SENTENCING POST-*BOOKER*
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I. *Booker* Opinion

A. Sixth Amendment Holding (Stevens, J.)

The merits majority held that sentencing under the Guidelines violates the Sixth Amendment right to jury trial as interpreted in cases from Jones v. United States, 526 U.S. 227 (1999), to Apprendi v. New Jersey, 530 U.S. 466 (2000), to Ring v. Arizona, 536 U.S. 584 (2002), to Blakely v. Washington, 542 U.S. 296 (2004). See United States v. Booker, 125 S. Ct. 738, 748-50 (2005).

Blakely's constitutionally permissible maximum sentence applies to the Guidelines because they are mandatory -- if "the Guidelines as currently written could be read as merely advisory provisions . . ., their use would not implicate the Sixth Amendment. . . . The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. . . . Because they are binding on all judges, we have consistently held that the Guidelines have the force and effect of laws." Id. at 750.

Held: "Accordingly, we reaffirm our holding in Apprendi: Any 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." Id. at 756.

B. Remedial Interpretation of the Sentencing Act (Breyer, J.)

The remedial majority "modified" the SRA by "sever[ing] and excis[ing]" 18 U.S.C. § 3553(b)(1) – "the provision of the federal sentencing statute that makes the Guidelines mandatory," and 18 U.S.C. § 3742(e) – the appellate review section "which depends upon the Guidelines' mandatory nature," including in particular *de novo* review which made "Guidelines sentencing even more mandatory than it had been." See 125 S. Ct. at 756-57, 764, 765.

"So modified, the Federal Sentencing Act . . . makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C. § 3553(a)(4), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." Id. at 757.

[1] Parts of this memorandum have been updated recently and other parts have not. I have noted those sections that have not been updated in several months.

Note re child crimes and sexual offenses, safety valve: The mandatory language in 3553(b)(2) and 3553(f) was not at issue in Booker and was not stricken. However, the guidelines are advisory for child and sexual offenses covered by Section 3553(b)(2),[2] as well as after application of the safety valve under Section 3553(f).[3]

II. Sentencing Framework

1. Sentencing courts must now consider all of the goals and factors set forth in 18 U.S.C. § 3553(a), not just the guidelines and policy statements in the Guidelines Manual. See Booker, 125 S. Ct. at 757, 764, 766, 767, 768. See also, e.g., United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. Feb. 2, 2005); United States v. Hughes, 401 F.3d 540, 546 (4th Cir. Mar. 16, 2005).

2. Parsimony Provision: The new mandatory principle is a limiting one: The sentence must be "**sufficient, but not greater than necessary**," to satisfy "(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;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant;
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. § 3553(a)(2) (emphasis supplied).

Courts across the spectrum have recognized that they must honor the parsimony provision. See, e.g., United States v. Foreman, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006); United States v. Cawthorn, 419 F.3d 793, 802 (8th Cir. 2005) ("district court's duty" is that it "shall impose a sentence sufficient but not greater than necessary"); United States v. Spigner, 416 F.3d 708, 711 (8th Cir. 2005); United States v. Acosta-Luna, 2005 WL 1415565 (10th Cir. June 17, 2005) (the "provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing"); United States v. Gray, 362 F.Supp.2d 714, 717 (S.D. W. Va. 2005)

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[2] United States v. Yazzie, 407 F.3rd 1139, 1145 (10th Cir. 2005); United States v. Sharpley, 399 F.3d 123, 127 n.3 (2d Cir. 2005); United States v. Selioutsky, 409 F.3d 114, 117 (2d Cir. 2005).

[3] United States v. Bolano, 409 F.3d 1045, 1047 (8th Cir. 2005); United States v. Cherry, 366 F. Supp.2d 372, 376 (E.D. Va. 2005); United States v. Duran, __ F. Supp.2d __, 2005 WL 395439, *4 (D. Utah Feb.17, 2005) (Cassell, J.).

(Goodwin, J.); United States v. Angelos, 345 F.Supp.2d 1227, 1240 (D. Utah Nov. 16, 2004) (Cassell, J.).

3. Factors the court "shall consider" in determining the "particular sentence" that is sufficient but not greater than necessary to satisfy the goals of sentencing:

(1) "the nature and circumstances of the offense" and "the history and characteristics of the defendant"
(2) "the kinds of sentences available"
(3) the advisory guidelines
(4) "any pertinent policy statement" in the Guidelines Manual, which includes departures
(5) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"
(6) "the need to provide restitution to any victims of the offense"

4. A failure to consider 3553(a) factors ***which are invoked by counsel*** in the case,[4] is a mandatory guidelines sentence and thus violates both the Sixth Amendment and Booker's remedial interpretation of the sentencing statute. See United States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005) (mandatory application of the guidelines is error if based on judge found facts, or if based on jury-found facts); United States v. Williams, 372 F. Supp.2d 1335 (M.D. Fla. May 5, 2005) (government shows disrespect for law in continuing to advocate that the guideline sentence is the only reasonable sentence, contrary to Booker and separation of powers); United States v. Hoskins, 364 F.Supp.2d 1214 (D. Mont. Apr. 8, 2005) (government's argument for a life sentence simply because that is the guidelines sentence assumes that Booker's abandonment of mandatory guidelines is illusory).

All of the district courts are giving the guidelines and policy statements at least serious consideration, but many have expressed the view that giving the guidelines "presumptive" or "heavy" weight amounts to imposition of a mandatory guideline sentence.[5] The Fourth, Fifth, Seventh, Eighth and Tenth Circuits have held that the guideline range is entitled to a presumption of reasonableness.[6] The Sixth Circuit

[4] United States v. Dean, 414 F.3d 725, 728-29 (7th Cir. 2005) (court is required to consider the 3553(a) factors, but is not required to write a comprehensive essay on all of the factors even when not invoked by counsel).

[5] See, e.g., United States v. Moreland, 366 F.Supp.2d 416, 423 (S.D. W. Va. 2005), aff'd in part, vacated in part, 437 F.3d 424 (4th Cir. 2006); United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. 2005); Simon v. United States, 361 F.Supp.2d 35, 40-49 (E.D.N.Y. 2005); United States v. Biheiri, 356 F. Supp.2d 589 (E.D. Va. 2005); United States v. Huerta-Rodriguez, 355 F. Supp.2d 1019 (D. Neb. Feb. 1, 2005); United States v. Myers, 353 F. Supp.2d 1026 (S.D. Iowa Jan. 26, 2005); United States v. Ranum, 353 F. Supp.2d 984, 986-87 (E.D. Wis. Jan. 19, 2005).

[6] United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006); 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. Mykytiuk, 415 F.3d 606 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005). This does not

adopted a presumption of reasonableness in one case,[7] but tempered that conclusion in a subsequent case, stating that this was "in fact rather unimportant" because the district court must follow the "statutory mandate to 'impose a sentence sufficient, but not greater than necessary' to comply with the purposes of sentencing in section 3553(a)(2)," in doing so it must "consider[] all of the relevant section 3553(a) factors," and the court of appeals must engage in "meaningful review" of sentences within and outside an applicable guideline range.[8] The First, Second and Third Circuits, and possibly the Eleventh, have declined to hold that the guidelines are entitled to a presumption of reasonableness.[9] The First Circuit is the only court of appeals to approve of the district court according the guidelines "substantial weight,"[10] which seems at odds with its rejection of a presumption of reasonableness on appeal. For a discussion of legal challenges to guidelines with "substantial weight" or a "presumption of reasonableness," see Amy Baron-Evans, Antidote to the Kool-Aid (April 10, 2006).

In order to "consult" the Guidelines and "take them into account," the court must find the guidelines facts and correctly calculate the guideline range,[11] and a factually or legally erroneous guideline calculation remains a basis for appeal. Thus, the defendant will want to ensure that the guideline range is calculated most favorably to him/her. **Practice Tip**: *Fight the guideline calculation as hard as if Booker was never decided. Don't assume you will make it up with 3553(a). Courts are sticking close to the guidelines*.

Furthermore, defense counsel who simply argues that the guideline sentence is "too high" is taking a grave risk at sentencing and on appeal – counsel must invoke the applicable 3553(a) factors, present legal and evidentiary support for them, and carefully explain why the requested sentence is sufficient but not greater than necessary to achieve the goals of sentencing that are applicable in the case.

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mean that a sentence outside the guideline range is unreasonable. United States v. Haggard, 2006 WL 715758, slip op. *3 (10th Cir. Mar. 22, 2006); United States v. Moreland, 437 F.3d 424, 433-34 (4th Cir. 2006).

[7] United States v. Williams, 436 F.3d 706 (6th Cir. 2006).

[8] United States v. Foreman, 436 F.3d 638 (6th Cir. 2006).

[9] United States v. Fernandez, __ F.3d __, 2006 WL 851670 *6 (2d Cir. Apr. 3, 2006); United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006); United States v. Cooper, 437 F.3d 324 (3d Cir. 2006); United States v. Lisbon, slip op., 2006 WL 306343 *2 (11th Cir. Feb. 10, 2006) ("A sentence within the guidelines range is not presumptively reasonable.") (unpublished).

[10] Jimenez-Beltre, 440 F.3d at 516-19.

[11] See United States v. Hughes, 396 F.3d 374, 381 (4th Cir. 2005); United States v. Crosby, 397 F.3d 103 (2d Cir. Feb. 2, 2005); United States v. Ameline, 400 F.3d 646, 655-56 (Feb. 9, 2005); United States v. Pimental, 367 F.Supp.2d 143 (D. Mass. 2005).

5. Departure, "Non-Guidelines Sentence,"[12] or Both

The Sentencing Commission advocates a three-step approach which would require a departure analysis in every case: (1) Apply the Sentencing Guidelines to establish the advisory sentencing range (which the Commission wrongly contends is entitled to "substantial weight"); (2) Determine if a traditional departure applies; (3) Determine if a non-guideline sentence is warranted under § 3553(a).

The Commission's post-Booker statistics show that courts are imposing sentences below the guideline range (not sponsored by the government) in about 12.5% of cases, but are designating only one fourth of those sentences as downward departures and more than three fourths as otherwise below the guidelines.[13] This may indicate that courts view the use of the 3553(a) factors as more efficient and less vulnerable on appeal than departures.

In either a departure or 3553(a) analysis, a different sentence is authorized if the guideline sentence is greater than necessary to achieve the purposes of sentencing.[14] The Guidelines prohibit and discourage departure on a number of grounds, while the same is not true of a 3553(a) analysis, but the Guidelines also recognize that a court may validly depart on unmentioned grounds. In some cases, a reason that is prohibited or discouraged by the Guidelines could be called a departure on an unmentioned ground.

The problem with this approach, and perhaps the reason the district courts have tended to rely on 3553(a) rather than "departing" after Booker, is that the courts (and the Commission itself) have interpreted the departure system more restrictively than necessary. See Paul J. Hofer & Mark H. Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 20-21, 24, 83 (2003) (Appellate courts have enforced the Guidelines more rigidly than expected or required, creating "'unwarranted uniformity,' which is really just another type of unwarranted disparity."); United States v. Bailey, 369 F.Supp.2d 1090, 1100 (D. Neb. May 12, 2005) ("The Guidelines, while certainly not elastic, are not as rigid as we make out.").

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[12] Some of the material in this subsection draws from an excellent paper by Alan DuBois, an Assistant Federal Public Defender in the Eastern District of North Carolina.

[13] U.S. Sentencing Commission, Final Report on the Impact of United States v. Booker on Federal Sentencing E-1 (March 2006) (hereinafter "Booker Report"), http://www.ussc.gov/booker_report/Booker_Report.pdf.

[14] Under the Guidelines, a court "may depart from the applicable guideline range if . . . there exists an aggravating or mitigating circumstance . . . of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, *in order to advance the sentencing objectives set forth in 18 U.S.C. § 3553(a)(2),* should result in a sentence different from that described." U.S.S.G § 5K2.0(a) (emphasis supplied).

The Booker remedial opinion should be read as a repudiation and reconceptualization of that restrictive departure jurisprudence.[15] As the Eighth Circuit has noted, Booker excised both the PROTECT Act's *de novo* standard of review under § 3742(e), and "§ 3553(b) and its narrow prescription for when departures are warranted." United States v. Hadash, 408 F.3d 1080, 1083 (8th Cir. 2005). This means, the court explained, that Booker went further to expand district courts' discretion to depart than simply returning to the pre-PROTECT Act standard under Koon v. United States, 518 U.S. 81 (1996). Under Koon, a district court could depart without abusing its discretion if the Sentencing Commission did not adequately consider the relevant fact in formulating the guidelines, which was to be determined by considering only the guidelines, policy statements and official commentary, pursuant to § 3553(b). After Booker, appellate review differs from Koon review "*because our primary point of reference is now § 3553(a), instead of § 3553(b) as interpreted in Koon*." Id.

Thus, it should be possible to "depart" more freely than the strict pre-Booker regime allowed, and some of the stricter sentencing judges have done so.[16] Even so, in a case involving a discouraged or prohibited factor, the judge should state, in the alternative, that s/he would impose the same sentence for a reason or reasons under 3553(a). Compare United States v. Robinson, 409 F.3d 979 (8th Cir. 2005) (finding no clear error in factual determination that defendant did not meet requirements of section 5H1.4 for departure based on extraordinary physical impairment) with United States v. Ryder, 414 F.3d 908, 920 (8th Cir. 2005) ("The prior mandatory nature of the Guidelines deprived the district court of the opportunity to consider age and physical condition in any manner other than as a basis for a Guidelines departure. Now coupled with the requirements in § 3553 that a district court consider a defendant's characteristics and the need to provide medical care in the most effective manner when sentencing a defendant, the district court would be well within its discretion to at least consider Alfred's and Mary Ann's ages and medical conditions as non-Guideline factors on remand.")

6. Suggested Argument Framework

In general:

[15] See Booker, 125 S. Ct. at 765 ("In 2003, Congress modified the pre-existing text, adding a *de novo* standard of review for departures and inserting cross-references to § 3553(b)(1). . . . In light of today's holding, the reasons for these revisions-- to make Guidelines sentencing even more mandatory than it had been--have ceased to be relevant.").

[16] See United States v. Bailey, 369 F.Supp.2d 1090 (D. Neb. May 12, 2005) (Kopf, J.) (stating that the Guidelines "are not as rigid as we make out" and departing 8 levels to probation based on extraordinary family circumstances in a child pornography case); United States v. Perez-Chavez, No. 2:05-CR-00003PGC, **24-26, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005) (Cassell, J.) (departing for family circumstances where defendant returned to the U.S. to help his wife with responsibilities that were overwhelming her).

(1) Set forth all of the facts and circumstances relevant to all applicable 3553(a) factors, usually starting with the sympathetic history and characteristics of the defendant, then the unusual circumstances of the offense.
(2) Make all factual and legal arguments for the lowest advisory guideline range and calculate it. (Do not neglect this step.)
(3) Argue for a sentence below the guideline range, explaining why the guideline sentence is greater than necessary to achieve the goals of sentencing in 3553(a)(2), based on the 3553(a) factors.
(4) Include in step (3) traditional departure grounds if available.
(5) Ask the court to state that it is departing downward if there is a basis for doing so, *and* in every case that it is imposing the sentence that is sufficient but not greater than necessary to achieve the goals of sentencing based on all of the 3553(a) factors present in the case.[17]

Provide Proposed Statement of Reasons/Findings of Fact and Conclusions of Law. Make sure the judge checks all the right boxes on the Statement of Reasons form (indicating the reasons and the government's position with respect to any below-guideline sentence).

This approach will frame a well-reasoned decision that will stand up in the event of a government appeal, provide a favorable record for a defense appeal, and provide reasons that Congress can understand.

III. Reasons for Sentences Below the Guideline Range

This section contains some of the compelling sentencing arguments that can now be made that were unavailable or would not have had as much force before Booker. For others, see Levine, 128 Easy Mitigating Factors, available at http://www.fd.org/pdf_lib/128EasyMitigatingFactors.pdf; Kalar, McClellan & Sands, A *Booker* Advisory: Into the Breyer Patch, Champion at 8 (March 29, 2005); Blanchard & Rogers, Presumptively Unreasonable: Using the Sentencing Commission's Words to Attack the Advisory Guidelines, Champion at 24 (March 29, 2005); McColgin & Sweitzer, Post-*Booker* Sentencing Litigation Strategies, Parts 1 & 2, Champion (November & December 2005).

[17] This is the general approach, with some variation, reflected in many published decisions. See, e.g., United States v. Moreland, 366 F.Supp.2d 416, 423 (S.D. W. Va. 2005), aff'd in part, vacated in part, 437 F.3d 424 (4th Cir. 2006); United States v. Pimental, 367 F.Supp.2d 143 (D. Mass. 2005); Simon v. United States, 361 F.Supp.2d 35, 40-49 (E.D.N.Y. 2005); United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. Mar. 3, 2005); United States v. Smith, 359 F.Supp.2d 771 (E.D. Wis. Mar. 3, 2005); United States v. Mullins, 356 F.Supp.2d 617 (W.D. Va. Feb. 16, 2005); United States v. Blume, 2005 WL 356816 (S.D.N.Y. Feb. 14, 2005); United States v. Nellum, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); United States v. Galvez-Barrios, 2005 WL 323703 (E.D. Wis. Feb. 2, 2005); United States v. Myers, 353 F. Supp.2d 1026 (S.D. Iowa Jan. 26, 2005).

A. Positive History and Characteristics Previously Discouraged or Prohibited

The Sentencing Reform Act has always provided that the "court, in determining the particular sentence to be imposed, shall consider-- (1) the nature and circumstances of the offense *and the history and characteristics of the defendant*," 18 U.S.C. § 3553(a)(1) (emphasis supplied), and that "[n]o limitation shall be placed on the information concerning the *background, character*, and conduct of [the defendant which the court] may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (emphasis supplied). However, other than the aggravating factor of criminal history, the mandatory guidelines and interpretive caselaw prohibited, discouraged or hedged with limitations and exceptions the defendant's mitigating history and characteristics.

1. Discouraged Factors

Mitigating factors that were previously discouraged except under certain circumstances or for certain purposes should be considered more broadly to the extent they bear on the sentencing considerations found in section 3553(a). Those are age, education and vocational skills, mental and emotional conditions not meeting the diminished capacity standard, physical condition or appearance, employment record, family ties and responsibilities, military, civic, charitable or public service. See U.S.S.G. §§ 5H1.1-6, 11. Likewise, the limitations on each of the generally encouraged mitigating factors in U.S.S.G. §§ 5K2.10 (victim's conduct), 5K2.11 (lesser harms), 5K2.12 (coercion and duress), 5K2.13 (diminished capacity), 5K2.16 (voluntary disclosure), 5K2.19 (post-sentencing rehabilitation efforts), 5K2.20 (aberrant behavior), and 5K2.23 (discharged terms of imprisonment) should no longer bar consideration of these factors to the extent they are relevant under section 3553(a).

Post-Booker cases illustrate that the court may consider formerly discouraged factors, or facts that would not have met pre-Booker standards for departure, to impose a lower sentence. See, e.g., United States v. Spigner, 416 F.3d 708, 711-13 & n.1 (8th Cir. 2005) (health problems); United States v. Gorsuch, 404 F.3d 543 (1st Cir. 2005) ("serious mental illness, maternal responsibilities, and lack of a criminal record may be more relevant than under the pre-Booker regime of mandatory guidelines"); United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005) (that defendant was caretaker for brain damaged son may be considered under 3553(a) though there were alternative means of care and thus not ground for departure); United States v. Haidley, 400 F.3d 642, 645 (8th Cir. Mar. 16, 2005) (that defendant used embezzled money for her child's high medical expenses, and her "family situation, which included two young children at home" (neither of which rose to the level of departure) were both "factors which can be considered under 3553(a)(1) ('the nature and circumstances of the offense and the history and characteristics of the defendant').").

Practice Tip: First check to see what Chapter 5 has to say about the factor. If it seems to discourage departure, give reasons grounded in 3553(a) as to why the court should consider it in this case.

For example, U.S.S.G. 5H1.1 states: "Age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4." Section 5H1.4 states, in part: "Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. However, an extraordinary physical impairment may be a reason to depart downward: e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."

Thus, youth is not ordinarily relevant. But the Supreme Court's decision striking down the death penalty for juveniles, Roper v. Simmons, 543 U.S. __, 125 S. Ct. 1183 (2005), discusses the "diminished culpability of juveniles," the "mitigating force of youth," due in part to their "immaturity" and "vulnerability," which bears on what is "just punishment" for a youthful offender under 3553(a)(2)(A). In United States v. Naylor, 359 F. Supp.2d 521 (W.D. Va. 2005), the court reduced the defendant's career offender sentence from 188 to 120 months because he committed the predicates (nine counts of breaking and entering sentenced on two separate occasions) during a six-week period in the middle of which he turned seventeen, and because of "technical distinctions concerning age" whereby the predicates would not have been counted if the state had treated him as a juvenile, or if his present crime was committed a few months later. Citing Roper, the judge stated that "[j]uveniles have an underdeveloped sense of responsibility, are more vulnerable to negative influences and peer pressure, and their character is not as well formed as an adult's. Thus, 'it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'" Id. at 524 (quoting Roper, 125 S. Ct. at 1195-96).

The defendant's age may warrant a lower sentence if, because of his age, the resulting sentence is greater than necessary to reflect the seriousness of the offense. See United States v. Lewis, 406 F.3d 11, 21-22 (1st Cir. 2005) (remanding for re-sentencing where district court expressed concern that the guideline sentence of 319 months amounted to a life sentence for a defendant who was 38 years old).

As to defendants over forty, the risk of recidivism drops dramatically, lessening the need to protect the public from further crimes of the defendant under 3553(a)(2)(C). See United States Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 ("Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.), available at http://www.ussc.gov/publicat/Recidivism_General.pdf.

Elderly offenders, whether or not seriously infirm, suffer greater punishment in prison because they are at risk of being preyed upon by younger inmates and lack social support. See Correctional Health Care, Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates, U.S. Department of Justice, National Institute of Corrections (2004 ed.), http://www.nicic.org/Library/018735.

Thus, though age and infirmity were discouraged bases for departure, they may be considered under 3553(a). United States v. Ryder, 414 F.3d 908, 920 (8th Cir. 2005); United States v. Lata, 415 F.3d 107, 113 (1st Cir. 2005); United States v. Thomas, 360 F.Supp.2d 238, 243 (D. Mass. Mar. 14, 2005); Simon v. United States, 361 F.Supp.2d 35 (E.D.N.Y. Mar. 17, 2005); United States v. Nellum, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

A defendant's impaired health, whether s/he is elderly or not, is a greater burden on the federal prison system as well as making incarceration a greater burden on the defendant, Simon v. United States, supra, and needed medical care must be provided in "the most effective manner," 18 U.S.C. § 3553(a)(2)(D), which may well not be in prison. See subpart E, infra.

2. Prohibited Factors

Congress directed the Commission to make the Guidelines neutral as to the constitutionally invidious factors of race, gender, national origin, creed, and socio-economic status, see 28 U.S.C. § 994(d), and the Commission prohibited those factors from consideration. See U.S.S.G. § 5H1.10. Obviously, a sentence cannot be increased or decreased *because* of one of these characteristics because that would violate the Equal Protection Clause. However, these issues have never been prohibited from consideration in any way, and should be considered in relation to any of the 3553(a) factors. For example, disparate racial impact, battered woman's syndrome, devout participation in religious activities, the defendant's poverty in contributing to the offense,[18] or the need to work to pay restitution,[19] are all valid considerations.

The Commission also prohibited as grounds for downward departure drug or alcohol dependence and gambling addiction, U.S.S.G. § 5H1.4, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, U.S.S.G. § 5H1.12, personal financial difficulties or economic pressures on a trade or business, U.S.S.G.§ 5K2.12, and post-sentencing rehabilitation on re-sentencing. U.S.S.G. § 5K2.19. Courts may now consider such factors to the extent they bear on the sentencing considerations found in section 3553(a). See, e.g., United States v. Wilkerson, 401 F.3d

[18] Cf. United States v. Genao, 831 F.Supp.2d 246, 254 (S.D.N.Y. 1993) (poor and uneducated pay the price of Congress' frustration at inability of law enforcement to stem distribution of drugs, system of justice that strips judges of power to even consider socio-economic and educational background of defendant is not rational).

[19] United States v. Peterson, 363 F.Supp.2d 1060, 1062 (E.D. Wis. Mar. 28, 2005).

1 (1st Cir. June 9, 2005) (judge may impose lower sentence based on "the most horrible young life he had seen in 17 years on the bench"); United States v. Haidley, 400 F.3d 642, 645 (8th Cir. Mar. 16, 2005) (defendant needed embezzled money for her child's high medical expenses); United States v. Murray, 2005 WL 1200185 (S.D.N.Y. May 20, 2005) (court may consider post-sentence conduct).

You can argue that the Commission's reason for prohibiting the factor does not apply to your client, if you can locate the reason. The Commission occasionally gives a reason for its actions in the guideline itself or the amendment through which it was promulgated, which can be found in Appendix C of the Guidelines Manual. For example, the Commission said that drug or alcohol dependence was prohibited because it creates an "increased propensity to commit crime." See USSG 5H1.4. You can argue that in this particular case, substance abuse explains the offense and your client has overcome the problem and completely turned his life around, indicating a reduced danger of recidivism.

On the other hand, the Commission gave no reason for prohibiting lack of guidance as a youth and similar circumstances indicating a disadvantaged background. See USSG 5H1.12; Appendix C, amendment 466. Arguably, there is therefore no reason to give it weight. Notably, Judge Cassell, who contends that the Guidelines already take into account the 3553(a) factors in all but the most extraordinary case, ruled in United States v. Croxford, 324 F.Supp.2d 1230 (D. Utah 2004) that advisory Guidelines allowed him to consider "facts the Guidelines would make irrelevant," and therefore relied in part on the defendant's sexual abuse as a child to impose a sentence below the guideline range. Id. at 1247-29. And in United States v. Clay, 2005 WL 1076243 (E.D. Tenn. May 6, 2005), Judge Greer concluded that the Guidelines are due "substantial weight," but imposed a sentence below the guideline range because, inter alia, the defendant was neglected and abandoned by his addicted mother, his only male role models were drug dealers, and he re-established ties with his family and lived drug free for a year after the offense, which the judge characterized as "family circumstances."

B. Guideline Ranges That Are Greater Than Necessary or Dis-Serve the Purposes of Sentencing Generally or in the Individual Case

Congress directed the Sentencing Commission to establish guidelines and policy statements that assure that the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are met, provide certainty and fairness, avoid unwarranted disparity among similarly situated defendants, provide sufficient flexibility to permit individualized sentences, and to reflect advancement in knowledge of human behavior. See 28 U.S.C. § 991(b)(1). Congress also directed the Commission to develop means of measuring the degree to which sentencing practices are effective in meeting the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), see 28 U.S.C. § 991(b)(2), and to periodically review and revise the guidelines based on data and consultation with judges, practitioners and probation officers. See 28 U.S.C. § 994(o). A number of critics persuasively argue that this endeavor has failed. See, e.g., Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 419 (1992) ("Since their introduction in 1987, however, the federal sentencing

guidelines have not been designed or applied in a manner explicitly intended to achieve specific purposes of sentencing."); Michael M. O'Hear, The Original Intent of Uniformity in Sentencing, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: http://ssrn.com/abstract=800831. The amendments to the Guidelines over the years have, except in rare instances, made punishment only more and more severe. This has often been done without explanation, and often was not justified by the data and information before the Commission, and increasingly has been driven by real or perceived political pressures. See Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315 (2005).

1. Guidelines (and Statutes) Identified as Problematic by the Commission

In its recently published Fifteen Year Study, the Commission found that (1) the 100 to 1 crack/powder quantity ratio creates racial disparity, (2) the career offender provision creates racial disparity and serves no clear sentencing purpose, including the need to protect the public from further crimes of the defendant, (3) congressional directives that required or suggested amendments to the guidelines (set forth in Appendix B to the Study at www.ussc.gov/15_year/appendix_B.pdf) were often not based on careful study or the purposes of punishment but politics, (4) the drug trafficking guideline in combination with the relevant conduct rule creates sentences that are far higher than past practice and greater than required by statutes, for reasons that are unexplained and unknown, and (5) prosecutorial policies and practices especially in the use of relevant conduct and substantial assistance departures create unwarranted disparity. See United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 49, 76, 92, 103-06, 112, 131-34, 143-46 (2004) (hereinafter "Fifteen Year Study"), available at www.ussc.gov; Blanchard & Rogers, Presumptively Unreasonable: Using the Sentencing Commission's Words to Attack the Advisory Guidelines, Champion at 24 (March 29, 2005); Amy Baron-Evans, Antidote to the Kool-Aid (April 10, 2006).

The court may adjust the sentence to avoid a sentence that, because of a *mandatory minimum* that has not been incorporated in the guidelines, is contrary to the goals of sentencing. See United States v. Alexander, 381 F.Supp.2d 884 (E.D. Wis. Aug. 9, 2005) (imposing 79 months, where guideline range was 37-46 months, 924(c) required consecutive mandatory minimum of 60 months, and guideline range would have been 46-57 months if defendant got two guideline points for possession of a firearm rather than being charged with 924(c)); United States v. Angelos, 345 F. Supp.2d 1227, 1260 (D. Utah Nov. 16, 2004) (in 924(c) case requiring consecutive mandatory minimum of 55 years, court reduced guideline sentence from 78-97 months to one day).

2. Other Guidelines That Do Not Advance the Goals and Purposes of the Sentencing Reform Act

You can demonstrate that the applicable guideline in your client's case was not designed with the purposes of sentencing in mind, was not justified by the available sentencing data, and produces a sentence that is greater than necessary to achieve the purposes of punishment. The "legislative history" of most guideline amendments is either non-existent or not neatly recorded in one place, but it often can be reconstructed from the notices of proposed amendments and issues for comment published in the Federal Register, the Commission's own publications, including Reports to Congress, Annual Reports and Statistical Sourcebooks and Research Projects and Working Group Reports, letters and testimony from practitioners, probation officers, judges and other sentencing experts that were before the Commission, all of which are available at www.ussc.gov, and law review articles recounting the history of particular amendments. See, e.g., Frank O. Bowman III, Pour Encourager Les Autres?, 1 Ohio St. J. Crim. L. 373 (Spring 2004); Frank O. Bowman III, The Sarbanes-Oxley Act and What Came After, 15 Fed. Sent. R. 231 (April 2003); Robert J. McWhirter & Jon M. Sands, A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases, 8 Fed. Sent. R. 275 (Mar./Apr. 1996); Amy Baron-Evans, Antidote to the Kool-Aid (April 10, 2006).

An interesting example of how this might be done is contained in a letter dated March 25, 2005 from the Practitioners' Advisory Group to the Commission criticizing proposed amendments to the guidelines for Antitrust Offenses in terms of the 3553(a) framework. See www.usscpag.com/index.asp. The letter makes a strong case, based on statistics, that the proposed amendments would create sentences greater than necessary to achieve the purposes of punishment. The Commission promulgated the amendments.

3. Guidelines that Do Not Fit the Offense or the Offender

The guideline may simply fail to reflect the nature of the offense and the characteristics of the offender in the individual case. See, e.g., United States v. Emmenegger, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004) ("In many cases ... the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence."); United States v. Myers, 353 F.Supp.2d 1026, 1031 (S.D. Iowa Jan. 26, 2005) (imposing sentence of time served and three months' supervised release for defendant who pled guilty to possession of a sawed-off shotgun, in view of "the aberrant nature of the conduct, the law-abiding character of the defendant, the almost innocent circumstances surrounding the shortening of the Defendant's gun, the Defendant's background, the dependence of his family on his income, the lack of any need for rehabilitation on the part of the Defendant, his undergoing significant alcohol evaluation and treatment.").

The 16-level increase for prior aggravated felonies in illegal re-entry cases was never explained by the Commission. Though Congress did not direct the Commission to do anything, the 16-level increase followed on the heels of a statutory amendment which, according to the legislative history, was based on the representation that "these felons" have a history of involvement in syndicates involving drug trafficking, money laundering, racketeering, weapons sales, murder and prostitution. See 133 Cong. Rec.

S4992-01 (1987). When the defendant does not fit that alleged profile, argue that the guideline sentence is greater than necessary to achieve just punishment.

A number of courts have held that the career offender guideline produced a sentence that was greater than necessary to achieve the purposes of sentencing. See United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) (affirming 90-month sentence where career offender sentence for sale of $350 worth of crack was 188-235 months based on one prior conviction of possession with intent to sell cocaine and one conviction of carrying a concealed firearm); United States v. MacKinnon, 401 F.3d 8 (1st Cir. 2005) (remanding for re-sentencing where the district court, before Booker, found that the career offender guideline produced a sentence that was "obscene" and "unwarranted by the conduct."); United States v. Hubbard, 369 F. Supp.2d 146, 148 (D. Mass. 2005) (imposing sentence of 108 months rather than 188-235 month career offender range based on diminished capacity from appallingly traumatic childhood which "directly precipitated his life on the streets and his conduct as a career offender"); United States v. Williams, 372 F. Supp.2d 1335, 2005 (M.D. Fla. 2005) (sentencing defendant to 204 months because career offender sentence of 360 months to life was out of character with the seriousness of the offense, was not necessary to achieve deterrence or incapacitation, and would undermine respect for law); United States v. Person, 377 F. Supp.2d 308 (D. Mass. 2005) (departing downward from 262 to 84 months where career offender status based on one drug distribution and resisting arrest "grossly overstated" seriousness of defendant's criminal history); United States v. Carvajal, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005) (imposing sentence of 168 months because career offender guideline of 262 months was "excessive," and would be "greater than necessary, to comply with the purposes" set forth in the statute, including rehabilitation, which cannot be achieved without hope).

At sentencing in United States v. Burhoe, No. 1:01-cr-10464-RCL (D. Mass.), Judge Lindsay resorted to plain English, imposing 77 months instead of a career offender sentence of 151 months, in part because the defendant had a significant work history and thus was not in his personal profile a "career offender."

Congress directed the Commission to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." See 28 U.S.C. § 994(j). The Commission has not done so. The Commission has recently found that minimal or no prior involvement with the criminal justice system is a powerful predictor of recidivism, which the Guidelines do not take into account.[20] If your client is such an offender but the guideline sentence puts him or her in prison, you can argue that the sentence is greater than necessary based on this statutory directive and other applicable 3553(a) factors.

[20] A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score at 15, http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf.

C. Need to avoid unwarranted sentence disparities, 18 U.S.C. § 3553(a)(6)

1. Cooperators v. non-cooperators -- United States v. Aldridge, 413 F.3d 829, 835-36 (8th Cir. 2005); United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. 2005) (defendants in same case prosecuted in different districts with different substantial assistance policies).

2. Equally culpable co-defendant with a lesser sentence – United States v. Lewis, 406 F.3d 11, 21-22 (1st Cir. 2005) (defendant's sentence because of his criminal history was significantly higher than co-defendant's based on same charges); United States v. Colby, 367 F.Supp.2d 1 (D. Me. 2005) (where first defendant was sentenced after Blakely and before Booker and thus received a sentence of one month incarceration and 7 months home detention based only on facts admitted, other defendant sentenced after Booker would receive same sentence though his guideline range was 37-46 months based on judge found facts); United States v. Revock, 353 F.Supp.2d 127 (D. Me. 2005) (similar); United States v. Gray, 362 F.Supp.2d 714, 718-19 (S.D. W. Va. 2005) (imposing same sentence as co-defendant though guidelines range was different because they were equally culpable); United States v. Thurston, No. 1:98-cr-10026-MLW (D. Mass.), Statement of Reasons June 17, 2005 (imposing sentence of three months where guideline range was 63-78 months, to avoid unwarranted disparity with co-defendant and promote respect for law), available on PACER; United States v. Burhoe, No. 1:01-cr-10464-RCL (D. Mass.), Statement of Reasons Sept. 24, 2005 (77 months instead of 151 months in part because of gross disparity between his sentence and that of co-defendant who was more typical career offender), available on PACER.

3. 100:1 powder/crack disparity – United States v. Perry, 389 F.Supp.2d 278 (D.R.I. 2005); United States v. Clay, 2005 WL 1076243 at **3-6 (E.D. Tenn. May 6, 2005); United States v. Williams, 372 F. Supp.2d 1335 (M.D. Fla. 2005); Simon v. United States, 361 F.Supp.2d 35 (E.D.N.Y. 2005); United States v. Harris, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005); United States v. Smith, 359 F. Supp.2d 771 (E.D. Wis. Mar. 3, 2005). The Sentencing Project recently published an excellent piece on the policy reasons that the powder/crack ratio is wrong, and the ways in which the courts are dealing with it after Booker. See Sentencing With Discretion: Crack Cocaine Sentencing After *Booker*, www.sentencing project.org.

The government is appealing some of these decisions. In United States v. Pho, 433 F.3d 53 (1st Cir. 2006), the First Circuit issued an opinion that, while full of *dicta* that can be read as requiring mandatory Guidelines, *held* only that the district court could not "jettison" the guideline range and "construct a new sentencing range." After describing the disparity as "a problem that has tormented many enlightened observers ever since Congress promulgated the 100:1 ratio," the court states: "By the same token, we do not intend to diminish the discretion that, after *Booker*, district courts enjoy in sentencing matters or to suggest that, in a drug-trafficking case, *the nature of the contraband and/or the severity of a projected guideline sentence* may not be taken into account on a case-by-case basis." (emphasis added)

In United States v. Eura, 440 F.3d 625 (4th Cir. 2006), the Fourth Circuit essentially followed Pho, prohibiting district courts from substituting a different ratio but leaving them free to sentence outside the range based on individual characteristics and circumstances: "Of course, it does not follow that *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range. We certainly envision instances in which some of the § 3553(a) factors will warrant a variance from the advisory sentencing range in a crack cocaine case. However, a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the factors listed in 18 U.S.C. § 3553(a) and, in reliance on those findings, impose a non-Guidelines sentence that is reasonable." Id. at 633-34 (emphasis in original).

Thus, under Pho and Eura, you can still rely on the problems the Sentencing Commission identified in its various reports to Congress, but individualize them to your client. E.g., the sentence produced by the nature of the contraband overstates the culpability and/or need for deterrence in the particular case because there was no weapon, or no serious violence, it did not involve a minor, the defendant is merely an addict, the quantity or role does not indicate he was a major dealer, etc.

According to the Commission, the rate of non-government-sponsored below-guideline sentences in crack cases more than tripled as compared to the post-Protect Act period, but courts do not explicitly cite the crack/powder disparity as the reason,[21] wisely so.

4. Career Offender guideline, USSG 4B1.1, pegs offense level to statutory maximum for the offense of conviction and automatic CHC VI, requires only two prior felony convictions of either a "crime of violence" or a "controlled substance offense."

Inherent disparity: "The Career Offender provision provides no mechanism for evaluating the relative seriousness of the underlying prior conviction. Instead of reducing unwarranted sentencing disparities, such a mechanical approach ends up creating additional disparities because this Guideline instructs the court to substitute an artificial offense level and criminal history in place of each individual defendant's precise characteristics. This substitution ignores the severity and character of the predicate offenses and equates relatively minor distribution convictions with violent and egregious drug trafficking crimes for sentencing purposes." United States v. Moreland, 366 F.Supp.2d 416, 424 (S.D. W. Va. April 27, 2005) (defendant with career offender range of 30 years to life received 10 years because "[t]wo relatively minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison"), aff'd in part, vacated in part, 437 F.3d 424 (4th Cir. 2006) (upholding decision to vary but finding it was unreasonable in extent); United States v. Williams, 372 F. Supp.2d 1335 (M.D. Fla. 2005) (sentencing defendant to 204 months because career offender sentence of 360 months to life (based on prior convictions for possession of cocaine with intent to deliver and carrying a concealed firearm) was out of character with the seriousness of the offense

[21] Booker Report at 111, 128.

, was not necessary to achieve deterrence or incapacitation, and would undermine respect for law), aff'd, 435 F.3d 1350 (11th Cir. 2006); United States v. Carvajal, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005) (career offender guidelines are "the same regardless of the severity of the crimes, the dangers posed to victims' and bystanders' lives, and other appropriate criteria").

Racial disparity and disparity not warranted by risk of recidivism in any case where the priors are drug trafficking offenses: In its Fifteen Year Report, the Sentencing Commission found that the career offender guideline vastly overstates the risk of recidivism when the predicates are drug offenses, because the recidivism rate for offenders whose career offenders status is based on drug offenses is no more than that for offenders in the criminal history category in which they would have been placed under the normal criminal history rules. The career offender guideline "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." This, furthermore, has a racially disparate impact on Black offenders because most Black offenders fall within the career offender guideline based on prior drug offenses, most likely because drug sales in impoverished minority neighborhoods take place on the street where they are easy to detect. [22]

Driving Offenses classified as "Crimes of Violence," another potential source of racial disparity: Some driving offenses have been characterized as "crimes of violence" by the federal courts, for example, Failure to Stop for a Blue Light under South Carolina law.[23] Many courts and commentators have recognized, and many studies have shown, that Blacks are stopped by the police and not charged with any crime or only with traffic offenses in disproportionate numbers, often called "driving while black."[24]

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[22] Fifteen Year Report at 133-34.

[23] United States v. James, 337 F.3d 387, 391 (4th Cir. 2003).

[24] See Bingham v. City of Manhattan Beach, 341 F.3d 939, 954 (9th Cir. 2003); Washington v. Lambert, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996); Smith v. City of Gretna Police Dept., 175 F. Supp.2d 870, 874 (E.D. La. 2001); Martinez v. Village of Mount Prospect, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000); United States v. Leviner, 31 F. Supp.2d 23, 33 (D. Mass. 1998); David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 341-52 (1998); Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board, 28 Colum. Hum. Rts. L. Rev. 551, 554-69 (1997); Jennifer A. Larrabee, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & Pl'y 291, 296 (1997); David Harris, Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology, 544, 560-69 (1997); Christopher Hall, Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong and the Evolution of Police Discretion, 76 Tex. L. Rev. 1083, 1088 (1998); Matthew Dolan, Summit Addresses Biased Police Stops Officials, Citizens Discuss Solutions in the Shadow of Hampton

The definition of "crime of violence" in the career offender guideline is problematic in that it commonly reaches offenders who are not the "repeat violent offenders" Congress had in mind.[25] In 28 U.S.C. § 994(h), Congress instructed the Commission to provide punishment at or near the maximum for certain offenders with two or more prior felonies that were "crimes of violence." The original career offender guideline defined "crime of violence" as in 18 U.S.C. § 16, section (b) of which defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical *force* against the person or property of another may be used in the course of committing the offense." The Commission later changed the definition, narrowing it in some respects but broadening it in others. The catchall clause now covers any offense punishable by more than one year that "involves conduct that presents a serious potential risk of physical *injury* to another." Unfortunately, the courts have interpreted this to include offenses that are not actually violent, such as failure to pull over for a police cruiser, unlawful use of a motor vehicle, child neglect, walk-away escape from a halfway house, breaking and entering an unoccupied commercial building, and pickpocketing. Further, any offense that is "punishable by more than one year" includes misdemeanors and other minor offenses under state laws that do not attempt to calibrate the maximum penalty according to the seriousness of the offense, while ignoring more salient indicators such as the actual sentence served.[26]

Nonetheless, the Commission, without explanation, limited the extent of a departure for criminal history score overstating the risk of recidivism of a career offender to one level.[59] The rate of below-guideline sentences in career offender cases increased notably post-Booker. See Booker Report at 136-140.

5. Unavailability of "fast track" adjustment under 5K3.1 in your district to avoid unwarranted regional disparity – United States v. Santos, 2005 WL 3434791 **4-7 (S.D.N.Y. Dec. 12, 2005) (and citing unreported cases); United States v. Medrano-Duran, 386 F. Supp.2d 943, 946-48 (N.D. Ill. 2005); United States v. Peralta-Espinoza, 383 F. Supp.2d 1107, 1108 (E.D. Wis. 2005); United States v. Ramirez-Ramirez, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); United States v. Galvez-Barrios, 355 F.Supp.2d 958, 963 (E.D. Wis. 2005).

Incident, The Virginian-Pilot and The Ledger-Star, Norfolk, Va., November 22, 1998, Al; Rick Sarlat, Racial Profiling on Interstates is Under Attack: Pa. Legislation drafted, The Philadelphia Tribune, May 26, 1998, 1A.

[25] S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

[26] See NACDL Report: Truth in Sentencing? The Gonzales Cases, 17 Fed. Sent. Rep. 327, **7-11 (June 2005) (defendant was classified as a career offender based on possession of less than 1 gram of crack and three "crimes of violence" classified as non-violent misdemeanors under state law, all committed at the age of 17, to which he pled guilty on the same day when he was 18, and for which he received a suspended sentence and served 7 months when revoked).

[59]U.S.S.G., App. C, amend. 651 (2004).

DOJ's position is that the absence of a fast track program in the district does not create "unwarranted" disparity because Congress approved the disparity created by the Attorney General's designation of some districts for fast track programs and not others, that the disparity is warranted by an explosion of immigration cases in southwest border districts, and that ameliorating that disparity in non-fast track districts somehow damages the government's fast track programs in other districts. All of this is false.

As the district court found in United States v. Medrano-Duran, 386 F. Supp.2d 943 (N.D. Ill. 2005), based on documents submitted to it by the government,[27] (1) the Attorney General approved a charge bargain method in five districts, which is not the four-level departure Congress authorized and that the Commission promulgated, see see PROTECT Act, Pub. L. 108-21 § 401(m)(2)(B); USSG § 5K3.1, and results in more of a reduction than a four-level departure, and (2) in five of the approved districts each AUSA handles between .58 and 3.32 immigration cases per year. In another case, the court noted that the Attorney General has approved fast track programs in districts far from the southwest border with small immigration caseloads, including Georgia, Idaho, Nebraska and North Dakota. United States v. Perez-Chavez, 2005 U.S. Dist. Lexis 9252 *9 (D. Utah 2005).

Thus, the Attorney General is operating fast track programs that Congress did not specifically authorize. While this does not mean that those programs are forbidden, it demonstrates that the government's argument that Congress deemed to be warranted any disparity created by the Attorney General's fast track programs is specious. Further, that Congress authorized the Attorney General to create fast track programs does not mean that it forbade courts from ameliorating disparities among defendants with similar records convicted of the same conduct. Congress' purpose was not to create regional disparity, but to increase the number of prosecutions in districts allegedly overwhelmed with immigration cases. That purpose is in no way undermined by a variance that ameliorates the unwarranted regional disparity resulting from the government's choice of some districts for fast track programs and not others. In fact, courts should consider the fact that the government initiates fast track departures in at least 73% of illegal re-entry cases as strong objective evidence that those sentences are sufficient to satisfy the need for just punishment, adequate deterrence and incapacitation, regardless of where the defendant is prosecuted.

When defendants seek lower sentences based on co-defendant disparity, the government argues, and the courts of appeals often accept, that the unwarranted disparity in subsection (a)(6) refers to a national norm. E.g., United States v. Smith, __F.3d__, 2006 WL 893622 (Apr. 7, 2006). Use the national norm theory to the defendant's advantage in the lack of fast track context.

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[27] See United States v. Medrano-Duran, N.D. Illinois, Document 19 at 8, 22-37, available on PACER at https://ecf.ilnd.uscourts.gov/cgi-bin/show_case_doc?19,143476,,,,,7745517,1.

The Medrano-Duran judge said: "There is nothing in § 3553, *Booker*, or any other existing authority to support a construction of § 3553(a)(6) that allows Congress and prosecutors to determine what sentence disparities are warranted and unwarranted but prevents a court from doing so." In a report to Congress in 2003, the Commission stated: "Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders."[28]

Thus far, there is no court of appeals decision from a government appeal of a lower sentence based on absence of fast track, though a government appeal is pending in the Fourth Circuit in United States v. Perez-Pena, No. 05-5054, which will be argued in May, and has been ably briefed by the defendant-appellee. In cases where the defendant claimed on appeal that the district court erred by not imposing a non-guideline sentence on that basis, the D.C., Seventh and Tenth Circuits affirmed but did not preclude it as a basis for consideration.[29] The First, Sixth and Eighth Circuits have come close to precluding this disparity as a basis for a variance based on the government's congressional intent argument, with no apparent awareness of the relevant facts or law.[30]

6. Local v. federal sentencing disparity for same conduct -- see United States v. Snyder, 136 F.3d 65 (1st Cir. 1998), in which district court was reversed for such a departure, now possibly available under 3553(a)(6), depending on the circumstances. See United States v. Moreland, 366 F.Supp.2d 416, 422-23 & n.2 (S.D. W. Va. April 27, 2005); United States v. Wilkerson, 411 F.3d 1 (1st Cir. June 9, 2005) ("disparate treatment between federal and state court sentences"). Note that the government sought rehearing in Wilkerson seeking a ruling that disparity between state and federal sentences is a *per se* invalid reason for a sentence outside the guidelines. The defense argued, inter alia, that the district court in this case was concerned that the officer had referred the case

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[28] See U.S. Sentencing Commission, Report to Congress: Downward Departures from the Federal Sentencing Guidelines 66-67 (October 2003), available at http://www.ussc.gov/departrpt03/departrpt03.pdf.

[29] United States v. Martinez-Martinez, __ F.3d __, 2006 WL 722140 (7th Cir. Mar. 23, 2006); United States v. Simpson, 2005 WL 3370060 **8-10 (D.C. Cir. Dec. 13, 2005); United States v. Morales-Chaires, 2005 WL 3307395 (10 th Cir. Dec. 7, 2005).

[30] United States v. Hernandez-Cervantes, 161 Fed.Appx. 508 (6th Cir. Dec. 23, 2005) (Congress authorized the disparity); United States v. Sebastian, __ F.3d __, 2006 WL 265507 (8th Cir. 2006) ("to require the district court to vary from the advisory guidelines based solely on the existence of early disposition programs in other districts would conflict with" Congress' and the Attorney General's decisions); United States v. Martinez-Flores, 428 F.3d 22, 30 n.3 (1st Cir. 2005) stating in *dicta* that "[i]t is arguable even post-Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable.").

for federal prosecution because the defendant had once thrown a lizard on him and that personal animus was not a legitimate law enforcement objective. The panel added only this: "We express no opinion at this time about whether federal-state disparities may be considered under the post-*Booker* advisory guidelines."

D. Circumstances in Which Cooperation May be Considered Without a Government Motion: Bad Faith, Reduced Need for Deterrence, Need to Avoid Unwarranted Disparity

The Guidelines (in § 5K1.1) but not the statute (in 28 U.S.C. § 994(n)) require a government motion for departure based on "substantial assistance" to the government. Thus, a departure for "substantial assistance" without a government motion may well be reversed. United States v. Crawford, 407 F.3d 1174, 1182 (11th Cir. 2005). A variance based on the defendant's cooperation or efforts to cooperate, however, may be upheld if it relates to the defendant's character (e.g., remorse and rehabilitation) and the purposes of sentencing (e.g., the likelihood of rehabilitation, the necessity for individual deterrence, a reduced need for punishment). United States v. Fernandez, __ F.3d __, 2006 WL 851670 **4, 11 (2d Cir. Apr. 3, 2006). In United States v. Murray, 2005 WL 1200185 (S.D.N.Y. May 20, 2005), the court determined that it would consider that the defendant cooperated after his original sentencing which led to multiple indictments including two for murder and testified at the trial of one of them when he had nothing to gain. This conduct was "significant" and "goes to the heart of the characteristics of this Defendant and provides support for his genuine contrition." The government did not appeal.

The Sentencing Commission reports lower recidivism rates for defendants who receive substantial assistance departures. U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 14 (May 2004). If, as one would expect, this stems from true remorse, cutting ties with former criminal associates, and the like, then the same should hold true for defendants who cooperate but are not rewarded by the government.

In United States v. Lazenby, __ F.3d __, 2006 WL 569284 (8th Cir. 2006) (Loken, J.), the single case in which a court of appeals reversed a within-guideline sentence, the Eighth Circuit found that the district court did not adequately consider a number of relevant factors and remanded for such consideration. The relevant factors were, first, that Goodwin pled guilty first of all the co-conspirators, cooperated fully and stood ready to testify against the others. The threat of her testimony caused them to plead guilty and caused co-defendant Lazenby to drop objections to her pre-sentence report; thus, her in-court testimony was not needed; the government therefore declined to move for a downward departure under § 5K1.1. Second, the prosecutor stated that Goodwin was similarly situated to Lazenby (who received a 12-month sentence), and the facts set forth in the two pre-sentence reports showed that Lazenby was if anything more culpable. Third, while perfect parity among co-defendants may be impossible, the court gave too little weight to the extreme disparity in the sentences imposed on these two members of the same conspiracy and the need to promote respect for law. Id. at **2, 4-5. At the same time, the court reversed Lazenby's 12-month below-guideline sentence as

unreasonable in extent, because although her post-offense rehabilitation was "dramatic," a 12-month sentence did not reflect the seriousness of the offense and created unwarranted disparity compared with higher sentences imposed on less culpable members of the same conspiracy. Id. at **3-4.

In United States v. Hubbard, 369 F.Supp.2d 146, 150 (D. Mass. Apr. 25, 2005), Judge Ponsor said that if his other rulings reducing the defendant's sentence were reversed on appeal, remand for re-sentencing may be necessary to "ventilate" the issue of the government's bad faith in failure to abide by its agreement, and indicated that the court itself could correct for the government's bad faith under section 3553(a). For most defendants, this would be preferable to vacating the plea.

The accident of where different defendants are caught and prosecuted and disparate substantial assistance practices in the different districts may create unwarranted disparity that the court should correct. See United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. Mar. 3, 2005).

E. "Kinds of sentences available," 18 U.S.C. § 3553(a)(3)

1. Chapter 5, Parts A-D, no longer mandatory.

Several district courts have recognized what should be obvious, that the "kinds of sentences available" does not refer to U.S.S.G. § 5C1.1, and that they need not impose the kind of sentence recommended by U.S.S.G. § 5C1.1. See United States v. Anderson, 365 F.Supp.2d 67 (D. Me. 2005); United States v. Greer, 375 F.Supp.2d 790 (E.D. Wis. 2005); United States v. Cherry, 366 F.Supp.2d 372 (E.D. Va. 2005); United States v. Myers, 353 F.Supp.2d 1036 (S.D. Iowa 2005); United States v. Ranum, 353 F.Supp.2d 984 (E.D. Wis. 2005).

Only statutory provisions limit what kinds of sentences may be imposed. That includes mandatory minimums; 18 USC § 3559(c)-(e) (mandatory life for "serious violent felony" after two or more serious violent felonies or serious drug offenses; mandatory life for certain crimes against children); § 3561(a) (probation precluded for Class A or B felonies, or an offense for which probation has been expressly precluded); § 3571 (fines are not required, limits on amount)[31]; § 3581 (limits on authorized terms of imprisonment by Class of felony or misdemeanor); § 3583 (supervised release is discretionary)[32]; § 3663A (mandatory restitution).

[31] United States v. Huber, 404 F.3d 1047 (8th Cir. April 21, 2005) (rejecting government=s argument that district court erred in failing to impose fine that government claimed was required because guidelines are now advisory and there is no statutory authority requiring imposition of fine).

[32] United States v. Melton, unpublished, 2005 WL 1475302 (after *Booker*, district court is no longer required to impose term of supervised release because guidelines are advisory)

Note that even if a statutory limitation applies, the court may impose a sentence below any minimum imposed by statute upon motion of the government to reflect substantial assistance. See 18 U.S.C. § 3553(e). This includes not only typical mandatory minimums but, for example, the prohibition against probation for a Class A or B felony.

2. To provide "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D)

The "court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment is not an appropriate means of promoting correction and rehabilitation*." 18 U.S.C. § 3582(a) (emphasis supplied).

The Bureau of Prisons has recently made numerous changes that make punishment harsher and eliminate treatment and rehabilitation opportunities that judges have recommended or assumed were available in the past, for reasons that have nothing to do with the purposes of punishment:[33]

- Change in availability of Community Confinement Centers (CCCs), both for initial designation and pre-release placement
- Elimination of ICC (Boot Camp) programs
- Closure of stand alone camps
- Limitations on RDAP participation and benefit (Residential Drug Abuse Treatment Program with up to 12 month sentence reduction and up to 6 months in halfway house at end of sentence)
- Limitations on camp placement because of certain offenses of conviction
- Lack of recreation (particularly weight training) facilities and/or directive not to repair or replace
- Curtailment of many educational programs facilitated by local community colleges
- Calculating good time credit at only 47 days per year rather than 54 days per year
- Cuts in quality and regularity of medical and mental health care

The court can now fashion a sentence that recreates what the BOP has eliminated or that otherwise accomplishes treatment or rehabilitation in the most effective manner, e.g., order that the defendant spend all of his sentence or the last six months in a halfway

[33] Some of the BOP's changes are discussed in Bussert & Sickler, Bureau of Prisons Update: More Beds, Less Rehabilitation, The Champion (Mar. 2005). To keep abreast of changes in BOP policy and complaints about particular policies and institutions, join BOP Watch. http://groups.yahoo.com/group/bopwatch/.

house (as a condition of probation or supervised release) while working to repay the victim; order all or part of the sentence to be served in residential drug treatment while working to support his family; impose probation, with or without electronic monitoring, so that the defendant can receive medical or mental health treatment or educational or vocational training "in the most effective manner," etc.

To prove that BOP does not provide the needed treatment or rehabilitation in the most effective manner, you can submit publicly available documents or articles when they are available, your own affidavit (or that of a sentencing specialist, for example) based on conversations with BOP staff, or use expert testimony, such as former BOP staff, if necessary.

When defense counsel claims that inadequate treatment of medical or mental health problems is a reason for a non-incarceration or brief incarceration sentence, the government will submit a BOP letter or testimony stating that it can treat anything. This is not true, and can be successfully countered. See United States v. Martin, 363 F.3d 25, 49-50 & n.39 (1st Cir. 2004); United States v. Derbes, 369 F.3d 579, 581-83 (1st Cir. 2004); United States v. Gee, 226 F.3d 885, 902 (7th Cir. 2000).

IV. Sentencing Procedures

A. Defense Pre-Sentence Investigation

Based on the foregoing, defense counsel cannot afford to rely on a cursory interview of the defendant. Instead, develop a full social and medical history, interviewing the defendant, family members, friends, doctors, teachers, employers, etc., collecting relevant documents, and having the defendant evaluated for any medical, psychiatric, or psychological condition.

B. Plea Agreements

- New cost/benefit analysis
    - Less downside to pleading straight up, unless 3553(a) factors point in only upward direction, or there is an advantage in a charge bargain, or you need a motion under 3553(e) to get out from under a statutory minimum, or the only mitigating factor is substantial assistance.

- Appeal and collateral challenge waivers
    - With advisory guidelines, less reason to agree to waiver – only if the government is giving something substantial in return.

    - Increased risk with possibility of sentence up to statutory maximum

    - *If* a waiver is necessary, it should be a limited one:
        - D retains right to appeal or collaterally challenge any sentence that exceeds the guideline range or a stated number of months. Note –

the government in some districts is using language that permits appeal if the court "unreasonably departs upward." Defense counsel should preserve the right to appeal *any* sentence above the guideline range, not just when the court "unreasonably departs upward."

- D does not waive the right to appeal or collaterally challenge his sentence based on "changes in the law reflected in Circuit or Supreme Court cases decided after the date of this agreement." United States v. Taylor, 413 F.3d 1146 (10th Cir. 2005)
- D does not waive any claim based on ineffective assistance of counsel.

- Attempt to avoid waiver of any collateral review, citing ethical conflict in advising client to waive the right to raise ineffective assistance of counsel. Such a waiver is unenforceable in most circuits. At the very least, exclude claims of ineffective assistance of counsel.

- 3553(a) factors – the government should not be permitted to seek waiver of the right to raise 3553(a) factors, given the language of the statute and of Booker.

- Notice – right to notice of the prosecution's intention to seek (or the judge's intention to impose), a sentence above the guideline range, and the facts and factors the prosecutor (or judge) plans to rely on. Cf. Fed. R. Crim. P. 32(h); Burns v. United States, 501 U.S. 129, 138-39 (1991). Insist on continuance if surprised at sentencing.

- 11(c)(1)(C) pleas – possible advantage if the prosecutor is agreeable to a non-guideline sentence but you believe the judge may not be; or the judge is likely to use advisory guidelines to impose a higher sentence and *ex post facto*/due process argument not available because offense committed after Booker, or the reason the judge may go higher is one the Guidelines already recognized, or your circuit has (mistakenly) ruled that the *ex post facto*/due process argument is not available because the maximum foreseeable sentence was always the statutory maximum.

- What's different about the boilerplate or terms of Plea Agreements after Booker?

  -D. Mass: "In imposing the sentence, the Court must consult and take into account the United States Sentencing Guidelines, along with the other factors set forth in 18 U.S.C. §3553(a)."

  -W.D.N.Y.: "The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines."

C. Plea Colloquy

Defendant may not be compelled to admit details of the offense that are not elements but sentencing considerations. See Mitchell v. United States, 526 U.S. 314 (1999). "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege," and no negative inference may be drawn from the defendant's exercise of this right to remain silent regarding sentencing issues. Id. at 330.

D. Pre-Sentence Interview and PSR

- Prepare the client for the pre-sentence interview – should not discuss offense unless mitigating, should not discuss criminal history, tell P.O. will submit defense version of offense conduct in writing to ensure acceptance of responsibility; discuss mitigating 3553(a) factors in truthful and credible way.

- Attending the pre-sentence interview is more important than ever:

  -to make sure the P.O. receives all of the favorable information relating to the 3553(a) factors
  -to ensure P.O. gets back-up needed in order to include favorable information in the PSR – documentation, affidavits, contact information for favorable witnesses, etc.
  -to learn in advance of receiving the PSR what information the government has provided, concerns the P.O. has that need to be addressed, what facts or arguments you need to present to refute the government's information or defuse the P.O.'s concerns

- Pre-sentence Report
  - Provide a written submission including all 3553(a) factors that are present in the case, in hard and electronic copy to be included in the PSR.
  - File written objections to inaccurate facts, incorrect legal reasoning, and failure to include information relevant to 3553(a) factors in the PSR.

E. Defense Submission to P.O., Sentencing Memorandum, Proposed Statement of Reasons

In a submission to the Probation Officer and your Sentencing Memorandum, set forth the facts and arguments organized in terms of the section 3553(a) mandate, sentencing goals and factors as to why a guidelines range sentence is greater than necessary in this case. The caselaw provides good ideas as to how to structure the information and argument,[34] and samples can be found at www.fd.org (accessible from

[34] See, e.g., United States v. Pimental, 367 F.Supp.2d 143 (D. Mass. Apr. 15, 2005); Simon v. United States, 361 F.Supp.2d 35, 40-49 (E.D.N.Y. Mar. 17, 2005); United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. Mar. 3, 2005); United States v. Smith, 359 F. Supp.2d 771 (E.D. Wis. Mar. 3, 2005); United States v. Mullins, 356 F.Supp.2d 617 (W.D. Va. Feb. 16, 2005); United States v. Blume, 2005 WL 356816 (S.D.N.Y. Feb. 14, 2005); United States v. Nellum, 2005 WL

any computer) and www.fpdforums.org (accessible only from a Federal Defender Office computer).

Provide a shorter version as a proposed Statement of Reasons for the court to adopt or adapt. See, e.g., Simon, 361 F.Supp.2d 35, 49 (E.D.N.Y. Mar. 17, 2005). The Statement of Reasons under 18 U.S.C. § 3553(c) is still required,[35] and is a good idea in any case for purposes of appeal.

A new judgment form with a detailed checklist entitled Statement of Reasons has been issued; it records data regarding calculation of the advisory guideline range; how the court's calculation differs from that in the PSR; whether a mandatory minimum applied; whether the sentence is within the range, departs from the range, or is "outside the advisory guideline system"; reasons for departure or sentence outside the advisory guidelines system, and whether or not the government agreed to or moved for a below-guideline sentence (for reasons other than 5K1.1), or did not object to the defendant's motion. *However, the Sentencing Commission reports a sentence to which the government did not object as a non-government-sponsored below-guideline sentence, and thus, in its new terminology, "non-compliant."*

The USA Patriot Act requires the courts to use this form now; there is also a proposed amendment to Fed. R. Crim. P. 32(k) pending which would require the district courts to use the form, which would not take effect until December 2007. See http://www.uscourts.gov/rules/Rules_Publication_August_2005.pdf.

Make sure your judge fills this form out correctly. If it is wrong when you get your copy, have it corrected.

F. Sentencing Hearing

1. Right to Notice

Insist on notice of government's position and information upon which it will rely, and any judicial inclination to impose a higher sentence. See Fed. R. Crim. P. 32(h), United States v. Dozier, No. 05-6259 (10th Cir. Apr. 5, 2006); Burns v. United States, 501 U.S. 129, 138-39 (1991); Gardner v. Florida, 430 U.S. 349 (1977) (sentence based on undisclosed facts in a PSR violates Due Process Clause); Specht v. Patterson, 386 U.S. 605 (1967) (right to notice, hearing and counsel on offender characteristics that could

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300073 (N.D. Ind. Feb. 3, 2005); United States v. Galvez-Barrios, 355 F.Supp.2d 958 (E.D. Wis. Feb. 2, 2005); United States v. Myers, 353 F. Supp.2d 1026 (S.D. Iowa Jan. 26, 2005).

[35] For all sentences in open court at time of sentencing; for any sentence within the guideline range and more than 24 months, the reason for a sentence at particular point within range; for any sentence not of the kind or outside the range specified in Guidelines, the reasons for the particular sentence must be stated with specificity in the written order of judgment.

raise the sentence). If raised for the first time at the sentencing hearing, object and seek a continuance.

2. Right to Accurate Factual Resolution

The court must find facts relevant to each of the applicable factors under 3553(a), must resolve all material factual disputes, see Fed. R. Crim. P. 32(i), and must resolve them with care. See U.S.S.G. § 6A1.3. Even in the pre-Guidelines era when federal sentencing did not hinge on any particular facts and thus was more discretionary than it is under the Booker remedy, a defendant had a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that were "materially untrue." United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948).

3. Limits on Sentences Above the Guidelines

The Sentencing Commission reports that 1.6 % of sentences since Booker was decided have been above the guideline range, as compared to .8% in 2002. This suggests that half of these are not upward departures. Argue against this result:

If the offense was committed before Booker, *ex post facto* principles incorporated in the Due Process Clause preclude such a sentence, at least if strict standards for upward departure and *de novo* review of upward departure are not met. See Part VIII, infra.

Regardless of when the offense was committed, the court must articulate in the written order of judgment why a guidelines sentence is not sufficient to achieve the purposes of sentencing for reasons grounded in 3553(a). This should be a very difficult standard to meet. One strain of post-Booker interpretation asserts that the Guidelines already take into account all of the 3553(a) factors except in the most extraordinary case.[36] This is certainly wrong as to mitigating factors,[37] see Part III, infra, but it is quite true of aggravating factors – it is difficult to think of any offense guideline that produces sentences that are too low or of any aggravating factor that is not included in the applicable guideline or an invited ground for upward departure.

V. Standard of Proof

The Supreme Court did not decide in Booker what standard of proof the Fifth Amendment requires for judicial factfinding under the new "advisory" guideline system, much less the "substantial weight"/"presumptively reasonable" system now widely in effect. Nor does the Sentencing Reform Act prescribe a standard of proof. The Sentencing Commission's policy statement stating its belief that a preponderance of the evidence standard meets due process requirements always was advisory and in hindsight

[36] See United States v. Wilson, 355 F.Supp.2d 1269 (D. Utah Feb. 2, 2005).

[37] See United States v. Jaber, 362 F. Supp.2d 365 (D. Mass. Mar. 3, 2005).

probably wrong. Even before the line of cases culminating in Booker, at least seven of the courts of appeals held or stated in dicta that a heightened standard of proof (either beyond a reasonable doubt or clear and convincing evidence), or an opportunity to depart downward, was required for facts with a significant, disproportionate, unreliable, or otherwise unfair impact on the sentence.[38] In both Watts and Almendarez-Torres, the Supreme Court acknowledged these opinions but did not resolve the issue.[39]

As the Supreme Court explained in In re Winship, the function of a standard of proof as embodied in the Due Process Clause of the Fifth Amendment is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[40] In a civil suit for damages, the preponderance standard is acceptable because it is viewed as no more serious for there to be an error in the plaintiff's favor than for there to be an error in the defendant's favor.[41] But "[w]here one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden * * * of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt."[42] Winship involved factfinding in a juvenile delinquency proceeding, where, as in federal sentencing today, the judge did the factfinding and it did not result in "conviction" of a "crime." The Court held that those distinctions made no difference; the potential loss of liberty required proof beyond a reasonable doubt.[43]

In Apprendi v. New Jersey, the Court stated: "Since Winship, we have made clear beyond peradventure that Winship's due process and associated jury protections

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[38] See United States v. Jordan, 256 F.3d 922, 927-29 (9th Cir. 2001); United States v. Shonubi, 103 F.3d 1085, 1087-92 (2d Cir. 1997); United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996); United States v. Lombard, 72 F.3d 170, 186-87 (1st Cir. 1995), aff'd after remand, 102 F.3d 1 (1st Cir. 1996); United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.D.C. 1992); United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992); United States v. Townley, 929 F.2d 365, 370 (8th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990).

[39] United States v. Watts, 519 U.S. 148, 156-57 (1997) (declining to address the issue because the cases before it did not present such "exceptional circumstances"); Almendarez-Torres v. United States, 523 U.S. 224, 247-48 (1998) (noting but not addressing the Due Process issue because appellant did not raise it).

[40] 397 U.S. 358, 370 (1970).

[41] Id. at 371-72.

[42] Id. at 363-64; id. at 370, 371-72 (Harlan, J, concurring). See also Addington v. Texas, 441 U.S. 418, 423 (1979) ("standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision," holding that clear and convincing standard is required for civil commitment).

[43] Winship, 397 U.S. at 365-66.

extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'"[44] In Ring v. Arizona, the Court held that any "increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt."[45] And in Summerlin v. Schriro, the Court held that Ring was not retroactive because, though the Sixth Amendment rights at stake were fundamental, Arizona's requirement that the judge make the factfindings *beyond a reasonable doubt* did not implicate the "fundamental fairness and accuracy of the criminal proceeding."[46]

In Booker, the questions presented and holdings were stated solely in terms of the Sixth Amendment,[47] but there are indications that a majority of the Court would hold that the Fifth Amendment requires proof beyond a reasonable doubt particularly if the Guidelines are again "presumptive" as they were before Booker. In Blakely, the majority strongly criticized real offense sentencing generally.[48] In Booker, a majority indicated that Watts was wrongly decided.[49] Justice Scalia sharply criticized the unreliability of the way in which facts are found under the Guidelines,[50] and Justice Thomas thought that the Court had corrected the Commission's "mistaken belief" that judges may use a preponderance of the evidence standard.[51]

After Booker, it is clear that disputed facts that increase the guideline range continue to have a definite and measurable effect on the sentence. Once correctly calculated, the guideline range is to be considered against the other 3553(a) factors, and a number of courts have held that the guideline range is not only the starting point but entitled to presumptive weight. The courts certainly have no discretion to calculate the guideline range *inaccurately*. Moreover, courts of appeals have judged whether a

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[44] 530 U.S. 466, 484 (1999).

[45] 536 U.S. 584, 602 (2002).

[46] 542 U.S. 348, 351 n.1, 352, 355-57 (2004).

[47] Booker, 125 S. Ct. at 746, 747 n.1, 748-50, 756, 769.

[48] Blakely, 542 U.S. at 306 (that "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it" was an "absurd result" that "not even Apprendi's critics would advocate.").

[49] Booker, 125 S. Ct. at 754 n.4 (indicating that Watts was wrongly decided and noting Justice Kennedy's dissent in Watts).

[50] Id. at 790 (criticizing factfinding under the Guidelines as "judges determin[ing] 'real conduct' on the basis of bureaucratically-prepared, hearsay-riddled presentence reports") (Scalia, J., dissenting in part).

[51] Id. at 798 n.6 (Thomas, J. dissenting in part).

sentence is "reasonable" by *how much* it differs from the guideline range.[52] Recognizing that the guideline range still has a definite and measurable effect on the loss of liberty, a number of district courts after Booker have adopted the beyond a reasonable doubt standard as a matter of constitutional avoidance, as a matter of discretion, or as an indicator of how much weight they should give the guideline range, and some have declined to use acquitted conduct.[53] Some courts of appeals have held that the district courts may use the preponderance standard, but so far, none has held that they must.[54] The Third Circuit, which has rejected the presumption of reasonableness, has said that the preponderance of the evidence standard applies, but, "We do not address here the standard of proof for finding a separate crime under relevant law."[55]

For practitioners in circuits using a rebuttable presumption of reasonableness, Steve Sady has developed an argument, based on the Supreme Court's burden-shifting cases, including Ulster County v. Allen, 442 U.S. 140 (1979), Mullaney v. Wilbur, 421 U.S. 684 (1975) and others, that the burden of rebutting the presumption may not be shifted to the defendant without proof beyond a reasonable doubt of the operative facts supporting the harsher punishment.[56]

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[52] See, e.g., United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) (the more the sentence departs from the guidelines sentence, the more compelling the justification based on other 3553(a) factors has to be); United States v. Rogers, 400 F.3d 640, 642 (8th Cir. Mar. 16, 2005) (sentence of probation in a case where the guideline range was 51-63 months was "unreasonable" because it "is unreasonable to expect that defendants with similar records, guilty of similar conduct, would receive probation").

[53] See United States v. Okai, 2005 WL 2042301 at **4-10 (D. Neb. Aug. 22, 2005); United States v. Coleman, 370 F.Supp.2d 661 (S.D. Ohio 2005); United States v. Pimental, 367 F. Supp.2d 143 (D. Mass. Apr. 15, 2005); United States v. Gray, 362 F.Supp.2d 714, 720-24 (S.D. W. Va. Mar. 17, 2005); United States v. Thomas, 360 F.Supp.2d 238, 241 (D. Mass. 2005); United States v. Huerta-Rodriguez, 355 F. Supp.2d 1019, 1028 (D. Neb. Feb. 1, 2005); United States v. Carvajal, 2005 WL 476125 *4 (S.D.N.Y. 2005); United States v. West, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).

[54] See United States v. Cuellar-Cuellar, 2005 WL 3395371 *3 n.4 (Dec. 13, 2005) (declining to reach what standard of proof due process requires for prior convictions with a significant effect on the sentence in light of appellant's failure to argue that he did not admit the fact of conviction); United States v. Vaughn, 2005 WL 3219706 (2d Cir. Dec. 1, 2005) (courts may use preponderance of the evidence standard but are not required to take into account acquitted conduct); United States v. Welch, 429 F.3d 702, 704-05 (7th Cir. 2005) (district court may use preponderance of the evidence standard); United States v. Pirani, 406 F.3d 543, 551 n.4 (8th Cir. 2005) (nothing in Booker requires use of the beyond a reasonable doubt standard).

[55] United States v. Cooper, __ F.3d __, 2006 WL 330324 *4 n.7 (3d Cir. Feb. 14, 2006).

[56] See Stephen R. Sady, Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt, 18 Fed. Sent. R. __ (March 2006), also available at http://circuit9.blogspot.com/2006/02/guidelines-appeals-presumption-of.html.

The government may contend that Williams v. New York, 337 U.S. 241 (1949) means that a beyond a reasonable doubt burden of proof and other procedural protections designed to ensure accuracy are not required under the advisory guidelines. That would be wrong, first, because we do not have the purely discretionary system that existed in Williams, and second, it would be wrong even if sentencing were truly discretionary. In Townsend v. Burke, 334 U.S. 736 (1948), the Supreme Court held that a defendant in a discretionary state sentencing proceeding had a right under the Due Process Clause to be sentenced on the basis of *accurate* information about his criminal history. Id. at 741. Although Williams, decided the following year, is often cited for the proposition that defendants have no right to any procedural safeguards in sentencing, that is not an accurate rendition of Williams. Williams held that a defendant had no right in a *purely discretionary state* sentencing system where the judge could impose a sentence based on "no reason at all," 337 U.S. at 252, to notice and an opportunity to confront adverse witnesses; this was based solely on principles of federalism, i.e., the need to allow states to experiment with progressive sentencing systems with a rehabilitative focus; the Court did not address what procedures *were* required in such a system, other than to say sentencing was not immune from due process scrutiny. Id. at 252 n.18 (citing Townsend). In United States v. Tucker, 404 U.S. 443 (1972), the Court held that a defendant in a pre-Guidelines federal bank robbery case had a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that were "materially untrue." Id. at 447. In Gardner v. Florida, 430 U.S. 349 (1977), the Court held that a sentence based on undisclosed facts in a PSR violates Due Process Clause; although this was a capital case, the Court specifically did not rely on the Eighth Amendment but on the Due Process Clause, which would make it applicable to all sentencing proceedings. In Specht v. Patterson, 386 U.S. 605 (1967), the Court held that a state defendant has a right to notice, hearing and counsel on offender characteristics (threat to the public, habitual offender and mentally ill) that could raise the sentence. Thus, any suggestion in Williams that there is no right to a burden of proof and other procedures designed to ensure accuracy in sentencing -- even in a purely discretionary system -- has long been abandoned.

VI. The prior conviction exception, *Shepard* and *Almendarez-Torres*[57]

(This section has not been updated in many months.)

Booker, like Apprendi and Blakely, expressly creates an exception from its Sixth Amendment holding for facts of prior conviction, stating, "Any 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." Booker, 125 S. Ct. at 756 (emphasis added). But this exception is not consistent with the broad reasoning of these

[57] This Section was written by David McColgin, Supervising Appellate Attorney, Federal Defender Office, Eastern District of Pennsylvania. The next footnote and some citations were added by Amy Baron-Evans.

three cases, which would seem to require that *any fact* increasing the sentence range must be either admitted or proven to the jury. See Apprendi, 530 U.S. at 499-523 (Thomas, J., concurring).

In Shepard v. United States, 125 S. Ct. 1254 (2005), decided after Booker, the Court strongly suggested that the prior conviction exception should be viewed narrowly and that Almendarez-Torres v. United States, 523 U.S. 224 (1998), on which this exception is based, may soon be overturned.[58] Particularly in view of Shepard, defense

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[58] This followed the troubled history of Almendarez-Torres, in which the sentencing factors/elements distinction upon which the Court relied in that case has now been abandoned:

In Almendarez-Torres, the Court relied on a distinction between elements and sentencing factors to hold that a prior conviction that raised the maximum sentence was not required to be pled in the indictment. 523 U.S. at 226-27, 246-47. The dissent, written by Justice Scalia, would have construed the penalty provision as an element in order to avoid the "genuinely doubtful" question whether the Constitution permits an increase in the maximum punishment based on a fact, whether designated as an element or a sentencing factor, that has not been charged in an indictment and proved to a jury beyond a reasonable doubt. Id. at 251-60.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court reserved judgment on the validity of Almendarez-Torres, since a prior conviction enhancement was not at issue, but noted that Almendarez-Torres "represents at best an exceptional departure from the historic practice [of requiring pleading and proof of factors increasing statutory maximums]," id. at 484, 487, emphasized that no question regarding jury trial or standard of proof arose in Almendarez-Torres, and explicitly stated that it may have been incorrectly decided and should be narrowly applied. Id. at 488-489. Furthermore, Justice Thomas in a concurring opinion renounced his swing vote in Almendarez-Torres. Apprendi, at 520-21 (Thomas, J., concurring).

In Ring v. Arizona, 536 U.S. 584 (2002), the Court explicitly abandoned any distinction for constitutional purposes between elements and sentencing factors. Id. at 605, 609.

In Dretke v. Haley, 124 S. Ct. 1847 (2004), the Court applied the doctrine of constitutional avoidance to Almendarez-Torres, stating: "Respondent contends that Almendarez-Torres should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential. These difficult constitutional questions . . . are to be avoided if possible." Id. at 1853. If the Court had made a constitutional ruling rather than construing the statute pursuant to the doctrine of constitutional avoidance, it would have had to consider extending Almendarez-Torres, a Fifth Amendment right to indictment case, to deny Haley the Fifth Amendment right to proof beyond a reasonable doubt of In re Winship, 397 U.S. 358 (1970). Haley, 124 S.Ct. at 1853. It declined to do so.

In Blakely v. Washington, 124 S.Ct. 2531 (2004), the Court again explicitly rejected the notion, upon which Almendarez-Torres was based, that the jury need only find whatever facts the legislature chooses to label elements, while those it labels sentencing factors may be found by the judge. Id. at 2539-40 and 2542 n.13. Instead, all "facts essential to punishment" must be charged in an indictment and proved to a jury beyond a reasonable doubt. Id. at 2536-37 & n.5. The Blakely Court did not mention the prior conviction exception in its holding.

counsel must be sure to object to any statutory sentencing enhancements based on prior convictions that were not admitted or proven to the jury.

A. The basic holding of *Shepard*

Shepard was charged with gun possession. Under the Armed Career Criminal Act ("ACCA" 18 U.S.C. § 924(e)), a defendant charged with gun possession under 18 U.S.C. § 922 faces a dramatic sentencing enhancement -- from a maximum of 10 years to a minimum of 15 years and a maximum of life -- if he or she has three prior convictions for serious drug offenses or violent felonies, including burglary. Shepard held that a prior conviction for non-generic burglary based on a guilty plea can count as a qualifying violent felony only if the charging document, plea agreement, or plea colloquy make clear that the offense conduct actually constituted generic burglary.[59]

In so holding, Shepard simply extended the "categorical approach" of Taylor v. United States, 495 U.S. 575 (1990), to guilty pleas. Taylor held that a prior conviction for burglary must be for generic burglary (which does not include entry into boats or cars). Under the "categorical approach," the court cannot delve into the underlying facts of the conviction, but instead must look only to the statutory elements. The Court created a "narrow exception," however, for cases in which the statutory definition is broader than generic burglary, but the indictment or information and jury instructions show that the defendant was only charged with generic burglary, and the jury necessarily had to find the elements of generic burglary in order to convict.

Shepard, in applying Taylor's categorical approach to cases tried without a jury, ruled that the closest analog to jury instructions "would be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, Fed. R. Crim. P. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." Shepard, 125 S. Ct. at 1259-60. The Court emphatically rejected the government's request to broaden the categorical approach to include documents such as police reports submitted in support of complaints. Id. at 1260.

In United States v. Booker, 125 S.Ct. 738 (2005), the Court reaffirmed its holding in Apprendi: "Any 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." Id. at 756. Though the Court recited the prior conviction exception, it was not at issue in the cases before the Court, and the Court ignored Almendarez-Torres in its review of the relevant precedent. Id. at 748-49.

[59] "Generic burglary," as the term is used in Shepard, is the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime," while "non-generic burglary" refers to burglary when it is more broadly defined to include, for example, entries into boats and cars. 125 S. Ct. at 1257.

B. The implications of *Shepard* for the prior conviction exception

Although the defendant in Shepard did not challenge Almendarez-Torres or the prior conviction exception, parts of Shepard make clear that five Justices would support overturning that decision and eliminating the exception. And until that happens, Shepard also makes clear that Almendarez-Torres should be read very narrowly to apply only to facts established by the record of conviction.

In section III of the opinion, which only commanded a four-justice plurality, Justice Souter explains that the Court's holding limiting the scope of judicial fact-finding regarding prior convictions is required also by the "rule of reading statutes to avoid serious risks of unconstitutionality." 125 S. Ct. at 1263. As Souter explained, judicial fact-finding about a disputed prior conviction "raises the concern underlying Jones [v. United States, 526 U.S. 227, 243 n.6 (1999)] and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." Id. at 1262. Souter then notes that the dissent charges the Court's decision "may portend the extension of Apprendi . . . to proof of prior convictions." Id. at 1263 n.5. Souter does nothing to dispel this impression, but instead observes that any risk that a defendant might be prejudiced by proof of prior convictions to the jury could easily be addressed by the defendant waiving the right to have the jury decide that issue.

The fair implication of this plurality opinion is that any judge fact-finding that strays beyond the "fact of prior conviction," whether that be facts regarding probationary status, release date from custody, or nature of offense, risks constitutional infirmity. Thus, the Almendarez-Torres exception for facts of prior conviction should be construed very narrowly so as to minimize this risk. The Fourth Circuit adopted this view in United States v. Washington, 404 F.3d 834 (4th Cir. Apr. 15, 2005), holding, in the context of the enhancement for a prior conviction of a "crime of violence" under U.S.S.G. § 2K2.1(a)(4) that in light of Shepard, the "prior conviction exception" is a limited one that does not permit judicial fact-finding regarding facts not contained in the indictment or the other documents Shepard permits. See also United States v. Kortgaard, 2005 WL 2292046 (9th Cir. Sept. 21, 2005) (whether criminal history category under-represents the seriousness of the defendant's criminal history or likelihood of recidivism for purposes of upward departure under § 4A1.3 are facts beyond the mere fact of conviction that must be made by a jury or considered on an advisory basis); United States v. Greer, 359 F.Supp.2d 1376 (M.D. Ga. Feb. 17, 2005) (relying on Taylor and Booker to hold that determination of whether prior felonies were "violent" under ACCA must be made by a jury).

Justice Thomas concurred in the other parts of the opinion but did not join in Part III only because it did not go far enough. Thomas states that "a majority of the Court now recognizes that Almendarez-Torres was wrongly decided," and he would find the ACCA unconstitutional as applied to Shepard because it requires an increase in the sentence based on facts (the prior convictions) not admitted by the defendant or proven to a jury. Shepard, 125 S. Ct. at 1264 (Thomas, J. concurring).

There is an excellent discussion of this issue on the Ninth Circuit blog, in the context of the Fourth Circuit's disappointing opinion, over dissent by Judge Wilkins, in United States v. Thompson, 421 F.3d 278 (4th Cir. Sept. 6, 2005). See http://circuit9.blogspot.com/2005/09/thompson-fourth-circuit-demonstrates.html.

C. Applying *Shepard*

1) *Check the prior offense charging documents and statutes of conviction:* In any case in which the defendant faces enhancement for prior convictions under the ACCA or similar statutes, such as illegal re-entry (8 U.S.C. § 1326(b)), drug trafficking (21 U.S.C. § 841(b)), three strikes (18 U.S.C. § 3559), and sexual abuse (18 U.S.C. § 2241, et seq.; § 2426), or even the career offender provision of the guidelines, USSG § 4B1.1, defense counsel must check the applicable state or federal statutes to see whether the prior convictions as specified in the charging documents count as predicate felonies under the "categorical approach." If the crime is defined broadly and encompasses conduct that does not meet the definition of "violent felony" or "serious drug trafficking offense," counsel should check the charging document, plea colloquy, and plea agreement (or jury instructions if there was a jury trial) to verify that those documents do not narrow the offense of conviction so that it does qualify. The same is true for statutes written in outline form, defining various types of conduct disjunctively as a certain crime, some of which may not qualify for the enhancement. As long as the documents permitted under *Shepard* do not narrow the offense, the conviction does not qualify and the enhancement cannot apply. Under Shepard, the government cannot use any other documents, such as police reports, presentence reports or complaints, to show that the convictions do meet the statutory definitions.

2) *Move to strike surplusage from indictment:* If the government tries to preempt the constitutional challenge to the enhancements by charging the prior convictions in the indictment and proving them to the jury, move to strike the prior convictions as surplusage on the ground that only Congress can add elements to the offenses, and both Congress and the courts have made clear that prior convictions are only sentencing factors. See United States v. Jackson, 390 U.S. 570, 580 (1968) (courts are not free to impose upon an unwilling defendant a jury fact-finding procedure not authorized by Congress, solely for the purpose of rescuing a statute from the charge of unconstitutionality).

If the motion to strike is unsuccessful, and the case goes to trial, move to bifurcate the trial so that the presentation of evidence and the deliberations regarding the prior convictions take place after the jury determines whether defendant was guilty of the offense. In the alternative, consider Justice Souter's suggestion: "[A]ny defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions." Shepard, 125 S. Ct. at 1263 n.5. But make clear that you are preserving your original objection to the inclusion of this surplusage in the indictment, and presenting this alternative only now that the judge has overruled that objection.

3) ***Do not admit to prior convictions at guilty plea or any other time****:* Be sure defendant does not admit to the prior convictions at any point (*e.g*., in plea agreement, plea or PSI interview), since that would waive the challenge. If the defendant wishes to plead guilty to the offense and the court insists that the defendant also admit to the prior convictions, object that under the Fifth Amendment the defendant need only plead guilty to the elements of the offense. Under Mitchell v. United States, 526 U.S. 314 (1999), a defendant who pleads guilty retains the Fifth Amendment right to remain silent with regard to sentencing issues. As the Court explained, "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." Id. at 330. No negative inference, moreover, can be drawn from the defendant's exercise of this right to remain silent regarding sentencing issues. Id. The exercise of this privilege also should not affect the reduction for acceptance of responsibility under USSG § 3E1.1, since that section only requires acceptance of responsibility for the "offense," and neither the guideline nor the commentary suggests the defendant must also admit to prior convictions.

4) ***At sentencing, argue the unconstitutionality of statutory recidivist enhancements based on Thomas's concurrence****:* If a statutory enhancement based on prior convictions does apply, object at sentencing to the constitutionality of this enhancement, whether under ACCA, § 1326(b) illegal re-entry, § 841(b) drug trafficking, or § 2241 sexual abuse. Argue based on Thomas's concurrences in Shepard and Apprendi that Almendarez-Torres should be overruled, and that the fact of prior conviction should be covered by the rule of Apprendi -- prior convictions used to enhance the sentence must be charged in the indictment and proven to the jury beyond a reasonable doubt.[60] (Remember, this position is consistent with the motion to strike the priors from the indictment as surplusage because the argument is that only Congress, and not the courts, can correct the statute by making the prior convictions elements of the offense.) And in order to keep the issue alive as long as possible, raise this issue on appeal and file a petition for certiorari if necessary.

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[60] A persuasive argument can also be made that Almendarez-Torres does not need to be overruled, but instead can be viewed as limited to its facts and the Fifth Amendment issue raised in that case. There, the defendant admitted in the course of pleading guilty to violating 8 U.S.C. § 1326 that he had been deported pursuant to three earlier felony convictions. 523 U.S. at 227. For this reason, as the Court in Apprendi noted, Almendarez-Torres raised "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact." Apprendi, 530 U.S. at 488. The only issue there was whether under the Fifth Amendment the prior convictions should have been charged in the indictment. Since the Sixth Amendment jury trial issue was not factually or legally presented in Almendarez-Torres, that case should be seen as only a limited ruling on the Fifth Amendment indictment issue. Thus, Almendarez-Torres does not preclude application of Apprendi's Sixth Amendment ruling to prior convictions. See Brief of NACDL as Amicus Curiae, Shepard v. United States, 125 S. Ct. 1254 (2005), pp. 7 n.2, 8 n.3; Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 994 (2004).

5) ***In the alternative, argue that Shepard limits what the court may consider in determining whether the enhancement applies****:* If the court rejects your constitutional argument against the enhancement, argue that Shepard sharply limits what the court can consider in determining factually whether the statutory enhancement applies. For example, the ACCA requires proof of more than the mere fact of prior convictions; the government must also establish that these prior offenses were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). These facts relating to timing may not be apparent from the court records. Shepard strongly suggests that the Almendarez-Torres exception for facts of prior conviction should be strictly limited under the rule of constitutional avoidance to facts conclusively established by the court record of the conviction. As the Court in Shepard states, "While the disputed fact here [regarding the nature of the burglary] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute." Shepard, 125 S. Ct. at 1262.

By this reasoning, facts relating to the timing of the convictions, since they go beyond the mere fact of conviction, should be subject to the rule of Apprendi -- the government should be required to prove such facts to the jury beyond a reasonable doubt. The same argument can be made with regard to all other facts that go beyond the mere "fact of conviction," such as facts regarding whether the prior conviction qualifies as a "violent felony," or an "aggravated felony," or a "serious drug offense." Such facts go beyond the narrow Almendarez-Torres exception for "fact of conviction," and thus, in any case where these facts were not found by the jury beyond a reasonable doubt, under *Shepard* and the rule of constitutional avoidance, the enhancement cannot apply.

Alternatively, even if the court is permitted to find these facts, under Shepard, the court should be limited to examining the documents Shepard authorizes -- the charging documents, plea agreement, plea colloquy, (or jury instructions if there was jury trial). And under the doctrine of constitutional avoidance, the Shepard limitation regarding the records the court may consider should apply not just to determinations for statutory enhancement purposes, but also to all criminal history determinations under the guidelines. See United States v. Washington, 404 F.3d 834 (4th Cir. Apr. 15, 2005) (holding in light of Shepard that court's consideration of extra-indictment facts as basis for finding that prior breaking and entering conviction constituted a "crime of violence" for purposes of enhancement under USSG § 2K2.1(a)(4) and § 4B1.2 violated Sixth Amendment); United States v. Person, 377 F. Supp.2d 308 (D. Mass. Apr. 27, 2005) (questioning whether Shepard permitted court to conclude that priors were "crimes of violence" under career offender guideline); United States v. Goetchius, 369 F.Supp.2d 13 (D. Me. Apr. 25, 2005) (refusing to consider what defendant did in committing two priors and thus finding the cases were related; refusing to add a point under 4A1.1(f) for being committed on separate occasions where indictments said they were committed during the same period of time); United States v. Harper, 360 F. Supp. 2d 833 (E.D. Tex. Mar. 17, 2005) (Clark, J.) (rejecting, in light of Shepard, government argument that enhancements should be found by preponderance of the evidence, and concluding that enhancements

can only be based "upon jury findings, prior convictions, the court documents and statutory definitions pertinent to such convictions, and admissions by a defendant").

VII. Mandatory Minimums

A. Proof of Crack v. Other Forms of Cocaine Base

In a trio of recent cases, Judge Ponsor decided that the government must charge and prove that the substance is "crack" rather than some other form of cocaine base under both the guidelines and the statutory mandatory minimums under 21 USC § 841(b)(1)(A)(iii) and (B)(iii). See United States v. Thomas, 360 F. Supp.2d 238 (D. Mass. Mar. 14, 2005); United States v. Hubbard, 369 F. Supp.2d 146 (D. Mass. Apr. 25, 2005); United States v. Person, 377 F. Supp.2d 308 (D. Mass. Apr. 27, 2005). Judge Ponsor reasoned that on November 1, 1993, the Sentencing Commission published an amendment stating that "forms of cocaine base other than crack . . . will be treated as cocaine." See U.S.S.G. App. C, Amend. 487 (1993). The Fourth, Seventh, Eighth and Eleventh Circuits held thereafter that the reference to "cocaine base" in § 841 is to be construed the same way, i.e., as covering only crack. See United States v. Booker, 70 F.3d 488, 494 (7th Cir. 1995); United States v. Jackson, 64 F.3d 1213, 1219 (8th Cir. 1995); United States v. Fisher, 58 F.3d 96, 99 (4th Cir. 1995); United States v. Munoz-Realpe, 21 F.3d 375, 377-78 (11th Cir. 1994). The Second and Third Circuits had held that the definition of cocaine base is broader in the statute than it is the Guidelines. See United States v. Barbosa, 271 F.3d 438, 467 (3d Cir. 2001); United States v. Jackson, 59 F.3d 1321, 1422-24 (2d Cir. 1995). See also United States v. Edwards, 397 F.3d 570 (7th Cir. 2005) (describing split).

Judge Ponsor recognized that the First Circuit had held in United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992) that 21 U.S.C. § 841 referred to any form of cocaine base, but noted that at that time, the Sentencing Commission had not yet promulgated its amendment, and the other courts of appeal had not yet interpreted it. He also recognized that the First Circuit repeated its holding in Lopez-Gil in United States v. Richardson, 225 F.3d 46 (1st Cir. 2000), but that it did so without discussion of the intervening amendment and caselaw.

Recently, in United States v. Medina, __ F.3d __, 2005 WL 2740828 (1st Cir. Oct. 25, 2005), the appellant raised the issue for the first time on appeal, so it was reviewable only for plain error. The First Circuit noted the amendment and the circuit split, but said the law was settled in the First Circuit by Lopez-Gil, and there was no plain error because the judge's instructions were correct. It is possible that the issue could still be resolved favorably if the defendant raised it below.

B. Continuing Viability of *Harris*

In Harris v. United States, 536 U.S. 545 (2002), a four-member plurality consisting of Justices Kennedy, Rehnquist, O'Connor and Scalia, with Justice Breyer concurring in part and concurring in the judgment, upheld the use of judicial factfinding

by a preponderance of the evidence of facts that raise or trigger a mandatory minimum sentence. Harris was charged with and convicted by a jury of carrying a firearm during and in relation to a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A). At sentencing, the judge found that he brandished the firearm, which raised the applicable mandatory minimum sentence from five years under subsection (c)(1)(A)(i) to seven years under subsection (c)(1)(A)(ii).

The plurality relied heavily on its existing jurisprudence holding that legislatures are free to designate particular facts as either elements or sentencing factors, with constitutional protections attaching to the former but not the latter, absent a legislative purpose to evade constitutional requirements. First, it found that Congress intended the brandishing provision to be a sentencing factor because it was in a subsection separate from the principal offense, there was no tradition of treating brandishing as an element, and it increased only the minimum sentence, and only incrementally, from 5 to 7 years. Id. at 552-54. Second, the doctrine of constitutional avoidance posed no obstacle to this construction because under McMillan v. Pennsylvania, 477 U.S. 79 (1986), which Congress presumably relied on when it enacted the statute, facts increasing minimum sentences are not subject to Fifth and Sixth Amendment protections. Id. at 555-56. Third and not so convincingly, the plurality held that McMillan need not be overruled in light of Apprendi. Id. at 557-69. The maximum under the statute of conviction was "well in excess of seven years," and the sentencing judge could exercise discretion anywhere within that range based on various factors. Id. at 554, 565, 559. The plurality acknowledged that in mandatory minimum statutes, the legislature dictates the precise weight the sentencing judge must give particular facts, but reasoned (circularly) that the factfinding involved was not subject to Fifth and Sixth Amendment protections because the legislature had designated those facts as sentencing factors and not elements. Id. at 549, 558, 559, 567. It said: "Read together, McMillan and Apprendi mean that those facts setting the outer limits [read: maximum limits] of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion--and rely upon judicial expertise--by requiring defendants to serve minimum terms after judges make certain factual findings." Id. at 567.

The dissent more convincingly argued that when Congress dictates the precise weight to be given to a certain fact, that fact sets one end of the "outer limits" of the sentence and therefore must be charged and proved to a jury beyond a reasonable doubt. Id. at 575-76 (dissenting opinion). Apprendi held that judicial factfinding unconstitutionally "removes from the jury the assessment of facts that increase the *range* of penalties to which the defendant is exposed." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis supplied).

Justice Breyer said that he was unable to distinguish facts that increase the minimum from facts that increase the maximum "in terms of logic," and disagreed "with the plurality's opinion insofar as it finds such a distinction." Id. at 569-70. But Justice Breyer did not "yet" accept Apprendi. Apprendi, however, is the premise of the Booker remedy he created. The Booker remedy permits judicial factfinding to increase the

guideline range above that authorized by the verdict but only because the effect is not mandatory. Facts underlying hard statutory maximums must still be found by a jury. Permitting hard statutory minimums to be based on judicial factfinding by a preponderance of the evidence cannot be squared with the logic of either of the Booker opinions. If confronted with a similar case in the future, Justice Breyer may have to formally accept Apprendi as the law.[61] If so, he has already stated that it applies "in terms of logic" to facts that increase the minimum. Furthermore, Justice Breyer sharply criticized mandatory minimums as a matter of policy in Harris,[62] and rejected the government's proposed remedy in Booker in terms equally applicable to mandatory minimums, stating that "the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences. We do not believe that such 'one-way lever[s]' are compatible with Congress' intent." Id. at 768.

Justice Scalia, too, may well vote the other way when the Harris question next arises. He never explained why he switched sides in Harris from his position in Jones, Castillo, and Apprendi. He subsequently made clear that "facts essential to punishment" must be charged and proved to a jury beyond a reasonable doubt, Blakely v. Washington, 124 S. Ct. 2531, 2536-37 & n.5, and ridiculed the notion, which was key to the Harris plurality's reasoning, that the jury need only find whatever facts the legislature chooses to label as elements, while those it labels as sentencing factors may be found by the judge. Id. at 2539-40 & 2542 n.13. The way he put it in Ring was that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute

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[61] Justice Breyer joined the result in Ring on Eighth Amendment grounds. Justice Scalia said: "There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to Apprendi. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to Apprendi-land." 536 U.S. at 613 (Scalia, J., concurring).

[62] He stated:

> Mandatory minimum statutes are fundamentally inconsistent with . . . a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. . . . They rarely reflect an effort to achieve proportionality B a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate.

See Harris, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment) (internal citations omitted).

calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt." Ring, 536 U.S. at 610 (Scalia, J., concurring).

As detailed in footnote 33, supra, the Court in a series of cases has abandoned the distinction between sentencing factors and elements upon which the Harris plurality's decision depended.

Recognizing that Harris is inconsistent with Booker, some lower courts have declined to apply it, by carving out exceptions, applying the doctrine of constitutional doubt, or finding that the Supreme Court has already overruled Harris. Other courts have declined to find that Booker altered Harris,[63] but the issue should be preserved.

1) In United States v. Malouf, 377 F.Supp.2d 315 (D. Mass. June 14, 2005), Judge Gertner noted three strains of analysis in Apprendi: (1) the impact test (if the fact has a substantial impact, it should be treated like an element), (2) the statutory test (how to treat the fact depends on whether the legislature has made it an element or a sentencing factor), and (3) the traditional element or sentencing factor test (has the fact been traditionally viewed as an element or a sentencing factor?). Id. at 321 n.9. She found that the Court in Blakely chose the impact test by focusing on "facts essential to punishment" and rejected the statutory test, and that the Court in Shepard cast doubt on the traditional element or sentencing factor test. Id. at 324-25. Judge Gertner could have relied on the doctrine of constitutional doubt as the Court did in Jones, but instead found that the Court had effectively already overruled Harris by choosing the impact test. Id. at 325-27. Then, applying all three tests, she concluded that section 841 is an offense-defining statutory provision, all elements of which must be tried to a jury or admitted. Id. at 327-28. The government's appeal is pending.

2) United States v. Harris, 397 F.3d 404 (6th Cir. 2005) involved USSG § 2K2.4(b), which provides that "the guidelines sentence [for a § 924(c) violation] is the minimum term of imprisonment required by statute." The sentencing court had imposed a ten-year consecutive mandatory minimum based on a semiautomatic assault weapon that was not charged in the indictment or submitted to the jury, based on USSG § 2K2.4 and 18 U.S.C. 924(c)(1)(B)(i). Id. at 408-09, 411.

The Sixth Circuit held that the "§ 924 Firearm-Type Provision mandatory minimum is not binding on a sentencing court unless the type of firearm involved is charged in the indictment and proved to a jury beyond a reasonable doubt." See 397 F.3d at 414. The court first discussed the inconsistency between Booker and Harris where the fact triggering the mandatory minimum had such a significant impact,[64] but relied on the traditional element or sentencing factor test.

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[63] United States v. Duncan, 413 F.3d 680, 683-84 (7th Cir. July 1, 2005); United States v. Crawford, 133 Fed. Appx. 612, 620-21 (11th Cir. May 18, 2005).

[64] The court said:

The Sixth Circuit started its analysis with Castillo v. United States, 530 U.S. 120 (2000), where the Supreme Court held that Congress intended types of firearms to be elements of an aggravated form of the basic offense of using or carrying a firearm during

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Neither Booker nor its immediate predecessor, Blakely[], addressed the constitutionality of judicial fact-determinations for purposes of mandatory minimum sentences under the § 924 Firearm-Type Provision. This subsection presents particular problems, because Booker teaches that there is no Sixth Amendment violation when a sentencing judge exercises genuine discretion within a clearly defined statutory range. [citing Booker, 125 S. Ct. at 750 (Stevens, J.)] Although not entirely clear, the Supreme Court has implied that § 924(c) sets forth a statutory maximum sentence of life in prison, regardless of whether the sentencing judge finds any of the factors enhancing the required minimum. [citing Harris v. United States, 536 U.S. 545, 554 (2002); id. at 574 (Thomas, J., dissenting)] However, unlike most Guidelines provisions, which provide for overlapping sentencing ranges, see Booker, 125 S. Ct. at 775 (Stevens, J., dissenting), the Guidelines provision relating to § 924(c) does not provide for sentencing ranges. Instead, U.S.S.G. § 2K2.4 provides that, except when an individual qualifies as a career offender under U.S.S.G. § 4B1.1, "the guideline sentence [for a § 924(c) violation] is the minimum term of imprisonment required by the statute." U.S.S.G. § 2K2.4(b). The Commentary to the Guidelines emphasizes this position, explicitly stating that . . . "a sentence above the minimum term required by [that statute] is an upward departure from the guideline sentence." Id. cmt. 2(B).

This presents us with a troubling situation. The Guidelines range for a § 924(c) violation is the minimum statutory range. Booker clearly applies to judicial fact-determinations under the (formerly mandatory) Guidelines, but the Booker Court did not address whether it applies to fact determinations under (still mandatory) statutory provisions such as § 924(c). The central problem is how to reconcile, for Booker purposes, the Guidelines mandate (now recommendation) of the minimum possible sentence in a particular factual situation with the apparent possibility of a (rarely, if ever, imposed, see Harris, 536 U.S. at 578 & n.4 (Thomas, J., dissenting)) maximum sentence of life imprisonment for any violation of § 924(c). If we look only at the theoretical possibility of a life sentence for any § 924(c) violation, the reasoning of Booker suggests that there is no Sixth Amendment violation. However, under the Guidelines regime, a life sentence was only possible -- absent an upward departure -- for a person who, having previously been convicted for a violation of § 924(c), is again convicted of violating the subsection, the second time with a very serious weapon. See 18 U.S.C. § 924(c)(1)(C)(ii) (mandating life sentence only in the case of a "second or subsequent conviction under this subsection" where "the firearm involved is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler"). *Given the severe constraints on imposition of a life sentence in the pre-Booker world, it would seem strikingly at odds with the principles set forth in Booker to hold that the sudden advisory nature of the Guidelines prevents the (still mandatory) provisions of § 924(c) from violating the Sixth Amendment.*

Id. at 410-12 (emphasis supplied).

and in relation to a trafficking crime or crime of violence.[65] As elements, they had to be charged in an indictment and proved to a jury beyond a reasonable doubt. They were not sentencing factors that could be found by a judge at sentencing, id. at 123-24, for reasons "even apart from the doctrine of constitutional doubt" upon which the Supreme Court relied in a similar situation in Jones v. United States, 526 U.S. 227 (1999). Id. at 124.

The Sixth Circuit said that although Castillo rested in part on the structure of the pre-1998 version of § 924(c) (in that the type of firearm was in the same sentence with "uses or carries a firearm" rather than in a separate subsection as it is now), the Supreme Court also devoted significant attention to why the type of firearm is more appropriately considered an element rather than a sentencing factor: (1) it could not say that courts typically treated firearm types as sentencing factors at least in "use or carry" crimes, (2) having the jury decide the type of firearm would not complicate the trial or risk unfairness to the defendant, and (3) the length and severity of an added mandatory sentence that turns on the type of firearm weighs in favor of treating such offense-related words as elements.[66] Harris, 397 F.3d at 412-13; Castillo, 530 U.S. at 124-31.

The Sixth Circuit then dealt with Harris, where the Supreme Court said that the structure of the 1998 version of 924(c) (separating the firearm type, brandishing/ discharge, and second or subsequent provisions into subsections) was "the kind which allowed the Court to 'presume that its principal paragraph defines a single crime and its subsections identify sentencing factors.'" Harris, 397 F.3d at 413, quoting Harris, 536 U.S. at 553. However, this did not mandate a finding that the firearm type provision set forth sentencing factors, because, as the Supreme Court said, the text might provide compelling evidence to the contrary. While the Supreme Court found in Harris that the brandishing/discharge subsection did not provide evidence to the contrary because it was a traditional sentencing factor and only incrementally raised the minimum from 5 to 7 or 10 years, the Supreme Court found in Castillo that firearm type was traditionally treated as an element and it sharply raised the minimum from 5 to 10 or 30 years. Id. at 413. "We conclude that the tradition of treating firearm type as an element, the sharply higher penalties involved, and the serious constitutional problems that would result from a contrary conclusion, are together sufficient to overcome the presumption, based on the structure of the statute, that § 924(c)(1)(B) is intended to set out sentencing factors rather than elements of separate crimes." Id. (internal citations omitted).

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[65] The pre-1998 version of 18 U.S.C. § 924(c)(1) carried a consecutive mandatory minimum of five years, which could be increased to ten or thirty years based on certain types of firearm.

[66] The Sixth Circuit had already held before Harris' trial that the type of firearm even under the 1998 version of 924(c) had to be charged and proved to a jury beyond a reasonable doubt based on Castillo. See United States v. Bandy, 239 F.3d 802, 807 (6th Cir. 2001). In light of Bandy, it is puzzling that the government did not charge the type of firearm and submit it to the jury and that the district court nonetheless imposed the ten-year consecutive mandatory minimum. The government and the court may have assumed based on the Supreme Court's intervening Harris decision that the type of firearm, like brandishing a firearm, was a sentencing factor not subject to constitutional protections.

3) In United States v. Greer, 359 F.Supp.2d 1376 (M.D. Ga. Feb. 17, 2005), the court imposed a guidelines sentence of 78 months rather than the mandatory minimum of fifteen years under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and U.S.S.G. § 4B1.4. The PSR alleged that the defendant had three previous convictions for a violent felony and thus was an armed career criminal under 924(e)(1). If the sentence was not enhanced pursuant to 924(e)(1), the applicable statutory maximum would be ten years under 924(a)(2) and the guideline range would be 63-78 months. If the sentence was enhanced under 924(e)(1), the mandatory minimum would be fifteen years and the guideline range would be 188-235 months. The court reasoned that Booker requires that any fact other than a prior conviction that mandates (whether under mandatory guidelines or a mandatory minimum statute) a sentence higher than that authorized by the jury verdict or plea must be proved to a jury or admitted. To find the defendant guilty of being a felon in possession of ammunition, the jury had to find that he had one prior felony, did not consider whether he had three prior violent felonies, and therefore did not find the requisite facts for the fifteen-year mandatory minimum. The court could not determine whether the prior felonies were "violent" because this went beyond the mere fact of prior conviction.

4) In United States v. Gonzalez, 2005 WL 2002275 (2d Cir. Aug. 22, 2005), the defendant admitted to conspiring to distribute .4 grams of crack. Because he had a prior drug felony, this exposed him to a range of 0-30 years under 841(b)(1)(C). The district court found by a preponderance of the evidence that he conspired to distribute 50 grams of crack, departed from the guideline range of 262-327 months, and sentenced him to the 20-year mandatory minimum under 841(b)(1)(A).

The Second Circuit held that drug quantity is an element that must be charged and proved to a jury or admitted, even if, as here, the resulting mandatory minimum under an aggravated form of the offense (20 years) does not exceed the maximum that would apply to an identical unquantified drug offense (30 years). It rejected the government's argument that Harris establishes that quantity is not an element in those circumstances, first noting that the "logic of the distinction drawn in Harris between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped," then concluding that this did not matter. Unlike 924(c), 841 did not use a fact to increase minimum sentences within a penalty scheme with a fixed maximum, but instead simultaneously increased the corresponding maximum. Id. at **11-12. "Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and –(b)(1)(B) to create sentencing ranges that 'raise the limit of the possible federal sentence,' Shepard v. United States, 125 S. Ct. at 1262, drug quantity must be deemed an element for all purposes relevant to the application of these increased ranges." Id. at 14. The Second Circuit also found support in Booker, where "the Supreme Court did not deconstruct the Guidelines' sentencing ranges, converting only the maximums to advisory provisions, while permitting the minimums to operate as mandatory sentencing factors. Instead, recognizing that Congress had structured the Guidelines as a unified system, the Court construed the whole as advisory to ensure against Apprendi error in particular cases." Id.

In Cordoba-Murgas, 2005 WL 2143879 (2d Cir. Sept. 7, 2005), the Second Circuit made clear that the defendant's admission of type and quantity of drugs does not waive the requirement that the type and quantity be charged in the indictment.

5) In State v. Barker, 692 N.W.2d 755 (Minn. Ct. App. 2005), the Minnesota Court of Appeals held that a mandatory minimum statute that increased the sentence above the presumptive sentence under state law for the offense of conviction "functions the same as an aggravating factor by increasing what otherwise would be the presumptive sentence. Because it functions in the same way, we conclude, it should be treated the same as an upward departure from the presumptive sentence for the purposes of Blakely." Id. at 760.

The same argument could be made in a federal sentencing where the mandatory minimum exceeded the guideline maximum. However, the government could argue that after Booker, the mandatory minimum did not exceed the maximum sentence authorized by the jury verdict. When the Guidelines were mandatory, the maximum lawful sentence was the maximum sentence that could be imposed under the Guidelines because the guideline range had the force of law.[67] The Booker remedial majority did not say explicitly that the maximum lawful sentence under the Booker remedy would be the U.S. Code maximum but that must be so since the guideline range is no longer mandatory.[68] If the offense was committed before Booker was decided, you can argue that (1) *ex post facto* principles inherent in the Due Process Clause prohibit the defendant from being sentenced under the Booker remedy because it increased the maximum sentence from the top of the guidelines range to the statutory maximum, see Part VIII, infra; (2) the mandatory minimum results in a sentence higher than the top of the guideline range; (3) it therefore functions as a mandatory aggravating factor that must be charged and proved to a jury beyond a reasonable doubt.

C. Challenges to Offense-Based Mandatory Minimums

For mandatory minimums based on the elements of the offense, different challenges to mandatory minimums are necessary. If Congress continues in the direction of blanketing the code with such mandatory minimums, or in especially egregious cases, possibilities are Separation of Powers, Equal Protection, Substantive Due Process Right to Individualized Sentencing, and the Eighth Amendment.

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[67] See Booker, 125 S. Ct. at 750 (citing Mistretta v. United States, 488 U.S. 361, 391 (1989); Stinson v. United States, 508 U.S. 36, 42 (1993)); see also Glover v. United States, 531 U.S. 198, 203-04 (2001); United States v. R.L.C., 503 U.S. 291, 297-98, 306 (1992); Miller v. Florida, 482 U.S. 423 (1987).

[68] See United States v. Crosby, 397 F.3d 103, 109 n.6 (2d Cir. 2005); United States v. Antonakopoulos, 399 F.3d 68, 79 (1st Cir. 2005).

1) Separation of Powers – The prosecutor has sole power to charge an offense that carries a mandatory minimum sentence and sole power to lower that sentence. Offense-based mandatory minimums therefore unite the power to prosecute and the power to sentence within the Executive Branch, aggrandizing the power of the Executive and encroaching upon the Judiciary's constitutionally assigned sentencing function. See Mistretta v. United States, 488 U.S. 361, 382, 391 n.17 (1989). An article by Professor Rachel Barkow argues, *inter alia*, that "the danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check. That is, . . . the key problem with these laws is their *mandatory* nature, not whether they set a floor or ceiling. Thus, under a formalist analysis that looked to the criminal jury's role in the separation of powers, the Court would reject not only those laws that require judges (not juries) to increase a defendant's maximum sentence but also those laws that require judges (not juries) to set a minimum sentence."[69]

2) Equal Protection -- Congress has been informed for years that mandatory minimums are costly, that they have little effect on crime control, and have a disparate impact on minorities.[70] Even the Director of the Office of National Drug Control Policy has told Congress that the current policy of imprisoning low-level offenders for years is ineffective in reducing crime and only breaks generation after generation of poor minority young men.[71] Do mandatory minimums therefore fail the rational basis test, or even reflect discriminatory intent?

3) Substantive Due Process Right to Individualized Sentencing – The death penalty is prohibited as the mandatory punishment for any crime, Woodson v. North Carolina, 428 U.S. 280 (1976), and the sentencer in a capital case must be able to give effect to all mitigating circumstances. Lockett v. Ohio, 438 U.S. 586, 602-04 (1978).

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[69] Rachel Barkow, Separation of Powers and the Criminal Law, to be published in the Stanford Law Review 2006, available now at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=805984.

[70] See Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 21-22 (2004); U.S. Sentencing Commission, Cocaine and Federal Sentencing Policy (May 2002); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994); U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994); Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, Justice on Trial (2000).

[71] Kris Axtman, Signs of Drug-War Shift, Christian Science Monitor, May 27, 2005.

Can these principles be extended to mandatory minimum sentencing, at least where the result is mandatory life, or effectively mandatory life?

4) Eighth Amendment Do mandatory minimums violate the Eighth Amendment ban on grossly disproportionate punishment in some cases? In United States v. Angelos, 345 F.Supp.2d 1227 (D. Utah Nov. 16, 2004), Judge Cassell was required to sentence a twenty-four-year-old first offender to a consecutive mandatory minimum term of 55 years based on his three convictions in the same trial for possessing (not displaying or using) a firearm in connection with small marijuana deals. The judge found this sentence to be "grossly disproportionate," "unjust, cruel, and even irrational," but rejected the defendant's Equal Protection Clause and Eighth Amendment arguments. The case was appealed to the Tenth Circuit. An *amicus* brief was filed on behalf of Angelos by 163 former U.S. Attorneys, federal judges, and DOJ officials, including four former Attorneys General. The Tenth Circuit affirmed. United States v. Angelos, __ F.3d __, 2006 WL 412211 (10th Cir. Jan. 9, 2006). In rejecting the Eighth Amendment challenge, the Tenth Circuit gave precedence over the three-factor test of Harmelin v. Michigan, 501 U.S. 957 (1991) to a previous decision, Hutto v. Davis, 454 U.S. 370 (1982), which rejected the three-factor test and concluded that a 40-year-sentence for marijuana dealing was not disproportionate. The Tenth Circuit also essentially rejected the district court's findings of fact in favor of its own findings of fact. It is likely that Angelos will seek rehearing *en banc* and/or petition for certiorari.

VIII. Limits on the Length of Sentences for Offenses Committed Before January 12, 2005 Based on the Fair Warning Component of the Due Process Clause, the Sixth Amendment Right to Jury Factfinding, and the Right to Beneficial Constitutional Rules Announced Before the Case Was Final.

(This section has not been updated since July 2005.)

There are two arguments, set forth in detail below, that limit sentences for offenses committed before January 12, 2005:

(1) Straight Fair Warning Argument: The sentence may not exceed the top of the guideline range (fully adjusted with judicial factfinding) in effect when the defendant committed the offense unless based on an upward departure that complies with strict standards for upward departure contained in the Guidelines Manual and the *de novo* standard of review of such departures set forth in now-excised 18 U.S.C. § 3742(e).

(2) Fair Warning Plus Sixth Amendment Argument: (a) Fair Warning: The Booker remedy raises the maximum potential punishment from the top of the guideline range (fully adjusted with judicial factfinding) in effect when the defendant committed the offense to the U.S. Code maximum. Because this change was unexpected and indefensible in light of the law in effect when the defendant committed the offense, it violates fair warning principles inherent in the Due Process Clause. (b) Thus, the Booker remedy may not be used *at all* in sentencing a defendant who committed the offense before Booker was decided. Instead, the mandatory guidelines in effect when the

defendant committed the offense must be used. (c) Sixth Amendment: Mandatory guidelines can be constitutionally applied only if based solely on facts found by a jury or admitted by the defendant. Thus, the sentence may not exceed the guideline range corresponding to the facts found by a jury or admitted by the defendant. (d) Under Griffith v. Kentucky, 479 U.S. 314 (1987) and Marks v. United States, 430 U.S. 188 (1977), the defendant is entitled to the benefit of a new constitutional rule announced before his case became final on direct appeal, whether he expected the change or not, but cannot be saddled with an unforeseeable judicial construction of a statute that is more onerous.

The first argument should be non-controversial, yet it apparently is not always being made. The Sentencing Commission reported on June 6, 2005 that 1.4 % of sentences since United States v. Booker, 125 S. Ct. 738 (2005) was decided have been above the guideline range, as compared to .8% in 2002 and 2003. See http://www.ussc.gov/Blakely/PostBooker_082305.pdf. This suggests that the reasons for these above-range sentences are not all upward departures.

The second argument has been rejected by every court to address it thus far, for various reasons that are incorrect, as explained below. There seem to be two basic problems in the way the argument is being made, or at least in the way the courts are describing the argument. First, no one seems to be making the point that the maximum potential sentence for fair warning purposes is the top of the guideline range under Miller v. Florida, 482 U.S. 423 (1987). Second, because it is true that the defendant *did* have fair warning when he committed the offense that he would receive a guidelines sentence based on judicial factfinding, the courts are uncomfortable about accepting an argument for a lower sentence that they believe is based solely on fair warning. The argument does not stop with fair warning but has three distinct further steps.

The Straight Fair Warning Argument (steps 1-4 below) should be made in any case in which the sentencing court may exceed, or did exceed, the top of the fully adjusted guideline range. The Fair Warning Plus Sixth Amendment Argument (steps 1-7 below) should be made whenever the guideline range based on judicial factfinding exceeds the guideline range based solely on the jury verdict or the defendant's admission.

1. The Fair Warning Component of the Due Process Clause Prohibits Retroactive Application of a Judicial Interpretation of a Statute that Increases the Maximum Punishment, or Permits Sentencing Increases Based on Reasons Previously Not Permitted, or Subjects Sentencing Increases to a Lesser Standard of Appellate Review.

The *Ex Post Facto* Clause prohibits application of a law enacted after the date of the offense that "inflicts a greater punishment, than the law annexed to the crime, when committed," or "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense." Calder v. Bull, 3 U.S. 386, 390 (1798); Carmell v. Texas, 529 U.S. 513, 524 (2000).

A new law that increases the statutory maximum sentence, Lindsey v. Washington, 301 U.S. 397, 401-02 (1937), increases the presumptive sentencing guidelines range, Miller v. Florida, 482 U.S. 423, 432-33 (1987), or permits courts to increase sentences for reasons not permitted under prior law or with less meaningful appellate review, id. at 432-33, 435, United States v. Safarini, 257 F.Supp.2d 191, 201 (D.D.C. 2003), violates the *Ex Post Facto* Clause.

The same prohibitions apply to judicial interpretations of statutes by virtue of the fair warning component of the Due Process Clause.[72] See Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964) ("If a . . . legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a . . . [c]ourt is barred from achieving precisely the same result by judicial construction."); Marks v. United States, 430 U.S. 188, 191-92 (1977) (following Bouie).

However, unlike the *Ex Post Facto* Clause, the Due Process Clause does not prohibit every judicial change to the defendant's detriment. The change must violate "the more basic and general principle of fair warning." Rogers v. Tennessee, 532 U.S. 451, 459 (2001). That is, the change must be "unexpected and indefensible" with reference to the law in effect at the time of the offense. Id. at 456, 457, 462-64; Bouie, 378 U.S. at 354.

2. The Maximum Sentence for Fair Warning Purposes in a Guidelines System is the Top of the Guideline Range.

In Miller v. Florida, 482 U.S. 423 (1987), the Supreme Court made clear that in a guidelines system, the maximum potential sentence for fair warning purposes is the presumptive sentencing guidelines range on the date of the offense, even if the statutory maximum is higher and remains unchanged, and the court could upwardly depart from the presumptive range under the old law. Id. at 428, 431, 432-33, 435.

The Court held that retroactive application of Florida's revised sentencing guidelines (raising the top of the petitioner's applicable guideline range from 4 ½ to 7 years) violated the *Ex Post Facto* Clause. The Florida guidelines had the "force and effect of law," id. at 435, and the guidelines in effect at time of the offense "did not

[72] This doctrine developed in Supreme Court cases involving judicial interpretations of laws defining an offense, but the courts of appeal have applied it to judicial interpretations of sentencing laws as well. See Johnson v. Kindt, 158 F.3d 1060, 1063 (10th Cir. 1998); Davis v. Nebraska, 958 F.2d 831, 833-34 (8th Cir. 1992); Helton v. Fauver, 930 F.2d 1040, 1045 (3d Cir. 1991); Dale v. Haberlin, 878 F.2d 930, 934 (6th Cir. 1989). In the post-Booker cases addressing the Due Process/Sixth Amendment argument, the First, Fifth, Seventh and Eleventh Circuits have explicitly or implicitly acknowledged that the fair notice requirement applies to a judicial interpretation of a *sentencing* law. Only the Ninth Circuit has held (in the alternative to other reasons) that Bouie applies only to after-the-fact changes in criminal liability and not to retroactive sentence enhancements, see United States v. Dupas, No. 04-50055, slip op. at *9067 (9th Cir. Aug. 3, 2005), based on its earlier opinion in United States v. Newman, 203 F.3d 700, 703 (9th Cir. 2000).

warn" the defendant that the top of the guideline range was 7 rather than 4 1/2 years. Id. at 430, 431. The Court rejected the Florida Supreme Court's holding that the increase in the guideline range did not change the statutory maximum for the offense, id. at 428, and the government's argument that the judge could have imposed a 7-year sentence even under the old law by upwardly departing. Id. at 432-33. To impose a 7-year sentence under the old law, the sentencing judge would have had to follow strict rules for upward departure, i.e., provide, in writing, clear and convincing reasons different from those already weighed in arriving at the presumptive sentence, that were credible and proven beyond a reasonable doubt, and those reasons were reviewable on appeal. Miller, 482 U.S. at 432-33, 435. See also United States v. Safarini, 257 F.Supp.2d 191, 201 (D.D.C. 2003) (holding that a new law was *ex post facto* where the defendant could receive a death sentence under the old law only if one or more of a limited set of aggravating factors was found and no mitigating factors were found, while death could be imposed under the new law based on additional aggravating factors and a weighing of aggravating and mitigating factors).

Based on Miller, every court of appeals recognized that because the Guidelines had the "force of law," e.g., Stinson, 508 U.S. at 42, any amendment that would raise a defendant's guideline range could not be applied to conduct occurring before the amendment took effect without violating *ex post facto* principles.[73]

3. The *Booker* Remedy Increased the Maximum Foreseeable Sentence, Permits Increases in Sentencing for Reasons Not Permitted Before, and Subjects Sentencing Increases to Less Rigorous Appellate Review.

In striking the provisions of the Sentencing Reform Act that made the Guidelines mandatory, Booker's remedial interpretation of the statute increases the potential punishment from the presumptive guideline range to the U.S. code maximum, and also permits the court to use reasons to increase the sentence that were not available under the Guidelines and subjects sentencing increases to less meaningful appellate review.

The Booker remedy replaced mandatory Guidelines, which required a sentence within the guideline range unless standards for departure and *de novo* review were met, with a new sentencing system requiring consideration and weighing of all of the factors listed in 18 U.S.C. § 3553(a). This new system permits a sentence within or above the guideline range based on factors that were prohibited, discouraged or not recognized in the guidelines or the policy statements pertaining to upward departure. Further, by

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[73] See United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); United States v. Kopp, 951 F.2d 521, 526 (3d Cir. 1991); United States v. Morrow, 925 F.2d 779, 782-83 (4th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990); United States v. Nagi, 947 F.2d 211, 213 n.1 (6th Cir. 1991); United States v. Seacott, 15 F.3d 1380, 1386 (7th Cir. 1994); United States v. Bell, 991 F.2d 1445, 1448-52 (8th Cir. 1993); United States v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); United States v. Lam, 924 F.2d 298, 304-05 (D.C. Cir. 1991).

excising the provision establishing *de novo* review of upward departures (18 U.S.C. § 3742(e)) and replacing it with a "reasonableness" standard, Booker, 125 S. Ct. at 757, 766, the Booker remedy permits such a sentence to stand subject to a less meaningful standard of review.

In short, the Booker remedy permits a sentence higher than the top of the guideline range for reasons that do not meet the strict definitions and standards for upward departure and *de novo* review under the now-excised section 3742(e). It thus violates fair warning, see Miller, 482 U.S. at 432-33, 435, Safarini, 257 F.Supp.2d at 201, if the changes were "unexpected and indefensible" by reference to the law in effect at the time of the offense.

Beware of Erroneous Characterizations of the Change in Law: Many courts have rejected this argument because the Booker remedy did not change the maximum sentence for purposes of fair warning, claiming that the maximum foreseeable sentence was always the U.S. Code maximum. See United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005); United States v. Jamison, __ F.3d __, 2005 WL 1683961 at *1 (7th Cir. July 20, 2005); United States v. Dupas, No. 04-50055, slip op. at *9067 (9th Cir. Aug. 3, 2005); United States v. Gray, No. 3:03-00182, slip op. at **18-23 (S.D. W. Va. Mar. 17, 2005); United States v. Correa, 2005 WL 1113817 (W.D. Wis. May 10, 2005); United States v. Null, 2005 WL 1527747, at *4-5 (E.D. Pa. June 28, 2005).

The Supreme Court has squarely rejected this reasoning. In Miller v. Florida, 482 U.S. 423 (1987), it held that the maximum sentence for purposes of fair warning in a guidelines system is the top of the guideline range even if the statutory maximum is higher and remains unchanged, and the court could upwardly depart under the old law. Similarly, in Booker, the constitutional majority held that the availability of a departure under the guidelines does not mean that the judge is "bound only by the statutory maximum," because the judge is bound to impose a sentence within the Guidelines range, except when a departure is legally permissible. Booker, 125 S. Ct. at 750. Long before Booker, every circuit had held that any retroactive increase in the guideline range is *ex post facto*.

The Eleventh Circuit in Duncan (but not other courts thus far) also relied on Dobbert v. Florida, 432 US 282 (1977), where the Court held that the defendant was on sufficient notice that death was the maximum sentence by virtue of a statute in effect when he committed the offense even though the statute was later held to be unconstitutional. Duncan, at * 22 (quoting Dobbert at 297-98). Dobbert, however, was a case in which death was the maximum sentence under the statute in effect at the time of the offense and the statute applied at sentencing, so the maximum sentence did not change, and the new law made procedural changes only. In Miller, the Supreme Court held that Dobbert does not apply when there is a substantive change in the penalty and not merely a procedural one. Miller, 482 U.S. at 431.

4. **These Changes Violate the Fair Warning Component of the Due Process Clause Because They Were Unexpected and Indefensible With Reference to the Law in Effect at the Time of the Offense.**

Changes made by a judicial interpretation of a statute violate the Due Process Clause if they were unexpected and indefensible with reference to the law in effect at the time of the offense. See Rogers, 532 U.S. at 456, 457, 462-64; Bouie, 378 U.S. at 354. Here, the test is whether the Booker remedy was objectively foreseeable in light of the statutes, guidelines and caselaw in existence at the time of the offense.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Supreme Court said that a defendant is deprived of fair warning by an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language. . . . Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids. . . . If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." Id. at 353. It held that the South Carolina Supreme Court's expansion of the state trespassing statute violated the Due Process Clause because it was "clearly at variance with the statutory language," and "has not the slightest support in prior . . . decisions." Id. at 356.

In Marks v. United States, 430 U.S. 188 (1977), the Court followed Bouie and held that an "unforeseeable" judicial relaxation of the definition of obscenity violated the Due Process Clause because it "marked a significant departure from" prior law. Id. at 191-96.

In Rogers v. Tennessee, 532 U.S. 451 (2001), the Court considered a common law rule that was changed retroactively. The Court quoted the standard from Bouie as above. Id. at 457. It said that when "the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging," strict application of the *ex post facto* test (simply whether the law has changed in a way that is more onerous) would be too restrictive. Id. at 461. Thus, "we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" Id. at 462.

Rogers indicates that where a change in law is *not* common law judging, but "the interpretation of a statute," the simple question should be whether the law has changed in a way that makes it more onerous, just like under the *Ex Post Facto* Clause. The Booker remedy was a judicial interpretation of a statute, not common law judging. It makes no difference, however, because the Booker remedy changed the law to make it more onerous, and it was unexpected and indefensible. In particular:

- At the time the defendant committed the offense, he had fair warning that the maximum potential punishment was the top of the applicable guideline range, and

that that range could be exceeded only for reasons complying with the Guidelines' strict departure policy statements and the *de novo* standard of review.

- The Booker remedy, by making the guidelines advisory, raised the potential punishment to the U.S. code maximum and permitted courts to sentence up to that maximum for reasons discouraged, prohibited, or not recognized under the guidelines, subject only to reasonableness review rather than *de novo* review.

The revision of the statute from mandatory to advisory and what flowed from it was unexpected and indefensible. The Booker remedial majority stated that "[w]e do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system," but, "given today's constitutional holding, that is not a choice that remains open." 125 S. Ct. at 767. The remedial majority therefore "significantly alter[ed] the system that Congress designed." Id. at 757. The unavoidable conclusion is that the revision of the statute by the remedial majority is a new law that previously did not exist.

Like the addition of language to a statute by the state court in Bouie, 378 U.S. at 349-50, the remedial majority's excision of portions of the Sentencing Reform Act is "clearly at variance with the statutory language," and "has not the slightest support in prior . . . decisions." Id. at 356. And, like the Supreme Court's expansion of one of the standards defining "obscene" material in Marks, it "mark[s] a significant departure from" prior law. See 430 U.S. at 194.

As the constitutional majority emphasized, Booker, 125 S. Ct. at 750, and the remedial majority acknowledged, id. at 759, the Guidelines "as written" were mandatory up to the moment Booker was decided on January 12, 2005. The plain language of the statute made them mandatory, see 18 U.S.C. § 3553(b)(1) (court "shall impose a sentence of the kind, and within the range" established by the Guidelines), an unbroken line of Supreme Court decisions said they were mandatory, see Mistretta v. United States, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts"), Stinson v. United States, 508 U.S. 36, 42 (1993) (same), Glover v. United States, 531 U.S. 198, 203-04 (2001) ("any amount of actual jail time . . . under a determinate system of constrained discretion such as the Sentencing Guidelines" that results from counsel's deficient performance constitutes prejudice under Strickland), United States v. R.L.C., 503 U.S. 291, 297-98, 306 (1992) ("maximum term of imprisonment" was that "under the statute requiring application of the Guidelines, § 3553(b)"), and nothing in either Booker opinion found "any constitutional infirmity in" the sections that were excised. Booker, 125 S. Ct. at 771 (Stevens, J., dissenting). The revision of the statute was so "unexpected and indefensible" in reference to prior law that neither the government, nor the respondents, nor any of the *amici* contemplated or requested it.[74] Id. at 771 (Stevens, J., dissenting).

[74] The circumstances were quite different in Rogers v. Tennessee, 532 U.S. 451 (2001), where the Supreme Court held that judicial abolition of a common law rule was not unexpected or indefensible with reference to prior law because the rule was "widely viewed as an outdated relic of the common law," had been "legislatively or judicially abolished in the vast majority of

There is an additional argument that the Booker remedy is not subject to the "unexpected and indefensible" test because it is a direct violation of the *Ex Post Facto* Clause: It should be viewed as an implied legislative change to the statute because it was based on the Court's view of what Congress would have intended had it known that mandatory Guidelines would violate the Sixth Amendment.[75] See Booker, 125 S. Ct. at 767 ("[W]e have examined the statute in depth to determine Congress's likely intent *in light of today's holding*.") (emphasis in original). No court has ever held that a judicial interpretation of a statute was a legislative change and thus a direct violation of the *Ex Post Facto* Clause. On the other hand, no court has ever rewritten a criminal statute based on perceived legislative intent the way the Booker remedial majority did. In any event, the Booker remedy easily passes the "unexpected and indefensible" test. Use of this argument might signal to the Court that you are not confident that it does. You may want to put in a footnote, or use it to point out how extraordinary and radical the Booker remedy is in arguing the "unexpected and indefensible" test.

Beware of *dicta* that could be used to corrupt the test. In United States v. Lata, __ F.3d __, 2005 WL 1491483 (1st Cir. June 24, 2005), Judge Boudin, in *dicta*, said that Apprendi and Blakely made "some major change in guideline status or operations seem[] possible," that in Booker the government had "urged a similar result to that reached by the Supreme Court," and that the "Booker majority" would not call its decision "indefensible" Id. at *3.

This is more than a little disingenuous. Before Blakely and Booker, the First Circuit and every other court of appeals had held that it was not remotely possible that Apprendi had anything to do with the Guidelines. See, e.g., United States v. Picanso, 333 F.3d 21, 25-26 (1st Cir. 2003) (Boudin, J.).

Furthermore, this gets entirely wrong the relevant date and the relevant change in law. The only relevant date for fair warning purposes is the date of the offense. If that was before Blakely, no court had ever held that the Guidelines were advisory or that federal courts had discretion to sentence up to the statutory maximum for reasons prohibited, discouraged or not recognized by the Guidelines. Before Blakely, Jones (1999), Apprendi (2000), and Ring (2002) had been decided. Each of those cases held that it violated the Constitution for a judge to find facts raising the statutory maximum penalty. If these decisions portended anything, it was that judges would not be permitted to increase the guideline range based on judge-found facts. Judge Boudin cites Blakely as support for the proposition that the Booker revision of the statute might not have been

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jurisdictions," "did not exist as part of Tennessee's statutory criminal code," and "had never once served as a ground of decision in any prosecution for murder in the State." Id. at 462-64.

[75] This argument is explained in more detail in *Booker* Litigation Strategies, available at http://www.fd.org/pdf_lib/BookerLitStrategies.pdf, and "*Booker*: Ex Post Facto Independent of Due Process," available at http://circuit 9.blogspot.com/2005/02/booker-ex-post-facto-indepent-of.html.

unexpected and indefensible, but the precise opposite is true. The Court held that its "precedents make clear" 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.*" Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (emphasis in original), citing Ring and Apprendi.

Thus, while Booker's constitutional holding *might* have been reasonably foreseeable to a defendant who committed the offense before Booker was decided (though every court of appeals had rejected the argument that Apprendi applied to the Guidelines before Blakely was decided and some even after Blakely was decided), Booker's remedial revision of the statute – making the Guidelines advisory, increasing the maximum from the presumptive guideline range to the U.S. code statutory maximum, and permitting sentences up to that new maximum for reasons not permitted by the Guidelines and subject to only reasonableness review -- was unexpected and indefensible with reference to the law in effect when the defendant committed the offense.

If you are only making the Straight Fair Warning Argument, you can conclude here: A sentence higher than the top of the applicable guideline range in effect when the defendant committed the offense (assuming there was no basis for upward departure that would pass *de novo* review under excised section 3742(e)) violates the Due Process Clause. Cf. United States v. Lata, __ F.3d __, 2005 WL 1491483, at *4 (1st Cir. June 24, 2005) (defendant's sentence did not violate fair warning because it was based on valid reasons for upward departure).

5. Because the *Booker* Remedy Violates the Fair Warning Component of the Due Process Clause with Respect to a Defendant Who Committed the Offense Before *Booker* Was Decided, It May Not Be Used in Sentencing Such a Defendant *At All*; Instead the Mandatory Guidelines in Effect at the Time of the Offense Must Be Used.

Because the Booker remedy increases the *potential* punishment to the U.S. code maximum, it may not be applied at all, even though the court has discretion to impose a sentence less than the U.S. code maximum. In Lindsey v. Washington, 301 U.S. 397, 401-02 (1937), the Court stated:

> But the *ex post facto* clause *looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed*. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the material disadvantage of the wrongdoer. It is for this reason that an increase in the *possible penalty* is *ex post facto*, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier.

Id. at 401 (emphasis supplied) (internal citations omitted). See also Miller, 482 U.S. at 432 ("one is not barred from challenging a change in the penal code on *ex post facto*

grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old"); Weaver v. Graham, 450 U.S. 24, 33 (1981) (the "inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual."); Garner v. Jones, 529 U.S. 244, 251, 253 (2000) (any change in a sentencing law or regulation that "creates a significant risk of prolonging" incarceration violates the *Ex Post Facto* Clause, and the existence of discretion "does not displace the protections of the *Ex Post Facto* Clause."); California Department of Corrections v. Morales, 514 U.S. 499, 510 n.6 (1995) (defendant bears the burden of establishing that the "measure of punishment itself has changed," but not "that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme").

Thus, a defendant may not be sentenced under a "penalty provision [with a higher maximum such as the Booker remedy] that did not exist at the time of the offense," but instead must be sentenced "under the preexisting penalty provision." United States v. Molina, __ F.3d __, 2005 WL 1177221, at 10 (1st Cir. May 19, 2005).

The preexisting penalty provision was mandatory Guidelines. Thus, the Booker remedy may not be used, and the defendant must be sentenced under the mandatory Guidelines.

6. The Mandatory Guidelines Can be Constitutionally Applied Only if Based Solely on Facts Found by a Jury Beyond a Reasonable Doubt or Admitted by the Defendant.

For mandatory Guidelines to comply with the Sixth Amendment, "[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." Booker, 125 S. Ct. at 756 (emphasis supplied).

Thus, the mandatory Guidelines must be applied based only on those facts found by a jury beyond a reasonable doubt or admitted by the defendant.

7. A Defendant is Entitled to the Benefit of a New *Constitutional* Rule Announced Before His Case Becomes Final on Direct Appeal Whether He Expected the Change or Not, But May Not Be Saddled With the Burden of an Unforeseeable Judicial Interpretation of a Statute that is More Onerous.

Why should the defendant get the benefit of Booker's Sixth Amendment holding, but not the detriment of the Booker remedy? A defendant is entitled to the "benefit" of a new constitutional rule if his case was not yet final when the rule was announced, even though he thought the law was otherwise when he committed the offense, Griffith v. Kentucky, 479 U.S. 314, 327-28 (1987), but a change in the law after the defendant's conduct occurred which disadvantages him may not be applied in his case. This concept

is illustrated in Marks v. United States, 430 U.S. 188 (1977), where the Court held that the Due Process Clause precluded application of standards expanding criminal liability for obscenity announced in Miller v. California, 413 U.S. 15 (1973), but that "any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case." Id. at 196-97.

The government may argue that the defendant was "on notice" that he could be sentenced under the Guidelines based on judicial factfinding. The defendants in Marks were "on notice" when they committed the offense that their conduct would violate then-existing obscenity standards, but those standards were later found to violate the First Amendment and therefore could not be applied to their conduct, regardless of notice. The government cannot violate a defendant's Sixth Amendment rights just by giving notice that the violation will occur.

If the court views this as "unfair to the government," defendants who committed the offense after Jones and before some courts started holding that the Guidelines were advisory following Blakely, could point out that they (and the government) were on notice by virtue of Jones, Apprendi, and/or Ring of Booker's eventual constitutional holding, but *no one* had ever suggested the eventual Booker remedy.

Beware of Over-Reading the Supreme Court's Instructions for Cases on Direct Review: The remedial majority stated that "we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." Booker, 125 S. Ct. at 769. The Fifth Circuit has rejected the Due Process argument because "[i]t is at least implicitly contrary to" this statement in Justice Breyer's opinion. United States v. Scroggins, 411 F.3d 572, 576 (5th Cir. June 6, 2005). The Seventh and Ninth Circuits have relied on this in addition to the claim that the maximum potential sentence of which the defendant had fair notice was always the U.S. Code maximum. See United States v. Dupas, No. 04-50055, slip op. at *9067 (9th Cir. Aug. 3, 2005); United States v. Jamison, __ F.3d __, 2005 WL 1683961 at *1 (7th Cir. July 20, 2005).

In making that statement, the Supreme Court cited Griffith, 479 U.S. at 328, which requires that constitutional rules that "benefit" defendants be applied to cases not yet final. Griffith, 479 U.S. at 327, 328. The "remedial interpretation of the Sentencing Act" is *not* a constitutional rule. The excised sections were not themselves unconstitutional or held to be unconstitutional, see Booker, 125 S. Ct. at 771 (Stevens, J., dissenting); id. at 797 (Thomas, J., dissenting), nor did the remedial majority contend that its revision of the statute was a constitutional rule, but instead consistently distinguished between its "severance and excision" of the statute and the merits majority's "constitutional holding." Id. at 756, 757.

Booker's case had to be remanded because the district court "applied the Guidelines as written and imposed a sentence higher than the maximum authorized by the jury's verdict." Booker, 125 S. Ct. at 769. Fanfan's case was remanded although his sentence was authorized by the jury's verdict and therefore did not violate the Sixth

Amendment, with the comment that "the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions." Id.

Neither Booker nor Fanfan argued that the fair warning component of the Due Process Clause would preclude a sentence greater than that authorized by the jury's verdict under the Booker remedy. They could not make that argument unless and until the district court actually imposed such a sentence on remand. Thus, the issue was not presented or addressed, and nothing can be read into the Court's silence on the subject.[76] In Booker itself, the Court rejected the government's contention that *stare decisis* precluded application of Blakely to the Guidelines based on a number of its prior cases because in none of those cases did the appellant raise the argument that his or her sentence exceeded the sentence authorized by the jury's verdict. See 125 S. Ct. at 753-54

Marks clearly illustrates that the Supreme Court has previously announced rules in the same decision that both benefit and disadvantage defendants, and held later when the issue was squarely presented that the former are retroactive, while the latter are prospective only.

IX. Limitations on Re-Sentencing on Remand

A. One Bite at the Apple/Consideration of Intervening Facts

The government may not introduce additional evidence at re-sentencing on an issue it had a full and fair opportunity to litigate at the first sentencing. US v. Montero-Montero, 370 F.3d 121, 124 (1st Cir. 2004); US v. Matthews, 278 F.3d 880, 885-86 (9th Cir. 2002); US v. Parker, 30 F.3d 542, 553-54 (4th Cir. 1994).

When a case is remanded for re-sentencing based on facts that existed but the court was constrained from fully considering at the initial sentencing, the court may also consider facts that arose after the initial sentencing, such as a worsening of the defendant's medical condition. United States v. Lata, __ F.3d __, 2005 WL 1491483, at *5 & n.3 (1st Cir. June 24, 2005).

B. Ex Post Facto Principles Incorporated in Due Process Clause

See VIII, supra.

C. Prosecutorial Vindictiveness

Due process precludes the prosecutor from seeking a longer sentence unless he rebuts the presumption of vindictiveness with a legitimate nonvindictive justification. See Blackledge v. Perry, 417 U.S. 21 (1974); Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979).

[76] Unfortunately, Judge Hornby accepted this argument in re-sentencing Fanfan to a fully adjusted guideline sentence on May 24, 2005.

D. Judicial Vindictiveness

- Due process precludes judge from imposing longer sentence unless presumption of vindictiveness is rebutted by specific reasons stated on the record based on objective evidence of defendant's conduct that occurred after initial sentencing, North Carolina v. Pearce, 395 U.S. 711, 726 (1969), events occurring after initial sentencing such as convictions, Wasman v. US, 468 U.S. 559, 569-71 (1984), or evidence that existed but was not presented at initial sentencing, such as expanded evidence of the defendant's offense conduct and criminal history. Texas v. McCullough, 475 U.S. 134, 143-44 (1986), Alabama v. Smith, 490 U.S. 794 (1989).

- Subject to all limitations above.

- It bolsters the argument if the initial sentence was below the top of guideline range, or the judge did not exercise discretion to *sua sponte* upwardly depart, or rejected upward departure proposed by government.

E. 3742(g)(2)

- Added by PROTECT Act on April 30, 2003:

The court shall not impose a sentence outside the applicable guidelines range except upon a ground that--

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

- General rule is re-sentence in light of circumstances as they exist at time of re-sentencing. Werber v. US, 149 F.3d 172, 178 (2d Cir. 1998) (and cases cited therein).

- Section 3742(g)(2) should not apply in re-sentencing after Booker. Its purpose was to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 108-66, at 59 (2003), reprinted in U.S.C.C.A.N. 683, 694. D is not seeking the "same illegal departure on a different theory," but application of newly relevant 3553(a) factors. Courts of appeal have held that grounds for a sentence outside the Guidelines that arose only by virtue of some ruling on appeal (such as Booker) may be raised at re-sentencing despite section 3742(g)(2). See United States v. Martin, 363 F.3d 25, 40 (1st Cir. 2004); United States v. Lauersen, 348 F.3d 329, 344 n.16 (2d Cir. 2003); United States v. Lynch, 378 F.3d 445, 449 n.4 (5th Cir. 2004); United States v. Phipps, 368 F.3d 505, 512-13 (5th Cir. 2004); United States v. Jackson,

346 F.3d 22, 26 n.4 (2d Cir. 2003). In an initial sentencing before Booker, it would have been illegal to impose a sentence for reasons under 3553(a) unless those reasons happened to coincide with the guideline range and standards for departure. Many 3553(a) factors were discouraged or prohibited (e.g., family circumstances, health issues, drug addiction, crack/powder disparity).

- If previous sentencing pre-dated PROTECT Act, section 3742(g)(2) cannot be applied because district courts were not required to give a written statement of reasons at that time. See United States v. Derbes, 369 F.3d 579, 583-84 (1st Cir. 2004); United States v. Bolden, 368 F.3d 1032, 1036 (8th Cir. 2004); United States v. Kostakis, 364 F.3d 45, 53 (2d Cir. 2004); United States v. Daniel, 2004 WL 2203810 (9th Cir. Sept. 20, 2004).

- If offense pre-dated PROTECT Act, the *Ex Post Facto* Clause prohibits application of section 3742(g)(2) to preclude consideration of grounds not stated at first sentencing or approved by the court of appeals, but which could be considered under the law in effect at the time of the offense. United States v. Coates, 295 F.Supp2d 11, 17-18 (D.D.C. 2003).

- Section 3742(g)(2) should not be applied even if the previous sentencing occurred after Booker because it requires that any sentence outside the guideline range be based on a "*permissible ground of departure*." A sentence can now be outside the guideline range for reasons under 3553(a) other than departure. Like the reason for section 3742(e) (to make "Guidelines sentencing even more mandatory than it had been"), the reasons for section 3742(g)(2) (to prevent "illegal departures") "have ceased to be relevant." Booker at 765.

- Caution! The government may argue that it has the same right to introduce 3553(a) factors supporting a higher sentence. This is subject to one bite at the apple and vindictiveness rules. So if there was no full and fair opportunity to raise it the first time and the government has a non-vindictive justification, it can raise it on re-sentencing. But if the new information could have been presented under the mandatory Guidelines at the initial sentencing, for example as relevant conduct, then the government may not present it at re-sentencing.

X. Resources

Various materials - www.fd.org

Levine, 128 Easy Mitigating Factors,
http://www.fd.org/pdf_lib/128EasyMitigatingFactors.pdf

McColgin, Booker Litigation Strategies Manual,
http://www.fd.org/pdf_lib/BookerLitStrategies_MJMver03.pdf

Sentencing Law and Policy (Professor Berman's blog with comprehensive daily updates and decisions), http://sentencing.typepad.com

http://www.fpdforums.org (accessible only from a Federal Defender computer)

http://circuit9.blogspot.com

http://circuit2.blogspot.com

http://circuit3.blogspot.com, Federal Defender blogs by circuit

www.nacdl.org, National Association of Criminal Defense Lawyers

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