No. 05-_______

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR MANUEL GUZMAN-BALBUENA,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2006), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines are to be applied as advisory only, and as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence, and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's twin holdings, the following questions are presented.

(1) Does a presumption on appellate review that a sentence imposed within the advisory guideline range is reasonable violate this Court's holdings in *Booker* by making the guideline range effectively mandatory again?

(2) Does a presumption on appellate review that a sentence imposed within the advisory guideline range is reasonable violate 18 U.S.C. § 3553(a) by giving undue and excessive weight to one particular factor when the statute itself does not give primacy to any factor but rather requires that a sentencing court "impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing" set forth in the statute after considering the other factors listed?

LIST OF PARTIES

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VICTOR MANUEL GUZMAN-BALBUENA,
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v.

UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Victor Manuel Guzman-Balbuena, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is unpublished, appears at pages 1a to 3a of the appendix to the petition and at 163 Fed. Appx. 235 (4th Cir. Jan. 24, 2006). The ruling of the district court appears at pages 4a to 15a of the appendix to the petition and is unpublished.

JURISDICTION

The district court in the Western District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on January 24, 2006. Petitioner did not request rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part, that "[i]n 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 . . . ." U.S. Const. amend. VI.

The text of section 3553(a) of Title 18 of the United States Code is reproduced in the appendix to this petition at pages 16a to 17a.

STATEMENT OF THE CASE

A. Proceedings in the District Court

Petitioner, a native of Mexico, was charged on August 4, 2004, with one count of violating 8 U.S.C. § 1326, because he was found in the United States without permission in April of 2004 after having been previously removed in June of 2002.

C.A.J.A. at 5, 22-23.[1] Petitioner pled guilty to the charge without a plea agreement on October 8, 2004. At the end of the plea hearing, the court set sentencing for January 12, 2005, at 11:30 a.m. C.A.J.A. at 28; *see* C.A.J.A. at 2.

After preparing the presentence report, the probation officer determined that Petitioner's final offense level was 21[2] and that he fell into criminal category V.[3] Accordingly, the guideline range was 70-87 months. C.A.J.A. at 99. Neither side raised any objections to the guideline calculations. C.A.J.A. at 34, 39, 102. The court adopted the presentence report with one change not related to the determination of the guideline range. C.A.J.A. at 39, 66, 103.

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[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. "Pet. App." refers to the appendix included at the end of this petition.

[2] To reach this offense level, the probation officer applied U.S.S.G. § 2L1.2, the guideline for illegal reentry cases. C.A.J.A. at 92. The probation officer set the base offense level at 8, then added 16 points because the officer determined that Petitioner had a 1999 conviction for a drug trafficking offense. C.A.J.A. at 92, 95. The probation officer reduced the resulting offense level of 24 to 21 because Petitioner accepted responsibility for the offense. C.A.J.A. at 92; *see* C.A.J.A. at 40 (government motion for third point).

[3] In regard to Petitioner's criminal history, the probation officer calculated a total of nine points for convictions. C.A.J.A. at 97. With the exception of the felony drug conviction that was also used to increase the offense level, which received three criminal history points, the other convictions were all misdemeanors, mostly for property offenses and driving offenses. C.A.J.A. at 93-97. The probation officer added another two points because Petitioner committed the instant offense less than two years after release from imprisonment on the drug conviction. C.A.J.A. at 97. Petitioner thus had a total of eleven criminal history points, which placed him in category V. *Id.*

On January 12, the day of Petitioner's sentencing, the district court received notice that the Supreme Court was going to announce its decision in *United States v. Booker*, 543 U.S. 220 (2005), that day. C.A.J.A. at 63. The Supreme Court released its opinion shortly after 10:00 a.m. Without advising the parties that *Booker* had come out or asking counsel if they wanted to continue the sentencing in order to review the decision, the district court proceeded with the hearing at the scheduled time. Not knowing that the Sentencing Guidelines had just become advisory, defense counsel argued for a sentence at the low end of the guideline range, and did not ask for a downward departure. C.A.J.A. at 41-42. Counsel for the government recommended a sentence within the guideline range. C.A.J.A. at 41.

The district court sentenced Petitioner to 70 months, the low end of the guideline range because the court found "nothing overly remarkable or calling out for some harsh punishment" in Petitioner's case. C.A.J.A. at 43. The court did not announce an alternative sentence, nor did it enter a written judgment at that time. *See* C.A.J.A. at 3, 43-49, 63-64.

Two days later, defense counsel moved for reconsideration of Petitioner's sentence in light of the *Booker* decision. C.A.J.A. at 51-53. At a hearing on January 27, 2005, after considering each side's argument, the court concluded that it would resentence Petitioner. C.A.J.A. at 54-65. The court again adopted the presentence report, and stated that, treating the Sentencing Guidelines as advisory,

a "recommended" guideline range of 70-87 months applied. Pet. App. at 5a-6a, C.A.J.A. at 66-67.

The government argued, as it had at the first sentencing hearing, that a sentence within the guideline range was appropriate. Pet. App. at 6a-7a, C.A.J.A. at 67-68; *see* C.A.J.A. at 41. Defense counsel argued that a lower sentence was appropriate for several reasons: first, Petitioner's criminal history category overrepresented the seriousness of his past behavior and any future threat that he might pose, Pet. App. at 8a, C.A.J.A. at 69; second, a long sentence did not make fiscal sense when Petitioner would be deported at its conclusion, Pet. App. at 9a, C.A.J.A. at 70; and finally, that Petitioner should not be punished for any gang affiliations he might have, Pet. App. at 9a-10a, C.A.J.A. at 70-71.

The district court agreed with defense counsel that it could consider a greater range of factors than it could previously under the Sentencing Guidelines when they were mandatory. Pet. App. at 12a, C.A.J.A. at 73. The court also agreed with defense counsel that the offense was not a serious or violent offense that posed any danger to the people of Virginia. Pet. App. at 12a, 13a, C.A.J.A. at 73, 74. Ultimately, however, the court imposed the same 70-month sentence that it had previously imposed, in order to deter Petitioner from returning to the United States again. Pet. App. at 13a, C.A.J.A. at 74. In the court's view, such a sentence was "fair" and "appropriate." Pet. App. at 13a-14a, C.A.J.A. at 74-75.

The court entered its written judgment on January 31, 2005. C.A.J.A. at 82. Petitioner filed his notice of appeal on February 7. C.A.J.A. at 88.

B. Proceedings in the Court of Appeals

On appeal in the Fourth Circuit, Petitioner argued vigorously that the district court committed legal error that rendered Petitioner's sentence unreasonable by treating the advisory guideline range as presumptively appropriate or predominant. Appellant's Br. at 22-26 (4th Cir. filed Aug. 10, 2005); *see id.* at 20-22; (discussing *Booker* decision and sentencing scheme resulting from decision); *see also* Appellant's Reply Br. at 4-8 (4th Cir. filed Sept. 26, 2005) (replying to government's implicit argument that advisory guidelines are *per se* or presumptively reasonable).[4]

The court of appeals issued a brief, unpublished, *per curiam* opinion affirming Petitioner's sentence on January 24, 2006. Pet. App. at 1a. In relevant part, the court first stated, "After *Booker*, courts must calculate the appropriate guidelines range, consider the range in conjunction with other relevant factors under the guidelines and 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2004), and impose a sentence." Pet. App. at 2a. Further, according to the court of appeals, "[i]f a court imposes a sentence outside the guidelines range, the district court must state its reasons for doing so." Pet. App. at 3a. Finally, "[t]his court should review a sentence imposed pursuant to

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[4] Petitioner also raised another challenge to his sentence that is not at issue before this Court.

§ 3553 to determine whether it is reasonable." Pet. App. at 3a. In the court's view, "[t]he district court imposed a sentence within the advisory guideline range and below the statutory maximum for the offense and considered the relevant factors under § 3553" and "Guzman-Balbuena identifies no persuasive reason why the sentence imposed was not reasonable." Pet. App. at 3a. The court affirmed Petitioner' sentence. Pet. App. at 3a.

Only two weeks later, on February 6, 2006, the court of appeals announced that it would treat a sentence imposed within a correctly-calculated guideline range as presumptively reasonable. *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006), *petition for cert.* filed April 17, 2006 (U.S. No. 05-10474). The court, however, gave no rationale for that conclusion. Rather, it simply agreed with the Seventh Circuit's decision in *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1455 (2006). *Green*, 436 F.3d at 457. *Newsom*, in turn, likewise provided no explanation, relying upon the Seventh Circuit's earlier decision in *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005).

Two months later, in a case involving a defendant's appeal of a within-range sentence, the court of appeals explained why it was that it believed such a sentence to be presumptively reasonable. *United States v. Johnson*, ___ F.3d ____, 2006 WL 893594 (4th Cir. April 7, 2006). The court identified three reasons: first, because of the legislative and administrative process by which they were created; second,

because the Sentencing Guidelines incorporate the § 3553(a) factors; and third, because sentences are based on individualized fact-finding resulting from a process that permits defendants to raise objections. *Id.* at at *2-*4.

Although the opinion in Petitioner's case does not explicitly rely on the presumption of reasonableness adopted in *Green* and explained in *Johnson*, it is apparent that the court of appeals did so in affirming Petitioner's within-range sentence because it rejected Petitioner's argument that the district court erred in applying such a presumption.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* to consider the questions presented for three reasons. First, whether an appellate court can determine that a sentence imposed within the applicable guideline range is presumptively reasonable is an important question of federal law that this Court should settle. *See* S. Ct. R. 10(c). Second, the federal circuits are split on whether, in the course of reviewing a sentence imposed under 18 U.S.C. § 3553(a) for reasonableness, a sentence imposed within the applicable advisory guideline range is to be deemed presumptively reasonable. This is an important matter warranting this Court's attention. *See* S. Ct. R. 10(a). Finally, the Fourth Circuit's position that a sentence imposed within the applicable guideline range is presumptively reasonable is similarly an important question of federal law

that conflicts with relevant decisions of the Court, and also with the principal federal sentencing statute. S. Ct. R. 10(c).

A. *Booker* and Its Impact on Federal Sentencing Procedure

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that a federal criminal defendant's Sixth Amendment rights are violated when his or her sentence is increased under the United States Sentencing Guidelines based on the district judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. *Id.* at 243-44. As a remedy for the constitutional infirmity presented when the Guidelines mandate a sentence increase based on judge-found facts, the Court severed 18 U.S.C. § 3553(b)(1)[5] from the Sentencing Reform Act of 1984, thereby rendering the Guidelines "effectively advisory." *Id*. at 245.

Under *Booker*, a sentencing court must still "consider Guidelines ranges," but is now permitted "to tailor the sentence in light of other statutory concerns as well" under § 3553(a). *Id*. at 245-46; *see* 18 U.S.C. § 3553(a). In other words, the Sentencing Reform Act now requires district judges "to take account of the

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[5] Section 3553(b)(1) made the Guidelines mandatory, stating that a district judge "shall impose a sentence of the kind, and within the range, referred to in [the Guidelines]" except in circumstances justifying a departure. The *Booker* Court found this provision "incompatible with [its] constitutional holding" and accordingly excised it. 543 U.S. at 245.

Guidelines together with other sentencing goals" set forth in § 3553(a). 543 U.S. at 245. Section 3553(a) in turn mandates that a district court "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) . . . ." Section 3553(a)(2) describes those purposes as the needs of 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 defendants; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In addition, courts are to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant, *see* § 3553(a)(1); (2) the kinds of sentences available, *see* § 3553(a)(3); (3) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* § 3553(a)(6); and (4) the need to provide restitution to victims, *see* § 3553(a)(7). "[W]ith the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance." *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

In addition to excising § 3553(b)(1), the Court determined that it was also necessary to excise 18 U.S.C. § 3742(e), which had provided the standards of review for the federal courts of appeals to apply in considering sentencing appeals. The Court excised the latter provision because "it depend[ed] on the Guidelines' mandatory nature." *Booker*, 543 U.S. at 245.

Appellate courts thus continue to review sentencing determinations under *Booker* and § 3553(a), but apply a different standard than before. The federal courts of appeals now review sentencing decisions only for unreasonableness. More specifically, "appellate courts [are] to determine whether the sentence 'is unreasonable' with regard to § 3553(a). 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." *Booker*, 543 U.S. at 261.

In directing the lower courts in how to proceed under a sentencing scheme in which the Sentencing Guidelines are advisory, not mandatory, the Court made clear that the Guidelines are one of many factors to be considered. The Court, however, said nothing as to just how much weight either the district courts or the appellate courts should give to the Sentencing Guidelines and the range generated by their application to particular cases – that is, whether the advisory range is a starting point,

or whether it is effectively both a starting point and an ending point absent unusual circumstances.

B. This Court Should Settle the Important Questions of Federal Law Raised by the Presumption That a Sentence Imposed Within a Correctly-Calculated Advisory Guideline Range Is Reasonable

The questions presented in this petition regarding the presumption of reasonableness on appellate review of sentences imposed within correctly-calculated guideline ranges represent important questions of federal law for two reasons. First, the reasonableness standard of review applies to nearly every appellate challenge to a sentence following *Booker*. The federal courts of appeals collectively consider thousands of sentencing appeals annually. In fiscal year 2003, the courts decided over 4,300 sentencing appeals. *See* U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 56.[6] Similarly, in fiscal year 2002, the appellate courts ruled on nearly 4,500 cases raising sentencing issues. U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, Table 56.[7] Thus, because the questions presented in this petition will arise in a tremendous number of cases every year, answers to them by this Court are necessary to prevent

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[6] *Available at* http://www.ussc.gov/ANNRPT/2003/SBTOC03.htm.

[7] *Available at* http://www.ussc.gov/ANNRPT/2002/ SBTOC02.htm.

discordant results among the courts of appeals – which have already issued conflicting opinions, as described in greater detail below.

Further, the questions concerning whether sentences within the advisory guideline range can be presumptively reasonable implicate the applicable standard and scope of appellate review. This Court has deemed such issues to be important questions warranting resolution in the past. In *Koon v. United States*, 518 U.S. 81, 96-100 (1996), for example, the Court considered whether a district court's decision to depart downward should be reviewed *de novo* or for abuse of discretion; after determining that abuse of discretion was the appropriate standard, the Court also explained what such review entailed. More recently, the Court reviewed a similar question in *Buford v. United States*, 532 U.S. 59 (2001) (whether *de novo* or clear error review applied to district court's determination of sentencing guideline issue).

The Court has also considered whether certain errors should be presumptively reversed. For example, in *Neder v. United States*, 527 U.S. 1 (1999), the Court was asked to decide whether the failure to submit an element of an offense to a jury is automatically reversible or subject to harmless error analysis. Likewise, *United States v. Lane*, 474 U.S. 438 (1986), presented the question of whether a violation of the federal rule of criminal procedure pertaining to joinder of defendants was *per se* error or subject to harmless error analysis. The questions presented by this petition present the flip side of those questions: whether a sentence imposed within a

correctly-calculated guideline range can be presumed to be reasonable and therefore automatically affirmed.

In short, both because of the sheer number of sentencing appeals affected by the change in the standard of review that *Booker* implemented and because the nature of the issues presented in this petition is similar to the types of questions that this Court has previously found important enough to warrant its review, the questions presented here should likewise be deemed important matters worthy of the Court's consideration.

C. The Courts of Appeals Have Split on Whether a Sentence Imposed Within a Correctly-Calculated Advisory Guideline Range Can Be Deemed Presumptively Reasonable

The second reason why this Court should grant *certiorari* in this case is that the federal courts of appeals are clearly split over the question of whether a sentence imposed upon a defendant after *Booker* can be treated as presumptively reasonable if it falls within the range set by the now-advisory Sentencing Guidelines. Several courts have refused to adopt a presumption of reasonableness. The Sixth Circuit, in a decision issued soon after *Booker*, ruled that "to hold that a sentence within a proper Guidelines range is per-se reasonable . . . 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. Crosby, 397 F.3d 103, 115 (2d Cir. 2005)), *cert. denied*, 126. S. Ct. 1110 (2006).[8]

More recently, the Third Circuit, in *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006), declined to adopt a presumption of reasonableness because "[a]lthough a within-guidelines sentence demonstrates the court considered one of the § 3553(a) factors – namely, the guidelines range itself, 18 U.S.C. § 3553(a)(4) – it does not show the court considered the other standards reflected in that section." *Id.* at 330; *see also United States v. Fernandez*, ___ F.3d ____, 2006 WL 851670, at *6 (2d Cir. 2006) (Cabranes, J.) (stating that "[w]e . . . decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable"); *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (stating that "[w]e do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable'") (footnote omitted); *United States v. Lisbon*, unpublished, 2006 WL 306343, at *2 (11th Cir. Feb. 10, 2006) (No. 05-12637) (stating that "[a] sentence within the guidelines range is not presumptively reasonable"); *see also United States v. Talley*, 431 F.3d 784, 787 (11th Cir. 2005) (finding that a Guideline sentence is not *per se* reasonable).

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[8] *But see United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (in subsequent decision, adopting presumption of reasonableness).

In contrast, other courts of appeals – such as the Fourth Circuit – have adopted a presumption of reasonableness. *See United States v. Johnson*, ___ F.3d ____, 2006 WL 893594 (4th Cir. April 7, 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir.), *cert. denied*, 126 S. Ct. 840 (2005);[9] *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006).

In light of the split of authority between the circuits and even within individual courts, this Court should grant *certiorari* in order to settle these crucial questions left open by *Booker*. Doing so will provide definitive guidance not only to the courts of appeals, but to the district courts as well.[10] *See United States v. Valencia-*

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[9] *But see United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005) (in subsequent decision, rejecting position that "the range of reasonableness is essentially co-extensive with the Guidelines range," because it "would effectively render the Guidelines mandatory").

[10] In addition to the split of authority among the circuit courts, the district courts are similarly split on the question of how much weight the advisory guideline range should be given under § 3553(a) in the first instance. *Compare, e.g.*, *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) (Cassell, J.) (in considering "just how 'advisory' the Guidelines are," concluding that "that in exercising its discretion in imposing sentences, the court will give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate" and "will only deviate from those Guidelines in unusual cases for clearly identified and persuasive reasons" because "[t]his is the only course that implements the congressionally-mandated purposes behind imposing criminal sentences"), *and United States v. Wanning*, 354 F. Supp. 2d 1056 (D. Neb. 2005) (Kopf, J.) (explaining why court agrees with Judge Cassell in *Wilson*), *with United States v. Ranum*, 353 F.
(continued...)

Aguirre, 409 F. Supp. 2d 1358, 1371 (M.D. Fla. 2006) (observing that "whether a properly calculated guidelines sentence is 'presumptively' or '*per se*' or '*prima facie*' a reasonable sentence has persisted in the circuit courts without definitive consensus, the prospect for which is explicitly threatened by the view that, assuming a declaration that a guidelines sentence is presumed reasonable, the guidelines might again feature an unconstitutionally 'mandatory' aspect, impinging the requirements of *Booker*") (footnote omitted).

D. This Court Should Grant the Petition Because the Presumption That a Sentence Imposed Within a Correctly-Calculated Guideline Range Is Reasonable Conflicts With Relevant Decisions of This Court and With 18 U.S.C. § 3553(a)

The presumption of reasonableness on appellate review also presents serious constitutional concerns in light of *Booker* and therefore conflicts with that decision, as well as with the Court's earlier decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Under the Sentencing

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[10] (...continued)
Supp. 2d 984 (E.D. Wis. 2005) (Adelman, J.) (in explaining why court was imposing sentence lower than that recommended by Guidelines, stating that while court agreed that it must seriously consider Guidelines, "*Booker* is not an invitation to do business as usual;" courts need not follow old departure methodology in imposing sentence outside guideline range) *and United States v. Myers*, 353 F. Supp. 2d. 1026 (S.D. Iowa 2005) (Pratt, J.) (fin,ding *Ranum* persuasive and adopting Judge Adelman's view because "[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 factors . . . making the Guidelines, in effect, still mandatory").

Guidelines, sentence enhancements are imposed based on facts found by the district court. *Booker* held that such a system is constitutional only if sentencing judges have the discretionary authority to decide whether to apply the resulting guideline range in any given case.

Making the guideline range presumptively binding on sentencing judges – as the appellate presumption effectively does by encouraging those judges to impose sentences within the guideline range in order to avoid reversal on appeal[11] – thus creates serious constitutional problems because the facts establishing the presumptive range were not found by a jury or admitted by the defendant but instead were found by the sentencing judge. *See Jimenez-Beltre*, 440 F.3d at 518 (although making Guidelines "presumptive" or "per se reasonable" does not technically make them mandatory, "it tends in that direction"); *see also United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1025 (D. Neb. 2005) (stating that "the court will not preserve a 'de facto' mandatory Guidelines scheme by affording the Guidelines a presumption of reasonableness in every case [because] [s]uch an interpretation of the *Booker*

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[11] To date, the vast majority of published appellate court decisions reviewing sentences that were lower than the applicable guideline range have reversed those sentences as unreasonable. *See* Douglas A. Berman, *Tracking Reasonableness Review Outcomes*, blog entry for March 31, 2006, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/tracking_reason.html.

remedy would circumvent *Booker*'s substantive holding, and would defy the directive that the court consider the factors in 18 U.S.C. §3553(a)").

Indeed, the Guidelines have always been presumptively binding in the sense that district courts have always had the authority to depart from the Guideline range when the facts and circumstances of a particular case warrant a sentence reduction. *See* former 18 U.S.C. § 3553(b)(1) (stating that a district judge "shall impose a sentence of the kind, and within the range, referred to in [the Guidelines]" except in circumstances justifying a departure). Yet this Court in *Booker* made clear that such departure authority was not enough to save the constitutionality of the Guidelines. *See* 543 U.S. at 234.

Further, the presumption that a sentence is reasonable under 18 U.S.C. § 3553(a) because it falls within the advisory guideline range cannot be reconciled with the plain language of that statute. Section 3553(a) first directs district courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing, and then sets forth multiple factors which those courts are to consider in reaching sentence. The advisory guideline range determined by the Sentencing Guidelines is just one of those several factors, and the statute does not expressly provide it any presumptive weight. *See United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005) (stating that "[t]he Guidelines range is merely one factor" under § 3553(a)). Indeed, if the statute gives primacy to any of its language,

it is the directive to the sentencing court to impose a sentence sufficient, but not greater than necessary, to satisfy the various factors. *See* Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 83 (2005) (noting that "the structure of section 3553(a)" strongly implies that this directive – known as the "parsimony principle" – "set[s] overall limits on the crime-control and other purposes which follow").

In light of the plain language and structure of § 3553(a), therefore, there is no statutory basis for creating an presumption of reasonableness for sentences that fall within the applicable advisory guideline range. Indeed, if the Sentencing Guidelines incorporated all of the sentencing factors listed in § 3553(a), those factors would not have been set out separately in the statute.[12] It is a basic canon of statutory

[12] Moreover, not only do the Guidelines say little about the history and characteristics of the defendant, they in fact prohibit consideration of certain individualized factors, such as lack of guidance as a youth, drug or alcohol dependence or abuse, post-sentencing rehabilitative efforts, and diminished capacity in various types of cases. *See* U.S.S.G. §§ 5K2.0(d)(1), 5K2.13, 5K2.20(c). The Guidelines also discourage, except in exceptional cases, consideration of other individualized factors, including age (§ 5H1.1), education and vocational skills (§ 5H1.2), mental and emotional conditions (§ 5H1.3), physical condition (§ 5H1.4), employment record (§ 5H1.5), and family ties and responsibilities (§ 5H1.6). These prohibited and discouraged factors come into play, however, under the individualized approach called for by § 3553(a). *See United States v. Bisanti*, 414 F.3d 168, 173-74 (1st Cir. 2005) (recognizing that mitigating factors were presented at sentencing that, although not warranting departure under the Guidelines, might result in lower sentence under § 3553(a)); *United States v. Lata*, 415 F.3d 107, 113 (1st Cir. 2005) (factors discouraged as bases for departure under Guidelines may receive more (continued...)

construction that every part of a statute has meaning and that no provision should be construed as inoperative, superfluous, or insignificant. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quotation omitted); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (criminal statutes should not be construed so that element is rendered superfluous). Accordingly, the strong assumption is that Congress means to require something additional by each separate clause of the statute. *See Jones v. United States*, 529 U.S. 848, 857 (2000).

Although both the sentencing and appellate courts must continue to consider the Sentencing Guidelines, *see* § 3553(a)(4), nothing in § 3553(a) provides any basis for treating the Guidelines as more controlling of the final sentencing decision than any of the other factors that the courts must consider under that statutory section as a whole. The appellate presumption of reasonableness, then, conflicts with § 3553(a) as well as with this Court's decisions in *Booker*, *Blakely*, and *Apprendi*. Accordingly, this Court should grant *certiorari* to resolve these important federal questions.

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[12] (...continued)
weight under § 3553(a)).

CONCLUSION

For the reasons given above, Petitioner requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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