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Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker

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ARTICLES

MANDATORY GUIDELINES: THE OXYMORONIC STATE OF SENTENCING AFTER *UNITED STATES V. BOOKER*

The Honorable Graham C. Mullen *
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I. INTRODUCTION

Like a vampire buried without a stake, mandatory sentencing guidelines have been resurrected to stalk our jurisprudence once more. When the Supreme Court announced the end of the mandatory Sentencing Guidelines regime in *United States v. Booker*,[1] many expected to see a major paradigm shift in the way sentences were handed down. A year and half has passed since *Booker*, but little has changed. Judges are still enhancing sentences based on facts neither found by a jury nor admitted by the defendant, and nearly two-thirds of all sentences are within the prescribed Guidelines range, a difference of less than ten percent from pre-*Booker* levels.[2] While the principal results of sentencing remain the same, the logistics of sentencing have changed. Sentencing has become more complicated than ever before and consumes more judicial time and resources. The ultimate result is that the constitutional issues behind *Booker* and its parent case

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

2. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, app. D-10 (2006).

Apprendi v. New Jersey[3] have been glossed over while the federal courts grow more backlogged in the process.

Now, as the Supreme Court stands poised to decide the issue in *Claiborne v. United States*[4] and *Rita v. United States*[5], the time has come to examine the constitutional and practical ramifications of our post-*Booker* jurisprudence. In particular, this article will focus on the Fourth Circuit, which originated *Rita*. First, we will discuss the Supreme Court's decisions leading up to *Booker*, especially *Apprendi* and *Booker* itself, and explore the rationale behind declaring a mandatory sentencing-enhancement scheme, such as that embodied by the Sentencing Guidelines, to be unconstitutional.

Second, we will explore the way *Booker* has been interpreted and applied by the lower courts, with the Fourth Circuit Court of Appeals as our primary example. We will examine the evolution of post-*Booker* sentencing in the Fourth Circuit, including the "presumption of reasonableness" applied to the Guidelines range, and set forth the steps a district court must follow in imposing a sentence that will be considered "reasonable." We will then briefly compare this standard to the methods employed by other circuits.

Third, we will explore the constitutional dimensions of the Fourth Circuit's sentencing jurisprudence, particularly with regards to the presumption of reasonableness, and compare the current sentencing regime with the principles behind *Apprendi* and the substantive opinion in *Booker*. We conclude that the current sentencing regime fails purely as a matter of constitutional principle, as it essentially recreates (with a few more grounds for variance) the mandatory Guidelines regime.

Fourth, we will give a view from the bench of the much-neglected practical dimensions of the post-*Booker* sentencing regime. Here, we will discuss our experience in the courtroom and how that has changed before and after *Booker*, as well as how we see sentencing continuing to evolve should the "presumption of reasonableness" trend persist. In this section we will also discuss the role of Congress in the development of the post-*Booker* sentencing law.

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3. 530 U.S. 466 (2000).

4. 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5618).

5. 177 F. App'x 357 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5754).

Finally, we will undertake a brief discussion of alternatives to the Fourth Circuit's sentencing jurisprudence and avenues for future thought and discussion. The focus of this article is not on these solutions, as many other, wiser, commentators are currently offering a plethora of ideas for resolving these issues. Instead, it is our intent merely to call attention to a few of the most important areas in the debate. Thus, this section will be directed only toward providing a basis for future thought rather than a detailed set of possible solutions.

Hopefully, at the conclusion of this article, it will become clear that a sentencing regime such as the one currently installed by the Fourth Circuit after *Booker* is both constitutionally and pragmatically unsound. We must chart a new course, taking into account the goals of Congress (including the ever-present cudgel of more restrictive legislation), the dictates of our Constitution, and the practical realities of a justice system with limited resources. Such a course could lead to a new sentencing regime that provides both for the protection of the public and for fairness to the defendant.

II. *UNITED STATES V. BOOKER* AND ITS PREDECESSORS

A. *Sixth Amendment Sentencing Through* Blakely

In *Booker*, the Supreme Court struck down the provisions of the Federal Sentencing Act[6]—which made the Federal Sentencing Guidelines mandatory—and declared the Guidelines to be advisory.[7]

Prior to *Booker*, federal judges had no choice but to make findings of fact independent from those facts found by a jury or admitted by the defendant and to use these judicially determined facts to enhance the defendant's sentence beyond the maximum that the judge could otherwise have imposed.[8]

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6. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3583 (2000); 28 U.S.C. §§ 991–998 (2000 & Supp. III 2000).

7. *Booker*, 543 U.S. at 257–65.

8. *See* Mistretta v. United States, 488 U.S. 361 (1989) (holding the Guidelines to be a constitutional delegation of power and therefore binding on the courts). Justice Scalia's dissent in *Mistretta* is also noteworthy as a remarkably accurate prediction of the future.

In *Apprendi*, the legislature required the judge to make a finding of fact that enhanced a defendant's sentence, but labeled those facts as "sentencing factors" rather than elements of the crime.[9] Apprendi pleaded guilty to possession of a firearm for an unlawful purpose, a crime that carried a maximum sentence of ten years.[10] At sentencing, the judge found that Apprendi had been motivated by racial animus, a fact that, by statute, increased his maximum sentence to twenty years.[11] The Supreme Court reversed, setting down the rule that would go on, virtually unaltered, to form the basis of *Booker*: "Other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[12]

This rule is the essence behind our jury requirement. Trial by jury exists because "[t]he founders of the American Republic were not prepared to leave [criminal justice] to the State."[13] If the legislature could mandate raises in individual sentences based on facts not found by a jury, it is not hard to foresee a situation wherein

> a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene.[14] . . . The jury could not function as circuit breaker in the State's machinery of justice if it were relegated to making a determi-

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See id. at 413–27 (Scalia, J., dissenting).

9. *Appendi v. New Jersey*, 530 U.S. 466 468–69, 471 (2000).

10. *Id.* at 469–70.

11. *Id.* at 470–71.

12. *Id.* at 490.

13. *Id.* at 498 (Scalia, J., concurring).

14. These scenarios are not far fetched. In our experience, defendants are frequently charged with possession of a gun by a felon when the real intent is to sentence them for some other crime; thus, the colloquial charge of "possession of a gun while shooting somebody." Justice Scalia's "lane change" example follows the same principles, and in our experience, would be a tactic federal prosecutors would be only too happy to employ. Justice Breyer, in his remedial opinion, in *Booker* crafts a hypothetical wherein a bank robber convicted on a single charge of possession of a firearm receives the same sentence, based on mandatory judicial fact-finding, as another defendant convicted of bank robbery itself. *Id.* at 253. While this example certainly sounds compelling, it begins with the underlying assumption that both defendants are guilty of the same crime. This logic may work well in the hypothetical, but in the real justice system, a defendant's guilt can only be determined by a jury or his own admission; it is not built into the equation from the start. Thus, there are two different defendants here: one who is guilty of bank robbery and one who is guilty of possession of a firearm. This is precisely the scenario Justice Scalia sought to avoid in *Blakely v. Washington*. *See* 542 U.S. 296, 306–07 (2004).

> nation that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.[15]

Thus, the *Apprendi* rule is necessary to give any effect at all to the Sixth Amendment's guarantee of a trial by jury.

The Court went on to clarify what it meant by "prescribed statutory maximum" in *Ring v. Arizona*,[16] a capital case where the judge made findings of fact that made the death penalty applicable,[17] and *Blakely v. Washington*,[18] which involved state sentencing guidelines that were virtually identical to the Federal Guidelines.[19] In *Blakely*, Justice Scalia, writing for the Court, explained that

> the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings [of fact]."[20]

Thus, even though Washington's sentencing guidelines were not technically statutes and all fell within the technical statutory ranges, they functioned as "micro-statutes," imposing a new minimum and maximum, based on the facts of the case, which judges were legally bound to follow. Because a judge could not impose a sentence outside of the guidelines range without making additional findings of fact beyond those contained in the jury verdict or admitted by the defendant, the top of the guidelines effectively served as the statutory maximum for *Apprendi* purposes. When a judge did make findings of fact raising that maximum, the Sixth Amendment right to jury trial applied, rendering that judicial fact-finding unconstitutional.

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15. *Blakely*, 542 U.S. at 306–07.
16. 536 U.S. 584 (2002).
17. *Id.* at 594–95.
18. *Blakely*, 542 U.S. at 303–04.
19. *See* United States v. Booker, 543 U.S. 220, 226–27 (2005).
20. *Blakely*, 542 U.S. at 303–04 (citations omitted).

B. *The Jekyll and Hyde of* Booker

The state guidelines in *Blakely* functioned almost identically to the Federal Guidelines, and therefore it was not much of a surprise when the Supreme Court, which had previously specifically declined to address the issue,[21] applied *Blakely*'s logic in *Booker* to render the Guidelines unconstitutional.[22] The surprise came in the remedy. The *Booker* court effectively split 4-4, with Justice Ginsburg (who wrote the opinion in *Ring*) straddling the middle. One side, led by Justice Stevens, felt that *Blakely* clearly rendered the Guidelines unconstitutional and that the only option was to strip the guidelines of judicial fact-finding and require that any sentence-enhancing facts[23] be found by a jury or admitted.[24] The other camp, led by Justice Breyer, who helped develop the initial Sentencing Guidelines, argued that the Guidelines were not unconstitutional at all.[25] Justice Ginsburg gave her vote to the Stevens camp on the constitutionality of the Guidelines, but, without explanation,[26] sided with Justice Breyer's camp when it came to a solution.[27]

Justice Breyer seized upon language in the constitutional majority opinion that stated that the Guidelines would not implicate the Sixth Amendment if they recommended, rather than required, a certain sentence,[28] and used this language to strike down two provisions in the Federal Sentencing Act, one of which made the Guidelines mandatory for sentencing judges, and the other that set a de novo standard of review for sentencing.[29] In their place, the remedial opinion declared that the Guidelines were now advisory, though sentencing judges must still "consult" them, and that sentencing decisions should be reviewed for whether or not the sentence "*is unreasonable*, having regard for

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21. *Id.* at 305 n.9.

22. *See Booker*, 543 U.S. at 226–27.

23. Except the fact of a prior conviction. *See* Apprendi v. New Jersey, 530 U.S. 466, 487–88 (2000) (discussing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

24. *Booker*, 543 U.S. at 284–85 (Stevens, J., dissenting).

25. *Id.* at 326–27 (Breyer, J. dissenting).

26. Though there are six opinions in *Booker*, Justice Ginsburg did not write separately.

27. *See Booker*, 543 U.S. at 244.

28. *Id.* at 259.

29. *Id.* (citing 18 U.S.C.A. § 3553(b)(1) (Supp. 2004) & 18 U.S.C. § 3742(e) (2000 & Supp. 2004)).

. . . the factors to be considered in imposing a sentence . . . and . . . the reasons for the imposition of the particular sentence, as stated by the district court.'"[30] Unfortunately, the remedial opinion gave no further definition of either "advisory" or "unreasonable."[31]

III. BASTARD PROGENY: POST-*BOOKER* SENTENCING JURISPRUDENCE IN THE FOURTH CIRCUIT

In the wake of *Booker*, it is clear that the Guidelines must be "consulted" during any sentencing procedure, but it is equally clear that automatically imposing a Guidelines sentence as though the Guidelines were still mandatory is unconstitutional. Other than these two mandates, appellate courts have had to divine on their own the extent to which the Guidelines apply to sentencing. In response to this lack of clarity, there has been an overwhelming trend in many circuits to give, either explicitly or implicitly, a "presumption of reasonableness" to the Guidelines range and to examine in great detail any sentence outside of that range. We focus here on the jurisprudence of the Fourth Circuit, but as discussed below, this jurisprudence is similar to that found throughout the Circuits, with a few notable exceptions.

A. *Basic Sentencing in the Fourth Circuit Post-*Booker

Sentencing in the Fourth Circuit after *Booker* can be divided into a three-step procedure, best set forth by Judge Wilkins in *United States v. Moreland.*[32] First, the sentencing judge must properly calculate the Guidelines as they were written, including making any findings of fact that would enhance the Guidelines range.[33] Second, the judge must determine whether a Guidelines sentence would adequately serve the factors enumerated by Congress in 18 U.S.C. § 3553(a),[34] and if not, select a sentence that

30. *Id.* at 261 (quoting 18 U.S.C. § 3742(e)(3) (1994)).

31. Though the two can and should be reconciled, it should be noted that there is some intellectual strain between the two majority opinions in *Booker*. This should not be unexpected, however, where the remedy to a problem is entrusted to those who believe there never was a problem in the first place.

32. 437 F.3d 424 (4th Cir. 2006).

33. *Id.* at 432.

34. For a more thorough discussion of these factors, see *infra* Part IV and note 79.

does.[35] Third and finally, "[t]he district court must articulate the reasons for the sentence imposed, particularly explaining any departure or variance from the guideline range. The explanation of a variance sentence must be tied to factors set forth in § 3553(a) and must be accompanied by findings of fact as necessary."[36]

As stated in the remedial opinion in *Booker*, sentencing decisions are subject to "reasonableness" review, which consists of two parts: procedural reasonableness and substantive reasonableness.[37] A sentence will be considered procedurally unreasonable if it fails to conform to the three steps listed above. Procedural unreasonableness is reversible error.[38] Thus, if the judge improperly calculates the Guidelines or fails to articulate his reasons for a variance, the sentence will be reversed.

This is exactly what happened in *United States v. Green*,[39] where the sentencing judge determined that even though Green technically qualified for an armed career criminal enhancement, the facts of the case were such that applying the enhancement would result in a sentence that seriously overstated Green's criminal record and therefore would not satisfy the § 3553(a) factors.[40] The appellate court reversed without considering whether the imposed sentence would be reasonable in light of the explanation given or whether the ultimate sentence would have been different had the Guidelines been correctly calculated and a variance applied. Instead, the circuit held that the lower court's failure to apply the armed career criminal enhancement was by itself sufficient grounds for reversal.[41]

Substantive reasonableness review, on its face, involves determining whether the sentencing court focused "on an improper factor or reject[ed] policies articulated by Congress or the Sentencing Commission."[42] In reality, substantive reasonableness review is considerably more complex because of two additional develop-

35. *Moreland*, 437 F.3d at 432.

36. *Id.*

37. *Id.* at 434.

38. *See, e.g.*, United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006).

39. *Id.*

40. *Id.* at 453–54.

41. *Id.* at 458 (stating that the court's opinion "focus[ed] only on the district court's consideration of the Sentencing Guidelines and not whether a *properly calculated* Guideline sentence would be unreasonable when measured against § 3553(a) factors").

42. *Moreland*, 437 F.3d at 434.

ments: the presumption of reasonableness for a sentence within the Guidelines range, and the requirement for more persuasive reasoning for a larger variance from the Guidelines range ("extent-of-the-variance review").

B. *The Presumption of Reasonableness*

The presumption of reasonableness, first instituted in *Moreland*,[43] means that a sentence within the Guidelines range will be assumed reasonable until it is proven that such a sentence is unreasonable.[44] While this standard is applied literally on the appellate level,[45] the Fourth Circuit's precedents have ensured that it effectually applies to the sentencing level as well by requiring the sentencing court to make findings of fact that specifically tie into the factors of § 3553(a) before the Court may leave the Guidelines range.[46] Thus, if the judge wishes to impose a sentence within the Guidelines range, then, at the absolute most, he is required to state that he has considered the factors in § 3553(a) with no further elaboration.[47]

This is precisely what happened in *Rita*, currently under review by the Supreme Court.[48] There, the defendant, a distinguished veteran and former agent for the Immigration and Naturalization Service, was convicted of perjury in a grand jury investigation involving kits for creating automatic weapons (he had purchased one of these kits prior to their recall by the Bureau of Alcohol, Tobacco, and Firearms).[49] At sentencing the court elevated Rita's offense level from 14 to 20, effectively doubling his sentence, based on a finding that he was an accessory after the fact to illegal importing and exporting of firearms (conduct which

43. *Id.*

44. *Id.* at 433.

45. *See* United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir. 2006). The language in *Montes-Pineda* is ambiguous as to whether its statement applies solely to the appellate level or to the initial sentencing as well. However, for reasons set forth above, it is clear that this standard effectually applies to both.

46. *Moreland*, 437 F.3d at 432.

47. In fact, there is even strong case law supporting the idea that he does not even need to reference § 3553(a) at all. *See* United States v. Johnson, 445 F.3d 339, 345 (4th Cir. 2006).

48. Rita v. United States, 177 F. App'x 357 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5754).

49. Brief of Petitioner-Appellant at 1–2, Rita v. United States, 127 S. Ct. 551 (2006) (No. 06-5754).

was never charged in the indictment).[50] Rita's attorneys argued for a variance based on his age and infirm physical condition, including long-standing effects from exposure to Agent Orange, as well as his special vulnerability as a former law enforcement agent.[51] The court denied a variance, stating only that is was "unable to find that the sentencing guidelines range . . . is an inappropriate guideline range . . . and under [§] 3553, certainly the public needs to be protected."[52] In an unpublished opinion, the Fourth Circuit summarily affirmed the finding, holding that the sentencing judge had sufficiently invoked the factors in § 3553(a) to satisfy *Booker*,[53] and that the presumption of reasonableness automatically allowed the Guidelines sentence to stand.[54] To date, a within-guidelines sentence has never been found unreasonable in the Fourth Circuit[55] (and, as of this writing, only once for substantive reasons in any other circuit).[56]

Should the sentencing judge believe a sentence outside the Guidelines is merited, on the other hand, the Court must make findings on the record describing exactly how the facts of the particular case before him or her relate to the § 3553(a) factors, and specifically explaining why the proposed sentence is *better* than a Guidelines sentence.[57] Moreover, in doing so, the sentencing court must keep in mind the Fourth Circuit's proclamation that the Guidelines are considered to already incorporate the most salient § 3553(a) factors.[58] This explanation need not address every factor robotically, but cannot give "excessive weight" to any one factor and must show that all factors were considered, as well as meritorious arguments on both sides.[59] Thus, the sentencing court's decision to vary from the Guidelines range will be re-

50. *Id.* at 2–3.

51. *Id.* at 3–4.

52. *Id.* at 5.

53. United States v. Rita, 177 F. App'x 357, 358 (4th Cir. 2006).

54. *Id.*

55. Brief of Petitioner-Appellant, *supra* note 49, at 32.

56. *Id.* at 30–31.

57. *See* United States v. Hampton, 441 F.3d 284, 288–89 (4th Cir. 2006) (reversing because the district court "did not explain how this variance sentence better served the competing interests of § 3553(a) than the guidelines sentence would").

58. United States v. Johnson, 445 F.3d 339, 342–43 (4th Cir. 2006) holding that the process creating the Guidelines "has led to the incorporation . . . of the factors Congress identified in 18 U.S.C.A. § 3553(a) as most salient in sentencing determinations"). In light of this reasoning, the circumstances where a variance sentence will actually be held to be "better" than a Guidelines sentence will be scant indeed.

59. United States v. Montes-Pineda, 445 F.3d 375, 380 (4th Cir. 2006).

versed if the judge does not specifically relate the factors in § 3553(a) to the facts of the particular case before him, making specific factual findings showing that a Guidelines sentence does not adequately serve the § 3553(a) factors *and* that a variant sentence does. It is important to note that the Fourth Circuit has *never* upheld a downward variance from the Guidelines.[60]

C. *Extent-of-the-Variance Review*

Even once the high hurdle posed by the presumption of reasonableness has been passed and the decision to vary from the Guidelines has been correctly made, the decision of how *much* to vary is independently reviewable. Simply put, the sentencing court will be reversed if it goes too far from the Guidelines range: "[t]he farther the [sentencing] court diverges from the advisory guideline range, the more compelling the reason for the divergence must be."[61] In *Moreland*, the defendant was subjected to a career offender enhancement that increased his Guidelines range from 78–97 months to 360 months.[62] The sentencing judge correctly determined that 360 months was the appropriate Guidelines range, but held that the career offender enhancement overstated Moreland's previous controlled substance convictions (both of which were nonviolent and one of which involved simply delivering a marijuana joint to an inmate) and failed to take into account his "'ability and potential to become a productive member of society.'"[63] Based on this, the court held that a Guidelines sentence would not adequately serve the factors in § 3553(a), and instead imposed a sentence of 120 months, the statutory minimum for his offense of conviction and still more than the 78–97 month sentence the Guidelines suggested without the career offender enhancement.[64]

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60. As discussed below, however, the Fourth Circuit has ruled in at least one case that a variance was merited, just not to the extent that the sentencing court imposed. *See* United States v. Moreland, 437 F.3d 424, 436 (4th Cir 2006). For a thorough breakdown of appellate sentencing statistics, spanning all circuits, see New York Council of Defense Lawyers, Reasonableness Review Database (2006), http://www.nycdl.org/itemcontent/booker/NYCDL_reasonableness_review.pdf.

61. *Moreland*, 437 F.3d at 434; *see also Hampton*, 441 F.3d at 288 (stating that "[i]n order to withstand reasonableness scrutiny, such a dramatic variance from the advisory guideline range must be supported by compelling justifications").

62. *Moreland*, 437 F.3d at 434.

63. *Id.* at 435 (quoting U.S. v. Mooreland, 366 F. Supp. 2d 416, 420 (S.D. W. Va. 2005)).

64. *Id.*

On appeal, the Fourth Circuit agreed with the district court's reasoning, holding that a variance would indeed be reasonable under the circumstances.[65] The court then reviewed the facts that provided the grounds for the variance one at a time. As it did so, it explicitly noted that the sentencing court did *not* base the variance on a rejection of congressional policy.[66] Ultimately, however, the appellate court found that the circumstances of the case were not "so compelling as to warrant a two-thirds reduction from the bottom of the advisory guideline range."[67] It based this decision in part on its own reevaluation of Moreland's work history, stating that it had "little confidence in his willingness to become a productive member of society," effectively replacing the judgment of the district court on this issue with its own.[68] It then vacated the sentence and remanded for re-sentencing to a smaller variance of no less than 240 months.[69] No rationale whatsoever was provided for the choice of this number. The *Moreland* court did not consider whether a sentence of 120 months, absent the 360 month Guidelines range, would have satisfied the factors in § 3553(a). In light of *Moreland*, it is abundantly clear that any variance imposed in the Fourth Circuit is judged by the degree that it varies from the Guidelines range, *not* by how well it serves the § 3553(a) factors.

D. *Sentencing in Other Circuits*

The Fourth Circuit is hardly alone in its post-*Booker* interpretations. To date, six other circuits have embraced the presumption of reasonableness,[70] and two more have tacitly enforced the same.[71] In fact, only the Ninth and Eleventh Circuits have ac-

65. *Id.*
66. *Id.*
67. *See id* at 437.
68. *Id.*
69. *Id.*
70. United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (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. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005).
71. United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (holding that "the guidelines cannot be called just 'another factor'" in the statutory list); United States v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006) (holding that "appellants have the burden of demonstrating unreasonableness. A sentence that falls within the guidelines range is more likely to be reasonable than one outside the guidelines range"). While these courts

tively rejected the presumption of reasonableness, holding instead that every sentence, within-Guidelines or otherwise, must be reviewed for reasonableness against the § 3553(a) factors.[72] Likewise, cases in at least four circuits have reversed sentences for properly finding that a variance was warranted but varying too far from the Guidelines range.[73] Few of these have offered any guidance as to where the proper sentence would be and, as in *Moreland*, those that have produced actual numbers have provided no reasoning justifying the numbers they produced.

Though there are slight variations on the theme, the jurisprudence of the Fourth Circuit is as good a model as any for the major trends emerging in the wake of *Booker*, especially in light of the Court's grant of certiorari in a Fourth Circuit case, *Rita*.[74] In reviewing *Rita* and its sister case *Claiborne*,[75] it is of utmost importance that the Supreme Court ensure that appellate courts rely on sound constitutional law and take into account the practical ramifications of its rulings. Currently, they do neither.

IV. CONSTITUTIONALITY AND POST-*BOOKER* SENTENCING

The watchword in sentencing is discretion. A sentencing judge, by necessity, becomes intimately familiar with the facts of each case in a way that no other impartial decisionmaker can. Each crime and each criminal is unique, with a unique background, unique circumstances, unique factors in the commission of the crime, and a unique propensity (or lack thereof) for rehabilitation. No blanket guideline or rule can possibly take account for all the facts of an individual case; only a sentencing judge, who receives those facts first-hand, can approximate a sense of the entire

still give heavy weight to the Guidelines, their position is indisputably more deferential than the presumption of reasonableness adopted by the Fourth Circuit and others.

72. *See* United States v. Hunt, 459 F.3d 1180, 1185 (11th Cir. 2006) (holding that "[w]hether, after consideration of § 3553(a) in its entirety, a court finds the Guidelines to be compelling is a fact-specific judgment that we neither mandate nor foreclose").

73. United States v. Robinson, 454 F.3d 839, 843 (8th Cir. 2006); United States v. Martin, 455 F.3d 1227, 1237–38 (11th Cir. 2006); United States v. Cage, 451 F.3d 585, 594 (10th Cir. 2006); United States v. Castro-Juarez, 425 F.3d 430, 437 (7th Cir. 2005).

74. 177 F. App'x 357 (4th Cir. 2006), *cert granted*, 127 S. Ct. 551 (Nov. 3, 2006) (No. 06–5754).

75. 439 F.3d 479 (8th Cir. 2006), *cert granted* 127 S. Ct. 551 (Nov. 3, 2006) (No. 06–5618).

situation.[76] Of course, this discretion can be constrained by Congress, but when a judge's discretion is so constrained, the Sixth Amendment provides a careful limitation: no rule or guideline may raise a defendant's sentence beyond the maximum authorized through jury verdict or by the defendant's admission. This safeguard prevents a defendant from receiving a heightened sentence based not on the factual entirety of his case, but on "micro-crimes" for which he has not been proven guilty.

At least, such is the logical implication of *Apprendi* and *Booker*. According to *Apprendi*, the statutory maximum for Sixth Amendment purposes is the maximum sentence a defendant may receive without the finding of any facts other than those admitted by the defendant or contained in a jury verdict.[77] After *Booker*, there are three constitutionally-acceptable ways that a defendant's sentence may be increased based on the facts of the case. First, a judge may constitutionally consider any and all circumstances in formulating a sentence within the bounds of the statutory range.[78] This discretion is unreviewable, except for clear error of fact or misapplication of the § 3553(a) factors, such as consideration of a statutorily forbidden factor.[79] Second, Congress may set a mandatory increase of the maximum sentence based on any facts it chooses, but those facts *must* be found by a jury or admitted by the defendant.[80] Third and finally, the fact of a prior conviction may always be used to increase a maximum sentence without a jury verdict or admission.[81]

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76. *See* Eric Citron, *Sentencing Review: Judgment, Justice, and the Judiciary*, 115 YALE L.J. POCKET PART 150, 151 (2006), *available at* http://www.thepocketpart.org/2006/07/citron.html.

77. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

78. *Id.* at 481.

79. *Id.* at 481–82 (citing United States v. Tucker, 404 U.S. 443, 447 (1972)). Congress may, of course, prescribe what a judge can and cannot consider in determining a sentence. For example, Congress may say, "in sentencing, the court *must* consider the impact on the victim, and *cannot* consider the defendant's childhood." In such a situation, a judge's failure to take into account the impact on the victim or inclusion of the defendant's childhood in his sentencing determination would be reversible error. However, if he took into account the former and did not take into account the latter, whatever sentence he imposed, so long as it was within the statutory range and did not involve clear error of fact, would be unreviewable.

80. *Id.* at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).

81. *Id.* at 498 (citing Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998)). Though this is the current law, the Court intimated in *Apprendi* that this scenario could be constitutionally dubious. *Id.* at 489–90.

The Fourth Circuit has in no way abandoned pre-*Booker* sentencing procedure. In fact, pre-*Booker* and post-*Booker* sentencing are identical, right up to the determination of a Guidelines range. Judges still use facts not found by the jury to enhance the defendant's Guidelines range, using exactly the same standard of proof and the exact same methodology as before. Whatever changes were made to comply with *Booker* must occur after the Guidelines range has been determined—in the variance phase.

Once the court reaches the variance phase, the presumption of reasonableness requires the court to set forth specific facts that show why any variant sentence is *superior* to a Guidelines sentence.[82] Without this, the court will be reversed. If the facts are deemed insufficient by the appellate court, the sentencing court will also be reversed. The sentencing judge cannot simply discuss why the proposed sentence would serve the § 3553(a) factors;[83] the court must actively show why a Guidelines sentence would *not* serve the § 3553(a) factors as well as would a variant sentence.[84] This stands in stark contrast to a within-Guidelines sentence, which apparently barely even requires a cursory indication that the judge considered the § 3553(a) factors in order to be upheld.[85]

The Fourth Circuit would likely dispute this interpretation, noting that both *Moreland* and *Hampton* proclaim that the presumptive reasonableness of a guidelines sentence "does not mean . . . that a variance sentence is presumptively *un*reasonable."[86] But this statement is demonstrably false. As the circuit court noted in *Montes-Pineda*, the burden is on the defendant to rebut

82. *See* United States v. Hampton, 441 F.3d 284, 288–89 (4th Cir. 2006).

83. It is important to note here that § 3553(a)'s prime dictate is that the judge impose a sentence "sufficient *but not greater than necessary*" to comply with its purposes. 18 U.S.C. § 3553(a) (2000) (emphasis added). Thus, based solely on the facts of conviction, a judge might well reasonably determine that the Guidelines did not provide the *lowest sufficient sentence* necessary to serve the § 3553(a) factors, even though a Guidelines sentence would otherwise achieve those goals.

84. *See Hampton*, 441 F.3d at 288 ("[W]e must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.") (quoting United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006))). Judge Motz, writing for the majority in *Hampton*, then dissected the district court's reasoning, and determined that even though the district court did invoke relevant factors under § 3553(a) in making its decision, it did not explain *how* the sentence imposed served those factors *better* than the Guideline sentence. *Id.* at 288–89.

85. United States v. Johnson, 445 F.3d 339, 342–43 (4th Cir. 2006).

86. *Moreland*, 437 F.3d at 433 (emphasis added).

the presumption of reasonableness, and this burden requires facts demonstrating that a Guidelines sentence would be unreasonable.[87] Though *Montes-Pineda* could have been referring purely to appellate burdens of proof (the text is unclear), the effect is still exactly the same from the sentencing court's standpoint: without affirmative factual evidence that a Guidelines sentence would be unreasonable and a detailed list of reasons supporting that determination, the sentencing court cannot impose a sentence outside the Guidelines range. A sentence outside the Guidelines range requires a judge to justify its existence by citing compelling individual facts under a rigorous standard of review. If the judge fails to cite facts deemed adequate by the Circuit, the sentence will be reversed.[88] If this does not qualify as a presumption against an outside-of-Guidelines sentence, it is unclear what such a presumption would look like.

To break this argument down into a more manageable form, let us put it in terms of the question posed by *Apprendi*: is the maximum sentence that a judge may impose after judicial fact-finding higher than the maximum sentence the judge may impose based on the jury verdict or admissions alone? Here, the answer is yes. Therefore, the presumption of reasonableness sentencing scheme is unconstitutional.

Essentially, what the presumption of reasonableness has instituted is a mandatory Guidelines system with greater ground for departure, in the form of a variance, than before. As the Stevens majority stated in *Booker*:

> The availability of a departure in specified circumstances does not avoid the constitutional issue . . . [because] departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.[89]

This remains true, as the Fourth Circuit has explicitly said that the Guidelines incorporate the most salient § 3553(a) factors.[90]

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87. United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir. 2006).

88. *See, e.g.*, United States v. Eura, 440 F.3d 625, 634 (4th Cir. 2006) (holding that since there was nothing atypical in Eura's case, no variance would be allowed).

89. United States v. Booker, 543 U.S. 220, 234 (2005).

90. *Johnson*, 445 F.3d at 342–43.

Justice Stevens went on to apply this reasoning to Booker's case:

> Booker's is a run-of-the-mill drug case, and does not present any factors that were inadequately considered by the Commission. The sentencing judge would therefore have been reversed had he not imposed a sentence within the . . . Guidelines range. Booker's actual sentence, however, was . . . almost 10 years longer than the Guidelines range supported by the jury verdict alone . . . . Thus, just as in *Blakely*, "the jury's verdict alone does not authorize the sentence. The judge acquires the authority only upon finding some additional fact." There is no relevant distinction between the sentence imposed pursuant to Washington statutes in *Blakely* and the sentences imposed [here].[91]

To illustrate, let us imagine that Freddy Booker is being resentenced in the Fourth Circuit today. Again, the jury has convicted him of possession of at least 50 grams of crack based on evidence of 92.5 grams of crack, again rendering a Guidelines offense level of 32 and a sentence of 210–262 months. If there were no other facts and this was where our inquiry ended, Booker could not receive a sentence greater than 262 months. However, as he was prior to Supreme Court's decision, Booker's sentencing judge is required to properly calculate the Guidelines, which, as before, results in a factual finding of 566 additional grams of crack not presented to the jury, enhancing the Guideline range to 360 months. Booker's case still has no unusual facts; it is "run-of-the-mill." If the judge now imposes a sentence outside of the Guidelines range, such as the verdict-authorized maximum of 262 months, then, regardless of § 3553(a) purposes (remember, he has no specific facts from this defendant to tie into his arguments), he will be reversed.

This example makes it clear that based on the Fourth Circuit's interpretation of *Booker*, absolutely nothing has changed. In the average, run-of-the-mill case, the Sentencing Guidelines are just as mandatory as ever. A judge must still use facts not found by a jury to enhance a sentence beyond what he would be able to impose based on the jury verdict alone, and he has no discretion to go outside of the enhanced range, except with a *further* finding of fact. This system is exactly as it was prior to *Booker*, only now, the field of potential facts that might authorize a sentence outside the Guidelines range is slightly expanded. The availability of

91. *Booker*, 543 U.S. at 235 (citations omitted).

downward departures did nothing to rescue Washington's sentencing guidelines in *Blakely* and did nothing to rescue the Federal Guidelines in *Booker*. There is no reason why expanding the availability of these fact-based departures and terming them "variances" should do anything to save the sentencing scheme in place today.

Further, even in situations where a variance is actually granted, Fourth Circuit jurisprudence runs into a field of constitutional snares. Because the extent of a variance will also be independently measured for reasonableness,[92] the further one strays from the Guidelines, the greater the justification that must be presented. Thus, even variance sentences result in an unconstitutional increase in the defendant's sentence.

As discussed previously, a judge is required to make findings of fact to raise the Guidelines range.[93] Then, the judge must decide whether a variance is warranted.[94] If so, the judge must decide the degree of the variance and present a justification relative to the *distance of the sentence from the Guidelines range*.[95] Currently, neither the Fourth Circuit nor its contemporaries have provided any form of guidance as to how to make this calculation.

From the language of *Moreland*, it is clear that the Guidelines range, not the specific facts and factors applied to the case, determines the degree of scrutiny a sentence will receive, and consequently, the range of permissible variance. Thus, in *Moreland* itself, the district court's sentence of 120 months was much longer than the Guidelines range of 78–97 months Moreland would have been subject to absent the career-offender enhancement.[96] As the appellate court upheld the district court's reasoning that the career-offender enhancement overstated Moreland's criminal history, the appellate court, had it reviewed that sentence purely based on § 3553(a) factors alone, might well have found that the 120-month enhanced sentence adequately served to punish the crime of conviction while taking into account the defendant's record. In fact, the appellate court did *not* find that a sentence of 120 months was too short to adequately serve the § 3553(a) fac-

92. United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006).
93. *See supra* note 44 and accompanying text; *see also supra* Part III.B.
94. *See supra* notes 32–33 and accompanying text; *see also supra* Part III.B.
95. *See supra* note 36 and accompanying text; *see also supra* Part III.C.
96. *Moreland*, 437 F.3d at 434–35.

tors. Instead, it found that the facts of Moreland's case were insufficient to justify a sentence *two-thirds lower than the Guidelines range*.[97] Had the career-offender enhancement merely placed Moreland's Guidelines range at 200 months, it is distinctly possible that a 120-month sentence would have been found reasonable. Thus, the Guidelines, not the § 3553(a) factors, provide the basis for the length of the sentence that may be imposed. Therefore, as the Guidelines are enhanced based on facts not found by a jury or admitted by a defendant, the maximum extent of any variance is also enhanced. Once more, the defendant's sentence is being increased past the *Apprendi* statutory maximum based solely on facts not found by a jury or admitted by the defendant. This determination is just as unconstitutional now as it was before *Booker*.

The Stevens majority in *Booker* stated that the Sentencing Guidelines would not implicate the Sixth Amendment if they "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences."[98] The question we must now ask ourselves is whether or not the Guidelines as employed in sentencing today can possibly be considered "recommended, rather than required."[99] Since a judge cannot leave the enhanced Guidelines range without making further specific findings of fact beyond those authorized by the jury verdict or admitted by the defendant, it is difficult to see how they could be considered merely recommendations. In *Ring*, the Court stated that when the government "makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—*no matter how the [government] labels it*—must be found by a jury beyond a reasonable doubt."[100] The Fourth Circuit has chosen to label the mandatory nature of the Guidelines as a simple, surreptitious "presumption of reasonableness,"[101] but the evidence indicates that the Guidelines are mandatory, and pun-

97. *Id.* at 437. A very similar calculation attracted the Supreme Court's attention in *Claiborne*, where the 8th Circuit characterized as "extraordinary" a 63% reduction in a defendant's sentence. 439 F.3d 479, 481 (8th Cir. 2006). For a thorough discussion of the absurdity of a percentage-based definition of "extraordinary variance" see Brief of Petitioner, Claiborne v. United States, 127 S. Ct. 551 (2006) (No. 06-5618).

98. United States v. Booker, 543 U.S. 220, 233 (2005).

99. *Id.*

100. Ring v. Arizona, 536 U.S. 584, 602 (2002) (emphasis added) (citing Apprendi v. New Jersey, 530 U.S. 466, 482–83 (2000)).

101. *Moreland*, 437 F.3d at 433.

ishments are still being increased based solely on facts neither found by a jury nor admitted by the defendant. If *Booker* is to have any meaning at all, these sentence-enhancing factors must be either sent to a jury or consigned to the judge's discretion. There is simply no other way to satisfy the Sixth Amendment.

V. SENTENCING UNDER THE FOURTH CIRCUIT PARADIGM: A VIEW FROM INSIDE THE COURTROOM

A. *The Sentencing Process—An Overview*

From the perspective of an ideological purist, sentencing should involve as much detail, time, and attention as the district court can spare. Unfortunately, these demands can place crippling burdens on district courts, an effect that can be hard to foresee from the distance of an appellate courtroom. While judicial economy should never be invoked as an excuse to sacrifice the effective operation of the criminal law (both in terms of protection of the public and fairness to the defendant), an appellate court should be hesitant to impose any requirements that needlessly complicate the sentencing process. This is especially true when these complicating rules not only fail to serve an important congressional or constitutional goal, but actively work to defeat those goals. Yet, this failure is precisely what has happened in the wake of *Booker*.

In our experience, sentencing has become needlessly complex following *Booker*, greatly increasing the amount of time a judge must spend in preparation and in the courtroom and, consequently, decreasing the amount of time and attention that can be paid to the rest of his or her already crowded docket. A brief overview of the current sentencing process as it plays out in real life using Judge Mullen's sixteen years of experience on the federal bench in the Western District of North Carolina should provide a useful backdrop for this discussion.

Essentially, sentencing post-*Booker* can be broken down into three main phases: preparation, Guidelines calculation, and consideration of a variance. Preparation involves the creation of a Pre-Sentence Report ("PSR") by the Probation Office, which seeks to determine all relevant conduct and arrive at a proposed Guidelines range for the judge, objections to that PSR by the parties,

and written briefs arguing the objections or for a departure or variance. All of this must be considered by the sentencing judge prior to the hearing, and he must also familiarize himself more generally with the case before him in order to understand all the facts that will play into the sentencing decision. In our experience, sentencing prior to the presumption of reasonableness required approximately a half-day, or five to six hours, of the judge's personal attention for a routine sentencing hearing (about ten to twelve defendants). In the wake of the Fourth Circuit's post-*Booker* sentencing jurisprudence, the same amount of preparation is needed for six or seven defendants, essentially doubling the overall preparation time the judge must devote to his cases.

Once the hearing begins, the court must proceed exactly as it did prior to *Booker*, including any departures and the determination of the accurate Guidelines range.[102] The length of this portion may vary and defendants rarely object to many facts in the PSR. If they do object, however, the Government must prove those facts by a preponderance of the evidence, which results in a "mini-trial" with both sides presenting evidence, including witnesses, exhibits, and arguments. Should either side wish to seek a departure as authorized by the Guidelines, even more argument ensues. The seeking of traditional departures has dropped in frequency after *Booker*, but recent statistics reveal that this trend is reversing.[103] Again, all of this occurred prior to *Booker*, and continues unchanged today.

At this point, however, the Court must engage in yet another inquiry, determining whether or not the Guidelines adequately serve the purposes of sentencing as listed in 18 U.S.C. § 3553(a).[104] As the judge is required by *Moreland* to make specific

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102. The one exception, as noted above, is the increase in preparation time required, resulting in what is effectively a doubling of the time spent to prepare per case.

103. *See* SPECIAL POST-*BOOKER* CODING PROJECT, U.S. SENTENCING COMM'N, CASES SENTENCED SUBSEQUENT TO *U.S. V. BOOKER* (Jul. 6, 2006), *available at* http://www.ussc.gov/sc_cases/PostBooker_060106.pdf.

104. The following factors must be considered in sentencing:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most ef-

findings of fact when granting a variance,[105] the party seeking a variance from the Guidelines range must introduce factual evidence to support their position, and the other side may, of course, rebut this evidence, resulting in yet another "mini-trial."

The Fourth Circuit and its sister circuits have been willing to allow variances in a remarkably limited set of circumstances and given the fact that the court must consider every factor, it is in the defendant's best interests to produce as much evidence as possible concerning every single factor. This phase can be enormous, involving, for example:

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fective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to § 994(a)(1) of title 28 United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under § 994(p) of title 20); and

(ii) that, except as provided in § 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation of supervised release, the applicable guidelines or policy statements issued bu the Sentencing Commission pursuant to § 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under § 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to § 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under § 994(p) of title 28); and

(B) that, except as provided in § 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000).

105. *See Moreland*, 437 F.3d at 434.

1. Testimony of the defendant and others concerning the exact circumstances of the crime, including rebuttal witnesses;[106]

2. Testimony of the defendant and others concerning the character and circumstances of the defendant, including: his family obligations, his support network (or lack thereof), his employment history and ability to retain a job, his motivations for the crime and regret or lack thereof, his post-arrest behavior, his health, his mental well-being, or any other facts related to his characteristics that might mitigate his sentence;[107]

3. Evidence about the deterrent effect of the proposed sentence as it relates to this particular defendant and crime;[108] and

4. Evidence of the sentences given to other defendants similarly situated, which is often extensive and complex.[109]

Given the vast array of potential evidence in the variance phase, these hearings can be extensive, sometimes lasting as long as two or more hours for a single defendant.

B. *Results of the Sentencing Process*

In our experience, the average time that must be spent on each case has essentially doubled and even now, attorneys are not comfortable with post-*Booker* sentencing and do not pursue variances as much as they could. As more defense attorneys grow familiar with post-*Booker* jurisprudence, we expect to see an even greater increase in time consumed per sentencing. Thus, on a day when the court would have previously heard ten to twelve cases, perhaps only five or six will be effectively dealt with, though those five or six require the same amount of preparation as the twelve. Judges with higher docket loads now spend much of their time in the courtroom. As the time it takes to conduct a sentencing increases, and as the seventy-day rule[110] still requires that attention be given to new criminal cases, civil cases languish unattended. It is our prediction that removal and refusal to magistrate jurisdiction will increasingly be used as cudgels in

106. *See* 18 U.S.C. § 3553(a)(1) (2000).
107. *See id.*
108. *See id.* § 3553(a)(2)(B).
109. *See id.* § 3553(a)(6).
110. *See id.* § 3161(c)(1).

business litigation, because a case simply will not be able to proceed on track once assigned to a federal judge. While the only way to truly deal with this problem is an increase in the size of the judiciary, a more stream-lined sentencing procedure would greatly alleviate the difficulties here.

Let there be no mistake, sentencing after *Booker* must inevitably increase the amount of time spent per sentence so long as the Guidelines remain in effect, either in the current, effectively mandatory, system or in a truly advisory capacity. This is simply unavoidable and should not be disparaged idly.[111] However, that increase can and should be minimized by abolishing the unconstitutional presumption of reasonableness attached to a Guidelines sentence. The incredibly high standard for imposition of a variance ensures that defendants leave no stone unturned in pouring evidence onto the court, and the court must spend a great deal of time scrutinizing this evidence to determine whether a variance is required. Essentially, if T's are not crossed and I's are not dotted, a judge can be sure he will be reversed, and this probability is only enhanced by the degree to which appellate courts scrutinize the *extent* of a variance. A lengthy and thorough justification requires a lengthy and thorough hearing, and thus a lengthy and thorough examination of the evidence in that hearing. With more discretion comes greater flexibility, allowing the judge to tailor his sentencing proceedings to the most effective balance between judicial economy and the need to properly consider all grounds for variance.

C. *Appellate Court Ping-Pong*

On the appellate level, two rules imposed with no regard for judicial economy push the expenditure of judicial resources into the realm of absurdity. First, as noted above, the procedural reasonableness requirement causes any sentence that fails to adequately calculate the Guidelines range or is imposed as a variance without a detailed statement of reasons to be automatically reversed.[112] While this requirement increases the amount of at-

111. As Lord Blackstone noted, "[L]et it be again remembered, that delays, and little inconveniences in the form of justice, are the price that all free nations must pay for their liberty in more substantial matters." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350 (R.I. Burn ed., Garland Publishing, Inc. 1978) (1783).

112. *See* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006).

tention a judge must pay to the original sentencing hearing, and consequently, the amount of time and resources spent on the sentencing as a whole, this expenditure alone is probably not egregious in and of itself, as most judges will take care to follow procedural rules with or without the threat of automatic reversal. At the appellate level, however, a reasonable sentence will be automatically reversed without a determination as to the merits of the appeal.

Second, the appellate courts doggedly insist that different levels of proof are required for different levels of variance, yet they rarely adequately explain their reasoning in cases where this principle has been applied. Even in the few cases where the appellate court has instituted an actual figure to guide the judge on re-sentencing, they have given no explanation for how this figure was derived and certainly have not said anything that might help a sentencing judge in future cases.

When these two rules are combined, a result occurs that might best be called "appellate court ping-pong." Sentences automatically reversed for procedural unreasonableness will almost inevitably lead to a new appeal, as the merits have never been reached. This begins the process all over again. On top of this, "extent of the variance" review has a similar effect, as judges resentence based on the loose reasoning given to them by the appellate court without any guidance whatsoever. Again, this inevitably results in a new appeal and, potentially, a new reversal.

This loop is precisely what happened in *United States v. Martin*,[113] where the sentencing judge was reversed for imposing too great a variance, imposed a new variance, and was reversed again.[114] In order to prevent this, the appellate courts occasionally state what the maximum allowable variance would be, which, in essence, completely usurps the function of the lower court, requiring the appellate court to expend even more energy in the process. Thus, until judicial guidelines exist for what factual situations justify what degree of deviation (the institution of which would invoke serious constitutional difficulties, similar to those addressed above), courts will constantly be subject to the

113. 455 F.3d 1227 (11th Cir. 2006).

114. *See id.* at 1230. Ultimately, the Eleventh Circuit still refused to pass on what a reasonable sentence might be, but ordered the case reassigned to a different judge for resentencing. *Id.* at 1241–42.

second-guessing of the circuit, appeals will be frequent, and reversals and re-sentencings will be abundant.

The expenditure of increasingly scarce judicial resources invoked by the current system simply cannot be overstated. The system is clogged with cases, forcing civil litigants to wait years for the first level of justice, or else enter unfavorable settlements if they wish to avoid being caught in the congestion. This delay might be acceptable were some legitimate purpose served by the presumption of reasonableness, the automatic nature of procedural reasonableness review reversal, and extent-of-the-variance review, but none is. As described above, two of these three are, in fact, unconstitutional, and cannot possibly justify the expenditure of *any* judicial resources.[115] As for automatic reversal based on procedural reasonableness review, it is hard to fathom what purpose this could serve, as without this, a sentence would still be reversed if it were held to fail the objectives set out by Congress. The amount of time judges spend on sentencing is enormous, and it is only increasing. Unless something is done to alleviate this problem, the system will grind to a stand still.

C. *The Role of Congress in the Current Sentencing Debate*

A discussion of the practical aspects of post-*Booker* sentencing would be remiss without mention of the proverbial elephant in the room: the all-too-real threat that Congress will remove even more discretion from the judiciary. For years, Congress, particularly Representative James F. Sensenbrenner, former head of the House Judicial Committee, has threatened further legislation to induce compliance from the judiciary. Never has this been more true than in the aftermath of *Booker*. Recently, Representative Sensenbrenner introduced legislation designed to institute a topless guidelines system, wherein the constitutional problem of *Booker* would be addressed by giving judges unfettered discretion to impose the maximum sentence allowed by statute, but requiring judges to find facts raising the mandatory minimum to which a defendant would be subject.[116]

115. *See supra* Part IV.

116. *See* Sentencing Fairness and Equity Restoration Act of 2006, H.R. 6254, 109th Cong. (2d Sess. 2006).

Appellate courts, ever sensitive to political winds, have been careful in crafting a post-*Booker* system that will comply with what they believe Congress wishes, knowing full well that any legislation would only reduce judicial discretion and result in harsher sentences and fewer rights for defendants. However realistic these fears may be, and however much we may vehemently disagree with the policies driving this hypothetical future legislation, the judiciary cannot abrogate its role to faithfully interpret the Constitution simply because we believe Congress will make disastrous policy decisions in the future. It is not the role of the courts to make policy. As private citizens and judges, we can, and should, attempt to educate both our legislature and the populace at large as to why the type of reform championed by Representative Sensenbrenner is both cruel and foolish, and we should do our best, as any citizen should, to influence our representatives in Congress toward making the correct decisions. But what we cannot do is substitute our professional judgments for theirs by ignoring our responsibility to uphold the Constitution. Neither can we attempt to divine what the legislature might do in the future, and tailor our jurisprudence around what we believe Congress *might* want. It is Congress's job to create legislation expressing its will, and the job of the federal courts to interpret that legislation and square it with the principles of the Constitution. Though the results may be catastrophic, those results must be dealt with by Congress. The results of a judiciary that refuses to apply the Constitution because it is fearful of Congressional activity are far worse.

That said, Congress should not rush to apply a "fix" to *Booker*. There has been very little experimentation in the courts, in large part due to the threat of Congressional action. If Congress were to allow the courts more breathing room, it would see a great deal more post-*Booker* experimentation, likely resulting in a better understanding of what does and does not work in federal sentencing. We must push Congress towards this understanding, and we must not abdicate the constitutional role of the courts for fear that they will not "get it."

VI. TOWARDS A CONSTITUTIONAL SENTENCING SYSTEM

The remedial opinion in *Booker* left many terms undefined, creating a wave of confusion resulting in the constitutional and

practical dilemmas outlined above. Ultimately, given the variation across circuits and the growing constitutional issues arising in the post-*Booker* jurisprudence, Supreme Court intervention was inevitable. Only the Supreme Court has the power to clarify the confusion it left behind in the wake of *Booker* and to truly enforce *Apprendi* principles. Now, in *Claiborne* and *Rita*, the Court will directly examine whether a presumption of reasonableness should ever be afforded to the Sentencing Guidelines, extent-of-the-variance review, and whether a within-guidelines sentence can ever be upheld without explicitly examining the § 3553(a) factors.

We leave it to other, wiser scholars to truly flesh out the many potential paths sentencing may take after *Booker*, and fervently hope that the Supreme Court will take careful note of these thorough examinations in deciding *Claiborne* and *Rita*. In brief, however, it appears to us that any true solution to the problems that have arisen post-*Booker* must follow one of two paths to comply with the Sixth Amendment, correlating with the constitutionally acceptable requirements set out in Part IV: (1) the discretionary path or (2) the jury finding path. The fault-line issue between the two lies in whether or not "a correct Guidelines calculation" will include facts not found by the jury or admitted by the defendant.

A. *The Discretionary Path*

The discretionary path allows the Guidelines to continue being calculated as they are today but grants the sentencing judge much greater discretion as to whether or not to follow the Guidelines' "advice." Essentially, the Guidelines serve as an anchor,[117] a starting point from which the judge may base his evaluation of the individual case. The judge may then choose whether or not to vary from the Guidelines as he sees fit under the circumstances of the individual case, and review of this decision would be sharply curtailed.

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117. *See* Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006), http://www.thepocketpart.org/2006/07/gertner.html (describing the process of anchoring and the role advisory Guidelines play in this process). Judge Gertner notes that judgments tend to be strongly biased towards their anchors, a fact which strongly supports the belief that this system would still adequately serve the Congressional objectives involved in creating the sentencing commission and the Guidelines in the first place. *See id.* at 138.

This is not to say that even the most liberal version of the discretionary path gives the sentencing judge unfettered discretion, however. The procedural aspect of reasonableness review would survive intact. The judge would be required to calculate the Guidelines properly, make findings of fact that enhance the Guidelines range, consider the § 3553(a) factors and tailor a sentence that conforms with the purposes of sentencing set out in those factors, and state on the record his reasons for imposing the sentence that he does. Failure to do any of these could well be considered reversible error.[118] Essentially, from the constitutional angle, procedural reasonableness review would be unchanged.

Substantive reasonableness review, on the other hand, would change dramatically. Under a discretionary path approach, substantive reasonableness review would be limited to exactly what *Moreland* claimed it would be: a determination as to whether the judge properly considered the factors in § 3553(a), congressional policy and made no clear errors of fact.[119] A sentence would be held unreasonable if the judge considered a factor not listed in § 3553(a) or failed to consider one of the listed factors. Further, misconstruction of a factor, such as considering the disparity between state and federal defendants,[120] would also be grounds for reversal. In sum, the judge must consider § 3553(a) factors as Congress intended them to be considered. This approach does not require an appellate court to attempt to divine what Congress would do if Congress were the judge on this case. It simply means that a judge who misinterprets or misapplies a factor is subject to reversal. As in the Ninth and Eleventh Circuits today, no presumption of reasonableness would apply, and *all* sentences, Guidelines or not, would be reviewed in light of the purposes set forth in § 3553(a).

An example is in order. Imagine a case where the defendant is a fifty-five-year-old man with health problems convicted of possession of over five grams of crack, which carries a statutory sen-

118. *But see supra* Part V.B (discussing why making a Guidelines miscalculation automatic grounds for reversal is unwise from a practical standpoint).

119. Some might find even this level of review constitutionally offensive. *See* David J. D'Addio, *Sentencing After* Booker*: The Impact of Appellate Review on Defendant's Rights*, 24 YALE L. & POL'Y REV. 173, 192–94 (2006) (discussing why any substantive reasonableness inquiry must fail the dictates of the Sixth Amendment).

120. United States v. Clark, 434 F.3d 684, 685 (4th Cir. 2006).

tence of five to forty years.[121] The defendant has two prior controlled substance offenses, qualifying him for a career offender enhancement, placing his offense level at 34 and his criminal history category at VI, subjecting him to a sentence of 262–327 months in prison.[122] At sentencing, the judge finds that the Guidelines fail to take health problems into account, and therefore an earlier release is warranted. The judge then imposes a sentence at the statutory minimum of sixty months, a seventy-seven percent reduction in sentence.

Under the current sentencing scheme in the Fourth Circuit, the appellate court could (and likely would) reverse for substantive unreasonableness if the judge failed to make specific findings of fact showing *how* this sixty-month sentence served *all* the factors *better* than a Guidelines sentence for this particular defendant or that the judge gave "excessive weight" to a single factor.[123] Or it might, as it did in *Moreland*, proclaim that the defendant's physical condition warranted a reduction but that a reduction of seventy-seven percent below the Guidelines required more compelling reasons.[124]

Under a discretionary sentencing scheme, the appellate court could only reverse this sentence if it found a misapplication of the § 3553(a) factors or a clear error of fact. Thus, this sentence would be affirmed as reasonable unless, for instance, the appellate court found that Congress specifically intended the defendant's medical condition to be relevant only to the conditions of his sentence, not the length, or that the district court had actually based his sentence, in part, on his personal belief that career offender enhancements are universally too harsh.[125] Likewise, if the file showed that the defendant had gone through many tests showing that he was actually in excellent health, a reversal would be in

121. 21 U.S.C. § 841(b)(1)(B) (2000).

122. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2005).

123. United States v. Hampton, 441 F.3d 284, 288 (4th Cir. 2006). In our example, as in *Hampton*, the court stated that it had considered *all* the factors in § 3553(a), but the appellate court still disagreed with its reliance on a single factor. Since there must surely be circumstances where a single factor would be sufficiently compelling to outweigh the others, it seems that the "excessive weight" prohibition, at least until it is further defined, may simply be code for the institution of *de novo* review of sentences.

124. *See* United States v. Moreland, 437 F.3d 424, 437 (4th Cir. 2006).

125. *See* Citron, *supra* note 76, at 153.

order. Absent one of these scenarios, however, the district court's ruling would be affirmed.[126]

The discretionary path is open to much variation. Naturally, Congress can define what factors can and cannot be considered by judges and may even go into great detail as to the weight assigned to each factor. A common law of sentencing may also emerge from this process, as courts determine exactly how each factor should be construed.[127] Even more radical approaches could be pursued constitutionally, should the legislature so choose, including the diabolical topless guidelines system championed by the Department of Justice,[128] which affords judges limitless discretion to vary upwards, but requires them to make findings of fact that raise the mandatory minimum.[129] However unwise and inhumane we might consider such a course of action, it would likely be constitutional.[130]

B. *The Jury Finding Path*

If the legislature does not wish to grant sentencing judges the discretion to determine punishment, its only other recourse is to require jury findings or admission of any facts that will be used to enhance a defendant's sentence.[131] The most obvious example of

126. *Id.* (stating that a consistent pattern from a judge showing that his reasoning is nothing more than pretense might also be grounds for a remand).

127. *See generally* Amy Baron-Evans, Antidote to the Kool-Aid: Giving the Guidelines Substantial or Presumptive Weight is Constitutionally, Textually and Factually Unsound (2006), http://www.fd.org/pdf_lib/antidote%20for%20the%20kool%20aid.pdf.

128. *See Judiciary Asks Congress to Tread Carefully with Sentencing*, THE THIRD BRANCH (Admin. Office of the United States Courts, Wash., D.C.), Apr. 2006, http://www.uscourts.gov/ttb/04-06/tread_carefully/index.html (recounting testimony of members of the judiciary before the Senate Judiciary Committee discussing potential legislative action, including topless guidelines).

129. This type of solution must be implemented by the legislature, not the courts. As Judge Heaney noted in his footnote to *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006), some courts have been far more willing to consider upward departures reasonable than downward departures. *Id.* at 1000–01 n.3. It has not been suggested that this is anything other than a discretionary double standard, but even if it could be considered as an attempt to implement topless guidelines, the judiciary has no authority to perform this essentially legislative act.

130. The constitutionality of mandatory minimums is secured by *Harris v. United States*, 536 U.S. 545 (2002), but *Harris* itself may be vulnerable to constitutional challenge, as it was decided pre-*Booker* and two members of the *Harris* majority have since been replaced. Moreover, *Harris* relies on reasoning that is arguably inconsistent with the constitutional opinion in *Booker*, specifically its focus on the source of the sentence as opposed to the impact on the defendant.

131. Excepting, of course, the fact of a prior conviction.

this type of solution comes from Justice Stevens's dissent in *Booker*, where he stated:

> Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant's sentence under the Guidelines to a jury beyond a reasonable doubt."[132]

This solution, rejected by the Supreme Court but still available to the legislature, would keep the Guidelines as-is, including their mandatory nature but prohibit judges from finding facts that increase the Guidelines range. In many ways, this fits best with the rationale of *Apprendi*, preventing defendant's sentences from being raised at all based on facts found by a judge rather than a jury.

This path is open to some experimentation. The legislature could abolish the Guidelines altogether and focus on creating more comprehensive definitions of crimes and more defined statutory ranges. It could make enhancements for distinct crimes, mandate bifurcated trials, or create a nested series of lesser included offenses. Under a jury-finding system, prosecutors would also play a large role, lobbying defendants to waive their right to a jury trial and submit to judicial fact-finding as part of plea bargaining. While issues might arise concerning the imbalance of power between the prosecution and the defense, a freely given waiver of this kind would certainly meet Sixth Amendment standards.

While it seems to us that the basic discretionary path option is the path mandated by *Booker*, the purpose of this article is not to set forth our opinions of what sentencing ought to be. Instead, we offer these options as a starting point for a discussion on how a constitutional sentencing method can be created now that the old mandatory Guidelines regime is no longer viable. Variations on the two major themes presented in this section are sure to abound,[133] and each should be explored more thoroughly in the future before post-*Booker* sentencing reaches its final form.

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132. United States v. Booker, 543 U.S. 220, 284–85 (2005).

133. *See, e.g.*, D'Addio, *supra* note 119, at 174–75 (stating that appellate courts should look only to the facts of conviction when determining reasonableness, not judicially determined facts).

Currently, a majority of the circuit courts treat the Sixth Amendment as a constitutional technicality that ruined an otherwise ideal system rather than as a bedrock principle of American law. In *Apprendi*, the Supreme Court warned against attempts by the legislature to circumvent the constitutional rules it laid down;[134] this type of circumvention is precisely what is happening now, only led by the lower courts rather than Congress. The warning in *Apprendi* may provide some indication of the Supreme Court's ultimate conclusion in *Claiborne* and *Rita*: the *Apprendi* principles, and by extension the principles of *Blakely* and *Booker*, have been ignored, and now the Court may come down with a much more expansive vision of sentencing law than we have previously seen.

VII. CONCLUSION

Currently, the Fourth Circuit and the other circuits, consciously or not, are attempting to revive the mandatory Guidelines system by attaching a virtually irrebuttable presumption of reasonableness to within-Guidelines sentences while imposing a high bar for judges to hurdle should they wish to grant a variance. Essentially, these appellate courts have written in a few extra requirements that greatly increase the practical difficulties with sentencing but do nothing to alleviate the constitutional problems. Now, the problems of this system seem poised to overtake it. In *Claiborne* and *Rita*, the Supreme Court will either embrace the principles expressed in *Apprendi* or forever relegate *Booker* to a constitutional footnote. We believe they will choose the former.

Courts must recognize that sentencing as it was prior to *Booker* is simply no longer a constitutionally viable option. We must find a new path, one that keeps in mind the dictates of the Sixth Amendment, the realities of sentencing, and the practical effects of policy decisions. And while we must be ever mindful of the dangers coming from Congress, we cannot prevent these dangers through neglect of our constitutional duties. Instead, we must institute a system that complies with *Apprendi* and its progeny and obeys the mandates of *Booker* without assuming the legislative

134. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 n.16 (2000).

role. Many paths open before us as we proceed into the uncertain territory that lies beyond *Booker*, each with its own benefits and perils. One thing is clear, however: the road we are currently on leads tortuously backward, and that is a place we can never go again.