CRIMINAL LAW — SENTENCING GUIDELINES — NINTH CIRCUIT FINDS A WITHIN-GUIDELINES SENTENCE FOR ILLEGAL REENTRY TO BE SUBSTANTIVELY UNREASONABLE. — *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir.), *reh'g en banc denied*, 586 F.3d 1176 (9th Cir. 2009).

Since the Supreme Court's landmark decision in *United States v. Booker*,[1] which rendered the Federal Sentencing Guidelines advisory[2] and required courts of appeals to review district court sentences for unreasonableness,[3] the proper application of appellate review to district court sentencing has remained unsettled. In response to *Booker*, the Ninth Circuit has promoted a deferential standard of review, which has empowered district courts to conduct discretionary sentencing. Recently, in *United States v. Amezcua-Vasquez*,[4] a panel of the Ninth Circuit, for the first time in a published opinion of the circuit,[5] overturned a district court's sentence within the Guidelines range for being substantively unreasonable.[6] Its reasoning was based not on a typical application of the deferential abuse of discretion standard, but rather on a distinction between "defendant-specific" and "offense-specific" factors, whereby sentencing decisions based on the latter receive less deferential review.[7] As a result, the opinion creates an unjustified exception to uniformly deferential review and undermines the Ninth Circuit's policy of promoting district court discretion.

Javier Amezcua-Vasquez ("Amezcua") was a citizen of Mexico and had lived in the United States as a permanent resident since 1957.[8] In 1981, he was convicted of attempted voluntary manslaughter and assault with great bodily injury for stabbing someone at a bar during a gang fight; he was sentenced to four years in prison and released on parole in 1984.[9] In 2006, twenty-five years after his conviction, authorities deported Amezcua to Mexico for having committed an aggravated felony as an alien.[10] Two weeks after his deportation, Amezcua was arrested as he attempted to reenter the United States illegally.[11]

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[1] 543 U.S. 220 (2005).

[2] *Id.* at 245.

[3] *Id.* at 261.

[4] 567 F.3d 1050 (9th Cir.), *reh'g en banc denied*, 586 F.3d 1176 (9th Cir. 2009).

[5] *Amezcua-Vasquez*, 586 F.3d at 1176 (O'Scannlain, J., dissenting from denial of rehearing en banc). The only prior instance of such a holding in the Ninth Circuit was in an unpublished opinion. *See* United States v. Paul, 239 Fed. App'x 353 (9th Cir. 2007) (per curiam).

[6] *Amezcua-Vasquez*, 567 F.3d at 1058.

[7] *Id.* at 1057.

[8] *Id.* at 1052.

[9] *Id.*

[10] *Id.*

[11] *Id.*

Amezcua pled guilty in the United States District Court for the Southern District of California, without a plea agreement, to attempted illegal reentry.[12] Under the Guidelines, a judge must calculate the offense level of the defendant's crime and then his criminal history category; the two computations together determine the appropriate sentencing range.[13] Following the Guidelines, the district judge applied a 16-level enhancement to Amezcua's base offense level because Amezcua's 1981 conviction counted as a "crime of violence."[14] This resulted in a Guidelines range of 46 to 57 months, followed by 2 to 3 years of supervised release.[15]

Acknowledging that the Guidelines were ruled advisory in *Booker*, the district judge discussed the various statutory sentencing factors required under 18 U.S.C. § 3553(a)[16] and noted Amezcua's family network in and long ties to the United States, as well as his history of drug abuse, run-ins with the law, and prior convictions (which also included drunk driving and battery).[17] The judge sentenced Amezcua to 52 months in prison — the middle of the Guidelines range.[18]

Amezcua appealed his sentence to the Ninth Circuit, arguing that it was both procedurally and substantively unreasonable.[19] Amezcua argued that the district judge's 16-level enhancement to the offense level, although technically correct,[20] was substantively unreasonable because it was based on a 1981 conviction.[21] Convictions this old do not count under the criminal history category,[22] arguably indicating a judgment by the Sentencing Commission that "convictions over fifteen years old serve no legitimate sentencing purpose."[23] The panel unanimously agreed,[24] holding that the district judge should have considered the age

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12 *Id.* The relevant criminal statute for illegal reentry is 8 U.S.C. § 1326(a)–(b) (2006).

13 U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2008).

14 *Amezcua-Vasquez*, 567 F.3d at 1053 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2008)) (internal quotation marks omitted); *see id.* at 1052–53.

15 *Amezcua-Vasquez*, 567 F.3d at 1053; *see* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl (2008).

16 18 U.S.C. § 3553 (2006).

17 *Amezcua-Vasquez*, 567 F.3d at 1052 n.1, 1053.

18 *Id.* The sentence also included three years of supervised release.

19 *Id.* at 1053–54.

20 *Id.* at 1054.

21 Appellant's Opening Brief at 14, *Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (No. 07-50239), 2007 WL 3192534, at *14.

22 U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(e) (2008). Under the Guidelines, courts do not consider convictions over 15 years old when calculating a criminal history score. *See id.*

23 Appellant's Opening Brief, *supra* note 21, at 14.

24 Judge Canby's opinion was joined by Judges Kleinfeld and Bybee. The panel rejected the procedural unreasonableness claim, holding that the district judge had sufficiently considered all of the relevant factors under § 3553 to justify his sentencing decision on procedural grounds. *Amezcua-Vasquez*, 567 F.3d at 1053–54.

of the prior conviction during sentencing because it was unreasonable to assume that a "decades-old prior conviction is deserving of the same severe additional punishment as a recent one."[25] As a result, the panel held that the district judge had committed clear error by failing to consider, as a § 3553(a) factor, the timing of the 1981 conviction and by failing to vary the sentence accordingly.[26]

In order to distinguish prior Ninth Circuit decisions, which had applied a highly deferential review of district court sentences even when the courts had sentenced outside the Guidelines range,[27] the panel distinguished between "defendant-specific" and "offense-specific" § 3553(a) factors.[28] The court reasoned that for "defendant-specific" factors, which relate to the defendant's personal background, the district judge deserves more deference because he is in a "superior position to adjudge."[29] But for "offense-specific" factors, which relate to the nature of the crime, the district judge is not in a superior position and therefore deserves less deference.[30] The panel then found that the district judge's sentencing decision overstated offense-specific factors and should have paid greater attention to the defendant-specific factor that Amezcua's prior conviction was stale and therefore mitigated the gravity of his illegal reentry.[31]

A majority of the Ninth Circuit denied a judge's sua sponte request for rehearing en banc,[32] and Judge O'Scannlain dissented.[33] The dissent criticized the panel's distinction between "offense-specific" and "defendant-specific" sentencing factors and argued that the distinction had "no support in Supreme Court precedent"[34] and would be a "lasting source of confusion"[35] for future judges. Instead, under Ninth Circuit precedent the panel should have applied the same deferential standard of review irrespective of the offense- or defendant-specific nature of the § 3553(a) factors.[36] The dissent also argued that the panel's decision was in tension with the Supreme Court's decision in *Kim-*

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[25] *Id.* at 1055–56.

[26] *Id.* at 1055.

[27] *Id.* at 1056 (citing United States v. Ruff, 535 F.3d 999 (9th Cir. 2008); United States v. Whitehead, 532 F.3d 991 (9th Cir. 2008) (per curiam)).

[28] *Id.* at 1057.

[29] *Id.*

[30] *See id.*

[31] *See id.*

[32] United States v. Amezcua-Vasquez, 586 F.3d 1176 (9th Cir. 2009).

[33] *Id.* at 1176 (O'Scannlain, J., dissenting from denial of rehearing en banc). Judge O'Scannlain's dissent was joined by Chief Judge Kozinski and Judges Gould, Tallman, Callahan, Bea, and N.R. Smith.

[34] *Id.* at 1178.

[35] *Id.* at 1179.

[36] *Id.* at 1178.

brough v. United States,[37] which had held that a district court has discretion to disagree with Guidelines policies and sentence below the recommended range.[38] The panel was now *requiring* a district court to depart from the Guidelines based on the *appellate court's* policy disagreement with the Guidelines.[39]

In response to the Supreme Court's decision in *Booker*, the Ninth Circuit has generally allowed district courts to conduct discretionary sentencing by reviewing their sentences with great deference; as a result, the Ninth Circuit, more than any other circuit, has empowered district courts to issue sentences below Guidelines ranges.[40] The natural consequence of deferential review of below-Guidelines sentences has been that within-Guidelines sentences have been reviewed with similar deference. This approach accords with the Supreme Court's decision in *Gall v. United States*,[41] which required the courts of appeals to "review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse-of-discretion standard."[42] While the Ninth Circuit has sometimes vacated below-Guidelines sentences as abuses of discretion, within-Guidelines sentences have almost never been disturbed.[43] But in *Amezcua*, the panel carved out a potentially broad exception to deferential review through its distinction between offense- and defendant-specific factors, which could lead to more rigorous scrutiny of district court decisions that issue within-Guidelines sentences. This needless distinction runs counter to Ninth Circuit precedent and is contrary to the Ninth Circuit's uniform policy of reserving sentencing decisions to district courts, not appellate courts, whether the sentences are inside or outside the Guidelines.

Although *Booker* declared the Guidelines advisory, they have continued to exert a gravitational pull on sentences across the country, giving rise to what one judge has deemed "guidelinitis," or the "inability of most federal courts to break their habit of mechanically relying

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[37] 128 S. Ct. 558 (2007).

[38] *Id.* at 564; *see Amezcua-Vasquez*, 586 F.3d at 1179 (O'Scannlain, J., dissenting from denial of rehearing en banc). In *Kimbrough*, the district court had imposed a sentence significantly below the Guidelines range due to a disagreement with the 100:1 disparity for crack versus powder cocaine in the Guidelines sentences. *Kimbrough*, 128 S. Ct. at 565.

[39] *Amezcua-Vasquez*, 586 F.3d at 1179 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[40] *See* Anne Louise Marshall, Note, *How Do Federal Courts of Appeals Apply* Booker *Reasonableness Review After* Gall*?*, 45 AM. CRIM. L. REV. 1419, 1432 (2008) ("The standard as applied by the Ninth Circuit is the most deferential to the district court's determination to use discretion.").

[41] 128 S. Ct. 586 (2007).

[42] *Id.* at 591.

[43] *See Amezcua-Vasquez*, 586 F.3d at 1176 (O'Scannlain, J., dissenting from denial of rehearing en banc).

just on the guidelines alone."[44] However, the Ninth Circuit has been in the vanguard of resisting "guidelinitis" by affording its district courts broad discretion to sentence outside the Guidelines. For example, although most courts of appeals adopted a presumption of reasonableness for any sentence within the Guidelines range,[45] the Ninth Circuit has expressly refused to adopt such a presumption.[46]

The broad discretion the Ninth Circuit affords to district courts plays out most vividly in the approval of sentences significantly below the Guidelines range. In *United States v. Whitehead*,[47] a defendant who committed fraud totaling over $1 million received no prison time despite a Guidelines range of 41 to 51 months in prison.[48] The *Whitehead* panel remarked that the Supreme Court wanted *Booker* to "empower[] district courts, not appellate courts . . . [and] breathe[] life into the authority of district court judges to engage in individualized sentencing."[49] Noting the district judge's superior ability to assess the "nature of the crime and [the] defendant's role in it," the Ninth Circuit upheld the sentence notwithstanding the large disparity between the recommended and actual sentences.[50]

In light of the Ninth Circuit's policy of deferential review of below-Guidelines sentences, the *Amezcua* panel's decision to reverse Amezcua's properly calculated within-Guidelines sentence is hard to justify. Instead of reviewing Amezcua's sentence with its typical deference, the panel rejected the district court's judgment and concluded that even though there was ample legal justification for ignoring the staleness of Amezcua's 1981 conviction,[51] the sentence was unreasonable "under

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[44] United States v. Sedore, 512 F.3d 819, 829 (6th Cir. 2008) (Merritt, J., dissenting).

[45] Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625, 631 (2007); *see also* Nancy J. King, *Reasonableness Review After* Booker, 43 HOUS. L. REV. 325, 335 & n.47 (2006) (listing various circuits that have adopted such a presumption). The Supreme Court approved this approach in *Rita v. United States*, 127 S. Ct. 2456 (2007), when it upheld, but did not mandate, the use of a rebuttable presumption of reasonableness for appellate review of within-Guidelines sentences. *Id.* at 2462.

[46] United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008). However, the Ninth Circuit has held that a within-Guidelines sentence will "usually be reasonable." *Id.* at 994 (quoting *Rita*, 127 S. Ct. at 2465) (internal quotation mark omitted).

[47] 532 F.3d 991 (9th Cir. 2008) (per curiam).

[48] *Id.* at 992.

[49] *Id.* at 993 (second and third alterations in original) (quoting United States v. Vonner, 516 F.3d 382, 392 (6th Cir. 2008) (en banc)).

[50] *Id.* Similarly, in *United States v. Ruff*, 535 F.3d 999 (9th Cir. 2008), a defendant who had embezzled $644,866 from a hospital received a sentence of one day in prison despite a Guidelines range of 30 to 37 months. *Id.* at 1001. The Ninth Circuit upheld the sentence, *id.* at 1004, quoting the same language from *Whitehead* about *Booker*'s intent to promote individualized sentencing in district courts, *id.* at 1002.

[51] *Amezcua-Vasquez*, 567 F.3d at 1054–55 (citing United States v. Lara-Aceves, 183 F.3d 1007, 1013–14 (9th Cir. 1999) (holding, pre-*Booker*, that on facts similar to those in *Amezcua* the district judge could apply an aggravated felony enhancement to the crime of illegal reentry, even though

the circumstances of this case."[52] These circumstances included Amezcua's "subsequent history showing no convictions for harming others or committing other crimes listed in Section 2L1.2."[53] But this holding is cannily phrased to omit mentioning Amezcua's subsequent misbehavior, including convictions for battery, violation of a court order, and driving under the influence, as well as multiple law enforcement contacts for drug use.[54] The panel assumed that Amezcua's subsequent crimes were essentially harmless, a dubious assumption and a purely factual, not legal, consideration that should have been left to the district court to judge.

Although the panel never explicitly claimed to apply a more stringent standard of review than that usually required by Ninth Circuit precedent, its unusually searching review of the district court's sentencing judgment suggests a standard other than abuse of discretion. In fact, Judge O'Scannlain's dissent suggested that the panel's review was close to de novo review, akin to no deference at all.[55] Although this interpretation is probably overstated, the dissent was right to note the panel's unconvincing distinction between offense-specific and defendant-specific factors, which the panel used to explain its deviation from the much more deferential standard of review used in *Whitehead*.

The premise of the panel's distinction between offense-specific and defendant-specific factors is that sentencing judges are comparatively better only at assessing defendant-specific factors.[56] One way to think about the distinction is that offense-specific factors relate to the nature of the actual conduct, such as the harm to the victim or the amount of money stolen, whereas defendant-specific factors relate to the characteristics of the defendant independent of the actual crime, such as his criminal history or family circumstances.[57] But the panel failed to

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the prior conviction was excluded from the criminal history category, due to "the plain language of the Sentencing Guidelines and the distinct policies underlying the calculation of the offense level and criminal history category, as well as the reasoning of our sister circuits," *id.* at 1014), *overruled on other grounds by* United States v. Rivera-Sanchez, 247 F.3d 905, 909 (9th Cir. 2001) (en banc)). Amezcua's appellant brief seemed to agree that *United States v. Lara-Aceves*, 183 F.3d 1007, was a significant hurdle and attempted to argue that it was no longer good law. *See* Appellant's Opening Brief, *supra* note 21, at 23. But the *Amezcua* panel simply ignored *Lara-Aceves* due to the unique "circumstances of [Amezcua's] case," *Amezcua-Vasquez*, 567 F.3d at 1055; it did not overrule *Lara-Aceves*, *see id.* at 1054–55.

[52] *Amezcua-Vasquez*, 567 F.3d at 1055.

[53] *Id.*

[54] *Id.* at 1052 nn.1–2.

[55] United States v. Amezcua-Vasquez, 586 F.3d 1176, 1179 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[56] *See Amezcua-Vasquez*, 567 F.3d at 1057.

[57] *Cf.* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 277 (2005) (contrasting "offense conduct" with "offense characteristics" — that is, defendant-specific facts — in sentencing).

provide any meaningful explanation of its distinction. The panel suggested at one point that the staleness of Amezcua's 1981 conviction was a defendant-specific factor.[58] In fact, the staleness of a prior conviction could make sense as either a defendant- or offense-specific factor: on the one hand, it relates specifically to the conduct and can be assessed independently of the defendant (offense-specific);[59] on the other hand, it also has a bearing on assessing the defendant's risk of recidivism (defendant-specific).

Moreover, the panel failed to explain how this purported distinction between offense- and defendant-specific factors works in conjunction with § 3553(a). One of the § 3553(a) considerations is "the nature and circumstances of the *offense* and the history and characteristics of the *defendant*."[60] This combination of "offense-specific" and "defendant-specific" characteristics in one statutory factor suggests that Congress intended sentencing judges to consider both types of characteristics holistically, contradicting the panel's implication that sentencing judges should have wide discretion only with respect to the § 3553(a) factor's latter half.[61] Moreover, many of the § 3553(a) factors do not lend themselves to simple offense- versus defendant-specific categorization at all. For example, § 3553(a)(2)(B) requires sentencing judges to consider the need for a sentence to "afford adequate deterrence to criminal conduct."[62] But estimating optimal deterrence depends on both the defendant's probability of recidivism (defendant-specific) *and* the severity of the offense (offense-specific), as well as a judge's larger outlook on the effectiveness of prison time as a deterrent, which falls under neither category.

Finally, the panel predicated its less deferential standard of review on the erroneous assumption that sentencing judges have an institutional advantage only in addressing defendant-specific factors. The Supreme Court held in *Gall* that district judges are in a "superior position" to assess the circumstances relevant to sentencing and to "judge their import,"[63] without drawing any lines between which factors are

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[58] *See Amezcua-Vasquez*, 567 F.3d at 1057 ("[T]he district court applied the Guidelines sentence without considering the *defendant-specific facts* that made the resulting sentence unreasonable under § 3553(a) — i.e., the staleness of the predicate prior conviction . . . ." (emphasis added)).

[59] The prior conviction relates to the offensive conduct because illegal reentry after deportation is a more serious crime if the defendant has previously committed a violent felony. *See id.* at 1055.

[60] 18 U.S.C. § 3553(a)(1) (2006) (emphases added).

[61] Inexplicably, the panel suggested that "offense-specific" sentencing factors include § 3553(a)(1)–(2)(A), *Amezcua-Vasquez*, 567 F.3d at 1057, even though § 3553(a)(1) includes references to "the history and characteristics of the defendant," § 3553(a)(1).

[62] § 3553(a)(2)(B).

[63] Gall v. United States, 128 S. Ct. 586, 597 (2007) (quoting Brief Amici Curiae of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioner at 16, *Gall*, 128 S. Ct. 586 (No. 06-7949), 2007 WL 2197511, at *16).

more or less amenable to district court discretion. Indeed, both offense- *and* defendant-specific factors are highly contextual and best judged at the district court level. For example, the Guidelines sometimes require an offense-level enhancement based on harm to the victim[64] or the victim's status as unusually vulnerable.[65] These factors are offense-specific and assessing them for the purpose of sentencing enhancement often depends on hearing live witness testimony, which district courts are in a better position to do. And to the extent that the panel's understanding of "offense-specific" refers to the policy behind a particular Guidelines offense-level enhancement,[66] the Supreme Court in *Gall* emphasized that district courts have "an institutional advantage over appellate courts in making [sentencing] determinations, especially as they see so many more Guidelines sentences than appellate courts do."[67] Such experience allows district courts to understand better the policy behind any offense-level enhancement in the Guidelines and determine when a departure is warranted.

The correct approach in *Amezcua* would have been to apply the deferential standard of review typified in *Whitehead* and uphold Amezcua's sentence as reasonable. The hybrid approach that the *Amezcua* panel actually took will result in arbitrary review of sentencing decisions. Although the panel claimed to limit its holding to the unusual circumstances of Amezcua's case, where the timing of his prior conviction was a unique fact that the appellate court could judge just as well as the district court, the panel's opinion sweeps much more broadly and suggests that *any* offense-specific enhancement could be reviewed less deferentially. Since district judges necessarily rely on numerous sentencing factors to calculate a sentence, defendants will now seek to overturn their sentences by attempting to fit one of the judge's sentencing factors into the offense-specific category in order to authorize more searching appellate review. Defendants who are unable to characterize their sentencing factors as offense-specific will be left with a less favorable standard of review. This new distinction not only constrains district judges' ability to engage in discretionary sentencing, but also will lead to arbitrary discretion at the appellate level.

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[64] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 2A2.1(b)(1), 2B3.1(b)(3) (2008).

[65] *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) & n.2 (2008) (stating that enhancement applies when the victim is "unusually vulnerable due to age [or] physical or mental condition").

[66] *Cf.* Berman, *supra* note 57, at 282 ("Federal Sentencing Guidelines are a bit more nuanced, but similarly emphasize offense conduct relative to offender characteristics. The bulk of the Guidelines' intricate sentencing instructions to judges focuses on various aspects of offense conduct . . . .").

[67] *Gall*, 128 S. Ct. at 598 (quoting Koon v. United States, 518 U.S. 81, 98 (1996)) (internal quotation mark omitted).