No. 05-60419

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

v.

MACEO SIMMONS,

Defendant-Appellant/
Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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As the United States explained in its opening brief, this Court should vacate defendant Maceo Simmons' sentence and remand for resentencing. US Br. 60-70.[1] The sentence that the district court imposed is invalid for two independent reasons. First, the district court erred in calculating the relevant sentencing range under the Sentencing Guidelines. US Br. 60-63. This error requires a remand for resentencing because, although the Guidelines are now advisory, a district judge

[1] "US Br. __" indicates the page number of the government's opening brief. "Reply Br. __" refers to the page number of Simmons' reply brief. Record citations are indicated by "__.R.__"; the number before the "R." is the volume number of the Record on Appeal and numbers after the "R." are pages in that volume.

must still "arrive at the proper guideline calculation before deciding which sentence to impose." *United States* v. *Angeles-Mendoza*, 407 F.3d 742, 754 (5th Cir. 2005). Second, Simmons' sentence is unreasonable under *United States* v. *Booker*, 543 U.S. 220 (2005), even assuming that the district court correctly calculated the relevant Guidelines range. See US Br. 63-70. Simmons has failed to provide any convincing responses to these arguments.

I

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN REFUSING TO IMPOSE A TWO-LEVEL ENHANCEMENT UNDER SENTENCING GUIDELINES § 2A3.1(B)(3)(A), WHICH APPLIES IF THE VICTIM WAS "IN THE CUSTODY, CARE, OR SUPERVISORY CONTROL OF THE DEFENDANT"

The district court refused to apply the two-level enhancement under § 2A3.1(b)(3)(A) on the ground that doing so would be impermissible double counting. As the government explained in its opening brief, the district court's double-counting rationale was erroneous as a matter of law. US Br. 60-63.

Simmons does not attempt to defend the district court's double-counting ruling. Instead, Simmons urges this Court (Reply Br. 22-25) to affirm the sentence on the alternative ground that the victim, Syreeta Robinson, was not "in the custody, care, or supervisory control of the defendant" under § 2A3.1(b)(3)(A). That argument is meritless.

Simmons contends (Reply Br. 22-25) that § 2A3.1(b)(3)(A) applies when a minor is entrusted to a caretaker (such as a baby-sitter or teacher), but is inapplicable to police custody of an adult. That argument cannot be squared with

the language of the Guidelines provision, which authorizes a two-level enhancement "[i]f the victim was (A) in the custody, care, or supervisory control of the defendant." § 2A3.1(b)(3)(A). An adult who is in the custody of a police officer is plainly in the "custody, care, or supervisory control" of that officer under the ordinary meaning of those terms. By arguing that § 2A3.1(b)(3)(A) is inapplicable to adult victims in police custody, Simmons is urging this Court to manufacture an exception that does not appear on the face of the Guidelines provision.

Rather than focusing on the language of § 2A3.1(b)(3)(A) itself, Simmons relies (Reply Br. 24-25) on the following commentary that appears in the current version of the Sentencing Guidelines:

> *Care, Custody, or Supervisory Control*. – Subsection (b)(3) is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

§ 2A3.1 comment. (n.3(A)) (2006). This passage contains slightly different wording but is substantively the same as the commentary that appeared in the 1998 edition of the Guidelines, under which Simmons was sentenced:[2]

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[2] The district court sentenced Simmons using the 1998 version of the Guidelines. See US Br. 13-15. The current version of the Guidelines is less favorable to Simmons because, after 1998, the Sentencing Commission amended

(continued...)

> Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

§ 2A3.1, comment. (n.2) (1998).

The commentary to § 2A3.1(b)(3) does not support Simmons' argument. The Sentencing Commission emphasized that § 2A3.1(b)(3) was intended to have "broad application." § 2A3.1, comment. (n.2) (1998). In addition, the Sentencing Commission did not intend the commentary to provide an exhaustive list of those who have custody, care, or supervisory control over victims. That intent is clear from the statement that "teachers, day care providers, baby-sitters, or other temporary caretakers are *among those* who would be subject to this enhancement." *Ibid.* (emphasis added). In sum, nothing in the commentary indicates that the Sentencing Commission intended § 2A3.1(b)(3)(A)'s reference to "custody" to exclude police custody of adults.

Finally, Simmons' argument is contrary to the only court of appeals' decision addressing whether § 2A3.1(b)(3)(A) applies to victims in police custody.

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[2](...continued)
the Guidelines to increase the base offense level under § 2A3.1 by three levels. See US Br. 13 n.2. Thus, even without the two-level "custody" enhancement of § 2A3.1(b)(3)(A), Simmons' offense level under the current version of the Guidelines would be 44, which translates into a sentence of life imprisonment.

In *United States* v. *Volpe*, 224 F.3d 72 (2d Cir. 2000), the Second Circuit upheld a two-level enhancement under § 2A3.1(b)(3)(A) where the defendant police officer had sexually assaulted an adult who was in police custody. See 224 F.3d at 76-77. As the Second Circuit explained, the custody enhancement "punishes abuse of power over an individual in the officer's physical and legal control. * * * The additional punishment recognizes the particular harm inflicted when an individual entrusted to the care and supervision of an officer of the state is unlawfully abused by his supposed caretaker." *Id.* at 76. Although Simmons cites a number of cases involving minor victims (Reply Br. 23), none of those decisions held, much less suggested, that § 2A3.1(b)(3)(A) would not apply to an adult victim in police custody.

II

THE SENTENCE IMPOSED WAS UNREASONABLE UNDER *BOOKER*

As the United States explained in its opening brief, the sentence imposed was unreasonable under *United States* v. *Booker*, 543 U.S. 220 (2005), especially in light of the egregiousness of the offense, Simmons' perjury at his state trial, his lack of remorse, and the inadequacy of the district court's explanation for choosing a sentence so far below the Guidelines range. US Br. 63-70. Simmons has offered no convincing rebuttal to the government's arguments.

Although Simmons attempts to minimize the seriousness of his offense (Reply Br. 26-27, 29), he fails to acknowledge that the district judge stated at the

sentencing hearing that he agreed with the prosecutor about "the egregiousness of the crime." 10.R.21. The judge made this statement moments after the prosecutor had characterized Simmons' raping of Syreeta Robinson as an "unusually heinous" crime and an "outrageous abuse of his power" as a police officer. 10.R.21.

The court's conclusion that the crime was particularly egregious weighed heavily against *any* leniency for Simmons, much less the magnitude of the leniency the court awarded in imposing sentence. Although the district court agreed that the crime was especially serious, the judge's explanation for the sentence imposed (see 10.R.36) does not indicate that he gave adequate consideration to this factor in deciding to deviate so substantially from the Guidelines range. See *United States* v. *Duhon*, No. 05-30387, __ F.3d __, 2006 WL 367017, at *5-*7 (5th Cir. Feb. 17, 2006) (finding sentence unreasonable under *Booker* in part because it failed to adequately reflect the seriousness of the offense).

Simmons attempts to downplay the seriousness of his crime by characterizing it as nothing more "than an aberration in his behavior at a weak moment." Reply Br. 29. What Simmons did to Robinson was no momentary lapse of judgment or self-control. He planned his crime by driving Robinson to a dark, isolated, wooded area before attacking her, and by having a fellow officer act as a look-out so that no one would interfere with the crime. Simmons then raped Robinson multiple times. He first forced her to perform oral sex on him while in the patrol car. He then made her get out of the car and again forced her to perform oral sex. He then bent her over the trunk of the car and raped her both anally and

vaginally. Simmons' cruelty did not stop there. After he finished raping her, he took Robinson (who was sobbing) to the other police officer and invited him to have sex with her as well, causing Robinson to fear that she was about to suffer another round of sexual assault. See US Br. 6-8.

Nor does the record support Simmons' attempt to downplay the impact of his crime on the victim. Although Simmons asserts (Reply Br. 26) that "the district court obviously inferred * * * that Robinson experienced no significant long-term ill effects of Simmons' actions," the district judge said nothing at the sentencing hearing to suggest that he drew such an inference. In addition, the record refutes Simmons' attempt (Reply Br. 26) to portray Robinson as "living a normal life" despite being raped. In fact, Robinson and her mother indicated at the sentencing hearing that the rape had caused the victim lasting psychological damage. 10.R.25-26. At the hearing, which occurred more than five and a half years after the rape, Robinson told the judge that she still suffered "a lot of depression." 10.R.26. Robinson's mother advised the judge that her daughter was experiencing "mental problems" because of the rape and that the counseling she had received was "not working." 10.R.25. Indeed, Robinson's mother predicted that "what [Simmons] did to [Robinson] is going to last her lifetime." 10.R.25.

Simmons also contends (Reply Br. 25-27) that the district court provided an adequate explanation for its decision to impose a non-Guidelines sentence. He cites this Court's recent decision in *United States* v. *Smith*, No. 05-30313, __ F.3d

__, 2006 WL 367011 (5th Cir. Feb. 17, 2006). In fact, *Smith* undercuts Simmons' position.

Significantly, *Smith* endorsed the position that "[t]he farther a sentence varies from the applicable Guideline sentence, 'the more compelling the justification based on factors in [18 U.S.C.] 3553(a)' must be." *Smith*, 2006 WL 367011, at *2 (quoting *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005)); accord *Duhon*, 2006 WL 367017, at *2. That is precisely the standard that the United States advocated in its opening brief. US Br. 66 (quoting *Dean*).

Here, the deviation from the applicable Guidelines range was so substantial that the district court had an obligation to provide a particularly compelling justification for its sentencing decision. Even under the district court's incorrect calculation of the offense level, the applicable Guidelines range would have been 324-405 months. (Under a correct calculation, the Guidelines sentence would have been life imprisonment. See US Br. 62-63.) Yet the court sentenced Simmons to a prison term of only 240 months. The magnitude of this disparity required more than the vague and conclusory explanation that the district court offered in imposing sentence.

As this Court recently emphasized, "a sentence must be supported by the *totality* of the relevant statutory factors." *Duhon*, 2006 WL 367017, at *3. In this case, the district court's justification for the sentence boiled down to one factor: a 20-year sentence was long enough, in the judge's view, because Simmons would be "very close if not at the end of his life" when he got out of prison. 10.R.36.

The judge failed to explain, however, how the sentence "reflect[ed] the seriousness of the offense" (18 U.S.C. 3553(a)(2)(A)), "avoid[ed] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (18 U.S.C. 3553(a)(6)), "promote[ed] respect for the law" (18 U.S.C. 3553(a)(2)(A)), or "afford[ed] adequate deterrence to criminal conduct" (18 U.S.C. 3553(a)(2)(B)). The district court's vague and conclusory explanation thus provides no assurance that the sentence was "supported by the *totality* of the relevant statutory factors." *Duhon*, 2006 WL 367017, at *3.

Yet another factor contributing to the unreasonableness of the sentence is the district court's failure to acknowledge that the Guidelines discourage reliance on age as the basis for a downward departure. See Guidelines § 5H1.1 (1998); US Br. 66-67. As this Court recently explained, "a district court that 'relies on any factors which are deemed by the Guidelines to be prohibited or discouraged . . . [should] address these provisions and decide what weight, if any, to afford them in light of *Booker*.'" *Duhon*, 2006 WL 367017, at *4 (quoting *United States* v. *Jackson*, 408 F.3d 301, 305 n.3 (6th Cir. 2005)). In *Duhon*, this Court found a non-Guidelines sentence unreasonable, based in part on the district court's reliance on the defendant's back injury in deviating downward from the applicable Guidelines range. Noting that the Guidelines state that "[p]hysical condition * * * is not ordinarily relevant in determining whether a departure may be warranted" (§ 5H1.4), this Court criticized the district court's failure to explain why it was deviating from that Guidelines provision. *Duhon*, 2006 WL 367017, at *4-*5.

In the present case, the district court's failure to acknowledge the Guidelines provision discouraging reliance on age, much less explain why a deviation from that provision was warranted, weighs heavily against finding the sentence reasonable. That is particularly true because reliance on age threatens to undermine Congress's goal of "avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). Especially in light of that threat, the district court was obligated to provide a "specific" and "compelling" explanation (*Smith*, 2006 WL 367011, at *2) for its decision to impose a sentence so far below the applicable Guidelines range. See US Br. 66-68. The court's failure to do so means that Simmons' sentence cannot survive reasonableness review under *Booker*.

CONCLUSION

For the reasons set forth in this brief and in the United States' opening brief, this Court should vacate defendant's sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2006, two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT, along with a computer disk containing an electronic version of the brief, were served by first-class mail, postage prepaid, on:

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I further certify that, on the same date, copies of the United States' brief were sent by first-class mail, postage prepaid, to the Clerk of the United States Court of Appeals for the Fifth Circuit.

_____
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 28.1(e)(2)(C). This brief contains 2,503 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type-face requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief has been prepared in a proportionally spaced typeface (Times New Roman, 14-point font) using Wordperfect 9.0.

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March 27, 2006