IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 02-1729

UNITED STATES OF AMERICA,

Appellee

v.

AUSTIN R. WILKERSON,

Appellant

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

PETITION FOR REHEARING

INTRODUCTION

On June 9, 2005, a panel of this Court (Gibson, Sr. J., Torruella, Lynch, JJ.) affirmed appellant Austin R. Wilkerson's conviction, but remanded his case to the district court for resentencing. In relevant part, the panel found that in light of United States v. Booker, 125 S. Ct. 738 (2005), the district court had committed an error that was plain in sentencing Wilkerson under a mandatory system of Sentencing Guidelines. See slip op. 19. The panel further found (see id. at 19-20) that Wilkerson had presented a "reasonable indication that the district judge might well have reached a different result under advisory guidelines" (United

States v. Heldeman, 402 F.3d 220, 224 (1st Cir. 2005)). In reaching this conclusion, the panel reasoned (see slip op. 19-20) that (1) at Wilkerson's sentencing the district court had "repeatedly expressed his concern about disparate treatment between federal and state court sentences in similar cases, but stated that the Guidelines did not permit him to take that disparity into account," and (2) "the need to avoid unwarranted sentencing disparities" is "among the factors to be considered by the now advisory Guidelines. 18 U.S.C. §3553(a)."

The United States does not object to the panel's decision to remand this case to the district court for resentencing. It does, however, believe that rehearing is warranted to correct a serious error in the panel's opinion, namely, the suggestion (see slip op. 19-20) that sentencing courts may properly consider disparities between federal and state sentences for similar offenses under the advisory Guidelines system established by Booker. It is clear from the history of the federal Sentencing Guidelines and from cases interpreting the Guidelines -- including this Court's own cases -- that Congress was concerned with unwarranted disparities between federal sentences for the same or similar offenses when, in 18 U.S.C. §3553(a)(6), it directed sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." See, e.g., United States v. Snyder, 136 F.3d 65, 68-70

(1st Cir. 1998); see also United States v. Martin, 221 F.3d 52, 57 (1st Cir. 2000). Indeed, consideration of federal-state sentencing disparity is "flatly incompatible" with the structure and theory of the Guidelines. Snyder, 136 F.3d at 69. The panel should therefore grant rehearing and delete from its opinion any suggestion that such disparity is an appropriate consideration in federal sentencing.[1]

RELEVANT FACTUAL BACKGROUND

On May 24, 2004, following a jury trial in the United States District Court for the District of Massachusetts, Wilkerson was convicted of possessing a firearm as a previously convicted felon (18 U.S.C. §922(g)(1)) (Count 1); of possessing more than five grams of cocaine base with the intent to distribute it (21 U.S.C.

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[1]We are not alone in our assessment of the relevant statements in the panel's opinion. Several commentators have already interpreted the panel's statement to open the door to consideration of federal-state sentencing disparities in the district courts of this Circuit. See Sentencing Law and Policy, "Important disparity statement (dicta?) from the First Circuit" (June 9, 2005) ("Wilkerson as it stands seems to approve [federal-state sentencing] comparisons"), at http://sentencing.typepad.-com/sentencing_law_and_policy/2005/06/important_dispa.html; Appellate Law and Practice, "CA1. Some Booker and Prior Inconsistent Statements" (June 9, 2005) ("disparities between state and federal sentencing are to be considered. Wow! This is good. I think."), at http://appellate.typepad.com/appellate/2005/06/ca1_some_booker.-html; Puerto Rico Association of Criminal Defense Lawyers, "Disparity Between States and Federal Sentences for Same Conduct" (June 10, 2005) ("the panel seems to be endorsing the idea that a district court may take into account the disparity between federal and state sentences for the same conduct in arriving at a correct sentence in a post-Booker world"), at http://pracdl.-typepad.com/- pracdl/2005/06/disparity_betwe.html.

§841(a)(1)) (Count 2); and of carrying a firearm during and in relation to a drug trafficking crime (18 U.S.C. §924(c)(1)) (Count 3). The district court (Wolf, J.) sentenced him to a term of 170 months' imprisonment, to be followed by a five-year period of supervised release. Dist. Ct. Doc. No. 145. Wilkerson appealed to this Court. Dist. Ct. Doc. No. 143. On March 12, 2004, briefing was completed. On April 5, 2004, this Court heard oral argument in the case. On August 4, 2004, the Court ordered a round of supplemental briefing on issues raised by the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004). On February 11, 2005, on Wilkerson's motion, the Court permitted a second round of supplemental briefing on issues raised by the Supreme Court's decision in Booker.

On June 9, 2005, as noted above, the panel affirmed Wilkerson's conviction, but remanded his case to the district court for resentencing, finding a reasonable indication that the district court would have imposed a different sentence if it had known that the Guidelines were advisory only (see slip op. 2, 19-20). The panel focused on comments the district court made about the disparity between federal and state sentences, and noted (id. at 19-20) that "the need to avoid unwarranted sentencing disparities" is "among the factors to be considered by the now advisory Guidelines. 18 U.S.C. §3553(a)."

REASONS FOR GRANTING THE PETITION

CONSIDERATION OF DISPARITIES BETWEEN FEDERAL AND STATE SENTENCES FOR SIMILAR CONDUCT IS INCONSISTENT WITH THE HISTORY, STRUCTURE, AND THEORY OF THE SENTENCING GUIDELINES

To the extent that the panel's statements suggest that disparities between federal and state sentences for similar conduct are an appropriate consideration in federal sentencing, they are inconsistent with 18 U.S.C. §3553(a)(6) and the history, structure, and theory of the Guidelines as interpreted by this Court and other courts of appeals. Those statements should therefore be deleted from the panel's opinion or revised to make it clear that federal-state sentencing disparity is not a proper consideration in federal sentencing.[2]

As noted above, the history of the Sentencing Guidelines and cases interpreting the Guidelines -- including this Court's own cases -- show clearly that Congress was concerned with unwarranted disparities between federal sentences when, in 18 U.S.C. §3553(a)-(6), it directed sentencing courts to consider "the need to avoid

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[2]Although the parties discussed the district court's comments about federal-state sentencing disparity in their supplemental briefs, their focus was not on the appropriateness of the court basing a sentence on such a disparity, but rather was on whether the court's comments established a reasonable likelihood of a different sentence on remand. See, e.g., Second Supp. Br. for U.S. 6-7, 9-11. For reasons explained in detail below, we believe that federal-state sentencing disparity is never an appropriate consideration in federal sentencing, even in a post-Booker setting. We submit that at the very least the Court should not address the issue until it has been fully litigated in both the district court and this Court.

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." See Snyder, 136 F.3d at 68-70; see also Martin, 221 F.3d at 57. Contrary to the panel's suggestion, the "disparities" referred to in Section 3553(a)(6) are not those between federal and state sentences.

In Snyder, this Court conducted its most searching inquiry into the relevance of federal-state sentencing disparities to sentencing under the Guidelines. See 136 F.3d at 68-70. It undertook that inquiry in determining whether such disparities constituted a mitigating circumstance not adequately taken into consideration by the Sentencing Commission, see Guidelines §5K2.0, and thus provided a valid ground for departure from a defendant's otherwise applicable sentencing range. See 136 F.3d at 68.

At the outset, the Court noted that five appellate courts had already held that "federal/state sentencing disparity is never a valid basis for departure." 136 F.3d at 68 (collecting cases). The Court also noted that the letter of the Guidelines was "unhelpful" in determining whether federal-state sentencing disparity was a valid departure ground; the Guidelines text neither expressly permitted or forbade such departures, nor explicitly encouraged or discouraged them. See ibid. The Court therefore looked to relevant federal statutes, the Guidelines themselves, accompanying commentary and policy statements, and case law for

guidance. See ibid.

The Court found that the legislative history of the Guidelines made it "crystal clear that Congress's allusion to 'unwarranted sentencing disparities' reflected a concern with variations among federal courts across the nation, without reference to their state counterparts." 136 F.3d at 69 (emphasis added); see also United States v. Aguilar-Pena, 887 F.2d 347, 351-352 (1st Cir. 1989). The Court in Snyder observed that the Guidelines sought to "promote uniform sentencing among federal courts in respect to federal crimes." 136 F.3d at 69 (emphasis added); see also United States v. Dietz, 991 F.3d 443, 447 (8th Cir. 1993); United States v. Sitton, 968 F,2d 947, 962 (9th Cir. 1992). Given the clear goal of the Guidelines to promote uniform federal sentencing for federal crimes, the Court in Snyder observed that departures based on federal-state sentencing disparity would be "flatly incompatible" with that goal, and would "recreate the location-based sentencing swings that Congress sought to minimize when it opted for a guideline paradigm." 136 F.3d at 69; see United States v. Searcy, 132 F.3d 1421, 1422 (11th Cir. 1998); Dietz, 991 F.2d at 447-448; see also Aguilar-Pena, 887 F.2d at 352 (noting Congress's "ardent desire to dispense with inequalities based on localized sentencing responses"). After noting further that disparity between federal and state sentences in career offender cases was not accidental, because Congress sought to impose "stiffer sentences" on armed

career criminals who were being "treated too gently by state courts," the Court in Snyder concluded that departures based on federal-state sentencing disparity "would contradict hopelessly the guidelines' structure and theory." 136 F.3d at 69-70.

As noted by this Court in Snyder, 136 F.3d at 68, numerous other courts of appeals had reached the same conclusion. See, e.g., Searcy, 132 F.3d at 1422 ("allowing departure because the defendant could have been subjected to lower state penalties would undermine the goal of uniformity which Congress sought to ensure; federal sentences would be dependent on the practice of the state in which the federal court sits"); United States v. Dietz, 991 F.3d at 447-448 (consideration of potential state sentence for similar state-charged offenses would impede "the Sentencing Commission's goal of imposing uniformity upon federal sentences for similarly situated defendants"; "such an approach would fracture the uniform national system for sentencing a particular federal crime into one which would impose fifty potentially different sentence permutations for the same crime and it would create the very same kind of sentencing disparity the Congress sought to avoid by creating the Sentencing Guidelines system").

The reasoning of the Court in Snyder and similar cases applies with equal force after Booker. Those decisions rest on a determination that when in 18 U.S.C. §3553(a)(6) Congress directed sentencing courts to consider "the need to avoid unwarranted

sentence disparities among defendants with similar records who have been found guilty of similar conduct," it was referring to "variations among federal courts across the nation, without reference to their state counterparts." Snyder, 136 F.3d at 69; see also Aguilar-Pena, 887 F.2d at 351-352. Booker rendered the Guidelines advisory, but it did not purport to change in any way the accepted meaning of Section 3553(a)(6). Accordingly, when the panel suggested that Section 3553(a)(6) authorized consideration of federal-state sentencing disparities, the suggestion was in conflict with this Court's own settled interpretation of that statute. On this ground alone, revision of the panel opinion to eliminate any such suggestion is imperative.

In addition, Booker requires a district court to consult the Guidelines and take them into account at sentencing. See 125 S. Ct. at 767; United States v. Vazquez-Rivera, 407 F.3d 476, 490 (1st Cir. 2005); United States v. Figuereo, 404 F.3d 537, 542 (1st Cir. 2005); United States v. Serrano-Beauvaix, 400 F.3d 50, 55 (1st Cir. 2005); United States v. Antonakopoulos, 399 F.3d 68, 76 (1st Cir. 2005). A sentencing court, however, cannot be said to have adequately consulted the Guidelines and taken them into account within the meaning of Booker if it rests a sentence wholly or in part on a factor like race, sex, national origin, creed, religion, or socio-economic status that is never relevant in the determination of a sentence. See Sentencing Guidelines §5H1.10.

Similarly, a sentencing court would not have adequately consulted the Guidelines and taken them into account under Booker if it based a sentence on a factor -- like federal-state sentencing disparity -- that is "flatly incompatible" with, and that "contradict[s] hopelessly," the structure and theory of the Guidelines. If consideration of federal-state sentencing disparities was "flatly incompatible" with, and "would contradict hopelessly" (Snyder, 136 F.3d at 69, 70), the structure and theory of the mandatory, pre-Booker Guidelines system, it is no less "flatly incompatible" with, and in hopeless contradiction of, the structure and theory of the identical Guidelines system that Booker has made advisory. Such consideration would effectively render the advisory Guidelines system nugatory, and as this Court has recognized, see, e.g., Vazquez-Rivera, 407 F.3d at 490, the Supreme Court plainly did not intend that result, see Booker, 125 S. Ct. at 767.

Moreover, the panel's suggestion is in conflict with the structure and theory of federal sentencing generally. As we have already noted, this Court recognized in Snyder, 136 F.3d at 69-70, that the federal-state disparity at issue in this and similar cases reflects the specific intent of Congress, which sought in the Armed Career Criminal Act to impose "stiffer sentences" on recidivists with guns who were being "treated too gently by state courts." Similarly, the federal drug statutes impose strict uniform

sentences on drug traffickers, particularly those with prior felony drug convictions, regardless of the sentences that might have been imposed on those defendants in state court.

Finally, the danger of the balkanized federal sentencing system apparently endorsed by the panel's opinion is not merely hypothetical. Under the panel's suggestion, federal defendants in other cases in the district courts of this Circuit "with similar records who have been found guilty of similar conduct" (18 U.S.C. §3553(a)(6)) could receive widely disparate sentences depending on whether their offenses were committed in Maine, New Hampshire, Massachusetts, or Puerto Rico. Accordingly, the panel should grant rehearing and revise its opinion in this case to eliminate any suggestion that federal-state sentencing disparity is a proper consideration in federal sentencing proceedings.

CONCLUSION

For the foregoing reasons, rehearing should be granted, and the panel's opinion should be revised to eliminate any suggestion that disparities between state and federal sentences are appropriate for consideration under 18 U.S.C. §3553(a)(6) and the advisory Guidelines regime established by Booker.

Respectfully submitted,

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