



imposed pursuant to the Federal Sentencing Guidelines” in the cases before the Court. Id. at 751. Accordingly, reaffirming its holding in Apprendi, the Court concluded that

[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Id. at 756.<sup>1</sup>

Based on this conclusion, the Court further found those provisions of the federal Sentencing Reform Act of 1984 that make the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) or which rely upon the Guidelines’s mandatory nature, 18 U.S.C. § 3742(e), incompatible with its Sixth Amendment holding. Booker, 125 S. Ct. at 756. Accordingly, the Court severed and excised those provisions, “mak[ing] the Guidelines effectively advisory.” Id. at 757.

Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by Booker,

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<sup>1</sup> It should be noted that the fact-of-prior-conviction exception to the Apprendi rule is based on Almendarez-Torres v. United States, 523 U.S. 224 (1998). But the continued vitality of this case and the exception it created has been called into question not only by the broad reasoning of Booker itself, which would seem to apply to all enhancement facts, including facts of prior conviction, but also more recently by Shepard v. United States, 125 S. Ct. 1254 (2005). Shepard sharply limits the Almendarez-Torres exception to the fact of prior conviction as determined by the judicial record, and excludes facts about the conviction which are not contained in such conclusive records. As Justice Thomas notes, moreover, five justices agree that Almendarez-Torres was wrongly decided. 125 S. Ct. at 1264 (Thomas, J., concurring).

requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a).

Booker, 125 S. Ct. at 757. Thus, under Booker, sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. § 3553(a).

The primary directive in Section 3553(a) is for sentencing courts to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.” Section 3553(a)(2) states that such purposes 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 in the most effective manner.

In determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

- 1) “the nature and circumstances of the offense and the history and characteristics of the defendant” (§ 3553(a)(1);
- 2) “the kinds of sentences available” (§ 3553(a)(3);
- 3) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6); and
- 4) “the need to provide restitution to any victims of the offense.” (§ 3553(a)(7).

Other statutory sections also give the district court direction in sentencing.

Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to “recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation” (emphasis added).

Under 18 U.S.C. § 3661, “*no limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence” (emphasis added). This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as “not ordinarily relevant” to sentencing a variety of factors such as the defendant’s age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. *See* U.S.S.G. § 5H1. *See also* United States v. Nellum, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.) (taking into account fact that defendant, who was 57 at sentencing, would upon his release from prison have a very low likelihood of recidivism since recidivism reduces with age; citing Report of the U.S. Sentencing Commission, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines*, May 2004); United

States v. Naylor, \_\_ F. Supp. 2d \_\_, 2005 WL 525409, \*2, 2005 U.S. Dist. LEXIS 3418 (W.D. Va. Mar. 7, 2005) (Jones, J.) (concluding that sentence below career offender guideline range was reasonable in part because of defendant's youth when he committed his predicate offenses – he was 17 – and noting that in Roper v. Simmons, 125 S. Ct. 1183, 1194-96 (2005), the Supreme Court found significant differences in moral responsibility for crime between adults and juveniles).

The directives of Booker and § 3553(a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be “inconsistent with the holdings of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in Booker, directing courts to consider all of the § 3353(a) factors, many of which the guidelines either reject or ignore.” United States v. Ranum, 353 F. Supp. 2d 984, 985-86 (E.D. Wisc. Jan. 19, 2005) (Adelman, J.). As another district court judge has correctly observed, any approach which automatically gives “heavy” weight to the guideline range “comes perilously close to the mandatory regime found to be constitutionally infirm in Booker.” United States v. Jaber, \_\_ F. Supp. 2d \_\_, 2005 WL 605787 \*4 (D. Mass. March 16, 2005) (Gertner, J.). See also United States v. Ameline, 400 F.3d 646, 655-56 (9th Cir. Feb. 9, 2005) (advisory guideline range is “only one of many factors that a sentencing judge must consider in determining an

appropriate individualized sentence”), reh’g en banc granted, 401 F.3d 1007 (9<sup>th</sup> Cir. 2005).

Justice Scalia explains the point well in his dissent from Booker’s remedial holding:

Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise – if it thought the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but had generally to be followed – its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part). Likewise, if the remedial majority thought the guidelines had to be given “heavy weight,” its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In sum, in every case, a sentencing court must now consider all of the § 3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing. And where the guidelines conflict with other sentencing factors set forth in § 3553(a), these statutory sentencing factors should generally trump the guidelines. See United

States v. Denardi, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J, concurring in part, dissenting in part) (arguing that since § 3553(a) requires sentence be no greater than necessary to meet four purposes of sentencing, imposition of sentence greater than necessary to meet those purposes violates statute and is reversible, even if within guideline range).

**Application of the Statutory Sentencing Factors  
to the Facts of this Case**

In the present case, the following factors must be considered when determining what type and length of sentence is sufficient, but not greater than necessary, to satisfy the purposes of sentencing:

**1. The Nature and Circumstances of the Offense and the History and Characteristics of the Offender**

**(a) Nature and Circumstances of Offense**

[Detail any sympathetic factors relating to the offense.]

**(b) History and Characteristics of Mr. Doe**

[Detail any sympathetic factors relating to the defendant.]

**2. The Need for the Sentence Imposed To Promote Certain Statutory Objectives:**

**(A) to reflect the seriousness of the offense, promote respect for the law, and 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**

**(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**

In Booker, the Supreme Court severed and excised 18 U.S.C. § 3553(b), the portion of the federal sentencing statute that made it mandatory for courts to sentence within a particular sentencing guidelines range. Booker, 125 S. Ct. at 756. This renders the sentencing guidelines advisory. Id. [Cite to 18 U.S.C. §§ 3551, 3559, 3561, 3571, 3581 for the types of available sentences based upon defendant's conviction.]

[See argument in *Booker* Litigation Strategies Manual regarding probationary and split sentences: § IV, J].

[For cases involving offenses committed pre-Booker, consider including here the due process/ex post facto argument that the sentence cannot exceed the top of the guideline range as calculated on the basis of facts proven to the jury or admitted by the defendant. See Booker Litigation Strategies Manual, § IV, D and E.]

### **4. The Sentencing Range Established by the Sentencing Commission**

[Argue for what you contend is the correct guideline range under the provisions of the guidelines, then argue for any traditional downward departures that are available under the guidelines and case law. Next, explain why the guideline range does not adequately reflect the

defendant’s conduct, personal history, etc.]

**5. The Need To Avoid Unwarranted Disparities**

[Discuss any disparity among similarly situated defendants, especially co-defendants or other defendants who have been sentenced in your district. See arguments in regarding disparity in crack cocaine, career offender, and illegal reentry cases in “*Booker* Litigation Strategies Manual” § IV, I]

**6. The need to provide restitution to any victims of the offense**

[If your client is employed and restitution is owed, argue for a non-custodial sentence which would allow your client to continue working and make restitution in a timely fashion.]

\* \* \* \* \*

**[Include any of the following specific objections to statutory enhancements that are applicable in your case]**

**Objection to Application of the Statutory Recidivist Enhancement  
On the Ground that the Alleged Prior Convictions do not Qualify  
Under the “Categorical Approach”**

[Insert here any argument you may have to challenge the applicability of the recidivist enhancement on the ground that, applying the Taylor and Shepard “categorical approach,” the prior convictions do not qualify under the definitions set out in the recidivist statute involved in this case: 18 U.S.C. § 924(e) (ACCA), or 8 U.S.C. § 1326(b) (illegal reentry), or 21 U.S.C. § 841(b) (controlled substances) or 18 U.S.C. § 2241 (sexual abuse). Use arguments set out in “Recidivist Enhancements in the Aftermath of *U.S. v. Shepard*” (by Felicia Sarner) and “*Booker* Litigation Strategies Manual” § IV, M.]

[Note that in drug trafficking cases in which the government has filed

an information under 21 U.S.C. § 851 alleging prior convictions triggering a mandatory minimum penalty under 21 U.S.C. § 841(b), you should include a separate objection under § 851(c) to the validity of the prior convictions if such a challenge can be raised. *See* § 851(e) (5 years statute of limitations on challenges). This objection may be included in the sentencing memorandum, or filed separately before sentencing.]

**Objection to Application of the Statutory Recidivist Enhancement  
On the Ground that the Enhancement is Unconstitutional**

[Include this constitutional objection so as to preserve the issue even if you have a strong argument above that the enhancement does not apply under the categorical approach.]

The application of the recidivist enhancement under

[select applicable statute: 18 U.S.C. § 924(e) (ACCA),  
or 8 U.S.C. § 1326(b) (illegal reentry),  
or 21 U.S.C. § 841(b) (controlled substances)  
or 18 U.S.C. § 2241 (sexual abuse)]

based on the alleged fact of prior conviction is unconstitutional on its face and as applied in this case because it violates defendant’s rights under the Fifth and Sixth Amendments of the Constitution. The application of this statutory enhancement depends on the continued vitality of Almendarez-Torres, 523 U.S. 224 (1998), but as Justice Thomas has observed, “a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.” Shepard v. United States, 125 S. Ct. 1254, 1264 (Thomas, J., concurring). As Justice Thomas explained, the Sixth Amendment ruling of Apprendi v. New Jersey, 530 U.S. 466 (2000), barring

increases in the sentencing range based on judge-found facts not proven to the jury beyond a reasonable doubt or admitted by the defendant, should apply equally to facts of prior conviction. Shepard, 125 S. Ct. at 1263 (Thomas, J., concurring); Apprendi, 530 U.S. at 520-21 (Thomas, J., concurring). In this case, Defendant has never admitted the alleged prior convictions, and the convictions have not been proven to a jury. Application of the recidivist enhancement, therefore, would be unconstitutional. But see, United State v. Ordaz, 398 F. 3d 236, 240-41 (3d Cir. 2005) (ruling, pre-Shepard, that Almendarez-Torres is still good law).

**Objection to Mandatory Minimum Sentence  
On the Ground that it is Factually Inapplicable**

[Insert here any factual argument you have as to why a mandatory minimum penalty under, for example, 18 U.S.C. § (c)(1)(A) (brandishing firearm – 7 years; discharging firearm – 10 years) is in applicable in this case.]

**Objection to Application of Mandatory Minimum Sentence  
on Basis of Facts not Proven to Jury or Admitted by Defendant  
On the Ground that the Enhancement is Unconstitutional**

The application of the mandatory minimum penalty under [insert statute, e.g. 18 U.S.C. § 924(c)(1)(A) (brandishing firearm – 7 years; discharging firearm – 10 years)] is unconstitutional on its face and as applied in this case. The rule of Apprendi v. New Jersey, 530 U.S. 466 (1998), barring increases in the sentencing range based on judge-found facts not proven to the jury beyond a reasonable doubt

or admitted by the defendant, should apply equally to facts that increase the minimum as well as the maximum sentence. As Justice Thomas explained, “Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.” Harris v. United States, 536 U.S. 545, 579 (2002) (Thomas, J., dissenting).

Although the majority in Harris upheld the application of such mandatory minimum penalties, id. at 567-68, Harris was decided by a 5 to 4 vote, in which one of the five majority justices was Justice Breyer, who candidly acknowledged that this holding could not logically be squared with Apprendi. Breyer nonetheless concurred in the result because he could not “yet accept” Apprendi’s rule. Id. at 569. Since Breyer’s remedy opinion in Booker was predicated on the application of Apprendi’s rule to the federal guidelines, he presumably does now accept its rule. The continued vitality of Harris, therefore, appears doubtful.

In the instant case, the facts necessary for the application of the mandatory minimum penalty were not proven to a jury beyond a reasonable doubt, and defendant did not admit to them. In accordance with the Sixth Amendment right to jury trial, this mandatory minimum penalty provision cannot be applied.

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**Proposed “Statement of Reasons Pursuant to 18 U.S.C. § 3553(c)”  
for sentence below guideline range.**

[Include here a proposed “Statement of Reasons Pursuant to 18 U.S.C. § 3553(c)” that the judge can adopt word-for-word to explain why a sentence below the guideline range is warranted. This statement, which is still required under § 3553(c) even after Booker, must be specific, in writing, and included in the judgment and commitment order (except for information received in camera). The statement should be a concise and enumerated list of the reasons that are argued more fully in your sentencing memo. Placing it at the end of your memo will allow it to serve as a good wrap-up for your sentencing argument.]

### **Conclusion**

For the foregoing reasons, [Defendant’s name] respectfully submits that a sentence of XXXXXXXXX is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. § 3553(a).

Respectfully submitted,

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