

No. 03-_____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,)	On appeal from the United
)	States District Court for the
Plaintiff-Appellee,)	Western District of Wisconsin.
)	
)	
vs.)	No. 03 CR _
)	
S_____ H_____,)	Honorable John C. Shabaz,
)	United States District Judge,
Defendant-Appellant.)	Presiding.

APPELLANT’S POSITION STATEMENT AFTER THE DISTRICT COURT’S ORDER REGARDING THE LIMITED REMAND, PURSUANT TO *UNITED STATES v. PALADINO*, 401 F.3d 471 (7th Cir. 2005)

INTRODUCTION

Now comes the Defendant-Appellant, S_____ H_____, by his attorney, and submits the following position statement regarding the appropriate disposition of his appeal, in light of the district court’s decision on limited remand, as ordered by this Court on July 7, 2005 and respectfully moves this Honorable Court to vacate his sentence and remand his case to the district court for resentencing, in accordance with *United States v. Booker*, 5__ U.S. ____, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005),

because the sentence imposed by the district court is unreasonable.

Mr. H_____ was convicted and sentenced based on his guilty plea to selling 17.23 grams of crack cocaine to an undercover officer, with the assistance of his co-defendant, J_____ A_____. (21 U.S.C. §§841(a) &(b)(1)(B), 2; CR¹ 17-18; PT 2-24; PSR 7; App. 3-6.)

Mr. H_____ pled guilty, pursuant to a plea agreement. As part of the plea agreement, Mr. H_____ agreed to cooperate with the government. In return for Mr. H_____’ cooperation, the government agreed to file a motion for a downward departure, pursuant to U.S.S.G. §5K1.1, or a motion for a reduction of sentence, pursuant to F.R.Crim.P. 35. The government also agreed to recommend that Mr. H_____ be given a three level reduction for acceptance of responsibility, pursuant to U.S.S.G. §3E1.1. (CR 17-18, PT 2-24, App. 3-6.)

In her presentence report, the probation officer recited several instances of relevant conduct, in addition to the conduct underlying Mr. H_____’ conviction. This conduct was based on his statements to agents after he was arrested and involved approximately 3.63 kilograms of crack cocaine. (PSR 9-10.) Therefore, the probation officer recommended that Mr. H_____’ base offense level be 38, based on

¹ CR is used as an abbreviation for the district court clerk’s record of Mr. H_____’ case. PT is used as an abbreviation for the reporter's transcript of Mr. H_____’ Rule 11 or plea hearing. ST is used as an abbreviation for the reporter’s transcript of the sentencing hearing. PSR is used as an abbreviation for the probation officer's presentence report. AOB is used as an abbreviation for appellant’s opening brief. App. is used as an abbreviation for the appendix to Mr. H_____’s opening brief. ARB is used as an abbreviation for appellant’s reply brief.

over one and a half kilograms of crack cocaine. (PSR 14.) The probation officer also recommended that Mr. H_____ receive a three-level reduction for acceptance of responsibility. (PSR 15.) She also found that Mr. H_____ was in criminal history category six, based on both his criminal history score and being a career offender. (PSR 15-18.) Mr. H_____’ prior record includes four convictions for controlled substance offenses. (PSR 15-18.)

The government filed a motion for a downward departure, pursuant to U.S.S.G. §5K1.1, based on Mr. H_____’ substantial assistance. (CR 29-30.)

On July 23, 2003, the court held a sentencing hearing for Mr. H_____. The court adopted the Guidelines’ calculations in the presentence report. (ST 3-4, App. 14-15.)

The government then argued for a downward departure, pursuant to U.S.S.G. §5K1.1. It asked the court to either depart by three levels and sentence Mr. H_____ at the high end of the resulting guideline range or depart by two levels and impose a sentence at the low end of the resulting range. The government noted that Mr. H_____ cooperated with investigators as soon as he was arrested. However, he was not yet represented by counsel when he gave his first statement and that information was used against him at sentencing. The government also stated that Mr. H_____ had always been truthful. Mr. H_____’ cooperation allowed the government to obtain an additional conviction, after a trial, and the pleas of other

people. (ST 5-6, App. 16-17, RB 7-8.) Mr. H_____ argued that his cooperation was extraordinary because he gave a detailed statement as soon as he was arrested, instead of waiting to see how it would help him. In addition, Mr. H_____ gave subsequent statements and even testified in another defendant's trial. Counsel also noted that Mr. H_____ ' family was threatened as a result of his cooperation. (ST 6-8, App. 17-19.) The court said that it granted the government's motion for a downward departure, but only departed by one level.² (ST 9, App. 20.) It found that, while Mr. H_____ ' assistance was substantial, it was not extraordinary. The court focused on the fact Mr. H_____ had given evidence against a confederate who was less culpable than he was. The court observed that such cooperation "happens all the time." (ST 9, App. 20.)

Both parties then asked the court for a sentence at the low end of the guideline range. The prosecutor noted that Mr. H_____ chose to go forward with his testimony even after he heard that his girlfriend was threatened. (ST 12, App. 22.)

The court then stated that it "believes [Mr. H_____] has an extensive criminal record and believes the seriousness of his past criminal conduct is a likelihood of recidivism and that he belongs in prison for as long as the law will allow." The

² As this Court noted, the district court did not really depart at all, "since the sentence imposed still fell within the originally calculated range of 292 to 365 months." *United States v. A_____*, Nos. 03-____ & 03-____, slip opn. (7th Cir. J____, 2005) (unpub.).

court stated that it would have imposed the upper end of the original range if it had not departed. It then stated that:

The Court believes that there is only (sic) sentence that can be provided here and that is at the top of the guideline imprisonment range. His conduct goes beyond the top. He's off the scales and he's full of recidivism as soon as he gets out. A sentence near the top of the guideline range may be sufficient to hold him accountable for his ongoing criminal activity and provide the community, which apparently no one has been thinking of up to now, that much needed reprieve.

(ST 13, App. 23.) The court then sentenced Mr. H_____ to a term of 327 months (27 years and four months) imprisonment, which was the high end of the guideline range. (CR 34; ST 13-15; App. 7-12, 23-25.)

Mr. H_____ raised two issues in his appeal. First, he argued that his case should be remanded for resentencing, pursuant to *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). (AOB 14-22; ARB 7-12.) Second, Mr. H_____ argued that his sentence should be reversed, under *Booker*, because it is unreasonable. (AOB 22-27, ARB 12-18.) This Court found that the district court sentenced Mr. H_____ in violation of *Booker*. Since, it was not apparent whether the district court would have imposed a lower sentence under *Booker*, this Court issued a limited remand of Mr. H_____’ case in order for the district court to answer that question, pursuant to *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005). This Court has not yet decided the issue of whether Mr. H_____’ statement was

unreasonable. *United States v. A_____*, Nos. 03-____ & 03-____, slip opn. (7th Cir. J_____, 2005) (unpublished). After the limited remand, the district court obtained the views of both parties, through counsel. It then issued an order, stating that it would still impose the same sentence under *Booker*. It relied on its statements and findings at Mr. H_____’ sentencing hearing as justification for its refusal to revisit Mr. H_____’ sentence. (CR 76.)

However, this Court must still determine whether the district court’s sentence is unreasonable. *United States v. Paladino*, 401 F.3d at 484. In this case, the sentence is unreasonable. There are several mitigating facts in this case which warrant a lower sentence.

Mr. H_____ had a rough upbringing and fell in with the wrong crowd when he was a teenager. However, he has now accepted responsibility for his actions. Most importantly, Mr. H_____ has done everything he possibly could to assist the government with this case and others ever since the day he was arrested in this case. In addition, Mr. H_____ is now attempting to improve himself by furthering his education in prison.

Perhaps more important, the Sentencing Commission and several courts have found that the disparity between sentences for crack and powder cocaine is unjustified. A sentence which fails to take this disparity into account and reduce it is irrational and does not comply with the statutory purposes of sentencing.

In addition, the district court did not give substantial weight to the government's evaluation of Mr. H_____ ' substantial assistance and recommendation for a greater departure. The limited extent of the district court's downward departure is unreasonable.

The Sentencing Commission has also suggested that the criminal history for someone like Mr. H_____ may be elevated because African-Americans have a higher risk of being convicted for a drug offense. In addition, the Commission also found that sentences for lower level drug dealers do not deter others from committing the same offense.

Therefore, a much shorter sentence than Mr. H_____ ' current sentence of 327 months in prison would be sufficient to fulfill the statutory goals of sentencing. In contrast, Mr. H_____ ' current sentence is much greater than necessary to fulfill those purposes.

STATEMENT OF FACTS

Most of the facts regarding Mr. H_____’ offense and his history and characteristics are set forth above and in his opening and reply briefs. (AOB 6-10, ARB 2-4.) However, some additional facts were brought to the district court’s attention during the limited remand.

In addition to his cooperation against co-defendants, Mr. H_____ also gave information about some people he knew in Chicago to DEA Agent Lou Gade. Agent Gade passed this information on to Chicago authorities. (CR 71 - Mr. H_____’ *Paladino* position statement in the district court p. 10.)

Mr. H_____ has continued his attempts to cooperate with the government since his sentencing. He was even brought to Chicago to talk with agents about his former drug supplier. Mr. H_____ met with agents and was quite cooperative. He told them everything he knew about his former supplier. Unfortunately, the information he had did not add anything significant to the government’s case. Mr. H_____ even asked his brother to help with the investigation. However, that did not happen. (See letter sent to the district court by attorney Gerald Collins and attached to CR 71.)

Mr. H_____ has also relayed, through current counsel, offers of cooperation that he was given from family members. Unfortunately, the family members did not actually provide much cooperation when they were contacted by agents. (CR 71 p.

11.)

In addition, Mr. H_____’ mother, Ann, said that he grew up in a part of town where gangs were a constant presence. There was constant pressure on him to join, even to the point that his siblings were threatened with harm if Mr. H_____ did not join. (Report of Federal Public Defender’s Investigator Phillip Geier, attached to CR

71.)

Mr. H_____’ mother also said that Mr. H_____ was a good student until he got into high school. That was when he started to have problems and get into trouble. (Report of Federal Public Defender’s Investigator Phillip Geier, attached to CR71.)

Furthermore, Mr. H_____ has continued his participation in a G.E.D. program in prison. That includes his completion of a course in “U.S. Economics and Political Studies.” He has not received any disciplinary reports in prison. In addition, his work performance rating is good. (Prison records, attached to CR 71.)

ARGUMENT

Mr. H_____’ sentence is unreasonable.

A. Standard of Review

Booker held that sentences must now be reviewed for reasonableness. *United States v. Booker*, 125 S.Ct. at 765. This Court has not decided what that means. *Booker* analogized review for reasonableness to review of Guideline departures. *Ibid.* The Court previously held that departures are reviewed for abuse of discretion. *Koon v. United States*, 518 U.S. 81, 98-100 (1996). Therefore that appears to be the standard of review for the question of whether a sentence is unreasonable.

B. Argument

1. A Guidelines sentence is not automatically reasonable.

As Mr. H_____ noted in his opening brief, in addition to the Sentencing Guidelines, district courts must now consider the purposes of sentencing set forth in 18 U.S.C. §3553(a). *United States v. Booker*, 125 S.Ct. at 764-765. (AOB 15, 17.) The fact the district court’s sentence is within the Guidelines does not mean that it is reasonable.

Last week, this Court stressed the mandatory nature of 18 U.S.C. §3553(a) and the advisory nature of the Guidelines. It noted that:

the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for

such a variant sentence to be reasonable and thus within the sentencing judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by section 3553(a), which as we have stressed is mandatory.

United States v. Dean, 4__ F.3d ___, 2005 U.S. App. LEXIS 13510, *14-*15 (7th Cir. July 7, 2005). Immediately after that statement, this Court cited, with approval, three district court opinions that rejected the government's position that the Guidelines are entitled to presumptive or heavy weight. *Id.*, citing *United States v. Ranum*, 353 F.Supp.2d 984, 985-986 (finding that, under *Booker*, the Guidelines are just one of a number of sentencing factors); *United States v. Kelley*, 355 F.Supp.2d 1031, 1035-1037 (D. Neb. 2005) (refusing to afford the Guidelines a presumption of reasonableness in every case); *Simon v. United States*, 361 F.Supp.2d 35, 39-41 (E.D. NY 2005) (adopting the view that the Guidelines are entitled to the same weight as other §3553(a) factors). Therefore, this Court has effectively rejected the position that a Guidelines sentence is automatically reasonable.

In apparent contrast, in an opinion that was issued the same day as *Dean*, a different panel of this Court held that a Guidelines sentence is entitled to a rebuttable presumption of reasonableness. The second panel found that "[t]he defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a)."

United States v. Mykytiuk, 4__ F.3d ___, 2005 U.S. App. LEXIS 13508, *3-*5 (7th Cir.

July 7, 2005). Perhaps, the panel did not intend to make such a strong statement in *Mykytiuk*. However, if the language in *Mykytiuk* is taken literally, this Court has apparently created an intra-circuit conflict.

In addition, a literal reading of *Mykytiuk* appears to conflict with *Booker*. Such a reading appears to have the effect of making the Guidelines mandatory, unless the defendant can show that his sentence should be outside the Guidelines. That would not be any different than the pre-*Booker* situation of the Guidelines being mandatory with narrow exceptions for departures. The merits majority in *Booker* found that sentencing scheme unconstitutional. *United States v. Booker*, 125 S.Ct. at 746. (See also ARB 13-14.) *United States v. Moreland*, 366 F.Supp.2d 416, 418 (S.D.W.V. 2005); *United States v. Williams*, 3__ F.Supp.2d ____, 2005 U.S. Dist. LEXIS 8178, *3-*8 (M.D. Fla. May 5, 2005); *United States v. Strange*, 370 F.Supp.2d, 2005 U.S. Dist. LEXIS 9671, *14 (N.D. OH 2005). *Contra: United States v. Harper*, 360 F.Supp.2d 833, 834 (E.D. Tex. 2005). *See also United States v. Phelps*, 366 F. Supp. 2d 580, 589 (E.D. Tenn. 2005) (treating the Guidelines as controlling for some §3553(a) factors, but not for others). In addition, the Second Circuit recently noted that the statutory *Booker* error of treating the Guidelines as mandatory means that a court erred by relying on 18 U.S.C. §3553(a)(4) “to the exclusion of the other factors specified in section 3553(a).” *United States v. Fagans*, 406 F.3d at 141 fn. 1. The Sixth Circuit also declined to hold that a sentence within a Guidelines range is per-se reasonable. *United States v. Webb*,

403 F.3d 373, 385 fn. 9 (6th Cir. 2005).

Therefore, this Court should follow the *Dean* decision, because it does not conflict with *Booker*. If this Court were to follow a literal reading of the *Mykytiuk* decision, this Court's decision may conflict with the Supreme Court's decision in *Booker*, which is paramount. As a result, this Court may wish to take this opportunity to clarify the *Mykytiuk* decision in a manner that will harmonize it with *Dean* and eliminate the apparent conflict with *Booker*.

2. The district court's sentence is unreasonable because it failed to consider the disparity between sentences for crack and powder cocaine.

This Court should reverse Mr. H_____ ' sentence even if it follows the literal language of *Mykytiuk*. As shown below and in his briefs, Mr. H_____ has rebutted any presumption that a Guidelines sentence is reasonable in his case.

As Mr. H_____ noted and argued in his opening and reply briefs, the Sentencing Commission has found that the substantially harsher treatment of crack cocaine, compared to powder cocaine, under the Guidelines is not justified by the harms associated with it. (AOB 17-18, 24-25; ARB 9, 14-17.) *See also United States v. Castillo*, 3__ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 9780, *12-*14 (S.D. NY May 20, 2005) (following *United States v. Smith*, 359 F.Supp.2d 771, 777-782 (E.D. Wis. 2005) by finding that the 100:1 ratio is unreasonable and applying a 20:1 ratio).

[T]here is no persuasive penological or scientific justification for treating 1 gram of crack the same as 100 grams of powder. The Sentencing Commission studied the issue in depth and concluded that the assumptions underlying the disparity between crack and powder are unsupported. Specifically, the Commission concluded that: (1) the prevalence of aggravating factors in crack cases does not differ substantially from powder cocaine cases; (2) any pharmacological differences between crack and powder do not justify the disparity in penalties; (3) in comparison to the mid-80s, the use of crack has decreased; (4) the unjustifiably harsh crack penalties disproportionately impact on black defendants and have increased racial disparity in federal sentencing, contrary to one of the Sentencing Reform Act's primary goals; (5) the disparity in sentences involving crack and powder brings irrationality into the criminal justice system, allowing guideline sentences to vary widely depending on whether the offender had cooked the powder into crack by the time of arrest; and (6) the 100:1 ratio results in lesser sentences for large scale suppliers of powder cocaine than the street level crack dealers who exist below them in the hierarchy of distribution.

United States v. Leroy, 3__ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 12653, *11-*12 (E.D. Wis. June 20, 2005) (citations omitted).

Treating a defendant one hundred times harsher than another defendant who possesses a chemically identical substance is unreasonable. The district court should have realized this and adjusted Mr. H_____’ sentence accordingly. The court’s failure to do so makes Mr. H_____’ sentence unreasonable.

3. The district court's sentence was unreasonable because it did not give adequate consideration to Mr. H_____ ' substantial assistance.

As Mr. H_____ argued in his opening and reply briefs, the limited extent of the district court's downward departure is unreasonable. (AOB 25-26, ARB 17.) The court should have given substantial weight to the government's evaluation of Mr. H_____ ' substantial assistance and recommendation for a greater departure. (ST 5-6, 9; App. 16-17, 20.) *United States v. Thomas I*, 930 F.2d 526, 530 (7th Cir. 1991).

All five factors in U.S.S.G. §5K1.1(a) weighed in favor of Mr. H_____. Contrary to the district court's assertion, that is not the case for every defendant who cooperates with the government. Therefore, the district court's refusal to give more than a bare minimum departure was unreasonable. Such an approach gives little incentive for defendants to cooperate with the government. While people argue about the wisdom of the policy, Congress has found that defendants should be encouraged to assist the government with the prospect of a reward for their cooperation. (18 U.S.C. §3553(e); 28 U.S.C. §994(n).) The district court's approach in this case is not only unreasonable, but contrary to that Congressional policy.

4. Application of the §3553(a) factors to Mr. H_____’ case.

a. Nature and Circumstances of the Offense.

Mr. H_____ has recounted the nature and circumstances of his offense above. Mr. H_____’ conduct involved a significant quantity of crack cocaine over several months. However, the most he ever bought or sold at one time was nine ounces, which is about one-quarter of a kilogram. In addition, Mr. H_____ was personally involved in retail sales, even though he also had people working for him. Therefore, he was not a large scale dealer. He might be best characterized as a mid-level dealer. (PSR 9-10.)

So, the nature of Mr. H_____’ offense does not suggest the need for a sentence that is anywhere near as long as 327 months.

b. Mr. H_____’ history and characteristics.

As noted above, Mr. H_____ had a troubled childhood due to the neighborhood influences where he grew up. He ultimately succumbed to those influences and became involved in criminal activity.

However, Mr. H_____ has now accepted responsibility for his conduct and decided that he has had enough. He never tried to hide or minimize his conduct after he was arrested.³ In addition, Mr. H_____ fully cooperated with the _____

³ His unprotected admissions after his arrest even increased his Guideline range by one level over what it would have been under the career offender guideline. (U.S.S.G. §§2D1.1 & 4B1.1.)

government. He did this with respect to people who were both above and below him on the supply chain. Unfortunately, he simply did not know enough about the people who were above him for his cooperation against them to amount to substantial assistance.

Finally, Mr. H_____ has begun to further his education since he has been incarcerated.

Therefore, Mr. H_____ certainly has the potential to become a contributing member of society as a law-abiding citizen. He is working toward that goal.

c. Needs of the public.

Congress has determined that the public has a need to harshly punish individuals who sell crack cocaine. However, Mr. H_____ will have been harshly punished even if this Court were to order that his sentence be reduced to the ten year mandatory minimum or any period of time above that, but less than 327 months.

d. The advisory Guidelines.

The range for Mr. H_____’ offense and criminal history, under the advisory Guidelines was 292 to 365 months before the one-level departure and 262 to 327 months after the departure. (ST 9; U.S.S.G. §5A.)

As noted above, the advisory Guidelines do not fully account for cases like Mr. H_____’. They do not allow this Court to fully take into account all of the mitigating circumstances about Mr. H_____ and his case.

Mr. H_____ has already noted the problems with the disparity between sentences for crack and powder cocaine and the district court’s refusal to adequately credit his cooperation. (*supra*, at pp. 14-16; AOB 17-18, 24-26; ARB 9, 14-17.)

In addition, the Sentencing Commission found that inclusion of drug offenses in the career offender guideline also disproportionately affects African-Americans. U.S.S.C., *Fifteen Years of Guidelines Sentencing* at 133. The Commission further noted that “[c]ommentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods, which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers.” *Id.* at 134 (citations omitted). Thus, it is now obvious that Mr. H_____ is not really worse than many defendants that have not committed any fewer crimes, but have fewer convictions.

Furthermore, as Mr. H_____ pointed out in his reply brief, his incarceration is not likely to protect the community. As long as the demand for drugs remains high, there will always be someone who is willing to step in and fill a spot that was created by the arrest and incarceration of someone like Mr. H_____. (ARB 10.) Therefore, a sentence of 327 months does no more to deter others than does a much shorter sentence of imprisonment.

In addition, reports of disparity in sentencing

undermine public confidence in the federal courts, particularly among minority groups. Public confidence also is threatened by data showing that the gap in average sentences between African-American and other offender groups grew wider in the years following implementation of the guidelines and mandatory minimum penalty statutes enacted shortly after passage of the Sentencing Reform Act. ... Today's sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.

U.S.S.C., Fifteen Years of Guidelines Sentencing at p. 135. Therefore, a sentence of 327 months is actually contrary to the statutory goal of: reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment for the offense. (18 U.S.C. §3553(a)(2)(A).)

A lesser sentence would also be sufficient to further the statutory goal of protecting the public from further crimes of Mr. H_____. (18 U.S.C. §3553(a)(2)(C).) The Sentencing Commission has found that defendants who are sentenced under

U.S.S.G. §2D1.1 have a lower recidivism rate than all other defendants who are in criminal history category six and the lowest recidivism rate overall. U.S.S.C., Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 30 (2004). Therefore, it is likely that a much shorter sentence would still be a sufficient deterrent for Mr. H_____. Ten or fifteen years would be just as effective as over 27 years will be in deterring Mr. H_____.

It does not appear that a reduced sentence would have any impact on the statutory goal of providing Mr. H_____ with needed medical care, or other correctional treatment in the most effective manner. (18 U.S.C. §3553(a)(2)(D).) Obtaining his G.E.D. may help Mr. H_____, since there is a positive correlation between increased education and reduced recidivism. U.S.S.C., Measuring Recidivism 29. It will also help if is able to learn a trade in prison that he do on the outside. However, a sentence of even ten years would give him more than enough time to do those things.

Even if the 20:1 ratio for crack to powder is used, rather than some lesser level, and Mr. H_____’ prior convictions are only used to increase his criminal history category, Mr. H_____’ base offense level would be reduced to 36 (U.S.S.G. §2D1.1(c)(2)), before the reduction for acceptance of responsibility, and 33 after that reduction. Then, if the government’s recommendation for a departure would be followed, Mr. H_____’ offense level would be reduced to either level 31 or 30. Since,

the government recommended the high end of the lower range or the low end of the higher range that would make Mr. H_____’ sentence either 210 or 188 months. Such a sentence may still be excessive by some standards, but would probably not be an abuse of discretion.

If two sufficient and reasonable sentences are potentially applicable, the parsimony provision of 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.") requires a district court to choose the lesser sentence. *United States v. Carey*, 368 F.Supp.2d 891, 895 fn. 4 (E.D. Wis. 2005). "Punishment should not be more severe than that necessary to satisfy the goals of punishment." *United States v. Carvajal*, 3__ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 3076, *16 (S.D. NY Feb. 22, 2005). In many cases, there may be a question about whether a lesser sentence would be sufficient. However, in this case, it is clear that a lesser sentence would be sufficient to fulfill the purposes of sentencing. Therefore, the district court’s refusal to impose a lesser sentence, than 27 years and four months in prison, is unreasonable. Even if that Guidelines sentence is presumed reasonable, Mr. H_____ has rebutted that presumption.

CONCLUSION

For the reasons stated above, and in his briefs, this Court should reverse Mr. H_____’ sentence and remand his case to the district court with instructions to impose a substantially lower sentence.

S_____ H_____,
Defendant-Appellant

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