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**A PRESUMPTION OF REASONABLENESS:  
THE SEVENTH CIRCUIT’S UNREASONABLE  
APPROACH TO THE FEDERAL SENTENCING  
GUIDELINES**

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INTRODUCTION

The Supreme Court’s decision in *United States v. Booker* rendered the Federal Sentencing Guidelines (“Guidelines”) advisory and directed appellate courts to use a “reasonableness” standard of review when considering criminal sentences.<sup>1</sup> The question remained, however, of the relationship between the sentencing ranges provided by the Guidelines and a “reasonable” sentence.

The Seventh Circuit has chosen to grant sentences falling within the range proscribed by the Guidelines a presumption of reasonableness on appellate review.<sup>2</sup> This approach is flawed for two reasons: first, the presumption of reasonableness is not supported by the Supreme Court’s remedial opinion in *Booker* and second, the court cannot find support for the presumption in the plain meaning of 18 U.S.C.A. 3553. Recent cases have highlighted both the flaws in the

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<sup>1</sup> 543 U.S. 220 (2005).

<sup>2</sup> *United States v. Mykutiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

court's rationales in developing the presumption, as well as a surprising inconsistency in the court's application of the presumption.

The Supreme Court has recently granted *certiorari* for the question of whether *Booker's* holding can be harmonized with granting a presumption of reasonableness to a sentence falling within the Guidelines. Because the Seventh Circuit has played a notable role in the history of the Guidelines, and because the Circuit's handling of the Guidelines post-*Booker* has been particularly influential, the Seventh Circuit's approaches and rationales for the presumption are likely to be featured prominently in the Supreme Court's upcoming decision.

## I. BACKGROUND

### *The Road to Booker*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI

For decades, the potential conflict between judicial fact-finding in criminal sentencing and the Sixth Amendment's jury requirement has arisen when defendants' sentences were affected by factors neither admitted nor found by a jury.<sup>3</sup> As state and federal statutes have increasingly sought to emphasize the virtues of uniformity and predictability, the concern that the role of the jury was being usurped by mechanical judicial determinations increased as well. The last seven years have seen the Supreme Court clarify the Sixth

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<sup>3</sup> See *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Jones v. United States*, 526 U.S. 227 (1999).

Amendment's requirements, and in doing so, have set the stage for the current status of the Guidelines.<sup>4</sup>

In *Apprendi v. New Jersey*, the Court considered a sentence given to a defendant convicted of possession of a firearm for unlawful purpose and unlawful possession of a prohibited weapon.<sup>5</sup> The sentencing judge determined that the defendant, who had fired shots into the home of an African American family, was eligible for an extended term of incarceration under New Jersey's hate crime statute, and sentenced him to twelve years. The Court, in an opinion written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, held that the defendant's increased sentence violated the Sixth Amendment's jury requirement. Because the hate crime enhancement increased the defendant's sentence beyond the statutory maximum for the crimes to which the defendant had pled guilty, the Sixth Amendment required that it "must be submitted to a jury, and proved beyond a reasonable doubt."<sup>6</sup> Although the holding was limited to situations in which an enhancement resulted in the sentence exceeding the statutory maximum, the Court endorsed the more broad rule that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."<sup>7</sup>

Four years later the Court was faced with a similar situation in *Blakely v. Washington*, in which it considered a sentence given to a defendant convicted of second-degree kidnapping involving domestic violence and the use of a firearm.<sup>8</sup> The sentencing judge found that the defendant had acted with deliberate cruelty, and imposed a sentence of ninety months, more than three years above the statutory

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<sup>4</sup> See *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2004).

<sup>5</sup> 530 U.S. 466 (2000).

<sup>6</sup> *Id.* at 490.

<sup>7</sup> *Id.* (quoting *Jones*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

<sup>8</sup> 542 U.S. 296 (2004).

maximum without the enhancement.<sup>9</sup> In an opinion written by Justice Scalia and joined by Justices Stevens, Souter, Thomas, and Ginsburg, the Court held that because the facts supporting the defendant's additional sentence were neither found beyond a reasonable doubt by a jury, nor admitted by the defendant, the sentence violated his Sixth Amendment right to trial by jury.<sup>10</sup> Despite the fact that the sentence in *Blakely* was below the statutory maximum, the Court nevertheless stated that the issue was controlled by the rule expressed in *Apprendi*.<sup>11</sup> Justice Scalia clarified that "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."<sup>12</sup>

Although the Court was willing to extend *Apprendi*'s rule to encompass any fact that increased a defendant's punishment above what could have been given in its absence, it was not yet ready to consider the mandatory Guidelines.<sup>13</sup> Even though the Guidelines required sentencing judges to make findings of fact that could substantially increase a defendant's sentence, Justice Scalia made clear that "[t]he Federal Guidelines are not before us, and we express no opinion on them."<sup>14</sup>

## II. *UNITED STATES V. BOOKER*

Freddie Booker was convicted for possessing with the intent to distribute at least 50 grams of cocaine base.<sup>15</sup> Upon sentencing, the district court found by a preponderance of the evidence that the defendant had distributed several hundred grams more than the 92.5

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 303-04.

<sup>11</sup> *Id.* at 301.

<sup>12</sup> *Id.* at 303-04.

<sup>13</sup> *Blakely v. Washington*, 542 U.S. 227, 305 n.9 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> *United States v. Booker*, 375 F.3d 508, 509 (7th Cir. 2004)

grams found by the jury.<sup>16</sup> The defendant was eligible for a range of thirty years to life in prison under the mandatory Guidelines, and was sentenced to the bottom of the range.<sup>17</sup> Judge Posner, writing for the Seventh Circuit, considered the mandatory nature of the Guidelines to be determinative.<sup>18</sup> The “difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds...and commanding him to make fact-finding and base the sentence (within a narrow band) on them” was, for the court, the difference between a constitutional and unconstitutional sentencing scheme.<sup>19</sup>

Judge Posner was unwilling to allow the consistency of the Guidelines to outweigh their constitutional flaws.<sup>20</sup> While it was “tempting to think that maybe the guidelines can be saved by imagining the Sentencing Commission as a kind of super-judge who elaborates a code of sentencing principles much a thoughtful real judge, operating in a regime of indeterminate sentencing, might do informally in an effort to try to make his sentences consistent[,]” the importance of the Sixth Amendment’s jury requirement under *Blakely* could not be ignored.<sup>21</sup>

#### A. Justice Breyer’s Remedial Opinion

That is why we think it fair . . . to assume judicial familiarity with a “reasonableness” standard. And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would Justice Scalia what he calls the “daunting prospect” of applying such a standard across the board. *United States v. Booker*, 543 U.S. 220, 262-63 (2005).

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<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.* at 512.

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

In *United States v. Booker*, the Supreme Court continued the reasoning of *Apprendi* and *Blakely* and found that the Sixth Amendment's jury requirement prohibited mandatory judicial fact-finding that determined a defendant's sentence absent specific jury findings.<sup>22</sup> The opinion, while seemingly a logical continuation of *Apprendi* and *Blakely*, was notable for the bifurcated majorities responsible for the Court's constitutional and remedial opinions.<sup>23</sup> First, a majority comprised of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg, held that the Guidelines were unconstitutional.<sup>24</sup> Next, a majority made up of Justices Breyer, O'Connor, Kennedy, Ginsburg, and Chief Justice Rehnquist fashioned the remedy.<sup>25</sup>

Writing for the majority in the constitutional opinion, Justice Stevens noted that Sixth Amendment rights "are implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant."<sup>26</sup> In short, the Guidelines were unconstitutional so long judges were required to act in the role traditionally reserved for juries.<sup>27</sup>

Although the mandatory nature of the Guidelines was unconstitutional, the question remained of how exactly to fix them.<sup>28</sup> Writing for a separate remedial majority, Justice Breyer adopted an approach neither party had sought and determined that the Guidelines could be salvaged if the portions making them mandatory were severed from the rest of the statute.<sup>29</sup> First, § 3553(b)(1) was severed to remove the provision that required sentencing courts to impose a sentence within the Guidelines range, which transformed them from

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<sup>22</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>23</sup> *Id.* at 226, 244.

<sup>24</sup> *Id.* at 226-27.

<sup>25</sup> *Id.* at 246.

<sup>26</sup> *Id.* at 232.

<sup>27</sup> *Id.* at 231-33.

<sup>28</sup> *Id.* at 245.

<sup>29</sup> *Id.*

mandatory to “effectively advisory.”<sup>30</sup> Second, and most importantly for this note, the Court severed §3742(e), which set forth the mandatory de novo review appellate courts used for any departures from the Guidelines.<sup>31</sup>

Justice Breyer acknowledged that excising § 3742(e) left the Guidelines with no clear standard of appellate review, but quickly dismissed concerns that appellate courts would be unable to function without a statutory standard.<sup>32</sup> Even in the absence of explicit statutory language, Justice Breyer wrote, courts can infer review standards from related statutory language, the structure of the statute, and the sound administration of justice.<sup>33</sup> Justice Breyer noted that the appellate courts were not without experience applying a reasonableness standard to criminal sentences.<sup>34</sup> Prior to 2003, the Guidelines had specifically directed the appellate courts to use a type of reasonableness analysis when reviewing sentences falling outside the proscribed Guidelines range.<sup>35</sup> Additionally, the text of the Guidelines had “long required their use in important sentencing circumstances—both on review of departures . . . and on review of sentences imposed where there was no applicable Guideline . . .”<sup>36</sup>

The standard for the Guidelines was now clear, at least to Justice Breyer: “The district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing . . . The courts of appeals review sentencing decisions for unreasonableness.”<sup>37</sup>

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<sup>30</sup> *Id.* at 259.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 259-60.

<sup>33</sup> *Id.* at 260-61.

<sup>34</sup> *Id.* at 261.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 262.

<sup>37</sup> *Id.* at 264.

*B. Justice Scalia's Dissent*

What I anticipate will happen is that 'unreasonableness' review will produce a discordant symphony of different standards, varying from court to court...<sup>38</sup>

Justice Scalia's dissent in *Booker* expressed skepticism about both the legal reasoning behind the remedial opinion and about the practical effect of the "reasonableness" standard of review for the appellate courts.<sup>39</sup> He noted that contrary to the Justice Breyer's assurance that appellate courts had sufficient experience applying a reasonableness standard or review, such a standard was in actually in contrast to the bulk accepted practice of appellate sentencing review.<sup>40</sup> In Justice Scalia's opinion, applying a standard of review to the entirety of sentencing appeals that had previously only applied to 16.7% of cases was a recipe for uncertainty.<sup>41</sup>

Justice Scalia summed up his apprehension about an uncertain future in the closing lines of his dissent.<sup>42</sup> He wondered,

Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district court judges from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district court judges say all the right things when they explain how they have exercised their newly restored discretion? Time may tell, but today's remedial majority will not.<sup>43</sup>

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<sup>38</sup> *Id.* at 312 (Scalia, J., dissenting).

<sup>39</sup> *Id.* at 303-04.

<sup>40</sup> *Id.* at 310-11.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 313.

<sup>43</sup> *Id.*

### III. THE SEVENTH CIRCUIT DEVELOPS A STANDARD OF PRESUMPTIVE REASONABLENESS

The Seventh Circuit's understanding of the post-*Booker* reasonableness standard of review coalesced over the course of three cases in mid 2005.<sup>44</sup> The first two of these cases, *United States v. George* and *United States v. Dean*, foreshadowed the court's desire to find a standard of review for *Guideline* sentences that respected *Booker's* remedial opinion.<sup>45</sup> In the last of these cases, *United States v. Mykytiuk*, the Seventh circuit expressly adopted for the first time a presumption of reasonableness for any within-the-guidelines sentence.<sup>46</sup> In each of these cases, the court took pains to reiterate the post-*Booker* advisory status of the Guidelines while simultaneously developing a standard of review that elevated the Guidelines above the other § 3553(a) factors.<sup>47</sup>

#### A. *George* and *Dean* Set the Stage

In *George*, the court hinted that although *Booker* made clear that the Guidelines were advisory, the Seventh Circuit would nevertheless still be willing to treat them with a respect not necessarily afforded to the other sentencing factors in § 3553(a).<sup>48</sup> The defendant in *George* had pled guilty to a charge of conspiracy to defraud the United States and was sentenced to 48 months imprisonment as well as roughly \$614,000 in restitution.<sup>49</sup> The defendant argued that under *Booker's* interpretation, his sentence violated the Sixth Amendment's

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<sup>44</sup> See *United States v. George*, 403 F.3d 470 (7th Cir. 2005); *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005); *United States v. Mykutiuk*, 415 F.3d 606 (7th Cir. 2005).

<sup>45</sup> *George*, 403 F.3d 470; *Dean*, 414 F.3d 725.

<sup>46</sup> *Mykutiuk*, 415 F.3d 606.

<sup>47</sup> See 18 U.S.C.A. § 3553(a); *George*, 403 F.3d 470; *Dean*, 414 F.3d 725; *Mykutiuk*, 415 F.3d 606.

<sup>48</sup> *George*, 403 F.3d at 472-73.

<sup>49</sup> *Id.*

jury requirement.<sup>50</sup> In the opinion, Judge Easterbrook made clear that the court would not expect a sentencing judge to “record all of the considerations that 18 U.S.C. § 3553(a) lists; it [was] enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.”<sup>51</sup> The implication of that statement was clear: the court would only require explanation from a sentencing judge if the sentence imposed lay *outside* the Guideline range.<sup>52</sup> If a district court judge wished to avoid addressing the factors in § 3553(a), he could continue to find safe harbor within the Guidelines.<sup>53</sup>

Three months later in *Dean*, the court addressed more directly the status that the Guidelines would be given in post-*Booker* reasonableness review.<sup>54</sup> In *Dean*, the defendant argued that the sentencing judge placed undue emphasis on the range calculated by the Guidelines and did not adequately consider the other factors in § 3553(a).<sup>55</sup> Writing for the court, Judge Posner acknowledged that sentencing judges are required to consider the relevant factors in § 3553(a), even noting the sentencing factors’ “new vitality” in the exercise of sentencing discretion.<sup>56</sup>

This apparent respect for the parity of sentencing factors was immediately tempered, however, by what Judge Posner considered to be the “practical objection[s]” to the defendant’s argument that the sentencing judge should consider all the § 3553(a) factors equally.<sup>57</sup> Despite the plain language of § 3553(a), the court was unwilling to increase the workload of sentencing judges (and by extension, appellate justices) by requiring them to consider these factors in every

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<sup>50</sup> *Id.* at 472.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *United States v. Dean*, 414 F.3d 725, 728 (7th Cir. 2005).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing *United States v. Trujillo-Terrazas*, 405 F.3d 814, 819 (10<sup>th</sup> Cir.2005)).

<sup>57</sup> *Dean*, 414 F.3d at 729.

case.<sup>58</sup> In support of this reasoning, Judge Posner bemoaned the “vague and, worse perhaps, hopelessly open-ended” nature of the factors listed in § 3553(a).<sup>59</sup> Showing a noteworthy disdain for the statutory factors, Judge Posner pointed to the “interminable character of inquiry into the meaning and application of each of the ‘philosophical’ concepts” in reaffirming *George’s* treatment of within-the-guidelines sentences.<sup>60</sup>

Additionally, the court stated in *Dean* (without citation) that *Booker* “requires the sentencing judge first to compute the guidelines sentence just as he would have done before *Booker*, and then . . . to decide whether the guidelines sentence is the correct sentence to give the particular defendant.”<sup>61</sup> This formula did not by itself bestow presumptive reasonableness, but it did grant the Guidelines a significant priority that is unsupported in *Booker*.<sup>62</sup> By enshrining this process as one “required” by *Booker*, the court embraced a formulaic approach for the Guidelines while rejecting a formulaic approach when addressing the factors listed in § 3553(a).<sup>63</sup> The calculation of the appropriate Guidelines sentence, of course, cannot be anything other than formulaic; what is remarkable about the Seventh Circuit’s approach is its *use* of that determination.<sup>64</sup> After *Dean*, the Guidelines remained not only the sole factor that must be taken into account in each sentence, but the factor that must be taken into account prior to the consideration of any others listed in § 3553(a).<sup>65</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 727.

<sup>62</sup> *See id.* at 729-30.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

*B. Mykytiuk elevates the Guidelines*

The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.<sup>66</sup>

With this uncited declaration, the Seventh Circuit carried *George* and *Dean* to their natural conclusions and effectively elevated the Guidelines beyond a purely advisory status.<sup>67</sup> Writing for the court, Judge Wood framed the issue presented as a choice between two extremes: the court could grant *per se* reasonableness to the Guidelines at one extreme, or use “a clean slate that ignores the proper Guidelines range” at the other.<sup>68</sup> While acknowledging that the former standard would obviously conflict with *Booker*’s constitutional analysis and the latter would be inconsistent with *Booker*’s remedy, Judge Wood attempted to strike a middle ground between these two extremes.<sup>69</sup>

Explaining how the court reached its conclusion, Judge Wood pointed out that the Guidelines “represent at this point eighteen years’ worth of careful consideration of the proper sentence for federal offenses.”<sup>70</sup> It was natural to assume, therefore, that the Supreme Court intended for the Guidelines to continue to play an important role in sentencing.<sup>71</sup> Many, or even most, sentences would and should continue to fall within the applicable Guideline range.<sup>72</sup> Accordingly, the court concluded that a properly calculated Guidelines sentence was entitled to a rebuttable presumption of reasonableness at the appellate level.<sup>73</sup> “While we fully expect that it will be a rare Guidelines

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<sup>66</sup> United States v. Mykutiuk, 415 F.3d 606, 608 (7th Cir. 2005).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 607.

<sup>69</sup> *Id.* at 607-08.

<sup>70</sup> *Id.* at 607.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 608.

sentence that is unreasonable,” judge Wood wrote, “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.”<sup>74</sup>

#### IV. THE SEVENTH CIRCUIT’S APPROACH CANNOT FIND SUPPORT IN *BOOKER* OR § 3553(A)

The court was careful in *Mykytiuk* to portray its decision as merely granting the Guidelines the status to which they were “entitled.”<sup>75</sup> This deferential approach, however, does not find support in Justice Breyer’s remedial *Booker* opinion or the relevant text of § 3553(a).<sup>76</sup> The Seventh Circuit’s grant of presumptive reasonableness to within-the-guidelines sentences is at best unsupported by *Booker*’s remedial opinion, and in some respects contrary to the opinion.<sup>77</sup> Nothing in the Supreme Court’s *Booker* opinion suggests that the Court intended to grant the Guidelines preferential status in relation to the other factors in § 3553(a).<sup>78</sup> Justice Breyer noted in the remedial opinion that the appropriate standard of appellate review could be inferred from pre-2003 practice, where sentences falling outside the applicable Guideline range were measured for reasonableness against § 3553(a) factors.<sup>79</sup> Because § 3553(a) remained in effect after *Booker*, the Court directed appellate courts to use those factors, as they have in the past, in determining whether a sentence is unreasonable.<sup>80</sup>

Justice Breyer also pointed out that even without the mandatory provisions of § 3553(b)(1), the Guidelines “continue[] to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See* United States v. Booker, 543 U.S. 220 (2005); 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq.

<sup>77</sup> *See* *Booker*, 543 U.S. at 261.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

of his discretionary power under § 3553(a).”<sup>81</sup> Had the remedial majority intended to grant within-the-guidelines sentences a presumption of reasonableness, or any preferential treatment, it seems unlikely that they would have specified that sentences both within and outside the Guidelines range should be measured for reasonableness against § 3553(a) in this manner. As Justice Scalia pointed out in his dissent, “[i]f the majority thought...the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but generally to be followed—its opinion would surely say so.”<sup>82</sup> Instead, the remedial opinion explicitly states that the “numerous factors” listed in § 3553(a) “will guide appellate courts . . . in determining whether a sentence is reasonable.”<sup>83</sup>

This lack of authority within *Booker* supporting a presumption of reasonableness is reflected by the citations within the *Mykytiuk* decision itself.<sup>84</sup> Nowhere in the opinion does Judge Wood cite to a specific portion of *Booker* that supports the presumption.<sup>85</sup> Instead, the portion of the opinion that expressly creates the presumption merely points out that *Booker* requires the district courts to consult the Guidelines and that the Sentencing Commission will continue to revise the Guidelines in light of both district and appellate court decisionmaking.<sup>86</sup> Immediately following these two points, Judge Wood states that the Guidelines are “entitled” to the rebuttable presumption of reasonableness.<sup>87</sup>

The Seventh Circuit’s grant of presumptive reasonableness to within-the-Guidelines sentences also conflicts with the plain language of 18 U.S.C.A. § 3553 (a).<sup>88</sup> Nowhere does the statute suggest a

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<sup>81</sup> *Id.* at 260.

<sup>82</sup> *Id.* at 307.

<sup>83</sup> *Id.* at 261.

<sup>84</sup> *See generally* United States v. Mykutiuk, 415 F.3d 606 (7th Cir. 2005).

<sup>85</sup> *Id.* at 608.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 10 U.S.C.A. § 3553(a) states in relevant part:

particular order in which the factors should be considered, much less a mandate that the Guidelines be considered first.<sup>89</sup> The Seventh Circuit's directive to only consider the statutory factors after calculating the appropriate Guidelines sentence conflicts with Justice Scalia's observation that § 3553(a) itself "provides no order of priority among all those factors."<sup>90</sup> It seems difficult to imagine that under a regime of advisory Guidelines, a statutory factor that appears fourth out of seven should be given a priority absent specific statutory language.<sup>91</sup>

By elevating the Guidelines above the other factors listed in § 3553(a), the Seventh Circuit is in danger of deferring to precisely the kind of "superjudge" Judge Posner warned against in his *Booker*

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The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set for in the guidelines . . . issued by the Sentencing Commission . . .

(5) any pertinent policy statement . . . issued by the Sentencing Commission . . .

(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.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

opinion.<sup>92</sup> In justifying the presumption of reasonableness created in *Mykutiuk*, Judge Wood relied on the “careful consideration” that has gone into the Guidelines over the last two decades, but that consideration is not synonymous with the factors listed in § 3553(a).<sup>93</sup> Since their inception, the principal goal of the Guidelines has been uniformity of sentencing throughout the federal system, not the consideration of § 3553(a) factors.<sup>94</sup> When appointed by Congress in 1985, the Sentencing Commission was given the primary task of decreasing the “unjustifiably wide” disparities that existed within federal sentencing.<sup>95</sup> In doing so, the Commission made certain concessions and compromises that took a wide range of factors into consideration, but the Guidelines were not intended to replace the § 3553(a) factors.<sup>96</sup>

#### V. THE SEVENTH CIRCUIT’S APPLICATION OF THE PRESUMPTION OF REASONABLENESS STANDARD

Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows.<sup>97</sup>

Four recent cases have demonstrated a surprising inconsistency in the court’s application of the presumption of reasonableness for within-the-guidelines sentences.<sup>98</sup> In *United States v. Jointer*, the court addressed an eighty-seven month sentence given to a defendant convicted of distribution of crack cocaine and possession with intent to

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<sup>92</sup> *United States v. Booker*, 375 F.3d 508, 512 (7th Cir. 2004).

<sup>93</sup> *United States v. Mykutiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

<sup>94</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Booker*, 375 F.3d at 516 (Easterbrook, J. dissenting).

<sup>98</sup> See *United States v. Jointer*, 457 F.3d 682 (7th Cir. 2006); *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006); *United States v. Hankton*, 463 F.3d 626 (7th Cir. 2006); *United States v. Gonzalez*, 462 F.3d 754 (7th Cir. 2006).

distribute crack cocaine.<sup>99</sup> In the district court, the sentencing judge calculated the defendant's Guideline range, found several enhancements as well as several subtractions, and found the applicable Guideline range to be 135 to 168 months.<sup>100</sup> The district court then turned to the § 3553(a) factors and found that that, among other factors, the need for sentencing consistency across the country justified the reduction of the 100-1 ratio between crack and powder cocaine sentences to 20-1.<sup>101</sup> The sentence, after calculating the Guideline range and consulting the § 3553(a) factors was eighty-seven months.<sup>102</sup>

Judge Ripple, writing for the court, held that, by using § 3553(a) (6) to reduce the disparity between sentences for powder cocaine and those for crack, the sentencing judge erred as a matter of law.<sup>103</sup> The court noted that although the Guidelines are advisory, the court must "respectfully adhere to the 100-1 ratio that Congress has decided to implement..."<sup>104</sup> Despite the fact that the district court judge followed the precise procedure laid out in *Mykytiuk*, the court nevertheless held that the district court's sentencing discretion did not include overriding a particular aspect of the Guidelines with any other factor from § 3553(a).<sup>105</sup> Even while limiting the district court's ability to implement § 3553(a) factors if they conflict with the Guideline sentencing range, the court repeatedly stressed that its decision recognized the advisory nature of the Guidelines.<sup>106</sup>

Two days after *Jointer*, the court was faced with the issue of whether current Guidelines may be applied retroactively without triggering ex post facto problems in *United States v. Demaree*.<sup>107</sup>

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<sup>99</sup> *Jointer*, 457 F.3d 682, 684 (2006).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 687.

<sup>104</sup> *Id.* at 686

<sup>105</sup> *Id.* at 686-87(7th Cir. 2006).

<sup>106</sup> *Id.* 687.

<sup>107</sup> *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006).

Judge Posner wrote for the court and held that because the Guidelines were no longer mandatory, they could be applied retroactively without raising ex post facto concerns.<sup>108</sup> The court likened the “purely advisory” Guidelines to a joint resolution of Congress urging heavier sentences to white-collar criminals, or an increase in prison funding intended to allow for lengthier sentences.<sup>109</sup> None of the analogies drawn by the court, however, squarely addressed the effect of a presumption of reasonableness.

The court did acknowledge the argument that a presumption of reasonableness granted to even an advisory Guideline system could raise ex post facto issues, but immediately dismissed such concerns out of hand.<sup>110</sup> Judge Posner wrote that the sentencing judge “is not required—or even permitted—to ‘presume’ that a sentence within the guidelines range is the correct sentence and if he wants to depart give a reason why it’s not correct. All he has to do is consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a).”<sup>111</sup>

This remarkable retreat from the formulaic approach the Seventh Circuit had employed since *Mykytiuk* did not last for long, however. Less than a month after *Demaree*, the court ruled in *United States v. Hankton* that “the presumption that a correctly calculated Guidelines sentence is reasonable not only applies to the appellate standard of reasonableness review, but also serves as a benchmark for trial judges in evaluating whether or not a Guidelines sentence is appropriate.”<sup>112</sup>

Judge Coffey, writing for the court, made clear that the only time a sentencing judge even need consider the § 3553(a) factors is

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<sup>108</sup> *Id.* at 794

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* 794-95.

<sup>111</sup> *Id.*

<sup>112</sup> *United States v. Hankton*, 463 F.3d 626, 629 (7th Cir. 2006).

when the defendant provides convincing argument as to why they should apply.<sup>113</sup>

Finally, the court in *United States v. Gonzalez* showed a marked unwillingness to even consider a within-the-guidelines sentence as unreasonable.<sup>114</sup> In stark contrast to the concession in *Mykytiuk* that the “door must be left open” to the possibility of a sentence falling within the Guidelines being unreasonable, Judge Posner seems to discount the possibility that anything other than a departure from the Guidelines justify such a finding.<sup>115</sup> According to Judge Posner, a sentencing judge’s lack of consideration for § 3553(a) factors was not enough to even raise the question that a within-the-Guidelines sentence may be unreasonable.<sup>116</sup> Merely citing various § 3553(a) factors that the defendant raised, but were not addressed by the sentencing court, is insufficient to challenge a sentence as unreasonable.<sup>117</sup> Judge Posner even goes so far as to characterize appeals of this kind as a “waste [of] time”.<sup>118</sup> This approach seems to conflict with Judge Posner’s own warnings against sentencing judges using the presumption as a shortcut to avoid addressing more individualized, and time consuming, sentencing factors.<sup>119</sup>

## VI. THE FUTURE OF THE GUIDELINES WITHIN THE SEVENTH CIRCUIT

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted limited to the following Questions: 1) Was the district court's choice of within-Guidelines sentence reasonable? 2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220

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<sup>113</sup> *Id.*

<sup>114</sup> *United States v. Gonzalez*, 462 F.3d 754, 755 (7th Cir. 2006)

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 756.

<sup>119</sup> *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005).

(2005), to accord a presumption of reasonableness to within-Guidelines sentences? 3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. §3553(a) factors and any other factors that might justify a lesser sentence?<sup>120</sup>

In the time since *Booker's* remedy was instituted, Justice Scalia's predictions of a "discordant symphony of different standards" has proven somewhat accurate.<sup>121</sup> Currently, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have adopted a presumption of reasonableness for sentences falling within the Guidelines.<sup>122</sup> The First, Second, Third, Ninth, and Eleventh Circuits have rejected the presumption, but have generally given the Guidelines some level of deference.<sup>123</sup>

The Supreme Court has decided to address this Circuit split as well as other issues left unresolved by *Booker* in two upcoming cases: *Rita v. United States* and *Claiborne v. United States*.<sup>124</sup> In *Rita*, the Court will address directly whether a presumption of reasonableness for within-the-Guidelines sentences is consistent with the Court's *Booker* decision.<sup>125</sup> If the Court determines that the presumption is consistent with *Booker*, it will go on to determine if that presumption is enough to justify a sentence without an explicit analysis of the §

<sup>120</sup> *Rita v. United States*, 127 S.Ct. 551 (Mem) (2006)

<sup>121</sup> *United States v. Booker*, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting).

<sup>122</sup> *See United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Smith*, 440 F.3d 704 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Mykutiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Tabor*, 439 F.3d 826 (8th Cir. 2006); *United States v. Kristl* 437 F.3d 1050 (10th Cir. 2006).

<sup>123</sup> *See United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006); *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. 2006); *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006).

<sup>124</sup> --- U.S. ----, (2007); --- U.S. ----, (2007).

<sup>125</sup> *Rita v. United States*, 127 S.Ct. 551 (Mem) (2006).

3553(a) factors that may merit a different sentence.<sup>126</sup> The current makeup of the Court suggests that whatever the specific outcome, a modification of *Booker's* remedy may be likely. Only Justices Breyer, Kennedy, and Ginsburg remain of *Booker's* remedial majority, while all four dissenting Justices remain.

The Seventh Circuit has not been unresponsive to the Supreme Court's recent actions.<sup>127</sup> In *United States v. Gama-Gonzales*, Judge Easterbrook offered an opinion meant perhaps as both a summation and a defense of the Seventh Circuit's position.<sup>128</sup> He explained in the court's opinion that "[t]o say that a sentence within the range is presumptively reasonable is *not* to say that district judges ought to impose sentences within the range. It is only to say that, *if* the district judge does use the Guidelines, then the sentence is unlikely to be problematic."<sup>129</sup> Using an interesting logic, Judge Easterbrook argued that by granting the presumption, the Seventh Circuit is merely using the increased sentencing discretion granted by *Booker*.<sup>130</sup> "One permissible use of discretion[,] according to Judge Easterbrook, "is to start with the Guidelines' framework, which is designed to curtail unjustified disparity in sentences--for avoiding unjustified disparity is one of the statutory objectives."<sup>131</sup>

*Gama-Gonzales's* most notable defense of the Seventh Circuit's approach comes from Judge Easterbrook's minimization of the presumption's effect.<sup>132</sup> Distilling the Seventh Circuit's position, he wrote that "[w]hen saying that sentences within the Guidelines are presumptively reasonable, we mean no more than the modest proposition that district judges generally possess the discretion under §

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<sup>126</sup> *Id.*

<sup>127</sup> See *United States v. Gama-Gonzales*, 469 F.3d 1109 (7th Cir. 2006).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1110 (citations omitted, emphasis original).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1111.

3553(a) and *Booker* to follow the Guidelines, if they so choose, without acting *un-reasonably*.”<sup>133</sup>

#### CONCLUSION

Despite the Seventh Circuit’s assurances of the presumption’s innocuous nature, Judge Easterbrook’s clarification in *Gama-Gonzalez* begs the question: if the presumption is nothing more than a rather generalized statement of a sentencing judge’s discretionary powers, why is it necessary at all? The uniformity of sentencing and judicial economy offered by granting sentences falling within the Guidelines a presumption of reasonableness are certainly legitimate rewards. Those rewards, however, also carry the danger that the Guidelines will become a shelter for sentencing judges wishing to avoid the complexity of individualized sentencing, and a justification for the appellate court to evade § 3553(a) factors.

As Judge Posner warned in *United States v. Cunningham*, “the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored.”<sup>134</sup> By adopting the presumption of reasonableness, the Seventh Circuit has indulged that temptation in a way that allows the court to continue to extol the advisory nature of the Guidelines, the vitality of the § 3553(a) factors, and the discretion of sentencing judges while simultaneously undermining each.

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<sup>133</sup> *Id.* (emphasis original).

<sup>134</sup> *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005).