

No. 09-6338

IN THE
Supreme Court of the United States

PERCY DILLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

Daniel J. Popeo
Cory L. Andrews*
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

**Counsel of Record*

Mark Osler
Rory Ryan
BAYLOR LAW SCHOOL
1114 Univ. Parks Dr.
Waco, TX 76706
(254) 710-2817

Date: January 27, 2010

QUESTIONS PRESENTED

(i) Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

(ii) Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

These issues necessarily encompass a full examination of whether, and to what extent, a criminal defendant is entitled to individualized consideration during re-sentencing.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTERESTS OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. CONGRESS HAS DIRECTED THAT ANY SENTENCING PRACTICE (SUCH AS A RE-SENTENCING) MUST ALLOW FOR AN INDIVIDUALIZED CONSIDERATION OF THE DEFENDANT	5
A. 28 U.S.C. § 991(b) Establishes That The Sentencing Commission Exists To Create Policies And Practices That Embrace 18 U.S.C. § 3553(a)(2) And Permit “Individualized Sentencing”	6
B. 28 U.S.C. § 991(b)(1)(B) And 18 U.S.C. § 3661 Expressly Require That Re-sentencing Include Individualized Consideration Of The Defendant	8
1. 28 U.S.C. § 991(b)(1)(B)	8
2. 18 U.S.C. § 3661	9

II.	THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THIS COURT TO CHOOSE THE INTERPRETATION OF 18 U.S.C. § 3582(c)(2) THAT WOULD NOT ARGUABLY VIOLATE <i>BOOKER</i> OR NONDELEGATION PRINCIPLES	10
III.	IN THE WAKE OF <i>BOOKER</i> , THE VALUE OF INDIVIDUALIZED CONSIDERATION AS EXPRESSED IN THE GOVERNING STATUTE, THE CONSTITUTION, AND THE PRIOR OPINIONS OF THIS COURT, MUST BE OF PARAMOUNT IMPORTANCE WHEN CONSIDERING RE-SENTENCINGS	16
A.	The United States Constitution Broadly Requires Individualized Consideration Of Defendants Throughout The Criminal Case	18
B.	Requiring Individualized Consideration During Re-sentencing Reduces The Unjustifiable Disparity In Treatment Of Capital And Noncapital Defendants	20
	CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	12
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	20
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	20
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	2
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991)	21
<i>Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.</i> , 448 U.S. 607 (1980)	13
<i>Jones v. United States</i> , 526 U.S. 227 (1999)	11
<i>Nat'l Cable Television Ass'n, Inc. v. United States</i> , 415 U.S. 336 (1974)	13
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	21
<i>Stinson v. United States</i> , 508 U.S. 36 (1993)	15
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	<i>passim</i>
<i>United States v. Dillon</i> , 572 F.3d 146 (3rd Cir. 2009)	5, 12
<i>United States v. Dunphy</i> , 551 F.3d 71 (4th Cir. 2009)	12
<i>United States v. Mitchell</i> , 18 F.3d 1355 (7th Cir. 1994)	13
<i>United States v. Rita</i> , 551 U.S. 338 (2007)	2
<i>United States v. Savoy</i> , 567 F.3d 71 (2d Cir. 2009)	12

Page(s)

<i>Wash. Legal Found. v. U.S. Sentencing Comm'n</i> , 17 F.3d 1446 (D.C. Cir. 1994)	1
<i>Wash. Legal Found. v. U.S. Sentencing Comm'n</i> , 89 F.3d 897 (D.C. Cir. 1996)	1
<i>Williams v. New York</i> , 337 U.S. 241 (1949)	21
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	20

Statutes:

18 U.S.C. § 3553(a)(2)	<i>passim</i>
18 U.S.C. § 3582	<i>passim</i>
18 U.S.C. § 3582(c)(2)	<i>passim</i>
18 U.S.C. § 3583(c)	14
18 U.S.C. § 3661	<i>passim</i>
28 U.S.C. § 991(b)	<i>passim</i>
28 U.S.C. § 994(a)(2)	10

Miscellaneous:

Nelson B. Lasson, <i>The History and Development of the Fourth Amendment to the United States Constitution</i> (1937)	18
Rachel E. Barkow, <i>The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity</i> , 107 Mich. L. Rev. 1145 (2009)	21
Roger A. Fairfax, Jr., <i>The Jurisdictional Heritage of the Grand Jury Clause</i> , 91 Minn. L. Rev. 398 (2006)	19

	Page(s)
S. Rep. No. 225, 98th Cong., 1st Sess. 37-150	14
U.S. Sentencing Guidelines § 1B1.10(a)	5, 10, 15

**BRIEF OF WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.¹ WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly initiates litigation, files *amicus curiae* briefs, and publishes monographs and other publications on these and other related topics.

Since the U.S. Sentencing Commission's establishment approximately twenty-five years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of its guidelines. WLF has also taken the Commission and its advisory committees to task for failing to operate in an open and transparent manner in the formulation of official Commission policy. *See, e.g., Wash. Legal Found. v. U. S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U. S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

¹ Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored any part of this brief; and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

In addition, WLF has regularly appeared before this and numerous other federal and state courts to address issues of great importance related to the U.S. Sentencing Commission and the Federal Sentencing Guidelines, and to oppose the application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences. *See, e.g., Gall v. United States*, 552 U.S. 38 (2007); *United States v. Rita*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

WLF has no direct interest, financial or otherwise, in the outcome of this case. WLF submits this brief solely to urge individualized consideration of defendants in all federal sentencings, including re-sentencings. All parties have consented to the filing of this brief, and written letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

In the interest of brevity, WLF hereby adopts and incorporates by reference the Statement of the Case contained in Petitioner's brief.

SUMMARY OF THE ARGUMENT

This case essentially asks what 18 U.S.C. § 3582 means during re-sentencing and, depending upon that answer, whether the present re-sentencing scheme satisfies *Booker*. In short, this Court need not reach the *Booker* issue for two reasons. First, Congress has repeatedly made clear through statute that any federal sentencing procedure requires the individualized consideration of defendants. Section 3582 should not be construed to allow a policy statement to trump these

statutory provisions. Second, any doubt about § 3582’s meaning should be resolved in favor of allowing individualized discretion during re-sentencing, because the alternative construction raises colorable constitutional issues. The end result—requiring individualized consideration during re-sentencing—would be part of the denouement of an historical detour that temporarily demoted individualized consideration in noncapital cases.

The opinion below approves a practice under which criminal defendants who receive a re-sentencing based on retroactive guidelines are barred from raising any issues other than the guideline change. There is no direct statutory basis for this practice; rather, this limitation is contained in a sentencing guideline policy statement and, in turn, 18 U.S.C. § 3582(c)(2) notes that re-sentencings should be “consistent” with such policy statements. Petitioner’s brief properly describes this practice as a violation of this Court’s holding in *United States v. Booker*, 543 U.S. 220 (2005).

Amicus Washington Legal Foundation writes to supplement this argument by establishing that the re-sentencing approved by the Third Circuit not only violates *Booker*, but also runs contrary to Congress’s explicit directions in 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a)(2), and 18 U.S.C. § 3661, all of which specifically direct that a sentencing practice should allow for some measure of individualized consideration of the defendant. For example, 18 U.S.C. § 3661 instructs that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” No sentencing

guideline policy statement can trump such clear Congressional guidance.

While applying *Booker* to the procedure approved by the Third Circuit would prove fatal to that procedure, it is not necessary to take that step. Because Congress, by statute, already forbids that procedure and because the procedure approved below raises colorable constitutional issues, the doctrine of constitutional avoidance directs that 18 U.S.C. § 3582(c)(2) should be interpreted as requiring district courts to give weight only to policy statements that comport with congressional directives expressed through statute (such as the directives described above, which require that individualized consideration be a part of every sentencing process). To do otherwise is to wade needlessly into the swamp of at least two colorable constitutional questions. First, it leads to the Sixth Amendment issue identified in *Booker*. Second, it introduces serious questions about the authority and wisdom of delegating to an administrative body Congress's ability to define the jurisdiction of the courts.

The Constitution of the United States, as part of a broader theme of protecting the individual against government power, gives repeated expression to the value of individualized consideration in creating and recognizing checks on that power through the warrant requirement, the grand jury, the right to trial by jury, the "cruel and unusual" clause of the Eighth Amendment, and the pardon power. Giving 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a), and 18 U.S.C. § 3661 their plain meaning in the case at bar will not only be consistent with the will of Congress, but in harmony with a deep vein of American legal thought stretching back to the framers, who firmly grasped the importance of the

individualized consideration of criminal defendants as a check on government power.

ARGUMENT

I. CONGRESS HAS DIRECTED THAT ANY SENTENCING PRACTICE (SUCH AS A RE-SENTENCING) MUST ALLOW FOR AN INDIVIDUALIZED CONSIDERATION OF THE DEFENDANT

The opinion below asserts that there are separate and wildly different standards for sentencings and re-sentencings. The Third Circuit held that *Booker* applies only to “full” sentencing hearings, which must give play to all the factors in 18 U.S.C. § 3553(a), while re-sentencings on retroactive guideline changes cannot include any individualized consideration of the defendant. *United States v. Dillon*, 572 F. 3d 146 (3d Cir. 2009). This bifurcation is based only indirectly on statutory authority: 18 U.S.C. § 3582(c)(2) notes that re-sentencing practice should be “consistent” with policy statements made by the sentencing commission, and a sentencing commission policy statement (U.S.S.G. 1B1.10(a)) suggests that re-sentencings be limited to considering only the effect of the change in the guidelines.

Not only does the opinion below misconstrue the impact of *Booker* (as set out in other briefs), but by rejecting absolutely any individualized consideration of the defendant, the sentencing practice approved by the court below sharply conflicts with Congress’s express directives in 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a)(2), and 18 U.S.C. § 3661.

In contemporary federal criminal practice, both a sentencing and a re-sentencing under 18 U.S.C. § 3582 involve the federal sentencing guidelines. In fact, the government's point in the case at bar seems to be that a re-sentencing such as that Percy Dillon received is *only* about the guidelines. Thus, it is appropriate to look first to the statute through which Congress gave explicit instructions to the Sentencing Commission regarding the shape and nature of a sentencing-guideline system.

A. 28 U.S.C. § 991(b) Establishes That The Sentencing Commission Exists To Create Policies And Practices That Embrace 18 U.S.C. § 3553(a)(2) And Permit “Individualized Sentencing.”

Congress's directives to the Sentencing Commission in creating guidelines are plainly stated in 28 U.S.C. § 991(b):

The purposes of the United States Sentencing Commission are to establish sentencing policies and practices for the Federal criminal justice system that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code [and to] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct *while maintaining sufficient flexibility to permit individualized sentences when warranted* by mitigating or

aggravating factors not taken into account
in the establishment of general sentencing
practices

28 U.S.C. § 991(b) (emphasis added). Because re-sentencings are a “sentencing practice,” and because the questions at the heart of this case involve “sentencing policy,” 28 U.S.C. § 991(b) is indeed the right place to find Congress’s expressed intent.

That statute sets out two directives that are particularly important to this case: First, 18 U.S.C. § 3553(a) guides any sentencing proceeding under the guidelines; and second, even apart from the provisions of § 3553(a), any guideline sentencing must “permit individualized sentences” when warranted. Importantly, this guidance applies whether or not *Booker* controls re-sentencing—the applicable statutes themselves direct that individualized consideration of the defendant be a part of re-sentencing.

28 U.S.C. § 991 requires the Sentencing Commission to establish sentencing processes that “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18” In turn, § 3553(a)(2) expressly sets out that a sentencing court “shall consider” the degree to which the sentence imposed reflects the four traditional goals of sentencing: punishment (Section 3553(a)(2)(A)), deterrence (Section 3553(a)(2)(B)), incapacitation (Section 3553(a)(2)(C)), and rehabilitation (Section 3553(a)(2)(D)). Each of these traditional goals are necessarily predicated on the individual characteristics of the defendant. The appropriateness of incapacitation or rehabilitation, for example, will often depend on the circumstances of the defendant at the time of re-sentencing, which may occur

years or decades after conviction.

Because Congress has directed that the Sentencing Commission create sentencing systems that expressly mandates some consideration of the four traditional goals of sentencing, the Third Circuit’s restrictive view of re-sentencing must be rejected as contrary to the will of Congress as expressed in statute.

B. 28 U.S.C. § 991(b)(1)(B) And 18 U.S.C. § 3661 Expressly Require That Re-sentencing Include Individualized Consideration Of The Defendant.

The guideline system was created pursuant to the Sentencing Reform Act of 1984. Both 28 U.S.C. § 991(b) and the present version of 18 U.S.C. § 3661 resulted from the SRA. The terms of both § 991 and § 3661 directly prohibit the creation of a sentencing practice that bars individualized consideration of defendants. Although mandatory guidelines were tolerated under these statutes, those guidelines also contained tools for flexibility—departures—which are absent in the re-sentencing mechanism approved by the Third Circuit. Without departures, the process of re-sentencing described in the opinion below fails to fulfill the expressed will of Congress.

1. 28 U.S.C. § 991(b)(1)(B)

Even beyond its reference to 18 U.S.C. § 3553(a)(2), § 991(b)(1)(B) itself directly calls on the Sentencing Commission to mandate individualized consideration, instructing that sentencing policies and practices must “maintain sufficient flexibility to permit individualized sentences when warranted by mitigating

or aggravating factors not taken into account in the establishment of general sentencing practices.”

With its reference to “factors not taken into account in the establishment of general sentencing practices,” this provision seems to be describing the departure provisions that were a central feature of federal sentencing before *Booker* and are still a part of the guidelines. In other words, § 991 seems to be requiring on its face at least the flexibility contained in the mandatory guidelines prior to *Booker*.

The re-sentencing practice approved below does not meet that requirement. Rather, under the view of the Third Circuit, re-sentencings are restricted to simply adjusting offense levels to fit retroactive changes and do not allow for departures or any equivalent. Without the ability to depart or otherwise give effect to individual considerations, re-sentencings as described by the Third Circuit not only fail to satisfy the requirements of *Booker*, but contravene the dictates of 28 U.S.C. § 991(b).

2. 18 U.S.C. § 3661

Like § 991(b), the text of 18 U.S.C. § 3661 plainly requires that some form of individualized consideration be available to the district-court judge during any form of sentencing: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence.”

This language is unequivocal. Congress has barred the Sentencing Commission, by statute, from doing exactly what it has attempted to do here—forbid a

sentencing judge from considering “the background, character, and conduct” of a defendant. The language of the statute is quite specific in defining the proceedings covered (where a “court of the United States” is called upon to impose “an appropriate sentence”), and re-sentencing fits well within that definition. Thus, the Third Circuit’s restrictive view of re-sentencing conflicts with the will of Congress as expressed multiple times in the federal code.

Taken together, 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a)(2), and 18 U.S.C. § 3661 deny the Sentencing Commission the authority to wholly remove individualized consideration from a sentencing practice. Although 18 U.S.C. § 3582(c)(2) acknowledges that re-sentencings must be “consistent” with the Commission’s policy statements, that does not somehow allow the Commission to write enforceable policy statements that conflict with Congress’s direct commands as expressed through statute. *See* 28 U.S.C. § 994(a)(2) (requiring that general policy statements further the purposes of § 3553 (a)(2)). Because the policy statement at issue here (United States Sentencing Guideline § 1B1.10(a)) does not allow for any form of individualized consideration of a defendant, it runs contrary to statute and thus is invalid.

II. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THIS COURT TO CHOOSE THE INTERPRETATION OF 18 U.S.C. § 3582(c)(2) THAT WOULD NOT ARGUABLY VIOLATE *BOOKER* OR NONDELEGATION PRINCIPLES

The Third Circuit below held that, despite the

above-discussed statutory endorsements of individualized consideration, § 3582(c)(2) authorizes the Sentencing Commission, through general policy statements, to block district courts from engaging in any individualized consideration of criminal defendants at re-sentencing hearings. The court reached this conclusion by reading the language of § 3582(c)(2) as a delegation of authority to the Sentencing Commission to make binding law with sufficient force to carve out an exception to principles enshrined in statutes passed by Congress. This interpretation of § 3582(c)(2) raises serious constitutional questions under *Booker* and principles of non-delegation, and should be avoided in favor of a reasonable, constitutionally sound alternative. The Court should avoid these constitutional questions, by interpreting § 3582(c)(2) as requiring district courts to give persuasive weight *only* to policy statements that are otherwise consistent with Congress's statutes that govern sentencing.

The cardinal principle of constitutional avoidance is relevant here because the Third Circuit's interpretation of § 3582(c)(2) raises a constitutional question under *Booker*. The rule of constitutional avoidance holds that when a statute is reasonably susceptible of two constructions and one construction raises serious constitutional questions, a court has a "duty" to adopt the interpretation that avoids the constitutional issue. *Jones v. United States*, 526 U.S. 227, 239 (1999). This doctrine ensures that Congress must speak clearly before the Court attributes a constitutionally questionable purpose to its words. The Third Circuit's interpretation raises a *Booker* question because it effectively makes the sentencing guidelines mandatory at re-sentencing. As other briefs before this Court discuss, there is a serious question whether the

Sixth Amendment requires individualized consideration of criminal defendants at re-sentencing hearings. Thus, assuming § 3582(c)(2) is susceptible to a constitutionally-sound alternative, this Court is duty-bound to adopt that alternative interpretation.

The Third Circuit's interpretation also raises the specter of constitutionally improper delegation. The decision below interprets §3582(c)(2) as giving the Sentencing Commission discretion, untethered from statutory principles, to control district-court subject-matter jurisdiction in re-sentencings. Courts adopting the Third Circuit's approach have held that they *lack jurisdiction* to sentence below amended sentencing guideline minimums. *See United States v. Dillon*, 572 F.3d 146 (3rd Cir. 2009) (“[T]he District Court found that Booker did not apply and that it lacked *jurisdiction* to grant more than a 2-level sentence reduction.”) (emphasis added); *United States v. Savoy*, 567 F. 3d 71 (2d Cir. 2009); *United States v. Dunphy*, 551 F. 3d 71 (4th Cir. 2009). The Constitution specifically grants Congress the power to create federal courts and therefore to define their jurisdiction. *See* Article I, § 8; *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). Under the Third Circuit's interpretation, however, Congress is understood to have delegated to the Sentencing Commission broad authority to control the jurisdiction of Article III courts in re-sentencing hearings.

This delegation raises a colorable constitutional question. Congressional authority to delegate is not boundless. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). While this Court has been reluctant to strike down delegations, it has readily avoided interpretations of statutes that would create constitutionally questionable delegations. *See Indus.*

Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980); *Nat'l Cable Television Ass'n Inc. v. United States*, 415 U.S. 336, 342 (1974).

Further, this Court has never considered a case where Congress specifically delegated its *jurisdiction-defining* power. There is reason to believe delegations of jurisdiction-defining power are more suspect than delegations of other types of lawmaking power. *United States v. Mitchell*, 18 F.3d 1355, 1360 n. 7. (7th Cir. 1994) (“[O]ne can readily distinguish between Congress’ ability to delegate its commerce power over price controls during wartime . . . and its ability to delegate a power as sensitive and central to our Anglo-American legal tradition as shaping a federal court’s jurisdiction.”). Here, an agency with no experience in such matters and—according to the Third Circuit’s interpretation—no relevant guiding statutory principles, has been empowered to define the subject-matter jurisdiction of Article III courts. Contrary to the interpretation adopted by the Third Circuit, unless standards from other statutory sections are read in, § 3582(c)(2) does not provide principles sufficient to channel the Commission’s decisions. Thus, this Court should adopt an interpretation of § 3582(c)(2) that avoids this constitutionally questionable delegation.

A reasonable and constitutionally sound interpretation *is* available. The constitutional problems described above are eliminated when § 3582(c) is read to require federal courts to give authoritative weight (rather than binding force) to policy statements, and only if those statements are consistent with other congressional directives contained in sentencing statutes. Thus, rather than giving the Sentencing Commission the ability to effectively write re-sentencing jurisdictional

statutes that trump other statutory provisions, § 3582(c) should be understood to require federal courts to consider sentencing commission policy statements regarding re-sentencing only if those policy statements are consistent with other statutory principles, including the above-discussed provisions enshrining principles of individualized consideration.

Although the Third Circuit insisted that § 3582(c) made policy statements binding upon district courts, a less aggressive reading is reasonable. After *Booker*, the baseline presumption must be that policy statements, like the guidelines themselves, are advisory rather than binding. *Cf.* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150, at 167-68 (stating that no appeal will be available when a sentence is merely “inconsistent with policy statements”). The text of § 3582(c) is not sufficiently strong to definitively reverse this presumption. It requires only that, before granting a reduction, district courts ask whether a reduction “is consistent with” any “applicable” policy statements. The statute suggests that this consideration takes place in the context of a discretionary decision. 18 U.S.C. § 3582(c)(2) (“[T]he court may reduce”). Further, an identical “consistent with policy statements” clause also appears in § 3582(c)(1), where it clearly seems to mean that the district court should use the Commission’s policy statements only as advisory guides to its discretionary decision. Additionally, the legislative history is consistent with an advisory reading. *See, e.g.*, S. Rep. No. 225 at 55-56 (“The bill, as reported, provides . . . in 18 U.S.C. § 3583(c) for *court determination*, subject to *consideration* of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.”) (emphasis added).

Section 3582(c)(2)'s language and legislative history are susceptible to the interpretation that Congress intended to create a place in the re-sentencing process for the Commission to provide guidance that must be carefully considered by federal courts. It is not clear enough to give an otherwise advisory policy statement independent binding force, especially where—as here—doing so would raise two constitutional questions.

Properly interpreted as an advisory policy guideline, rather than an adopted standard, Guideline § 1B1.10 does not trump the above-discussed statutory provisions in which Congress stressed individualized consideration. Because § 1B1.10 conflicts with other statutory provisions, it should have neither binding nor persuasive authority. Policy statements are invalid if they are inconsistent with federal statutory law. *See Stinson v. United States*, 508 U.S. 36, 38 (1993). Section 1B1.10, which purports to prevent federal courts from considering any sentencing factors that would bring a sentence below a guideline minimum, conflicts with the provisions of federal law discussed in Part I. Importantly, it conflicts with the very mandate provided to the Sentencing Commission in § 991(b)(1)(B) that, in forming its policies it must create “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” While § 3582(c)(2) was clearly intended to give the Sentencing Commission an opportunity to influence what sentencing factors should be relevant at re-sentencing, its language should not be read to override the statutory requirements that individualized consideration be an important tenet of the sentencing

guideline framework. Reading section 3582(c)(2)'s grant of power to the Sentencing Commission in light of other statutory principles avoids a potential *Booker* problem and provides a guiding principle that alleviates non-delegation concerns.

III. IN THE WAKE OF *BOOKER*, THE VALUE OF INDIVIDUALIZED CONSIDERATION AS EXPRESSED IN THE GOVERNING STATUTE, THE CONSTITUTION, AND THE PRIOR OPINIONS OF THIS COURT, MUST BE OF PARAMOUNT IMPORTANCE WHEN CONSIDERING RE-SENTENCINGS

The question before this Court presents an opportunity to complete an important historical arc. For about two hundred years, from the founding of the Republic until 1987, the individual consideration of defendants was a guiding principle of American criminal law. It is enmeshed in the Constitution (discussed in subsection (a) below), reflected in the opinions of this Court (subsection (b)), and even informs the statute that established the Sentencing Commission and guides the inquiry here (as set out in section I, *supra*). But the mandatory-guideline era of 1987-2005 was an historical anomaly during which the value of individualized consideration was, to a large (though not total) degree, obscured in favor of uniformity.

Booker reversed that historical anomaly. By making the guidelines advisory and requiring a “reasonableness” standard on review, this Court recognized that post-*Booker* sentencing would not “provide the uniformity that Congress originally sought to secure.” 543 U.S. at 263. Given the tension that

exists necessarily between uniformity and individualized consideration, this “letting go” of a certain amount of uniformity marked a return to the deep vein of American law that recognizes the importance of individualized consideration, a principle lauded even by the language of the Sentencing Reform Act itself.

In *Booker*, this Court expressly invited Congress to adjust the longstanding historical balance between individualized consideration and uniformity:

Ours, of course, is not the last word: The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.

543 U.S. at 265. In the five years since *Booker* was announced, Congress has declined this invitation to reimpose mandatory guidelines or assure uniformity by another means.

The statutes and canons discussed above stand on their own as arguments against the opinion below, as their language bars the sentencing practice at issue here, or at least raises an ambiguity worthy of avoidance resolution. Nonetheless, it is worth noting that by giving effect to the value of individual consideration at resentencing, those statutes may play a role in a broad historical correction that will bring federal non-capital sentencing into alignment with the imperatives of the Constitution, the decisions of this Court in capital litigation, and the broad sweep of 200 years of American legal thought, all of which consistently have supported

the individual consideration of criminal defendants as part of a broader bulwark against the potential abuses at the hands of an otherwise overwhelmingly powerful federal government.

A. The United States Constitution Broadly Requires Individualized Consideration Of Defendants Throughout The Criminal Case.

The Constitution itself mandates several aspects of criminal procedure that exist primarily to require consideration of the individual characteristics of the accused or convicted. Given the Constitution's consistent theme of safeguarding the individual against the power of the federal government, this focus is unsurprising. These constitutional provisions require individual consideration of defendants during investigation, when bringing a charge, at trial, at sentencing, and throughout the post-conviction process.

Even before a charge is brought, the Constitution insists on individual consideration of the defendant. The Fourth Amendment's probable-cause requirement reflects not only the need to limit police power, but also the need to do so with regard for the individual circumstances of the target of the investigation. The Constitution's call for particularized warrants was in large part a reaction to the general writs assistance that were used by British authorities in colonial America and that authorized the King's agents to search wherever they thought they might find evidence. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (1937). Such breadth outrages us today precisely because we expect that more specific consideration should be

required before liberty is deprived. Today, the discretion given to a magistrate in considering probable cause embodies the Constitution's central value of considering the individual circumstances of criminal defendants in the face of the overwhelming power of the federal government, but it is not the only one.

The Fifth Amendment's requirement of indictment by grand jury also reflects the value of individualized consideration, specifically in the charge. The convening of twenty-three citizens to consider indictments is designed not for efficiency, but rather to ensure that a formal criminal charge is based on a careful examination of the particular circumstances of the case. For 150 years, this high and inefficient level of scrutiny of particularized facts was seen as so important, in fact, that indictment by the grand jury could not be waived in federal court.²

At trial the defendant's Sixth Amendment right to a jury similarly reflects individual rights that attribute individualized circumstances significant importance within the criminal process. Like the Grand Jury, one advantage of a trial by jury is the ability of many people acting together to have a more contextual view of the specific facts relating to the defendant and the crime alleged. At sentencing as well, the Eighth Amendment requires individualized consideration of defendants (as discussed in the next section).

² Only with the adoption of Federal Rule of Criminal Procedure 7's waiver provision was a defendant who decided to plead guilty provided the option to forgo indictment. See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 400 (2006).

Finally, post-trial practices mandated by the Constitution once again require evaluation of individual circumstances. By including both habeas corpus and the pardon power among the criminal processes recognized in the Constitution, the Framers repeatedly valued the individual circumstances of the defendant over efficiency. These processes allow a third and fourth review of the specific facts of a case (after trial and appeal), an extraordinary number of reviews that makes sense only as a part of the broader project of protecting individual rights through a constant attention to individualized circumstances.

B. Requiring Individualized Consideration During Re-sentencing Reduces The Unjustifiable Disparity In Treatment Of Capital And Noncapital Defendants.

Individualized consideration plays a constitutionally mandated role in capital sentencing. After a splintered decision from this Court outlawed the death penalty as it was then administered in the United States, *Furman v. Georgia*, 408 U.S. 238 (1972), states attempted to remedy their capital processes. It soon became clear that to survive Eighth Amendment scrutiny, a state's capital process would have to give "the individual . . . his due." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Mandatory capital sentences violated the Eighth Amendment precisely because they "treat all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Robust debate exists regarding whether the Eighth Amendment should be read to insist on individualized consideration even in the noncapital context. As Professor Barkow asked: “Why can defendants be treated as ‘a faceless, undifferentiated mass’ when they received a term of imprisonment” instead of a death sentence? Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1178 (2009). In noncapital cases, just as much as in capital cases, it is relevant that “the belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.” *Williams v. New York*, 337 U.S. 241, 247 (1949). Further, given that the political process focuses disproportionately on death sentences, strong arguments can be made that noncapital sentences will receive little meaningful consideration if not from the Court. *Id.* at 1166-67. Although it is now reasonably settled that mandatory noncapital sentences are *constitutionally* acceptable even without individualized discretion, this Court has not always taken this view, *Solem v. Helm*, 463 U.S. 277, 291 n.17 (1983) (recognizing, in a noncapital case, “the inherent nature of our federal system and the need for individualized sentencing.”), and there certainly are valid reasons why a legislature might choose to emphasize individualized sentencing over uniformity. *Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J, concurring).

When Congress’s choice to mandate individualized consideration is taken seriously, the historical correction becomes apparent. No longer is the disparity so complete between capital and noncapital sentencing—individual consideration matters for all individuals sentenced,

though such consideration is only constitutionally compelled in capital cases. Nor is there a sentencing scheme that allows (indeed requires) individualized consideration during preliminary sentencing but that forbids it during re-sentencing. Instead, sentencing and re-sentencing individuals to death or prison will involve individual consideration. This rule draws from one of the deepest of American social impulses, which is an abiding respect for the individual in relation to government. In keeping with statute, doctrines of interpretation, and that primal impulse, no law should forbid individual consideration while directing the sentencing of an individual.

CONCLUSION

For all of these reasons, as well as those raised in Petitioner's brief on the merits, *amicus curiae* requests that this Court reverse the opinion of the court of appeals.

Respectfully submitted,

Daniel J. Popeo
Cory L. Andrews*
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
**Counsel of Record*

Mark Osler
Rory Ryan
BAYLOR LAW SCHOOL
1114 Univ. Parks Dr.
Waco, TX 76706
(254) 710-2817

Dated: January 27, 2010

Counsel wish to thank Elizabeth Ryan, a third-year law student at Harvard Law School, for her valuable assistance in the writing of this brief.