No. 05-4833

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellant
v.

MARC RICKS,

Appellee

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

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

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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 ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU seeks to end punitive drug policies that cause the widespread violation of constitutional and human rights, as well as unprecedented levels of incarceration.

The ACLU of Pennsylvania is one of its statewide Affiliates of the national ACLU, with nearly 20,000 members. For eighty-five years, the ACLU has sought to advance the principles of liberty and equality embodied in the Constitution of the United States. In support of these principles, the ACLU has appeared before the United States Supreme Court, this Court, and other federal Courts of Appeals in numerous cases, both as direct counsel and as amicus curiae. Because this Court's decision on this appeal addresses important constitutional questions, the resolution of this appeal is a matter of substantial concern to the ACLU and its members.

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 the concepts of disparity and uniformity.

Amicus David N. Yellen is Dean and Professor of Law at Loyola University Chicago School of Law. He is co-author of 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

Pursuant to Federal Rule of Appellate Procedure 29(b), amici seek the leave of this Court to file this brief. A motion for leave to file this amicus brief and present oral argument accompanies this brief.

Certificate of Compliance, Bar Membership and Virus Check

Amici certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7), as it is under 15 pages long.

Counsel for Amici, Mark Osler, is presently a member of bar of the First, Fifth and Ninth Courts of Appeal, and is applying for membership of the Bar of this Court contemporaneous with this filing.

This document was screened for viruses using the Symantec Anti-Virus tool. The word count for the document as a whole is 4,054.

SUMMARY OF ARGUMENT

This Court should decline the government's invitation to create new law contrary to statutory requirements and Supreme Court precedent. The sentencing court, relying on the guidance of the sentencing commission, concluded that the guidelines overstate the seriousness of crack offenses relative to powder cocaine offenses, then acted on that conclusion. While the government is unhappy with the outcome, the sentencing court committed no error in following the relevant statute and the plain meaning of the Supreme Court in Booker v. United States, 543 U.S. 220 (2005).

Appellee Ricks has properly asserted that factors particular to this case were a basis for Judge Buckwalter's sentencing decision. Amici do not challenge that assertion, but rather argue that even if there were no such particular factors present or considered (as the government contends), the sentencing judge did not commit error.

A careful examination of 18 U.S.C. § 3553(a) makes clear that the statute not only allows, but requires an independent judicial evaluation of the "seriousness of the offense" and "just punishment," 18 U.S.C. § 3553(a)(2)(A), separate and apart from the "nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), and the requirements of the guidelines, 18 U.S.C. § 3553(a)(4). To conflate these factors to read

seriousness of the offense as related only to factors particular to the case, as the government urges, would make them redundant, a construction which cannot be allowed.

The government warns of the danger of inter-judge disparities unless discretion is restricted. However, now that Booker has struck down 18 U.S.C. § 3553(b), no controlling law requires promoting concerns about uniformity over the other constitutional and statutory concerns reflected in Booker and 18 U.S.C. § 3553(a). While uniformity is a goal, it is one among many.

Very simply, discretion and uniformity are in tension. Booker, on its face, increased discretion. The Booker court anticipated the concerns expressed by the government, recognized that uniformity would probably decrease with advisory guidelines, and made it very clear that a system mandating strict uniformity must give way to a system granting judges wider discretion.

The government asks this Court to expand the ambit of reasonableness review to create a universal and broad rule stating that it is improper for district courts to countenance a particular sentencing consideration (seriousness of crack cocaine offenses relative to powder cocaine offenses). Accepting the government's invitation to turn reasonableness review into a debate over sentencing policy would fly in the face of the Supreme Court's admonition to the Courts of Appeal not to make such broad rulings, and would risk a de facto recurrence of the circumstances

which caused the Supreme Court to strike down mandatory sentencing guidelines in the first place.

Argument

I. THE SENTENCING COURT PROPERLY IMPOSED A REASONABLE SENTENCE, FOLLOWING THE STATUTES AND PROCEDURES APPLICABLE TO SENTENCING AFTER BOOKER.

A. The government seeks to vacate Ricks' sentence based on a policy it prefers, not a statutory requirement or binding precedent.

This case presents an example of the change to federal sentencing wrought by Booker v. United States, 543 U.S. 220 (2005). The judge below acknowledged his discretion to vary from the guidelines, considered and weighed the factors listed in 18 U.S.C. § 3553(a), and issued a sentence outside of the guideline range the government sought.[1] (Consolidated App. at 116-120). In doing so, he scrupulously followed the directives of the Supreme Court and the controlling statute, which expressly directed him to consider the seriousness of the offense and a just sentence, separate and apart from his co-equal consideration of the guideline sentence and the need to avoid disparities. So, how can the government claim error?

In short, the government argues that the sentencing judge lacked the discretion to deviate from the guidelines in this case because no factors unique to Ricks' case (in the government's view) supported a departure or variance. This

[1] Appellee Ricks properly claims that Judge Buckwalter relied on particular facts specific to this case in crafting a sentence. Amici do not disagree with this, but address the issue as if there were no such particular factors in play, assuming for the sake of argument the government's claim to that effect.

view ignores not only the several directives of 18 U.S.C. §3553(a) which include those relied upon by Judge Buckwalter, but the central premise of the remedial holding in Booker v. United States, 543 U.S. 220 (2005): That sentencing is no longer subject to mandatory guidelines which single-mindedly enforce the goal of uniformity. 543 U.S. at 258-260. The government's construction of Booker would equate "considering" the range to "following" the range but for individualized considerations particular to a given case. This conclusion 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.

B. The District Court properly considered 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.

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, 543 U.S. at 266.

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" as well as "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

The opinion below reveals that the court carefully followed the sentencing instructions set forth in § 3553(a) by expressly considering those several factors and weighing them relative to one another. (Consolidated App. 116-120.) Before evaluating other factors, Judge Buckwalter stated that

> "[The guidelines] are entitled to great weight, and I think they're presumptively reasonable. As I indicated in my earlier remarks, a presumption can be rebutted, and I think it's clearly rebuttable in this case as to the reasonableness of the guidelines…"

(Consolidated App. 119.) Thus, the District Court not only took the Guidelines into account, as required by both Booker and Third Circuit precedent, but treated them as presumptively reasonable. The District Court only varied from the Guidelines after a reasoned and detailed examination of the 100:1 ratio. See id. at 116-121.

That reasonable and detailed examination led the judge to conclude that the guidelines would result in an unjust sentence which would overstate the

seriousness of the offense. These were proper and co-equal considerations because 18 U.S.C. § 3553(a)(2)(A) explicitly requires that the court consider both the "seriousness of the offense" and "just punishment for the offense." Thus, the plain language of the statute directed the judge to independently evaluate and consider not only the individual circumstances of the case and the guidelines which apply, but to make an independent evaluation of the seriousness of the type of offense at issue and consider whether or not a guideline sentence would be just. It appears that Judge Buckwalter did exactly what the statute required.

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 consider his own evaluation of 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 just punishment, separate from the independent statutory dictates to consider the effect of the guidelines (§ 3553(a)(4)) and the "nature and circumstances of the offense and the history and characteristics of the defendant." (§ 3553(a)(1)).

It cannot be that § 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, because then that instruction would be 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 particular 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 consider his or her own evaluation of the seriousness of that *type* of offense, independent of the guideline range and the individual aspects of that case. Further, the judge is also affirmatively charged with evaluating the justice of the punishment, and it is clear in this case that Judge Buckwalter felt use of the 100-to-1 ratio was unjust.

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 (U.S. 1979). This Court has itself held that when construing statutes, "courts should avoid a construction of the statute that renders any provision superfluous." United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 42 (3d Cir. 1993).

The government asks that this Court focus on the intent of Congress as embodied in text which was struck from 18 U.S.C. § 3553—that which required that sentencing courts be held to the 100-to-1 ratio. In contrast, Amici ask that this Court consider the intent of Congress as embodied in the relevant statute that survived Booker. It is the surviving congressionally-mandated directive which expressly tells a sentencing judge to consider not only the guidelines, but his perception of the seriousness of the crime and a just punishment, separate from his consideration of the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a).

Favoring the intent of Congress as expressed in Guidelines which are no longer mandatory (the 100-to-1 ratio) over the intent of Congress as expressed in its own statutory directives (the requirement to independently assess the seriousness of the offense and justice in sentencing) was the mistake the First and Fourth Circuits made in United States v. Pho, 433 F. 3d 53 (1st Cir. 2006) and United States v. Eura, 440 F. 3d 625 (4th Cir. 2006). Amici respectfully disagree with Eura's embrace of Pho's conclusion that "a district court's categorical rejection of the 100:1 ratio impermissibly usurps Congress's judgement about the proper sentencing policy for cocaine offenses." Eura at 634 (*quoting* Pho at 63). It could equally be said, after all, that a judge's refusal to independently evaluate the seriousness of the offense and the need for a just sentence would violate

Congress's judgement about proper sentencing policy, as expressed through extant and relevant statutes.

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 just punishment and the seriousness of offense conduct apart from individual aspects of the case, and that the court below did not err.

II. THE GOVERNMENT SEEKS TO HAVE THE AVOIDANCE OF DISPARITIES TRUMP THE OTHER CO-EQUAL FACTORS DESCRIBED IN 18 U.S.C. § 3553(a).

The government expresses great concern about sentencing disparities which might result should courts take seriously their duty under 18 U.S.C. § 3553(a)(2) to affirmatively consider just punishment and independently evaluate the seriousness of a particular type of crime. Certainly, pursuant to 18 U.S.C. § 3553(a)(6), unwarranted disparities are to be considered, but the government seeks to place this concern above all the other factors listed co-equally in § 3553(a). Congress, in promulgating § 3553(a), did not elevate that factor above the others, leaving the weighing of the listed factors to the judge who is issuing a sentence. Given that Congress did not choose to rank-order the importance of the various factors in § 3553(a), this Court should decline the government's invitation to do so.

The Supreme Court in Booker predicted this debate, and refuted pre-emptively the idea that concern for disparities should skew post-Booker sentencing governed by all the provisions of 18 U.S.C. § 3553(a). Contrary to the government's view that concern for disparities is a trump card over other § 3553(a) considerations under the broad banner of review for reasonableness, the Supreme Court knew that the changes wrought in Booker likely would impact the pursuit of strict uniformity, and forged ahead with those changes anyway. In his majority opinion in Booker, Justice Breyer anticipated exactly the "reasonableness" argument made by the government here:

> Regardless, in this context, we must view fears of a "discordant symphony," "excessive disparities," and "havoc" (if they are not themselves "gross exaggerations") with a comparative eye. We cannot and do not claim that use of a reasonableness standard will provide the uniformity that Congress originally sought to secure.

125 S. Ct. at 766-767.

III. THE GOVERNMENT SEEKS TO CREATE NEW LAW AND RE-IMPOSE A SENTENCING SYSTEM CONTAINING THOSE ELEMENTS ALREADY REJECTED BY THE SUPREME COURT.

A. It would be improper to create new law restricting judicial discretion.

As set out above, the plain text of 18 U.S.C. § 3553(a) and Supreme Court precedent do not support the rule restricting judicial discretion which the government seeks. Moreover, a restrictive approach to 3553(a) would violate a precept set out by the Supreme Court in Koon v. United States, 518 U.S. 81 (1996): That only Congress and the Sentencing Commission, and not the Courts of Appeal, should devise limits on the discretion of District Courts in sentencing.

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, the government now asks this Court to exercise exactly that authority and rule that a sentencing consideration which rejects the guideline range as overstating the seriousness of that category of offense is inappropriate in every circumstance.

Of course, Amici agree with the government's general assertion 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 rewrite statutes 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 should not transform the application of the Supreme Court's Booker decision; rather, review for reasonableness must be focused on the provisions of 18 U.S.C. § 3553(a).

B. The government seeks to re-introduce precisely those factors already rejected by the Supreme Court in *Booker*.

The government claims that a court cannot refuse to follow a guideline range based primarily or only upon the harshness of that guideline. To accept their position 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. This is exactly the construct that was overturned in Booker. To choose the government's preferred course would violate the directive announced by the Supreme Court to avoid creating "grave constitutional questions":

> [W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

Jones v. United States 526 U.S. 227, 239 (1999).

If this Court bans 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 was then locked into the guideline range because the only possible basis for departure or variance would be the seriousness of the offense relative to the offense score. The precise scenario found to offend the Sixth Amendment in Booker would arise: 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 are not 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 grants the government's wish and finds that a court's own judgment of the seriousness of the offense cannot outweigh the guidelines's offense score, it re-introduces into the system precisely the element

that 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, constitutional infirmity will recur.

Conclusion

For these reasons, Amici ask that this court affirm the decision below.

For Amici,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Amici American Civil Liberties Union, et. al., was served upon counsel for Appellant and Appellee, as listed below, via delivery to Federal Express for overnight delivery service on May 18, 2006. The foregoing Brief was also filed with the Clerk of Court by electronic transmission and via delivery to Federal Express for overnight delivery service on May 18, 2006.

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