was inattentive and rubbing and rolling her eyes during voir dire. ***750** Thus, the prosecutor proffered a credible and nonracially motivated explanation for the exclusion of the three challenged jurors. The requirement enunciated in *Batson* having been satisfied, the district court properly overruled the defendant's objection to peremptory challenges.

[2] Next, the defendant argues that the district court erred when it denied defense counsel's request to present hearsay evidence of statements made by a witness who invoked his Fifth Amendment right to remain silent. Defendant argues that he needs the testimony of Sandy Payne, an alleged drug-informant who, prior to Hendrieth's trial, was arrested on drug charges and who properly invoked his Fifth Amendment privilege against self-incrimination. Once Payne became unavailable, the defendant sought to introduce Payne's alleged exculpatory statements through the statements of Addys Walker. Walker claimed that he was in the federal courthouse looking for his attorney, who also was Hendrieth's counsel, when Payne, a stranger to Addys Walker, began a conversation with him while the two were sitting outside the courtroom on the day of Hendrieth's trial. Payne allegedly told Walker that, among other things, Payne and his family were drug dealers and that to avoid arrest, he had been cooperating with the government by setting up drug dealers and persons passing counterfeit money.

[3] Statements made by a witness who is unavailable at trial which tend to exculpate a defendant may be admissible as a hearsay exception under Federal Rule 804(b) if (1) the declarant is unavailable; (2) the statements are against the declarant's penal interest; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. Fed.R.Evid. 804(b)(3); *United States v. Gossett*, 877 F.2d 901, 906 (11th Cir.1989), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1141,

107 L.Ed.2d 1045 (1990). "Unavailability," for purposes of the Rule, includes a declarant not testifying because of privilege. Fed.R.Evid. 804(a)(1); *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir.1978).

Under the "clearly erroneous" standard of review for failure to consider an element of admissibility under Rule 804(b)(3), *United States v. Bagley*, 537 F.2d 162, 166 (5th Cir.1976), *cert. denied*, 429 U.S. 1075, 97 S.Ct. 816, 50 L.Ed.2d 794 (1977), this court finds no error in the district court's determination that no evidence existed to corroborate Walker's recitation of Payne's alleged story that he had been setting up people for the government. The district court also considered Walker's motive to misrepresent the matter, the character of the speaker, whether other people heard the out of court statement, the spontaneity of the statement, and the relationship between the speaker and the witness. The district court found Walker completely unworthy of belief and, as a result, was unable to determine what, if any, statements actually were made by Payne. *See United States v. Alvarez*, 584 F.2d 694, 701-02 (5th Cir.1978) (pursuant to 804(b)(3), the court should determine credibility primarily by analysis of the probable veracity of the in-court witness and the reliability of the out-of-court declarant). Payne's statements, thus, were properly excluded under the rules of evidence.

[4] Third, Hendrieth claims that the district court erred by permitting the government to introduce evidence of statements alleged to have been made by the defendant while in custody and after the defendant had invoked his right to remain silent and to obtain the assistance of counsel. The district court, in a hearing held outside the presence of the jury, heard testimony of the arresting officer, Ray Jones, that he advised Hendrieth of his *Miranda* rights, and Hendrieth responded "Let's make a deal." Officer Walter Beck corroborated Jones' testimony. Both officers testified that Hendrieth volunteered additional information at the police department, stating that he was helping out a friend and had "screwed up." He repeated his statements, while on the telephone, within earshot of the police officers.

This court previously has held that statements made while in custody are not per se involuntary, ***751***Martin v. Wainwright*, 770 F.2d 918 (11th Cir.1985), *cert. denied*, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986), and statements voluntarily made by the defendant after he has invoked his *Miranda* rights are admissible against him. *United States v. Ogueri*, 798 F.2d 452 (11th Cir.1986). When a defendant deliberately chooses to initiate or continue conversation, *Michigan v. Mosley*, 423 U.S. 96, 103-06, 96 S.Ct. 321, 326-27, 46 L.Ed.2d 313, 321-22 (1975), the statements violate neither the Fifth Amendment right against self-incrimination nor the Sixth Amendment right to counsel. *Smith v. United States*, 505 F.2d 824, 829 (6th Cir.1974). Considering all the facts and circumstances of the possible waiver by Hendrieth of his *Miranda* rights, we find that Hendrieth's statements were made voluntarily

and were admissible on that basis.

[5] Fourth, the defendant challenges the prosecutor's reference in closing argument to the defendant's failure to call certain witnesses or present evidence that he was not guilty. During closing argument the prosecutor stated that "the only witness the defense called was a police officer," and pointed to the defendant's failure to call additional witnesses. He commented that "[t]here has been no evidence presented that indicates that Robert Leslie Hendrieth is not guilty" and made similar statements regarding the lack of exculpatory evidence.

"The test for determining whether a prosecutor's comments warrant the granting of a new trial is (1) whether the remarks were improper and (2) whether they prejudicially affected substantial rights of the defendant's." *United States v. Vera*, 701 F.2d 1349, 1361 (11th Cir.1983). The prosecutor at Hendrieth's trial made no comment on the defendant's own failure to testify. His remarks were directed to the failure of the defense to counter or explain the evidence. *United States v. Watson*, 866 F.2d 381 (11th Cir.1989) (mistrial unnecessary when prosecutor commented on the failure of the defense to counter evidence presented by the government); *United States v. Bright*, 630 F.2d 804, 825 (5th Cir.1980); *United States v. Hartley*, 678 F.2d 961 (11th Cir.1982), *reh'g denied*, 688 F.2d 852, *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983). For these reasons, we find no error in the failure of the district court to declare a mistrial based upon prosecutor's remarks to the jury.

[6] Finally, Hendrieth argues that his sentence is not in accordance with the Sentencing Guidelines. He challenges the court's characterization of him as an "organizer" or "leader" of the criminal activity and the resulting increase in his sentence under the guidelines. U.S.S.G. § 3B1.1(a). Hendrieth also challenges the court's upward adjustment for criminal activity involving more than minimal planning or a scheme to defraud more than one victim. U.S.S.G. § 2F1.1(b)(2).

The guidelines commentary provides that in considering the role of the defendant as a "leader" or "organizer," the court should consider, among other things, "the exercise of decision making authority, ... the recruitment of accomplices, ... the degree of participation in planning or organizing the offense, [and] the nature and scope of the illegal activity." U.S.S.G. § 3B1.1, comment. (n. 3). "More than minimal planning" means "more planning than is typical for commission of the offense in simple form." It exists in "any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. § 1B1.1, comment. (n. 1f).

We find no basis in the record for appellant's challenge of his sentence. Hendrieth suggested to Taylor that the counterfeit money be distributed in Tallahassee and made arrangements to sell a substantial amount of currency in Tallahassee; he had complete responsibility for negotiating its sale.

Hendrieth enlisted the aid of McFadden as an accomplice to carry out his plan. This court has recognized that "[t]he sentence imposed is committed to the discretion of the trial court and, so long as the sentence falls within the range provided by statute, generally will not be reviewed on appeal." *United States v. Funt,* 896 F.2d 1288, 1298 (11th Cir.1990). On these facts, ***752** it is clear that Hendrieth's sentence falls within the statutory guidelines for sentencing.

[7] Finally, Hendrieth emphasizes that a comparison of the offenses of Hendrieth and his co-defendant, McFadden, shows that although both participated almost equally in the offense, Hendrieth's sentence under the guidelines was substantially greater than McFadden's sentence. However, this court has rejected as "frivolous" challenges to sentencing because a co-defendant received a less severe penalty. *United States v. Allen,* 724 F.2d 1556, 1558 (11th Cir.1983), *reh'g denied,* 732 F.2d 944 (1984). His sentence will not be disturbed on appeal.

In light of the foregoing, the conviction and sentence imposed against Robert Leslie Hendrieth is AFFIRMED.

C.A.11 (Fla.),1991.
U.S. v. Hendrieth
922 F.2d 748, 32 Fed. R. Evid. Serv. 210

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C
Briefs and Other Related Documents

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Plaintiff-Appellant,
v.
Manuel Earl GATEWOOD, Defendant-Appellee.
**No. 05-1865.**

Submitted: Dec. 13, 2005.
Filed: Feb. 27, 2006.

**Background:** Defendant was convicted in the United States District Court for the Western District of Missouri, Scott O. Wright, J., of being a felon in possession of a firearm, and the government appealed his 36-month sentence.

5**Holding:** The Court of Appeals, Loken, Chief Judge, held that sentence was unreasonable.

Reversed and remanded.

West Headnotes

**[1] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
Because the Guidelines are fashioned taking the other statutory sentencing factors into account and are the product of years of careful study, the guidelines sentencing range, though advisory, is presumed reasonable. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
When the district court has varied from the guidelines range based upon its analysis of the other statutory sentencing factors, the court of appeals must examine whether the district court's decision to grant a variance from the appropriate guidelines range is reasonable, and whether the extent of any variance is reasonable. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[3] Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings

350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases
For the court of appeals to properly carry out the appellate review mandated by *United States v. Booker*, it is essential that the district court explain the reasons why it has imposed a sentence outside the guidelines sentencing range in a particular case. 18 U.S.C.A. § 3553(c)(2); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 996**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk996 k. Sufficiency. Most Cited Cases
Sentences varying from the guidelines range are reasonable so long as the judge offers appropriate justification under the statutory sentencing factors; how compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[5] Sentencing and Punishment 350H 726(4)**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(B) Offense Levels
350HIV(B)3 Factors Applicable to Several Offenses
350Hk726 Dangerous Weapons or Destructive Devices
350Hk726(4) k. Use. Most Cited Cases

**Sentencing and Punishment 350H 779**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(E) Prior or Subsequent Misconduct
350Hk779 k. In General. Most Cited Cases

**Weapons 406 17(8)**

406 Weapons
406k17 Criminal Prosecutions
406k17(8) k. Sentence and Punishment. Most Cited Cases
Defendant's 36-month sentence for being a felon in possession of a firearm was unreasonably lenient; advisory guidelines sentencing range was 63-78 months, violent nature of defendant's relevant conduct of using stolen shotgun to aggressively threaten grocery store cashier while robbing store argued against leniency, defendant's prior criminal history, while not egregious, did not justify extreme leniency, defendant had lengthy history of drug abuse without successful effort to turn his life around, and sentence did not afford adequate deterrence,

protect public from further crimes by defendant, or avoid unwarranted sentencing disparity. 18 U.S.C.A. § 3553(a).

***895** Jim Y. Lynn, Asst. U.S. Atty., argued, Jefferson City, MO (Todd P. Graves, U.S. Atty, Kansas City, MO, on the brief), for appellant.
David R. Mercer, Asst. Fed. Public Defender, argued, Springfield, MO, (Raymond C. Conrad, Jr., Fed. Public Defender, on the brief), for appellee.

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.
LOKEN, Chief Judge.
Manuel Gatewood pleaded guilty to being a felon in possession of a firearm. The district court sentenced him to 36 months in prison, substantially below the advisory guidelines sentencing range of 63 to 78 months. The United States appeals. We agree the sentence is unreasonable and therefore remand for resentencing.

Gatewood entered a grocery store in Camdenton, Missouri in March 2004. He asked the cashier for change, removing a shotgun from his coat when she opened the register. He stuck the shotgun in the cashier's chest, said "don't fucking move," and grabbed over $1600 from the register. The shotgun had been stolen from a local business where Gatewood formerly worked. After Gatewood pleaded guilty to being a felon in possession, the government dismissed a charge of possession of a stolen firearm. A state charge of robbery was awaiting trial.

The district court held a sentencing hearing two weeks after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). The district court determined that Gatewood's guidelines ***896** sentencing range is 63 to 78 months in prison. Gatewood then argued that, under *Booker*, the court had discretion to sentence him anywhere within the statutory range (zero to ten years). Gatewood urged a 36-month sentence to be served concurrently with any sentence Gatewood received in the pending state criminal proceedings. The district court, without explanation, imposed a concurrent 36-month sentence.

Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60, 125 S.Ct. 738. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. *United States v. Haack*, 403 F.3d 997, 1002-03 (8th Cir.), *cert. denied* --- U.S. ----, 126 S.Ct. 276, 163 L.Ed.2d 246 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of [the] other statutory concerns" in § 3553(a). *Booker*, 543 U.S. at 245-46, 125 S.Ct. 738.

[1][2] When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence

for reasonableness. This standard is akin to our traditional review for abuse of discretion. Because the Guidelines are fashioned taking the other § 3553(a) factors into account and are the product of years of careful study, the guidelines sentencing range, though advisory, is presumed reasonable. *See United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir.2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir.2005). When the district court has varied from the guidelines range based upon its analysis of the other § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance ... is reasonable." *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir.2005); *see Haack*, 403 F.3d at 1004. A "range of reasonableness" is within the court's discretion. *United States v. Saenz*, 428 F.3d 1159, 1165 (8th Cir.2005).

[3][4] For this court to properly carry out the appellate review mandated by *Booker*, it is essential that the district court explain the reasons why it has imposed a sentence outside the guidelines sentencing range in a particular case. *See* 18 U.S.C. § 3553(c)(2); *United States v. McMannus*, 436 F.3d 871 (8th Cir.2006). We do not require a rote recitation of each § 3553(a) factor, but the court should explain both the decision to vary and the extent of the variance. *United States v. Dieken*, 432 F.3d 906, 909 (8th Cir.2006). "Sentences varying from the guidelines range ... are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir.2005) (citation omitted); *see United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005).

[5] In this case, the district court sentenced Gatewood only two weeks after *Booker* was decided, before these principles even began to evolve. The court granted a substantial downward variance-forty-three percent below the bottom of the advisory guidelines range-with no explanation of why this sentence is warranted by the other § 3553(a) factors. Moreover, our review of the record suggests that Gatewood is hardly the sort of ***897** felon-in-possession offender who warrants a substantial downward variance. He used a stolen shotgun to aggressively threaten a grocery store cashier while robbing the store. The violent nature of this relevant conduct argues against leniency. Gatewood's prior criminal history, while not egregious, does not justify extreme leniency. Gatewood argues that the sentence is reasonable because of his history of drug abuse. But the Guidelines prohibit departures based upon drug dependence or abuse because "[s]ubstance abuse is highly correlated to an increased propensity to commit crime." U.S.S.G. § 5H1.4 (policy statement); *see* U.S.S.G. § 5K2.0(d)(1) (policy statement). While a guidelines departure prohibition does not preclude the district court from considering that factor when the issue is a

variance under *Booker*, the Sentencing Commission's policy statements show the need to explain why a particular defendant's drug problems warrant extreme leniency. Gatewood has a lengthy history of drug abuse without the extraordinary and successful effort to turn his life around demonstrated by the defendant in *United States v. Kicklighter*, 413 F.3d 915, 917 (8th Cir.2005), where the court imposed the mandatory minimum sentence of 120 months rather than the bottom of the guidelines sentencing range, 188 months.

On this record, we conclude that the substantial downward variance to a 36-month sentence results in punishment that does not accurately reflect the seriousness of Gatewood's offense conduct and does not afford adequate deterrence or protect the public from further crimes by this defendant. 18 U.S.C. § 3553(a)(2). In addition, the sentence fails to avoid unwarranted sentencing disparity among defendants with similar criminal histories who have illegally possessed stolen firearms to commit armed robberies. *See* 18 U.S.C. § 3553(a)(6); *United States v. Rogers*, 400 F.3d 640, 642 (8th Cir.2005), *cert. denied* --- U.S. ----, 126 S.Ct. 1020, 163 L.Ed.2d 865 (2006). Accordingly, the sentence is unreasonable. The judgment of the district court is reversed and the case is remanded for resentencing.

C.A.8 (Mo.),2006.
U.S. v. Gatewood
438 F.3d 894

Briefs and Other Related Documents (Back to top)

• 05-1865 (Docket) (Mar. 31, 2005)

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Briefs and Other Related Documents

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Jesus JIMENEZ-GUTIERREZ,
Defendant-Appellant.
**No. 04-2119.**

Submitted: Jan. 11, 2005.
Filed: Oct. 13, 2005.

**Background:** Defendant was convicted, upon a guilty plea, in the United States District Court for the Western District of Missouri, Nanette K. Laughrey, J., of conspiring to distribute fifty grams or more of a mixture or substance containing methamphetamine. Defendant appealed, challenging his sentence.

**Holdings:** The Court of Appeals, Melloy, Circuit Judge, held that:

2(1) imposition of two-level managerial role sentencing increase was warranted, and

3(2) sentence imposed under mandatory Sentencing Guidelines was plainly erroneous, warranting remand for resentencing under the advisory Guidelines.

Affirmed in part; vacated in part; and remanded.

Colloton, Circuit Judge, filed concurring opinion.

West Headnotes

**[1] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
When a defendant raises a sentencing issue for the first time on appeal, the appellate court reviews only for plain error.

**[2] Sentencing and Punishment 350H 752**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk752 k. Organizers, Leaders, Managerial Role. Most Cited Cases

Imposition of two-level managerial role sentencing increase was warranted for defendant convicted of conspiring to distribute fifty grams or more of a mixture or substance containing methamphetamine; drug courier who was stopped for speeding implicated defendant as her supervisor and contact person, when courier reported to supervisor that her van broke down, defendant met courier with a plane ticket, and wired her some cash. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

**[3] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases

**Criminal Law 110 1181.5(8)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases
Sentence imposed under mandatory Sentencing Guidelines for defendant convicted of conspiring to distribute fifty grams or more of a mixture or substance containing methamphetamine was plainly erroneous, warranting remand for resentencing under the advisory Guidelines; sentence imposed was at bottom of Guidelines range, sentencing court expressed its dissatisfaction with the lack of discretion under the Guidelines, and with the large sentencing discrepancy between defendant's Guidelines sentence and that of another participant in conspiracy, and court stated its belief that defendant's sentence was very punitive. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
A district court's statements specific to a sentence actually imposed are relevant to the prejudice inquiry, in determining whether sentence imposed under the mandatory Sentencing Guidelines was plainly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[5] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of

Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
The showing of a "reasonable probability" that sentencing court would have imposed a lesser sentence under the advisory Sentencing Guidelines, as required to demonstrate that sentence under the mandatory Guidelines was plainly erroneous, does not equate to proof by a preponderance of the evidence. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.
West Codenotes Limitation Recognized U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

***1124** Anita L. Burns, Asst. Fed. Public Defender, Kansas City, MO (Raymond C. Conrad, Jr., Fed. Public Defender), for appellant.
Philip M. Koppe, Asst. U.S. Atty., Kansas City, MO (Bruce Rhoades, Spec. Asst. U.S. Atty., Todd P. Graves, U.S. Atty., on the brief), for appellee.

Before MELLOY, SMITH, and COLLOTON, Circuit Judges.

MELLOY, Circuit Judge.
Jesus Jimenez-Gutierrez pled guilty to conspiring to distribute fifty grams or more of a mixture or substance containing methamphetamine. At sentencing, he received a two-level enhancement due to his role in the offense as a manager or supervisor. The resultant Guidelines range was 188 to 235 months. The district court sentenced him at the bottom of this range, 188 months.

[1] On appeal, Mr. Jimenez-Gutierrez alleges error in the district court's application of the two-level enhancement. He also alleges error under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). "We review the district court's decision to assess a sentencing enhancement based upon a defendant's role in the offense for clear error." *United States v. Johnson*, 278 F.3d 749, 752 (8th Cir.2002). Regarding the *Blakely*/*Booker* issue, because Mr. Jimenez-Gutierrez raised this issue for the first time on appeal, we review only for plain error. *United States v. Pirani*, 406 F.3d 543 (8th Cir.2005).

[2] For a two-level managerial role enhancement to apply, it is only necessary that the defendant supervise or manage one other participant. *See* U.S.S.G. § 3B1.1 cmt. 2 ("To qualify for a [U.S.S.G. § 3B1.1(c) ] adjustment ... the defendant must have been the ... manager or supervisor of one or more other participants.") The record in this case demonstrates, at a minimum, that Mr. Jimenez-Gutierrez was a supervisor/contact person at the destination point for a drug courier on an Arizona-to-Minnesota drug shipment. When officers stopped the courier for speeding in Missouri and discovered drugs, the courier agreed to cooperate. Her statements implicated Mr. Jimenez as a supervisor. Also, Mr. Jimenez-Gutierrez's own actions showed that he played a supervisory role. The courier cooperated by calling Mr. Jimenez-Gutierrez to ask for

instructions and help. She told Mr. Jimenez-Gutierrez that her van had broken down. Mr. Jimenez-Gutierrez then traveled from Minnesota to Missouri, receiving numerous calls from the courier during his trip. When he arrived at the courier's van in Missouri, officers arrested ***1125** him. At the time of his arrest, he had a plane ticket and travel itinerary for the courier as well as the cell phone she had called. In addition, he had wired the courier $300 prior to her trip, as demonstrated by a receipt found in the courier's van. This evidence is sufficient to support the district court's finding that Mr. Jimenez-Gutierrez supervised the courier.

Regarding the *Blakely*/*Booker* issue, the district court understandably treated the Guidelines as mandatory at Mr. Jimenez-Gutierrez's May 2004 sentencing. We now know that this was error. In *Pirani*, 406 F.3d at 552, we stated that a *Blakely*/*Booker* error affects a defendant's substantial rights and may be plain error if the defendant can show a reasonable probability that the district court would have granted a more favorable sentence had it treated the Guidelines as advisory.

[3] In this case, the district court sentenced Mr. Jimenez-Gutierrez at the bottom of the Guidelines range. Also, the district court made repeated statements at sentencing to explain its dissatisfaction with Mr. Jimenez-Gutierrez's Guidelines sentence. The district court was primarily dissatisfied with the discrepancy between the sentence imposed upon the courier, twenty-four months, and the minimum sentence available for Mr. Jimenez-Gutierrez, 188 months. Counsel for Mr. Jimenez-Gutierrez raised the issue of the discrepancy, and the district court asked the government how it justified such a discrepancy. The government stated that the courier had not brought drugs into the United States. In response to this comment, the district court stated, "There's no evidence that he [Mr. Jimenez-Gutierrez] brought drugs into the country. There's evidence that he arranged this transportation of these drugs." The government then claimed that Mr. Jimenez-Gutierrez had arranged multiple other instances involving the transportation of drugs. The district court responded, "That is not before the court."

The district court later stated, "And the question is, that is a large discrepancy for people who were basically involved in exactly the same conspiracy with exactly the same drugs with exactly the same purity with slightly different roles." The district court then noted that the long sentence for Mr. Jimenez-Gutierrez and the downward departure for the courier resulted in "a very generous reward to her or an unduly punitive award to him." Next, the district court stated, "[i]t is hard, though, to argue that it in any way promotes the idea of uniformity in sentencing, which is what the [G]uidelines were intended to achieve.... It does not promote uniformity. There are wildly varying levels of departures for the courts, and for every [United States Attorney] in the country." The discussion continued and the district court continued to express dissatisfaction with

the lack of discretion available in sentencing. The district court concluded:

I wonder what would happen if the judges routinely just said no downward departures, period. You can ask for them, but the judges say no. It would be interesting to see what would happen under those circumstances. Given the punitiveness of the [G]uidelines, sometimes it's very difficult. In an attempt to, in fact, do justice, we find ourselves in a Catch-22. Regardless of what we do, there is an element of injustice in it, and I think this case is a good demonstration of the element of injustice in it. Not that Mr. Jimenez didn't get what he deserved, but Ms. Salinas probably didn't get what she deserved through the generosity of the government.

...

I have given the defendant the low end of the [G]uideline, given the very punitive nature of the [G]uidelines. It is ***1126** more than sufficient to deter the defendant and those like him from entering the United States to engage in drug conduct, drug conspiracy conduct.

[4] We held in *Pirani* that a sentence at the bottom of the Guidelines range, standing alone, is insufficient to demonstrate a reasonable probability that the district court would have imposed a more favorable sentence under an advisory regime. *Pirani*, 406 F.3d at 553. We also stated that a district court's expression of a general dissatisfaction with the Guidelines fails to demonstrate the required reasonable probability of a lesser sentence. *Id.* at 553 n. 6. In contrast, a district court's statements specific to a sentence actually imposed are relevant to the prejudice inquiry. *Id.*; *United States v. Rodriguez-Ceballos*, 407 F.3d 937, 941 (8th Cir.2005).

Applying these rules, we see that the record in this case is mixed. The district court spoke generally about the Guidelines and specifically about the sentence. Speaking generally, the district court stated that it believed a system that allowed for such large discrepancies was unjust. Speaking about the sentence actually imposed, the district court emphasized that the present case was an example of what it believed to be unjust. The district court, in fact, sentenced Mr. Jimenez-Gutierrez at the bottom of the Guidelines range and expressly stated that it believed the Guidelines to be "very punitive," that the sentence imposed on Mr. Jimenez-Gutierrez might be an "unduly punitive award to him," and that the sentence it felt bound to impose was "more than sufficient to deter the defendant." On the other hand, the district court stated, "not that Mr. Jimenez didn't get what he deserved."

[5] Taken together, we believe that the bottom-of-the-range sentence and the district court's statements are sufficient to show a reasonable probability that the district court would have imposed a lesser sentence under an advisory Guidelines regime. In this regard, we note that the plain error standard for relief expressed in *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), and applied in *Pirani* is difficult but not impossible for defendants to satisfy. A reasonable probability does not

mean certainty. In fact, it does not even equate to proof by a preponderance of the evidence. *See United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 2340 n. 9, 159 L.Ed.2d 157 (2004) (describing the plain error standard and noting that, "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different."); *see also, Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (stating that, the "touchstone ... is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict."). Because the reasonable probability standard is not the same as a preponderance of the evidence standard, we need not determine whether it was more likely that the district court wanted to impose a lesser sentence on Mr. Jimenez Gutierrez or a greater sentence on the courier. The district court's language in this case leaves open the reasonable probability that either or both outcomes were desired. The record in this case is sufficient for Mr. Jimenez-Gutierrez to make the requisite showing under *Pirani.*

Because there is a reasonable probability that Mr. Jimenez-Gutierrez would have received a lesser sentence under an advisory regime, we must determine whether the fourth *Olano* factor is satisfied, i.e., whether the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial***1127** proceedings." *Olano*, 507 U.S. at 732, 113 S.Ct. 1770. We believe that this final factor is satisfied by the fact that the sentence Mr. Jimenez-Gutierrez received may be much longer than what the district court would have imposed under an advisory Guidelines regime. *Rodriguez-Ceballos*, 407 F.3d at 941.

We affirm as to the two-level enhancement but vacate the sentence and remand for re-sentencing in light of *Booker.*

COLLOTON, Circuit Judge, concurring.
As the court recounts, the record in this case shows that the district court granted a substantial sentence reduction to Linda Salinas, based on her provision of substantial assistance in the investigation and prosecution of others, and then expressed frustration that Jesus Jimenez-Gutierrez, who provided no such assistance, was subject to a much lengthier term of imprisonment under the then-mandatory sentencing guidelines. It seems to me that there is a substantial question whether a district court may, in essence, create a "sentence disparity" by granting a reduction under the now-advisory guidelines to one defendant based on the provision of substantial assistance, and then "reasonably," within the meaning of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), vary from the advisory guidelines based solely on this "disparity" when sentencing another defendant who declined an opportunity to provide such assistance. Congress clearly thought it appropriate that defendants who provide substantial assistance should receive lower

sentences than would otherwise be imposed, *see* 28 U.S.C. § 994(n); 18 U.S.C. § 3553(e), so it is difficult to conclude that Congress at the same time believed that such reductions in sentence would cause "unwarranted sentence disparities" that need to be avoided. *See* 18 U.S.C. § 3553(a)(6). But given the "mixed" record, I accept the court's conclusion that there is a "reasonable probability" that the district court, if aware of *Booker*, would have preferred to reduce Jimenez-Gutierrez's sentence on the basis of a perceived "sentence disparity." And our precedent holds that the fourth prong of plain error analysis does not entail consideration of whether the proffered reason for a more favorable sentence would be reasonable with regard to 18 U.S.C. § 3553(a). *Cf. United States v. Betterton*, 417 F.3d 826, 833-36 (8th Cir.2005) (Hansen, J., concurring). Therefore, I concur in the decision to remand this case for resentencing, although the ultimate result may be imposition of the same sentence.

C.A.8 (Mo.),2005.
U.S. v. Jimenez-Gutierrez
425 F.3d 1123

Briefs and Other Related Documents (Back to top)

• 04-2119 (Docket) (May. 11, 2004)
• 2004 WL 2732395 (Appellate Brief) Brief of Appellant (Jan. 01, 2004) Original Image of this Document with Appendix (PDF)

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449 F.3d 827
**(Cite as: 449 F.3d 827)**

Briefs and Other Related Documents

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Plaintiff-Appellant,
v.
Gregory Alan KRUTSINGER, also known as Krutsy, also known as KKK, Defendant-Appellee.
United States of America, Plaintiff-Appellant,
v.
Katherine Colleen O'Meara, Defendant-Appellee.
**No. 05-2713, 05-2781.**

Submitted: Feb. 15, 2006.
Filed: June 6, 2006.

**Background:** Defendants pled guilty in the United States District Court for the District of North Dakota, Ralph R. Erickson, J., to making false declarations before a grand jury and obstruction of justice. The government appealed the sentences imposed.

3**Holding:** The Court of Appeals, Melloy, Circuit Judge, held that district court did not abuse its discretion by imposing sentences of 21-months and 24-months imprisonment.

Affirmed.

West Headnotes

**[1] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
The standard of review for sentences imposed by the district court is whether the district court abused its discretion by imposing unreasonable sentences on the defendants.

**[2] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
The Court of Appeals examines the statutory sentencing factors to determine whether a sentence is unreasonable. 18 U.S.C.A. § 3553(a).

**[3] Obstructing Justice 282 21**

282 Obstructing Justice
282k21 k. Sentence and Punishment. Most Cited Cases

**Sentencing and Punishment 350H 56**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk56 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
District court did not abuse its discretion by imposing sentences of 21-months and 24-months imprisonment on two defendants who pled guilty to making false declarations before a grand jury and obstruction of justice, even though the guidelines range was sixty to eighty-seven months, to avoid unwarranted sentence disparities with codefendant who had already been sentenced, and thus sentences were not unreasonable; within four month period four individuals with same criminal history committed same crime of lying in front of grand jury regarding involvement of friends and relatives in drug conspiracy, first codefendant sentenced received fifteen month sentence, but by the time defendants were sentenced government was able to attribute more drugs to conspiracy, resulting in higher guidelines ranges for defendants. 18 U.S.C.A. § 3553(a)(6).

***828** Counsel who presented argument on behalf of the appellant was Christopher C. Myers, AUSA, of Fargo, ND.
Counsel who presented argument on behalf of appellee Krutsinger was Sara K. Sorenson of Fargo, ND. Arguing on behalf of appellee O'Meara was Matthew D. Greenley of Fargo, ND.

Before RILEY, HEANEY, and MELLOY, Circuit Judges.
MELLOY, Circuit Judge.
Gregory Alan Krutsinger and Katherine

Colleen O'Meara pled guilty to making false declarations before a grand jury in violation of 18 U.S.C. § 1623 and obstruction of justice in violation of 18 U.S.C. § 1503. They were sentenced by the district court [FN1] to twenty-one and twenty-four months respectively. The government filed a timely appeal, arguing that the sentences were unreasonable. We affirm.

FN1. The Honorable Ralph R. Erickson, United States District Judge for the District of North Dakota.

I.

Krutsinger and O'Meara were low-level participants in a large conspiracy to distribute methamphetamine. Both testified before a grand jury pursuant to a grant of informal immunity. Both later pled guilty for having committed perjury.

The district court found that the underlying conspiracy involved more than fifteen kilograms of methamphetamine and correctly calculated the advisory Guidelines offense level as thirty-eight pursuant to United States Sentencing Guidelines §§ 2J1.2 and 2J1.3. The district court then correctly applied the cross referencing formula of U.S.S.G. § 2X3.1(a)(3)(A), which limits to thirty the maximum base offense level for an accessory after the fact. The district court then applied a three-level reduction to Krutsinger and O'Meara for their acceptance of responsibility. Krutsinger's offense level of twenty-seven, in combination with his criminal history category of IV, resulted in an advisory Guidelines range of 100 to 125 months. The government made a substantial assistance motion pursuant to U.S.S.G. § 5K1.1. The government's recommendation was sixty months, a forty percent reduction from the low end of the advisory ***829** Guidelines range. The district court sentenced Krutsinger to twenty-one months.

At sentencing, the district court offered a number of reasons for the sentence it imposed. Although Krutsinger had benefitted from the government's § 5K1.1 motion, the court felt the government's recommendation did not fully recognize the extraordinary nature of the assistance provided. Krutsinger provided assistance in a timely fashion and continued to offer assistance until the time of his sentencing. The information he provided was extensive and truthful, and it resulted in other defendants pleading guilty. The district court also noted that while on presentence release, Krutsinger did not present any problems to his pretrial services officer. In fact, Krutsinger maintained sobriety and lived a stable life. He also spoke to the public about the dangers of drug addiction.

O'Meara's offense level of twenty-seven, in combination with her criminal history category of I, resulted in an advisory Guidelines range of seventy to eighty-seven months. The government recommended a sentence of seventy months. The district court sentenced O'Meara to twenty-four

months.

In sentencing O'Meara, the district court referred to her "extraordinary rehabilitative efforts." These included her voluntary completion of a drug treatment program prior to being indicted and her continued attendance at Alcoholics Anonymous and Narcotics Anonymous meetings. The district court also emphasized that O'Meara had difficulties with obsessive compulsive disorder, was employed at the time of sentencing, and had re-established a relationship with her family.

The sentencing memoranda for both Krutsinger and O'Meara also expressed the district court's desire not to impose disparate sentences. The court explained that Linda Quam, another member of the same conspiracy who was very similarly situated to O'Meara, was also convicted for lying to the grand jury and had been sentenced to only fifteen months. Likewise, another co-conspirator, Stanley Dietz, had co-operated and received a § 5K1.1 departure. In the Dietz case, the government recommended a twenty month sentence, which was a seventy-one percent departure from the bottom of his Guidelines range.

II.

[1][2] We review the sentences imposed by the district court for reasonableness. The "standard of review is whether the district court abused its discretion by imposing ... unreasonable sentence[s] on the defendant[s]." *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir.2005). We examine the 18 U.S.C. § 3553(a) factors to determine whether a sentence is unreasonable. *United States v. Rogers*, 400 F.3d 640, 641 (8th Cir.2005).

III.

This case presents an unusual scenario. If we were only considering the characteristics of each defendant and the extent of his or her co-operation, we would likely reverse. *See United States v. Bradford*, 447 F.3d 1026, 2006 WL 1277104, slip op. at 5 (8th Cir. May 11, 2006); *Haack*, 403 F.3d at 1006; *Rogers*, 400 F.3d at 642. However, *Booker* made clear that the § 3553(a) factors must be considered in fashioning a reasonable sentence. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Although the Guidelines remain an important factor in determining a sentence, there may be cases where another § 3553(a) factor predominates. *See Haack*, 403 F.3d at 1003 ("We, like the Second Circuit, realize that ***830** there may be situations where sentencing factors may be so complex, or other § 3553(a) factors may so predominate, that the determination of a precise sentencing range may not be necessary or practical."). This is such a case.

[3] We are assisted in this case by a district judge that made a thorough and careful record of the reasons for the sentence in each case. The judge was clearly troubled by, and ultimately determined his sentence based on,

the § 3553(a)(6) factor: "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

In this case, within a four-month period, Quam, Krutsinger, Dietz, and O'Meara each committed the identical crime. They each lied in front of the grand jury about the involvement of friends or relatives in a drug conspiracy. By happenstance of timing, Quam was indicted first, was found guilty, and was sentenced using the U.S.S.G. § 2J1.2(c) cross-reference to § 2X3.1. Based on the information available to the government at that time, twenty to thirty grams of methamphetamine were attributed to the conspiracy. The result was an offense level of fourteen and a resulting Guidelines range of fifteen to twenty-one months. The government lodged no objection to this Guidelines computation. Quam was sentenced to fifteen months imprisonment.

The government does not seriously contest there is any difference between the offense conduct and defendant characteristics of O'Meara and Quam. Both have a criminal history of I, both committed the same crime in the same conspiracy, and neither co-operated. The only real difference, other than timing, was that O'Meara pled guilty while Quam went to trial, which is a difference that would indicate O'Meara should receive a lower, not a higher, sentence.

Because of the timing of her conviction, O'Meara ended up with a much higher offense level. By the time she was sentenced, the government had developed more information about the scope of the conspiracy and was by then able to attribute fifteen kilograms of methamphetamine to the conspiracy. As a result, O'Meara's Guidelines range was determined under § 2J1.3(c) using the cross-reference of § 2X3.1. This resulted in an offense level of thirty, less three levels for acceptance of responsibility, for a final offense level of twenty-seven. The resulting sentencing range was seventy to eighty-seven months.

We cannot say the district court abused its discretion in fashioning a sentence that attempted to address the disparity in sentences between two nearly identically situated individuals who committed the same crime in the same conspiracy. The only distinction the government points to is the timing of the indictments. There will be many cases where a defendant receives a higher Guidelines range when he or she pleads or is tried later in the conspiracy, after the government has more fully developed its case. However, under the facts of this case, we cannot say the district court improperly applied § 3553(a)(6) or abused its discretion.

Likewise, the district court did not abuse its discretion in granting a substantial § 5K1.1 departure to achieve sentencing uniformity between Krutsinger and Dietz. The government concedes Krutsinger provided as much, if not more, co-operation than Dietz. Yet the government recommend a seventy-one percent departure in Dietz's case. We cannot

say the district court abused its discretion in granting a similar departure to a co-defendant who provided as much or more co-operation.

***831** IV.

For the foregoing reasons, we find the sentences reasonable and affirm the judgments of the district court.

C.A.8 (N.D.),2006.
U.S. v. Krutsinger
449 F.3d 827

Briefs and Other Related Documents (Back to top)

- 05-2781 (Docket) (Jun. 28, 2005)
- 05-2713 (Docket) (Jun. 21, 2005)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,Second Circuit.
UNITED STATES of America, Appellee,
v.
Francisco LAKE, Defendant-Appellant.
**Docket No. 04-3238-CR.**

Argued: June 20, 2005.
Decided: Aug. 15, 2005.

**Background:** Defendant pleaded guilty in the United States District Court for the Eastern District of New York, Frederic Block, J., to robbery, drug, and firearms offenses, and was sentenced to 540 months' imprisonment, and he appealed his sentence.

**Holding:** The Court of Appeals, Jon O. Newman, Circuit Judge, held that error in application of mandatory sentencing guidelines was not harmless.

Remanded.

West Headnotes

**Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible

Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

**Sentencing and Punishment 350H 661**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk655 Constitutional, Statutory, and Regulatory Provisions
350Hk661 k. Construction. Most Cited Cases
In sentencing of defendant to 540 months' imprisonment for robbery, drug, and firearms offenses, district court's statement that sentence was necessary for punishment and to incapacitate defendant during his adult life to protect public from the type of violence he had visited upon public when he was free from incarceration, and fact that sentence was in middle of guidelines range of 360 months to life imprisonment, did not establish that possibility that court would have imposed a different sentence under advisory guidelines was so remote as to render error in application of mandatory guidelines harmless. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

***111** Robin C. Smith, Brooklyn, N.Y., for Defendant-Appellant.
Jack Smith, Asst. U.S. Atty., Brooklyn, N.Y. (Roslynn R. Mauskopf, U.S. Atty., Susan Corkery, Asst. U.S. Atty., on the brief), for Appellee.

Before: NEWMAN and SOTOMAYOR, Circuit Judges; and CHIN,[FN*] District Judge.

FN* Honorable Denny Chin, United States District Judge for the Southern District of New York, sitting by designation.

JON O. NEWMAN, Circuit Judge.
This sentencing appeal concerns the issue of whether a sentencing judge's error in mandatorily applying the Sentencing Guidelines prior to the Supreme Court's decision in *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), is harmless. Defendant-Appellant Francisco Lake appeals from a judgment of the United States District Court for the ***112** Eastern District of New York (Frederic Block, District Judge) convicting him on a plea of guilty to Hobbs Act, narcotics, and firearms offenses and sentencing him principally to 540 months' imprisonment. Because Lake preserved for appeal his objection to the mandatory use of the Guidelines and because the Government has not sustained its burden of proving that the *Booker* sentencing error was harmless, we remand for resentencing.

Background

Lake was arrested for his participation in the robberies of two jewelry stores. Lake belonged to a criminal association called the Padmore Crew, led by Vere Padmore, which included, among others, two members of the

New York Police Department, Jamil Jordan and Anthony Trotman. The Padmore Crew functioned as a loosely affiliated criminal network perpetrating robberies of jewelry stores and known drug dealers. The group's criminal offenses included several homicides. Trotman and Jordan supplied the ring with the identities of their drug-dealer victims, as well as police uniforms to assist in the robberies.

In September 1999, in accordance with a cooperation agreement, Lake pled guilty to a four-count superseding information charging (1) a Hobbs Act conspiracy to rob drug dealers and business employees and threatening violence in furtherance of such robberies, in violation of 18 U.S.C. §§ 1951, 3551; (2) a Hobbs Act substantive offense involving the robbery of employees of a jewelry store, in violation of 18 U.S.C. §§ 2, 1951, 3551; (3) possession with intent to distribute and distribution of five or more kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(ii)(II); 18 U.S.C. §§ 2, 3551; and (4) use and possession of a firearm in relation to a crime of violence, the robbery of a drug dealer, in violation of 18 U.S.C. §§ 924(c)(1), 2, 3551.

The presentence report ("PSR") assigned Lake a total offense level of 40 in Criminal History Category ("CHC") VI,[FN1] yielding a Guidelines range of 360 months to life in prison, with a mandatory five-year consecutive sentence, pursuant to 18 U.S.C. § 924(c)(1) and U.S.S.G. § 2K2.4(a)(2).

FN1. Lake's CHC score was enhanced by 3 points because he committed the instant offenses while on probation and within two years of release from imprisonment. As we have previously ruled, judicial fact-finding of facts concerning a prior conviction does not encounter Sixth Amendment objections under *Booker*. *See United States v. Fagans*, 406 F.3d 138, 141-42 (2d Cir.2005).

The Government moved for an upward departure for understatement of criminal history and obstruction of justice for the various lies Lake told while "cooperating" with authorities.

Lake objected to some of the enhancements recommended by the PSR, prompting the District Court to conduct a *Fatico* hearing. Lake also objected, on Sixth Amendment grounds, to any enhancement of his sentence based on facts not found by a jury, relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and the argument presented to the Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which was then pending.

The District Court found that Lake had been involved in several robberies and the murders of four persons. He called Lake an "abject criminal of the highest nature," "a wanton murderer," and "a person who doesn't belong out on the street in society," adding, "If ever there was a situation where somebody needed

to be incapacitated***113** to protect the public, this is one of those cases."

Applying a grouping analysis, *see* U.S.S.G. §§ 3D1.1-.5, which is not challenged on appeal (beyond the objection to judicial fact-finding), the District Court determined that the adjusted offense level was 38 and placed Lake in CHC V, yielding a sentencing range of 360-life. The Court denied Lake's motion for an acceptance of responsibility reduction, *see* U.S.S.G. § 3E1.1, and the Government's motions for upward departures.

The Court sentenced Lake to 240 months on Counts One and Two, to run concurrently; 480 months on Count Three, concurrent with Counts One and Two; and a mandatory, consecutive 60-month sentence on Count Four. The total sentence was therefore 540 months (45 years). The Court also imposed restitution in the amount of $1,000,564.75, and a $400 special assessment.

Based solely on the facts to which he allocuted, Lake faced a statutory mandatory minimum sentence of 15 years (10 years on Count Three plus 5 years, consecutively, on Count Four).

Discussion

Because Lake properly preserved for appellate review his Sixth Amendment objection to Guidelines enhancements based on judicial fact-finding, he is entitled to resentencing, *see* *United States v. Fagans*, 406 F.3d 138, 142 (2d Cir.2005) (remand for resentencing where statutory objection to mandatory use of the Guidelines properly preserved), unless the Government can sustain its burden of proving that the sentencing error was harmless, *see* *United States v. Olano*, 507 U.S. 725, 734-35, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). [FN2]

FN2. In *United States v. Crosby*, 397 F.3d 103 (2d Cir.2005), we said that "[a] remand for determination of *whether* to resentence is appropriate in order to undertake a proper application of the plain error and harmless error doctrines." *Id.* at 117. That statement was dictum with respect to harmless error because, in the absence of any indication that the sentencing error in *Crosby* had been preserved, we were applying plain error analysis. *See* *United States v. Williams*, 399 F.3d 450, 454 (2d Cir.2005) (amplifying rationale for *Crosby* remand "where an unpreserved error violates the Sixth Amendment"). The panel that decided *Crosby* had no occasion to rule on the application of the harmless error doctrine to review of a preserved sentencing error.
Since *Crosby*, we considered a preserved error in a pre-Booker sentence in *Fagans*. Implicitly concluding that the error-the mandatory use of the Guidelines-had not been shown to be harmless, we remanded for resentencing, rather than order a *Crosby* remand for

> determination of whether, absent the error, a non-trivially different sentence would have been imposed. *See* 406 F.3d at 142. *Fagans* thus abrogated the dictum in *Crosby* that had indicated that a *Crosby* remand would be appropriate for application of the harmless error doctrine as well as the plain error doctrine. In the pending case, therefore, the issue upon review of the preserved error is whether we should affirm, if the Government has shown the error to be harmless, or remand for resentencing, if such a showing has not been made.

Once the Supreme Court fundamentally altered federal sentencing procedures by ruling in *Booker* that the Guidelines were no longer required to be applied, it became difficult for the Government to sustain its burden of proving that a *Booker* error was harmless. Although some sentences imposed under the pre-*Booker* regime would not have been different had the sentences been imposed under the post-*Booker* regime, it will usually not be easy to divine with certainty that the sentencing judge would have imposed the same sentence. [FN3] ***114** We have recognized that a "rare" case may arise where we can confidently say that a sentencing error was harmless, as occurs in circumstances where a statutory mandatory minimum prevents the sentencing judge from giving a lesser sentence after *Booker* than the one imposed pre-*Booker*. *See United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir.2005).

> FN3. We frame the inquiry in terms of whether the original sentence *would have been* different, not whether, if resentencing were to occur, the new sentence *would be* different. Whether an error is alleged to be harmless with respect to a trial or a sentencing, the issue is always the effect of the error on the proceeding that occurred, not on any new proceeding that might be ordered.

In the pending case, the Government urges that Judge Block's statements in imposing sentence provide sufficient indication that the sentence would have been the same under the post-*Booker* regime. The Judge said, among other things:

This sentence is necessary for every reason that sentencing is necessary; for punishment, to incapacitate you during your adult life to protect the public from the type of violence you have visited upon the public when you were free from incarceration.

The Government also contends that the applicable guideline range of 360 months to life did not constrict Judge Block's sentencing discretion because he selected a sentence of 480 months on Count Three, indicating his view that neither a lower nor a higher sentence was warranted.

Although these arguments are not without force, we believe they overlook significant aspects of sentencing under the post-*Booker* regime. First, the fact that a judge selects a sentence *within* a guideline range that the

judge thought he was required to apply does not necessarily mean that the same sentence would have been imposed had the judge understood the Guidelines as a whole to be advisory. The applicable guideline range provides the frame of reference against which the judge chooses an appropriate sentence. In this case, for example, Judge Block might have thought that once the Commission specified the range it deemed appropriate for offense conduct like Lake's, the details of Lake's offense conduct were sufficiently serious to warrant punishment somewhat high in that range, but he might also have thought that a somewhat lower sentence would have been appropriate if he was selecting a sentence without regard to a Commission-prescribed range. Second, although even before *Booker,* a sentencing judge was obliged to consider all the factors set forth in 18 U.S.C. § 3553(a), the required use of one of those factors-the Guidelines, *see id.* § 3553(a)(4)-rendered of "uncertain import" the significance of the other factors. *See Crosby,* 397 F.3d at 111. Now, without the mandatory duty to apply the Guidelines, consideration of the other section 3553(a) factors "acquires renewed significance," *Crosby,* 397 F.3d at 111, and might result in a different sentence. Third, absent the strictures of the Guidelines, counsel would have had the opportunity to urge consideration of circumstances that were prohibited as grounds for a departure. *See* U.S.S.G. § 5K2.0(d).

In the pending case, we cannot say that it is likely that Judge Block would have imposed a different sentence under the post-*Booker* regime, but the Government has not shown that the possibility is so remote as to render the sentencing error harmless.

Conclusion

Accordingly, the case is remanded with directions to resentence the Appellant in ***115** conformity with *Booker* and *Fagans.*[FN4]

FN4. We have considered the Appellant's challenges to the Guidelines calculation and conclude that they are without merit. The challenges to the adjusted offense level for the offense conduct of attempting to rob George and Patricia Pessoa are irrelevant because even if that offense conduct had been counted as only half a unit for purposes of the grouping calculation, as urged by the Appellant, the resulting total number of units, 4, would still have required a 4-level increase in the adjusted offense level. *See* U.S.S.G. § 3D1.4 (3 1/2 -5 units require addition of 4 offense levels).

C.A.2 (N.Y.),2005.
U.S. v. Lake
419 F.3d 111

Briefs and Other Related Documents (Back to top)

• 2006 WL 889561 (Appellate Brief) Brief and Appendix for the United States (Feb. 18,

2006) Original Image of this Document with Appendix (PDF)
• 2004 WL 3758267 (Appellate Brief) Brief for Defendant-Appellant (Dec. 21, 2004) Original Image of this Document with Appendix (PDF)
• 04-3238 (Docket) (Jun. 09, 2004)

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Briefs and Other Related Documents

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America,
Plaintiff-Appellant,
v.
Lynn Marie LAZENBY,
Defendant-Appellee.
United States of America,
Plaintiff-Appellee,
v.
Christine Marie Goodwin,
Defendant-Appellant.
**No. 05-2214.**

Submitted: Jan. 11, 2006.
Filed: March 10, 2006.

**Background:** Pursuant to their guilty pleas, defendants were convicted in the United States District Court for the Northern District of Iowa of conspiring to manufacture and distribute methamphetamine. Government appealed sentence imposed on one defendant, and other defendant appealed her sentence.

**Holdings:** The Court of Appeals, Loken, Chief Judge, held that:

5(1) downward variance to 12 months' imprisonment for first defendant was unreasonable notwithstanding her significant

post-offense rehabilitative conduct, and

6(2) imposition of 87 months' imprisonment on codefendant convicted of similar conduct was also unreasonable in light of sentencing disparity and defendant's role in securing guilty pleas from others.

Reversed and remanded for resentencing.

West Headnotes

**[1] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
When the district court has correctly determined the Sentencing Guidelines range, the Court of Appeals reviews the resulting sentences for reasonableness, a standard akin to traditional review for abuse of discretion. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
Sentencing Guidelines sentencing range, though advisory, is presumed reasonable. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[3] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
When district court varies from Sentencing Guidelines range based upon its analysis of statutory factors, Court of Appeals will examine whether variance is reasonable, and whether the extent of any variance is reasonable. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases
Sentences varying from the Sentencing Guidelines range are reasonable so long as the judge offers appropriate justification under statutory sentencing factors. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[5] Sentencing and Punishment 350H 869**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk869 k. Rehabilitation. Most Cited Cases
Downward variance to 12 months' imprisonment from advisory Sentencing Guidelines range of 70 to 87 months' imprisonment was unreasonable for defendant who pled guilty to conspiring to manufacture and distribute methamphetamine, notwithstanding her significant post-offense rehabilitative conduct, where sentence was 83% below bottom of advisory range, sentence did not adequately reflect seriousness of defendant's conduct in assisting two different methamphetamine traffickers, and sentence resulted in unwarranted sentencing disparity with second female coconspirator who was convicted of same offense based on similar conduct but sentenced to 87 months' imprisonment. 18 U.S.C.A. § 3553(a)(6); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[6] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
Imposition of sentence of 87 months' imprisonment, which was bottom of Sentencing Guidelines range, upon defendant who pled guilty to conspiracy to manufacture and distribute methamphetamine was unreasonable in light of sentencing disparity with equally culpable coconspirator who received unreasonably low sentence of 12 months' imprisonment and role that defendant's early guilty plea and pledge of cooperation played in securing pleas from coconspirators. 18 U.S.C.A. § 3553(a)(6); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

***929** Stephanie M. Rose, AUSA, argued, Cedar Rapids, IA, for appellant USA.
David E. Mullin, argued, Cedar Rapids, IA, for appellant Goodwin.
Michael L. Mollman, argued, Cedar Rapids, IA, for appellee Lazenby.

Before LOKEN, Chief Judge, McMILLIAN [FN*] and MELLOY, Circuit Judges.

FN* The Honorable Theodore McMillian died on January 18, 2006. This opinion is being filed by the remaining judges of the panel pursuant to 8th Cir. Rule 47E. The opinion is consistent with the views expressed by Judge McMillian at the conference following the oral arguments.

LOKEN, Chief Judge.
Lynn Marie Lazenby and Christine Marie Goodwin pleaded guilty to conspiring to manufacture and distribute methamphetamine

in violation of 21 U.S.C. §§ 841 and 846. The district court sentenced Lazenby to twelve months and one day in prison, a substantial downward variance from the bottom of her advisory guidelines range. One month later, a different judge of the same court sentenced Goodwin to 87 months in prison, the bottom of her advisory guidelines range. The United States appealed Lazenby's sentence and Goodwin appealed her sentence as unreasonable under 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). After oral arguments, the court on its own motion consolidated the appeals for disposition. We conclude that Lazenby's sentence is unreasonable and that the district court did not adequately consider a number of relevant factors in determining Goodwin's sentence. Accordingly, we remand both cases for resentencing.

## I.

Lazenby and Goodwin fell in love with the same methamphetamine manufacturer and distributor, Patrick Lazenby (Lynn Lazenby's ex-husband, who is now serving a long federal prison sentence). The two women became methamphetamine users at Patrick's behest. More significantly, Lazenby***930** and Goodwin assisted Patrick and other more culpable conspirators in the manufacture and distribution of methamphetamine.

*Lazenby's Offense Conduct.* Beginning in early 2003, Lazenby purchased precursor items for the manufacture of methamphetamine and drove Patrick to rural areas where he could steal anhydrous ammonia. When Patrick was arrested in early 2004, Lazenby took up with a new boyfriend, conspirator Daniel Allie. She remained active in the conspiracy, purchasing precursor items for Allie and allowing her home to be used for the sale and use of methamphetamine in exchange for user amounts of methamphetamine. When arrested in October 2004, Lazenby called Allie at her home to warn him she had been arrested. A later search of the home uncovered evidence of methamphetamine manufacture-peeled lithium batteries, burned aluminum foil, muriatic acid, a cooler and tubing that smelled of anhydrous ammonia, baggies, and a small amount of methamphetamine. The Iowa Department of Human Services removed Lazenby's five-year old son from the home when his hair tested positive for chronic exposure to methamphetamine. In her plea agreement, Lazenby stipulated she "knew that Allie and his associates used at least 100 grams of pseudoephedrine in the manufacture of methamphetamine."

*Goodwin's Offense Conduct.* In March 2003, Goodwin was caught shoplifting lithium batteries and pseudoephedrine at a Wal-Mart store. A search incident to the arrest uncovered more pseudoephedrine, four cans of starter fluid, two propane cylinders showing signs of exposure to anhydrous ammonia, and other objects consistent with methamphetamine production. When Goodwin was again arrested for shoplifting

lithium batteries in September 2003, police uncovered a spoon and home-made pipe that tested positive for methamphetamine. As a result of the arrests, Goodwin began living at the Gerald R. Hinzman Center, a half-way house. She also maintained a "furlough residence" with Patrick Lazenby in Cedar Rapids. A warrant search of this residence in January 2004 uncovered evidence of methamphetamine production, including tanks of anhydrous ammonia, boxes of pseudoephedrine, heavy tubing, and lithium batteries. In her plea agreement, Goodwin stipulated that she "purchased at least 300 grams of pseudoephedrine for use in the manufacture of methamphetamine."

*Lazenby's Sentencing.* In determining Lazenby's advisory guidelines sentencing range of 70 to 87 months in prison, the parties and the court agreed on a base offense level of 32 based on at least 100 grams but less than 300 grams of pseudoephedrine. *See* U.S.S.G. § 2D1.11(d)(4). The government agreed that Lazenby qualified for "safety valve" relief. The district court denied a two-level reduction for her role in the offense. To support her claim for a downward variance from the guidelines range, Lazenby called three witnesses who testified that she was allowed to care for her son during weekdays and has a loving relationship with him, that she has attended meetings of a Moms Off Meth support group and passed post-arrest drug tests, and that she is a valued and trusted employee.

The district court sentenced Lazenby to twelve months and one day in prison. The court found it highly unlikely she will commit future crimes and noted that she made extraordinary efforts to reunite with her son, probably used methamphetamine only on the weekends because she was able to "maintain a high level of job performance on what would be a relatively stressful job," and was drawn into the conspiracy as ***931** a result of her poor choices in relationships with men. Regarding the need to avoid unwarranted sentencing disparity, the court stated: "the sentence that I'm about to give is a sentence that I would give for a similarly situated individual post-Booker, and hopefully the sentences on the whole will be somewhat less harsh in the post-Booker world." The government objected to the sentence as unreasonable and now appeals.

*Goodwin's Sentencing.* One month later, Goodwin appeared for sentencing before a different district judge who had previously sentenced Patrick Lazenby and eleven other participants in separately prosecuted but overlapping methamphetamine conspiracies. The parties and the court agreed on a base offense level of 34 based on at least 300 grams but less than 1000 grams of pseudoephedrine. *See* U.S.S.G. § 2D1.11(d)(3). Goodwin's base offense level is two levels higher than Lazenby's because Goodwin stipulated to being involved in a greater quantity of pseudoephedrine. The government agreed that Goodwin qualified for "safety valve" relief. The government explained that it was not filing a substantial assistance motion because, while Goodwin cooperated with the

government and stood ready to testify against other conspirators, her testimony was not needed when they pleaded guilty. As with Lazenby, the district court denied a two-level reduction for Goodwin's role in the offense. This produced an advisory guidelines range of 87-108 months.

To support her claim for a downward variance from the guidelines range, Goodwin introduced letters from family members and present and former employers stating that she has ended her dependence on drugs, reestablished ties with her children and her niece, and become a reliable and valued employee. Government counsel urged a sentence at the bottom of the guidelines range but, responding to a question by the court, said she was not authorized to support a sentence below that range. Government counsel noted that the court could consider the time Goodwin spent at the Hinzman Center in deciding whether to grant a downward variance under § 3553(a), because the Bureau of Prisons was unlikely to credit that time towards her sentence. But again, the government refused to request a sentence beneath the guidelines range on that ground. The district court then sentenced Goodwin to 87 months in prison. Goodwin appeals the sentence as unreasonable.[FN1]

FN1. The United States initially argued that we have no jurisdiction to review a sentence that is within the defendant's properly determined advisory guidelines range but withdrew this argument after our contrary decision in *United States v. Mickelson*, 433 F.3d 1050, 1052-53 (8th Cir.2006).

**II.**

[1] Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60, 125 S.Ct. 738. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. *United States v. Haack*, 403 F.3d 997, 1002-03 (8th Cir.), *cert. denied* --- U.S. ----, 126 S.Ct. 276, 163 L.Ed.2d 246 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of [the] other statutory concerns" in § 3553(a). *Booker*, 543 U.S. at 245-46, 125 S.Ct. 738. When the district court has correctly determined the guidelines sentencing range, as in these cases, we review the resulting sentences for reasonableness, ***932** a standard akin to our traditional review for abuse of discretion.

[2][3][4] The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. *See United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir.2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir.2005). When the

district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance ... is reasonable." *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir.2005); *see Haack*, 403 F.3d at 1004. "Sentences varying from the guidelines range ... are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir.2005) (citation omitted). A "range of reasonableness" is within the court's discretion. *United States v. Saenz*, 428 F.3d 1159, 1165 (8th Cir.2005).

The notable aspect of these appeals is the extreme disparity in the sentences imposed on two remarkably similar participants in the same criminal conspiracy. Moreover, a number of factors suggest that substantially greater leniency was afforded the *more culpable* defendant, Lynn Lazenby:

• Both Lazenby and Goodwin were drawn into the conspiracy by their relationship with ringleader Patrick Lazenby. When Patrick was convicted in early 2004, Lazenby took up with conspirator Daniel Allie and continued to assist in the manufacture and distribution of methamphetamine. By contrast, Goodwin's PSR and plea agreement do not link her with the conspiracy after early 2004.

• When arrested in October 2004, Lazenby called Allie and advised him to remove incriminating items from her home. Though unsuccessful, this was an obvious attempt to obstruct the investigation.

• Goodwin pleaded guilty on November 10, 2004. Within a week, three other conspirators including Lazenby pleaded guilty, and a fourth changed his plea one month later. Goodwin cooperated fully. She was willing to testify at Lazenby's sentencing in support of portions of the PSR to which Lazenby objected. On the eve of sentencing, Lazenby admitted these portions of the PSR were true.

• Both Lazenby and Goodwin are single mothers who neglected their children while participating in the conspiracy and have made significant efforts to reunite with the children and become suitable parents. Lazenby's five-year-old son was removed from her home when testing revealed chronic exposure to methamphetamine. Goodwin's children were not directly harmed by the conspiracy.

[5] *Lazenby's Sentence.* We conclude that the district court granted Lazenby an unreasonable downward variance. The twelve-month prison sentence is 83% below the 70-month bottom of her advisory guidelines range. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005). This extraordinary variance is not supported by comparably extraordinary

circumstances. Lazenby's significant post-offense rehabilitative conduct is relevant in evaluating the § 3553(a) factors. *Cf. United States v. Kapitzke*, 130 F.3d 820, 823-24 (8th Cir.1997) (atypical post-offense rehabilitation***933** may support guidelines downward departure). The other factors cited by the district court, though discouraged or prohibited departure factors under the mandatory guidelines, may also be considered in applying the § 3553(a) factors under *Booker.* But taken together, they do not justify an 83% variance because a twelve month sentence does not adequately reflect the seriousness of and provide just punishment for Lazenby's drug offense. *See* 18 U.S.C. § 3553(a)(2)(A). She assisted two different methamphetamine traffickers in the manufacture and distribution of this destructive drug for at least eighteen months. She allowed her house to be used by the drug ring, greatly endangering her young son while helping the conspiracy ruin the lives of its customers. Her post-offense rehabilitation is dramatic and hopefully permanent, but a twelve month sentence for this offense conduct "lies outside the limited range of choice dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied* --- U.S. ----, 126 S.Ct. 276, 163 L.Ed.2d 246 (2005); *see United States v. Rogers*, 400 F.3d 640, 642 (8th Cir.2005), *cert. denied,* --- U.S. ----, 126 S.Ct. 1020, 163 L.Ed.2d 865 (2006).

Finally, the twelve month sentence is unreasonable because it results in unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. *See* 18 U.S.C. § 3553(a)(6). The district court candidly met this point by observing that "hopefully the sentences on the whole will be somewhat less harsh in the post-Booker world." But that is an issue for Congress, not a valid basis for exercising discretion under *Booker.* Congress has made avoiding unwarranted disparity a legislative priority. The disparity between Lazenby's sentence and the far greater sentences imposed on the other less culpable members of these related conspiracies does not adequately serve this congressional objective. Lazenby's case must be remanded for resentencing.

[6] *Goodwin's Sentence.* Goodwin's appeal is more difficult. The district court expressly considered the Guidelines and the sentencing factors in § 3553(a) and imposed a sentence at the bottom of the advisory guidelines range. This sentence is presumed reasonable; only highly unusual circumstances will cause this court to conclude that the presumption has been rebutted. But a number of circumstances make this case highly unusual. First, the prosecutor stated at sentencing that Goodwin and Lazenby were similarly situated members of the conspiracy. In Goodwin's plea agreement, she stipulated to being involved with 300 grams of pseudoephedrine. Less than two weeks later, Lazenby entered into a plea agreement stipulating to 100 grams of pseudoephedrine. The higher quantity increased Goodwin's offense level by two levels and the bottom of her guidelines range by seventeen months. Yet nothing in the fact sections of the two PSRs-prepared by the

same probation officer-justifies this disparity. Prior to *Booker*, the district court lacked discretion to remedy this type of Guidelines-created disparity. *Booker* gave courts discretion to cure such an injustice, but the court did not consider this factor.

Second, Goodwin was the first of her co-defendants to plead guilty. It is a fair inference that her pledge of full cooperation played a role in the rapid guilty pleas entered by her conspirators, and in Lazenby dropping objections to the offense as described in her PSR. As a result, Goodwin's testimony was not needed, causing the government to exercise its discretion not to move for a § 5K1.1 downward departure. Prior to *Booker*, the court was then virtually precluded from considering this factor. *See, e.g., United States v. Moeller*, 383 F.3d 710 (8th Cir.2004). Under***934** *Booker*, the prosecution's evaluation of the cooperation factor remains critical but is less controlling. The district court did not take this change into account.

Third, the district court appeared to give too much weight to the prosecutor's statement that she was not authorized to support a downward variance. Under the Sentencing Reform Act and *Booker*, sentencing discretion rests in the final analysis with the sentencing judge, not with the prosecution.

Finally, and perhaps most importantly, the district court gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators, Lazenby and Goodwin. Even under the mandatory Guidelines, we reviewed variations in sentencing among similarly situated defendants for abuse of discretion. *See United States v. Thompson*, 51 F.3d 122, 126 (8th Cir.1995). Under *Booker*, that discretion has increased. Perfect parity among the sentences imposed on the various members of a criminal conspiracy is no doubt impossible to achieve, given the complexity of the task. But the extreme disparity in these two sentences not only fails to serve the legislative intent reflected in § 3553(a)(6), it also suggests an arbitrary level of decision-making that fails to "promote respect for the law," § 3553(a)(2)(A). Here, it is apparent the district court believed that Lazenby's sentence was unreasonably low. That presented the court with a delicate and difficult problem in sentencing Goodwin, which illustrates the virtue of having the members of a criminal conspiracy sentenced, when possible, by the same district judge, even if all have pleaded guilty. The problem is significantly reduced because we have now reversed Lazenby's sentence. In these unusual circumstances, we conclude that Goodwin's sentence should be reversed as well.

The judgments of the district court are reversed and the cases are remanded to the district court for resentencing of Lynn Lazenby and Christine Goodwin.

C.A.8 (Iowa),2006.
U.S. v. Lazenby
439 F.3d 928

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• 05-2214 (Docket) (May. 04, 2005)

END OF DOCUMENT

United States Court of Appeals,First Circuit.
UNITED STATES of America, Appellee,
v.
Kenny MATEO-ESPEJO, Defendant, Appellant.
**No. 03-1177.**

Submitted Sept. 12, 2005.
Decided Oct. 21, 2005.

**Background:** Defendant was convicted pursuant to his guilty plea before the United States District Court for the District of Rhode Island, Ernest C. Torres, Chief Judge, of conspiracy to distribute more than fifty grams of crack cocaine and distribution of crack cocaine. Defendant appealed his sentence.

**Holdings:** The Court of Appeals, Selya, Circuit Judge, held that:

1(1) refusal to grant defendant additional one-level reduction for acceptance of responsibility was not clearly erroneous;

4(2) determination that defendant did not qualify for minor role reduction under Sentencing Guidelines was not clearly erroneous; and

7(3) error under *United States v. Booker* in sentencing defendant under mandatory

Guidelines regime did not rise to level of plain error.

Affirmed.

West Headnotes

**[1] Sentencing and Punishment 350H 765**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)3 Factors Decreasing Offense Level
350Hk765 k. Acceptance of Responsibility. Most Cited Cases
Refusal to grant defendant who pled guilty on day of scheduled jury selection an additional one-level reduction for acceptance of responsibility under Sentencing Guidelines was not clearly erroneous, as he did not discuss details of crimes with government until day before his scheduled sentencing or notify government of his intent to plead guilty in time to save trial preparation time, as required to qualify for additional reduction. U.S.S.G. § 3E1.1(b), 18 U.S.C.A.

**[2] Criminal Law 110 641.10(1)**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.10 Choice of Counsel
110k641.10(1) k. In General; Forcing Counsel on Accused. Most Cited Cases

**Sentencing and Punishment 350H 765**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)3 Factors Decreasing Offense Level
350Hk765 k. Acceptance of Responsibility. Most Cited Cases
Withholding additional one-level reduction for acceptance of responsibility under Sentencing Guidelines from defendant who jettisoned one retained attorney for another did not infringe upon his Sixth Amendment right to counsel of his own choosing, where counsel change, and earlier switch from appointed to retained counsel, did not affect timing of guilty plea decision on day of jury selection, which came too late to prevent waste of judicial resources and government trial preparation time. U.S.C.A. Const.Amend. 6; U.S.S.G. § 3E1.1(b), 18 U.S.C.A.

**[3] Sentencing and Punishment 350H 764**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)3 Factors Decreasing Offense Level
350Hk764 k. Minor or Minimal Participation. Most Cited Cases

To qualify for a minor role reduction under Sentencing Guidelines, the defendant must demonstrate that he is less culpable than most of those involved in the offenses of conviction and that he is less culpable than most of those who have perpetrated similar crimes. U.S.S.G. § 3B1.2(b), 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 764**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)3 Factors Decreasing Offense Level
350Hk764 k. Minor or Minimal Participation. Most Cited Cases
Refusal to grant downward adjustment to defendant as minor participant in drug sales was not clearly erroneous, even if co-conspirator arranged initial meeting with buyer without aid from defendant, where defendant transported crack to delivery site, played significant role in culmination of sale, and met again with buyer to collect unpaid balance. U.S.S.G. § 3B1.2(b), 18 U.S.C.A.

**[5] Criminal Law 110 1035(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(1) k. In General. Most Cited Cases
Alleged Sixth Amendment error under *United States v. Booker* was subject to plain error review only, where Sixth Amendment objection was not made at sentencing. U.S.C.A. Const.Amend. 6; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[6] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
To demonstrate plain error, defendant must present something concrete that provides plausible basis for finding that he would have received lesser sentence under advisory Sentencing Guidelines regime to demonstrate that *United States v. Booker* error in Guidelines' mandatory application affected substantial rights. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[7] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or

Judgment. Most Cited Cases
Error under *United States v. Booker* in sentencing defendant under mandatory Sentencing Guidelines regime did not affect defendant's substantial rights, as required to show plain error, by reason of court's inability to consider defendant's age and family circumstances, where sentencing court's reluctance to sentence defendant at lower end of mandatory Sentencing Guidelines range suggested lack of reasonable possibility that defendant would have received lesser sentence under advisory regime. U.S.S.G. § 1B1.15H1.1, 5H1.6, 18 U.S.C.A.

**[8] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
Lesser sentence received by coconspirator did not suggest reasonable possibility that defendant would have received lesser sentence under advisory Sentencing Guidelines regime, so as to show that *United States v. Booker* error in treating Guidelines as mandatory affected defendant's substantial rights, as required for finding of plain error, where, unlike defendant, coconspirator had promptly and fully cooperated with authorities. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[9] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
Defendant's claim that he committed crimes because he needed money to provide for ailing grandmother and parents who were being evicted did not raise reasonable possibility that he would have received lesser sentence under advisory Sentencing Guidelines regime, so as to demonstrate that his substantial rights were violated under *United States v. Booker* by use of mandatory regime, as required to show plain error. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

***509** Jeffrey L. Baler on brief for appellant.
Robert Clark Corrente, United States Attorney, and Donald C. Lockhart and Kenneth P. Madden, Assistant United States Attorneys, on brief for appellee.

Before SELYA, Circuit Judge, COFFIN and CYR, Senior Circuit Judges.

SELYA, Circuit Judge.
Defendant-appellant Kenny Mateo-Espejo pleaded guilty to charges of conspiracy to distribute more than fifty grams of crack cocaine, *see* 21 U.S.C. §§ 841(a)(1), 846, and distribution of that amount of crack cocaine, *see id.* § 841(a)(1). He now appeals his sentence. Concluding, as we do, that the

district court committed no reversible error in the course of sentencing, we affirm the judgment below.

## I. BACKGROUND

Because this appeal follows a guilty plea, we draw the relevant facts from the change-of-plea colloquy, the unchallenged portions of the presentence investigation report (PSI Report), and the transcript of the disposition hearing. *United States v. Brewster*, 127 F.3d 22, 24 (1st Cir.1997); *United States v. Dietz*, 950 F.2d 50, 51 (1st Cir.1991).

On March 14, 2002, Leopold Weeks, alleged to be the appellant's coconspirator, accepted $3,000 as a down payment for the sale of 250 grams of cocaine base (colloquially known as crack cocaine). At the appointed***510** time, Weeks and the appellant went to meet the prospective purchaser. The appellant removed 247.04 grams of crack cocaine from his pocket and delivered it to the buyer. Five days later, the appellant met with the buyer and collected the balance of the purchase price ($3,600). The buyer proved to be an undercover police officer, so arrests and an indictment soon followed.

After twice switching counsel, the appellant entered a guilty plea on August 13, 2002 (the day that jury empanelment was to occur). The PSI Report, which the appellant received on November 5, 2002, recommended a base offense level of 34, *see* USSG § 2D1.1(a)(3), and a two-level downward adjustment for acceptance of responsibility, *see id.* § 3E1.1(a).[FN1] The appellant's only objection to the PSI Report was to the absence of an additional level in the credit for acceptance of responsibility. *See id.* § 3E1.1(b). Because the appellant had not yet met with the authorities-he did not participate in a debriefing until the day before sentencing-the PSI Report did not recommend a so-called "safety valve" reduction. *See id.* § 2D1.1(b)(6).

> FN1. We refer throughout this opinion to the November 2002 edition of the sentencing guidelines. *See United States v. Harotunian*, 920 F.2d 1040, 1041-42 (1st Cir.1990) (explaining that, absent ex post facto concerns, the version of the sentencing guidelines in effect on the date of sentencing controls). That point is of more than academic interest, as the contours of USSG § 3E1.1(b) have changed materially.

At the disposition hearing, the district court, with obvious reluctance, granted the two-level safety valve adjustment. The court also bestowed a two-level reduction for acceptance of responsibility, but declined to award an additional one-level reduction. Midway through the hearing, the appellant for the first time asserted an entitlement to a minor role adjustment, *see id.* § 3B1.2(b), but the court rebuffed that initiative. These rulings yielded a total offense level of 30 which, combined

with a criminal history category of I (the appellant had no prior criminal record), produced a guideline sentencing range (GSR) of 97-121 months. The court, albeit grudgingly, acquiesced in the government's recommendation and sentenced the appellant to a 97-month incarcerative term. This timely appeal ensued.

## II. ANALYSIS

In this venue, the appellant advances three claims of error. He maintains that the sentencing court erred (i) in refusing to grant him an additional one-level reduction for acceptance of responsibility; (ii) in failing to find that he played only a minor role in the offenses of conviction; and (iii) in sentencing him contrary to the mandate of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). We discuss these claims in sequence.

### A. *Acceptance of Responsibility.*

We begin with the sentencing court's refusal to grant an additional one-level reduction for acceptance of responsibility. "A defendant bears the burden of proving entitlement to decreases in the offense level, including downward adjustments for acceptance of responsibility." *United States v. Morillo*, 8 F.3d 864, 871 (1st Cir.1993). Where, as here, the district court has ruled adversely on such an issue, the ruling will be set aside only if it is shown to be clearly erroneous. *United States v. Royer*, 895 F.2d 28, 29 (1st Cir.1990). The appellant has not made such a showing.

[1] A defendant who accepts responsibility for his criminal conduct normally receives a two-level discount in his offense level. *See* USSG § 3E1.1(a). To qualify for an additional one-level reduction, the defendant must either: timely provide ***511** complete information to the government anent his own involvement in the offense(s) of conviction or, at least, timely notify the authorities of his intention to plead guilty. *Id.* § 3E1.1(b). The guidelines offer this second avenue as a means of "permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *Id.*

The first of these routes is not available to the appellant. He did not discuss the details of the offenses of conviction with the government until the day before his scheduled sentencing. That hardly can be considered a timely provision of complete information to the government. *See, e.g., United States v. Brack*, 188 F.3d 748, 765 (7th Cir.1999) (finding no timely provision of complete information when defendant was not debriefed until four days before trial).

The second avenue also proves to be a dead end. The district court regarded the appellant's eleventh-hour decision to plead guilty, made on the day of jury empanelment, as failing to satisfy the applicable criterion. That determination was not clearly erroneous.

Although this case was not a complicated one, the government needed some time to prepare for trial-and the timing of the appellant's change of plea meant that the government's preparation had largely been done. Equally as important, the appellant's belated decision wasted judicial resources; jurors had been summoned unnecessarily and the court's calendar had been cleared to accommodate a trial that never took place. A timely decision on the appellant's part would have ameliorated these problems, saving the government a significant portion of its trial preparation expenses and allowing the court to husband judicial resources. Under these circumstances, denying the additional one-level discount was not clearly erroneous. *See, e.g.,* *Morillo,* 8 F.3d at 872 (finding no clear error in denial of additional one-level reduction when defendant waited until the day of jury selection to enter a guilty plea); *United States v. Donovan,* 996 F.2d 1343, 1345 (1st Cir.1993) (per curiam) (finding no clear error in denial of additional one-level reduction when defendant waited until the eve of trial to plead guilty).

[2] The appellant makes a last-ditch effort to salvage his acceptance of responsibility argument: he asserts that his change of counsel caused the delay in notifying the government of his intent to change his plea and that withholding the extra level of credit infringes upon the exercise of his constitutionally assured right, under the Sixth Amendment, to counsel of his choosing. We agree with a portion of the appellant's underlying premise, but in the end, we find his argument unpersuasive.

The point of agreement is that a district court may properly consider the right to effective assistance of counsel in determining if a defendant qualifies for the additional one-level reduction under section 3E1.1(b). *See, e.g., United States v. Altier,* 91 F.3d 953, 958 (7th Cir.1996). On the facts of this case, however, the conclusion that the appellant would have us draw does not follow from this premise. Nothing in the record indicates that the timing of the appellant's decision to plead guilty had anything to do with switching from one lawyer to another. Indeed, the appellant does not even attempt to explain how changing counsel impacted his decision to abjure a trial.

In all events, the district court gave careful attention to this plaint. The court found it meritless, noting that the appellant may have had a more plausible argument if, shortly before he changed his plea, he had switched from appointed counsel to retained counsel. Yet, that was ***512** not the scenario here; the appellant's original attorney was court-appointed but rapidly replaced by a privately retained attorney, and the shuffling to which the appellant points is the replacement of that attorney with yet another privately retained attorney. The district court found that the appellant's decision to jettison one retained lawyer in favor of another, without more, did not create a Sixth Amendment impediment to the withholding of the additional one-level reduction. On the record before us, that finding was not clearly

erroneous.

**B. *Role in the Offense.***

We turn next to the appellant's claim that he should have received a two-level reduction for his minor role in the offenses of conviction. The government argues plausibly that the appellant either waived or forfeited this claim of error because he failed to object to the PSI Report within the prescribed period. *See* Fed.R.Crim.P. 32(f); D.R.I. R. 40.2(a). Giving the appellant the benefit of every doubt, we assume, for argument's sake, that the claim was properly preserved. On that basis, appellate review is for clear error. *United States v. Graciani*, 61 F.3d 70, 75 (1st Cir.1995).

[3] A defendant who seeks a downward adjustment stemming from his supposedly peripheral role in the offense bears the burden of proof on that issue. *United States v. Ocasio*, 914 F.2d 330, 332-33 (1st Cir.1990). To qualify for a minor role reduction under USSG § 3B1.2(b), the defendant must satisfy a two-pronged test. First, he must demonstrate that he is less culpable than most of those involved in the offenses of conviction. *See United States v. Santos*, 357 F.3d 136, 142 (1st Cir.2004); *Ocasio*, 914 F.2d at 333. Second, he must establish that he is less culpable than most of those who have perpetrated similar crimes. *See Santos*, 357 F.3d at 142; *Ocasio*, 914 F.2d at 333.

[4] In an effort to satisfy the first prong, the appellant asserts that Weeks was the ringleader-the person who arranged the transaction-while he (Mateo-Espejo) was merely a courier. This assertion lacks force.

Although the appellant may not have arranged the initial meeting, he transported a large amount of crack to the delivery site, played a significant role in the culmination of the sale, and met again with the buyer (this time, without Weeks) to collect the unpaid balance of the purchase price. Based on these facts, the district court found that the appellant was not substantially less culpable than his coconspirator (and, thus, not a minor participant).

That finding demands our fealty. After all, this court repeatedly has upheld the denial of downward role-in-the-offense adjustments for defendants who have been no more involved in drug transactions than the appellant. For example, in *United States v. Ortiz-Santiago*, 211 F.3d 146 (1st Cir.2000), we descried no clear error in the sentencing court's denial of a minor role adjustment where the defendant had performed only "menial tasks" such as unloading the drugs and conducting surveillance. *Id.* at 149. So too in *United States v. Gonzalez-Soberal*, 109 F.3d 64 (1st Cir.1997), we discerned no clear error in the sentencing court's denial of a downward role-in-the-offense adjustment on the assumption that the defendant had been no more than a courier. *Id.* at 73-74. And in *United States v. Cepeda*, 907 F.2d 11 (1st Cir.1990), we found no clear error in the sentencing court's denial of a minor role adjustment where, as here, the defendant

delivered drugs and collected money. *Id.* at 12. Silhouetted against this precedential backdrop, the decision of the court below denying the appellant's request that ***513** he be classified as a minor participant cannot be characterized as clearly erroneous. *Cf.* *United States v. González*, 363 F.3d 15, 18 (1st Cir.2004) (per curiam) ("Even if [defendant's] role were limited to that of driver, that would not necessarily, without more, prove that he deserved a role adjustment.").

### C. *Booker Error.*

In *Booker*, the Supreme Court held that a defendant's Sixth Amendment right to trial by jury is violated when his sentence is imposed under a mandatory guidelines system that gives decretory significance to judge-found facts. 125 S.Ct. at 756. The appellant notes that he was sentenced prior to the *Booker* decision and under the mandatory guidelines system then in effect. Building on this foundation, he maintains that his sentence is tainted by *Booker* error.

[5] The appellant did not make a Sixth Amendment objection at the time of sentencing, so this claim of error is unpreserved. Consequently, our review is for plain error. *United States v. Guzmán*, 419 F.3d 27, 30 (1st Cir.2005); *United States v. Antonakopoulos*, 399 F.3d 68, 75 (1st Cir.2005). To cross that threshold, the appellant must show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected [his] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States v. Duarte*, 246 F.3d 56, 60 (1st Cir.2001).

In this instance, the lower court, operating in accordance with the pre-*Booker* norm, treated the guidelines as mandatory. Thus, the first two elements of the plain-error formulation are present here. *See* *Antonakopoulos*, 399 F.3d at 77.

[6] To satisfy the third element, the appellant must demonstrate a reasonable probability that he would have received a lesser sentence under an advisory guidelines regime. *See* *Guzmán*, 419 F.3d at 30; *Antonakopoulos*, 399 F.3d at 75. Although we are not overly demanding in our assessment of a defendant's attempt to make this showing, *see* *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir.2005), we do require "something concrete, whether or not in the sentencing record itself, that provides a plausible basis for such a finding," *Guzmán*, 419 F.3d at 32.

[7] The appellant first suggests that there are factors present here that the sentencing court, under a mandatory guidelines system, was unable to consider when passing sentence and that, under an advisory guidelines system, these factors would have led to a milder sentence. In this regard, the appellant, who was twenty-three years of age at the time of sentencing, mentions his youth and his significant familial responsibilities. While the district court did not allude to either of these factors at sentencing, the appellant

attributes the court's silence to the prohibitory language of the now-discredited mandatory guidelines system. *See* USSG § 5H1.1 (directing that age ordinarily should not be deemed relevant in determining whether a sentence should be imposed outside the applicable GSR); *id.* § 5H1.6 (same, with respect to family circumstances).

It is, of course, possible that a judge might reserve comment on a matter because he thought that the mandatory nature of the sentencing guidelines rendered comment futile. Here, however, the district court, fully apprised by the PSI Report of the appellant's age and family responsibilities, went out of its way to indicate its reluctance to impose the low-end sentence that the government strongly recommended. The court stated, in no uncertain terms, that it did not see "any reason" for a sentence at the bottom of the GSR, "except for the government's ***514** recommendation." These statements are a powerful indication that the court was unpersuaded that the factors limned in the PSI Report counseled in favor of leniency. In the last analysis, the colloquy in the record, taken as a whole, neither suggests nor supports a reasonable probability that the court would have imposed a sentence outside the GSR under an advisory guidelines regime.

The appellant has another string to his bow. He asseverates that there were other circumstances, not mentioned in the PSI Report, that would have led the court to impose a more lenient sentence. We reject this asseveration.

[8] The first circumstance to which the appellant alludes is the disparity between his 97-month sentence and Weeks's 70-month sentence. A well-founded claim of disparity, however, assumes that apples are being compared to apples. Here, there is no true disparity; differences between the appellant's belated and grudging cooperation and Weeks's prompt and full cooperation sensibly account for the differing sentences. On a practical level, it would seem patently unreasonable to endorse a regime in which a defendant could steadfastly withhold cooperation from the authorities and then cry foul when a coconspirator benefits from rendering substantial assistance to the government.

[9] The only other "new" circumstance to which the appellant adverts is his claim that he committed the crimes because he needed money to provide for an ailing grandmother and parents who were being evicted from their home. This line of defense did not work for Jean Valjean, *cf.* Victor Hugo, Les Misérables (Norman Denny trans., Penguin Books 1982) (1862), and we see no basis for a reasonable expectation that it would have worked here. After all, the sentencing court was aware of the appellant's familial obligations and it said nothing that might lead to a well-founded belief that those obligations ought to impact the length of the sentence. That silence, combined with the court's avowed reluctance even to give the appellant a sentence at the bottom of the GSR, leads to the conclusion that the appellant has failed to demonstrate a reasonable probability that the *Booker* error had a prejudicial effect in this

case. *See, e.g.,* *United States v. Martins*, 413 F.3d 139, 154 (1st Cir.2005); *United States v. Vega Molina*, 407 F.3d 511, 534 (1st Cir.2005).

Because the appellant has not shown a reasonable probability that the lower court would have imposed a more lenient sentence under an advisory guidelines system, we reject his *Booker* challenge.

**III. CONCLUSION**

We need go no further. The court below did not err in calculating the applicable GSR. It did, of course, commit *Booker* error, but that unpreserved error was not prejudicial (and, therefore, was not plain). Accordingly, there is no justification for disturbing the appellant's sentence.

***Affirmed.***

C.A.1 (R.I.),2005.
U.S. v. Mateo-Espejo
426 F.3d 508

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,Eleventh Circuit.
UNITED STATES of America,
Plaintiff-Appellant,
v.
Malcolm E. McVAY, Defendant-Appellee.
**No. 04-13455.**

May 5, 2006.

**Background:** Defendant was convicted in the United States District Court for the Northern District of Alabama, No. 03-00195-CR-C-S,U.W. Clemon, Chief Judge, of conspiracy to commit wire and securities fraud that resulted in losses of some $400 million, and false certification of financial information filed with the Securities and Exchange Commission (SEC), and sentenced to 60 months' probation, and government appealed.

4**Holding:** The Court of Appeals, Marcus, Circuit Judge, held that district court's consideration of defendant's "exemplary record" and "the situation with his daughter," in the context of a substantial-assistance departure was error.

Sentence vacated and remanded.

West Headnotes

**[1] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Whether district court misapplied Sentencing Guidelines is subject to *de novo* review. 18 U.S.C.A. § 3742(f).

**[2] Sentencing and Punishment 350H 800**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk800 k. In General. Most Cited Cases
It is only after a district court correctly calculates the Guidelines range that it may consider imposing a more severe or more lenient sentence. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[3] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
Government's challenge to the extent of a substantial-assistance departure from the Guidelines range is subject to review for an abuse of discretion. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
District court's consideration of defendant's "exemplary record" and "the situation with his daughter," in the context of a substantial-assistance departure was error; court did not have discretion to consider factors altogether unrelated to the nature and extent of defendant's assistance. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

**[5] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases

**Sentencing and Punishment 350H 996**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk996 k. Sufficiency.
Most Cited Cases
Sentencing Guidelines contemplate a substantial-assistance determination that is individualized to the defendant based on the relevant factors and more specific than a simple statement that the reduction is based on the defendant's substantial assistance. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

***1348** Joyce White Vance, Birmingham, AL, for U.S.
Sam Heldman, Gardner, Middlebrooks, Gibbons & Kittrell, Washington, DC, J. Don Foster, Jackson, Foster & Graham, LLC, Mobile, AL, for McVay.

Appeal from the United States District Court for the Northern District of Alabama.

Before DUBINA and MARCUS, Circuit Judges, and GOLDBERG[FN*], Judge.

FN* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

***1349** MARCUS, Circuit Judge:

I.

The United States appeals from a sentence of 60 months' *probation* imposed by the district court on Malcolm E. McVay, the former Chief Financial Officer, Senior Vice-President, and Treasurer of HealthSouth Corporation ("HealthSouth"). McVay pled guilty to conspiracy to commit wire and securities fraud that resulted in losses of some $400 million, and to false certification of financial information filed with the Securities and Exchange Commission ("SEC"). On appeal, the government argues that the trial court erred by downwardly departing so drastically from the Sentencing Guidelines range-from an offense level 29 to an offense level 8-based on the government's substantial-assistance motion, filed pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. This 21-level departure resulted in an adjustment from a Guidelines sentencing range of 87 to 108 months' imprisonment to a sentencing range of 0 to 6 months' imprisonment. The government says that this extraordinary downward departure was unwarranted as a substantial-assistance adjustment.

After careful review of the record and the parties' briefs and oral arguments, we conclude the district court reversibly erred by downwardly departing so sharply, based on substantial assistance, virtually without explanation, and on a wholly improper basis. Accordingly, we vacate McVay's sentence and remand for resentencing consistent with this opinion.

This is the fourth appeal by the United States challenging what we have called "dramatic" and "extraordinary" downward departures awarded by the district court, without sufficient record support. *See* *United States v. Livesay*, 146 Fed.Appx. 403 (11th Cir.2005) (reversing "dramatic" 18-level reduction in offense level based on record that provided "scant basis to assess reasonableness" of departure); *United States v. Botts*, 135 Fed.Appx. 416 (11th Cir.2005) (reversing "extraordinary" 26-level reduction in offense level based on record that "is incapable of meaningful appellate review"); *United States v. Martin*, 135 Fed.Appx. 411 (11th Cir.2005) (reversing "extraordinary" 21-level reduction in offense level based on record that "is incapable of meaningful appellate review"). All arise out of crimes, to which all four defendants, former executives of HealthSouth, pled guilty, in connection with a massive, multibillion-dollar securities fraud. As in the other three cases, the instant offenses occurred in the course of a conspiracy by senior officers of HealthSouth, one of the nation's largest providers of outpatient surgery, diagnostic imaging, and rehabilitative healthcare services. HealthSouth has approximately 1,800 locations in all fifty states, Puerto Rico, the United Kingdom, Australia, and Canada. HealthSouth is an issuer of a class of securities registered under Section 12 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78l. Because its common stock was listed on the New York Stock Exchange, HealthSouth was required to comply with federal securities laws and regulations to ensure that the company's financial information was accurately reported and disclosed to the public.

Beginning in 1994, if not earlier, senior officers of HealthSouth conspired to inflate sharply financial statements filed with the SEC, including the company's Forms 10-Q and 10-K for years 1994 through 2002. Publicly traded corporations must file the Form 10-Q quarterly and the Form 10-K annually with the SEC, pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78m, and 17 C.F.R. §§ 240.13a-1, 240.13a-13. The conspirators accomplished this earnings inflation in the financial statements by making false entries in HealthSouth's books and records and presenting***1350** false financial reports to banks and other lenders. Some of HealthSouth's officers, including McVay, took these actions after recognizing that the company's financial results were not producing sufficient earnings to meet or exceed Wall Street "earning expectations" or "analyst expectations" and that these shortfalls would lead to a decline in the market price of HealthSouth's securities.

Over the course of the conspiracy, the cumulative inflations amounted to about $400 million. When the conspiracy was uncovered in March 2003, the SEC temporarily suspended trading and the total drop in value of the outstanding stock was approximately $1.4 billion. While the investing public, HealthSouth shareholders, and the company were the direct victims of the conspiracy, the scheme collaterally affected many others,

including: HealthSouth employees, several of whom were fired when the conspiracy was discovered, and particularly those who had participated in the company's stock ownership plan or pension fund and were long-time employees close to retirement; employees of contractors who were dependent on HealthSouth contracts for income; banks and other lenders who loaned money to HealthSouth based on the false financial information; and health-service competitors who lost business or financing, again based on HealthSouth's false financial representations.

Malcolm McVay was employed at HealthSouth from September 1999 to May 2003. In September 2000, he was promoted to Senior Vice-President and Treasurer. From August 27, 2002 to January 3, 2003, McVay was the Chief Financial Officer ("CFO") and Treasurer of the company. Finally, in April 2003, he served solely as Treasurer. Shortly after he became CFO in August 2002, McVay learned that revenue had been materially overstated in prior quarters and that cash was materially overstated on the balance sheet. At the plea colloquy, McVay informed the district court that the person who told him about the irregularities was Emery Harris, who was then serving as Group Vice-President and Controller. McVay also spoke to the then-current CEO, Richard Scrushy, who informed McVay that it was okay to sign the 10-Q because irregularities in the numbers on the form were "commonplace." Despite this knowledge, on or about November 14, 2002, McVay signed HealthSouth's 10-Q Form for the third quarter of 2002, knowing that it did not fairly represent the financial condition at Health South.

On April 21, 2003, in a three-count information, McVay was charged with conspiracy to commit wire and securities fraud, in violation of 18 U.S.C. § 371 ("Count 1"), and falsification of financial information filed with the SEC, in violation of 18 U.S.C. § 1350 and 18 U.S.C. § 2 ("Count 2"). The information also included a forfeiture count, pursuant to 18 U.S.C. § 981 and 28 U.S.C. § 2461(c). McVay pled guilty to all three counts under a plea agreement in which the government agreed to recommend that McVay be given a three-level reduction to his offense level for his acceptance of responsibility, and also agreed to file a motion for a downward departure based on substantial assistance, pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), if the government determined that McVay's cooperation and substantial assistance warranted such a motion.

At sentencing, the presentence investigation report ("PSI") recommended a base offense level of 6 and the following adjustments: (1) a 26-level upward adjustment based on a *$1,390,800,000* loss (representing the total drop in value of the outstanding stock when the conspiracy was uncovered in March 2003 and the ***1351** SEC temporarily suspended trading), pursuant to U.S.S.G. § 2B1.1(b)(1)(N) (2002); and (2) a 3-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. With an adjusted offense level of 29 and a criminal

history category I (based on 0 criminal history points), McVay's Guidelines sentencing range was 87 to 108 months' imprisonment. The PSI recommended a sentence at the bottom of that range, 87 months.[FN1]

> FN1. The probation officer noted that if the government filed a § 5K1.1 motion, she would recommend a probationary term, with at least 6 months' home detention and a substantial fine and/or restitution. She suggested the following reasoning supported a downward departure based on substantial assistance:
> The conduct committed by this defendant is a shame. He is a single father who, with the exception of his actions in the instant offense, was successful in building a financially secure future for himself and his daughter. It is this officer's opinion that the individuals higher on the "food chain" of this conspiracy exploited the defendant's drive for success. This defendant, although he held a position of great significance (CFO), was not in the "family" who w[as] the foundation of this conspiracy. He was not involved in the "family meetings" and he did not direct anyone in the furtherance of the conspiracy.

The government and McVay filed objections to the PSI.[FN2] The government also filed a § 5K1.1 motion for a downward departure from the Guidelines, citing McVay's substantial assistance in the investigation and prosecution of others. The government noted that McVay made himself available on a "continuous and regular basis" and provided "information implicating several other culpable individuals." McVay's "immediate cooperation has allowed the HealthSouth case to be prosecuted at a pace which, on a relative basis, constitutes swift and efficient enforcement of the United States' criminal laws. Further, the details of the fraudulent scheme were exposed to the public shortly after discovery of the fraud due, in part, to the defendant's cooperation." The government continued: "The United States expects the defendant to continue his substantial assistance in the investigation and prosecution of others after the sentencing hearing is complete."

> FN2. At the sentencing hearing, the district court determined that the government's objections were filed untimely because they were not filed within 14 days of receipt of the PSI. The government does not appeal that decision.

In connection with the substantial-assistance motion, based on McVay's adjusted offense level of 29, the government recommended that, despite McVay's cooperation, a "substantial term of imprisonment is required" given the seriousness of McVay's crimes. After noting that McVay "knowingly submit[ted] false and misleading financial

statements to the markets ..., knowing that the document he submitted had between 2 and $400 million of phoney cash," the government urged that "giving Mr. McVay anything other than a substantial term of imprisonment in this case sends the message to the markets that this type of conduct can be committed and committed successfully without punishment." The government ultimately urged a term of not less than 65 months' imprisonment.

At the sentencing hearing, the government presented the testimony of Neal A. Seiden, a senior staff accountant in the SEC Division of Enforcement, in support of the amount of loss. Seiden opined that a conservative estimate of the amount of loss to the stockholders was approximately $330 million.

In fact, the district court found that the amount of loss to the victims was approximately $400 million. It adopted the PSI's ***1352** recommendations as to offense level, criminal history and sentencing range. Immediately after the government noted its substantial-assistance motion and requested a sentence of not less than 65 months, without further discussion or any explanation, the district court summarily stated: "All right. The Court departs downward to a Level 8 which, when combined with a criminal history category of I, creates a Guideline Imprisonment Range of 0 to 6 months, a fine range of $1,000.00 to $1,000,000.00, and a supervised release term of 2 to 3 years." The court then imposed the following sentence:

First, you shall pay a fine of $10,000.00, with interest waived. I will not require restitution because the number of identifiable victims is so large as to make restitution impracticable. And determining complex issues of fact relating to the amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is substantially outweighed by the burden on the sentencing process.

And thirdly, in light of the pending civil litigation to which you are a party defendant, the Court will not order restitution in this case on consideration of the other two findings I've just made.

You shall pay to the United States a special assessment of $200.00. And that special assessment and fine are due immediately.

You shall be placed on probation for a term of 5 years as to Counts One and Two, separately, with the sentence on each count to run concurrently with the other.

You shall serve 6 months home detention for the first part of that probationary period. The home detention may include electronic monitoring as directed by the probation officer.

....

You shall forfeit $50,000.00 to the United States which will be made available to the victims of your crime.

*The probationary sentence is influenced by the exemplary record you've compiled before becoming involved in this most serious kind of criminal activity and by the circumstances surrounding your daughter.*

(emphasis added). The foregoing is the *only* record explanation given by the district court

to support its downward departure, from an advisory Guidelines range of 87 to 101 months' imprisonment to a probationary term, and McVay's resulting sentence.

After the district court announced the terms of the sentence, the government stated that, in addition to its objection to the ultimate sentence imposed, it objected to "the Court's failure to follow 18 U.S.C. § 3553 and the factors that are supposed to be considered in the imposition of sentence," to which the district court responded:

I have factored all of those considerations in imposing the sentence that I have. I do wish to point out that it's only because of your motion that I'm allowed to exercise any discretion. Otherwise, the discretion would be with the United States Attorney. If you hadn't made the motion for a downward departure, I would have had to sentence him to at least 87 months.

In its final (written) judgment, entered on June 7, 2004, the district court checked a box stating that the downward departure was "based on 5K1.1 motion of the government based on the defendant's substantial assistance." The court offered no other explanation or additional reasons. This appeal followed.

II.

[1] We review a district court's interpretation of the Sentencing Guidelines *de* ***1353** *novo* and its factual findings for clear error. *See United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir.), *cert. denied*, --- U.S. ----, 126 S.Ct. 812, 163 L.Ed.2d 639 (2005). Although we review a defendant's *ultimate* sentence for reasonableness, *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), "[n]othing in *Booker* suggests that a reasonableness standard should govern review of the interpretation and application as advisory of the Guidelines by a district court." *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir.2005). This is so because "*Booker* did not affect 18 U.S.C. section 3742(f), which mandates remand of any case in which the sentence was imposed as a result of an incorrect application of the sentencing guidelines." *Id.* (internal quotation marks and citation omitted). Thus, whether the district court *misapplied* the Guidelines remains, according to our pre-*Booker* precedent, subject to *de novo* review. *See United States v. Luiz*, 102 F.3d 466, 468 (11th Cir.1996) (engaging in *de novo* review of whether district court misapplied § 5K1.1 in refusing to grant downward departure).

[2] Before we conduct a reasonableness review of the ultimate sentence imposed, "we first determine whether the district court correctly interpreted and applied the Guidelines to calculate the appropriate advisory Guidelines range." *United States v. Williams*, 435 F.3d 1350, 1353 (11th Cir.2006) (citing *Crawford*, 407 F.3d at 1178). It is only after a district court correctly calculates the Guidelines range, which it still must do after *Booker*, that it may consider imposing a more severe or more lenient

sentence. *Id.; see also United States v. Caldwell*, 431 F.3d 795, 798 (11th Cir.2005) ("After *United States v. Booker*, ... the district court is still required to correctly calculate the guidelines range, and the same standards of review apply." (footnote omitted)), *cert. denied*, --- U.S. ----, 126 S.Ct. 1665, 164 L.Ed.2d 405 (2006); *Crawford*, 407 F.3d at 1178-79 (holding that after *Booker*, district courts "remain [ ] obliged to 'consult' and 'take into account' the Guidelines in sentencing," and the Guidelines "remain an essential consideration in the imposition of federal sentences, albeit along with the factors in § 3553(a)"; observing that the consultation requirement is "inescapable").

[3] We have held that "pursuant to 18 U.S.C. § 3742(a), a defendant may not appeal a court's refusal to make a downward departure." *United States v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir.1990) (citation omitted). We will, however, review the government's challenge to the *extent* of a departure under § 5K1.1 for an abuse of discretion. *United States v. Blas*, 360 F.3d 1268, 1274 (11th Cir.2004). As we have recognized, "[o]nce it has made a 5K1.1 motion, the government has no control over whether and to what extent the district court departs from the Guidelines, *except* that if a departure occurs, the government may argue on appeal that the sentence imposed was '*unreasonable*.' " *United States v. Pippin*, 903 F.2d 1478, 1485 (11th Cir.1990) (emphasis added).[FN3]

FN3. The government has not appealed the initial calculation of the Guidelines range in the PSI, which was adopted by the district court *prior* to its decision to grant a substantial-assistance departure. The government objected in the district court to the PSI's use of the 2002 Guidelines, arguing that the PSI used the wrong version of the Guidelines because the probation officer focused on the date of the last overt act, as charged in the information (November 2002), rather than the date of the offense of conviction (McVay did not withdraw from the conspiracy prior to March 2003). *Cf. Pippin*, 903 F.2d at 1482 (commission of overt act in furtherance of conspiracy after effective date of Sentencing Guidelines was not prerequisite to application of Guidelines in compliance with ex post facto clause where conspiracy continued after effective date of Guidelines) (citing *United States v. Wells Fargo Armored Serv. Corp.*, 587 F.2d 782, 783 (5th Cir.1979) (affirming conspiracy conviction under Sherman Act after a plea of nolo contendere, even though defendant argued that his conviction violated the ex post facto clause "in that the indictment purported to charge a felony without alleging that overt acts occurred during the time period after December 21, 1974, when the offense was made a felony")). But, because the government has not

> appealed the district court's decision that the government's objection was untimely, on remand, the district court need not *recalculate* the initial Guidelines range, which is not disputed here. Thus, we start our analysis from the correctly calculated Guidelines range of 87 to 108 months' imprisonment, which was based on an adjusted offense level of 29 and a criminal history category I.

***1354** [4] The government concedes that a substantial-assistance departure from the Guidelines range was warranted here, but challenges the district court's enumeration of non-assistance-related grounds for downwardly departing, *and* the extent of the departure as being wholly unreasonable. The government adds that to the extent the district court provided two cursory explanations of its reasoning-(1) the substantial-assistance motion, and (2) McVay's "exemplary record" and "the circumstances surrounding his daughter"-the enumerated reasons did not provide sufficient support for its dramatic departure.

[5] Section 5K1.1 provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1, p.s. The appropriate substantial-assistance reduction
shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
(5) the timeliness of the defendant's assistance.

U.S.S.G. § 5K1.1(a), p.s. The commentary to § 5K1.1 recognizes that the "nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis," and, thus, accords latitude to the sentencing judge to reduce a sentence based on "variable relevant factors." U.S.S.G. § 5K1.1 comment. (backg'd). "The sentencing judge must, however, state the reasons for reducing a sentence under this section." *Id.* (citing 18 U.S.C. § 3553(c)). Thus, it is clear the Guidelines contemplate a substantial-assistance determination that is individualized to the defendant based on the relevant factors and more specific than a simple statement that the reduction is based on the defendant's substantial assistance. Moreover, the commentary to § 5K1.1 requires the sentencing court to give "[s]ubstantial weight ... to the government's evaluation of the extent of the defendant's

assistance." U.S.S.G. § 5K1.1, comment. (n.3).

The only individualized analysis that we can discern in the instant sentencing calculation was the PSI's and the district court's vague references to McVay's "exemplary ***1355** record" and "relationship with his daughter" as supporting the § 5K1.1 downward departure. However, we have made clear that "[w]hen, on the Government's motion, a district court grants a downward departure under U.S.S.G. § 5K1.1 or reduces a sentence under Rule 35(b), the sentence reduction may be based *only on factors related to the defendant's substantial assistance.*" *Luiz*, 102 F.3d at 469 (emphasis added); *see also United States v. Aponte*, 36 F.3d 1050, 1052 (11th Cir.1994) (holding that a court, in considering a § 5K1.1 motion to depart below a statutory minimum, should only consider factors relative to a defendant's substantial assistance); *cf. United States v. Chavarria-Herrara*, 15 F.3d 1033, 1037 (11th Cir.1994) (reversing Rule 35(b) substantial-assistance departure, where district court considered factors such as the defendant's first-time offender status and good prison behavior in reducing his sentence).

Thus, the district court's consideration of McVay's "exemplary record" and "the situation with his daughter," in the context of a § 5K1.1 substantial-assistance departure, was error as a matter of law and must be reversed. Simply put, although the sentencing court had discretion under § 5K1.1 to decide (1) whether to depart from the guidelines based on substantial assistance, and (2) if so, the reasonable extent of that departure, plainly it did *not* have discretion to consider factors altogether unrelated to the nature and extent of McVay's assistance. *See Luiz*, 102 F.3d at 469; *cf. United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir.2005) (rejecting government's argument that district court's grant of § 5K1.1 motion rendered *Booker* error harmless beyond a reasonable doubt; "The flaw in the Government's argument is that the grant of § 5K1.1 did not give the sentencing court 'unfettered' discretion, but rather, gave the court only limited discretion to consider the assistance that Davis rendered.").

The foregoing prohibition on the consideration of factors unrelated to substantial assistance is consistent with a majority of the courts of appeals that have considered the issue. *See, e.g., United States v. Pepper*, 412 F.3d 995, 999 (8th Cir.2005) (holding that district court's consideration of non-assistance-related matters in the context of a § 5K1.1 motion was improper); *United States v. Pearce*, 191 F.3d 488, 492 (4th Cir.1999) (holding that "any factor considered by the district court on a § 5K1.1 motion must relate to the 'nature, extent, and significance' of the defendant's assistance" (quoting U.S.S.G. § 5K1.1 comment. (backg'd))); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir.1993) (holding that "a district court may depart below the minimum sentence set by Congress only to reflect substantial assistance by the defendant"); *United States v. Valente*, 961 F.2d 133, 134-35 (9th

Cir.1992) (rejecting defendant's argument that "once the court departed below the mandatory minimum sentence pursuant to the government's [substantial assistance] motion, it was free to depart even further downward based on Valente's 'aberrant' behavior"); *United States v. Thomas*, 930 F.2d 526, 529 (7th Cir.1991) (holding that "only factors relating to a defendant's cooperation should influence the extent of a departure for providing substantial assistance under § 3553(e)"), *overruled on other grounds by United States v. Canoy*, 38 F.3d 893, 903-07 (7th Cir.1994). Indeed, the assistance-related limitation on a district court's consideration of a § 5K1.1 motion formed the basis for our post-*Booker* reversal and remand for resentencing in *Davis*, in which we held that a § 5K1.1 motion does not render a *Booker* error harmless because a sentencing court is limited by the factors identified in § 5K1.1 when determining the extent of the downward departure. *See* 407 F.3d at 1271; *see also* ***1356***United States v. Turnbough*, 425 F.3d 1112, 1115 (8th Cir.2005) (same) (citing *Davis*).

The district court's consideration of factors unrelated to substantial assistance was improper. Moreover, under the facts and circumstances of this case, the district court's single mention of the government's substantial-assistance motion *alone* did not warrant the extraordinary departure granted in this case.

Section 5K1.1 allows a downward departure upon motion by the government based on the defendant's substantial assistance "for reasons stated." U.S.S.G. § 5K1.1(a), p.s. Here, the record contains *no* indication that the sentencing judge considered *any* of the § 5K1.1(a) factors. Moreover, in its written judgment, the court provided no reasons, other than the single fact of the government's motion, for the extent of its § 5K1.1 departure. Although the government's motion for a § 5K1.1 departure detailed the extent of McVay's assistance and its usefulness, the district court failed to consider the government's evaluation of the assistance provided, as required by Application Note 3. *See* U.S.S.G. § 5K1.1, comment. (n.3).

On this record, meaningful appellate review is simply not possible due to the district court's (1) erroneous consideration of non-assistance-related factors, and (2) failure to consider the § 5K1.1(a) factors or otherwise detail a permissible basis for the substantial-assistance departure upon which it did rely. *Cf. United States v. Suarez*, 939 F.2d 929, 933 (11th Cir.1991) (observing that "[t]he district court's reasons [for departing] must be sufficiently specific so that an appellate court can engage in the meaningful review envisioned by the Sentencing Guidelines"). Here there was no discussion by the district court of the assistance provided by McVay to the government. Nor was there any discussion about the nature and extent of that assistance, nor was there any reference, let alone any explanation for rejecting the government's recommendation of 65 months' in prison. Section 5K1.1 expressly enumerates, as we have noted, several

particular factors for the district court to consider including the government's evaluation of the assistance, the truthfulness and reliability of the information provided by the defendant, any injury suffered or any danger or risk of injury to the defendant or his family resulting from his assistance, or, indeed, the timeliness of the defendant's assistance. U.S.S.G. § 5K1.1(a), p.s. None were so much as referenced by the district court. On remand, in considering the government's substantial-assistance motion, the district court is obliged to confine its § 5K1.1 analysis to assistance-related reasons supporting a departure and state its reasoning if it departs in such a manner as to enable us to engage in meaningful appellate review.

Because we must remand for resentencing in light of the district court's consideration of improper factors within the § 5K1.1 calculus and its failure to provide any rationale for its extraordinary departure, we have no occasion to address the permissible *extent* of a substantial-assistance departure or the overall reasonableness of the ultimate sentence. We do however provide the following observations for guidance at resentencing. First, on remand, in deciding the nature and extent of a substantial-assistance departure, the district court should consider the factors expressly enumerated in § 5K1.1(a), p.s. Moreover, after it has decided the length of departure warranted by the substantial assistance motion, the district court is then obliged to take into account the advisory Guidelines range *and* the sentencing factors set forth in 18 U.S.C. § 3553(a) in fashioning a reasonable sentence. *See Booker*, 543 U.S. at 259-60, 125 S.Ct. 738. "The factors in § 3553(a) include: (1) the nature and circumstances of the offense; ***1357** (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (4) the need to protect the public; and (5) the Guidelines range." *United States v. Scott*, 426 F.3d 1324, 1328-29 (11th Cir.2005) (citing 18 U.S.C. § 3553(a)).

We add that when imposing a sentence falling far outside of the Guidelines range, based on the § 3553(a) factors, "[a]n extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005); *see also United States v. Moreland*, 437 F.3d 424, 434 (4th Cir.2006) (when district court imposes sentence substantially outside of the Guidelines range, "[t]he farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be"); *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir.2005) ("How compelling [the] justification must be [to support a sentence varying from the Guidelines range] is proportional to the extent of the difference between the advisory range and the sentence imposed."). We pause to note that, in the absence of truly compelling reasons-in the face of a multi-billion dollar securities fraud at the expense of the investing public-a six-month probationary term given to the Chief Financial Officer, Senior Vice-President, and Treasurer of the company

at the time of the fraud (who signed the Form 10-Q with full knowledge of its falsity), is not easily reconcilable with the basic factors enumerated by Congress in § 3553(a), including the need for a sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment.

Accordingly, we vacate and remand McVay's sentence for resentencing in a manner consistent with this opinion and with the Supreme Court's decision in *Booker*.

VACATED AND REMANDED.

C.A.11 (Ala.),2006.
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447 F.3d 1348, 19 Fla. L. Weekly Fed. C 515

Briefs and Other Related Documents (Back to top)

• 04-13455 (Docket) (Jul. 12, 2004)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellant,
v.
Enrique PEREZ-PENA, Defendant-Appellee.
**No. 05-5054.**

Argued: May 26, 2006.
Decided: June 30, 2006.

**Background:** Defendant was convicted in the United States District Court for the Eastern District of North Carolina, Malcolm J. Howard, J., of illegally reentering the United States after being deported, and government appealed sentence.

**Holdings:** The Court of Appeals, Wilkins, Chief Judge, held that:

1(1) need to avoid sentencing disparities between defendants receiving fast-track downward departures and those not receiving such departures did not justify four level downward departure, and

5(2) defendant was not significantly more deserving of a lower sentence than the typical defendant whose illegal reentry crime has produced the 37 to 46 month guideline range, and thus imposition of 24-month sentence was unreasonable.

Vacated and remanded for resentencing.

West Headnotes

[1] **Sentencing and Punishment 350H**  **870**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk870 k. Other Particular Grounds. Most Cited Cases
Need to avoid sentencing disparities between defendants receiving fast-track downward departures and those not receiving such departures did not justify imposition of 24-month prison sentence for defendant convicted of illegal reentry after deportation, which was 13 months less than the low end of the guideline range and reflected equivalent of four level downward departure allowable in fast-track districts. Immigration and Nationality Act, § 276(a, b)(2), 8 U.S.C.A. § 1326(a, b)(2); 18 U.S.C.A. § 3553(a)(6);.

**[2] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
When an appellate court reviews a sentence outside the advisory guideline range, whether as a product of a departure or a variance, the court considers whether the district court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the guideline range.

**[3] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

**Sentencing and Punishment 350H 995**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases
If a district court provides an inadequate statement of reasons or relies on improper factors in imposing a sentence outside the properly calculated advisory guideline range, the sentence will be found unreasonable and vacated.

**[4] Sentencing and Punishment 350H 870**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk870 k. Other Particular Grounds. Most Cited Cases
Allowing sentencing courts to determine whether they should sentence non-fast-track defendants as if they had been fast-tracked would produce "unwarranted sentence disparities" between similarly situated

non-fast-track defendants, some of whom would benefit from the existence of others' fast-track deals and some of whom would not.

**[5] Sentencing and Punishment 350H 780**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(E) Prior or Subsequent Misconduct
350Hk780 k. Grade, Degree or Classification of Other Offense. Most Cited Cases

**Sentencing and Punishment 350H 850**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk850 k. In General. Most Cited Cases

Defendant convicted of illegal reentry after deportation was not significantly more deserving of a lower sentence than the typical defendant whose illegal reentry crime has produced the 37 to 46 month guideline range, and thus imposition of 24-month sentence was unreasonable; defendant had prior conviction for sexual intercourse with 12-year old girl, and, since defendant was in the lowest criminal history category, his guideline range already reflected that his sex crime was his only prior offense. 18 U.S.C.A. § 3553(a); Immigration and Nationality Act, § 276(a, b)(2), 8 U.S.C.A. § 1326(a, b)(2).

West CodenotesRecognized as Unconstitutional18 U.S.C.A. § 3553(b)(1)18 U.S.C.A. § 3742(e)

***238 ARGUED:** Eric David Goulian, Assistant United States Attorney, Office of the United States Attorney, Raleigh, North Carolina, for Appellant. George Alan DuBois, Assistant Federal Public Defender, Office of the Federal Public Defender, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Frank D. Whitney, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Office of the United States Attorney, Raleigh, North Carolina, for Appellant. Thomas P. McNamara, Federal Public Defender, Raleigh, North Carolina, for Appellee.

Before WILKINS, Chief Judge, SHEDD, Circuit Judge, and HAMILTON, Senior Circuit Judge.

Vacated and remanded by published opinion. Chief Judge WILKINS wrote the opinion, in which Judge SHEDD and Senior Judge HAMILTON joined.

**OPINION**

WILKINS, Chief Judge:

The United States appeals Enrique Perez-Pena's sentence for illegally reentering the United States after being deported, *see* 8 U.S.C.A. § 1326(a), (b)(2) (West 2005). The district court imposed a below-guidelines variance sentence primarily to avoid an "unwarranted sentence disparit[y]," 18 U.S.C.A. § 3553(a)(6) (West 2000), between Perez-Pena and defendants that had participated in a "fast-track" program. Finding the sentence unreasonable, we vacate

and remand for resentencing.

I.

A.

"Fast-tracking" refers to a procedure that originated in states along the United States-Mexico border, where district courts experienced high caseloads as a result of immigration violations. To preserve resources and increase prosecutions, prosecutors sought to obtain pre-indictment pleas by offering defendants lower sentences through charge-bargaining or through motions for downward departure.

Congress officially sanctioned the use of departure fast-track programs in 2003, with its enactment of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub.L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003). In conjunction with authorizing the Attorney General to create and implement such programs, Congress directed the Sentencing Commission to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." *Id.* Pursuant to this directive, the Commission adopted § 5K3.1 of the sentencing guidelines, providing that "[u]pon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides." *United States Sentencing Guidelines Manual* § 5K3.1, p.s. (2004).

The Attorney General provided guidelines for fast-track programs in a 2003 memorandum to all United States Attorneys. Under these guidelines, the programs are to be "reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases." J.A. 70. The memorandum goes on to describe the criteria to be used in determining whether ***239** such exceptional circumstances exist: (1) the district must face an "exceptional local circumstance with respect to a specific class of cases" that warrants expediting their disposition; (2) declination of such cases in favor of state prosecution must be unavailable or unwarranted; (3) the cases must be highly repetitive and present similar fact scenarios; and (4) the cases must not involve an offense that the Attorney General has designated a "crime of violence." *Id.* at 71 (internal quotation marks omitted).

The memorandum further specifies that any fast-track program must require the defendant to enter into a written plea agreement and to waive his rights to file pretrial motions, to appeal, and to challenge the resulting conviction under 28 U.S.C.A. § 2255 (West Supp.2006), except on the ground of

ineffective assistance of counsel. These requirements apply to charge-bargaining fast-track programs as well as PROTECT Act programs involving downward departures.

Acting pursuant to authority delegated by the Attorney General, the Deputy Attorney General approved fast-track programs in 13 districts for illegal reentry offenses under 8 U.S.C.A. § 1326. No such program has been approved for the Eastern District of North Carolina, however.

B.

Perez-Pena, a citizen of Mexico, illegally entered the United States in 1993. In July 1999, he was convicted in Florida of the felony of committing a lewd, lascivious, or indecent act upon a child. Perez-Pena's conviction was based on his having had sexual intercourse with a 12-year-old girl on several occasions in late 1998, when he was 21. He was sentenced to two years of house arrest, to be followed by three years of probation, and he was deported on July 28, 1999.

Perez-Pena reentered the United States without permission in early 2004. A little more than a year later, he was arrested in Greenville, North Carolina following a traffic stop. As a result, Perez-Pena was indicted on a single count of reentering the United States after having been deported. *See* 8 U.S.C.A. § 1326(a), (b)(2). He pleaded guilty to the indictment without a plea agreement.

At sentencing, the district court began by calculating Perez-Pena's sentencing guideline range. Because Perez-Pena had been convicted of a felony crime of violence prior to his deportation-his indecent act offense-the district court applied a 16-level increase to his base offense level of 8. *See* U.S.S.G. § 2L1.2(a), (b)(1)(A)(ii). Application of a 3-level adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, reduced the total offense level to 21. With a Criminal History Category of I, Perez-Pena's guideline range was 37 to 46 months. The district court then heard argument on a request by Perez-Pena for a below-guidelines sentence. Perez-Pena contended that such a sentence was necessary to avoid an unwarranted sentence disparity with defendants who had received "fast-track" sentences. These defendants included not only defendants in other districts but also a group of 48 illegal immigrants who Perez-Pena maintained had been arrested on a single occasion the prior month in the Eastern District of North Carolina and had been allowed to plead guilty to illegal entry under 8 U.S.C.A. § 1325 (West 2005), rather than face possible prosecution for the more serious offense of illegal reentry. Perez-Pena also argued that failure to impose a below-guidelines sentence would create a disparity with at least one other similarly situated defendant in the Eastern District of North ***240** Carolina who had received a reduction from a different district court judge on the basis of fast-track disparity. Perez-Pena further argued that his prior conviction was for sexual conduct to which the victim consented, and that he was

sentenced only to two years of house arrest followed by three years of probation. For these reasons, Perez-Pena requested a six-month sentence.

In contrast, the Government sought a 37-month sentence, the low end of the applicable guideline range. The Government denied that any disparity produced by such a sentence would be "unwarranted" since Perez-Pena did not participate in any fast-track program and was not similarly situated to the illegal immigrants who had recently received expedited treatment in the Eastern District of North Carolina because they were not known to have had any prior convictions. The Government also emphasized that the victim of Perez-Pena's prior crime was only 12 years old.

At the close of arguments, the court imposed a sentence of 24 months, which was 13 months less than the low end of the guideline range and the equivalent of a four-level downward departure. As justification for sentencing Perez-Pena below the applicable guideline range, the court cited the sentencing disparity issues with defendants both within and outside the Eastern District of North Carolina. The court also noted Perez-Pena's "total lack of criminal record with the exception of the predicate offense which was committed some seven years ago with the alleged consent of both parties." J.A. 235.

II.

[1] The Government first argues that the district court erred to the extent that it imposed a below-guidelines sentence to account for sentences received by defendants participating in fast-track programs. We agree. *See United States v. Galicia-Cardenas*, 443 F.3d 553, 555 (7th Cir.2006) (per curiam) (vacating as unreasonable non-fast-track defendant's sentence that was reduced the equivalent of four levels below guideline range to avoid disparity with sentences of fast-track defendants); *cf. United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir.2006) (affirming as reasonable refusal by district court to impose below-guidelines sentence based on alleged unwarranted disparity with fast-track defendants); *United States v. Martinez-Martinez*, 442 F.3d 539, 542-43 (7th Cir.2006) (same); *United States v. Jimenez-Beltre*, 440 F.3d 514, 519 (1st Cir.2006) (en banc) (same); *United States v. Sebastian*, 436 F.3d 913, 916 (8th Cir.2006) (same).

In *United States v. Booker*, 543 U.S. 220, 244, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the Supreme Court held that the Sixth Amendment right to a jury trial is violated when the district court, acting pursuant to a mandatory guidelines system, imposes a sentence greater than the maximum authorized by the facts found by the jury alone. To remedy this problem, the Court severed and excised the provisions of the Sentencing Reform Act [FN1] that mandated sentencing and appellate review in conformance with the guidelines. *See Booker*, 543 U.S. at 259, 125

S.Ct. 738 (severing and excising 18 U.S.C.A. § 3553(b)(1) (West Supp.2006) and 18 U.S.C.A. § 3742(e) (West 2000 & Supp.2006)). This excision rendered the guidelines "effectively advisory," *id.* at 245, 125 S.Ct. 738, and replaced the previous standard***241** of review with review for reasonableness, *see id.* at 261, 125 S.Ct. 738.

> FN1. Sentencing Reform Act of 1984, Pub.L. No. 98-473, ch. II, 98 Stat.1987-2040 (1984) (codified as amended at 18 U.S.C.A. §§ 3551-3742 (West 2000 & Supp.2006) and at 28 U.S.C.A. §§ 991-998 (West 1993 & Supp.2006)).

That the guidelines are non-binding in the wake of *Booker* does not mean that they are irrelevant to the imposition of a sentence. To the contrary, remaining provisions of the Sentencing Reform Act require the district court to consider the guideline range applicable to the defendant and pertinent policy statements of the Sentencing Commission. *See* 18 U.S.C.A. § 3553(a)(4), (a)(5) (West Supp.2006); *Booker*, 543 U.S. at 264, 125 S.Ct. 738 (stating that district courts "must consult [the] Guidelines and take them into account when sentencing"). In addition to the guidelines, the district court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C.A. § 3553(a)(1) (West 2000); the court also must ensure that the sentence it imposes "fulfill[s] the congressionally established objectives for sentencing: promoting respect for the law; providing just punishment for the offense; affording adequate deterrence; protecting the public from further criminal activity of the defendant; providing the defendant training, medical care, and correctional treatment; ... providing restitution to victims," *United States v. Green*, 436 F.3d 449, 455 (4th Cir.2006), *cert. denied*, --- U.S. ----, 126 S.Ct. 2309, 164 L.Ed.2d 828 (2006) (No. 05-10474); *see* 18 U.S.C.A. § 3553(a)(2), (a)(7) (West 2000). Further, the court must "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C.A. § 3553(a)(6); *see Green*, 436 F.3d at 455.

Thus, in imposing a sentence after *Booker*, the district court must engage in a multi-step process. First, the court must correctly determine, after making appropriate findings of fact, the applicable guideline range. *See United States v. Hughes*, 401 F.3d 540, 546 (4th Cir.2005). Next, the court must "determine whether a sentence within that range ... serves the factors set forth in § 3553(a) and, if not, select a sentence [within statutory limits] that does serve those factors." *Green*, 436 F.3d at 456. The district court must articulate the reasons for the sentence imposed, particularly explaining any departure or variance from the guideline range. *See* 18 U.S.C.A. § 3553(c) (West Supp.2006); *Hughes*, 401 F.3d at 546 & n. 5. The explanation of a variance sentence must be tied to the factors set forth in § 3553(a) and must be accompanied by findings of fact as

necessary. *See Green,* 436 F.3d at 455-56.

[2][3] We review the sentence for reasonableness, considering "the extent to which the sentence ... comports with the various, and sometimes competing, goals of § 3553(a)." *United States v. Moreland,* 437 F.3d 424, 433 (4th Cir.2006), *cert. denied,* --- U.S. ----, 126 S.Ct. 2054, 164 L.Ed.2d 804 (2006) (No. 05-10393). When we review a sentence outside the advisory guideline range-whether as a product of a departure or a variance-we consider whether the district court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the guideline range. *See id.* at 433-34 (variance sentence); *United States v. Hairston,* 96 F.3d 102, 106 (4th Cir.1996) (departure sentence). If a district court provides an inadequate statement of reasons or relies on improper factors in imposing a sentence outside the properly calculated advisory guideline range, the sentence will be found unreasonable and vacated. *See Green,* 436 F.3d at 457.

We now turn to the facts before us. The outcome here depends largely on whether a sentencing disparity between a fast-track sentence and a non-fast-track ***242** sentence can be "unwarranted" within the meaning of § 3553(a)(6). Different arguments pertain to disparities with PROTECT Act fast-track sentences than do disparities with charge-bargained sentences. We will therefore address these types of disparities separately, beginning with disparities resulting from charge bargaining.[FN2]

FN2. We intend this discussion to apply as well to Perez-Pena's allegations concerning the illegal immigrants arrested within the Eastern District of North Carolina.

A.

There is no denying that Congress has decided that governmental law enforcement or administrative concerns warrant sentencing disparities between defendants with similar criminal conduct and records, under some circumstances. For example, Congress specifically provided in the Sentencing Reform Act that, "[u]pon motion of the Government, [district courts] shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C.A. § 3553(e) (West Supp.2006). This subsection reflects Congress' determination that sentencing disparities between defendants with similar criminal conduct and records are warranted to the extent that the Government determines that a particular defendant has advanced its interest in prosecuting other offenders. Indeed, that is exactly what the Government does when, through charge-bargaining, it obtains a sentence for a fast-track defendant that is lower than he otherwise might have faced considering his conduct. That is so because

the defendant's acceptance of the fast-track plea bargain frees up governmental resources that the Government can then use to prosecute other offenders. *See* J.A. 70 (Attorney General's memorandum stating that " 'fast-track' programs are based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in U.S.S.G. § 3E1.1").

Perez-Pena argues that a sentencing disparity between two otherwise similar defendants, one who accepts a fast-track plea bargain and another who cannot do so because he was arrested in a non-fast-track district, is unwarranted because the resulting disparity is based only on the jurisdiction in which the defendants were arrested. That is an overly simplistic view, however, because the disparity is due not to the location of the arrest, but rather to the fact that the Government offered only one of the defendants a plea bargain. Of course, whether the Government wishes to plea bargain with a particular defendant often depends on any number of factors far beyond the defendant's control. The fortuity of whether a defendant is offered a fast-track plea bargain is not different in any relevant way from the fortuity of whether a defendant possesses information that he can offer the Government in return for a reduced sentence. Defendants who are fortunate enough to be able to offer the Government what it wants can obtain reduced sentences not because they deserve the reductions, but because the reductions are the leverage that allows the Government to get what it wants. Thus, the resulting reductions (and disparities with otherwise similarly situated defendants) serve an important purpose.

***243** Critically, to sentence defendants who have not been offered plea bargains as if they had been offered and had accepted plea bargains would effectively nullify the Government's discretion to determine which defendants it wishes to receive the benefit of a bargain. *Cf. United States v. Banuelos-Rodriguez*, 215 F.3d 969, 976 (9th Cir.2000) (en banc) ("[A]llowing a district court to depart in order to equalize the sentences of defendants who had pleaded guilty to committing different crimes (even if they had engaged in similar conduct) would implicate the authority given to United States attorneys to negotiate plea bargains." (internal quotation marks omitted)). The effect of such sentencing would be to give the benefit of the Government's plea bargains to defendants with whom the Government did not wish to bargain. Congress certainly would not have sanctioned that result.

[4] Moreover, refusing to sentence Perez-Pena as if he were a fast-track defendant is not "penalizing" him for not accepting a deal that the Government never offered, *but see United States v. Medrano-Duran*, 386 F.Supp.2d 943, 948 (N.D.Ill.2005) ("[I]t hardly makes sense to penalize [a defendant in a non-fast-track

jurisdiction] for failing to meet the requirements of a program that was never available to him."); rather, it is simply not rewarding him for conferring a benefit upon the Government that he did not confer. By virtue of his not receiving this reward, it is true that his sentence will be greater than it would have been had he reached a deal with the Government. But comparing the sentences of defendants who helped the Government to those of defendants who did not-regardless of why some were in a position to help and others were not-is comparing apples and oranges. For this reason, Congress could not have intended that disparities resulting from the exercise of prosecutorial discretion could be determined to be "unwarranted." FN3

FN3. In fact, allowing sentencing courts to determine whether they should sentence non-fast-track defendants as if they had been fast-tracked would *produce* "unwarranted sentence disparities" between similarly situated non-fast-track defendants, some of whom would benefit from the existence of others' fast-track deals and some of whom would not. *Cf. United States v. Eura*, 440 F.3d 625, 633 (4th Cir.2006) (noting that "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants").

B.

Sentencing disparities between defendants receiving fast-track downward departures under the PROTECT Act and those not receiving such departures are "warranted" as a matter of law for all the same reasons, as well as for the additional reason that Congress and the Sentencing Commission *explicitly* sanctioned such disparities. In enacting the PROTECT Act, Congress directed the Commission to authorize a downward departure of no more than four levels if the Government moved for such a departure pursuant to a fast-track program authorized by the Attorney General. *See* Pub.L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003). As the Sentencing Guidelines had the force of law at the time, *see Booker*, 543 U.S. at 233-34, 125 S.Ct. 738, Congress necessarily intended that defendants who did not benefit from such motions-whether because the Attorney General had not authorized a program in that district or because the Government determined that the program was not appropriate for a particular defendant-would receive higher sentences than those who did benefit. *Cf.* ****244*** *United States v. Montes-Pineda*, 445 F.3d 375, 379-80 (4th Cir.2006) ("Congress seems to have endorsed at least some degree of disparity by expressly authorizing larger downward departures for defendants in 'fast track' districts."); *United States v. Eura*, 440 F.3d 625, 634 (4th Cir.2006) (holding that the

variance from the 100:1 crack cocaine/powder cocaine ratio chosen by Congress "impermissibly usurp[ed] Congress's judgment about the proper sentencing policy for cocaine offenses" (internal quotation marks omitted)). In following Congress' directive and promulgating U.S.S.G. § 5K3.1, p.s., the Sentencing Commission also sanctioned these disparities.

Perez-Pena argues that PROTECT Act disparities were not so much explicitly sanctioned by Congress and the Commission as they were "an undesirable, albeit not unexpected, by-product of the pursuit of more illegal reentry prosecutions." Br. of Appellee at 25. While it is true that Congress and the Commission may not have intended such disparities for their own sake, they surely recognized that such disparities were necessary to achieve the twin goals of obtaining more prosecutions and limiting downward departures to jurisdictions and defendants selected by the Government. If defendants in fast-track districts expected to receive similar sentences regardless of whether they participated in a program, defendants would have little incentive to participate. And, if defendants in non-fast-track districts were sentenced as if they had participated in fast-track programs, then the Government would be effectively deprived of its discretion to decide which districts would have fast-track programs and which defendants within those jurisdictions should be allowed to participate. These results would amount to a rejection of Congress' and the Sentencing Commission's policy choices. *See Sebastian,* 436 F.3d at 916 ("In this instance, Congress and the President, by directing that the Sentencing Commission provide for guideline departures in certain judicial districts, concluded that the advantages stemming from fast-track programs outweigh their disadvantages, and that any disparity that results from fast-track programs is not unwarranted." (internal quotation marks omitted)). FN4

FN4. Perez-Pena maintains that the fact that other defendants have received fast-track sentences is relevant to § 3553(a) factors other than the "unwarranted sentence disparity" factor, including the need to impose a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense and to promote respect for the law. The record contains no evidence that the district court reduced Perez-Pena's sentence on this basis. And, the sentences imposed upon fast-track defendants have no significant relevance to these factors in any event.

Such sentences represent *compromises* between the Government's administrative and law enforcement interests and its interest in having the defendant receive a sentence sufficient to reflect the seriousness of the offense and to promote respect for the law. It is for this reason that comparing the sentences to non-fast-track sentences

would be improper.

In short, there is no reason to believe that Congress intended that sentencing disparities between defendants who benefitted from prosecutorial discretion and those who did not could be "unwarranted" within the meaning of § 3553(a)(6). We therefore conclude that the need to avoid such disparities did not justify the imposition of a below-guidelines variance sentence.

III.

[5] The Government also argues that the variance sentence was not justified by the finding that Perez-Pena had "a total lack of criminal record with the exception of the predicate offense which was committed***245** some seven years ago with the alleged consent of both parties." J.A. 235. We agree.

Initially, we note that these findings by the district court do not indicate that Perez-Pena is significantly more deserving of a lower sentence than the typical defendant whose illegal reentry crime has produced the 37-46-month guideline range. Consensual sexual intercourse between a 21-year-old defendant and a 12-year-old girl constitutes a typical example of statutory rape, which the Commission has determined triggers a 16-level enhancement, *see* U.S.S.G. § 2L1.2, cmt. n. 1(B)(iii).[FN5] *Cf. Moreland*, 437 F.3d at 435-36 (concluding that decision to impose below-guidelines sentence was reasonable when guidelines called for defendant to be treated as a career offender, *see* U.S.S.G. § 4B1.1, but his three drug offenses all involved a small quantity, were nonviolent, and did not involve a firearm). Further, since Perez-Pena was in the lowest criminal history category, his guideline range already reflected that his sex crime was his only prior offense. Given that the Commission specifically intended Perez-Pena's guideline range to apply to defendants under the facts identified by the district court, the mere recitation of such facts is not a valid reason why the guideline range does not "serve[ ] the factors set forth in § 3553(a)," *Green*, 436 F.3d at 456. *See id.* at 455-56 (explaining that the reasons for imposing a variance sentence must be tied to the § 3553(a) factors). We therefore conclude that this latter basis for a below-guidelines variance is also invalid. Consequently, we vacate the sentence as unreasonable. *See id.* at 457.

FN5. In *United States v. Pierce*, 278 F.3d 282, 289-90 (4th Cir.2002), we held that violation of the North Carolina indecent liberties statute is a "crime of violence" as that term is employed in the career offender guideline because the statute "protects not only against the serious risk of physical injury but also against the application of constructive force created by the nature of the relationship of adult and child."

IV.

In sum, because neither of the bases offered by the district court justified imposition of a below-guidelines variance sentence, we vacate Perez-Pena's sentence and remand to the district court for resentencing.[FN6]

FN6. Our decision should not be read to foreclose the imposition of a variance sentence on remand for a reason not adequately articulated by the district court during imposition of the now-vacated sentence.

*VACATED AND REMANDED*

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Briefs and Other Related Documents (Back to top)

• 2006 WL 1071343 (Appellate Brief) Reply Brief of the United States (Mar. 30, 2006) Original Image of this Document (PDF)
• 2006 WL 850608 (Appellate Brief) Brief for Appellee (Mar. 17, 2006) Original Image of this Document (PDF)
• 2006 WL 952358 (Appellate Brief) Brief for Appellee (Mar. 17, 2006) Original Image of this Document (PDF)
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• 2006 WL 952357 (Appellate Brief) Brief of the United States (Jan. 26, 2006) Original Image of this Document (PDF)
• 05-5054 (Docket) (Oct. 28, 2005)

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Briefs and Other Related Documents

United States Court of Appeals,Seventh Circuit.
UNITED STATES of America,
Plaintiff-Appellee, Cross-Appellant,
v.
Lance PISMAN, Defendant-Appellant, Cross-Appellee.
**No. 05-1625, 05-1899.**

Argued Sept. 26, 2005.
Decided April 7, 2006.
Rehearing Denied May 31, 2006.

**Background:** Following a jury trial, defendant was convicted in the United States District Court for the Central District of Illinois, Joe Billy McDade, J., of use of interstate commerce to entice a minor to engage in illicit sex, and defendant appealed.

**Holdings:** The Court of Appeals, Rovner, Circuit Judge, held that:

1(1) jury's acquittal of defendant on underlying offense of conspiracy did not preclude defendant's conviction for use of interstate commerce to entice a minor to engage in illicit sex, and

2(2) district court's sentence of 60 months, based in part on its determination that defendant's conduct was less predatory than that of co-defendant, who pleaded guilty and received 68 month sentence, was not a proper application sentencing statute mandate that a court minimize unwarranted disparities in sentences.

Conviction affirmed, sentence vacated and remanded for resentencing.

West Headnotes

**[1] Criminal Law 110 878(3)**

110 Criminal Law
110XX Trial
110XX(K) Verdict
110k878 Several Counts
110k878(3) k. Acquittal or Conviction Under One of Several Counts. Most Cited Cases
Jury's acquittal of defendant on underlying offense of conspiracy did not preclude defendant's conviction for use of interstate commerce to entice a minor to engage in illicit sex, based on co-conspirator's internet correspondence with minors to arrange the meetings. 18 U.S.C.A. §§ 2422(b), 2423(b, e).

**[2] Sentencing and Punishment 350H 870**

350H Sentencing and Punishment

350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk870 k. Other Particular Grounds. Most Cited Cases
District court's sentence of 60 months for defendant convicted by jury of use of interstate commerce to entice a minor to engage in illicit sex, which was the statutory minimum but 48 months below the guidelines range, based in part on district court's determination that defendant's conduct was less predatory than that of co-defendant, who pleaded guilty and received 68 month sentence, was not a proper application sentencing statute mandate that a court minimize unwarranted disparities in sentences; the lower sentence for the co-defendant was attributable to his decision to plead guilty to the offense and his cooperation with the government, which was a legally appropriate consideration. 18 U.S.C.A. §§ 2422(b), 3553(a).

***913** Thomas A. Keith, Office of the United States Attorney, Peoria, IL, Jan P. Miller (argued), Office of the United States Attorney, for Plaintiff-Appellee.
D. Peter Wise (argued), Gates, Wise & Schlosser, Springfield, IL, for Defendant-Appellant.

Before EASTERBROOK, RIPPLE, and ROVNER, Circuit Judges.
ROVNER, Circuit Judge.
In March 2004, a federal grand jury returned an indictment against Lance Pisman and Jacob Wilkerson. Counts 1 and 2 charged both men with conspiracy to travel for sexual conduct with a minor in violation of 18 U.S.C. §§ 2423(b) and (e), and interstate travel for sexual conduct with a minor in violation of 18 U.S.C. § 2422(b). A third count charged Wilkerson with the use of interstate commerce to entice a minor to engage in illicit sex, in violation of 18 U.S.C. § 2422(b). Wilkerson subsequently pled guilty to Counts 1 and 2, and on June 16, 2004, the grand jury returned a superceding indictment mirroring the original two counts but adding Pisman as a defendant to Count 3.

At trial, Wilkerson testified against Pisman, and the government introduced into evidence 25 internet chats between Pisman and Wilkerson. That testimony and the internet communications established that Pisman and Wilkerson had a sexual relationship, and that the two made plans for Pisman to travel from his residence in Iowa to Illinois in order to meet with Wilkerson and others to engage in sex. Wilkerson was communicating with the other persons who would meet with them, and the internet correspondence and testimony also provided evidence that Pisman was aware that one or more of those persons were teenage boys who were minors. Because Wilkerson, rather than Pisman, was the one who made contact with the minors, Pisman's liability under count 3 was premised upon the existence of a conspiracy with Wilkerson as charged in Count 1. Under the doctrine set forth in *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), a defendant may be found guilty of a

substantive offense committed by a co-conspirator if the offense was committed in furtherance of the conspiracy at the time the defendant was a member of the conspiracy, even if the defendant neither participated in nor had knowledge of the substantive offense.

Relying on that theory, the government argued that Pisman and Wilkerson were members of a conspiracy in Count 1 to travel for sexual conduct with a minor, and that Wilkerson as a member of that conspiracy, used interstate commerce (the internet) to entice a minor to engage in illicit sex. The court accordingly issued the *Pinkerton* instruction with respect to Count 3, which stated that:

A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy. Therefore, if you find the defendant guilty of the conspiracy charged in Count I and if you find beyond a reasonable doubt that while he was a member of the conspiracy, his fellow conspirator committed the offense in Count III in furtherance of and as a foreseeable consequence of that conspiracy, then you should find him guilty of Count III.

Although the government's argument essentially tied liability under Count 3 to guilt on the conspiracy charge of Count 1, ***914** the jury had other ideas. The jury acquitted Pisman of Counts 1 and 2, and found him guilty of Count 3. Pisman now argues that the conspiracy acquittal forecloses a conviction on Count 3 under the *Pinkerton* doctrine, and that the district court erred in denying his motion for judgment of acquittal on that count.

Despite Pisman's extensive efforts to characterize it otherwise, this situation is one of inconsistent verdicts, and the Supreme Court has made clear that the mere inconsistency is not a basis for judgment of acquittal. In *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), the Court addressed a situation analogous to the one presented here. In that case, a jury acquitted the defendant of conspiracy to possess cocaine and of possession of cocaine, but nevertheless found her guilty of using the telephone to facilitate those offenses. The appellate court reversed the conviction, holding that the acquittal on the predicate felony necessarily indicated that there was insufficient evidence to support the telephone facilitation conviction and mandated acquittal on that count as well. *Id.* at 61, 105 S.Ct. 471. The Court rejected that reasoning and reiterated its established ruling that the inconsistency in jury verdicts is not a basis for reversal except in the situation in which two guilty verdicts cannot coexist. *Id.* at 68-69, 105 S.Ct. 471. In reaching that conclusion, the Court reiterated that each count in an indictment is regarded as if it were a separate indictment. *Id.* at 62, 105 S.Ct. 471. Quoting a prior opinion, the Court stated that where a jury returns an inconsistent verdict, " '[t]he most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not

show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than the assumption of a power which they had no right to exercise, but which they were disposed through lenity.' " *Id.* at 63, 105 S.Ct. 471, *quoting* *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932). Thus, although the inconsistency in the verdicts certainly reflected an " 'error' in the sense that the jury has not followed the court's instruction ... it is unclear whose ox has been gored." *Id.* at 65, 105 S.Ct. 471. A number of factors weighed against allowing review of verdicts based solely on inconsistency, including the difficulty in determining in whose favor the "error" was made, the inability of the government to invoke review of the acquittal, and the reluctance to inquire into the inner workings of the jury. *Id.* at 68-69, 105 S.Ct. 471. Moreover, a defendant was protected from jury irrationality as to an individual count by the independent review of the sufficiency of the evidence, which would ensure that the evidence supported a rational determination of guilt beyond a reasonable doubt as to that count. *Id.* at 67, 105 S.Ct. 471.

[1] In this case, Pisman does not contest that the government presented sufficient evidence to support a determination of guilt beyond a reasonable doubt as to Count 3. The only contention is that the jury could not find that guilt without first determining that he was guilty of the predicate offense of Count 1, and therefore that the finding of guilt cannot stand.

The *Powell* Court, however, explicitly rejected the argument that an exception should be made to the inconsistent verdict rule where the jury acquits a defendant of a predicate felony but convicts on the compound felony. The Court noted that the argument for such an exception misunderstands the nature of the inconsistent verdict problem, and suffers from the same defect in that it assumes that the acquittal was the right verdict-the one the jury " 'really meant.' " *Id.* at 68, 105 S.Ct. 471. Accordingly, the Court rejected the invitation***915** to create an exception to the inconsistent verdict rule.

We similarly rejected such an argument recently in *United States v. McGee*, 408 F.3d 966 (7th Cir.2005). In that case, a defendant, Harold McKinzie, argued that his conviction was improper because the jury acquitted him of the underlying conspiracy charge but convicted him of the compound offense of use of a telephone to facilitate the conspiracy. We held that his argument was precluded by *Powell*, noting that reversal as a matter of course in such situations was improper, especially considering that the acquittal may have been the result of juror mistake, compromise or lenity. *Id.* at 985. *See also* *United States v. Flaschberger*, 408 F.3d 941, 943 (7th Cir.2005) (holding that inconsistent verdicts do not entitle the defendant to relief, and noting that an inconsistent acquittal may demonstrate mercy or confusion rather than innocence); *United States v. Dykes*, 406 F.3d 717 (D.C.Cir.2005). The nature of this case as one involving the *Pinkerton* co-conspirator theory does not differentiate it from those cases, as Pisman's theory ultimately rests on the same assumption that the acquittal rather

than the conviction is the "right" jury verdict. Pisman's situation is factually indistinguishable from the cases above in which a jury acquitted on the predicate offense and convicted on the compound offense that necessarily incorporated that predicate offense. *See United States v. Gallo-Chamorro*, 48 F.3d 502 (11th Cir.1995) (noting that inconsistent verdicts are not a ground for reversal in a case in which the jury convicted the defendant of importation under the *Pinkerton* co-conspirator theory but acquitted him of the conspiracy count.) Accordingly, the district court properly denied Pisman's motion for judgment of acquittal.

That does not end this appeal, however, because the government cross-appealed as to the sentence imposed by the judge in this case. The Guidelines range for Pisman's sentence was 108-135 months. Of course, the district court has discretion to sentence above or beyond that range, but in determining the appropriate sentence the district court must take into consideration the Guidelines recommendation as well as the sentencing factors in 18 U.S.C. § 3553(a). Those factors include the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence to: reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, provide the defendant with needed educational or vocational training, and avoid unwarranted sentence disparities among defendants. The issue in this case concerns the last factor, the need to avoid unwarranted sentence disparities among defendants.

The district court in this case determined that a sentence of 60 months was appropriate, which was the statutory minimum but was 48 months below the Guidelines range. In reaching that conclusion, the court expressed its concerns that Pisman's sentence be reconciled with the sentence provided to his co-defendant Wilkerson. The trial evidence indicated that Wilkerson was the primary actor in the offense, and the one that the public at least would view as the more culpable. Wilkerson pled guilty to the offenses, however, and cooperated with the government in its prosecution of Pisman. As a result of the cooperation, Wilkerson was sentenced to only 68 months imprisonment.

[2] The district court noted that Pisman's predatory activity was not nearly as substantial as Wilkerson's, and attempted to fashion a sentence that reflected that difference. Accordingly, the court sentenced Pisman to 60 months. The district court made clear that the 60-month sentence***916** was directly related to the perceived disparity with Wilkerson's sentence, stating:

[H]ad Jake Wilkerson's sentence been more, the defendant's sentence would be more, but those who knew of both Mr. Wilkerson's and Mr. Pisman's conduct probably would not understand if Mr. Pisman got a higher sentence than Jake Wilkerson, and they probably would not appreciate the complexities of the guidelines that knock off something for acceptance of responsibility.

Sent. Tr. at 97. That comparison of co-defendants, however, is not a proper application of the § 3553(a) mandate that a court minimize unwarranted disparities in sentences. First, the lower sentence for Wilkerson was attributable to his decision to plead guilty to the offense and his cooperation with the government, which is a legally appropriate consideration. The corresponding reduction in his sentence as compared to a non-cooperating defendant is not an "unwarranted" disparity. *United States v. Boscarino*, 437 F.3d 634, 637-38 (7th Cir.2006). Moreover, the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts. *Id.* at 638. In fact, the focus on the differences among defendants in an individual case in which one defendant cooperates could actually increase sentence disparity, because the resulting lower sentence for the offense to redress that disparity will be out of sync with sentences in similar cases nationwide in which there were not multiple defendants or in which one did not cooperate. *Id.* As we noted in *Boscarino*, it makes no sense that one culprit should receive a lower sentence than an otherwise-similar offender, "just because the first is 'lucky' enough to have a confederate turn state's evidence." *Id.* The district court's approach does nothing to eliminate unwarranted disparity in sentences, and therefore is an improper application of the § 3553(a) factor. That is not to say that the district court could not impose the 60-month sentence; we express no opinion on that. Our holding is simply that the district court's sentence was based in part on an improper application of one factor of § 3553(a), and accordingly we vacate the sentence and remand for resentencing. The conviction is Affirmed, the sentence is Vacated, and the case is Remanded for resentencing.

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U.S. v. Pisman
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Briefs and Other Related Documents (Back to top)

- 05-1899 (Docket) (Apr. 5, 2005)
- 05-1625 (Docket) (Mar. 11, 2005)

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United States Court of Appeals,Third Circuit.
UNITED STATES of America
v.
James J. SEVERINO, Appellant.
**No. 05-3695.**

Submitted Pursuant to Third Circuit L.A.R. 34.1(a) May 19, 2006.
Filed July 11, 2006.

**Background:** Defendant pled guilty in the United States District Court for the Western District of Pennsylvania, Joy Flowers Conti, J., to bank robbery. Defendant appealed.

7**Holding:** The Court of Appeals, Ackerman, J., held that district Court understood its authority to consider extraordinary acceptance of responsibility in issuing a variance, but merely exercised its discretion not to reduce the sentence.

Affirmed.

West Headnotes

**[1] Criminal Law 110 1141(2)**

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1141 In General
110k1141(2) k. Burden of Showing Error. Most Cited Cases
The appellant bears the burden to demonstrate that a sentence was unreasonable.

**[2] Sentencing and Punishment 350H 40**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk40 k. In General. Most Cited Cases
When reviewing a sentence, the Court of Appeals must first be satisfied that the district court exercised its discretion by considering the relevant statutory sentencing factors. 18 U.S.C.A. § 3553(a).

**[3] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
The Court of Appeals reviews deferentially a district court's application of the statutory sentencing factors to the facts of a case, and must ensure only that the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors.

18 U.S.C.A. § 3553(a).

**[4] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
It is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable, but a within-guidelines sentence is not necessarily reasonable per se.

**[5] Sentencing and Punishment 350H 372**

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk369 Findings and Statement of Reasons
350Hk372 k. Necessity. Most Cited Cases
When reviewing a sentence, the record should demonstrate that the court considered the statutory sentencing factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the record. 18 U.S.C.A. § 3553(a).

**[6] Sentencing and Punishment 350H 801**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk801 k. Discretion of Court. Most Cited Cases
After *Booker*, a guidelines departure prohibition does not preclude the district court from considering that factor when the issue is a variance under *Booker*.

**[7] Sentencing and Punishment 350H 861**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk861 k. Remorse, Cooperation, Assistance. Most Cited Cases
District Court understood its authority to consider extraordinary acceptance of responsibility in issuing a variance, but merely exercised its discretion not to reduce defendant's bank robbery sentence below the suggested guideline range on that basis; court concluded that guidelines prohibited downward departure for extraordinary acceptance of responsibility but never stated it lacked authority to consider that factor, court recognized that guidelines were advisory, court considered the statutory sentencing factors, and court acknowledged and expressed respect for defendant's remorse but found that such acceptance was not something for which she was going to reduce his sentence. U.S.S.G. § 5K2.0(d), p.s., 18

U.S.C.A.; 18 U.S.C.A. § 3553(a).

**[8] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
While the Sentencing Guidelines are no longer mandatory post-*Booker*, they still must be consulted and provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[9] Sentencing and Punishment 350H 996**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk996 k. Sufficiency. Most Cited Cases
District judges are not required to routinely state by rote that they have read the *Booker* decision or that they know the sentencing guidelines are now advisory. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[10] Criminal Law 110 1134(3)**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases
The Court of Appeals reviews the application of the statutory sentencing factors deferentially, requiring only that the sentence be imposed for logical reasons consistent with the broad goals of the factors. 18 U.S.C.A. § 3553(a).

***207** Lisa B. Freeland, Federal Public Defender, Renee Pietropaolo, Assistant Federal Public Defender, Pittsburgh, PA, for Appellant.
Mary Beth Buchanan, United States Attorney, Laura Schleich Irwin, Assistant United States Attorney, Pittsburgh, PA, for United States.

Before RENDELL and VAN ANTWERPEN, Circuit Judges, and ACKERMAN, District Judge.[FN*]

FN* Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT
ACKERMAN, District Judge.
Defendant James Severino appeals the reasonableness of his sentence on the grounds that the District Court failed to recognize its authority to consider extraordinary acceptance

of responsibility as a factor in sentencing. After a careful review of the record, we conclude that the District Court properly understood its authority and the advisory nature of the Sentencing Guidelines, and that the sentence it imposed was reasonable. We will therefore AFFIRM the judgment of the District Court.

## I.

To support his heroin addiction, Defendant James Severino robbed several Pittsburgh-area banks in June 2004. Upon his arrest, he immediately gave a written statement confessing to all three bank robberies. On September 15, 2004, a federal grand jury in the Western District of Pennsylvania returned a three-count indictment against Severino, charging three counts of bank robbery in violation of 18 U.S.C. § 2113(a).

At his arraignment before a Magistrate Judge on September 30, 2004, Severino ***208** wanted to plead guilty but his attorney apparently convinced him to plead not guilty. After the arraignment hearing, Severino wrote a letter to the District Court stating that he wanted to plead guilty and was upset with his attorney's efforts to prevent a guilty plea in the absence of a plea agreement, and requesting appointment of new counsel. At a hearing on this letter, defense counsel stated that after meeting with his client, Severino agreed to have him continue as counsel, that Severino would plead guilty, and that counsel was negotiating a plea agreement with the Government.

Prior to the plea hearing, Severino again wrote to the court. He informed the court that "all I wanted to do from day one is plead guilty, Go to jail, work in jail and start to pay my restitution (50% of my pay) and hopefully take advantage of a Drug or Educational program offered." (App. at 63-64.) He also stated that "I do not want to waste a single dime more of the government's money on this case than possible" and that "I am guilty and wish to plead guilty and go to jail and start paying my debt." (*Id.* at 64.) Severino pled guilty to all three counts of the indictment without a plea agreement.

Prior to sentencing, and apparently against the advice of counsel, Severino wrote personal letters to the banks and tellers he victimized. In these letters, he took full responsibility for his actions and apologized. At sentencing, the probation officer stated that "[t]his is the first case that I've seen where someone has actually written the tellers their apologies. It is certainly the first case that someone has wanted to plead guilty at the arraignment phase and has pursued pleading guilty as fervently as Mr. Severino has." (App. at 99.) Severino also wrote to the court prior to sentencing. He again expressed his guilt and shame, and discussed his desire to rehabilitate himself. He stated in this letter that "I want to go to the drug program. I want to work to pay back the money I took. I want to take advantage of schooling, any and all opportunities. I don't want to come out of jail not learning anything.... I want to learn and

have a plan not to come back or be a part of recidivism." (App. at 73.)

The District Court sentenced Severino on June 24, 2005. Under the advisory provisions of the United States Sentencing Guidelines, the District Court found that Severino had a total offense level of 24 and a criminal history category of III, subjecting him to an advisory range of 63-78 months imprisonment. On the basis of "extraordinary acceptance of responsibility," Severino's counsel requested that the District Court impose a sentence below the suggested Guideline range. In his moving papers and at sentencing, counsel appeared to ask that the District Court issue a sentence only 12 months below the minimum suggested Guideline sentence of 63 months.

After hearing argument, the District Court imposed a sentence of 63 months imprisonment on each of the three counts, to run concurrently. In declining to issue a sentence below the minimum sentence under the suggested Guideline range, the District Court referenced this Court's opinion in *United States v. Lieberman*, 971 F.2d 989 (3d Cir.1992), and recent amendments to the Guidelines regarding downward departures for acceptance of responsibility:

The problem that I have with that is that in the guidelines-and the *Lieberman* case, I think, is helpful to you here; but I believe it predated the situation where they changed the guidelines and removed a basis for downward departure of anything that had to do with acceptance of responsibility. Looking at ***209** the person's use of drugs and all, there are a number of other factors-I think I have the-it's under 5K1.1. That was all removed from there; so when you look at the guidelines, under the guidelines there wouldn't be a basis for departure from the guidelines, based on the factors that you're arguing.

(App. at 103.) After defense counsel noted that the Guideline provision mentioned by the Court was now "an advisory matter," the Court observed that the amendment to the Guidelines "sort of cuts against the applicability of the *Lieberman* case." (App. at 103.)

In discussing the sentencing factors of 18 U.S.C. § 3553(a), the District Court stated:

Then you look at the kind of sentences and the sentencing range under the Sentencing Guidelines. When you look at the Sentencing Guidelines, you know, they've already taken into account the three-level reduction for the acceptance of responsibility, and then there's a prohibition in the guidelines from considering any extraordinary acceptance of responsibility.

So when you look at the kinds of sentences in the sentencing range established under the Sentencing Guidelines, those factors, while they're very compelling and I am-though I have to commend the Defendant for doing what he did, you know, no one else has done it in-at least the probation officer who is here today has never heard of anyone else doing that, and that bodes very well, but that doesn't-you know, for the guidelines, I can't do-I could not depart under the guidelines.

(App. at 106-07.) The court further commented that "I don't know that, considering Section 3553, that there's a basis within there that I can find to depart from the guidelines." Finally, in passing sentence, the District Court stated:But when I have to sentence, I have to look at a lot of things; and as much as I have respect for what you've done, that isn't something that I'm going to reduce your sentence for. An acceptance of responsibility is taken into account in the three points in the reduction, so I am going to follow the guidelines.
....
I feel that what will benefit society and benefit you is to stay within the guidelines, but to go at the very lowest level of the guidelines, which would be 63 months.

(App. at 111.)

The District Court entered its judgment of conviction and sentence on July 5, 2005. This timely appeal followed.[FN1] We have jurisdiction over the District Court's Order of judgment and conviction pursuant to 28 U.S.C. § 1291. We have jurisdiction to review Severino's sentence pursuant to 18 U.S.C. § 3742(a)(1). *United States v. Cooper*, 437 F.3d 324, 327-28 (3d Cir.2006).

FN1. Shortly after filing his appeal, Severino filed a *pro se* motion to modify or reconsider his sentence, a motion which the District Court denied.

**II.**

On appeal, Severino argues that the District Court erred by failing to recognize its authority to issue a sentence below the range suggested by the Guidelines on the basis of his extraordinary acceptance of responsibility. Under the sentencing terminology recently adopted by this Court, such a sentence "not based on a specific Guideline-departure provision" would constitute a "variance," as opposed to a departure. *See United States v. Vampire Nation*, 451 F.3d 189, 195 n. 2 (3d Cir.2006) (citing ***210***United States v. Sitting Bear*, 436 F.3d 929, 932-33 (8th Cir.2006)).

Severino also argues that by failing to consider all relevant factors under § 3553(a), the sentence imposed by the District Court was unreasonable.

[1][2] In *United States v. Booker*, the Supreme Court held that the United States Sentencing Guidelines are advisory and that district courts must merely consider the Guidelines in imposing sentences that promote the "sentencing goals" listed in § 3553(a). *Booker*, 543 U.S. 220, 264, 259-60, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Cooper*, 437 F.3d at 325-26. In *Cooper*, this Court established the contours of our review under *Booker*. The appellant bears the burden to demonstrate that a sentence was unreasonable. *Cooper*, 437 F.3d at 332. "[W]e must first be satisfied that the court exercised its discretion by considering the relevant factors" under § 3553(a). *Id.* at 329. "The record must demonstrate that the trial court gave meaningful consideration to the § 3553(a)

factors." *Id.* Those factors include consideration of the applicable Guideline ranges and policy statements. 18 U.S.C. § 3553(a)(4)-(5).

[3][4][5] We review deferentially a district court's application of the § 3553(a) factors to the facts of a case, and must ensure only that " 'the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a).' " *Id.* (quoting *United States v. Williams*, 425 F.3d 478, 481 (7th Cir.2005)). "[I]t is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable," but a "within-guidelines sentence is not necessarily reasonable *per se.*" *Id.* at 331. In sum, "the record should demonstrate that the court considered the § 3553(a) factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the record." *Id.* at 332.

## III.

Severino does not ask us to decide, in determining the applicable advisory Guideline range, whether the District Court could have granted a downward departure under U.S.S.G. § 5K2.0(d), which states that "the court may not depart from the applicable guideline range based on ... (2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under § 3E1.1 (Acceptance of Responsibility)." U.S.S.G. § 5K2.0(d) (policy statement).[FN2] Severino contends, ***211** however, that based on comments made by the District Court at sentencing, the District Court erred in ruling that the Guidelines prevented her from considering extraordinary acceptance of responsibility in issuing a variance below the Guideline range.

FN2. We held in *Lieberman* that under the policy statement of then-current § 5K2.0 of the Guidelines, "a sentencing court may depart downward when the circumstances of a case demonstrate a degree of acceptance of responsibility that is substantially in excess of that ordinarily present." *Lieberman*, 971 F.2d at 996. However, since *Lieberman*, the Sentencing Commission, in compliance with Congress's directive in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, amended § 5K2.0 specifically to preclude certain departures. Pub.L. No. 108-21, § 401(m), 117 Stat. 650, 675 (2003) (requiring the Sentencing Commission to "promulgate ... appropriate amendments ... to ensure that the incidence of downward departures is substantially reduced"). Section 5K2.0(d) states that "the court may not depart from the applicable guideline range based on ... (2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under § 3E1.1

> (Acceptance of Responsibility)." U.S.S.G. § 5K2.0(d) (policy statement).
> Here, Severino received the full three-level reduction for acceptance of responsibility under § 3E1.1. While we note that the District Court reasonably questioned the continued vitality of *Lieberman* under § 5K2.0(d)(2), this appeal only requires us to decide whether the District Court understood this provision to mean that it lacked the authority to consider extraordinary acceptance of responsibility in issuing a variance pursuant to the § 3553(a) factors.

[6] This Court has not specifically addressed the ability of sentencing judges post-*Booker* to consider extraordinary acceptance of responsibility in issuing sentence. We agree with the guidance of other courts that after *Booker*, "a guidelines departure prohibition does not preclude the district court from considering that factor when the issue is a variance under *Booker*." *United States v. Gatewood*, 438 F.3d 894, 897 (8th Cir.2006); *see also, e.g., United States v. Lake*, 419 F.3d 111, 114 (2d Cir.2005) (commenting that "absent the strictures of the Guidelines, counsel would have had the opportunity to urge consideration of circumstances that were prohibited as grounds for a departure" under § 5K2.0(d)); *United States v. Milne*, 384 F.Supp.2d 1309, 1312 (E.D.Wis.2005) (holding that post-*Booker*, "courts may grant additional consideration to defendants who demonstrate acceptance beyond that necessary to obtain a two or three level reduction under § 3E1.1" because "such conduct bears directly on their character, § 3553(a)(1), and on how severe a sentence is necessary to provide deterrence and punishment, § 3553(a)(2)"). Therefore, if the District Court held that it could not consider extraordinary acceptance of responsibility under the sentencing factors of § 3553(a), such error could render Severino's sentence unlawful under 18 U.S.C. § 3742(a)(1) and require reversal. However, we need not consider this issue in this case, because the District Court did not hold that reliance on a Guideline-prohibited factor was impermissible. Our thorough review of the record demonstrates to us that the District Court understood its authority to consider extraordinary acceptance of responsibility post-*Booker* but merely exercised its discretion not to reduce its sentence below the suggested Guideline range on that basis.

[7] This Court's review of the entire record reveals that the District Court well understood the advisory nature of the Guidelines and its duty to consider the Guidelines and other factors pursuant to the sentencing goals outlined in § 3553(a). Prior to sentencing, the District Court issued tentative findings which recognized that the Guidelines are advisory, that it must sentence defendants in accordance with the § 3553(a) factors, and that it must consider the Guidelines but not be bound by them. (App. at 75-76.) [FN3] The District Court reiterated these understandings at ***212** sentencing. (App. at 83.) At sentencing, the District Court calculated and considered the applicable Guideline range, as required under

§ 3553(a)(4) and directed by *Booker* and *Cooper*. *Booker*, 543 U.S. at 264, 125 S.Ct. 738; *Cooper*, 437 F.3d at 330. In considering Severino's motion for a variance, the District Court first properly consulted the Guidelines and reasonably concluded that § 5K2.0(d) prohibited a downward departure under the Guidelines based on extraordinary acceptance of responsibility. The court never stated that it lacked authority otherwise to consider this factor, only that the Guidelines themselves do not allow departure on that basis.

> FN3. In its tentative findings, the District Court stated:
> In light of the United States Supreme Court's holding in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2004) [*sic* ], the United States Sentencing Guidelines are advisory and no longer mandatory in the federal courts. The court is directed to sentence criminal defendants in accordance with the factors set forth in 18 U.S.C. § 3553(a). One of the factors enumerated in section 3553(a) that the court is required to consider is "the kinds of sentence and the sentencing range established for under the United States Sentencing Guidelines." 18 U.S.C. § 3553(a)(4). In fact, the United States Supreme Court stated that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Booker*, 543 U.S. at 220. Accordingly, the court's tentative findings reflect the advisory Guidelines range for defendant's offense as set forth by the United States Sentencing Guidelines. At the time of sentencing, the court will impose the defendant's sentence in consideration of all of the factors set forth under section 3553(a).
> (App. at 75-76.)

After making these Guideline determinations, the District Court proceeded to an express consideration of the sentencing factors under § 3553(a). (App. at 104-07.) [FN4] The District Court deliberately addressed each factor and arguments pursuant to each factor. The court's discussion demonstrates that it went beyond a "rote statement" of the factors and "gave meaningful consideration to the § 3553(a) factors." *Id.* at 329. In specifically addressing § 3553(a)(4), the District Court noted that the Guidelines take acceptance of responsibility into account in allowing for a three-level reduction and that the Guidelines prohibit any further reduction. The District Court clearly cabined this discussion to § 3553(a)(4)'s requirement that courts consider "the kind of sentences in the sentencing range established by under the Sentencing Guidelines." (App. at 106.) Under this rubric, the court concluded that while "compelling," the court "could not depart *under the guidelines.*" (*Id.* at 107 (emphasis added).)

FN4. The District Court specifically discussed each of the § 3553(a) factors, including "the nature and characteristics of the offense and the history and characteristics of the Defendant" (App. at 104); "secondly, the need for the sentence imposed ... to reflect the seriousness of the offense to promote respect for the law and to provide just punishment for the offense" (*id.* at 105); "to protect the public from further crimes of the Defendant" (*id.*); "to provide the Defendant with needed educational training, needed medical care, or other correctional treatment in the most effective manner" (*id.* at 106); "the kind of sentences involved" (*id.*); "the kinds of sentences and the sentencing range established under the Guidelines" (*id.*); "any pertinent policy statement issued by the Sentencing Commission" (*id.* at 107); "the need to avoid unwarranted sentence disparities among Defendants with similar records who have been found guilty of similar conduct" (*id.*); and "the need to provide restitution to the victims of any of the offenses" (*id.*).

After reviewing the § 3553(a) factors, the court acknowledged that "I don't know that, considering Section 3553, that there's a basis within there that I can find to depart from the Guidelines, even though I'm ... impressed with what the Defendant has done." (App. at 107-08.) Severino suggests that this statement shows that the court concluded that the Guidelines denied it authority to issue a sentence lower than the suggested Guideline range. However, the court's consideration of the § 3553(a) factors demonstrates to this Court that the District Court weighed all the relevant factors but determined that Severino's acceptance of responsibility, while "impressive," did not warrant a variance below the advisory Guideline range.

Any doubt as to the District Court's understanding of its authority to issue a sentence outside the Guideline range, and its conscious decision to not do so and instead accept the advice of the Guidelines, may be erased by examining the court's final comments before passing sentence. The court fully acknowledged and expressed its "respect" for Severino's "remorse"***213** and his efforts to accept responsibility (App. at 110-11), but then found that such acceptance "isn't something that I'm going to reduce your sentence for" (*id.* at 111). Noting that the Guidelines take acceptance of responsibility into account, the court elected to follow the advice of the Guidelines. The court concluded that the result that would "benefit society and benefit [Severino] is to stay within the guidelines, but to go at the very lowest level of the guidelines, which would be 63 months." (*Id.*)

The District Court's statement that Severino's impressive acceptance of responsibility "isn't something that I'm going to reduce your sentence for" clearly implies to this Court that the District Court understood that it *could*

reduce sentence on that basis, but that it chose not to do so based upon its consideration of the § 3553(a) factors, including consultation of the Guidelines under § 3553(a)(4). The District Court reinforced this understanding by stating that it chose "to stay within the guidelines." This statement reflects that the District Court knew it could issue a sentence outside the range suggested by the Guidelines, but that its consideration of the § 3553(a) factors and the circumstances of the case yielded the conclusion that society and Severino himself would best benefit from a sentence within the range recommended by the Guidelines.

[8][9] Severino argues that the court erred by "restrict[ing] consideration of 'acceptance-related' factors to its calculation of the advisory guideline range under § 3553(a)(4)" (Def.'s Br. 30), and that had the court understood its authority, "it would have included [acceptance-based] circumstances in its methodical recitation of the § 3553 factors (somewhere aside from within the narrow confines of § 3553(a)(4))" (Def.'s Reply Br. 6). However, just because the District Court did not explicitly mention acceptance of responsibility with regard to any other § 3553(a) factor does not mean that the District Court did not understand its ability to weigh such concerns under other factors. Rather, the District Court simply decided, in its discretion, that the Guidelines were persuasive on this issue and it did not believe that a lower sentence on the basis urged by Severino was warranted. While the Guidelines are no longer mandatory post-*Booker*, they still must be consulted and "provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct." *Cooper*, 437 F.3d at 331. Furthermore, district judges are not required "to routinely state by rote that they have read the *Booker* decision or that they know the sentencing guidelines are now advisory." *Cooper*, 437 F.3d at 329. Therefore, absent an express statement or other evidence to the contrary, we will not find a sentence unlawful merely because a sentencing court has not indicated that the Guidelines are advisory. The District Court here started with the Guidelines, while recognizing that they were not binding, and evidently concluded that they adequately accounted for the level of acceptance of responsibility displayed in this case.

[10] Severino suggests that the District Court had not only the authority but the "obligation ... to sentence below the guidelines range on the basis of acceptance of responsibility simply by properly applying *Booker's* § 3553(a) analysis." (Def.'s Br. 33.) To the contrary, *Booker* enhanced judicial discretion in sentencing rather than restricting it. *See Vampire Nation*, 451 F.3d at 195 (commenting that "[w]hat has changed post-*Booker*, is that sentencing is a discretionary exercise"). We review the application of the § 3553(a) factors deferentially, requiring only that the sentence be imposed for logical reasons consistent with the broad goals of § 3553(a). *Cooper*, 437 F.3d at 330. The ***214** District Court indeed could have stated its reasoning with greater precision, but this Court recognized in *Cooper*

that district judges issue sentencing decisions from the bench in "spontaneous remarks" that are "unlikely to be a perfect or complete statement of all of the surrounding law." *Cooper*, 437 F.3d at 330 n. 8 (quotation omitted). Isolating certain statements of the court to suggest that the court somehow felt obligated to follow the Guidelines ignores the context of those statements.

**IV.**

The District Court gave meaningful consideration to the § 3553(a) factors, and it reasonably imposed a sentence at the low end of the suggested Guidelines range for logical reasons consistent with those factors and the circumstances of this case. *Cooper*, 437 F.3d at 330. Severino has not met his burden to show otherwise. We conclude that the District Court's sentence was reasonable under *Booker*, and we therefore will AFFIRM.

C.A.3 (Pa.),2006.
U.S. v. Severino
454 F.3d 206

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,First Circuit.
UNITED STATES of America, Appellant,
v.
COREY SMITH, Defendant, Appellee.
**No. 05-1725.**

Heard Feb. 10, 2006.
Decided April 7, 2006.

**Background:** Defendant was convicted in the United States District Court for the District of Massachusetts, Morris E. Lasker, Senior District Judge FN*, of six counts of crack distribution and one count of conspiring to sell crack, and was sentenced to 46 months' imprisonment. Government appealed the sentence.

FN* Of the Southern District of New York, sitting by designation.

**Holdings:** The Court of Appeals, Boudin, Chief Judge, held that:

2(1) district court did not commit legal error in considering factors that were discouraged or prohibited bases for departure under sentencing guidelines, and

5(2) sentence was unreasonably low.

Vacated and remanded.

West Headnotes

**[1] Sentencing and Punishment 350H 800**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk800 k. In General. Most Cited Cases
The farther the judge's sentence departs from the sentencing guidelines sentence, the more compelling the justification based on the statutory sentencing factors that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
In sentencing defendant under advisory sentencing guidelines for crack distribution and conspiring to sell crack, district court did not commit legal error in considering factors of age, drug use, lack of a leadership role, and post-offense rehabilitation, that were either discouraged or prohibited bases for departure under the guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[3] Sentencing and Punishment 350H 40**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk40 k. In General. Most Cited Cases

**Sentencing and Punishment 350H 804**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk803 Grounds for Departure
350Hk804 k. In General. Most Cited Cases
That a factor is discouraged or forbidden as a basis for departure under the sentencing guidelines does not automatically make it irrelevant when a court is weighing the statutory sentencing factors apart from the guidelines. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Sentencing and Punishment 350H 300**

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk300 k. Use and Effect of

Report. Most Cited Cases
Statute setting forth factors to be considered in imposing sentence did not prohibit district court from considering, for purposes of determining defendant's sentence for crack distribution and conspiring to sell crack, probation officer's recommendation in presentence report of sentence below advisory sentencing guidelines range. 18 U.S.C.A. § 3553(a).

**[5] Sentencing and Punishment 350H 643**

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(D) Disposition
350Hk643 k. Length of Total or Aggregate Sentence in General. Most Cited Cases
Defendant's 46-month sentence for six counts of crack distribution and one count of conspiring to sell crack was unreasonably low; sentence was less than half of minimum of advisory sentencing guidelines range of 100-125 months, despite defendant's youth, he had significant criminal history and had progressed steadily toward more serious crimes, guidelines calculation took account of fact that defendant was not leader of criminal activity, defendant's post-arrest release was revoked for violations of release terms, offenses involved repeatedly selling crack near school and playground, and there was no indication that defendant had better than usual rehabilitation prospects. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

***2** Patrick M. Hamilton, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief for appellant.
Jonathan Shapiro with whom Stern, Shapiro, Weissberg & Garin, LLP was on brief, for appellee.

Before BOUDIN, Chief Judge, STAHL, Senior Circuit Judge, and HOWARD, Circuit Judge.
BOUDIN, Chief Judge.
Corey Smith pled guilty to six counts of crack distribution and one count of conspiring to sell crack. Applying the sentencing guidelines, the district court calculated Smith's sentencing range to be 100-125 months of imprisonment, but then sentenced Smith to 46 months of imprisonment (followed by six years of supervised release). The government now appeals, arguing that Smith's sentence is unreasonably low.

In October and November of 2003, Smith-who was twenty-one years old at the time-facilitated four sales and made three direct sales of crack cocaine to Adolfo Brito, an undercover police officer. All of the transactions, save perhaps one, took place within 1,000 feet of either the George A. Lewis Middle School or the Little Scobie Playground. Smith was arrested on April 15, 2004, and eventually pled guilty to six counts of crack distribution and one count of conspiring to sell crack. 21 U.S.C. § 841(a)

(2000).

Soon after his arrest, Smith was released to an in-patient drug treatment program at Spectrum House and successfully completed the initial treatment program. In January 2005, after his guilty plea, he was transferred to a "sober house" run by the South Middlesex Opportunity Council. After a series of violations of the sober house's rules-including staying out without authorization-Smith's release was revoked by a magistrate judge on February 8, 2005, and he was thereafter detained until April 19, 2005, when his sentence was imposed.

The pre-sentence report calculated Smith's total offense level as 25, based on the quantity of crack (14.25 grams), the proximity of his offenses to a school and playground, and Smith's acceptance of responsibility. Because of prior convictions for various offenses, including the possession of marijuana with the intent to distribute, Smith had a criminal history category of V (based on eleven criminal history points).[FN1]

> FN1. Smith was convicted of these crimes embracing six separate incidents spanning the period May 16, 2000, to December 3, 2002. He served time in prison after violating the conditions of his probation stemming from his drug possession conviction, and it was soon after his release from that period of incarceration that he was arrested for the crime in question here.

The probation officer found no basis for a downward departure under the guidelines. This meant that Smith's guideline sentencing range was 100 to 125 months. However, the sentencing occurred after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), so the district court was not restricted to a guideline sentence. It appears that the probation***3** officer recommended a below-guideline sentence of sixty months based on considerations such as Smith's limited role in the offenses, his rehabilitation from his drug habit, and the allegedly minor nature of his prior offenses.

After hearing argument from the government and defense counsel, and after an allocution by the defendant, the district judge (over the government's objection) sentenced Smith to 46 months in prison followed by six years of supervised release, and recommended drug treatment for Smith while in prison. In explaining the sentence, the district judge addressed Smith as follows:

I think you're a man who has done wrong things, gotten in trouble, find yourself in a fix, but you're young and you may turn around and I'd like to see you turn around rather than get crushed....

Against you is the nature of the offense that you committed, an aggravated selling of controlled substance regularly in a location close to a school, and although I don't suppose you sat and thought about whether it's close to a school or not, I'm sure you knew there were a lot of little kids in that area, and that's a hell

of a place to be selling cocaine, and the law makes it more of an offense, but in your favor is the fact that you were involved in the offense for a limited period of time and [d]o not appear to have been a leader. You appear to have committed the crime to support your drug habit.
While on pretrial release you did participate in drug abuse treatment and, for the most part, you received positive reports, although I guess you had a couple of slips, didn't you? And during pretrial release, you did obtain employment.
Bearing all these things in mind and the requirements of the statute that the sentence imposed be serious-I mean, be sufficient to take into consideration the seriousness of the offense, the protection of society, your own needs to improve and to make sure that the sentence is sufficient but not excessive, and bearing in mind that the Probation Department concludes that in accordance with this statute, a sentence substantially below the guidelines is appropriate. I'm imposing the same sentence on you as I have imposed on the two defendants in this case who have appeared before me already, although that sentence is somewhat below what the probation guideline recommends in your case.

In *Booker*, the Supreme Court held that mandatory guidelines based on judge-made findings violated the Sixth Amendment, but, after a severance analysis, ruled that the guidelines should be treated as "effectively advisory." 125 S.Ct. at 750-52, 757. The Court further stated that sentences would be reviewable for "reasonableness," and that this review would apply regardless of whether sentences fell within the advisory guidelines range. *Id.* at 765-66.

The sentencing court's discretion remains constrained by 18 U.S.C. § 3553(a) (2000), which requires courts to consider a number of factors in imposing sentences, *United States v. Pho*, 433 F.3d 53, 61-62 (1st Cir.2006), including "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), "the need for the sentence imposed," *id.* § 3553(a)(2),[FN2] and "the ***4** need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6).

> FN2. In making this determination, courts must consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(A)-(D).

The statute also requires courts to consider the sentencing range established by the guidelines.

18 U.S.C. § 3553(a)(4); *accord* *Booker*, 125 S.Ct. at 764-65. In *United States v. Jiménez-Beltre*, 440 F.3d 514 (1st. Cir.2006) (en banc), this court stated that the guidelines remained "an important consideration" because they represented the only "integration of the multiple factors" identified in the statute, often reflected past practice, and bore the imprimatur of the expert agency charged with developing them. *Id.* at 518 (emphasis omitted).

For the same reasons, we said that a district court should normally begin with a guideline calculation, and that after considering departures, the district court should decide whether "other factors" (beyond the guidelines) warranted an ultimate sentence above or below the guideline range. *Jiménez-Beltre*, 440 F.3d 514, 518. As for review for reasonableness, we stressed the need for "a plausible explanation and a defensible overall result." *Id.* at 519. The "within the range" sentence involved in *Jiménez-Beltre* was easily affirmed. *Id.* at 518-19.

[1] The present case is more difficult. The sentence is not a modest variance from the guideline range, but less than half the minimum of the range. "[T]he farther the judge's sentence departs from the guidelines sentence ... the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." *United States v. Dean*, 414 F.3d 725, 729 (7th Cir.2005) (Posner, J.). However, circumstances may make a major variance reasonable.

Here, the district court relied on six factors to distinguish this case: Smith's youth; his involvement in the offense "for a limited period of time"; the fact that Smith did not "appear to have been a leader"; the fact that Smith "appear[ed] to have committed the crime to support [his] drug habit"; Smith's participation in drug abuse treatment and his subsequent employment; and the probation officer's suggestion that a "sentence substantially below the guidelines is appropriate." FN3

FN3. The district judge also told Smith that he was "imposing the same sentence on you as I have imposed on the two defendants in this case who have appeared before me already." One of the defendants was sentenced to 46 months of imprisonment, while the other was sentenced to 57 months of imprisonment.

[2] The government first argues that the district court committed legal error because some of the factors relied upon-such as age, drug use, lack of a leadership role, and post-offense rehabilitation-are "either discouraged or prohibited bases for departure" under the sentencing guidelines and circuit precedent. Legal errors are reviewed *de novo* and are themselves a basis for remand, *Pho*, 433 F.3d at 60-61, unless the error had no

effect upon the sentence.

For the most part, the Commission's decision to discourage or exclude a factor seemingly rested either on a doubt whether the factor had much relevance to the statutory goals of sentencing or a concern that the factor was of a kind that tended to promote the inequality in sentencing that the guidelines aimed to reduce. ***5**U.S.S.G. § 5H1.1, intro. cmt. (2005); *cf. id.* § 5K2.0, cmt. (backg'd). But, as we explained in *Jiménez-Beltre*, the guidelines are generalizations; the benefit of advisory guidelines is the room allowed for finer tuning. 440 F.3d 514, 2006 WL 562154, at *3.

[3] That a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing the statutory factors apart from the guidelines. The guidelines-being advisory-are no longer decisive as to factors any more than as to results. About the best one can say for the government's argument is that reliance on a discounted or excluded factor may, like the extent of the variance, have some bearing on reasonableness.

[4] The government also argues that the district court erred in relying on the pre-sentence recommendation of a sentence substantially below the guidelines range, contending that this factor is "irrelevant" under section 3553(a). However, nothing in the statute forbids taking the probation officer's recommendation into account. A sentencing judge could reasonably consider the informed opinion of the officer in evaluating the section 3553(a) factors, *see United States v. Robinson*, 433 F.3d 31, 36 (1st Cir.2005), although the weight accorded such an evaluation surely depends on the strength of the reasons given.

The government next argues that the district court erred in (allegedly) basing Smith's sentence on those of his co-defendants. The government says that this misconstrues section 3553(a)(6), which requires district courts to avoid creating "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The government argues that the "disparity" referenced in the statutory language refers only to variations from a national norm.

We agree that Congress' goal of equality primarily envisions a national norm; the guidelines were in some measure a response to disparities among sentences for like individuals in different parts of the country. *United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir.1991), *cert. denied*, 502 U.S. 969, 112 S.Ct. 441, 116 L.Ed.2d 460 (1991). In any event, the district judge in this case was apparently stressing his own consistency rather than supplying an independent justification of the 46 month sentence.

[5] Having rejected the government's legal-error arguments, we turn now to its claim that the sentence was unreasonably low. In doing so, we do not think that the district court made any clear error as to underlying

fact warranting a remand. *Robinson*, 433 F.3d at 38 (sentence may be vacated if "predicated on a clearly erroneous view of material facts").[FN4] The issue, rather, is one of reasonableness: the plausibility of both the explanation and the result. *Jiménez-Beltre*, 440 F.3d 514, 518.

> FN4. The government says that the evidence did not support the district court's statements about drugs as a cause of Smith's crimes or his rehabilitation. A close reading indicates that the statements were quite qualified-that Smith "appear[ed]" to have engaged in his crimes in order to support a drug habit, and, in treatment, "received positive reports," though he "had a couple of slips." The former statement, so qualified, has some basis in the PSR; the latter is a matter of characterization.

The first fact relied on by the district court-Smith's youth-is a discouraged factor, but one that has a conventional appeal; among the concerns are that the crime may be a youthful aberration and that a young man may have a greater chance for rehabilitation. The district ***6** judge did not rely upon aberration-Smith, after all, had participated in six crack transactions and had a substantial criminal history continuing over several years-but the judge did express a hope of rehabilitation.

Yet Smith's criminal career has progressed fairly steadily toward more serious crimes (from license plate theft and marijuana possession, for example, to crack distribution near a school and playground). He served time in prison after violating the conditions of his probation stemming from his marijuana possession conviction, and it was soon after his release from that period of incarceration that he was arrested for the crime in question here.

The district judge also relied upon Smith's involvement in the present offenses "for a limited period of time." But Smith already had a significant criminal history; his first conviction (not necessarily his first crime) occurred more than three years before his crack transactions, which means that he was engaged in offenses from the age of 18 through the age of 21. During this period, he accumulated nine criminal history points, so his present offenses appear a further extension of his criminal history.

Further, the court said that Smith did not "appear to have been a leader," and this is true even though Smith progressed in the six transactions from aiding others to making his own sales. But the guideline calculations already account for this fact. U.S.S.G. § 3B1.1 (2005). If there is some more specific aspect of his role that mitigates over and above the usual guideline sentence for an ordinary participant, which in principle could be true, it is not stated.

Finally, the district judge mentioned the

potential contribution of drug addiction. The probation officer apparently said that the defendant "appear [ed] to have committed" the crimes to support a drug habit. At sentencing, the district judge essentially echoed the probation officer's qualified statement about the role of Smith's drug problems in his crimes. The government argues that this finding was without basis, and the defendant does not point to any specific facts on the record that support such a conclusion.

In any case, we note that Smith, as soon as he had completed his first phase of rehabilitation, immediately began to break the rules of the sober house, which resulted in the termination of his release. Regardless of the extent to which drug dependence may have played a role in his crimes, this relapse into misbehavior almost as soon as controls lessened does not speak well for his prospects of future self-control, whatever the cause for the relapse may have been.

We are hard-put to see any basis for finding this sentence reasonable. This is equally true if one turns from the facts relied upon by the district judge to the general considerations provided by the statute. Both vantages are pertinent in assessing reasonableness, and other circuits that have reviewed sentences for reasonableness have been willing to look at the matter from either end of the telescope. *See, e.g.,* *United States v. Lazenby,* 439 F.3d 928 (8th Cir.2006); *United States v. Duhon,* 440 F.3d 711, 715-20 (5th Cir.2006); *United States v. Moreland,* 437 F.3d 424, 436-37 (4th Cir.2006).

The first sentencing factor is "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Here, the offense involved repeatedly selling crack near a school and playground, and the defendant, although young, has accumulated a significant criminal history. Even ***7** after some rehabilitation and while this case was pending, he was unable to conform to the rules of the sober house to which he was sent.

Three more factors, grouped together by the statute, are the seriousness of the offense, need for respect for law, and need for just punishment. 18 U.S.C. § 3553(a)(2)(A). Selling crack near facilities where children gather speaks directly to these factors. The offense, and the defendant's developing criminal career, is also pertinent, again in ways unhelpful to him, to two other statutory factors: the need "to afford adequate deterrence" and "to protect the public." *Id.* § 3553(a)(2)(B)-(C).

The statute also refers to the need "to provide the defendant with needed ... medical care[ ] or other correctional treatment...." 18 U.S.C. § 3553(a)(2)(D). If drug treatment is required by Smith, this can presumably be done whether the sentence is 46 months or a longer guideline sentence. The statute's language does not itself make drug addiction an extenuating circumstance, and in any event, as we have seen, there is no very clear evidence of a causal link between drug abuse and

Smith's crimes in this case.

The next pertinent sentencing factor in the statute is the guideline range itself, 18 U.S.C. § 3553(a)(4)(A), which in turn is the principal means for complying with the last pertinent goal, namely, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). The factor in question-the guideline range-is obviously not one that supports the district court's non-guideline sentence, and, to the extent that the guidelines are given force, pushes in the other direction.

In a nutshell, the offense is quite serious and the defendant's record unpromising, and there are no developed findings to indicate that rehabilitation is a better prospect than usual. A sentence less than half the minimum range appears to us plainly unreasonable. Although we are unhappy to disagree with the respected and experienced district judge in this case, we cannot sustain the sentence on the findings and explanation before us.[FN5]

FN5. *Compare* *United States v. Hampton*, 441 F.3d 284, 286 (4th Cir.2006); *Lazenby*, 439 F.3d 928, 930; *Duhon*, 440 F.3d 711, 715; *Moreland*, 437 F.3d at 436-37; *United States v. McMannus*, 436 F.3d 871, 875 (8th Cir.2006).

The sentence is *vacated* and the case *remanded* for resentencing consistent with this decision. Framing a new sentence after any proceedings deemed appropriate is, in the first instance, the responsibility of the district judge.

*It is so ordered.*

C.A.1 (Mass.),2006.
U.S. v. Smith
445 F.3d 1

Briefs and Other Related Documents (Back to top)

• 05-1725 (Docket) (May 18, 2005)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
John Kevin TALLEY, Defendant-Appellant.
**No. 05-11353**
**Non-Argument Calendar.**

Dec. 2, 2005.

**Background:** Defendant appealed from sentence imposed by the United States District Court for the Northern District of Georgia, No. 04-00082-CR-TWT-1, Thomas W. Thrash, J., for making false statements on a firearms application.

6**Holding:** The Court of Appeals held that 51-month sentence for making false statements on a firearms application, which was at the low end of the Guidelines range, was not unreasonable.

Affirmed.

West Headnotes

**[1] Sentencing and Punishment 350H 665**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk665 k. Commentary and Policy Statements. Most Cited Cases

**Sentencing and Punishment 350H 720**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(B) Offense Levels
350HIV(B)3 Factors Applicable to Several Offenses
350Hk720 k. In General. Most Cited Cases

**Sentencing and Punishment 350H 750**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)1 In General
350Hk750 k. In General. Most Cited Cases

**Sentencing and Punishment 350H 800**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk800 k. In General. Most Cited Cases

After consulting the Sentencing Guidelines

and calculating the range provided, district court must consider several factors to determine a reasonable sentence: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Sentencing and Punishment 350H 996**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk996 k. Sufficiency. Most Cited Cases
District court is not required to state on the record that it has explicitly considered each of statutory sentencing factors or to discuss each of the factors. 18 U.S.C.A. § 3553(a).

**[3] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
A sentence within the Guidelines range is not per se reasonable. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Criminal Law 110 1141(2)**

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1141 In General
110k1141(2) k. Burden of Showing Error. Most Cited Cases
(Formerly 110k1163(1))
Party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both the record and statutory sentencing factors. 18 U.S.C.A. § 3553(a).

**[5] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
Review of sentence for reasonableness is deferential; court must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in sentencing statute. 18 U.S.C.A. § 3553(a).

**[6] Weapons 406 17(8)**

406 Weapons
406k17 Criminal Prosecutions
406k17(8) k. Sentence and Punishment. Most Cited Cases
Defendant's 51-month sentence for making false statements on a firearms application, which was at the low end of the Guidelines range, was not unreasonable. 18 U.S.C.A. §§ 924(a)(1)(A), 3553(a).

***784** Stephanie Kearns and V. NatashaPerdew Silas, Fed. Pub. Defenders, Fed. Def. Program, Inc., Atlanta, GA, for Talley.
Zahra S. Karinshak, Amy Levin Weil, U.S. Atty., Atlanta, GA, for U.S.

***785** Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, DUBINA and PRYOR, Circuit Judges.
PER CURIAM:
John Kevin Talley appeals his 51-month sentence for making false statements on a firearms application. *See* 18 U.S.C. § 924(a)(1)(A). Talley argues that his sentence was unreasonable because the district court failed to mention and discuss all the sentencing factors required by *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *See* 18 U.S.C. § 3553(a). The government counters that Talley's sentence is per se reasonable. We reject both these arguments. We conclude that the district court adequately considered the sentencing factors in section 3553(a) and, in the light of those factors and the record, imposed a reasonable sentence. We affirm.

## I. BACKGROUND

On January 23, 2004, Talley attempted to purchase four firearms in Jonesboro, Georgia, and falsely stated on a written application that he had never been convicted of a felony. A background check revealed that Talley had been convicted of a felony in New Jersey and was in violation of his probation. Talley was arrested and confessed to having attempted to purchase the firearms, knowingly answering the previous convictions question falsely, and having been convicted of the felonies of criminal trespass in New Jersey and obstruction of an officer in Georgia. Talley also admitted to having purchased more than 50 firearms since 1993, the majority of which he claimed to have given to relatives in Camden, New Jersey.

On January 20, 2005, Talley was sentenced to 51 months of imprisonment. The district court calculated this sentence by using section 2K2.1(a)(4)(A) of the U.S. Sentencing Guidelines, which assigned a base level of 20 because of Talley's previous conviction for a crime of violence. The district court added two levels because the current offense involved the attempted purchase of four firearms, but then subtracted two levels because Talley took responsibility for his crime and truthfully admitted his conduct. At level 20, the Guidelines provided a sentence

range of 51 to 63 months of imprisonment. Over Talley's objection, the district court imposed a sentence at the low end of the Guidelines range.

## II. STANDARD OF REVIEW

We review the sentence imposed by the district court for reasonableness. *Booker*, 125 S.Ct. at 765.

## III. DISCUSSION

Talley argues on appeal that his sentence was unreasonable because the district court did not mention or discuss each of the factors listed in section 3553(a). Talley also argues that the district court erred when it did not discuss either whether treatment for his medical conditions and blindness in one eye could be accomplished more effectively out of custody or whether he could receive education or vocational training out of confinement. Talley's arguments fail. We discuss these issues in three parts. First, we address Talley's objections to the sentencing process. Second, we address the argument of the government that Talley's sentence is per se reasonable. Third, we address whether Talley's sentence was reasonable.

### ***786** *A. The District Court Did Not Err in the Sentencing Process.*

[1] After *Booker*, sentencing requires two steps. First, the district court must consult the Guidelines and correctly calculate the range provided by the Guidelines. *See United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir.2005). Second, the district court must consider several factors to determine a reasonable sentence: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

[2] Contrary to Talley's argument, when the district court considers the factors of section 3553(a), it need not discuss each of them. In *United States v. Scott*, 426 F.3d 1324 (11th Cir.2005), we explained that "nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the section 3553(a) factors or to discuss each of the section 3553(a) factors." *Id.* at 1329. We concluded that an acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under *Booker*.

Talley's argument that the district court did not properly consider the factors of section 3553(a) also is foreclosed by *Scott.* The transcript of Talley's sentencing hearing provides ample evidence that the district court properly considered the factors. The district court correctly calculated the Guidelines range and stated, "*Based on all the facts and circumstances of this case,* I think that the guidelines do produce a fair and reasonable sentence considering the factors set forth in 18, section 3553(a) ...."

Although unnecessary under *Scott,* the district court also elaborated on the basis for its sentence. The district court determined that the range provided by the Sentencing Guidelines was appropriate because of the serious nature of the crime and the types of firearms Talley wanted to purchase. The district court stated its belief that Talley intended to distribute those firearms in Camden, New Jersey. The district court imposed a sentence at the low end of the recommended Guidelines range because Talley had committed "only one crime of violence and only one rather minor drug offense." The district court mentioned Talley's medical issues as a mitigating factor but determined that those issues would be addressed by the Bureau of Prisons.

*B. A Sentence Within the Guidelines Range Is Not Per Se Reasonable.*

[3] The United States argues that a "sentence at the low end of the applicable advisory Sentencing Guidelines range is, per se, a reasonable sentence." This argument does not comport with the *Booker* decision. According to Black's Law Dictionary, "per se" means, "Of, in, or by itself; standing alone, without reference to additional facts." To say that a sentence within the Guidelines range is "by itself" reasonable is to ignore the requirement that the district court, when determining a sentence, take into account the other factors listed in section 3553(a). *See Booker,* 125 S.Ct. at 765-66.

***787** Several other Circuits also have refused to adopt the rule that sentences within the Guidelines range are "per se" reasonable. The Sixth Circuit, in *United States v. Webb,* 403 F.3d 373, 385 n. 9 (6th Cir.2005), expressly "decline[d] to hold that a sentence within a proper Guidelines range is per se reasonable." Similarly, the Eighth Circuit, in *United States v. Archuleta,* 412 F.3d 1003, 1007 (8th Cir.2005), stated that it had "not yet held that a sentence within a correctly calculated Guideline range is reasonable per se." The Fifth Circuit, in *United States v. Mares,* 402 F.3d 511, 519-20 (5th Cir.2005), stated that it would give great deference to a sentence imposed by the district court judge if it was within the Guidelines range, but stopped short of stating that any sentence within the Guidelines range is, per se, reasonable. In *United States v. Mykytiuk,* 415 F.3d 606, 607 (7th Cir.2005), the Seventh Circuit stated that "*Booker* does not hold that a Guidelines sentence must conclusively be presumed to be reasonable."

Although we reject the argument of the United States that a sentence within the Guidelines range is per se reasonable, we agree that the use of the Guidelines remains central to the sentencing process. Our reading of the decision in *Booker* confirms this assessment. The Supreme Court, in its *Booker* decision, reiterated the importance of consulting the Guidelines, although in an advisory fashion. The *Booker* Court explained that, after it excised the provisions that made the Guidelines mandatory, the sentencing system would still provide uniformity and link the sentences to the actual offenses committed:
The approach, which we now adopt, would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct-a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.

*Booker,* 125 S.Ct. at 757.

The *Booker* Court explained that judges would continue to rely on extra-verdict information for sentencing purposes, because the *Booker* Court concluded that depriving the judges of this information would undermine the goals of Congress in adopting the Guidelines:
To engraft the Court's constitutional requirement [of jury fact-finding] onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

*Booker,* 125 S.Ct. at 760.

The *Booker* Court reasoned that continued use of the Guidelines in an advisory fashion would further the purposes of Congress in creating the sentencing system to be honest, fair, and rational:
As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. The courts of appeals review sentencing decisions for unreasonableness. These features of ***788** the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.

*Booker,* 125 S.Ct. at 767 (internal citations omitted).

[4] Although either a defendant or the government can appeal a sentence within the Guidelines range and argue that it is unreasonable, ordinarily we would expect a sentence within the Guidelines range to be reasonable. After *Booker,* our ordinary expectation still has to be measured against the record, and the party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both that record and the factors in section 3553(a). We now turn to that evaluation.

*C. Talley's Sentence Is Reasonable.*

When we review a sentence for reasonableness, we do not, as the district court did, determine the exact sentence to be imposed. Our review is not de novo. A district court may impose a sentence that is either more severe or lenient than the sentence we would have imposed, but that sentence must still be reasonable.

[5] Review for reasonableness is deferential. We must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a). In our evaluation of a sentence for reasonableness, we recognize that there is a range of reasonable sentences from which the district court may choose, and when the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one.

[6] Talley's argument that his sentence is unreasonable fails. Talley complains about the process by which the district court pronounced his sentence, but Talley fails to explain how the sentence itself is unreasonable. The record also shows that the district court carefully considered Talley's objections about his need for medical treatment and other appropriate sentencing factors. Nothing in this record suggests that Talley's sentence, at the low end of the Guidelines range, was unreasonable. The district court, therefore, did not err. *See Scott,* 426 F.3d at 1330; *United States v. Winingear,* 422 F.3d 1241, 1246 (11th Cir.2005).

IV. CONCLUSION

Because the district court did not err in the sentencing process and Talley's sentence is reasonable, the sentence imposed by the district court is

AFFIRMED.

C.A.11 (Ga.),2005.
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Briefs and Other Related Documents (Back to top)

• 05-11353 (Docket) (Mar. 11, 2005)

END OF DOCUMENT

Briefs and Other Related Documents

United States Court of Appeals,Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Mark A. WHITE, Defendant-Appellant.
**No. 03-2875.**

Submitted Dec. 30, 2003.
Decided May 3, 2005.

**Background:** Defendant was convicted in the United States District Court for the Southern District of Indiana, Larry J. McKinney, Chief Judge, for participating in drug conspiracy and money laundering. Defendant appealed. The Court of Appeals, Williams, Circuit Judge, 286 F.3d 950, affirmed the convictions and remanded for resentencing. Following resentencing, defendant appealed.

**Holdings:** The Court of Appeals, Williams, Circuit Judge, held that:

1(1) district court was entitled to consider other enhancements at resentencing;

7(2) imposition of two-level sentencing enhancement for obstruction of justice was supported by evidence; but

9(3) imposition of enhancement violated the Sixth Amendment.

Remanded.

Easterbrook, Circuit Judge, dissented from decision to not hear appeal on rehearing en banc and filed opinion.

West Headnotes

**[1] Criminal Law 110 1192**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1192 k. Mandate and Proceedings in Lower Court. Most Cited Cases
Appellate decision finding that application of murder cross-reference enhancement to defendant's offense level calculation was error, and ordering remand for resentencing consistent with ruling, sufficiently altered sentence to have effect of vacating sentence, and thus district court was entitled to determine whether an enhancement it was previously precluded from applying based on double counting implications could be supported by the record.

**[2] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Defendant's contention that the district court acted outside the scope of remand for resentencing by adding an obstruction of justice enhancement to his offense level calculation is a question of law that the appellate court reviews de novo.

**[3] Criminal Law 110 1192**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1192 k. Mandate and Proceedings in Lower Court. Most Cited Cases
The Court of Appeals is authorized to limit a remand to specific issues or to order complete resentencing. 28 U.S.C.A. § 2106.

**[4] Criminal Law 110 1192**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1192 k. Mandate and Proceedings in Lower Court. Most Cited Cases
Both the law of the case doctrine and the mandate rule require the district court to adhere to the commands of the appellate court on remand.

**[5] Criminal Law 110 1192**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1192 k. Mandate and Proceedings in Lower Court. Most Cited Cases
The scope of a district court's power on remand is determined by the language of the order of remand; there is no formula for determining its scope.

**[6] Criminal Law 110 1192**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1192 k. Mandate and Proceedings in Lower Court. Most Cited Cases

**Double Jeopardy 135H 116**

135H Double Jeopardy
135HIV Effect of Proceedings After Attachment of Jeopardy
135Hk114 Modification or Correction of Sentence; Cure of Illegal Sentence
135Hk116 k. Partial Invalidity; Several Counts or Sentences. Most Cited Cases

After remand for resentencing, a district court may increase a sentence on an unchallenged count without violating the Double Jeopardy Clause so long as the new sentence is lawful; the district court should be invited to resentence the defendant on all counts in order to achieve a rational, coherent structure in light of the remaining convictions. U.S.C.A. Const.Amend. 5.

**[7] Sentencing and Punishment 350H 761**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk761 k. Obstruction of Justice. Most Cited Cases
Evidence that defendant lied to authorities about his whereabouts on morning of and after murder of undercover informant and that defendant participated in cover-up of murder supported imposition of two-level sentencing enhancement for obstruction of justice following conviction for participating in drug conspiracy and money laundering. U.S.S.G. § 3C1.1, 18 U.S.C.A.

**[8] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
Where defendant failed to raise Sixth Amendment challenge to sentence before district court, the Court of Appeals reviews for plain error. U.S.C.A. Const.Amend. 6.

**[9] Criminal Law 110 1035(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(1) k. In General. Most Cited Cases

**Criminal Law 110 1181.5(8)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases

**Jury 230 34(7)**

230 Jury
230II Right to Trial by Jury

230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(7) k. Particular Cases in General. Most Cited Cases
(Formerly 230k34(1))
Imposition of two-level sentencing enhancement for obstruction of justice based on facts neither admitted by defendant nor proven by jury and under mandatory federal sentencing guideline regime, before Supreme Court's decision in *United States v. Booker* holding that the Guidelines were advisory, violated the Sixth Amendment, thus constituting plain error requiring remand in which sentencing judge was to determine whether he would have imposed same sentence had he known that the Guidelines were advisory, rather than mandatory; there was no indication that sentencing judge would have imposed the same sentence if he had known that the guidelines were not mandatory. U.S.C.A. Const.Amend. 6; U.S.S.G. § 1B1.1 et seq.; § 3C1.1, 18 U.S.C.A.

**[10] Criminal Law 110 1030(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
Under the plain error test, before an appellate court can correct an error not raised at trial, there must be error, that is plain, and that affects substantial rights; if all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

**[11] Criminal Law 110 1030(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
Under plain error test, requirement that the error must affect substantial rights requires the error to have been prejudicial in that it affected the outcome of the district court proceedings.

**[12] Criminal Law 110 1030(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of

Objections in General
110k1030(1) k. In General. Most Cited Cases
Under plain error test, limiting reviewable error to those which seriously affect the fairness, integrity, or public reputation of judicial proceedings, requires that the uncorrected error be intolerable, or result in a miscarriage of justice; while an error cannot be intolerable without being prejudicial, an error can be prejudicial without being intolerable, because it might be apparent that a retrial or a resentencing would lead to the same result.

**[13] Criminal Law 110 1042**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
Under plain error test, if a defendant has been prejudiced by an illegal sentence, then allowing that illegal sentence to stand would constitute a miscarriage of justice.

**[14] Sentencing and Punishment 350H 650**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk650 k. In General. Most Cited Cases
A disparity among co-defendants' sentences is not a valid basis to challenge a guideline sentence otherwise correctly calculated.

**[15] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases
The Court of Appeals will not disturb an appealing defendant's sentence even when a co-conspirator's sentence is lenient.

***829** Melanie C. Conour (Submitted), Office of United States Attorney, Indianapolis, IN, for Plaintiff-Appellee.
William H. Dazey, Jr. (Submitted), Indiana Federal Community Defenders, Inc., Indianapolis, IN, for Defendant-Appellant.

Before RIPPLE, EVANS, and WILLIAMS, Circuit Judges.
WILLIAMS, Circuit Judge.
In this successive appeal we consider the propriety of Mark A. White's sentence on his convictions for participating in a drug conspiracy and money laundering. White contends that our remand order following his initial appeal was limited in scope, solely permitting the district court to recalculate his sentence without the vacated murder cross-reference. Therefore, he reasons, the district court exceeded its authority when it

applied an obstruction of justice enhancement to White's sentencing guideline calculation. White also asserts that the district court's findings of fact do not support the obstruction of justice enhancement, and that the imposition of the enhancement was in violation of the Supreme Court's recent decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Lastly, he argues that his Due Process rights were violated based on the lower prison sentence granted his codefendant. While we find that our remand order allowed the district court to consider the obstruction of justice enhancement, and that the sentence did not violate due process, we nonetheless remand White's case to the district court for reconsideration of his sentence consistent with this opinion and *Booker*.

## I. BACKGROUND

We assume familiarity with the general facts of this case as set forth in *United States v. Thompson*, 286 F.3d 950 (7th Cir.2002). As this appeal is limited to Mark A. White, we will repeat only those facts pertinent to his conduct. A jury convicted White of participating in a conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846, and three counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i), and (h). During White's first sentencing hearing, the district court concluded, and we agreed, that Marcus Willis, an undercover law enforcement officer, was murdered in White's vehicle, a white Yukon. *Thompson*, 286 F.3d at 956-57. White aided in the cover-up of Willis's murder by lying to police officers about his whereabouts on the morning of and after the murder. He restated his lies under oath at his detention hearing, thereby actively participating in the cover-up. Moreover, he attempted to tamper with evidence of the murder by scheduling the Yukon to be repaired before police could examine the vehicle for evidence. *Id.* at 961 n. 4. However, after the conspirators' ***830** arrest but before the scheduled repair could take place, a police inspection of the Yukon revealed that the front passenger seat was removed, carpet from the front passenger side was cut out, damage to the left side of the front windshield was present, and Marcus Willis's blood was in the vehicle.

### A. The Original Sentencing and First Appeal

At his original sentencing hearing, the district court sentenced White to life imprisonment after concluding that the conspiracy trafficked in more than five kilograms of cocaine and that the United States Sentencing Guidelines (U.S.S.G.) § 2D1.1(d)(1) murder cross-reference enhancement was applicable.

The Presentence Report (PSR) also recommended increasing White's base offense level by two for obstruction of justice in accordance with U.S.S.G. § 3C1.1. The district court, however, chose not to apply the obstruction of justice enhancement because the murder cross-reference enhancement involved parallel relevant conduct and

application of both enhancements would have amounted to double counting in violation of U.S.S.G. § 1B1.1.

In *Thompson,* 286 F.3d at 955, we affirmed White's convictions but remanded his case for resentencing. We held that the district court's factual findings did not sufficiently support the murder cross-reference enhancement because the record did not reveal that White could reasonably foresee that Willis could be killed with malice aforethought in furtherance of the conspiracy. Our remand language was general, instructing the district court to resentence White "consistent with our ruling." *Id.* at 961.

### B. The Resentencing Hearing

Pursuant to our instructions, the district court resentenced White on June 13, 2003. Prior to White's resentencing, on November 15, 2002, Dennis Jones, White's co-conspirator, was resentenced. He was found guilty of the same criminal offenses as White and also lied to police about his whereabouts and participated in the murder's cover-up. At Jones's resentencing hearing, also done pursuant to this court's decision in *Thompson,* Chief Judge McKinney declined to add the obstruction of justice enhancement, reasoning:

It is true that those statements that I found to support the foreseeability of the murder aren't related to the offense of conviction in one way, but in another way they are. They are related to the ability of this conspiracy to successfully pursue its ends. I think it is a relatively difficult call to make at this point, and it is my view that I will not add that obstruction of justice at this point.

Despite Chief Judge McKinney's leniency with Jones, his analysis of the remand order and obstruction of justice enhancement led to a different result at White's resentencing hearing:

It seems to me that the remand is a narrow remand and it is for me to resentence Mr. White without the murder cross-reference. It is, I think, true that the findings that I made at the time that supported what I thought, or that I thought at the time supported a murder cross-reference are the same findings that could possibly then have supported an obstruction of justice .... I was concerned about it then as double counting. And so the issue today is on this remand, would it be permissible for the Court to take the findings that the Appellate Court determined did not support a murder cross-reference and use those same findings to support an obstruction of justice addition because there isn't any question of double counting anymore. [...] I think those findings made before do in fact support an ***831** obstruction of justice conclusion. [...] Again, the issue is whether under this narrow remand I can take that step. I don't believe there's anything in that remand that requires that those facts no longer be considered. And I will consider them.

Then, in agreement with the PSR's recommendation and the district court's own findings of fact, Chief Judge McKinney

imposed the obstruction of justice enhancement, sentencing White to 480 for the drug conspiracy charge and to 240 months on each of the other three convictions, to be served concurrently. Jones, however, as a result of the court's decision not to apply the obstruction of justice enhancement, was sentenced to 350 months in prison.

## II. DISCUSSION

White raises three issues on appeal. First, he asserts that the district court lacked jurisdiction to consider whether the obstruction of justice enhancement applies because it was beyond the scope of our remand. Second, he submits that even if the district court acted within the scope of remand, it clearly erred as its factual findings are not supported by the record, and were made in contravention of *United States v. Booker*, 543U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Lastly, he claims that the disparity between his sentence and that of his co-conspirator Jones violates his Due Process rights. We address each of his arguments in turn.

### A. Scope of Remand

[1][2] White's contention that the district court acted outside the scope of the remand by adding the obstruction of justice enhancement to his offense level calculation is a question of law that we review de novo. *United States v. Sumner*, 325 F.3d 884, 888 (7th Cir.2003); *United States v. Husband*, 312 F.3d 247, 251 (7th Cir.2002).

[3][4][5] Title 28 U.S.C. § 2106 grants appellate courts flexibility in determining the scope of remand.[FN1] This Court has previously stated that in the sentencing context, "the statute authorizes us to 'limit a remand to specific issues or to order complete resentencing.' " *United States v. Young*, 66 F.3d 830, 835 (7th Cir.1995) (quoting *United States v. Polland*, 56 F.3d 776, 777 (7th Cir.1995)). Both the law of the case doctrine and the mandate rule require the district court to adhere to the commands of this Court. *See Husband*, 312 F.3d at 250 n. 3 (" 'law of the case' generally requires the district court to confine its discussion to the issues remanded") (internal citation omitted); *Polland*, 56 F.3d at 777-78 ("mandate rule requires a lower court to adhere to the commands of a higher court on remand"). The scope of a district court's power on remand is determined by the language of the order of remand. *United States v. Buckley*, 251 F.3d 668, 669 (7th Cir.2001). There is no formula for determining its scope. *See Husband*, 312 F.3d at 251 ("The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly."). *But see Young*, 66 F.3d at 836 (suggesting that explicit language is required for a limited remand).

FN1. 28 U.S.C. § 2106 states:
The Supreme Court or any other court of appellate jurisdiction may affirm,

> modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Our case law has characterized the scope of the remand issue using two analogies: (1) that upon remand the district ***832** court is presented with a "clean slate" or (2) the district court may "unbundle the sentencing package." There is no meaningful distinction in this phraseology. In *United States v. Smith*, 103 F.3d 531, 534 (7th Cir.1996), we held that the sentencing guidelines provide lower courts with the authority to restructure sentences when part of a sentence is vacated. We opined:

If a multicount sentence is a package-and we think it is-then severing part of the total sentence usually will unbundle it. And we do not think it matters what means are used to bring resentencing proceedings before the district court. Under the sentencing package concept, when a defendant raises a sentencing issue he attacks the bottom line.

*Id.; see also United States v. Noble*, 299 F.3d 907, 910 (7th Cir.2002) ("[I]t is settled that after the appellate court vacates the sentence on a particular count, the district court on remand may adjust the entire sentencing 'package.' "); *United States v. Binford*, 108 F.3d 723, 729 (7th Cir.1997) (holding that package concept is applicable in the collateral attack context).

[6] Likewise, in *Polland,* we explained, "the vacation of a sentence results in a 'clean slate' and allows the district court to start from scratch." 56 F.3d at 777 (citing *United States v. Atkinson*, 979 F.2d 1219, 1223 (7th Cir.1992) (instructing trial court to write on a "clean slate" after vacating the original sentence)); *see also United States v. Barnes*, 948 F.2d 325, 330 (7th Cir.1991) (stating that the effect of a vacated sentence is to provide the trial judge with a "clean slate as far as sentencing [is] concerned"). In *Polland,* we further clarified that vacation of a sentence does not mean "we must always order, and the district court must always engage in, complete resentencing," 56 F.3d at 779; rather the calculus is a practical one. We recognize that in a sentencing determination potential enhancements are inter-connected and the district court's original sentencing intent may be undermined by altering one portion of the calculus. Furthermore, vacated aspects of a sentence may change the form of the sentence. We have ruled that "[a] court may increase a sentence on an unchallenged count without violating the Double Jeopardy Clause so long as the new sentence is lawful." *Smith*, 103 F.3d at 535 (citing *Pennsylvania v. Goldhammer*, 474 U.S. 28, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985)). Additionally, the district court should be "invited to resentence the defendant on all counts in order to achieve a rational, coherent structure in light of the remaining convictions." *United States v. Martenson*, 178 F.3d 457, 465 (7th Cir.1999).

In *Thompson,* we found that the district court erred in applying the murder cross-reference enhancement to White's offense level calculation. Further, we directed that "we remand for resentencing consistent with our ruling." Taken as a whole, the remand order did not implicitly or explicitly suggest that the district court only eliminate the murder cross-reference enhancement.

White incorrectly asserts that the sentence was not vacated because we did not explicitly use the word "vacate" in our remand order, and therefore did not provide the district court with a "clean slate" or "unbundled package." Our decision sufficiently altered the sentence to have the effect of vacating his sentence. As we have held, "when there is an alteration in the components of a sentence, the entire sentence is altered. If the alteration contains within itself potential for permeating the whole sentence, the entire sentence can be revisited ...." *Martenson,* 178 F.3d at 463 (quoting *Smith,* 103 F.3d at 535 (affirming a trial court's complete resentencing after vacating one of defendant's three convictions)). Here, the ***833** elimination of the murder cross-reference enhancement similarly permeated the entire sentence because it eliminated the life sentence imposed by the district court, leaving White's sentence at 240 months, thereby sufficiently disturbing the district court's sentencing intent.

Most importantly, the guidelines explicitly preclude the imposition of two enhancements which are based on the same relevant conduct. *See* U.S.S.G. § 1B1.1 ("Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level."); *see United States v. Szakacs,* 212 F.3d 344, 353 (7th Cir.2000) (double counting exists when enhancements are premised on identical facts) (quoting *United States v. Haines,* 32 F.3d 290, 293 (7th Cir.1994)); *United States v. Austin,* 54 F.3d 394, 403 (7th Cir.1995) (same). Therefore, once the district court chose to apply the murder cross-reference, it was no longer empowered to consider the obstruction of justice enhancement. The district court based the imposition of the murder cross-reference enhancement on the findings that White lied to police officers and participated in the cover-up of Willis's murder-the same findings of fact used for the obstruction of justice enhancement.

Our decision remanding stated that the district court's initial decision to apply the murder cross-reference was not supported by sufficient factual findings. Thus, without a remand order to the contrary, the district court was free to determine whether an enhancement that it was previously precluded from applying based on double counting implications could now be supported by the record.[FN2]

FN2. The district court properly resentenced White based on the existing record consistent with the this court's decision in *United States v.*

*Wyss*, 147 F.3d 631, 633 (7th Cir.1998), which holds that "the government [is] entitled to only one opportunity to present evidence" on an issue for which it carries the burden of proof at sentencing.

### B. Application of Obstruction of Justice Enhancement

White raises two challenges to the district court's application of the obstruction of justice enhancement to his sentence. First he argues that the district court's findings of fact do not support the enhancement because they fail to meet the requisite burden of persuasion. Second, he challenges the propriety of the very method through which those facts were found.

#### 1. Meeting Burden of Persuasion

[7] The guidelines provide that an obstruction of justice enhancement should be applied:
If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1.

Our prior opinion approved the district court's finding that White lied to authorities about his whereabouts on the morning of and after the murder of the undercover informant (Willis). *Thompson*, 286 F.3d at 960-61. We also noted that the district court properly concluded that "White participated in the cover-up because he often used the name 'Demarco,' the same name used by the party who scheduled the appointment to have the vehicle [in which the murder took place] repaired at Mobile Jamzz" before it could be examined by the ***834** police for evidence. *Id.* at 961 n. 4. Based upon this evidence, the district court upon remand found that White had impeded law enforcement's investigation, and applied the obstruction of justice enhancement accordingly.

White argues that this evidence is insufficient to support the obstruction of justice enhancement. However, if properly found, evidence establishing that White participated in a cover-up of an undercover informant's murder by both lying under oath during his detention hearing about his whereabouts the night of the murder, and assisting in the attempted destruction of evidence, would certainly qualify him for the obstruction of justice enhancement. Indeed, White's perjury alone-if properly found-may be sufficient to warrant the enhancement. *See United States v. White*, 240 F.3d 656, 661 (7th Cir.2001) (affirming obstruction of justice enhancement when witness committed perjury by flatly denying involvement in insurance fraud scheme); *United States v. Hickok*, 77 F.3d 992, 1006 (7th Cir.1996) ( "Perjury is a

well-established example of conduct that warrants an enhancement for obstruction of justice.") (internal citations omitted).

Moreover, a legitimate finding that White had assisted in the attempted destruction of evidence would also be independently sufficient for the obstruction of justice enhancement, as the application note highlights. U.S.S.G. § 3C1.1, App. Note 4(d) (noting that "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding" is an example of obstructive conduct). White's perjury coupled with his participation in the murder's cover-up would-if properly found-more than sufficiently demonstrate that the district court did not clearly err in applying the obstruction of justice enhancement.

### 2. Propriety of the Factual Findings-*United States v. Booker*

[8][9] However, as the repeated caveats above suggest, the ultimate propriety of applying the obstruction of justice enhancement here turns on the legitimacy of the method in which the facts supporting the enhancement were found. Toward this end, White argues that the district court's application of the obstruction of justice enhancement to his sentence violated his rights as interpreted in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Because he did not raise this challenge before the district court (nor any related challenge invoking the Sixth Amendment, the since decided *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), or *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)), we review for plain error. *See United States v. Paladino*, 401 F.3d 471, 481 (7th Cir.2005); *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

[10] "Under [the plain error] test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.' " *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* (quoting *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544).

We begin by assessing error. One error that White may argue is that the district court violated his Sixth Amendment right to a jury trial by increasing his sentence-***835** via the obstruction of justice enhancement-based on facts neither admitted by himself nor proven to his jury beyond a reasonable doubt. In *United States v. Booker,* the Supreme Court made clear that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." 125 S.Ct. at 746.

Accordingly, under the formerly mandatory regime, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756.

Indeed, both of the facts upon which the district court justified the obstruction of justice enhancement-namely, that White had (1) lied under oath during his detention hearing about his whereabouts on the night of the murder of the undercover informant; and (2) assisted in the attempted destruction of evidence by scheduling an appointment to have the vehicle in which the murder took place (the Yukon) repaired before it could be examined by the police for evidence-were found solely by the district court. Such sentencing in reliance on supplemental facts neither admitted by White nor proven to his jury beyond a reasonable doubt squarely violates our new understanding of the Sixth Amendment as divined by *Booker,* and thereby constitutes error.

The procedural posture of this case, however, presents an interesting wrinkle in assessing the propriety of the facts upon which the enhancement was based. The matter before us is a successive appeal. As noted above, we have already visited the findings upon which the district court based its imposition of the obstruction enhancement in our prior opinion. *Thompson,* 286 F.3d at 960-61 & n. 4. While the issue of the propriety of the facts found was before this court on prior appeal, White did not raise a Sixth Amendment challenge akin to that raised today.

We need not decide today, however, whether our prior decision precludes our ability to assess today a Sixth Amendment challenge to the propriety of these since settled facts. Increasing sentence under the mandatory scheme based on solely judge found facts is not the only error contemplated by *Booker.* As the government concedes, the mere mandatory application of the Guidelines-the district court's belief that it was required to impose a Guidelines sentence-constitutes error. *See Booker,* 125 S.Ct. at 769 (holding that parties in respondent Fanfan's case "may seek resentencing under the system set forth in [*Booker* ]" though "Fanfan's sentence d[id] not violate the Sixth Amendment"); *Paladino,* 401 F.3d at 480 (finding *Booker* error where a portion of defendant Velleff's sentence "was based on mandatory provisions of the sentencing guidelines"); *United States v. Labastida-Segura,* 396 F.3d 1140, 1142 (10th Cir.2005) ("We must apply the remedial holding of *Booker* to [defendant's] direct appeal even though his sentence does not involve a Sixth Amendment violation."). What's more, that error is plain. *Olano,* 507 U.S. at 734, 113 S.Ct. 1770 (" 'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' "); *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' *at the time of appellate*

*consideration.*") (emphasis added).

[11][12][13] In turning to the third and fourth prongs of the plain error standard, we note that the difference between the two elements "is not entirely clear." *Paladino*, 401 F.3d at 481. Under *Paladino* 's application of the plain error test in the ***836** *Booker* context, the third element-providing that the error must "affect substantial rights"-requires the error to have been "prejudicial," *id.,* in that it "affected the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, 113 S.Ct. 1770. The fourth element, on the other hand, by limiting reviewable error to those which "seriously affect the fairness, integrity, or public reputation of judicial proceedings," requires that the uncorrected error be "intolerable," or result in a "miscarriage of justice," *Paladino*, 401 F.3d at 481 (citing cases). While an error cannot be intolerable without being prejudicial, "[a]n error can be prejudicial without being intolerable, because it might be apparent that a retrial or a resentencing would lead to the same result." *Id.* "Here we can and have predetermined that if the defendant has been prejudiced by an illegal sentence, then allowing that illegal sentence to stand would constitute a miscarriage of justice." *United States v. Macedo*, 406 F.3d 778, 790, 2005 WL 851501, *8 (7th Cir.2005); *see also Paladino*, 401 F.3d at 483 ("It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person."); *United States v. Pawlinski*, 374 F.3d 536, 540-41 (7th Cir.2004) ("[T]he entry of an illegal sentence is a serious error routinely corrected on plain-error review."). What remains uncertain at this stage of our review, however, is whether the district court, operating under it newfound post-*Booker* discretion, would have sentenced the defendant any differently.

This is not a "case[ ] in which one can be certain that the judge would not have given a different sentence even if he had realized that the guidelines were merely advisory." *Paladino*, 401 F.3d at 480. There are no "indicators" here that might dissipate the "fog" that surrounds our understanding of "what the district judge would have done with additional discretion." *Cf. United States v. Lee*, 399 F.3d 864, 866 (7th Cir.2005) (listing several indicators that would suggest that the district court, notwithstanding its broader, post-*Booker* discretion, would not sentence differently). Here, with a final offense level of 42 and a criminal history category II, White's sentencing range was 360 months to life. The district court sentenced him to 460 months. That the sentencing judge imposed a sentence higher than the guideline minimum tells us nothing, for "[a] conscientious judge-one who took the guidelines seriously whatever his private views-would pick a sentence *relative* to the guideline range." *Paladino*, 401 F.3d at 482 (emphasis added). Vested with broader discretion, district courts may today find once mandated ranges wholly inapt, inexorably corrupting any sentence imposed relative to them.

Accordingly, so that we might complete our plain error analysis, we, "while retaining jurisdiction of the appeal, order a limited

remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence." *Id.* at 484. Before reaching this decision on remand,

(whether the judge's conclusion is that he would, or would not, adhere to the original sentence), 'the District Court should obtain the views of counsel, at least in writing, but 'need not' require the presence of the Defendant, *see* Fed.R.Crim.P. 43(b)(3). Upon reaching its decision (with or without a hearing) whether to resentence, the District Court should either place on the record a decision not to resentence, with an appropriate explanation,' *United States v. Crosby, supra,* at *13, or inform this court of its desire to resentence the defendant. (By 'should' in the quoted passage, we understand 'must.').

*Paladino,* 401 F.3d at 484. If the district court determines that it would nonetheless ***837** reimpose the original sentence if required to resentence, we will affirm the original sentence, provided that the sentence is reasonable. *Id.* If the district court determines that it would, with its greater discretion, sentence White differently, we will vacate White's original sentence and remand his case for resentencing. *Id.*

### C. Due Process Claim

[14][15] Finally, White argues that his Due Process rights were violated by the district court's decision to apply the obstruction of justice enhancement to his sentence and not that of his co-defendant, Jones, when the district court found that they both engaged in substantially identical conduct. Jones was sentenced to 350 months in prison and White was sentenced to 480 months. This court has explicitly rejected similar arguments. We have repeatedly stated, "a disparity among co-defendants' sentences is not a valid basis to challenge a guideline sentence otherwise correctly calculated." *United States v. Simpson,* 337 F.3d 905, 909 (7th Cir.2003) (quoting *United States v. Simmons,* 218 F.3d 692, 696 (7th Cir.2000)). White's sentence was correctly calculated and falls within the guidelines' range of 360 months to life. The propriety of Jones's sentence is not relevant to White's appeal. We will not disturb the appealing defendant's sentence even when a co-conspirator's sentence is lenient. *See United States v. McMutuary,* 217 F.3d 477, 489-90 (7th Cir.2000). The only time we will disturb a sentence based on an unjustifiable disparity between co-defendants is if it "actually creates a disparity between the length of the appellant defendant's sentence and all other similar sentences imposed nationwide." *Simpson,* 337 F.3d at 909 (quoting *McMutuary,* 217 F.3d at 490). White neither asserts nor presents evidence that his sentence creates such a national disparity. Therefore, he has not met his burden.

## III. CONCLUSION

For the reasons stated above, we direct a limited Remand of White's case in accordance

with the procedure set forth in this opinion, thus retaining appellate jurisdiction.

This opinion was circulated to the entire court before issuance. All but one member of the court in regular active service voted not to hear the case en banc. Judge Easterbrook voted to hear it en banc.

EASTERBROOK, Circuit Judge, dissenting from the decision not to hear these appeals en banc.

These cases pose one of the transition problems in implementing *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). What happens when there has not been a violation of the sixth amendment-because, for example, the only consideration that raised the sentence is a prior conviction, see *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), or the defendant has waived his right to submit any dispute to the jury, see *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1263 n. 5, 161 L.Ed.2d 205 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2541, 159 L.Ed.2d 403 (2004)-but the district judge treated the Guidelines as conclusive? *Booker* knocks out 18 U.S.C. § 3553(b)(1), which makes the system mandatory, for all prosecutions, not just those in which there is a constitutional problem. See 125 S.Ct. at 768-69. This holding applies to all cases on direct appeal. The opinions in *Castillo* and *White* put these propositions together and hold that cases in which there is no sixth amendment problem (and no misapplication of the Guidelines either) should be treated just like those in which the Constitution has been violated.

***838** Yet one element of plain-error analysis is whether the shortcoming seriously impairs the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 734-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *Jones v. United States*, 527 U.S. 373, 394-95, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *United States v. Vonn*, 535 U.S. 55, 62-63, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002); *United States v. Cotton*, 535 U.S. 625, 631-33, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 2339-40, 159 L.Ed.2d 157 (2004). This condition is not satisfied when the district judge complied with all requirements of the Constitution, statutes, and rules. See *United States v. Gonzalez-Huerta*, 403 F.3d 727, 736-39 (10th Cir.2005) (en banc).

*United States v. Paladino*, 401 F.3d 471 (7th Cir.2005), says that a sentence lengthened because of a constitutional violation meets the plain-error standard; more time in prison, caused by a constitutional wrong, is unjust. One cannot say the same when there has been no violation of the Constitution (or, indeed, of any other legal norm). The Sentencing Guidelines are not themselves an engine of wrong. They emphasize candor and consistency in sentencing and have been applied about a million times since 1987. *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct.

2519, 159 L.Ed.2d 442 (2004), holds that sentences imposed in violation of another rule derived from *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), are not so likely to be unjust that the new rule must apply retroactively on collateral review, and we held in *McReynolds v. United States*, 397 F.3d 479 (7th Cir.2005), that *Booker* likewise does not govern on collateral review. If this is so when the sixth amendment has been violated, what can be the source of injustice when it has been obeyed?

Although the plain-error standard differs from the standard for retroactive application, whether an error gravely undermines the reliability of the outcome is common to the two inquiries. Given *Schriro* and opinions such as *Edwards v. United States*, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998), and *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997), it would be unsound to assert that applying the Guidelines is so problematic that relief is apt under the plain-error standard. When every statute has been enforced accurately and constitutionally, the fairness, integrity, and public reputation of judicial proceedings are unimpaired.

The disposition of *United States v. Fanfan*, which was consolidated with *Booker,* does not bear on this issue. The remedial majority's penultimate paragraph says, in part:
In respondent Fanfan's case, the District Court held *Blakely* applicable to the Guidelines. It then imposed a sentence that was authorized by the jury's verdict-a sentence lower than the sentence authorized by the Guidelines as written. Thus, Fanfan's sentence does not violate the Sixth Amendment. Nonetheless, the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions.

125 S.Ct. at 769. This does not mean that applying the Guidelines is wrongful even when the judge does not resolve any factual dispute. Quite the contrary. The reason that Fanfan's sentence did not violate the sixth amendment was precisely that it *did* violate the Sentencing Reform Act of 1984 and the Sentencing Guidelines. The jury found that Fanfan had distributed 500 or more grams of cocaine. How much more? ***839** The judge concluded (on a preponderance of the evidence) that Fanfan was culpable for 2.5 kilograms of powder cocaine plus 262 grams of crack. The top of the Guideline range for 500 grams was 78 months; the range for Fanfan's relevant conduct (including his role as a leader of a criminal organization) was 188 to 235 months. To avoid any constitutional problem, the judge sentenced Fanfan to 78 months' imprisonment. The United States appealed to the first circuit and filed a petition for certiorari before judgment, which the Court granted. So the case was before the Court on the prosecutor's complaint, not Fanfan's; the remand occurred because the sentence was too low, not because it might have been too high; plain-error review played no role in the decision.

Applying *Paladino* to no-constitutional-error situations is inconsistent with the reason the

remedial opinion in *Booker* made the Guidelines advisory across the board. The alternative was asymmetric: defendants would have been free to argue for less time in every case, but when the top of the Guideline range was favorable defendants could have waived their sixth amendment rights and preserved that benefit. The Court stated that Congress would have been unlikely to adopt a one-sided approach. 125 S.Ct. at 768. Yet the approach taken in *Castillo* and *White* implements only the defendant-favoring portion of the Court's remedy. No defendant is placed at risk of a higher sentence by a limited *Paladino* remand. (It would be anachronistic to reply that the prosecutor, too, could have appealed. Recall that this is plain-error review, which is to say that *neither* side noticed this issue until after the time for filing a notice of appeal had expired. Until *Booker* a prosecutor would have had no reason-and no statutory authority-to appeal from a sentence that fell within a properly calculated Guideline range. See 18 U.S.C. § 3742(b).) That both sides have enjoyed the even-handed application of a symmetric Guidelines system is still another reason to say that no injustice has occurred.

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Briefs and Other Related Documents (Back to top)

• 03-2875 (Docket) (Jul. 14, 2003)

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Briefs and Other Related Documents

United States Court of Appeals,Eleventh Circuit.
UNITED STATES of America,
Plaintiff-Appellant,
v.
Aaron Eric WILLIAMS,
Defendant-Appellee.
**No. 05-13205.**

July 21, 2006.

**Background:** Defendant was convicted of possessing crack cocaine with intent to distribute by the United States District Court for the Middle District of Florida, No. 04-00111-CR-ORL-31-JGG,Gregory A. Presnell, J., 372 F.Supp.2d 1335, and government appealed from sentence imposed.

**Holdings:** The Court of Appeals, Black, Circuit Judge, held that:

22(1) district court's disagreement with policy choice of Congress to employ a 100-to-1, crack-to-powder drug quantity ratio to punish crack cocaine offenders much more severely than those convicted of narcotics offenses involving powder cocaine was not permissible sentencing factor;

26(2) district court's disagreement with what it perceived as "arbitrary compounding" effect of the career offender Guidelines provision, on theory that repeat drug offender's prior criminal history was adequately taken into consideration by his criminal history category, was likewise an impermissible factor;

27(3) government's decision to engage in controlled purchase of crack cocaine from defendant who was reported to be dealing in crack cocaine, rather than arranging to purchase some other drug that was punished less severely, was not permissible factor; and

28(4) defendant failed to show that error was harmless.

Vacated and remanded.

**[1] Criminal Law 110 1134(3)**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases

**Criminal Law 110 1147**

110 Criminal Law
110XXIV Review

110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
On challenge to sentence imposed under the post-*Booker*, advisory Sentencing Guidelines regime, Court of Appeals first considers challenges to district court's calculation of the advisory Guidelines range and then reviews sentence for reasonableness. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[2] Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
Even under the post-*Booker*, advisory Sentencing Guidelines regime, district court must calculate Guidelines range accurately. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[3] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases

**Criminal Law 110 1158(1)**

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(1) k. In General. Most Cited Cases
Court of Appeals reviews district court's interpretation of the Sentencing Guidelines de novo and accepts its factual findings unless clearly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[4] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

**Sentencing and Punishment 350H 651**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
Error in district court's calculation of advisory Guidelines range warrants vacating defendant's sentence, unless error was harmless. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Error in district court's calculation of advisory Guidelines range warrants vacating defendant's sentence, unless error was harmless. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[5] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases
Guidelines miscalculation is harmless, and will not warrant vacation of defendant's sentence, if district court would have imposed same sentence without the error. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[6] Sentencing and Punishment 350H 40**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk40 k. In General. Most Cited Cases
If, on challenge to sentence imposed under the post-*Booker*, advisory Sentencing Guidelines regime, Court of Appeals concludes that Guidelines calculation is correct, or that any miscalculation is harmless, Court of Appeals then considers whether the sentence is reasonable based on whether it achieves purposes of sentencing as set forth in sentencing statute. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

**[7] Criminal Law 110 1141(2)**

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1141 In General
110k1141(2) k. Burden of Showing Error. Most Cited Cases
Party challenging a sentence on appeal bears burden of establishing that sentence is unreasonable in light of statutory factors. 18 U.S.C.A. § 3553(a).

**[8] Sentencing and Punishment 350H 59**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk59 k. Effect of Applying Invalid Factor. Most Cited Cases
Sentence can be unreasonable, regardless of length, if district court's selection of sentence was substantially affected by its consideration of impermissible factors.

**[9] Criminal Law 110 1134(2)**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(2) k. Matters or Evidence Considered. Most Cited Cases
Court of Appeals' inquiry into the reasonableness of sentence imposed under the post-*Booker*, advisory Sentencing Guidelines regime is not confined to reviewing whether

there are facts and circumstances found in record that would justify length of sentence imposed; reasons which district court gives for selecting sentence are also important to assessing reasonableness.

**[10] Sentencing and Punishment 350H 59**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk59 k. Effect of Applying Invalid Factor. Most Cited Cases
Sentence based on improper factor fails to achieve purposes of sentencing statute and may be unreasonable, regardless of length. 18 U.S.C.A. § 3553(a).

**[11] Criminal Law 110 339.11(3)**

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k339.5 Identity of Accused
110k339.11 Determination of Admissibility
110k339.11(3) k. Presumptions and Burden of Proof. Most Cited Cases
Party challenging sentence bears initial burden of establishing that district court considered impermissible factor at sentencing.

**[12] Criminal Law 110 1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Whether factor considered by district court in imposing sentence is impermissible is question of law, that Court of Appeals will review de novo.

**[13] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

**Criminal Law 110 1181.5(8)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases
If district court considered impermissible factor when imposing sentence and its error was preserved for appeal, Court of Appeals will vacate sentence and remand based on this

error, unless error was harmless.

**[14] Criminal Law 110 1163(1)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(1) k. In General. Most Cited Cases
Party defending sentence has burden of establishing that any error was harmless.

**[15] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases
District court's consideration of impermissible factor at sentencing is harmless if record as whole shows that this error did not substantially affect district court's selection of sentence imposed.

**[16] Criminal Law 110 1141(2)**

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1141 In General
110k1141(2) k. Burden of Showing Error. Most Cited Cases

**Criminal Law 110 1163(1)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(1) k. In General. Most Cited Cases

**Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

**Criminal Law 110 1181.5(8)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases
To succeed on claim that impermissible factor affected district court's sentence, party challenging that sentence bears initial burden of establishing that district court considered an

impermissible factor in fashioning sentence, whereupon, if error was preserved, burden shifts to party defending sentence to show, based on record as whole, that error was harmless, i.e., that error did not substantially affect district court's choice of sentence; absent this showing, Court of Appeals will vacate sentence as unreasonable and remand for district court to resentence defendant based upon individualized facts and circumstances of defendant's case that bear on statutory sentencing considerations. 18 U.S.C.A. § 3553(a).

**[17] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases

Upon showing that district court's error in considering an impermissible factor at sentencing did not substantially affect district court's choice of sentence, Court of Appeals will review sentence for reasonableness in light of statutory factors and the reasons given by district court. 18 U.S.C.A. § 3553(a).

**[18] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases

**Sentencing and Punishment 350H 40**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk40 k. In General. Most Cited Cases

Court of Appeals reviews length of sentence for reasonableness in light of facts and circumstances of defendant's case reflecting the statutory sentencing considerations. 18 U.S.C.A. § 3553(a).

Court of Appeals reviews length of sentence for reasonableness in light of facts and circumstances of defendant's case reflecting the statutory sentencing considerations. 18 U.S.C.A. § 3553(a).

**[19] Criminal Law 110 1147**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases

Review of length of sentence for reasonableness is deferential, and appellate court must bear in mind that there is a range of reasonable sentences from which district court may choose; weight to be accorded any given statutory factor is matter committed to sound discretion of district court, and Court of Appeals will not substitute its judgment in weighing the relevant factors. 18 U.S.C.A. § 3553(a).

**[20] Sentencing and Punishment 350H 35**

350H Sentencing and Punishment
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk33 Effect of Statute or Regulatory Provision
350Hk35 k. Discretion of Court. Most Cited Cases
District court's choice of sentence is not unfettered.

**[21] Criminal Law 110 1181.5(8)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases
In reviewing length of sentence for reasonableness, Court of Appeals will remand for resentencing if it is left with definite and firm conviction that district court committed clear error of judgment in weighing statutory factors by arriving at sentence that lies outside range of reasonable sentences dictated by facts of case. 18 U.S.C.A. § 3553(a).

**[22] Sentencing and Punishment 350H 55**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk55 k. Comparison with Dispositions in Other Cases. Most Cited Cases
District court's disagreement with policy choice of Congress to employ a 100-to-1, crack-to-powder drug quantity ratio to punish crack cocaine offenders much more severely than those convicted of narcotics offenses involving powder cocaine was not permissible sentencing factor, and should not have been considered by district court in fashioning sentence for defendant convicted of possessing with intent to distribute five or more grams of crack cocaine; powder and crack cocaine offenders had been determined by Congress not to be similarly situated, for purpose of provision in sentencing statute permitting court, in imposing sentence, to consider "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.A. § 3553(a)(6); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1)(B)(iii), 21 U.S.C.A. § 841(a)(1), (b)(1)(B)(iii).

**[23] Sentencing and Punishment 350H 37**

350H Sentencing and Punishment
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk37 k. Necessity That Punishment Be Individualized. Most Cited Cases

**Sentencing and Punishment 350H 40**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk40 k. In General. Most Cited Cases
Sentences must be based upon individualized aspects of defendant's case that fit within statutory sentencing factors, and not on generalized disagreement with Congressional sentencing policy. 18 U.S.C.A. § 3553(a).

**[24] Sentencing and Punishment 350H 55**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk55 k. Comparison with Dispositions in Other Cases. Most Cited Cases
While some disparity between similarly situated defendants is inevitable result of advisory nature of the Sentencing Guidelines following the Supreme Court's *Booker* decision, this inevitable disparity should only be product of district court's discretion in weighing individualized statutory factors in given case, and not consequence of district court's general, across-the-board policy considerations. 18 U.S.C.A. § 3553(a).

**[25] Sentencing and Punishment 350H 34**

350H Sentencing and Punishment
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk33 Effect of Statute or Regulatory Provision
350Hk34 k. In General. Most Cited Cases
Allowing sentencing courts to subvert Congress' clearly expressed will does not promote respect for the law, provide just punishment for offense of conviction, or result in sentence reflective of offense's seriousness as deemed by Congress. 18 U.S.C.A. § 3553(a).

**[26] Sentencing and Punishment 350H 94**

350H Sentencing and Punishment
350HI Punishment in General
350HI(E) Factors Related to Offender
350Hk93 Other Offenses, Charges, Misconduct
350Hk94 k. In General. Most Cited Cases
District court's disagreement with what it perceived as "arbitrary compounding" effect of the career offender Guidelines provision, on theory that repeat drug offender's prior criminal history was adequately taken into consideration by his criminal history category, was impermissible sentencing factor, and should not have been considered by district court in fashioning sentence for defendant convicted of possessing with intent to distribute five or more grams of crack cocaine. 18 U.S.C.A. § 3553(a); U.S.S.G. § 4B1.1, 18 U.S.C.A.

**[27] Sentencing and Punishment 350H 89**

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk89 k. Other Offense-Related Considerations. Most Cited Cases
Even assuming that there are circumstances under which district court may consider sentencing factor manipulation by government as permissible factor at sentencing, government's decision to engage in controlled purchase of crack cocaine from defendant who was reported to be dealing in crack cocaine, rather than arranging to purchase some other drug that was punished less severely, was not permissible factor, on which district court could rely to mitigate defendant's sentence. 18 U.S.C.A. § 3553(a).

**[28] Criminal Law 110 1177**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177 k. Sentence and Judgment and Proceedings After Judgment. Most Cited Cases

**Criminal Law 110 1181.5(8)**

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases

**Sentencing and Punishment 350H 59**

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk59 k. Effect of Applying Invalid Factor. Most Cited Cases
Defendant failed to satisfy burden of showing that district court's error, in considering impermissible sentencing factors such as its generalized disagreement with policy choice of Congress to employ 100-to-1, crack-to-powder drug quantity ratio in punishing crack cocaine offenders, was mere harmless error, where district court devoted overwhelming majority of its explanation of sentence to these improper factors; accordingly, sentence had to be vacated, and case had to be remanded so that district court could resentence defendant based solely on individualized facts and circumstances of his case that bore on statutory factors. 18 U.S.C.A. § 3553(a).

Defendant failed to satisfy burden of showing that district court's error, in considering impermissible sentencing factors such as its generalized disagreement with policy choice of Congress to employ 100-to-1, crack-to-powder drug quantity ratio in

punishing crack cocaine offenders, was mere harmless error, where district court devoted overwhelming majority of its explanation of sentence to these improper factors; accordingly, sentence had to be vacated, and case had to be remanded so that district court could resentence defendant based solely on individualized facts and circumstances of his case that bore on statutory factors. 18 U.S.C.A. § 3553(a).

Peggy Morris Ronca, Jacksonville, FL, for U.S.
George Allen Couture and Rosemary T. Cakmis, Fed. Pub. Defenders, Clarence W. Counts, Jr., Asst. Fed. Pub. Def., Orlando, FL, for Wiliams.

Appeal from the United States District Court for the Middle District of Florida.

Before BLACK, PRYOR and COX, Circuit Judges.
BLACK, Circuit Judge:
The Government appeals Aaron Eric Williams' 204-month sentence imposed for possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). We conclude the district court erred in mitigating Williams' sentence based on (1) its generalized disagreement with Congress's policy of punishing crack cocaine offenders more severely than powder cocaine offenders through the 100-to-1 crack-to-powder drug quantity ratio, (2) its generalized disagreement with the Guidelines career offender enhancement, U.S.S.G. § 4B1.1, and (3) its belief that the Government manipulated Williams' sentence by arranging to purchase crack cocaine instead of powder cocaine. We further conclude that these errors are not harmless because Williams has failed to meet his burden of showing that, considering the record as a whole, the errors did not have a substantial effect on the court's choice of sentence. We, therefore, vacate the sentence as unreasonable and remand for the district court to sentence Williams based on the individualized facts and circumstances of Williams' case bearing upon the sentencing considerations enumerated in 18 U.S.C. § 3553(a).

## I. BACKGROUND

In April 2003, a confidential informant told Drug Enforcement Administration (DEA) agents and Osceola County Sheriff's Deputies that Williams was selling crack cocaine from his home in Kissimmee, Florida. Based on this tip, DEA agents initiated a sting operation to purchase crack cocaine from Williams with the help of the confidential informant. In three separate transactions in April, May, and July of 2003, an undercover DEA agent purchased a total of 34.8 grams of crack cocaine from Williams.[FN1] A grand jury subsequently indicted Williams for one count of possessing crack cocaine with intent to distribute, in violation of § 841(a)(1) and (b)(1)(C), and two counts of possessing five or more grams of crack cocaine with intent to distribute, in violation of § 841(a)(1) and (b)(1)(B)(iii). On the day of trial, but before the jury was

empaneled, the Appellant filed a notice pursuant to § 851(a) of its intent to rely on Williams' prior felony drug convictions to seek enhanced punishment. On February 1, 2005, the jury found Williams guilty of all three counts in the indictment, making specific findings of the drug quantities involved in each transaction.

At the sentencing hearing, the district court adopted, without objection, the facts and Guidelines calculation set out in Williams' presentence investigation report (PSI). According to the PSI, Williams has an extensive criminal history, which began in 1991, when he was sixteen years old. His scored criminal history includes five convictions for possession of crack cocaine (two of which were committed with the intent to sell), four convictions for offenses involving possession of marijuana, one conviction for possession with intent to sell MDMA (a controlled substance also known as Ecstasy), and two convictions for battery of two women, one of whom was pregnant at the time. As a result, Williams had a total of 22 criminal history points, well above the 13 points needed to place him in the highest criminal history category, category VI.

The PSI calculated Williams' base offense level at 28, pursuant to U.S.S.G. § 2D1.1(c)(6).[FN2] Williams' multiple prior felony convictions for drug offenses qualified him as a career offender under § 4B1.1(a). Because the statutory maximum for his offenses was life imprisonment, *see* 21 U.S.C. § 841(b)(1)(B), § 4B1.1 enhanced Williams' offense level to 37, *see* U.S.S.G. § 4B1.1(b)(A). Williams' advisory Guidelines range was, therefore, 360 months to life imprisonment.

The district court sentenced Williams to 204 months' incarceration on all counts, to run concurrently. The district court explained its choice of sentence at the sentencing hearing and in its subsequent "Memorandum Sentencing Opinion," which is published at *United States v. Williams*, 372 F.Supp.2d 1335 (M.D.Fla.2005). In explaining the sentence, the district court purported to track the sentencing factors outlined in 18 U.S.C. § 3553(a).

At the sentencing hearing, the district court expressed "concern about the discrepancy between powder and crack cocaine"-referring to Congress's policy of punishing crack cocaine offenders more severely than powder cocaine offenders-and viewed the cocaine sentencing disparity as bearing on "the nature and circumstances of the offense." *See id.* § 3553(a)(1). The district court suggested the harsher penalties for crack offenses "smacks of discrimination against blacks, African-Americans." It said crack cocaine and powder cocaine are "the same drug" with the same effects and that the different form of the drug "has never justified the substantial disparity in sentences." The court also condemned the DEA's conduct in investigating Williams, characterizing the sting operation as "basically set up by the Government to snare Mr. Williams." The district court stated, without elaboration, that

this was also relevant to "the nature and circumstances of the offense."

In considering "the seriousness of the offense" and the need for the sentence "to provide just punishment," *see id.* § 3553(a)(2)(A), the district court disagreed with what it called the "compounding effects" of the Guidelines, which it said causes "incongruity and unjust results." The district court was referring to the interplay between the Guidelines career offender enhancement, U.S.S.G. § 4B1.1, and the enhanced statutory maximum provided in 21 U.S.C. § 841(b)(1)(B) for offenders with at least one prior felony drug conviction. The enhanced offense levels set out in § 4B1.1(b) for career offenders vary depending on the statutory maximum for the offense of conviction. *See* U.S.S.G. § 4B1.1(b). Because Williams had a prior conviction for a felony drug offense, his statutory maximum sentence under § 841(b)(1)(B) increased from 40 years' imprisonment to life imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). The § 841(b)(1)(B) "enhancement" had the corresponding effect under § 4B1.1(b) of increasing Williams' offense level from 28 to 37. The district court saw the interaction between § 841(b)(1)(B) and § 4B1.1(b) as a "totally inappropriate way to consider the individual nature of an offense or a defendant's individual background" and stated it was "not going to do it."

With respect to the "history and characteristics of the defendant," *see id.* § 3553(a)(1), the district court noted Williams' "long history of criminal conduct" and stated Williams was, therefore, "going to be spending a bunch of time in prison." Turning to the need for the sentence "to afford adequate deterrence," *see id.* § 3553(a)(2)(B), the district court opined that sending a "petty drug dealer" like Williams to prison for 30 years was not the way to deter the illegal drug trade.

In its subsequent "Memorandum Sentencing Opinion," the district court again addressed the cocaine sentencing disparity. The district court stated it was "mindful of the substantial criticism" the disparity had garnered and that evidence suggested the disparity had a "discriminatory impact on African Americans of whom Williams is one." *Williams*, 372 F.Supp.2d at 1339 n. 8. The district court's disdain for the disparity factored into its choice of sentence in another way as well. Echoing its earlier statement that the DEA had snared Williams, the district court concluded a Guidelines sentence would not "promote respect for the law," *see id.* § 3553(a)(2)(A), because the DEA arranged a sting purchase of crack cocaine instead of powder cocaine to obtain a longer prison sentence. *Williams*, 372 F.Supp.2d at 1339. Without referring to any facts in the record, the district court found that a powder cocaine sale would have been consistent with Williams' prior drug sales. *Id.* To highlight the injustice it perceived in the Government's decision to purchase crack cocaine from Williams, the district court compared Williams' Guidelines range with the range applicable to defendants who, though not career offenders, have a criminal history category of VI and are convicted of selling the same quantity of powder cocaine.[FN3] *Id.*

The district court then explained, as it did at the sentencing hearing, that a Guidelines sentence was inappropriate for another reason, namely its disagreement with the career offender provision in § 4B1.1. *Id.* According to the district court, Williams' past criminal conduct was already accounted for in his category VI criminal history. *Id.* The "layering of Chapter 4 enhancements," the district court reasoned, "results in a double-compounding effect, increasing Williams' minimum guideline sentence ... in light of the *same* criminal conduct." *Id.* The district court stated this "arbitrary compounding results in a guideline sentence much greater than that necessary" to achieve the sentencing goals enumerated in § 3553(a). *Id.*

Finally, the district court explained that although "Williams is a low-level drug dealer ... convicted of selling relatively small amounts of crack cocaine," the "substantial term" of 204 months' incarceration was warranted by "the circumstances (crack versus powder cocaine) and Williams' long history of selling illegal drugs." *Id.* The Appellant subsequently appealed Williams' sentence as unreasonable.

## II. STANDARD OF REVIEW

[1] Our review of sentences after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), has two components. First, we consider challenges to the district court's calculation of the advisory Guidelines range. Second, we review the sentence for reasonableness. *See United States v. Williams*, 435 F.3d 1350, 1353 (11th Cir.2006) (determining whether the district court correctly calculated the Guidelines range before evaluating the reasonableness of the sentence).

### A. *Guidelines Calculation*

[2][3][4][5] "[A]s was the case before *Booker*, the district court must calculate the Guidelines range accurately." *United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir.2005). We review the district court's interpretation of the Guidelines de novo and accept its factual findings unless clearly erroneous. *United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir.2005). An error in the district court's calculation of the advisory Guidelines range warrants vacating the sentence, unless the error is harmless. *See United States v. Scott*, 441 F.3d 1322, 1329 (11th Cir.2006) (applying harmless error review to Guidelines miscalculation). A Guidelines miscalculation is harmless if the district court would have imposed the same sentence without the error. *See id.*

### B. *Reasonableness*

[6][7] If the Guidelines calculation is correct, or if the miscalculation is harmless, we consider whether the sentence is reasonable. When reviewing a sentence for reasonableness, we must evaluate whether the sentence achieves the purposes of sentencing

as stated in 18 U.S.C. § 3553(a).[FN4] *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). This evaluation must be made having "regard for ... the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)]; and ... the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." *Booker*, 543 U.S. at 261, 125 S.Ct. at 765 (quoting 18 U.S.C. § 3742(e)(3) (1994)); *see also Williams*, 435 F.3d at 1355 (stating that "when reviewing for reasonableness, we must consider both the § 3553(a) factors and the reasons given by the district court"). The party challenging the sentence bears the burden of establishing the sentence is unreasonable in light of the § 3553(a) factors. *Talley*, 431 F.3d at 788.

In order to tailor our reasonableness standard of review to the issues in this case, we must first identify the challenges Appellant makes to the reasonableness of Williams' sentence. First, Appellant argues the sentence is unreasonable, regardless of length, because it resulted from the district court's consideration of impermissible factors. Second, Appellant contends in the alternative that, even if Williams' sentence was not affected by legal errors, the length of the sentence is unreasonable because the record does not support a deviation from the Guidelines range.

1. *Reasons for the Sentence*

[8][9][10] With respect to Appellant's first argument, we agree that a sentence can be unreasonable, regardless of length,[FN5] if the district court's selection of the sentence was substantially affected by its consideration of impermissible factors. This is so, because our reasonableness inquiry is not confined to reviewing whether there are facts and circumstances found in the record that would justify the length of the sentence imposed. *See United States v. Webb*, 403 F.3d 373, 383 (6th Cir.2005) ("[R]eview for reasonableness is not limited to the length of the sentence." (quotation omitted)). The reasons given by the district court for its selection of a sentence are important to assessing reasonableness. *United States v. Jimenez-Beltre*, 440 F.3d 514, 519 (1st Cir.2006) (en banc) (stating the emphasis in reviewing the reasonableness of a sentence "will be on the provision of a reasoned explanation, a plausible outcome and-where these criteria are met-some deference to different judgments by the district judges on the scene"). A sentence based on an improper factor fails to achieve the purposes of § 3553(a) and may be unreasonable, regardless of length. *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir.2006) ("A sentence may be substantively unreasonable if the court relies on an improper factor or rejects policies articulated by Congress or the Sentencing Commission.").

[11][12][13][14] Because the party challenging the sentence bears the burden of demonstrating that the sentence is unreasonable, the party challenging the sentence bears the initial burden of establishing that the district court considered an impermissible factor at sentencing.

Whether a factor is impermissible is a question of law that we will review de novo. *See* *United States v. Robinson*, 935 F.2d 201, 203 (11th Cir.1991) ("The application of the law to sentencing issues is subject to de novo review."). If such an error exists and was preserved for appeal, we will vacate the sentence and remand, unless the error is harmless. *See* 28 U.S.C. § 2111; Fed.R.Crim.P. 52(a). The party defending the sentence has the burden of establishing the error was harmless. *See, e.g.*, *United States v. Mathenia*, 409 F.3d 1289, 1291-92 (11th Cir.2005).

[15] In considering whether an error is harmless, we apply our traditional harmless error standard: "A 'non-constitutional error' is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the sentence, 'or had but very slight effect.' If one can say 'with fair assurance ... that the sentence was not substantially swayed by the error,' the sentence is due to be affirmed even though there was error." *Id.* at 1292 (quoting *United States v. Hornaday*, 392 F.3d 1306, 1315-16 (11th Cir.2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762, 763, 66 S.Ct. 1239, 1246, 1248, 90 L.Ed. 1557 (1946))); *see also* *Williams v. United States*, 503 U.S. 193, 203, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992) (holding that once the party challenging the sentence shows the district court relied on an invalid factor at sentencing, "a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed"); *United States v. Paley*, 442 F.3d 1273, 1278 (11th Cir.2006) (stating a district court's misinterpretation of the Guidelines is harmless if the district court would have imposed the same sentence absent the error); *United States v. Jones*, 1 F.3d 1167, 1171 (11th Cir.1993) ("A sentencing error is harmless if the record as a whole shows that the error did not affect the district court's selection of the sentence imposed."). Consistent with this standard, a district court's consideration of an impermissible factor at sentencing is harmless if the record as a whole shows the error did not substantially affect the district court's selection of the sentence imposed.

If the error is not harmless, we will go no further, and will vacate the sentence and remand for the district court to impose a sentence based on the individualized facts and circumstances of the defendant's case bearing upon the sentencing considerations enumerated in § 3553(a). If, on the other hand, the party defending the sentence is successful in showing the error did not substantially affect the district court's selection of the sentence, we must then resolve whether the sentence is reasonable in light of the § 3553(a) factors and the reasons given by the district court.

[16][17] In sum, to succeed on a claim that an impermissible factor affected the sentence, the party challenging the sentence has the initial burden of establishing that the district court considered an impermissible factor in fashioning the sentence. If we conclude after

a de novo review that the district court considered an impermissible factor at sentencing, and if the error was preserved, the burden shifts to the party defending the sentence to show, based on the record as a whole, that the error is harmless, *i.e.,* that the error did not substantially affect the court's choice of sentence. If the error is not harmless, we will vacate the sentence as unreasonable and remand for the district court to resentence the defendant based on the individualized facts and circumstances of the defendant's case bearing upon the sentencing considerations enumerated in § 3553(a). If the error is harmless, we will review the sentence for reasonableness in light of the § 3553(a) factors and the reasons given by the district court.

2. *Unreasonable Length of the Sentence*

Appellant argues that even if the district court considered only permissible sentencing factors, the length of Williams' sentence is unreasonable because the facts and circumstances of Williams' case do not warrant any deviation from the advisory Guidelines range. In essence, Appellant contends that, assuming the sentence is based on only permissible factors, the district court nevertheless made a clear error of judgment in weighing those factors in Williams' case.

[18][19] We review the length of a sentence for reasonableness in light of the facts and circumstances of the defendant's case reflecting the sentencing considerations in § 3553(a). *Talley,* 431 F.3d at 788. "Review for reasonableness is deferential." *Id.* And we must bear in mind "that there is a range of reasonable sentences from which the district court may choose." *Id.* The weight to be accorded any given § 3553(a) factor is a matter committed to the sound discretion of the district court. *See United States v. Fernandez,* 443 F.3d 19, 32 (2d Cir.2006). We will not substitute our judgment in weighing the relevant factors because "[o]ur review is not de novo." *Talley,* 431 F.3d at 788.

[20][21] The district court's choice of sentence, however, is not unfettered. When reviewing the length of a sentence for reasonableness, we will remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case. *See United States v. Martin,* --- F.3d ----, --- (11th Cir.2006) (concluding a seven-day sentence for a multi-billion-dollar securities fraud was unreasonable); *United States v. Crisp,* 454 F.3d 1285, ---- (11th Cir.2006) (vacating a sentence as unreasonable because of the district court's unjustified reliance on a single § 3553(a) factor to the detriment of the others); *Moreland,* 437 F.3d at 436 (concluding the district court committed " 'a clear error of judgment by arriving at a sentence outside the limited range of choice dictated by the facts of the case' ") (quoting *United States v. Hawk Wing,* 433 F.3d 622, 631 (8th Cir.2006));

*United States v. Smith*, 440 F.3d 704, 708 (5th Cir.2006) (holding a non-Guidelines sentence may be unreasonable where it "represents a clear error of judgment in balancing the sentencing factors"); *United States v. Sebastian*, 436 F.3d 913, 915 (8th Cir.2006) (holding a sentence may be unreasonable if the district court "commits a clear error in judgment in weighing the sentencing factors").

## III. DISCUSSION

### A. *Guidelines Calculation*

The first step in our review is to determine whether the district court properly interpreted and applied the Guidelines to Williams' case to arrive at a correct calculation of Williams' advisory Guidelines range. *See Williams*, 435 F.3d at 1353. There is no dispute about the district court's Guidelines calculation. The district court accurately calculated Williams' advisory Guidelines range using an enhanced offense level of 37 and criminal history category of VI, corresponding to an advisory Guidelines range of 360 months to life imprisonment. Moreover, the district court expressly considered the properly calculated Guidelines range in imposing a non-Guidelines sentence.

### B. *Reasonableness*

#### 1. *Reasons for the Sentence*

Appellant argues the district court committed multiple legal errors in applying the § 3553(a) factors to Williams' case. Specifically, Appellant contends the district court erred in three ways: (1) it rejected Congress's policy of punishing crack cocaine offenders more severely than powder cocaine offenders; (2) it refused to sentence Williams as a career offender, thereby rejecting Congress's policy of punishing recidivist drug offenders more severely; and (3) it erroneously concluded the Government engaged in sentencing manipulation by arranging to purchase crack cocaine instead of powder cocaine and erred in factoring this conclusion into Williams' sentence. According to Appellant, these impermissible considerations affected the district court's choice of sentence, rendering the sentence unreasonable, regardless of length. Because these contentions present questions of law as to the proper considerations at sentencing, we will review de novo whether the district court considered improper factors in fashioning Williams' sentence.

##### a. *Impermissible Considerations Affecting the Sentence*

###### i. *The Cocaine Sentencing Disparity*

[22] Under 21 U.S.C. § 841 and § 2D1.1 of the Sentencing Guidelines, a defendant convicted of an offense involving "cocaine

base" (i.e., crack cocaine)[FN6] faces a longer possible sentence than a defendant convicted of an offense involving the same amount of powder cocaine, a chemically-similar substance. This disparity is commonly referred to as the "100-to-1" ratio, so named because of the relative quantities of each drug required to trigger the mandatory sentencing ranges in § 841(b). For example, § 841(b)(1)(B) provides that offenses involving 5 grams or more of crack cocaine or 500 grams or more of powder cocaine call for sentences in the range of 5 to 40 years' imprisonment. Where the defendant has at least one prior conviction for a felony drug offense, § 841(b)(1)(B) enhances the sentencing range to ten years to life in prison.[FN7] Congress enacted harsher penalties for crack cocaine than for powder cocaine based on its conclusion that crack cocaine poses a greater threat to society. Specifically, Congress found crack cocaine (1) has a more rapid onset of action, (2) is more potent, (3) is more addictive, (4) is less expensive than powder cocaine, (5) has widespread availability, (6) more highly correlates with the incidence of violence and other crimes, (7) is more likely to have physiological effects, and (8) is more likely to attract users who are young or especially vulnerable. *See United States v. Byse*, 28 F.3d 1165, 1169 (11th Cir.1994) (quoting *United States v. Thurmond*, 7 F.3d 947, 953 (10th Cir.1993)); U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 118 (1995). The Sentencing Commission adopted the same 100-to-1 crack-to-powder cocaine ratio in establishing the Drug Quantity Table in U.S.S.G. § 2D1.1(c), which sets the offense levels for drug offenses. For example, § 2D1.1(c)(6) designates offense level 28 for offenses involving 20 to 35 grams of crack cocaine or 2 to 3.5 kilograms of powder cocaine.

In 1994, Congress directed the Sentencing Commission to conduct a study of the disparities in penalties for different forms of cocaine and to make recommendations about retaining or modifying the disparities. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 280006, 108 Stat. 1796, 2097 (1994). Pursuant to this directive, the Commission issued a report to Congress in 1995 in which it agreed with Congress's finding that "crack cocaine poses greater harms to society than does powder cocaine," but concluded "it [could not] recommend a ratio differential as great as the current 100-to-1 quantity ratio." U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 195-96 (1995).[FN8] One reason why the Commission rejected the 100-to-1 ratio was that Congress adopted it prior to the Guidelines taking effect, and the Commission believed that many, but not all, of the attendant additional harms of crack vis-à-vis powder cocaine (such as the increase in violent and other crimes) are now accounted for in the Guidelines. *Id.* at 196 ("[I]f Congress believed that certain factors warranted a 100-to-1 quantity ratio and if the subsequently adopted guidelines provided a punishment for some of those factors, then, as a logical matter, the ratio should be lowered by an amount commensurate with the extent

to which these factors are addressed by the guidelines.").

The Commission subsequently proposed Guidelines amendments that would eliminate entirely the sentencing disparity between crack and powder cocaine. *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 60 Fed.Reg. 25,074, 25,076 (May 10, 1995). Although Congress stated "the current 100-to-1 quantity ratio may not be the appropriate ratio," it rejected the Commission's proposals because "the evidence clearly indicates that there are significant distinctions between crack and powder cocaine that warrant maintaining longer sentences for crack-related offenses" and "gross sentencing disparities" would result if the proposals were to take effect without Congress lowering the statutory mandatory minimum penalties. H.R.Rep. No. 104-272, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 337; *see also* Federal Sentencing Guidelines, Amendment, Disapproval, Pub.L. No. 104-38, § 1, 109 Stat. 334, 334 (1995).

The Commission issued a second report in 1997, again at the direction of Congress. U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997). In this report, the Commission reiterated its earlier finding that "although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified." *Id.* at 2. The Commission recommended that Congress adjust the mandatory sentencing ranges to reflect a 5-to-1 ratio. *Id.* Congress, however, took no action.

In 2002, at the request of the Senate Judiciary Committee, the Commission issued a third report on the crack-to-powder disparity. U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy (2002). In the report, the Commission "firmly and unanimously" declared the 100-to-1 drug quantity ratio "is unjustified and fails to meet the sentencing objectives set forth by Congress." *Id.* at 91. The Commission made four principal findings. First, it found that current penalties exaggerate the relative harmfulness of crack cocaine.[FN9] *Id.* at 93-97. Although the Commission found that crack was the most addictive form of cocaine because of the method of ingestion, it concluded this difference alone did not warrant the 100-to-1 ratio. *Id.* at 94. Second, the Commission concluded the current penalties sweep too broadly and apply most often to lower-level offenders, creating disparate penalties in comparison to similar powder cocaine offenders and overstating the culpability of most crack cocaine offenders. *Id.* at 97-100. Third, the Commission found the penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.[FN10] *Id.* at 100-02. Fourth, the Commission found that the current penalties impact minorities most severely, fostering disrespect for the criminal justice system. *Id.* at 102-03. Based on these findings, the Commission recommended that Congress revise the mandatory sentencing range for

crack and powder cocaine to implement a 20-to-1 drug quantity ratio. *Id.* at 107. The Commission also asked Congress for guidance in changing the Guidelines structure to better target the most serious drug offenders. *Id.* at 108. Again, Congress did not act on the Commission's recommendations.

With this background in mind, we turn to the district court's treatment of the cocaine sentencing disparity. The district court disapproved of the severity of Congress's disparate treatment of crack cocaine offenders relative to powder cocaine offenders. At sentencing, the district court expressed its belief that the disparity "smacks of discrimination" and that the difference between crack cocaine and powder cocaine "has never justified the substantial disparity in sentences." Even though the district court did not completely reject Congress's policy of imposing harsher penalties on crack offenders, it took into account its personal disagreement with Congress's judgment as to how much harsher the penalties for crack offenders should be. To the extent the district court did so, it considered an impermissible factor in fashioning Williams' sentence.

[23] The First Circuit's decision in *United States v. Pho*, 433 F.3d 53 (1st Cir.2006), and the Fourth Circuit's decision in *United States v. Eura*, 440 F.3d 625 (4th Cir.2006), are particularly instructive.[FN11] The district courts in both cases categorically rejected the 100-to-1 drug quantity ratio because they believed it overstated what the penalties ought to be for crack cocaine offenders relative to powder cocaine offenders. *Pho*, 433 F.3d at 58-59; *Eura*, 440 F.3d at 631-32. In sentencing the defendants below the advisory Guidelines range, the district courts failed to mention any facts concerning the defendants as individuals that would have warranted non-Guidelines sentences, but instead relied on the general inequities they perceived existed in the 100-to-1 ratio. *Pho*, 433 F.3d at 64; *Eura*, 440 F.3d at 634. The First and Fourth Circuits vacated the sentences, concluding that district courts are bound by Congress's policy judgments concerning the appropriate penalties for federal offenses. *Pho*, 433 F.3d at 62-63; *Eura*, 440 F.3d at 633-34. Both courts held that sentences must be based on individualized aspects of the defendant's case that fit within the § 3553(a) factors, and not on generalized disagreement with congressional sentencing policy. *Pho*, 433 F.3d at 64-65; *Eura*, 440 F.3d at 634.

We agree with the First and Fourth Circuit's conclusions. Congress's decision to punish crack cocaine offenders more severely than powder cocaine offenders is plainly a policy decision. It reflects Congress's judgment that crack cocaine poses a greater harm to society than powder cocaine. We have repeatedly held Congress's disparate treatment of crack cocaine offenders is supported by a rational basis. *See, e.g.*, *Byse*, 28 F.3d at 1168-71 (rejecting equal protection challenge that the crack-to-powder cocaine disparity constitutes intentional race discrimination); *United States v. Sloan*, 97 F.3d 1378, 1383-84 (11th Cir.1996) (holding the sentencing disparity is supported by a rational basis).[FN12] The

100-to-1 drug quantity ratio not only reflects Congress's policy decision that crack offenders should be punished more severely, but also reflects its choice as to how much more severe the punishment should be. Federal courts are not at liberty to supplant this policy decision. *See Pho*, 433 F.3d at 62-63; *Eura*, 440 F.3d at 633; *see also Mistretta v. United States*, 488 U.S. 361, 364, 109 S.Ct. 647, 650-51, 102 L.Ed.2d 714 (1989) ("Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." (internal citation omitted)). Although the two drugs may be chemically similar, their effect on society is not the same, and it is not for the courts to say just how much worse crack cocaine is than powder cocaine. This is simply an impermissible sentencing consideration. As the Seventh Circuit aptly put it: "§ 3553(a) ... does not include a factor such as 'the judge thinks the law misguided.' " *Miller*, 450 F.3d at 275.

Williams, however, asserts that the crack versus powder cocaine sentencing disparity is a valid consideration under § 3553(a)(6), which requires courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Several district courts that have addressed the issue agree with Williams' position. *See, e.g., United States v. Fisher*, --- F.Supp.2d ----, ---- (S.D.N.Y. 2005); *United States v. Smith*, 359 F.Supp.2d 771, 781 (E.D.Wis.2005). Powder cocaine offenders, however, have not been found guilty of similar conduct in any relevant sense. Congress has determined that crack offenders and powder offenders are not similarly situated, and that the disparities caused by its choice of the 100-to-1 drug quantity ratio are warranted. *See Pho*, 433 F.3d at 64 ("Congress plainly believed that not all cocaine offenses are equal and that trafficking in crack involves different real conduct than trafficking in powder .... Clearly, then, Congress intended that particular disparity to exist, and federal courts are not free to second-guess that type of decision."). The district court's rejection of the 100-to-1 drug quantity ratio, therefore, cannot be justified under § 3553(a)(6).

Williams also contends the district court did not impermissibly usurp Congress's policy judgment because Williams was sentenced within the statutory range. He argues the 100-to-1 ratio embedded in the Guidelines is not Congress's policy, but the Sentencing Commission's policy, one the Commission has unanimously rejected. He suggests that the district courts can exercise their sentencing discretion to reject the advisory crack cocaine Guidelines without running afoul of Congress's policy judgment.

Williams is incorrect in suggesting the 100-to-1 ratio embedded in the Guidelines is merely the Sentencing Commission's policy and not Congress's policy. In determining the threshold quantities for triggering the statutory sentencing ranges in § 841(b), Congress decided on a 100-to-1 differential, and the Sentencing Commission was left no choice

but to employ the same ratio in crafting the various Guidelines ranges within those statutory ranges. *See id.* at 63 ("As the Sentencing Commission recognized when it superimposed the guidelines on the statutory framework, it would be illogical to set the maximum and minimum sentences on one construct and then to use some other, essentially antithetic construct as the basis for fashioning sentences within the range."). Indeed, Congress rejected the Commission's proposal that would have equated the drugs for Guidelines purposes because of the gross sentencing disparities that would result if the Guidelines did not employ the same drug quantity ratio as the statutory scheme. *See* H.R.Rep. No. 104-272, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 337. The same is true if instead of equating the two drugs, the Guidelines used a different drug quantity ratio, say a 20-to-1 ratio. *See Pho*, 433 F.3d at 63-64. If the Guidelines used a 20-to-1 ratio, a first time offender convicted of selling 50 grams of crack cocaine (the equivalent of one kilogram of powder cocaine in our hypothetical) would have a Guidelines range of 63 to 78 months' imprisonment, *see* U.S.S.G. § 2D1.1(c)(7), but would have a mandatory minimum sentence of 120 months' incarceration under § 841(b)(1)(A). In contrast, a first time offender convicted of selling 49 grams of crack cocaine (the equivalent of 980 grams of powder cocaine in our hypothetical) would also have a Guidelines range of 63 to 78 months' imprisonment, but would not be subject to the 120-month mandatory minimum. *See id.* § 841(b)(1)(B). In this scenario, the difference of one gram of crack cocaine would result in a sentencing disparity of at least 42 months. Thus, the statutory minimums and maximums and the Guidelines reflect Congress's policy decision to punish crack offenses more severely than powder cocaine offenses by equating one gram of crack to 100 grams of cocaine.

[24] The same unwarranted disparities between similarly situated defendants would result if a district court were permitted to use its discretion to disregard the 100-to-1 ratio. Thus, a district court's rejection of the 100-to-1 ratio embedded in the Guidelines not only countermands Congress's policy choice, but also undermines sentencing uniformity in direct contravention of § 3553(a)(6)'s command that district courts seek to avoid unwarranted sentencing disparities between similarly situated defendants. *See Pho*, 433 F.3d at 63-64; *Eura*, 440 F.3d at 633 ("[G]iving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants in direct contradiction to the specific mandate of 18 U.S.C. § 3553(a)(6)."). Of course, some disparity between similarly situated defendants is an inevitable result of *Booker*. *See Booker*, 543 U.S. at 263, 125 S.Ct. at 766-67 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."). This inevitable disparity, however, should only be the product of the district court's discretion in

weighing individualized § 3553(a) factors in a given case, not the consequence of the district court's "general, across-the-board policy considerations." *Pho*, 433 F.3d at 62.

Williams is correct that a sentence below the Guidelines range in a crack cocaine case may be reasonable, so long as it reflects the individualized, case-specific factors in § 3553(a). It may be that for some of the reasons stated in the Sentencing Commission's reports, the Guidelines range in a given crack case overstates the seriousness of the particular defendant's offense or that individualized mitigating factors counsel against a Guidelines sentence. *See Eura*, 440 F.3d at 637 (Michael, J., concurring) ("While the Commission's findings alone cannot justify a below-guidelines sentence, in certain cases they can help sentencing courts analyze the § 3553(a) factors and select a sentence that is 'sufficient, but not greater than necessary' to punish, deter, and rehabilitate the defendant."). But to say Congress's choice of a 100-to-1 drug quantity ratio is never justified is a categorical rejection of congressional policy, not an individualized, case-specific consideration. Congress concluded the 100-to-1 ratio is justified, and the courts have no authority to change that.

[25] In short, the district court erred in mitigating Williams' sentence based on its personal disagreement with Congress's policy decision to employ a 100-to-1, crack-to-powder drug quantity ratio in punishing crack cocaine offenders more severely than powder cocaine offenders. In so doing, the district court impermissibly usurped Congress's authority to set sentencing policy and failed to properly consider § 3553(a)(6)'s directive to avoid unwarranted sentence disparities between similarly situated defendants. We agree, moreover, with the Fourth Circuit that "allowing sentencing courts to subvert Congress' clearly expressed will certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress." *Id.* at 633 (majority opinion).

ii. *Career Offender Guideline Provision*

[26] Appellant next argues the district court erred in refusing to sentence Williams as a career offender. There is no dispute that Williams qualified as a career offender under U.S.S.G. § 4B1.1. At sentencing, however, the district court stated the career offender enhancement "is a totally inappropriate way to consider the individual nature of an offense or a defendant's individual background" and said it was not going to sentence Williams as a career offender. In its sentencing memorandum, the district court again explained what it considered to be the "arbitrary compounding" effect of the career offender enhancement. *Williams*, 372 F.Supp.2d at 1339. This, too, was error.

In creating the Sentencing Commission and charging it with establishing sentencing policies and practices for the federal criminal justice system, Congress directed the

Commission to:
assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and-
(1) has been convicted of a felony that is-
(A) a crime of violence; or
(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841) ...; and
(2) has previously been convicted of two or more prior felonies, each of which is-
(A) a crime of violence; or
(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841)....

28 U.S.C. § 994(h). Section 994(h) reflects Congress's policy that repeat drug offenders receive sentences "at or near" the enhanced statutory maximums set out in § 841(b). *See United States v. LaBonte*, 520 U.S. 751, 762, 117 S.Ct. 1673, 1679, 137 L.Ed.2d 1001 (1997) (holding "the phrase 'at or near the maximum term authorized' ... requires a court to sentence a career offender 'at or near' the 'maximum' prison term available once all relevant statutory sentencing enhancements are taken into account").

Congress's goal was not simply to punish offenders with prior criminal histories more severely than first time offenders; Congress also wanted to target specific recidivism, particularly repeat drug offenders. There is no question Williams is a recidivist drug dealer. To the extent the district court believed Williams' prior criminal history was adequately taken into consideration in his criminal history category of VI, it ignored Congress's policy of targeting recidivist drug offenders for more severe punishment. The district court, therefore, erred in mitigating Williams' sentence based on its disagreement with the career offender Guidelines provision.

iii. *Sentencing Factor Manipulation*

[27] Finally, Appellant argues the district court erred in mitigating Williams' sentence based on its belief that the DEA "snared" Williams by arranging to purchase crack cocaine from him, when a powder cocaine purchase would have been consistent with his prior drug sales. The district court's decision to mitigate Williams' sentence because of the DEA's conduct in investigating Williams calls to mind a claim we have referred to as "sentencing factor manipulation." *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir.1998).

A sentencing factor manipulation claim " 'requires us to consider whether the manipulation inherent in a sting operation, even if insufficiently oppressive to support an entrapment defense, ... or due process claim, ... must sometimes be filtered out of the sentencing calculus.' " *Id.* (quoting *United States v. Connell*, 960 F.2d 191, 194 (1st Cir.1992)). The claim focuses on the Government's conduct and "points to 'the opportunities that the sentencing guidelines pose for prosecutors to gerrymander the district court's sentencing options and thus,

defendant's sentences.' " *Id.* (quoting *Connell,* 960 F.2d at 194).

We need not decide whether a finding of sentencing factor manipulation is a valid mitigating consideration under § 3553(a) because, even if it can be, it was not an appropriate consideration here. There is no question Williams' arrest and conviction was the result of a valid sting operation, and the DEA no more "snared" Williams or engaged in sentencing factor manipulation than in any other sting operation. To say a district court may factor into a crack cocaine offender's sentence the bare fact that the Government chose to purchase crack instead of powder cocaine, without more, would undermine Congress's policy of punishing crack cocaine offenders more severely and impermissibly interfere with the executive branch's performance of legitimate law enforcement practices. Contrary to the district court's conclusion, it does not promote respect for the law to imply Government misconduct from the mere fact that the Government chose to purchase crack cocaine from a crack dealer instead of any other controlled substance.[FN13] To the extent the district court considered this fact as a mitigating consideration, it erred as a matter of law. This is not to say that sentencing manipulation may never be a valid consideration in sentencing. In this case, however, it was error to mitigate Williams' sentence based on the fact that the DEA purchased crack cocaine from Williams instead of powder cocaine.

b. *Harmless Error*

[28] Because Appellant objected to the district court's consideration of these impermissible factors, it is Williams' burden under our traditional harmless error standard to show, based on the record as a whole, that the errors did not substantially affect the district court's choice of sentence. *See Mathenia,* 409 F.3d at 1292. Williams has failed to meet his burden.

Williams points to nothing in the record showing the errors did not substantially affect the district court's choice of sentence. A review of the sentencing transcript and the district court's sentencing memorandum instead shows the district court devoted the overwhelming majority of its explanation of the sentence to expressing its disagreement with the cocaine sentencing disparity, the career offender provision, and the DEA's decision to purchase crack cocaine from Williams. Although the record reflects that the district court also considered individualized facts and circumstances of Williams' case-such as the relatively small amount of crack cocaine involved in his offenses-the district court's explanation of Williams' sentence was so permeated by its consideration of impermissible factors that we are unable to conclude the errors did not have a substantial effect on its choice of sentence. The errors are, therefore, not harmless, and we must vacate the sentence and remand for the district court to resentence Williams solely on the basis of the individualized facts and circumstances of Williams' case bearing on the § 3553(a) factors.

2. *Unreasonable Length of the Sentence*

Having concluded Williams' sentence is unreasonable because it is based on impermissible factors, we do not reach Appellant's alternative argument that, assuming the district court considered only proper factors in crafting Williams' sentence, the length of the sentence is nevertheless unreasonable because the record does not justify any deviation from the advisory Guidelines range. We express no opinion as to whether there are individual facts and circumstances in Williams' case that would make a 204-month sentence reasonable.

## IV. CONCLUSION

We conclude, after a de novo review, that the district court considered impermissible factors in crafting Williams' sentence. Because Williams failed to show, based on the record as a whole, that the errors did not substantially affect the district court's choice of sentence, we conclude the errors are not harmless. We, therefore, vacate Williams' sentence as unreasonable without reaching Appellant's alternative argument that the record does not justify the length of the sentence imposed. On remand, the district court must resentence Williams based on the individual facts and circumstances of Williams' case bearing on the § 3553(a) factors. We express no opinion as to what sentence the district court should impose after properly applying the § 3553(a) factors.

VACATED AND REMANDED.

FN1. Williams sold the undercover agent 4.6 grams of crack cocaine in April, 10.1 grams of crack cocaine in May, and 20.1 grams of crack cocaine in July.

FN2. All references to the Sentencing Guidelines refer to the Guidelines effective November 1, 2004.

FN3. The advisory Guidelines range for a defendant convicted of selling 34.8 grams of powder cocaine with a criminal history category of VI is 37 to 46 months' imprisonment. *See* U.S.S.G. § 2D1.1(c)(13); ch. 5, pt. A. Notably, the district court did not compare Williams' sentence to the range applicable to a career offender convicted of selling 34.8 grams of powder cocaine: 262 to 327 months' imprisonment. *See* 21 U.S.C. § 841(b)(1)(C); U.S.S.G. § 4B1.1(b); ch. 5, pt. A.

FN4. The § 3553(a) sentencing factors include the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; the need to deter crime, protect the public, and provide the defendant with educational

or vocational training, or medical care; the kinds of sentences available; the Sentencing Guidelines range; pertinent policy statements of the Sentencing Commission; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. 18 U.S.C. § 3553(a); *United States v. Winingear*, 422 F.3d 1241, 1246 (11th Cir.2005).

FN5. We realize a sentence could be alleged to be unreasonable on grounds other than length. Here, the Government contests only the length of Williams' sentence, so we confine our discussion to length. Our opinion should not be read to foreclose other possible challenges to the reasonableness of the terms of a sentence.

FN6. Section 841 refers to "cocaine base," and the Sentencing Guidelines define cocaine base to mean crack cocaine. *See* U.S.S.G § 2D1.1(c), n.D.

FN7. Similarly, § 841(b)(1)(A) sets the sentencing range for offenses involving 50 grams or more of crack cocaine or 5 kilograms or more of powder cocaine at ten years to life in prison. If the defendant has at least one prior conviction for a felony drug offense, § 841(b)(1)(A) requires a sentence between 20 years and life in prison.

FN8. The Sentencing Commission's reports are available at http://www.ussc.gov/reports.htm.

FN9. For example, the Commission pointed to studies showing the effects of prenatal crack cocaine exposure were the same for powder cocaine and that the epidemic of young users and distributors "never materialized to the extent feared." U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 93-97 (2002).

FN10. For example, the Commission stated that although studies showed harmful conduct (such as violence) occurs more often in crack cocaine offenses than in powder cocaine offenses, "it occurs in only a relatively small minority of crack cocaine offenses." U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 100 (2002). Thus, "to the extent that the 100-to-1 drug ratio was designed to account for the harmful conduct ..., it sweeps too broadly by treating all crack cocaine offenders as if they committed these various harmful acts, even though most crack cocaine offenders in fact had not." *Id.* Although the Commission recognized that "some differential in the quantity-based penalties for crack cocaine and powder cocaine is warranted" because sentencing enhancements did not

account for the fact that "trafficking in crack cocaine is associated with somewhat greater levels of systemic crime," it opined that this consideration did not justify the 100-to-1 ratio. *Id.* at 101-02.

FN11. *See also United States v. Miller*, 450 F.3d 270, 275 (7th Cir.2006) (agreeing with *Pho* and *Eura*).

FN12. Post-*Booker*, we have rejected a defendant's challenge to the reasonableness of his sentence predicated on the disparity between crack and powder cocaine. *See United States v. Marlin*, 147 Fed.Appx. 122, 124 (11th Cir.2005) (unpublished opinion).

FN13. We note that all five of Williams' prior felony cocaine convictions listed in the PSI involved crack cocaine; two of those were convictions for possessing crack cocaine with intent to sell.

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