Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options

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Summary

Historically, the way in which convicted offenders are sentenced falls under one of two penal policies—indeterminate and determinate sentences. Indeterminate sentencing practices were predominant for several decades, leading up to the major reform efforts undertaken by many states and the federal government in the mid- to-late 1970s and early 1980s. The perceived failure of the indeterminate system to "cure" the criminal, coupled with renewed concern about the rising crime rate throughout the nation in the mid-1970s, resulted in wide experimentation with sentencing systems by many states and the creation of sentencing guidelines at the federal level. In 1984, Congress passed a sentencing reform measure, which abolished indeterminate sentencing at the federal level and created a determinate sentencing structure through the federal sentencing guidelines. The Sentencing Reform Act of 1984 reformed the federal sentencing system by (1) dropping rehabilitation as one of the goals of punishment; (2) creating the U.S. Sentencing Commission and charging it with establishing sentencing guidelines; (3) making all federal sentences determinate; and (4) authorizing appellate review of sentences.

In *United States* v. *Booker (Booker)*, an unusual two-part opinion transformed federal criminal sentencing by restoring to judges much of the discretion that Congress took away when it put mandatory sentencing guidelines in place. In the first opinion, the United States Supreme Court held that the mandatory sentencing guidelines violated defendants' Sixth Amendment right to a trial by jury by giving judges the power to make factual findings that increased sentences beyond the maximum that the jury's finding alone would support. In the second part, a different majority concluded that the constitutional deficiency could be remedied if the guidelines were treated as discretionary or advisory rather than mandatory. As a result of the decisions, the Court struck down a provision in law that made the federal sentencing guidelines mandatory as well as a provision that permitted appellate review of departures from the guidelines. In essence, the high Court's ruling gives federal judges discretion in sentencing offenders by not requiring them to adhere to the guidelines; rather, the guidelines can be used by judges on an advisory basis.

In light of the Court ruling in *Booker* and subsequent cases, the issue for Congress is whether to amend current law to require federal judges to follow guided sentences, or permit federal judges to use their discretion in sentencing under certain circumstances. Congressional options include (1) maintain the sentencing guidelines by specifying mandatory minimum sentences and increasing the top of each guideline range to a statutory maximum for specified offenses (hence, codify specified sentencing ranges that are in the guidelines); (2) require jury trials for any enhancement factor that would increase the sentence for which the defendant did not waive his or her rights; or (3) take no action, thus permitting judicial discretion in sentencing in cases where Congress has not specified mandatory sentences.

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Introduction

On January 12, 2005, the U.S. Supreme Court ruled that the Sixth Amendment right to a trial by jury requires that federal sentencing guidelines be advisory, rather than mandatory.[1] In doing so, the Court struck down a provision in law that made the federal sentencing guidelines mandatory[2] as well as a provision that permitted appellate review of departures from the guidelines.[3] In essence, the Court's ruling gives federal judges discretion in sentencing offenders by not requiring them to adhere to the guidelines; rather, the guidelines can be used by judges on an advisory basis.[4] As a result of the ruling, judges now have discretion in sentencing defendants unless the offense carries a mandatory sentence (as specified in law). While some may view the ruling as an opportunity for federal judges to take into consideration the circumstances unique to each individual offender, thus handing down a sentence that better fits the offender, others fear that federal sentencing will give way to unwarranted disparity and inconsistencies across jurisdictions.[5] The Court has begun to clarify some of the lingering questions regarding the amount of weight to be given to the guidelines and what standards appellate courts should use in assessing the "reasonableness" of a particular sentence. In light of these rulings, the issue for Congress is whether to amend current law to require federal judges to follow guided sentences (hence, codify specified sentencing ranges that are in the guidelines), or to continue the status quo and permit federal judges to use their discretion in sentencing, under certain circumstances.

The issue that brought the matter before the Court was a judge's obligation to move from one guideline maximum to a higher one based on the judge's factual determination. The Court examined "[w]hether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines (USSG) based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant."[6]

This report provides background information on the federal sentencing guidelines. In doing so, the report provides a summary of U.S. penal policy, paying particular attention to such policy at the federal level. The report then discusses legislation enacted in 1984 that created the pre-*Booker* federal sentencing structure. A legal analysis of the Court's Sixth Amendment jurisprudence leading up to the *Booker* decision as well as subsequent, related Court decisions follow. Next, the different types of sentencing guidelines, including the one that was approved by Congress that was the basis for the recent U.S. Supreme Court decision, are discussed. The report then provides an analysis of departures from the guidelines under the federal system. The report

[1] See *United States* v. *Booker*, 543 U.S. 220 (2005).

[2] According to the ruling, a provision in current law makes the guidelines binding on all judges. The provision, 18 U.S.C. §3553(b), requires courts to impose a sentence within the applicable guidelines range.

[3] See 18 U.S.C. §3742(e).

[4] While the Court struck down a provision that made the federal sentencing guidelines mandatory, the Court also noted that current law "... requires judges to take account of the guidelines together with other sentencing goals." See 18 U.S.C. §3553(a). The Court also struck down a provision that permitted appellate review of sentences that were imposed as a result of a judge's departure from the guidelines. The Court noted, however, that current law "... continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the guidelines range)". See 18 U.S.C. §3742(a),(b).

[5] See for example, Erik Luna, "Misguided Guidelines: A Critique of Federal Sentencing," *Policy Analysis*, no. 458, November 1, 2002.

[6] *United States* v. *Booker*, 543 U.S. 220 (2005).

concludes with an analysis of possible policy options Congress may wish to consider if it chooses to address this issue.

Penal Policy

Historically, the way in which convicted offenders are sentenced in the United States falls under one of two penal policies—indeterminate and determinate sentences. Indeterminate sentencing practices were predominant for several decades, leading up to the major reform efforts undertaken by many states and the federal government in the mid- to late 1970s and early 1980s (see discussion in the next section). Today, however, some states and the federal government have variations of determinate sentencing. Some states, however, continue to operate under indeterminate sentencing.

Early penal policy in the United States served the goals of retribution and punishment. Beginning in 1870, however, rehabilitation became the focus of criminal sentencing, which led to the adoption of an indeterminate sentencing system in the federal penal system. At the time, indeterminate sentencing was seen as the preferred mechanism to rehabilitate offenders, which was the stated goal of punishment. Under the federal indeterminate sentencing scheme, Congress established the penalty range within which the judge imposed a sentence. Typically, after one-third of the sentence was served, a parole board would determine if the offender had been rehabilitated and could be released from prison and placed on parole.[7]

Federal sentencing policy was reexamined by Congress in the early 1970s, and in 1973 a proposal to revise the entire Federal Criminal Code was introduced, which ultimately included a reform of the federal sentencing system.[8] It wasn't until 1984, however, that Congress passed a sentencing reform measure, which abolished indeterminate sentencing at the federal level and created a determinate sentencing structure through the federal sentencing guidelines (see discussion below).

Indeterminate Sentencing

As stated previously, federal sentencing was indeterminate throughout much of the 20th century. Defendants sentenced under an indeterminate sentencing scheme do not know the exact length of time they will serve. At the federal level, primary control over sentencing rested with the district court. With few exceptions, Congress provided only maximum terms of incarceration for federal crimes, while judges set the minimum sentence in individual cases, and the U.S. Parole Board decided when the offender was released. At the state level, a range of sentences for a particular

[7] Parole is the conditional, supervised release of a prisoner prior to the expiration of his term of imprisonment.

[8] The Criminal Justice Codification, Revision and Reform Act (S. 1) was a product of the movement to revise the Federal Criminal Code that began in 1952 with the drafting of a Model Penal Code by the American Law Institute (Institute). That document was refined during the following 10 years, and in 1962 the Institute published a "Proposed Official Draft" of a Model Penal Code. In 1966, Congress created a National Commission on Reform of Federal Criminal Laws (the Brown Commission) and mandated that it study and review U.S. statutory and case law and make recommendations for its improvement. The Brown Commission's report was transmitted to Congress and the President in 1971 in the form of a "work basis," from which S. 1 was derived. See U.S. Congress, Senate Committee on the Judiciary, *Criminal Code Reform Act of 1977*, Report on S. 1437, 95th Cong., 1st sess., S.Rept. 95-605, part I (Washington: Govt. Print. Off., 1977) pp. 10-15.

crime is established according to statute (e.g., 12 to 20 years) and a judge would sentence the defendant to that range. The precise amount of time an offender serves, however, is left to prison officials, usually a parole board. Sentences were indeterminate because the actual length of time that would be served could not be determined at the time of sentencing.

Indeterminate sentencing, once viewed as a major reform designed to individualize the treatment of offenders and facilitate rehabilitation, came under attack because it was perceived as promoting unwarranted disparity in sentences. Critics contended that the unlimited judicial discretion, without documented justification and review by an appellate court, produced sentencing disparities.[9]

The perceived failure of the indeterminate system to "cure" the criminal (usually measured by recidivism[10] rates), coupled with a concern about rising crime rates throughout the nation in the mid-1970s, resulted in experimentation with sentencing systems by several states and the creation of sentencing guidelines at the federal level. Despite these developments, however, indeterminate sentencing remains "the predominate sentencing structure for most states ... although these laws are becoming increasingly determinate in structure ... by greater use of mandatory minimums, truth in sentencing provisions, and reduction in the amount of good time credits an inmate can earn while incarcerated."[11]

Determinate Sentencing

Prior to many states and the federal governments adopting sentencing guidelines and other forms of "structured" sentencing policies, the only alternative to indeterminate sentencing was determinate or "fixed" sentencing. As sentencing policy evolved, so did the scope of determinate sentencing. For example, beginning in the 1970s and continuing into the 1990s, Congress and many states passed legislation that revised sentencing laws and required, in many cases, the mandatory imprisonment of offenders for committing certain types of crimes. In many instances, such legislation required a *mandatory minimum* term of imprisonment. In addition to mandatory minimum laws, Congress and several states passed legislation that created sentencing commissions and charged them with establishing sentencing guidelines. Congress and some states also passed "three-strikes" provisions, which usually required a life sentence after the third strike (i.e., conviction), and truth-in-sentencing measures, which required an offender to serve a large percentage of his or her sentence.

Many of the current sentencing alternatives to indeterminate sentencing are variations of determinate sentencing. There are usually explicit standards specifying the amount of punishment and a set release date that is not subject to review by an administrative body (i.e., a parole board). Under determinate sentencing, however, time served can be reduced by good time or earned time.

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[9] See for example, Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973); Report of the Twentieth Century Fund, Task Force on Criminal Sentencing, *Fair and Certain Punishment* (New York: McGraw-Hill Book Company, 1976); and Andrew Von Hirsch, *Doing Justice, The Choice of Punishments* (New York: Hill and Wang, 1976).

[10] Recidivism is the rearrest, reconviction and resentencing of an ex-offender.

[11] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *1996 National Survey of State Sentencing Structures*, BJA Monograph, pp. xi and 18. According to a 1996 DOJ BJA report, 36 states and the District of Columbia had at that time an indeterminate sentencing structure.

Both indeterminate and determinate sentencing practices have been criticized by many who believe that such practices lead to abuse by criminal justice officials and unwarranted disparities in sentences. Critics of both penal policies contend that such sentences give way to a nonuniform application of sentences across jurisdictions. With respect to determinate sentences, for example, judges sentence offenders to a fixed period based on statute, which some contend does not take into consideration individual offender characteristics. Moreover, they argue that determinate sentences essentially move discretion away from the judge to the charging attorney.[12] Indeterminate sentencing practices, on the other hand, lead to disparities due to the potential for "two defendants committing the same crime under similar circumstances receiving very different sentences depending on a particular judge's sentencing idiosyncrasies."[13]

The Sentencing Reform Act of 1984

In 1984, Congress passed legislation that led to the creation of federal sentencing guidelines. The Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act of 1984; P.L. 98-473), in essence, eliminated indeterminate sentencing at the federal level. The act created the United States Sentencing Commission, an independent body within the judicial branch of the federal government and charged it with promulgating guidelines for federal sentencing. The purpose of the Commission was to examine unwarranted disparity in federal sentencing policy, among other things.[14] In establishing sentencing guidelines for federal judges, the Commission took into consideration factors such as (1) the nature and degree of harm caused by the offense; (2) the offender's prior record; (3) public views of the gravity of the offense; (4) the deterrent effect of a particular sentence; and (5) aggravating or mitigating circumstances.[15] In addition to these factors, the Commission also considered characteristics of the offender, such as age, education, vocational skills, and mental or emotional state, among other things.[16] Prior to the *Booker* decision (discussed below), the guidelines were binding.[17]

In summary, the Sentencing Reform Act reformed the federal sentencing system in the following ways:

- It abandoned one of the traditional goals of punishment, *rehabilitation*, and asserted the following goals: *retribution, education, deterrence* and *incapacitation.*[18]

[12] For example, a charging attorney decided which charges to bring forth for prosecution.

[13] American Bar Association, Justice Kennedy Commission, *Report with Recommendations to the ABA House of Delegates*, August 2004, p. 14.

[14] The Commission was also mandated to examine the effects of sentencing policy upon prison resources (e.g., overcrowding) and the use of plea bargaining in the federal criminal justice system.

[15] See 18 U.S.C. §994(c).

[16] See 18 U.S.C. §994(d).

[17] Mandatory minimum sentencing laws are separate from the federal sentencing guidelines. Over the years, Congress has directed the U.S. Sentencing Commission to integrate mandatory minimum penalties it has passed into the federal sentencing guidelines. Examples of federal mandatory minimum sentencing laws include the 1986 and 1988 Anti-Drug Abuse Acts (P.L. 99-570 and P.L. 100-690). In addition to mandatory minimum penalties for certain drug violations, Congress has passed mandatory minimum penalties for certain gun violations and sex offenses.

[18] See 28 U.S.C. §994(k) and 18 U.S.C. §3553(a)92).

- It consolidated the power that had been exercised by judges and the U.S. Parole Board to decide the type of punishment and its length by abolishing paroles and creating the U.S. Sentencing Commission and charging it with establishing sentencing guidelines.[19]
- It made all federal sentences determinate.[20]
- It authorized appellate review of sentences in which the judge departed from the guidelines[21] and review of other sentences under certain circumstances. [22]

Sixth Amendment Jurisprudence Regarding the Right to Trial By Jury

In a series of cases, the U.S. Supreme Court has held that given the Sixth Amendment right to trial by jury, judges cannot impose sentences beyond the prescribed statutory maximum unless the facts supporting such an increase are found by a jury beyond a reasonable doubt.[23] In *Apprendi* v. *New Jersey (Apprendi)*,[24] the Court struck down New Jersey's hate crime law, which allowed a judge to increase a sentence to double the statutory maximum if he or she found, by a preponderance of the evidence, that the defendant acted with a purpose to intimidate an individual or group of individuals because of race. In reversing the lower court's decision, the Court declared that the jury trial and notification clauses of the Sixth Amendment and Due Process Clauses of the Fifth and Fourteenth Amendments embody a principle that insists that, except in the case of recidivists, [25] a judge could not on his own findings sentence a criminal defendant to a term of imprisonment greater than the statutory maximum assigned for the crime for which he had been convicted by the jury. [26]

In *Blakely* v. *Washington (Blakely)*,[27] the Court held that Washington State's sentencing guidelines violated the Sixth Amendment's guarantee of a trial by jury in criminal cases. Washington State guidelines allowed judges, rather than juries, to make certain findings of fact that increased an offender's sentence. The Court found 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

[19] The guidelines were also subjected to congressional directives and mandatory minimum penalties for specific offenses set by Congress. See 28 U.S.C. §991, 994 and 995(a)(1).

[20] See 18 U.S.C. §3624(a), (b).

[21] See 18 U.S.C. §3742(e).

[22] See 18 U.S.C. §3742(a), (b).

[23] See *Ring* v. *Arizona*, 536 U.S. 584 (2002)(holding that an aggravating circumstance that makes a defendant eligible for a death sentence is the functional equivalent of an element of an offense for purposes of the Sixth Amendment right to a jury trial and therefore must be found by a jury).

[24] 520 U.S. 466 (2000).

[25] A recidivist is an ex-offender who has either committed a new crime or has violated the terms of his or her probation or parole.

[26] 520 U.S. at 490.

[27] 542 U.S. 296 (2004).

impose without any additional facts.[28] After *Blakely*, federal courts were immediately faced with arguments that the USSG also violated the Sixth Amendment. The courts were divided sharply on this issue.[29]

United States v. *Booker*[30] and Beyond

The Court spoke to the application of *Blakely* to the federal sentencing guidelines in *United States* v. *Booker (Booker)*. In *Booker*, the Supreme Court consolidated two lower court cases and considered them in tandem, *United States v. Fanfan*[31] and *United States v. Booker*.[32] Booker was arrested after officers found in his duffle bag 92.5 grams of crack cocaine. He later gave a written statement to the police in which he admitted selling an additional 566 grams of crack cocaine.[33] A jury in the United States District Court for the Western District of Wisconsin found Booker guilty of two counts of possessing at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. § 841(b)(1)(A)(iii).[34] At sentencing, the judge found by a preponderance of the evidence that Booker had distributed 566 grams in addition to the 92.5 grams that the jury found; the judge also found that Booker had obstructed justice.[35] In the absence of the judge's additional findings, Booker would have only faced a maximum sentence of 262 months under the United States Sentencing Guidelines.[36] The judge, however sentenced Booker to 360 months, based on the Guidelines' treatment of the additional cocaine and the obstruction of justice.[37] The United States Court of Appeals for the Seventh Circuit affirmed the conviction but overturned the sentence.[38]

Narcotic agents arrested Fanfan when they discovered 1.25 kilograms of cocaine and 281.6 grams of cocaine base in his vehicle.[39] A jury in the District of Maine found that he possessed "500 or more grams" of cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. At sentencing, the court determined that Fanfan was the "ring leader of a significant drug conspiracy," which, combined with his criminal history, resulted in a sentence of 188 to 235 months under the Guidelines. However, four days before the June 28, 2004, sentencing hearing,

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[28] Ibid. at 302. In *Oregon v. Ice*, the Court held that the Sixth Amendment does not prohibit judges from imposing consecutive sentences based on facts not found by a jury. The Court declined to establish a broad bright-line rule that guarantees the Sixth Amendment right to a jury trial for all aspects of sentencing. Instead, the Court limited *Apprendi* and its progeny to sentencing for single crimes. 129 S.Ct. 711 (2009).

[29] See, *United States* v. *Fanfan*, 2004 WL 1723114, *2 (D.Me. June 28, 2004)(holding that for purposes of constitutional analysis the federal sentencing guidelines were indistinguishable from those in *Blakely*); Compare, *U.S.* v. *Koch*, 383 F.3d 436 (en banc)(6th Cir. 2004); *United States* v. *Pineiro*, 377 F.3d 464, 468-73 (5th Cir. 2004); *United States* v. *Reese*, 382 F.3d 1308 (11th Cir. 2004); *United States* v. *Ameline*, 376 F. 3d 967, 984-87(9th Cir. 2004 (Gould, J. dissenting), with *United States* v. *Koch*, 383 F.3d at 443-449 (Martin J., dissenting); *United States* v. *Ameline*, 376 F.3d at 972-978.

[30] 543 U.S. 220 (2005).

[31] 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 542 U.S. 956 (2004).

[32] 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 542 U.S. 956 (2004).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 510.

[37] *Id.*

[38] *Id.* at 515.

[39] *United States v. Fanfan*, 2004 WL 1723114 (D. Me. June 28 2004).

the Supreme Court decided *Blakely v. Washington*,[40] holding that as part of a state sentencing guideline system, a Washington state judge could not find an aggravating fact authorizing a higher sentence than the state statutes otherwise permitted. The sentencing judge in *Fanfan* considered the effect that *Blakely* may have on the federal sentencing Guidelines and recalculated the Guidelines based only on the possession of 500 grams and imposed the 78 month maximum for that range.

The Court unanimously agreed that discretionary sentencing guidelines would not implicate a defendant's Sixth Amendment right.[41] Applying its decisions in *Apprendi* and *Blakely*, the Court[42] held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." The Court reasoned that the sentencing guidelines direct a judge in some instances to enhance sentences in a manner which violates this principle. This violation occurs when a judge makes certain factual findings supported by a preponderance of the evidence[43] to enhance a sentence beyond the range otherwise authorized by the jury's verdict or the defendant's admissions.

In rejecting the government's arguments against *Blakely's* applicability to the federal sentencing guidelines (guidelines), the Court found the fact that the guidelines were developed by the United States Sentencing Commission rather than by Congress was constitutionally insignificant.[44] Moreover, the Court found that *Blakely's* application to the guidelines was not precluded or contradicted by recent cases dealing with other issues including perjury[45] and the Double Jeopardy clause.[46] Finally, the Court noted that a separation of powers argument was precluded by its decision in *Mistretta* v. *United States*.[47]

In the first opinion, the Court sought to restore the jury's significance in its finding of the underlying crime.[48] However, in the remedial portion of the decision, the majority gave judges

[40] 542 U.S. 296 (2004).

[41] *Booker* at 231 (stating that "everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the Sentencing Reform Act of 1984 (SRA) the provisions that make the Guidelines binding on district judges ..."); Cf, *Booker* at 795-802 (Thomas, J., dissenting). The majority does not explain how changing the mandatory nature of the guidelines to discretionary cures the constitutional deficiency.

[42] This opinion of the Court, in part, was delivered by Justice Stevens, who was joined by Justices Scalia, Souter, Thomas and Ginsburg.

[43] A preponderance of the evidence is "the greater weight of the evidence; superior evidentiary weight that, through not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." Bryan A. Garner, Editor, "Black's Law Dictionary," Second Edition, (St. Paul, MN: West Group: 2001).

[44] *Booker* at 238. The dissenters in part, Justice Breyer, Chief Justice Rehnquist, and Justices O'Connor and Kennedy found that *Blakely* should not apply to the federal sentencing guidelines as they are not statutes nor represent elements of a crime but rather are sentencing facts.

[45] *United States* v. *Dunnigan*, 507 U.S. 87 (1993) (holding that the provisions of the guidelines that require a sentence enhancement if the judge determines that the defendant committed perjury do not violate the privilege of the accused to testify on her own behalf).

[46] See *Witte* v. *United States*, 515 U.S. 389 (1995) (holding that the Double Jeopardy Clause did not bar a prosecution for conduct that had provided the basis for an enhancement of the defendant's sentence in a prior case.

[47] 488 U.S. 361 (1989) (concluding that even though the Commission performed political rather than adjudicatory functions, Congress did not exceed its constitutional limitations in creating the Commission).

[48] *Booker* at 237 (stating that the "new sentencing practice forced the Court to address the question of how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.").

more discretion in sentencing. With Justice Ginsburg joining the four dissenting judges from the first part (Justices Breyer, O'Connor, Kennedy and Chief Justice Rehnquist), the Court held unconstitutional two provisions of the Sentencing Reform Act (SRA): 18 U.S.C. §3553(b)(1), which makes the guidelines mandatory, and 18 U.S.C. §3742(e), which sets forth standards of review for appeals of departures from the mandatory guidelines.[49]

To reach this conclusion, the majority evaluated the likely effect of the constitutional requirement on the SRA's language, history and basic purpose. In other words, the Court answered the question of what "Congress would have intended" in light of the Court's constitutional holding. The Supreme Court based its decision to delete the mandatory requirement of the guidelines on the supposition that, given the choice, Congress would not have enacted a mandatory system modified to accommodate *Blakely*.[50] This majority considered three options: (1) invalidating the act in its entirety; (2) engrafting the Sixth Amendment "jury trial" requirement; and (3) severance and excision of the offending parts of the SRA. The Breyer majority opined that Congress would have preferred "the total invalidation of the Act to an Act with the Court's Sixth Amendment requirement engrafted onto it."[51] In addition, it concluded that Congress would have preferred the "excision of some of the Act, namely the Act's mandatory language to the invalidation of the entire Act."[52] The Breyer majority noted that severance and excision was closer to Congress' intended system by "maintaining a strong connection between the sentence imposed and the offender's real conduct...."[53] As such, the Court concluded that 18 U.S.C. §3553(b)(1) and 18 U.S.C. §3742(e) should be severed and excised to match Congress' intent of increased uniformity of sentencing. The Court called upon Congress to decide whether its declaration of judicial discretion merits legislative action.[54]

Post-Booker Legal Issues

Retroactivity

In *Booker's* aftermath, questions remain regarding the decision's retroactivity. It appears that the *Booker* Court did not intend that every case on appeal be remanded for resentencing.[55] Rather, appellate courts were directed "to apply ordinary prudential doctrines, determining, for example,

[49] The solution urged by Justice Stevens with but three of his colleagues would be to avoid constitutional infirmities by allowing juries to decide the facts that have guideline consequences. The Court found that the remainder of the SRA is constitutional, can function independently, and is consistent with Congress' basic objectives in enacting the SRA.

[50] *Booker* at 249 (stating that "several considerations convince us that, were the Court's constitutional requirement added onto the SRA as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand.").

[51] Ibid. at 248.

[52] Ibid. The dissenters opined that if the constitutional problem was a violation of the right to trial by jury, the solution should also lay with the jury: to require prosecutors to make more specific indictments and to present to the jury any fact that would increase a sentence beyond the ordinary range. Justice Stevens said that in avoiding this solution and instead changing the nature of the guidelines themselves, it was "clear that the court's creative remedy is an exercise of legislative, rather than judicial, power," one that "violates the tradition of judicial restraint."

[53] Ibid. at 253 (stating that "uniformity does not consist simply of similar sentences for those convicted of violations of the same statute ... It consists, more importantly, of similar relations that Congress' sentencing statutes helped to advance and that Justice Stevens' approach would undermine.").

[54] Ibid. at 263 (stating that "ours, of course, is not the last word: The ball now lies in Congress' court.").

[55] *Booker* at 268 (applying the Court's holding to all cases pending on direct review).

whether the issue was raised below and whether it fails the 'plain-error' test."[56] Although the Supreme Court did not address the issue of its retroactivity on collateral review,[57] the Court's decision in *Schriro* v. *Summerlin*,[58] may provide guidance on the point. Generally, the question of retroactivity turns on whether the Court announced a new rule and whether the new rule is substantive (in which case it may apply retroactively) or procedural (in which case it would not apply retroactively unless it qualified as "watershed").[59] The *Summerlin* Court concluded that its previous decision in *Ring v. Arizona* holding that "any increase in a defendant's authorized punishment contingent on the finding of a fact, including eligibility for the death penalty must be found by a jury beyond a reasonable doubt"[60] cannot be treated as a new substantive rule, a rule that "alters the range of conduct or the class of persons that the law punishes."[61] As such, the *Summerlin* Court held that *Ring* is not retroactive on collateral review. In *McReynolds* v. *United States*,[62] a lower court found that *Booker*, like *Apprendi* and *Ring*, must be treated as a procedural decision for purposes of retroactivity analysis.[63] As such, the court concluded that *Booker* does not apply retroactively to criminal cases that became final before its issuance on January 12, 2005.

Reasonableness

Due to the severance of 18 U.S.C. §3553(b)(1) and 18 U.S.C. §3742(e)[64] district courts are not bound to apply the guidelines. However, they must consult and consider the guidelines when sentencing. In addition, the Court preserved a right to appeal.[65] A sentence that is outside the

[56] Ibid. Some courts are requiring automatic resentencing where a Sixth Amendment claim is preserved, either in explicit *Apprendi/Blakely* terms or by contesting a judicial enhancement on other grounds. See, e.g., *United States* v. *Coffey*, 395 F.3d 856 (8th Cir. 2005); *United States* v. *Davis*, 397 F.3d 340 (6th Cir. 2005)(unpublished); *United States* v. *Reese*, 397 F.3d 1337 (11th Cir. 2005); *United States* v. *Harrower*, 121 Fed. Appx. 500 (4th Cir. 2005). Other courts have suggested that even unpreserved *Booker* violations (i.e., imposing mandatory enhancements on judge-found facts) always amount to plain error warranting a remand for resentencing. *See, e.g.*, *United States* v. *Hughes*, 396 F.3d 374 (4th Cir. 2005)(finding no plain error where "overwhelming" evidence supported obstruction of justice enhancement); *United States v. Milan*, 398 F.3d 445 (6th Cir. 2005).

[57] Collateral review occurs after final judgment. For a discussion of retroactivity in criminal law, see CRS Report RL32613, *Standards For Retroactive Application Based Upon Groundbreaking Supreme Court Decisions in Criminal Law*, by (name redacted)

[58] 542 U.S. 348 (2005) (applying *Apprendi's* principles to a particular subject is not retroactive on collateral review).

[59] Ibid at 351-52. A procedural decision may be applied retroactively if it establishes one of those rare "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Ibid. at 2522.

[60] *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002).

[61] *Summerlin* at 352.

[62] 397 F.3d 479 (7th Cir. 2005)(concluding that *Booker* does not apply retroactively to criminal cases that became final before its release on January 12, 2005).

[63] See also, *Varela v. United States*, 400 F.3d 864 (11th Cir. 2005)(granting certificate of appealability, but concluding that although neither 11th Circuit nor Supreme Court have addressed retroactivity of *Blakely* and *Booker*; also stating that U.S. Supreme Court case, *Schiro v. Summerlin*, "is essentially dispositive" of issue); *Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005) *King v. Jeter*, 2005 WL 195446 (N.D. Tex. January 27, 2005)(stating that *Booker*, like *Blakely*, does not implicate petitioner's conviction for a substantive offense, and that *Booker* is not retroactive when first raised on collateral review); *Tuttamore v. United States*, 2005 WL 234368 (N.D. Ohio February 1, 2005); *United States v. Ceja*, 2005 WL 300415 (N.D. Ill. February 7, 2005).

[64] Severance of this section renders inapplicable §401(d)(1) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), P.L. 108-21, which added a *de novo* standard of review for departures from the sentencing guidelines.

[65] Justice Breyer noted that the body of federal sentencing appellate law decided since the guidelines' adoption remains in effect to guide federal courts.

guidelines-determined range is subject to reversal if it fails to meet a "reasonableness" standard, a term the Court did not define. Some may contend that this lack of definition for "unreasonableness" may signal a return to pre-guideline sentencing disparities. For example, Justice Scalia noted in his dissent from the opinion's second holding, "what I anticipate will happen is that 'unreasonableness' review will produce a discordant symphony of different standards, varying from court to court and judge to judge." Justice Breyer's majority felt that the "reasonableness" standard of review would not be a foreign concept to appellate courts as they have experience in dealing with reviews of departures and reviews of sentences imposed in the absence of applicable guidelines. As such, this majority feels that it is fair to assume that appellate judges will prove capable of handling the task. However, subsequent to the *Booker* decision, circuits have been split as to the use of a presumption of reasonableness for within-guidelines sentences.[66]

In *Rita v. United States*,[67] the Court provided some guidance on how appellate courts should undertake the "reasonableness" review of a lower court's sentencing decision. Mr. Rita was convicted of perjury, making false statements, and obstructing justice. A pre-sentencing report calculated the applicable guideline range of 33-41 months. After hearing sentencing arguments from both sides, the judge imposed a sentence of 33 months. On appeal, the defendant argued that his 33-month sentence was "unreasonable" because (1) it did not adequately take into account "the defendant's history and characteristics," and (2) it "is greater than necessary to comply with the purposes of the sentencing set forth in 18 U.S.C. § 3553(a)(2)." The Fourth Circuit stated that a sentence imposed within properly calculated guidelines range is presumptively reasonable. As such, the court rejected Mr. Rita's arguments and upheld the sentence. The issue before the Supreme Court was whether a presumption of reasonableness should apply to a sentence within the Federal Sentencing Guidelines.

Justice Breyer, writing for the Court,[68] held that an appellate court may view the Guideline range as presumptively reasonable, although the presumption is non-binding.[69] The plurality also concluded that the guidelines are rightly owed a presumption of reasonableness as the guidelines embody the culmination of an academic effort to craft ranges which accurately reflect the severity of the charged conduct, while balancing statutory considerations and seeking uniformity and predictability in sentences.[70] However, according to the Court, this presumption is applicable only

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[66] Compare *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006)(using presumption); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006)(same); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006)(same); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006)(same); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. July 5, 2005) (same); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005)(same); and *United States v. Kristl*, 437 F.3d 1050, 1054-1054 (10th Cir. 2006) (per curiam)(same), with *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (not using presumption); *United States v. Fernandez*, 443 F.3d 19, 27 (2nd Cir. April 3, 2006)(same); *United States v. Cooper*, 437 F.3d 324, 331 (3rd Cir. 2006)(same); and *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005) (per curiam)(same).

[67] 551 U.S. 338 (2007), 127 S.Ct. 2456 (2007).

[68] It should be noted that the Court's opinion consisted of four parts, none of which received a majority vote. Arguably, eight justices concurred in the judgment of the Court with Justice Souter being the lone dissenter.

[69] 127 S.Ct. at 2463 (noting that by the time the appellate court reviews a within-guidelines sentence, both the "sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.").

[70] *Id.* at 2466-67. The plurality also noted that, although appellate courts may presume reasonable a within-guideline sentence, they may not presume a non-guidance sentence to be unreasonable.

on appellate review.[71] As such, a sentencing judge is apparently forbidden from using a similar presumption that the guideline sentence is a correct or reasonable one.[72] Rather, the sentencing judge, after determining the guideline range, may decide that the guideline sentence

> should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, U.S.S.G. §5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps the case warrants a different sentence regardless. See Rule 32(f). Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure.[73]

As such, the Court affirmed the broad sentencing discretion district judges possess under *Booker* and stated that they may impose non-guideline sentences by departing or applying §3553(a). However, the Court also stressed the importance of providing reasons for the sentencing decision.[74] These reasons may be brief when a sentencing judge imposes a guideline sentence. However, the sentencing judge must respond when a "party contests the Guidelines sentence generally under §3553(a) - that is argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in a proper way—or argues for departure[.]"[75]

While the guidelines can be considered reasonable as a starting point for appellate review, the plurality cautions that this should not be interpreted to be obligatory.[76] Justice Stevens, in a concurrence in part signed by Justice Ginsburg, appears to pick up on this point and seeks to draw a distinction between the process described in *Rita* and prior practices that were deemed unconstitutional in *Apprendi* and *Booker*.[77] Justice Souter, the lone dissenter in the case, appears to be concerned that affording the Guideline range a presumption of reasonableness moves the federal sentencing system back in the direction of the prior mandatory scheme that was found unconstitutional in *Booker*, and is incongruous with the Sixth Amendment protections outlined in *Apprendi*.[78]

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[71] *Id.* at 2465.

[72] *Id.* (stating that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

[73] *Id.* In addition, Justice Stevens' concurrence apparently assures district courts that the guidelines are truly advisory. *Id.* at 2473 (Stevens, J. concurring).

[74] *Id.* at 2468.

[75] *Id.*

[76] *Id.* at 2464 (stating that a "non-binding appellate presumption that a Guidelines is reasonable does not require the sentencing judge to impose that sentence.").

[77] *Id.* at 2473 (Stevens, J. concurring)(stating that

> *Booker's* standard of review allows—indeed, requires—district judges to consider all of the factors listed in §3553(a) and to apply them to the individual defendants before them. Appellate courts must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range, under traditional abuse-of-discretion principles. As the Court acknowledges, moreover, presumptively reasonable does not mean always reasonable; the presumption, of course, must be genuinely rebuttable.

[78] *Id.* at 2487 (Stevens, J. dissenting)(stating that

> But if sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right. For a presumption of Guidelines reasonableness would tend to produce

(continued...)

In the aftermath of this decision, it appears that, while it is permissible for appellate courts to apply a non-binding presumption of reasonableness to within-guidelines sentences, questions linger as to what factors the appellate courts may or should consider to overcome the presumption. Moreover, given that the Court apparently approved only one method of reviewing sentences, questions remain as to other methods the Court might approve and whether the acceptable methods of appellate review apply in other instances where sentences are not within guideline range.

In *Gall v. United States*[79] and *Kimbrough v. United States*,[80] the Court provided additional clarification to both sentencing and appellate courts as to crafting and reviewing sentences in a post-*Booker* regime. In *Gall*, the Court ruled that judges may deviate from the guidelines without having to demonstrate that "extraordinary circumstances" required sentencing outside the guidelines.[81] Gall, while in college, joined a criminal enterprise to sell "ecstasy".[82] Gall withdrew from the enterprise and obtained steady employment and ultimately became a successful entrepreneur.[83] Approximately three years after withdrawing from the enterprise, Gall pleaded guilty to conspiracy to distribute ecstasy.[84] The guideline range from this crime was imprisonment between 30 to 37 months.[85] However, the sentencing judge gave him 36 months on probation, largely based on Gall's most recent behavior.[86] The Eighth Circuit reversed the decision on the ground that a sentence outside the guidelines must be supported by "extraordinary circumstances."[87]

In a 7-2 decision, the Court disagreed and held that the acceptable method of appellate review for all sentences, whether inside, just outside, or significantly outside the guidelines range, was a deferential abuse-of-discretion standard. Justice Stevens writing for the majority rejected a presumption of unreasonableness for sentences outside the guidelines range. As such, the appellate court must first ensure that the sentencing court followed proper procedure to include correctly calculating the guidelines range and considering the §3553(a) factors with appropriate explanation.[88] The appellate court may consider the extent of any deviation from the guidelines range. However, the appellate court "must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance."[89] The fact that an appellate

(...continued)

> Guidelines sentences almost as regularly as mandatory Guidelines had done, with judges finding the facts needed for a sentence in an upper subrange. This would open the door to undermining *Apprend*i itself, and this is what has happened today.

[79] 128 S.Ct. 586 (2007).

[80] 128 S.Ct. 558 (2007).

[81] *Id.* at 596-599.

[82] *Id.* at 591-592.

[83] *Id.* at 592.

[84] *Id.*

[85] *Id.* at 592-593.

[86] *Id.* at 593.

[87] *Id.* at 594.

[88] *Id.* at 597.

[89] *Id.*

court would have concluded a different sentence was more appropriate, "is insufficient to justify reversal of the district court."[90]

Similarly, In *Kimbrough v. United States*,[91] another 7-2 decision, the Court held that a sentence outside the guidelines range is not per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powered cocaine offenses.[92] In reaching its decision, the Court found that the cocaine guidelines, like all other guidelines, are only advisory.[93] As such, the cocaine guidelines are just one of the factors warranting consideration under §3553(a) when determining an appropriate sentence.[94] Under relevant statutes, Kimbrough pleaded guilty to a myriad of offenses including conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than 50 grams of crack; possession with intent to distribute powder; and possession of a firearm in furtherance of a drug-trafficking offense.[95] Kimbrough's plea subjected him to a minimum prison term of 15 years and a maximum of life. The applicable guidelines range was 19 to 22.5 years. The district court judge found that a sentence within this range would have been greater than necessary to achieve the sentencing purposes of §3553(a).[96] In making its determination, the district court took into account Kimbrough's "history and characteristics" and also took exception with the relative treatment of crack and powdered cocaine.[97]

As in *Gall*, the Court noted that the district court followed appropriate procedure by properly calculating and considering the guidelines range. In addition, the district court addressed the relevant §3553 factors in crafting its sentence. The Court noted that the district court "homed in on the particular circumstances of Kimbrough's case and accorded weight to the U.S. Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with §3553(a)."[98] As such, the Court found that a reviewing court "could not rationally conclude that the ...reduction Kimbrough received qualified as an abuse of discretion."[99]

Taken together, these cases arguably provide federal district court judges some discretion in crafting reasonable sentences, regardless of whether the sentence falls within or outside the guidelines range.[100] It would appear that judges have more flexibility in determining sentences in drug cases as judges can disagree with the crack versus cocaine disparity.[101] For example, in *Spears v. United States*,[102] the Court clarified its *Kimbrough* ruling by holding that district court

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[90] *Id.*

[91] 128 S.Ct. 558 (2007).

[92] *Id.*

[93] *Id.* at 569-570.

[94] *Id.*

[95] *Id.* at 563.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 575.

[99] *Id.* This decision does not change the statutory 100:1 ratio under federal law.

[100] *See, Nelson v. United States*, 129 S.Ct. 890 (2009)(holding that the sentencing guidelines are not to be presumed reasonable).

[101] For a discussion on the sentencing levels for crack and powder cocaine, refer to CRS Report RL33318, *Sentencing Levels for Crack and Powder Cocaine: Kimbrough v. United States and the Impact of United States v. Booker*, by (name redacted) and (name redacted). It is unclear as to whether a court would recognize such judicial discretion in other areas of the law.

[102] 129 S.Ct. 840 (2009).

judges "are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." It is unclear as to whether a court would recognize such judicial discretion in other areas of the law. In addition, it should be noted that this flexibility does not eliminate the mandatory minimums established by statute under federal law.

Sentencing Guidelines

Sentencing guidelines can be presumptive, statutory, advisory or voluntary. The most notable of these are the presumptive sentencing guidelines, which had been in place at the federal level at the time of the Supreme Court's ruling in *Booker*.

Presumptive Sentencing Guidelines

Prior to the Court's ruling in *Booker*, the federal sentencing guidelines were characterized as being presumptive, rather than statutory, advisory or voluntary. Presumptive sentencing guidelines are contained in or based on legislation, which are adopted by a legislatively created body, usually a sentencing commission. Presumptive sentencing guidelines set a range of penalties for an offense that is based on the seriousness of the offense and the defendant's criminal history.[103] "The guidelines are presumptive in the sense that they set sentencing standards for individual cases that were presumed to be appropriate and that judges were expected to follow" unless they documented the reasons for departing.[104] At the federal level, after the guidelines have been adopted by the sentencing commission they are submitted to Congress and they become effective, barring other congressional action. While judges were required to adhere to the guidelines, they could depart from them. Departures under presumptive sentencing guidelines, however, are subject to appellate review.

Statutory Sentencing Guidelines

Statutory sentencing guidelines are created by a legislative body. Statutory sentencing guidelines are sometimes confused with presumptive sentencing guidelines. While both types of guidelines are ultimately authorized by a legislative body, statutory sentencing guidelines are *directly* authorized by a legislative body, while presumptive sentencing guidelines are established by a sentencing commission that is usually legislatively created.

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[103] At the federal level, an applicable sentencing guideline has been designated for each of the more frequently prosecuted federal crimes. The guideline begins by assigning a base offense level (there are 43 offense levels). For example, the guideline for a theft offense, U.S.S.G. §2B1.1, has a base offense level of 6. Offense level adjustments are available to accommodate aggravating and mitigating circumstances associated with a particular case. The theft guideline has offense level increases for the amount of money involved, the amount of planning that went into the offense, and the nature of the property taken, among other things. The final offense level dictates a band of six sentence ranges, based on the offender's criminal history. The sentencing range for theft at the base offense level of 6 for a first time offender is 0-6 months; that is, absent a departure, a sentencing court may impose a sentence of imprisonment at any term up to six months or simply impose a fine. The sentencing range for an offense level of 6 in the case of a repeat offender with more than four prior felony convictions is 12-18 months; that is, absent a departure, a sentencing court must impose a sentence between a year and a year-and-a-half.

[104] Michael Torny and Kathleen Hatlestad, eds., *Sentencing Reform in Overcrowded Times* (New York: Oxford University Press, 1997), pp. 7-8.

Advisory or Voluntary Sentencing Guidelines

Under an advisory or voluntary sentencing guideline scheme, judges are not required to follow the sentences set forth in the guidelines but can use them as a reference. As previously discussed, the *Booker* ruling made the federal sentencing guidelines advisory.

States' Sentencing Guidelines

According to the National Center for State Courts, as of 2004, 23 states and the District of Columbia had implemented presumptive, statutory, or voluntary/advisory sentencing guidelines.[105] Some states, however, may only have presumptive sentencing guidelines that are applicable to specific offenses (e.g., certain felonies). Unlike the federal system pre-*Booker*, states that have adopted presumptive sentencing guidelines generally do not have enhancement factors built into the guidelines' structure.

Departures from the Guidelines

Departures from the sentencing guidelines in the federal system can take three forms: *substantial assistance departures, other downward departures* and *upward departures*. Substantial assistance departures are a form of downward departures and occur when a defendant provides *substantial* assistance to the prosecution. Of the three types of departures, upward departures are used least often and substantial assistance departures are used most often. While departures are available for judges, the guidelines explicitly prescribe when a judge can depart from the guidelines. As the Supreme Court asserted in the *Booker* ruling, "... 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."[106]

Prior to the *Booker* decision, Congress weighed in on the issue of downward departures in the 108th Congress when an amendment to the PROTECT Act was passed that restricted the grounds upon which a federal judge could apply a downward departures.[107] Among other things, the amendment struck language in 18 U.S.C. §3742(e) that required appellate courts to "give due deference to the district court's application of the guidelines to the facts" with respect to departures and in cases wherein the district court failed to provide a written statement of reasons for the sentence.[108]

[105] The 23 states include AK, AR, DE, IN, KA, LA, MD, MI, MN, MO, NC, NJ, OH, OR, PA, RI, SC, TN, UT, VA, VT, WA and WI. See National Center for State Courts, *Blakely* v. *Washington: Implications for State Courts*, July 16, 2004, Appendix E.

[106] *Booker* at 234.

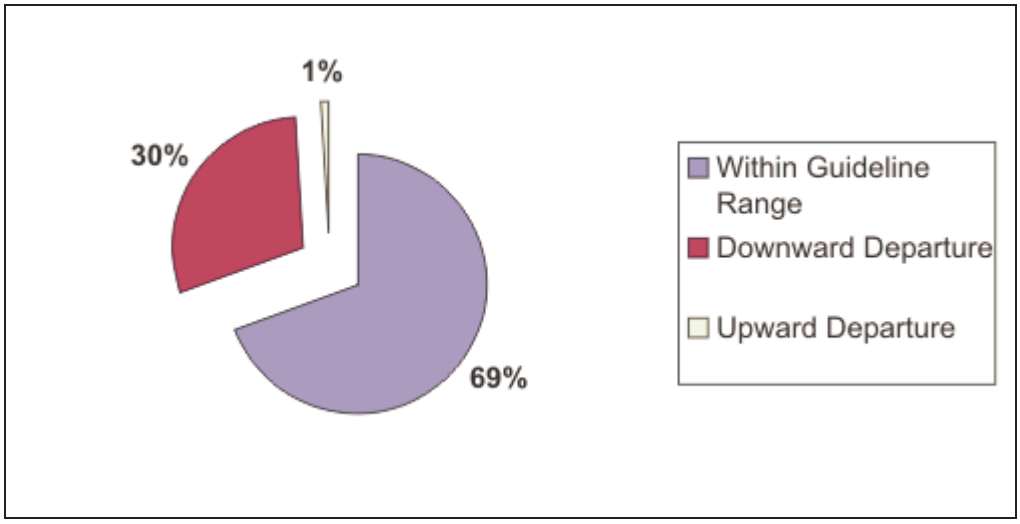
[107] Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003 (P.L. 108-21).

[108] For additional information, see CRS Report RL31917, *The PROTECT (Amber Alert) Act and the Sentencing Guidelines*, by (name redacted).

The majority of federal sentences are handed down under the guidelines, with approximately 1% of federal sentences falling outside the guideline's jurisdiction.[109] The following figures (**Figures 1** and **2**) depict aggregate departure data pre-and post-*Booker* (2002 and 2007).

As **Figure 1** shows, the majority of pre-Booker departures were downward departures. The majority of the downward departures occurred due to the defendant providing substantial assistance to the prosecution or the judge finding mitigating factors, which in both cases would necessitate a downward departure. In 2003, federal judges departed from the sentencing guidelines 29.7% of the time, of which less than 1% of the departures were upward departures. These figures have remained relatively constant for the years preceding 2003.[110] Since the *Booker* decision, however, the percentage of sentences that fell within the guideline range has dropped, while the percentages for both upward and downward departures have increased, as discussed below.

Figure 1. Federal Sentences Under the Guidelines, 2003 (Pre-Booker)



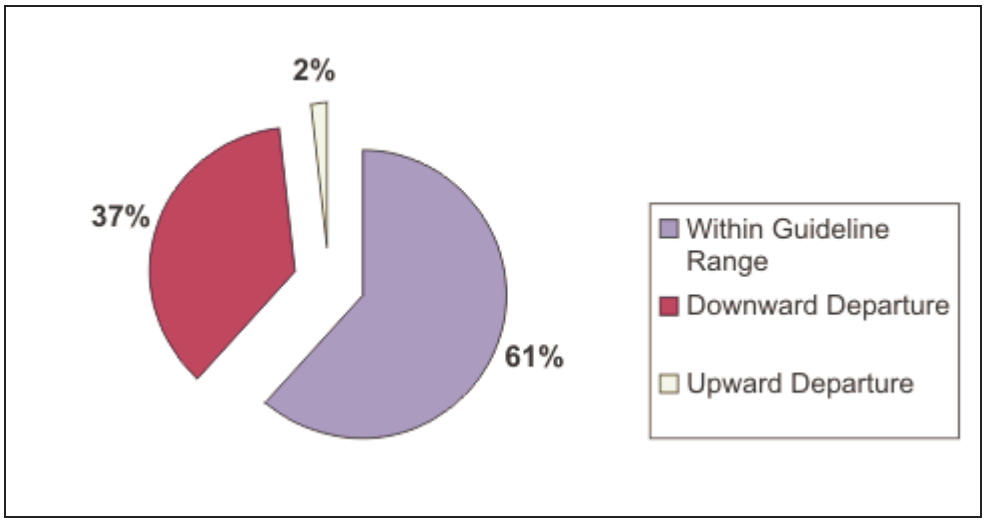
Source: CRS presentation of federal sentencing data.

Figure 2 depicts a similar picture as in **Figure 1** with respect to the majority of sentences falling within the guideline range. However, there were some variances. In 2007, there was an 8% drop in federal judges sentencing within the guideline range, when compared to 2003. As a result, both downward and upward departures increased by almost 8% and a half percent, respectively. In order to fully understand the changes in federal judicial sentencing practices post-*Booker*, one would need to take a more nuance examination of the data at the district and circuit court level.

[109] For example, defendants who are found guilty of an Act of Congress applicable exclusively in the District of Columbia and defendants convicted of petty crimes are not sentenced under the guidelines.

[110] See United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, (1999, 2000, 2001 and 2002), Table 26.

Figure 2. Federal Sentences Under the Guidelines, 2007 (Post-Booker)



Source: CRS presentation of federal sentencing data.

In both years examined, the data revealed that the vast majority of departures were downward departures. While proponents view downward departures as necessary in a structured system because their use allows judges to individualize sentences, critics argue that the frequent use of downward departures is a mechanism for judges to circumvent the limits imposed on them through the sentencing guidelines. Moreover, such critics argue that departures should be eliminated because they produce unwarranted disparity. Unlike the structure that exists with the prescribed sentencing ranges in the guidelines, departures provide an opportunity for judges to sentence outside that range. Critics contend that permitting a judge to sentence outside the specified range could be problematic because judges could potentially increase or decrease a defendant's sentence substantially, depending on the circumstances. Departures, however, are not always viewed as a negative tool. Some view departures as a mechanism for judges to tailor a sentence that reflects the totality of circumstances regarding an offender and the offense.

Possible Policy Consideration

In light of the Court's ruling in *Booker* and its subsequent rulings in *Gall* and *Kimrough*, the issue for Congress is whether to amend current law to require federal judges to follow guided sentences, or continue to permit federal judges to use their discretion in sentencing, under certain circumstances. Following is a discussion and analysis of several selected options Congress could consider.

Maintain the Sentencing Guidelines

One option Congress may wish to consider could be to maintain the sentencing guidelines by specifying mandatory minimum sentences and increasing the top of each guideline range to a statutory maximum for specified offenses (hence, codify specified sentencing ranges that are in the guidelines). In essence, this option would require any upward departures to coincide with the statutory maximum for the offense in question, in which case a statutory maximum would have to be specified. This option was first presented to the U.S. Sentencing Commission shortly after the

U.S. Supreme Court decision in *Blakely* by Frank Bowman, who concluded with respect to such an option:

> The practical effect of such an amendment would be to preserve current federal practice almost unchanged. Guidelines factors would not be elements. They could still constitutionally be determined by post-conviction judicial findings of fact.... The only theoretical difference would be that judges could sentence defendants above the top of the current guideline ranges without the formality of an upward departure....[111]

Provide Jury Trials

Congress could consider a measure that has been implemented in Kansas. Kansas had presumptive sentencing guidelines that were invalidated by the state's supreme court.[112] In response to the court ruling, the state's legislature chose to retain the sentencing structure by incorporating jury fact-finding as the basis for enhanced sentences.[113] Under this scheme, for each enhancement that would increase the sentence beyond the guideline maximum for which the defendant did not waive his or her rights, the judge has the option of trying aggravating factors before the jury, either during the main trial or in a separate, bifurcated proceeding. The jury would have to find that the enhanced factors exist beyond a reasonable doubt in order for the enhanced sentence to be applicable. While this option may satisfy constitutional questions, it may prove to be an expensive and time-consuming.

Permit Judicial Discretion in Sentencing

Congress may also allow federal judges to exercise their discretion in sentencing in cases where Congress has not specified a mandatory term of sentence. This option could possibly mirror the indeterminate sentencing scheme that was in place prior to the sentencing reform effort in 1984. While such an option would allow judges to individualize sentences to the extent that Congress has not established a mandatory sentence for the offense, it could also result in a lack of uniformity due to judges applying different sentences across jurisdictions.

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[111] Frank Bowman, "A Proposal for Bringing the Federal Sentencing Guidelines Into Conformity with *Blakely* v. *Washington*," *Federal Sentencing Reported*, vol. 16, no. 364 (June 2004), p. 7.

[112] *State* v. *Gould*, 23 P.3d 801 (Kan. 2001).

[113] Kansas statute annotated §21-4718(b).