

Docket No. 05-4241

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

UNITED STATES OF AMERICA,

Appellee,

v.

ERIC LLOYD,

Defendant-Appellant.

On Appeal from Judgment on Resentencing in a Criminal Case
filed August 22 and entered August 23, 2005, at No. 02-CR-141-01
in the United States District Court
for the District of Delaware (Jordan, Ch.J.)

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**BRIEF FOR APPELLANT LLOYD
With Volume 1 Appendix (pp. 01a-22a)**

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STATEMENT OF JURISDICTION

The United States District Court for the District of Delaware had subject matter jurisdiction of this federal criminal case under 18 U.S.C. § 3231. This Court has jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. Judge Kent A. Jordan resentenced appellant Lloyd, pursuant to a mandate of this Court, 2App. 69, on August 2, 2005. 2App. 57.¹ The Judgment was not filed until August 22 and was entered August 23, 2005. 1App. 17; 2App. 58 (Dkt. #237). Counsel filed an untimely notice of appeal on September 14, 2005. Fed.R.App.P. 4(b); see 2App. 58 (Dkt. #238), 1App. 1 (notice). On September 23, 2005, the defendant-appellant filed a consent motion in the district court to extend the time for filing the notice of appeal. 2App. 58 (Dkt. #240). Judge Jordan granted that motion on September 26, 2005. 2App. 58 (Dkt. #241). Accordingly, this Court has jurisdiction. See Fed.R.App.P. 4(b)(4).

¹ The appellant's appendix is in two volumes. Volume One is attached to this brief, pursuant to LAR 28.1(a)(iii) and LAR 32.2(c). Volume Two is bound separately and contains the pertinent transcripts, etc. These volumes are cited in this brief as 1App. and 2App. respectively.

**STATEMENT OF THE ISSUES
WITH STATEMENT OF PLACE RAISED**

1. Did the district court err by treating the U.S. Sentencing Guidelines as establishing a presumptively correct range of reasonable sentences, rather than as one of several factors to "consider" under 18 U.S.C. § 3553(a) before imposing the sentence which was "sufficient but not greater than necessary"?

Where in the Record Raised and Ruled Upon: Raised below in defendant's Sentencing Memorandum.

2. Did the district court violate 18 U.S.C. § 3553(c) by failing to give a specific, meaningful reason for sentencing at the bottom of a guideline range which spans more than 24 months and not any lower?

Where in the Record Raised and Ruled Upon: Not raised below.

3. Was it unreasonable for the district court to conclude that a sentence of 168 months' (14 years') imprisonment was the least sentence sufficient to satisfy the purposes of punishment, as required by 18 U.S.C. § 3553(a)?

Where in the Record Raised and Ruled Upon: Not raised below.

STATEMENT OF THE CASE

This direct criminal appeal follows a guilty plea and sentencing, a prior appeal which led to a remand for resentencing, and then the imposition of a new sentence on remand. The defendant-appellant, Eric Lloyd, was convicted of participating in a cocaine distribution conspiracy.

a. The Course of Proceedings

A grand jury in the District of Delaware returned a one-count indictment on December 19, 2002, charging conspiracy in violation of 21 U.S.C. § 846, and naming the appellant, Eric Lloyd, as one of two defendants. 2App. 31. The case had originated with a local arrest on February 12, 2001, and ensuing prosecution in the state courts of Delaware. A jury trial in December 2001 ended in mistrial. On the day set for retrial, November 21, 2002, the state filed a nolle prosequi in light of a federal complaint filed that day. See Def't Mtn. for Downward Departure ¶¶ 2-4 (filed Nov. 17, 2003); PSI ¶¶ 29-31, at 8.

Three superseding indictments were eventually returned, the last naming Mr. Lloyd in two counts and filed April 23, 2003, against three defendants. 2App. 60-61 (third superseding indictment). On August 11, 2003, Mr. Lloyd pleaded guilty under an agreement to Count 1sss. 2App. 42-43. This count charged that from February through August 2001 appellant Lloyd and his two co-defendants conspired to possess with intent to distribute more than 500 grams of cocaine. 2App. 60. (This set the mandatory minimum sentence at five years, and the maximum at 40 years' imprisonment under 21 U.S.C. § 841(b)(1)(B)(ii)(II).)

The original sentencing occurred on December 15, 2003. 2App. 49. Judge Jordan determined the guideline range at 168 to 210 months (Offense Level 32, Criminal History Category IV), and denied appellant a downward departure he sought. The district court then imposed sentence of 168 months' (14 years') imprisonment, to be followed by five years' supervised release, as well as the \$100 special assessment. 1App. 6-8. Judgment of sentence was filed and entered on December 17, 2003. 2App. 63. Mr. Lloyd's prior (retained) counsel filed a timely notice of appeal on December 22, 2003. 2App. 49.

Following a change of counsel, the undersigned filed Mr. Lloyd's opening brief in this Court (under No. 04-1081) on November 1, 2004. Following the announcement by the Supreme Court of its decision in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005), rather than file a brief as appellee, the government filed a motion for summary remand. This Court (per Alito, J., with McKee & Ambro, JJ.) granted the motion on March 17, 2005. 1App. 69.

On remand, the Probation Office prepared a revised Pre-Sentence Investigation Report ("PSI").² The defendant submitted information about his rehabilitative efforts in the Bureau of Prisons, 2App. 98-105, many supporting letters attesting to his good character, 2App. 80-97, and a detailed sentencing memo-

² Four copies of this Report are being submitted to the Court in sealed envelopes, pursuant to LAR 30.3(c). Also submitted in those envelopes are copies of the non-public Statements of Reasons for both the original sentence and the sentence on remand, as included by Judge Jordan in the amended Judgment, pursuant to LAR 106.1(c)(1).

randum. 2App. 70-79. The hearing on resentencing was held on August 2, 2005. 2App. 106-27. Judge Jordan rejected the defense arguments for a lower, non-Guidelines sentence, on the sole basis that "the guideline range is the thing that I should be looking to primarily." 1App. 11; 2App. 122. The court then imposed the same sentence as originally, that is, 168 months' (14 years') imprisonment. 1App. 13-14.

The judgment of sentence was not filed under nearly three weeks later, on August 22, 2005, 1App. 17, and was entered on the docket the next day. 2App. 58. Although the notice of appeal was not initially filed on a timely basis, 2App. 58 (#238), the district court granted an extension of time under Fed.R.App.P. 4(b)(4) which retroactively validated the notice. 1App. 2. This appeal follows.

Mr. Lloyd was placed in home confinement when arrested on the federal complaint but was detained upon indictment and during the ensuing proceedings in the district court. He is presently serving his sentence at a federal correctional institution.

b. Statement of Facts

According to the proffered factual basis for the plea, which appellant Lloyd agreed the prosecution could prove (but did not say he agreed was true), Tr. 8/11/03, at 20, in "early February 2001" Mr. Lloyd arranged with the two named co-defendants to buy kilograms of cocaine in Houston, Texas. Mr. Lloyd and a co-defendant recruited two women to carry money to

Texas for the purchase and then to transport the drugs back to Delaware. On or about February 4, Mr. Lloyd and a co-defendant jointly purchased "approximately three kilograms of cocaine," which the women concealed "on other persons." However, while in possession of just under three kilograms of cocaine, the couriers were arrested at the Houston Airport on February 7. Tr. 8/11/03, at 18.³ Working with the other co-defendant, according to the prosecutor, Mr. Lloyd made two additional trips to Texas in June and July 2001. Finally, in August 2001, Mr. Lloyd and a co-defendant returned to Texas with a courier, where they purchased five kilograms of cocaine, the prosecutor recited. This time, the trip back was to be by automobile, but again (on August 9), the courier was arrested, this time in possession of 4.5 kilograms of cocaine. Tr. 8/11/03, at 19.

All that Mr. Lloyd admitted was true, however, was that "I paid Erica Negron and Wheattina Goodman to go to Texas and bring back drugs from Texas ... to Delaware." Tr. 8/11/03, at 17. When the unspecified "drugs" reached Delaware, Mr. Lloyd was "going to distribute those, sell those to other people or have other people sell them for [him.]" Id. He also agreed that what the prosecutor said, "is right, that they can prove it." Tr. 8/11/03, at 20.

Under the plea agreement, Mr. Lloyd "stipulated" that "the total amount of cocaine that is attributable to the conspiracy charged in Count One of the indictment to which the defendant is

³ This incident undelay Mr. Lloyd's initial, February 12, 2001, arrest in Delaware. PSI ¶ 31, at 8.

pleading guilty is approximately 7,506 grams," Tr. 8/11/03, at 7, and that "the conspiracy ... involved five or more participants, and that the defendant was a manager or supervisor of the conspiracy pursuant to United States Sentencing Guidelines Section 3B1.1[(b)]." Tr. 8/11/03, at 7-8. These stipulations also appear in the written plea agreement. 2App. 43 (Dkt #91, at 2). However, at the change of plea hearing, the prosecutor added that "The parties further reserve the right to contest or dispute any findings of the sentencing Court, including on appeal." Tr. 8/11/03, at 8.

c. Statement of Related Cases and Proceedings

This case was previously before this Court at No. 04-1081. By Order filed March 17, 2005, a panel (per Alito, J., with McKee & Ambro, JJ.) granted the government's motion for summary remand, to allow a resentencing under United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005). This case initially grew out of a prosecution in Delaware State Superior Court, under No. 01-02-010574 (New Castle Co.) involving the February transaction. The case went to trial, resulting in a hung jury.

One co-defendant (Ernest Morris) pleaded guilty, and the other was convicted after trial. The latter, Albari Malik Johnson, appealed to this Court under No. 04-2205. (That case, by order filed October 4, 2005 (per Fuentes, J., with Sloviter & Nygaard, JJ.), also resulted in a summary remand for resentencing. As of this filing, Johnson has not yet been resentenced.) The undersigned is not aware of any other related cases or proceedings.

SUMMARY OF ARGUMENT

Appellant's sentence must again be vacated and the case remanded for resentencing for three related reasons. First, the district court misapplied the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), when it reimposed the same guideline sentence on remand, on the basis that "the Federal Sentencing Guidelines ... represent an effort by the United States Government to avoid sentencing disparity across the nation" and that to treat the guidelines as just one factor among many under 18 U.S.C. § 3553(a), as the law now requires, "would be ignoring what the elected representatives of the United States citizens have strongly encouraged" Regardless of what the district judge might personally believe is "wise and good public policy," the court's duty was to sentence in accordance with the statutory mandate and the Supreme Court's decision. Its failure to do so requires resentencing.

The district court imposed a 14-year prison term as the principal sentence on remand, which was the bottom of the guideline range. Because that range spans more than 24 months (168-210), the Sentencing Reform Act required the court to state a reason for sentencing at that particular point in the range. 18 U.S.C. § 3553(c)(1). The district court failed to articulate such a reason, by reference to the § 3553(a) factors, as required. Before Booker, this failure would be harmless error when the sentence imposed was at the very bottom of the range. Now, when no "departure" is required to go lower, the court's

failure to explain why, in light of all the factors identified in § 3553(a), a shorter sentence would not be sufficient, affected the appellant's substantial rights. Although defense counsel did not object in the court below, this error is plain and also requires a resentencing.

Finally, if the judgment is not reversed for either of the foregoing reasons, the Court must review the sentence imposed on Mr. Lloyd for reasonableness, as discussed in Booker. A sentence within the properly computed guideline range should not be presumed to be "reasonable" under this test. Instead, this Court must consider the district court's balancing of the history and characteristics of the defendant -- including Mr. Lloyd's relative youth and sad childhood history of deprivation and neglect --, the nature and circumstances of the offense, and the objectives of avoiding unwarranted disparity, protecting the public from future crimes, and affording the defendant essential correctional treatment. The question is not whether the "sentence" in some abstract sense is "reasonable," but whether it was reasonable to conclude that a 14-year prison term is the least punishment sufficient in Mr. Lloyd's case to fulfill the Congressionally-specified objectives of federal sentencing. Because such a conclusion would not be reasonable, the judgment of sentence must be reversed and the case remanded for further sentencing proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED UNDER *BOOKER* WHEN IT TREATED THE U.S. SENTENCING GUIDELINES AS ESTABLISHING A PRESUMPTIVELY CORRECT RANGE OF REASONABLE SENTENCES, RATHER THAN AS ONE OF SEVERAL FACTORS TO "CONSIDER" BEFORE IMPOSING THE SENTENCE WHICH WAS "SUFFICIENT BUT NOT GREATER THAN NECESSARY."

Standard or Scope of Review: This Court exercises plenary review over the district court's compliance with its statutory obligation to impose sentence in accordance within the framework established by Congress in the Sentencing Reform Act. 18 U.S.C. § 3742(f)(1). See United States v. Ledesma, 2005 WL 3477715, *1 n.1 (3d Cir., Dec. 20, 2005) (non-precedential). A sentence imposed through the application of a mistaken legal standard does not survive review for "reasonableness." See Koon v. United States, 518 U.S. 81, 100 (1996) (a "court by definition abuses its discretion when it makes an error of law").

Discussion:

Appellant Eric Lloyd's judgment of sentence must again be vacated and the case remanded, because the court below imposed sentence under a fundamental misapprehension of the statutory framework which governs after the Supreme Court's landmark decision in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Having "excised" 18 U.S.C. § 3553(b) from the Sentencing Reform Act, thus severing the provision which made the statute unconstitutional, the Supreme Court rendered adherence to the Guidelines no longer mandatory. While the district court plainly understood that much, it failed to comply with the compulsory language of the Act which remains. This error requires another resentencing.

The Sentencing Reform Act, as it stands after Booker, now obligates the district court, in every case, to select the punishment which is "sufficient, but not greater than necessary" to accomplish the legislatively specified purposes of criminal punishment. 18 U.S.C. § 3553(a). See United States v. Soto, 2005 WL 2811778, *2 (3d Cir., Oct. 27, 2005) (non-precedential).

Section 3553(a) *requires* -- as a matter of law -- that district courts impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2) -- retribution, deterrence, incapacitation, and rehabilitation. Imposition of a sentence greater than necessary to meet those purposes is therefore a violation section 3553(a) The question then becomes whether a sentence imposed pursuant to applicable guidelines could ever be greater than necessary to meet the four statutory purposes. I believe that it could.

United States v. Denardi, 892 F.2d 269, 276 (3d Cir. 1989)

(Becker, J., concurring and dissenting) (emphasis original).⁴

Accord, United States v. Neufeld, 2005 WL 3055204, *9 (11th Cir., Nov. 16, 2005) (non-precedential) ("Under the new

advisory-guidelines system, a more-than-adequate sentence would conflict with § 3553(a)'s injunction against greater-than-necessary sentences."). Through section 3553(a)'s introductory language, Congress embedded in federal legislation the overriding moral command to impose on any convicted person the least

⁴ When the Supreme Court in Booker severed § 3553(b) from the Sentencing Reform Act after finding it to require a process which is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), as applied in Blakely v. Washington, 542 U.S. 296 (2004), the effect was to revive the controlling power of § 3553(a). Judge Becker's prescient discussion, dissenting on this point in Denardi, was thus vindicated.

suffering that is demanded by the general welfare -- a concept known in the sentencing literature as the "principle of parsimony."⁵

This Court, sitting en banc, has unanimously acknowledged that Booker "brought about sweeping changes in the realm of federal sentencing." United States v. Davis, 407 F.3d 162, 163 (3d Cir. 2005) (en banc). The district court in this case established and followed a process for post-Booker sentencing which in most cases would simply negate the significance of that change. Instead of complying with that Congressional mandate, the court below announced its own intention to follow the Guidelines in all but unspecified exceptional cases. The lower court asserted that to sentence in accord with § 3553(a) "would be ignoring what the elected representatives of the United States citizens have strongly encouraged and what I think to be wise and good public policy, which is a fair degree of predictability and consistency in sentencing across the country." 2App. 122. "I look to the direction of the Federal Sentencing Guidelines I believe that [the] guideline range is the thing that I should be looking to primarily," Judge Jordan opined. 2App. 121-22. These comments reflected an error of law.

This case was before the district court pursuant to a remand order from this Court for resentencing in accordance with

⁵ See, e.g., Richard S. Frase, *Punishment Purposes*, 58 STANFORD L.REV. 67, 77 & n.24, 78 & n.29 (2005); Testimony of Mary Price, Gen'l Counsel, FAMM, before U.S. Sentencing

Booker. In their respective arguments prior to resentencing, the parties disagreed about the weight that should properly be given the Guidelines at a sentencing after Booker. The defense contended, in reliance on statutory language which remains binding after the excision of § 3553(b), that the guideline range is but one of numerous factors to be "considered," and that the Act plainly states that the range is to be treated as inherently neither more nor less significant than any other factor. 2App. 71-72, 76. The government, in contrast, argued (as is Justice Department policy) that the Guidelines define the presumptively correct range of reasonable sentences in every case, leaving other statutory factors superfluous, subject only to pre-Booker-defined "departure" grounds. 2App. 116.

Judge Jordan expressly rejected the idea that federal sentencing after Booker must be conducted according to fundamentally different standards than before 2005. He thus ruled in favor of the government's position on this basic legal dispute:

I don't feel, as your attorney has said, shackled by the guidelines and I'm going to give you the sentence I gave you before[,] because the guidelines I view as deserving great weight in my considerations.

This case points out an important question, which is[, "W]ho is responsible for saying what the right punishment is in our society?["]

Your lawyer pointed out that many people are rethinking sentencings. What is the right range? What is the right and appropriate level of punishment? And in the State [of Delaware], they have done some rethinking and evidently done some adjustments. But I look to the direction of the Federal Sentencing Guidelines[,] which do represent an effort by the United States Government to avoid sentencing

(footnote continued)

Comm'n, http://www.ussc.gov/hearings/02-15-05/price_testimony.pdf (Feb. 15, 2005), at 3 (citing Cesare Beccaria).

disparity across the nation[,] so a person appearing before me doesn't get a higher or lower sentence in any significant degree than somebody showing up in a courtroom in Portland, Oregon or in Sacramento, California or in San Antonio, Texas, that if you do a crime that violates federal law, you should reasonably expect to be looking at about the same punishment. And if I were to say, as your attorney is encouraging me, 'you know what, under 3553, that feels too harsh to me, I'm just not going to pay attention to that guideline range,' I would be ignoring what the elected representatives of the United States citizens have strongly encouraged and what I think to be wise and good public policy, which is a fair degree of predictability and consistency in sentencing across the country. So I don't view the guidelines as shackling me, I view them as allowing me to be fair and consistent with other judges who have the unhappy responsibility of sentencing.

So I believe that [the] guideline range is the thing that I should be looking to primarily. I looked at the other factors under 3553(a). I've examined them and think that they are not inconsistent with the sentence that you received.

2App. 121-22. The court added, "I don't believe downward departure is appropriate. I agree with the Government, nothing has changed in the time between the first sentencing and today that would lead me to think differently about a downward departure."

2App. 123. The judge thus declined to mitigate Mr. Lloyd's sentence on the basis of post-conviction rehabilitative efforts, for example, because "the sentencing guidelines direct me not to make that a factor in reducing the sentence that you're going to face" 2App. 127.

The district court imposed the same sentence of 168 months' imprisonment, followed by five years' supervised release, as it had in December 2003. 2App. 125. Apparently as the reason for imposing this sentence again, Judge Jordan stated:

The Court has considered the defendant's arguments regarding sentencing and has considered [the] United

States Supreme Court's decision in Booker which ruled [that the] sentencing guidelines are now advisory. The Court also believes the sentence which is within the advisory guideline range and meets the sentencing goals outlined in Title 18, United States Code, Section 3553.

2App. 125 (sic).⁶

The district court's justification for "looking ... primarily" to the guidelines (2App. 122) in this case reveals starkly how that approach re-establishes the constitutional problem which led to the decision in Booker, while failing to comply with the statutory structure which survives and governs after Booker. In context, it is apparent that when Judge Jordan said he did not "feel ... shackled by the guidelines" he did not mean that as a consequence of being liberated by Booker he was choosing a sentence after freely balancing all the § 3553(a) factors (one of which is the guideline range). Rather, what the judge was saying was that his continuing fealty to the Guidelines did not make him feel "shackled," that is, restricted in a way he considered undesirable. This is apparent from the rest of his comments. As the court stated, "I don't view the guidelines as shackling me[;] I view them as allowing me to be fair and consistent with other judges who have the unhappy responsibility of sentencing." 2App. 122. While consistency is indeed a lawful and generally laudible goal in post-Booker sentencing, the statute plainly states that this objective is not to be

⁶ The last sentence of the court's stated reason can be rendered grammatical by omitting either the word "which" or the word "and." Appellant is not sure what Judge Jordan intended, or whether there may be an error in the transcript.

elevated above all others.⁷ The sentence in this case was thus "imposed in violation of law." 18 U.S.C. § 3742(f)(1).

The answer to the questions, "Who is responsible for saying what the right punishment is in our society? ... What is the right range? What is the right and appropriate level of punishment?," according to Judge Jordan, 2App. 121, is the Sentencing Commission, not the individual judge. "I look to the direction of the Federal Sentencing Guidelines," he explained, because the guideline range "do[es] represent an effort by the United States Government to avoid sentencing disparity across the nation" 2App. 121-22. The district court's comments in this case betray a view that is inconsistent with 18 U.S.C. § 3553(a) itself. After excising § 3553(b)(1) and § 3742(e), the remainder of the Sentencing Reform Act is constitutional, the Court held in Booker, and therefore to be obeyed and implemented by judges, not disparaged, undermined, disregarded, or second-guessed. It is the individual judge's responsibility to weigh all the factors under § 3553(a) in each case. The Sentencing Reform Act, that is, the law which instructs the court how to proceed, is directly contrary to the position taken by the court below.

Examination of the remaining, unexcised provisions of the SRA discloses the key provision of the Sentencing Reform Act which remains mandatory post-severance: the district court's duty to impose ("The court shall impose ...") a sentence which

⁷ By "fair," it appears that Judge Jordan meant the virtue of treating similar cases alike. It does not appear that he meant to use the term in any other sense, such as in the sense of doing individualized justice in particular cases.

is "sufficient" in the case at hand, without being "greater than necessary," to achieve four articulated objectives. These Congressionally defined purposes are: (A) "just punishment" in light of "the seriousness of the offense"; (B) "deterrence," both general (deterrence of others) and specific (of the defendant); (C) incapacitation "to protect the public"; and (D) any "needed" rehabilitation and "correctional treatment" of the offender. 18 U.S.C. § 3553(a)(2). Before choosing that sentence, it is also mandatory under the Act that the sentencing court "consider" a number of factors. One, but only one, of those factors is the guideline range, referenced in subsection (a)(4). Nothing in the statutory language or structure makes subsection (a)(4) either a starting point or a presumptive ending point for the sentencing decision.⁸

Listed in § 3553(a) are a dozen or so factors (in seven numbered subsections) which the court, "in determining the particular sentence, shall consider." Those mandatory points for consideration are: (1) "the nature and circumstances of the

⁸ The sentence thus selected may then be reviewed on appeal, but will be reversed only if found "unreasonable." At the same time, it must be emphasized that "reasonableness" is only the standard of appellate review; it is not the criterion for judgment or "rule of decision" in the district court. The district court, when selecting a sentence, cannot skip the step of complying with § 3553(a) and be affirmed on the basis that the resulting punishment was "reasonable." Not all decisions in other circuits have recognized this essential point. See, e.g., United States v. Talley, -- F.3d --, 2005 WL 3235409, *2-*3 (11th Cir., Dec. 2, 2005) (per curiam; Tjoflat, Dubina & Pryor, JJ.) (describing process as calling upon judge first to determine guideline range, then to "consider several factors," and finally to "determine a reasonable sentence," disregarding statutory mandate for parsimony).

offense," and "the history and characteristics of the offender"; (2) the six philosophical and penalogical purposes just listed from the four clauses of subsection (a)(2); (3) the "kinds of sentences available"; (4) whatever sentence types and ranges are called for by the Guidelines (this is where the Guidelines are made "advisory" only); (5) "any pertinent policy statement" of the U.S. Sentencing Commission (these include most definitions of grounds for departure); (6) "the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victim."⁹

To give respectful consideration to the guideline range as one factor among several -- which is what the statute demands and what the defense advocated in the court below -- is not the equivalent of saying, as Judge Jordan unfairly caricatured it, "I'm just not going to pay attention to that guideline range." 2App. 122. Nor would choosing a sentence below that range, after consideration of multiple factors, on the basis that a

⁹ A sentence of dictum in this Court's en banc decision slightly misstates the post-Booker regime, when it explains, "District Courts will consider the applicable advisory guidelines range in addition to factors set forth in 18 U.S.C. § 3553(a). See Booker, 125 S.Ct. at 764-65." Davis, 407 F.3d at 163. As the Supreme Court clearly stated on the cited pages, the properly computed guideline range is but one of the factors that § 3553(a) requires to be considered, not something "in addition to" them. See also United States v. Gorsuch, 404 F.3d 543, 545 (1st Cir. 2005) (on rehearing) ("the district court must consider the sentence guidelines -- but only on an advisory basis -- and also must consider the other statutory factors set forth in 18 U.S.C. § 3553(a)"); United States v. Green, 426 F.3d 64, 65 (1st Cir. 2005) ("the district court must still consult the guidelines as one among several factors in resentencing").

sentence within the range would be "greater than necessary" to achieve the four statutory purposes, be the equivalent of a judge's saying, as disparaged by the court below, "You know what[? U]nder 3553, that feels too harsh to me." 2App. 122. It is true, in other words, that "the elected representatives of the United States citizens have strongly encouraged ... a fair degree of predictability and consistency in sentencing across the country." Id. But is also true that those same "elected representatives" have barred the elevation of "predictability and consistency" above the multitude of other relevant considerations. It is not for any individual judge to act upon a personal view that "wise and good public policy" would mandate that each judge be "fair and consistent with other judges," with all other factors subordinated to that goal. Id.

It is surely incorrect to read a statute requiring a court to consider seven different enumerated factors, as does 18 U.S.C. § 3553(a), as establishing an unexpressed presumption that every significant aspect of all of those factors is incorporated into the consideration listed fourth (the Guidelines), or perhaps into those listed fourth and fifth (the Commission's policy statements). To the contrary, the strong assumption is that Congress means to require something additional by each separate clause of a statute. See Jones v. United States, 529 U.S. 848, 857 (2000); Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994) (criminal statutes should not be construed so that an element is rendered superfluous). Instead, although the judge must "consider" the guidelines -- and separately, for

example, must consider the "need" to "avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct" -- the actual sentence imposed must never be "greater than necessary," although it must also be "sufficient," to achieve the purposes of sentencing listed in § 3553(a)(2)(A-D). That is what Congress has made the bottom line, not a rigid national "consistency."

Plainly, what is a "wise and good public policy" with respect to the complex problem of sentencing is a matter for Congress, not for any judge or group of judges, to decide. "Section 3553(a), unlike the guidelines themselves after Booker, is mandatory. ... The sentencing judge cannot, after considering the factors listed in that statute, import his own philosophy of sentencing if it is inconsistent with them." United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.). The Supreme Court in Booker, by exercising the judicial power to sever a particular unconstitutional provision from a complex statutory scheme, preserved the statute as a whole, leaving it (in the Supreme Court's view) to work as designed by Congress. That statute does not direct a judge to pay no attention to the guideline range, nor had the defense urged this approach. To the contrary, the Act "requires a sentencing court to consider Guideline ranges," Booker, 125 S.Ct. at 757, but it also requires that same court to consider many other factors.

That the sentence imposed on remand by the court below represented legal error in the application of Booker, and not merely an exercise of discretion, is revealed in its treatment

of the one ground for reduction of the sentence advanced by the defense at sentencing which happens to be addressed in a Sentencing Commission policy statement, that is, post-sentence rehabilitative efforts. In section 5K2.19 (p.s.) of the Guidelines Manual, the Commission has proposed that such efforts, "even if exceptional, ... are not an appropriate basis for a downward departure when resentencing the defendant" As a "policy statement" by the Commission, this was a perspective that Judge Jordan was obligated to "consider." 18 U.S.C. § 3553(a)(5).¹⁰ Yet instead, the court stated, "I have listened carefully to and paid attention to information provided to me by your attorney about your postconviction rehabilitative efforts. It's true that the sentencing guidelines direct me not to make that a factor in reducing the sentence that you're going to face[,] but I hope you continue on the path you have chosen." 2App. 127 (emphasis added). As other circuits have already noted, after Booker, grounds that do not warrant a "departure" may nevertheless support a proper sentence outside the guideline range. United States v. Spigner, 416 F.3d 708, 712 n.1 (8th Cir. 2005); United States v. Gorsuch, 404 F.3d 543, 548 (1st Cir. 2005).

In the end, the question is not, as Judge Jordan suggested, whether those other factors are "inconsistent" with a sentence

¹⁰ Prior to the adoption of that policy by the Commission in 2000, this Court took the contrary view. See United States v. Sally, 116 F.3d 76, 80 (3d Cir. 1997). This Court's opinions surely also constitute something a district court within this Circuit might be expected to "consider" at a resentencing.

selected under a mandatory guidelines regime, 2App. 122, but rather whether any punishment that might be imposed is "greater than necessary," and whether it would be "sufficient," to achieve the general purposes for which society utilizes criminal sanctions. See United States v. Soto, 2005 WL 2811778, *2 (3d Cir., Oct. 27, 2005) (non-precedential, panel of Rosenn, Sloviter & Fisher, JJ.) (denying Anders motion and remanding for resentencing in case where initial sentence was at bottom of guidelines range, given "possibility that the court would find a lesser sentence to be adequate and appropriate, especially in light of the command of 18 U.S.C. § 3553(a) that the sentence be "sufficient, but not greater than necessary").

Many other Circuits have recognized that after Booker sentencing judges must still compute and then consider the guideline range, see 18 U.S.C. § 3553(a)(4), but that these rules are no more controlling of the final sentencing decision than any of the many other factors the court must "consider" under § 3553(a) as a whole. United States v. Menyweather, 2005 WL 3440800, *3 (9th Cir., Dec. 16, 2005); United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005), explaining United States v. Crosby, 397 F.3d 103, 111-13 (2d Cir. 2005); United States v. Gorsuch, 404 F.3d at 548 ("in the post-Booker world, the sentencing guidelines [and policy statements] are only advisory and the district court may justify a sentence below the guideline level based upon a broader appraisal"); Dean, 414 F.3d at 728 ("the sentencing factors articulated in § 3553(a), which the mandatory application of the Guidelines made dormant, have a new

vitality in channeling the exercise of sentencing discretion."), quoting United States v. Trujillo-Terrazas, 405 F.3d 814, 819 (10th Cir. 2005). In short:

the district court's duty at sentencing is to consider the Guidelines range but tailor the sentence in light of other statutory concerns as well, such as the sentencing factors listed in 18 U.S.C. § 3553(a). ... Under § 3553(a), the court shall impose a sentence sufficient but not greater than necessary, to, for example, account for the nature and seriousness of the offense, provide just punishment, deter criminal conduct, protect the public, and avoid sentencing disparities.

United States v. Cawthorn, 419 F.3d 793, 802 (8th Cir. 2005).

To sentence, as the district court did here, upon a presumption that the lawful sentence should be chosen from within the guideline range unless some other factor pulls it out, is to replicate the regime held unconstitutional in Booker and to disobey the surviving statutory command.

This Court long has held that when a statutory scheme requires the sentencing judge to exercise individualized discretion, the imposition of judgment under a "fixed and mechanical" approach constitutes error requiring resentencing. United States v. King, 53 F.2d 589, 591 (3d Cir. 1995), citing United States v. Thompson, 483 F.2d 527 (3d Cir. 1973), leave to file for prohibition or mandamus denied, 415 U.S. 911 (1974); see also United States v. Townsend, 478 F.2d 1072 (3d Cir. 1973) (fixed sentencing policy constitutes "bias" requiring recusal and resentencing by different judge). Because that appears to be just what happened at appellant's resentencing, he must be sentenced again, under a proper application and understanding of United States v. Booker.

II. THE DISTRICT COURT FAILED AT THE RESENTENCING TO OFFER A MEANINGFUL RATIONALE FOR CONCLUDING THAT A SENTENCE WITHIN THE "ADVISORY" GUIDELINE RANGE WAS THE LEAST SENTENCE "SUFFICIENT" TO ACHIEVE THE PURPOSES OF PUNISHMENT, AS REQUIRED BY 18 U.S.C. § 3553(c).

Standard or Scope of Review: This Court's review of the district court's compliance with its statutory obligation to give a reason for the sentence selected from within a wide guideline range is de novo. See United States v. Gricco, 277 F.3d 339, 363 (3d Cir. 2002). In the absence of "extenuating circumstances," however, the lack of a timely objection in the district court limits review to "plain error." United States v. Merlino, 349 F.3d 144, 161 (3d Cir. 2003).

Discussion:

Appellant Lloyd's sentence must again be vacated and the case remanded for another resentencing because the court below failed to give a specific, meaningful reason for sentencing at the bottom of a guideline range which spans more than 24 months and not any lower. As applicable here, the Sentencing Reform Act calls upon the district judge to "state in open court ... the reason for imposing a sentence at a particular point within the [Guideline] range." 18 U.S.C. § 3553(c)(1). Prior to Booker, this Court held that the failure to give any reason for a sentence at the bottom of a range, even one exceeding 24 months, was necessarily harmless to the defendant. Gricco, 277 F.3d at 363 n.15. After Booker, that rule cannot survive without creating a presumption of guideline sentencing that would be inconsistent with the constitutional values, if not the rules and principles, underlying that landmark decision.

At the resentencing in this case, the district court determined anew that the guideline imprisonment range ran from 168 to 210 months, 2App. 108, a span of 42 months, and again imposed the minimum of that range. App. 125. Apparently as the reason for imposing this sentence again, Judge Jordan stated:

The Court has considered the defendant's arguments regarding sentencing and has considered [the] United States Supreme Court's decision in Booker which ruled [that the] sentencing guidelines are now advisory. The Court also believes the sentence which is within the advisory guideline range and meets the sentencing goals outlined in Title 18, United States Code, Section 3553.

2App. 125 (sic).¹¹ This "reason" was legally inadequate, requiring another remand.

¹¹ As noted above, it is not clear whether the last sentence of the court's stated reason should be understood as calling for omission of the word "which" or of the word "and." In its written "Statement of Reasons" included in the judgment, the district court stated (at p. 3), "The sentence recognizes the serious need to protect the public. Additionally, it takes into account the defendant's documented history of substance abuse and his limited educational background." (Appellant assumes that Judge Jordan meant the first sentence to address why the sentence was not lower than the bottom of the range. It is possible that the second sentence was intended to identify mitigating characteristics explaining why the sentence was not higher, but since both characteristics are sometimes identified with a greater risk of recidivism and not viewed by some judges as particularly mitigating, no firm conclusion on this score can be reached.) This nonpublic statement is included with the PSI in the sealed envelopes provided to the Court pursuant to LAR 30.3(c). This explanation is not similar to any statement made by the judge "at the time of sentencing ... in open court," 18 U.S.C. § 3553(c), and thus cannot fulfill the statutory obligation. In the written "Statement of Reasons" following Mr. Lloyd's original sentence, Judge Jordan (erroneously) checked the box stating that the guideline range did not exceed 24 months and offered no other reason. A copy of that form is also included in the PSI envelopes.

The cases to date agree that the district court after Booker must still state reasons for its sentence. Nothing in that decision affected the duty under § 3553(c). United States v. Menyweather, 2005 WL 3440800, *7 (9th Cir., Dec. 16, 2005); United States v. Simpson, 430 F.3d 1177, 1186-87 (D.C. Cir. 2005); United States v. Engler, 422 F.3d 692, 696 (8th Cir. 2005); United States v. Webb, 403 F.3d 373, 385 n.8 (6th Cir. 2005); United States v. Crosby, 397 F.3d 103, 116 (2d Cir. 2005).¹² In light of the Booker opinion, which elevated the parsimony directive of 18 U.S.C. § 3553(a) to the level of controlling statutory mandate, the statutory requirement to give a "specific reason" has to mean, at the least, a reason attempting to explain why no lower sentence would be "sufficient" to accomplish the purposes of sentencing set forth under id.(a)(2), even if it does not reference all the other pertinent § 3553(a) factors. Anything else is not really a reason "for imposing [that] sentence." 18 U.S.C. § 3553(c)(1).

It would be "a very small burden upon the district court to explain its consideration of the § 3553(a) factors and their impact on the sentence imposed. It should not to be the job of this court, nor [of] the defendant, to attempt to divine the motivation of the district court at sentencing in the penumbra of the record." Engler, 422 F.3d at 697. The reason given in

¹² For any sentence outside the guideline range, the Court must place its specific reasons in writing and make them part of the judgment. 18 U.S.C. § 3553(c)(2). See United States v. Hughes, 401 F.3d 540, 546 n.5 (4th Cir. 2005). That particular provision does not apply in this case.

this case, considered in the context of the entirety of the court's remarks, did not "recognize the discretion with which it was vested and the factors that were to inform that discretion." United States v. Ledesma, 2005 WL 3477715, *2 (3d Cir., Dec. 20, 2005) (non-precedential). The reasons offered by the court below on remand do not come near to satisfying this obligation.

The requirement of stating reasons, including specific reasons for particular sentences given within the broader guideline ranges, is not a formality; it was one of the principal features of the 1984 Sentencing Reform Act. Mistretta v. United States, 488 U.S. 361, 367-68 (1989). The legislative history emphasizes as a "glaring defec[t] in current sentencing law" the "fact that the sentencing judge is not required to state his reasons for imposing a particular sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 74-75 (1983).

After Booker, "the district court may justify a sentence below the guideline level based upon a broader appraisal." United States v. Gorsuch, 404 F.3d 543, 548 (1st Cir. 2005) (on rehearing). Congress directed the sentencing judge in each case to select the sentence from within or without that range that was "sufficient, but not greater than necessary" to achieve the purposes of punishment. 18 U.S.C. § 3553(a). The reason given by the district court should therefore at least suggest what purpose or purposes of sentencing would be inadequately addressed by any sentence shorter than that imposed and why.

The error under § 3553(c) at the resentencing in this case is apparent, and it affected Mr. Lloyd's substantial rights,

because there were many reasons offered by the defense for imposing a sentence of less than 14 years that would nevertheless protect the public and reflect the seriousness of the offense. This sentence did not follow a lengthy trial, where extensive evidence about defendants' varied, violent, organized crime activities, for example, were spread upon the record. Compare Merlino, 349 F.3d at 162. To the contrary, this was a fairly routine drug case, involving a small-scale conspiracy. The defendant was himself a drug user and the product of a severely deprived childhood.¹³ He pleaded guilty and accepted responsibility. The imposition of what appears -- in the absence of any articulable reason -- to be an excessive and unnecessarily severe sentence does affect the fairness, reputation and integrity of the proceedings. See, e.g., Davis, 407 F.3d at 164 (any sentence "not authorized by law" is plain error); United States v. Adams, 252 F.3d 276, 285 (3d Cir. 2001) (discussing plain and fundamental error occurring at sentencing; employing reasonable doubt standard); United States v. Bogusz, 43 F.3d 82, 89-90 (3d Cir. 1994), discussing "plain error" at sentencing.

Contrary to the sua sponte suggestion of the panel in Merlino, 349 F.3d at 161, a remand for a statement of reasons, rather than for a resentencing, would not be an adequate remedy. The language of § 3553(c) itself makes clear that the reasons for a sentence must be given in connection with the pronouncement of that sentence, not later or separately: "The court, at

¹³ These factors are elaborated under Point III of this Brief.

the time of sentencing, shall state in open court ... (1) ... the reason for imposing a sentence at a particular point within the range" See also United States v. Rose, 185 F.3d 1108, 1113 (10th Cir. 1999); United States v. Price, 51 F.3d 175, 177-78 (9th Cir. 1995). In this way, the statute promotes thought by the decisionmaker prior to its exercise of discretion, and respects the defendant's due process right to be present at sentencing and to hear the reasoning before sentence is imposed.

Post-Booker, a sentence cannot be deemed "reasonable" by the appellate court if the district court has not meaningfully articulated its reasons. Such a sentence has been "imposed in violation of law," 18 U.S.C. § 3742(f)(1), requiring a remand for resentencing. Even if the sentence is not reversed for the legal reason given under Point I, or for the more discretionary reason suggested under Point III, those arguments at least raise serious questions about its reasonableness, making all the more clear that the error discussed in this section was not harmless. For these reasons, the judgment must be vacated and the case remanded for a lawful resentencing.

III. IT WAS UNREASONABLE FOR THE DISTRICT COURT TO CONCLUDE THAT A SENTENCE OF FOURTEEN YEARS' IMPRISONMENT, EVEN THOUGH IT IS THE MINIMUM OF THE GUIDELINE RANGE DEEMED APPLICABLE, WAS THE LEAST SENTENCE SUFFICIENT TO SATISFY THE PURPOSES OF PUNISHMENT, AS REQUIRED BY 18 U.S.C. § 3553(a).

Standard or Scope of Review: If the district court complies with the Sentencing Reform Act, then review of the sentence itself is for reasonableness. Booker, 543 U.S. 220, 125 S.Ct. at 767; see also United States v. Ledesma, 2005 WL 3477715, *1 n.1 (3d Cir., Dec. 20, 2005) (non-precedential).

Discussion:

If the Court determines that no error under the Sentencing Reform Act occurred in the imposition of Mr. Lloyd's 168-month sentence, the Court must nevertheless review the sentence for "reasonableness." Booker, 543 U.S. 220, 125 S.Ct. at 767. Here, the imposition of 14 years' imprisonment, even though at the bottom of the guideline range, was unreasonable for this 26-year-old, drug abusing high school dropout, the father of three young children. Just as there can be no presumption in the district court, after Booker, that a Guideline sentence will satisfy all the statutory criteria of § 3553(a), so there can be no presumption on appeal that every sentence within the Guideline range is "reasonable." See United States v. Vazquez-Rivera, 407 F.3d 476, 490 (1st Cir. 2005).¹⁴ This Court should reverse the judgment.

¹⁴ The other circuits are divided on this question. Compare United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 718 (8th Cir. 2005) (presuming within-range sentences to be reasonable), with United States v. Mares, 402 F.3d 511, 519 (5th Cir.

When the Supreme Court confirmed "reasonableness" as the standard of review for criminal sentences appealed after Booker, it was not assigning to this Court the task of reassessing all sentences according to its own subjective ideas of appropriate punishment. Like any other standard of appellate review, the "reasonableness" test must be applied with reference to the nature of the legal decision that was to be made by the court below. Where the discretion of the lower court, as here, is to be exercised according to some substantive criterion for judgment, then it is the reasonableness of the district judge's application of that rule of decision which this Court must assess. "In other words, the [pre-2003] text [of 18 U.S.C. § 3742(e)] told appellate courts to determine whether the sentence 'is unreasonable' with regard to § 3553(a)." Booker, 125 S.Ct. at 765 (emphasis added). And that is the test which the Supreme Court then determined should be applied now, after holding § 3553(b) unconstitutional and excising it (along with § 3742(e), as amended in 2003) from the statute, for the review of all sentences appealed under § 3742(a) or § 3742(b). See Booker, 125 S.Ct. at 766.

Here, the rule governing the district judge's decision at the time of sentencing was the principle of parsimony, applied after consideration of a list of statutory factors, as stated in

_____ (footnote continued)

2005) (if guideline range is properly computed and if district court properly weighs all statutory factors then reversal of sentence as "unreasonable" will be "rare"); United States v. Shannon, 414 F.3d 921, 924 (8th Cir. 2005) (sentence within guideline range is only "generally indicative" of reasonableness).

18 U.S.C. § 3553(a). See Point I ante. "The courts of appeals [are now to] review sentencing decisions for unreasonableness." Booker, 125 S.Ct. at 767. Assuming that the range was calculated correctly, the least sentence recommended by the guidelines was the term imposed -- 168 months, equal to 14 years' imprisonment. This Court should hold, upon review pursuant to 18 U.S.C. § 3742, that the decision to sentence Mr. Lloyd to that term and no less was not "reasonable" in the pertinent sense, that is, by reference to the statutory standards.

It was not reasonable for the court below to conclude, in light of all the factors it was due to consider, that a sentence of 14 years' imprisonment -- a period more than half as long as the defendant had lived to date -- was "not greater than necessary" to accomplish the purposes of criminal punishment, that is, that no lesser penalty would have been "sufficient." 18 U.S.C. § 3553(a). The purposes of punishment, as articulated by Congress, are promotion of respect for law, including the provision of just punishment in light of the seriousness of the offense, id.(a)(2)(A); deterrence (both general and specific), id.(a)(2)(B); incapacitation to protect the public, id.(a)(2)(C); and any needed rehabilitation and treatment of the offender, id.(a)(2)(D).

Before choosing the least sentence sufficient to fulfill these objectives, as already mentioned under Point I above, the court was obligated to "consider" a number of other factors:

- "the nature and circumstances of the offense," and "the history and characteristics of the offender," id.(a)(1);

- the "kinds of sentences available," id.(a) (3);
- the sentence types and ranges called for by the Guidelines, id.(a) (4);
- "any pertinent policy statement" of the U.S. Sentencing Commission, id.(a) (5);
- "the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct," id.(a) (6); and
- "the need to provide restitution to any victim," id.(a) (7).

As discussed under Point I of this Brief, the record strongly suggests that Judge Jordan did not fairly "consider" each of these seven or more statutory factors before selecting the sentence, but instead applied a presumption that the guideline range -- listed in the statute as factor (a) (4) -- would give the right answer, and then merely asked whether the other factors demanded a different result. And as further shown under Point I, that method of selecting the sentence violates the Act as it stands after Booker. But even assuming for purposes of discussion that the lower court's methodology was not unlawful, the choice of sentence was still unreasonable.

The process of choosing a reasonable sentence will, as the statute suggests, begin with identifying "the history and characteristics" of the defendant, and "the nature and circumstances of the offense." 18 U.S.C. § 3553(a) (1). It was undisputed in the court below, as the PSI discloses, that the defendant-appellant, Eric Christopher Lloyd, was at the time of resenten-

cing a 26-year-old,¹⁵ never-married father of three.¹⁶ Growing up without knowing his own father and with a mother who was a drug addict, Mr. Lloyd was first arrested at age 17 (the year his mother died at age 36), when he was orphaned with younger siblings depending on him.¹⁷ He accumulated 9 criminal history points -- as measured under Chapter 4 of the Guidelines Manual -- by age 18, without ever committing an offense more serious than running away from a juvenile facility.¹⁸ His poverty-stricken childhood was marked by instability and transience. He left high school after tenth grade.¹⁹ Himself a former drug abuser, he had no real employment history.²⁰

Yet when Mr. Lloyd came before the court a second time, he had made significant efforts at self-improvement in prison, 2App. 98-105, and had a number of loving, articulate supporters who testified to the changes he had made in recent years. 2App. 82-97. His own letter to the judge is impressive; it rings of sincerity, and growing maturity and insight. 2App. 80-81. Any "reasonable" sentencing decision would have to take into account these objective indicators of a substantial need for and

¹⁵ Date of birth May 26, 1979. PSI, p. 2.

¹⁶ PSI ¶¶79-82, at 19.

¹⁷ PSI ¶73, at 17.

¹⁸ PSI ¶¶ 49-72, at 11-17.

¹⁹ PSI ¶ 91, at 21.

²⁰ PSI ¶¶ 86-87, 94-96, at 20-21.

likelihood to benefit from rehabilitation, following a rocky start in very difficult circumstances.

The charges to which Mr. Lloyd pleaded guilty are indeed serious, involving several kilogram deals that crossed state lines. However, the facts were never settled with respect either to quantity or to his role in the offense. 2App. 72-75.

As for the disparity factor, the defense argued in the court below, invoking 18 U.S.C. § 3553(a)(6), that the penalties for the same conduct in state court would be only half of that imposed here. 2App. 111. The two codefendants also received lesser sentences.²¹ This provision calls upon the district court to avoid unwarranted disparity (which may exist notwithstanding application of the Guidelines to each case) by considering the sentences received by offenders with "similar records" who were "convicted of similar conduct."²² Unwarranted disparity can result from treating unlike cases the same, or like cases differently. Consideration of the factor of "unwarranted disparity" suggests that it was unreasonable to conclude

²¹ One then also obtained a remand from this Court. As of this filing, he has yet to be resentenced, but for purposes of disparity analysis it can safely be presumed that his sentence will necessarily be the same as or shorter than originally.

²² While the Guidelines were designed to address certain aspects of disparity, the separate existence of subsections (a)(4) and (a)(6) shows that the sentencing court is required to consider forms of unwarranted disparity that may exist despite even proper application of the Guidelines. See Jones v. United States, 529 U.S. 848, 857 (2000); Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994), and discussion at p. 19 ante. Examples of such disparity include the two that the defense raised below -- federal/state disparity, and codefendant disparity.

that any sentence less than a 14-year term would not be "sufficient" in Mr. Lloyd's case and that the sentence imposed was not "greater than necessary" to achieve the purposes of punishment.

The same questions arise when the significant factor of protection of the public is considered objectively, as the reasonableness standard requires. This factor has mostly to do with commission of further crimes. Mr. Lloyd's 9 points, putting him in Criminal History Category IV without any serious prior conviction and all acquired during the traumatic two-year period when he was 17-18 years old and became an orphan, was misleading and uninformative. He had never previously served much as a year in jail. Under the Act, the "protection" consideration under § 3553(a)(2)(C) is separate from computation of the Criminal History Category (which must be "considered" as part of the guideline computation, under § 3553(a)(4)). For this reason as well, the district court's assignment of sentence at the bottom of the elevated guideline range does not satisfy objective examination against a criterion of reasonableness.

As for deterrence, *id.* § 3553(a)(2)(B), experience with the "war on drugs" raises questions about this factor, as it does with respect to protection of the public. One dealer is incarcerated, and another takes his place on the corner. Punishment and incapacitation can perhaps be achieved in drug sentencing, but as long as the profits remain high, deterrence is unlikely. In any event, the criterion of deterrence could not contribute significantly to any reasonable conclusion that no sentence of less than 14 years could be sufficient. On the other hand, Mr.

Lloyd is just the sort of defendant who could benefit from "correctional treatment" (education, vocational training and counseling, parenting skills, and drug counseling) which is not best provided in a prison setting. See id.(a)(2)(D); see also 18 U.S.C. § 3582(a). Such treatment, to the extent that it rehabilitates, then serves to protect the public from future crimes. Thus, applying all the statutory criteria to this case, it was unreasonable for the court below to conclude that a sentence of 14 years was "not greater than necessary" to be imposed at resentencing.

As already conceded, the offense of conviction is admittedly "serious," as that term is used in § 3553(a)(1). The defense did not suggest any minor punishment in its arguments below, and does not do so now. Tested against the governing criteria, however, the sentence imposed on appellant Lloyd could not reasonably be thought to comply with the post-Booker statutory mandate of parsimony. For this reason as well, the judgment must be vacated and the case remanded for resentencing.

CONCLUSION

For all the reasons set forth in this Brief, appellant Eric Lloyd is entitled to a second resentencing.

Respectfully submitted,

Dated: January 9, 2006

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VOLUME 1 APPENDIX (LAR 32.2(c)) FOR APPELLANT LLOYD

1.	Notice of Appeal (filed 9/14/05)	1a
2.	Order extending deadline for appeal to October 6, 2005 (filed 9/26/05)	2a
3.	Original imposition of sentence, 12/15/03 (transcript excerpt)	3a
4.	Imposition of sentence, 8/2/05 (resentencing transcript excerpt)	10a
5.	Amended Judgment of Sentence (filed 8/22/05, entered 8/23/05)	17a

CERTIFICATE OF SERVICE

On January 9, 2006, I served two copies of the foregoing brief on counsel for the appellee, the United States, along with a copy of the appellant's appendix (one additional volume), by priority mail, postage prepaid, addressed to:

Richard G. Andrews, Esq.
First Ass't U.S. Attorney
P.O. Box 2046
Wilmington, DE 19899-2046

On January 9, 2006, I also caused to be hand-delivered to the Office of the Clerk ten copies of this Brief and four of the Appellant's Appendix, plus four sealed envelopes containing the Pre-Sentence Report and non-public Statements of Reasons, along with a motion for leave to file *instanter*.

____s/Peter Goldberger_____