

No. 05-XXXX

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

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

JOHN DOE**
Defendant/Appellant.

**On Appeal from the United States District Court
for the Eastern District of Virginia
Alexandria Division**

BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Jurisdiction 1

Statement of the Issues 2

Statement of the Case 2

Statement of Facts 2

Summary of Argument 7

Standard of Review 10

Argument 12

The Sentence Imposed by the District Court Upon John Doe Was Both Procedurally and Substantively Unreasonable Where the District Court Failed to Give an Adequate Statement of Reasons, Failed to Properly Consider All Relevant Factors in 18 U.S.C. § 3553(a), and Imposed a Sentence That Was Greater Than Necessary to Meet the Purposes of Sentencing 12

A. The District Court Failed to Provide an Adequate Explanation of Its Reasons for Selecting the Sentence, Thus Preventing Effective Appellate Review 14

B. The District Court Failed to Give Proper Consideration to All of the Relevant § 3553(a) Factors Before Imposing the Sentence 18

C. The District Court Erred by Treating the Guideline Range as Presumptively Appropriate or Predominant, Which Renders the Sentence Unreasonable	21
D. The Sentence Imposed in This Case Is Unreasonable in Light of the Relevant § 3553(a) Factors Because It Is Greater Than Necessary	24
Conclusion	20
Request for Oral Argument	31
Certificate of Compliance	
Certificate of Service	

TABLE OF AUTHORITIES

Cases

<i>United States v. Biheiri</i> , 356 F. Supp. 2d 589 (E.D. Va. 2005)	6
<i>United States v. Booker</i> , 125 S. Ct. 738 (2005)	<i>passim</i>
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005)	12, 23, 25
<i>United States v. Cupa-Guillen</i> , 34 F.3d 860 (9th Cir. 1994)	28
<i>United States v. Galvez-Barrios</i> , 355 F. Supp. 2d 958 (E.D. Wis. 2005)	28
<i>United States v. Gray</i> , 405 F.3d 227 (4th Cir. 2005)	17
<i>United States v. Hughes</i> , 401 F.3d 540 (4th Cir. 2005)	11, 18
<i>United States v. Iskander</i> , 407 F.3d 232 (4th Cir. 2005)	17
<i>United States v. Jackson</i> , 408 F.3d 301 (6th Cir. 2005)	16-17
<i>United States v. Mishoe</i> , 241 F.3d 214 (2d Cir. 2001)	26
<i>United States v. Myers</i> , 353 F. Supp. 2d 1026 (S.D. Iowa 2005)	23
<i>United States v. Pierce</i> , 409 F.3d 228 (4th Cir. 2005)	17
<i>United States v. Riggs</i> , 410 F.3d 126 (4th Cir. 2005)	17
<i>United States v. Skoczen</i> , 405 F.3d 537 (7th Cir. 2005)	11
<i>United States v. Webb</i> , 403 F.3d 373 (6th Cir. 2005)	12, 23, 25
<i>United States v. Zelaya</i> , 293 F.3d 1294 (11th Cir. 2002)	28

Statutes and Rules

8 U.S.C. § 1326 2, 3, 28

18 U.S.C. § 3231 1

18 U.S.C. § 3553 *passim*

18 U.S.C. § 3742 1, 20

28 U.S.C. § 1291 1

United States Sentencing Guidelines

U.S.S.G. § 2L1.2 3, 28

U.S.S.G. Ch. 4, pt. A, introductory cmt 28

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. That court entered the judgment of conviction and sentence on April 22, 2005. J.A. 97. John Doe timely filed his notice of appeal on April 29. J.A. 102. Therefore, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

The specific issue posed by this appeal is whether the sentence imposed by the district court upon John Doe was reasonable when the district court failed to provide an adequate statement of reasons, failed to consider all of the relevant factors in 18 U.S.C. § 3553(a), and imposed a sentence that was greater than necessary to achieve the purposes of sentencing. A more general issue at the heart of this appeal is what weight a district court should give to the federal sentencing guidelines now that they are advisory, or phrased another way, how shall a district court consider the advisory guideline range.

STATEMENT OF THE CASE

On February 3, 2005, John Doe was charged by indictment with one count of violating 8 U.S.C. § 1326. J.A. 5. Mr. Doe pled to the indictment without a plea agreement on February 7. J.A. 3, 15. The district court sentenced him on April 22, 2005, to 46 months in prison and three years of supervised release. J.A. 94, 97-99. Mr. Doe timely filed his notice of appeal from the sentence on April 29. J.A. 102-03.

STATEMENT OF FACTS

A grand jury sitting in the Eastern District of Virginia returned a one-count indictment against the appellant, John Doe, on February 3, 2005. The indictment

alleged that Mr. Doe was found in the United States after having been previously deported, in violation of 8 U.S.C. § 1326. J.A. 5.

Only four days later, on February 7, Mr. Doe pled to the indictment without a plea agreement. As part of his plea, he signed an extensive and highly-detailed statement of facts, which included information relating to a 1991 Texas conviction for drug distribution, an aggravated felony. *See* J.A. 7-12. Although the statement of facts indicates that Mr. Doe, a native of Honduras, has been deported from the United States three times, nothing in it suggests that he has previously been prosecuted for reentering the United States after being deported, even though the last deportation occurred in 1992.

The presentence report based the calculations for the advisory guideline range upon the statement of facts. For the offense of conviction, the probation officer applied U.S.S.G. § 2L1.2, beginning with a base offense level of 8 and adding 16 levels because of Mr. Doe's 1991 conviction. J.A. 120. The officer reduced the resulting level of 24 by 3 points because Mr. Doe had fully accepted responsibility for his offense. J.A. 111-12, 123. (Not only did he cooperate with the probation officer, J.A. 111, but he waived his preliminary hearing, did not contest his pre-trial detention, and pled guilty just four days after the indictment issued, J.A. 107.)

In regard to Mr. Montes-Pinedes' criminal history, the probation officer assigned 3 points to the 14-year-old drug conviction as to which the officer had

already added 16 points to the offense level. “According to police records . . . , during a controlled buy, the defendant delivered .2 grams of crack cocaine to an undercover officer. The record further reflect[ed],” according to the probation officer, “that at the time of the defendant’s arrest, officers found .16 grams of crack cocaine and 1.5 grams of marijuana among the defendant and two other co-defendants.” J.A. 112. Although sentenced to five years in prison, Mr. Doe served only a few months. J.A. 112, 115. Nothing in the presentence report suggested that he was involved in drug-dealing other than that one incident. *See* J.A. 105-31.¹ The only other conviction that Mr. Doe had was the misdemeanor first-offense DWI conviction in November 2004, as to which his license was suspended for twelve months, which received one criminal history point, and which resulted in Virginia law enforcement officials turning him over to federal immigration officials. J.A. 8-9, 113, 121. The only other arrest that Mr. Doe had been subjected to was in 1990, on an assault charge that was dismissed. J.A. 113. He had no other charges pending against him at the time of the instant offense. J.A. 113.

Mr. Doe’s final offense level was 21, and his criminal history category was III, which resulted in an advisory guideline range of 46-57 months. J.A. 123. Neither

¹ The drug arrest listed at page 114 of the joint appendix was a companion possession charge to the 1991 conviction that was dismissed when Mr. Doe was sentenced on the offense of conviction.

side objected to the calculation of the advisory guideline range or disputed any of the information contained in the report. J.A. 13, 15.

Counsel for Mr. Doe argued, both in writing and at sentencing, for a sentence imposed in accordance with 18 U.S.C. § 3553(a) that would be below the advisory guideline range. Counsel based her argument on several factors, including (1) the age and actual circumstances of the conviction used to triple his offense level; (2) Mr. Doe’s motivations for returning to the United States multiple times (to be with his girlfriend and their children, and to earn enough money for an operation on the cataracts in his eyes, J.A. 115, 116); (3) the disparate treatment Mr. Doe would receive at the hands of the Sentencing Guidelines because he was prosecuted in a district that does not have the “fast-track” downward departure program; and (4) the disparate treatment he would receive at the hands of the Bureau of Prisons because he was a removable alien. J.A. 17-18, 24-30, 88-90, 93-94.

In its written response, the government “submit[ted] that a sentence within the Guideline range [was] both reasonable and appropriate.” J.A. 72, 79. As the government specifically pointed out, Mr. Monte-Pineda’s “argument for a non-Guidelines sentence raise[d] the issue of what weight to accord the Guidelines in the § 3553 sentencing calculus post-*Booker*.” J.A. 74. The government suggested that the Guidelines should be given “a significant role,” relying on *United States v. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2005), for support. J.A. 74. While

acknowledging at the sentencing hearing that, technically, the Guidelines are now advisory, the government nonetheless took the position that the court had to stay within the Guidelines to avoid disparity and because the Guidelines already took into account the various factors of § 3553(a). J.A. 90-91 (stating that “[t]he Guidelines were designed to protect against the very disparity that the defendant now complains of” and that “[a]dhering to the Guidelines means that the Court does consider all of the factors and all of the wisdom and all of what was going into the Guidelines when they were trying to treat offenders and offenses similarly across the United States”).

The sentencing hearing, held on April 22, 2005, lasted only a few minutes. *See* J.A. 87-95. The court adopted the presentence report as its findings of fact. J.A. 88. During counsels’ arguments, the district court asked only two questions relating to their positions, one of each side. J.A. 90, 94.

In imposing sentence upon Mr. Doe, the district court explained very little about why it determined that 46 months (the low end of the advisory guideline range) was an appropriate term of imprisonment. The court stated only that “[t]he reason for the Court’s sentence is punishment and deterrence” and that “[t]he reason the Court feels punishment and deterrence in this case – and what disturbs me is the criminal history category of three, and I think that’s the reason that the Court feels that the 46 months of the advisory Guidelines is appropriate in this case.” J.A. 95. The court did

not address, either in imposing sentence or earlier in the sentencing hearing, the multiple grounds argued by defense counsel for a sentence imposed pursuant to the factors required by 18 U.S.C. § 3553(a).

SUMMARY OF ARGUMENT

In light of the Supreme Court’s decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the sentences imposed upon federal criminal defendants are now to be reviewed for “reasonableness.” This review involves two components: review for procedural compliance, and review of the length of the sentence in light of the factors in 18 U.S.C. § 3553(a) that a district court must consider.

Given these considerations, it is readily apparent that the sentence imposed by the district court upon John Doe was not reasonable for four reasons. First, the district court failed to provide an adequate statement of reasons justifying the sentence that the court imposed. Although district courts have been required for some time to provide statements of reasons by § 3553(c), the replacement of the U.S. Sentencing Guidelines with § 3553(a) as the driving force behind federal sentencing decisions makes district court compliance with § 3553(c) critical for appellate courts to be able to conduct their review effectively. The district court in this case provided practically no reasoning for its decision to sentence John Doe to 46 months in prison. Therefore, this Court must find the sentence to be procedurally unreasonable.

Second, and closely related, the district court further erred when the court failed to consider, on the record, the factors governing the length of a sentence specified in 18 U.S.C. § 3553(a). Although theoretically required under the pre-*Booker* mandatory Guidelines regime, district courts, as a practical matter, rarely considered the § 3553(a) factors separate and apart from the Guidelines. *Booker*, of course, has changed that approach. Now district courts “shall” consider the factors in the course of determining what sentence “is sufficient but not greater than necessary” in a particular case. To demonstrate consideration, district courts must therefore state on the record what factors were considered and what weight was accorded to each of them. The district court in this case, however, failed to do this. The court relied only cursorily on one factor, deterrence, and failed to explain at all why the factors argued by defense counsel did not warrant a lower sentence than the 46 months the court selected. For this reason as well, then, this Court should find the sentence to be procedurally unreasonable.

Third, the district court erred when it gave overriding consideration to the advisory guideline range, such that the court rendered the range effectively mandatory again, and to only one of the four purposes of sentencing, deterrence. As both § 3553(a) itself and *Booker* make clear, no single factor is to be given any more weight than another relevant factor in the sentencing determination. Thus, as several courts have already recognized, the advisory guideline range cannot be deemed to be

presumptively reasonable. Similarly, undue weight cannot be given to any other single factor to the exclusion of other relevant factors. To the extent that the district court's minimal explanation of its sentence can shed any light on its thought process, it is apparent that the court gave far too much weight to the guideline range and to deterrence, again without explaining why the other relevant factors did not justify a lower sentence.

Fourth and finally, in light of all the relevant factors under § 3553(a), the sentence that was imposed violated that statute, as the sentence was greater than necessary to accomplish the goals of sentencing. To begin, the 46-month sentence was far greater than necessary in light of the facts that Mr. Doe has never before been prosecuted for illegal reentry and that on his one other felony conviction (from 1991) he served only a few months. Next, in light of the fact that the prior conviction was used to increase his sentence in three different ways, the low end of the guideline range was also unreasonable. Finally, the sentence was unreasonable because it creates an unwarranted disparity based on the chance fact of the geographic location of the prosecution. Had Mr. Doe's case arisen in a "fast-track" district, he likely would have received a lower sentence, either because he would have received a downward departure, or because his prior conviction would not have been used to triple his offense level as well as to boost his criminal history score.

For all of the above reasons, this Court should vacate Mr. Doe’s sentence and remand the case for resentencing.

STANDARD OF REVIEW

After *United States v. Booker*, 125 S. Ct. 738 (2005), this Court now reviews the sentence imposed upon a federal criminal defendant for “reasonableness.” *See* 125 S. Ct. at 765. Although the Supreme Court did not fully explain how this standard would apply, it did provide at least two clues. First, the Court observed that “Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.” 125 S. Ct. at 765-66. This observation indicates that review for reasonableness must be in reference to all of the applicable factors referenced in 18 U.S.C. § 3553(a), not just the Guidelines. Second, the Supreme Court stated that “the [Sentencing Reform] Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guideline range in the exercise of his discretionary power under § 3553(a)).” 125 S. Ct. at 765. This statement strongly suggests that a sentence within the advisory guideline range is not automatically reasonable, but instead must be reasonable under *all* of the applicable § 3553(a) factors. *See Booker*, 125 S. Ct. at 794 (Scalia, J., dissenting) (criticizing remedy majority for having reasonableness

review “apply across the board, even to sentences within ‘the applicable guideline range,’ where there is no legal error or misapplication of the Guidelines”).

The Fourth Circuit has not yet spoken on what review for reasonableness entails in the context of an appeal of a sentence imposed after *Booker*. In *United States v. Hughes*, however, which involved a sentence imposed before *Booker*, the Court explained that review for reasonableness entails consideration of at least two components, one procedural and one substantive. *United States v. Hughes*, 401 F.3d 540, 556 n.14 (4th Cir. 2005). More specifically, “[t]he determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also on the method employed in determining it.” *Id.* Further, if the district court errs in any way, for example by miscalculating the guideline range, then the sentence will likely be found unreasonable. *See United States v. Skoczen*, 405 F.3d 537, 549 (7th Cir. 2005) (stating that “[e]ven under an advisory regime, if a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error”).

The Second and Sixth Circuits also agree that process as well as substance factor into the reasonableness of the sentence imposed by a district court. *See United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005) (stating that “we read *Booker* as instructing appellate courts in determining reasonableness to consider not only the length of the sentence but also the factors evaluated and the procedures employed by

the district court in reaching its sentencing determination”); *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005) (stating that “[i]n considering appellate review of sentences under the now applicable standard of ‘reasonableness,’ we first note that review for ‘reasonableness’ is not limited to consideration of the length of the sentence” and that “[i]f a sentencing judge committed a procedural error by selecting a sentence in violation of applicable law, and that error is not harmless . . . the sentence will not be found reasonable”) (internal citation omitted).

ARGUMENT

THE SENTENCE IMPOSED BY THE DISTRICT COURT UPON John Doe WAS BOTH PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE WHERE THE DISTRICT COURT FAILED TO GIVE AN ADEQUATE STATEMENT OF REASONS, FAILED TO PROPERLY CONSIDER ALL RELEVANT FACTORS IN 18 U.S.C. § 3553(A), AND IMPOSED A SENTENCE THAT WAS GREATER THAN NECESSARY TO MEET THE PURPOSES OF SENTENCING

Prior to the Supreme Court’s decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the mandatory application of the U.S. Sentencing Guidelines was the driving force in federal criminal sentencing. As the Supreme Court noted, “[w]hile subsection (a) of [18 U.S.C.] § 3553 . . . lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court ‘shall impose a sentence of the kind, and within the range’ established by the Guidelines, subject to departures in specific, limited cases.” 125 S. Ct. at 750 (emphasis in

original). However, in order to solve the Sixth Amendment problem inherent in the application of mandatory guidelines based on judicial fact-finding, the Court eliminated from the statute the command that a court must impose a Guideline sentence. As a result, the guideline range is now only one of many factors to be considered at sentencing.

Taking the place of the Guidelines as the driving force in criminal sentencing is the sentencing mandate found in § 3553(a). That mandate requires that a district court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” Those purposes, which are fourfold, are:

(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

18 U.S.C. § 3553(a)(2). In order to fashion a sentence that fulfills these purposes, the district court must also consider (a) the nature and circumstances of the offense and the history and characteristics of the defendant; (b) the kinds of sentences available;

(c) the range calculated under the now-advisory Sentencing Guidelines; (d) the need to avoid unwarranted sentencing disparities; and (e) the need for restitution. 18 U.S.C. § 3553(a)(1), (3)-(7). Finally, “[t]he 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).

The district violated § 3553 when it imposed its sentence upon Mr. Montes-John. First, the court failed to provide an adequate statement of reasons as required by § 3553(c). Relatedly, the court failed to consider, on the record, the factors that it was required to consider under § 3553(a). Finally, the court violated the overarching principle of § 3553(a) when it imposed a sentence that was greater than necessary because it treated the advisory guideline range as presumptively appropriate. Mr. Doe addresses each of these in turn.

A. The District Court Failed to Provide an Adequate Explanation of Its Reasons for Selecting the Sentence, Thus Preventing Effective Appellate Review

The Supreme Court’s decision in *Booker* has rendered the statement of reasons given by a district court of critical importance for appellate review. A court of appeals cannot determine if a sentence is reasonable without an adequate explanation of reasons for its imposition. Further, the appellate court cannot determine if the district court complied with § 3553(a)’s requirement that it consider various factors. Whereas before *Booker*, when the Guidelines were mandatory and drove a district

court's determination of a sentence, that court could get by with providing only a very minimal statement of reasons if the guideline range was less than 24 months. *See* 18 U.S.C. § 3553(c)(1). But after *Booker*, this is no longer the case, because the decision clearly contemplates appellate review of sentences within the guideline range even when that range is less than 24 months. *See Booker*, 125 S. Ct. at 765 (stating that “the [Sentencing Reform] Act continues to provide for appeals from sentencing decisions (*irrespective of whether the trial judge sentences within or outside the Guideline range* in the exercise of his discretionary power under § 3553(a))”) (emphasis added). Accordingly, it is imperative that a district court give a statement of reasons sufficiently detailed to allow proper appellate review.

In Mr. Doe's case, the district court failed to provide a sufficient statement of reasons to enable this Court to review the reasonableness of the sentence it imposed. The sum total of the district court's statement at the sentencing was that “[t]he reason for the Court's sentence is punishment and deterrence” and that “[t]he reason the Court feels punishment and deterrence in this case – and what disturbs me is the criminal history category of three, and I think that's the reason that the Court feels that the 46 months of the advisory Guidelines is appropriate in this case.” J.A. 95. The district court provided no written justification other than to check off two boxes on the statement of reasons – a boilerplate form that had not been updated to reflect

the fact that the Guidelines are now advisory. J.A. 131 (AO 245 S (Rev. 3/99)(EDVA rev.) Sheet).

The utter insufficiency of the district court's statement of reasons is illustrated by comparison to a recent Sixth Circuit case. *United States v. Jackson*, 408 F.3d 301 (6th Cir. 2005), involved a pre-*Booker* sentence resulting from a downward departure as to which the district court orally gave several reasons and, in a memorandum opinion, gave no less than seven reasons justifying the extent of the departure. *Id.* at 303-04. The Sixth Circuit held that "even post-*Booker*, the list provided by the district court, without any accompanying analysis, is insufficient to justify the sentence imposed, as it renders our reasonableness review impossible." *Id.* at 305. "Although we are fully cognizant of the fact that district courts are no longer bound by the Guidelines in the manner they once were," the court continued, "we nonetheless find that, pursuant to *Booker*, we as an appellate court must still have the articulation of the reasons [as to why] the court reached the sentence ultimately imposed, as required by 18 U.S.C. § 3553(c)." *Id.* The Sixth Circuit concluded that "*Booker* requires an acknowledgment of the defendant's applicable Guidelines range as well as a discussion of the reasonableness of a variation from that range. Further, in determining the sentence, the district court must consider the advisory provisions of the Guidelines and the other factors identified in 18 U.S.C. § 3553(a)." *Id.*

Although *Jackson* involved a sentence below the guideline range, its conclusion applies equally to sentences within a guideline range, especially when a defendant's request for a sentence under the range has been declined by the district court.² Applying its requirements to this case, it is beyond question that the district court in this case provided practically no reasons at all for its sentence. Though the

² This Court has suggested in several published opinions (and numerous unpublished opinions) that post-*Booker*, a district court must do more to justify a sentence that is outside of the advisory guideline range than when the sentence is within the range. See, e.g., *United States v. Riggs*, 410 F.3d 126, 137 (4th Cir. 2005); *United States v. Pierce*, 409 F.3d 228, 235 n.7 (4th Cir. 2005); *United States v. Iskander*, 407 F.3d 232, 243 n.12 (4th Cir. 2005); *United States v. Gray*, 405 F.3d 227, 244 n.10 (4th Cir. 2005). This requirement is both unsupported and unsupportable. As to the latter, nothing in *Booker* requires greater justification of a sentence when it is outside the range. To the contrary, as suggested twice above, *Booker* contemplates equal review of the reasonableness of *all* sentences, whether within or without the range.

As to the latter, requiring less justification for a sentence in a guideline range effectively creates the presumption that such a sentence will always be reasonable – which in turn effectively renders the Guidelines mandatory again by creating a strong incentive for judges to stay within the guideline range because they can forego the time and energy needed to write a full-blown memorandum opinion in support of a lower sentence. See *Booker*, 125 S. Ct. at 795 (Scalia, J., dissenting) (asking whether “appellate review for ‘unreasonableness’ [will] preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges”). Further, it makes no sense to require a greater justification of a sentence just barely below the low end of a guideline range than for one that is years over that low end, for example, where a guideline range is 30 years to life, requiring a more complete statement of reasons for a 29-year sentence than for a 40- or 50-year, or even life-long sentence. Criminal defendants, the government, and the public are all equally entitled to have *every* sentence carefully explained, no matter where the sentence falls in relation to the advisory guideline range.

court did acknowledge the applicable guideline range, J.A. 88, it stated only that it thought that 46 months would deter Mr. Doe based on his criminal history. J.A. 95. In no way did the district court explain why it was rejecting Mr. Doe's request for a lower sentence, nor is there anything to suggest that the court considered the many factors other than deterrence contained in § 3553. The district court therefore committed procedural error that renders the sentence imposed unreasonable. *See United States v. Hughes*, 405 F.3d 540, 556 n.14 (4th Cir. 2005). Accordingly, this Court must vacate the sentence for this reason alone.

B. The District Court Failed to Give Proper Consideration to All of the Relevant § 3553(a) Factors Before Imposing the Sentence

The opening text of § 3553(a) includes the requirement that “[t]he court, in determining the particular sentence to be imposed, shall consider” the various factors that follow. Prior to *Booker*, whereas district courts were in theory required to consider all of the factors in § 3553(a) in imposing sentences under the Guidelines, in reality, few if any courts actually did so because the mandatory nature of the Guidelines and limited bases for departure precluded full consideration of all relevant factors.

Now that the Guidelines are advisory, however, and only one factor to be considered, it is beyond doubt that a district court must return to the prefatory directive and consider as many factors as are relevant to the particular case before it.

In addition to the Guidelines, therefore, the court should consider at a minimum the following factors, as they will be relevant in every case to determining what sentence is sufficient but not greater than necessary: the nature and circumstances of the offense and the history and characteristics of the defendant, the kinds of sentences available, the need for the sentence to reflect the seriousness of the offense, respect for the law, adequate deterrence of the defendant and protection of the public, and avoidance of unwarranted disparity. *See* 18 U.S.C. § 3553(a). It is only through a district court's on-the-record explanation of its balancing of these factors in a particular case that this Court can fulfill its responsibilities under *Booker*.

In failing to give an adequate statement of reasons in Mr. Doe's case, including the factors specifically raised by Mr. Doe in support of his argument for a particular sentence that was lower than what the Guidelines suggested, the district court failed to demonstrate that it considered and balanced all of the relevant § 3553(a) factors. Therefore, the court imposed the sentence in violation of law. That is, by essentially considering only the applicable guideline range, the district court effectively treated the Guidelines as still mandatory, or at least as the predominant factor, rather than as advisory and as only one of multiple factors that § 3553(a) – and *Booker* – require it to consider.

Mr. Doe does not suggest that a district court must always consider every factor, as he recognizes that not every factor will be present in every case. However,

when a defendant has brought specific factors to the district court’s attention, as here, the court must at least address them and explain why it finds that they do not warrant a sentence different from the guideline range.

Accordingly, this Court should rule that, at least in post-*Booker* cases such as this in which the defendant has presented arguments concerning specific non-guideline § 3553(a) factors, the district court must articulate its analysis of the § 3553(a) factors. The district court’s failure in the instant case to analyze the non-guideline § 3553(a) factors on the record precludes this Court’s determination of whether the district court appropriately considered the required factors and whether its conclusions were reasonable. This Court should rule, therefore, that the lack of specificity with respect to the non-guideline § 3553(a) factors renders the sentence in this case procedurally unreasonable and thus imposed in violation of law. *See* 18 U.S.C. § 3742(f)(1) (where “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”).

C. The District Court Erred by Treating the Guideline Range as Presumptively Appropriate or Predominant, Which Renders the Sentence Unreasonable

If this Court were to conclude that the statement of reasons and consideration of § 3553(a) factors by the district court were in fact sufficient to permit the Court to

review Mr. Doe’s sentence for reasonableness, then Mr. Doe make two additional arguments as to why the sentence is not reasonable. First, the district court implicitly treated the advisory guideline range as predominant rather than one of many considerations. Similarly, the court gave too much weight to one purpose of sentencing, deterrence, when it should have considered additional factors.

After *Booker*, it is clear that the sentencing range called for by the Guidelines is but one factor among many relevant to the sentencing decision. See 18 U.S.C. § 3553(a)(4). Importantly, § 3553(a) creates no order of priority among the listed factors. Rather, its plain language and structure indicate that each is to be treated equally.

Justice Breyer’s majority opinion acknowledges and adopts this reading of § 3553(a). As it described the post-*Booker* sentencing world, the Sentencing Act, excised of its unconstitutional mandatory provisions,

requires judges to consider the Guidelines “sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,” . . . the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims The Act [further] requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocation training and medical care.

125 S. Ct. at 764-65. This is, of course, but a paraphrase of § 3553(a). Primacy is not awarded to any specific factor. And while Justice Breyer emphasizes that a court must still “consider,” “consult,” and “take account of” the Guidelines-determined range under § 3553(a), *id.* at 764, 766, he also directs that a court must consider, consult, and take account of *all* the factors in § 3553(a). *Id.* Nowhere in *Booker* is there a statement or sentiment that the Guidelines range should be considered controlling or even presumptively correct.³

For these reasons, a sentence imposed within the advisory Guideline range cannot be deemed *per se* reasonable, because the Guidelines cannot be treated as the predominant factor. The Sixth Circuit, in rejecting such a *per se* conclusion, noted that such a test “is not only inconsistent with the meaning of ‘reasonableness,’ but is also inconsistent with the Supreme Court’s decision in *Booker*, as such a standard ‘would effectively re-institute mandatory adherence to the Guidelines.’” *United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005) (quoting *United States v.*

³ Indeed, such a reading would contradict the clear language and structure of § 3553(a), as well as the holding of Justice Stevens’s majority opinion that mandatory Guidelines violate the Sixth Amendment. As Justice Stevens noted, “judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C.A. § 3553(a).” 125 S. Ct. at 787 (Stevens, J., dissenting) (emphasis in original). And as Justice Scalia observed, “The statute provides no order of priority among all [the] factors” *Booker*, 125 S. Ct. at 790 (Scalia, J., dissenting).

Crosby, 397 F.3d 103, 115 (2d Cir. 2005)); *see also United States v. Myers*, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005) (stating that “[t]o treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified reasons” and that “[i]f presumptive, the Guidelines would continue to overshadow the other factors listed in section 3553(a), causing an imbalance in the application of the statute to a particular defendant by making the Guidelines, in effect, still mandatory”). A sentence can be reasonable only if it is “sufficient, but not greater than necessary” to comply with the purposes of sentencing set forth in § 3553(a)(2), after considering all the relevant factors of § 3553(a).

Finally, and relatedly, because no “order of priority” among these factors exists either in § 3553(a) or *Booker*, a sentencing court cannot give undue weight to any particular factor, whether the Guideline range or another one. As the Sixth Circuit suggested in its *Webb* decision, a sentence may be vacated on appeal when there is “evidence in the record that the district judge acted unreasonably by . . . giving an unreasonable amount of weight to any pertinent factor.” 403 F.3d at 385.

In sentencing Mr. Doe to the low end of the advisory guideline range, the district court stated that “[t]he reason for the Court’s sentence is punishment and deterrence” and that “[t]he reason the Court feels punishment and deterrence in this case – and what disturbs me is the criminal history category of three, and I think

that’s the reason that the Court feels that the 46 months of the advisory Guidelines is appropriate in this case.” J.A. 95. By relying solely on the criminal history category – which represented one half of the guideline range calculus, and which was driven by the very same conviction that was also was used to triple the offense level – the district court placed undue emphasis on the advisory guideline range. And by implicitly refusing to consider any § 3553(a) factor other than deterrence to impose a sentence in keeping with the purposes of sentencing , the district court effectively treated the Guidelines as mandatory. This cannot be deemed reasonable.

D. The Sentence Imposed in This Case Is Unreasonable in Light of the Relevant § 3553(a) Factors Because It Is Greater Than Necessary

The final reason why the sentence in this case is unreasonable is because the one § 3553(a) factor expressly articulated by the district court, deterrence, is insufficient, by itself, to justify the 46-month sentence, especially when balanced with the other factors argued by counsel below. As explained above, the mere fact that the 46-month sentence falls within the applicable Guidelines range does not immunize it from reversal on appeal. *E.g.*, *Crosby*, 397 F.3d at 115; *Webb*, 403 F.3d at 385 n.9; *see also Booker*, 125 S. Ct. at 791 n.4 (Scalia, J., dissenting) (arguing that although “the Guidelines represent what the Sentencing Commission ‘finds to be better sentencing practices’ . . . the Commission’s view of what is ‘better’ is no longer

authoritative, and district judges are free to disagree – as are appellate judges”). Indeed, in this particular case, the 46-month sentence – which falls within the 46 to 57 months range determined by the presentence report and advocated by the government – is unreasonable on several grounds.

First, the sentence imposed by the district court upon Mr. Doe in order to deter him from returning to this country after he is deported is far greater than necessary to achieve that goal in light of Mr. Doe’s history. Although it is true that he has returned to the United States several times after being deported, it bears noting that the United States had previously taken no steps whatsoever to deter Mr. Doe from reentering this country prior to this prosecution. Although it could have prosecuted him as early as 1992 for reentering after being deported following conviction of an aggravated felony, the government failed to do so. Further, when Mr. Doe applied for temporary protective status (“TPS”) in 1999, the government inadvertently issued him an employment authorization. J.A. 108. Finally, although immigration officials subsequently discovered Mr. Doe’s prior conviction and deportation history, they did nothing beyond denying his application for TPS. J.A. 108. As a result of the government’s oversight, Mr. Doe was never prosecuted for illegal reentry until this case, thus lulling him into thinking that his reentries, while perhaps prohibited, were not criminal. In light of these unique combination of circumstances, a sentence of 24

months would have been sufficient for this first offense, but not greater than necessary, to deter him from entering the United States another time.

Further, the 46-month sentence actually imposed is far greater than necessary to achieve deterrence in light of Mr. Doe’s prior punishments for criminal offenses. As the Second Circuit has explained in *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), although a lengthy sentence may be necessary to “achieve a deterrent effect that [] prior punishments failed to achieve,” there must be “an appropriate relationship between the sentence for the current offense and the sentences, *particularly the times served*, for the prior offenses.” *Id.* at 220 (emphasis added). No such “appropriate relationship” exists in this case.

The most time that Mr. Doe had previously spent in prison was for a fourteen-year-old drug conviction, for which he received a sentence of five years. J.A. 112. However, he actually spent only about five *months* on that sentence before being released. J.A. 115. And as to his one other conviction, the 2004 misdemeanor DWI charge (sustained thirteen years after his first conviction), his only punishment was suspension of his driver’s license for twelve months. J.A. 113. Thus, Mr. Doe spent only a total of five months in custody for the 1991 conviction, which was the only sentence that he had served before committing the instant offense.

In light of this history, a 46-month sentence – multiplying by nearly ten times the amount of time that Mr. Doe had ever spent in prison on a prior conviction – is

far greater than necessary to achieve deterrence. It must therefore be vacated as unreasonable.

Moreover, the sentence was far greater than necessary when viewed in light of the other purposes and factors to be considered under § 3553(a). First, in regard to the specifics of the offense, the government did not dispute that Mr. Doe returned to this country to try to obtain a better life for himself by being with his children and earning enough money to pay for an operation on his eyes. J.A. 17, 88-89, 115; *see also* J.A. 13, 72-79, 90-93. He did not come back with the intent to commit more crimes, as the thirteen-year period between his only two convictions demonstrates.

Further, in regard to his criminal history, which the district court deemed so troubling and which the government grossly mischaracterized, *see* J.A. 75-76, he had only one felony conviction, which was fourteen years old, for distributing a very small amount of crack cocaine. Nothing in the record indicates that he was in any way a drug dealer, much less a large-scale drug dealer. Further, the state of Texas deemed it safe to release him after he had served only about ten percent of the mandatory minimum sentence. Moreover, despite the age and low-level nature of that conviction, it was nonetheless used in two other ways to increase Mr. Doe's punishment beyond simply raising his criminal history score. First, it was used to increase the statutory maximum that he faced from two to twenty years. *See* 8 U.S.C. 1326(a), (b). Second, it was used again to triple his base offense level, increasing it

from a level 8 to a level 24. Yet, all three increases serve the exact same purpose.⁴ And finally, as to the recent DUI conviction, he received only a suspension of his driver's license. Thus, placing Mr. Doe in criminal history category III not only overrepresented the seriousness of his prior convictions but also dramatically increased his overall sentencing exposure.

Finally, the geographic differences in sentencing in illegal reentry cases warranted a lower sentence because of “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). Permitting such disparity to exist based solely on the general prosecutorial resource needs of the government⁵ violates this

⁴ The criminal history category is designed to reflect culpability and increased need for deterrence. See U.S.S.G. Ch. 4, pt. A, introductory cmt. (2004). The rationale of 8 U.S.C. § 1326(b), the statute authorizing § 2L1.2, is no different. See, e.g., *United States v. Zelaya*, 293 F.3d 1294, 1298 (11th Cir. 2002) (noting that a “purpose of the statute is to provide a *greater deterrence* to illegal entry by a deportee who has earlier committed a serious crime while in the United States” (emphasis added)); *United States v. Cupa-Guillen*, 34 F.3d 860, 863 (9th Cir. 1994) (citing the “strong societal interest” in “enhancing *punishment* against persons who illegally enter the country after having previously committed aggravated felonies”) (emphasis added). “Although it is sound policy to increase a defendant’s sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis.” *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005).

⁵ This basis is a red herring. The question is whether this sentencing disparity is “unwarranted.” The impetus for such programs is undoubtedly the high number of illegal reentry prosecutions along the southwest border, such as in the Districts of Arizona or Southern California, and the need for the government to efficiently
(continued...)

directive. While the government argued below that Mr. Doe was not similarly situated to other defendants because he did not meet all the criteria for the “fast-track” program in place in districts other than the Eastern District of Virginia, J.A. 78-79, 92, that argument does not implicate either the record or the conduct of the defendant, which is the disparity to be avoided, as the government itself acknowledged at Mr. Doe’s sentencing hearing. J.A. 91 (stating that “[y]ou need to look at the offender and the offense conduct in order to make any kind of meaningful analysis of whether there was disparate treatment”). Moreover, in regard to disparate treatment between offenders committing similar conduct who have similar records, the government itself affirmatively acknowledged that this occurs when it explaining a second form of fast-track program, in which defendants who have aggravated felony convictions are “treated as garden-variety reentry after deportation case[s], which makes the Guidelines much lower.” J.A. 92. Thus, in light of this sentencing directive as well as the other factors in § 3553(a), the 46-month sentence was much greater than necessary.

⁵ (...continued)

respond to burgeoning immigration dockets in those areas. Had fast-track programs been limited to those districts, the government would have an argument that such sentencing disparities were warranted due to the need for increased efficiency and conservation of prosecutorial resources. However, the Attorney General has authorized fast-track programs in districts facing far lighter immigration caseloads than the Eastern District of Virginia, including in Idaho, Nebraska, and North Dakota.

CONCLUSION

For the reasons stated above, the district court's sentence cannot be deemed reasonable when the court provided an insufficient justification for its imposition and it was greater than necessary to achieve the four purposes of sentencing. Therefore, the sentence must be vacated and the case remanded for resentencing.

Respectfully submitted this 27th day of July, 2005.

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REQUEST FOR ORAL ARGUMENT

Counsel for appellant asserts that the issues raised in this brief may be more fully developed through oral argument, and respectfully requests the same.

CERTIFICATE OF COMPLIANCE

1. This brief of the appellant has been prepared using WordPerfect 9 software, Times New Roman font, 14 point proportional type size.
2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of authorities; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, this brief contains thirty (30) pages.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

Date

Suzanne Little
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Brief of Appellant and of the Joint Appendix were sent by Federal Express, second day delivery, to

Louis Joseph Ruffino
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on this 27th day of July, 2005.

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