

No.

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2004

ROBERT WILLIAM LARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

Given that the district court sentenced Mr. Larson to the low end of his 12-18 month guideline range under the prior mandatory guideline sentencing scheme, and given that there was copious evidence of Mr. Larson's atypical post-offense rehabilitation, should Mr. Larson's case be remanded for resentencing in accordance with the remedial sentencing scheme established by this Court in *United States v. Booker*?

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Petitioner Robert William Larson respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. He seeks an expedited remand to the district court so that he can be resentenced in accordance with the remedial sentencing scheme announced in *United States v. Booker*, 125

S.Ct. 738 (2005), prior to April 18, 2005, his projected release date from Bureau of Prisons custody.

QUESTION PRESENTED

Given that the district court sentenced Mr. Larson to the low end of his 12-18 month guideline range under the prior mandatory guideline sentencing scheme, and given that there was copious evidence of Mr. Larson's atypical post-offense rehabilitation, should Mr. Larson's case be remanded for resentencing in accordance with the remedial sentencing scheme established by this Court in *United States v. Booker*?

OPINION BELOW

On December 8, 2004, the Ninth Circuit filed and entered a Memorandum Opinion in *United States Larson*, 2004 WL 2806496 (9th Cir. Dec. 8, 2004). *See*, Appendix A.

JURISDICTION

On December 8, 2004, the Court of Appeals entered its decision affirming the sentence of Mr. Larson. *See*, Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS

This Petition asserts that Mr. Larson is entitled to be resentenced under the remedial sentencing scheme established by this Court in *United States v. Booker*, 125 S.Ct. 738 (U.S. 2005), which, by way of amendments to the Sentencing

Reform Act of 1984, rendered the federal Sentencing Guidelines advisory, rather than mandatory, and established a reasonableness standard of appellate review. The relevant constitutional provision, the Sixth Amendment, is set forth in Appendix B. The relevant statutes, 18 U.S.C. §§ 3553 and 3742, are set forth in Appendix C, with *Booker* impact noted.

STATEMENT OF THE CASE

A. Nature of the Case

1. Introduction

Under the prior mandatory guideline system, Mr. Larson barely failed to receive a downward departure for exceptional post-offense rehabilitation. Instead, after reviewing the documentary and testimonial evidence of such rehabilitation, and after commending Mr. Larson's promising turnaround, the district court sentenced Mr. Larson to the low end of his 12-18 month guideline range, plus one day in order to make Mr. Larson eligible for good time credit.¹

Mr. Larson respectfully submits that under the new advisory guideline sentencing scheme, he would receive a shorter sentence. Not only would his 12-18 month guideline range be merely advisory, rather than mandatory, but the district

¹ A Bureau of Prisons policy requires that a prisoner have a sentence of

court would be permitted to give greater weight to Mr. Larson's impressive post-offense rehabilitation, as well as other mitigating factors that did not constitute grounds for an outright downward departure under the mandatory guideline scheme. Mr. Larson is currently scheduled for release from prison on April 18, 2005. Thus, he seeks an expedited remand to the district court for resentencing.

2. Proceedings in the District Court

On August 22, 2003, the government indicted Mr. Larson on one count of manufacturing counterfeit currency and one count of possessing counterfeit currency. The offense conduct, which involved a total of \$700.00, had taken place between November 24 and 28, 2002. On December 16, 2003, Mr. Larson pled guilty to manufacturing counterfeit currency; the possession count was eventually dismissed pursuant to a plea agreement.

At sentencing, held on April 9, 2004, Mr. Larson argued for a downward departure from his 12-18 month guideline range on the basis of post-offense rehabilitation efforts that he documented by way of witness testimony and numerous supporting letters. Although impressed by Mr. Larson's rehabilitation efforts, the district court ultimately sentenced Mr. Larson to the low end of his guideline range, plus one day so that he would be eligible for good time credit in

longer than one year before the prisoner can be eligible for good time credit.

prison. The district court also imposed three years of supervised release and ordered Mr. Larson to pay \$700.00 in restitution.

3. Decision by the Court of Appeals

Mr. Larson appealed his sentence, arguing that he should have received a downward departure for his post-offense rehabilitation and that his sentence violated the separation of powers because the district court had been chilled by new downward departure reporting requirements imposed as part of the Feeney Amendment to the PROTECT Act. *See*, Pub.L. 108-21, § 401(d)(1).

On December 8, 2004, a panel of the Court of Appeals ruled that it lacked jurisdiction over Mr. Larson's first challenge because the district court had recognized its discretion to depart downward for post-offense rehabilitation, but had chosen not to do so. Regarding the separation of powers challenge, the panel ruled that Mr. Larson lacked standing because he had failed to demonstrate that the district court had in fact been chilled by the reporting requirements. *See, United States v. Larson*, 2004 WL 2806496 (9th Cir. 2004), attached as Appendix A.

On January 4, 2005, prior to the issuance of *Booker*, Mr. Larson notified the Court of Appeals by letter that he did not intend to file a petition for certiorari. Of course, like all of the parties that filed briefs with this Court in the consolidated cases that resulted in *Booker*, Mr. Larson did not anticipate the remedy announced

in Justice Breyer’s opinion for the Court. See, *Booker*, 125 S.Ct. at 777 (“The novelty of this remedial maneuver perhaps explains why *no party* or *amicus curiae* to this litigation has requested the remedy the Court now orders.”) (Stevens, J., dissenting, joined by Souter, J., and Scalia, J.) (emphasis in the original). As explained below, it was the remedy announced in Justice Breyer’s opinion for the Court that rejuvenated this case.

4. Bail Status of Mr. Larson

Mr. Larson is currently serving his 12 month and 1 day sentence at Englewood Federal Correctional Institute in Littleton, CO. His full address is set forth in the certificate of service.

B. Statement of Facts

Mr. Larson’s brief and relatively minor foray into counterfeiting precipitated from an addiction to methamphetamine. Mr. Larson used methamphetamine for the six years that preceded his arraignment in this case.

At sentencing, Mr. Larson presented three witnesses and 28 letters of support documenting (1) his sincere and extreme remorse for both counterfeiting currency and abusing methamphetamine; (2) his commitment and efforts to overcome his addiction; (3) his establishment of a recovery support system; (4) his efforts to maintain steady employment and his desire to grow professionally; and

(5) community acknowledgment of Mr. Larson's recovery.

Although the district court ultimately declined to award Mr. Larson a downward departure, the court stated, "I'm going to give you the lowest sentence I can give you, under the guidelines, under the circumstances of the case." The court also stated that the 12-18 month guideline range controlled the "punishment factor" set forth in 18 U.S.C. § 3553(a)(2)(A).

REASON TO GRANT PETITION

Mr. Larson's Petition should be granted and his case should be remanded for resentencing in accordance with *Booker* because the record reflects that, had the district court not been constrained by the downward departure analysis inherent in the prior mandatory guideline scheme, the district court would almost surely have imposed a shorter sentence of imprisonment.

In *Booker*, this Court expressly stated that its holdings apply to all cases then on direct review, which includes the present case. 125 S.Ct. at 769. Here, Justice Stevens' opinion for the Court is not implicated, as Mr. Larson's sentence was not enhanced in violation of the Sixth Amendment right to a jury trial. Rather, this Petition implicates Justice Breyer's remedial opinion for the Court, which renders the Guidelines advisory, for there is a substantial likelihood that the district court would have imposed a shorter term of imprisonment if the court had not erroneously treated Mr. Larson's 12-18 month guideline range as mandatory. Put

otherwise, had the district instead treated the 12-18 month advisory range as one of many important factors, and had the court also treated Mr. Larson's impressive post-offense rehabilitation as another important factor rather than a narrowly available basis for departure, there is little doubt that the court would have imposed a shorter sentence.

The new reasonableness standard of appellate review, also announced in Justice Breyer's opinion for the Court, does not save Mr. Larson's present sentence. As more than one Court of Appeals has held, simply because a particular pre-*Booker* sentence might be reasonable had it been imposed in accordance with *Booker*, it does not follow that the sentence should now be upheld. Such a sentence constitutes plain error because the district court might have imposed a shorter sentence under the new advisory sentencing scheme. When such a possibility exists, resentencing by the district court is in order. *See* case law discussed *infra* at pp. 10-13.

A. The prior mandatory sentencing guideline scheme under which Mr. Larson was sentenced is now an advisory scheme, and that change applies to Mr. Larson's sentence, which is still on direct review.

In the first part of *Booker*, this Court reaffirmed its recent holding in *Blakely v. Washington* “that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in*

the jury verdict or admitted by the defendant.” *Id.* at 749 (quoting *Blakely*, 124 S.Ct. 2531, 2537(U.S. 2004), with emphasis originally in *Blakely*). Emphasizing the mandatory nature of the Sentencing Guidelines, the Court determined that there was “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington [sentencing] procedures at issue in [*Blakely*].” *Id.* As the Court explained, “[t]he [Sentencing] Guidelines as written ... are not advisory; they are mandatory and binding on all judges.” *Id.* at 750. Thus, the Court held that the Sixth Amendment as construed by *Apprendi* and *Blakely* applied to the Sentencing Guidelines.

In the second part of *Booker*, in lieu of engrafting onto the Guidelines a requirement that all sentencing increases be justified by jury findings beyond a reasonable doubt, the Court severed two provisions of the Sentencing Reform Act of 1984, one of which made the Guidelines mandatory and the other of which based appellate review on the mandatory nature of the Guidelines. *Id.* at 756 and 764-65 (excising 18 U.S.C. §§ 3553(b)(1) and 3742(e) and invalidating all cross-references to those provisions). The result of the foregoing severance is that the Guidelines are now “effectively advisory.” *Id.* at 757. In place of the severed appellate standard of review provision — i.e., former § 3742(e) — the Court substituted a reasonableness standard of appellate review for all sentences. *Id.* at

765-67.

At the conclusion of the majority opinion in *Booker*, the Court noted that the holdings discussed above, including the remedial interpretation of the Sentencing Act, apply to all cases on direct review. *Id.* at 769 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Thus, the holdings apply to Mr. Larson's sentence.

B. Under recent circuit-level applications of the remedial sentencing scheme announced in *Booker*, Mr. Larson's sentence constitutes plain error, and therefore his case should be remanded to the district court for resentencing.

Both the Sixth and Ninth Circuits have observed that *Booker* encourages appellate courts, in cases in which the defendant has invoked *Blakely* and/or *Booker* for the first time on appeal, to review for plain error. *United States v. Oliver*, 2005 WL 233779 (6th Cir. Feb. 4, 2005)(citing *Booker*, 125 S.Ct. at 769); and *United States v. Ameline*, 2005 WL 350811 (9th Cir. Feb. 10, 2005)(same); see also, *United States v. Hughes*, 396 F.3d 374 (4th Cir. Jan. 24, 2005) (without referencing *Booker*'s encouragement, applying plain error review to an unchallenged sentence still on direct review). All three circuits cited directly above found plain error, and therefore remanded for resentencing by the district court, because (1) the respective district court had erred by increasing the defendant's sentencing range based on a judge-found fact, in violation of the Sixth Amendment; (2) such error was plain by the time of appeal, via *Booker*; (3) the

error affected the defendant's substantial rights because it increased the defendant's sentence; and (4) leaving the error uncorrected would diminish the fairness, integrity, and reputation of the sentencing system because the defendant would remain sentenced based on facts not supported by a jury verdict (*Oliver*), or because automatically attributing reasonableness to a sentence that was not imposed under the new advisory guideline scheme, simply because it might be a reasonable sentence if it were imposed under the new advisory scheme, would jeopardize the fairness, integrity, and reputation of the sentencing system (*Hughes*, footnote 8; and *Ameline*). *Oliver*, 2005 WL 233779, *6-8; *Ameline*, 2005 WL 350811, *5-6; and *Hughes*, 396 F.3d at 379-81.

The one difference in the present case is that Mr. Larson's sentencing range was not increased in violation of the Sixth Amendment. Still, the district court erred by deeming Mr. Larson's 12-18 month sentencing range as mandatory. See, *Booker*, 125 S.Ct. at 769 (observing that "cases not involving a Sixth Amendment violation" will also require resentencing); and *Ameline*, 2005 WL 350811, *6. As is reflected in the court's statement at the time of sentencing — i.e., "I'm going to give you the lowest sentence I can give you, under the guidelines...." — if the court had known that the guideline was only advisory, the court would have imposed a shorter sentence. Notably, the court drew a specific correlation between Mr.

Larson’s guideline range and the punitive sentencing policy set forth in 18 U.S.C. § 3553(a)(2)(A). In other words, the court apparently thought that the prior mandatory nature of a guideline range was primarily oriented toward punishment. As explained in *Booker*, though, a guideline range, now advisory, and the punitive policy set forth in § 3553(a)(2)(A) are both separate sentencing considerations. The overarching goal of sentencing, moreover, is not punishment, but uniformity in the punishment of real offense conduct. 125 S.Ct. at 759 (“Congress’ basic statutory goal--a system that diminishes sentencing disparity--depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.”) (emphasis in the original).

As the Ninth Circuit noted in *Ameline*,

“[D]eclining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to performing the sentencing function ourselves.” Accordingly, it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime.

Ameline, 2005 WL 350811, *6 (quoting *Hughes*, *381, footnote 8) (emphasis in *Ameline*). This is hardly one of the truly exceptional cases referenced in *Ameline*. There was compelling evidence of Mr. Larson’s post-offense rehabilitation that was placed before the district court. Further, there may be other mitigating factors that, while they did not rise to the level of a ground for downward departure under

the prior mandatory scheme, would be an appropriate sentencing consideration now. “We simply do not know how the district court would have sentenced [Mr. Larson] had it been operating under the regime established by *Booker*.” *Hughes*, footnote 8; see also, *United States v. Crosby*, 2005 WL 240916, *9-11 (2nd Cir. Feb. 2, 2005) (without reviewing for plain or harmless error, remanding for to the district court for a determination of whether resentencing is necessary, explaining: “Even if reasonable as to length, a sentence unreasonable for legal error in the method of its selection is cause for concern because, in many cases, it will be impossible to tell whether the judge would have imposed the same sentence had the judge not felt compelled to impose a Guidelines sentence. It will also be impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence.”)

C. Time is of the essence.

Mr. Larson’s projected release date is April 18, 2005. Thus, he respectfully seeks an expedited remand to the district court for resentencing.

CONCLUSION

Although the district court chose not to award Mr. Larson a downward departure under the tight constraint imposed by the prior mandatory sentencing scheme, the court did give Mr. Larson the shortest sentence that the court thought was possible. Because the court plainly erred in light of *Booker* (and *Ameline*), the court should be given an opportunity to sentence Mr. Larson under the new advisory regime. Finally, an expedited remand would allow the court to consider reducing Mr. Larson's sentence prior to his April 18, 2005 release date.

DATED March 9, 2005.

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APPENDIX A

OPINION AND JUDGMENT
OF THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT
C.A. No. 04-30186 (9th Cir. Dec. 8, 2004))

APPENDIX B
CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT VI

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C
18 U.S.C. §§ 3553 and 3742

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

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

(2) the need for the sentence imposed--
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued

under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.

(1) In general [Caution: In *United States v. Booker*, 2005 U.S. LEXIS 628, the Supreme Court held that 18 USCS § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform Act of 1984.]. Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 [18 USCS § 1201] involving a minor victim, an offense under section 1591 [18 USCS § 1591], or an offense under chapter 71, 109A, 110, or 117 [18 USCS §§ 1460 et seq., 2241 et seq., 2251 et seq., or 2421 et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating 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 greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a 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 lower than that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4),

the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements. If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,[.] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555 [18 USCS § 3555], the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

- (1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;
- (2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
- (3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that-- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 USCS § 848]; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3742. Review of a sentence

(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements. In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure--

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of

subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and (2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review. If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

- (1) that portion of the record in the case that is designated as pertinent by either of the parties;
- (2) the presentence report; and
- (3) the information submitted during the sentencing proceeding.

(e) Consideration [Caution: In *United States v. Booker*, 2005 U.S. LEXIS 628, the Supreme Court held (1) that 18 USCS § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform Act of 1984, and (2) that 18 USCS § 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised.]. Upon review of the record, the court of appeals shall determine whether the sentence--

- (1) was imposed in violation of law;**
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;**
- (3) is outside the applicable guideline range, and**
 - (A) the district court failed to provide the written statement of reasons required by section 3553(c) [18 USCS § 3553(c)];**
 - (B) the sentence departs from the applicable guideline range based on a factor that--**
 - (i) does not advance the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; or**
 - (ii) is not authorized under section 3553(b) [18 USCS § 3553(b)]; or**
 - (iii) is not justified by the facts of the case; or**
 - (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title [18 USCS § 3553(a)] and the reasons for the imposition of the particular sentence, as**

stated by the district court pursuant to the provisions of section 3553(c) [18
USCS § 3553(c)]; or
(4) was imposed for an offense for which there is no applicable
sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district
court to judge the credibility of the witnesses, and shall accept the findings of
fact of the district court unless they are clearly erroneous and, except with
respect to determinations under subsection (3)(A) or (3)(B), shall give due
deference to the district court's application of the guidelines to the facts. With
respect to determinations under subsection (3)(A) or (3)(B), the court of
appeals shall review de novo the district court's application of the guidelines
to the facts.

(f) Decision and disposition. If the court of appeals determines that--

(1) the sentence was imposed in violation of law or imposed as a result of an
incorrect application of the sentencing guidelines, the court shall remand the case
for further sentencing proceedings with such instructions as the court considers
appropriate;

(2) the sentence is outside the applicable guideline range and the district
court failed to provide the required statement of reasons in the order of judgment
and commitment, or the departure is based on an impermissible factor, or is to an
unreasonable degree, or the sentence was imposed for an offense for which there is
no applicable sentencing guideline and is plainly unreasonable, it shall state
specific reasons for its conclusions and--

(A) if it determines that the sentence is too high and the appeal has
been filed under subsection (a), it shall set aside the sentence and remand the case
for further sentencing proceedings with such instructions as the court considers
appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has
been filed under subsection (b), it shall set aside the sentence and remand the case
for further sentencing proceedings with such instructions as the court considers
appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the
sentence.

(g) Sentencing upon remand. A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 [18 USCS § 3553] and with such instructions as may have been given by the court of appeals, except that--

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that--

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) [18 USCS § 3553(c)] in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate. An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range. For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions. For purposes of this section--

(1) a factor is a "permissible" ground of departure if it--

(A) advances the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; and

(B) is authorized under section 3553(b) [18 USCS § 3553(b)]; and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

