No. 11-1203

In the Supreme Court of the United States

SHOLOM RUBASHKIN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR JUSTICE FELLOWSHIP AND CRIMINAL LAW AND SENTENCING PROFESSORS AND LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID B. DEITCH
Counsel of Record
ALAIN JEFF IFRAH
IFRAH PLLC
1717 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006-2004
(202) 524-4140
ddeitch@ifrahlaw.com

Counsel for *Amici Curiae*

May 2, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Table of Authorities iii

Statement of Interest 1

Summary of Argument 2

Argument 5

I. Appellate courts have a critical role in ensuring that a sentence is procedurally reasonable in that the trial court has considered all of the factors listed in Title 18, U.S. Code Section 3553(a) 5

II. An appellate court cannot determine whether a sentence is procedurally reasonable unless the record clearly reflects that the trial court has considered the parties' non-frivolous arguments regarding the sentencing factors in Section 3553(a) . . 8

III. Ensuring that trial courts consider Section 3553(a)(6) is particularly critical in ensuring the individualized sentencing decision mandated by Section 3553(a)'s parsimony provision 12

IV. The Court should therefore require that trial courts specifically address non-frivolous arguments relating to the Section 3553(a) factors as the only means to ensure the procedural reasonableness of federal criminal sentences, and find that the Eighth Circuit erred in this case by not imposing such a rule 14

Conclusion 20

TABLE OF AUTHORITIES

CASES

Gall v. United States,
552 U.S. 38, 128 S.Ct. 586,
169 L.Ed. 2d 445 (2007) . . . . . *passim*

Kimbrough v. United States,
552 U.S. 85, 128 S.Ct. 558,
169 L.Ed.2d 481 (2007) 13

Koon v. United States,
518 U.S. 81, 116 S.Ct. 2035,
135 L. Ed. 2d 392 (1996) 7

Rita v. United States,
551 U.S. 338, 127 S.Ct. 2456,
168 L.Ed.2d 203 (2007) . . . . . *passim*

United States v. Ausburn,
502 F.3d 313 (3d Cir. 2007) 13

United States v. Booker,
543 U.S.220, 125 S.Ct. 738,
160 L. Ed. 2d 621 (2005) 1, 2, 5, 6, 17

United States v. Clark,
383 Fed.Appx. 310,
2010 WL 2464979 (4th Cir. 2010) 18-19

United States v. Cooks,
589 F.3d 173 (5th Cir. 2009) 12

United States v. Friedman,
658 F.3d 342 (3d Cir. 2011) 9, 18

United States v. Livesay,
525 F.3d 1081 (11th Cir. 2008) 10

United States v. Petters,
663 F.3d 375 (8th Cir. 2011) 9, 11

United States v. Shy,
538 F.3d 933 (8th Cir. 2008),
cert. denied,
129 S.Ct. 1689 (2009) 9, 19

United States v. Taylor,
487 U.S. 326, 108 S.Ct. 2413,
101 L.Ed.2d 297 (1988) 10

United States v. Wallace,
597 F.3d 794 (6th Cir. 2010) 19

STATUTES

18 U.S.C. § 3553(a) . . . . . *passim*

18 U.S.C. § 3553(a)(2) 5

18 U.S.C. § 3553(a)(6) 2, 12, 13, 18

18 U.S.C. § 3553(c) 8

18 U.S.C. § 3553(c)(1) 8

18 U.S.C. § 3553(c)(2) 8

OTHER AUTHORITY

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 ("Fifteen Year Report") (2004), http://www.ussc.gov/-15_year/15year.htm 13-14

STATEMENT OF INTEREST[1]

Justice Fellowship is the criminal justice reform arm of Prison Fellowship, the largest prison ministry in the world, which was founded 30 years ago by Chuck Colson, President Nixon's special counsel who went to prison in 1975 for Watergate-related crimes. Pat Nolan, Vice-President of Justice Fellowship, has been an expert witness before the U.S. Sentencing Commission on several occasions, particularly regarding the unjust burdens imposed by sentences that cause more harm than the underlying crime.

Additional *amici curiae* are professors and lawyers who teach, write, conduct research and/or have practiced in the fields of criminal law and sentencing in the United States. They have a professional interest in ensuring that federal sentencing statutes are interpreted and applied in a manner that coherently advances the purposes of those statutes and is consistent with relevant jurisprudential principles and contemporary function in the criminal law. These *amici curiae* submit this brief to highlight their deep concerns with the failure of the Eighth Circuit Court of Appeals to ensure that the sentence of defendant Sholom Rubashkin was procedurally reasonable.

Amici curiae file this brief in the hope of helping federal sentencing law and procedure evolve sensibly in the wake of *United States v. Booker*, 543 U.S. 220

---

[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. *Amici curiae* and their counsel were not compensated in any way.

(2005) and its progeny. *Amici curiae* believe that this case raises an important issue regarding the role of appellate courts in ensuring the procedural reasonableness of criminal sentences, and that the legal principles applied by the Eighth Circuit Court of Appeals in this case - which are at odds with the principle applied by at least three other Circuit Courts of Appeal - could have a very negative impact on the law and policy of modern federal sentencing under advisory guidelines. *Amici curiae* seek to ensure that, as post-*Booker* jurisprudence evolves in lower courts, sound sentencing policies and sensible sentencing practices are preserved. *Amici curiae* also believe it is critical that the Supreme Court resolve the split in the Circuits on this issue so that appellate courts may properly perform their essential role in ensuring the procedural reasonableness of federal criminal sentences.

SUMMARY OF ARGUMENT

Federal appellate courts play an essential role in ensuring that the sentence imposed upon each criminal defendant is procedurally reasonable. Procedural reasonableness requires, among other things, that a trial court fully consider each of the factors listed in Title 18, United States Code section 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S. Code § 3553(a)(6). *See Rita v. United States*, 551 U.S. 338, 358, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) (stressing the need for a sentencing court to "filter the Guidelines' general advice through § 3553(a)'s list of factors"); *Gall v. United States*, 552 U.S. 38, 49-50 & n.6, 128 S.Ct. 586, 169 L.Ed.2d 445

(2007) (calling upon district courts to "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party").

The role of appellate courts in ensuring procedural reasonableness is a critical one, because the law requires that appellate courts show great deference to a trial court regarding the ***substantive*** reasonableness of criminal sentences. This deference is the result of recognition of the trial court's superior familiarity with individual defendants and individual cases, as well as the trial court's superior ability to judge the evidence that is presented in those cases. But respect for the ability of a trial court to make a reasoned decision about the sentence to impose on a criminal defendant is only justified if the court has fairly considered all of the sentencing factors listed in Section 3553(a). For this reason, it is essential that appellate courts' responsibility to ensure the procedural reasonableness of a criminal sentence include the obligation to ensure that the trial court has considered all of the parties' non-frivolous arguments regarding those factors.

But appellate judges are not mind-readers. The only way in which an appellate court can know whether a trial judge has considered an argument and how that argument has or has not influenced the trial judge's decision-making in crafting a sentence is if trial court makes a record of this thought process. If a trial judge states on the record that he or she has considered an argument and explains why he or she accepted or rejected the argument, the appellate court knows that the judge has considered it. If the record – including the judge's statement of reasons and the transcript of any sentencing hearing – are silent, there

is simply no way for the appellate court to know one way or another. And if the lack of record precludes meaningful review by the appellate court, then the resulting sentence is procedurally unreasonable, and deference to the trial court's sentencing decision cannot be justified.

In sentencing Sholom Rubashkin, the district court never acknowledged on the record the defendant's non-frivolous argument that a sentence greater than 72 months would create unwarranted disparities with sentences of other similarly situated defendants, nor did the district court state on the record whether and how that argument affected the court's ultimate decision-making on the sentence to be imposed. In affirming the sentence, the Eighth Circuit Court of Appeals simply ignored this omission, and inaccurately stated that the district court had "explicitly discussed" each possible basis for a variance raised by the defendant. By doing so, the appellate court failed to fulfill its role of ensuring the procedural reasonableness of Mr. Rubashkin's sentence.

In order to ensure that federal criminal sentences are imposed in a manner consistent with Section 3553(a), it is essential that trial courts be required to state on the record – either in a statement of reasons or during a sentencing hearing – how they have considered each non-frivolous argument by the parties regarding any of the sentencing factors in Section 3553(a). Such a rule is the only way to ensure the procedural reasonableness of criminal sentences and the only way to justify appellate deference to the substantive reasonableness of trial court sentencing.

ARGUMENT

I. Appellate courts have a critical role in ensuring that a sentence is procedurally reasonable in that the trial court has considered all of the factors listed in Title 18, U.S. Code Section 3553(a).

Title 18, United States Code Section 3553(a) requires that a district court determining the sentence to be imposed on a criminal defendant must consider certain enumerated factors: the nature and circumstances of the offense and history and characteristics of the defendant; the general purposes of sentencing; the kinds of sentences available; the advisory sentencing range calculated according to the United States Sentencing Guidelines; any relevant policy statement issued by the United States Sentencing Commission; the need to avoid unwarranted sentence disparities; and the need to provide restitution to any victim. 18 U.S.C. § 3553(a). This list of factors is preceded by a general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing, as described in the statute. *Id.* (citing 18 U.S.C. § 3553(a)(2)).

One result of the Court's ruling in *United States v. Booker*, 543 U.S.220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), that the United States Sentencing Guidelines are to be viewed as advisory and not mandatory was to refocus attention on the critical role of trial courts in applying the factors in Section 3553(a). Because sentencing judges were now vested with the discretion to sentence a defendant within, below or above the advisory range of sentences resulting from the

sentencing guidelines, it was even more important than before that the judges' decisions reflect application of the statutorily mandated factors.

As before *Booker*, the role of the appellate courts continues to be the review of each appealed sentence to determine if it is "unreasonable." *United States v. Booker*, 543 U.S. 220, 264, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (Breyer, J. for the Court in part). In subsequent decisions, this Court has distinguished between two components of the determination of whether a sentence is unreasonable. On review of a sentence, an appellate court will first look to determine whether the sentence was "procedurally reasonable." Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51. "Assuming that the district court's sentencing is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* The Court's decision that the substantive reasonableness of a sentence would be accorded great deference – through the application of the abuse-of-discretion standard – arose from the Court's acknowledgement that trial judges were better able to analyze and determine the facts necessary for analysis for the statutorily mandated sentencing factors. As the Court noted in *Gall*, "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the

evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." 552 U.S. at 597 (quoting Brief for Federal Public and Community Defenders et al. as *Amici Curiae* at 16). *See also Rita*, 551 U.S. at 357-58 ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."); *Koon v. United States*, 518 U.S. 81, 98, 116 S.Ct. 2035, 135 L.Ed2d 392 (1996) ("District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.")

The result of this deference, however, has been to elevate significantly the importance of determinations by appellate courts whether a trial court's sentencing decision is procedurally reasonable. Given that a procedurally reasonable sentence will be largely shielded from review, the deference to be accorded to a trial court sentence can only be justified to the extent that the appellate court is provided with the ability to satisfy itself that the trial court has applied all of the factors set forth in Section 3553(a). And appellate courts can only serve this critical role in determining that sentences are "reasoned" – and not the result of arbitrary fancy or improper motives – if the appellate courts are provided with the record they need in order to make the determination of procedural reasonableness.

II. An appellate court cannot determine whether a sentence is procedurally reasonable unless the record clearly reflects that the trial court has considered the parties' non-frivolous arguments regarding the sentencing factors in Section 3553(a).

There is clearly nothing controversial about the assertion that meaningful appellate review can only take place when an adequate record exists of the trial court's proceedings. Indeed, the need to provide a basis for meaningful appellate review is the obvious reason for the statutory requirement, set forth in Section 3553(c), that a Court state its reasons for imposing a sentence at a particular point within, below or above the advisory Guidelines range. 18 U.S.C. § 3553(c)(1) (requiring that the court state its reason for imposing a sentence at a particular point within the advisory range); 18 U.S.C. § 3553(c)(2) (requiring that the court state "with specificity" its reason for imposing a sentence outside of the advisory range). To the extent that appellate courts must review the procedural reasonableness of a sentence, the sole basis on which an appellate court may judge whether or not a trial court considered all of the factors listed in Section 3553(a) is the judge's statements on the record during sentencing hearings together with the statement of reasons filed by the trial court in which it explains the decisions that led it to the sentence it imposed on the defendant.

Numerous appellate courts – including the Eighth Circuit Court of Appeals – have held that the failure of a trial court to articulate the reasons for its decision-making at sentencing precludes meaningful review of

whether the trial court has complied with Section 3553(a). *See*, *e.g.*, *United States v. Friedman*, 658 F.3d 342, 363 (3d Cir. 2011) (remanding case for resentencing because "there is no explicit discussion or indication in the record that [the need to avoid unwarranted sentencing disparities] was considered"); *United States v. Shy*, 538 F.3d 933, 937 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1689 (2009) (district court erred by failing to adequately explain why sentencing defendant did not create unwarranted sentencing disparity). *Cf. United States v. Petters*, 663 F.3d 375, 386 (8th Cir. 2011) (finding no procedural error because the court "created a meaningful record for appellate review"). Indeed, in *Rita*, the Court specifically addressed the question of whether the sentencing court's statement of reasons was sufficient to make clear whether the judge addressed each of the non-frivolous arguments of the parties. 551 U.S. at 358-59. *See also Gall*, 552 U.S. at 51 (appellate court must "first ensure that the district court committed no significant procedural error, such as . . . failing to adequately explain the chosen sentence").

While it may be an unnecessary formality for a trial court to list and discuss each factor in every case, when the government or a defendant make a specific, non-frivolous argument relating to one of the Section 3553(a) factors, there is no way for the appellate court to determine whether the trial court considered that argument if the court does not address it explicitly. Indeed, it is for that reason that this Court noted in *Rita* that "[t]he sentencing judge should set forth in [in his statement of reasons] enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita*, 551 U.S. at

356 (citing *United States v. Taylor*, 487 U.S. 326, 336-37, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988)).

The requirement that a trial court state the reasons for its sentencing decisions is the only way to preserve the appellate court's role in ensuring the procedural reasonableness of a sentence while at the same time exercising deference to the trial court as to the substantive reasonableness of the sentence as required by now well-established precedent. If a trial court is silent as to an argument raised by a party, there is no way for the appellate court to determine whether the trial court considered that argument in making its ultimate decision on sentencing.

The necessity of requiring a trial court to state its reasons for the sentencing decision and thereby preserving the appellate court's role is a concern that is shared by the Government. For example, in *United States v. Livesay*, 525 F.3d 1081, 1093 (11th Cir. 2008), the government successfully appealed a downward variance because the district court decision "simply failed to explain its reasons for why it would do so in a way that allows for meaningful appellate review and promotes the perception of fair sentencing."

In a case in which the trial court has failed to make a record of its consideration of one of the Section 3553(a) factors, it is no answer for the appellate court simply to consider the case record in its entirety and determine whether the resulting sentence complied with Section 3553(a) and the listed factors. To do so would mean substituting the discretion of the appellate court for that of the trial court in determining how to apply the factors listed in Section 3553(a). This, of course, would not be consistent with

the deference to which the trial court is entitled as to the substantive reasonableness of the sentence.

It is for these reasons that a trial court's explanation of its sentencing is essential if there is to be meaningful appellate review of the procedural reasonableness of a sentence. *See Gall*, 552 U.S. at 50 ("After settling on the appropriate sentence, [the judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."); *Rita*, 551 U.S. at 357 ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.") And while it may be appropriate for a reviewing court to consider the transcript of the sentencing hearing in addition to the court's statement of reasons, *see*, *e.g.*, *United States v. Petters*, 663 F.3d 375, 386 (8th Cir. 2011) (noting that the court "created a meaningful record for appellate review"), it is critically necessary that the trial court make clear that it has considered and addressed any non-frivolous argument that a party has made regarding sentencing.[2]

---

[2] *See e.g. Gall v. United States*, 552 U.S. 38, 49-50, 128 S. Ct. 586, 596-97, 169 L. Ed. 2d 445 (2007) ("Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. . . . After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

As the Court explained in *Rita*, the judge's explanation satisfies a number of important policy considerations. *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 2468, 168 L. Ed.

III. Ensuring that trial courts consider Section 3553(a)(6) is particularly critical in ensuring the individualized sentencing decision mandated by Section 3553(a)'s parsimony provision.

While consideration of all of the factors listed in Section 3553(a) are necessary to a procedurally reasonable sentence, the directive that courts seek to avoid unwarranted disparities between sentences is particularly important. Recent studies have confirmed that there are, in fact, significant disparities among the sentences that criminal defendants receive in federal cases. The significance of the existence of these inter-judge disparities does not lie in the mere fact that the disparities exist, because there are certainly reasonable bases on which defendants receive disparate sentences. *See e.g. United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009) (though there was disparity between defendant's and co-defendant's sentence, the two were not similarly situated in that co-defendant pleaded guilty to one count and defendant was convicted of fourteen counts, co-defendant received downward departure for substantial assistance and defendant had much more significant role in the scheme and received much

---

2d 203 (2007) (noting a judge's explanation "reflects sound judicial practice" and evidences that "Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust."). Further, the explanation not only shows "that the sentencing process is a reasoned process but also helps that process evolve." *Rita v. United States*, 551 U.S. 338, 357, 127 S. Ct. 2456, 2469, 168 L. Ed. 2d 203 (2007).

larger profits than his co-defendant). The important question for trial courts is whether any disparity in sentence between defendants is "unwarranted." 18 U.S.C. § 3553(a)(6) (requiring court to consider avoiding unwarranted sentencing disparities); *See also United States v. Ausburn,* 502 F.3d 313, 330 (3d Cir. 2007) (holding that the district court must demonstrate that it gave meaningful consideration to counsel's arguments about an unwarranted disparity between the similarly situated defendants). And the risk of unwarranted sentencing disparities arises, at least in large part, from the tension between the application of generalized characteristics in the Guidelines and the mandate that a court conduct individualized consideration of what sentence is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a).

The risk of sentencing disparities is particularly acute where, as here, the manner in which the advisory Guidelines range that applies to the offense in question is driven by factors that do not reflect the Sentencing Commission's expertise but are fixed instead by Congressional directive. Indeed, this Court has recognized the ability and power of a district court to disagree with Guidelines provisions on the ground that its fact-finding does not support the policy-making underlying such provisions. *Kimbrough v. United States*, 552 U.S. 85, 101, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). In this case, the severity of the loss value table in Section 2B1.1 is the result of a specific statutory directive from Congress, and does not reflect the exercise of the Sentencing Commission's expertise in identifying common trends in sentences bearing particular characteristics. *See* 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 56 ("Fifteen Year Report") (2004), http://www.ussc.gov/-15_year/15year.htm. The fact that the guidance provided by the Guidelines loss value table does not reflect empirical evidence or the expertise of the Sentencing Commission increases the possibility that application of that guidance may resulted in unwarranted sentencing disparities. This increased possibility makes it even more important that trial courts give full and fair consideration to arguments regarding the need to avoid unwarranted sentencing disparities and that appellate courts ensure that trial courts have done so.

IV. The Court should therefore require that trial courts specifically address non-frivolous arguments relating to the Section 3553(a) factors as the only means to ensure the procedural reasonableness of federal criminal sentences, and find that the Eighth Circuit erred in this case by not imposing such a rule.

For the foregoing reasons, the Court should reject the failure of the Eighth Circuit Court of Appeals in this case to require that the trial court address each non-frivolous argument that a party makes regarding the Section 3553(a) factors. In this case, the failure of the trial court to state that it had considered and addressed the defendant's argument regarding unwarranted sentencing disparities left the appellate court to engage in sheer guesswork to conclude that the trial judge had considered that argument. And for the appellate court to engage in such guesswork meant

that it inevitably abandoned its essential role in ensuring that trial courts comply with Section 3553(a).

In this case, the trial court failed to make any record that it considered the defendant's non-frivolous argument regarding the need to avoid unwarranted sentencing disparities.[3] In its decision (included in the Appendix at pages 69 to 135), the district court listed five arguments that it identified as the basis for the defendant's motion for variance and discussed each one these items separately – (1) that the calculated advisory Guidelines range was fundamentally unreasonable; (2) the defendant's motive in committing the conduct involved; (3) defendant's charitable and civic activities; (4) defendant's special relationship with his developmentally disabled son; and (5) defendant's history of depression. *See* Appendix at 129-133. The trial court then stated that it "carefully considered all of the statutory factors set forth in 18 U.S.C. § 3553(a)" and imposed sentence without further discussion of those factors. App. at 133. The trial court never even mentioned the defendant's

---

[3] *See* Defendant's Sentencing Memorandum at Docket 879, pp 47-49, where defendant argued that the district court should consider the sentencing disparity of the codefendants and of similarly situated defendants. For instance, the Sentencing Memorandum noted that one codefendant received a sentence of only 41 months imprisonment, which is an excessive disparity, even after accounting for the cooperation of that codefendant. The Sentencing Memorandum also listed a number of infamous individuals (such as Marc Dreier, Jeffrey Skilling, Bernard Ebbers, John Rigas, etc.) that caused far greater losses than the defendant and yet they received lighter sentences. Likewise, similarly situated defendants that caused a similar amount of losses received sentences ranging from a year and a day to nine years, but did not approach the length of defendant's sentence.

argument regarding sentencing disparities in its decision, and gave no indication as to whether or how it had considered that argument in deciding upon the sentence it imposed.[4]

The Court of Appeals in this case therefore had no record from the district court whatsoever on which it could base a conclusion that the district court had complied with its obligation to consider all of the Section 3553(a) factors in considering the sentence to be imposed. *Gall*, 552 U.S. at 51. Indeed, in its treatment of this issue, the Court of Appeals erroneously substituted its judgment for that of the trial court – and determined that the defendant's disparity argument had no merit – as an impermissible proxy for determining whether trial court had itself considered that argument:

> Next Rubashkin argues that his sentence creates unwarranted disparities with similarly situated defendants. He points to data showing that fraud defendants with loss amounts in the $20-50 million range receive 145 month sentences on average. These figures do not show the degree of variation around that average, and district courts are certainly not required to impose an average sentence in every case. Such a requirement would cut directly against their broad sentencing discretion. *See Gall v. United States*, 552 U.S. 38 (2007);

---

[4] In this regard, the Eighth Circuit's statement in its discussion of this issue that "the district court explicitly discussed each possible basis for departure [sic], disproving Rubashkin's contention that it overlooked them," App. at 39, is simply incorrect.

> *United States v. Booker*, 543 U.S. 220 (2005). Nor does the sentencing information advanced by Rubashkin at all suggest that the district court in this case failed to consider § 3553(a).

App. at 38. Notwithstanding the absence of any mention of the sentencing disparity factor in the district court's opinion, the Court then asserted that "the district court explicitly discussed each possible basis for [variance]" and that this "disprov[ed] Rubashkin's contention that it overlooked them." App. at 39.

In this case, the trial court may or may not have considered the defendant's non-frivolous argument based upon the need to avoid unwarranted sentencing disparities. But because the trial court in fact did not state that it had considered the sentencing disparities argument or indicate how it resolved that argument, the appellate court had no other means to consider it than to guess at what the trial court ***would have done*** if it had considered that argument. In doing so, the Court of Appeals abandoned its assigned role to ensure that trial court sentence defendants in a procedurally reasonable manner so as to justify the deference shown to the trial court's substantive sentencing decision.

In this regard, the Court of Appeals was correct in stating that a "mechanical recitation of the § 3553(a) factors" should not be required. App. at 39. By necessity, what will constitute a sufficient explanation in each case will be highly dependent on the facts of that case. But it cannot have been sufficient for the district court in this case merely to make a formal recitation that it had considered all of the factors in

Section 3553(a) without any recognition of an important, non-frivolous argument made by a defendant. App. at 133.[5] Procedural reasonableness requires that the district court make clear that it acknowledges the existence of a non-frivolous argument by a party in the case, that the district court explain why it accepted or rejected the argument and what, if any, effect the argument has had on the court's decision as to the ultimate sentence to be imposed. This is the bare minimum that is sufficient to permit appellate courts to ensure that the trial courts are complying with the directive of Congress to consider the factors listed in Section 3553(a) and the requirements of procedural reasonableness (as explained by this Court) that justify the deference with which appellate courts treat the ultimately decision-making of trial courts in imposing sentence.

In failing to remand this case for resentencing on the ground that the trial court failed to make a record of its consideration of the sentencing disparities argument, the Eight Circuit Court of Appeals acted at odds with the rule imposed in at least three other Circuits. *See*, *e.g.*, *United States v. Friedman*, 658 F.3d 342, 363 (3d Cir. 2011) (where defendant raised argument in sentencing memorandum of unwarranted sentencing disparities under Section 3553(a)(6), district court's failure to do more than simply "generally state[] that it had considered the § 3553(a) factors" was procedural error); *United States v. Clark*,

---

[5] Indeed, the omission of any mention of the sentencing disparities argument is particularly glaring in this case given the district court's particularized treatment of each of the five other arguments for variance listed above. App. at 129-33.

383 Fed.Appx. 310, 2010 WL 2464979 at 1-2 (4th Cir. 2010) (finding sentence not procedurally reasonable because district court failed to address defendant's sentencing disparity argument or to "explain its individualized assessment of the applicable § 3553(a) factors, with result that appellate court was "simply unable to gauge whether the district court considered the parties' arguments and the applicable sentencing factors and had a reasoned basis for its decision"); *United States v. Wallace*, 597 F.3d 794, 803 (6th Cir. 2010) (noting that when defendant raises a particular non-frivolous argument in seeking lower sentence, "the record must reflect both that the district court considered the defendant's argument and that the judge explained the basis for rejecting it" and finding that based on the record in that case, the appellate court "ha[d] no way of knowing how or what extent the disparity argument influenced the district judge's eventual sentence").[6] These Courts of Appeal have recognized that a trial court's failure to make a sufficient record of consideration of a non-frivolous argument regarding a Section 3553(a) sentencing factor is procedurally unreasonable, and that a district court must state on the record that it has considered

---

[6] In fact, the Eighth Circuit Court of Appeals itself has applied this rule, but in the context of an appeal by the government, asserting a failure of the district court to explain adequately a downward variance. *See United States v. Shy*, 538 F.3d 933, 937 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1689 (2009) (finding that district court's failure to address need to avoid unwarranted sentencing disparities was procedural error, and "[g]iven this procedural error, we are not able to conduct a meaningful review of the reasonableness of [the defendant's] sentence"). Surely, the procedural reasonableness of a sentence does not depend on which party asserts before the appellate court that the district court did not act in accordance with the law.

such an argument and provide an individualized explanation of how that argument impacted the sentence it imposed. This Court should endorse such a rule, and should remand this case for resentencing on that basis.

CONCLUSION

For the reasons set forth in this brief, *amici curiae* urge the Court to resolve the split in the Circuits on this issue, and to provide guidance to the Courts of Appeal by making clear the requirement that sentencing judges state on the record that they have considered each non-frivolous argument for variance under the factors listed in Section 3553(a) and how and why each such argument affected the sentence imposed.

Respectfully submitted,

David B. Deitch
Counsel of Record
Alain Jeff Ifrah
Ifrah PLLC
1717 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006-2004
(202) 524-4140
ddeitch@ifrahlaw.com

Counsel for Amici Curiae,

Pat Nolan
Vice-President
Justice Fellowship

Professor Barbara Bader Aldave
University of Oregon School of Law

Professor Robert H. Aronson
University of Washington School of Law

Professor John S. Baker Jr.
Louisiana State University Law School

Professor Fletcher N. Baldwin
University of Florida

Professor Ricardo J. Bascuas
University of Miami School of Law

Professor Craig Bradley
Indiana University

Professor James E. Coleman, Jr
Duke University School of Law

Professor Randall Coyne
University of Oklahoma

Professor Steven B. Duke
Yale Law School

Professor Alfredo Garcia
St. Thomas University School of Law

Professor Sheri L. Johnson
Cornell University

Harold J. Krent
Dean & Professor
IIT Chicago-Kent College of Law

Professor Arnold Loewy
Texas Tech School of Law

Professor Michael Meltsner
Northeastern University School of Law

Professor Michael Millemann
University of Maryland

Professor Wallace Mlyniec
Georgetown University

Professor Eddie Ohlbaum
Temple University

Professor Michael J. Saks
Sandra Day O'Connor College of Law
Arizona State University

Professor David Swank
Oklahoma University

Professor Robert Steinbuch
University of Arkansas

Professor Stephen Thaman
Saint Louis University

Dean and Professor David Yellen
Loyola University Chicago School of Law