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**CASE NO. 05-5295**

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**IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH  
CIRCUIT**

**UNITED STATES OF AMERICA**  
Plaintiff-Appellee

vs.

**ALVIN GEORGE VONNER**  
Defendant-Appellant

On Appeal from the United States District Court for the Eastern District of  
Tennessee

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**SUPPLEMENTAL BRIEF OF  
DEFENDANT-APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF THE ISSUES**

- I. IT IS NOT CONSISTENT WITH U.S. v. BOOKER, 543 U.S. 200 (2005), TO ACCORD A PRESUMPTION OF REASONABLENESS TO WITHIN-GUIDELINES SENTENCES.
  
- II. EVEN IF A PRESUMPTION OF REASONABLENESS FOR A WITHIN-GUIDELINES SENTENCE WERE CONSISTENT WITH BOOKER, THAT PRESUMPTION CANNOT JUSTIFY A SENTENCE IMPOSED WITHOUT AN EXPLICIT ANALYSIS BY THE DISTRICT COURT OF THE 18 U.S.C. § 3553(A) FACTORS AND ANY OTHER FACTORS THAT MIGHT JUSTIFY A LESSER SENTENCE.
  
- III. NON-OBJECTION TO THE PRE-SENTENCE REPORT DOES NOT CONSTITUTE ADMISSION OF FACTS FOR BLAKELY/BOOKER SIXTH AMENDMENT PURPOSES, PARTICULARLY WHEN THERE IS A SPECIFIC BLAKELY OBJECTION MADE PRIOR TO SENTENCING.

## **SUMMARY OF THE ARGUMENT**

It is not consistent with U.S. v. Booker, 543 U.S. 200 (2005), to accord a presumption of reasonableness to within-guidelines sentences. A sentencing scheme in which the guidelines are termed advisory, but presumed to provide for a reasonable sentence is no different than the sentencing regime in existence prior to Booker. While this Court is currently providing a presumption of reasonableness to sentences that are within the sentencing guidelines, which the Sixth Amendment compels must be *advisory* only, there is a significant split of authority as to the constitutionality of such a practice. By applying such a presumption, the guidelines are elevated to a super-

factor, and one which necessarily is accorded a significant amount more weight than other sentencing considerations. The primary argument in this circuit advanced in support of the presumption is that the guidelines account for all § 3553(a) factors. However, a review of the guidelines and the statutory factors belies that finding.

Even if a presumption of reasonableness for a within-guidelines sentence were consistent with Booker, that presumption cannot justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence. A presumption of reasonableness is to only apply if certain procedural requirements are met. Those procedural requirements include, but are not limited to, the requirements that the judge must make all findings of fact necessary to apply the guidelines to the defendant, calculate the guidelines sentencing range correctly, determine whether to grant a downward departure, consider the § 3553(a) factors in exercising her independent judgment about what an appropriate sentence should be, and give a reasoned explanation for the sentence. In this case, the district court below did not provide a sufficient analysis to enable appellate review for reasonableness. Accordingly, the panel opinion in Vonner correctly applied this Court's authority in finding Mr. Vonner's sentence to be procedurally unreasonable.

Non-objection to the pre-sentence report does not constitute admission of facts for Blakely/Booker Sixth Amendment purposes, particularly when there is a specific

objection made prior to sentencing. Mr. Vonner did not admit to the relevant conduct amount used to enhance his sentence, and in fact specifically objected to it, triggering the district court's responsibility to resolve a disputed factual issue. However, in this case, the district court did not resolve the disputed factual issue.

## ARGUMENT

### I. IT IS NOT CONSISTENT WITH *U.S. v. BOOKER*, 543 U.S. 200 (2005), TO ACCORD A PRESUMPTION OF REASONABLENESS TO WITHIN-GUIDELINES SENTENCES.

Prior to the Supreme Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), and U.S. v. Booker, 543 U.S. 220 (2005), the federal sentencing guidelines prescribed a presumptive sentence. The presumptive sentence, one within the guideline range, controlled unless a court found that the sentencing guidelines either did not adequately consider factors relevant to the case, or authorized a below or above range sentence pursuant to a downward or upward departure. Such departures were reviewed *de novo* on appeal. 18 U.S.C. § 3742(e).

A sentencing scheme in which the guidelines are termed advisory, but presumed to provide for a reasonable sentence is no different than the sentencing regime in existence prior to Booker. A presumption that a sentence within the guideline range is reasonable raises the constitutional concern that formed the basis for Justice Stevens' majority opinion in Booker. Indeed, section 3553(b), invalidated by Booker, was passed to make the sentencing guidelines presumptive rather than advisory. See Booker, 543 U.S. at 293 & n.12 (Stevens, J., dissenting in part); Stith & Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993); 124 Cong. Rec. 209,

382-83 (1978); S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983). The Sentencing Commission itself recognized that the guidelines were, prior to the Booker decision, a presumptive system. See U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004) (hereinafter “Fifteen Year Report”), available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm). Thus, “[t]here is scant difference between treating a guideline sentence as presumptively controlling and stating that the court will depart from that sentence only for ‘clearly identified and persuasive reasons.’” U.S. v. Jimenez-Beltre, 440 F.3d 514, 524 (1st Cir. 2006)(en banc)(Lipez, J. dissenting).

The panel decision in the instant case noted that this Court has found that a within-guidelines sentence carries with it a presumption of reasonableness on appeal:

In United States v. Williams, 436 F.3d 706 (6th Cir.2006), we considered what weight should be given the appropriate advisory guideline range when considering whether a sentence is reasonable. Despite the fact that under Section 3553(a) the advisory guidelines are but one of many sentencing factors to be considered, and without a reasoned explanation, the Williams panel “join[ed] several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness.” Id. at 708.

U.S. v. Vonner, 452 F.3d 560, 566 (6th Cir. 2006).

While this Court is currently providing a presumption of reasonableness to

sentences that are within the sentencing guidelines, which the Sixth Amendment compels must be *advisory* only, there is a significant split of authority as to the constitutionality of such a practice. In fact, the United States Supreme Court has recently granted *certiorari* review to resolve this very question. Rita v. U.S., --- S.Ct. ---, 2006 WL 2307774 (Nov. 3, 2006).<sup>1</sup> Additionally, a number of other petitions raising this issue are being held by the Supreme Court pending a decision in Rita.<sup>2</sup>

A presumption of reasonableness violates the Sixth Amendment as interpreted by the Supreme Court in Booker. In practical effect, such a presumption is akin to having to establish a basis for departure *within* the advisory Sentencing Guidelines

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<sup>1</sup> It could be argued that this Court should delay review in this case until the Supreme Court renders a decision in Rita and another post-Booker case in which *certiorari* review has recently been granted by the Supreme Court, Claiborne v. U.S., --- S.Ct. ---, 2006 WL 2187967 (Nov. 3, 2006). However, rather than delay decision, guidance and thoughtful consideration of this important issue from this Court sitting *en banc* will allow for meaningful development of the law, provide direction to judges in this circuit, and perhaps ultimately provide assistance to the Supreme Court in its determination of this important issue. See, e.g., U.S. v. Koch, 383 F.3d 436, 438 (6th Cir. 2004) (*en banc*) (“We are not the first court to consider this question and we will not be the last, as the Supreme Court has scheduled oral arguments on this question for October 4, 2004. See United States v. Booker, 2004 WL 1713654 (Aug. 2, 2004); United States v. Fanfan, 2004 WL 1713655 (Aug. 2, 2004). *Because we cannot expect a final answer from the Court for several months and because the judges in this Circuit deserve guidance in the interim, we granted Koch’s en banc petition.*”) (Emphasis added).

<sup>2</sup> Undersigned counsel represents the petitioner in one of those pending cases, which originated in this circuit. See Duckett v. U.S., No. 06-5559, docket sheet located at <http://www.supremecourtus.gov/docket/06-5559.htm>

range, a notion specifically rejected by the Supreme Court in Booker.

The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in Blakely itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge “finds 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 that should result in a sentence different from that described.” 18 U.S.C.A. § 3553(b)(1) (Supp.2004). At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no Apprendi problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.

Booker, 543 U.S. at 225.

Furthermore, the Supreme Court in Booker held review of a sentence is for its reasonableness given *all* of the considerations within the Sentencing Reform Act, and not just the Sentencing Guidelines.

In other words, the text told appellate courts to determine whether the sentence “is unreasonable” with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

Booker, 543 U.S. at 261. The guidelines, after Booker, are just one factor of many for courts to take into consideration. Giving the guidelines a mandatory rebuttable

presumption of reasonableness elevates them to a factor requiring greater weight than other statutory factors, and thereby significantly modifying, if not rendering completely ineffective, the remedial portion of the Supreme Court's holding in Booker.

In rejecting the notion that a sentence within the Sentencing Guidelines range was presumptively or per se reasonable, the First Circuit, sitting *en banc*, stated:

In holding the mandatory regime unconstitutional, the flaw discerned by the five-Justice majority was that mandatory guidelines created mini-crimes requiring jury findings. Booker, 125 S.Ct. at 750-52. Although making the guidelines “presumptive” or “per se reasonable” does not make them mandatory, it tends in that direction; and anyway terms like “presumptive” and “per se” are more ambiguous labels than they at first appear.

At the same time, the guidelines cannot be called just “another factor” in the statutory list, 18 U.S.C. § 3553(a) (2000), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges, Booker, 125 S.Ct. at 766-67; 28 U.S.C. § 994(o). The Sentencing Commission is also an expert agency charged by Congress with the task of promulgating guidelines and keeping them up to date. 28 U.S.C. § 994(c). In its remedial opinion, the Supreme Court has stressed the continuing role of the guidelines in promoting uniformity and fairness. Booker, 125 S.Ct. at 757-64.

Yet the guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases. Some of the guidelines in particular cases were not reflections of existing practice but were deliberate deviations or turned tendencies into absolutes. Others have been affected by directions from Congress. See, e.g., Pho, 433 F.3d at 61-63. Booker's remedial solution makes it possible for courts to impose non-guideline sentences that override the guidelines, subject only to the ultimate requirement of reasonableness.

U.S. v. Jimenez-Beltre, 440 F.3d at 518.

A panel of the Ninth Circuit, in also rejecting a presumption of reasonableness, found:

[W]e have already said that a district court should use the Guidelines as a “starting point.” Cantrell, 433 F.3d at 1280; see also United States v. Menyweather, 431 F.3d 692, 696-97 (9th Cir.2005). But what is that? Is it the same as a presumption? We think not; at least not in a legal sense. One can use the word “presumption” in a rather loose or colloquial sense. “Dr. Livingstone, I presume,” is a fairly weak statement as far as the law is concerned. So too is merely venturing that something is so, or assuming it so based on limited information. In law, once we start talking about presumptions, we usually mean something more than that. Certainly, there can be a “bursting bubble” presumption, which disappears if anything to the contrary is placed before the court. See Nunley v. City of L.A., 52 F.3d 792, 796 (9th Cir.1995). Then, there can be a mandatory conclusive presumption, which precludes any contrary information from being placed before the court. See United States v. Warren, 25 F.3d 890, 897 (9th Cir.1994). In between are mandatory rebuttable presumptions, which always have some weight although other information may well overcome them in a particular case.FN4 See id.

FN4. We, of course, do not overlook permissive presumptions, which can actually be called permissive inferences. McLean v. Moran, 963 F.2d 1306, 1308 (9th Cir.1992). Those are not of concern here.

In this area, were a presumption proper, we suppose it would be a mandatory rebuttable presumption. But even that is more than a mere starting point because it gives particular weight to the thing presumed. It would indicate that the Guideline range is to be used unless (by some evidentiary standard) a party can prove the contrary. Id. That is much more than a mere consult for advice, and the Guidelines are to be no more than that. See Booker, 543 U.S. at 264, 125 S.Ct. at 767. If a district court presumed that the sentence should be a Guideline range sentence, it would thereby make it much more than something to be consulted and

would give it much heavier weight than § 3553(a) now does.FN5 That leaves it as a factor in the sentencing alchemy. Id.

FN5. A different approach would tend to make the adjective “mandatory” renascent. See United States v. Strange, 370 F.Supp.2d 644, 650 & n. 7 (N.D. Ohio 2005); Simon v. United States, 361 F.Supp.2d 35, 40-41 (E.D.N.Y.2005).

U.S. v. Zavala, 443 F.3d 1165, 1169 (9th Cir. 2006).

This Court has already rejected the notion that a guidelines sentence is *per se* reasonable on the basis that “[s]uch a per se test is ... inconsistent with the Supreme Court’s decision in Booker, as such a standard would effectively re-institute mandatory adherence to the Guidelines.” U.S. v. Webb, 403 F.3d 373, 385 n.9 (6th Cir. 2005); U.S. v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005) (same). However, there is not an effective difference, other than semantics, between a Guidelines sentence being *per se* reasonable and a mandatory presumption of reasonableness being applied to a Guidelines sentence. Under either rubric, the Guidelines are elevated to a super-factor, and one which necessarily is accorded a significant amount more weight than other sentencing considerations.

The primary argument in this circuit advanced in support of the presumption is that “the guidelines remain the one § 3553(a) factor that accounts for all § 3553(a) factors.” U.S. v. Buchanan, 449 F.3d 731, 735 (6th Cir. 2006) (Sutton, J., concurring); U.S. v. Cage, 458 F.3d 537, 542-43 (6th Cir. 2006). Respectfully, even a cursory

review of the guidelines and the statutory factors belies that finding. The guidelines are general and say little about individual characteristics, the focus of several of the § 3553(a) factors. Indeed, the guidelines prohibit consideration of many individualized characteristics and discourage consideration of others, except in “extraordinary cases.” See Jimenez-Beltre, 440 F.3d at 524, 526-27 (Lipez, J., dissenting).

The nuanced sentencing instructions in § 3553(a) provide no textual basis for elevating the guidelines well above all other factors or for presuming that all guidelines sentences are reasonable. Importantly, the guidelines do not reflect or incorporate the central command of § 3553(a), which directs district courts to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of punishment set forth in § 3553(a)(2). In developing and revising the guidelines, the U.S. Sentencing Commission has never fully explored, nor even formally addressed, whether the guidelines serve the parsimony provision of § 3553(a). Moreover, the Sentencing Commission has expressly stated in various reports that certain guidelines, such as the 100-to-1 ratio in calculating crack/powder cocaine sentences, and the severe career-offender enhancement, undermine the sentencing goals set forth by Congress in § 3553(a)(2).<sup>3</sup> Consequently, when district courts give the guidelines heavy weight or

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<sup>3</sup> See U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131-34 (2004),

when circuit courts presume all within-guideline sentences are reasonable, they disregard the important reality that the Sentencing Commission has itself indicated that some guidelines do not produce just and effective sentencing outcomes in certain cases.

Two specific provisions highlight additional inconsistencies between the guidelines and the statutory factors. 18 U.S.C. § 3553(a) requires a court to consider, among other things, the nature and circumstances of the offense and history and characteristics of the defendant. However, under the guidelines, the history and characteristics of the defendant are generally prohibited by the sections within U.S.S.G. § 5H1. Since § 5H1 of the guidelines now stands in direct contradiction to 18 U.S.C. §§ 3553(a)(1), 3582(a) and 3661, and since the guidelines are advisory only per the Booker decision, then no other interpretation can be maintained except that the provisions of U.S.S.G. § 5H1 and any other contradictory provisions of the guidelines are unlawful. Additionally, while the Sentencing Guidelines only allow consideration of cooperation with the government upon the government's motion, see U.S.S.G. § 5K1.1, this provision is in conflict with 18 U.S.C. § 3661, which states that “[n]o limitation shall be placed on the information concerning the background, character, and

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*available at [http://www.ussc.gov/15\\_year/chap4.pdf](http://www.ussc.gov/15_year/chap4.pdf); see also U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm).*

conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” Booker at 760 (quoting 18 U. S. C. § 3661).

Accordingly, it is not consistent with U.S. v. Booker, 543 U.S. 200 (2005), to afford a presumption of reasonableness to within-guidelines sentences, such as the sentence that was provided to Mr. Vonner by the district court below.

**II. EVEN IF A PRESUMPTION OF REASONABLENESS FOR A WITHIN-GUIDELINES SENTENCE WERE CONSISTENT WITH *BOOKER*, THAT PRESUMPTION CANNOT JUSTIFY A SENTENCE IMPOSED WITHOUT AN EXPLICIT ANALYSIS BY THE DISTRICT COURT OF THE 18 U.S.C. § 3553(A) FACTORS AND ANY OTHER FACTORS THAT MIGHT JUSTIFY A LESSER SENTENCE.**

An abundance of authority from this Court prior to the Vonner panel’s decision dictates that a presumption of reasonableness is to only apply if certain procedural requirements are met:

(1) *the judge must make all findings of fact necessary to apply the guidelines to the defendant*, United States v. Orlando, 281 F.3d 586, 600-01 (6th Cir.2002); see United States v. Moreland, 437 F.3d 424, 432 (4th Cir.2006);

(2) *the judge must calculate the guidelines sentencing range correctly*, see 18 U.S.C. § 3742(f)(1); United States v. Gibson, 409 F.3d 325, 338-39 (6th Cir.2005);

(3) *the judge must determine whether to grant a downward departure or an upward departure from the guidelines*, see, e.g., United States v. McBride, 434 F.3d 470, 474-75 (6th Cir.2006); United States v.

Puckett, 422 F.3d 340 (6th Cir.2005);

(4) the judge must recognize her discretion to issue a sentence that varies from the guidelines, see Booker, 543 U.S. at 245-46, 125 S.Ct. 738;

(5) *the judge must consider the § 3553(a) factors in exercising her independent judgment about what an appropriate sentence should be, id.*;

(6) the judge must account for any relevant statutory minimum and maximum sentences, see, e.g., United States v. Van Hoosier, 442 F.3d 939, 946 (6th Cir.2006); and

(7) *the judge must give a reasoned explanation for the sentence, see, e.g., United States v. Jackson, 408 F.3d 301, 305 (6th Cir.2005); United States v. Kirby, 418 F.3d 621, 626 (6th Cir.2005).*

U.S. v. Buchanan, 449 F.3d 731, 738-39 (6th Cir. 2006) (Sutton, J., concurring) (emphasis added).

The panel decision in this case clearly articulated the reasoning behind the necessity for an explicit analysis by the district court of all factors raised for a lesser sentence.<sup>4</sup>

United States v. Foreman, 436 F.3d 638 (6th Cir.2006) clarified the Williams holding that a sentence within the advisory guideline range is presumptively reasonable. In Foreman, we held that “Williams does not mean that a Guidelines sentence will be found reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors.” Id. at 644. In fact, Foreman noted that

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<sup>4</sup> The Supreme Court has also recently granted *certiorari* review of this issue. See Rita v. U.S., --- S.Ct. ---, 2006 WL 2307774 (Nov. 3, 2006).

“[a] sentence within the Guidelines carries with it no implication that the district court considered the [other] 3553(a) factors if it is not clear from the record.” Id. “Moreover, Williams does not mean that a sentence within the Guidelines is reasonable if there is no evidence that the district court followed its statutory mandate to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the purposes of sentencing in section 3553(a)(2). Nor is it an excuse for an appellate court to abdicate any semblance of meaningful review.” Id.

...

Overall, the record must be sufficiently clear and detailed to permit “meaningful appellate review.” This requirement is of even greater importance where the defendant has raised a specific claim as to why a lower sentence ought to be imposed. In such a case, meaningful appellate review requires that the district court record indicate not only that the district court considered the defendant’s argument but it must also explain why the district court decided to reject that argument. We do not require district courts to be automatons in their discussion of the Section 3553(a) factors. Rather, the focus is on substance rather than form and no “ritual incantation” of the factors is required.<sup>FN4</sup> Instead, the record must simply be sufficiently clear to allow us to be assured that the district court considered all the arguments before it and to understand how those arguments factored into the district court’s ultimate sentencing determination. This is required even where the district court’s sentence of a defendant is presumptively reasonable under Williams.

FN4. The dissent notes that the district court stated that “[f]or the record” it had considered the Section 3553(a) factors. Although we have held that it is not necessary for a district court to engage in a “ritualistic incantation” of the Section 3553(a) factors, we have also not held that the mere recitation of the magic words “Section 3553(a)” is itself sufficient to immunize a district court’s sentencing decision from reversal. To so hold would send a false message to district courts that all they need to do at sentencing is list the Section 3553(a) factors, impose a Guideline sentencing, and conclude by stating that the sentence provides “just punishment and affords adequate deterrence.” Magic words are not necessary, but nor are they alone sufficient. If there is any doubt about the inadequacy of the district court’s consideration here, one need only

compare the transcript from Vonner's sentencing hearing to the transcript from this Court's recent holding in United States v. Morris, 448 F.3d 929 (6th Cir.2006).

U.S. v. Vonner, 452 F.3d 560, 566-68 (6th Cir. 2006); U.S. v. Cage, 458 F.3d 537, 541 (6th Cir. 2006).

The panel in Vonner relied upon the decision in U.S. v. Richardson, 437 F.3d 550 (6th Cir.2006). The Richardson court held:

This rebuttable presumption does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence. Even when selecting a presumptively reasonable sentence within the Guidelines range, a district court must "articulate[ ] its reasoning sufficiently to permit reasonable appellate review, specifying its reasons for selecting" the specific sentence within that range. United States v. Williams, 436 F.3d 706, 708 (6th Cir.2006). A district court "need not recite these [§ 3553(a)] factors but must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review." United States v. Kirby, 418 F.3d 621, 626 (6th Cir.2005). We emphasize the obligation of the district court in each case to communicate clearly its rationale for imposing the specific sentence. *Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it. This assures not only that the defendant can understand the basis for the particular sentence but also that the reviewing court can intelligently determine whether the specific sentence is indeed reasonable.*

Richardson, 437 F.3d at 553-54 (6th Cir.2006) (emphasis added); U.S. v. Morris, 448 F.3d 929, 931 (6th Cir.2006) (citing Richardson, 437 F.3d at 554).

Consistent with Vonner, a panel of this Court in U.S. v. Johnson, --- F.3d ----,

2006 WL 3069075 (6th Cir., Oct. 31, 2006), recently held:

We hold here that the district court's sentence is not procedurally reasonable under Booker. ... We find persuasive Defendant's argument that the district court failed to consider the other § 3553 factors, and sentenced him solely on the basis of the Guidelines. Despite the fact that the district court expressly acknowledged that the Guidelines are now advisory, and that the Guidelines are only one factor that should be considered, the district court failed to state on the record that it was considering any of the other § 3553 factors. In fact, the district court provides no indication at all of why it felt that Defendant's sentence was appropriate, other than to state that it was appropriate under the Guidelines. While it is true that the district court is not required to explicitly go through each sentencing factor, the district court is required to provide this Court with some evidence on the record that the § 3553(a) factors were considered. See Webb, 403 F.3d at 385 n. 8 ("Post- Booker we continue to expect district judges to provide a reasoned explanation for their sentencing decisions in order to facilitate appellate review."); Jackson, 408 F.3d at 305 ("Although we are fully cognizant of the fact that district courts are no longer bound by the Guidelines in the manner they once were ... we nonetheless find that, pursuant to Booker, we as an appellate court must still have the articulation of the reasons why the district court reached the sentence ultimately imposed, as required by 18 U.S.C. § 3553(c)."). Absent such articulation on the record that the § 3553(a) factors were considered, we are unable to review Defendant's sentence for reasonableness, and we decline to find that a sentence within the Guidelines range is reasonable.

U.S. v. Johnson, --- F.3d ----, 2006 WL 3069075, \*3 (6th Cir., Oct. 31, 2006); see also U.S. v. Cage, 458 F.3d 537 (2006) (noting that defendant had only raised family hardship as a factor for a lesser sentence, and that district court discussed its rejection of that factor, the other statutory factors, and the sentencing guidelines).

Additionally, the Vonner panel's discussion of the necessity for an explanation

of the sentencing decision below has been subsequently cited and quoted at length by another panel of this Court as authoritative. See U.S. v. Davis, 458 F.3d 505, 510 *et seq.* (6th Cir. 2006). Moreover, the analysis concerning the necessity for an explanation of the sentencing decision below in the Vonner panel’s opinion is also consistent with the decisions of other circuits. See U.S. v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006) (“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”); U.S. v. Carty, 453 F.3d 1214, 1221-1222 (9th Cir. 2006) (remanding for resentencing “[b]ecause the district court failed to create a record memorializing its consideration of the sentencing factors listed in § 3553(a) and explaining its sentence selection”); U.S. v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005) (Posner, J.) (reversing and remanding district court’s sentence within guidelines range when district court failed to articulate basis for sentence; “[a] rote statement that the judge considered all relevant factors will not always suffice; the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored.”).

In this case, the district court below did not provide a sufficient analysis to enable appellate review for reasonableness. Accordingly, the panel opinion in Vonner

correctly applied this Court's authority in finding Mr. Vonner's sentence to be procedurally unreasonable.

**III. NON-OBJECTION TO THE PRE-SENTENCE REPORT DOES NOT CONSTITUTE ADMISSION OF FACTS FOR BLAKELY/BOOKER SIXTH AMENDMENT PURPOSES, PARTICULARLY WHEN THERE IS A SPECIFIC OBJECTION MADE PRIOR TO SENTENCING.**

The Vonner panel found that judge found facts within the statutory minimum and maximum penalties are constitutional post-Booker. U.S. v. Vonner, 452 F.3d 560, 564 (6th Cir. 2006). The panel did not reach what standard of proof applied to judicial factual determinations at sentencing. However, the panel also found that technically the facts at issue concerning the drug amount in this case were not judge-found facts, but rather constituted admissions of the defendant to which the rule in Booker did not apply. Vonner, 453 F.3d at 565.

First, Mr. Vonner did not admit to the relevant conduct amount used to enhance his sentence, and in fact specifically objected to it, triggering the district court's responsibility to resolve a disputed factual issue. However, in this case, the district court did not resolve the disputed factual issue.

Fed. R. Crim. Proc. 32(i)(3)(B) states in relevant portion that “[a]t sentencing, the court ... must - for any disputed portion of the presentence report *or other controverted matter* - rule on the dispute ...” (Emphasis added). Mr. Vonner, through

counsel, did file a notice of no objection to the PSR on April 9, 2004, prior to the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004). (R.21, Notice; Apx. pg. 155). However, on June 24, 2004, the defendant, through counsel, specifically objected to any enhancement of his sentence based upon the relevant conduct transaction to which he did not specifically admit in the signed Stipulation of Facts. (R.37, Second Notice of Supplemental Authority; Apx. pg. 49; R.19, Stipulation of Facts, Apx. pg. 29). Notably, it is clear from a review of the signed Stipulation of Facts that any reliance on the additional relevant conduct amount was objected to by the defendant. At the change of plea hearing, Mr. Vonner specifically objected to the paragraph concerning the drug amounts, which included a non-charged relevant conduct transaction, and an amendment was made to the Stipulation of Facts by crossing out that section. (R.19, Stipulation of Facts, Apx. pg. 29).

At the sentencing hearing below, the district court asked counsel for the defendant if there were any objections to the PSR, to which counsel responded in the negative. (R.51, Sentencing Hearing Transcript, pg. 4-5; Apx. pgs. 111-112). However, this statement was certainly not a specific endorsement of the unproven conduct in the PSR used to elevate the defendant's Sentencing Guidelines range.

The Fourth Circuit and two state supreme courts have recently held that a defendant can only be found to have admitted facts authorizing an enhanced sentence

if he has explicitly made a knowing, intelligent, and voluntary waiver, and that the non-objection to facts contained within a presentence report does not constitute such a waiver for purposes of the Sixth Amendment. U.S. v. Milam, 443 F.3d 382, 385 (4th Cir.2006); U.S. v. Revels,455 F.3d 448, 451 (4th Cir. 2006);<sup>5</sup> People v. Isaacks, 133 P.3d 1190, 1192 (Colo. 2006); State v. Dettman, 719 N.W.2d 644, 651 (Minn. 2006).<sup>6</sup>

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<sup>5</sup> The Fourth Circuit in Revels stated:

The district court asked defendant whether he had objections to anything contained or omitted from the PSR, and defendant replied “No, sir.” While this single statement is more than the silence in Milam, it remains the only evidence that defendant admitted brandishing a gun during a robbery. The defendant did, moreover, properly raise a Blakely objection to the constitutionality of the judicial factfinding procedure. Taken as a whole, the facts are thus not sufficiently distant from Milam, and we must hold that Revels did not admit the facts underlying his four-level sentencing enhancement. The district court accordingly increased Revels’s sentence beyond that prescribed in the Guidelines on the basis of facts neither admitted by him nor proved to a jury beyond a reasonable doubt. See Booker, 125 S.Ct. at 756. This was Sixth Amendment error.

Revels, 455 F.3d at 451.

<sup>6</sup> The Minnesota Supreme Court in Dettman reasoned:

It is well established that a defendant’s waiver of his right to a jury trial on the elements of an offense must be knowing, intelligent, and voluntary. Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). ...We see no principled basis for differentiating between a waiver of the right to a jury trial on the elements of an offense and a waiver of the right to a jury determination of aggravating sentencing factors. Both rights arise from the same Sixth

Rather, Mr. Vonner specifically objected in subsequent argument and in the defendant's Sentencing Memorandum to the use of relevant conduct to enhance the defendant's sentence. (R.47, Sentencing Memorandum, pg. 4-5; Apx. pgs. 82-83). Accordingly, under the Sixth Amendment and the plain language of Fed. R. Crim. Proc. 32, the district court was required to rule on the objection to the relevant conduct amount used to enhance the defendant's sentence.

Second, if a presumption of reasonableness is to apply to within-guidelines sentences, then due process requires a beyond a reasonable doubt standard of proof for judge found facts unadmitted to by the defendant. While U.S.S.G. § 6A1.3 provides that the district court may resolve factual disputes under a preponderance standard, that guideline provision is called into question when a mandatory rebuttable presumption of reasonableness is applied to a sentence within the guidelines. A judge made mandatory presumption, whether rebuttable or not, violates Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidating rebuttable presumption of intent), and only if the burden

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Amendment guarantee, and the Supreme Court has said that a fact used to enhance a sentence is the 'functional equivalent of an element of a greater offense.' Apprendi, 530 U.S. at 494 n. 19, 120 S.Ct. 2348; see also *id.* at 494, 120 S.Ct. 2348 (commenting that the distinction between elements and sentencing factors is 'constitutionally novel and elusive').

Dettman, 719 N.W.2d at 651.

of proof at sentencing was elevated to beyond a reasonable doubt could a presumption for guideline sentencing survive constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979). Moreover, such facts used to elevate the sentence beyond those admitted to by the defendant should only be considered by the district court at sentencing, if they are contested by the defendant, if the government submits those facts to the truth-finding function of cross-examination by the defendant.

Courts have questioned the continuing validity of allowing testimonial hearsay at sentencing post- Crawford and post- Booker. The Eleventh Circuit noted, “[w]hile [the Crawford rule] may eventually be extended to the sentencing context, that has not happened yet.” Chau, 426 F.3d at 1323. In ruling that Crawford did not apply at the sentencing in the particular case, a West Virginia District Court stated, “[f]or hotly contested issues, however, the truth-seeking function of the Confrontation Clause deserves attention at sentencing.” United States v. Gray, 362 F.Supp.2d 714, 725 (2005). This Court has recently stated that “[i]t is an open question in this circuit whether our rule that ‘confrontation rights do not apply in sentencing hearings…’ applies after Crawford.” Stone, 432 F.3d at 654 (quoting Silverman, 976 F.2d at 1510).

Though the cases may be a broad signal of the future, there is nothing specific in Blakely, Booker or Crawford that would cause this Court to reverse its long-settled rule of law that Confrontation Clause permits the admission of testimonial hearsay evidence at sentencing proceedings.

U.S. v. Katzopoulos, 437 F.3d 569, 575-76 (6th Cir. 2006).

Accordingly, Mr. Vonner did not admit, for Sixth Amendment purposes, the relevant conduct amounts used to enhance the calculation of his guidelines sentence,

and the district court failed to resolve the disputed factual issue at sentencing.

## CONCLUSION

For all of the foregoing reasons, defendant respectfully requests this Honorable Court of Appeals to reverse the judgment of the sentencing court below. Defendant further relies upon the briefs filed with the panel in this case, as well as the portion of the panel opinion in U.S. v. Vonner, 452 F.3d 560 (6th Cir. 2006), finding the sentence provided to be procedurally unreasonable.

Respectfully submitted,

RITCHIE, DILLARD, & DAVIES, P.C.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel hereby certifies that this brief complies with the type-volume limitation. Counsel has checked the number of words in this brief using Corel Word Perfect 11, and the report indicates that this brief contains 7,028 words.

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