

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 05-5295
	)	
Plaintiff/Appellee,	)	On Appeal from the United States District
	)	Court for the Eastern District of Tennessee
v.	)	
	)	
ALVIN VONNER,	)	
	)	
Defendant/Appellant.	)	
	)	
	)	

---

**BRIEF *AMICUS CURIAE* OF THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF THE DEFENDANT**

---

David M. Eldridge  
Eldridge & Blakney, PC  
900 South Gay Street, Suite 1404  
Knoxville, TN 37902  
Phone: (865) 544-2010  
deldridge@eblaw.us  
*Counsel of Record for the  
National Association of Criminal  
Defense Lawyers*

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Identity and interest of <i>Amicus Curiae</i> .....	1
Summary of Argument .....	2
Argument .....	3
I.    This Circuit Should Not Accord a Presumption of Reasonableness to Within-Guideline Sentences Because It is Contrary to the Plain Language of 18 U.S.C. § 3553(a) and it would Effectively Reinstate the System Held Unconstitutionally In <u>Booker</u> . ....	3
II.   Constitutional Avoidance Principles Preclude Adoption of a Presumption of Reasonableness for Within-Guideline Sentences .....	15
Conclusion .....	18
Brief Format Certification Pursuant to Circuit Rule 32 .....	20

## TABLE OF AUTHORITIES

### FEDERAL CASES

	Page(s)
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000) . . . . .	5, 17
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004) . . . . .	5, 17
<i>Burns v. United States</i> , 501 U.S. 129, 138 (1991) . . . . .	15
<i>Farese v. Story</i> , 823 F.2d 975 (6 <sup>th</sup> Cir. 1987) . . . . .	1
<i>Fulcher v. Motley</i> , 444 F.3d 791 (6 <sup>th</sup> Cir. 2006) . . . . .	1
<i>I.N.S. v. St. Cyr</i> , 533 U.S. 289 (2001) . . . . .	15
<i>In re Lott</i> , 424 F.3d 446 (6 <sup>th</sup> Cir. 2005) . . . . .	1
<i>Rita V. United States</i> , No. 06-5754, 2006 WL 2307774 (Nov. 3, 2006) . . . . .	4
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979) . . . . .	3, 17
<i>Ulster County Court v. Allen</i> , 442 U.S. 140 (1979) . . . . .	3, 17
<i>United States v. Alonzo</i> , 435 F.3d 551 (5 <sup>th</sup> Cir. 2006) . . . . .	9
<i>United States v. Barragan-Espinoza</i> , 350 F.3d 978 (9 <sup>th</sup> Cir. 2003) . . . . .	10
<i>United States v. Booker</i> , 543 U.S. 220 (2005) . . . . .	5, 7
<i>United States v. Bruce</i> , 405 F.3d 1034 (6 <sup>th</sup> Cir. 2005) . . . . .	1

<i>United States v. Buchanan</i> , 449 F.3d 731, 735 (6 <sup>th</sup> Cir. 2006) . . . . .	11
<i>United States v. Carey</i> , 368 F. Supp. 2d 891 (E.D. Wis. 2005) . . . . .	18
<i>United States v. Cooper</i> , 437 F.3d 324 (3d Cir. 2006) . . . . .	13
<i>United States v. Dorcely</i> , 454 F.3d 366 (D.C.Cir.2006) . . . . .	9
<i>United States v. Dunlap</i> , 452 F.3d 747 (8th Cir. 2006) . . . . .	9
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006) . . . . .	13
<i>United States v. Hernandez-Castillo</i> , 449 F.3d 1127 (10th Cir. 2006) . . . . .	9
<i>United States v. Jimenez-Beltre</i> , 440 F.3d 514 (1st Cir. 2006) . . . . .	9
<i>United States v. Johnson</i> , 445 F.3d 339 (4th Cir. 2006) . . . . .	9
<i>United States v. Kikumura</i> , 918 F.2d 1084 (3d Cir. 1990) . . . . .	18
<i>United States v. Lake</i> , 419 F.3d 111 (2d Cir. 2005) . . . . .	14
<i>United States v. Lee</i> , 454 F.3d 836 (8th Cir. 2006) . . . . .	8, 10
<i>United States v. Menyweather</i> , 431 F.3d 692 (9th Cir. 2005) . . . . .	14
<i>United States v. Meyer</i> , 452 F.3d 998 (8th Cir. 2006) . . . . .	10
<i>United States v. Mykytiuk</i> , 415 F.3d 606 (7th Cir. 2005) . . . . .	9
<i>United States v. Rattoballi</i> , 452 F.3d 127 (2d Cir. 2006) . . . . .	11
<i>United States v. Robinson</i> , 454 F.3d 839 (8th Cir. 2006) . . . . .	9

<i>United States v. Talley</i> , 431 F.3d 784 (11th Cir. 2005) . . . . .	13
<i>United States v. Taylor</i> , 956 F.2d 572 (6 <sup>th</sup> Cir. 1992)(en banc) . . . . .	1
<i>United States v. Williams</i> , 436 F.3d 706 (6th Cir. 2006) . . . . .	2, 4, 9
<i>United States v. Wilson</i> , 350 F. Supp. 2d 910 (D. Utah 2005) . . . . .	18
<i>United States v. Zavala</i> , 443 F.3d 1165 (9th Cir. 2006) . . . . .	13

**DOCKETED CASES**

<i>United States v. Thurston</i> , 456 F.3d 211 (1st Cir. 2006) . . . . .	8
---	---

**FEDERAL STATUTES**

18 U.S.C. § 3553(a) . . . . .	passim
18 U.S.C. § 3742(e) . . . . .	5, 6, 7, 10

**MISCELLANEOUS**

Stith & Koh, <i>The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines</i> , 28 Wake Forest L. Rev. 223, 238, 245-46 (1993) . . . . .	8
U.S. Sentencing Commission, <i>Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform</i> at 47 (2004) . . . . .	8

## **IDENTITY AND INTEREST OF *AMICUS CURIAE***

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

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

NACDL often files amicus briefs before the Supreme Court of the United States. NACDL has appeared as amicus curiae in this Court several times, including in Farese v. Story, 823 F.2d 975 (6<sup>th</sup> Cir. 1987); United States v. Taylor, 956 F.2d 572 (6<sup>th</sup> Cir. 1992) (en banc); In re Lott, 424 F.3d 446 (6<sup>th</sup> Cir. 2005); United States v. Bruce, 405

F.3d 1034 (6<sup>th</sup> Cir. 2005); and Fulcher v. Motley, 444 F. 3d 791 (6<sup>th</sup> Cir. 2006). The NACDL amicus curiae committee requested and authorized the undersigned to file this brief.

This brief is filed pursuant to Rule 29 of the Federal Rules of Appellate Procedure with the consent of all parties to this action. Undersigned counsel has spoken with Assistant United States Charles E. Atchley, Jr. representing the United States and Stephen Ross Johnson representing the Defendant and both counsel have authorized undersigned counsel to represent that they consent to the filing of this brief.

#### **SUMMARY OF ARGUMENT**

The presumption of reasonableness of a guideline sentence that has been adopted by a panel opinion of this Circuit in United States v. Williams, 436 F.3d 706 (6<sup>th</sup> Cir. 2006), and which was applied by the panel opinion in this case has no basis in the statutory language and is contrary to the constitutional principle that underlies Booker. The adoption of a judge-made presumption resurrects pre-Booker guideline sentencing. There is little difference between sentencing prior to Booker, under which a district judge was to impose a sentence within the guideline range unless there existed extraordinary features which removed the case from the "heartland" of the guidelines,

and a scheme under which a sentence within the guideline range is presumed to be reasonable, while any sentence outside of the guideline range is suspect.

Furthermore, a judge-made, mandatory presumption, whether rebuttable or not, of the kind that Williams applies violates Sandstrom v. Montana, 442 U.S. 510 (1979). Only if the burden of proof at sentencing for facts which raise the top of a guideline range were elevated to "beyond a reasonable doubt" could a presumption for guideline sentencing survive constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979). Constitutional avoidance principles thus counsel against this en banc court affirming the adoption of such a presumption, whether rebuttable or not.

## ARGUMENT

### **I. This Circuit Should Not Accord a Presumption of Reasonableness to Within-Guideline Sentences Because It Is Contrary to the Plain Language of 18 U.S.C. § 3553(a) and It Would Effectively Reinstate the System Held Unconstitutional In Booker.**

A panel opinion of this Circuit in United States v. Williams, 436 F.3d 706 (6<sup>th</sup> Cir. 2006) adopted a presumption of reasonableness to be applied to a guideline sentence, which was applied by the panel opinion in this case. T h e United States Supreme Court has recently granted certiorari to resolve the question whether the application of such a presumption can be constitutionally reconciled with the Court's prior precedent. Rita v. United States, No. 06-5754, 2006 WL 2307774 (Nov. 3, 2006).

This Court's decision to grant en banc review of this case enables the Court to answer this question for the courts of this Circuit prior to the Supreme Court's decision and provide assistance to the Supreme Court in its resolution of the question. For the following reasons, such a presumption has no basis in the statutory language and is contrary to the constitutional principle that underlies Booker.

According a presumption of reasonableness to within guideline sentences effectively resurrects pre-Booker sentencing practice which mandated a sentence within the guideline range unless the defendant qualified for a departure. Thus, treating

guideline sentences as presumptively reasonable restores the sentencing as it was practiced prior to the Supreme Court decisions in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005). Such a result is inconsistent with Supreme Court precedent.

Booker held (as expressed in an opinion by Justice Stevens) that the operation of the U.S. Sentencing Guidelines, when implemented in the manner prescribed in the Sentencing Reform Act, the Commission's policy statements, and the Federal Rules of Criminal Procedure, violated a defendant's Sixth Amendment right to jury trial, as interpreted Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely. As a remedy for this constitutional defect, in the part of the decision authored by Justice Breyer, the Court severed and excised 18 U.S.C. § 3553(b)(1) (the provision making application of the guidelines mandatory) from the SRA, leaving the rest of that Act (other than the standards of appellate review in § 3742(e)) intact, as well as all of the sentencing guidelines and policy statements. The Court held that applying severability analysis to strike these two statutory sections from the Act was necessary to achieve as closely as possible the intent of Congress in enacting the Sentencing Reform Act.

After excising § 3553(b)(1) and § 3742(e), the remainder of the Act is constitutional because the guidelines would no longer bind the sentencing court.

Booker, 543 U.S. at 234. The surviving provisions of the Sentencing Reform Act are governed by one key provision: the actual sentence imposed must never be "greater than necessary" -- although it must also be "sufficient" -- to achieve the purposes of sentencing, i.e., just punishment, general and specific deterrence, and rehabilitation. 18 U.S.C. § 3553(a)(2)(A - D).

It is also mandatory under the Act that the sentencing court "consider" a number of factors before choosing that sentence. The guidelines are but one of the many listed factors.<sup>1</sup> Nothing in the statute gives greater weight to the guidelines as opposed to any other factor. After Booker, in other words, a sentence within the guideline range may not be "necessary," in the case at hand, to achieve the Congressionally defined purposes -- (A) "just punishment" in light of "the seriousness of the offense"; (B) "deterrence," both general and specific; (C) incapacitation "to protect the public"; and

---

<sup>1</sup> Listed in § 3553(a) are the factors that the court, "in determining the particular sentence, shall consider." In addition to the six objectives found in the four clauses of subsection (a)(2), those mandatory points for consideration are: (1) "the nature and circumstances of the offense," and "the history and characteristics of the offender"; (2) the general purposes of sentencing; (3) the "kinds of sentences available"; (4) whatever sentence types and ranges are called for by the Guidelines; (5) "any pertinent policy statement" of the U.S. Sentencing Commission (these include most definitions of grounds for departure); (6) "the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victim."

(D) any "needed" rehabilitation and "correctional treatment" of the offender. 18 U.S.C. § 3553(a)(2). The district court's duty is to impose not a "reasonable" sentence, but one which is "sufficient" to achieve these four objectives, without being "greater than necessary." 18 U.S.C. § 3553(a)(2)

The reason that the new advisory guidelines remain constitutional is that they do not bind the sentencing court. United States v. Booker, 543 U.S. 220 (2005). So long as the advisory guidelines remain one out of the many factors for consideration, district courts may consult them without running afoul of the Fifth and Sixth Amendments. But, if the guidelines become presumptive, the courts effectively return to the old so-called mandatory system. See Booker, 543 U.S. at 233.

Prior to the Supreme Court's decisions in Blakely and Booker, in fact, the sentencing guidelines prescribed just such 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. The act of granting a presumption of reasonableness to a within guideline sentence implies, if not explicitly holds, that any sentence outside the guidelines is presumptively unreasonable. See, e.g., United States v. Thurston, 456 F.3d 211(1st Cir. July 26, 2006); United States v. Lee, 454 F.3d 836, 838-39 (8th Cir. 2006). A presumption that a sentence within the guideline range is reasonable raises the same liberty interest 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 US 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. 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, "There 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.'" United States v. Jimenez-Beltre, 440 F.3d 514, 524 (1st Cir. 2006)(en banc)(Lipez, J. dissenting).

Despite the obvious difficulty with a presumption that a guideline sentence is reasonable, several courts, including a panel of this Court have adopted precisely that rule and held that the guideline sentence must be given presumptive weight after Booker. E.g., United States v. Dorcely, 454 F.3d 366 (D.C.Cir. 2006); United States v. Dunlap, 452 F.3d 747, 750 (8th Cir. 2006); United States v. Hernandez-Castillo, 449 F.3d 1127, 1130 (10th Cir. 2006); United States v. Mares, 402 F.3d 511 (5<sup>th</sup> Cir. 2005); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Johnson, 445 F.3d 339, 341 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005).

The courts adopting the presumption of reasonableness have assumed not only that a sentence within the guidelines is reasonable, but that a sentence falling outside the guideline range is unreasonable, or at the least, requires significant justification by reference to the guidelines themselves. E.g. United States v. Robinson, 454 F.3d 839, (8th Cir. 2006) (reversing a sentence below the guidelines for failure to adequately consider defendant's criminal history and giving undue weight to the fact that the

defendant was hunting with a firearm in which he illegally possessed); Lee, 454 F.3d 836, (holding that drug addiction was an improper reason for non-guideline sentence based on a policy statement on the guidelines); cf. United States v. Meyer, 452 F.3d 998, 1001-02 (8th Cir. 2006) (affirming sentence 50% above the guideline range based on recent guideline amendments).

These cases are predicated on nothing but an unsupported assertion. Further and more troubling, implementation of such a presumption recreates the same constitutional flaw which the Supreme Court found in Booker. In adopting a presumption that such a sentence is within the guidelines is reasonable, courts have abjured the holding in Booker. The resulting sentencing scheme is identical to pre-Booker sentencing which imposed de novo review on sentences falling outside the guideline range. 18 U.S.C. § 3742(e); United States v. Barragan-Espinoza, 350 F.3d 978, 981 (9th Cir. 2003).

Even some of the circuits that have not adopted a presumption of reasonableness nonetheless wrongly treat the guidelines as a factor which carries greater weight than the other factors set forth in 18 U.S.C. § 3553(a). For example, the Second Circuit has held that the guidelines are to receive paramount consideration, viewing non-guideline sentences as "inherently suspect." United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006). The First Circuit has held that the guidelines, while not presumptive, should

receive "substantial" weight. Jimenez-Beltre, 440 F.3d at 516. These decisions, too, effectively have undermined the Supreme Court's holding in Booker, which resolved the Sixth Amendment problem by declaring unconstitutional the portion of 18 U.S.C. § 3553 that rendered application of the guidelines mandatory. By according the guidelines either presumptive or controlling weight, other circuits have returned the guidelines to their former mandatory status.

Many of the courts that have accorded the guidelines either presumptive or substantial status, have done so on the basis that the guidelines purport to consider the factors set forth in §3553 (a) already. E.g., Rattoballi, 452 F.3d at 133 (guidelines are the "'only integration of multiple factors'" (quoting Jimenez-Beltre, 440 F.3d at 518)). See also United States v. Buchanan, 449 F.3d 731, 735 (6<sup>th</sup> Cir. 2006)(Sutton, J., concurring). In fact, further analysis reveals this basis lacking in logical support.

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 only individualized characteristics the guidelines direct the sentencer to consider are criminal history and role in the offense. The guidelines largely fail to

address a defendant's individual characteristics that might mitigate culpability. Instead, the guidelines focus largely on two matters - offense conduct (which in many cases is judged primarily based on quantity) and criminal history. The guideline policy statements which largely preclude imposition of a non-guideline sentence, identifying numerous factors which the Sentencing Commission deemed not to be relevant to sentencing. These factors are limited not only to matters of race or income level, but include factors plainly contemplated in § 3553, such as the defendant's history and character. By definition the defendant's history and character includes matters such as his upbringing, childhood abuse, history of drug addiction, rehabilitative efforts, and employment history. Similarly, the statute directs the sentencer to consider the nature and circumstances of the offense. But the guidelines prohibit consideration of numerous factors that might be considered in mitigation under that rubric. For example, the guidelines provide little room for consideration of motive in financial crimes, despite the fact that a defendant's motive may be a significant factor in mitigation.

In contrast, several circuits have correctly declined to adopt a rule that a sentence within the properly calculated Guideline range is "per se reasonable." See United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006); United States v. Cooper, 437 F.3d 324, 329-31 (3d Cir. 2006); United States v. Talley, 431 F.3d 784, 786-87 (11th Cir.

2005) (per curiam); United States v. Zavala, 443 F.3d 1165, 1168-69 (9th Cir. 2006) (per curiam) (panel opn.). These courts recognized that presuming the reasonableness of a guideline sentence was inconsistent with Booker and the Sixth Amendment. See Cooper, 437 F.3d at 331; Talley, 431 F.3d at 786-87.

The Supreme Court in Booker, by exercising the judicial power to sever a particular unconstitutional provision from a complex statutory scheme, preserved the statute as a whole, leaving it to work as designed by Congress. The Court did not strike down the Sentencing Reform Act (SRA) generally and substitute out of whole cloth an "advisory guideline" system as a sort of judicial policy choice. Thus, sentencing judges must still consider the guidelines, but nothing in the statute affords any reason to treat those rules as more controlling of the final sentencing decision than any of the many other factors the court must "consider" under § 3553(a) as a whole. See United States v. Menyweather, 431 F.3d 692, 701 (9th Cir. 2005); United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005). Nor does either Booker or the SRA contain any reason to believe that a sentence within the guideline range is presumptively likely to achieve the purposes of the SRA than a sentence outside the range. This Court's ruling that the guidelines are but one of many factors to be considered in sentencing, entitled to no special weight or consideration would insure that the reinstatement of an

unconstitutional sentencing system would be avoided. See generally United States v. Zavala, 443 F. 3d at 1169.

An appellate court presumption presents the same threat of reinstating the mandatory nature of the guidelines. District courts are well aware of the standard of review applied by the United States Courts of Appeals. Knowledge that a sentence would be presumed valid, rather than inherently suspect, would necessarily push district judges to return or remain with pre-Booker sentencing practices. Indeed, an appellate presumption will necessarily resurrect pre-Booker guideline sentencing, with sentences imposed inside the guideline range unless a defendant can meet the high standard necessary for a departure. Jimenez-Beltre, 440 F.3d at 527-28. In short, if any type of presumption is adopted, district courts will again feel compelled to impose a sentence within the guideline range, resulting in a return to the presumptive sentencing that was the hallmark of sentencing under the mandatory guideline system.

In evaluating this point, this Court should consider the significance of historical practice. Most district judges sitting today have only imposed sentence under the sentencing guidelines. Only a few have experience with pre-guideline discretion. Thus, many judges are likely to accord significant weight to the guidelines simply based on their prior experience.

Indeed, even using the guidelines as a starting point, will accord excessive weight to the sentencing guidelines in contrast to the other sentencing factors. If other evidence is not presented, the starting point will be the ending point. A presumption of reasonableness, even a rebuttable one, will unconstitutionally increase the showing required to move a defendant away from that starting point.

## **II. Constitutional Avoidance Principles Preclude Adoption of a Presumption of Reasonableness for Within-Guideline Sentences.**

A court is obligated to resolve matters without reaching the constitutional issue if it can reasonably do so. I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001). See also Burns v. United States, 501 U.S. 129, 138 (1991) (interpreting Federal Rule of Criminal Procedure 32, in part to avoid due process question, as including a notice requirement regarding a district court's intent to give notice of an upward departure under the Guidelines). For the following two reasons, the Court can and should avoid the constitutional issue presented by the application of a presumption of reasonableness to guideline sentences.

First, if this Court adopts any type of presumption, whether rebuttable or not, that a guideline sentence is the correct one, then this Court must address the question whether the Fifth Amendment requires sentencing findings to be made using a standard of proof of beyond a reasonable doubt. This would require a ruling that U.S.S.G. §

6A1.3 is unconstitutional. To avoid reaching this question, and consistent with Booker and the plain language of the Sentencing Reform Act, the Court can hold that when a district court sentences a defendant, the applicable Guideline range is not entitled to more weight than any other factor listed by Congress in 18 U.S.C. § 3553(a). Booker, 543 U.S. at 234, 259-60 (noting that the Guidelines are one of several factors which a court must consult when sentencing a defendant). See also Menyweather, 431 F.3d at 695-96; Cooper, 437 F.3d at 329 (observing that Section 3553(a) lists "the relevant factors" upon which a judge must sentence a defendant). By reaffirming that the sentencing judge should give the applicable Guideline range equal consideration with the remaining Section 3553(a) factors, this Court would avoid grappling with the constitutional question presented and reject those decisions which grant a Guidelines sentence a presumption of reasonableness.

Second, constitutional avoidance principles preclude adoption of a presumption of reasonableness, because even a mandatory rebuttable presumption that the Guidelines should be followed would be unconstitutional under the Due Process Clause. See Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidated rebuttable presumption of intent). As the first part of the Booker opinion recognizes, each guideline range functions as a statutory maximum until another fact is found to increase

that range. See Booker, 543 U.S. at 233-34; Blakely v. Washington, 542 U.S. 296 (2004), applying Apprendi v. New Jersey, 530 U.S. 466 (2000). The process of calculating a guideline range is therefore unconstitutional if use of the guidelines is mandatory, the Court held. The same is true when compliance is presumptive, under Sandstrom. It follows that only if the burden of proof at sentencing for facts which raise the top of a guideline range were elevated to "beyond a reasonable doubt," and a jury trial were afforded, could a presumption for sentencing within the guideline range survive constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979). But the remedial section of Booker suggests that the standard of proof for findings at sentencing is a preponderance of the evidence. U.S.S.G. §6A1.3 so provides.

If a presumption of reasonableness is adopted, however, then all advisory guideline findings must be made using a standard of proof of beyond a reasonable doubt. Through the introductory directive in § 3553(a) to impose a sentence which is "sufficient, but not greater than necessary," Congress embedded in federal sentencing legislation the moral imperative to impose on any individual the least suffering that is demanded by the general welfare -- a concept known in the sentencing literature as the "principle of parsimony."<sup>2</sup> Under this rule, a person must be given the sentence which

---

<sup>2</sup> See, e.g., Richard S. Frase, *Punishment Purposes*, 58 STANFORD L. REV. 67, 77 & n.24, 78 & n.29 (2005); Testimony of

is sufficient but not greater than is necessary for the protection of society. The sentence which is lawful is the sentence which is "minimally sufficient." See United States v. Kikumura, 918 F.2d 1084, 1111 (3d Cir. 1990) (per Becker, J.). The guideline sentence is neither necessarily nor frequently the minimally sufficient one.

### CONCLUSION

For the reasons set forth above, and in the briefs filed on behalf of the appellant, the National Association of Criminal Defense Lawyers respectfully suggests that this Honorable Court reverse the judgment of the sentencing court below and adopt a standard of review for sentencing proceedings that contains no presumption of reasonableness to sentences within the applicable guideline range.

Dated: November 22, 2006

Respectfully submitted,

---

DAVID M. ELDRIDGE  
Counsel of Record, NACDL

---

Mary Price, Gen'l Counsel, FAMM, before U.S. Sentencing Comm'n, [http://www.ussc.gov/hearings/02-15-05/price\\_testimony.pdf](http://www.ussc.gov/hearings/02-15-05/price_testimony.pdf) (Feb. 15, 2005), at 3 (citing Cesare Beccaria's pathbreaking 1764 work on Crime and Punishment). See United States v. Carey, 368 F.Supp. 2d 891, 895 n.4 (E.D. Wis. 2005); United States v. Wilson, 350 F.Supp. 2d 910, 922-23 (D. Utah 2005) (citing scholarly literature).



IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ) No. 05-5295  
)  
Plaintiff/Appellee, )  
)  
v. )  
)  
ALVIN VONNER, )  
)  
Defendant/Appellant. )  
)  
)

**BRIEF FORMAT CERTIFICATION PURSUANT  
TO CIRCUIT RULE 32-1**

---

Pursuant to Rule 32 (a)(7)(C), Federal Rules of Appellate Procedure and Sixth Circuit Rule 32, I certify that this brief is in times new roman monospaced typeface, has 14 or less characters per inch, and contains 4,747 words.

Dated: November 22, 2006

---

DAVID M. ELDRIDGE  
Counsel of Record, NACDL

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing pleading was forwarded, by hand delivery or by placing the same in the United States mail, with proper postage affixed thereon to:

Charles E. Atchley, Jr., Esq.  
Assistant United States Attorney  
800 Market Street, Suite 211  
Knoxville, TN 37902

Stephen Ross Johnson, Esq.  
Ritchie, Dillard & Davies, PC  
606 W. Main Street, Suite 300  
Knoxville, TN 37902

This the 22<sup>nd</sup> day of November, 2006.

---

DAVID M. ELDRIDGE