

Fact Sheet: A Statute Mandating a Presumption of Reasonableness for Guideline Sentences Would Renew Constitutional Doubt About the Federal Sentencing System.

The Commission asks Congress to “require” a presumption of reasonableness for guideline sentences on appeal to “assist in ensuring that the federal sentencing guidelines be given substantial weight during sentencing,” and to “promote more consistent sentencing outcomes.”¹

There could hardly be more “consistent” outcomes, in the sense of consistent affirmances, under review for *substantive* reasonableness. Only four guideline sentences have been reversed as substantively unreasonable, one in a presumption circuit and three in non-presumption circuits.² In contrast, guideline sentences are more frequently reversed as *procedurally* unreasonable, when the district court treated the guidelines as mandatory, did not adequately explain how the sentence complied with § 3553(a), or did not address or explain its rejection of non-frivolous arguments for a different sentence.³ This type of reversal results in a different sentence on remand more than half the time.⁴

Given the reality of reasonableness review, a statute that would result in more affirmances of guideline sentences, as the Commission apparently seeks, would either require courts of appeals to presume guideline sentences to be procedurally reasonable, or eliminate review for procedural unreasonableness.

A statute mandating a presumption of procedural reasonableness, or eliminating review for procedural unreasonableness, would be unconstitutional.

While the Supreme Court has permitted a rebuttable non-binding presumption of *substantive* reasonableness, it has not permitted any presumption of *procedural* reasonableness. To the contrary, it is “significant procedural error” if, in imposing a sentence within a correctly calculated guideline range, the district court “treat[s] the Guidelines as mandatory, fail[s] to consider the § 3553(a) factors, . . . or “fail[s] to adequately explain the chosen sentence.”⁵ When a party “presents non-frivolous reasons for imposing a different sentence,” the judge “must explain why he has rejected those arguments.”⁶ Review for procedural unreasonableness is the appellate safeguard against the guidelines being treated as mandatory at sentencing. A statute mandating a presumption of procedural reasonableness or eliminating review for procedural unreasonableness would permit the guidelines to be treated as mandatory at sentencing, and it would eliminate reversals of guideline sentences on any ground other than incorrect application of the guidelines, just as before *Booker*. Such a statute would be unconstitutional.

A statute mandating a presumption of substantive reasonableness may function in unconstitutional ways.

The Commission proposes a mandatory presumption of reasonableness to ensure that the guidelines are given “substantial weight” at sentencing.⁷ But the presumption the Court approved is limited and rests on deference to the district court judge, not the guidelines.

The Court held that a court of appeals “may, but is not required to, apply a presumption of reasonableness” when reviewing a within-guideline sentence,⁸ and went to great lengths to specify the limited nature of the presumption. The “presumption is not binding,” “does not insist that [either side] shoulder a particular burden of persuasion or proof,” does not reflect “deference of the kind that leads appellate courts to grant greater factfinding leeway to an expert agency than to a district judge,”⁹ and has no “independent legal effect.”¹⁰ The premise is that it is possible for a judge, after considering all of the § 3553(a) purposes and factors, to independently reach a guideline sentence.¹¹ When that “double determination” occurs, it “increases the likelihood that the sentence is a reasonable one.”¹² Thus, “when a district judge’s discretionary decision in a particular case accords with the sentence the . . . Commission deems appropriate ‘in the mine run of cases,’ the court of appeals may presume that the sentence is reasonable.”¹³

A statute requiring courts of appeals to apply a presumption of substantive reasonableness, written without the limitations set forth in *Rita*, may well function as a presumption of *unreasonableness* for sentences outside the guideline range, particularly if coupled with a proportional justification requirement as the Commission also proposes. This is exactly what occurred before *Rita* and *Gall*,¹⁴ and what led the Court to hold that a presumption of unreasonableness may not be applied to sentences outside the guideline range.¹⁵

Further, it is a fair question whether a mandatory presumption of reasonableness, written without the limitations specified in *Rita*, would be rebuttable on appeal. If not, it would be impermissible.¹⁶

A mandatory presumption would discourage feedback from the courts of appeals.

Two of the four decisions holding a guideline sentence substantively unreasonable contributed appellate feedback regarding guidelines in need of repair, one the Commission has relied on in amending the illegal re-entry guideline,¹⁷ and one the Commission will surely include in its review of the child pornography guideline.¹⁸ A statute mandating a presumption of reasonableness would discourage such decisions, and therefore undermine the Commission’s duty to “modify its Guidelines in light of what it learns” from “appellate court decision-making.”¹⁹

¹ Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 55-56 (Oct. 12, 2011) (hereinafter Commission Testimony).

² The First, Second, Third, Ninth and Eleventh Circuits declined to adopt a presumption; the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits adopted a presumption. Guideline sentences have been held substantively unreasonable in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), *United States v. Paul*, 561 F.3d 970 (9th Cir. 2009), and *United States v. Wright*, 426 Fed. App’x 412 (6th Cir. 2011).

³ See Appellate Decisions After *Gall* (Nov. 10, 2011) (citing over 70 such appellate decisions), http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf.

⁴ See Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (Nov. 2011), http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

⁵ *Gall v. United States*, 552 U.S. 38, 51 (2007).

⁶ *Rita v. United States*, 551 U.S. 338, 357 (2007).

⁷ Commission Testimony at 55-56.

⁸ *Gall v. United States*, 552 U.S. 38, 51 (2007).

⁹ *Rita v. United States*, 551 U.S. 338, 347 (2007).

¹⁰ *Id.* at 350.

¹¹ *Id.*; *see also id.* at 347 (stating that “the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.”) (emphases in original).

¹² *Rita*, 551 U.S. at 347.

¹³ *Gall*, 552 U.S. at 40.

¹⁴ *See Rita*, 551 U.S. at 355; *Gall*, 552 U.S. at 47.

¹⁵ *See Gall*, 552 U.S. at 51; *Rita*, 551 U.S. at 354-55.

¹⁶ *Rita*, 551 U.S. at 366-67 (Stevens & Ginsburg, JJ., concurring).

¹⁷ USSG App. C, amend. 754 (Nov. 1, 2011) (Reason for Amendment) (relying on *United States v. Amezcua-Vazquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) (reversing as substantively unreasonable a within-guideline sentence in an illegal reentry case because 16-level enhancement based on decades-old conviction not counted under the criminal history rules created unwarranted uniformity)).

¹⁸ *United States v. Dorvee*, 604 F.3d 84, 93-98 (2d Cir. 2010) (reversing within-guideline sentence in part because of problems with the child pornography guideline, an “eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results”).

¹⁹ *United States v. Booker*, 543 U.S. 220, 263 (2005).