IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. ALPHONSO KINZAR CARTY, Defendant/Appellant.	)	No. 05-10200 On Appeal from the United States District Court for the District of Arizona D.C. No. Cr. 03-01135-RGS
UNITED STATES OF AMERICA Plaintiff/Appellee, v. JUAN ANTONIO ZAVALA, Defendant/Appellant.	)	No. 05-30120 On Appeal from the United States District Court for the District of Idaho D.C. No. Cr. 02-00079-12-BLW

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE DEFENDANTS

Karen L. Landau
Law Office of Karen L. Landau
2626 Harrison Street
Oakland, California 94612

Phone: (510) 839-9230, ext. 14

Counsel of Record

Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003-2276

Phone: (610) 649-8200

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), is a District of Columbia nonprofit corporation founded over 45 years ago, whose membership now includes more than 12,500 attorneys, including citizens of every state. The NACDL has some 90 local, state and international affiliates which permit it to speak on behalf of over 35,000 professional defenders. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is adherence to laws restraining the imposition of excessive and arbitrary punishments.

NACDL often files amicus briefs before the Supreme Court of the United States. NACDL has appeared as amicus curiae in this Court in several cases, including United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc), and United States v. Walters, 309 F.3d 589 (9th Cir. 2002).

The NACDL amicus curiae committee requested and authorized the undersigned to file this brief.

By order dated August 25, 2006, this Court granted leave for the filing of supplemental and *amicus* briefs.

SUMMARY OF ARGUMENT

The presumption of reasonableness adopted by some other circuits and advocated by the government has no basis in the statutory language and is contrary to the constitutional principle that underlies Booker. Adoption of a judge-made presumption would resurrect pre-Booker guideline sentencing. There is little difference between sentencing prior to Booker, under which a district judge was to impose a sentence within the guideline range unless they were extraordinary features which removed the case from the "heartland" of the guidelines, and a scheme under which a sentence within the guideline range is presumed to be reasonable, while any sentence outside of the guideline range is suspect.

Furthermore, a judge-made, mandatory presumption, whether rebuttable or not, of the kind that the government seeks would violate Sandstrom v. Montana, 442 U.S. 510 (1979). Only if the burden of proof at sentencing for facts which raise the top of a guideline range were elevated to "beyond a reasonable doubt" could a presumption for guideline sentencing survive

constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979). Constitutional avoidance principles thus counsel against adopting such a presumption, whether rebuttable or not.

ARGUMENT

I. This Court Should Not Accord a Presumption of Reasonableness to Within-Guideline Sentences Because It Is Contrary to the Plain Language of 18 U.S.C. § 3553(a) and It Would Effectively Reinstate the System Held Unconstitutional In Booker.

This Court has posed the question whether it should adopt a presumption that a sentence imposed within the correctly calculated guideline range is reasonable. The answer is unequivocally no. According a presumption of reasonableness to within guideline sentences effectively resurrects prior sentencing practice which mandated a sentence within the guideline range unless the defendant qualified for a departure. Thus, treating guideline sentences as presumptively reasonable restores the sentencing as it was practiced prior to the Supreme Court decisions in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005). Such a result is inconsistent with Supreme Court precedent.

Booker held (as expressed in an opinion by Justice Stevens) that the operation of the U.S. Sentencing Guidelines, when implemented in the manner prescribed in the Sentencing Reform

Act, the Commission's policy statements, and the Federal Rules of Criminal Procedure, violated a defendant's Sixth Amendment right to jury trial, as interpreted Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely. As a remedy for this constitutional defect, in the part of the decision authored by Justice Breyer, the Court severed and excised 18 U.S.C. § 3553(b)(1) (the provision making application of the guidelines mandatory) from the SRA, leaving the rest of that Act (other than the standards of appellate review in § 3742(e)) intact, as well as all of the sentencing guidelines and policy statements. The Court held that applying severability analysis to strike these two statutory sections from the Act was necessary to achieve as closely as possible the intent of Congress in enacting the Sentencing Reform Act.

After excising § 3553(b)(1) and § 3742(e), the remainder of the Act is constitutional because the guidelines would no longer bind the sentencing court. Booker, 543 U.S. at 234. The surviving provisions of the Sentencing Reform Act are governed by one key provision: the actual sentence imposed must never be "greater than necessary" -- although it must also be "sufficient" -- to achieve the purposes of sentencing, i.e., just punishment, general and specific deterrence, and rehabilitation. 18 U.S.C. § 3553(a)(2)(A - D). It is also mandatory under the Act that the

sentencing court "consider" a number of factors before choosing that sentence. The guidelines are but one of the 12 listed factors.[1] Nothing in the statute gives greater weight to the guidelines as opposed to any other factor. After Booker, in other words, a sentence within the guideline range may not be "necessary," in the case at hand, to achieve the Congressionally defined purposes -- (A) "just punishment" in light of "the seriousness of the offense"; (B) "deterrence," both general and specific; (C) incapacitation "to protect the public"; and (D) any "needed" rehabilitation and "correctional treatment" of the offender. 18 U.S.C. § 3553(a)(2). The district court's duty is to impose not a "reasonable" sentence, but one which is

[1] Listed in § 3553(a) are a dozen factors that the court, "in determining the particular sentence, shall consider." In addition to the six objectives found in the four clauses of subsection (a)(2), those mandatory points for consideration are: (1) "the nature and circumstances of the offense," and "the history and characteristics of the offender"; (2) the general purposes of sentencing; (3) the "kinds of sentences available"; (4) whatever sentence types and ranges are called for by the Guidelines; (5) "any pertinent policy statement" of the U.S. Sentencing Commission (these include most definitions of grounds for departure); (6) "the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victim."

"sufficient" to achieve these four objectives, without being "greater than necessary."

The reason that the new advisory guidelines remain constitutional is that they do not bind the sentencing court. See generally United States v. Cantrell, 433 F.3d 1269, 1277-78 (9th Cir. 2006). So long as the advisory guidelines remain one out of the dozen factors for consideration, district courts may consult them without running afoul of the Fifth and Sixth Amendments. But, if the guidelines become presumptive, the courts effectively return to the old so-called mandatory system. See Booker, 543 U.S. at 233.

Prior to the Supreme Court's decisions in Blakely and Booker, in fact, the sentencing guidelines prescribed just such a presumptive sentence. The presumptive sentence, one within the guideline range, controlled unless a court found that the sentencing guidelines either did not adequately consider factors relevant to the case, or authorized a below or above range sentence pursuant to a downward or upward departure. Such departures were reviewed de novo on appeal. 18 U.S.C. § 3742(e).

A sentencing scheme in which the guidelines are termed advisory, but presumed to provide for a reasonable sentence is no different than the sentencing regime in existence prior to Booker. The act of granting a presumption of reasonableness to a

within guideline sentence implies, if not explicitly holds, that any sentence outside the guidelines is presumptively unreasonable. See, e.g., United States v. Thurston, 456 F.3d 211 (1st Cir. July 26, 2006); United States v. Lee, 454 F.3d 836, 838-39 (8th Cir. 2006). A presumption that a sentence within the guideline range is reasonable raises the same liberty interest that formed the basis for Justice Stevens' majority opinion in Booker. Indeed, section 3553(b), invalidated by Booker, was passed to make the sentencing guidelines presumptive rather than advisory. See Booker, 543 US at 293 & n.12 (Stevens, J., dissenting in part); Stith & Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993); 124 Cong. Rec. 209, 382-83 (1978); S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983). The Sentencing Commission itself recognized that the guidelines were, prior to the Booker decision, a presumptive system. U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 47 (2004) (hereinafter "Fifteen Year Report"), available at http://www.ussc.gov/15_year/15year.htm. Thus, "There is scant difference between treating a guideline sentence as presumptively controlling and stating that the court

will depart from that sentence only for 'clearly identified and persuasive reasons.'" United States v. Jimenez-Beltre, 440 F.3d 514, 524 (1st Cir. 2006)(en banc)(Lipez, J. dissenting).

Despite the obvious difficulty with a presumption that a guideline sentence is reasonable, some courts have adopted precisely that rule. Several circuits have held that the guideline sentence must be given presumptive weight after Booker. E.g., United States v. Dunlap, 452 F.3d 747, 750 (8th Cir. 2006); United States v. Hernandez-Castillo, 449 F.3d 1127, 1130 (10th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Johnson, 445 F.3d 339, 341 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005).

The courts adopting the presumption of reasonableness have assumed not only that a sentence within the guidelines is reasonable, but that a sentence falling outside the guideline range is unreasonable, or at the least, requires significant justification by reference to the guidelines themselves. E.g. United States v. Robinson, 454 F.3d 839, ___ (8th Cir. 2006) (reversing a sentence below the guidelines for failure to adequately consider defendant's criminal history and giving undue weight to the fact that the defendant was hunting with a firearm

in which he illegally possessed); Lee, 454 F.3d 836, (holding that drug addiction was an improper reason for non-guideline sentence based on a policy statement on the guidelines); cf. United States v. Meyer, 452 F.3d 998, 1001-02 (8th Cir. 2006) (affirming sentence 50% above the guideline range based on recent guideline amendments).

These cases are predicated on nothing but ipse dixit. Worse, implementation of such a presumption recreates the same constitutional flaw which the Supreme Court found in Booker. In adopting a presumption that such a sentence is within the guidelines is reasonable, courts have abjured the holding in Booker. The resulting sentencing scheme is identical to pre-Booker sentencing which imposed de novo review on sentences falling outside the guideline range. 18 U.S.C. § 3742(e); United States v. Barragan-Espinoza, 350 F.3d 978, 981 (9th Cir. 2003). Even some of the circuits that have not adopted a presumption of reasonableness nonetheless wrongly treat the guidelines as a factor which carries greater weight than the other factors set forth in 18 U.S.C. § 3553(a). For example, the Second Circuit has held that the guidelines are to receive paramount consideration, viewing non-guideline sentences as "inherently suspect." United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006). The First Circuit has held that the guidelines,

while not presumptive, should receive "substantial" weight. Jimenez-Beltre, 440 F.3d at 516. These decisions, too, effectively have undermined the Supreme Court's holding in Booker, which resolved the Sixth Amendment problem by declaring unconstitutional the portion of 18 U.S.C. § 3553 that rendered application of the guidelines mandatory. By according the guidelines either presumptive or controlling weight, other circuits have returned the guidelines to their former mandatory status.

Many of the courts that have accorded the guidelines either presumptive or substantial status, have done so on the basis that the guidelines purport to consider the factors set forth in §3553 (a) already. E.g., Rattoballi, 452 F.3d at 133 (guidelines are the "'only integration of multiple factors'" (quoting Jimenez-Beltre, 440 F.3d at 518)). In fact, this basis lacks support in reality.

The guidelines are general and say little about individual characteristics, the focus of several of the § 3553(a) factors. Indeed, the guidelines prohibit consideration of many individualized characteristics and discourage consideration of others, except in "extraordinary cases." See Jimenez-Beltre, 440 F.3d at 524, 526-27 (Lipez, J., dissenting). The only individualized characteristics the guidelines direct the

sentencer to consider are criminal history and role in the offense. The guidelines largely fail to address a defendant's individual characteristics that might mitigate culpability. Instead, the guidelines focus largely on two matters, offense conduct which in many cases is judged primarily based on quantity, and criminal history. The guideline policy statements which largely preclude imposition of a non-guideline sentence, identifying numerous factors which the Sentencing Commission deemed not to be relevant to sentencing. These factors are limited not only to matters of race or income level, but include factors plainly contemplated in § 3553, such as the defendant's history and character. By definition the defendant's history and character includes matters such as his upbringing, childhood abuse, history of drug addiction, rehabilitative efforts, and employment history. Similarly, the statute directs the sentencer to consider the nature and circumstances of the offense. But the guidelines prohibit consideration of numerous factors that might be considered in mitigation under that rubric. For example, the guidelines provide little room for consideration of motive in financial crimes, despite the fact that a defendant's motive may be a significant factor in mitigation.

In contrast, several circuits have correctly declined to adopt a rule that a sentence within the properly calculated

Guideline range is "per se reasonable." See United States v. Cooper, 437 F.3d 327, 329-31 (3d Cir. 2006); United States v. Talley, 431 F.3d 784, 786-87 (11th Cir. 2005) (per curiam); United States v. Zavala, 443 F.3d 1165, 1168-69 (9th Cir. 2006) (per curiam) (panel opn.). These courts recognized that presuming the reasonableness of a guideline sentence was inconsistent with Booker and the Sixth Amendment. See Cooper, 437 F.3d at 331; Talley, 431 F.3d at 786-87. Ninth Circuit cases, too, have correctly read the sentencing statute as a whole post-Booker. Because the guidelines are but one factor out of seven that the Sentencing Reform Act identifies for consideration, the panel opinion in Zavala correctly rejected a rule that a sentence in the guideline range is a reasonable one. 443 F.3d at 1169-70. The Zavala opinion correctly held that the guidelines are to be no more than "a mere consult for advice." Id. (citing Booker, 543 U.S. at 264).

The reasoning adopted by the panel in Zavala carefully considered the statutory language of section 3553(a). The panel properly recognized that Congress had established a fair and consistent sentencing scheme in the Sentencing Reform Act. The Supreme Court in Booker, by exercising the judicial power to sever a particular unconstitutional provision from a complex statutory scheme, preserved the statute as a whole, leaving it to

work as designed by Congress. The Court did not strike down the Sentencing Reform Act generally and substitute out of whole cloth an "advisory guideline" system as a sort of judicial policy choice. Thus, sentencing judges must still consider the guidelines, but nothing in the statute affords any reason to treat those rules as more controlling of the final sentencing decision than any of the many other factors the court must "consider" under § 3553(a) as a whole. See United States v. Menyweather, 431 F.3d 692, 701 (9th Cir. 2005); United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005). Nor does either Booker or the SRA contain any reason to believe that a sentence within the guideline range is presumptively likely to achieve the purposes of the SRA than a sentence outside the range. By ruling that the guidelines were but one of many factors to be considered in sentencing, the Zavala panel avoided reinstating an unconstitutional system.

In fact, the Zavala panel explicitly considered the problems presented by a mandatory by rebuttable presumption of reasonableness. 443 F.3d at 1169. Rejecting such a presumption, the court wrote:

> But even that is more than a mere starting point because it gives particular weight to the thing presumed. It would indicate that the guideline range

> *is* to be used unless (by some evidentiary standard) a party can prove the contrary. That is much more than a mere consult for advice, and the guidelines are to be no more than that. See Booker, 543 U.S. at 264. If the District Court presumed that the sentence should be a guideline range sentence, it would thereby make it much more than something to be consulted and would give it much heavier weight than § 3553(a) now does.

Id. (emphasis in original). The panel noted that a contrary approach would revive the mandatory nature of the guidelines. Id. at 1169, n.5.

While the Zavala panel addressed the problem of a presumption at the district court level, an appellate court presumption would present the same threat of reinstituting the mandatory nature of the guidelines. District courts are well aware of the standard of review applied by the United States Courts of Appeals. Knowledge that a sentence would be presumed valid, rather than inherently suspect, would necessarily push district judges to return or remain with pre-Booker sentencing practices. Indeed, an appellate presumption will necessarily resurrect pre-Booker guideline sentencing, with sentences imposed inside the guideline range unless a defendant can meet the high standard necessary for a departure. Jimenez-Beltre, 443 F.3d at

527-28. In short, if any type of presumption is adopted, district courts will again feel compelled to impose a sentence within the guideline range, resulting in a return to the presumptive sentencing that was the hallmark of sentencing under the mandatory guideline system.

In evaluating this point, this Court should consider the significance of historical practice. Most district judges sitting today have only imposed sentence under the sentencing guidelines. Only a few have experience with pre-guideline discretion. Thus, many judges are likely to accord significant weight to the guidelines simply based on their prior experience. Indeed, even using the guidelines as a starting point, as this Court suggested in Menyweather, will accord excessive weight to the sentencing guidelines in contrast to the other sentencing factors. If other evidence is not presented, the starting point will be the ending point. A presumption of reasonableness, even a rebuttal one, will unconstitutionally increase the showing required to move a defendant away from that starting point.

II. Constitutional Avoidance Principles Preclude Adoption of a Presumption of Reasonableness for Within-Guideline Sentences.

The Court is obligated to resolve this matter without reaching the constitutional issue if it can reasonably do so. I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001). See also Burns

v. United States, 501 U.S. 129, 138 (1991) (interpreting Federal Rule of Criminal Procedure 32, in part to avoid due process question, as including a notice requirement regarding a district court's intent to give notice of an upward departure under the Guidelines); United States v. Buckland, 289 F.3d 564 (9th Cir. 2002) (en banc) (every reasonable statutory construction should be resorted to in order to save statute from unconstitutionality). For the following two reasons, the Court can and should avoid the constitutional issue presented.

First, if this Court adopts any type of presumption, whether rebuttable or not, that a guideline sentence is the correct one, then this Court must address the question whether the Fifth Amendment requires sentencing findings to be made using a standard of proof of beyond a reasonable doubt. This would require a ruling that U.S.S.G. § 6A1.3 is unconstitutional. To avoid reaching this question, and consistent with Booker and the plain language of the Sentencing Reform Act, the Court can hold that when a district court sentences a defendant, the applicable Guideline range is not entitled to more weight than any other factor listed by Congress in 18 U.S.C. § 3553(a). Booker, 543 U.S. at 234, 259-60 (noting that the Guidelines are one of several factors which a court must consult when sentencing a defendant). See also Menyweather, 431 F.3d at 695-96; Cooper,

437 F.3d at 329 (observing that Section 3553(a) lists "the relevant factors" upon which a judge must sentence a defendant). Indeed, this Court has already noted that "[t]he advisory guidelines range is itself one of the § 3553(a) factors[.]" Menyweather, 431 F.3d at 331. By reaffirming that the sentencing judge should give the applicable Guideline range equal consideration with the remaining Section 3553(a) factors, the Court would once again reject, as the panel did in Zavala, those decisions which grant a Guidelines sentence a presumption of reasonableness.

Second, Constitutional avoidance principles preclude adoption of a presumption of reasonableness, because even a mandatory rebuttable presumption that the Guidelines should be followed would be unconstitutional under the Due Process Clause. See Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidated rebuttable presumption of intent). As the first part of the Booker opinion recognizes, each guideline range functions as a statutory maximum until another fact is found to increase that range. See Booker, 543 U.S. at 233-34; Blakely v. Washington, 542 U.S. 296 (2004), applying Apprendi v. New Jersey, 530 U.S. 466 (2000). The process of calculating a guideline range is therefore unconstitutional if use of the guidelines is mandatory, the Court held. The same is true when compliance is presumptive,

under Sandstrom. It follows that only if the burden of proof at sentencing for facts which raise the top of a guideline range were elevated to "beyond a reasonable doubt," and a jury trial were afforded, could a presumption for sentencing within the guideline range survive constitutional scrutiny. See Ulster County Court v. Allen, 442 U.S. 140 (1979). But the remedial section of Booker suggests that the standard of proof for findings at sentencing is a preponderance of the evidence. U.S.S.G. §6A1.3 so provides.

If a presumption of reasonableness is adopted, however, then all advisory guideline findings must be made using a standard of proof of beyond a reasonable doubt. Through the introductory directive in § 3553(a) to impose a sentence which is "sufficient, but not greater than necessary," Congress embedded in federal sentencing legislation the moral imperative to impose on any individual the least suffering that is demanded by the general welfare -- a concept known in the sentencing literature as the "principle of parsimony."[2] Under this rule, a person must be given the sentence which is sufficient but not greater than is

[2] See, e.g., Richard S. Frase, Punishment Purposes, 58 STANFORD L. REV. 67, 77 & n.24, 78 & n.29 (2005); Testimony of Mary Price, Gen'l Counsel, FAMM, before U.S. Sentencing Comm'n, http://www.ussc.gov/hearings/02-15-05/price_testimony.pdf (Feb. 15, 2005), at 3 (citing Cesare Beccaria's pathbreaking 1764 work on Crime and Punishment). See United States v. Carey, 368 F.Supp. 2d 891, 895 n.4 (E.D. Wis. 2005); United States v. Wilson, 350 F.Supp. 2d 910, 922-23 (D. Utah 2005) (citing scholarly literature).

necessary for the protection of society. The sentence which is lawful is the sentence which is "minimally sufficient." See United States v. Kikumura, 918 F.2d 1084, 1111 (3d Cir. 1990) (per Becker, J.). The guideline sentence is neither necessarily nor frequently the minimally sufficient one.

There is one other reason why the Court must not announce a presumption that the district court should impose sentence within the guideline range, also involving avoidance of constitutional problems. This Court has long held that when a statutory scheme requires the sentencing judge to exercise individualized discretion, the imposition of judgment under a "mechanistic" approach constitutes error requiring resentencing. United States v. Barker, 771 F.2d 1362, 1363 (9th Cir. 1985). Indeed, the requirement of an individualized sentencing endured even after the advent of the sentencing guidelines. United States v. Brady, 895 F.2d 538, 541 (9th Cir. 1990). While this Court held in Brady that the guidelines left enough of individualized sentencing to survive a Due Process challenge, that holding is questionable after Booker and Blakely. This Court reached its ruling in Brady based on the fact that the guidelines allowed for departures. 895 F.2d at 540. Sentencing developments post-Brady unreasonably limited the availability of departures, with the Sentencing Commission tightly restricting departures based on a

defendant's individual characteristics. E.g., U.S.S.G. Chapter 5; Booker, 543 U.S. at 234 (noting that departures are unavailable in most cases). The Guidelines range is important, as the statute states, but the Commission in designing the Guidelines was mandated only to define ranges for "categories" of offenses, 28 U.S.C. § 994(b),(c), and "categories" of defendants. Id. § 994(d). The judge, by contrast, is to look not at categories (other than by "considering" the Guidelines) but at a particular defendant. Truly individualized sentencing requires compliance with section 3553(a), under which the sentencer considers a myriad of factors, rather than granting undue weight to the guideline range and policy statements by the Sentencing Commission prohibiting or discouraging departure. To avoid a renewed due process challenge to the lack of individualized sentence, this Court should decline the government's invitation to adopt a presumption that a within guideline sentence is reasonable.

CONCLUSION

For the reasons set forth above, and in the briefs filed on behalf of the appellants, the National Association of Criminal

Defense Lawyers suggests that the judgments be reversed and the cases remanded for further sentencing proceedings.

Dated: September 25, 2006

Respectfully submitted,

_____

KAREN L. LANDAU
Counsel of Record, NACDL

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. ALPHONSO KINZAR CARTY, Defendant/Appellant.	)	No. 05-10200
UNITED STATES OF AMERICA Plaintiff/Appellee, v. JUAN ANTONIO ZAVALA, Defendant/Appellant.	)	No. 05-30120

BRIEF FORMAT CERTIFICATION PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Rule 32 (a)(7)(C), Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this brief is in courier (new) monospaced typeface, has 10.5 or less characters per inch, and contains 4,298 words.

Dated: September 25, 2006

_____

KAREN L. LANDAU
Counsel of Record, NACDL

TABLE OF CONTENTS

Page

Table of Authorities ii

Identity and interest of *Amicus Curiae*.....1

Summary of Argument.....2

Argument.....3

I. This Court Should Not Accord a Presumption of Reasonableness to Within-Guideline Sentences Because It is Contrary to the Plain Language of 18 U.S.C. § 3553(a) and it would Effectively Reinstate the System Held Unconstitutionally In Booker.....4

II. Constitutional Avoidance Principles Preclude Adoption of a Presumption of Reasonableness for Within-Guideline Sentences.....15

Conclusion 20

Brief Format Certification Pursuant to Circuit Rule 32(e)(4).....21

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

Apprendi v. New Jersey, 530 U.S. 466 (2000) 4, 17

Blakely v. Washington, 542 U.S. 296 (2004) 3, 16

Burns v. United States, 501 U.S. 129 (1991) 15

I.N.S. v. St. Cyr, 533 U.S. 289 (2001) 15

Sandstrom v. Montana, 442 U.S. 510 (1979) 2, 16

Ulster County Court v. Allen, 442 U.S. 140 (1979) 3, 17

United States v. Alonzo, 435 F.3d 551 (5th Cir. 2006) 8

United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) 1

United States v. Barker, 771 F.2d 1362 (9th Cir. 1985) 18

United States v. Barragan-Espinoza, 350 F.3d 978 (9th Cir. 2003) 9

United States v. Booker, 543 U.S. 220 (2005) ..... passim

United States v. Brady, 895 F.2d 538 (9th Cir. 1990) 18, 19

United States v. Buckland, 289 F.3d 564 (9th Cir. 2002) 15

United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006) 5

United States v. Carey, 368 F. Supp. 2d 891 (E.D. Wis. 2005) 18

United States v. Cooper, 437 F.3d 327 (3d Cir. 2006) 11, 16

United States v. Dunlap, 452 F.3d 747 (8th Cir. 2006) 8

United States v. Hernandez-Castillo, 449 F.3d 1127 (10th Cir. 2006) 8

United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) 7, 9, 10
United States v. Johnson, 445 F.3d 339 (4th Cir. 2006) 8

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) 18

United States v. Lake, 419 F.3d 111 (2d Cir. 2005) 12

United States v. Lee, 454 F.3d 836 (8th Cir. 2006) 6, 8

United States v. Menyweather, 431 F.3d 692 (9th Cir. 2005) 12, 16

United States v. Meyer, 452 F.3d 998 (8th Cir. 2006) 8

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005) 8

United States v. Rattoballi, 452 F.3d 127 (2d Cir. 2006) 9, 10

United States v. Robinson, 454 F.3d 839 (8th Cir. 2006) 8

United States v. Talley, 431 F.3d 784 (11th Cir. 2005) 11

United States v. Walters, 309 F.3d 589 (9th Cir. 2002) 1

United States v. Williams, 436 F.3d 706 (6th Cir. 2006) 8

United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) 18

United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006) 11, 12, 13

DOCKETED CASES

United States v. Thurston, 456 F.3d 211 (1st Cir. 2006) 6

FEDERAL STATUTES

18 U.S.C. § 3553(a) ..... passim

18 U.S.C. § 3742(e) 6, 9

28 U.S.C. § 994(b),(c) 19

MISCELLANEOUS

Stith & Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993) 7

U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 47 (2004) 7