September
2006
Volume 54
Number 6

United States
Department of Justice
Executive Office for
United States Attorneys
Washington, DC
20530

Michael A. Battle
Director

The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b).

The United States Attorneys' Bulletin is published bimonthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

Managing Editor
Jim Donovan

Program Manager
Nancy Bowman

Law Clerk
Kevin Hardy

Internet Address
www.usdoj.gov/usao/reading_room/foiamanuals.html

Send article submissions and address changes to Program Manager, United States Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

Booker

In This Issue

Booker 101

Ed Hagen
Assistant Director
Office of Legal Education
Executive Office for United States Attorneys

I. Introduction

Before 2004, the State of Washington used a sentencing guidelines system that mandated certain sentencing ranges. These ranges were calculated using a grid that accorded values to the severity of the offense and the criminal history of the defendant. Some of the findings necessary to determine the proper sentencing ranges were made at sentencing proceedings by sentencing judges. In *Blakely v. Washington*, 542 U.S. 296, 301 (2004), the United States Supreme Court decided that this system violated the rule previously announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (1999): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The following year, in *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the Sixth Amendment principles announced in *Apprendi* and *Blakely* apply to the U.S. Sentencing Guidelines. The Court, however, did not take the further step of requiring that the government plead and prove enhancements to a jury. Instead, it held that the statute making the Guidelines mandatory (18 U.S.C. § 3553(b)(1)) and the provision establishing standards of review on appeal (18 U.S.C. § 3742(e)) were severable from the statutory guidelines scheme. With those statutes off the board, the Guidelines became "effectively advisory." *Booker*, 543 U.S. at 245. Sentencing judges must consider the guidelines range, but are permitted to "tailor the sentence in light of other statutory concerns" that include the factors listed in 18 U.S.C. § 3553(a). *Id.* at 245-46. The resulting sentences can be reviewed on appeal for "unreasonableness." *Id.* at 260-61.

The Keycite feature of Westlaw indicates that, at this writing, more than 15,000 case decisions have cited *Booker*. It is safe to say that nobody has read them all. One might conclude from this that a proper treatment of *Booker*, its sources, and its progeny, would be better done in a book, or series of books. However, a less ambitious approach makes more sense. Consider a historic parallel, the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 444 (1966). A book about the *Miranda* decision written in 1967 would have been close to useless within months of its publication. However, a collection of articles in a periodical would have helped clarify the issues. That is the approach taken in this issue of the *United States Attorneys' Bulletin*.

This article reflects the views of the author, and is not a policy statement of the Department of Justice. It will not dwell unnecessarily on what the law was, it will not attempt to argue what the law should be, and it will not forecast what the law will be. It is instead intended to be a working lawyer's survey of what the law is now. Lengthy analysis of individual cases is avoided as it would interfere with the goal of providing a practical overview of the entire legal picture.

II. Indeterminate and determinate sentencing

It was only after the American Revolution that the incarceration of criminals as punishment became common in this country. In colonial times, misdemeanants were pilloried or flogged, and felons were executed. *See United States v. Scroggins*, 880 F.2d 1204, 1206-08 (11th Cir. 1989). In those days the idea of incarceration as a punishment would have been considered an "absurd expense." *Apprendi*, 530 U.S. at 480 n.7, *citing* J.H. BAKER *Criminal Courts and Procedure at Common Law. Historical Essays* 1550-1800, CRIME IN ENGLAND 1550-1800 259 (1986).

A rapid rise in the population and increasingly liberal sentiments about crime and punishment caused Americans to look for alternatives to the slaughter of felons. An Italian criminologist, Cesare Beccaria, was particularly influential. Beccaria recommended that:

> (1) legislatures strictly define punishments for various crimes and limit the power of judges to arbitrarily modify them, (2) laws be clear and public, (3) punishments be designed solely to specifically deter any given offender from further offense and to generally deter

> society from criminal acts, and (4) punishments be the "least necessary" to achieve deterrence.

Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 844 (1999). State by state, legislatures restricted the number of capital offenses, and began to house convicted criminals in prisons. *Id.* at 846-64. By the twentieth century, felons typically received "indeterminate sentences." Criminals were sentenced to a maximum sentence, but the actual length of the sentence was determined by parole boards, who would release prisoners when they were "rehabilitated." *Scroggins*, 880 F.2d at 1206-07.

Congress adopted a system of indeterminate sentencing for federal offenses in the Act of June 25, 1910, ch. 387, 36 Stat. 819, 819-21 (Parole Act), and the Act of May 13, 1930, ch. 255, 46 Stat. 272 (United States Board of Parole). Federal sentencing under those Acts was not completely indeterminate. Judges had the option under former 18 U.S.C. § 4205(a) to mandate that the defendant serve one-third of the sentence before being eligible for parole, and typically did so. *Scroggins*, 880 F.2d at 1207 n.7.

Congress abandoned indeterminate sentencing in 1984 after a Congressional study concluded that "[w]e know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated." S. REP. NO. 225, at 40 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3223. It was replaced by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat.1987 (codified as amended in scattered sections of Titles 18 and 28 U.S.C.). Under this new system of "determinate sentencing" the Board of Parole was abolished, and defendants served their full term, minus a provision for statutory "good time" credits and prerelease custody. *See* 18 U.S.C. § 3624. The Act established the United States Guidelines Commission, which was tasked to create sentencing guidelines to determine how long sentences ought to be for "each category of offense" and "each category of defendant." 28 U.S.C. § 994(b)(1).

Under the determinate sentencing regime in force after the adoption of the U.S. Sentencing Guidelines, a sentencing judge would calculate the defendant's "guidelines range" from a "sentencing grid," after making findings about the defendant's personal background and the nature of the offense.

> The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, cmt. n. 1. (2005).

This was the system that came crashing down when *Blakey* and *Booker* were decided.

III. Sentencing enhancements based on judicial findings at sentencing

In a parallel development, Congress, from time to time, enacted statutes that required that defendants serve mandatory minimum sentences, or face higher maximum sentences, based on findings by judges at sentencing proceedings. Defense attorneys have challenged these judicial findings on constitutional grounds, arguing that they violate the Fifth Amendment right to an indictment, Sixth Amendment right to a jury trial, and the Fourteenth Amendment due process right to proof beyond a reasonable doubt. These types of findings resemble the findings required to place a defendant in a sentencing grid and, consequently, a review of these cases is essential to understanding *Booker*.

In *In re Winship*, 397 U.S. 358, 364 (1970), the United States Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975), the Court held that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt

the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."

However, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court upheld a murder statute that made homicide committed under extreme emotional disturbance a lesser crime, and placed the burden of proof on that issue on the defendant. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court upheld a Pennsylvania statute that provided a five-year minimum sentence for some felonies if the judge found, by a preponderance of the evidence at the sentencing hearing, that the defendant "visibly possessed a firearm" while committing the felony. The rationale for *Patterson* and *McMillan* was that only elements of the offenses must be proven beyond a reasonable doubt, and the "state legislature's definition of the elements of the offense is usually dispositive." *Id.* at 85.

> The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm. Pennsylvania's decision to do so has not transformed against its will a sentencing factor into an "element" of some hypothetical "offense."

Id. at 90-91.

The federal reentry after deportation/removal statute, 18 U.S.C. § 1326, originally provided a maximum penalty of two years in prison. In 1988, Congress amended the statute to provide a twenty-year maximum sentence if the deportation came after the commission of an aggravated felony. Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4471 (1988). The defendant in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), argued that he could not receive more than two years in prison because his prior aggravated felonies had not been alleged in his indictment. The sentencing judge decided otherwise, and imposed an eighty-five-month sentence. The Supreme Court noted that, within limits, Congress determines whether a fact is an element of the crime that must be proven beyond a reasonable doubt, or simply a sentencing factor. *Id*. at 228. Congressional intent was not extremely clear on the aggravated felony provision, but the Court concluded that it was intended to be a sentencing factor. *Id.* at 235.

The defendant argued that, even if Congress so intended, treating the aggravated felony provision as a mere sentencing factor violated his constitutional rights to have the factor alleged in the indictment and proved beyond a reasonable doubt before a jury. He further argued that *McMillen* was distinguishable because the factor in *McMillen* (possession of a firearm) did not alter the maximum penalty for the crime. The Supreme Court disagreed. Recidivism is traditionally a sentencing factor. The Court was not persuaded that hard minimums (*McMillan*) are less onerous than permissive maximums (*Almendares-Torres*). The aggravated felony provision did not "change a pre-existing definition of a well-established crime," and there is no reason "to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense." *Id.* at 246.

Things took a dramatic turn in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the Supreme Court held unconstitutional a New Jersey statute that increased the maximum sentence for certain offenses from ten years to twenty years if the sentencing judge found, by a preponderance of the evidence, that the crime involved racial intimidation. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. It did not matter that the New Jersey legislature intended it to be a "sentencing enhancement," not an element. If a fact "is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19.

Once again, *McMillan* was distinguished, not overruled. "We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself." *Id.* at 487 n.13. *Almendares-Torres* was characterized as "at best an exceptional departure from the historic practice that we have described" and perhaps "incorrectly decided." *Id.* at 487, 489.

In *Harris v. United States*, 536 U.S. 545, 556 (2002), the Court determined that the enhanced sentence under 18 U.S.C. § 924(c)(1)(A)(ii) for brandishing a firearm was intended by Congress to be a sentencing enhancement, not an element. Under *Apprendi*, it is unconstitutional to craft sentencing enhancements that increase the maximum sentence. However, the enhancements in § 924(c)(1)(A)(ii) increased the mandatory minimum sentence, not the statutory maximum sentence. This is permitted by *McMillan*, and per *Harris*, *McMillan* survives *Apprendi*.

In *Washington v. Recuenco*, 2006 WL 1725561 (U.S. June 26, 2006), the state sentencing judge had, pre-*Blakely*, used a firearms finding not determined by the jury or admitted by the defendant to enhance a sentence. This was constitutional error, but not structural error, so a harmless error test applied on review. The Court emphasized that there was no practical or legal distinction to be drawn between "elements" and "sentencing factors." *Id.* at *5.

As noted above, the continuing validity of *Almendarez-Torres* was called into question in *Apprendi*. *See also Shepard v. United States*, 544 U.S. 13, 26 (2005) (Thomas, J., concurring) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."). Circuit courts have declined defense invitations to ignore *Almendarez-Torres*. *See, e.g.*, *United States v. Cheek*, 415 F.3d 349, 352-53 (4th Cir. 2005) ("Even were we to agree with Cheek's prognostication that it is only a matter of time before the Supreme Court overrules *Almendarez-Torres*, we are not free to overrule or ignore the Supreme Court's precedents.") The Supreme Court seems unlikely to revisit the issue. Justice Stevens issued this statement accompanying the denial of petitions for certiorari raising the issue:

> While I continue to believe that [*Almendarez-Torres*] was wrongly decided, that is not a sufficient reason for revisiting the issue. The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any significant risk of prejudice to the accused. Accordingly, there is no special justification for overruling *Almendarez-Torres*. Moreover, countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.

Rangel-Reyes v. Unites States, 2006 WL 1209141, *1 (U.S. June 12, 2006).

IV. Sentencings after *Booker*

A. Required findings

Sentencing proceedings are governed by Federal Criminal Procedure Rule 32. The Rule has not been amended post-*Booker*, and nothing in it seems to have been abrogated by the decision.

Paragraph (h) requires notice before imposing a departure sentence. *See United States v. Dozier*, 2006 WL 864877 (10th Cir. Apr. 5, 2006). As discussed in Section V.B. of this article, *Booker* introduced the concept of sentences outside guidelines ranges that are not technically departures, and one circuit has held that the notice provision in Rule 32(h) does not apply in those cases. *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005).

Criminal Procedure Rule 32(i)(3)(B) calls on judges to rule on factual disputes at sentencing, but they need not "address every argument that a defendant makes at the sentencing hearing." *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). Explicit fact-finding is required, however, if "contested facts are material to the judge's sentencing decision." *United States v. Dean*, 414 F.3d 725, 730 (7th Cir. 2005).

Since judges are required to "consider" the guidelines range, 18 U.S.C. § 3553(a)(4), it logically follows that they are required to calculate it. *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). A failure to do so is generally reversible error. *United States v. Robinson*, 435 F.3d 699, 702 (7th Cir. 2006); *United States v. Davila*, 418 F.3d 906, 908 (8th Cir. 2005) (sentence reversed where the government suggested that the court use the Guidelines as a reference, and the judge replied, "I'm not actually going to make any guidelines calculations whatsoever").

The judge should consider applicable 18 U.S.C. § 3553(a) factors. These need not be discussed in "checklist fashion." *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006). "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges

that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

Section 3553(a) requires a "sentence sufficient, but not greater than necessary" to meet the purposes of § 3553(a)(2). This has sometimes been referred to as the "parsimony provision." It does not appear to call for any special findings. *See United States v. Navedo-Concepcion*, 2006 WL 1575573, *4 (1st Cir. June 9, 2006) ("[W]e do not think that the 'not greater than necessary' language requires as a general matter that a judge, having explained why a sentence has been chosen, also explain why some lighter sentence is inadequate.")

Most sentences should fall within the sentencing range. "[T]he guidelines cannot be called just 'another factor' in the [§3553(a) list] 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) (citation omitted); *accord United States v. Scott*, 426 F.3d 1324, 1330 (11th Cir. 2005). The farther a sentence strays from the range, the more compelling the § 3553(a) based justification must be. *Dean*, 413 F.3d at 729. A "dramatic variance" from a guideline range "must be supported by compelling justifications related to § 3553(a) factors," and "excessive weight" may not be given to any single factor. *United States v. Hampton*, 441 F.3d 284, 288 (4th Cir. 2006).

The imposition of a within-guidelines sentence "does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence." *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir. 2006).

> To a defendant, the sentencing proceeding is perhaps one of the most important and grave life moments. It is the time that a person is faced with the prospect of confinement for many years in a federal prison, often followed by an extended period of supervised release. Given the Supreme Court's clarification of what considerations should guide sentencing decisions, we consider it a very small burden upon the district court to explain its consideration of the § 3553(a) factors and their impact on the sentence imposed. It ought not be the job of this court, nor the defendant, to attempt to divine the motivation of the district court at sentencing in the penumbra of the record.

United States v. Engler, 422 F.3d 692, 697 (8th Cir. 2005).

A judge must give a reason for a sentence, but need not state a reason for denying a request for a departure. *United States v. Jones*, 2006 WL 986958 (6th Cir. Apr. 17, 2006).

B. Rules of evidence and burden of proof

Title 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Although confrontation is a fundamental component of due process, the Supreme Court has held that the use of hearsay at sentencing does not violate a defendant's confrontation rights. *See Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *Williams v. New York*, 337 U.S. 241, 250-51 (1949) (citing with approval the "age-old practice of seeking information from out-of-court sources to guide [a court's] judgment toward a more enlightened and just sentence."). *Booker* has no effect on these time-honored rules. *See, e.g.*, *United States v. Martinez*, 413 F.3d 239, 244 (2d Cir. 2005) ("If consideration of hearsay testimony during a sentence proceeding was not prohibited under a mandatory Guidelines regime, there is no logical basis for concluding that it is prohibited under the system of advisory Guidelines established by *Booker*.").

There are due process limits to this rule.

> A sentencing court may consider any information, (including hearsay), regardless of its admissibility at trial, in determining whether factors exist that would enhance a defendant's sentence, provided that the evidence has sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence.

United States v. Baker, 432 F.3d 1189, 1253 (11th Cir. 2005); *Martinez*, 413 F.3d at 244 (the hearsay

must contain "some minimal indicia of reliability").

The burden of proof for guidelines sentencing facts, before and after *Booker*, is a preponderance of the evidence. *United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). *See also United States v. Gonzalez*, 407 F.3d 118, 124 (2d Cir. 2005) ("[T]he rule of lenity is not applicable to a district court's fact-finding role at sentencing.")

A judge can even consider conduct that the defendant was acquitted of at trial, since the burden of proof at sentencing is lower than at trial. *United States v. Watts*, 519 U.S. 148 (1997); *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005) (*Booker* does not undermine the continuing validity of *Watts*); *United States v. Price*, 418 F.3d 771, 788 (7th Cir. 2005) (jury acquitted the defendant on a conspiracy count, but the district judge found that he was a member of the conspiracy for sentencing purposes); *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005) (*Watts* and § 3661 "remain[] in full force" after *Booker*). *See also United States v. Phillips*, 431 F.3d 86, 90-93 (2d Cir. 2005) (unadjudicated juvenile conduct may be properly considered under U.S. Sentencing Guidelines Manual § 4B1.5(b)).

V. Appellate review

A. Reasonableness of Guidelines sentences

The United States has taken the threshold position that appellate courts lack jurisdiction under 18 U.S.C. § 3742 to review sentences that are within a properly calculated guidelines range, but every circuit considering this argument has rejected it. "A majority of Justices said explicitly in *Booker* that sentences would be reviewable for reasonableness whether they fell within or without the guidelines, and for us that is the end of the matter." *United States v. Jimenez-Beltre*, 440 F.3d at 517 (1st Cir. 2006) (en banc) (footnote omitted)).

A reasonableness review will involve a review of legal conclusions and findings of fact. It is axiomatic that a sentencing court's legal conclusions are reviewed de novo. *See, e.g., Hampton*, 441 F.3d at 287. This would include the interpretation and application of the U.S. Sentencing Guidelines. *United States v. Bailey*, 405 F.3d 102, 113 (1st Cir. 2005). It would also include constitutional challenges. *United States v. Richardson*, 437 F.3d 550, 555 (6th Cir. 2006). Factual findings are reviewed for clear error. *Hampton*, 441 F.3d at 287; *United States v. Creech*, 408 F.3d 264, 270 n.2 (5th Cir. 2005). Mixed questions of fact and law are reviewed either "de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005).

Reasonableness review is deferential. *United States v. Talley*, 431 F.3d 784, 787 (11th Cir. 2005). Trial judges are "in the best position to determine the appropriate sentence in light of the particular circumstances of the case." *Cooper*, 437 F.3d at 330; *United States v. Ellis*, 440 F.3d 434, 438 (7th Cir. 2006) ("While we would not necessarily impose the same sentence as the district court, our inquiry is bound by substantial deference to it.") "We do not apply the reasonableness standard to each individual decision made during the sentencing process; rather, we review the final sentence for reasonableness." *United States v. Winingear*, 422 F.3d 1241, 1245 (11th Cir. 2005).

It is not surprising that most circuits accord a presumption of reasonableness where a sentencing judge has accurately computed the guideline range, considered the § 3553(a) factors, and exercised discretion to sentence within the guidelines range. *United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Cawthorn*, 429 F.3d 793, 802 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). The Fourth Circuit has termed this the "foremost" principle in looking at the reasonableness of a sentence. *United States v. Johnson*, No. 2006 WL 893594, *2 (4th Cir. Apr. 7, 2006).

This presumption is consistent with the related rule, in several circuits, that "a sentencing court's discretionary refusal to depart is [generally] unreviewable." *United States v. Melendez-Torres*, 420 F.3d 45, 50 (1st Cir. 2005); *Cooper*, 437 F.3d at 333; *United States v. Puckett*, 422 F.3d 340, 345 (6th Cir. 2005); *United States v. Winingear*, 422 F.3d 1241, 1245 (11th Cir. 2005); *United States v. Frokjer*, 415 F.3d 865, 875 (8th Cir. 2005); *United States v.*

Sierra-Castillo, 405 F.3d 932, 936 n.2 (10th Cir. 2005).

There are circuits that hesitate to use the word "presumption," but the difference seems to be more a matter of semantics than substance. For example, in *United States v. Fernandez*, No. 05-1596 (2d Cir. Apr. 3, 2006), the court rejected the notion that there is a "presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable." However, in the same decision, the court noted that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion." The court also "presume[d], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors." Similarly, in *United States v. Jimenez-Beltre*, 440 F.3d at 518, the court declined to afford a presumption, but observed that the Guidelines are more than just "another § 3553(a)] factor" because they are the only integration of the multiple factors, and the calculations are based on studies of actual sentences by an "expert agency charged by Congress."

Error in construing or applying the Guidelines will result in the sentence being vacated as unreasonable. *United States v. Green*, 436 F.3d 449, 460 (4th Cir. 2006) (incorrect application of § 4B1.1); *United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir. 2005) ("[A]s was the case before *Booker*, the district court must calculate the Guidelines range accurately."); *United States v. Mashek*, 406 F.3d 1012, 1015 (8th Cir. 2005) ("If the sentence was imposed as the result of an incorrect application of the guidelines, we will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of § 3553(a)."); *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) (case goes back unless the error is harmless).

The key to understanding all of this is to remember the different roles of sentencing and appellate courts.

> It is worth noting that a district court's job is not to impose a "reasonable" sentence. Rather, a district court's mandate is to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" of section 3553(a)(2). Reasonableness is the *appellate standard* of review in judging whether a district court has accomplished its task.

United States v. Foreman, 436 F.3d 638, 644 n.1 (6th Cir. 2006) (emphasis added). *See also United States v. Zavala*, 2006 WL 914528 (9th Cir. Apr. 11, 2006) (presumptions of reasonableness may be permissible on the appellate level, but sentencing judges commit "legal error" if they presume that a Guidelines sentence is reasonable).

B. Standard of review for sentences outside the Guidelines range

Sentences outside of the Guidelines range may be called various things, depending on the circuit and legal context. The Fourth Circuit, for example, uses the term "variance" to describe discretionary non-guidelines sentences. The "permissible factors justifying traditional departures differ from—and are more limited than—the factors a court may look to in order to justify a post-*Booker* variance." *Hampton*, 441 F.3d at 288 n.2. The Fifth Circuit talks of a "third option" in addition to a within-Guidelines or a departure sentence, "a non-Guideline sentence—a sentence either higher or lower than the relevant Guideline sentence." *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). The Seventh Circuit considers the term "departure" "obsolete." *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). In the Eighth Circuit, a sentencing judge calculates the sentencing range, and then decides if a traditional departure is appropriate under U.S. SENTENCING GUIDELINES Part K or U.S. SENTENCING GUIDELINES § 4A1.3. This results in a "guidelines sentence." The court should then consider all the other § 3553(a) factors "to determine whether to impose the sentence under the guidelines or a non-guidelines sentence." *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005).

Prior to 2003, review of departure decisions was for abuse of discretion pursuant to 18 U.S.C. § 3742(e). Section 401(d)(2) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-066, 117 Stat. 650, (2003), required appellate courts to apply a de novo standard of review to decisions to depart downward. As noted in Section I of this article, *Booker* excised § 3742(e), leaving the appellate courts to review sentences for reasonableness. *See*

United States v. Smith, 417 F.3d 483, 489-90 (5th Cir. 2005). Consequently, the clock has been rolled back to the pre-2003 standard of abuse of discretion. *United States v. Saldana*, 427 F.3d 298, 308 (5th Cir. 2005); *United States v. Dalton*, 404 F.3d 1029, 1032 (8th Cir. 2005).

"Sentences that vary from the advisory guidelines range are reasonable as long as the district judge offers adequate justification consistent with the sentencing factors in § 3553(a)." *United States v. Jordan*, 435 F.3d 693, 696 (7th Cir. 2006). "[T]here is no presumption of unreasonableness that attaches to a sentence that varies from the range." *Id.* at 698. If the decision to depart is based on a factual determination, the district court's decision is entitled to "substantial deference." *United States v. Wolfe*, 435 F.3d 1289, 1295 (10th Cir. 2006). The farther the sentence diverges from the advisory guideline range, the more compelling the reasons for the divergence must be. *Dean*, 414 F.3d at 729.

Some questionable sentences have been approved under this standard. In *United States v. Menyweather*, 431 F.3d 692 (9th Cir. 2005), a United States Attorney's office employee stole almost a half a million dollars, creating significant hardships for victims. Her sentence was reduced to a few weekends in jail because the defendant persuaded the judge that her relatives were unsuitable to care for her child if she went to prison, but the crime involved stealing money to take expensive trips while leaving the child behind with the same relatives.

> Were we reviewing de novo, we would conclude that Defendant did not prove that she provides care that is irreplaceable or that could not feasibly be provided by another. Under an abuse of discretion standard, however, we hesitate to "second guess" the district court's conclusion that Defendant's relationship with her daughter, and the care that Defendant provides, are unusual as compared with the situation of other single parents.

Id. at 700.

Errors in applying the law or reliance on impermissible factors may result in vacatur of a sentence. For example, in *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006), the sentencing judge somehow concluded that *Booker* prevented the use of facts not admitted by the defendant, even in an advisory sentence. The judge calculated the guidelines, and then stated that they would not be followed because they were completely discretionary, and gave the defendant straight probation. This was an error because the sentence must reflect the totality of the sentencing factors. "Specifically, the sentence (1) does not adequately take into account the Sentencing Guidelines, (2) fails to sufficiently reflect the seriousness of Duhon's offense, and (3) improperly gives weight to the Guideline sentence of a differently-situated codefendant. As a result, the sentence is unreasonable." *Id.* at 715.

In *United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005), the defendant defrauded a government infant nutrition program of almost a half a million dollars in 100 transactions over a period of five years. The district court somehow found that the defendant did not engage in more than minimal planning. This was a finding of fact, so the standard of review was clear error, a burden that was met in this case. The district court also departed downward because the defendant's restitution and remorse, lack of criminal sophistication, substantial assistance to the government, and loss to the government, which the court thought overstated Crawford's criminality, collectively took the defendant outside of the "heartland" of similar cases. *Id.* at 1177. The standard of review for this is not deferential; it is de novo. "Whether a factor is a permissible ground for a downward departure from the Sentencing Guidelines is a question of law." *Id.* at 1178. Most of these grounds for the departure were bogus, so the case was remanded for resentencing. *See also United States v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005) (downward departure reversed where the "district court's reasoning . . . did not include any reference to the applicable Guidelines provisions"); *Moreland*, 437 F.3d at 437 ("To the extent that the sentence imposed by the district court rests on a rejection of congressional policy with respect to repeat drug offenders, it is subject to reversal on that basis alone."); *United States v. Haack*, 403 F.3d at 1001 (judge reduced a 180 month sentence to sixty months because of his view that the Guidelines sentences for marijuana were "ridiculous").

C. Appellate waiver

Defendants sentenced before *Booker*, pursuant to plea agreements waiving appeal rights, have argued that *Booker* was a change in the law that voided their agreements not to appeal. All of the

circuits have rejected that argument. *See, e.g.*, *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) ("the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompany a guilty plea"); *United States v. Cortez-Arias*, 425 F.3d 547, 548 (9th Cir. 2005), amended (July 14, 2005), amended again (Sept. 30, 2005) ("a favorable change in the law does not entitle a defendant to renege on a knowing and voluntary guilty plea").

These waivers should be tightly written as any ambiguity in the language will be construed against the government. *See, e.g.*, *United States v. Speelman*, No. 04-30067 (9th Cir. Dec. 16, 2005) (waiving the "right to contest either the conviction or the sentence or the application of the sentencing guidelines in any post-conviction proceeding including any proceeding under 28 U.S.C. § 2255" not sufficient to waive the right to direct appeal).

D. Collateral review

"Every court that has considered whether *Booker* applies retroactively to cases on collateral review has held that it does not." *Selected Post-Booker Decisions* 49 (U.S. Sentencing Commission, May 24, 2005), *available at http://www.ussc.gov/Blakely/Sel_PostBooker.pdf*. On June 5, 2006, in *Burton v. Waddington*, No. 05-9222, the Supreme Court accepted certiorari on this issue.

Defendants have had mixed success attempting to circumvent this rule by labeling the motion as a "motion to recall the mandate." *See United States v. Crawford*, 422 F.3d 1145 (9th Cir. 2005); *United States v. Saikaly*, 424 F.3d 514, 518 (6th Cir. 2005).

VI. Sentencing disparities

A. Codefendant disparities

Title 18 U.S.C. § 3553(a)(6) discourages "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." However, "a sentencing difference is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation." *United States v. Boscarino*, 437 F.3d 634, 637-38 (7th Cir. 2006). *See also United States v. Pisman*, 2006 WL 890764 (7th Cir. Apr. 7, 2006) (more culpable cooperating codefendant received lighter sentence).

B. Fast-track disparities

Section 5K3.1 of the Sentencing Guidelines provides for downward departures pursuant to early disposition programs authorized by the Attorney General. These are commonly implemented for immigration law prosecutions in districts on the Mexican border. Defendants sentenced in districts that do not have these programs have complained that their unavailability leads to disparity that violates equal protection. This objection has no merit because there is no suspect classification involved, and the program has a rational basis. *United States v. Melendez-Torres*, 420 F.3d 45, 52 (1st Cir. 2005). They do not violate 18 U.S.C. § 3553(a)(6) because they are not an "unwarranted" disparity. *Jimenez-Beltre*, 440 F.3d at 519. The lack of a fast-track program "certainly permits disparities but they are the result of a congressional choice made for prudential reasons." *Id.*

C. Crack cocaine disparities

The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(a)), established severe minimum sentences for trafficking in relatively small amounts of crack cocaine ("cocaine base"). Under the scheme, one gram of crack cocaine is treated the same as 100 grams of powder cocaine (the "100:1 ratio"). Subsequently, in the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988) (codified at 21 U.S.C. § 844(a)), Congress enacted a minimum five-year sentence for simple possession of five grams or more of cocaine base. The rationale and legislative history is set out in the *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (U.S. Sentencing Commission February 1995) at 6.C., *available at* http://www.ussc.gov/crack/exec.htm.

These minimum sentences have been controversial. In 1994, Congress responded by enacting a safety valve provision which lowers minimum sentences for certain drug offenses, 18 U.S.C. § 3553(f), and directed the Sentencing Commission to study the crack-to-powder ratio and submit recommendations. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 2097 (1994). The Sentencing Guidelines Commission issued a report the following year recommending that the disparity be eliminated altogether. This led to a Congressional hearing that concluded that "the evidence overwhelmingly demonstrates

significant distinctions between crack and powder cocaine." H.R. REP. NO. 104-272, at 3 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 335, 337. The Sentencing Guidelines Commission recommendations were rejected, and the guidelines were left as they were. *See* Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995). Since then, the Sentencing Commission has issued other reports and recommendations, including a 2002 Report recommending that the ratio be changed to 20:1. Congress has considered, but not acted, on these proposals. *See United States v. Pho*, 433 F.3d 53, 56-57 (1st Cir. 2006). The United States Sentencing Commission failed to note them in its Proposed 2006 Guideline Amendments, *available at* http://www.ussc.gov/2006guid/proposed12506.pdf.

Some district courts, especially post-*Booker*, have expressly based departures on a disagreement with the 100:1 ratio, and in other cases defendants who have failed to persuade judges to do so, have filed appeals. The leading case is *Pho*, which involved two cases in which the sentencing judge indicated agreement with every aspect of the guidelines sentence except for the 100:1 ratio. Stating that the Commission's recommendation of a 20:1 ratio "makes sense" and is "more appropriate," the sentencing judge recalculated the guidelines sentence accordingly, and imposed significantly lower sentences. These sentences were reversed. *Booker* provides for a reasonableness review for sentences, but "regardless of length, a sentence based on an error of law is per se unreasonable." *Id.* at 60-61. *See also United States v. Eura*, No. 05-4437 (4th Cir. Feb. 24, 2006) (varying from the sentencing range based on a disagreement with the 100:1 ratio violates the uniformity concerns of 18 U.S.C. § 3553(a)(6)).

D. Disparity with state sentences

Some defendants have argued for reduced sentences because of lower sentences for similar offenses in state courts. "The sole concern of section 3553(a)(6) is with sentencing disparities among federal defendants." *United States v. Clark*, 438 F.3d 684, 685 (4th Cir. 2006). Consideration of potential federal/state sentencing disparities is "neither permitted nor required." *United States v. Jeremiah*, No. 05-3164 (8th Cir. May 3, 2006).

VII. Common issues

A. Excision of §§ 3553(b)(1) and (b)(2)

Booker excised 18 U.S.C. § 3553(b)(1), but was silent concerning a parallel provision, 18 U.S.C. § 3553(b)(2), which covers child crimes and sexual offenses. The only difference between the two provisions is that § 3553(2) is more restrictive than § 3553(1) when it comes to the types of mitigating factors that would support a departure. "There is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005). The court in *Selioustsky* declined to excise the portion of subsection 3553(b)(2) that makes the application of the relevant guideline range compulsory, but left standing the limits on factors that may be considered in making downward departures, once again because such an approach was inconsistent with *Booker*. *Id.* at 118. *See also United States v. Yazzie*, 407 F.3d 1139, 1145 (10th Cir. 2005).

B. Ex post facto

Per *Booker* and *Blakely*, going higher than a guidelines maximum without a jury finding under *mandatory* guidelines violates the Sixth Amendment. Defendants who committed their crimes before *Booker* have argued that sentencing them under *advisory* guidelines, based on post-*Booker* judicial findings, violates the ex post facto provision of Article I, § 10, of the Constitution, because the *Booker* advisory approach to the Sentencing Guidelines was not in place when the crimes were committed. This argument has been rejected in every circuit where it has been considered. *See, e.g., United States v. Jamison*, 416 F.3d 538, 539 (7th Cir. 2005) ("Distributing cocaine base was not made a crime by the Court's decision in *Booker*. Jamison also had fair warning that distributing cocaine base was punishable by a prison term of up to twenty years, as spelled out in the United States Code."); *United States v. Dupas*, 417 F.3d 1064, 1067-68 (9th Cir. 2005) (*Booker* directed courts to apply the remedy to cases on direct review; due process ex post facto limitations only apply to substantive criminal statutes, not sentencing enhancements; the defendant had fair notice of the maximum sentence); *United States v. Mix*, 2006 WL 802535, *5 (9th Cir. Mar. 30, 2006) ("There is no ex post facto problem here because § 3553(a) has been the law of the land since 1984.")

C. Booker does not apply to "safety valve" findings

Defendants can escape the requirements of a mandatory minimum sentence if they meet the five requirements of the "safety valve" statute, 18 U.S.C. § 3553(f). Defendants have argued that, consistent with *Booker*, courts should have the discretion to apply the safety valve to defendants who fail to meet one or more of the five requirements. However, as noted in Section III of this article, judicial fact-finding triggering a statutory minimum sentence does not implicate the Sixth Amendment. *See Harris v. United States*, 536 U.S. 545, 558-60 (2002). Consequently, there is no constitutional problem that would require advisory safety valve provisions. *See United States v. Bermudez*, 407 F.3d 536 (1st Cir. 2005); *United States v. Barrero*, 425 F.3d 154, 158 (2d Cir. 2005).

D. Restitution

Booker has no application to restitution. *See, e.g.*, *United States v. Antonakopoulos*, 399 F.3d 68, 83 (1st Cir. 2005) (restitution has no bearing on the defendant's guideline range or term of imprisonment); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005) (restitution is authorized by statute and is "distinct and separate" from the Sentencing Guidelines; the Sixth Amendment does not come into play because an order of restitution does not exceed the statutory maximum provided under the penalty statutes; also, the Victim Witness Restitution Act and the Mandatory Victim's Restitution Act specify that victim losses be determined by the court); *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) ("[u]nder the MVRA there is no specific or set upper limit for the amount of restitution in contrast to criminal statutes which provide maximum terms of imprisonment and fine amounts").❖

ABOUT THE AUTHOR

❑**Ed Hagen** is an Assistant Director at the Office of Legal Education. He has co-authored two legal texts, THE PROSECUTION FUNCTION (Lexington Books 1981) and THE LAW OF CONFESSIONS (Thomas West 1994).✠

This article was reviewed by Tamra Phipps, Assistant United States Attorney, Middle District of Florida, who made a number of helpful corrections and suggestions.

Responding to the Fast-Track Disparity Argument

Paul W. Hahn
Office of Counsel to the Director
Executive Office for United States Attorneys
Assistant United States Attorney
Eastern District of Missouri

I. Introduction

Immigration law reform is a topic of great public interest, which is receiving extraordinary media coverage and the focus of Congress. Enforcement of existing immigration laws is problematic, particularly with apprehensions for immigration offenses exceeding one million along the Southwest border annually. The crisis along the Southwest border is not new. Starting with Southern California, fast-track programs for immigration offenses were implemented in the Southwest border districts during the mid-1990s, which enabled districts to focus scarce prosecution resources on the most dangerous criminal aliens.

The federal government placed unprecedented attention on immigration offenses occurring along the Southwest border in 1994. "Operation Gatekeeper" substantially increased the number of federal agents, equipment, and other resources along the Southwest border. The initiative more than doubled the number of border patrol agents in the Southern District of California. Operation Gatekeeper also introduced the Automated

Biometric Identification System (IDENT), which enabled the government to biometrically identify every illegal alien apprehended while attempting to cross the border. IDENT provided the capability to identify aliens with criminal histories, thus enabling federal prosecutors to focus prosecutorial resources on those criminal aliens who presented the greatest likelihood of danger to the community. The success of Operation Gatekeeper presented the United States Attorneys' offices with an unprecedented number of criminal alien cases to prosecute. Alan D. Bersin and Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 300 (1998).

The ability of U.S. Customs and Border Protection to detect criminal aliens at the border was substantially enhanced when it gained the ability to quickly check the fingerprints of illegal immigrants against the FBI's massive biometric database, known as the Integrated Automated Fingerprint Identification System (IAFIS). Access to IAFIS became fully available to all 136 border patrol stations in September 2005. While IDENT compares two fingerprints to determine a match, IAFIS compares an individual's ten fingerprints with the FBI's database of 49,000,000 sets of prints. As of December 27, 2005, Customs and Border Protection officials reported that IAFIS had returned "hits" on 118,557 criminal subjects who were trying to enter this country illegally. *Using Technology to Catch Criminals, Fingerprint Database "Hits" Felons at the Border*, FBI Headline Archives (Dec. 27, 2005), *available at* http://www.fbi.gov/page2/dec05/border_iafis122705.htm.

Data provided by the Sentencing Commission indicates that the number of prosecuted federal immigration offenses rose dramatically from 2,300 in fiscal year (FY) 1991 to 10,458 in FY 2001.

> The increase in the number of immigration offenses has put enormous caseload pressures on the districts along the Southwest border. The Southern District of California alone, for example, sentences more defendants under the guidelines (4,213) than do all of the district courts in each of the First Circuit (1,645), Second Circuit (4,147), Third Circuit (2,636), Seventh Circuit (2,450), Eighth Circuit (3,568), Tenth Circuit (3,415), and District of Columbia Circuit (276).

U.S. SENTENCING COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 62 (Oct. 2003) , *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf [hereinafter DEPARTURES REPORT].

Prior to *United States v. Booker*, 543 U.S. 220 (2005), those Courts of Appeals addressing the issue ruled that the presence of fast-track programs in some districts, for illegal reentry after deportation offenses, was not a permissible basis for departure under the Sentencing Guidelines in a district lacking a fast-track program. *See United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. 2000); *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000) (en banc); *United States v. Armenta-Castro*, 227 F.3d 1255 (10th Cir. 2000).

After *Booker* held that the United States Sentencing Guidelines were advisory, and no longer binding, aliens charged with illegal reentry offenses in violation of 8 U.S.C. § 1326 in non-fast-track districts were quick to claim that they should receive the same sentencing concessions as similarly situated defendants in fast-track districts. The uncertainty created by *Booker* gave rebirth to the previously settled fast-track disparity argument.

II. Early fast-track programs

The initial fast-track programs enabled United States Attorneys' offices to dispose of cases against criminal aliens quickly and efficiently. Within twenty-four hours after arraignment, discovery was provided and a pre-indictment plea offer was made. Defendants would generally be allowed to plead guilty to a violation of 8 U.S.C. 1326(a) and receive the statutory maximum sentence of twenty-four months, as opposed to being prosecuted under 8 U.S.C. 1326(b), which provided a statutory maximum sentence of twenty years.

> In all but the most serious cases, the defendant (who is potentially chargeable under 8 U.S.C. § 1326(b), carrying a maximum 20 year penalty) was allowed to plead guilty to a violation of 8 U.S.C. § 1326(a), which carries a maximum term of two years. The conditions for the reduced sentence were that the defendant (1) waive indictment; (2) forego motions; (3) waive a presentence report; (4) stipulate to a particular sentence (usually 24 months); (5) submit to immediate sentencing;

> (6) waive all sentencing appeals; (7) consent to the entry of an order, issued by an Immigration Judge or officer, removing defendant from the United States upon conclusion of his or her prison term; and (8) waive all appeals of the removal order.

Bersin and Feigin, *supra* at 301.

Following implementation of its fast-track program in 1995, the United States Attorney's Office for the Southern District of California filed 1,334 criminal alien cases charging a violation of 8 U.S.C. § 1326, in sharp contrast to 240 criminal alien cases filed by the office in 1994. This five-fold increase was sustained in 1996 when 1,297 criminal alien cases were filed by the office. In 1997 the Southern District of California filed 1,606 criminal alien cases, nearly seven times the number filed in 1993. *Id*. at 302.

Prosecution of felony immigration offenses by United States Attorneys' offices increased significantly in 1995. Felony immigration offenses were filed against 4,634 persons in 1995, representing a 66.4% increase over 1994. Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT. REP. 254, 258 n.1 (citing EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. ATTORNEY'S OFFICES, STATISTICAL REPORT, FISCAL YEAR 1995 23 (1996)).

The United States Court of Appeals for the Ninth Circuit favorably discussed the fast-track program in the Southern District of California in *United States v. Estrada-Plata*, 57 F.3d 757 (9th Cir. 1995).

> In light of the overall crime problem in the Southern District of California, the government chose to allow §1326(b) defendants the opportunity to plead to a lesser offense, if done so at the earliest stage of the case. Like the district court, we find absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice. The policy benefits the government and the court system by relieving court congestion. But more importantly, the policy benefits § 1326(b) defendants by offering them a substantial sentence reduction. These defendants have nothing to lose and much to gain from the fast-track policy.

Id. at 761.

III. Formal recognition of fast-track programs

A. PROTECT Act

Congress recognized the value of early disposition programs authorized by the Attorney General when it passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act. Pub. L. No. 108-21, 117 Stat. 650 (2003). The PROTECT Act directed the United States Sentencing Commission to promulgate "a policy statement authorizing a departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." Pub. L. No. 108-21, § 401(m), 117 Stat. at 675 (2003).

B. Fast-track programs authorized by the Sentencing Commission

As directed by Congress, the United States Sentencing Commission adopted U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2003) [hereinafter U.S.S.G.], entitled "Early Disposition Programs (Policy Statement)," which became effective on October 27, 2003 and provides: "Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."

C. Formal authorization of fast-track programs by the Attorney General

Guidance for implementing a fast-track program was issued by Attorney General John Ashcroft on September 22, 2003. The Attorney General recognized that "'fast-track' programs are based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in U.S.S.G. § 3E1.1." Memorandum from Attorney Gen. John Ashcroft to All United States Attorneys (Sept. 22, 2003) (on file with the Dep't of Justice Library), *available at* http://10.173.2.12 /jmd/lib/memo3.pdf. *reprinted in* 16 FED. SENT.

REP. 134 (2003) [hereinafter Ashcroft Fast-Track Memorandum].

The Ashcroft Fast-Track Memorandum requires fast-track programs to meet the following four criteria to receive authorization:

- The district faces an exceptionally large number of a specific class of offenses and the failure to handle such cases on an expedited basis will "significantly strain prosecutorial and judicial resources," (or the district can show some other "exceptional local circumstance").
- Declination of such cases in favor of state prosecution is unavailable or unwarranted.
- The cases are highly repetitive and present similar fact scenarios.
- The cases do not involve a "crime of violence."

In addition, any authorized fast-track program must require that the defendant enter into a written plea agreement; that he waive filing any pretrial motions; that he waive any right to appeal; and that he waive the opportunity to challenge his conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel. *Id.*

D. Fast-track programs authorized for FYs 2004 and 2005

The Attorney General delegated the authority to authorize the fast-track programs to the Deputy Attorney General, and on October 24, 2003, Acting Deputy Attorney General Robert D. McCallum, Jr., authorized twenty-seven fast-track programs in fifteen different USAOs. That authorization was effective through September 30, 2004, and was later extended to October 31, 2004.

Deputy Attorney General James B. Comey authorized twenty-eight separate fast-track programs in sixteen different USAOs on October 29, 2004, for FY 2005. Most fast-track programs are for immigration offenses in violation of 8 U.S.C. §§ 1324, 1326.

IV. Authorized fast-track programs for illegal reentry after deportation offenses

Fast-track programs for prosecution of illegal reentry after deportation offenses in violation of 8 U.S.C. § 1326 were authorized for the five Southwest border Districts of Arizona, Southern California, New Mexico, Southern Texas and Western Texas for FY 2005. The fast-track criteria does not restrict fast-track programs to border districts. Several interior districts are experiencing significant growth in illegal immigrant population. As noted by columnist Ruth Marcus in a recent op-ed piece in the Washington Post, "Nebraska illustrates the new geographic reality of illegal immigration: They're not just in Texas (or California or Florida) anymore. In recent years the most rapid growth in the population of undocumented migrants (as well as legal immigrants) has taken place in states that previously had only a handful of foreign-born residents." Ruth Marcus, Editorial, *Immigration's Scrambled Politics*, WASH. POST, Apr. 4, 2006, at A23. The number of illegal immigrants in Nebraska has increased because of the opportunities the meat packing industry provides. In 1990, there were approximately 6,000 illegal immigrants in the state. In 2000, this number had risen to 24,000, and in 2006 it may be as high as 40,000. *Id.* There were eight non-Southwest border districts authorized for fast-track programs for illegal reentry offenses for FY 2005—Central California, Eastern California, Northern California, Idaho, Nebraska, North Dakota, Oregon, and Western Washington.

Disposition pursuant to the fast-track program varies from district to district. Most fast-track districts employ a departure-based program for illegal reentry offenses. Consistent with the PROTECT Act and U.S.S.G.§ 5K3.1, departures do not exceed four levels. The amount of the reduction depends on the defendant's criminal history and may also depend on whether the defendant was on supervised release at the time of the offense. The departure typically ranges from two to four levels under § 5K3.1. One district, however, limits the reduction to one level. For those districts employing a charge-bargain program, the resulting sentence reduction generally complies with the departure limitations of § 5K3.1.

Typical fast-track dispositions for defendants charged with illegal entry after deportation in violation of 8 U.S.C. § 1326 for FY 2005 are described by district in Appendix A, attached to a responsive memorandum filed by the government in compliance with an order issued by the Southern District of New York in *United States v. Krukowski*, No. 04 Cr. 1308(LWK) (S.D.N.Y. June 10, 2005). The memorandum was a collaborative effort filed by Reed Brodsky,

Assistant United States Attorney for the Southern District of New York, in response to the fast-track disparity argument. In preparing this article, the author has drawn liberally from that memorandum without further attribution.

V. Responding to the fast-track disparity argument

As a consequence of *Booker*, federal prosecutors, in the majority of districts lacking approved fast-track programs for illegal reentry offenses, have to grapple with the fast-track disparity argument. District courts have been encouraged to follow a three-step analysis in determining sentences after *Booker*. The Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984), requires judges to consider the factors listed in 18 U.S.C. § 3553(a) in determining a sentence. *United States v. Booker*, 543 U.S. 220, 259-60 (2005). The district courts must determine the advisory guideline sentencing range, whether a departure is supported by the Guidelines' policy statements, and if a variance (a non-guideline sentence) is appropriate under 18 U.S.C. § 3553(a). Illegal reentry defendants argue that 18 U.S.C. § 3553(a)(6) entitles them to a "fast-track" reduction because the district court is required to consider "the need to avoid unwarranted sentence disparities among defendants who have been found guilty of similar conduct."

Some district courts have been sympathetic to this argument and granted a reduction in sentence based, at least in part, on perceived disparities between defendants prosecuted for immigration offenses in districts with an authorized fast-track program and those prosecuted in districts lacking an authorized program. *See, e.g., United States v. Medrano-Duran*, 386 F.Supp.2d 943 (N.D. Ill. 2005); *United States v. Ramirez-Ramirez*, 365 F.Supp.2d 728, 732 (E.D. Va. 2005); *United States v. Galvez-Barrios*, 355 F.Supp.2d 958 (E.D. Wis. 2005).

The absence of a fast-track program in the Southern District of New York led some district court judges to award illegal reentry defendants a downward departure. They based the lesser sentence on the fact that the existence of fast-track programs in other districts created an unwarranted sentencing disparity. Other district court judges in the Southern District of New York have rejected that argument. *See* cases collected in *United States v. Duran*, 399 F.Supp.2d. 543, 544-45 (S.D.N.Y. 2005) and *United States v. Constantine*, 417 F.Supp.2d 337, 339 (S.D.N.Y. 2006) (both cases rejected a sentence reduction based on fast-track disparity). *See also United States v. Santos*, 406 F.Supp.2d 320 (S.D.N.Y. 2005); *United States v. Austin*, No. 05 Cr. 744(RWS), 2006 WL 305462 (S.D.N.Y. Feb. 6, 2006) (fast-track disparity supported a reduction in sentence); and *Krukowski*, 04 Cr. 1309(LWK) (S.D.N.Y. July 25, 2005) (existence of fast-track programs in some districts created an unwarranted disparity in an illegal reentry § 1326 prosecution although a guideline sentence was imposed after evaluating all the factors in 18 U.S.C. § 3553(a)).

A. Eligibility of defendant for fast-track consideration

Federal prosecutors must initially determine whether the defendant would qualify for fast-track disposition in a fast-track district when confronted with the fast-track disparity argument. In many cases, the disparity argument is unavailable to an illegal reentry defendant because his criminal history disqualifies him from fast-track disposition, even if he was being prosecuted in a fast-track district. *See United States v. Pena-Carrillo*, No. 05-30362, 2006 WL 620728 (9th Cir. Mar. 14, 2006) (unpublished) (existence of fast-track programs in other districts is irrelevant in determining defendant's sentence because his prior felonies included sexual crimes against children, which generally disqualifies a defendant from fast-track consideration in fast-track districts); *United States v. Hernandez-Martinez*, 154 Fed. Appx. 778 (11th Cir. 2005) (unpublished) (reduction in sentence based on fast-track disparity not warranted when defendant had been deported twice before, had committed robbery and a burglary, and committed the illegal reentry offense while on supervised release and within two years from his release from prison); *United States v. Emence*, 154 Fed.Appx. 74 (2d Cir. 2006) (unpublished) (guideline sentence was not unreasonable, despite fast-track disparity argument, because defendant's "persistently violent criminal conduct" justified a sentence at the low end of the guideline range).

Depending on the criteria used by the United States Attorney's Office, defendants charged with illegal reentry after deportation may be excluded from fast-track consideration if they have been convicted of crimes of violence, including the following offenses:

- Murder.
- Kidnapping.
- Voluntary manslaughter.
- Forcible sex offenses.
- Child-sex offenses.
- Drug or firearms offenses.
- Convictions which otherwise reflect a history of serious violent crime resulting in injury to others.

Approved fast-track programs exclude any offense designated by the Attorney General as a "crime of violence" in 28 C.F.R. § 28.2.

Defendants may also be excluded if they have ten or more criminal history points, four or more prior deportations, a prior conviction for illegal reentry under 8 U.S.C. § 1326, or a prior immigration conviction for which the sentence equaled or exceeded twenty-four months. Defendants may also be excluded if they have been sentenced to at least ten years imprisonment for all crimes or were encountered as part of an independent federal criminal investigation.

B. Fast-track programs do not create an "unwarranted" disparity

In the legislative history for the PROTECT Act, the House of Representatives addressed the "unwarranted disparity" issue, and made clear that properly authorized early disposition programs did not create unwarranted sentence disparities.

> Several districts, particularly on the Southwest border, have early disposition programs that allow them to process very large numbers of cases with relatively limited resources. Such programs are based on the premise that a defendant who promptly agrees to participate in such program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account . . . . This section preserves the authority to grant limited departures pursuant to such programs. In order to avoid unwarranted sentencing disparities within a given district, any departure under this section must be pursuant to a formal program that is approved by the United States Attorney and that applies generally to a specified class of offenders.

H.R. REP. NO. 108-48, at 4 (2003).

In one of the first district court opinions to address the fast-track disparity issue, Judge Paul G. Cassell in the District of Utah took particular note of Congress' approval of fast-track programs in finding that any disparity between illegal reentry cases in Utah and those in districts with a fast-track program was not unwarranted. *United States v. Perez-Chavez*, 422 F.Supp.2d 1255 (D. Utah 2005). Judge Cassell noted:

> The number of federal immigration offenses has exploded from 2,300 in fiscal year 1991 to 10,458 in fiscal year 2001. Moreover, these offenses are concentrated in various districts, typically along the Mexican border. The Southern District of California alone prosecuted more immigration offenses (4,213) than did the entire Tenth Circuit (3,415). It stands to reason that some districts may need to find ways to rapidly process immigration cases. Fast-track programs also arguably reduce disparity by allowing more violators to be prosecuted. For example, the U.S. Attorney for the Southern District of California has reported that without a fast-track program, the number of immigrant offenders that could be prosecuted along the California-Mexico border would significantly decrease. This means that while fast-track programs do create disparity between *prosecuted* offenders from district to district; because they permit more prosecutions, they may prevent the even greater disparity that occurs when an offender goes *unprosecuted* because of the lack of prosecutorial resources in a district with a large volume of immigration offenses.
>
> In short, Congress has concluded that the advantages stemming from fast-track programs outweigh their disadvantages, and that any disparity that results from fast-track programs is not "unwarranted." This court's sentencing task is to faithfully implement the congressional will. . . . In this case, that means applying the recommended Guidelines sentence without varying to try and eliminate the disparity caused by fast-track programs. If Congress is willing to accept that disparity, so must this court.

Id. at 1262-63 (footnotes omitted). To vary from a Guidelines sentence on the basis that other similarly situated defendants in fast-track districts might receive less prison time "would . . . ignore

the recent congressional directive, contained in the PROTECT Act, that only the Attorney General can authorize fast-track programs." *Id.* at 1256. Judge Cassell appropriately labeled Congress' determination a "command" and a statutory validation of the fast-track approach. *Id.*

VI. Courts of Appeals: fast-track disparity not unwarranted

The Circuit Courts of Appeals addressing the fast-track disparity argument, to date, have upheld district court refusals to impose a more lenient sentence based solely on the claim that an illegal reentry offender would be entitled to a sentencing reduction in a fast-track district.

A. First Circuit

The absence of a fast-track program in the district of Maine gave rise to a claim by an illegal reentry after deportation defendant that his equal protection rights were violated. The First Circuit disagreed, finding that any distinction between aliens sentenced in fast-track versus non-fast-track districts did not constitute a suspect classification or involve fundamental rights. *United States v. Melendez-Torres*, 420 F.3d 45 (1st Cir. 2005). The court determined that the United States Attorney General and the United States Attorney for the District of Maine could rationally conclude that the low volume of crimes involving illegal aliens in Maine, as opposed to the high volume in Southwestern states, the effect of greater deterrence, and swifter adjudications, could justify the absence of a fast-track program in the district of Maine. Therefore, no equal protection violation existed. *Id.* at 53.

On plain error review, the First Circuit subsequently denied the claim of an illegal reentry defendant, sentenced pre-*Booker*, that the district court would have sentenced him to a lower sentence because of fast-track disparity under non-binding guidelines post-*Booker*. *United States v. Martinez-Flores*, 428 F.3d 22, 29-30 (1st Cir. 2005). The defendant made no showing that the district court would have sentenced him any differently had it been operating under advisory guidelines. In fact, the district court's comments at sentencing indicated that it would not have considered any fast-track disparity unwarranted. In a footnote, the court indicated: "It is arguable that even post-*Booker,* it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable." *Id.* at 30 n.3 (citing *Perez-Chavez*, 422 F.Supp.2d at 1263).

The First Circuit in *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) also upheld the district court's denial of a below-Guidelines sentence to an illegal reentry defendant. Disparities created by fast-track programs permitted in some districts, but not in others, were authorized by Congress for prudential reasons. "The impact is probably more modest than the decision of a United States Attorney, in a district with a heavy case load, to forgo entirely some prosecutions that would routinely be brought in other districts. Whether it would even be permissible to give a lower sentence on the ground sought is itself an open question." *Id.* at 519, citing *Martinez-Flores*, 428 F.3d at 30 n.3.

B. Second Circuit

In an unpublished opinion, the Second Circuit referred to the fast-track disparity issue as "an intriguing question ripe for resolution by this Court," but upheld, on other grounds, a seventy-two month sentence imposed for an illegal reentry offender that was five months less than the minimum guideline sentence of seventy-seven months. *United States v. Urena*, No. 05-2343-CR, 2006 WL 755962 (2d Cir. Mar. 22, 2006). It is not clear from the record whether the district court considered the impact of fast-track programs in other districts in making its sentencing determination. *Id.* at *1, n. 2. The court made reference to four district court opinions in the Southern District of New York expressing divergent views on whether fast-track disparity should be a relevant factor in determining an individual defendant's sentence. *Compare United States v. Duran,* 399 F.Supp.2d 543 (S.D.N.Y. 2005) (fast-track not a relevant consideration), with *United States v. Linval*, [No. 05 Cr. 345(RWS),] 2005 WL 3215155 [(S.D.N.Y. Nov. 23, 2005)] (considering fast-track), *and United States v. Krukowski*, No. 04-CR-1308 (S.D.N.Y. July 28, 2005) (considering fast-track), and *United States v. Deans*, 03-CR-387 (S.D.N.Y. Nov. 9, 2005) (considering fast-track). *Id. See also United States v. Emence*, 164 Fed. Appx. 74 (2d Cir. 2006) (unpublished) (court found no merit in claim by illegal reentry defendant that the district court failed to consider the fast-track disparity argument in imposing the minimum guideline sentence of seventy-seven months); *United States*

v. Constantine, 417 F.Supp. 2d. 357 (S.D.N.Y. 2006) (court imposed minimum guideline sentence after determining that a fast-track adjustment was not warranted).

C. Fourth Circuit

The Fourth Circuit upheld a guideline sentence for an illegal reentry defendant who claimed that the absence of a fast-track program in the Eastern District of Virginia resulted in unwarranted disparity. *United States v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006). The defendant, while demonstrating the existence of a significant fast-track sentencing disparity, failed to show that such disparity required the district court to grant him a below-Guidelines sentence. "It would be especially inappropriate to impose such a general requirement on district courts in non-'fast track' districts, given that Congress seems to have endorsed at least some degree of disparity by expressly authorizing larger downward departures for defendants in 'fast track' districts." *Id.* at 379-80. However, this does not mean that a district court cannot consider the fast-track disparity in determining an appropriate sentence under 18 U.S.C. § 3553(a). The defendant had been deported at least three times prior to his present offense, including deportation after being convicted for trafficking in cocaine, which is an aggravated felony. The court emphasized that it was not passing on the validity of sentence reductions based on fast-track disparity. "Rather, we hold that merely pointing out the existence of such disparities, with no reference to the characteristics of the particular defendant, does not render a within-Guidelines sentence unreasonable." *Id.* at 380.

The Fourth Circuit vacated a below-guidelines sentence given to an illegal reentry after deportation offender in *United States v. Perez-Pena*, 2006 WL 1791697 (4th Cir. June 30, 2006). The court held that the sentencing disparities between defendants receiving a fast-track reduction pursuant to the PROTECT Act in a fast-track district and those not receiving the reduction in other districts were "warranted" as a matter of law. *Id*. at *6. Avoiding such disparities did not justify the imposition of a below-guidelines sentence.

D. Sixth Circuit

The Sixth Circuit upheld the district court's refusal to reduce an illegal reentry defendant's sentence based on the absence of a fast-track program in the Western District of Tennessee. *United States v. Hernandez-Cervantes*, 161 Fed. Appx. 508 (6th Cir. 2005) (unpublished). In the PROTECT Act, Congress authorized the precise disparities caused by the fast-track program. Accordingly, to reduce a defendant's sentence based on the absence of a fast-track program, the court would have to override the legislative judgment of Congress. *Id.* at 512. *See also United States v. Hernandez-Fierros*, 2006 WL 1806477 (6th Cir. July 3, 2006) (guidelines sentence not rendered unreasonable by fast-track disparity in § 1326 prosecution since such disparity is not unwarranted under 18 U.S.C. § 3553(a)(6)).

E. Seventh Circuit

The Seventh Circuit reached a similar conclusion in *United States v. Martinez-Martinez*, 442 F.3d 539 (7th Cir. 2006). The district court rejected an illegal reentry defendant's claim that he was entitled to a reduction in his sentence because the Southern District of Indiana did not have an authorized fast-track program. The defendant argued, post-*Booker*, that the district court was required by 18 U.S.C.§3553(a)(6) to avoid unwarranted sentence disparities. Congress, however, explicitly recognized that fast-track dispositions would create sentencing disparities. In upholding the district court's guideline sentence, the court noted that a guideline sentence imposed for an illegal reentry offense is not unreasonable simply because it was imposed in a non-fast-track district. "Congress simply has authorized prosecutorial authorities to weigh the benefits of a longer sentence against the burdens of delay and oppressive case management issues and, in such situations, to determine that the public good requires that the latter value be given preference." *Id.* at 542.

After the Seventh Circuit decided *Martinez-Martinez*, it issued an opinion in two consolidated cases involving illegal reentry offenders raising the fast-track disparity argument. *United States v. Galicia-Cardenas*, 443 F.3d 553 (7th Cir. 2006). In the first case, involving Galicia-Cardenas, the district court determined the advisory guideline for an illegal reentry offender to be forty-one to fifty-one months. The Court then departed

downward four levels and imposed a sentence of twenty-seven months, after finding that the absence of a fast-track program in the Eastern District of Wisconsin created an unwarranted disparity. In the second case, involving Vega-Lopez, the district court in the Western District of Wisconsin declined to make a similar finding and imposed a guideline sentence for an illegal reentry offender. Citing *Martinez-Martinez*, decided the preceding day, the Seventh Circuit indicated "we cannot say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program." *Id.* at 555. The guideline sentence for Vega-Lopez was affirmed, and the non-guideline sentence for Galicia-Cardenas was vacated. "Mr. Galicia-Cardenas must be resentenced without a credit for Wisconsin's lack of a fast-track program. Whether he deserves a sentence below the advisory guideline range based on other factors is left to the discretion of the district court." *Id.*

F. Eighth Circuit

In *United States v. Sebastian*, 436 F.3d 913 (8th Cir. 2006), the Eighth Circuit noted that while early disposition programs create disparities among defendants with similar criminal histories based solely on geography,"[t]he command that courts should consider the need to avoid 'unwarranted sentence disparities,' however, emanates from a statute, and it is thus within the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided." *Id.* at 916. Congress and the President have "concluded that the advantages stemming from fast-track programs outweigh their disadvantages, and that any disparity that results from fast-track programs is not 'unwarranted.'" *Id.*, quoting *Perez-Chavez*, 422 F.Supp.2d at 1263. Requiring district courts to vary from the advisory Guidelines, based solely on early disposition programs in other districts, would conflict with Congress' decision to limit fast-track programs to certain geographical areas and would also conflict with the Attorney General's exercise of prosecutorial discretion in determining not to authorize an early disposition program in the Eastern District of Missouri. The Eighth Circuit concluded that the defendant's sentence of forty-six months, representing the low end of the advisory guideline range of forty-six to fifty-seven months, was not unreasonable despite the sentence disparities arising from fast-track programs.

G. Ninth Circuit

The Ninth Circuit upheld guidelines sentences given to three illegal reentry offenders, despite their claim that the absence of a fast-track program in the District of Montana created unwarranted sentencing disparity. *United States v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006). The court recognized that, since Congress had authorized fast-track programs in the PROTECT Act, the disparity created by the absence of a fast-track program was not unwarranted under 18 U.S.C. § 3553(a)(6). When Congress passed the PROTECT Act, it did so with the knowledge that § 3553(a)(6) directed sentencing courts to avoid unwarranted sentencing disparity. "By authorizing fast-track programs without revising the terms of § 3553(a)(6), Congress was necessarily providing that the sentencing disparities that result from these programs are warranted and, as such, do not violate § 3553(a)(6)." *Id.* at 718. The Ninth Circuit held that the disparity created by the sentences imposed on the illegal reentry offenders in the District of Montana, and the sentences imposed on similarly situated illegal reentry offenders prosecuted in fast-track districts was not unwarranted.

H. Tenth Circuit

In upholding the imposition of a guideline sentence, the Tenth Circuit analyzed, but did not decide whether sentencing disparities caused by the existence of fast-track programs created an unwarranted sentencing disparity under 18 U.S.C. § 3553(a)(6). *United States v. Morales-Chaires*, 430 F.3d 1124 (10th Cir. 2005). The directive in § 3553(a)(6) to avoid unwarranted sentencing disparities is but one of the factors district courts are to consider in determining a reasonable sentence. In light of the other factors in § 3553(a) considered by the district court, the court concluded that the guideline sentence of seventy-seven months was reasonable. *See also United States v. Gomez-Castillo*, No. 05-4139, 2006 WL 1166119 (10th Cir. May 3, 2006) (unpublished) (upheld imposition of a guideline sentence for illegal reentry offender despite fast-track disparity argument, where district court found that the remaining sentencing factors under § 3553(a) supported imposition of a Guideline sentence).

I. Eleventh Circuit

In *United States v. Castro*, 2006 WL 1897209 (11th Cir. July 12, 2006), the Eleventh Circuit upheld a guidelines sentence imposed for an illegal reentry after deportation offender who argued that he was entitled to a four-level downward departure in a non-fast-track district. The court held that any disparity created by U.S.S.G. § 5K3.1 did not violate 18 U.S.C. § 3553(a)(6) because Congress had implicitly determined that the fast-track disparity was warranted. *Id.* at *3.

VII. Sentencing Commission findings

In its 2003 Departures Report to Congress submitted prior to *Booker*, the Sentencing Commission expressed the concern that "sentencing courts in districts without early disposition programs, particularly those in districts that adjoin districts with such programs, may feel pressured to employ other measures—downward departures in particular—to reach similar sentencing outcomes for similarly situated defendants." Departures Report, *supra* at 67.

Although some district courts have approved fast-track disparity departures, the effect of such departures in non-fast-track districts has not been dramatic.

> One reason is that immigration cases account for only a fraction of the cases sentenced in the 78 districts that do not have early disposition programs. In all, these districts account for 3.6 percent (2,456 cases) of the overall post-*Booker* caseload. Of these 78 districts, only four have sentenced greater than 100 immigration cases post-*Booker.* The District of Utah sentenced 204 immigration cases (or 21.4% of its post-*Booker* caseload). The Northern District of Texas sentenced 172 immigration cases (or 18.8% of its post-*Booker* caseload). The Middle District of Florida sentenced 162 immigration cases (or 10.3% of its post-*Booker* caseload). The Southern District of New York sentenced 106 immigration cases (or 8.3% of its post-*Booker* caseload).
>
> With respect to these 4 districts, all but one, the Southern District of New York, had rates of imposition of non-government-sponsored, below-range sentences using *Booker* in immigration cases that were less than the overall national average of 9.3 percent. In the Middle District of Florida, the rate of imposition of an otherwise below range sentence is 7.4 percent. In the District of Utah, the rate of imposition of an otherwise below-range sentence is 6.9 percent. In the Northern District of Texas, the rate of imposition of an otherwise below-range sentence is 1.7 percent.

U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 141-42 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf (footnotes omitted).

VIII. Conclusion

As uniformly recognized by the United States Courts of Appeals that have addressed the issue, any disparity between sentences imposed in fast-track and non-fast-track districts for illegal reentry after deportation offenses in violation of 8 U.S.C. § 1326 is not unwarranted under 18 U.S.C. § 3553(a)(6). The greatest disparity exists when illegal reentry offenders escape prosecution altogether because United States Attorneys' offices lack resources to prosecute them. Fast-track programs actually reduce disparity because they enable United States Attorneys' offices to prosecute more illegal reentry after deportation offenders than would otherwise be feasible, absent properly authorized fast-track programs. District courts should not override the will of Congress by granting fast-track reductions to illegal reentry offenders in districts which lack authorized fast-track programs. ❖

ABOUT THE AUTHOR

❑**Paul W. Hahn** joined the United States Attorney's Office for the Eastern District of Missouri in May 1997 as an Assistant United States Attorney, and was detailed in 2003 to the Office of Counsel to the Director, Executive Office for United States Attorneys. He has served as the EOUSA liaison for several subcommittees of the Attorney General's Advisory Committee, including the Sentencing Guidelines Subcommittee and the Border and Immigration Subcommittee. Mr. Hahn regularly teaches a session on "DOJ Policies and Guidance for Sentencing After *Blakely* and *Booker*" at the

National Advocacy Center's Criminal Federal Practice Seminar for new federal prosecutors.✠

Preparing for a Sentencing Hearing

Lori A. Hendrickson
Trial Attorney
Tax Division
Department of Justice

I. Introduction/overview

This article is intended to be a practical guide to assist prosecutors in preparing for the most common sentencing issues. Recognizing office procedures and local rules may vary greatly district-to-district, there is no need to inundate the reader with case citations. Since the majority of federal criminal cases are resolved through guilty pleas, the meticulous drafting of the plea agreement may be the *most* important step in preparing for the subsequent sentencing hearing. Another crucial document is the sentencing memorandum. Although it is not necessary in every case, a persuasive sentencing memorandum about targeted issues may make the difference between the defendant serving a few years in prison or remaining incarcerated until he is eligible for Medicare.

Generally, the burden of proof for most factual matters at sentencing is preponderance of the evidence. A judge's discussion and adoption of factual findings in the presentence report is the usual method of meeting the burden of proof. Since the probation officer uses the plea agreement to begin drafting his presentence report, the contents of that document will be examined in detail.

II. Plea agreement

A. Counts of conviction/factual basis

When the defendant has been indicted for dozens of counts of fraud, the actual counts of conviction may be critical to determining the proper restitution amount for individual victims and the government. The loss for the duration of a conspiracy may be ordered as restitution, based on the defendant's participation in the conspiracy, regardless of his minimal personal, direct involvement. A detailed factual basis may also support restitution amounts to specific victims.

With a guilty plea, the defendant may agree to any restitution amount, including losses attributed to dismissed or acquitted counts. However, the *court* cannot order restitution for all counts if the defendant only pleads guilty to one count. Therefore, prior to finalizing the plea agreement in cases with multiple victims, the prosecutor should consult the Financial Litigation Unit (FLU) to ensure the plea language entitles the government and victims to the maximum allowable restitution.

Similarly, if the indictment includes forfeiture language, or if there were seizures of forfeitable assets during search warrants, a forfeiture unit attorney should be consulted for the proper language to insert in the plea agreement.

B. Guidelines offense calculation

Most districts do not include complete Guidelines calculations in their plea agreements since some decisions will not be made until the sentencing hearing. To establish the Base Offense Level, the plea agreement should state: "the parties agree the Base Offense Level is 20, based on a tax loss of $450,000, § 2T4.1(H);" *See* U.S. SENTENCING GUIDELINES MANUAL § 2T4.1(H) 2005), or, "the parties agree the Base Offense Level is 34, based on a quantity of 15-50 kilograms of cocaine hydrochloride, § 2D1.1(c)(3)." *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(3). By including the offense level, the specific term which controls the offense level (drug quantity or dollar amount of tax loss), and the Guidelines section reference, there will be no misunderstanding as to how the parties determined the Base Offense Level. This specificity also eliminates any potential misunderstandings based on a typographical error. Under basic contract principles, any errors will be

construed against the government, the writer of the plea agreement.

Applicable Guidelines Chapter Three adjustments, such as role in the offense, victim-related adjustments, and obstruction, should be set forth with specificity in the plea agreement. If the prosecutor wants to foreclose a potential minimal role argument, he may insert the following sentence in the plea agreement: "The parties agree there are no applicable adjustments under Chapter Three of the Guidelines." If there is an agreement to disagree, put that in too—then the parameters for the sentencing hearing are established. In this situation, the probation officer will ask for more information to make his own determination, and the court will be alerted to the disputed issues well in advance of the sentencing hearing.

A statement with respect to potential departures under § 5K2 is an additional factor to consider inserting in a plea agreement. We have all experienced a sentencing hearing in which a defense attorney suddenly raised his client's previously undisclosed mental problems as a basis for lenient treatment under the Guidelines. One strategy to avoid this experience is to always include a sentence in the plea agreement about departures. For example, during plea negotiations defense counsel asks for the right to argue for a departure. His rambling statements about how his client has never been in trouble, and just made this one mistake, appear to be an argument for aberrant behavior. In the plea agreement, the prosecutor writes: "Defendant may argue for a departure under § 5K2.20, aberrant behavior, which the government will oppose. Defendant may not seek any other departures which are not specifically set forth in this plea agreement." When the defendant's ten-page sentencing memorandum arrives, the prosecutor need not spend an afternoon responding to arguments about departures under § 5K2.12, coercion and duress, and § 5K2.13, diminished capacity. The response will be concise: "The plea agreement permits defendant to argue for a departure under § 5K2.20, and specifically precludes other departures. See paragraph 10."

Another frequent post-*Booker* argument is that the advisory Guidelines should not be applied to sentence the defendant. Of course, the sentencing judge must consider the Guidelines *and* the factors set forth at 18 U.S.C. § 3553(a) when imposing a sentence. It may be prudent to include language similar to: "the parties agree the Guidelines should apply, and agree that the contemplated Guidelines range is a reasonable and appropriate sentence." When there is a plea agreement, the government should make every effort to preclude, or at least limit, this sentencing argument.

III. Presentence report

Immediately after the guilty plea hearing or trial, the prosecutor should provide relevant documents to the probation officer. If the investigating agent obtained detailed criminal history information to support an enhancement under 21 U.S.C. § 851 or a career offender designation, provide copies to the probation officer. While the probation officer has access to that information, she will appreciate efforts to make her job easier. Perhaps the time she would have spent on retrieving prior convictions can now be devoted to an in-depth review of the facts which the government argues support an obstruction adjustment.

It is important to get the government's version of the facts and potential adjustments in the *first* draft of the presentence report for two reasons. First, the original report's description of the facts is rarely changed in the revised report. Second, the prosecutor will get a preview of the defendant's opposing arguments when he files his objections to the presentence report. The prosecutor may then take time to respond to defendant's arguments in a sentencing memorandum, instead of having to scramble to draft a quick response when the defendant files his sentencing memorandum the week before, or even the day before, the sentencing hearing.

IV. Monetary penalties

In addition to terms of incarceration, prosecutors should seek to require defendants to pay fines, restitution, and forfeit property. Financial penalties are very effective tools of both specific and general deterrence. In plea agreements, parties can agree to virtually anything, per 18 U.S.C. § 3663(a)(1)(A), enabling the prosecutor to craft an appropriate monetary penalty to fit the facts of the case.

It is the *defendant's* burden to prove he has the *inability* to pay a fine. The defendant must put forth evidence of "the financial resources of the defendant and financial needs of the defendant's dependents." 18 U.S.C. § 3664(e). In other words,

the defendant must prove that he or she can *not* pay a fine. Additionally, the defendant's ability to pay is also relevant to an order for discretionary restitution, and in determining the manner of payment of the fine or discretionary restitution.

The defendant's ability to pay is *not* relevant for mandatory restitution.

A. Fines

To determine the applicable fine, the prosecutor should first look to the statute of conviction. If there is no fine listed, 18 U.S.C. § 3571 sets maximum fines based on the particular category of crime. Next, Guidelines § 5E1.2(c) sets forth a range of fines based on the defendant's Offense Level. If the statutory fine is greater than $250,000, then that becomes the maximum range under the Guidelines as well. § 5E1.2(c)(4).

Note that forfeiture of the defendant's assets may affect his ability to pay a fine or discretionary restitution, or the manner in which those penalties are paid, since the defendant's ability to pay is a consideration. Keep this in mind when recommending the fine the defendant should be ordered to pay.

B. Restitution

The Mandatory Victim Restitution Act, 18 U.S.C. § 3663(A), was enacted on April 24, 1996. It sets forth categories of offenses for which restitution is mandatory, including violent offenses and property offenses. Additionally, specific statutes for a wide range of offenses mandate restitution, including: sexual abuse (18 U.S.C. § 2248); sexual exploitation of children (18 U.S.C. § 2259); telemarketing fraud (18 U.S.C. § 2327); tax fraud (26 U.S.C. § 7201) ("costs of prosecution"); clandestine laboratory site cleanup (21 U.S.C. § 853(q)); and maintaining drug-involved premises (21 U.S.C. § 856(c)) ("considered an offense against property for purposes of Section 3663A(c)(1)(A)(ii) of Title 18").

In order to obtain a court order for restitution, the government must establish a factual basis, by a preponderance of the evidence, that a particular victim suffered an actual loss of a specified dollar amount, and should tie that loss to a specific count of conviction. 18 U.S.C. § 3664(e). For crimes with dozens of victims, this information should be shared with the probation officer immediately. The government is required to provide restitution information to the probation officer "not later than 60 days prior to the date initially set for sentencing." 18 U.S.C. § 3664(d)(1). If the loss information is known when the plea agreement is drafted, the prosecutor should include restitution language and an attachment listing the names of the victims and the amount of their loss. The ability to put this information in the plea agreement will depend on how long the case has been pending, the stage of the proceeding at which the plea was entered, and whether the loss information is easily summarized.

In most cases, a sentencing memorandum should be prepared outlining the facts of the scheme and how the loss was calculated, with a spreadsheet listing each victim's name and actual loss amount. At the sentencing hearing, the prosecutor should ask the court to adopt the information contained within the government's sentencing memorandum and make a factual finding on the record that there is proof, by a preponderance of evidence, as to each victim and loss amount.

The court should order full restitution for each victim's loss, *regardless* of the defendant's ability to pay. 18 U.S.C. § 3664(f)(1)(A). The judgment order should include the specific dollar loss per victim, but the victim's address or other personal information should be provided in a separate document. It is important to make sure the court's restitution order is accurate as to victim and to count, as it can be very difficult to amend later. A detailed sentencing memorandum exhibit which can be attached to the judgment order minimizes the risk of error. If the loss information is in the plea agreement, the court may refer to the plea agreement when ordering the restitution amount (for example, as set forth on page five of the judgment order under the heading "Criminal Monetary Penalties").

In addition to actual loss, other amounts may be ordered as restitution. For instance, in telemarketing cases, it is proper to include interest in loss amounts. Seek assistance from FLU colleagues to make the proper calculation.

C. Financial information

Detailed financial information should be made public at the sentencing hearing to allow for immediate collection of fines and restitution. The most common users of this financial information will be the Probation Office, the FLU, and the civil authorities of the Internal Revenue Service

(IRS). Information that was obtained outside the grand jury process may be easily shared, however, financial information developed through the grand jury must still be protected pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. A sentencing memorandum with exhibits may be the most efficient method to put the defendant's financial information in the public record. The memorandum will serve two purposes.

- To rebut the defendant's claimed inability to pay a fine or restitution.
- To disclose grand jury information.

Prior to filing the memorandum, the prosecutor should verify if his district requires a court order to disclose grand jury information.

A sentencing memorandum with detailed financial information may also be useful to increase the defendant's prison term. The financial exhibits may be used to support an argument that other relevant conduct should be included in a fraud case. For example, if the defendant prepared an additional ten false income tax returns which resulted in a $50,000 tax loss, that increase may move him to the next higher base offense level.

The preparation of exhibits with financial information to be attached to a sentencing memorandum should begin immediately after the trial or guilty plea hearing. The prosecutor should ask the case agent to prepare spreadsheets summarizing income figures, victim losses, and the defendant's assets. The FLU may also use this information to obtain lis pendens or temporary restraining orders to prevent the defendant from transferring assets to avoid paying fines or restitution.

In white collar crime cases, the prosecutor should include a clause in the plea agreement which mandates providing financial information to government agencies as a condition of acceptance of responsibility. If the defendant fails to provide the requested financial information between the guilty plea hearing and the sentencing hearing, the prosecutor can argue the defendant should not get the third point (or any points, depending on the egregiousness of the violation and the realistic expectations of what a particular judge will do).

Finally, the prosecutor on a fraud case should also consider inserting a clause in the plea agreement which requires the defendant to provide financial information to the probation office and to the IRS (or other agency) as a condition of supervised release. This should be discussed at the sentencing hearing so the defendant knows that failure to comply with that condition may result in revocation of his supervised release and additional prison time.

D. Payment of fine or restitution as a condition of supervised release

If a fine or restitution is ordered, payment is usually a standard condition of supervised release. The liability to pay a fine or restitution lasts twenty years from the date of judgment or twenty years from date of release from incarceration, whichever is later, or until the death of the defendant.18 U.S.C. § 3613(b). These orders generally may not be discharged in bankruptcy.

For tax fraud cases, the defendant may seek to pay his income tax liability to avoid dealing with the IRS when he gets out of prison. Tax Division and IRS policies emphasize obtaining restitution orders for proven tax losses. In cases where the defendant agrees to pay money to a government agency, the amount may be ordered as restitution or collected directly by the agency. The prosecutor should seek the agency's opinion as to their preferred method and ask if the agency has specific language to include in the plea agreement or the restitution order. Substantial payments toward this obligation should be a condition of supervised release.

V. Sentencing memorandum

If the defendant files a sentencing memorandum, the government should respond in writing, even if the prosecutor does not have time for a thorough analysis. A few judges, usually one or two in each district, are likely to grant the defendant's request for a downward adjustment or departure if it is not precluded in the plea agreement and the government fails to file a written response.

A sentencing memorandum may also be important if the factual basis in the plea agreement, or the discussion during the plea colloquy, were not detailed. If there are disputed issues as to role adjustments or if a special skill was used, it is best to set forth detailed reasons why the government believes they apply. This permits the court to review the issue, and perhaps do its own research, instead of learning of the arguments for the first time at the hearing. Many

judges will not grant a motion for an adjustment they have not thoroughly analyzed, as they want to keep the record clean in the likely event of an appeal.

One of the most important issues to be resolved at sentencing is the defendant's criminal history. This is critical when the defendant's prior convictions make him eligible to be sentenced as a career offender, under Guidelines § 4B1.1, or an armed career criminal, pursuant to § 4B1.4.

A sentencing memorandum may be of great assistance to the court if the defendant's release date is crucial to the determination of the defendant's status as a career offender. *See* § 4A1.2. Additionally, if there is a dispute as to whether a prior conviction is a "controlled substance offense" or a "crime of violence" under § 4B1.1 or § 4B1.4, attach the prior indictment and the certified entries of the guilty plea and sentencing hearing as exhibits. *See Shepard v. United States*, 544 U.S. 13 (2005) (holding that the categorical approach permits the review of the statute, the charging document, the plea agreement, and factual findings by a sentencing court to characterize a prior felony and determine if the Armed Career Criminal Act applies).

A sentencing memorandum is the government's opportunity to supplement, or rebut, the presentence report's conclusions. Written, well-reasoned arguments about disputed issues will be invaluable when the prosecutor is appearing before a judge who usually does not ask the government for recommendations during the sentencing hearing. Indeed, the sentencing memorandum may be the government's only method to advocate its sentencing position.

VI. Sentencing hearing

For the hearing, the prosecutor should always have the following materials.

- Indictment or information.
- Plea agreement.
- Presentence report.
- Objections to presentence report (government and/or defense).
- Sentencing memoranda (government and/or defense).
- Federal criminal code book.
- Guidelines Manual.

In addition, the prosecutor should prepare a one-page summary of the counts of conviction, the material terms of the plea agreement, and the anticipated sentencing issues. This summary should note any motions the government intends to make, including for the third point of acceptance under § 3E1.1, for substantial assistance under § 5K1.1, and to dismiss remaining counts in the indictment. Procedures for these motions vary from district to district. The prosecutor should verify whether the court expects a § 5K1.1 motion to be in letter format, filed under seal, or simply made orally during the hearing.

A checklist used by the author at a recent sentencing hearing follows.

Sentencing Hearing- **Frank Adams**

Guilty plea hearing: November 14, 2005

Counts of conviction:

Ct *1*: conspiracy to distribute and possess with intent to distribute > 5 kilo cocaine (21 U.S.C. §§ 846/841(b)(1)(A))

Ct *41*: money laundering, financial transaction of $9,500 used to purchase vehicle in nominee name to conceal true ownership, used proceeds from specified unlawful activity (21 U.S.C. §§ 846/841(b)(1)(A)) (18 U.S.C. § 1956)

Presentence Report: Criminal History Category *IV*

Sentencing Guidelines Calculation:

Base Offense Level: 38 § 2D1.1(c)(1) (at least 150 KG cocaine)

+2 § 2S1.1(b)(2)(B) (18 U.S.C. § 1956 conviction)

- 3 § 3E1.1(a) (Acceptance of Responsibility)

Adjusted Offense Level 37

Total Offense Level: 37, CHC IV 292-365 months

Plea Agreement terms:

Dismiss counts: 6 - 19, 21 - 28, 30 - 35

Gov't recommendation: 27 year binding sentence (324 months)

Supervised release: 21 U.S.C. § 841(b)(1)(A)/18 U.S.C. § 3583/§ 5D1.2

Special assessment: 18 U.S.C. § 3013, felony, 3013(a)(2)(A)- $100 individual

Fine:

Statute: 21 U.S.C. § 841(b)(1)(A) with prior conviction- $8 million

18 U.S.C. § 3571: N/A

§ 5E1.2(c)(4): statute > $250,000, therefore use $8 million

Restitution/Forfeiture:

For Judgment and Commitment Order, include language set forth in Preliminary Order of Forfeiture (Docket #244)

Appeal: Right to appeal conviction and/or sentence as limited by plea agreement paragraph 24

Alternatively, a judgment form, AO 245B, is an excellent tool for the prosecutor to use as a checklist for items the court should discuss at each sentencing hearing.

United States v. Booker, 543 U.S. 220 (2005), has added a new dimension to some sentencing issues, although it does not apply to restitution. Every prosecutor should be familiar with post-*Booker* decisions in their circuit which impact sentencing. While generally the case law holds a sentencing judge need not recite each and every factor under 18 U.S.C. § 3553(a), how detailed must the discussion be? Prosecutors should know their circuit's rule so they are prepared to ask the judge to review a factor which, if omitted, may result in a remand for a new sentencing hearing.

VII. Conclusion

A thorough, detailed plea agreement which anticipates the most common sentencing issues is a great asset to the prosecutor. It is the template from which a prosecutor may quickly respond to the defendant's objections to the presentence report or oppose departures not permitted by the plea agreement. Moreover, a comprehensive sentencing memorandum will ensure financially able defendants, especially white collar criminals and drug dealers, pay substantial monetary penalties in addition to serving a significant term in prison. After reading the carefully drafted plea agreement and sentencing memorandum, the court will be more apt to follow the government's sentencing recommendations.❖

ABOUT THE AUTHOR

❑**Lori A. Hendrickson** has been prosecuting and investigating federal criminal tax cases, money laundering, and other white collar crimes for nineteen years. She has been a trial attorney with the Western Criminal Enforcement Section of the Tax Division since May 1998, litigating cases primarily in the western United States. She has also prosecuted several Organized Crime Drug Enforcement Task Force cases during her tenure with the Tax Division. Prior to May 1998, she was a special agent for eleven years with the Criminal Investigation Division of the Internal Revenue Service in Cleveland, Ohio. Ms. Hendrickson also is licensed as a certified public accountant in the state of Ohio. She has been a frequent instructor at local, regional, and national seminars regarding financial investigative techniques.✠

The Presumption of Reasonableness for Within-Guidelines Sentences

Elizabeth A. Olson
Attorney
Criminal Division
Appellate Section

I. Introduction

In *United States* v. *Booker*, 543 U.S. 220 (2005), the Supreme Court held that sentencing a defendant under a mandatory sentencing guidelines scheme based on facts found by a judge, rather than a jury, violated a defendant's Sixth Amendment right to a jury trial. *Id.* at 226-27. To remedy this problem, the Court excised the provisions in the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat.1987 (codified in scattered sections of 18 U.S.C.) (1984), that made the federal guidelines mandatory, thus rendering them advisory. *Booker*, 543 U.S. at 245. The Court in *Booker* stressed that "[w]ithout the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals," *id*. at 259, and that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 264. The Court directed that appellate courts review sentences for "unreasonableness." *Id.* at 261.

In the fifteen months since *Booker* was decided, the courts of appeals have begun to develop a jurisprudence of "reasonableness" review. Although development of the law in this area is still in its infancy, some themes are beginning to emerge. This article discusses one of those themes: the extent to which a sentence imposed within the applicable guidelines range should be afforded a presumption of reasonableness. Part II will survey appellate decisions in which courts have adopted, or declined to adopt, a presumption of reasonableness for within-guidelines sentences. Part III will address the distinct, but related, question of whether the district court at sentencing should presume that the appropriate sentence falls within the (now-advisory) guidelines range. Finally, Part IV will provide some practical suggestions for AUSAs with respect to both advocating for, and defending, a within-guidelines sentence.

II. Presumption of reasonableness in the courts of appeals

As of mid-April 2006, six courts of appeals have held, on appellate review, that a sentence imposed within a correctly calculated guidelines range is entitled to a presumption of reasonableness. *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. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717-18 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2005). These courts reasoned that "[t]he Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country," *Mykytiuk*, 415 F.3d at 608, and that a rebuttable presumption of reasonableness is appropriate in light of "the purpose of the Guidelines[:]. . .to promote uniformity in sentencing so as to prevent vastly divergent sentences for offenders with similar criminal histories and offenses." *Kristl*, 437 F.3d at 1054. While adopting a rebuttable presumption of reasonableness, the courts declined to declare a within-guidelines sentence reasonable per se. *See*, *e.g.*, *Mykytiuk*, 415 F.3d at 608. ("While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the Court's charge that we measure each defendant's sentence against the factors set forth in § 3553(a) requires the door to be left open for this possibility.")

The Fourth Circuit has taken this presumption farther than the other circuits, holding that "[i]f a sentence within the sentencing range serves the factors set forth in § 3553(a), the court should impose a sentence within that range," and that only if "a sentence within the sentencing range does not serve the § 3553(a) factors, the court may impose a sentence outside of the sentencing range," provided it gives an explanation "why a sentence outside of the Sentencing Guideline range better serves the relevant purposes set forth

in § 3553(a)." *United States v. Eura*, 440 F.3d 625, 632 (4th Cir. 2006).

Other circuits have not articulated their treatment of a within-guidelines sentence in terms of a presumption, but have nevertheless taken a similar approach. The Eleventh Circuit, for example, has said that "ordinarily [it] would expect a sentence within the Guidelines range to be reasonable." *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). Similarly, the Third Circuit has found it "[un]necessary to adopt a rebuttable presumption of reasonableness for within-guidelines sentences," reasoning that appellants "already bear the burden of proving the unreasonableness of sentences on appeal." *United States v. Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006). That court did say, however, that "a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range." *Id.* at 331. Finally, while the First Circuit declined to adopt a presumption of reasonableness for within-guidelines sentences, *see United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) ("We do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable. . .'"), it made clear that "the guidelines cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a) (2000), 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." *Id.*

The Second Circuit has also declined to adopt a presumption of reasonableness for within-guidelines sentences. *See United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). The Second Circuit has identified two aspects of its reasonableness review:

> (1) procedural reasonableness, whereby [it] consider[s] such factors as whether the district court properly (a) identified the Guidelines range supported by the facts found by the court, (b) treated the Guidelines as advisory, and (c) considered the Guidelines together with the other factors outlined in 18 U.S.C. § 3553(a); and (2) substantive reasonableness, whereby [it] consider[s] whether the length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a).

United States v. Claudillo-Marquez, 2006 WL 224182, at *3 (2d Cir. Jan. 30, 2006) (unpublished). So far, the Second Circuit has affirmed as reasonable on appeal every sentence imposed within a properly calculated advisory guidelines range. Only the Ninth and D.C. Circuits have yet to decide whether to adopt a presumption of reasonableness for within-guidelines sentences.

Regardless of the terminology adopted or rejected by the courts, however, the courts of appeals have affirmed as reasonable within-guidelines sentences in the overwhelming majority of cases. The exceptions are notable. In *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), the Seventh Circuit vacated and remanded a within-guidelines sentence because it concluded that the district court had failed to provide an adequate explanation for the sentence it imposed. Although the sentence was within the guidelines range, and therefore had a presumption of reasonableness under the Circuit's precedent, the court was troubled that the district court had failed to discuss the defendant's apparently strong evidence of psychiatric problems and substance abuse, which he argued warranted a downward departure or variance. While refusing to say that a district court "is obliged to address every argument that a defendant makes at the sentencing hearing," the court nevertheless found that it could not "have much confidence in the judge's considered attention to the factors in this case, when he passed over in silence the principal argument made by the defendant." *Id.* at 679.

In *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006), defendants Lazenby and Goodwin were convicted of conspiring to manufacture and distribute methamphetamine. Goodwin's Sentencing Guidelines range was calculated at 87-108 months, and the district court imposed a sentence of eighty-seven months. The court of appeals vacated and remanded, despite the sentence being within the applicable guidelines range, given the "unusual circumstances." *Id.* at 934. The court noted that Goodwin was arguably less culpable than her codefendant, who had been sentenced by a different judge to twelve months. The court of appeals noted that this disparity "illustrates the virtue" of having coconspirators sentenced by the same district judge, and remanded the case for resentencing. *Id.*

Finally, the Ninth Circuit recently vacated a below-guidelines sentence in *United States v.*

Zavala, 2006 WL 914528 (9th Cir. Apr. 11, 2006). The court held that the district court erred in concluding that the guideline range was the "presumptive sentence," and in stating that the defendant bore the burden of explaining any justification for imposing a lower sentence.

Thus, while the overwhelming majority of within-guidelines sentences are affirmed as reasonable on appeal, the "presumption" of reasonableness for such sentences is not absolute. This is true both on appeal and in the district courts.

III. Presumption of reasonableness in the district courts

Although the cases above focus primarily on the presumption of reasonableness as a matter of *appellate* review of a within-guidelines sentence, a related question focuses on the district court's procedures at the initial sentencing. All the courts of appeals have held, post-*Booker*, that the district court is obligated, in most cases, to correctly calculate the guidelines range and to "consider" that range when determining the defendant's sentence. *See*, *e.g.*, *Crosby*, 397 F.3d at 111; *United States v. Crawford*, 407 F.3d 1174, 1178-79 (11th Cir. 2005) ("This consultation requirement [in § 3553(a) that survives *Booker*], at a minimum, obliges the district court to calculate correctly the sentencing range prescribed by the Guidelines. . . . In other words, as was the case before *Booker*, the district court must calculate the Guidelines range accurately. A misinterpretation of the Guidelines by a district court effectively means that [the district court] has not properly consulted the Guidelines." (quoting *United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005)) (alteration in original); *Hazelwood*, 398 F.3d at 801 ("[R]egardless of whether the Guidelines are mandatory or merely advisory, district courts are required by statute to consult them. . . ." (citing 18 U.S.C. § 3553(a)).

The scope and limits of this "consultation," however, remain unclear. At least two circuits have suggested that it is inappropriate for the district court to begin and end with the guidelines range, without considering the other § 3553(a) factors as well. In *Zavala*, the defendant was convicted of conspiracy to distribute or to possess with intent to distribute methamphetamine and of distribution of methamphetamine. *See Zavala*, 2006 WL 914528; 21 U.S.C. §§ 841(a)(1), 846. The district court calculated the guidelines "range" as life imprisonment, and announced at the sentencing hearing that it assumed that the calculated guideline range becomes a presumptive sentence, and that it must then decide if the other factors in 18 U.S.C. § 3553(a) "would justify the Court in imposing a lesser sentence than that set forth in the Guideline range." *Zavala*, 2006 WL 914528, at *1. The court later clarified that it viewed the guidelines range as the "starting point," and rejected the defendant's assertion that the "starting point" should be the mandatory minimum sentence. The district court then went on to consider the factors in 18 U.S.C. § 3553(a), and ultimately sentenced the defendant to thirty years' imprisonment.

The Ninth Circuit vacated and remanded. Although the court rejected the defendant's assertion that the guidelines range should not be used as the "starting point," it found that the district court had gone too far in declaring the guidelines range the "presumptive" sentence. By doing so, the court held, the district court improperly accorded the guidelines range greater weight than it accorded the other § 3553(a) factors. Id. 2006 WL 914528, at *5.

The Seventh Circuit also touched on this issue in *Cunningham*. Although the court accepted the district court's use of the guidelines range as a starting point, it cautioned that "the sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors." *Cunningham*, 429 F.3d at 676. The government argued in *Cunningham* that the district court's statement that it had considered "all of the factors that [it has] to adhere to" sufficed to demonstrate that the district court had exercised its discretion, and that no further explanation for its within-guidelines sentencing decision was necessary. *Id.* at 677. The court of appeals said that this might be sufficient "if those circumstances made only a weak case for a sentence below the guidelines range," *id.* at 678, and that a district court need not address every argument a defendant makes at sentencing because the "failure to discuss an immaterial or insubstantial dispute relating to the proper sentence would be at worst a harmless error." *Id.* at 679. The court cautioned, however, that a "rote statement that the judge considered all relevant factors will not always suffice" in a case where a defendant brings forward a strong

argument in support of a lower-than-guidelines sentence. *Id*.

Thus, here too, prosecutors are well-advised not to rest solely on the presumptive reasonableness of the guidelines sentencing range. Instead, the better practice is to take a step back, and focus the district court's attention on the basis for that presumption.

IV. Advocating for, and defending, the within-guidelines sentence

In advocating for a within-guidelines sentence in the district court, prosecutors should make clear that the sentence is appropriate *not only* because it falls within the applicable guidelines range, but also because a sentence within that range necessarily furthers several of the goals of sentencing specified in 18 U.S.C. § 3553(a). Because the guidelines reflect nationwide sentencing practices—including identifying and assigning weights to the factors, both aggravating and mitigating, that judges traditionally used in determining an appropriate sentence—a sentence within the guidelines range reflects the federal courts' collective sentencing expertise accumulated over the past two decades. A properly calculated guidelines range takes into effect the nature and circumstances of the offense and the history and characteristics of the offender. *See* 18 U.S.C. § 3553(a)(1). It gives appropriate weight to the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment. *See id.* § 3553(a)(2)(A). It affords adequate deterrence to criminal conduct and protects the public from further crimes of the defendant. *See id*. §§ 3553(a)(2)(B), (C). Moreover, a guidelines sentence—and *only* a guidelines sentence—provides a means for the district court to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. *See id.* § 3553(a)(6). Prosecutors should focus on these factors in their sentencing memoranda and at sentencing hearings, and stress that, as the First Circuit concluded, "the guidelines cannot be called just 'another factor' in the statutory list," because they are instead "the only integration of the multiple factors." *Jimenez-Beltre*, 440 F.3d at 518.

This is equally true on appeal. Noting the presumptive reasonableness of a within-guidelines sentence is a good starting point in those circuits that have adopted the presumption. Even then, however, it is best to reiterate the reasons for that presumption. A guidelines sentence is not reasonable merely because the Sentencing Commission has deemed it so—rather, it is reasonable because it takes into account almost all of the factors that the court is statutorily obligated to consider. In addition, it is the only factor that allows the courts to avoid unwarranted sentencing disparity among similarly situated defendants.

While a district court need not address every argument a defendant makes in support of a below-guidelines sentence, prosecutors will be well-advised to consider whether any of the defendant's arguments might appear, from a cold record at the appellate stage, to be close calls. In those cases, the better practice would be to address these issues head-on in the district court, and to ask the court to make clear on the record that it has considered and rejected those claims. Where the record is clear, the courts of appeals will be deferential. *See*, *e.g.*, *United States v. Williams*, 425 F.3d 478, 480 (7th Cir. 2005) ("It is enough that the record confirms that the judge has given meaningful consideration to the section 3553(a) factors, and the record supplies us with that assurance here.")

Although the majority of sentences are imposed within the now-advisory guidelines, and while the overwhelming majority of within-guidelines sentences are being affirmed as reasonable on appeal, the exceptions are instructive. They suggest that prosecutors still need to assure that the record is clear, that the district court has imposed sentence in light of the statutory factors in § 3553(a), and that the court has actually exercised its discretion at sentencing.❖

ABOUT THE AUTHOR

❑**Elizabeth A. Olson** is an attorney in the Appellate Section of the Criminal Division. She joined the Department of Justice in 2003. She has been actively involved with the government's response to the Supreme Court's sentencing decisions since the Court's decision in *Blakely v. Washington*. Ms. Olson presented the government's position at oral argument in *United States v. Booker* in the Seventh Circuit, and worked on the government's petition for cert

and merits brief in that case. She continues her work as a member of the *Booker* team, consulting with, and advising government attorneys on various aspects of post-*Booker* sentencing procedures on a daily basis. Ms. Olson regularly teaches a session on "DOJ Policies and Guidance for Sentencing After *Blakely* and *Booker*" at the National Advocacy Center's seminar for new federal prosecutors, and frequently makes presentations to attorneys and others about federal sentencing and *Booker*.✠

Guideline "Departures" at Sentencing

Robert Don Gifford
Assistant United States Attorney
District of Nevada

Not every defeat of authority is a gain for individual freedom nor every judicial rescue of a convict a victory for liberty.
-Chief Justice Robert H. Jackson

I. Introduction

Like "skinnin' a cat," there have always been a variety of ways for a defendant to obtain a "departure" from a federal criminal sentence calculated under the U.S. Sentencing Guidelines, e.g., "substantial assistance," as well as those departures that fall outside of the "heartland" of the guidelines. *See Koon v. United States*, 518 U.S. 81, 98 (1996). The Supreme Court altered the sentencing landscape in *Booker v. United States*, 543 U.S. 220 (2005), declaring the Guidelines merely advisory. Tenth Circuit Judge Michael McConnell concisely summarized *Booker*'s end-result with an apt quote from the Disney movie *Pirates of the Caribbean*, "The [Pirate] Code is more of what you would call guidelines than actual rules." *The Booker Mess*, 83 DENV. U. L. REV. 665, 665 (2006).

II. The *Booker* effect

After the 2003 PROTECT Act, sentences within the Guidelines increased from 65% in FY 2002 to 72.2% in FY 2004. While the media and the information being posted on the United States Court's Web page still claim that "most" sentences are within the Sentencing Guideline range, a closer look at the statistics by the Sentencing Commission demonstrates a growing disparity between the circuit courts, and even district courts within the same circuit. *See* http://www.uscourts.gov/ttb/02-06/indepth/index.html. In his statement to the Committee on the Judiciary for the U.S. House of Representatives, United States Attorney and Principal Associate Deputy Attorney General William Mercer cited as an example of the disparity of *Booker* departures between neighboring districts, the 25.7% rate in the District of Massachusetts versus the 8.9% rate in Northern District of New York. It has also been revealed that there is a growing increase in downward departures in every circuit. Three federal circuits seem to be hovering at or below the sentencing guideline range.

- The Ninth Circuit (48% of post-*Booker* sentences within guideline range).
- The Second Circuit (49.6% of post-*Booker* sentences within guideline range).
- The Third Circuit (51.9% of post-*Booker* sentences within guideline range).

The federal district courts within the Fifth Circuit appear to be the most likely to sentence within the guideline range (71.6%). *See Special Post Booker Coding Project* (Feb. 14, 2006), http://www.ussc.gov/Blakely/postBooker_021406.pdf. Senator Patrick Leahy, in Senate Hearings in 2004, referred to sentencing prior to the

Sentencing Reform Act of 1984 as the "bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect [a defendant's] sentence." *See* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=2629.

III. Hair splitting–departures, variances *et al.*

In essence, the Guidelines have placed federal criminal practitioners, as former Central Command's Commanding General Tommy Franks would describe it, at a "crease in history," with circuit-by-circuit interpretive differences for the entire federal sentencing system. For example, some districts will refer to any sentence outside the guidelines as a "departure," while others differentiate with terms such as "variance" or "divergence." *See e.g. United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006) (district courts must decide whether a "traditional departure" is appropriate after calculating the guideline range and before deciding whether to impose a "variance" sentence). *See also, United States v. Hampton*, 441 F.3d 284, 288 n.2 (4th Cir. 2006); *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). Muddying the waters further, the Seventh Circuit recently declared that "the concept of 'departures' has been rendered obsolete . . .," *United States v. Vaughn*, 433 F.3d 917, 923 (7th Cir. 2006), however the Fourth and Sixth Circuits stepped up to hold that departures remain an important part of sentencing, even after *Booker*. *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir. 2006); *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006). The interaction between *Booker,* the guidelines, and relevant statutory provisions concerning guideline departures, continues to raise novel issues almost daily at federal sentencing hearings in various jurisdictions. *See generally* Professor Douglas A. Berman, *Sentencing Law and Policy*, *available at* http://www.sentencing.typepad.com.

IV. The basics–back to the future

It is in this new era that "baby steps" may be required in taking a fresh look at how the guidelines "advise" and how to proceed at sentencing in the post-*Booker* era. Despite the fact that the Sentencing Guidelines are now only "advisory," the *Booker* decision still found them to be a factor that the district court "must" consider in fashioning a sentence that is "sufficient but not greater than necessary." 18 U.S.C. § 3553(a)(4); *United States v. Crosby*, 397 F.3d 103, 108 n.5 (2d Cir. 2005). The guidelines are not just "'another factor' in the [§ 3553(a) list] 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). The guidelines are "not presumptive," and should serve only as a "starting point" for determining the sentence and be given the same weight as other § 3553(a) factors. *United States v. Zavala*, 443 F.3d 1165, 1169 (9th Cir. 2006). In addition, remember that federal criminal sentencing proceedings are governed by Rule 32 of the Federal Rules of Criminal Procedure, and nothing in *Booker* altered its guidance. In arriving at an appropriate disposition, the court must consider, and make clear on the record, a number of factors so that the sentence will accomplish the following purposes.

- Reflect the seriousness of the offense.
- Promote respect for the law and provide just punishment for the offense.
- Provide adequate deterrence to criminal conduct.
- Protect the public.
- Provide the defendant with . . . educational or vocational training, medical care, or other correctional treatment. . . .

See 18 U.S.C. § 3553(a)(2). Failure to calculate a guideline sentence will generally be a reversible error. *United States v. Robinson*, 435 F.3d 699, 702 (7th Cir. 2006).

Prior to Guideline sentencing, federal judges were not required to explain their respective rationales for imposing any particular sentence. Post-*Booker*, sentencing judges must make the record clearer, but judges need not engage in a "ritualistic incantation" of statutory factors for a sentence to be considered "reasonable." *United States v. Johnson*, 403 F.3d 813, 816 (6th Cir. 2005). While a judge must give a reason for a sentence, it is not necessary to state a reason for denying a request for a departure. *United States v. Jones*, 445 F.3d 865 (6th Cir. 2006). *Booker* freed the sentencing courts from the departure methodology of the guidelines that were otherwise previously prohibited. Courts should also be wary

of making statements on the record that appear as if too much weight was placed on the guidelines by the sentencing judge.

V. Plea agreements and negotiations

While the defense bar may now view "normal" plea agreements as having less value, prosecutors should continue to draft plea agreements that provide for defendants to be sentenced within, and according to, the Sentencing Guidelines, when possible. *See* David L. McColgin and Brett G. Sweitzer, *Grid and Bear It: Post-Booker Sentencing Litigation Strategies, Part 2*, 29 THE CHAMPION 42 (Dec. 2005). The traditional plea agreements may otherwise protect the record by showing that a defendant still has the right, in a post-*Booker* sentencing, to "waive constitutional or statutory rights then in existence, as well as those that courts may recognize in the future . . . the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature." *United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005).

Prosecutors should also be careful to protect the record from any statements by the court that violate 18 U.S.C. § 3582(a) and make it appear that the imprisonment imposed by the court is the only and most appropriate means of "promoting correction and rehabilitation." Another statutory provision that prosecutors must be aware of, and be ready to invoke, is 18 U.S.C. § 3661, which states "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." *See also Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (hearsay admissible at sentencing); *United States v. Littlesun*, 444 F.3d 1196 (9th Cir. 2006). Section 3661 is currently being viewed favorably by the defense bar. On its face, however, it is a potential double-edged sword. While it forbids limitations in favor of the defendant, it also frees up the court to consider any negative information about the defendant. This type of information would not have been considered under pre-*Booker* case law.

VI. Before the judge pulls that trigger . . .

If a court intends to depart from the guideline range on a ground not identified in the presentence report or a prehearing submission, Rule 32(h) of the Federal Rules of Criminal Procedure and § 6A1.4 of the Sentencing Guidelines require reasonable notice, by the court, stating that it is contemplating such a ruling and specifically identifying the grounds for the departure. *See United States v. Evans-Martinez*, 2006 WL 05-10280 (9th Cir. June 1, 2006) (notice still required); *United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006) ("Nothing in the PSR or any pre-hearing submission by the government indicated the District Court might be considering the victim impact statements as a basis for an upward departure"). The Seventh and Eighth Circuits, however, have stated that the requirement for reasonable notice under Rule 32(h) no longer applies in cases in which a sentence outside the guidelines is imposed due to "variance," since it is not a "departure." *United States v. Walker*, 2006 WL 1329923 (7th Cir. May 17, 2006); *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005).

In circuits other than the Seventh and Eighth, it is not clear what kind of "notice" is necessary before a court, acting under the guidance of § 3553(a) and *Booker*, may go outside the guideline range. *See* FED. R. CRIM. P. 32(i)(1)(C) (court must allow the parties' attorneys to comment on "matters relating to an appropriate sentence"); FED. R. CRIM. P. 32(h) (Proposed Draft Aug. 2005) (expanding notice requirement to include grounds for both departures and other non-guideline sentences); *See generally Burns v. United States*, 501 U.S. 129, 138-39 (1991) (considering Rule 32 required notice); *United States v. Calzada-Maravillas*, 443 F.3d 1301, 1308 (10th Cir. 2006) (improper for sentencing court to depart upwards *sua sponte*).

VII. Reasons to depart

Before *Booker* struck § 3553(b)(1) from the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of Title 18), the Sentencing Guidelines placed strictures on a sentencing court's ability and authority to sentence outside the guideline range. Non-guideline sentences were available only when a case presented a mitigating or

aggravating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a) (2005). Excepting downward departures requested by the government, federal courts nationwide are now more likely to sentence outside the sentencing guideline range based on § 3553(a) factors, rather than on the grounds listed in Chapter Five. *See* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 62, tbl. 1 (2005) [hereinafter *Final Report*) (courts sentenced outside the range in 2,276 cases based on departure grounds other than government motions, and in 6,947 cases based on the factors in 3553(a)). *See* www.ussc.gov/ booker_report/Booker_Report.pdf.

Chapter Five of the Sentencing Guidelines, parts H and K, originally set out the policies on factors that may be considered in departing from, or fixing a sentence within, the guideline range. While *Booker* has put much of that in flux, an analysis of it should be done and presented to the court. Part H of that chapter discusses the policy that certain offender characteristics that are "not ordinarily relevant" (e.g. age, education and vocational skills, employment record, family ties/responsibilities, and community ties) in determining whether a departure would be proper. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2005). In this new and uncertain sentencing era, it appears that flexibility may be found in the word "ordinarily." Arguably, in the "exceptional" cases, one or more of these listed characteristics may support some form of departure. In the ordinary guideline-calculated case, the characteristics may be relevant for courts deciding where to sentence within the guideline range, or whether to impose a sentence outside the range under *Booker* and § 3553(a). *See generally*: *Booker Litigation Strategies Manual: A Reference for Criminal Defense Attorneys* (Apr. 20, 2005), *available at* http://www.fd.org/pdf_lib/BookerLit Strategies_MJMver03.pdf; Michael R. Levine, *128 Easy Mitigating Factors* (Feb. 1, 2006), http:// www.fd.org/pdf_lib/128EasyMitigatingFactors .pdf.

While advisory, the post-*Booker* version of the guidelines still discuss certain characteristics listed in Part H of Chapter Five that should never support a departure, such as substance or gambling addiction, role in the offense, or lack of guidance as a youth. *See* U.S. SENTENCING COMMISSION GUIDELINES MANUAL §§ 5H1.4 5H1.7, 5H1.12 (2005), respectively. The Post-*Booker* guidelines also state that family and community ties can never be the sole basis for downward departure in a child or sex offense, even though they may be a potential departure ground in the extraordinary case. *Id.* § 5H1.6. In accordance with 28 U.S.C. § 994(d), race, sex, national origin, creed, religion, and socioeconomic status are never relevant to the determination of the sentence. *Id.* § 5H1.10. As with other sections of the Guidelines, there is disagreement whether such characteristics are otherwise relevant to sentencing pursuant to § 3553(a). *See United States v. Long*, 425 F.3d 482, 488 (7th Cir. 2005) (after *Booker*, district court is free to consider factors outlined in § 3553(a), "including those that were specifically prohibited by the guidelines. . . ."); *see, supra, e.g.*, *Final Report* 82-83, tbls. 8-9 (below guideline sentences cite factors of drug/alcohol addiction referenced seventy-two times).

VIII. Government motions to depart downward

Another downward departure historically in the province of government motion is found at § 5K1.1, if a defendant has "provided substantial assistance in the investigation or prosecution of another person who has committed an offense." *cf.* 18 U.S.C. § 3553(b)(2)(A)(iii), § 3553(e). Upon such a government motion, as authorized under § 3553(e), the sentencing judge may only depart on factors related to "substantial assistance," and not continue further departure on other factors discussed in § 3553(a). *See United States v. Pepper*, 412 F.3d 995, 999 (8th Cir. 2005); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003).

For a departure on a ground other than cooperation, § 5K2.0 provides special rules and general principles for downward departures in child and sex offenses. A departure may be warranted when a case presents a circumstance that the Sentencing Commission identified as a potential departure ground. It may also be warranted in the "exceptional" case, based on a circumstance the Commission did not identify, one it considers in Part H as "not ordinarily relevant," or one that is present in an exceptionally great degree. *See* § 5K2.0(a)(2), (3), (4). A particular circumstance that, in and of

itself, does not make a case "exceptional," may do so with a mixture of other circumstances, and therefore justify a departure. This is true, however, only if each of the circumstances is actually identified in the Guidelines as a permissible departure ground. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(c) (2005).

The § 5K departure policy statements, like those found in Part H of the guidelines, limit certain circumstances as grounds for departure, such as financial difficulties and post-offense efforts in rehabilitation. *See* §§ 5K2.0(d), 5K2.12, 5K2.19. Other circumstances are identified as potential grounds for departure, usually upward. Six listed circumstances may support a downward departure: victim's wrongful provocation; commission of the offense to avoid greater harm; coercion/duress; diminished capacity; voluntary disclosure of the crime; and aberrant behavior. For child and sex offenses, grounds supporting departure are much more limited. *See* §§ 5K2.0(b), 5K2.22.

In addition, certain federal districts (traditionally the southwest border districts), utilize a provision in § 5K3.1 that allows for departures of up to four levels, pursuant to a government-authorized early disposition program ("fast-track" programs). For a number of years, these high-volume federal districts have offered the "fast-track" sentencing procedures in immigration cases to defendants who met certain qualifications. Both pre- and post-*Booker* case law has found that those defendants sentenced in non-fast track districts do not have any valid objection. *United States v. Marcial-Santiago,* 447 F.3d 715, (9th Cir. 2006)*; United States v. Melendez-Torres*, 420 F.3d 45, 52 (1st Cir. 2005). Such programs are currently available in sixteen federal districts and provide up to a four level downward departure from the guideline range. These programs can offer favorable charge bargains or sentencing dispositions in exchange for an early guilty plea. *See* PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in Title 42); *see also* UNITED STATES SENTENCING GUIDELINES MANUAL § 5K3.1 (2005).

IX. Conclusion

The United States Supreme Court has spoken on how sentencing is to be determined and that the United States Sentencing Guidelines are no longer mandatory. The factors of 18 U.S.C. § 3553(a) now provide guidance to the court, in its discretion, for imposing sentences and protecting the public. The one thing that is clear is that the pre-guideline disparity in sentencing exists once more. With over 1,000 federal criminal sentencing hearings occurring every week, uniformity is once again needed. One positive view is that *Booker* is a two-way street that has provided a rebirth in sentencing advocacy. That is, however, still subject to much debate and varying views by the circuit courts, and even between district courts within the same circuits. The Sixth Circuit in *United States v. McBride* may have summed up the post-*Booker* litigation most accurately as "[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow." 434 F.3d 470, 474 (6th Cir. 2006).❖

ABOUT THE AUTHOR

❑**Robert Don Gifford** is an Assistant United States Attorney with the District of Nevada. Prior to joining the U.S. Attorney's Office in 2001, Mr. Gifford served as an Assistant District Attorney in Tulsa, OK and served on active duty with the Army JAG Corps as defense counsel in Bosnia and Fort Sill, OK, a prosecutor at Fort Knox, and as a Special Assistant U.S. Attorney in the Western District of Kentucky. He is also currently Senior Defense Counsel in the U.S. Army Reserves, 22d Legal Support Organization.✠

Off The Beaten Path: A Case Study of Unusual Post-*Booker* Litigation In *United States v. Harper*

Traci L. Kenner
Assistant United States Attorney
Appellate Chief
Eastern District of Texas

I. Introduction

In the aftermath of *United States v. Booker*, 543 U.S. 220 (2005), confusion arose regarding the evidentiary standard for factual findings necessary for application of the federal sentencing guidelines. Despite defense arguments for "beyond a reasonable doubt," the circuit courts generally settled the issue in favor of "preponderance of the evidence," the historical standard and the one endorsed by the guideline commentary. *See, e.g., United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006); *United States v. Dean*, 414 F.3d 725, 730 (7th Cir. 2005); *United States v. McKay*, 431 F.3d 1085, 1094-95 (8th Cir. 2005); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2005). Nevertheless, some practitioners may have encountered a published district court order from the Eastern District of Texas, *United States v. Harper*, 360 F.Supp. 2d 833 (E.D. Tex. 2005), advancing the novel theory that the Supreme Court's decision in *Shepard v. United States*, 544 U.S. 13 (2005), mandates proof beyond a reasonable doubt for facts affecting guideline determinations. Although vacated on appeal, the district court's order has been incorrectly cited in other contexts.

II. What happened in *Harper?*

Richard Andrew Harper, an inmate at the federal correctional facility in Beaumont, Texas, stabbed one of his fellow inmates six times with a six-inch meat thermometer. An indictment soon followed, charging Harper with assault on a federal inmate with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3) and possession of a prohibited object while an inmate, in violation of 18 U.S.C. § 1791(a)(2). Harper subsequently reached a plea agreement with the United States and entered a guilty plea to the assault charge.

At sentencing, a dispute arose regarding the degree of the victim's injuries. Because the victim required treatment at a local hospital for a collapsed lung, the presentence report recommended a four-level increase in Harper's offense level for the specific offense characteristic of causing an injury that fell between "bodily injury" and "serious bodily injury." *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(3)(D) (2004) (hereinafter U.S.S.G.). Harper objected, claiming that *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), precluded factual findings by the trial court in support of specific offense characteristics or adjustments not admitted by the defendant or proved to a jury beyond a reasonable doubt.

By the time Harper was sentenced, the Supreme Court had decided *Booker*, but the United States Court of Appeals for the Fifth Circuit had not yet released an opinion regarding its application. The district court struggled with Harper's objection as to the degree of bodily injury because Harper did not specifically agree to it in the plea agreement or during the guilty plea hearing. Based on its interpretation of *Booker*, the court believed it was required to make the factual finding regarding degree of injury beyond a reasonable doubt. "And that's the problem, is as I understand *Booker* and *Fanfan* and *Apprendi*, we have to either have a finding beyond a reasonable doubt by a jury or an admission. . . ." Brief of the United States at 8-9, *United States v. Harper*, No. 05-40500 (5th Cir. July 19, 2005) (quoting the sentencing transcript). Although the court stated that it could have found the victim's injuries to be "serious" by a preponderance of the evidence, it sustained Harper's objection because it could not make the finding beyond a reasonable doubt. *Id.* Instead, the court applied the three-level increase authorized by U.S.S.G. § 2A2.2(b)(3)(A) when a victim suffers "bodily injury" and sentenced Harper to sixty months' imprisonment.

Two days after Harper's sentencing, the Fifth Circuit clarified that a sentencing judge is "entitled to find by a preponderance of the evidence all the facts relevant to the determination of a guideline sentencing range. . . ." *United States v. Mares*, 402 F.3d 511, 119 (5th Cir. 2005). The government quickly moved for correction of Harper's sentence pursuant to FED. R. CRIM. P. 35(a), but the district court denied the motion in a published order. 360 F.Supp. 2d 833. In the order, the court reiterated that it could have made the disputed finding by a preponderance of the evidence. Nevertheless, it determined that the Supreme Court's decision in *Shepard*, which was released three days after *Mares*, precluded application of "a sentence enhancement . . . based upon the court's choice of which of two possible inferences may be drawn, by a preponderance of the evidence, from facts admitted by Defendant." *Harper*, 360 F.Supp. 2d at 835-36. The court reasoned that "[i]n spite of the Fifth Circuit's recent decision in *Mares*, this court must respectfully conclude that the even more recent Supreme Court decision in *Shepard*, requires that sentence enhancements under the guidelines require more than inferences drawn from a preponderance of the evidence." *Id.* at 836. The United States appealed.

III. *Harper* on appeal

The crux of the United States' appellate argument regarding the *Harper* order was that the district court simply misconstrued the Supreme Court's *Shepard* decision. *Shepard* involved a question of statutory interpretation that implicated, at most, the basic question addressed in *Apprendi*: whether a fact that is used to raise a particular statutory maximum must be proved beyond a reasonable doubt. *Shepard*, 544 U.S. at 24. In *Shepard*, the Court considered the Armed Career Criminal Act, 18 U.S.C. § 924(e), which provides for a fifteen-year minimum sentence for convicted felons who possess a firearm and who have three previous convictions for "violent" felonies. Specifically, the Court addressed the narrow issue of the type of evidence that a sentencing court may consider when determining whether a previous conviction was for a "violent" felony, if the defendant entered a guilty plea to the earlier crime. *Shepard*, 544 U.S. at 16. The Court held that, when a district court inquires into the nature of a prior conviction for the purposes of the Armed Career Criminal Act, the proof is limited to the "terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record. . . ." *Id.* at 26. With this holding, the Court followed its prior decision in *Taylor v. United States*, 495 U.S. 575 (1990), a case that presented essentially the same question in the context of a prior jury conviction. *Id.* at 17.

The district court in *Harper* appeared to rely on the third section of *Shepard*, which was joined by only four members of the Court. *Id.* at 24-26 (Section III). That portion of *Shepard* discussed the decision in light of *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi*, and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (facts related to recidivism are sentencing factors that need not be presented to a jury). The plurality expressed concern that, if the rule of *Almendarez-Torres* did not apply, constitutional questions under *Apprendi* would be presented if the Court construed § 924(e) as permitting proof of the violent nature of defendant's past felonies by less than beyond reasonable doubt. *Shepard*, 544 U.S. at 24-25. The Court avoided the constitutional question, however, by limiting the nature of proof available to a district court when determining whether the prior felonies were violent. *Id.*

In its *Harper* order, the district court observed that "[i]t seems clear that the Supreme Court has ruled that sentencing enhancements must be based upon jury findings, prior convictions, the court documents and statutory definitions pertinent to such convictions, and admissions by a defendant." *Harper*, 360 F.Supp. 2d at 835-36. In reaching this conclusion, the court blurred the line between factual findings that affect a guideline sentence within a statutory range and those that trigger an enhancement, which raises the statutory range, determining that there was no substantive difference between the two. *Id.* In doing so, the district court appeared to give weight to the current, unfortunate practice of referring to the U.S.S.G.'s Chapter 2 specific offense characteristics and Chapter 3 adjustments as "enhancements"—a term previously reserved for statutory sentencing enhancements.

On appeal, the United States asserted that the district court misconstrued the Court's discussion in Section III. As noted above, the issue addressed in *Shepard* implicated the fundamental question addressed in *Apprendi*: whether a fact that is used to raise a particular statutory maximum must be

proved beyond a reasonable doubt. *Shepard*, 544 U.S. 24-26. *Shepard* did not address the question of whether, post-*Booker*, a fact relevant to determining a guideline sentencing range that does *not* raise a statutory or other mandatory maximum must be proved beyond a reasonable doubt. That question, the government argued, is controlled by *Booker* and the various post-*Booker* circuit court decisions defining sentencing procedure under the advisory guideline scheme.

The Fifth Circuit agreed, noting that "prior precedent and the uniform position of the courts of appeals" permit a district court to find facts relevant to a defendant's guideline calculation by a preponderance of the evidence. *United States v. Harper*, 448 F.3d 732, 735 and n.2 (5th Cir. 2006)(collecting cases). After describing the Supreme Court's decision in *Shepard*, the court focused on the distinction between the mandatory nature of the Armed Career Criminal Act and the now-advisory sentencing guidelines.

> Unlike in *Shepard*, the facts relevant to the application of U.S.S.G. § 2A2.2(b)(3)(D) to Harper do not subject him to a higher potential sentence. In this case, Harper's guilty plea by itself authorized a sentence of zero to ten years imprisonment. 18 U.S.C. § 113(a)(3). Under an advisory Guidelines system, a judicial finding with respect to the degree of injury that Harper inflicted on [the victim] no longer mandates a sentence within any particular subset of the statutory range. Application of the [Armed Career Criminal Act], however, remains mandatory for all defendants to whom it applies. *See* 18 U.S.C. § 924(e) (stating that a person convicted of three prior violent felonies "shall be ... imprisoned not less than 15 years"). It is this mandatory increase in the upper limit of Shepard's sentence that created a Sixth Amendment right to have the facts supporting the ACCA enhancement found by a jury beyond a reasonable doubt. Because application of U.S.S.G. § 2A2.2(b)(3)(D) has no mandatory effect on Harper's sentence, the district court erred in declining to find the relevant facts by a preponderance of the evidence.

Id. at 735-36 (footnote deleted).

The Fifth Circuit vacated Harper's sentence and remanded the case for resentencing. On June 30, 2006, Harper was sentenced to sixty-three months imprisonment, which was within the correctly calculated guideline range.

IV. How *Harper* has been construed

Although not widely cited, the district court's *Harper* order found its way into post-*Booker* litigation, primarily in briefing by defense counsel, before it was vacated by the Fifth Circuit. Only one brief relies on the case as support for an argument concerning the actual holding in *Harper*—that guideline determinations must be made beyond a reasonable doubt. Reply Brief of Appellant Oswin Abraham at 17, *United States v. Abraham*, No. 05-4704 (4th Cir. Dec. 7, 2005), *available at* 2005 WL 3689116. Additionally, *Harper* has been referred to, in conjunction with other district court holdings, as being in favor of giving the guidelines "considerable weight" in the post-*Booker* sentencing analysis. Appellant's Opening Brief at 14, *United States v. Heredia*, No. 05-50163 (9th Cir. July 6, 2005), *available at* 2005 WL 3134468.

Because of its reliance on *Shepard*, *Harper* has also been used to support legal propositions unrelated to its actual holding. Two appellate briefs rely on *Harper* for the argument that the Supreme Court implicitly overruled *Almendarez-Torres* in *Shepard*. *See* Brief of Defendant/Appellant at 17, *United States v. Nelson*, No. 04-6182 (10th Cir. June 9, 2005), *available at* 2005 WL 2174533; Brief of Defendant/Appellant at 17 n.4, *United States v. Kelly*, No. 04-6187 (10th Cir. May 31, 2005), *available at* 2005 WL 2105637 (subsequently remanded on other grounds in an unpublished opinion).

Similarly, the case has been cited as standing for limiting the types of evidence that a district court may consider for "all criminal history determinations under the guidelines" to the documents approved in *Shepard*. David L. McColgin & Brett G. Sweitzer, *Grid & Bear It: Post-Booker Sentencing Litigation Strategies—Part II*, THE CHAMPION, Dec. 2005, at 44, 46 n.26, *available at http://www.fd.org/*; *see also* Appellant's Opening Brief (Amended) at 51; *United States V. Walker*, No. 04-10616 (9th Cir. Oct. 7, 2005), *available at* 2005 WL 3516838 (subsequently affirmed in an unpublished opinion).

The arguments that stray from *Harper*'s holding appear to focus on the district court's

conclusion that "[i]t seems clear that the Supreme Court has ruled that sentencing enhancements must be based upon jury findings, prior convictions, the court documents and statutory definitions pertinent to such convictions, and admissions by a defendant." *Harper*, 360 F.Supp. 2d at 835-36. To date, no other court has agreed with *Harper*'s basic holding that all facts necessary for application of the advisory sentencing guidelines must be admitted by the defendant or proved beyond a reasonable doubt. A district court in Pennsylvania, however, recently quoted *Harper* for the finding that "prior convictions must be admitted or proved beyond reasonable doubt," one of the theories for which *Harper* has been incorrectly relied upon. *See Armstrong v. United States*, 382 F.Supp. 2d 703, 710 (E.D. Pa. 2005).

When confronted with a defense argument that *Harper* supports the idea that the Supreme Court implicitly overruled *Almendarez-Torres* in *Shepard* or that it limited the types of evidence that a district court may consider for criminal history determinations under the guidelines, the standard responses regarding precedential value of district court orders—particularly **vacated** orders from other districts—obviously apply. Substantively, the most cogent response is also the simplest: the district court's statement that "the Supreme Court has ruled that sentencing enhancements must be based upon jury findings, prior convictions, the court documents and statutory definitions pertinent to such convictions, and admissions by a defendant" misconstrues *Shepard*. The *Harper* order failed to recognize the difference between the Supreme Court's holdings dealing with sentencing enhancements that increase a statutory range, such as *Apprendi* and *Shepard*, and those dealing with the operation of the sentencing guidelines within the statutory range, such as *Booker*.

Despite its reliance on *Shepard*, *Harper* involved an entirely different issue. As noted above, the *Harper* court struggled with the applicable standard of proof–preponderance of the evidence or beyond a reasonable doubt—for factual decisions necessary to determine specific offense characteristics or adjustments under the sentencing guidelines. *Harper* did not involve a sentencing enhancement at all, or address *Shepard*'s narrow issue of what types of evidence a sentencing court may consider when determining the nature of a prior conviction for the purposes of applying the Armed Career Criminal Act, a statutory sentencing enhancement. Nor did the factual dispute involve Harper's criminal history. Dicta aside, *Harper* does not support legal arguments beyond those concerning the proper evidentiary standard for factual findings necessary to calculate the advisory sentencing guideline range.

V. Conclusion

The Fifth Circuit unequivocally determined that *Harper* did not correctly state the law concerning sentencing procedure. Nevertheless, the district court's order may still be cited by creative defendants. Therefore, practitioners who encounter *Harper*-based arguments must understand what the district court held—and, more importantly, what it did not hold—in order to respond to the varied, misguided uses to which it has been put.❖

ABOUT THE AUTHOR

❑**Traci L. Kenner** became an Assistant United States Attorney for the Eastern District of Texas in 1992 and has served as the District's Appellate Chief since 2004. In 2005, an article she co-authored with former First Assistant United States Attorney Becky Gregory, *A New Era In Federal Sentencing*, was published in Vol. 68 of the Texas Bar Journal.✠

Notes

Request for Subscription Update

In an effort to provide the UNITED STATES ATTORNEYS' BULLETIN to all federal law enforcement personnel who wish to receive it, we are requesting that you e-mail Nancy Bowman (nancy.bowman@usdoj.gov) with the following information: Name, title, complete shipping address, telephone number, number of copies desired, and e-mail address. If there is more than one person in your office receiving the BULLETIN, we ask that you have one receiving contact and make distribution within your organization. If you do not have access to e-mail, please call 803-705-5659. Your cooperation is appreciated.