No. 05-10219

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO STARKS,

Appellant,
v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION DRUG LAW REFORM PROJECT, DOUGLAS A. BERMAN, MICHAEL M. O'HEAR, DAVID N. YELLEN, AND DAVID M. ZLOTNICK AS AMICI CURIAE IN SUPPORT OF APPELLANT STARKS AND IN FAVOR OF REVERSAL AND REMAND

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation ("ACLU") is a corporation with no parent corporation. No publicly held company owns 10% or more of the stock of ACLU.

Statement of Amici

Amicus American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU's Drug Law Reform Project ("DLRP") is a project of the ACLU's national legal department. The DLRP's mission is to end punitive drug policies that cause the widespread violation of constitutional and human rights, as well as unprecedented levels of incarceration.

Amicus Douglas A. Berman is the William B. Saxbe Designated Professor of Law at the Moritz College of Law at Ohio State University. He is Managing Editor of the *Federal Sentencing Reporter*, and co-author of a leading textbook, *Sentencing Law and Policy*.

Amicus Michael M. O'Hear is an Associate Professor of Law at Marquette University Law School. He is an Editor of the *Federal Sentencing Reporter* and has written numerous articles on federal guideline sentencing and concepts of disparity and uniformity.

Amicus David N. Yellen is Dean and Professor of Law at Loyola University Chicago School of Law. He has co-authored a leading treatise, *Federal Sentencing*

Law, and Practice and has written numerous articles on federal guideline sentencing.

Amicus David M. Zlotnick is an Associate Professor of Law at Roger Williams University School of Law. He has written numerous articles on federal guideline sentencing and mandatory minimum sentencing laws.

Basis for Filing and Request for Oral Argument

Counsel for amici conferred with counsel for the other parties in this case. Although Defendant's counsel consented to the filing of an amicus brief, counsel for the United States did not consent. Pursuant to Federal Rule of Appellate Procedure 29(b), amici have filed a motion for leave to file this brief.

Amici possess specialized expertise in the area of federal sentencing and because of the issues presented in this case are of unusual complexity and raise an issue of first impression in this Circuit, amici respectfully request the opportunity for oral argument in this case.

SUMMARY OF ARGUMENT

The District Court erred in holding that the guidelines are mandatory in the absence of individualized circumstances. In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court held that the federal sentencing guidelines are now advisory, not mandatory. Importantly, *Booker* did not include the limitation read into that decision by the district court and the government—that a sentencing judge's use of discretion may result in a non-guideline sentence only when some unusual or unique fact exists in the case. At issue is not the reasonableness of the sentence imposed, but the process; the case should be remanded for reconsideration because the sentencing judge made an error of law in finding he lacked discretion to give the sentence he believed was most appropriate.

Further, the District Court failed to consider the sentencing factors mandated in 18 U.S.C. § 3553(a). Had the sentencing judge properly considered those factors, he would have independently assessed the seriousness of crack cocaine offenses and relied on that assessment in sentencing Mr. Starks. In particular, 18 U.S.C. § 3553(a)(2)(A) commands a sentencing judge to consider the "seriousness of the offense." This statutory phrase cannot be interpreted to mean that the court should consider the seriousness of the offense as reflected in the guidelines (ie, the 100-to-1 powder-to-crack ratio), or the seriousness of the offense in light of

individualized factors relating to the crime or defendant, because those factors are independently identified for separate consideration in that same statute (at § 3553(a)(4) and (a)(1), respectively). To give § 3553(a)(2)(A) either of those meanings would make it redundant, a construction that must be avoided.

Just as significantly, this Court must be mindful of Congress's authority to regulate the discretion of sentencing judges. Should this Court affirm the District Court, it would create a new legal limitation on the exercise of judicial sentencing discretion that wrongfully supplants the role of Congress, which rightfully has the sole ability to limit the discretion of sentencing judges, and has not done so through a lawful statute.

Finally, affirmance of the district court's sentencing decision in this case would re-introduce limits on judicial discretion which will result in a recurrence of the violation of the Sixth Amendment that led to the *Booker* decision in the first place.

Argument

I. THE DISTRICT COURT COMMITTED ERROR IN FINDING THE GUIDELINES MANDATORY IN THE ABSENCE OF INDIVIDUALIZED FACTORS.

A. The District Court Misread *Booker* in Finding the Guidelines Mandatory in the Absence of Individualized Factors.

At sentencing, the District Court judge was careful to state that he stayed within the guideline range because he felt that, in the absence of individualized sentencing issues, he was not free to deviate from those guidelines:

> If called upon to make an independent determination as to the reasonableness of the 100-to-1 ratio that Congress has imposed based on what has been presented to this Court, I would conclude, as did Judge Adelman and Judge Sifton, that the 100-to-1 ratio is not reasonable…. Therefore, if I believed that it was appropriate and lawful for a judge to impose outside the sentencing guidelines simply because the judge felt the guidelines were unreasonable and/or that the reasons given for those guidelines having been imposed by Congress were themselves unreasonable, I would deviate from the guidelines as did Judge Adelman and Judge Sifton.
>
> So in imposing this sentence, I am accepting the government's suggestion that it is not appropriate or proper for the Court to deviate from the guidelines simply for those reasons.

Transcript, pp. 12-13.

In short, the sentencing judge did not believe he had the discretion to deviate from the guidelines in this case because he found that no factors unique to Starks'

case supported a departure or variance. This view ignores the central premise of the remedial holding in *Booker*: That sentencing within the relevant guideline range is no longer mandatory, and a sentencing court will need only to *consider* that range as one of many factors. 125 S. Ct. at 764-765. The District Court's construction of *Booker* would equate "considering" the range to "following" the range but for individualized considerations. This conclusion that simply fails to recognize that *Booker* occurred at all, given that individualized aspects of a case were considered pre-*Booker* as the basis for departures.

It is no secret that what the government wants is to return to an era where only "exceptional circumstances" allow for the judge to vary from the guidelines—that is, erase *Booker* altogether. This was made abundantly clear by the attorney for the government appearing at sentencing, who even brought in the "heartland" analysis relating to departures:

> Your honor, the government's position is that the concept from the guideline scheme of exceptional circumstances or some sort of individualized reason that the guidelines are not appropriate, to borrow the old language of outside the heartland—

Transcript at 5.

Thus, the government position, ultimately accepted by the district court, was that *Booker* essentially changed nothing—that exceptional situations and

individual circumstances, as before, might allow for a non-guideline sentence, but that the sentencing judge otherwise lacked discretion. Indeed, the sentencing judge seemed frustrated that, under the theory he accepted, the only basis for binding him to the guidelines in this case was the simple existence of those guidelines, despite the fact that they were no longer mandatory:

> I haven't seen anything from any court setting forth any reasons why the Court should follow the guidelines, except that they are the guidelines, they are the guidelines, they are the guidelines. I know. I know.

Transcript at 2.

The bare fact of the matter is that the sentencing judge's frustration was unnecessary—after *Booker*, the refrain that "they are the guidelines" is not enough, as those guidelines are merely to be "considered" in sentencing a defendant. *Booker*, 125 S. Ct. at 764; *see also* 18 U.S.C. § 3553(a). This is true whether or not individualized sentencing issues are present. Nothing in *Booker* suggests that the holding there only applies so as to allow for individualized consideration of defendants—quite the opposite. *See infra Part I(B), (C)*. Rather, *Booker*, read together with the governing statute, expressly directs that such a limitation does not exist, and courts are directly charged with evaluating the seriousness of this type of offense independent of the conclusions the guidelines make, including the 100-to-1 powder-to-crack ratio set forth in the guidelines. Indeed, the constitutionality of

the remedy adopted by the Court in *Booker* depends upon judges having discretionary authority to refuse to follow the guidelines' advice.

To be absolutely clear, amici here do not write to address the issue of reasonableness of the sentence. It is not necessary for this court to address the question of whether or not the sentence given was reasonable: In deciding not to give the sentence he would have were he to have properly exercised his discretion, the sentencing judge made a fundamental error that significantly prejudiced the defendant. At issue is not the reasonableness of the sentence imposed, but rather whether the case should be remanded to the district court for reconsideration because the sentencing judge made an error of law in determining that he was bound by the guidelines. *See United States v. Moreno-Hernandez*, 419 F. 3d 906, 916 (9th Cir.), cert. denied 126 S. Ct. 636 (2005) (holding that a remand is necessary where "the sentence was imposed under guidelines believed to be mandatory.").

B. The District Court Erred in Failing to Properly Consider the Factors Listed in 18 U.S.C. § 3553(a), Which Not Only Allow But Require an Independent Judicial Determination of the Seriousness of the Offense.

Having an inclination to sentence outside the guideline range, the sentencing judge should have turned to an analysis of 18 U.S.C. § 3553(a) to inform him on that decision. As explained by the Supreme Court in *Booker*, the instructions set

forth in § 3553(a) are central to the sentencing work of both circuit courts and district courts: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts as they have in the past, in determining whether a sentence is reasonable." *Booker*, 125 S. Ct. at 766.

The transcript of the sentencing hearing reflects an absence of consideration of any § 3553(a) factor besides the guideline range. This plainly runs contrary to *Booker*, and to the recent instruction of this court that "18 U.S.C. § 3553(a) is still operative, and requires district courts to take the applicable guidelines range into consideration when sentencing, along with other sentencing factors enumerated by Congress." *United States v. Cantrell*, __ F. 3d __, 2006 WL 73483 (9th Cir., Jan. 13, 2006). The sentencing judge did the former (consider the guidelines), but not the latter (consider the other sentencing factors).

The statutory mandates of 18 U.S.C. § 3553(a) begin with an initial command that the sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." It then states that a sentencing court "shall consider" a number of listed factors when sentencing, including "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide

just punishment for the offense" and "the sentencing range … as set forth in the guidelines" and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

In failing to fully consider and weigh the § 3553(a) factors, the sentencing judge not only failed to follow the proper process, but missed that part of 18 U.S.C. § 3553(a) which commands him to do exactly what he felt he lacked the power to do: evaluate the seriousness of crack offenses against that expressed in the guidelines through the 100-to-1 powder-to-crack ratio. The sentencing judge's error is not only in ignoring the other § 3553(a) factors, but in ruling that he could not consider them. In fact, the statutes remaining after *Booker* direct exactly the opposite result—§ 3553(a) in particular compels a sentencing court to independently consider the seriousness of the offense even after that factor has been evaluated in compilation of the offense level for the crime. Specifically, § 3553(a)(2)(A) explicitly requires that the court consider the "seriousness of the offense."

Here, the judge evaluated the seriousness of crack offenses, and stated his belief that it was overstated by the guidelines' 100-to-1 ratio. However, he did not act on that belief, as he did not think the law gave him the power to act on that belief. In fact, in telling a judge to consider the seriousness of the offense,

§ 3553(a)(2)(A), gives him precisely the power to evaluate the seriousness of crack offenses. As set out below, the meaning of the directive to consider the "seriousness of the offense" must mean the seriousness of that type of offense apart from the guideline offense level (which would include the 100-to-1 powder-to-crack ratio), as individualized consideration of the crime, the criminal and the seriousness of the offense as reflected in the guideline offense score are expressly accounted for in other 18 U.S.C. § 3553(a) factors.

C. The Rule of Avoiding Redundancy Dictates That 18 U.S.C. § 3553(a)(2)(A) Be Construed to Mean That a Sentencing Judge Must Evaluate the Seriousness of the Type of Offense, Independent of the Guidelines and Individual Characteristics of the Defendant and the Crime.

On its very face, 18 U.S.C. § 3553(a)(2)(A) directs the sentencing judge to consider the seriousness of the offense and is separate from the independent statutory dictates to consider the effect of the guidelines (§ 3553(a)(4)) and the individual circumstances of the defendant and the crime (§ 3553(a)(1)). Thus, the plain language of the statute directs that the sentencing judge's view of the seriousness of the offense should be independent of both the guidelines' evaluation of the seriousness of the offense (ie, through the 100-to-1 ratio) and the individual circumstances of the case.

If, as the government will probably urge, § 3553(a)(2)(A)'s directive to

consider the "seriousness of the offense" is simply an instruction to follow the seriousness of the offense as reflected in the guidelines, the instruction is redundant of 18 U.S.C. § 3553(a)(4), which requires consideration of the guidelines. Similarly, if the government urges that this is an instruction merely to consider the seriousness of the offense only as to the individual characteristics of the criminal and the crime, that would make § 3553(a)(2)(A) redundant of § 3553(a)(1), which requires the consideration of "the nature and circumstances of the offense and the history and characteristics of the crime."

Thus, the meaning left to attach to 18 U.S.C. § 3553(a)(2)(A) is that the judge must evaluate the seriousness of that type of offense, independent of the guideline range and the individual aspects of the case.

Reading the language of 18 U.S.C. § 3553(a)(2)(A) as redundant, rather than requiring an independent evaluation of the seriousness of that type of offense by the sentencing court, runs contrary to the Supreme Court's instructions regarding statutory construction, which direct that statutes should not be construed so as to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

This Court has itself held that when construing statutes a court must make "every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp.*

v. United States EPA, 942 F.2d 1427 (9th Cir. 1991). *See also United States v. Fish*, 368 F.3d 1200, 1205 (9th Cir. 2004) ("It is a basic rule of statutory construction that one provision should not be interpreted in a way which… renders other provisions of the same statute inconsistent or meaningless.").

Put simply, if this Court reads 18 U.S.C. § 3553(a) so as to avoid redundancies, it should rule that it is proper for a sentencing court after *Booker* to make an independent judgment about the seriousness of offense conduct apart from individual aspects of the case, and that the District Court erred in holding otherwise.

II. AFFIRMANCE WOULD CREATE NEW LAW LIMITING SENTENCING DISRETION CONTRARY TO SUPREME COURT PRECEDENT.

A. It Would Be Improper to Create New Law Restricting Judicial Discretion.

Nothing in *Booker* supports the reading given the law by the District Court, and affirming its ruling would create, for the first time in this Circuit after *Booker*, a categorical bar on judicial discretion in sentencing. Creating such a new legal limitation would violate a precept set out by the Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996)—that it is the place of Congress and the Sentencing Commission to place new limits on the discretion of District Courts in sentencing,

not the Courts of Appeal.

In warning appellate courts against placing undue restrictions on sentencing courts, the Supreme Court in *Koon* flatly stated that "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." 518 U.S. at 106. Nevertheless, in seeking affirmance the government now asks this Court to exercise exactly that prohibited authority in ruling that a sentencing consideration that rejects the guideline range as overstating the seriousness of that category of offense is inappropriate in every circumstance.

Of course, amici agree that Congress's will should be respected, but the discernment of that will must be drawn from, and limited to, what is duly and currently expressed through statute. In short, we ask that this Court not legislate from the bench where the existing law is unambiguous, but does not give the government all that it wants. Deference to the perceived intent of Congress not reflected in current law cannot trump the clear meaning of the Supreme Court in altering the scheme Congress devised; post-*Booker* sentencing and the provisions of 18 U.S.C. § 3553(a), rather than a rigid view of uniformity, is what the law now requires.

B. Affirmance Would Re-Introduce Precisely Those Factors Already Rejected By the Supreme

Court in *Booker*.

The sentencing judge was told by the government to follow a path that would return us to a system of sentences devoid of significant judicial discretion outside of the determination of individualized factors relating specifically to that crime and that defendant— the very sentencing construct overturned in *Booker*. Transcript at 5-6. If this Court accepts this logic and refuses to consider the seriousness of the offense as a reason to vary from the guidelines, the underlying problem raised in *Booker* would arise again—a case would occur where a sentence was enhanced based on a judge-determined factor (such as the amount of narcotics at issue), and the judge would then be locked into the guideline range because the only possible basis for departure or variance would be the seriousness of the type of offense relative to the offense score. The precise scenario found to offend the Sixth Amendment in *Booker* inevitably would arise again: A judge would be forced to sentence within the guidelines, against her weighing of the 18 U.S.C. § 3553(a) factors, having raised the sentence above the presumptive range without proper jury findings.

"But wait!" the government may cry, "there are other factors that could lead to a variance that just aren't present here, thus it is not a mandatory system!" Such logic is unavailing. In *Booker*, Justice Stevens' majority opinion shot down an

analogous claim that the ability to depart from the guidelines made them something other than a mandatory system:

> The availability of a departure in specified circumstances does not avoid the constitutional issue…. At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most.

125 S. Ct. at 750.

Therein lies the rub: If this Court agrees with the government's argument and finds that a court's own judgment of the seriousness of the offense can't outweigh the guidelines' offense score, it re-introduces into the system precisely the element which was expelled in *Booker*, even without making the system fully mandatory. Unless the full range of discretion to consider and weigh the § 3553(a) factors is preserved, including the judge's independent view of the seriousness of the crime under § 3553(a)(2)(A), constitutional infirmity will recur.

In an attempt to preserve the pre-*Booker* order of things, the First Circuit recently held that a sentence which used a 20-to-1 ratio in a crack case in the absence of individualized considerations was "unlawful." *United States v. Pho*, 2006 U.S. App. Lexis 153 (1st Cir. Jan. 5, 2006). But the First Circuit's analysis in *Pho* fails to give full consideration to the provisions of 18 U.S.C. § 3553(a), which

now control federal sentence. The only statutory provision which is transgressed by giving independent consideration of the seriousness of crack offenses is 18 U.S.C. § 3553(b)(1), which is the provision that made the guidelines mandatory and thus had to be excised by the Supreme Court in *Booker* to eliminate the constitutional problems with the guidelines, 125 S. Ct. at 764.

The government in *Pho* essentially asked the court to follow a statute that no longer exists or, in the alternative, the will of Congress other than as expressed through existing statutes (thus elevating the intent of Congress over the plain language of what remains of 18 U.S.C. § 3553). While the *Pho* court seemed motivated by the threat of disparities, the *Booker* Court has already acknowledged that providing the Sixth Amendment right to a jury might have that consequence, and anticipated that truly advisory guidelines with a reasonableness review would not and could not mandate sentencing uniformity. *See Booker*, 125 S. Ct. at 766 ("We cannot and do not claim that use of a reasonableness standard will provide the uniformity that Congress originally sought to secure.").

Congress expressed its intent that the guidelines be mandatory quite clearly in § 3553(b)(1), but that provision no longer exists; nor does the sentencing world that the government seeks to re-create here through the affirmance of a decision that imposes on judges imaginary discretion-limiting handcuffs.

Respectfully Submitted

Dated: January 19, 2006

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