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The Booker Mess

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THE *BOOKER* MESS

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> The [Pirate] Code is more of what you would call guidelines than actual rules.
>
> – Barbossa, *Pirates of the Caribbean*[1]

Each year, over 65,000 criminal defendants are sentenced in the federal courts; about 1,200 are sentenced each week.[2] Since 1984, Congress has required sentences to be determined according to a strict and detailed set of Sentencing Guidelines. On January 12, 2005, in *United States v. Booker*,[3] the Supreme Court declared this sentencing system unconstitutional. The Justices left many questions unanswered regarding how the lower courts should treat defendants sentenced under the prior regime and how to sentence defendants in the future. These issues occupied much of the attention of federal courts during 2005. The Tenth Circuit alone rendered two en banc decisions and some 226 panel decisions (as of this writing), addressing how to deal with defendants who were sentenced before *Booker* was decided. Nationwide, this retrospective question produced a four-way circuit split and literally thousands of panel decisions. And it will require many more decisions to figure out how to apply *Booker* moving forward.

I. THE *BOOKER* DECISION

The *Booker* decision is described in detail in an article elsewhere in this issue,[4] and I will not go over the same ground. The Supreme Court delivered two different opinions in the case, both by five to four majorities, with the dissenters to each opinion joining the majority in the other. In one opinion, written by Justice John Paul Stevens, the Court held that the Sentencing Guidelines violate a criminal defendant's Sixth Amendment right to trial by jury insofar as they permit imposition of a sentence on the basis of facts found by a judge, if the sentence exceeds the maxi-

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† Judge, U.S. Court of Appeals for the Tenth Circuit; B.A., Michigan State University, 1976; J.D., University of Chicago Law School, 1979. Thanks to Michelle Spak for assistance with the empirical research and chart preparation.

1. Pirates of the Caribbean: The Curse of the Black Pearl (Walt Disney Pictures 2003).

2. *See, e.g.*, UNITED STATES SENTENCING COMMISSION, SELECTED 2004 SOURCEBOOK TABLES 14, 27 (2004), http://www.ussc.gov/ANNRPT/2004/selected_2004.pdf (65,043 defendants were sentenced in fiscal year 2004).

3. 543 U.S. 220 (2005).

4. Peter A. Jenkins, *Requiring the Unknown or Preserving Reason: United States v. Gonzalez-Huerta and the Tenth Circuit's Compromise Approach to Booker Error*, 83 DENV. U. L. REV. 815 (2006). *See also*, Amanda Farnsworth, Comment, United States v. Booker: *How Should Congress Play the Ball?*, 83 DENV. U. L. REV. 579 (2005).

mum that would be justified on the basis solely of facts found by the jury or admitted by the defendant (with the exception of the fact of a prior conviction).[5] In the other opinion, written by Justice Stephen Breyer, the Court remedied this constitutional violation by rendering the Guidelines "effectively advisory."[6] According to this opinion, it is permissible to enhance a sentence on the basis of judge-found facts so long as the district judge has discretion to impose a sentence either higher or lower than the Guidelines range, on the basis of broad statutory factors.[7] Under this new system, sentences continue to be subject to appellate review, but variances from the Guidelines will be reversed only if the resulting sentence is "unreasonable."[8]

There are two ways to read these opinions. According to one view, which I call "*Booker* maximalism," district courts are liberated to sentence criminal defendants in accordance with the judge's sense of individualized justice, with the Guidelines merely taken into "consideration" for what they are worth. In such a system, the Guidelines are like the Pirate Code in the movie *Pirates of the Caribbean*: more what you would call guidelines than actual rules. According to the other view, which I call "*Booker* minimalism," not much has changed in practical effect.

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5. *Booker*, 125 S. Ct. at 755-56 (Stevens, J.).

6. *Id.* at 757 (Breyer, J.).

7. The Guidelines provide seven factors to be considered in imposing a sentence:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentences and the sentencing range established for -

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

(i) issued by the Sentencing Commission . . . subject to any amendments made to such guidelines by act of Congress . . .; and

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

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission .. . taking into account any amendments made to such guidelines or policy statements by an act of Congress . . .;

(5) any pertinent policy statement -

(A) issued by the Sentencing Commission . . . subject to any amendments made to such policy statement by an act of Congress . . .; and

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

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

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

18 U.S.C. § 3553(a) (2000).

8. *Booker*, 125 S. Ct. at 756-66 (Breyer, J.).

District courts continue to be required to calculate the Guidelines sentence, which is presumed to be reasonable, and must justify any variance from the Guidelines sentence on the basis of the particulars of the case; appellate courts will ensure that they do not get too far out of line. The former version sees *Booker* as a sea change in sentencing; the latter as a modest adjustment. In this Foreword, I will address three questions, one empirical, one doctrinal, and one normative:

(1) What has been the effect of *Booker* on sentencing? In this, I will focus particularly on the Tenth Circuit.

(2) Are the *Booker* decisions coherent as a matter of constitutional doctrine?

(3) Has *Booker* improved the sentencing process as a practical matter?

II. EFFECT

To determine the effect of *Booker* on sentencing (so far), I will examine two different types of statistics. First, I will look at the results of so-called "pipeline cases," to see how many resulted in a significant change of sentence as a result of applying *Booker*. Pipeline cases are cases in which the defendant was sentenced prior to *Booker* but the case was not yet final, usually because it was on appeal. Because the Supreme Court held that the *Booker* decision must be applied to all cases on direct review,[9] the pipeline cases had to be reconsidered, because in all of them the district court treated the Guidelines as mandatory. Second, I will look at cases where the defendant was sentenced after the *Booker* decision to see whether and how the district courts are employing their new-found sentencing discretion.

The Courts of Appeals split four ways on how to deal with pipeline cases.[10] Some circuits vacated all sentences and remanded to the district courts for resentencing. This imposed a high cost on the district courts, U.S. Attorneys, public defenders, marshals, and prison authorities, because under the Rules of Criminal Procedure, resentencing entails an actual sentencing hearing (not just briefs), with counsel for both sides and the defendant in attendance.[11] Escorting an incarcerated defendant from prison to a court, which may be hundreds of miles away, presents serious security issues and costs. Other circuits partially remanded the cases to district court to determine whether resentencing would be necessary. This was a practical solution, but difficult to justify in legal terms. Other circuits, including the Tenth, examined each case individually to

9. *Id.* at 769 (Breyer, J.).

10. Those interested in more detail or citations regarding the split should consult Jenkins, *supra* note 4; *see also* Farnsworth, *supra* note 4.

11. *See* FED. R. CRIM. P. 32(i).

determine whether a remand was needed, based on whether there was anything in the record that indicated that the district judge believed the sentence was excessive (or inadequate) or that the facts would warrant a variance from the Guidelines sentence. These circuits further divided according to the legal standards to apply to this inquiry.

The Tenth Circuit, as of this writing, has decided 226 pipeline cases.[12] That may not sound like a lot of cases, but ours is a small circuit. Those 226 cases contributed to about an 11% increase in the number of criminal appeals, as compared to the preceding year. Nationwide, that would translate into a considerable increase in the burden on already overworked defense counsel, prosecutors, judges, and court staff. What was the result? As illustrated in Figure 1, the Tenth Circuit reversed the sentence in 32% of the pipeline cases and affirmed in 68%.

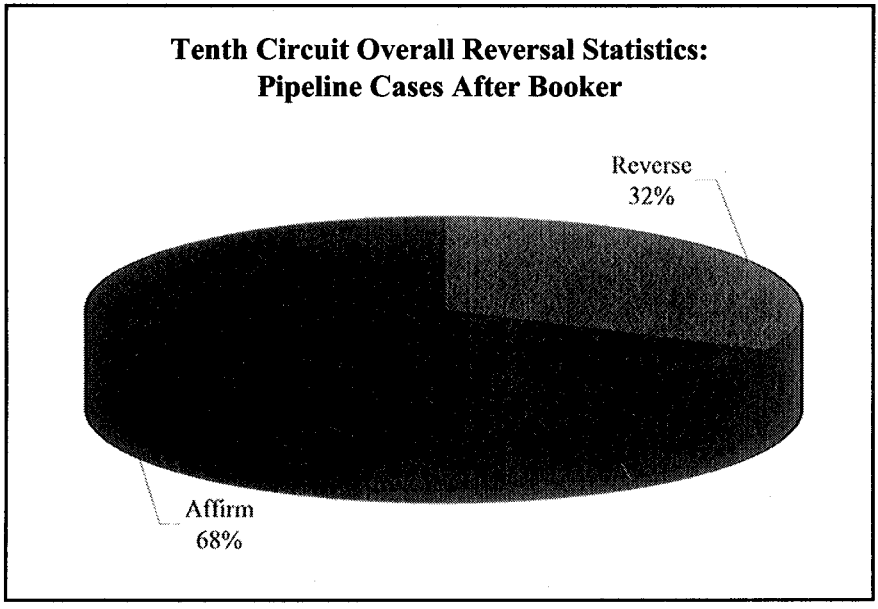

Figure 1

These aggregate numbers, however, obscure some important differences among the pipeline cases. In some of these cases, the defendant had lodged an objection to the constitutionality of sentencing under the Guidelines; these cases were reviewed to determine whether the error in sentencing method was harmless beyond a reasonable doubt.[13] Generally speaking, these were affirmed only if the district judge had made some affirmative indication that he would sentence at the same or a higher level if the Guidelines were not mandatory,[14] or the judge sentenced

12. This and all other Tenth Circuit statistics in this section are based on my own count of the cases.

13. United States v. Labastida-Segura, 396 F.3d 1140, 1142-43 (10th Cir. 2005).

14. *See, e.g.*, United States v. Serrano-Dominguez, 406 F.3d 1221, 1223-24 (10th Cir. 2005).

above the minimum specified by the Guidelines range, which indicated that the judge would not use his *Booker* discretion to go lower.[15] In other cases, the defendant did not make a relevant objection; these cases were reviewed for plain error.[16] Generally, these were reversed where the evidence in support of sentence enhancements was contested and problematical,[17] there were significant mitigating circumstances,[18] or (the most common situation) the district judge had expressed misgivings about the justice of the sentence.[19] The differences in these standards proved to be significant. Some 58% of the harmless error cases were reversed, as compared to only 15% of the plain error cases.

A further difference relates to the type of error. In slightly fewer than half of the cases, the sentence had been enhanced on the basis of judge-found facts. These were cases of "constitutional *Booker* error." In slightly more than half, the sentence was based entirely on the facts found by the jury or admitted by the defendant, and on prior convictions. These cases involved no constitutional error at all, but they were nonetheless inconsistent with *Booker*, because the remedial opinion in *Booker* rendered the Guidelines advisory. The error of treating the Guidelines as mandatory (an error committed in every case, because it was not error prior to *Booker*) is called "non-constitutional *Booker* error."[20] The reversal rate for pipeline cases involving constitutional error was 40%, while that for non-constitutional error was only 24%.

The four permutations of these case types exhibited dramatically different reversal rates, ranging from a reversal rate of 70% for constitutional error reviewed for harmlessness to a reversal rate of 7% for non-constitutional error reviewed for plain error. Figure 2 shows the differences. The nature and direction of these differences are precisely what one would predict. But the magnitude is nonetheless interesting, because it shows that standards of review make a serious difference.

But reversal rates are just the first part of the story. What matters to defendants is whether their sentences were actually changed. To determine that, we must look at what happened to the cases that were reversed and remanded. As of this writing, 44 of the 73 defendants whose sentences were reversed by the Tenth Circuit for *Booker* error have been resentenced. Of these, 32% of the defendants received the same sentence

15. *See, e.g.*, United States v. Riccardi, 405 F.3d 852, 876 (10th Cir. 2005); United States v. Paxton, 422 F.3d 1203, 1207 (10th Cir. 2005).
16. United States v. Gonzalez-Huerta, 403 F.3d 727, 732 (10th Cir. 2005) (en banc).
17. *See, e.g.*, United States v. Dazey, 403 F.3d 1147, 1178-79 (10th Cir. 2005).
18. *See, e.g.*, United State v. Trujillo-Terrazas, 405 F.3d 814, 821 (10th Cir. 2005).
19. *See, e.g.*, United States v. Williams, 403 F.3d 1188, 1199-1200 (10th Cir. 2005).
20. *Gonzalez-Huerta*, 403 F.3d at 731-32.

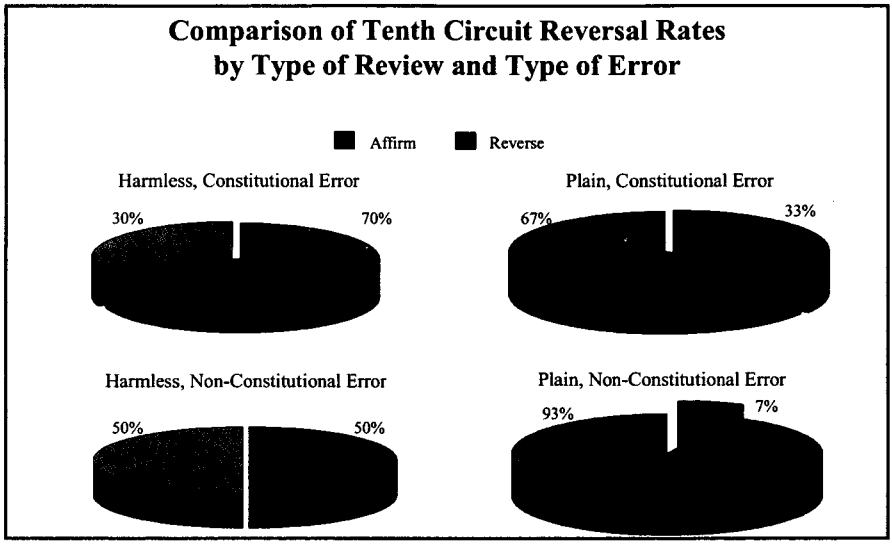

Figure 2

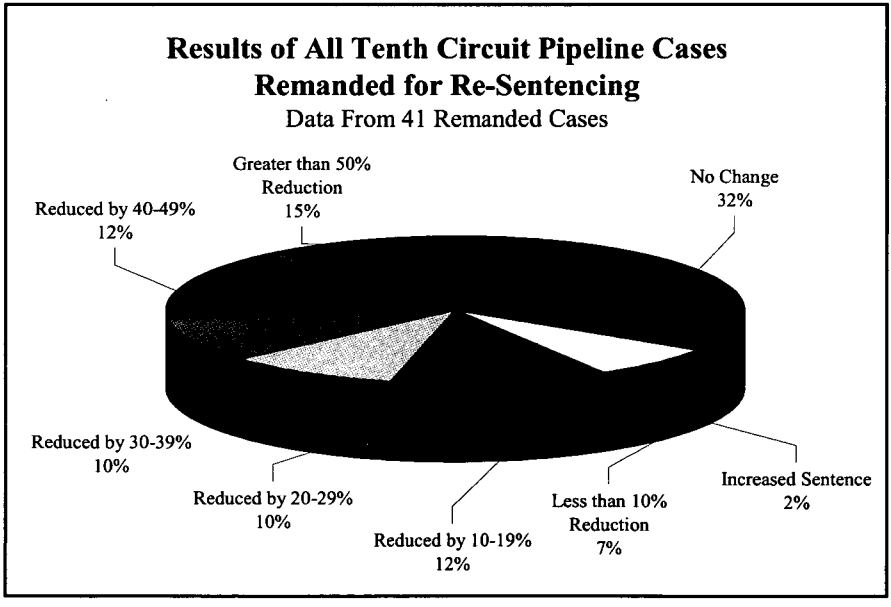

Figure 3

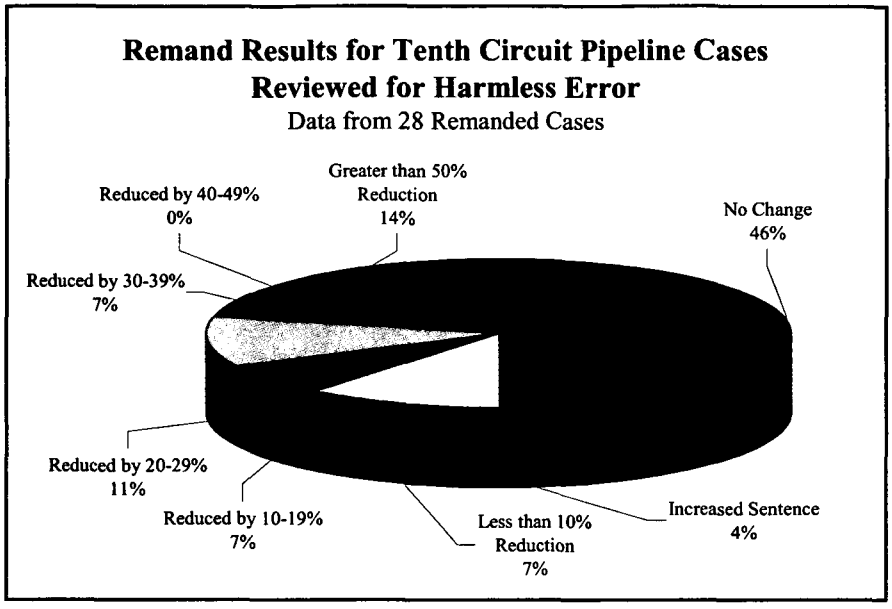

Figure 4

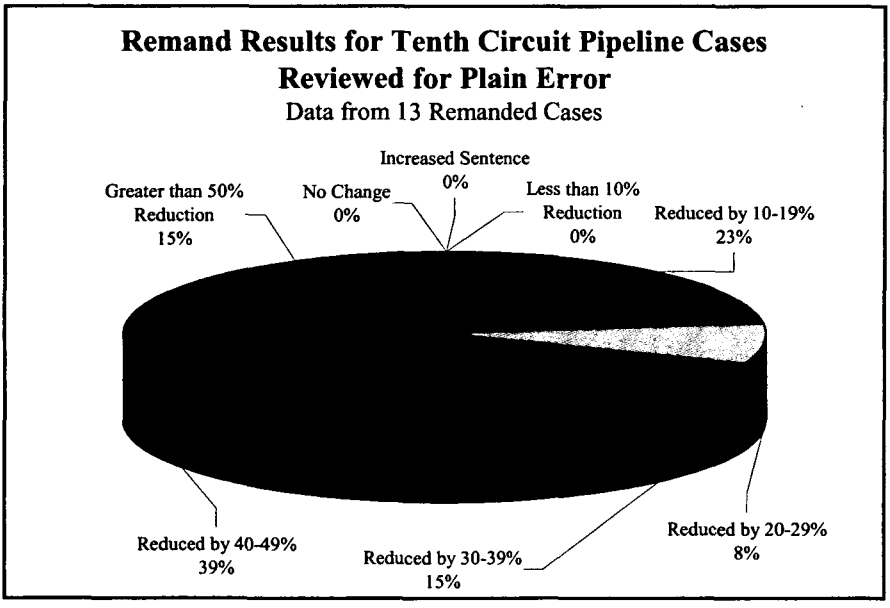

Figure 5

they received the first time. On the other hand, 27% had their sentenced reduced by over 40%. Figure 3 sets forth the results.[21]

Again, these aggregate statistics obscure the differences between types of cases. In cases reviewed for harmless error, almost half – 46%– of the defendants received the same sentence they received the first time. Figure 4 shows these results. In cases reviewed for plain error, every sentence was changed, and 54% were reduced by more than 40%, as shown in Figure 5.

In sum, taking into account sentences affirmed by the Tenth Circuit and those in which the same sentence was imposed on remand, the result of the pipeline litigation was that 16% of defendants saw reductions in their sentences. That is not a large number, but it is undoubtedly of great significance to the individuals involved.

Let us turn, then, to post-*Booker* sentencing results. Even before *Booker*, the Guidelines permitted district judges to "depart" from the Guideline ranges, either up or down, in narrow and carefully defined circumstances.[22] Most downward departures were at the request of the prosecutor, often for cooperation. Others were at the instigation of the judge, usually because the judge concluded that the Guidelines range, for some reason, failed to reflect the true seriousness of the offense. The question is whether the new-found discretion of judges to vary from the Guidelines has had much effect. I will focus on variances and departures not requested by the prosecution because those are the ones that reflect *Booker*'s expansion of judicial discretion.[23]

In the two years prior to *Booker*, nationwide, 71% of defendants were sentenced within the Guidelines range. Twenty-two percent received a downward departure at the behest of the prosecution. Only 6% received downward departures at the instigation of the district judge, and 0.78% received upward departures at the judge's instigation. After *Booker* (between Jan. 12 and Dec. 21, 2005), the rate of within-Guidelines sentencing declined from 71% to 62%. The rate of judge-instigated downward departures or variances more than doubled, from 6% to 13%. But *Booker* was a double-edged sword: the number of judge-instigated upward departures also increased significantly, from 0.78% to 1.35%. Figure 6 shows the numbers. (Note that these results come from the district courts. The Courts of Appeals have so far decided only a handful of post-*Booker* non-pipeline sentencing appeals. What we

21. Note that none of these new sentences has yet gone through appellate review. It is possible that some will be held to be unreasonable. The effect of appellate review is almost certainly to reduce the amount of change in sentencing, though it is impossible to predict by how much.

22. *See* UNITED STATES SENTENCING GUIDELINES MANUAL ch. 5, pt. K (2005), http://www.ussc.gov/2005guid/gl2005.pdf.

23. Statistics in this section come from UNITED STATES SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT 16-18 (Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_120105.pdf. They are current as of December 21, 2005.

are seeing, then, is a product of the culture of the district courts in the various circuits rather than of appellate decisions.).

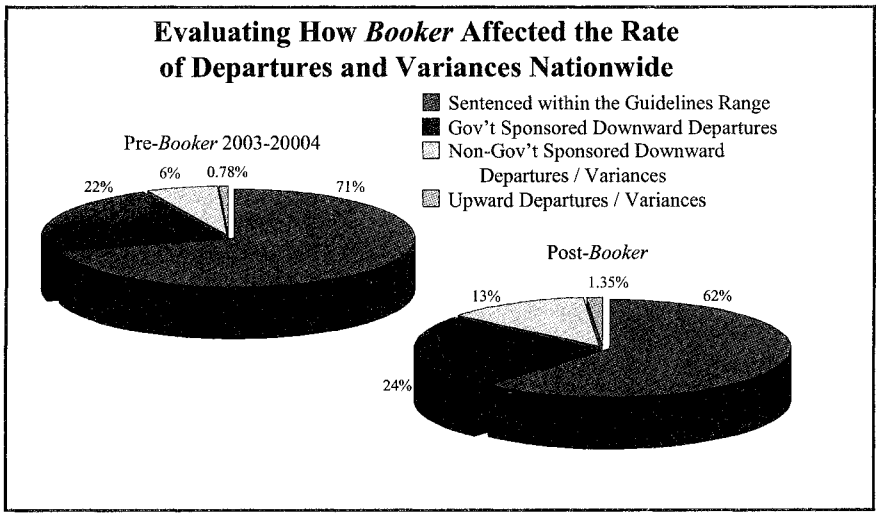

Figure 6

The changes in the Tenth Circuit have been less dramatic than in the nation as a whole. The Tenth Circuit district courts were significantly more Guidelines-compliant than the national average prior to *Booker*, and have exercised their *Booker* discretion less aggressively than their counterparts in other circuits, in both downward and upward directions. The percentage of within-Guidelines sentences in the Tenth Circuit declined from 72% to 66% – two thirds of the average national change. The percentage of downward departures and variances instigated by the district judge went from 5% to 10%, and the percentage of upward departures and variances went from 0.61% to 0.84%. Figure 7 illustrates this information.

As the following charts indicate, district courts in the various circuits have responded quite differently to *Booker*. Figure 8 shows the difference in downward departures and variances. Figure 9 shows only the difference in judge-instigated downward departures and variances.

In every circuit, there has been an increase in downward departures and variances. But the difference between circuits is striking. The district courts of the Tenth Circuit, always more Guidelines-compliant than the national norm, experienced less change than courts in most other circuits. The Fifth and the Eleventh showed a similar pattern to the Tenth. The First Circuit went from being about average in Guidelines-compliance to being the second most deviant of all Circuits. The Second, which was always far more Guidelines-variant than the other circuits, became even more so. Interestingly, the Ninth, which was more variant than the national average before *Booker*, became a little less vari-

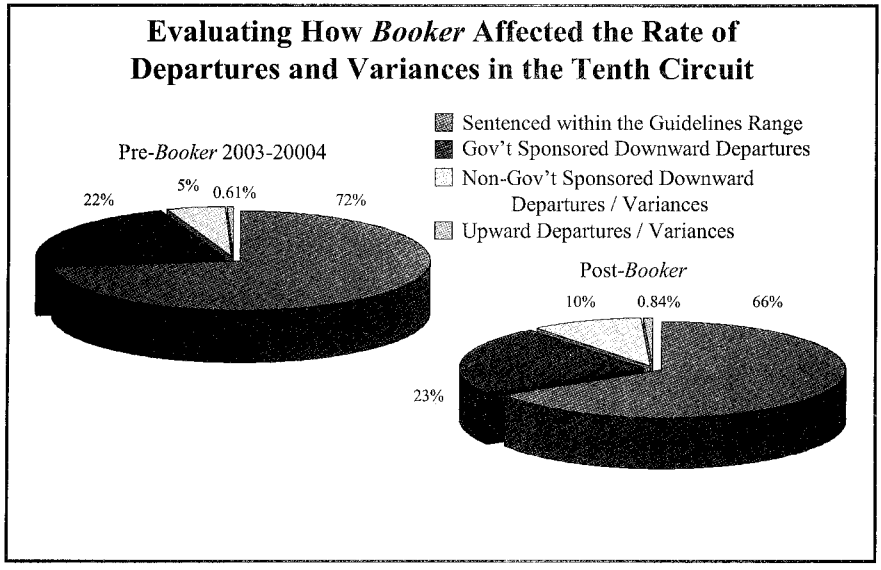

Figure 7

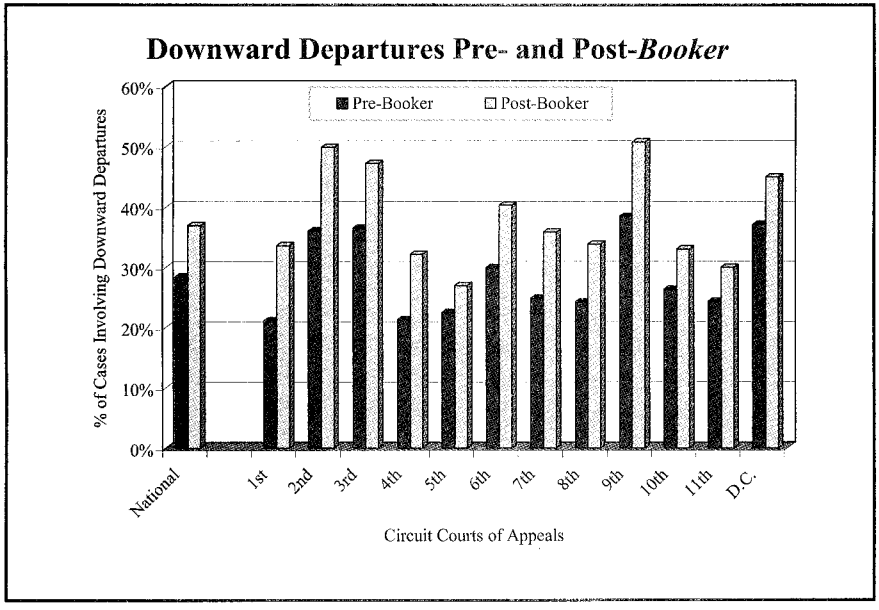

Figure 8

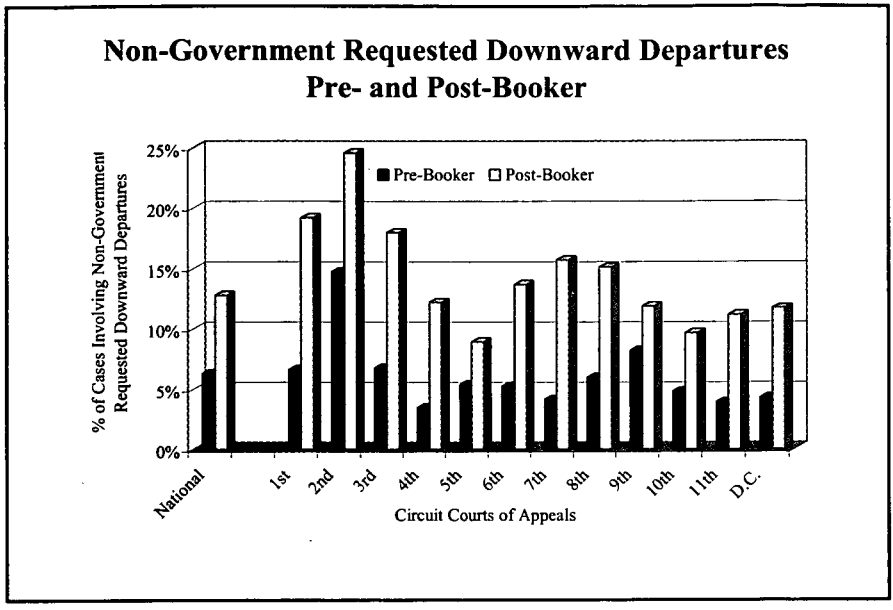

Figure 9

ant than the national average after the decision. It exhibited the smallest percentage change of any circuit in the number of departures and variances after *Booker*. It is as if the district judges in the Ninth Circuit sentence without much regard to whether the law grants them discretion. The Seventh, which was one of the most Guidelines-compliant under the old regime, soared to fourth place among the variant after *Booker*. This is the converse of the Ninth.

Upward departures and variances are much rarer, but as Figure 10 shows they too exhibit a striking difference among the circuits. The district courts in the Tenth Circuit, which were below the national average in departures under the pre-*Booker* system, showed little inclination to change. This suggests that the district courts in the Tenth Circuit tend to adhere to the Guidelines whether they have to or not, and whether the defendant or the prosecution would benefit. The district courts in the First Circuit, by contrast, which showed the greatest percentage increase in propensity to sentence below the Guidelines range, also showed by far the greatest percentage increase in propensity to sentence above the Guidelines range. This suggests that, after *Booker*, the district courts in the First tend to flex their discretion to vary from the Guidelines more than the national average both in favor of defendants and in favor of the prosecution. The Second Circuit, which exhibited higher-than-average levels of downward departures before *Booker* and the nation's highest levels of downward departures and variances after *Booker*, has been well below the national norm in upward departures and variances, both before and after the decision. This suggests that discretion in the Second Circuit

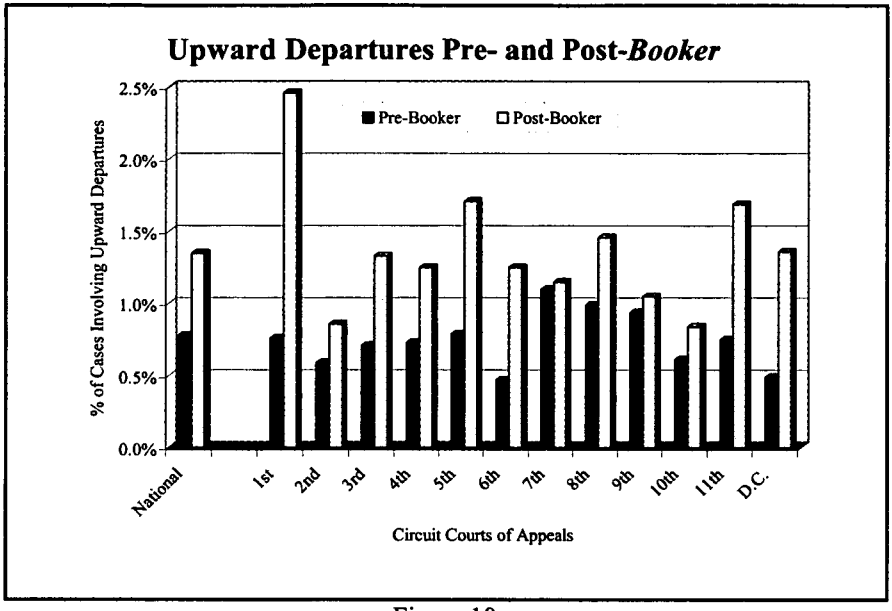

Figure 10

is principally exercised in favor of the defendant. The Fifth and Eleventh Circuits, by contrast, are below the national norm for post-*Booker* downward departures and variances, but are second and third highest in post-*Booker* upward departures and variances. They are thus the pro-prosecution *yin* to the Second Circuit's pro-defendant *yang*.

One clear effect of *Booker*, then, is to produce a greater degree of regional non-uniformity in sentencing practices.

The overall effect on sentence length, so far, has been negligible. After *Booker*, the average length of sentence has been about the same as before.[24] On the other hand, in the years before *Booker*, there had been a persistent and significant annual increase in the length of sentences. As Figure 11 shows, this increase came to a halt in 2005, presumably (though not certainly) as a result of the courts' increased discretion under *Booker*.

It is hard to evaluate the magnitudes of these changes. The effects have been larger than I personally would have guessed; but, the effects have surely been more modest than the most hopeful enthusiasts for *Booker* wanted. The lack of effect on sentence length must be particularly disappointing to those who hoped that an end to mandatory Guidelines sentencing would produce lower sentences.

24. Statistics regarding average length of sentences come from *id.* at 13-15.

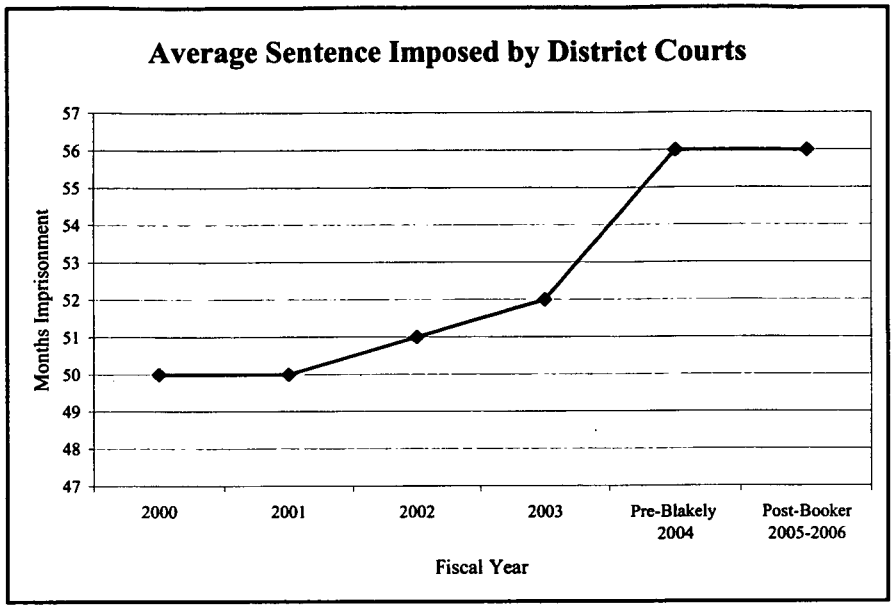

Figure 11

III. CONSISTENCY AND COHERENCE

The *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence. If that seems a presumptuous thing for an inferior court judge to say about the product of his superiors, I take comfort in the fact that eight of the nine Justices agree with me that either the Sixth Amendment holding or the remedial holding is wrong, and that the two do not fit together. Five Justices joined the Sixth Amendment holding, and four of those five dissented from the remedial holding. The four dissenters from the Sixth Amendment holding, plus one, formed the majority for the remedial holding. As Figure 12 shows, only one Justice thought the two parts of the opinion could be squared, and she did not write an opinion explaining why.

The most striking feature of the *Booker* decision is that the remedy bears no logical relation to the constitutional violation. The violation, according to the Stevens majority, is that judges were permitted to make factual findings that properly were the province of the jury. The remedy according to the Breyer majority, however, was to give judges more power than they had previously. The jury verdict is no more consequential after *Booker* than it was before, but now the district judge can thumb his nose (within the bounds of reasonableness) at Congress's determination regarding the appropriate sentence for offenses of that type and circumstance. If there were a right to "sentence by judicial discretion" in the Constitution, the *Booker* decision would be on the money. How it serves to enforce "trial by jury" is another matter. Yet somehow, a case based on the proposition that judges were given too much power to sentence based on facts not found by a jury was transmogrified, as if al-

chemically, into a holding that they should have more discretion to disregard sentencing ranges set by Congress.

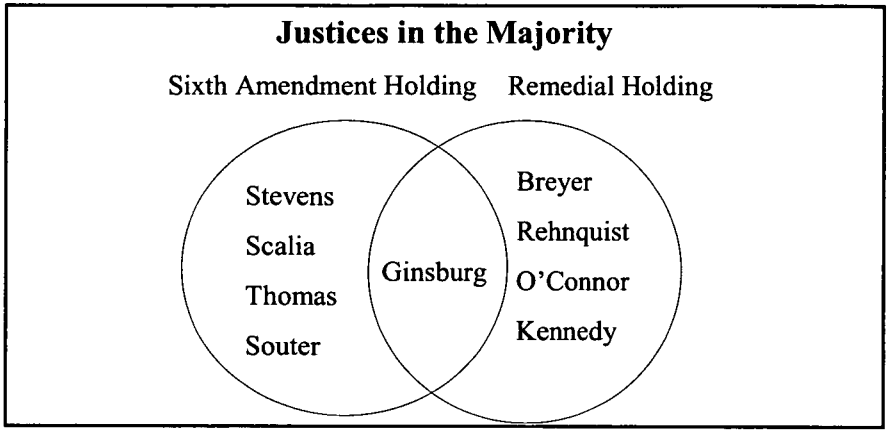

Figure 12

All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged. Under the pre-*Booker* Guidelines system, defendants could be sentenced to additional years in prison for so-called "uncharged conduct" – crimes that were neither charged in the indictment nor proven to the jury. For example, a defendant convicted of a drug offense could be sentenced to extra months in prison if the judge concluded he had carried an illegal firearm, even if the firearms offense was never mentioned during the trial. But the same is true after *Booker*, the only difference being that district judges have an extra dollop of discretion to sentence above or below the resulting Guidelines range. Indeed, under the pre-*Booker* Guidelines system, defendants could even be sentenced to additional years in prison for committing crimes on which they were acquitted by the jury (the theory being that acquittal on a reasonable doubt standard is not inconsistent with guilt under a preponderance of the evidence standard, which is all the Guidelines required for enhancements). For example, in one Tenth Circuit case, the jury found that the defendant had possessed 50-500 grams of methamphetamine, and that he had not possessed more than 500 grams; nonetheless, the district judge sentenced him on the basis of his own finding that the defendant possessed over 1200 grams.[25] But defendants can still be sentenced on the basis of acquitted conduct after *Booker*, again with the sole difference being an increase in judicial discretion to go above or below the resulting range.[26] Trial by jury has no greater role in sentencing than it did before *Booker*.

Indeed, and still more remarkably, the *Booker* remedial majority held that district judges must have discretion to treat the Guidelines as

25. United States v. Magallanez, 408 F.3d 672, 682 (10th Cir. 2005).
26. *See id.* at 685.

"advisory" even in cases where the Sixth Amendment was in no way involved. Slightly more than half of the criminal defendants (based on statistics from Tenth Circuit pipeline cases) were sentenced entirely on the basis of the jury verdict, the defendant's admissions, and prior criminal history. Under the Stevens majority opinion, these sentences were entirely constitutional under the Sixth Amendment. Yet under the Breyer remedial opinion, these sentences became violations of the Sentencing Reform Act, as reinterpreted by the Court. District courts now have discretion to vary from the Guidelines even in cases where it would not violate the Constitution to obey the Guidelines.

One might interpret the remedial holding as a pragmatic attempt by supporters of the Guidelines system, four of whom dissented from the Stevens majority, to patch together a workable sentencing system as close to the Guidelines as was possible under the circumstances. Responsibility for the inconsistency between violation and remedy, according to this theory, must lie with the remedial majority, which was unwilling to accede to the force of a Sixth Amendment holding with which they disagreed. But this is not the whole story.

The inconsistency cannot be blamed solely on the remedial majority. The Sixth Amendment majority opinion itself contains the seeds of this incoherence. According to that opinion, fully discretionary sentencing is permitted under the Sixth Amendment. This is explicitly acknowledged at least three times in the opinion. If the statutory penalty applicable to the crime of distributing five kilograms or more of cocaine is ten years to life (as it is[27]), the district judge under a discretionary sentencing system could set the sentence anywhere between ten years and life, based on the judge's perception of such factors as the severity of the crime, the defendant's prospects for rehabilitation, the effects on the victims, the defendant's ties to the community or family responsibilities, or whatever other factors he deems relevant. In making these discretionary judgments, the court perforce would consider facts beyond those found by the jury. This, the Stevens majority said, comported with the Sixth Amendment: "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[28] Indeed, the Court could hardly say otherwise: this was the system in place when the Sixth Amendment was adopted, which prevailed in the federal courts from the Founding until enactment of the Sentencing Reform Act of 1984, and which is used in a majority of states even today, without anyone ever suggesting a conflict with the Sixth Amendment. Yet the *Booker* Court never explained how such a system could be squared with its interpretation of the requirements of the Sixth Amendment. If a sentence can be

27. 21 U.S.C. § 841(b)(1)(A) (2000).
28. *Booker*, 125 S. Ct. at 750 (Stevens, J.).

based on judge-found facts under a discretionary system, why does the defendant care if his sentence is based on judge-found facts under a mandatory Guidelines system? From the defendant's perspective, the Guidelines system gives no less authority to the jury, but is less arbitrary, more predictable, with more due process, than a fully discretionary system. Under the Guidelines, the defendant has the right to know the factual basis for the sentence, to present evidence, and to challenge the sentence if the enhancement facts are not proven by a preponderance of the evidence. A fully discretionary system provides none of these protections.

Because the Sixth Amendment majority reaffirmed the constitutionality of discretionary judging, it left itself wide open to a remedial holding that enhanced judicial discretion rather than eliminating judicial fact-finding. Justice Breyer's remedial majority simply took the Sixth Amendment majority's unexplained concession regarding discretionary sentencing to its logical conclusion. The remedial opinion reasoned that the Guidelines could remain in force so long as they were not formally mandatory. To be sure, the Sixth Amendment content of the holding was leached out of the remedy, but that was a logical consequence of a Sixth Amendment holding that attempted to paper over so gaping a doctrinal hole.

IV. PRACTICAL CONSIDERATIONS

Few legal observers have praised the *Booker* opinions, at least in tandem, for their logical and doctrinal quality. But many have welcomed the decision as a pragmatic adjustment that may ameliorate some of the more objectionable features of the prior Guidelines system. It is difficult to evaluate the pragmatic effects of a decision without taking sides on contentious issues. I shall simply set forth the most common criticisms of the Guidelines and ask to what extent *Booker* is responsive to them, without necessarily implying agreement with the criticisms (though I do agree with some of them). My point is that even from the perspective of critics of the Guidelines system, *Booker* offers at best a modest palliative.

It must be remembered that the Guidelines were originally the product of a remarkable cross-ideological consensus. Liberal members of Congress criticized the prior discretionary sentencing system for being arbitrary and discriminatory, suspecting that punishment depended more on the race of the defendant, the place of the offense, and the temperament of the judge than on the legitimate characteristics of the crime or the defendant. Conservative members of Congress suspected that "soft on crime" federal judges were using their sentencing discretion to mete out insufficiently punitive sentences. Advocates of the Guidelines system were united in the view that the prior discretionary system violated principles of the rule of law. The Guidelines were intended to achieve greater uniformity and fairness.

But not long after they were enacted, the Guidelines began to attract serious criticism, which became more vehement as years went by. Many critics, especially federal judges, argued that the rigidity of the Guidelines prevented judges from sentencing defendants in accordance with the justice of the particular case.[29] Others complained that the Guidelines were excessively complex and confusing, consuming vast resources in litigation, and incomprehensible to defendants or other people involved in the system.[30] Many pointed to particular anomalies in the Guidelines, such as the much-denounced treatment of a gram of crack as equivalent to 100 grams of cocaine for purposes of setting the level of punishment.[31] Others objected to the fact that defendants could receive increased sentences for offenses other than the crime for which they were convicted – and even for offenses for which they were acquitted by the jury. Perhaps most insistently, many critics complained simply that sentences under the Guidelines were excessive.[32] How has *Booker* responded to these criticisms?

A. Rigidity

There is no doubt that *Booker* has ameliorated the rigidity of the Guidelines system. District judges now have the freedom to consider factors previously deemed out of bounds, and thus to avoid some of the more evident miscarriages of justice under the Guidelines. But as the empirical portion of this article suggests, the degree of this increased flexibility may be less significant in practice than in theory. Only in about 7% of cases, nationwide, have district judges exercised their newfound discretion to sentence below the Guideline ranges.

No one can predict how appellate courts will interpret the "reasonableness" requirement, but it stands to reason that as appellate precedents pile up, the amount of district court discretion will gradually be reduced. One important question, not yet addressed by the Tenth Circuit, is whether *Booker* discretion allows district judges to vary from Guidelines ranges on the basis of generic objections to the policy choices embodied in the Guidelines, or whether – as the Court of Appeals for the First Circuit recently held - *Booker* discretion "was meant to operate only within

29. *See, e.g.*, KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236-37 (2004).

30. *See, e.g.*, Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992).

31. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). Many other anomalies are discussed in Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005).

32. *See, e.g.*, United States v. Brewer, 899 F.2d 503, 513 (6th Cir. 1990) (Merritt, C.J., dissenting) (describing the Guidelines as "a prescription for injustice because district judges can no longer prevent the imposition of inappropriately harsh sentences"); FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 156-75 (1991).

the ambit of the individualized factors spelled out in Section 3553(a)."[33] If the First Circuit's interpretation prevails, *Booker* discretion will be less significant than many district courts now assume.

The sentencing statute, 18 U.S.C. § 3553(a), treats the Guidelines range as one of a number of factors the district judge should consider in sentencing. But there are procedural and institutional considerations, built into the structure of sentencing, that nudge district judges in the direction of Guidelines compliance. Judges are required in every case to perform the Guidelines calculations and to "take them into account when sentencing."[34] The Guidelines range is widely regarded as presumptively reasonable[35] – and district judges must give cogent reasons if they intend to sentence outside the Guidelines. This has the psychological, if not the legal, effect of establishing the Guidelines range as more than just one factor among many. In practical effect, the Guidelines continue to be the benchmark for responsible judging, with variances only for unusual cases. Moreover, and more speculatively, appellate review may coerce virtual Guidelines compliance in the ordinary run of cases. Variances from the Guidelines are often appealed, and when they are appealed receive serious scrutiny; but as of this writing, no appellate court has yet reversed a within-Guidelines sentence for being unreasonable. These considerations will not prevent a determined district judge from doing what seems just, but it surely makes Guidelines compliance the path of least resistance.

B. Complexity

With respect to the arcane complexity of the Guidelines, *Booker* only makes matters worse. District courts still will need to go through the complex task of calculating the Guidelines ranges, and appellate courts still will hear appeals challenging those calculations. Then, as a result of *Booker*, on top of the Guidelines calculations district judges will have to consider the statutory factors and make judgments about variances; appellate courts will have to review these judgments for reasonableness. At first, this discretionary superstructure may seem relatively intuitive and simple, but over time, precedents governing the exercise of *Booker* discretion will develop in a common law-like fashion, and these precedents will constitute an increasingly intricate body of law governing sentencing, which must be consulted in addition to the body of law interpreting the Guidelines.

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33. United States v. Pho, 433 F.3d 53, 62 (1st Cir. 2006).

34. *Booker*, 125 S. Ct. at 767.

35. United States v. Kristl, No. 05-1067, 2006 WL 367848, at *2-3 (10th Cir. Feb. 17, 2006); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); United States v. Williams, No. 05-5416, 2006 WL 224067, at *1 (6th Cir. Jan. 31, 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Guerrero-Velasquez, No. 05-30066, 2006 WL 133494, at *4 n.1 (9th Cir. Jan. 19, 2006).

C. Anomalies

Booker does nothing to eliminate the substantive anomalies associated with the Guidelines. To be sure, as of this writing, some twenty-four district courts have used their *Booker* discretion to refuse to apply the 100:1 crack-cocaine discrepancy.[36] But two courts of appeals have reversed such decisions.[37] Unless other courts of appeals or the Supreme Court go the other way, or Congress acts, the discrepancy will remain.

D. Sentences Based on Uncharged and Acquitted Conduct

As already noted, *Booker* does nothing to protect defendants from receiving enhanced sentences based on judicial findings that they committed uncharged offenses, or even offenses for which they were acquitted by the jury. A district judge who refused to take uncharged or acquitted conduct into account in calculating the Guidelines range would presumably be reversed, and whether *Booker* discretion would extend to a categorical refusal to enhance sentences based on such conduct is an open question.

E. Excessive Sentencing

Booker might eventually have the effect of reducing the length of sentences, for better or worse. Early indications are that district judges far more often exercise their discretion downward than they do upward. In the first year of post-*Booker* sentencing, however, there has been no change in the average length of sentences.

But consider Judge Paul Cassell's analysis of the problem. He argues, in an article in the *Stanford Law Review*, that Guidelines sentences as a whole reasonably reflect societal judgments regarding appropriate punishment, and that the most egregious cases of excessive sentences result not from the Guidelines but from the stacking up of statutory minimums.[38] Judge Cassell recently handed down an opinion sentencing a defendant to fifty-five years in prison for a first offense of drug distribution while carrying a firearm. Despite his view that the sentence was grossly excessive, he held that it was required under statutory minimums.[39] Judge Cassell argues that the best way to reform the sentencing

36. Gary Fields, *Judges Show More Lenience on Crack Cocaine*, WALL ST. J., Jan. 12, 2006, at 2A.

37. *Pho*, 433 F.3d at 64; United States v. Clark, No. 05-4274, 2006 WL 60273 (4th Cir. Jan. 12, 2006); *cf.* United States v. Gipson, 425 F.3d 335 (7th Cir. 2005) (holding that the district court did not act unreasonably in applying the 100:1 ratio); *but cf.* United States v. Williams, No. 05-11594, 2006 WL 68559 (11th Cir. Jan. 13, 2006) (affirming below-Guidelines sentence in a crack case on the basis of the individual circumstances, where the value of the crack involved was $350 and the Guidelines range was 188-235 months imprisonment).

38. Paul G. Cassell, *Too Severe?: A Defense Of The Federal Sentencing Guidelines (And A Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

39. United States v. Angelos, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004). The decision was affirmed by the Tenth Circuit. United States v. Angelos, 433 F.3d 738 (10th Cir. 2006).

system would be to keep the Guidelines intact, but to repeal all statutory minimums.

And also consider the politics of sentencing. Prior to *Booker*, there was a significant movement for sentencing reform. Such conservative organizations as the Heritage Foundation, in an effort led by former Attorney General Edwin W. Meese, and Prison Fellowship, led by Chuck Colson, have joined more liberal organizations, such as the American Constitution Society, in efforts to reduce sentences that they consider excessive. But now, after *Booker*, attention in Congress has reverted to whether federal judges have too much discretion and whether they will be soft on crime. The principal statutory lever Congress has to combat lenient discretionary sentencing – now that *Booker* has made the Guidelines advisory – is the enactment of more, and more draconian, statutory minimums. If Judge Cassell is correct that mandatory minimums are the principal cause of excessive sentencing, and if Congress responds to *Booker* by enacting more mandatory minimums, we may have purchased a small increase in discretion and a marginal amelioration of the Guidelines' excesses at the price of exacerbating the worst aspect of the sentencing system.

CONCLUSION

I am inclined to think that a modest increase in the discretion of district judges, exercised judiciously, could enhance justice. In this sense, I welcome the *Booker* result, even though I cannot endorse its reasoning. But it was more important to take a serious look at the statutes governing sentencing. This is a matter for Congress. I fear that *Booker*, by putting forward an extravagant claim of constitutional principles coupled with an anemic and self-contradictory remedy, may have set back the cause of reform, to relatively little purpose.