No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TERRENCE BEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *United States v. Booker*, 543 U.S. 220 (2005), this Court ruled that mandatory use of the U.S. Sentencing Guidelines violated the Sixth Amendment right to a jury trial of any fact required to enhance a criminal sentence. The Court remedied the error by making the Guidelines "effectively advisory," one of many factors a court considers in choosing a sentence under 18 U.S.C. § 3553(a). The Court also prescribed appellate review of sentences for "reasonableness" in light of all the 3553(a) factors and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based this "reasonableness" standard paid "substantial deference" to a sentencing judge's discretionary choices in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81 (1996).

In light of the foregoing, these issues are presented:

I. On reasonableness review, is it consistent with *Booker* to require that a sentence substantially below the Guidelines range be supported by extraordinary or compelling circumstances?

II. Is the Guidelines prohibition on downward departures of more than one criminal history category for career offenders relevant to assessing the reasonableness of a non-Guidelines sentence imposed under 3553(a)?

PARTIES

The Parties are:

TERRENCE BEAL, Petitioner, and

THE UNITED STATES OF AMERICA, Respondent.

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The opinion of the United States Court of Appeals for the Eighth Circuit (App'x p. 1) entitled United States v. Terrence Beal is reported at 463 F.3d 834 (8th Cir. 2006).

JURISDICTION

The district court in the Eastern District of Missouri had jurisdiction over this federal criminal case pursuant to 18 U.S.C. §3231. The Court of Appeals for the Eighth Circuit entered its judgment on September 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable constitutional provision is Amendment VI to the United States Constitution, which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." US. Const. Amend. VI.

STATUTORY PROVISIONS:

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 at 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 – [omitted].

18 U.S.C. § 3742. Review of a sentence

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that–

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(c) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

SENTENCING GUIDELINES PROVISIONS:

U.S.S.G. Downward Departures § 4A.1.3(b)

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

***

(3) LIMITATIONS

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURES FOR CAREER OFFENDER - The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.— [omited]

STATEMENT OF THE CASE

A. Proceedings in the District Court

Terrence Beal sold $730 worth of crack cocaine to undercover officers and confidential informants during the fall of 2003. On September 5, 2003, Beal sold a rock of crack weighing 4.5 grams for $250. Three weeks later, on September 25, 2003, he sold a rock weighing 4.1 grams for $230. On October 9, 2003, Beal sold a rock of crack weighing 4.8 grams for $250. Police did not arrest Beal after the incidents.

On June 9, 2005 Beal was indicted for one count of distributing cocaine base, on October 9, 2003, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(c). The statute has no minimum quantity requirement and no mandatory minimum sentence. Six days later, police arrested Beal in possession of crack cocaine.

On August 29, 2005, the government filed an Information seeking an enhanced sentence pursuant to 21 U.S.C. § 851 based on Beal's prior convictions for a controlled substance offense. His prior convictions, both on May 6, 2002 in the circuit court of Cape Girardeau County, were for distribution of a controlled substance and possession with intent to distribute. Beal received a suspended the imposition of sentence and five years probation in both cases. He served no jail time.

On September 6, 2005, Beal pled guilty as charged in the indictment. At the change of plea hearing, the parties filed a stipulation in which they agreed that Beal was responsible for over 5 grams but less than 20 grams of cocaine base, which included all relevant conduct. The plea agreement stipulated a base offense level of 34 under the career offender guideline, §4B1.1, an adjusted offense level of 31 (reduced for acceptance of responsibility), criminal history category VI, and a resulting sentencing range of 188 to 235 months. The government agreed to recommend a sentence within the lowest end of the applicable guideline range.

The Presentence Report established that Beal was twenty-three years old when he committed the instant offense. It agreed with the stipulation and concluded that the total drug quantity was at least 5 grams but less than 20 grams of cocaine base. The Presentence Report calculated a base offense level of 26 pursuant to §2D1.1(c). After a 3-level reduction for acceptance of responsibility, Beal's total offense level was 23, and his corresponding criminal history category was III.[1] As a career offender, Beal's criminal history category jumped to category VI, which resulted in an advisory Guidelines range of 188 to 235. The district court adopted the Presentence Report as its findings of fact.

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[1] Although not reflected in the PSR, this calculation produces a Guidelines range of 57 to 71 months. See U.S.S.G., Chap. 5, Part A, Sentencing Table.

At sentencing, the court heard Beal's apology and personal history. Beal expressed his regret and remorse for his offense and for having used drugs in part to ease the ongoing pain from his childhood. Beal's mother was mentally disabled and his father a cross-dressing homosexual. He was raised by an aunt and exposed to drug use at a young age by his uncles. Furthermore, the Presentence Report confirmed that Beal was sexually abused as a child.

Beal recounted how he held steady employment, whether working as a farm laborer, in factories or restaurant positions. He earned his GED and, in 2005, completed a vocational training course. The district court also learned of Beal's religious conversion, family support, and his efforts to overcome his drug addiction through two different substance abuse treatment programs.

Having reviewed the PSR, and considered the Sentencing Guidelines, the court addressed itself to its obligation to consider a variety of factors under 18 U.S.C. § 3553(a) and to impose "a sentence that is sufficient but not greater than necessary to meet the sentencing objectives set out in the statute:

> In doing that, I am required, of course, to consider the sentencing guidelines calculations as part of the –one of the factors that I should consider...
>
> [T]he guidelines do consider many of the factors that are appropriate in reaching a sentence. They are not all bad. They consider most of the things that should be considered. What they take away, though,...if they

are mandatory, they take away the Court's discretion to consider the individual, and the individual circumstances of the case.

For example, the career offender statute would reach the same result in this case if the defendant instead of having the two drug offenses that he has in the past, where he received suspended impositions of sentence on each one, and actually never did any real jail time, even though he might have done a day or two or week or two from time to time, he never spent any actual real time in jail because those were [suspended imposition of sentences], but they say treat him exactly the same as if he had done two different ten-year sentences in the federal prison, and then they tell me that this time I need to give him, you know, 15 to 20 years on this case because he is a career offender.

I do understand the Government's position that there were reasons it made the decisions it made in its plea agreements, but I think when I consider all of the factors, a sentence within the advisory sentencing guidelines is greater than necessary to achieve the sentencing goals.

This defendant has two prior convictions for drug offenses, both of which in the state system the state did not believe warranted any jail time. The defendant obviously is culpable and has a bad history, and this is a serious matter, but to say that this defendant should be sentenced to 15 to 20 years is simply overkill. It's not necessary for punishment, it's not necessary for deterrence of others, and it's not necessary to protect the public from this defendant. A much lower sentence, or a lower sentence that is still a significant sentence would meet the sentencing objectives.

I am, therefore, going to sentence the defendant to 84 months, or seven years in jail. That's a long time. It s a serious sentence. It's less than half of what he would get under the career offender guidelines, though, so it's a long sentence, and it's a serious sentence, but because he has the two prior offenses, I think it's appropriate to give him significant jail time, and that's why I'm doing this.

I do understand everything you have told me, Mr. Beal, about your

> personal situation. I did review the Presentence Report carefully, as well as the other information I had about you, including your letter....
>
> I am considering...that you did sort of have a chance and you blew it after that [Teen Challenge] program, but you also – I don't think you are the most hardened criminal I ever had, and I don't think that a 15-year sentence serves any purpose that our society wishes to serve by having punishment. so that's why I'm giving you the seven years in jail, and I recognize that it is lower, but I think the career offender guidelines in your case work an injustice, and that's why I'm sentencing you to a lower sentence.

App'x pp. 24–29

B. Proceedings at the Eighth Circuit

A panel of the Eighth Circuit Court of Appeals recognized that the district court correctly considered many of the § 3553(a) factors, but declared the district court's sentence unreasonable. The panel further declared that the "farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be. An extraordinary reduction must be supported by extraordinary circumstances." (internal citations omitted). App'x p. 4.

The court stated that the "justifications given in this case [were not] compelling enough" to overcome the Guidelines approach to career offenders. App'x p. 7. The court explained:

> this provision is instructive regarding the reasonableness of a variance

> related to criminal history. Section 3553(a)(5) calls for the district court to consider "any pertinent policy statement issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(5). The Commission expressly limits the extent of traditional departures based on section 4A1.3(b)(1). A departure for a career offender "may not exceed one criminal history category." USSG §4A1.3(b)(3)(A). Here, the court's variance far exceeded one criminal history category. While we do not suggest that section 4A1.3(b)(3)(A) strictly limits the scope of variances post-*Booker*, it remains relevant to consider the Guidelines and the commentary in our assessment of reasonableness and these sources do not support the variance in this case.

App'x p. 5.

The Eighth Circuit concluded that because Congress chose not to distinguish between levels of career offenders, the district court's decision to vary from the Guidelines did "not give appropriate deference to the congressional policy on career offenders." App'x p. 6. The court explained that

> While we recognize that not all career offenders have the same severity of criminal conduct in their backgrounds, we also must acknowledge that Congress made the decision not to differentiate between levels of career offenders. The statute and resulting guideline make no distinction between those two-time drug offenders who received lengthy prior prison terms and those who received probation.

App'x p. 6.

REASONS FOR GRANTING THE WRIT

I. The Court should decide whether, on reasonableness review, it is consistent with *Booker* to require that a sentence substantially below the Guidelines range be supported by extraordinary or compelling circumstances.

The Eighth Circuit begins its reasonableness review from the premise that a sentence within the Guidelines is presumptively reasonable. *United States v. Beal*, 463 F.3d 834, 836 (8th Cir. 2006), App'x p. 4. Conversely, "a sentence outside the guidelines range is not presumed to be reasonable." *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006). When a district court imposes a non-Guidelines sentence, the reasonableness of the sentence depends on whether (1) the district court's decision for imposing a non-Guidelines sentence is reasonable, and (2) the extent to which the variance from the Guidelines is reasonable. *Beal*, 463 F.3d at 836, App'x p. 4. "The farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be. An extraordinary reduction must be supported by extraordinary circumstances." *Id.* (Internal citations omitted).

This approach shifts the appellate focus from assessing the reasonableness of the sentence in light of all of the § 3553(a) factors to the limited question of

whether the judge reasonably chose to vary from the Guidelines range and whether the extent of that variance was reasonable. The Eighth Circuit's version of reasonableness review essentially ignores *Booker's* excision of 18 U.S.C. § 3553(b)(1), which "required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." *United States v. Booker*, 543 U.S. 220, 259 (2005).

This Court granted certiorari on this issue in another case arising out of the Eighth Circuit. In *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), *cert. granted,*75 U.S.L.W. 3243 (U.S. Nov. 3, 2006) (No. 06-5618), 2006 WL 2187967, the Court of Appeals reversed the district court's sentence as unreasonable because the "extraordinary" variance of 60% was not supported by extraordinary circumstances. In the instant case, the Eighth Circuit reversed the sentence as unreasonable because the justifications for the extraordinary variance were not "compelling enough." App'x p. 7.

Furthermore, the Eighth Circuit's Guidelines-focused style of reasonableness review conflicts with the reasonableness review employed by three circuits. The First, Second and Third Circuits do not employ a presumption of reasonableness in the guidelines range to review non-guidelines sentences (*see* page 14).

Booker remedy required "effectively advisory" guidelines, not presumptive guidelines sentencing

The mandatory application of the United States Sentencing Guidelines violated the Sixth Amendment right to jury trial because they required judges rather than juries to find facts that led to enhanced sentences. *Booker*, 543 U.S. at 245. The constitutional problem arose because judges were essentially bound to impose the guideline range almost all the time. *Id.* at 259. Section 3553(b) made the Guidelines "binding on judges because it "required sentencing courts to impose a sentence within the applicable Guideline range (in the absence of circumstances that justify a departure)." *Id.* The fact that the statute allowed judges to impose sentences outside the Guidelines range did not render the Guidelines advisory, because such departures were not available in every case, "and in fact [were] unavailable in most." *Id.* at 234. In effect, the Sentencing Reform Act (SRA) made the Guidelines the "presumptive" sentencing range that bound judges' sentencing decisions most – but not all – of the time. *Id.*

This Court chose a constitutional remedy intended to render the sentencing Guidelines "effectively advisory." *Id*. at 245. The Court sought to achieve this result by (1) eliminating the statutory provision in § 3553(b) that required district courts to impose Guidelines sentences "in the absence of circumstances that

warranted a departure," and by eliminating the appellate review provisions intended to enforce Guidelines sentencing (§ 3742(e)). *Id.* at 259, 261. In excising § 3553(b), the Court directed that sentencing judges make individual sentencing decisions grounded in all the facts set forth in 18 U.S.C. § 3553(a). *Id.* at 245. Sentencing judges must still consider the Guidelines range as one such factor, but the constitutional remedy required that judges be free to impose non-Guideline sentences grounded in the other 3553(a) considerations. *Id.* Those factors included "the nature and circumstances of the offense and the history and characteristics of the defendant," § 3553(a)(1); the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," § 3533(a)(2)(A); to "protect the public," § 3553(a)(2)(C); to provide the defendant with training, care, "or other correctional treatment in the most effective manner," § 3553(a)(2)(D); pertinent policy statements issued by the Sentencing Commission, § 3553(a)(5); and the need to avoid unwarranted sentence disparities, § 3553(a)(6).

In excising the appellate review provisions of § 3742(e), the Court recognized a surviving right to appellate review of sentences to determine whether they are "unreasonable." *Booker*, 543 U.S. at 261. A significant feature of the new "reasonableness" review "is that it requires courts of appeals to evaluate each

sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand). *Id.* at 312 (Scalia, J., dissenting) (emphasis in original).

Appellate review granting "presumptive Guidelines sentencing" in Guidelines produces *de facto* "mandatory guidelines"

The Eighth Circuit's approach, that the sentencing court can only substantially vary from the Guidelines in compelling or extraordinary circumstances, has essentially replaced the mandatory Guidelines regime with a defacto mandatory regime. *Booker* instructed appellate courts to assess criminal sentences against the full range of sentencing factors listed in § 3553(a). 543 U.S. at 261. The Eighth Circuit, instead, reviews both non-Guidelines sentences and Guidelines sentences alike from a starting presumption that the Guidelines establish the range of reasonable sentencing. *Beal*, 463 F.3d at 836. Faced with a sentence outside the Guidelines range, the Eighth Circuit focuses on (1) whether the decision to vary from the Guidelines was reasonable, and (2) whether the extent of any variance from the Guidelines is reasonable. *Id.* The shift in appellate focus from the reasonableness of a district court's chosen sentence in light of all the § 3553(a) factors to the reasonableness of *not* using the Guidelines

range and the reasonableness of the degree of Guidelines variance, elevates the Guidelines calculation in § 3553(a)(4)(A) above all other considerations in § 3553(a), without any justification in the language or reasoning of *Booker.*

Appellate review requiring "extraordinary" circumstances to justify below-Guidelines sentences produces *de facto* "mandatory Guidelines"

Prior to this Court's decision in *Booker*, sentencing courts could only depart from the guidelines when the judge found "that there exist[ed] 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." 18 U.S.C. § 3553(b)(1). Because the Commission has, in most cases, "taken all relevant factors into account," departures were not permissible. *Booker*, 543 U.S. at 234. A court could depart only in "exceptional" cases. U.S.S.G. §5K2.0(a)(3) and (4).

The Eighth Circuit has replaced the Guidelines departure standard (requiring "exceptional" circumstances) with a requirement of "extraordinary" circumstances. In fact, the Eighth Circuit demands "extraordinary" justification for any sentence falling fifty percent or more below the Guidelines term.[2] *Cf.*

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[2] *See, e.g.*, *United States v. Bradford*, 447 F.3d 1026 (8th Cir. 2006) (67%); *United States v. Lee*, 454 F.3d 836 (8th Cir. 2006) (54%); *United States v. Maloney*, 466 F.3d 663 (8th Cir. 2006) (50%); *United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006) (roughly 50%); *United States v. Rogers*, 448 F.3d 1033

United States v. Saenz, 428 F.3d 1159, 1162 (8th Cir. 2005). In Beal's case, the Court of Appeals deemed the sentence unreasonable because the district court did not justify the extraordinary variance of 55% (188 to 84 months). App'x p. 7.

The Eighth Circuit's approach has essentially replaced the mandatory Guideline regime with a new mandatory Guideline regime. Now, the Guideline range is 50% broader than it was pre-*Booker*. For example, in Beal's case, under the pre-*Booker* mandatory Guidelines regime, the district court would have been required to sentence him within the range of 188 to 235 months, barring any "exceptional" circumstances. U.S.S.G. § 5K2.0(a)(3) and (4). Under the Eighth Circuit's approach, the district court must now sentence him within the range of 94 (50% below the Guidelines range) to 353 months (50% above), absent "extraordinary" circumstances.[3]

(8th Cir. 2006) (76%).

[3] The Eighth Circuit does not, in fact, require that extraordinary circumstances justify sentences *above* the Guidelines range. It routinely affirms above-Guidelines sentences which has prompted criticism that the approach makes non-Guidelines sentences "an escalator that only goes up." *United States v. McDonald*, 461 F.3d 948, 960 (8th Cir. 2006) (Bye, J., dissenting); *see also United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (Heaney, J., concurring).

The Eighth Circuit's requirement that substantial variances be justified by extraordinary circumstances prevents sentencing courts from imposing "a sentence sufficient, but not greater than necessary to comply with the purposes set forth in" § 3553(a)(2). 18 U.S.C. § 3553(a). In this case, the sentencing judge considered the Guidelines range, but found it to be an inappropriate sentence: "I think when I consider all of the factors, a sentence within the advisory sentencing guidelines is greater than necessary to achieve the sentencing goals." App'x p. 26. The judge's reasoning reflected her concern that in this particular case,

> 15 to 20 years is simply overkill. It's not necessary for punishment, it's not necessary for deterrence of others, and it's not necessary to protect the public from this defendant. A much lower sentence, or a lower sentence that is still a significant sentence would meet the sentencing objectives. I am, therefore going to sentence the defendant to 84 months, or seven years in jail. That's a long time. It's a serious sentence. App'x p. 26.

The Eighth Circuit did not suggest that the sentencing court's judgment in this regard was wrong. Instead it simply declared that Beal's personal circumstances did "not warrant such a large downward variance." App'x p. 6. The Eighth Circuit reversed the district court's judgment using essentially the same reasoning it would have employed prior to *Booker*: the district court failed to apply the Guidelines in the absence of factors that justified a departure. *See Booker*, 543 U.S. at 259 (describing § 3553(b)(1)).

The three circuits that have expressly rejected a "presumption of reasonableness"—the First, Second, and Third circuits—perceived that the practical effect of such presumption would be to revive the binding nature of the Guidelines. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (although making Guidelines "presumptive" or reasonable *per se* would not make them mandatory, "it tends in that direction"); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (same); *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) (declaring the Guidelines range reasonable *per se* "would come close to restoring the mandatory nature of the guidelines excised in *Booker*"); *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006) (treating Guidelines range as presumptive sentence brings the court "perilously close to the mandatory Guidelines regime squarely rejected by the Supreme Court in *Booker*."). The Eighth Circuit's use of such a presumption vindicates the caution expressed by these other jurisdictions.

II. This Court should decide whether the Guidelines prohibition on downward departures of more than one criminal history category for career offenders is relevant to assessing the reasonableness of a non-Guidelines sentence imposed under 3553(a).

Prior to *Booker*, 18 U.S.C. § 3742(e) required appellate courts to review sentences *de novo.* 543 U.S. 220, 261. This Court excised § 3742(e) and replaced

it with reasonableness review. *Id.* Appellate courts must now review sentences for unreasonableness with regard to the factors set forth in § 3553(a). *Id.* "Those factors [now] guide appellate courts . . . in determining whether a sentence is unreasonable." *Id.*

The § 3553(a) factors are (1) "the nature and circumstances of the offense and the history and characteristics of the defendant;" (2) the need for the sentence to satisfy the purposes of punishment; (3) "the kinds of sentences available;" (4) the sentencing range established by the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution.

In addition to the factors listed in § 3553(a), the Eighth Circuit also analyzes whether the sentence is reasonable in light of "congressional policy on career offenders." App'x p. 6. In Beal's case, the district court varied from the Guidelines in a manner "so great that it [did] not give appropriate deference to the congressional policy on career offenders." App'x p 6.

Congressional policy regarding career offenders is not itself a 3553(a) factor and the Eighth Circuit's use of congressional policy is inconsistent with *Booker.* Booker requires "appellate courts to determine whether a sentence is unreasonable with regard to [the] § 3553(a)" factors. 543 U.S. at 261. Congressional policy on

career offenders remains relevant to sentencing only to the extent that it may assist in determining the Guideline range or via policy statements issued by the Sentencing Commission.

The Eighth Circuit's reliance on the congressional policy set forth in U.S.S.G. §4A1.3(b)(3)(A) is misplaced. The court analyzes §4A1.3(b)(3)(A) because "it remains relevant to consider the Guidelines and the commentary in [its] assessment of reasonableness." App'x p. 5. Although section 3553(a)(5) requires sentencing courts to consider "any pertinent policy statement issued by the Sentencing Commission, " the policy statement the Eighth Circuit relies upon limits *downward departures* for career offenders to one criminal history category. U.S.S.G. §4A1.3(b)(3)(A) (emphasis added); 18 U.S.C. § 3553(a)(5). After the Guidelines range is calculated, the policy statement regarding *downward departures* does not act as an independent factor. The factor works only as means of determining the proper Guidelines range. In this case, Beal did not request a downward departure; rather, he asked the court to sentence him below the correctly calculated Guideline range. Therefore, the Guideline limitation on the extent of downward departures was not relevant to Beal's sentence.

When sentencing a career offender, sentencing courts must consider "the kinds of sentence and the sentencing range established" by the Guidelines, not

congressional policy on career offenders. 18 U.S.C. § 3553(a)(4). To "hold that district courts must follow congressional advice, or policy, when it is given within the context of an advisory system" is inconsistent with *Booker*. *United States v. Spears*, 2006 WL 3488734, at *11 (8th Cir. Dec. 5, 2006) (Bye, J. dissenting). In the instant case, the district court did not ignore the range established by the Guidelines. It considered the sentencing range of 188 to 235 months and decided the Guideline range to be inappropriate in light of the defendant's history and characteristics. App'x pp. 12–13, 26.

The Eighth Circuit stated that because Congressional policy urges career offenders to be sentenced at the maximum, sentencing courts should "give appropriate deference" to that policy. App'x p. 6. This requirement violates the Sixth Amendment because post-*Booker*, Congress may not require that a district court impose a within a particular Guideline sentencing range, be it a range for career offenders or not. *See Spears*, 2006 WL 3488734, at *11 (Bye, J. dissenting). Congress can only *advise* courts on a sentence within a particular range. *Id.* If the proper Guidelines range has been calculated and the defendant is sentenced within the minimum and maximum statutory ranges for the crime for which the defendant was convicted, the career offender Guideline is not different from or any less advisory than any other Guideline provision. *Cf. United States v.*

Gunter, 462 F.3d 237, 248 (3d Cir. 2006) ("[T]here is nothing special about the crack cocaine Sentencing Guidelines that makes them different, or less advisory, than any other Guideline provision.")

The Eighth Circuit considers the limit on downward departures for career offenders as also prohibiting a large variance from the Guidelines based on overstated criminal history. "Congress made the decision not to differentiate between levels of career offenders. The statute and resulting guideline make no distinction between those two-time drug offenders who received lengthy prior prison terms and those who received probation." App'x p. 6.

While the appeals court is correct in noting that Congress made no distinction between career offenders in the Guidelines, this approach is inconsistent with the statute's requirement that the sentencing court consider "the need to avoid unwarranted sentence disparities among defendants with similar records, who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Unlike the career offender designation within the guidelines which does not differentiate between "levels of career offenders," the statute obligates sentencing courts to evaluate whether the defendants have "similar records." *Id.* Indeed, "[i]n seeking uniformity, to distinguish among offenders on the basis of different behavior or different criminal backgrounds, often makes sense, when considered

in light of the basic purposes of punishment." *United States v. Beasley*, 12 F.3d 280, 283 (1st Cir. 1993).

Because Beal does not have a similar record to career offenders, the disparity between Beal's sentence and that of other career offenders is not unwarranted. The district court had a reasoned basis for sentencing Beal below the Guidelines. Beal had never served any jail time whereas many career offenders have done two ten-year sentences in federal prison. App'x pp. 25–26.

CONCLUSION

For the reasons given above, petitioner requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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