Presumptions of Reasonableness for Guideline Sentences after *Booker*

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Since the Supreme Court decided *United States v. Booker* over one year ago,[1] federal district courts have imposed thousands of sentences, relying on the Guidelines in an advisory capacity. They have also relied on a number of other sentencing factors—such as the nature of the offense, the history and characteristics of the defendant, and the need to reflect the seriousness of the offense—which are found in 18 U.S.C. § 3553(a).

Under *Booker*, appellate courts review sentences for unreasonableness, and they have begun to set the boundaries of what is a reasonable sentence. The appellate courts, however, have not uniformly embraced the criteria by which they review sentences for reasonableness. For example, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have adopted the view that sentences imposed within a properly calculated Guideline range enjoy a rebuttable presumption of reasonableness.[2]

By contrast, the First, Second, and Third Circuits have rejected the presumption rule.[3] Other circuits either have rejected a presumption of reasonableness, but have failed to do so in a published opinion,[4] or have struggled with the issue.[5]

The emergence of this split among the circuits is significant, because a presumption of reasonableness for Guideline sentences raises some serious constitutional and policy concerns. Its proponents suggest that a presumption of reasonableness affords Guideline sentences the deference necessary to reduce sentencing disparities in accord with the *Booker* decision, while permitting variances where appropriate. Its detractors claim that the presumption of reasonableness undermines the advisory nature of the Guidelines and overwhelms the consideration of section 3553(a) factors in the selection of a sentence.[6]

It is an intractable conflict which merits the attention of the Supreme Court and presents a valuable opportunity for the Court to further clarify the role of the Guidelines after *Booker*. This article seeks to persuade the reader that a presumption of reasonableness for Guideline sentences undermines the *Booker* decision.

I. Presumptions of Reasonableness for Sentences within the Guideline Range Undermine the *Booker* Decision

The presumption that Guideline sentences are reasonable should be rejected because its application has had the unintended effect of undermining the holdings of both majority opinions in *Booker*. Justice Stevens's opinion in *Booker* explained that a mandatory Guidelines regime violated the Constitution's Sixth Amendment. A presumption of reasonableness simply replaces a *de jure* mandatory system with a *de facto* mandatory system, because it gives too much weight to Guideline sentences, and that preference discourages variances from the Guidelines.

Justice Breyer's opinion in *Booker* called on sentencing courts to consider the advisory Guidelines and the appropriate section 3553(a) factors when imposing a sentence. In order to comply with that mandate, variance sentences cannot be presumptively unreasonable. A preference for Guideline sentences significantly limits the possibility of variance sentences based on section 3553(a) factors and is thus inconsistent with the "remedial" holding in *Booker*.

To demonstrate these two points, I hope to show that the appellate courts' reasonableness review has shown a near stifling preference for Guideline sentences (and for above-Guideline sentences over below-Guideline sentences). And the problem is worsened by a presumption in favor of the Guidelines.

If applied properly, a presumption in favor of Guideline sentences ought to be benign. A presumption in favor of Guideline sentences ought not to influence an appellate court's consideration of a variance sentence. The inference that a non-Guideline sentence is unreasonable, because a Guideline sentence is reasonable, is unsound but seductive. As the Sixth Circuit stated, the presumption of reasonableness "does not mean that a sentence outside of the Guidelines—either higher or lower—is presumptively *un*reasonable."[7] The Second Circuit echoed that view, going one step further in stating that a sentence within the Guideline range is not presumptively reasonable.[8] But the danger is that courts will not heed those words of caution, and all variance sentences will be seen as presumptively unreasonable. Unfortunately, there is statistical and anecdotal evidence suggesting that courts have begun to do just that.

Data collected by the Sentencing Commission show that reasonableness review, aided by the presumption rule in some circuits, is becoming a one-way street that

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favors Guideline sentences. The Commission's data show that the courts of appeals have reversed below-Guidelines sentences and upheld above-Guideline sentences in twenty-nine cases. They have upheld below-Guidelines sentences and rejected above-Guideline sentences in only eight cases.[9] And cases that were decided subsequent to the Commission's report have extended this trend.[10] These statistics appear to reflect a mandatory rather than an advisory Guideline system.

Admittedly, the statistics reported by the Commission represent a little more than one year of post-*Booker* data and may not provide an adequate basis from which to draw firm conclusions. The case law, however, shows that the presumption in favor of Guideline sentences has been cited as a decisional factor in several cases where the sentence imposed was a downward variance.[11] The fact that the presumption for Guideline sentences was even cited in these cases suggests that the presumption's influence has begun to creep into judges' consideration of all sentences, not just Guideline sentences. In other words, the very inference that should not be drawn from the presumption—that non-Guideline sentences are presumptively unreasonable—may be taking hold. This may account, in part, for the skewed reversal rate of below-Guideline variances.

The Commission's data further reveal that sentencing courts have granted far more downward than upward variances. This was to be expected and demonstrates that the sentencing courts have been faithfully considering all of the section 3553(a) factors, which tend to favor mitigating circumstances due to restrictions on mitigating factors found in the Guidelines. For example, the Guidelines do not normally permit a court to consider several mitigating factors such as a defendant's age, family responsibilities, and mental condition, just to name a few. The inevitable result of an advisory Guideline system is that judges are free to consider factors prohibited by the Guidelines. Appellate courts should embrace variance sentences as entirely consistent with the *Booker* decision. By favoring Guideline sentences at the outset, however, appellate courts are discouraging district courts from straying from the Guideline range.

Indeed, even the Commission anticipated that section 3553(a) would play a significant role in sentencing post-*Booker*. In its comprehensive report on *Booker*, the Commission reported that at a number of informational *Booker* clinics held for the federal judiciary, it encouraged judges to engage in a three-step sentencing process. First, judges were asked to consult the Guidelines and determine the proper Guideline range. Second, judges should determine whether a Guideline-based departure is warranted. And third, the Commission advised that "the court should evaluate whether a variance, i.e., a sentence outside the advisory guideline range, is warranted under the authority of 18 U.S.C. § 3553(a)."[12] A presumption of reasonableness for Guideline sentences encourages sentencing judges to stop after the second step, even though the Supreme Court and the Sentencing Commission have urged otherwise.

All of the courts that have adopted the presumption of reasonableness have cited as a justification for the rule the desire to reduce sentencing disparities. What these courts have ignored is that a presumption of reasonableness creates its own kind of disparity. A variance sentence is more likely to be reversed in a circuit that has adopted the presumption than in a circuit that has not adopted the presumption. Reducing sentencing disparities is important, but so is considering the "the nature and circumstances of the offense and the history and characteristics of the defendant"—both factors, among many others, are found in section 3553(a).

Finally, the presumption rule is unnecessary. The appellant already bears the burden of proving that a sentence is unreasonable.[13] The presumption undermines the heart of the *Booker* decision and should be abandoned, especially since there is a viable alternative.

II. An Alternative to a Presumption of Reasonableness for Guideline Sentences

A presumption of reasonableness should be replaced by an approach that reflects a more equitable balance between the Guidelines and section 3553(a). Although the Guidelines should be a sentencing court's starting point, they ought not to overwhelm other sentencing considerations. Achieving a better balance between the Guidelines and section 3553(a) will help fulfill *Booker*'s mandate.

The Supreme Court should embrace a view of reasonableness review that permits a sentence's reasonableness to be judged on a continuum—the greater the variance from the Guideline range (in either direction), the more compelling the reasons stated for the variance must be. The district court would have to adequately explain those factors, in order to facilitate appellate review, and the reasons stated would have to be rooted in sentencing factors found in section 3553(a). Appellate courts should consider the record and the sentencing court's reasoning as a whole and not transfix on the Guideline range.

The virtue of this approach is that it preserves the inherent flexibility of reasonableness review while ensuring that the Guidelines remain a national benchmark for sentencing. It strikes the proper balance between two laudable goals: reducing sentencing disparities by relying on the Guidelines and permitting sentencing judges to impose a sentence that best fits the crime and the offender.

Three appellate courts have already embraced a continuum-based standard of review.[14] Unfortunately, they have also unnecessarily augmented that approach with a presumption of reasonableness for Guideline sentences.

III. Conclusion

Many applauded *Booker* because the decision permits judges to more fully consider the offense and the offender when imposing a sentence. Adopting a presumption of

reasonableness for Guideline sentences stymies *Booker*'s promise by unduly favoring the Guidelines over other sentencing factors. That preference is incompatible with *Booker*'s core holding—that mandatory Guidelines are unconstitutional and that judges must be free to consider non-Guideline factors when imposing a sentence. In many cases, the Guidelines will produce reasonable and just sentences, but *Booker* anticipates and permits judges to go outside the Guideline range when it is appropriate to do so. To preserve this return to limited discretion in sentencing, a presumption that unnecessarily favors the Guidelines should be replaced with a more flexible understanding of reasonableness review.

Notes

* The views and opinions expressed herein do not necessarily represent those of either Kirkland & Ellis LLP or its clients.

1 543 U.S. 220 (2005).

2 *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Tobacco*, 428 F.3d 1148 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006).

3 *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006).

4 *United States v. Lisbon*, 2006 WL 306343 (11th Cir. Feb. 10, 2006) (unpub.).

5 *United States v. Zavala*, 443 F.3d 1165, 1168-72 (9th Cir. 2006) (per curiam) (suggesting in dicta that the presumption should not be adopted); *see also United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. 2006) (the first version of the opinion adopted the presumption rule but the corrected version of the opinion deleted the reference).

6 *United States v. Myers*, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005).

7 *United States v. Foreman*, 436 F.3d 638, 644 (6th Cir. 2006).

8 *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005).

9 U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing*, at 30 (Mar. 2006) (hereinafter cited as the U.S.S.C. *Booker* Report). A handful of these cases were vacated and remanded on grounds other than the sentence's reasonableness. It is unlikely that those sentences would have been considered reasonable if the court had examined that question.

10 In three cases, appellate courts held downward variances unreasonable. *See United States v. Smith*, 445 F.3d 1 (1st Cir. 2006); *United States v. Hampton*, 441 F.3d 284 (4th Cir. 2006); *United States v. Goody*, 442 F.3d 1132 (8th Cir. 2006). In two cases, the court upheld an upward variance as reasonable. *See United States v. Scherrer*, 444 F.3d 91 (1st Cir. 2006); *United States v. Eldick*, 443 F.3d 783 (11th Cir. 2006) (per curiam).

11 *See, e.g., Hampton*, 441 F.3d 284; *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006); *United States v. Gatewood*, 438 F.3d 894 (8th Cir. 2006); *United States v. McMannus*, 436 F.3d 871 (8th Cir. 2006); *United States v. Shafer*, 438 F.3d 1225 (8th Cir. 2006).

12 U.S.S.C. *Booker* Report, *supra* note 9, at 42.

13 *See United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006).

14 *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006).