

NO. 05-5295

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

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

ALVIN GEORGE VONNER,

Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

**Brief of *Amici Curiae* Federal Public Defenders for the Western District of
Kentucky, Eastern District of Michigan, Western District of Michigan,
Northern District of Ohio, Southern District of Ohio, Eastern District of
Tennessee, Middle District of Tennessee, Western District of Tennessee;
in Support of Defendant-Appellant Vonner**

**HENRY A. MARTIN
Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047**

Counsel for *Amici Curiae*

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae are all of the Federal Public and Community Defenders in the judicial districts of this Circuit. Federal Public and Community Defenders represent thousands of individuals each year who are sentenced under the Federal Sentencing Guidelines. The issues presented in this appeal are of obvious importance to our work and the welfare of our clients. We file this brief with the consent of counsel of record for both parties. *See* Fed. R. App. P. 29(a).

INTRODUCTION AND STATEMENT OF ISSUES

The district court below imposed a sentence within the guidelines range while stating perfunctorily that it had considered the Section 3553(a) factors. The district court did not explicitly address all of the factors argued by the parties. The Government contends that, when a sentence falls within the guidelines, a perfunctory explanation of this sort suffices for appellate review for reasonableness under *Booker*. Indeed, it goes so far as to state that “all that is required is that the ruling be consistent with the evidence and the applicable legal principles” for it to be sustained on appeal. (Govt.’s Pet. for Reh’g. at 11.)

Thus, this case asks primarily whether it suffices for a district court, which imposes a guidelines sentence, to provide an explanation that is perfunctory rather than reasoned. *Amici Curiae* file this brief first to address this central question, and

to show that, in light of Section 3553(c) and the nature of the *Booker* review for reasonableness, this Court most certainly should require an explanation that is reasoned and meaningful.

Second, *amici* urge the Court to follow the lead of the *en banc* First Circuit, *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (*en banc*) and to abandon a presumption on appeal that a guideline sentence is always reasonable.

SUMMARY OF THE ARGUMENT

I.

Section 3553(c) provides that the sentencing “court, at the time of sentencing, shall state in open court the reasons for the imposition of the particular sentence.” This statement of reasons is needed to permit reasonable appellate review and is all the more important after *Booker*. Due to *Booker*, the sentencing court now exercises guided discretion (that is, discretion guided by multiple, yet specific, statutory factors) to arrive at a decision momentous to the individual defendant. When a trial court exercises this type of discretion, it is customary for the appellate court to primarily examine its decision-making process, and therefore an explanation of the trial court’s reasoning is necessary. Moreover, Congress has signaled that a sentencing court must provide an explanation of its reasoning process that is

meaningful. It has done so by requiring that the explanation be given “in open court,” with the evident purpose of satisfying the litigants’ natural need to understand why a particular sentence was selected. Accordingly, this Court should require — and is fully justified in so doing — that the sentencing court explicitly address the Section 3553(a) factors raised by the parties and other factors of apparent relevance to the case, even if not raised by a party.

II.

The Court should decline to presume guidelines sentences reasonable on appeal. The three main arguments for such a presumption are unconvincing. First, the guidelines do not “account for” all the other Section 3553(a) factors; this is clear from the structure of the statute and from the history of the development of the current guidelines. Second, for appellate review, it matters not that the sentencing court’s judgment has aligned with the guidelines; the object of appellate review remains the sentencing court’s judgment, regardless what it aligns with. Third, an appellate court can maintain sufficient uniformity in sentencing by placing the burden of proof on the appellant and reviewing the sentence for reasonableness — rather than assuming that conformance with the guidelines (which in fact often create unwarranted disparities) ensures an appropriate degree of uniformity.

ARGUMENT

I. The Sentencing Court Must Give an Explanation for the Sentence that Is Reasonable and Meaningful, not Perfunctory

A perfunctory explanation of a sentence is a statement to the effect that “the court has considered the Section 3553(a) factors,” or that “the court has considered the evidence, objections, arguments of counsel, sentencing options, and the sentencing factors and guidelines.” A perfunctory explanation does not explicitly address all factors argued by the parties. At issue here is whether such a statement satisfies the district court’s duty to impose a sentence that is procedurally reasonable. A perfunctory explanation does not satisfy that duty because Section 3553(c) requires a statement of “reasons” for the sentence imposed after consideration of Section 3553(a) factors, because *United States v. Booker*, 543 U.S. 220 (2005) — by reinvigorating the sentencing court’s guided discretion and by mandating appellate review for reasonableness — has made that statement of reasons particularly important, and because Congress clearly intended for the Section 3553(c) statement of reasons to be meaningful, not perfunctory. Finally, to reverse the decision below would require this Court to overturn not just the Panel decision but also a coherent string of post-*Booker* decisions; because Vonner

himself has made this perfectly clear in his Supplemental Brief, *amici* will not revisit those cases.

A. Section 3553(c) requires the sentencing court to state “reasons” for any sentence it imposes, and *Booker* makes this statement all the more important

Through Section 3553(c), Congress has required: “The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c). *Booker* has left this requirement “unimpaired.” *United States v. Crosby*, 397 F.3d 103, 116 (2d Cir. 2005); *accord United States v. Webb*, 403 F.3d 373, 385 n.8 (6th Cir. 2005). A central reason for this requirement is “to permit reasonable appellate review.” *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir. 2006) (internal quotations removed); *accord United States v. Sanchez-Juarez*, 446 F.3d 1109, 1116-17 (10th Cir. 2006); *United States v. Rivera*, 439 F.3d 446, 448 (8th Cir. 2006). But precisely what type of statement of reasons does an appellate court need in order to conduct the reasonableness review that *Booker* requires? That depends first on the nature of the decision reviewed and second on the nature of the review itself. *Booker* has changed both of these parameters.

First, a sentencing court’s decision is, after *Booker*, both more challenging and more momentous. It is more challenging because the court must responsibly

exercise “guided discretion,” Steven Childress and Martha Davis, 2-7 *Federal Standards of Review* § 7.06[B][1] (2004): in each and every case, the court must consider and balance whichever of the many Section 3553(a) factors are relevant — some of which will weigh in opposite directions. And it is more momentous because of all the sentencing options that each sentencing decision *excludes*: each sentencing decision *could have been* much different in terms of the type of punishment selected and the duration of its term. As Congress has recognized, such circumstances should prompt the sentencing court to provide greater specificity when explaining its exercise of discretion. *See* 18 U.S.C. § 3553(c)(1) (requiring an explanation of greater specificity from a court “imposing a sentence at a particular point within” a guidelines range broader than 24 months); *see generally Pierce v. Underwood*, 487 U.S. 552, (1988) (stating that when a trial court’s decision has “substantial consequences, one might expect [that decision] to be reviewed [on appeal] more intensively”).

Second, whereas appellate review of a court’s discretion in choosing a guidelines sentence was unavailable before *Booker*, *see United States v. Ruiz*, 536 U.S. 622, 627 (2002), *Booker* itself has explicitly authorized appellate review of sentences for reasonableness, regardless whether they fall within the guidelines range. *Booker*, 543 U.S. at 260. This new review for reasonableness is “akin” to a

review for an abuse of discretion. *United States v. Davis*, 458 F.3d 491, 496 (6th Cir. 2006); *United States v. Feemster*, 435 F.3d 881, 884 (8th Cir. 2006). Of course, “[t]here is no such thing as *one* abuse of discretion standard.” Childress and Davis, 1-4 *Federal Standards of Review* § 4.01[A] (emphasis in original). But it has long been customary for appellate courts to review the exercise of the type of discretion involved in post-*Booker* sentencing — namely, guided discretion — primarily by examining the decision-making process. *See* Childress and Davis, 2-7 *Federal Standards of Review* § 7.06[B][3] (“abuse is found when the trial court goes outside the framework of legal standards or statutory limitations, or when it fails properly to consider the factors on that issue given by the higher courts to guide the discretionary determination. . . . The appellate court is not reviewing the decision but, instead, the manner of making it”); *see also id.* at § 7.06[B][1]; Henry J. Friendly, *Indiscretion about Discretion*, Emory L.J. 747, 769-70 (1982). In order to conduct appellate review of a customary nature in the circumstances created by *Booker*, the appellate courts will need an explicit statement from the sentencing court as to which factors it found relevant and how it weighed them.

Thus, because the sentencing court exercises a guided discretion, and because appellate court customarily focus review *on the process* of arriving at decisions reached by exercising such discretion, it is of paramount importance that the

sentencing court provide an explicit statement of its reasons for arriving at its end result. Indeed, this need for explicit reasoning is starkly apparent in light of the harmless-error doctrine: absent an explicit statement of reasons, the appellate court can never review for harmlessness because it cannot assess whether an error had prejudicial impact. *See generally United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005). In any event, even setting aside the harmless-error problem, a perfunctory explanation like the one Government defends here is not a useful statement of reasons because it discloses nothing about the decision-making process; it is merely a report that a reasonable process transpired.¹ Because such a perfunctory explanation is not commensurate with the post-*Booker* tasks of the trial and appellate courts, such an explanation does not satisfy the requirement that the sentencing court state its “reasons.” 18 U.S.C. § 3553(c).

Accordingly, and consistent with this Court’s string of prior decisions, many circuits have rejected the idea that a perfunctory explanation for a guidelines sentence suffices (even when the appellate court presumes a guidelines sentence reasonable on appeal), and they instead require sentencing courts to give reasoned

¹The issue is *not* whether the district court in fact engaged in the reported process, *see United States v. Vonner*, 452 F.3d 560, 569-70 (6th Cir. 2006) (Siler, J., dissenting); rather, the issue is whether the district court has supplied the appellate court the information it needs to review that process.

explanations that address all nonfrivolous sentencing arguments. *See United States v. Cunningham*, 429 F.3d 673, 678-79 (7th Cir. 2005); *Sanchez-Juarez*, 446 F.3d at 116-17; *United States v. Montes-Pineda*, 445 F.3d 375, 380 (4th Cir. 2006); *United States v. Cooper*, 437 F.3d 328, 329 (3d Cir. 2006); *see generally United States v. Diaz-Argueta*, 447 F.3d 1167, 1171-72 (9th Cir. 2006). The reasons stated above mandate adoption of such a standard, but there are further reasons as well, likewise rooted in the text of Section 3553(c).

B. Section 3553(c)'s "in open court" requirement signals that a sentencing court's statement of reasons must be meaningful, not perfunctory

Not only has Congress required that sentencing courts state their "reasons" for the sentences they impose, it has required that they give those reasons "in open court." 18 U.S.C. § 3553(c). The purpose of this requirement is obvious when one considers the impact of a criminal sentencing. By imposing a criminal sentence, a judge deprives an individual of liberty, often severely. Precisely because of the acuteness of the pain the sentence causes the defendant, he or she will often find it hard to accept the judge's decision as legitimate. *See Robert M. Cover, Violence and the Word*, 95 Yale L. J. 1601, 1602, 1608-09 (1986). If the sentencing judge merely gives a perfunctory explanation for the decision, the defendant "will naturally be skeptical" that all the relevant sentencing factors and all the arguments

of counsel have been considered and handled in a reasonable manner. *United States v. Scherrer*, 444 F.3d 91, 96-97 (1st Cir. 2006) (Lipez, J., concurring) (noting also that, when dissatisfied with a sentence, the government attorneys must also tend to feel such scepticism). For the public integrity of the federal courts, and for the dignity and satisfaction of the parties, Congress has required that the judge give reasons in open court, rather than merely imposing sentence. Those required reasons fail to serve their desired purpose unless they are given in enough detail to be meaningful to the litigants, and hence to the appellate court.

Moreover, “judges[] will give more careful consideration to a problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.” *United States v. Merz*, 376 U.S. 192, 199 (1964). By requiring a statement of reasons in open court, Congress evidently intended to ensure that federal sentencing does not degenerate into a mechanical — and careless — affair. Such degeneration is a danger. Judge Noonan has observed: “Sentencing is a difficult art. It is easy to make mechanical.” *United States v. Diaz-Argueta*, 447 F.3d 1167, 1172 (9th Cir. 2006). Making it mechanical is easy because it is tempting for anyone to slight a task requiring thought and judgment, especially when one has at hand an “advisory” guideline giving advice in concrete, numerical terms: “the temptation of 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.”
Cunningham, 429 F.3d at 679.

Through Section 3553(c), Congress has mandated meaningful, not mechanical, sentencing hearings. In light of Congress’s mandate, this Court is certainly justified in requiring that the district court’s statement of reasons be detailed enough to meaningfully rebut contrary arguments and to meaningfully explain the weight given to the factors relevant to its decision.

C. The Court should require an explanation that is reasoned and meaningful

In light of Section 3553(c) and the demands of post-*Booker* appellate review, a sentencing court’s statement of reasons must be reasoned and meaningful. Contrary to the suggestion of the Government, the *Vonner* panel did not adopt a standard that requires the sentencing court to mechanically address each and every Section 3553(a) factor in every case. (Govt.’s Pet. for Reh’g. at 8-12.) Rather, the panel upheld a moderate standard (adopted by several previous cases) that requires a reasonable and meaningful explanation. This *en banc* Court is poised to clarify precisely what that standard means. *Amici* urge the Court to require sentencing courts to address the Section 3553(a) factors raised by the parties and other factors of apparent relevance to the case, even if not raised by a party.

Because a sentencing court must in any event take the time to reason through its decision, and because it does not take much extra time for the court to verbally state those reasons for the parties, this standard would not make “[s]entencing hearings . . . exceed trials in length.” *United States v. Vonner*, 452 F.3d 560, 571 (6th Cir. 2006) (Siler, J., dissenting). Verbalizing reasons in open court as to each factor deemed relevant simply is not so time-consuming, and in any event Congress, by requiring verbalization, has indicated that such time is well spent. Moreover, because this standard is consistent with traditional appellate practice, it would not usher in an era of “appellate micromanaging.” *United States v. Jones*, 445 F.3d 865, 871 (6th Cir. 2006). As explained in Section I.A, the statement of reasons is necessary to conduct a review along the lines of a traditional review for an abuse of discretion; this review is customary, not micromanaging.

In sum, the standard that *amici* proposes is proper because in order to be reasoned and meaningful a sentencing explanation must comment on each Section 3553(a) factor raised by the parties; when a court passes over an argument in silence, it suggests error or oversight, *see Cunningham*, 429 F.3d at 679, and leaves the parties dissatisfied. *See Scherrer*, 444 F.3d at 96-97 (Lipez, J., concurring). Likewise, a sentencing explanation must address each factor of apparent relevance, even when no party raises it, because when no one comments on a factor of

apparent relevance, it suggests that no one (except perhaps the party that made the record on it) has noticed it, and thus that the sentence was formulated in error.

Accordingly, *amici* urge the Court to affirm the disposition below and to clarify the law of this Circuit by requiring district courts to address the Section 3553(a) factors raised by the parties and other factors of apparent relevance to the case, even if not raised by a party.²

II. A Presumption of Reasonableness on Appeal is Improper and Unnecessary

Although this Court need not decide here whether an appellate presumption of reasonableness is proper,³ such a presumption is important to the Government's argument, and it is reasonably at issue here. The Court should address the question and should — like the *en banc* First Circuit, *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (*en banc*) — reject an appellate presumption of reasonableness. Primarily, such a presumption is improper because it “tends to”

²If the Court decides to address the issue, it should also reject the *Vonner* dissent's suggestion that defense counsel needs to specifically enter an objection at the hearing's end to preserve the issue of reasonableness. The Court should reject this suggestion for the reasons given by the Seventh Circuit in *Cunningham*. 429 F.3d at 679-80.

³Courts have recognized that this issue need not be related to the issue addressed in Section I. *See, e.g., United States v. Buchanan*, 449 F.3d 731, 738 (6th Cir. 2006) (Sutton, J., concurring); *Sanchez-Juarez*, 446 F.3d at 1117 & n.8; *Cunningham*, 429 F.3d at 675-76.

create anew the unconstitutional sentencing regime dismantled by *Booker*. *Id.*; see *United States v. Zavala*, 443 F.3d 1165, 1170 (9th Cir. 2006) (applying a presumption that the guidelines range is the appropriate sentence discourages courts from considering all information there is about an individual, because it “bespeaks a mind which is rather closed unless it can be opened by something truly extraordinary. It harkens back to Guideline ‘departures,’ which were expected to be quite extraordinary”), *vacated for reh’g en banc*, 462 F.3d 1066 (9th Cir. 2006).

Nevertheless, three main arguments have been made *for* this presumption; below they are rebutted in turn.

A. It is inaccurate to claim that the Guidelines account for all Section 3553(a) factors.

Some defend an appellate presumption of reasonableness by claiming that the guidelines are the “one § 3553(a) factor that accounts for the all § 3553(a) factors.” *See, e.g., Buchanan*, 449 F.3d at 735 (Sutton, J., concurring). Similarly, the Sentencing Commission has claimed — *only* as of late — that it “considered the factors listed in section 3553(a) and cited with approval in *Booker* . . . in developing the initial set of guidelines and refining them throughout the ensuing years.”⁴ These

⁴*See* Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005) (hereinafter 2/10/05 Commission Testimony), available at <http://www.ussc.gov/Blakely/bookertestimony.pdf>.

claims overlook that: (1) the structure and design of Section 3553(a) indicate that the guidelines are just one of several factors; and, (2) as a matter of historical fact, the Sentencing Commission has not created guidelines that account for all Section 3553(a) factors.

First, Congress listed the guidelines range as the fourth of seven enumerated sentencing factors. *See* 18 U.S.C. § 3553(a)(4). This structure suggests no special prominence for the guidelines. Indeed, the most prominent command of Section 3553(a) comes in its very first sentence: the parsimony provision, which mandates that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with” the penological purposes listed in Section 3553(a)(2), after a review of *all* available sentences. 18 U.S.C. § 3553(a). By design, the guidelines range is inferior to the parsimony principle and shares the same plane with six other factors; the guidelines range is designed to be a part of the picture, not the whole. And so the guidelines do not include, and in many instances exclude, factors that the statute requires sentencing courts to consider.

Second, history bears this out. True, in the Sentencing Reform Act, Congress charged the Sentencing Commission with certain specific tasks: to ensure that the purposes of sentencing set forth in § 3553(a)(2) were met, to ensure that the guidelines were effective in meeting those purposes, to reflect advancement in

knowledge of human behavior, to minimize the likelihood of prison overcrowding, and to avoid unwarranted disparities while ensuring sufficient flexibility to permit individualized sentences. 28 U.S.C. §§ 991(b), 994(g). Had the guidelines been developed according to congressional directives, there might have been substantial overlap in many cases between the guidelines and Section 3553(a). But given the way in which the guidelines were actually developed, only occasionally does a sentence within the guideline range (much less one above it), meet Section 3553(a)'s requirements. Reviewing this history is illuminating.

1. *Abandonment of sentencing purposes and past practice in favor of trade-offs among commissioners*

Congress originally expected that the Commission would consider all four of the penological purposes of Section 3553(a)(2) in developing the guidelines and that judges would decide what impact, if any, each purpose should have on the sentence in each case. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 77 (1984). The original Commissioners, however, “considered” only two of the purposes — “just desserts” and “crime control” — and then expressly abandoned those purposes when they could not agree on which should predominate. *See* U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988). They solved their “philosophical dilemma” by adopting an “empirical approach that uses data estimating the existing sentencing system as a starting point,” *id.*, but did not follow that approach either. Instead they

implemented sentences “significantly more severe than past practice” for “the most frequently sentenced offenses in the federal courts.”⁵ These deviations from past practice resulted from “‘trade-offs’ among Commissioners with different viewpoints,” said then Judge and Commissioner Breyer. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988) (hereinafter, *Key Compromises*). In response to complaints that the original guidelines were “too harsh,” he said that “once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad” and the “resulting compromises do not seem too terribly severe.” He argued that the system was “evolutionary” and would be improved based on information from actual practice under the guidelines. *Id.* at 18-20, 23.

In fact, the opposite occurred. Since 1987 the Commission has produced nearly 700 guideline amendments, resulting in a steady increase in sentence lengths.

⁵ See U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); 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.

Prison population has quadrupled since inception of the guidelines.⁶ As of 2004, federal prison population was 40% over capacity⁷ despite the congressional directive that the guidelines “minimize the likelihood that . . . prison population will exceed the capacity of federal prisons.” 28 U.S.C. § 994(g). Commission staff reported that lengthy prison terms were being served by offenders with little risk of recidivism and recommended an evaluation of whether prison resources were being used effectively. *See* Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. R. 12 (July/August 1999). The Commission’s work runs counter to congressional directives and cannot be said to embody the objectives of the Sentencing Reform Act.

2. *Rejection of relevant mitigating factors*

The Commission’s recent claim that the guidelines account for all sentencing factors is further contradicted by its repeated previous acknowledgments that it is not possible to write a single set of guidelines that take into account all factors that

⁶ The federal prison population was 44,408 in 1986, 48,300 in 1987, *see* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics - 1988* Table 6.34, Department of Justice, Bureau of Statistics, Washington, DC: USGPO, 1989, and is more than 190,000 today. *See* <http://www.bop.gov/news/quick.jsp#1>.

⁷ U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

are potentially relevant to sentencing decisions.⁸ Tellingly, the Commission has affirmatively rejected most relevant mitigating factors, factors clearly within the reach of § 3553(a)(1) and (2) and the directive that the guidelines “permit” individualized sentences. 28 U.S.C. §§ 991(b), 994(g).

The only offender characteristic included in the calculation of the guideline range is the aggravating one of criminal history. Yet the principal source of legislative history for the Sentencing Reform Act suggests numerous situations in which offender characteristics should be relevant, and emphasizes that “the Committee decided to describe [some of] these factors as ‘generally inappropriate,’ rather than always inappropriate, . . . in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration.” S. Rep. No. 98-225, 98th Cong., 1st Sess. 172-175 (1984). As then Judge and Commissioner Breyer explained, some Commissioners argued that mitigating factors such as age, employment history, and family ties should be included. They were not because, once again, the Commissioners could not agree. Again, this was intended to evolve based on experience. *See* Breyer, *Key Compromises*, 17 Hofstra L. Rev. 1, 19-20; Justice

⁸*See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b); U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* at 3-4 (October 2003) (hereinafter “2003 Downward Departure Report”), available at <http://www.ussc.gov/departtrpt03/departtrpt03.pdf>.

Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999). No mitigating offender characteristics have been added to the guidelines — even though the Commission’s own research demonstrates that a number of factors predict a reduced risk of recidivism.⁹

For example, Commission studies show a reduced recidivism risk when the offender has any of the following characteristics: an advanced age, stable employment during the last year, advanced education, married or divorced status, female gender, recent abstinence from drugs, participation in certain rehabilitation programs, status as a nonviolent offender, and, a criminal history elevated due to minor offenses, such as non-moving traffic violations. *See Salient Factor Score*, *supra* note 9, at 8, 13-15; *Measuring Recidivism*, *supra* note 9, at 11-16. Section 3553(a)(2)(C) establishes the sentencing purpose of “protect[ing] the public from further crimes of the defendant.” 18 U.S.C. § 3553(a)(2)(C). In light of this purpose and the parsimony principle, guidelines that truly “account for” all Section

⁹*See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter “Measuring Recidivism”), available at http://www.ussc.gov/publicat/Recidivism_General.pdf; *Recidivism and the First Offender* (May 2004) (hereinafter “First Offender”), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) (hereinafter “Salient Factor Score”), <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>.

3553(a) factors would reduce the sentencing range when these characteristics showed a reduced likelihood of recidivism. But the guidelines do not.

Indeed, instead of permitting, or encouraging, judges to take these factors into account, the Commission has prohibited, discouraged, or restricted the use of most offender characteristics even as grounds for downward departure – contrary to past practice, *see* Breyer, *Key Compromises*, 17 Hofstra L. Rev. at 19, beyond what Congress directed,¹⁰ and beyond what the original Commission intended.¹¹ Not

¹⁰Congress directed the Commission to assure that the guidelines were “entirely neutral” as to race, sex, national origin, creed, and socioeconomic status, and to reflect the “general inappropriateness” of education, vocational skills, employment record, family ties, community ties. *See* 28 U.S.C. §§ 994(d), (e). The Commission has prohibited consideration of drug or alcohol dependence and gambling addiction, § 5H1.4, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, § 5H1.12, personal financial difficulties or economic pressures on a trade or business, § 5K2.12, diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, § 5K2.13, post-sentencing rehabilitation, § 5K2.19, a single aberrant act if the defendant had any “significant prior criminal behavior” even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum, § 5K2.20; has strictly discouraged consideration of age, § 5H1.1, education and vocational skills, § 5H1.2, mental and emotional conditions, § 5H1.3, physical condition or appearance, § 5H1.4, employment record, § 5H1.5, family ties and responsibilities, § 5H1.6, and military, civic, charitable or public service, good works, § 5H1.11; and has erected multiple detailed requirements for consideration of victim’s conduct, § 5K2.10, lesser harms, § 5K2.11, coercion and duress, § 5K2.12, diminished capacity, § 5K2.13, voluntary disclosure, § 5K2.16, and aberrant behavior, § 5K2.20.

¹¹ *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (1988) (“With [the] specific exceptions” of § 5H1.10 (race, sex, national origin, creed, religion, socioeconomic status), the third sentence of § 5H1.4 (drug dependence or alcohol abuse),

surprisingly, most judges surveyed in 2002 said that the guidelines infrequently met the goal of maintaining sufficient flexibility to permit individualized sentences, or of providing needed training, care or treatment in the most effective manner.¹²

Meanwhile, the guidelines require rigid arithmetic increases for a vast and complicated array of aggravating offense characteristics. They purport to make relevant distinctions based on quantifiable “harms,” while disregarding, restricting, or prohibiting consideration of factors that bear on personal culpability, such as *mens rea*, motive, mistake, and mental and emotional problems. *See, e.g.*, §§ 5H1.4, 5H1.12, 5K2.12, 5K2.13; § 2K2.1, comment. n.16, § 2J1.2. Further, intended “harms” increase the sentence whether or not they occurred, *see* § 1B1.3(a)(3); § 2D1.1, comment. n.12, and “harms” that were unintended, unknown, fortuitous, or arranged by law enforcement are often counted. The Commission “has never explained the rationale underlying any of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.” Jose

and the last sentence of § 5K2.12 (personal financial difficulties and economic pressures on a trade or business), “the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.”).

¹²*See* U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapter II, available at <http://www.ussc.gov/judsurv/judsurv.htm>.

Cabranes & Kate Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 69 (1998).

Given that the guidelines are responsive only to aggravating factors and not to mitigating factors, it should come as no surprise that judges, past Commissioners, Commission staff, former prosecutors, and academics have persistently criticized the guidelines' disproportionate severity, ineffectiveness, and inefficiency.¹³ This chorus of criticism is the result of the plain fact that the guidelines do not

¹³See, e.g., Fifteen Year Report, *supra* note 5, at 50, 52, 55, 82, 137; Report of the ABA Justice Kennedy Commission, Summary of Recommendations, <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005); Frank O. Bowman III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 165-66 & nn. 105-06 (2005); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 24, 33-35, 68-73 (2003); Breyer, *Key Compromises*, 17 Hofstra L. Rev. at 10-11; Michael Tonry, *Sentencing Matters* 78-79 (Oxford 1996); U.S. Sentencing Commission, *White Collar Working Group Report* 8 (April 1993); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992); U.S. Sentencing Commission, *Report of the Drugs/Role/Harmonization Working Group* 60 (Nov. 10, 1992); United States General Accounting Office, *Report to Congressional Committees, Sentencing Guidelines: Central Questions Remain Unanswered* at 151-52 (August 1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 921 (1991).

incorporate congressional directives, § 3553(a) factors and the frequently ameliorative effect of offender characteristics.

3. *Summary*

Just three months before the Commission announced that the guidelines are a “mirror image” of 18 U.S.C. § 3553(a), its Fifteen Year Report admitted that it *still* had not determined whether the guidelines’ increased severity achieves sentencing purposes, and suggested that penalties *could be* reduced to better achieve sentencing purposes and to relieve prison overcrowding.¹⁴ Coupled with the structure of Section 3553(a) and the history recounted above, these admissions show that the guidelines do not account for all of the § 3553(a) factors.

B. The object of appellate review is the district court’s judgment.

An appellate presumption of reasonableness has been defended by claiming that such a presumption “respects the alignment of the views of the Sentencing Commission with the independent views of a sentencing judge.” *Buchanan*, 449 F.3d at 736 (Sutton, J., concurring). That view does not justify a presumption of reasonableness; the addition of the district court’s judgment to that of the

¹⁴ See Fifteen Year Report, *supra* note 5, at 77, 137-140, Executive Summary at vi, xvii. See also the numerous articles cited in the Fifteen Year Report at 138, which recount a history of the Commission acting in response to pressure from law-and-order interests within and outside the Commission, rather than data and the purposes of sentencing.

Commission should not change anything *because it is the district court's judgment that is under review*. To presume that a guidelines sentence is reasonable simply because the district court imposed it, without fully inquiring into the adequacy of the reasons it gave for believing the guidelines adequately balanced the Section 3553(a) factors in that particular case, is to abdicate the appellate review that *Booker* mandates. Furthermore, if the rule is that appellate courts will presume guidelines sentences to be reasonable, one can hardly be confident that a district court's decision to impose a sentence within the guidelines represents its truly independent view as opposed to its desire to take advantage of the safe harbor created by the rule.

C. The starting point on appeal should be the district court's decision; reviewing that decision in light of the Section 3553(a) requirements will ensure an appropriate degree of uniformity in sentencing

An appellate presumption of reasonableness has also been defended by suggesting that the guidelines are the only reasonable starting point for assessing reasonableness. *See Buchanan*, 449 F.3d at 738 (Sutton, J. concurring). It is supposed that, absent such a starting point, “any chance at rough equality” in sentencing will be lost. *Id.* (internal quotations removed; citing parenthetically *Jimenez-Beltre*, 440 F.3d at 519)). This argument is unconvincing. On appeal, the logical starting point is the district court's properly explained judgment. And

reviewing that decision in light of the parsimony principle and Section 3553(a) factors will ensure the uniformity sought by Congress.

1. *The starting point should be the district court's decision*

Reviewing for reasonableness under *Booker* is akin to reviewing for an abuse of discretion. *Davis*, 458 F.3d at 496; *Feemster*, 435 F.3d at 884. When appealing the typical discretionary decision of a district court (such as the imposition of a sentence upon the revocation of supervised release, *United States v. Carr*, 421 F.3d 425, 427 (6th Cir. 2005)), the burden naturally rests with the appellant; the court of appeals starts with the district court's conclusion, as — so long as it is procedurally sound and based on valid legal premises . *See e.g., United States v. Johnson*, 403 F.3d 813, 816-17 (6th Cir. 2005) (reviewing a sentence imposed upon revocation). So it is natural, in the *Booker* context, that the burden should rest upon party who disagrees with the procedurally reasonable judgment of the district court, namely, the appellant. There is no special justification in the sentencing context for putting the burden, instead, on the party who disagrees with the Sentencing Commission.

2. *This approach will adequately ensure the uniformity in sentencing sought by Congress*

From that starting point, the court of appeals should examine the various sentencing factors in light of the record. Among other factors, the court of appeals

must consider “the need to avoid unwarranted sentence disparities among defendants” who are similarly situated. 18 U.S.C. § 3553(a)(6). That consideration will provide for an appropriate uniformity in sentencing.

Enforcing adherence to the guidelines cannot be an end in itself, in part because the guidelines themselves foster unwarranted disparity and excessive uniformity. The Sentencing Commission itself conceded that it has “only partially achieved” the goal of avoiding unwarranted disparities while maintaining sufficient flexibility to permit warranted differences. Fifteen Year Report, *supra* note 5, at 142-43.¹⁵ In explaining what it meant by directing judges to avoid unwarranted disparity, Congress stated that “the key word in discussing unwarranted sentence disparity is ‘unwarranted.’” S. Rep. No. 95-605, 95th Cong. 1161 (1977). Importantly, Congress said that “the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender,” and that “[t]his will assure that the . . . sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.” S. Rep. No. 98-226, 98th Cong., 1st Sess. 52-53 (1984). However, the

¹⁵See also Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 85 (2005) (“When viewed from any coherent normative perspective, the Federal Sentencing Guidelines have failed to reduce disparity and have probably increased it”).

guidelines preclude a comprehensive examination of the particular offense and offender. *See* pages 15 to 24, *supra*.

Unwarranted disparity is built into the guidelines in other ways as well. For example, regional disparity persists under the guidelines and has even increased for drug offenses. Fifteen Year Report, *supra* note 5, at 94, 98, 140. In addition, as the Sentencing Commission acknowledges, “[t]oday’s sentencing policies, crystallized in sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account in the discretionary system in place immediately prior to the guidelines implementation. *Id.* at 135. Rules identified by the Commission that create disparity but are not a “necessary and effective means to achieve the purposes of sentencing” include the drug-trafficking guidelines, the relevant-conduct rules, the career-offender guideline, and the inclusion of non-moving traffic violations and other minor offenses in the criminal history score. *Id.* at 47-55, 76, 113-14, 131-34, 141.

Even if the guidelines achieved *warranted* uniformity, it should be emphasized that, after *Booker*, one cannot legitimately expect to achieve the same level of uniformity that obtained when the guidelines were mandatory. *See Booker*, 543 U.S. at 263 (“We cannot and do not claim that use of a ‘reasonableness’ standard will provide the uniformity that Congress originally sought to secure”).

If there is a higher level of disparity in the new regime, it arises as a result of district courts' exercise of the discretion that *Booker* held is required to comply with the requirements of the Sixth Amendment, not as a result of the absence of a presumption of reasonableness for guidelines sentences.

Of course, uniformity would be achieved by holding that sentences *outside* the guidelines range are presumptively *unreasonable*. But no one disputes that such a rule would run afoul of *Booker*'s holding by effectively eliminating the district courts' sentencing discretion. See *Booker*, 543 U.S. at 311 (Scalia, J., dissenting in part) (“[A]ny system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds constitutional”); accord *United States v. Moreland*, 437 F.3d 424, 433-34 (4th Cir. 2006); *United States v. Reinhart*, 442 F.3d 857, 864 (5th Cir. 2006). As long as district judges have discretion to impose a non-guidelines sentence when they conclude that the totality of the Section 3553(a) factors requires such a sentence, they presumably will (and should) exercise that discretion. If the presumption of reasonableness leads district courts to impose guidelines sentences in cases where they would otherwise impose non-guidelines sentences, then that is simply evidence that the presumption creates a quasi-mandatory sentencing regime (and that it is impermissible). And if the presumption

does not have this effect on district judges, then it makes no sense to assert that the presumption is necessary in order to prevent disparities caused by the imposition of non-guidelines sentences.

In sum, a presumption of reasonableness on appeal for guidelines sentences is neither consistent with Section 3553(a) nor necessary to achieve the purposes of the Sentencing Reform Act. Appellate courts should treat the guidelines range just as they do the other factors listed in Section 3553(a) — they should give it weight that is appropriate given the particular facts and circumstances in the record.

CONCLUSION

_____ For the above reasons, and for the reasons in the briefs filed in support of the defendant, the Sixth Circuit Federal Public Defenders respectfully suggest that the Court affirm the judgment in the case before it.

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of *Amici Curiae* has been forwarded by internal courthouse mail to, Assistant United States Attorney, Charles E. Atchley, Jr., 800 Market Street, Suite 211, Knoxville, Tennessee 37902; and Stephen Ross Johnson, 606 West Main Street, Suite 300, Knoxville, Tennessee 37902 on this the 22nd day of November, 2006.

HENRY A. MARTIN

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B) in that it contains 6,968 words. In certifying the number of words in the brief I have relied on the word count of the word-processing system used to prepare the brief.

HENRY A. MARTIN