In The
United States Court of Appeals
For The Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

ALVIN GEORGE VONNER,

Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

RESPONSE IN OPPOSITION TO APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

Stephen Ross Johnson, Esq.
RITCHIE, DILLARD & DAVIES, P.C.
606 West Main Street, Suite 300
P.O. Box 1126
Knoxville, TN 37901-1126

Fax 524-4623
865-637-0661

Counsel for Appellant

See Reverse Side for Opposing Counsel

Charles E. Atchley, Jr.
U.S. ATTORNEY'S OFFICE
800 Market Street
Suite 211
Knoxville, TN 37902

Fax 545-4176
865-545-4167

Counsel for Appellee

TABLE OF CONTENTS

PAGE

RESPONSE IN OPPOSITION TO APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

Comes now the defendant-appellant, Alvin George Vonner, by and through undersigned counsel, and herein respectfully submits the following response in opposition to the appellee's petition for rehearing and rehearing en banc.

In further support thereof, defendant-appellant states as follows:

(1) The appellee has requested the extraordinary relief of rehearing and rehearing en banc pursuant to Fed. R. App. Proc. 35.

(2) Fed. R. App. Proc. 35 provides, in relevant portion, that "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless ... en banc consideration is necessary to secure or maintain uniformity of the court's decisions ...."

(3) Sixth Cir. R. 35(b) provides:

> A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precendent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent. Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

(4) While the appellant has suggested rehearing en banc on the basis of the majority's decision in *U.S. v. Vonner*, 452 F.3d 560 (6th Cir. 2006) somehow being

in conflict with *U.S. v. Jones*, 445 F.3d 865 (6th Cir. 2006) and *U.S. v. Williams*, 436 F.3d 706 (6th Cir. 2006), no such conflict exists at all. Moreover, the *Vonner* opinion is not only entirely consistent with other decisions of this Court, but is also consistent with the decisions of other Circuit Courts of Appeal.

(5) This Court's decision in *U.S. v. Vonner*, 452 F.3d 560 (6th Cir. 2006), is entirely consistent with the earlier *Webb* and *Jones* decisions of this Court, and has been subsequently cited and quoted at length by this Court as authoritative on sentencing issues. *See U.S. v. Davis*, —F.3d—, No. 05-6259, Slip Opinion (6th Cir., August 15, 2006) (Moore and Sutton, Circuit Judges; Katz, District Judge) (slip opinion attached hereto as *Exhibit 1*).

(6) In applying *Vonner* to the review of a sentence in a bank robbery case, this Court in *Davis* cited *Vonner* for the statement that "[r]easonableness is the *appellate* standard of review in judging whether a district court has accomplished its task." *Davis*, Slip Opinion at 4.

(7) This Court in *Davis* also quoted the *Vonner* decision in its analysis of both the substantive and procedural reasonableness review of a criminal sentence:

> This review is not restricted to the length of the sentence - substantive reasonableness - but also incorporates a procedural component: whether the district court adequately considered and expressed its application of the relevant factors listed in 18 U.S.C. § 3553(a) to permit "meaningful appellate review." *Vonner*, 452 F.3d at

567; *accord United States v. Richardson*, 437 F.3d 550, 553 (6th Cir. 2006).

(8) While the appellee strains to argue that the *Vonner* decision somehow "goes well beyond prior authority", Petition at 10, it is clear that *Vonner* reaffirms, consistent with prior authority, that:

> Although "no 'ritual incantation' of the [§ 3553(a)] factors is required, *Vonner*, 452 F.3d at 568, "there must still be sufficient evidence in the record to affirmatively demonstrate the court's consideration of them." *United States v. McBride*, 434 F.3d 470, 476, n.3 (6th Cir. 2006).

U.S. v. Davis, —F.3d—, No. 05-6259, Slip Opinion at pg. 4 (6th Cir., August 15, 2006).

(9) Furthermore, *Davis* specifically discusses the rebuttable presumption of reasonableness afforded to within-Guidelines sentences pursuant to *U.S. v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006), and how a district court's discussion of those factors allows for intelligent appellate review pursuant to *Vonner*, 452 F.3d at 567-68 and *Richardson*, 437 F.3d at 553. *See Davis*, Slip Opinion at pg. 4.

(10) The appellee takes issue with the *Vonner* decision's statement that the district court failed to adequately explain, for the purpose of meaningful appellate review, why it rejected the defendant-appellant's arguments concerning various Guidelines and § 3553(a) factors for a lesser sentence. Specifically, the appellee

states that:

> It [the court in *Vonner*] nevertheless adopted the rule that, when a defendant makes a specific argument for a sentence below the Guidelines range, the record must "indicate ... that the district court considered the defendant's argument" and, in addition, must "explain why the district court decided to reject that argument." *Vonner*, 2006 WL 1770095, *7. Applying that rule, the majority concluded as to this case that even if "the record indicates that the district court considered all of the [defendant's] arguments," "there is nothing in the record that explains why the district court rejected [defendant's] arguments." Id. (emphasis added).

Petition at 7-8 (emphasis in original).

(11) The appellee's re-writing of the above quoted portion of this Court's opinion in *Vonner* fails to provide the context of the quoted portions of the opinion. The portions cited, when examined in their original form, state as follows:

> Applying our past jurisprudence to this case, the district court's sentencing of Vonner was unreasonable. Admittedly, a presumption of reasonableness applies in this case given that the district court sentenced Vonner within the appropriate advisory guideline range. Our cases indicate, however, that this presumption does not relieve a district court of its duty to adequately explain a defendant's sentence. *See Morris*, 448 F.3d at 931; *Richardson*, 437 F.3d at 554. Since *Webb*, our cases dealing with reasonableness under *Booker* have emphasized again and again that for a sentence to be reasonable a district court must clearly articulate the reasons for its ultimate sentencing decision. *Richardson* further clarified that if a defendant provides mitigating evidence, the record must: (1) indicate that the court considered it and (2) provide the court's reasons for rejecting the defendant's argument. In this case, the evidence that the district court actually considered Vonner's various arguments is sketchy as best. *See Richardson*, 437 F.3d at 554. The only proof in the record of the district court's consideration is the district court's statement that

"[w]ith respect to the sentence in this case, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, the advisory Guideline range, as well as the other factors listed in the 18 United States 3553(a)." This type of offhanded dismissal of a defendant's claims provides mere lip service to the district court's responsibility to carefully weigh all the facts and provide a defendant with a well-reasoned, well-thought-out sentencing decision. *See McBride*, 434 F.3d at 476 n. 3 (holding that there must be "sufficient evidence in the record to affirmatively demonstrate the court's consideration" of the relevant Section 3553(a) factors) (emphasis added); Foreman, 436 F.3d at 644 (explaining that the sentencing court's consideration of "all of the relevant section 3553(a) factors" must be "clear from the record").

Even assuming, however, that the record indicates that the district court considered all of Vonner's arguments, there is nothing in the record that explains why the district court rejected those arguments. *See Richardson*, 437 F.3d at 554 (holding that "the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it"). The district court here merely provided a perfunctory explanation that it believed 117 months imprisonment was a reasonable sentence in light of the Section 3553(a) factors. But there is no explanation as to why the district court discredited Vonner's arguments for a lower sentence. Such a failure to provide adequate explanation is a violation of our decision in *Richardson*. Of additional concern, it leaves Vonner guessing as to why the district court rejected his claims and imposed the sentence that it chose. Moreover, it provides a record so woefully insufficient that it makes it nearly impossible for us to engage in meaningful appellate review. *Compare with Morris*, 448 F.3d at 934 (Martin, J., concurring) (calling the sentencing hearing "excellent" and stating that if "district courts were to follow Judge Enslen's example in this case, reversals would be exceedingly rare"). Even if we were to suspect that Vonner's sentence was unduly harsh, we would have no intelligent means of reviewing the district court's sentencing decision because the record does not inform us why the district court reached the decision it did, what factors it relied upon, or its reasons for rejecting Vonner's claim.

> Based on the district court's lack of adequate explanation for its sentencing decision, we find that the sentence is unreasonable.

Vonner, 452 F.3d at 568-569.

(12) A review of the *Vonner* opinion, both in the quoted portion above and in its entirety, clearly shows that the opinion is in no way in conflict with prior decisions of this Court. Rather, the *Vonner* opinion relies heavily on this Court's prior decisions discussing reasonableness review of criminal sentences, and correctly applies the holdings of those cases to the facts of the case at issue.

(13) One of the primary arguments of the appellee in its en banc petition is that "[t]his Court has never required a sentencing court to explicitly consider each of a defendant's mitigating arguments in order for the sentence to be considered procedurally reasonable." Petition at 8. This is simply not correct. In *U.S. v. Richardson*, 437 F.3d 550, 554 (6th Cir., Feb. 13 2006) (Siler, Batchelder, and Moore, Circuit Judges), this Court held that:

> We emphasize the obligation of the district court in each case to communicate clearly its rationale for imposing the specific sentence. Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it. This assures not only that the defendant can understand the basis for the particular sentence but also that the reviewing court can intelligently determine whether the specific sentence is indeed reasonable.

(14) The *Vonner* opinion specifically found that the error at issue was a *Richardson* error. *See Vonner* at 569. While the appellee states, with only perfunctory explanation, that the *Vonner* opinion is somehow at odds with *U.S. v. Jones*, 445 F.3d 865, 869-871 (6th Cir. 2006), *see* Petition at 9, there is no discrepancy. In *Jones*, the issue before the Court was the reasonableness of a sentence of incarceration when the defendant had requested a sentence of probation "pursuant to U.S. Sentencing Guidelines ("U.S.S.G") § 5K2.23 because he had already served a one-year state sentence for the same conduct." *Jones*, 445 F.3d at 867. At sentencing in that case, the district court went through a detailed analysis of the basis for its decision to not depart upward, its consideration of the § 3553(a) factors, and the facts and circumstances particular to that case. *Jones* at 869-870. In particular, the district court in *Jones* "found that 'the scope of ··· Jones' fraudulent activities spans over 20 years and far exceeds that which is normally encountered by the Court.' J.A. at 26 (Tr. of Sentencing Hr'g at 6)." *Id.* at 870.

(15) While the district court in *Jones* did not specifically state on the record that he was rejecting the argument that the defendant had requested a sentence of probation on the basis of serving a state sentence for the same conduct, the district court's consideration *and explanation* of the emphasis placed on the defendant's prior criminal history, as well as the additional explanation present in the record for the

defendant's sentence, provided sufficient detail in the record to enable meaningful appellate review pursuant to *U.S. v. Richardson*, 437 F.3d 550, 554 (6th Cir.2006). *See U.S. v. Jones*, 445 F.3d at 870.

(15) Unlike *Jones*, in the instant case the district court below failed to provide any analysis for its rejection of the multiple grounds raised for a lesser sentence both under the Sentencing Guidelines and the provisions of the Sentencing Reform Act. *Vonner*, 452 F.3d 569-570. Accordingly, there is no conflict between the opinions of this Court in *Jones* and *Vonner*.

(16) The appellee also argues that the evidence presented to the district court by the defendant-appellant at sentencing is somehow entitled to lesser consideration because it was submitted in the form of a proffer, both orally by counsel and in written form via a sentencing memorandum. *See* Petition at 10-11. In fact, the appellee incredibly goes so far as to argue that at sentencing "the defendant submitted no evidence." *Id.* at 11. It is clear that the Federal Rules of Evidence are inapplicable to sentencing hearings. *See* Fed. R. Evid. 1101(d)(3). Additionally, 18 U.S.C. § 3661 also provides "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Supreme Court has explained that this statute "codifies

the longstanding principle that sentencing courts have broad discretion to consider various kinds of information." *U.S. v. Watts*, 519 U.S. 148, 151 (1997). The Sentencing Guidelines themselves allow for the submission of evidence to the district court at sentencing by way of proffer or otherwise. *See* U.S.S.G. §§ 6A1.3(a), 6B1.4(d) and Commentary.

(17) Furthermore, the information submitted to the district court at sentencing was largely corroborated by the juvenile and other records of the defendant, which were obtained by the United States Probation Office and were discussed in the Presentence Investigation Report. Finally, none of the facts proffered to the district court by the defense concerning Mr. Vonner's background were controverted. In fact, at sentencing, counsel for the government stated that "I have no doubt that Mr. Vonner lived a miserable existence. I have no reason to believe that his childhood was anything better than what he states that it has been." (R. 51, Transcript of Sentencing, pgs. 17, lns. 24-25; 18, lns. 1-2; Apx. pgs. 124-125).

(18) Besides the *Vonner* opinion being consistent with decisions of this Court, the opinion is also consistent with decisions of other Circuit Courts of Appeal. *See U.S. v. Cooper*, 437 F.3d 324, 332 (3d Cir. 2006) ("the record should demonstrate that the court considered the § 3553(a) factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the

record"); *U.S. v. Carty*, 453 F.3d 1214, 1221-1222 (9th Cir. 2006) (remanding for resentencing "[b]ecause the district court failed to create a record memorializing its consideration of the sentencing factors listed in § 3553(a) and explaining it sentence selection"); *U.S. v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) (Posner, J.) (reversing and remanding district court's sentence within guidelines range when district court failed to articulate basis for sentence; "[a] rote statement that the judge considered all relevant factors will not always suffice; the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored.").

(20) Accordingly, it is respectfully submitted that the appellee's petition for the extraordinary remedies of rehearing and rehearing en banc should be denied.

Respectfully submitted by:

Stephen Ross Johnson (LC)

STEPHEN ROSS JOHNSON, ESQ.
RITCHIE, DILLARD & DAVIS, P.C.
606 W. Main St., Suite 300
P.O. Box 1126
Knoxville, Tennessee 37901-1126
(865) 637-0661
Srj@rddlawfirm.com
Counsel for Alvin George Vonner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was forwarded, via U. S. First Class mail postage prepaid, this 22 day of August, 2006, to:

Charles E. Atchley, Jr., Esq.
Assistant United States Attorney
United States Attorney's Office
800 Market Street, Suite 211
Knoxville, Tennessee 37902

Stephen Ross Johnson (LC)
STEPHEN ROSS JOHNSON

ADDENDUM

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0297p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LONNIE DAVIS,
Defendant-Appellant.

No. 05-6259

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 04-20439—Samuel H. Mays, Jr., District Judge.

Submitted: August 9, 2006

Decided and Filed: August 15, 2006

Before: MOORE and SUTTON, Circuit Judges; KATZ, District Judge.*

COUNSEL

ON BRIEF: April R. Goode, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF TENNESSEE, Memphis, Tennessee, for Appellant. Camille R. McMullen, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Defendant-Appellant Lonnie Davis appeals his sentence for escaping from a community corrections center in violation of 18 U.S.C. § 751(a). Davis asserts that the district court erred by applying a reasonableness standard in determining his sentence rather than "impos[ing] a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)]" as prescribed by 18 U.S.C. § 3553(a). Davis also argues that in imposing his thirty-seven-month sentence, the lowest within the recommended U.S. Sentencing Guidelines ("U.S.S.G." or "Guidelines") range, the district court did not adequately consider "the nature and circumstances of the offense" — namely, its nonviolent character — under § 3553(a)(1). Because no specific magic words are necessary to render a sentence reasonable, and the district court imposed a reasonable sentence after thorough consideration of the § 3553(a) factors as required following *United States v. Booker*, 543 U.S. 220 (2005), we **AFFIRM** Davis's sentence.

*The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

I. BACKGROUND

On May 28, 1993, Davis was sentenced to a 151-month prison term for bank robbery in violation of 18 U.S.C. § 2113. Joint Appendix ("J.A.") at 35 (Presentence Investigation Report ("PSR") ¶ 4). On April 30, 2004, Davis was transferred from the Federal Bureau of Prisons to Dismas Charities Community Corrections Center ("DCCCC") in Memphis, Tennessee. J.A. at 35 (PSR ¶ 5). Despite his October 26, 2004 release date, Davis left DCCCC without authority on May 10, 2004. *Id.* The United States Marshals Service arrested Davis on May 21, 2004. J.A. at 35 (PSR ¶ 6).

Davis pleaded guilty to one count of escape under 18 U.S.C. § 751(a). J.A. at 35 (PSR ¶ 3). The PSR, relying on the 2004 Guidelines, noted a base offense level of thirteen under U.S.S.G. § 2P1.1(a)(1). J.A. at 36 (PSR ¶ 11). This was decreased four levels pursuant to § 2P1.1(b)(3) because Davis "escaped from non-secure custody of a community corrections center." J.A. at 36 (PSR ¶ 12). Because (1) Davis was over eighteen at the time of his escape, (2) the district court considered escape in violation of 18 U.S.C. § 751(a) to be a crime of violence,[1] and (3) Davis had three prior robbery felony convictions, Davis was sentenced as a career offender under § 4B1.1(b)(F), which raised his offense level to seventeen.[2] J.A. at 37 (PSR ¶ 19). Davis's offense level was reduced by three levels for acceptance of responsibility under § 3E1.1, resulting in a final offense-level calculation of fourteen. J.A. at 37 (PSR ¶¶ 20-21).

Davis objected to the recommended sentence because he believed that he should receive a below-Guidelines sentence on the basis of a non-Guidelines departure (i.e., variance) due to the nonviolent nature of his offense under 18 U.S.C. § 3553(a). J.A. at 24-26 (Sentencing Tr. at 9-11). Specifically, Davis requested that the court exercise its discretion and not subject his sentence to the career-offender enhancement because, although the district court treated his escape as a crime of violence under the Guidelines, Davis's escape was nonviolent. J.A. at 24-26 (Sentencing Tr. at 9-11).

The district court sentenced Davis to thirty-seven months of imprisonment, the lowest sentence within the recommended Guidelines range, followed by two years of supervised release. J.A. at 30 (Sentencing Tr. at 20). The court explained:

> So, is a Guideline sentence reasonable in this case? Is a non Guideline sentence reasonable? If so, what would a reasonable non Guideline sentence be? I've said what the Guideline sentence is for incarceration purposes, 37 to 46 months. For supervised release purposes, 2 to 5 years. What's the nature of this offense? The defendant is in the position where he has served a considerable period of time. A considerable period of time. He had a significant prior offense. He has a long criminal history, much of it minor, but some of it is significant.

---

[1] Although Davis did not object to the district court's conclusion on this ground, this is not a settled point of law. Our only treatment of this precise question — whether escape in violation of 18 U.S.C. § 751(a) is a crime of violence — has been in two unpublished opinions, each of which has concluded that this offense is a crime of violence. *See United States v. Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006) (unpublished opinion); *United States v. Rodgers*, No. 99-5776, 2000 WL 1434706, at *5 (6th Cir. Sept. 19, 2000) (unpublished opinion). We have also concluded, in a published opinion, that escape in violation of a Tennessee state statute categorically constituted a crime of violence under the Guidelines. *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999).

[2] Davis also objected to the PSR because he believed that 18 U.S.C. § 751(a)'s five-year statutory maximum for his offense meant that his offense level was governed by U.S.S.G. § 4B1.1(b)(G), which covers offenses with a statutory maximum of "[m]ore than 1 year, but less than 5 years," as opposed to § 4B1.1(b)(F), which covers offenses with a statutory maximum of "5 years or more, but less than 10 years." J.A. at 19-24 (Sentencing Tr. at 4-9). The district court overruled this objection, J.A. at 20-22 (Sentencing Tr. at 5-7), and Davis does not press it on appeal.

> In any event, he served his time of incarceration and he had been placed in a community placement. Originally sentenced to 151 months for bank robbery in 1993. In 2004 he went to Dismas Charities Community Correction Center. That was on April the 30th. He was going to be released on October 26th of 2004. And on May 10, after he had been there a little over a week, he left, or escaped, as the report says in paragraph five, page three. Picked up his belongings and left at 10:40 a.m. Eleven days later on May 21, got picked up by the Marshal's Service in Nashville where he was with his money and his papers. Why he did that is unfathomable to me. But given his record and what he was in for originally, I don't have any problem at all with his being classified as a career offender. And I'm confident of my legal ruling on it. That's the way it is. But the question is, is that reasonable. I believe it is reasonable given the circumstances under which the defendant was serving. In looking over his criminal history, which is set out at length in the Presentence Report, particularly the fact that he had been sentenced for bank robbery.
>
> What about the seriousness of the offense? The offense is not as serious as some offenses that one might see. But to escape from custody in that circumstance is still serious. He didn't escape violently. He didn't escape from a correctional institution, which is why his offense level is where it is. If he had escaped violently or if he had escaped from a correctional institution, he would have a much higher offense level. So that's already taken account of in the Guideline calculation. But the need to promote respect for the law here is great. One simply can't have people who decide on their own that they are going to ignore court orders and walk off from institutions to which they have been committed.
>
> Is a Guideline range a just punishment? It seems to me it is. It seems to me that it affords adequate deterrence.
>
> What about protecting the public from further crimes of this defendant? The defendant, one would have thought, after having been sentenced to a hundred and fifty one months, I believe it was, would have thought at some length — perhaps he did — before he simply walked off from the institution where he was confined.
>
> Is this defendant likely to — is his offense conduct likely to recur, is there going to recidivism here? The criminal history suggests that there would be. The defendant's approach to today suggest[s] that there would be. The defendant's attitude is that he hasn't done anything very serious, all he did was, you know, violate the law, walk off and fail to complete his sentence. I consider that very serious. And I see nothing in this record that suggests to me that on release, the defendant would do anything other than what he has already done.
>
> As far as sentencing disparities, I believe following the Guidelines in this case would be the best way to avoid unwarranted sentencing disparities. And there is no restitution issue here that I'm aware of.
>
> So for all those reasons, I believe a Guideline sentence [in] this case is reasonable, and that's what I intend to impose. I do agree, however, with [Davis's counsel] and with the government that a low range sentence is appropriate in this case, because the defendant at one time, at least, acknowledged his guilt and entered a plea and accepted responsibility for his conduct. So he got a two level reduction for full acceptance and he got a three level — he is about to get a three level reduction if the government makes the motion. . . . And I think it is also worth considering in acceptance of responsibility going to the low end of the Guideline Range, which is 37 months.

J.A. at 26-30 (Sentencing Tr. at 16-20).

Davis then filed this timely appeal.

II. THE DISTRICT COURT'S REFERENCE TO REASONABLENESS

Davis argues that the district court erred in its sentencing procedure by applying a reasonableness standard rather than a sufficient-but-not-greater-than-necessary standard under § 3553(a). The record indicates that the district judge may have thought his obligation was to impose a reasonable sentence. For example, the district judge ponders: "So, is a Guideline sentence reasonable in this case? Is a non Guideline sentence reasonable? If so, what would a reasonable non Guideline sentence be?" J.A. at 26 (Sentencing Tr. at 16). He also asks, "But the question is, is that reasonable. I believe it is reasonable given the circumstances under which the defendant was serving." J.A. at 27 (Sentencing Tr. at 17). Finally, he concludes that "for all those reasons, I believe a Guideline sentence [in] this case is reasonable, and that's what I intend to impose." J.A. at 29 (Sentencing Tr. at 19).

We have made clear

> that a district court's job is not to impose a "reasonable" sentence. Rather, a district court's mandate is to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" of section 3553(a)(2). Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished its task.

United States v. Foreman, 436 F.3d 638, 644 n.1 (6th Cir. 2006); *accord United States v. Yopp*, 453 F.3d 770, 774 (6th Cir. 2006); *United States v. Vonner*, 452 F.3d 560, 565 n.2 (6th Cir. 2006). Therefore, at points during the sentencing the district court stated the wrong standard to describe the task before it — "impos[ing] a sentence sufficient but not greater than necessary" under § 3553(a).

These misstatements of the district court's sentencing task do not necessarily imply a reversible sentencing error. After *Booker*, we review a sentence for reasonableness, that is, "whether the district court's sentence is a reasonable application of Section 3553(a)." *Vonner*, 452 F.3d at 565; *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005), *cert. denied*, --- U.S. ---, 126 S. Ct. 1110 (2006). This review is not restricted to the length of the sentence — substantive reasonableness — but also incorporates a procedural component: whether the district court adequately considered and expressed its application of the relevant factors listed in 18 U.S.C. § 3553(a) to permit "'meaningful appellate review.'" *Vonner*, 452 F.3d at 567; *accord United States v. Richardson*, 437 F.3d 550, 553 (6th Cir. 2006). Although "no 'ritual incantation' of the [§ 3553(a)] factors is required," *Vonner*, 452 F.3d at 568, "there must still be sufficient evidence in the record to affirmatively demonstrate the court's consideration of them." *United States v. McBride*, 434 F.3d 470, 476 n.3 (6th Cir. 2006).

Within-Guidelines sentences such as Davis's are afforded a rebuttable presumption of reasonableness. *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006). This presumption is rebutted, however, when there is an "absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors." *Foreman*, 436 F.3d at 644. There is no such shortcoming here. As quoted above, after calculating the appropriate Guidelines range under 18 U.S.C. § 3553(a)(4)(A), the district court addressed each of the relevant § 3553(a) factors, including "the nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1); "the history and characteristics of the defendant," *id.*; "the need for the sentence imposed — (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant," *id.* § 3553(a)(2); "the need to avoid unwarranted sentence disparities," *id.* § 3553(a)(6); and "the need to provide restitution," *id.* § 3553(a)(7). The district court's thorough consideration of the § 3553(a) factors certainly allows for intelligent appellate review. *Vonner*, 452 F.3d at 567-68; *Richardson*, 437 F.3d at 553.

The rebuttable presumption of reasonableness also will not save a within-Guidelines sentence "if there is no evidence that the district court followed its statutory mandate to 'impose a sentence sufficient, but not greater than necessary' to comply with the purposes of sentencing in section 3553(a)(2)." *Foreman*, 436 F.3d at 644. In this case, despite the district court's repeated enunciation of "reasonableness," it nonetheless appears that the district court was concerned with imposing a sentence that was sufficient but no greater than necessary to comply with § 3553(a). The district judge balanced the seriousness of the offense and the need to promote respect for the law, provide just punishment and adequate deterrence, and protect the public, each of which he believed militated against a below-Guidelines sentence, with the mitigating factor of Davis's acceptance of responsibility, which he believed pointed to a sentence at the bottom of the Guidelines range. J.A. at 26-30 (Sentencing Tr. at 16-20).

Moreover, even when a Guidelines sentence is imposed, if "a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *Richardson*, 437 F.3d at 554. The district court considered Davis's argument regarding the nonviolent nature of his escape, but explained that he would still sentence Davis within the Guidelines range because the court considered Davis's offense to be quite serious and thus promoting respect for the law required such a sentence. J.A. at 28-29 (Sentencing Tr. at 18-19). The district court also explained that the significance of Davis's prior offenses, the concern of recidivism, and the need to protect the public were all factors that counseled against a below-Guidelines sentence. *Id.*

Finally, the "rebuttable presumption [of reasonableness] does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence [within the Guidelines]." *Richardson*, 437 F.3d at 554. The district court met its obligation on this ground by explaining that a sentence at "the low end of the Guideline Range, which is 37 months," was warranted due to Davis's acceptance of responsibility. J.A. at 30 (Sentencing Tr. at 20).

It is worthy of note that *Vonner* indicated that the district court that imposed the sentence at issue in that case "appear[ed] more focused on whether the sentence given is reasonable rather than whether the sentence complies with the mandate of Section 3553(a)," but did not suggest that this in and of itself would constitute reversible error. *Vonner*, 452 F.3d at 565 n.2. Given our repeated admonition that the focus of sentencing "is on substance rather than form" and that sentencing does not require any particular "magic words," *id.* at 568 & n.4; *accord McBride*, 434 F.3d at 476 n.3, the district court's reference to a reasonableness standard does not render Davis's sentence unreasonable in the face of the district court's satisfaction of the post-*Booker* sentencing mandates.

III. "NATURE AND CONDITIONS" FACTOR UNDER 18 U.S.C. § 3553(a)(1)

Davis also argues that his sentence is unreasonable because a thirty-seven month sentence does not adequately take into account "the nature and circumstances of the offense" — specifically, the nonviolent character of his escape — as required by 18 U.S.C. § 3553(a)(1).[3] The district judge *did* consider the nature and circumstances of the offense. He acknowledged that Davis "didn't escape violently," J.A. at 28 (Sentencing Tr. at 18), but went on to express that "[t]he defendant's

[3]Davis relies on *Harris*, 165 F.3d at 1068, to argue that despite the categorical nature of the crime-of-violence classification, the district court could properly consider his actual conduct in determining his sentence. *Harris* suggested "that a limited inquiry into his actual conduct at the time of his escape . . ., coupled with other relevant facts, might appropriately lead the sentencing court to conclude that a downward departure is warranted here." *Id.* *Harris* was decided before *Booker*. Davis no longer needs to rely on *Harris* and Guidelines departures; post-*Booker*, a district court has the discretion to impose a below-Guidelines sentence based on consideration of the actual nature of Davis's offense under 18 U.S.C. § 3553(a)(1).