05-10200 & 05-30120

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALPHONSO CARTY, Defendant-Appellant.	No. 05-10200 D.C. No. CR-03-1135-PCT-RGS District of Arizona, Phoenix
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JUAN ANTONIO ZAVALA, Defendant-Appellant.	No. 05-30120 D.C. No. CR-02-00079-12-BLW District of Idaho

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**BRIEF OF DOUGLAS A. BERMAN,
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MORITZ COLLEGE OF LAW AT THE OHIO STATE UNIVERSITY,
AS *AMICUS CURIAE* ON REHEARING *EN BANC*
IN SUPPORT OF APPELLANTS CARTY AND ZAVALA**

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

I, Amicus Douglas A. Berman, am the William B. Saxbe Designated Professor of Law at the Moritz College of Law at The Ohio State University. My scholarship has been devoted to sentencing reform and policy, and especially the Federal Sentencing Guidelines. I have addressed and testified before the United States Sentencing Commission on sentencing policy, and have lectured widely at Sentencing Institutes, seminars, and policy commissions on federal sentencing. I am co-author of a leading textbook, *Sentencing Law and Policy*, and a leading commentator on sentencing development through my Sentencing Law and Policy blog. I am also presently managing editor of the *Federal Sentencing Reporter*. My background, scholarship, and teaching is focused on the formation of sound sentencing policy by the United States Sentencing Commission, and the development of substantive and procedural sentencing law within the constitutional framework established by the United States Supreme Court.

ARGUMENT

I. Post-*Booker* Sentencing Should Respect and Reflect Both Parts of *Booker*.

A. The Theme of Reasoned Judgment in the *Booker* Opinions.

In *United States v. Booker*, 543 U.S. 220 (2006), the Supreme Court declared that the operation of the federal guidelines as mandatory rules — even though they afforded district judges sentencing discretion through departure authority — violated the Sixth Amendment jury trial right. To remedy this constitutional problem, *Booker* declared the guidelines "effectively advisory," emphasized the enduring validity and importance of the provisions of 18 U.S.C. § 3553(a), and set forth a new "reasonableness" standard for appellate review of sentences.

Read independently, each of the *Booker* opinions issued by different 5-4 majorities seems conceptually questionable; read together, the two *Booker* opinions perhaps seem conceptually incompatible.

But the two parts of *Booker* can be conceptually harmonized around the idea that broad judicial fact-finding authority at sentencing is authorized if and only when judges are exercising reasoned judgment. The *Booker* merits opinion recognizes and safeguards, implicitly if not expressly, a constitutional distinction between (1) finding facts that mandate particular sentencing

outcomes based on the predetermined judgments of legislatures or sentencing commissions (which is a task for juries), and (2) exercising reasoned judgment at sentencing based on the consideration of relevant sentencing facts (which is a task that can still be given to judges). The *Booker* remedial opinion explains that, with the guidelines "effectively advisory," federal judges are required "to take account of the Guidelines together with other sentencing goals" specified in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 259. The *Booker* remedy thus now requires judges to exercise reasoned judgment by filtering the guidelines through the dynamic, multi-faceted, purpose-oriented provisions of § 3553(a).[1]

As stressed in *Booker*, § 3553(a) instructs a judge to consider "the need to avoid unwarranted sentencing disparities" and the need for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 259-60 (quoting from 18 U.S.C. § 3553(a)). Moreover, the central directive of § 3553(a) commands federal judges to "impose a sentence sufficient, but not greater than necessary, to comply with the

[1] For a fuller development of these points, see Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387 (2006) and also Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. ___(forthcoming 2006).

[traditional] purposes" of punishment while considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). By mandating that judges consider a range of (sometimes competing) sentencing purposes and principles, *Booker* and § 3553(a) essentially demand that district judges exercise reasoned judgment in their sentencing decision-making.

Booker's embrace of reasoned judgment transcends the conversion of the guidelines from mandates to advice. The *Booker* remedial opinion, in preserving sentencing appeals, reformulated the appellate review standard as "reasonableness" in light of the provisions of § 3553(a). *Booker* explains that the "numerous factors that guide sentencing" in § 3553(a) should "guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261. As the term itself suggests, review for "reasonableness" is essentially a double endorsement of the exercise of reasoned judgment in federal sentencing: reasonableness review calls upon this Court to exercise its own reasoned judgment in each particular case to assess whether the district court properly exercised reasoned judgment in selecting a sentence in accord with the directives of § 3553(a).

In sum, *Booker*'s seemingly conflicting majority opinions can be harmonized around the theme of reasoned judgment at sentencing. Justice

Stevens's merits opinion in *Booker* makes reasoned judgment at sentencing constitutionally essential by suggesting that only juries may find facts with fixed sentencing consequences, but that judges may still consider facts when making discretionary sentencing decisions. Justice Breyer's remedial opinion in *Booker* makes reasoned judgment at sentencing statutorily required by stressing the importance of the dynamic, multi-faceted, purpose-oriented considerations that Congress set forth in § 3553(a) of the Sentencing Reform Act.

B. Ensuring the Application of Reasoned Judgment at Sentencing after *Booker.*

In order to fulfill and further *Booker*'s embrace of reasoned judgment at sentencing, federal district judges may no longer just find guideline-specified facts, plug those facts into a guideline calculation, and then mechanically impose a guideline sentence. Rather, federal judges must now integrate and assimilate the facts emphasized by the guidelines with the judgment-oriented provisions of § 3553(a). *Booker*'s two opinions indicate that both the Constitution and the Sentencing Reform Act now command judges to think critically and carefully, in each individual case, about how best to achieve the sentencing goals Congress set out in § 3553(a).

In short, instead of sentencing-by-the-numbers, *Booker* requires district courts, guided by the directives of § 3553(a), to exercise independent reasoned judgment when imposing a sentence. Circuit courts, in turn, must ensure sentences are both reasoned and reasonable by evaluating, in light of the directives of § 3553(a), district courts' explanations offered in support of their sentencing decisions. *Booker* calls for the Courts of Appeals to police the exercise of reasoned judgment at sentencing; any sentencing decision that fails to thoughtfully address the congressional directives of § 3553(a) should be considered suspect on appeal.

Before *Booker*, the federal sentencing system was "guideline-centric" — i.e., guideline calculations and interpretation were the centerpiece of federal sentencing decision-making for both district and circuit judges. After *Booker*, the system no longer can be allowed to be guideline-centric because (1) the pre-*Booker* guideline-centric sentencing system, according to the Supreme Court, violated defendants' Sixth Amendment rights, and because (2) the pre-*Booker* guideline-centric sentencing system, according to the U.S. Sentencing Commission and nearly all observers, failed to effectuate all the goals of § 3553(a). Given that the pre-*Booker* sentencing system was both constitutionally and statutorily suspect, courts should resist any post-*Booker*

sentencing doctrines that risk directly or indirectly recreating a guideline-centric federal sentencing system.

Disappointingly, many courts have not fully recognized the importance of reasoned judgment at sentencing after *Booker* and have maintained a guideline-centric approach to post-*Booker* sentencing. Even after *Booker* the federal sentencing process still remains exceedingly focused on the minutiae of guideline calculations and still gives only limited attention to the broader sentencing goals Congress set out in § 3553(a). Most Courts of Appeals have declared that district judges must still painstakingly calculate precise guideline sentencing ranges, and they have also demanded a detailed explanation for any deviation from the advisory guideline range. Some circuits have declared within-guideline sentences "presumptively reasonable," and appellate decisions have commonly framed and judged reasonableness in reference to the guidelines, rather than in reference to the provisions of § 3553(a). Tellingly, in more than twenty months since the *Booker* ruling, district courts have imposed nearly 75,000 within-guideline sentences, but circuit courts have declared only one single within-guideline sentence substantively unreasonable on appeal. Post-*Booker* doctrines and practices may be encouraging the sort of rote, mechanistic reliance on the Guidelines that Justice Stevens's merits opinion found constitutionally problematic.

In addition to being constitutionally suspect, decisions to afford the guidelines heavy weight, or to adopt a presumption of reasonableness for within-guideline sentences, lack a statutory foundation. The nuanced sentencing instructions in § 3553(a) provide no textual basis for elevating the guidelines well above all other factors or for presuming that all guideline sentences are reasonable. Even a cursory review of Congress's detailed list of required sentencing considerations in § 3553(a) spotlights that the Sentencing Reform Act calls for the guidelines to be one of many factors explored at sentencing.

Critically, the guidelines do not reflect or incorporate the central command of § 3553(a), which directs district courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment set forth in § 3553(a)(2). In developing and revising the guidelines, the U.S. Sentencing Commission has never fully explored — nor even formally addressed — whether the guidelines serve the parsimony provision of § 3553(a). Moreover, the Sentencing Commission has expressly stated in various reports that certain guidelines — such as the 100-to-1 ratio in calculating crack/powder cocaine sentences, and the severe career-offender enhancement — undermine the sentencing goals set forth by Congress in § 3553(a)(2).[2] Consequently,

[2] *See* U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131-34 (2004),

when district courts give the guidelines heavy weight or when circuit courts presume all within-guideline sentences are reasonable, they disregard the important reality that the Sentencing Commission has itself indicated that some guidelines do not produce just and effective sentencing outcomes in certain cases.[3]

Rather than give the guidelines heavy weight or presume within-guideline sentences are reasonable, courts should reorient their sentencing work around the text and principles set forth by Congress in § 3553(a) and by the Supreme Court in *Booker*. Rather than demand that district judges provide a detailed explanation only when deviating from the guidelines, this Court should be most concerned about within-guideline sentences that are not expressly justified in terms of the factors set forth in § 3553(a). Given the constitutional importance of judges exercising reasoned judgment at sentencing, the burden of explanation should be as great or perhaps even greater when a district judge imposes a guideline sentence. For it is only when the guidelines are followed that there is

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available at http://www.ussc.gov/15_year/chap4.pdf; *see also* U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

[3] Interestingly, federal judges have gone above the guidelines in nearly twice as many cases after *Booker* than before *Booker*. *See* U.S. Sentencing Commission, *Report on the Impact of United States v. Booker on Federal Sentencing*, Appendix D, at D-10 (March 2006).

reason to fear that a district judge has merely engaged in rote fact-finding (and thereby usurped the jury's role) and not exercised the sort of independent reasoned judgment at sentencing that is now constitutionally essential. Requiring a thoughtful explanation based in the provisions of § 3553(a) for both non-guideline and within-guideline sentences would ensure that district judges carefully evaluate all the § 3553(a) factors in each and every individual case.

Though an appellate presumption of reasonableness for within-guideline sentencing is constitutionally and statutorily suspect, this Court would be wise to require district judges to begin the sentencing process with basic guideline calculations. The text of § 3553(a) does call for district courts to consider the guidelines, and guideline calculations will often help ensure that district judges carefully examine some of the most salient issues raised in each case. Guideline calculations provide a useful starting point and framework for a district judge (and the parties) to sort through what facts and purposes should be the most important in a particular sentencing decision. Requiring basic guideline calculations fosters a beneficial measure of consistency in the sentencing

process: guideline provisions can help frame, inform, and regularize the exercise of reasoned judgment by different sentencing judges.

II. A Post-*Booker* Sentencing Process Focused on § 3553(a) Can be More Fair and Effective than a Guideline-Centric Sentencing Process

After *Booker*, some lower courts (and the Sentencing Commission) appear to be clinging to the existing guidelines like Linus clutching his security blanket. This reaction to *Booker* likely reflects an understandable pragmatism about the post-*Booker* world: some may be embracing and extolling the current guidelines because they fear that Congress might over-react to any migration away from the guidelines or because of they believe that only a guideline-centric sentencing process can foster fair and effective sentencing outcomes. But rather than fear Congress or the unknown, federal judges (and the Sentencing Commission) should champion principles over pragmatism by recognizing the many virtues and the considerable potential of a post-*Booker* sentencing process emphasizing the exercise of reasoned judgment focused on the provisions of § 3553(a).

In those courtrooms and cases in which district judges have thoughtfully explored the provisions of § 3553(a) after *Booker*, the move away from a guideline-centric sentencing process has generally furthered, not frustrated, the goals pursued by Congress when it enacted the Sentencing Reform Act. Particularly in those cases where the sentence suggested by the guidelines is

particularly (and perhaps unjustifiably) severe — such as in some non-violent crack offenses or minor offenses that may trigger certain large enhancements — judges are often effectively evaluating all the statutorily prescribed factors at sentencing to better comply with the congressional command in § 3553(a) to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" set forth in § 3553(a)(2). Indeed, thoughtful post-*Booker* district court decisions spotlight that an emphasis on § 3553(a) can make federal sentencing decision-making more even-handed, transparent and proportional by (1) improving the balance between the application of structured sentencing rules and judicial discretion; (2) improving the balance between the impact of judicial and prosecutorial discretion at sentencing; (3) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances; (4) reordering sentencing outcomes so that those defendants most deserving of reduced (or increased) sentences are getting the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines.[4]

This Court might be concerned that, with an emphasis on the commands of § 3553(a) and on individual judges exercising reasoned judgment, there is an

[4] For a fuller development of these points, see Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUSTON L. REV. 341 (2006).

increased risk of some sentencing disparity in the federal sentencing system. Indeed, it is possible that the reasoned judgment of a federal district judge in Alaska may differ from the reasoned judgment of a judge in Arizona, California, Hawaii, or Oregon. In this context, however, one must keep in mind the reality that the pre-*Booker* guideline-centric sentencing process may have itself undermined, rather than enhanced, the goal of greater sentencing consistency in the federal system.[5] Perhaps more importantly, even though achieving greater sentencing consistency was one goal of the Sentencing Reform Act of 1984, it was not the only goal. Indeed, the *Booker* Court's emphasis on all the provisions of 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed "the need to avoid unwarranted sentence disparities" as only one of seven distinct sentencing considerations.

Further, the Supreme Court's modern sentencing jurisprudence must be viewed as a dramatic and important statement that a range of values — such as

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[5] *See generally* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (convincingly arguing that the guidelines *increased* disparity in the federal sentencing system); *see also* U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) (spotlighting the guidelines' inability to regulate prosecutorial discretion and noting the increased impact of that discretion in the federal guideline sentencing system).

our society's commitment to fair procedures and adversarial justice and the proper constitutional roles of juries and judges in the criminal justice system — needs to be balanced with and integrated into a modern quest for greater sentencing consistency. Absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without recognizing that a just sentencing system should also strive to be thoughtful and reasoned, humane and respectful to all persons it impacts. Developing post-*Booker* doctrines that encourage judges to exercise reasoned judgment focused on the provisions of § 3553(a) is a step in the right direction as a matter of federal sentencing policy as well as a matter of constitutional jurisprudence.

CONCLUSION

For the reasons set forth above, and in the briefs filed on behalf of Appellants Carty and Zavala, Amicus Curiae Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at The Ohio State University, suggests that the judgments of the district courts be reversed and the cases remanded for resentencing.

Respectfully submitted this ____ day of September, 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32 (a)(7)(c) and Ninth Circuit rule 32-1, undersigned counsel certifies that the text in this brief:

- is proportionately spaced,
- has a typeface of 14 points or more, and
- contains _____ words.

_____ _____

Date

DOUGLAS A. BERMAN
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CERTIFICATE OF FILING AND SERVICE

I, the undersigned attorney, pursuant to FRAP 25(d) and Ninth Circuit Rules 35-4(b) and 40-1(b), certify that I caused:

the original and fifty (50) copies of the **Brief of Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at the Ohio State University, as *Amicus Curiae* on Rehearing *En Banc* in Support of Appellants Carty and Zavala**, to be delivered to the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California, 94103, for filing, on Monday, September 25, 2006; and

two (2) copies of **Brief of Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at the Ohio State University, as *Amicus Curiae* on Rehearing *En Banc* in Support of Appellants Carty and Zavala**, to be delivered to DHL on Monday, September 25, 2006, for overnight delivery to John Tuchi, Assistant United States Attorney, United States Attorney's Office, Two Renaissance Squire, 40 N. Central Ave., Suite 1200, Phoenix, AZ 85004-4408, Attorney for Appellee in *U.S. v. Carty*, on Tuesday, September 26, 2006;

two (2) copies of **Brief of Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at the Ohio State University, as *Amicus Curiae* on Rehearing *En Banc* in Support of Appellants Carty and Zavala** to be delivered to DHL on Monday, September 25, 2006, for overnight delivery to Allan Burrow, Assistant U.S. Attorney, U.S. Attorney's Office,Washington Group Plaza, 800 Park Blvd., Suite 600, Boise, Idaho 83712, Attorney for Appellee in *U.S. v. Zavala*, on Tuesday, September 26, 2006; and

two (2) copies of **Brief of Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at the Ohio State University, as *Amicus Curiae* on Rehearing *En Banc* in Support of Appellants Carty and Zavala**, to be placed in the

United States mail, first class postage prepaid, on Monday, September 25, 2006, to Milagros A. Cisneros, Asst. Fed. Public Defender, Attorney for Appellant Carty, 850 W. Adams, Suite 201, Phoenix, Arizona 85007; and

two (2) copies of **Brief of Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at the Ohio State University, as *Amicus Curiae* on Rehearing *En Banc* in Support of Appellants Carty and Zavala**, to be placed in the United States mail, first class postage prepaid, on Monday, September 25, 2006, to Dennis M. Charney, Attorney for Appellant Zavala, 951 E. Plaza Dr., Eagle, Idaho 83616.

Respectfully submitted this ___ day of September, 2006.

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