RITA, CLAIBORNE, AND THE COURTS OF APPEALS' ATTACHMENT TO THE SENTENCING GUIDELINES

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forthcoming 19 Fed. Sent'g Rep. ____ (2007)

This term the United States Supreme Court has granted review in *Rita v. United States*[1] and *Claiborne v. United States*.[2] Both cases arise from efforts by the appellate courts to maintain the vitality of the Federal Sentencing Guidelines in the wake of *United States v. Booker*.[3] *Booker* made the Sentencing Guidelines "effectively advisory," and it directed courts of appeals to review sentences not for compliance with the Guidelines, but for reasonableness in light of 18 U.S.C. § 3553(a). *Booker* gave little guidance on how to implement review for reasonableness; left to their own devices, the courts of appeals have developed doctrines that, according to the defendants in *Rita* and *Claiborne*, functionally return the Guidelines to their mandatory status.

This article provides a critical assessment of the work of the courts of appeals when conducting reasonableness review after *Booker*. Most circuits have afforded a presumption of reasonableness to within-Guidelines sentences and required a variance from the Guidelines to be supported by a justification proportionate to the variance. (*Rita* and *Claiborne* address these practices.) Moreover, in an effort to avoid the appearance of judicial policy making, the courts of appeals have generally refused to question guideline provisions, instead focusing their reasonableness determinations solely on the specific facts of each case. As a result, some appellate courts now act essentially as super-district

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courts, devoting efforts to second-guessing the factual findings and sentencing judgments of district courts rather than developing principles that could be applied in future cases.

I. Reasonableness as a Standard of Review

In *Booker*, the Court extended *Blakely v. Washington* to the Federal Sentencing Guidelines, holding that the Sixth Amendment is violated when a defendant's sentence is increased based on facts found by a judge under the mandatory Federal Guidelines. In its remedial opinion, the *Booker* Court declared that the Guidelines were merely advisory, and that district courts should consider not only the Guidelines, but also the other factors in 18 U.S.C. § 3553(a) in imposing sentence.[4] The Court further held that the courts of appeals' role would be to review these sentences for reasonableness "with regard to § 3553(a)," explaining that the provisions of § 3553(a) as well as the reasons given by the district court should guide the appellate courts in determining whether a sentence is unreasonable.[5] The Supreme Court did not define the term reasonableness nor explain what might constitute a reasonable sentence.[6]

Faced with this void, the courts of appeals have developed doctrines and practices that tend to preserve the primacy of the Guidelines. When a sentence is challenged as unreasonable, the courts of appeals have not asked only whether the sentence is substantively reasonable — that is whether, in light of all the evidence, a reasonable district judge could have imposed the challenged sentence in light of the provisions of 3553(a). They have focused also on the district court's reasons for the sentence.[7] Even if a sentence may be substantively reasonable, the sentence will be vacated if the reasons stated by the district court do not satisfy the court of appeals.[8]

Seven courts of appeals have afforded a presumption of reasonableness to within-Guidelines sentences.[9] These courts will sustain a sentence outside the Guidelines only if the district court expressly gives an appropriate justification for the deviation from the Guidelines.[10] A within-Guidelines sentence, by contrast, will be sustained even if the district court failed to provide a reason justifying the sentence, unless the party challenging the sentence points to circumstances establishing the unreasonableness of the sentence.[11]

The appropriateness of this presumption is the question presented in *Rita*.[12] In that case, Rita was convicted of obstruction of justice and lying to a grand jury and federal officers. The presentence report calculated a Guidelines range of 33-41 months. Rita did not challenge that calculation, but he moved for a below-Guideline sentence based on his long service in the military, his poor health, and the risk that he would be subject to abuse at the hands of other prisoners whom he had helped prosecute. The district court concluded that these reasons did not warrant a variance from the Guideline range, and it sentenced Rita to 33 months of imprisonment. The court's only mention of § 3553 was that "under 3553, certainly the public needs to be protected."[13] The Fourth Circuit affirmed. It explained that a sentence imposed within the Guidelines range is "presumptively reasonable," and it stated that the district court had adequately considered the factors set forth in § 3553(a).[14]

The principal justification given by the courts and the government for the presumption of reasonableness is that the U.S. Sentencing Commission fashioned the Guidelines after years of study and it did so by taking all of the other § 3553(a) factors into account.[15] But this is not a basis to presume that each and every Guideline

reasonably implements these statutory factors or that each and every Guideline sentence reasonably effectuates these standards. Rather, it is a justification for a court to generally defer to a guideline that it concludes is reasonable, even if the court would have promulgated a different (reasonable) guideline based on its own independent assessment of the § 3553 factors.

This is the teaching of administrative law. Under *Chevron*[16] and *Skidmore*[17] a court must defer to an agency's reasonable interpretation of a statute. But the court is not required to assume — indeed it has a duty not to assume — that the interpretation is reasonable; it must conduct an independent evaluation of the agency's interpretation for reasonableness.[18] And over the years, rules that were the product of an agency's balance of statutory interests have been vacated on the ground that the agency struck an unreasonable balance or failed to justify the balance that it struck.[19]

The Commission's work is not entitled to special treatment or a special presumption. As an agency subject to a variety of proper (and perhaps improper) influences, it can just as easily give unreasonable weight to a statutory factor, consider an inappropriate factor, or ignore a factor as the next agency. But the courts of appeals applying the presumption of reasonableness have not evaluated the reasonableness of particular Guidelines with respect to § 3553. They have not examined the reasons given by the Commission in prescribing a particular Guideline or otherwise questioned whether that Guideline is a reasonable implementation of § 3553(a). Instead, those courts have operated on an assumption that the Guidelines, in all cases and on all sets of facts, are reasonable implementations of § 3553(a).

An assumption of reasonableness seems particularly unwarranted in the sentencing context and in light of the Commission's statutory mandates. For one thing, the Commission is not required to consider all the § 3553(a) factors. The only § 3553(a) factor that the Commission is explicitly directed to consider is § 3553(a)(2).[20] And the Commission has not even done that in a clear and clearly defensible way. The Commission has explained that, in designing the initial Guidelines, it did not independently weigh the § 3553(a)(2) factors, but instead elected to use empirical evidence of past sentencing practice in order to avoid "the practical and philosophical problems" attendant with selecting between the punishment purposes articulated in § 3553(a)(2).[21]

To be sure, the Commission is required to consider some of the elements of the other § 3553(a) factors. For example, § 3553(a)(6)'s directive to avoid unwarranted disparity is almost certainly accounted for by 28 U.S.C. § 991(b)(1)(B), which directs the Commission to establish sentencing practices that "avoid[] unwarranted sentencing disparities" among defendants who are convicted of similar crimes and have similar records. And although the Commission is not directed to consider § 3553(a)(1)'s general admonition to account for the "history and characteristics of the defendant," the Commission's statutory instructions require it to consider aspects of the background of all defendants — considering characteristics such as age, education, vocational skills, mental and emotional condition, physical condition, previous employment record, and community and family ties.[22] The Commission has elected to classify all of these considerations as "not ordinarily relevant" for purposes of the Guidelines[23] — a conclusion that cannot be characterized as obviously reasonable.[24]

In addition, as generalizations meant to apply to all criminal sentences, the Guidelines by their nature fail to account for the § 3553 factors that are framed in terms of considerations for a particular defendant.[25] Significantly, the Commission was not instructed to consider, nor could it sensibly construct general guidelines to account for, the parsimony provision § 3553(a) requiring that a court to impose "a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing in a particular case.

In light of these considerations, a court of appeals should not blindly accord a sentence within a particular guideline a presumption of reasonableness. Such a presumption is a crude device that necessarily cannot reflect either the nuanced instructions of § 3553(a), nor the nuanced realities of how the Guidelines get applied to the unique facts of every unique case.

II. Appellate Review of Fact, Not Law

Claiborne presents a different, though related, issue. Every circuit has held that a district court must calculate the Guidelines and, if it decides to impose a sentence outside that range, provide a reasoned justification for any deviation. Eight circuits have gone even further, holding that the larger the variance between a judge's sentence and the Guidelines sentence, the more "compelling" the justification based on factors in section § 3553(a) must be.[26] The Eighth Circuit applied that principle in *Claiborne*. Claiborne pled guilty to two drug offenses. The Guidelines calculation yielded a range of 37-46 months, but the district court imposed a sentence of 15 months based on "Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future."[27] The Eighth Circuit vacated the sentence, explaining that Claiborne's sentence was an

"extraordinary variance" requiring an "extraordinary justification" and that the reasons offered by the district court were insufficient.

In imposing this sort of proportionality requirement, circuit courts have recharacterized *Booker*'s holding. *Booker* held that for all sentences the salient question is whether the imposed sentence is "unreasonable with respect to § 3553(a)."[28] But under the standard employed in *Claiborne*, the question for a sentence outside the Guidelines is not whether the sentence is reasonable with respect to § 3553; rather it is whether the sentence is reasonable with respect to the Guidelines.

Aside from raising this proportionality issue, *Claiborne* provides an interesting example of an attempt to constrain the deference to district courts inherent in the reasonableness standard. Under the reasonableness standard, a court of appeals that disagrees with the district court's sentence still should not vacate that sentence if is based on a reasonable application of § 3553 to the facts found by the district court. But some courts have circumvented this deferential standard by challenging the district court's factual findings. For example, in *United States v. Davis*, the Sixth Circuit vacated a below-Guideline sentence, in part, because it disagreed with the sentencing judge's factual finding that the defendant — who committed the crime fourteen years before the sentencing proceeding — had been "rehabilitated . . . by the passage of time."[29] Although the record reflected that the defendant had not "had any contact with the law" in the fourteen years since he had committed the offense,[30] the Sixth Circuit complained that the sentencing court had "not point[ed] to any evidence of rehabilitation in the record."[31]

In *Claiborne*, the Eighth Circuit went even further. It did not simply reject the district court's factual findings as unsupported by the evidence; the court made affirmative factual findings of its own. The Eighth Circuit vacated and remanded a below-Guideline sentence based on its own factual finding that "it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions" that formed the basis of the indictment in the case.[32]

The preoccupation with facts in *Claiborne* is part of a larger trend in appellate sentencing decisions to fixate only on the facts. One of the principle reasons that courts of appeals issue opinions is to provide guidance to help lower courts decide future cases. But, aside from rules reasserting the importance of the Guidelines, such as the presumption of reasonableness for guideline sentences and the extraordinary variance justification requirement, post-*Booker* appellate opinions rarely provide such guidance.[33] Instead, they tend to focus exclusively on the specific facts of the case under review.

The Eighth Circuit's recent opinion in *United States v. Wadena*[34] is a good example of the fact-specific nature of appellate sentencing review, even when the court is affirming a sentencing outside the Guidelines. In that case, the district court departed from the sentencing range of 18-24 months of imprisonment recommended by the Guidelines and imposed a sentence of five years of probation based on the defendant's chronic health conditions and the need to care for his son suffering from fetal alcohol syndrome. On appeal, the Government argued that previous Eighth Circuit decisions established a general rule that a sentence of probation was unreasonable where the Guidelines recommended imprisonment. The Eighth Circuit rejected the Government's suggested rule in a lengthy fact-laden opinion. The court distinguished the earlier cases,

noting that although several of the defendants in those cases had suffered from poor health, including heart disease and diabetes, Wadena's health condition was more severe than theirs — specifically, Wadena required three dialysis treatments per week — and that those defendants did not have sole caretaking responsibility for dependents "with the same kind of needs" as Wadena's son.

The focus on the particular facts of the case may be attributable in part to the nature of reasonableness review. (As has been well documented in the Fourth Amendment context, fashioning broadly applicable policies about reasonableness is no easy task.) But the appellate courts' hesitation to make broadly applicable pronouncements also appears to be part of a larger effort by the appellate courts to avoid the appearance of judicial policy making. This effort can be seen in the courts' insistence that sentences not be based on a sentencing court's disagreement with the policy decisions of the Guidelines[35] or on facts that might affect sentences of more than a small number of defendants.[36] For example, in *United States v. Wallace*, the Seventh Circuit's chastised a district court for imposing a below-guideline sentence based, in part, on its conclusion that the defendant's culpability was overstated by the Guidelines' use of intended loss rather than actual loss.[37] The Seventh Circuit explained that it was:

> troubled by the fact that the judge said that she thought that culpability should be measured by actual loss rather than intended loss. This was not an appropriate consideration, as the guidelines have already made the judgment that intended loss is what counts. Every defendant who commits a financial crime and gets away with only some of the money will make exactly the same argument . . . this is an attribute common to all defendants.[38]

Some courts of appeals have justified their restrictions of district court discretion on the grounds that they will promote sentencing uniformity. Others have reasoned that

these restrictions are necessary in order to ensure that sentences do not conflict with congressional intent. Both of these explanations are problematic.

The uniformity rationale has two main flaws. The first is that it prioritizes uniformity — which is but one of the § 3553(a) factors — above the others. The second is that, in encouraging district courts to sentence below the Guidelines based only on facts that seem relatively unique, the courts are creating a system for below guideline sentences that defies standardization. Assuming there is, for example, a widely shared sense by district courts that the sentence disparities between defendants convicted for crack cocaine offenses and powder cocaine offenses are unjustified, uniformity may be better served by allowing judges to state explicitly their disagreement with the advisory guideline ranges and impose lower sentences. By telling district courts that they can impose lower sentences only when they can point to some unique fact, the courts of appeals may be creating a system where district court judges will impose lower sentences for all crack cocaine offenders on the basis of arguably unique facts, but will not reduce sentences for defendants who have committed other offenses even when there are comparably unique circumstances.

The congressional intent rationale is equally problematic. For one thing, the courts of appeals have ignored the well-established legal standards for interpreting congressional intent. For example, in *United States v. Castillo*,[39] the Second Circuit concluded that a district court's decision to sentence a defendant based on a ratio of 20:1 instead of the 100:1 ratio reflected in the Guidelines conflicted with congressional intent. Although the Commission itself has repeatedly recommended that the 100:1 ratio be abandoned, the court claimed that Congress had revealed its intent to retain the ratio by

failing to enact legislation reducing the 100:1 Guideline disparity between sentences for crack and sentences for powder cocaine.[40] The court also cited a House committee report issued in 1995 — eight years after the adoption of the 100:1 ratio — that rejected the Commission's recommendation that crack and cocaine be treated equally,[41] and a presidential signing statement from 1995, in which the President stated that it would be inappropriate to reduce drastically the sentences for crack.[42] But neither of these sources demonstrate an intent to reject the 20:1 ratio; they reflect only the refusal to treat cocaine and crack equally. Nor is Congress's failure to amend the 100:1 ratio probative of congressional intent with respect to the 20:1 ratio. The Supreme Court has expressly held that, when, as in the case with the 100:1 ratio, Congress has not substantially revised the relevant statutory scheme, congressional silence does not represent ratification of a rule.[43] And just as Congress's failure to act with respect to the crack powder cocaine disparity cannot be assumed to reflect Congressional approval of that ratio, so too does Congress's general power to revise or amend the Commission's modification of the Guidelines[44] fail to demonstrate that the Commission's policy judgments embodied in the Guidelines actually reflect the policy judgments of Congress.

Perhaps more important, the courts of appeals' decisions to limit judicial discretion to "sentences based on the specific facts of the case"[45] has important Sixth Amendment ramifications. The *Booker* constitutional decision stated that, under the mandatory Guidelines regime, allowing a judge to find facts that exposed a defendant to a higher maximum sentence under the Guidelines violates that defendant's "right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment."[46] The *Booker* remedy opinion stated that this Sixth Amendment violation

could be cured by affording district court judges the discretion to sentence outside the Guidelines.[47] By limiting that discretion to cases where district courts find unique, individualized factual circumstances, the courts of appeals have created a system of appellate review that potentially violates the Sixth Amendment. Appellate courts still require district court to perform all Guideline calculations — including all upward adjustments to an offender's base offense level based on judge-found facts. In prohibiting district courts from imposing sentences outside the guideline range for offenders whose history, characteristics, and offense details resemble those of the typical defendant, the courts of appeals are denying the more typical offenders the right to have the jury find the existence of any fact that district courts used in their Guidelines calculation to increase base offense levels. In other words, these typical defendants are still being sentenced under a mandatory regime. By using their reasonableness review to place these limitations on the district courts, the courts of appeals have, in effect, largely circumvented the constitutional holding in *Booker*.[48]

III. Explaining Appellate Court Intransigence

The practices being challenged in *Claiborne* and *Rita* can be seen as part of a larger pattern of resistance by the courts of appeals to the Supreme Court's efforts to reconstruct the law of sentencing. Following *Apprendi*, the courts of appeals unanimously held that the Guidelines were intact, concluding that, by using the term "statutory maximum" the Court deliberately limited its decision to maximum sentences permitted by statute, not the Guidelines.[49] That reasoning was no longer sound after *Blakely*, which held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the

jury verdict or admitted by the defendant."[50] After all, the mandatory Guidelines prescribed maximum sentences that the judge could impose based solely on the jury's findings of fact but permitted the judge to impose higher sentences based on his own finding of facts. But only two circuits, the Seventh and the Ninth, acknowledged that *Blakely* spelled the Guidelines' doom — and both of those decisions were divided.[51] Six circuits — the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh — held that *Blakely* did not affect the Guidelines.[52] (The Third, Eighth, and D.C. Circuits avoided ruling on the issue.[53]) The presumption of reasonableness and the extraordinary variance justification requirements appear to be just the latest round of resistance on the part of the courts of appeals to the Supreme Court's Sixth Amendment sentencing jurisprudence.

A body of political science literature suggests that lower courts ordinarily act in accordance with the preferences expressed by the Supreme Court, out of either a desire to follow the law or a fear of reversal.[54] But when a Supreme Court's decision is ambiguous or the chance of review is low, lower courts have a tendency to render decisions based more on their own preferences than on a desire to further the Court's intent.[55] In the absence of clear guidance by the Supreme Court or the likelihood of Court review, "lower court judges may interpret cases consistently with Supreme Court intent only when they agree with the policy or are indifferent to it."[56]

Both of those conditions are present here. Appellate judges have openly complained about the ambiguity and inconsistency of the two *Booker* opinions.[57] And given the sheer volume of sentencing decisions and the shrinking Supreme Court docket, the chance of Supreme Court review must have seemed low, at least before the certiorari grants in *Rita* and *Claiborne*. Indeed, given the large increase in the appellate sentencing

workload after the Court's decision in *Booker*, the courts of appeals judges may have been predisposed against the decision even if they were not ideologically opposed to the Court's new sentencing jurisprudence.

Rita and *Claiborne* provide the opportunity for the Court to provide much needed guidance to litigators and lower courts. If the Court adheres to what it intimated in *Booker* — that the Guidelines are merely advisory and the only question for courts of appeals is whether the sentence is a reasonable implementation of the § 3553(a) factors — the Court must state that conclusion unambiguously and forcefully. Otherwise, the Court can expect to see the courts of appeals gravitate once again to the Guidelines. Of course, if there are five votes to affirm in these cases, then the Court need not worry about encouraging appellate compliance with its Sixth Amendment jurisprudence, because the courts of appeals will have, in the most basic sense, gotten it right.

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[1] 06-5754
[2] 06-5618
[3] 543 U.S. 220 (2005).
[4] Booker, 543 U.S. at 245-46.
[5] *Id.* at 261.
[6] Adam Lamparello, *The Unreasonableness of Reasonableness Review: Assessing Appellate Sentencing Jurisprudence After* Booker, 18 FED. SENT'G REP. 174, 174 (2006).
[7] *E.g.*, United States v. Cunningham, 429 F.3d 673, 678 (7th Cir. 2005); United States v. Jackson, 408 F.3d 301, 304-05 (6th Cir. 2005).
[8] *See, e.g.*, United States v. Hall, -- F.3d --, 2007 WL 155298, at *15 (10th Cir. Jan. 23, 2007) (vacating and remanding a sentence as "procedurally deficient," despite the observation that "[i]t may be that the 151-month sentence the District Court imposed in this case would be *substantively* reasonable") (emphasis in original).
[9] The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have held that sentences within the guideline range are presumptively reasonable. *See* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Myktiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lewis, 436 F.3d 939, 946 (8th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006).

[10] *See, e.g.*, United States v. Garnette, -- F.3d --, 2007 WL 57594, at *3 (8th Cir. Jan. 10, 2007).
[11] *See* Garnette, -- F.3d --, 2007 WL 57594, at *3; United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); Williams, 436 F.3d at 708; United States v. Johnson, 445 F.3d 339, 345 (4th Cir. 2006).
[12] United States v. Rita, 177 Fed. Appx. 357, 358 (4th Cir. May 1, 2006).
[13] Brief for Petitioner at 5, Rita v. United States, No. 06-5754 (S. Ct. Dec. 18, 2006).
[14] Rita, 177 Fed. Appx. at 358.
[15] *See* United States v. Demanee, 459 F.3d 791, 795 (7th Cir. 2006); United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006); United States v. Johnson, 445 F.3d 339, 342 (4th Cir. 2006); United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006). Though explicitly declining to adopt a presumption of reasonableness, the First Circuit explained that "the guidelines cannot be called 'just another factor' in the statutory list 18 U.S.C. § 3553(a), because they are the only *integration* of the *multiple* factors and, with important exceptions, their calculations were based upon the actual sentences of many judges." United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006); *see also* United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006); United States v. Shelton, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005) ("the factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a)").

This is, however, not the only stated reasons courts have given for adopting this presumption. The Seventh Circuit adopted the presumption in part to ensure that the Commission does not become obsolete. Mykytiuk, 415 F.3d at 608. At least one judge on the First Circuit would adopt the government's proposed presumption that all within-Guidelines sentences are *per se* reasonable out of a belief that it would be "likely to yield a federal sentencing regime that accords with Congress's policy preferences." Jimenez-Beltre, 440 F.3d at 521 (Howard, J., concurring in part and concurring in the judgment).
[16] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)
[17] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[18] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (arbitrary or capricious standard is to determine whether an agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment").
[19] *See, e.g.*, Public Citizen v. Federal Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004) (striking rule as arbitrary and capricious "because the agency failed to consider . . . a factor the agency must consider under its organic statute"); ITT Industries, Inc. v. NLRB, 251 F.3d 995, 1004 (D.C. Cir. 2001) (refusing to defer to agency interpretation of statute because it failed to justify rule);
[20] *See* 28 U.S.C. §§ 991(b), 994(a)(2),(g),(m).
[21] *See* U.S. SENTENCING GUIDELINES MANUAL § 1.4 (1987) ("the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point.... The Commission's empirical approach has helped it resolve its philosophical dilemma. Those who adhere to a just-deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what

punishment is deserved for a particular crime .... Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.").

[22] *See* 28 U.S.C. § 994(d).

[23] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.3, 5H1.4, 5H1.6 (2005); *see also* Jimenez-Beltre, 440 F.3d at 527 (Lipez, J, dissenting) (noting that "[t]hese prohibited and discouraged factors are in tension with the holistic, personalized view of the defendant required by section 3553(a)'s other factors").

[24] While § 994(e) instructs the Commission about "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant," it makes no reference to the appropriateness of considering a defendant's age, mental and emotion conditions, physical condition, or civil and military contributions.

[25] *See, e.g.*, § 3553(a)(2)(C) ("protect the public from further crimes of *the defendant*) (emphasis added); § 3553(a)(2)(D) ("to provide *the defendant* with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner") (emphasis added).

[26] United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006); United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006); United States v. Rita, 177 Fed. Appx. 357, 358 (4th Cir. May 1, 2006); United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005). Indeed, even those courts not adopting the presumption of reasonableness require the district courts to calculate guidelines and to provide a justification for departing from the guidelines commensurate with the degree of departure. *See, e.g.*, United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006).

[27] Claiborne, 439 F.3d at 480.

[28] Booker, 543 U.S. at 261.

[29] 458 F.3d 491, 494 (6th Cir. 2006).

[30] *Id.* at 502 (Keith, J., dissenting).

[31] *Id.* at 498.

[32] 439 F.3d at 481.

[33] *See* Lamparello, *supra* note 6, at 178.

[34] 470 F.3d 735 (8th Cir. 2006).

[35] *See, e.g.*, United States v. Thurston, 456 F.3d 211, 218-19 (1st Cir. 2006) ("A court may sentence below the guidelines because the guideline sentence in a particular sentence appears unreasonable in the particular case, but not because of general disagreement with broad-based policies enunciated by Congress or the Commission;" reversing a below-Guidelines sentence explained, in part, by district court's conclusion that "white collar defendants typically are more concerned about whether they will go to prison than with the actual length of imprisonment").

[36] *See, e.g.*, United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006) ("on appellate review, we will view as inherently suspect a non-Guidelines sentence that rests primarily

upon factors that are not unique or personal to a defendant, but instead reflects attributes common to all defendants"); United States v. Wallace, 458 F.3d 606, 611 (7th Cir. 2006) (citing Rattoballi with approval and concluding that "[t]he distinction between common and individualized factors is one that is compatible with our decisions").

[37] 458 F.3d at 608.

[38] *Id.* at 612.

[39] 460 F.3d 337 (2d Cir. 2006).

[40] *Id.* at 348-50.

[41] *Id.* at 358.

[42] *Id.* at 347.

[43] *See* Alexander v. Sandoval, 532 U.S. 275, 292 (2001).

[44] *See* 28 U.S.C. § 994(p).

[45] Castillo, 460 F.3d at 357.

[46] Booker, 543 U.S. at 232 (quoting Blakely v Washington, 542 U.S. 296, 301 (2004)).

[47] *Id.* at 245.

[48] *Cf.* Jason Hernandez, *Presumptions of Reasonableness for Guideline Sentences after* Booker, 18 FED. SENT'G REP. 252, 252-53 (2006) (noting that U.S. Sentencing Commission data "show that reasonableness review, aided by the presumption rule in some circuits, is becoming a one-way street that favors Guideline sentences. . . . These statistics appear to reflect a mandatory rather than an advisory Guideline system.").

[49] United States v. Johnson, 335 F.3d 589, 591-92 (7th Cir. 2003), *cert. denied*, 540 U.S. 1011 (2003); United States v. Piggie, 316 F.3d 789, 791 (8th Cir. 2003), *cert. denied*, 540 U.S. 857 (2003); United States v. Toliver, 351 F.3d 423, 434 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2429 (2004); United States v. Mendez-Zamora, 296 F.3d 1013, 1020 (10th Cir. 2002), *cert. denied*, 537 U.S. 1063 (2002); United States v. Bartholomew, 310 F.3d 912, 925-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1177 (2003); United States v. Marino, 277 F.3d 11, 38 (1st Cir. 2002), *cert. denied*, 536 U.S. 948 (2002); United States v. Fields, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001), *cert. denied*, 540 U.S. 961 (2003); United States v. Rivera, 282 F.3d 74, 76-77 (2d Cir. 2000), *cert. denied*, 537 U.S. 931 (2002); United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000), *cert. denied*, 534 U.S. 818 (2001); United States v. Kinter, 235 F.3d 192, 201 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001); United States v. Doggett, 230 F.3d 160, 166 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); United States v. Nealy, 232 F.3d 825, 829 n.3 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001).

[50] Blakely v. Washington, 542 U.S. 296, 303 (2004) (emphasis omitted).

[51] United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967 (9th Cir. 2004).

[52] United States v. Mincey, 380 F.3d 102, 106 (2d Cir. 2004); United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004) (en banc); United States v. Pineiro, 377 F.3d 464, 473 (5th Cir. 2004); United States v. Koch, 383 F.3d 436, 438 (6th Cir. 2004) (en banc); United States v. Sharbutt, 120 Fed. Appx. 244, 253 (10th Cir. 2005); United States v. Reese, 382 F.3d 1308, 1310 (11th Cir. 2004).

[53] United States v. Barbour, 393 F.3d 82, 94 (1st Cir. 2004); United States v. Thomas, 389 F.3d 424, 428 (3d Cir. 2004); United States v. Mellen, 393 F.3d 175, 182 n.2 (D.C. Cir. 2004); Administrative Order Regarding *Blakely* Cases, United States Court of

Appeals for the Eighth Circuit, Sept. 27, 2004 (staying Blakely cases until the Supreme Court decided Booker and Fanfan) available at http://sentencing.typepad.com/sentencing_law_and_policy/files/8th_cir_blakely_order.pdf

[54] *See, e.g.*, Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 299 (2005).

[55] *See* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. Rev. 612, 617 (2004) (concluding that if either clear precedent and effective judicial oversight is absent, federal judges are more likely to decide standing issues based on their own ideological preferences than on applicable precedent).

[56] Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 547-48 (2002); *see also* Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AMER. POL. SCI. REV. 1017, 1018 (1959).

[57] *See, e.g.*, Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677 (2006) ("The *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence."); United States v. Jimenez-Beltre, 440 F.3d 514, 521 (1st Cir. 2006) (Howard, J., concurring in part and concurring in the judgment) ("The Supreme Court's opinions in *Booker* left many questions unanswered.").