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## A DOG IN THE FIGHT – *U.S. v. HARGROVE* AND WHY AMERICANS SHOULD CARE ABOUT SENTENCING GUIDELINES IN ANIMAL CRUELTY CASES

United States v. Hargrove<sup>1</sup>

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I understand the strong emotions by some people about our family's decision to care for a pet. As a father, it is important to make sure my children develop a healthy relationship with animals . . . [t]his is an opportunity to break the cycle. To that end, I will continue to honor my commitment to animal welfare and be an instrument of positive change.<sup>4</sup>

Michael Vick

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11701 F.3d 156 (4<sup>th</sup> Cir. 2012) cert. dismissed, 12-9127, 2013 WL 867510 (U.S. Apr. 19, 2013).

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4Leslie Smith, Confirmed: Michael Vick has a dog, issues statement, DOGTIME, <http://dogtime.com/confirmed-michael-vick-has-a-dog-issues-statement.html> (Oct. 12, 2012).

## Introduction

On December 10, 2007, Michael Vick pleaded guilty to 1 count of violating the Animal Fighting Venture Prohibition<sup>5</sup> for “knowingly sponsoring and exhibiting an animal in an animal fighting venture.”<sup>6</sup>In April 2007, federal, state and local authorities began the “The Bad Newz Kennels dogfighting investigation,”<sup>7</sup> which revealed a systematic and pervasive dogfighting operation. Led by Vick and several other individuals (commonly referred to as the “Bad Newz Kennel” business enterprise),<sup>8</sup> the dogfighting operation resulted in the deaths of 6 to 8 dogs. After they refused to fight, some of the dogs were hanged or drowned.<sup>9</sup>

Additionally, more than 50 American Pit Bull Terriers rescued from the Bad Newz Kennels displayed signs of injuries.<sup>10</sup>Law enforcement officials also found evidence that Vick and others tortured some of the dogs during the Bad Newz Kennels operation.<sup>11</sup>Ultimately, Vick was charged with numerous violations of 7 U.S.C. § 2156(a)(1), and after pleading guilty was sentenced to 23 months imprisonment.<sup>12</sup>

Tragically, Vick’s case is not an isolated one. Despite being illegal in all 50 states,<sup>13</sup> dogfighting still occurs and often results in serious injury or death to the animals involved. For example, in *U.S. v. Hackman*<sup>14</sup> 2 defendants were convicted of violating 7 U.S.C. § 2156(a)(1) and sentenced to prison. One defendant was sentenced for twelve months and one day, the other for 18

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57 U.S.C. § 2156 (2013).

6Vick’s conduct violated 7 U.S.C. § 2156(a)(1) (the quote in the above paragraph was set forth in *U.S. v. Michael Vick*, Criminal No. 3:07CR277, Statement of Facts on Behalf of United States of America (hereinafter “Statement of Facts”) (E.D. Va. 2007).

7Details of the investigation are available at Rebecca J. Huss, *Lessons Learned: Acting As Guardian/Special Master in the Bad Newz Kennels Case*, 15 *ANIMAL L.* 69 (2008).

8Statement of Facts, *supra* note 6, at ¶ 3.

9Id. at ¶ 32.

10Id. at ¶33.

11Id. at ¶11.

12See *Michael Vick Sentenced to 23 Months*, CBSNEWS, [http://www.cbsnews.com/2100-400\\_162-3597108.html](http://www.cbsnews.com/2100-400_162-3597108.html) (Feb. 26, 2009).

13See Hanna Gibson, *Dog Fighting Detailed Discussion*, ANIMAL LEGAL & HISTORICAL CENTER, <http://www.animallaw.info/articles/ddusdogfighting.htm#legalstatus> (Dec. 29, 2012).

14630 F.3d 1078 (8th Cir. 2011).

months.<sup>15</sup>In *U.S. v. Courtland*,<sup>16</sup> 3 defendants convicted under the same statute were sentenced to 16, 18, and 24 months of imprisonment.<sup>17</sup>

Many states have their own anti-dogfighting laws, and these laws often carry stiffer penalties than the federal statute. For example, in *Ware v. State*<sup>18</sup> the Alabama Court of Criminal Appeals imposed a 20 year sentence on a defendant convicted of dogfighting charges. That sentence was held to be constitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>19</sup>In perhaps the most noteworthy dogfighting case to date, a defendant received a 102 year sentence for his repeated and prolonged engagement in dogfighting activities.<sup>20</sup>A more lenient sentence however was imposed in a Louisiana case, *State v. Schneider*,<sup>21</sup> where the defendant was given a five-year sentence after a conviction on dogfighting charges.<sup>22</sup>

While the facts of these cases are somewhat different - such as the severity of the offenses and the defendants' prior criminal histories - they all involve dogfighting activities where animals have been subjected to cruel torture and death. The alarming disparity in sentences imposed in animal cruelty cases warrants a further and principled inquiry into how, and to what extent these individuals should be punished. Focus should be placed on the Federal Sentencing Guidelines ("Guidelines")<sup>23</sup> and maximum sentences allowable by law. As argued below, increasing the baseline offense levels and maximum sentences for dogfighting and other crimes against animals will ensure

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<sup>15</sup>*Id.* at 1081.

<sup>16</sup>642 F.3d 545 (7th Cir. 2011).

<sup>17</sup>*Id.* at 549.

<sup>18</sup>949 So.2d 169 (Ala. Crim. App. 2006).

<sup>19</sup>*Id.* at 183.

<sup>20</sup>See *Man Receives 102 Year Prison Sentence for Dog Fighting Related Charges*, ITCHMO, <http://www.itchmo.com/man-receives-102-year-prison-sentence-for-dog-fighting-related-charges-3856> (Dec. 29, 2012).

<sup>21</sup>981 So.2d 107, 108 (La. Ct. App. 2008).

<sup>22</sup>See *id.*

<sup>23</sup>These Guidelines were developed by the United States Sentencing Commission, which was created by the Sentencing Reform Act of 1984, to "provide certainty and fairness" and avoid "unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct," subject to judicial flexibility to consider "relevant aggravating and mitigating factors." An Overview of the United States Sentencing Commission, available at [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited December 28, 2012).

the evolution of a purpose-driven jurisprudence that reflects the severity of these offenses and gives clarity to the goals of criminal punishment. These goals include retribution, deterrence, incapacitation, and rehabilitation. In a recent dogfighting case *U.S. v. Hargrove*,<sup>24</sup> the Fourth Circuit Court of Appeals affirmed the District Court's imposition of a 60-month sentence for violating 7 U.S.C. § 2156(b), providing a significant starting point for this discussion.

### U.S. v. Hargrove

In *U.S. v. Hargrove*, the defendant Harry Louis Hargrove was charged with, and pleaded guilty to violating 7 U.S.C. § 2156(b).<sup>25</sup> Hargrove received a 60-month sentence,<sup>26</sup> the statutory maximum allowed by 18 U.S.C. § 49.<sup>27</sup> He appealed to the Fourth Circuit Court of Appeals, arguing that the sentence was both procedurally and substantively unreasonable.<sup>28</sup>

#### A. Factual Background

Hargrove, a Vietnam War veteran, was described as a “legend”<sup>29</sup> in the dogfighting community and had “been involved in dogfighting activity for over 4 decades,” at one time having “approximately 250 fighting dogs on his property.”<sup>30</sup> One of Hargrove's fighting dogs Midnight Cowboy was extremely profitable due to his aggressiveness and propensity for fighting, and Midnight Cowboy's offspring sold for large amounts of money.<sup>31</sup> “Hargrove advertised his dogs in various dogfighting-related publications, and he [was] famous in the dogfighting industry for his dogfighting, his breeding activities, his training regimen, and his ability to produce aggressive

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<sup>24</sup>*Hargrove*, 701 F.3d at 156.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 163.

<sup>27</sup> “Whoever violates subsection (a), (b), (c), or (e) of section 26 of the Animal Welfare Act shall be fined under this title, imprisoned for not more than 5 years, or both, for each violation.” 18 U.S.C. § 49.

<sup>28</sup> Opening Brief for Appellant, 2011 WL 5548982, \*23 (2012).

<sup>29</sup> *Hargrove*, 701 F.3d at 158.

<sup>30</sup> *Id.* (this cite contains the latter 2 quotations in the sentence).

<sup>31</sup> See *id.*

fighting dogs.”<sup>32</sup>Hargrove’s criminal history included a felony dogfighting conviction in Georgia, as well animal fighting and cruelty misdemeanor convictions in North Carolina.<sup>33</sup>

After receiving tips that Hargrove was engaged in dogfighting on his property, state authorities began an undercover investigation using a confidential informant.<sup>34</sup>Hargrove’s arrest and plea resulted from the sale of an American Pit Bull Terrier to this informant.<sup>35</sup> The sale was completed after Hargrove demonstrated the dog’s “prowess”<sup>36</sup> by engaging it in a dogfight at his home.<sup>37</sup>Shortly thereafter, law enforcement officials obtained a search warrant and “seized 34 additional dogs which were eventually euthanized because of poor health, aggressive tendencies, or both.”<sup>38</sup>Officers also found tools on Hargrove’s property that were typically used for dogfighting, including a fighting pit covered with a significant amount of blood, jumper cables used to electrocute dogs that refused to fight, and a debris pit containing dog carcasses.<sup>39</sup>

#### B. The Legal Proceedings

The authorities charged Hargrove with one count of violating 7 U.S.C. § 2156(b), which makes it unlawful “for any person to knowingly sell, buy, possess, train, transport, deliver, or receive any animal for purposes of having the animal participate in an animal fighting venture.”<sup>40</sup>The statutory maximum for each violation of 18 U.S.C. § 49 is 60 months imprisonment.

Pursuant to the Guidelines, a probation officer prepared a pre-sentence report which recommended an advisory sentence guideline range of 10 to 16 months imprisonment.<sup>41</sup>The

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32Id.

33See id.

34Opening Brief for Appellant, Statement of Facts, 2011 WL 5548982 at \*5.

35See id.

36 Id.

37See id.

38Id.

39See id.

40Id.

41See id. For background information concerning the evolution and current application of the Guidelines, see Adam Lamparello, “Introducing the ‘Heartland’ Departure,” 27 HARVARD J.L. & PUB. POL’Y 643, 647-649 (2004); and Adam Lamparello, “Implementing the ‘Heartland Departure’ in a Post-Booker World,” 32 AMERICAN JOURNAL OF CRIMINAL

probation officer arrived at that guideline range by: (1) taking the dogfighting baseline offense level of 10;<sup>42</sup> (2) combining that baseline offense level with Hargrove's criminal history level of seven;<sup>43</sup> and (3) subtracting 2 points for Hargrove's acceptance of responsibility.<sup>44</sup> Hargrove objected to the probation officer's calculation, arguing that the advisory range should be zero to 6 months because his prior dogfighting convictions should not have been considered as part of his criminal history and thus should not have been used in determining his criminal history points.<sup>45</sup>

The United States Attorney did not contest the probation officer's guideline calculation, but instead filed a motion for an upward departure.<sup>46</sup> Among other factors, that motion was based upon Hargrove's history of extraordinary cruelty to animals, the violent nature of dogfighting, Hargrove's

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LAWAM.J.CRIM.L.135, 136 (2005). The Sentencing Reform Act of 1984 (the "Act") was designed to remedy the substantial disparities being imposed on defendants convicted of similar crimes. Prior to 1984, judges had nearly unfettered discretion when imposing sentences (provided any sentence imposed was within the statutory maximum for the particular offense). Judges were not, however, required to explain the reasons for their sentencing decisions, and there were no factors to guide their decision-making process. Furthermore, appellate review was virtually non-existent. Empirical evidence revealed that under this prior regime, sentencing decisions were often influenced by an individual's race, gender, and socio-economic status. Commentators described this system as "lawless," vesting judges, parole agencies and probation agencies with unchecked power. See Marvin E. Frankel, "Lawlessness in Sentencing," 41 U. CIN. L. REV. 1, 9-11 (1972). As a result, the Act was aimed at reducing disparity and producing consistent, principled, and purpose-driven sentencing decisions. To accomplish this, the Act established the Guidelines, comprised of a grid creating sentencing ranges based upon: (1) the severity of an offense; (2) an offender's prior criminal history; and (3) specific offense characteristics that enhanced culpability. After taking these factors into account, the Guidelines established a specific range within which a defendant would be sentenced for a particular crime. For example, if the guideline range was 51 to 61 months, the judge was required, in most cases, to sentence a defendant within that range. In this way, the Guidelines were, in most cases, binding on judges, severely limiting their discretion. While judges were permitted to depart from the guideline ranges, it was not a common occurrence. Consequently, the Act largely achieved its goals by limiting judicial discretion and requiring—except in rare cases—that defendants convicted of similar crimes be given substantially similar sentences. However, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court found the mandatory nature of the Guidelines' sentencing ranges unconstitutional, and returned back to judges a substantial amount of discretion. The Court held that the Guidelines violated the Sixth Amendment because they impermissibly permitted a judge to enhance a defendant's sentence based upon findings of fact that must, as a matter of due process, be found by a jury beyond a reasonable doubt. In other words, a court's sentence must be based solely on facts determined by a jury or admitted by the defendant. As a result, the Court severed and excised the provision of the Guidelines requiring judges to sentence defendants within the Guidelines' pre-determined sentencing ranges, thus rendering the Guidelines advisory. See *id.* at 246.

<sup>42</sup>U.S.S.G. § 2E3.1(a)(2).

<sup>43</sup>The probation officer apparently arrived at a level 7 criminal history by classifying the dogfighting operation as an ongoing offense and adding 3 points for Hargrove's prior felony dogfighting conviction and 1 point for his prior misdemeanor dogfighting conviction under U.S.S.G. § 3D1.2(d), adding 2 points because Hargrove's plea occurred while he was still on probation for the 1993 conviction under U.S.S.G. § 4A1.1(d), and adding another point for Hargrove's 2001 misdemeanor animal cruelty conviction under U.S.S.G. § 4A1.1(c).

<sup>44</sup>U.S.S.C. § 3E1.1.

<sup>45</sup>Hargrove, 701 F.3d at 159.

<sup>46</sup>See *id.* (author-describe what upward departure is).

extended multi-decade involvement in dogfighting, the desire for deterrence, and the need to protect the public.<sup>47</sup>In support of its motion, the United States Attorney included photographs detailing the condition of the dogs seized from Hargrove's residence, and a video of the dogfight demonstration Hargrove provided for the undercover informant.<sup>48</sup>

### C. The Sentencing Hearing

At Hargrove's sentencing hearing, the district court considered arguments from both the United States Attorney and Hargrove concerning the appropriate sentencing range.<sup>49</sup>While the probation officer recommended a guideline range of 10 to 16 months, Hargrove proposed a 0 to 6 month range. The district court however rejected both suggestions.<sup>50</sup> Instead, the district court discussed with the probation officer "the possibility of additional increases to the offense level calculation for more than minimal planning, vulnerable victims, and the role in the offense."<sup>51</sup>Based on these factors, the district court informed the parties that it intended to increase the base offense level.<sup>52</sup>

The district court then asked the United States Attorney to offer evidence in support of its motion for an upward departure or variance.<sup>53</sup>The United States Attorney presented testimony from a law enforcement agent who described the tools recovered from Hargrove's property as being used to increase a dog's aggressiveness and stamina. The agent discussed findings from a search of Hargrove's property, and detailed the sort of injuries dogs often suffer during dogfights.<sup>54</sup>With respect to the variance request, the United States Attorney emphasized the violent nature of

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47Id.

48Id.

49Id.

50Id.

51Id.

52Id.

53Hargrove, 701 F.3d at 159. A baseline offense level can be increased in certain circumstances, including where the crime involves extensive planning or the defendant's role is the crime is that of an organizer or leader, U.S.S.G. § 3B1.1, or where the victim of the crime is vulnerable, U.S.S.G. § 3A1.1.

54Id.

dogfighting and Hargrove's extensive, lengthy involvement in "breeding and training dogs for fighting."<sup>55</sup> The United States Attorney also argued that Hargrove "had not been deterred by his prior dogfighting-related convictions," and therefore deserved a longer sentence than those imposed on other defendants convicted under the same statute.<sup>56</sup> The United States Attorney requested an upward departure or variance and requested that Hargrove receive the statutory maximum sentence of 60 months imprisonment.<sup>57</sup>

After hearing the parties' arguments, the district court held that the appropriate Guideline calculation resulted in a sentence range of 41 to 51 months, far greater than the calculations suggested by either the probation officer or Hargrove.<sup>58</sup> The district court noted the "irrationality" of the dogfighting sentencing guideline.<sup>59</sup> The district court dismissed the 0 to 6 month sentence advocated by Hargrove, stating: "[O]ther than the criminal dog fighters in America, every other person in America would be shocked beyond belief that you could do what [Hargrove] did and come out with a federal sentence of 0 to 6 months. . . No one could defend that. No judges. No legislators. No president."<sup>60</sup>

The district court explained that due to the circumstances surrounding Hargrove's dogfighting activity, it would impose the statutory maximum sentence of 60 months.<sup>61</sup> The district court based its reasoning on the extreme cruelty of the offense, Hargrove's lack of remorse or sympathy for his actions, and Hargrove's continued involvement in dogfighting for many

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<sup>55</sup>Id.

<sup>56</sup>Id.

<sup>57</sup>Id. In favor of the 0 to 6 month sentencing range, Hargrove's counsel argued, among other things, that Hargrove was a "highly decorated military veteran who had been changed by his experience in Vietnam." Hargrove's counsel also argued that, in similar cases, defendants typically received sentences between 12 and 24 months. (insert something describing what variance is).

<sup>58</sup>Id. The district court reached this advisory sentence range by taking the baseline offense level of 10 and adding 2 levels for more than minimal planning, 4 levels for vulnerable victims, and 4 levels for aggravating role enhancement, then subtracting 2 levels for Hargrove's acceptance of responsibility. Opening Brief of Appellant, Statement of Facts.

<sup>59</sup>Hargrove, 701 F.3d at 159.

<sup>60</sup>Id. at 159-60.

<sup>61</sup>Id. at 159.



years.<sup>62</sup> Additionally, the district court expressed a desire to deter future similar crimes and avoid unwarranted sentencing disparities for similarly-situated defendants.<sup>63</sup>

Furthermore, the district court explained that even if it accepted Hargrove's proposed sentence range of 0 to 6 months, it still would sentence him to 60 months imprisonment.<sup>64</sup> The district court stated: "If I had sustained the Defendant's objections and come up with a Guideline range that the Defendant did not object to, I would still have imposed both the upward departure to [60] months and an upward variance to [60] months."<sup>65</sup>

### The Fourth Circuit's Review of Hargrove's Sentence

Despite its acknowledgement of the district court's miscalculation of the appropriate Guideline sentencing range, the Fourth Circuit affirmed the district court's 60-month sentence.<sup>66</sup> The Court began its analysis by stating, "[f]ederal sentencing law requires the district judge in every case to impose a 'sentence sufficient, but not greater than necessary, to comply with' the purposes of federal sentencing, in light of the Guidelines and other [18 U.S.C.] § 3553(a) factors."<sup>67</sup> As the Fourth Circuit explained, "district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'"<sup>68</sup>

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62Id.

63Id.

64Id.

65Id. at 160.

66Id. at 163.

67Id. at 160 (quoting *Freeman v. U.S.*, ---U.S. --- 131 S.Ct. 2685, 2692 (2011) (quoting 18 U.S.C. §3553(a)). Under 18 U.S.C. § 3553(a) ("Section 3553(a)"), the district court should consider: (1) the offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, retribution, deterrence, incapacitation, and rehabilitation; (3) the sentences legally available; (4) the sentencing guidelines; (5) any Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.

68Hargrove, 701 F.3d at 160 (quoting *Pepper v. U.S.*, ---U.S. --- 131 S.Ct. 1229, 1241 (2011)). For a more detailed discussion of reasonableness review in the Circuit Courts of Appeal, see Adam Lamparello, "The Unreasonableness of 'Reasonableness' Review: Assessing Appellate Sentencing Jurisprudence after Booker," 18 FED. SENT.REP. 174 (2006).

A review for reasonableness has 2 components—procedural and substantive.<sup>69</sup> Procedural reasonableness focuses on whether the district court correctly calculated the applicable Guideline range.<sup>70</sup> “Substantive reasonableness examines the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).”<sup>71</sup>

#### A. Procedural Reasonableness

In conducting its procedural reasonableness review, the Fourth Circuit explained that while “[t]he Guidelines ‘provide a framework or starting point. . . for the [district court’s] exercise of discretion . . . a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.’”<sup>72</sup> “[Although] the sentencing Guidelines are only advisory, improper calculation of a guideline range constitutes significant procedural error, making the sentence procedurally unreasonable and subject to being vacated.”<sup>73</sup>

Hargrove argued for a Guideline range of 0 to 6 months, and while the probation officer recommended a range of 10 to 16 months, the district court very erroneously calculated the range at 41 to 51 months.<sup>74</sup> On appeal, the United States Attorney conceded that the district court’s guideline calculation was incorrect.<sup>75</sup>

This fact however did not end the Fourth Circuit’s inquiry. As the court explained, “[t]he fact that ‘[a] sentence deviates significantly from the advisory guidelines range . . . does not alone render it presumptively unreasonable.’”<sup>76</sup> Instead, “procedural errors at sentencing . . . are routinely subject

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<sup>69</sup>Hargrove, 701 F.3d at 160.

<sup>70</sup>Id.

<sup>71</sup>Id. at 160-61 (quoting *U.S. v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010)).

<sup>72</sup>Id. at 163 (quoting *Freeman*, 131 S.Ct. at 2692 (quoting 18 U.S.C. § 3553(a)).

<sup>73</sup>Hargrove, 701 F.3d at 161; see also *U.S. v. Clay*, 627 F.3d 959, 970 (4th Cir. 2010).

<sup>74</sup>Hargrove, 701 F.3d at 161.

<sup>75</sup>Id.

<sup>76</sup>Id. at 163 (quoting *U.S. v. Rivera-Santana*, 668 F.3d 95, 106 (4th Cir. 2012)).

to harmless review.”<sup>77</sup> A sentencing error is harmless “if the resulting sentence was not longer than that to which [the defendant] would otherwise be subject.”<sup>78</sup> When performing harmless error review, “an appellate court may assume that a sentencing error occurred and proceed to examine whether the error affected the sentence imposed.”<sup>79</sup>

To prevail on this “assumed error harmless inquiry,”<sup>80</sup> the United States Attorney need only show that the error did not affect the defendant’s “substantial rights.”<sup>81</sup> Specifically, the United States Attorney must show that: (1) the district court would have reached the same result even if it had correctly calculated the applicable Guidelines sentencing range; and (2) the sentence would be reasonable even if the Guidelines sentencing range had been correctly calculated.<sup>82</sup>

As the Fourth Circuit explained, “it would make no sense to set aside [a] reasonable sentence and send the case back to the district court since it has already told [the appellate court] that it would impose exactly the same sentence, a sentence [the appellate court] would be compelled to affirm.”<sup>83</sup> In essence, “the assumed error harmless inquiry is an appellate tool that [courts] utilize in appropriate circumstances to avoid the ‘empty formality’ of an unnecessary remand where it is clear that the asserted guideline miscalculation did not affect the ultimate sentence.”<sup>84</sup> Thus, the Fourth Circuit determined that the district court’s procedural error was subject to harmless review.<sup>85</sup>

## B. Substantive Reasonableness

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77Id. at 161 (quoting *Puckett v. U.S.*, 556 U.S. 129, 141 (2009)).

78Id. (quoting *U.S. v. Mehta*, 594 F.3d 277, 283 (4th Cir. 2010)).

79Id.

80Id. at 162.

81Id. at 161 (quoting *U.S. v. Robinson*, 460 F.3d 550, 557 (4th Cir. 2006)).

82 Id. (quoting *U.S. v. Savillon-Matute*, 636 F.3d 119, 123 (4th Cir.), cert. denied, --- U.S. --- 132 S.Ct. 454, 181 L.Ed. 2d. 292 (2011)); see also *U.S. v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006).

83Hargrove, 701 F.3d at 162 (quoting *Savillon-Matute*, 636 F.3d at 123) (quoting *Keene*, 470 F.3d at 1350) (brackets in original)).

84Id. at 163 (However, “[t]his appellate standard of review does not allow district courts to ignore their responsibility to consider the guidelines in a meaningful manner when sentencing a defendant.”).

85Id. at 162.

Despite acknowledging that the District Court erred procedurally in performing the Guidelines calculation, the United States Attorney asserted that “the errors [were] harmless and resentencing [was] unnecessary because the district court expressly imposed a substantively reasonable alternative sentence based on the §3553(a) factors.”<sup>86</sup> The Fourth Circuit agreed. In applying the “assumed error harmlessness inquiry”<sup>87</sup> to Hargrove’s sentence, the Fourth Circuit held that “the district court would have sentenced Hargrove to 60 months even if the guideline range was [0 to 6] months.”<sup>88</sup> The dispositive question then was “whether the upward variance to 60 months from an assumed guideline range of [0 to 6] months [was] substantively reasonable under the facts of this case.”<sup>89</sup>

Based upon its review of the district court’s analysis, particularly in light of § 3553(a) factors,<sup>90</sup> the Fourth Circuit found that the 60-month sentence was reasonable given the “nature and circumstances of Hargrove’s offense.”<sup>91</sup> For example, the pre-sentence investigation report “detailed Hargrove’s cruel and barbaric treatment of the dogs he trained to fight.”<sup>92</sup> The Fourth Circuit described Hargrove’s offense as “incredibly barbaric.”<sup>93</sup>

With respect to Hargrove’s prior history, the Fourth Circuit held that, while the District Court acknowledged Hargrove’s military service, “he chose to discard all of that for this life of brutality and life of cruelty.”<sup>94</sup> The Fourth Circuit also recognized the District Court’s finding that Hargrove’s involvement in dogfighting became “the most prominent, distinguishing characteristic of

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<sup>86</sup>Id. at 161.

<sup>87</sup>Id. at 162.

<sup>88</sup>Id. at 163.

<sup>89</sup>Id.

<sup>90</sup>Id. at 164.

<sup>91</sup>Id.

<sup>92</sup>Id.

<sup>93</sup>Id. (citation omitted).

<sup>94</sup>Id. (citation omitted).

his life,”<sup>95</sup> and the District Court’s concerns about “whether Hargrove truly appreciated the wrongfulness of his conduct and accepted full responsibility for the damage his behavior caused.”<sup>96</sup>

The Fourth Circuit also held that the district court appropriately “considered the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, and to afford adequate deterrence to criminal conduct.”<sup>97</sup> Based on Hargrove’s admissions, the District Court knew that he “had been involved in dogfighting and training for several decades and that it was difficult for him to keep away from dogfighting because it was a big part of his life.”<sup>98</sup> Furthermore, the Fourth Circuit recognized that Hargrove “planned his extensive involvement in this criminal activity, and [the District Court] expressed concern about the danger that his conduct presented to others, stating that he was introducing into the society . . . animals who have been so deranged that they become a threat, a danger to humanity.”<sup>99</sup>

Ultimately, the Fourth Circuit concluded that the District Court “made abundantly clear that even if Hargrove’s sentencing guideline range was 0-6 months, it believed a [60] month sentence was necessary to accomplish the objectives of sentencing.”<sup>100</sup> Accordingly, the Fourth Circuit held that it could not conclude that the District Court’s “exercise of its sentencing discretion in imposing a [60] month sentence [was substantively] unreasonable.”<sup>101</sup>

### Analysis

The Fourth Circuit’s decision in *U.S. v. Hargrove*<sup>102</sup> raises important policy and penological issues.

#### 1. Imposing Harsher Punishments in Animal Cruelty Cases.

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95Id. (citation omitted).

96Id.

97Id.

98Id.

99Id. (citation omitted).

100Id.

101Id.

102Id. at 156.

As explained above, Booker changed the landscape of federal sentencing by making the Guidelines advisory.<sup>103</sup> Under the advisory regime, courts are nonetheless required to correctly calculate the Guideline range applicable to a particular offense.<sup>104</sup> This requirement is designed to promote sentencing uniformity while providing courts with sufficient flexibility to impose individualized sentences where the facts so warrant.<sup>105</sup> While some sentences have been reversed based on Guideline miscalculations without ever reaching the issue of substantive reasonableness,<sup>106</sup> others may be affirmed despite any procedural errors resulting from a Guideline miscalculation.<sup>107</sup>

The Fourth Circuit's decision in *Hargrove* raises the disparity issue when compared to factually similar cases and the advisory Guideline ranges applicable to those cases. For example, in *Hackman*, which involved defendants who "would routinely [and] inhumanely abandon, destroy and otherwise dispose of Pit Bull Terriers that lost fighting competitions,"<sup>108</sup> the advisory Guideline range for each defendant was 0 to 6 months.<sup>109</sup> The District Court departed from that range however, and imposed sentences of 12 months and 1 day, and 18 months.<sup>110</sup>

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<sup>103</sup>See *Booker*, 543 U.S. at 220.

<sup>104</sup>See *Lamparello*, supra note 68, at 175.

<sup>105</sup>Despite the Guidelines attempts to create uniformity in sentencing, there was some disparity in the departure rates among the circuit courts of appeal. For example, the Ninth Circuit had a departure rate of 38.7%, with the Second (20.4%) and Tenth Circuits (23.3%) having departure rates in excess of the national average (18.3%). The Fourth Circuit's departure rate was 5.2%, while the Third (8.8%), Sixth (7.3%), Seventh (6.9%), Eighth (10.5%) and Eleventh (7.5%) had low departure rates. See *Lamparello*, supra note 41, at 180 (internal citations omitted).

<sup>106</sup>See *id.*; see also *U.S. v. Davidson*, 409 F.3d 304, 310 (6th Cir. 2005) ("[a]n incorrect application of the guidelines requires re-sentencing under the post-Booker regime.") (quoting *U.S. v. Scott*, 495 F.3d 615, 616 (7th Cir. 2005)); *U.S. v. Mashek*, 406 F.3d 1012, 1017 (8th Cir. 2005); *U.S. v. Scoczen*, 405 F.3d 537, 548 (7th Cir. 2005).

<sup>107</sup>See *Rivera-Santana*, 668 F.3d at 103.

<sup>108</sup>630 F.3d at 1081.

<sup>109</sup>*Id.* The reason for the 0 to 6 month range is that, under the Guidelines, the base offense level for an "animal fighting venture" is 10. See 18 U.S.C.S. Appx § 2E3.1(a)(2). However, if the defendant accepts responsibility for this conduct, the base offense level is reduced to 8, resulting in Guideline range of 0 to 6 months, provided that a defendant does not have a prior criminal history. As described supra note 43, prior criminal conduct will result in an increase in the relevant base offense level.

<sup>110</sup>630 F.3d at 1081.

These cases all involved violations of 7 U.S.C. §2156, the same statute used to convict Hargrove.<sup>111</sup> Considering the cruel nature of these offenses, it is troubling that the most severe sentence imposed was only 2 years imprisonment. Significantly, prior to *Booker* the district courts would almost certainly have imposed more lenient sentences given that the Guidelines' sentencing ranges—which establish even shorter sentences for animal cruelty offenses—were all but mandatory. This underscores why *Hargrove* is such an important decision, both as a matter of law and policy. Admittedly, the District Court's calculation of a 41 to 51 month Guideline range was erroneous.<sup>112</sup> As the Fourth Circuit properly found however, even if the District Court had calculated the accurate Guideline range or accepted the probation officer's recommendation of a 10 to 16 month sentence, it would have imposed the statutory maximum of 60 months.<sup>113</sup> And the District Court made the right decision. The district court was correct to impose a sentence that was 42 months longer than the highest sentence imposed in *Hackman*, 36 months longer than the highest sentence imposed in *Courtland*, and 37 months longer than the sentence imposed on Michael Vick. Furthermore, the Fourth Circuit wisely held that the District Court's decision was substantively reasonable. Despite the District Court's procedural error its sentence reflected, to the extent allowable by 18 U.S.C. § 49, the true severity of Hargrove's crimes.

Thus, while the District Court's decision reveals substantial disparity between Hargrove's sentence and the sentences of defendants convicted of similar crimes, this disparity was warranted, justifiable, and necessary. Like the conduct of Michael Vick and the defendants in *Hackman* and *Courtland*, Hargrove's conduct was shocking, and his treatment of the dogs was "cruel" and "incredibly barbaric."<sup>114</sup> Unlike Vick and the other defendants however, Hargrove had an extensive

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111Id. Additionally, the facts of both *Hackman* and *Courtland* reveal unspeakable and sustained acts of torture comparable to those in *Hargrove*. In all 3 cases, the base offense level was 10.

112701 F.3d at 160.

113Id. at 159.

114Id. (citation omitted).

history of dogfighting and had made dogfighting his profession. Thirty-four dogs seized as a result of the undercover investigation were euthanized due to Hargrove's unspeakable actions. Hundreds of other dogs suffered and died during Hargrove's more than 40-year reign in the dogfighting industry.<sup>115</sup>Hargrove possessed jumper cables "used to electrocute dogs" and had a "debris pit" that contained many "dog carcasses" while the dogs—which numbered 250 at one time—depended solely on Hargrove for proper shelter, nutrition, and safety.<sup>116</sup>

The intentional torture and barbaric treatment of these animals over the span of more than 40 years, resulting in 3 prior convictions, fully justifies the district court's 60-month sentence. If the district court had followed the probation officer's recommendation regarding the applicable Guideline range, it could have imposed a maximum sentence of only 1 year and 4 months. A sentence of that length—similar to those imposed in Hackman and Courtland—would have turned a blind eye to the torture that Hargrove mercilessly inflicted on these animals. The District Court's decision demonstrates that sentencing disparity in certain instances represents a principled and purpose-driven exercise of judicial discretion.<sup>116</sup>

Hargrove also highlights the sentencing leniency in animal cruelty cases in both the advisory Guideline range, which without enhancements sets an average baseline sentence range of 0 to 6 months,<sup>117</sup> and 18 U.S.C. § 49 which sets a statutory maximum sentence for a violation of 7 U.S.C. § 2156 of 5 years. Consider for example the maximum sentence for the non-violent white collar crimes of mail fraud, wire fraud, and bank fraud, each of which carries a maximum sentence of 20 years per count.<sup>118</sup>

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115Id.

116Id. at 158.

117See generally Jelani Jefferson Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing* 15TEX. J. C.L. & C.R. 141 (2010).See U.S.S.G. §2E3.1(a)(2)(2005).

118See 18 U.S.C. §§ 1342-1344. This is not to suggest, however, that these white collar crimes are victimless crimes or that those convicted of such crimes are not deserving of long prison sentences.



Animal cruelty cases involve the most defenseless victims and are perpetrated by individuals with the most culpable mental states. Animals depend on their owners for every aspect of survival, and, when subject to neglect, cannot care for even their own most basic needs. When individuals such as Hargrove intentionally torture, maim, and use these animals for profit-making ventures that often result in death to the animals, they show the highest disregard for life. Consider the depravity of someone who can use jumper cables to electrocute a dog to death and then dump that dog's lifeless body into a carcass pit to decompose in the elements. Were these cases to involve human beings, the penalties would involve life imprisonment and, in some states possibly death. While the debate over whether penalties involving the intentional killing of animals should be equivalent to those applicable to humans is beyond the scope of this argument, suffice it to say that there can be little debate that the penalties should be far more severe than those currently in existence.<sup>119</sup>

## 2. Penological Considerations

As set forth in 18 U.S.C. §3553(a), a court should strive to tailor a sentence that, among other things, reflects the basic aims of criminal punishment, namely, deterrence, retribution, incapacitation and rehabilitation.<sup>120</sup>

### A. Deterrence

As the Fourth Circuit held in *Hargrove*, the district court's sentence reflected its desire to "afford adequate deterrence to criminal conduct."<sup>121</sup> Given Hargrove's history and evidence of the cruelty he exhibited toward his dogs, the district court was justified in departing from the advisory Guideline range and imposing the harshest possible sentence. Whether this sentence will actually deter Hargrove however is questionable, because the sentence itself is arguably too lenient. As a

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<sup>119</sup>This is particularly true considering that animal cruelty remains prevalent in many states. See Katie Galanes, "The Contradiction: Animal Abuse—Alive and Well," 44 J. MARSHALL L. REV. 209 (2010).

<sup>120</sup>*Hargrove*, 701 F.3d at 164.

<sup>121</sup>*Id.*

“legend”<sup>122</sup> in the dogfighting community for over 40 years, it is certainly possible that Hargrove will engage in dogfighting activity after what is a relatively short period of imprisonment, considering the gravity of Hargrove’s conduct. With 3 prior convictions for dogfighting, it is evident that Hargrove has previously not been deterred by the criminal justice system.

Furthermore, as someone “famous in the dogfighting industry for his dogfighting,”<sup>123</sup> Hargrove’s life and occupation largely involved acts of animal cruelty. Unlike Michael Vick, who is a professional football player, Hargrove’s dogfighting was not a secondary venture. Hargrove even admitted that, “because it was a big part of his life,”<sup>124</sup> he found it difficult “to keep away”<sup>125</sup> from dogfighting. Hargrove’s conduct provides yet another reason to impose harsher penalties in cases of animal cruelty, and the Fourth Circuit wisely affirmed the district court’s 60-month sentence.

#### B. Retribution and Incapacitation

As the Fourth Circuit stated, “[t]he district court considered the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, [and] to provide just punishment for the offense.”<sup>126</sup>Retribution and incapacitation were central to the district court’s decision because Hargrove was “introducing into ‘the society . . . animals who [had] become so deranged that they become a threat, a danger to humanity.’”<sup>127</sup> Hargrove’s treatment of innocent and defenseless animals included cruel acts of torture that resulted in the deaths of the 34 animals seized during the investigation, and countless other dogs killed by Hargrove during his multi-decade involvement in dogfighting.<sup>128</sup>By vindicating the principles of retribution and incapacitation, the District Court’s 60-month sentence also complimented deterrence. Had the District Court adhered to the probation officer’s recommendation—or imposed a sentence similar to those imposed in

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122Id. at 158.

123Id.

124Id. at 164.

125 Id.

126 Id.

127Id. (citation omitted).

128Id. at 158.

other cases under 7 U.S.C. § 2156—neither Hargrove nor others involved in dogfighting would have been appropriately punished.

### C. Rehabilitation

The District Court's sentence and the Fourth Circuit's decision contain no mention of rehabilitation. While it may seem counterintuitive to consider rehabilitation for an individual convicted of crimes involving the torture and death of animals, utilitarian principles can play a part in reforming an individual's attitudes after incarceration. Michael Vick now owns a dog and recently released the following statement:

I understand the strong emotions by some people about our family's decision to care for a pet. As a father, it is important to make sure my children develop a healthy relationship with animals. I want to ensure that my children establish a loving bond and treat all of God's creatures with kindness and respect. Our pet is well cared for and loved as a member of our family. This is an opportunity to break the cycle. To that end, I will continue to honor my commitment to animal welfare and be an instrument of positive change.<sup>129</sup>

Of course, this is not to say that Michael Vick's conduct did not warrant swift and severe punishment. It is an example, however, that punishment by imprisonment does not necessarily exclude the possibility of a rehabilitative component.<sup>130</sup>

### Conclusion

The Fourth Circuit's decision in *U.S. v. Hargrove* was correct as a matter of law and policy. However, *Hargrove* is not simply about whether the parties or the district court calculated the advisory Guideline sentence range correctly, or whether Hargrove's sentence was substantively reasonable. Instead, *Hargrove* presents an opportunity to start a policy discussion about imposing harsher penalties when animals are intentionally tortured and mercilessly killed due to the deliberate

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129Leslie Smith, Confirmed: Michael Vick has a dog, issues statement, DOGTIME, <http://dogtime.com/confirmed-michael-vick-has-a-dog-issues-statement.html> (Oct. 12, 2012).

130See, e.g., Adam Lamparello, "Using Cognitive Neuroscience To Predict Future Dangerousness," 42 COLUM. HUM. RTS. L. REV. 481 (2011) (discussing how, through rehabilitative measures such as cognitive and dialectical behavioral therapy, brain-injured individuals can successfully function despite afflictions such as frontal lobe disorder).

and premeditated acts of individuals who show an utmost indifference to life. Sentencing policies should be proportionate to the horrific nature of these crimes, not only as a matter of law, but as one of values, ethics, and morals. With respect to dogfighting cases, the baseline offense level and maximum sentence should be increased to reflect those values, ethics, and morals.