04-5277-cr

To Be Argued By:
WILLIAM J. NARDINI

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-5277-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ARLEX HOLGUIN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF AND GOVERNMENT APPENDIX FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

WILLIAM J. NARDINI
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court (Janet B. Arterton, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the "safety valve" statute, 18 U.S.C. § 3553(f), which in certain circumstances allows a court to sentence a defendant to less than an otherwise applicable mandatory minimum sentence, may be constitutionally applied, in whole or in part, in light of *United States v. Booker*, 125 S. Ct. 738 (2005):

1. Whether § 3553(f)'s directive that safety-valve eligible defendants receive a sentence "pursuant to" the Guidelines should be reasonably interpreted to authorize district courts to sentence such eligible defendants like any other defendants in conformity with the factors listed in § 3553(a), including the requirement that the court "consider" the Guidelines, and whether such reasonable interpretation should be adopted to avoid constitutional questions in light of *Booker*?

2. Whether *Booker* leaves intact settled law that a defendant is eligible for the safety valve only by proving to a sentencing judge by a preponderance of the evidence that he has satisfied all five statutory eligibility criteria?

3. Whether the Supreme Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), precludes the defendant's argument that the district court violated his Fifth and Sixth Amendment rights by making sentencing findings that triggered application of the statutory mandatory minimum sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-5277-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

ARLEX HOLGUIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant-appellant Arlex Holguin was caught trying to sell a kilogram of cocaine to an undercover federal agent. As a result, he pled guilty to one count of possessing with intent to distribute more than 500 grams of cocaine. At sentencing, the district court (Janet B. Arterton, J.) found that based on the undisputed facts, the defendant's offense level under the United States

Sentencing Guidelines was subject to a two-level enhancement under U.S.S.G. § 3B1.1(c) based on his recruitment and supervision of two other participants in the drug transaction. Due to the role enhancement, the district court found the defendant ineligible for the "safety valve" provision of 18 U.S.C. § 3553(f), which in limited circumstances permits imposition of a sentence below an otherwise applicable statutory mandatory minimum. Accordingly, the district court sentenced the defendant to the mandatory minimum five years of imprisonment established by 21 U.S.C. § 841(b)(1)(B).

On appeal, the defendant raises four claims. The first two involve his argument that the "safety valve" provision of § 3553(f) survives only in modified form in light of the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). First, he claims that the Sixth Amendment, as interpreted by *Booker,* requires that the command in § 3553(f) that a district court "shall impose" a sentence "pursuant to" the Sentencing Guidelines, upon a finding that the defendant meets all requirements for safety-valve eligibility, should be interpreted to mean that the court consider the Guidelines only as an advisory matter. Second, he argues that two of the eligibility criteria for the safety valve which cross-reference concepts defined in the Guidelines -- namely, that a defendant neither "have more than 1 criminal history point, as determined under the sentencing guidelines," § 3553(f)(1), nor have been "an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," § 3553(f)(4) -- must likewise be viewed as simply advisory.

The Government agrees with the first point, in light of the interpretive canon that a court should adopt a reasonable construction of a statute that avoids serious constitutional questions. *See infra* Part I.C.1. The Government disagrees, however, with the defendant's second contention. Under the Supreme Court's holdings in *Harris v. United States*, 536 U.S. 545 (2002), and *Booker*, the Sixth Amendment is implicated by judicial factfinding by a preponderance of the evidence only if such findings increase the maximum penalty to which a defendant is thereby exposed. In the context of the safety valve, however, the only effect of the judge's findings is to potentially *reduce* the defendant's sentence, not to *increase* it. Accordingly, there is no Sixth Amendment infirmity in judicial factfinding at sentencing with respect to safety-valve eligibility, regardless of the fact that certain eligibility criteria employ concepts borrowed from the Guidelines. *See infra* Part I.C.2.

Third, the defendant contends that the district court violated his Fifth and Sixth Amendment rights by imposing a statutorily mandated minimum sentence based on a judicial finding, by a preponderance of the evidence, of a disputed fact -- that is, that the defendant was the supervisor of a jointly undertaken criminal activity. As the defendant candidly acknowledges, this claim is squarely foreclosed by the Supreme Court's holding in *Harris*. *See infra* Part I.C.3.

Fourth, the defendant claims that the district court violated his Sixth Amendment rights by imposing the mandatory minimum five-year sentence, because that sentence exceeded the top of the guidelines range that

would have been otherwise applicable. This argument overlooks the fact that, in line with the Supreme Court's remedial opinion in *Booker*, authored by Justice Breyer, the relevant maximum penalty in this case was *not* the top of any guidelines range, but rather the 40 years established by 21 U.S.C. § 841(b)(1)(B). Because the defendant's five-year sentence was well below that statutory maximum, there was no Sixth Amendment violation. *See infra* Part I.C.4.

For all of these reasons, this Court should affirm the judgment of the district court.

Statement of the Case

On February 21, 2004, the defendant was arrested during an undercover drug deal. *See* Presentence Report ("PSR") 76 (separate sealed appendix). On February 23, 2004, a criminal complaint against him was filed in the U.S. District Court for the District of Connecticut. Joint Appendix ("JA") 1 (docket entry).

On March 4, 2004, a federal grand jury returned a two-count indictment against the defendant and two co-conspirators, Juan Mejia and Andres Rojas. JA 8-9. The case was assigned to United States District Judge Janet B. Arterton.

On June 16, 2004, the defendant entered a guilty plea to Count Two of the indictment, which charged him with possessing with intent to distribute 500 grams or more of cocaine. JA 3 (docket entry); JA 10-16 (plea agreement).

On September 8, 2004, the district court sentenced the defendant to 60 months of imprisonment, to be followed by four years of supervised release, together with a special assessment of $100. JA 61, 63 (hearing); 65 (written judgment). On the Government's motion, the district court dismissed the remaining count of the indictment. JA 63 (hearing); 7 (docket entry). Judgment entered on September 16, 2004. JA 7.

On September 13, 2004, the defendant filed a timely notice of appeal. JA 7 (docket entry); 66 (notice of appeal). The defendant is currently serving his sentence.

On January 12, 2005, the defendant filed a brief and joint appendix, as well as a sealed copy of his presentence report, with this Court.

On February 15, 2005, after the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (2005), the Government moved for summary affirmance based on the fact that the defendant had received the mandatory minimum sentence of five years established by 21 U.S.C. § 841(b)(1)(B).

On April 7, 2005, this Court denied the Government's motion, noting that full briefing was warranted on the "continued viability of 18 U.S.C. § 3553(f), which mandates use of the United States Sentencing Guidelines, in light of the Supreme Court's decision in [*Booker*]." By order dated April 27, 2005, this Court granted the Government's motion to allow the parties to submit supplemental briefing.

STATEMENT OF FACTS

A. The Offense Conduct

On various occasions in 2003, the defendant sold ounce quantities of cocaine to a confidential source working with the Drug Enforcement Administration ("DEA"). PSR 72-75. Subsequently, the defendant engaged in negotiations to sell a kilogram of cocaine to an undercover DEA agent. PSR 75-76.

On February 21, 2004, the defendant met with the undercover agent to consummate the deal. The defendant arrived at the pre-arranged location in a car, accompanied by co-defendant Andres Rojas. PSR 76 at ¶ 25. The defendant entered a sandwich shop to meet with the undercover agent, where they discussed how they would count the money and verify the presence of the cocaine. *Id.* They agreed to meet a short while later in the parking lot of the Norwalk Hospital. *Id.*

Shortly thereafter, the undercover agent telephoned the defendant, who said that he was in the hospital parking lot. PSR 76 at ¶ 26. A surveillance team saw Rojas get out of the car and make a call on his cell phone. *Id.* Within minutes, another car driven by Juan Mejia pulled up to Rojas, who got into the car. Mejia drove into the hospital parking lot, and the defendant pointed to Mejia's car as if to acknowledge them. Mejia drove out of the lot, and the defendant likewise drove out soon thereafter. *Id.* After some further maneuvers, both cars went to the parking lot of the Norwalk Hospital's emergency room. PSR 76 at ¶ 27.

After the cars arrived in the lot, agents arrested the defendant, Mejia, and Rojas while they were sitting in their respective cars. PSR 76 at ¶ 28. Rojas was found with a brick of packaged cocaine, weighing over a kilogram, stuffed in his waistband. In the defendant's pockets were four baggies with approximately 27 gross grams of cocaine and $750 in cash. *Id.*

When later questioned by law enforcement authorities, the defendant admitted his involvement in the drug deal, but claimed that neither Rojas nor Mejia had any involvement in the transaction. PSR 77 at ¶¶ 29-30. The defendant claimed that Rojas accompanied him to help count the cash, and that he had called Mejia in the midst of the transaction to help him, but that Mejia had not known what he was becoming involved in. *Id.* According to the defendant, although he thought Rojas and Mejia knew they were getting involved in a drug deal, neither one knew the quantity involved. *Id.* Mejia was likewise debriefed after his arrest, and he admitted knowing that the defendant and Rojas were involved in a drug deal, but denied knowing the quantity involved or expecting any payment for his role. PSR 77 at ¶ 31.

B. Indictment and Plea

On March 4, 2004, a federal grand jury sitting in Connecticut returned a two-count indictment against the defendant, Rojas, and Mejia, charging them with a conspiracy count, 21 U.S.C. § 846 (Count One) and a substantive count of possessing with intent to distribute 500 grams or more of cocaine, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) (Count Two). JA 8-9.

On June 16, 2004, pursuant to a plea agreement, the defendant pled guilty to Count Two of the indictment. JA 3 (docket entry); JA 10-16 (plea agreement). The plea agreement stated that the defendant faced a mandatory minimum penalty of five years of imprisonment, and a maximum penalty of 40 years. JA 11.[1]

---

[1] The agreement further included the following *Apprendi* waiver:

> The defendant understands that he may be able to argue under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that he had the right to have a grand jury and a trial jury make certain findings of facts that could, in turn, determine whether the Court could apply any mandatory minimum sentence prescribed by statute or any sentence within a range permitted by a higher statutory maximum sentence resulting from a finding of such facts. The defendant knowingly and voluntarily waives his right to have or have had such facts submitted for findings by a grand jury or trial jury.

JA 11. During the plea colloquy, the defendant was extensively canvassed on this provision. Government Appendix ("GA," appended hereto) 1, 6-8. The court described this waiver narrowly, as encompassing the defendant's right to have a grand jury and trial jury make findings "with respect to the quantity of drugs involved, that could, in turn, determine whether Judge Arterton can apply any mandatory minimum sentence prescribed by statute, or any sentence within a range permitted by a (continued...)

The plea agreement also included a Guidelines calculation, noting *inter alia* that the parties disputed the applicability of a two-level upward adjustment under U.S.S.G. § 3B1.1(c) based on the defendant's role as a manager or supervisor in the offense. JA 12-13. The parties also reserved their respective appellate rights. JA 13.

C. Sentencing

In the PSR, the Probation Office calculated the defendant's total offense level at 25 (base offense level of 26 under § 2D1.1(c)(7), plus 2 levels as an organizer and supervisor under § 3B1.1(c), minus 3 levels for acceptance of responsibility under § 3E1.1(b)). PSR 8-9 at ¶¶ 36-44. This yielded a guidelines sentencing range of 60-71 months. PSR 13 at ¶ 68.

On September 8, 2004, the district court held a sentencing hearing. The parties agreed that the base offense level was 26, that the defendant was entitled to a

---

[1] (...continued)
higher statutory maximum sentence resulting from a finding of such facts." GA 7. When asked whether he "knowingly and voluntarily waive[d] [his] right to have such facts submitted for findings by a grand jury or a trial jury," the defendant responded, "Yes." GA 7-8.

Because the defendant was only canvassed on this waiver as it applied to findings of drug quantity, the Government does not rely upon the waiver to bar his claim with respect to judicial factfinding as to other facts.

three-level reduction for acceptance of responsibility under § 3E1.1, and that the central issue for determination was whether the defendant was subject to a two-level upward adjustment under § 3B1.1 as a supervisor or manager. The court noted that the essential facts relating to the defendant's involvement with Rojas and Mejia were largely undisputed, JA 21-23, and the defendant conceded that both Rojas and Mejia were participants for purposes of the Guidelines, JA 26. The defendant noted that depending on how the Supreme Court followed up on its decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), a defendant might not be rendered ineligible for the safety valve by virtue of a role enhancement. JA 31.

After considering the undisputed facts, the district court concluded that the defendant was indeed subject to the two-level upward adjustment under § 3B1.1. JA 58-61. The court noted that although it was a "small criminal enterprise," it was the defendant who had recruited Rojas and Mejia "to perform roles in consummating the transaction that he needed." JA 58. "[A]lbeit a small enterprise, it was one that he ran entirely." *Id.* As a result, the court imposed the mandatory minimum sentence of 60 months of imprisonment, which was also the bottom of the applicable guidelines range.

SUMMARY OF ARGUMENT

First, in light of the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the safety-valve provision of 18 U.S.C. § 3553(f) should be interpreted to authorize a district court to impose a sentence under an advisory guideline system in conformity

with 18 U.S.C. § 3553(a), once the court has found by a preponderance of the evidence that the defendant has established that he satisfies all five of the statutory eligibility criteria. The language employed by § 3553(f) -- directing that a court "shall impose" a sentence "pursuant to" the Guidelines -- differs considerably from the more rigid language of § 3553(b)(1) invalidated by the Supreme Court in *Booker*, and can be reasonably interpreted to permit imposition of a sentence that is ordered after "consider[ation]" of the Guidelines as generally required by § 3553(a) for all defendants. Such an interpretation also respects the canon of statutory construction that requires courts to interpret laws in ways that avoid serious constitutional doubts, such as the Sixth Amendment considerations that would be triggered by a mandatory guideline sentencing regime.

Second, nothing in *Booker* requires this Court to revisit its settled precedents which interpreted § 3553(f) as requiring defendants to prove their eligibility for safety-valve treatment under all five criteria listed in the statute. The text of § 3553(f) unambiguously requires that all five eligibility criteria be satisfied, and leaves no room for the defendant's proposal that two of the criteria be viewed as purely advisory. Nor is the defendant's interpretation required by the *Booker* Court's reading of the Sixth Amendment, given that the safety valve *reduces the minimum penalty*, rather than *increases the maximum penalty*, to which a defendant is exposed. The fact that two of the safety-valve eligibility criteria happen to employ concepts that are borrowed from the Guidelines does not alter the analysis.

Third, to the extent the defendant claims that the Constitution bars a district court from making factual findings by a preponderance of the evidence that trigger a statutory mandatory minimum sentence, his claim is foreclosed by *Harris v. United States*, 536 U.S. 545, 560 (2002), and *United States v. Sharpley*, 399 F.3d 123, 126-27 (2d Cir. 2005), *pet'n for cert. filed*, No. 04-10167 (May 14, 2005).

Fourth, the defendant misreads *Booker* by claiming that the maximum penalty to which he was lawfully exposed at the time of his sentencing was the upper end of the guideline range as calculated by reference solely to the facts he admitted in his guilty plea. The Supreme Court made clear that both of its holdings -- both constitutional and remedial -- were to apply retroactively to all cases on direct review. Moreover, the Ex Post Facto Clause does not apply to judicial decisionmaking, and retroactive application of *Booker* does not run afoul of the *ex post facto* concepts embodied in the Due Process Clause. Accordingly, because the Guidelines should have been applied in an advisory manner to the defendant, the maximum penalty to which he should have been lawfully exposed was the 40 years fixed by 21 U.S.C. § 841(b)(1)(B). The five-year sentence he received was less than that maximum sentence, and indeed was the lowest possible sentence the district court could have lawfully imposed. Accordingly, any error caused by the district court's erroneous belief that the Guidelines were mandatory was harmless beyond any doubt.

ARGUMENT

I. The District Court Did Not Err Under *Booker* by Sentencing the Defendant to the Five-Year Mandatory Minimum Term of Imprisonment Established by 21 U.S.C. § 841(b)(1)(B)

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

Since 1984, Congress has enacted a series of laws that establish mandatory minimum penalties for certain crimes, "the aim of which was to provide a meaningful floor in sentences for certain serious federal controlled substance and weapons-related offenses." H.R. Rep. No. 103-460, at 3 (1994). In general, Congress sought to establish a two-tier system under which "kingpin" drug traffickers faced 10-year mandatory minimum sentences, and "middle-level" traffickers faced at least 5 years in prison. *Id.* at 3-4. For example, in the case of a defendant like Holguin who is convicted of possessing with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(B), "such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . ." When the Guidelines were first promulgated in 1987, the Sentencing Commission designed the guidelines governing drug offenses to work in concert with the mandatory minimum

sentences already established by statute. *Id.* In general, "sentences for offenses involving drug quantities that would trigger a mandatory minimum equate with a guideline sentence of at least that length," and the presence of aggravating factors leads to longer sentences under the Guidelines. *Id. Compare, e.g.,* 21 U.S.C. § 841(b)(1)(A) (listing drug quantities that trigger 10-year mandatory minimum sentences) *with* U.S.S.G. § 2D1.1 (drug quantity table) (1987) and § 2D1.1(c)(4) (2004) (listing those same quantities as triggering offense level 32 which, coupled with Criminal History Category I, call for guideline range of 121-151 months); *and compare* 21 U.S.C. § 841(b)(1)(B) (listing quantities that trigger 5-year minimum) *with* U.S.S.G. § § 2D1.1 (drug quantity table) (1987) and § 2D1.1(c)(7) (2004) (same quantities trigger offense level 26 which, with Criminal History Category I, call for guideline range of 63-78 months).

Congress later recognized, however, that this system did not always leave room for recognition of mitigating factors (such as acceptance of responsibility or reduced role in the offense) in cases involving the lowest-level offenders whose guideline sentences were at the mandatory minimum. *Id.* In 1994, in order to remedy this defect, Congress enacted 18 U.S.C. § 3553(f), commonly known as the "safety valve." That provision authorizes district courts to impose sentences below the statutory minimum in certain limited circumstances. As the legislative history reports, the goal of this legislation was to "permit a narrow class of defendants, *those who are the least culpable participants in such offenses*, to receive strictly regulated reductions in prison sentences for mitigating factors currently recognized under the federal

sentencing guidelines." H.R. Rep. 103-460, at 2 (emphasis added). The "safety valve" was designed so that mandatory minimum sentences continued to apply to those guilty of "relatively more serious conduct," while allowing mitigating factors to be applied through the Guidelines to the "*least culpable offenders*." *Id.* (emphasis added). *See also United States v. Reynoso*, 239 F.3d 143, 148 (2d Cir. 2000) ("Congress intended to provide relief from statutory minimum sentences to those defendants who, *but for their minor roles in criminal activity*, could (and would) have provided the Government with substantial assistance.") (emphasis in original).

In order to identify these "least culpable offenders," *id.*, § 3553(f) lists five criteria that must be satisfied in order for a court to impose a sentence below a mandatory minimum sentence in certain narcotics cases. The subsection reads in its entirety as follows:

> (f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

U.S.S.G. § 5C1.2 incorporates each of these statutory requirements nearly verbatim. It also establishes a minimum offense level of 17, based on application of Chapters Two (Offense Conduct) and Three (Adjustments) of the Guidelines Manual, for safety-valve eligible defendants.

This Court considers questions of statutory and constitutional interpretation *de novo*. *See United States v. Quinones*, 313 F.3d 49, 60 (2d Cir. 2002) ("Questions of constitutional interpretation are reviewed *de novo*."), *cert. denied*, 540 U.S. 1051 (2003); *United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002) (reviewing "question of statutory interpretation and of the constitutionality of [a statute] *de novo*").

C. Discussion

The defendant's principal contention on appeal is that, in light of the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the safety valve provisions of § 3553(f) may be constitutionally applied, though only in part.[2] His argument has two parts: (1) that § 3553(f) should be interpreted in light of *Booker* to authorize safety-valve eligible defendants to receive sentences under the post-*Booker* advisory Guideline regime; and (2) that the two safety-valve eligibility criteria

---

[2] This Court has noted that the constitutional validity of the safety valve provisions of § 3553(f) remains an open question after *Booker*. *United States v. Crosby*, 397 F.3d 103, 110 n.8 (2d Cir. 2005); *accord United States v. Antonakopoulos*, 399 F.3d 68, 76 n. 6 (1st Cir. 2005).

which are borrowed from the Guidelines should likewise be regarded as advisory. As set forth in greater detail below, the Government agrees with the first contention, but disagrees with the second.

1. In Light of *Booker*, § 3553(f) Should Be Interpreted to Authorize District Courts to Impose Sentences Below the Mandatory Minimum Sentence, and in Light of an Advisory Guideline System, for Defendants Who Are Eligible for the Safety Valve.

The Government agrees with the defendant that § 3553(f)'s command that the district court "shall impose" a sentence for eligible defendants "pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28" should be interpreted as requiring a court to impose a sentence after considering the Guidelines only as an advisory matter. As Judge Cassell recently explained in *United States v. Duran*, No. 2:04-CR-00396-PGC, 2005 WL 395439 (D.Utah Feb. 17, 2005), the words "pursuant to" can be reasonably read to mean "in compliance with" or as "authorized by" the Guidelines. *Id.* at *2. The Guidelines were never binding of their own force, but only by operation of 18 U.S.C. § 3553(b)(1). When the Supreme Court held in *Booker* that § 3553(b)(1) was unconstitutional, it struck down that statute but left the Guidelines themselves intact. The Sentencing Commission continues to update and promulgate the Guidelines pursuant to 28 U.S.C. § 994, *see Booker*, 125 S. Ct. at 766, and district courts are still

required to consider them at sentencing in an advisory manner pursuant to § 3553(a)(4), *see id.* at 767; *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

A fair reading of § 3553(f) therefore leaves room for the interpretation that a district court can impose a sentence "pursuant to" the Guidelines when it imposes a sentence like that applicable to any other defendant, in conformity with the factors listed in § 3553(a) -- including the requirement of § 3553(a)(4) that the sentence be imposed only after adequate "consider[ation]" of the "kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission." *See Duran*, 2005 WL 395439, at *2 (holding, in the wake of *Booker*, that "the safety valve provision, 18 U.S.C. § 3553(f), once satisfied, incorporates advisory Guidelines that gives the court discretion to impose any appropriate punishment").

Such a reading of § 3553(f) is not contrary to the Supreme Court's interpretation of § 3553(b) in *Booker*, since the two provisions use very different language. Section 3553(b) provides that a court "shall impose a sentence of the kind, *and within the range*" established by the Guidelines absent limited grounds for departures. 18 U.S.C. § 3553(b)(1). In *Booker*, the Supreme Court interpreted that language as imposing a mandatory guidelines sentencing regime. *See Booker*, 125 S.Ct. at 749. Likewise, this Court has interpreted the nearly identical language contained in § 3553(b)(2) ("the court shall impose a sentence of the kind, *and within the range*,

referred to in subsection (a)(4)" absent grounds for departure) (emphasis added) as requiring similar application of the guidelines as a mandatory matter -- and hence as being afflicted with the same Sixth Amendment infirmities identified by the Supreme Court in *Booker*. *United States v. Selioutsky*, 2005 WL 1253478 (2d Cir. May 27, 2005) (observing that "[b]oth subsections require use of the applicable Guidelines range, subject to slightly different departure provisions," and concluding that "[t]here is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*"). By contrast, the language employed in § 3553(f) is quite different. Subsection (f) does not require a district court to impose a sentence "of the kind, and within the range" established by the Guidelines, but more generally directs the court to impose a sentence "pursuant to" the Guidelines. Because the Guidelines are now advisory, a sentence imposed in conformity with all of the factors listed in § 3553(a) -- including § 3553(a)(4), which mandates consideration of the Guidelines -- can be deemed to satisfy that directive.

Although *pre-Booker* case law adopted a contrary reading -- that a district court is bound by the otherwise applicable guidelines system upon a finding that a defendant is safety-valve eligible -- such a reading was premised on the notion that the Guidelines were, in the ordinary case, binding upon district courts. *See generally United States v. Jeffers*, 329 F.3d 94, 101 (2d Cir. 2003) (rejecting the view that safety-valve relief is discretionary, even if the court finds that defendant has met all five eligibility criteria); *id.* at 101 n.6 (expressing the view that guidelines provisions are "no less binding on sentencing

courts" than are sentencing statutes). In the wake of *Booker*, however, such a reading would conflict with the Supreme Court's interpretation of the Sixth Amendment as prohibiting mandatory application of a guideline regime where judicial factfinding increases the upper end of sentencing ranges. The Supreme Court has repeatedly emphasized that where a statute is susceptible to more than one plausible interpretation, one of which raises serious constitutional doubts, the canon of constitutional avoidance dictates that "the other should prevail." *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005). "The cardinal principle of statutory construction is to save and not destroy." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

Given the ambiguity of the phrase "pursuant to," as used in § 3553(f), it is reasonable to interpret it in a way that is consistent with the Sixth Amendment -- that is, in a way that regards the Guidelines as advisory. *See United States v. Cherry*, 366 F. Supp. 2d 372, 375 (E.D. Va. 2005) (Jackson, J.) (holding that "guideline range determined under 18 U.S.C. § 3553(f) should be advisory only" in light of *Booker*, because contrary interpretation of § 3553(f) would render the statute unconstitutional). Construing the statute in this way is also fully consistent with Congress's expressed intent that safety-valve eligible defendants be treated like other offenders, free of the constraints imposed by statutory mandatory minimum sentences. *See, e.g.,* H.R. Rep. 103-460, at 2.

2. *Booker* Does Not Disturb Settled Law that a Defendant Is Eligible for the Safety Valve Only by Proving to a Judge by a Preponderance of the Evidence That He Has Satisfied All Five Eligibility Criteria

The defendant next argues that of the five statutory criteria for safety-valve eligibility, the two which expressly incorporate concepts defined in the Guidelines must be deemed purely advisory in the wake of *Booker*. The language of § 3553(f) leaves no doubt, however, about the mandatory nature of all five of the criteria listed for safety-valve eligibility. Accordingly, the statute is simply not susceptible to an interpretation that renders those criteria merely advisory -- much less an interpretation that treats some of them as advisory, and the others as mandatory.

The operative language of § 3553(f) regarding a defendant's eligibility for the safety valve provides that a court "shall impose a sentence" without regard to a statutory minimum sentence "*if the court finds at sentencing,*" that five criteria, listed in the conjunctive, are all satisfied. 18 U.S.C. § 3553(f) (emphasis added). This language is unambiguous in two relevant respects: First, the word "if" indicates that the court is *required* to make the statutory findings as a precondition of applying the safety valve. Second, the listing of those criteria with the conjunctive "and" requires that such findings encompass *all five criteria*. There is simply no room in the statutory text for the interpretation of § 3553(f) that the defendant proposes: that a district court may apply the safety valve

upon a finding that only *three*[3] of the criteria at issue have been satisfied. *See United States v. Bazel*, 80 F.3d 1140, 1144 (6th Cir. 1996) (explaining that Congress required defendants to prove eligibility under all five safety-valve criteria; analyzing conjunctive language adopted by Congress); *cf. In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004) (rejecting proposed interpretation of statute that would disregard plain language of statute and read disjunctive term "or" as the conjunctive term "and").

Even if the defendant's proposed interpretation of § 3553(f) were somehow viewed as plausible, the doctrine of constitutional avoidance would not counsel its adoption, given that the Sixth Amendment would not be violated by reading the statute in its most natural way -- namely, as requiring a defendant to prove that he satisfies all five of the eligibility criteria listed in the safety-valve statute, including the two criteria that happen to be borrowed from the Guidelines.

The first provision at issue, subsection (f)(1), measures the likelihood of a defendant's recidivism by the same yardstick employed in the Guidelines Manual, by requiring that the defendant have no "more than 1 criminal history

---

[3] Or, to be more precise, three and a half. Subsection (4) requires a court to find that the defendant *neither* merits a role enhancement under the Guidelines *nor* engaged in a continuing criminal enterprise as defined in 21 U.S.C. § 848. Presumably because this latter criterion is borrowed from a statute rather than the Guidelines, the defendant does not contend that it should be viewed as advisory.

point, as determined under the sentencing guidelines." Under the Guidelines, anywhere from one to three criminal history points are assigned to a defendant's prior convictions, depending on whether and how long the defendant was sentenced to prison. *See generally* U.S.S.G. § 4A1.1. Additional points are assigned for certain other facts that reflect a likelihood of recidivism, such as whether the defendant committed the offense in question within two years of release from prison, or while on probation. *Id.*

The second safety-valve eligibility criterion at issue here, subsection (f)(4), focuses on the defendant's role in the offense, drawing on concepts embodied in the Guidelines as well as concepts defined elsewhere in the United States Code. It requires a finding that "the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines." These terms are defined in U.S.S.G. § 3B1.1, which assigns a two- to four-level enhancement to a defendant's offense level based on his aggravating role in the offense conduct. The application notes to § 3B1.1 offer guidance on how to distinguish between organizers or leaders on the one hand, and managers and supervisors on the other.[4] Subsection (f)(4)

---

[4] Application note 4 to U.S.S.G. § 3B1.1 provides:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should

(continued...)

also measures the depth of a defendant's criminal activity in terms borrowed from another criminal statute, by conditioning safety-valve eligibility upon a finding that the defendant "was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substance Act," codified at 21 U.S.C. § 848. By disqualifying defendants who either had an aggravating role or participated in a continuing criminal enterprise, subsection (f)(4) effectively screens out those more culpable offenders who were not the intended beneficiaries of the safety valve.

Thus, in both subsections (f)(1) and (4), Congress expressly borrowed concepts which are defined in the Guidelines for one purpose (i.e., to determine a defendant's sentencing guideline range) and used them for a different purpose (i.e., to identify those "least culpable offenders," H.R. Rep. 103-460, who deserve the

---

[4] (...continued)
consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

opportunity to be sentenced below the statutory minimum sentence). The fact that both safety-valve criteria incorporate concepts defined in the Guidelines has no bearing on the fact that they are employed by § 3553(f) to determine whether to *reduce* a defendant's sentence, not to *increase* it. The Supreme Court has squarely held that judicial factfinding is only a constitutional stumbling block under the Sixth Amendment when it serves the latter function -- that is, when it increases the maximum sentence to which a defendant is subjected. *See Booker*, 125 S. Ct. at 749. Judicial factfinding by a preponderance of the evidence is entirely permissible when used to set the *minimum* sentence to which a defendant will be subject. *Harris v. United States*, 536 U.S. 545, 560 (2002); *see also United States v. Sharpley*, 399 F.3d 123, 126-27 (2d Cir. 2005) (holding that sentencing under mandatory guidelines regime is harmless where defendant receives mandatory minimum sentence), *pet'n for cert. filed*, No. 04-10167 (May 14, 2005). If judges may make findings that establish a sentencing floor, then *a fortiori* they may make findings that drop a defendant's sentence below that floor as with the safety valve.

In this regard, this Court should join the First and Tenth Circuits in holding that the Sixth Amendment permits sentencing judges to determine safety-valve eligibility based upon judicial factfinding, because such decisions do not increase the maximum penalty to which the defendant is exposed. Thus, in *United States v. Bermudez*, 407 F.3d 536 (1st Cir. 2005), the First Circuit rejected a *Booker* challenge to the safety valve premised on the claim that factfinding on safety-valve elements had to be made by a jury beyond reasonable doubt. As the

court explained, "a factual finding resulting in the denial of a sentencing reduction . . . is scarcely an 'enhancement'" which triggers Sixth Amendment requirements. *Id.* at 544.

Likewise, in *United States v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005), the Tenth Circuit rejected a similar challenge to judicial factfinding under U.S.S.G. § 5C1.2(a)(2), the Guidelines analogue to § 3553(f). According to the Tenth Circuit, "[n]othing in *Booker*'s holding or reasoning suggests that judicial fact-finding to determine whether a lower sentence than the mandatory minimum is warranted implicates a defendant's Sixth Amendment rights." *See also United States v. Rojas-Coria*, 401 F.3d 871, 874 n.4 (8th Cir. 2005) (affirming district court's holding that defendant was ineligible for safety-valve relief, based on judicial factual finding that defendant had not disclosed all relevant information; noting that *Booker* did not impact case, because defendant's sentence "was not based upon an application of the United States Sentencing Guidelines but rather upon the mandatory minimum sentence set forth in 21 U.S.C. § 841(b)(1)(A)").

Indeed, to construe § 3553(f) in a way that opened the safety valve to defendants who had more than one criminal history point, or who had served as leaders or supervisors of criminal activity, would run flatly contrary to the central purpose of the safety valve: to allow only the "least culpable offenders" to obtain sentences below the mandatory minimum sentence fixed by statute. *See* H.R. Rep. 103-460, at 3. If these two criteria were effectively excised from the statute, then even the most crime-

hardened drug kingpins could qualify for the safety valve, so long as their offenses had been nonviolent, § 3553(f)(2)-(3), and they had provided complete and truthful information about their offenses to the government, regardless of the utility of such information, § 3553(f)(5). Such a result would open wide the flood gates for far more defendants than that "narrow class of defendants . . . who are the least culpable participants in such offenses" anticipated by Congress when it enacted the safety valve. H.R. Rep. 103-460, at 2; *see also United States v. Jeffers,* 329 F.3d 94, 104 (2d Cir. 2003) (Raggi, J., concurring) (describing § 3553(f) as embodying "a clear congressional choice to exempt certain low-level drug defendants from the mandatory minimum sentences outlined in 21 U.S.C. § 841(b) and to permit their cases to be reviewed pursuant to the somewhat-more-flexible sentencing guidelines").

3. The District Court Did Not Violate the Defendant's Fifth or Sixth Amendment Rights by Making Sentencing Findings Relating to His Mandatory Minimum Sentence

The defendant further argues that "[a] factual finding that authorizes a higher sentence *or eliminates the possibility of a lower sentence* in a case is 'essential' to a defendant's sentence," and therefore under *Booker* "must be submitted to a jury and found beyond a reasonable doubt." Def. Br. at 13. In this respect, the defendant contends that the district court's imposition of a role enhancement based on judicial factfinding violated his Sixth Amendment rights because it rendered him ineligible

for a sentence below the statutory minimum by operation of the safety-valve. As the defendant candidly (and correctly) acknowledges, this claim is squarely foreclosed by the Supreme Court's decision in *Harris v. United States*, 536 U.S. 545, 560 (2002), which held that the Sixth Amendment does not preclude judicial factfinding that implicates a statutory minimum sentence. This Court has followed *Harris*, *see United States v. Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), and in any event is not authorized to disregard Supreme Court precedent that is directly applicable, *Agostini v. Felton*, 521 U.S. 203, 238 (1997). Because the defendant acknowledges that his claim is presented simply to preserve it in the event that *Harris* is overruled, this Court should reject his appeal on this ground. Def. Br. at 14.

4. The District Court's Findings Regarding the Defendant's Safety-Valve Eligibility Did Not Increase the Maximum Penalty to Which He Was Lawfully Exposed

Finally, the defendant argues that the sentence he received -- the five-year mandatory minimum -- was higher than the guideline range authorized solely by his own admissions during his plea colloquy. According to the defendant, "a minimum sentence is not mandatory *unless* it is first determined that the defendant is ineligible for 'safety valve' relief under 18 U.S.C. § 3553(f). Because the guidelines were mandatory at the time Mr. Holguin was sentenced, and the top of his guideline range was below the mandatory minimum, the district court's factual finding that he was a supervisor of others in the

offense raised his sentence in violation of his constitutional rights." Def. Br. at 15. In essence, the defendant is trying to manufacture a conflict between *Booker* and the eligibility criteria of § 3553(f) by turning the safety valve on its head -- that is, by converting the eligibility criteria for a sentence *reduction* into elements of the offense which *increase* his maximum sentence and hence which must be found beyond a reasonable doubt by a jury. This argument fails for several reasons.

As an initial matter, the defendant is simply incorrect in asserting that a "minimum sentence is not mandatory *unless* it is first determined that the defendant is ineligible for 'safety valve' relief." Def. Br. at 15. The statute does not require a district court to make affirmative findings on the safety valve before applying the mandatory minimum sentences listed in narcotics statutes. To the contrary, the minimum sentence is authorized solely by the terms of § 841(b)(1)(B), upon the defendant's admission or a jury finding of four elements: (1) that the defendant possessed a quantity of cocaine; (2) that he knew he possessed a quantity of a controlled substance; (3) that he possessed the cocaine with the intent to distribute it; and (4) that the quantity involved was 500 grams or more. *See United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc) (holding that drug quantity is element of offense to be submitted to grand jury and trial jury, to the extent that court seeks to impose sentence in excess of ten-year maximum established by § 841(b)(1)(C)).

Far from viewing the safety valve as enumerating additional elements to be proven by the prosecution, this Court has repeatedly held that "[t]he defendant has the

burden of proving that he meets all of the criteria of the safety-valve provisions." *United States v. Conde*, 178 F.3d 616, 620-21 (2d Cir. 1999); *see also United States v. Reynoso*, 239 F.3d 143, 146 (2d Cir. 2000); *United States v. Gambino*, 106 F.3d 1105, 1109-10 (2d Cir. 1997) ("[T]he plain language of the 'safety valve' places the burden on the defendant to provide truthful information to the government. It follows that the burden should fall on the defendant to prove to the court that he has provided the requisite information if he is to receive the benefit of the statute."). Although the defendant contends that these precedents should be revisited in light of *Booker*, he offers no reason why. Def. Br. at 18 n.5.

Apparently, the defendant takes the view that if there exists any possible findings that might mitigate punishment, such findings must be made by a jury beyond a reasonable doubt. *See id.* at 17. In support of this proposition, he relies upon the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury was required to find the existence of aggravating factors before a death sentence could be authorized under Arizona law. This argument not only misreads *Ring*, but also proves too much. First, the Supreme Court's holding in *Ring* depended on the fact that the Arizona statute governing first-degree murder "explicitly cross-referenced the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* at 604. The penalty provisions of § 841 do not cross-reference the safety valve in the present case, and hence it is apparent that Congress has *not* conditioned imposition of the five-year mandatory minimum sentence upon affirmative findings under § 3553(f).

Second, by arguing that all facts that mitigate punishment below otherwise applicable levels (and *a fortiori* facts that negate culpability, since that would preclude any punishment at all) must be considered elements to be found by a jury, the defendant is asking this Court to disregard the Supreme Court's decision in *Patterson v. New York*, 432 U.S. 197, 205-11 (1977), where it explained that the Constitution permits the government to place the burden on a defendant to prove an affirmative defense to culpability or a mitigating circumstance as to punishment, so long as that defense does not negate an essential element of the crime. *See id.* at 209 ("To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate."); *accord Farrell v. Czarnetzky*, 566 F.2d 381, 382 (2d Cir. 1977) (relying on *Patterson* to reject constitutional challenge to New York first-degree robbery statute, on ground that "a state, without violating the Constitution, may place on a defendant the burden of proving by a preponderance of the evidence a matter not defined by the legislature as a necessary ingredient of the crime but which mitigates the degree of the offense"). In the present case, none of the five eligibility criteria listed in § 3553(f) negate any of the elements required to prove an offense under § 841(b). Instead, they are simply standards that Congress has adopted for measuring a defendant's relative culpability, in determining whether he is particularly deserving of lenient sentencing. Accordingly, there is no reason -- constitutional or otherwise -- to revisit this Court's established precedents

which interpret § 3553(f) as placing upon the defendant the burden of establishing his eligibility for safety-valve relief.

The defendant's argument fails for one additional reason. He contends that "given the binding nature of the guidelines at the time of his sentencing," the maximum sentence to which he was lawfully exposed at the time of his sentencing was the upper end of the sentencing range "based on his admissions and absent further factfinding." Def. Br. at 18. The flaw in this argument is that it misidentifies the appropriate "lawful maximum" sentence as the upper end of the guidelines sentencing range, rather than the 40-year maximum pursuant to 21 U.S.C. § 841(b)(1)(B). The defendant reaches this incorrect result by retroactively applying the Sixth Amendment holding of Justice Stevens' opinion in *Booker*, without doing likewise with the remedial holding of Justice Breyer's opinion. Justice Breyer's opinion for the Court made it clear that the Guidelines must be applied as an advisory system to all cases that are still pending on direct review. *See* 125 S. Ct. at 769 ("must apply today's holdings -- both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act -- to all cases on direct review"). Once the Guidelines are viewed as advisory, the relevant statutory maximum to which the defendant is now subject is the 40 years established by his statute of conviction, irrespective of whether the safety valve applies. Because the sentence he received is less than this statutory maximum, and because it was the lowest possible sentence permissible under § 841(b)(1)(B), any *Booker* error was harmless beyond any doubt. *See Sharpley*, 399 F.3d at 126-27. Put another way, if this Court were to turn back

the clock and ask what the sentencing court should have done, had it known of *Booker,* the answer is clear: It should have imposed nothing less than the five-year mandatory minimum sentence which it ordered in this case.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated:

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant U.S. Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,471 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes, and this Certification.

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

ADDENDUM OF STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) 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;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United

States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an

applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing

guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so

received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [FN1] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any

additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other

dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

U.S.S.G. § 3E1.1 (2003) Acceptance of Responsibility.

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease by 1 additional level.

U.S.S.G. § 4A1.1 (2003). Criminal History Category.

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. Provided, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. § 5C1.2 (2003). Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) The offense did not result in death or serious bodily injury to any person;

(4) The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the

offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

GOVERNMENT APPENDIX

Excerpts from Plea Hearing
dated June 16, 2004 (pp. 15-25) GA 1-11