

# WHAT IS LOVELY (AND NOT SO LOVELY) ABOUT *RITA* IMPLICATIONS FOR *GALL*, *KIMBROUGH* AND FUTURE CASES

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## I. The Opinions, *Rita v. United States*, 127 S. Ct. 2456 (2007)

The majority opinion was written by Justice Breyer, joined in full by Justices Roberts, Kennedy and Alito. It is not without its mixed messages, bizarrely circular language, and misleading passages. Still, it is less than a ringing endorsement of the Guidelines. Aside from the vaguely suggestive *dicta* (which must be read closely for what it says and does not say), we find an appellate presumption of reasonableness for within guideline sentences with no independent legal effect and a notably tentative justification. In contrast, district court judges are mandated to determine the appropriate sentence under § 3553(a) completely independently of the Guidelines, and to consider nonfrivolous arguments to disregard the guidelines on general policy grounds, case-specific grounds, guideline-sanctioned departure grounds, or “regardless.”

Justices Stevens and Ginsburg joined the opinion and judgment but wrote a concurrence, elaborating on abuse of discretion review and confronting the most obvious deficiency in the guidelines (their failure to account for individual characteristics) which the majority opinion notably managed to dodge. Since only Justices Roberts, Kennedy and Alito joined Justice Breyer’s opinion without separately concurring, the concurrence by Justices Stevens and Ginsburg narrows the scope of the holding and its rationale.

Justices Scalia and Thomas concurred in the judgment and only in Part III of the opinion (which describes what kind of statement of reasons is required and holds that the one in *Rita* was enough). They did not join the rest of the opinion for reasons that could have been a dissent. But only Justice Souter truly dissented, in a refreshingly straightforward and realistic way.

### A. The Appellate Presumption (Part II), Breyer, Kennedy, Roberts, Alito, Stevens, Ginsburg, JJ.

A presumption of reasonableness *only* on appeal (*not* in the district court) for a within-guideline sentence comports with the Sixth Amendment and the excision of 3553(b) and 3742(e) in *Booker*, where (1) the presumption is not mandatory, binding, or more deferential to the Commission than to the district court, and (2) the district court independently reaches the conclusion that the guideline sentence is the appropriate sentence under § 3553(a) after considering nonfrivolous arguments (if made) that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, warrants a guideline-sanctioned departure, or that a different sentence is appropriate regardless, and (3) at least if the case is not one of Justice Scalia’s supposedly “hypothetical” ones in which the sentence is upheld as not unreasonably excessive only because of a judge-found fact.

In regard to the latter limitation, note that in this case, the sentencing judge *did* resolve a disputed fact (the cross-reference in the perjury guideline) to increase the guideline sentence from a range of 15-21 months corresponding to the jury verdict to a range of 33-41 months, imposing 33 months. However, the majority opinion does not recognize that there was judicial factfinding in this case; the only allusion to it is in Justice Scalia's concurrence and there it is unclear that he realized that it occurred. *Rita*, 127 S. Ct. at 2478 (Scalia & Thomas, JJ., concurring). This, *Rita* can be described as a case in which the guidelines were applied based on jury-found facts alone with no judicial factfinding to enhance the within-guideline sentence.

**1) The presumption is *not mandatory*.** Courts of appeals “may” adopt it, but need not. *Rita*, 127 S. Ct. at 2462.

- a. In circuits that *have* adopted a presumption, we can argue that the presumption should be discarded, and in circuits that have *not* adopted the presumption, that it should not be adopted. The reasons for the presumption are notably weak even as stated, *see* I(A)(7)(a) and (8), *infra*, and we can continue to argue that the Guidelines do not merit a presumption.
- b. Courts of appeals may, and should, decline to apply a presumption where the guideline at issue plainly does not advance the purposes of sentencing (*e.g.*, the crack guideline, the career offender guideline, acquitted and uncharged conduct, immigration guidelines).

**2) The presumption is “*not binding*.”** *Id.* at 2463 (emphasis added). “It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case.” *Id.* In other words, this is not like any presumption we know of. Indeed, it has no “independent legal effect.” *Id.* at 2465. It “simply recognizes the real-world circumstance that when the judge’s *discretionary* decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is *probable* that the sentence is reasonable.” *Id.* (emphasis added).

**3) There is *no presumption in the district court*.** *Id.* at 2465 (“We repeat that the presumption before us is an *appellate* presumption. Given our explanation in *Booker* that appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. . . . the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”).

- a. Ensure that district courts understand that they are expressly barred from entertaining even the weak, nonbinding “presumption” that the Court says courts of appeals “may” employ.

- b. The district court need not say it is applying a presumption in order to be reversed. It may say, for example, that it does not see “any reason why the guideline sentence isn’t appropriate in this case,” or that it cannot sentence below the guidelines range unless the defendant “presented some kind of good reason” to do so. *See United States v. Ross*, \_\_\_ F.3d \_\_\_, 2007 WL 2593509 (7th Cir. Sept. 11, 2007) (reversing based on those statements).

**4) “Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge.”** *Id.* at 2463. Put another way, courts of appeals may no longer give greater deference to the Sentencing Commission’s supposed factfindings (*e.g.*, family circumstances are “not ordinarily relevant”) than to the district court judge’s real factfindings (*e.g.*, in my experience, family circumstances are often very relevant, and in this case, they warrant a sentence of probation).

- a. This is useful to support an argument in the district court for a below-guideline sentence, and to defend the sentence in the court of appeals on a government appeal of a below-guideline sentence. Whatever “factfinding” the Sentencing Commission did in promulgating a guideline (usually none, always check the Reasons for Amendment in the amendments in Appendix C cited in the Historical Note and the end of the guideline) cannot be given deference on appeal over the district court’s conclusions to the contrary.

- (i) For example, the Sentencing Commission says the appropriate sentence for a defendant with two prior minor drug offenses is 210-262 months under the career offender guideline, and a departure of one level is all that is allowed. The district court disagrees, based on its own factfinding about the career offender guideline based on the many cases the judge sees (and which may also be informed by the Commission’s own findings that the career offender guideline fails to advance the purposes of sentencing and creates unwarranted disparity, *see* Fifteen Year Report at 133-34) and the facts and circumstances of the particular offense and offender, and determines that 40 months is the appropriate sentence. Under *Rita*, the district court’s conclusions should not be reversible.

**5) District courts are free to disagree with the Guidelines on general policy grounds, individualized fact-based grounds, or both.** District courts are no longer required, or permitted, to simply defer to the Sentencing Commission’s policies. *Rita*, 127 S. Ct. at 2465, 2468 (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate “regardless.”); *id.* at 2463 (The presumption is not binding, does not place any burden of persuasion or proof on either party, and does not reflect greater deference to the Commission’s factfinding than to that of the district court, but merely “reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached

the same conclusion as to the proper sentence in the particular case,” which is a “double determination”).

- a. *Rita* invites arguments that attack the Guidelines head-on. The district court “may hear arguments by prosecution or defense that the Guidelines sentence should not apply” because “the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply,” “the Guidelines sentence *itself* fails properly to reflect § 3553(a) considerations,” or “the case warrants a different sentence regardless.” *Id.* at 2465. A party may “contest[] the Guidelines sentence *generally* under § 3553(a)” by “argu[ing] that the Guidelines reflect an *unsound judgment*, or, for example, that they do not generally treat certain defendant characteristics in the proper way,” or may “argue[] for departure.” *Id.* at 2468. Launch such attacks wherever appropriate, reminding district judges that they are empowered and required by *Rita* to hear and consider them when raised.
- b. We must educate judges about the fact that what they imagine the Commission does in the way of “factfinding” rarely occurs, or, if it does not support a guideline increase or shows that an existing guideline fails to achieve or undermines sentencing purposes, it is ignored. It is not hard to do this. At the end of each guideline is a “Historical Note” stating the guideline’s effective date, and the amendment number for each time it was amended. Each amendment and the “Reasons for Amendment” appear in Appendix C to the Manual, which is published every year in hard copy and is also available on Westlaw. The “Reasons for Amendment” rarely reflect any data analysis or actual reasons. For example, when 5H1.12, prohibiting consideration of lack of guidance as a youth and similar circumstances indicating a disadvantaged background, was added in 1992, the following “Reason for Amendment” was given: “This amendment provides that the factors specified are not appropriate grounds for departure.” USSG, App. C, amend. 466. You can dig deeper to find affirmatively damning evidence by going to law review articles, transcripts of Commission hearings, Defender letters to the Commission, etc., *see* The Continuing Struggle for Just, Effective and Constitutional Sentencing After *United States v. Booker* at 56 (August 2006), [http://www.fd.org/pdf\\_lib/EvansStruggle.pdf](http://www.fd.org/pdf_lib/EvansStruggle.pdf), but for the most part, all you need to do is point to the lack of expert reasoning or empirical evidence on the face of the Reasons for Amendment.
- c. For some examples of district court opinions analyzing and rejecting Guidelines policies, and Sentencing Commission Reports, other government reports, and studies from other sources upon which courts can rely to do so, *see Gall v. United States*, No. 06-7949, Brief of the Fed. Public & Cmty. Defenders & Nat’l Ass’n of Fed. Defenders at 15-29, [http://www.fd.org/pdf\\_lib/Gall\\_Defender\\_NAFD\\_Amicus\\_Final.pdf](http://www.fd.org/pdf_lib/Gall_Defender_NAFD_Amicus_Final.pdf); Federal Public Defender’s Office Sentencing Resource Manual, [http://www.fd.org/pdf\\_lib/SentencingResourceManualMay2007.pdf](http://www.fd.org/pdf_lib/SentencingResourceManualMay2007.pdf); The Continuing Struggle for Just, Effective and Constitutional Sentencing After

*United States v. Booker* (August 2006),  
[http://www.fed.org/pdf\\_lib/EvansStruggle.pdf](http://www.fed.org/pdf_lib/EvansStruggle.pdf).

- d. As to the argument that the Guidelines “do not generally treat certain defendant characteristics in the proper way,” Justices Stevens and Ginsburg explicitly note that the Commission has no standards or recommendations for individual characteristics, *i.e.*, they are “not ordinarily considered under the Guidelines,” noting Justice Breyer’s admission in his 1988 Hofstra article that the only offender characteristic is criminal history. But 3553(a) “requires” sentencing judges to consider these matters, and so appellate courts must consider them as well but under the abuse of discretion standard, which means they *must* defer to the district court and *may not* substitute their own judgment. *Id.* at 2473 & n.3.
- e. In *United States v. Paul*, 2007 WL 2384234, No. 06-30506 (9th Cir. Aug. 17, 2007), an unpublished decision citable under 9th Cir. R. 36-3, the 9th Circuit vacated a within-Guidelines sentence as “unreasonable” because it “d[id] not fall within the ‘heartland’ of cases to which the guidelines are most applicable, as described by the Supreme Court in *Rita*,” and the district court failed to consider the strong mitigating evidence introduced by the defendant. *Id.* at \*2
- f. In *United States v. Wachowiak*, \_\_\_ F.3d \_\_\_, 2007 WL 2189561 (7th Cir. Aug. 1, 2007), the 7<sup>th</sup> Circuit affirmed a 70-month sentence for downloading and sharing child pornography where the Guideline range was 121 to 151 months, confirming the district court’s freedom under *Rita* to find the Guidelines inadequate. Although it strongly hinted that it believed the sentence was too low, the 7<sup>th</sup> Circuit approved of the district judge’s careful review of the § 3553(a) factors, and (most of) his reasons for concluding that the Guidelines failed to adequately account for particular factors calling for a lower sentence. The district judge had concluded that the defendant’s strong expression of remorse and his “insight into his condition and the harm he was causing children” were mitigating factors not adequately reflected in the Guidelines’ acceptance-of-responsibility factor, and that the defendant’s nature and strength of character, as testified to by his family, friends, colleagues, and teachers, were mitigating factors not adequately reflected in the Guidelines’ criminal history score. The court did not approve of the district court’s focus on the stigma of a child pornography conviction, noting that this factor did not genuinely distinguish the defendant from the mine-run of child pornography offenders.
- g. Under *Cunningham v. California*, 127 S. Ct. 856 (2007), judges’ freedom to disagree with the Sentencing Commission as a matter of policy is *essential* to avoiding a Sixth Amendment violation. There, the Court held that a sentencing system that did not permit a judge to sentence outside the presumptive middle range based on “general objectives of sentencing” alone without a “factfinding anchor” violates the Sixth Amendment. *Id.* at 862-70. The government has conceded that the judge must be free to disagree with the Guidelines based on policy alone without a factfinding. *See* Transcript of Oral Argument at 50, *Rita v.*

*United States*, No. 06-5754 (U.S. argued Feb. 20, 2007), [http://www.fd.org/pdf\\_lib/Rita%20oral%20argue.pdf](http://www.fd.org/pdf_lib/Rita%20oral%20argue.pdf); Transcript of Oral Argument at 32-33, *Claiborne v. United States*, No. 06-5618 (U.S. argued Feb. 20, 2007), <http://www.fd.org/Claiborne%20oral%20argue.pdf>.

It is at least arguable, and probably correct, that when a sentencing judge finds facts that were not found by a jury or admitted by the defendant to calculate the guideline range, then sentences below the guideline range based on a policy disagreement with the guidelines, and the court of appeals reverses on the basis that the district court may not disagree with the guidelines as a matter of policy but instead must impose the guideline sentence unless the judge finds individual case-specific factors warranting a lower sentence, the court of appeals is replicating the system held unconstitutional in *Booker*, i.e., holding that a sentence longer than that authorized by the jury verdict or admitted by the defendant is binding on the sentencing judge absent offense- or offender-specific mitigating factors. See *Booker v. United States*, 543 U.S. 220, 234 (2005) (“The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.”). See Petition for Panel Rehearing and Rehearing En Banc at 8-10, *United States v. Ricks*, No. 05-4833, filed September 7, 2007, available at [http://www.fd.org/pdf\\_lib/Ricks\\_%20Rehearing\\_Petition.pdf](http://www.fd.org/pdf_lib/Ricks_%20Rehearing_Petition.pdf).

One might say that an appellate prohibition on courts’ ability to disagree with the Guidelines in such a way that leads to a *lower* sentence (as in *Kimbrough*, *Ricks* and all of the other crack cases except *Pickett*) does not violate the Sixth Amendment in light of *Harris v. United States*, 536 U.S. 545 (2002). However, such a one-way ratchet was explicitly rejected in *Booker* as a matter of statutory construction, that is, as inconsistent with congressional intent. See *Booker*, 543 U.S. at 266; see also *Rita*, 127 S. Ct. at 2477 n.2 (Scalia & Thomas, JJ., concurring) (“since reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high”) (citations omitted).

- 6) **The district court must subject the Guidelines’ advice (or whatever sentence the government or Probation Officer proposes) and the alleged facts to “thorough adversarial testing.”** *Id.* at 2465, citing “Rules 32(f), (h), (i)(C) and (i)(D); see also *Burns v. United States*, 501 U.S. 129 (1991) (recognizing importance of *notice and meaningful opportunity to be heard at sentencing*).” (emphasis added) Put another way, the sentence cannot be reasonable unless it was subjected to thorough adversarial testing.
- a. This provides a basis for arguing that the courts of appeals that have held that no notice of an upward variance is required are wrong.
  - b. This also provides a basis for arguing that the Probation Officer’s secret recommendation cannot be secret.

- c. Further, this directive should be interpreted to mandate thorough testing of *both* (a) the merits of whether the guideline sentence properly reflects § 3553(a) in general and on the facts of the case, *and* (b) whether the facts that the government and/or Presentence Report allege in support of a guideline (or higher) sentence are sufficiently reliable.
- d. The narrow holding of *Burns* was that Rule 32 requires advance notice of a district court’s intention to impose an upward departure as a matter of constitutional avoidance. *Burns*, however, tells us what the components of “thorough adversarial testing” as required by the Due Process Clause are: notice, a meaningful opportunity to be heard, the right to confront adverse witnesses and evidence, and the right to a full, formal, adversarial-style hearing.<sup>1</sup> This passage in *Rita* may be no accident, as some of the *amici* argued that the Guidelines cannot be presumptively reasonable because the Commission’s procedural advice to find facts by a preponderance of the probably accurate information, including hearsay, *see* USSG 6A1.3, produces substantial sentencing increases based on utterly unreliable information. The Guidelines’ procedural advice falls far short of the “thorough adversarial testing” described in *Burns*, and thus, after *Rita*, cannot produce a “reasonable” sentence. This passage is also a reminder to use *Burns* to breathe new life into arguments that the Due Process Clause requires procedures designed to produce *reliable* factfinding. The Commission’s

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<sup>1</sup> According to *Burns*, 501 U.S. at 137-38:

[T]his Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals both notice and a meaningful opportunity to be heard. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 107-108, 67 S.Ct. 133, 143-144, 91 L.Ed. 103 (1946) (statute permitting Securities and Exchange Commission to order corporate dissolution); *The Japanese Immigrant Case*, 189 U.S. 86, 99-101, 23 S.Ct. 611, 614-615, 47 L.Ed. 721 (1903) (statute permitting exclusion of aliens seeking to enter United States). The Court has likewise inferred other statutory protections essential to assuring procedural fairness. *See Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 1055, 16 L.Ed.2d 84 (1966) (right to full, adversary-style representation in juvenile transfer proceedings); *Greene v. McElroy*, 360 U.S. 474, 495-508, 79 S.Ct. 1400, 1413-1420, 3 L.Ed.2d 1377 (1959) (right to confront adverse witnesses and evidence in security-clearance revocation proceedings); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51, 70 S.Ct. 445, 453-455, 94 L.Ed. 616 (1950) (right to formal hearing in deportation proceedings).

In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause. . . . [W]e decline to impute such an intention to Congress. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

purported pronouncement of minimum constitutional standards, which invite *unreliable* factfinding, is illegitimate for another reason – only courts are empowered by our Constitution to define constitutional limits, and the Commission is *not* a court. See *Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989).

**7) When the district court imposes a guideline sentence, it must first *independently* (i.e., independently of the Sentencing Commission) evaluate whether that sentence complies with 3553(a).** Theoretically, the district court can be reversed if it fails to act independently and simply follows the guidelines.

- a. This requirement is inherent in the primary justification for/description of the appellate presumption of reasonableness. The presumption is not binding, does not place any burden of persuasion or proof on either party, and does not reflect greater deference to the Commission’s factfinding than to that of the district court, but merely “reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.” *Rita*, 127 S. Ct. at 2463 (emphasis in original); *see also id.* at 2465 (“simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable”); *id.* at 2467-68 (“where judge and Commission both determine that the Guidelines sentences is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its ‘not greater than necessary’ requirement). This circumstance alleviates any serious general conflict between § 3553(a) and the Guidelines, for the purposes of appellate review.”).

This description would be entirely circular unless the district court actually conducted an independent assessment of what sentence is sufficient but not greater than necessary to satisfy the purposes of sentencing set forth in 3553(a)(2), after considering all of the purposes and factors set forth in 3553(a)(1)-(7).

- b. Argue in the district court that it is the judge’s obligation to act completely independently of the Guidelines. Object to any suggestion that the judge is applying a presumption. Giving the Guidelines “heavy weight” or “substantial weight” is no longer permissible. There are more subtle ways of giving undue weight to the Guidelines, such as the judge saying, “Tell me why I should not follow the guidelines in this case,” or, “You have not given me sufficient reason not to follow the guidelines in this case.” See *United States v. Ross*, \_\_\_ F.3d \_\_\_, 2007 WL 2593509 (7th Cir. Sept. 11, 2007). If you prefer a Guideline sentence, you should argue that application of section 3553(a) happens to lead to the same sentence as the Guideline sentence.



- c. In the court of appeals, argue that the sentencing judge did not act independently of the Guidelines, and thus the sentence should be reversed and the case remanded for a truly independent analysis.
- d. In order to act independently of the Guidelines, sentencing courts must abandon the notion that sentencing within the Guidelines constitutes a legitimate means of adhering to § 3553(a)(6)'s mandate to avoid "unwarranted sentence disparities." To the contrary, reading § 3553(a)(6) in combination with § 3553(a)(4), and observing the maxim that a statute must be construed so that no portion of it is rendered a nullity, § 3553(a)(6) must be read as directing sentencing courts to impose sentences that do not deviate without reasons grounded in the purposes of sentencing from sentences for other defendants *with similar criminal histories and similar offenses of conviction* – not defendants who are "similar" with respect to the bevy of additional factors, including unconvicted separate crimes, included by the Guidelines and § 3553(a)(4). This is the express mandate of § 3553(a)(6), which refers simply to disparities between defendants "with *similar records* who have been *found guilty of similar conduct*." 18 U.S.C. 3553(a)(6) (emphasis supplied). Thus, the Guidelines *create* unwarranted disparity by resulting in widely varying sentences for defendants with similar records who have been found guilty of similar conduct. For further arguments that the Guidelines fail to prevent, hide, and create unwarranted disparity, *see* The Continuing Struggle for Just, Effective and Constitutional Sentencing After *United States v. Booker* (August 2006), [http://www.fd.org/pdf\\_lib/EvansStruggle.pdf](http://www.fd.org/pdf_lib/EvansStruggle.pdf).

**8) It is "fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita*, 127 S. Ct. at 2464-65 (emphasis supplied).**

- a. Use this as a sword when the judge increases the sentence based on resolution of a disputed case-specific fact. *See* Brief of Appellant, *United States Preciado*, No. 06-50649 (9<sup>th</sup> Cir.), filed July 12, 2007; Objections to District Court's Proposed Upward Departure and Sentencing Memorandum, *United States v. Garcia-Renteria*, No. 06 CR0304 (S.D. Cal.), filed July 17, 2007, both available at [http://www.fd.org/odstb\\_MaterialsRef.htm](http://www.fd.org/odstb_MaterialsRef.htm).
- b. Debunk it when the government, district court or court of appeals contends or is inclined to believe that it means guideline sentences are automatically reasonable. This formulation is a mere shadow of the aggressive ad campaign launched by the Commission and DOJ after *Booker* insisting that the Guidelines *do* embody all relevant sentencing considerations for every offense and offender. However, the lead-up to it will undoubtedly be misread as an endorsement of Commission expertise and consequent automatic reasonableness of guideline sentences, if we allow it. Justice Breyer not quite accurately describes the statutory instructions to the Commission and those to district courts as congruent, "the one, at retail, the other at wholesale." *Id.* at 2463. And while he never goes so far as to say that the Commission has actually carried out its instructions (speaking in terms of its

“efforts” to do so, that it “tried” and “intends” and “seeks,” that its work is “ongoing” and it “can” revise the Guidelines in response to concerns, *id.* at 2463-64), he leaves the vague impression that it has. His history of guideline development ends in the 1980s with the supposed “empirical examination” of 10,000 PSRs, *id.* at 2464, failing to mention that the original Commission adopted sentences that were significantly more severe than past practice or the relentless increases ever since then.

Unless we set the record straight, the government and many lower courts will read this to say that Congress instructed the Commission to consider the very same things in writing the guidelines that sentencing courts are to consider in imposing sentence; the Commission has faithfully applied those instructions; ergo, a guideline sentence is always reasonable.

Here are a few things to point out if necessary:

First, only three other justices (Roberts, Alito, Kennedy) fully subscribe to Justice Breyer’s slippery version of the statutes and the vague implication that the Commission has implemented its instructions. Justices Scalia and Thomas did not join in this part of the opinion. Justice Souter dissented in full and wryly indicated that the Commission’s views may not be as “weighty as the Court says they are.” *Id.* at 2488. Justices Stevens and Ginsburg outed the Commission for “not develop[ing] any standards or recommendations” for individual characteristics, noting that then Commissioner Breyer admitted as much in his 1988 Hofstra article. *Id.* at 2473.

Second, all eight justices who affirmed Rita’s sentence agree that the guideline sentence may not properly reflect the § 3553(a) purposes and factors, that the Guidelines may reflect unsound judgment, that the Guidelines may not treat individual characteristics properly, and that the case may warrant a different sentence “regardless.” *Id.* at 2465, 2468. And they all recognize that the district court must apply the parsimony clause. *Id.* at 2463, 2467; *id.* at 2482 (Scalia & Thomas, JJ., concurring).

Third, though Breyer writes that congressional statutes “tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives,” *id.* at 2463, this is inaccurate. Congress directed the Commission to write guidelines for “categories of offenses” and “categories of defendants,” 28 U.S.C. § 994(c), (d), and in doing so to “assure the meeting of the purposes of sentencing as set forth in §3553(a)(2).” 28 U.S.C. § 991(b)(1)(A). It did not instruct the Commission to write guidelines that are “sufficient but not greater than necessary” to satisfy those purposes, as district courts *must* do. Nor did it directly instruct the Commission to write guidelines that take account of the “nature and circumstances of the offense and the history and characteristics of the offender,” which district courts *must* consider under § 3553(a)(1) in identifying the sentence that is “sufficient but not greater than necessary” to satisfy the purposes set forth in § 3553(a)(2).

Fourth, the Guidelines are inescapably “general” and “rough” even by Breyer’s account. And there are many examples of the guidelines not being amended to accord with the Commission’s own research, notably the criminal history rules, career offender guideline, relevant conduct guidelines, the drug guidelines generally, and the substantial assistance guideline (which requires a government motion where the statute does not).

Fifth, you can point out certain historical facts that Justice Breyer omitted. He cites 28 USC § 994(m), *id.* at 2463, which told the original Commission to study sentences imposed and sentences actually served (in a parole system). While Justice Breyer claims that the *original* Commission examined 10,000 PSRs “setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like,” *id.* at 2464, he omits that the original Commission implemented sentences “significantly more severe than past practice” for “the most frequently sentenced offenses in the federal courts,” including fraud, drug trafficking (*above* what the mandatory minimum laws required, as the Commission recently acknowledged in its Statement of Reasons for the crack amendment, *see* Amendments to the Sentencing Guidelines, May 11, 2007, at p. 66, <http://www.ussc.gov/2007guid/may2007rf.pdf>), immigration offenses, robbery of an individual, murder, aggravated assault, and rape.<sup>2</sup> According to Justice Breyer’s own contemporaneous explanation, these deviations from past practice resulted from “‘trade-offs’ among Commissioners with different viewpoints.”<sup>3</sup> The original Commission estimated that its own policy decisions, as distinct from congressional mandates, would increase the prison population by 10% over ten years.<sup>4</sup> As the Commission reported in 2004, the Guidelines alone (independent of mandatory minimum laws) were responsible for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession, and that many offenses not subject to mandatory minimum statutes had shown severity increases similar to offenses subject to mandatory minimums. 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 53-54, 64, 67, 138-139 (2004). The Commission acknowledged that guideline sentences were often

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<sup>2</sup> U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); 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 47 (2004), available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm).

<sup>3</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988).

<sup>4</sup> U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(g) (1988).

increased due to real or perceived political pressure, and suggested that penalties might be reduced to better achieve sentencing purposes and to relieve prison overcrowding. *Id.* at 77, 137-140; Executive Summary vi, vii.

Sixth, Justice Breyer’s description of the intended “evolution” of the Guidelines can be helpful. He says the Commission’s work is “ongoing,” that it “will” collect statements of reasons when district courts depart or impose non-guideline sentences, and that it “may” obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. *Id.* at 2464. And the Commission “*can* revise the Guidelines accordingly,” but he does not seriously contend that it has done so.<sup>5</sup> *Id.*

### **B. The Statement of Reasons (Part III), Breyer, Kennedy, Roberts, Alito, Stevens, Ginsburg, Scalia, Thomas**

The district court in *Rita* complied (barely) with the statement-of-reasons mandate of 18 U.S.C. § 3553(c).

The rubber meets the road in a not very attractive way in the discussion in Part III of what statement of reasons suffices for a guideline sentence versus a non-guideline sentence (which Justices Scalia and Thomas join), and in the application of the presumption to *Rita* in Part IV (which Justices Scalia and Thomas do not join and Justice Stevens does not entirely agree with but joins anyway “given the importance of paying

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<sup>5</sup> Justice Breyer cites “USSG § 1B1.10(c) (listing 24 amendments promulgated in response to evolving sentencing concerns).” *Id.* USSG 1B1.10(c) is what the government cited in its *Rita* Brief in an attempt to refute the contention that the guidelines have been amended in a one-way upward ratchet. This is 3% of all amendments over the past twenty years. Some of these 24 amendments did not lower sentences, App. C, amend. 156, 461; others raised sentences, *id.*, amend. 269, 329; others simultaneously raised and lowered sentences, *id.*, amend. 130, 176, 341, 657; others lowered sentences which were raised later, *id.*, amend. 380, 433; others adjusted for typographical errors and other mistakes, *id.*, amend. 499, 506, 606; and almost none apply to any substantial number of cases. In its *Rita* brief, the government pointed to three reductions that it said have “broad application.” In one, the Commission lowered the maximum sentence in drug cases from a level 42 (360 months to life) to a level 38 (235 months to life) to accommodate upward role and weapon adjustments (resulting in those cases in 292 months to life). At the same time, the Commission invited upward departure above level 38. *See* App. C, amend. 505 (Nov. 1, 1994). There appear to be no statistics on the number of cases affected by lowering the drug guideline maximum, but less than 2% of all offenders are sentenced at level 38 or above each year. *See* 2001-2005 Sourcebooks of Federal Sentencing Statistics, Table 21. The second example was the two-level reduction for safety valve, *see* App. C, amend. 515 (Nov. 1, 1995), which was directed by Congress, but does not successfully apply to all low-level offenders as intended. *See* Jane L. Froyd, Comment, *Safety Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-1500 (2000). The third example was the reduction in base offense level for drug defendants who receive a mitigating role adjustment. *See* App. C, amend. 640 (Nov. 1, 2002). The extent of this reduction was limited two years later. *See* App. C, amend. 668 (Nov. 1, 2004).

appropriate respect to the exercise of a sentencing judge's discretion," perhaps setting the stage for *Gall*).

**1) Despite the Court's statement that the presumption imposes no particular burden on any party, defense counsel must contest the guideline sentence in order to obtain a different sentence or to claim on appeal that there was no independent evaluation.**

- a. **The only way to enforce an independent evaluation and a full explanation of reasons is to contest the guideline sentence.** "Unless a party contests the Guidelines sentence generally under § 3553(a)-that is argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way-or argues for departure, the judge normally need say no more" than that the case is "typical." *Id.* at \*2468. When a party presents "nonfrivolous reasons for imposing a different sentence" then the judge "will normally go further." *Id.* "Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Id.*
- b. **In contrast, a guideline sentence requires [gobbledygook in the way of reasons], but you can force the issue by presenting strongly supported, nonfrivolous arguments. Only then can you argue that the "sentencing judge [did not] set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."** *Id.* at 2468. "[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3353(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical." *Id.* at 2468. Looking into Justice Breyer's crystal ball, this is what supposedly occurred in Rita's case by a district court judge who admittedly articulated the wrong legal standard and said almost nothing: The judge "said that this range was not 'inappropriate.' (This, of course, is not the legal standard for imposition of sentence, but taken in context it is plain that the judge so understood.) He immediately added that he found that the 33-month sentence at the bottom of the Guidelines range was 'appropriate.' He must have believed that there was not much more to say." *Id.* at 2469. Unfortunately, this rubber stamp can (and therefore will) signal courts of appeals that even if the district court used the wrong legal standard, and said little or nothing about the reasons proffered, at least in a "conceptually simple" case like this, they can just assume the right reasons were intended. *Id.* at 2469.
- c. Argue that the record does not show, as it supposedly did in *Rita*, that the judge actually "listened to" each argument and "considered" the evidence presented. *Id.* at 2469. The Sixth Circuit recently vacated a sentence where the sentencing judge had made only a cursory reference to the § 3553(a) factors in imposing a

Guidelines sentence. The court distinguished *Rita* on the ground that “the record in *Rita* made clear that the district court considered and rejected the defendant’s arguments for a lower sentence, as the district court summarized the defendant’s three arguments before rejecting them and sentencing the defendant within the Guidelines range.” *United States v. Thomas*, 498 F.3d 336, 341 (6th Cir. 2007) (citing *Rita*, 127 S. Ct. at 2461).

- d. There is a legitimate purpose for a more specific statement of reasons for a non-guideline sentence, although it has yet to be realized since the Guidelines’ inception. The “Commission’s work is ongoing,” and the SRA and the Guidelines “foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.” *Id.* at 2464. “By articulating reasons, even if brief, the sentencing judge . . . helps that process evolve. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. That being so, his reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.” *Id.* at 2469. “By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, see § 3553(c)(2) (2000 ed., Supp. IV), appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts. See *Booker*, supra, at 264, 125 S.Ct. 738 (citing 28 U.S.C. § 994 (2000 ed. and Supp. IV)).” *Id.* at 2483 (Scalia & Thomas, JJ., concurring).

**NOTE:** Justice Breyer does not claim that this envisioned evolution of the guidelines in response to district court reasons has ever *actually* happened, but it might if district courts truly have broad discretion to reject the guidelines and state why. See *Gall v. United States*, No. 06-7949, Brief of the Fed. Public & Cmty. Defenders & Nat’l Ass’n of Fed. Defenders, [http://www.fd.org/pdf lib/Gall\\_Defender\\_NAFD\\_Amicus\\_Final.pdf](http://www.fd.org/pdf_lib/Gall_Defender_NAFD_Amicus_Final.pdf).

### **C. Substantive Reasonableness (Part IV), Breyer, Kennedy, Roberts, Alito, Stevens, Ginsburg**

The Fourth Circuit did not err in upholding *Rita*’s sentence as “reasonable.”

- 1) A majority of the Court (Breyer, Roberts, Kennedy, Alito, Stevens and Ginsburg, JJ.) apply not just procedural reasonableness review (as Justices Scalia and Thomas would have it), but substantive reasonableness review, despite the fact that at least Justices Scalia, Thomas, Stevens and Ginsburg acknowledge that this will lead to a Sixth Amendment violation in some cases.

- 2) One factor noted in affirming the Fourth Circuit was that the sentencing judge sought “assurance” that the Bureau of Prisons would provide appropriate treatment for Rita’s physical problems. *Id.* at 2470. If BOP does not provide adequate treatment for your client’s health or mental health problems, as it often does not,<sup>6</sup> put on evidence to that effect. *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).
- 3) Another was that Rita had no more reason to fear retaliation than other former law enforcement might suffer. But, as in *Koon*, if the district court imposed a lower sentence on this basis, it should not be reversed.
- 4) Rita’s military service in particular: “Like the District Court and the Court of Appeals, we simply cannot say that Rita’s special circumstances are special enough that, in light of § 3553(a), they require a sentence lower than the sentence the Guidelines provide.” *Id.* at 2470. But if the district court gave a lower sentence on this basis, it should not be reversed, and if it was reversed on the basis that the Guidelines deem military service not ordinarily relevant, it would violate the Sixth Amendment if it was reversed, as Deputy SG Dreeben conceded. *See* Transcript of Oral Argument at 32-35, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007), [http://www.fd.org/pdf\\_lib/Rita%20oral%20argue.pdf](http://www.fd.org/pdf_lib/Rita%20oral%20argue.pdf).
- 5) Justice Breyer dodged the Guidelines’ most obvious conflict with section 3553(a), their blanket rejection of individual circumstances. As if this were a court of appeals decision, he declined to consider the argument that the sentence was unreasonable under the statute because the Guidelines expressly reject physical condition, employment record and military service, because “Rita did not make that argument below.” *Id.* at 2470.

#### **D. Concurring Opinion of Justices Stevens & Ginsburg**

The concurring opinion of Justices Stevens and Ginsburg is necessary to a proper interpretation of Parts II (defining the presumption) and IV (applying substantive review) of Justice Breyer’s opinion. Because Justices Scalia and Thomas concurred only in Part III (statement of reasons review), only three other justices (Roberts, Kennedy, Alito) joined Justice Breyer in Parts II and IV without concurring separately. “[W]hen no single rationale explaining the result carries the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977).

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<sup>6</sup> *See, e.g.*, Daniel Zwerdling, The Death of Richard Rust, National Public Radio, All Things Considered, December 5, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=5022866>; Betty Brink, Hospital of Horrors, Fort Worth Weekly, October 19, 2005, available at <http://www.fweekly.com/content.asp?article=3325>; Betty Brink, Cancer Cell, Fort Worth Weekly, August 24, 2005, available at <http://www.fweekly.com/content.asp?article=2691>.

- 1) The Breyer opinion states that “appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion.” *Rita*, 127 S. Ct. at 2465. The Stevens concurrence elaborates on what this means.

*Booker* replaced *de novo* review with an abuse of discretion standard called reasonableness review. *Booker* restored the abuse of discretion standard identified in *Koon*, except that the focus is *not* departure *from* the guidelines under section 3553(b),<sup>7</sup> but the exercise of discretion “with regard to § 3553(a).” *Rita*, 127 S. Ct. at 2470-72 (Stevens, concurring).

The abuse of discretion standard must be highly deferential to the sentencing court, and “it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence,” because district courts are “better positioned” to decide the issues, have “insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon,” have “special knowledge” about local practices, and have an “institutional advantage,” superior “vantage point,” and “day-to-day experience.” Even if full knowledge of the factual setting were possible for the court of appeals, it “will often come at unusual expense,” and it is impractical to formulate appellate rules of decision for issues that involve multifarious, fleeting, special or narrow facts “that utterly resist generalization.” *Id.* at 2471-73.

- 2) Accordingly, Justice Stevens concludes that “[w]hile reviewing courts may presume a sentence within the advisory Guidelines is reasonable, appellate courts must *still always defer to the sentencing judge’s individualized sentencing determination.*” *Id.* at 2472 (emphasis supplied). Further, this standard “allows-indeed, requires – district court judges to consider *all* of the factors listed in § 3553(a) and to apply them to the individual defendants before them. Appellate courts must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range.” *Id.* at 2474.
- 3) The appellate presumption for within-guideline sentences “must be genuinely rebuttable.” “Our decision today makes clear” that “the rebuttability of the presumption is real,” and “[i]t should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal ‘presumption’ of reasonableness) or outside that range. Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post- *Booker* interregnum will now recognize that the Guidelines are truly advisory.” *Id.* at 2474. Hope springs eternal!

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<sup>7</sup> Under *Koon*, a district court could depart without abusing its discretion only if the 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 the now excised § 3553(b).



- 4) Justice Stevens highlights the fact that “[t]he Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines,” *id.* at 2473, not to mention outright prohibited. “As such, they are factors that an appellate court must consider under *Booker’s* abuse-of-discretion standard.” *Id.* at 2473. Justice Stevens notes that Justice Breyer acknowledged in his 1988 Hofstra article that the only offender characteristic included in the guidelines is criminal history. *Id.* at 2473 n.3.
- 5) Justices Stevens and Ginsburg disagree with Justices Scalia and Thomas that there can only be a procedural component to reasonableness review lest the Sixth Amendment be violated in some cases, and agree with Justices Breyer, Roberts, Kennedy and Alito that there can and should be a substantive component to reasonableness review. According to Justices Stevens and Ginsburg, this substantive component apparently should operate only on the extreme margins. “After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable.” *Id.* at 2473.
- 6) Justices Stevens and Ginsburg agree with Justices Scalia and Thomas that substantive reasonableness review makes a Sixth Amendment violation possible, and that an as-applied challenge can be raised in such a case: “[E]ven if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet-to-be-defined judicial standard of reasonableness, Justice SCALIA correctly acknowledges this case does not present such a problem. . . . Such a hypothetical case should be decided if and when it arises.” *Id.* at 2473. Note that the Breyer opinion does not deny Justice Scalia’s contention, but simply ridicules his use of supposed hypotheticals to make the point. *Id.* at 2466.

### E. Concurring Opinion of Justices Scalia & Thomas

Justices Scalia and Thomas wrote separately, concurring in part (*i.e.*, only in Part III, statement of reasons review) and concurring in the judgment. It is unclear why this was not a dissent. *See* subpart 5, *infra*.

- 1) Justices Scalia and Thomas “would hold that **reasonableness review cannot contain a substantive component at all.**” *Rita*, 127 S. Ct. at 2476 (Scalia & Thomas, JJ., concurring). In order to avoid a Sixth Amendment violation in *all* cases, district courts must be completely free to sentence anywhere within the statutory range, *i.e.*, not subject to substantive review. *Id.* at 2476, 2482.

Under the canon of constitutional avoidance, “when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other

should prevail-whether or not those constitutional problems pertain to the particular litigant before the Court.” *Id.* at 2478, quoting *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).

“[T]he Court has failed to establish that every sentence which will be imposed under the advisory Guidelines scheme could equally have been imposed had the judge relied upon no facts other than those found by the jury or admitted by the defendant. In fact, the Court implicitly, but quite plainly, acknowledges that this will not be the case, by treating as a permissible post-*Booker* claim petitioner's challenge of his within-Guidelines sentence as *substantively excessive*. See ante, at Part IV. Under the scheme promulgated today, *some* sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and, as Justice Alito argued in *Cunningham*, some lengthy sentences will be affirmed (*i.e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run.” *Id.* at 2475-76 (emphasis added).

As noted, Justice Alito, in his *Cunningham* dissent, defended the constitutionality of California's system on the basis that it was no more unconstitutional than the federal system after *Booker*; in either system, “some federal sentences will be upheld as reasonable only if the judge makes additional findings of fact beyond those encompassed by the jury verdict or guilty plea.” *Id.* at 2475 (citing *Cunningham*, 127 S. Ct. at 867 & n. 11 (Alito, J., dissenting)). The example Justice Alito used was of a mail fraud offense, for which there is some sentence that represents the least onerous sentence that would be appropriate where the elements were met but the offense and offender were as little deserving of punishment as could be imagined; that sentence would be the statutory maximum as defined in *Blakely* and *Booker*; and reasonableness review anticipates that sentences above that level may be conditioned on judicial factfinding, which, in his view and that of Justices Breyer and Kennedy, does not violate the Sixth Amendment. *Cunningham*, 127 S. Ct. at 880-81.

Justice Scalia offers two hypotheticals to illustrate “why the notion of excessive sentences within the statutory range, and the ability of appellate courts to reverse such sentences, inexorably produces, in violation of the Sixth Amendment, sentences whose legality is premised on a judge's finding some fact (or combination of facts) by a preponderance of the evidence.” *Id.* at 2476.

- Two brothers rob a bank together, one fueled by racial animus, the other not; they both get the statutory maximum because the judge believes bank robbery is deserving of more punishment than the Guidelines provide, and an extra reason for the one brother is racial animus. The court of appeals reverses as excessive only the sentence of the nonracist brother. The racist brother has a Sixth Amendment claim that his sentence was reasonable and therefore lawful only because of the judicial finding of motive. *Id.* at 2476.
- The “common case” in which a within-guideline sentence is based on a series of judicial factfindings in support of guideline enhancements, increasing the

guideline range for robbery from 33-41 months to 293 months. The enhancing facts “are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find none of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.” *Id.* at 2477.

- Defending against charges of using hypotheticals, Justice Scalia cites a case cited in *Booker* as an example of it being “all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts—as *Booker* itself recognized, see 543 U.S., at 236-237 (citing, *inter alia*, a case in which a defendant’s sentence increased from 57 months to 155 years).” *Id.* at 2479 n.4. Note that another case cited in *Booker* was *United States v. Rodriguez*, 73 F.3d 161 (7<sup>th</sup> Cir. 1996) (Posner, J., joined by Wood., J., dissenting from denial of rehearing en banc), where a defendant convicted by a jury of selling 10 ounces of marijuana (subject to about 4 years) was sentenced to life in prison based on uncharged sales of 1,000 kilograms of marijuana.

Under a system “in which district courts lack full discretion to sentence within the statutory range,” by which he means a system in which there is substantive “excessiveness review,” “for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant,” and “[e]very sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment.” The only difference between this and the pre-*Booker* mandatory Guidelines is that “the maximum sentence based on the jury verdict or guilty plea . . . must be established by appellate courts, in case-by-case fashion,” which “is, if anything, an additional constitutional disease, not a constitutional cure.” *Id.* at 2477. “[T]here will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts.” *Id.* at 2478 (emphasis in original).

This does not mean judges can never find any facts. Facts that *must* be found in order for a sentence to be lawful must be found by a jury beyond a reasonable doubt. Facts that individual judges *choose* to make relevant to the exercise of their discretion may be found by judges. *Id.* at 2477. (But under the law of every circuit, the guideline range *must* be “correctly calculated,” and this means judges *must* find disputed facts.)

- 2) We are invited to **raise as-applied challenges**: “The one comfort to be found in the Court’s opinion—though it does not excuse the failure to apply *Martinez*’s interpretive principle—is that it does not rule out as-applied Sixth Amendment challenges **to sentences that would not have been upheld as reasonable on the facts**

**encompassed by the jury verdict or guilty plea.** Ante, at 2466-2467; ante, at 2473 (STEVENS, J., joined by GINSBURG, J., concurring).” *Id.* at 2479. For ideas on how this might be done, *see* Part II(E), *infra*.

- 3) **They are still on board for *Harris*, but there can be no one-way ratchet.** The Sixth Amendment problem with reasonableness review is created only by the lack of district court discretion to impose high sentences, since eliminating discretion to impose low sentences is the equivalent of judicially creating mandatory minimums, which are not a concern of the Sixth Amendment under *Harris*. “But since reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high.” *Id.* at 2477 n.2 (citing *Booker*, 543 U.S. at 257-58, 266). *See also id.* at 2478 (“if the contours of reasonableness review must be narrowed in *some* cases because of constitutional concerns, they must be narrowed in *all* cases in light of Congress’s desire for a uniform standard of review.”) (emphasis in original).
- 4) **They see no Sixth Amendment problem with a presumption of reasonableness for within-guideline sentences** because “such a presumption never itself makes judge-found facts legally essential to the sentence imposed, since it has no direct relevance to whether the sentence would have been unreasonable in the absence of any judge-found facts.” *Id.* at 2478. They do not join Justice Souter because they do not believe that removing the presumption will not achieve the “proper goal” of assuring judges that they can sentence anywhere in the range since even non-presumption circuits have never reversed a guideline sentence as substantively excessive. Only a prohibition against review of district courts’ substantive sentencing choices will assure that result. *Id.* at 2478 n.3. (Experience for over twenty years has demonstrated that they are right.)
- 5) **Have Justices Scalia and Thomas abandoned their bright line rule?** It’s very hard to say. On the one hand, it appears that they have, as they say that the Sixth Amendment was not violated in this case because “petitioner cannot demonstrate that his relatively low sentence would have been unreasonable if the District Court had relied on nothing but jury-found or admitted facts.” *Id.* at 2478. This indicates that if the sentence is “relatively low,” it does not matter that it was increased based on a judge-found fact unless the defendant can demonstrate that it would have been reversed as unreasonable absent the judge-found fact. But they make no mention of the fact that the district court in this case actually did resolve a disputed fact, and perhaps they did not realize it. If they did, it would be a drastic turnabout from *Blakely*. *Blakely*, whose offense of conviction carried a sentence of 53 months, was sentenced to 90 months based on a judicial fact finding that he acted with deliberate cruelty, in a guideline system that was presumptive at the trial court level. Justice Scalia (and four other justices) believed that this was an assault on the reservation of power in the jury in our adversary system. Justices Scalia and Thomas say in *Rita* that substantive reasonableness review creates the same evil because some sentences will be upheld as reasonable only if supported by a judicial finding of fact in addition

to the facts found by the jury or admitted by the defendant. Why, then, is Victor Rita's sentence not just as objectionable as Blakely's? The offense of conviction, perjury, carried a guideline range of 15-21 months. It was increased to 33-41 months based on a judicial finding of fact (albeit based on NO evidence) that Rita was an accessory after the fact to a "possible violation of the machinegun registration law" by InterOrdnance. The judge said "I cannot find that the guideline sentence is inappropriate" (essentially applying a presumption at the district court level). If the judge had not made the "finding" that Rita was an accessory after the fact to InterOrdnance's "possible violation of the machinegun registration law," and said "I am imposing 33 months just because I feel like it," that sentence would probably have been reversed as unreasonable even by the Fourth Circuit.

**6) What is procedural review, and is there a chance for a meeting of the minds with Justices Stevens and Ginsburg?**

The role of appeals courts is to police the observance of statutory procedures: Sentencing courts must (1) consider the various factors in 3553(a), (2) "impose a sentence that is sufficient but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [that] subsection," (3) give reasons for their sentencing decisions, the requisite detail of which depends on whether the sentence is within the advisory Guidelines range, within an advisory Guidelines range that spans more than 24 months, or outside the advisory Guidelines range. *Id.* at 2482. "By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, see § 3553(c)(2) (2000 ed., Supp. IV), appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts." *Id.*

Courts of appeals can reverse if the district court "appears not to have considered § 3553(a); considers impermissible factors; selects a sentence based on clearly erroneous facts; or does not comply with § 3553(c)'s requirement for a statement of reasons." *Id.* at 2483.

Justice Scalia appears to be seeking common ground with Justice Stevens, stating that "substance" and "procedure" are "admittedly chameleon-like terms." Justice Stevens' example of why a substantive component is needed -- "a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable" -- is really an impermissible reason, *i.e.*, discrimination against Yankees fans, which in Justice Scalia's view is procedurally unreasonable. *Id.* at 2483 n.6.

**F. Dissenting Opinion of Justice Souter**

Justice Souter, the lone dissent, reviewed the evolution of the Court's Sixth Amendment jurisprudence, how it began to falter with the *Booker* remedy, and had now come to a presumption for within-guideline sentences likely to produce guideline

sentences almost as regularly as mandatory guidelines did. In his opinion, “[o]nly if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them. *See Booker, supra*, at 263 (calling for a reasonableness standard ‘across the board’). And only then will they stop replicating the unconstitutional system by imposing appeal-proof sentences within the Guidelines ranges determined by facts found by them alone.” *Id.* at 2488.

## **II. Implications for *Gall*, *Kimbrough* and Other Future Cases**

### **A. *Gall v. United States*, No. 06-7949, Oral Argument October 2, 2007**

1) To be aware of what you should be arguing and preserving before *Gall* is decided, *see* Petitioner’s Brief and the amicus briefs posted at [http://www.fd.org/odstb\\_Gall.htm](http://www.fd.org/odstb_Gall.htm).

2) There are many indications in *Rita* that the government’s extraordinary circumstances test/proportionality review (ECT) will not survive, including:

- The *Rita* majority was emphatic that there is no presumption of unreasonableness for a non-guideline sentence, and suggested that the ECT amounts to the same thing. *Rita*, 127 S. Ct. at 2467.
- Justices Stevens, Ginsburg and Souter stated that the appellate court must accord the same deference to the district court’s sentence whether inside or outside the guideline range, and Justices Scalia and Thomas said there should be no substantive review at all.
- Justice Breyer expressed disdain for the ECT during oral argument in *Claiborne*. *See Claiborne Tr.* at 34-36 & 43, <http://www.fd.org/Claiborne%20oral%20argue.pdf>.

### **B. *Kimbrough v. United States*, No. 06-6330, Oral Argument October 2, 2007**

1) To be aware of what you should be arguing and preserving before *Kimbrough* is decided, *see* Petitioner’s Brief and the amicus briefs posted at [http://www.fd.org/odstb\\_Kimbrough.htm](http://www.fd.org/odstb_Kimbrough.htm).

2) The *Rita* Court’s endorsement of arguments that the guidelines reflect unsound judgment would seem to decide the case in our favor. The government’s only hope is its specious claim that it was congressional will that the Commission promulgate guidelines reflecting a 100:1 ratio above, between and below the mandatory minimum levels.

3) It is not unlikely that the Court in *Kimbrough* will say something like, “Of course, the sentencing court cannot reject a congressionally mandated sentence, but Congress did not

mandate that a 100:1 powder to crack ratio be incorporated into the Guidelines below, between and above the mandatory minimum levels.”

We should be arguing for a below-guideline sentence on the basis that the *Guidelines* violate congressional will. Here are a few of the ways in which they do.

a. Uncharged and acquitted offenses -- There is strong evidence in the legislative history that the Senate had no such thing in mind and that the House explicitly disapproved it. This was the brainchild of the original Sentencing Commission, and it was counter to the will of Congress.

To the extent Congress envisioned “real offense” sentencing, it contemplated differences in sentences based on the circumstances of the *offense of conviction*, not sentencing for uncharged and acquitted *other* offenses. Congress directed the Commission to establish categories of offenses for use in the guidelines based on “the circumstances under which *the offense* was committed,” and the “nature and degree of the harm caused by *the offense*.” 28 U.S.C. § 994(c)(2), (3) (emphasis supplied). The Senate Judiciary Committee expected “that there will be numerous guideline ranges, each describing a somewhat different combination of . . . *offense circumstances*.” S. Rep. No. 98-225, at 168 (1983) (emphasis supplied). The House Judiciary Committee explicitly rejected the form of “real offense” sentencing contained in USSG § 1B1.3: “The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit ‘real offense’ sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties.” H.R. Rep. No. 98-1017, at 98 (1984).

b. Offender Characteristics -- Congress directed the Commission in the SRA to consider the relevance of a variety of offender characteristics, 28 U.S.C. § 994(d), and to reflect the “general inappropriateness of considering” education, vocational skills, employment record, family ties and community ties “in recommending a term of imprisonment or length of a term of imprisonment.” 28 U.S.C. § 994(e). Congress explained that the purpose of § 994(e) was “to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties,” but “each of these factors,” in § 994(d) and (e), “may play other roles in the sentencing decision.” S. Rep. No. 98-225, at 175 (1983). Indeed, the Senate Report suggests many ways in which these factors may be relevant to sentencing. *See id.* at 171-75. For example, Congress suggested that the Commission might recommend that a drug dependent defendant be placed on probation in order to participate in a community drug treatment program. S. Rep. No. 98-225, at 173.

c. First Offenders -- Congress directed the Commission twenty-three years ago 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.” 28 U.S.C. § 994(j). It has never carried out this directive.

d. Other examples appear in *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker* (August 2006), [http://www.fd.org/pdf\\_lib/EvansStruggle.pdf](http://www.fd.org/pdf_lib/EvansStruggle.pdf).

**C. Are there enough votes for an abuse of discretion standard that would require courts of appeals to accord the same deference to any sentence -- effectively a presumption of reasonableness for any sentence the district court imposes -- whether within or outside the guideline range?**

**Hints from *Rita***

- Justice Souter says that that “[o]nly if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them.” *Id.* at 2488.
- Justices Stevens and Ginsburg say the appellate court must always defer to the district court’s sentencing determination. 127 S. Ct. at 2472, 2474. They disagree with Scalia and Thomas, however, that there can be no substantive review at all because of the harsh sentences for Yankees fans/lenient sentences for Red Sox fans problem. *Id.* at 2473.
- Justices Scalia and Thomas say there can be no substantive component to reasonableness review, and district courts must be completely free to sentence anywhere within the statutory range. *Id.* at 2476, 2482. As noted above, Justice Scalia seems to be seeking common ground with Justice Stevens by casting the Yankees/Red Sox problem as an impermissible reason, which would be procedurally unreasonable. *Id.* at 2483 n.6.

**Hints from Oral Arguments in *Rita and Claiborne***

- At oral argument in *Rita*, Justice Stevens asked Deputy SG Dreeben, “[t]here’s a presumption the district judge sentence is correct?” and wondering if there is a presumption that findings of fact are accurate, why is there not a “strong presumption that the ultimate judgment on the sentence is also accurate?” *See* Transcript at 45-46. Dreeben waved the uniformity flag, to which Justice Scalia responded: “this is a self fulfilling prophecy. You’re saying if you don’t comply with the guidelines, you’re not going to have uniformity. . . . Is that consistent with the notion that the guidelines are advisory?” *Id.* at 47. Dreeben then said “the further that a sentence diverges from the guidelines range, the greater the possibility of unwarranted disparity; and as a result of that, a court of appeals should look more critically at the reasons that the district court gave and ensure that the constellation of reasons and facts that’s presented is not so likely to be a disproportionate sentence.” *Id.* To which Justice Scalia responded: “But that’s just inconsistent with the notion which I think is correct, that the district judge can



simply disagree with the basic . . . reasons of the commission, can simply disagree with the fact that the commission considers white collar crime, for example, something that should justify incarceration.” *Id.*

- At oral argument in *Claiborne*, Justice Breyer said that “one big power a judge has that they didn’t have before, after *Booker*, is to say the guideline itself is unreasonable,” but the court of appeals gets to review that conclusion. *Claiborne Tr.* at 31-32. Justice Breyer said he does not think “proportionality review” works, even though it “sounds nice,” because the reason for sentencing outside the guideline range may have nothing to do with whether the guideline sentence is high or low. *Id.* at 34-35. And if the judge has a good reason, why shouldn’t it justify a big difference as much as it justifies a little difference, and why should a bad reason justify a little difference rather than a lot? *Id.* at 35-36. He says that the phrase “an extraordinary reduction must be supported by extraordinary circumstances . . . sounds like a slogan. I would think an extraordinary reduction must be supported by whatever reasons that justify the extraordinary reduction, period. . . . and if we really were to repeat that it would take on a tremendous force of generative law which would worry me quite a lot because I think it’s too complex to reduce to a formula. What you want is a reason that supports the sentence. . . . Better than what? Better than justifies it?” *Id.* at 43.
- Dreeben said that if we go back to *Koon*, it leads to the same constitutional problem. The difference is the district court is not forbidden from saying this is a typical case but the guideline sentence is not a reasonable sentence. *Id.* at 32-33. Justice Scalia corrected him – the district court does not have to conclude the guideline sentence is unreasonable in order not to apply it; there can be more than one reasonable sentence. *Id.* at 33.

#### **D. What is left of the Sixth Amendment?**

Why does a presumption not violate the Sixth Amendment? The appellate presumption “does not *require* the sentencing judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone.” *Id.* at 2466. The fact that “the presumption will encourage sentencing judges to impose Guidelines sentences [does not] change the constitutional calculus.” *Id.* at 2467. Why? The answer is a *non sequitur*: “Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity. The fact that the presumption might help achieve these congressional goals does not provide cause for holding the presumption unlawful as long as the presumption remains constitutional.” *Id.*

OK, but the *Booker* remedial majority found it necessary to excise those aspects of appellate review that reflected a presumption on appeal. Why, if an appellate presumption does not create the same constitutional problem?

Who knows? The most we can say is that the presumption does not violate the Sixth Amendment in this particular case (because the justices either did not recognize that there was judicial factfinding, or think the sentence would have been upheld even with no judicial factfinding, we just don't know), though it might in a "hypothetical" case described by Justice Scalia, which is not hypothetical at all. *See id.* at 2466; *id.* at 2473 (Stevens & Ginsburg, JJ., concurring); *id.* at 2475-79 (Scalia & Thomas, JJ., concurring).

### **E. As-Applied Challenges**

We can raise "as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Id.* at 2479. How to do so?

- One way is to find a case (or more than one case?) reversing a sentence for the exact same crime as substantively excessive, then show that this case has an additional fact that wasn't in that case that makes his sentence reasonable by comparison (like the two brothers who did a robbery, one with racial animus, one without). Then the defendant can argue that that fact is legally essential to his punishment and therefore violates the Sixth Amendment because it was found by a judge.
- Or, the defendant can show that his sentence was affirmed only because of a judge-found aggravating fact that distinguishes his case from the "mine-run." *Id.* at 2476. What is the "mine-run"? Perhaps it is a robbery defendant absent any aggravating facts as in Scalia's second hypo, or the mail fraud defendant in Alito's hypo, or a drug defendant with no uncharged or acquitted transactions.
- Justice Scalia's description of as-applied challenges sounds fairly impractical: "[O]rdinarily defendants and judges will be unable to figure out, based on a comparison of the facts in their case with the facts of all of the previously decided appellate cases [all of them?], whether the sentence imposed would have been upheld as reasonable based only on the facts supporting the jury verdict or guilty plea. . . . Judges [can] create complicated charts and databases, based on appellate precedents, to ascertain what facts are legally essential to justify what sentences." *Id.* at 2480.
- But wait, he endorses Judge Young's method in *United States v. Griffin*, 494 F.Supp.2d 1 (D. Mass. 2007): "At least one conscientious District Judge has decided to shoulder the burden of ascertaining what the maximum reasonable sentence is in each case based only on the verdict and appellate precedent, correctly concluding that this is the only way to eliminate Sixth Amendment problems after *Cunningham* if *Booker* mandates substantive reasonableness review." *Id.* at 2480 n.5. Steve Hubacheck and Shereen Charlick have made excellent use of the *Griffin* case based on this footnote. *See* Brief of Appellant, *United States Preciado*, No. 06-50649 (9<sup>th</sup> Cir.), filed July 12, 2007; Objections to District Court's Proposed Upward Departure and Sentencing Memorandum,

*United States v. Garcia-Renteria*, No. 06 CR0304 (S.D. Cal.), filed July 17, 2007, both available at [http://www.fd.org/odstb\\_MaterialsRef.htm](http://www.fd.org/odstb_MaterialsRef.htm).

- Seek data for the district from the Probation Office showing sentences imposed when there was no appeal, sentences affirmed on appeal, and sentences imposed after reversal on appeal. This should be available, *see Richardson v. United States*, 477 F. Supp. 2d 392, 402-05 (D. Mass. 2007) (using such data and complaining bitterly that it is kept secret), and should not be kept secret given *Rita*'s mandate for "thorough adversarial testing," including notice and a meaningful opportunity to be heard.
- The Commission publishes data on sentence length based on sentence imposed, though it does not tell sentence length after appeal. *See* [http://www.ussc.gov/sc\\_cases/Quarter\\_Report\\_3rd\\_07.pdf](http://www.ussc.gov/sc_cases/Quarter_Report_3rd_07.pdf). Similarly, a table of "U.S. District Courts—Criminal Defendants Sentenced After Conviction, by Major Offense (Excluding Transfers), During the 12-Month Period Ending September 30, 2006," from the JNet, is available at [http://www.fd.org/odstb\\_MaterialsRef.htm](http://www.fd.org/odstb_MaterialsRef.htm). You could use some combination of statistics that do not factor in appeals, and appellate caselaw for the circuit.
- Note that the Eighth Circuit plays right into an as-applied challenge by phrasing its standard of reasonableness review as requiring a sentence within "the limited range of choice dictated by the facts of the case."
- Do not allow the defendant to admit enhancing facts and object to enhancing facts in the PSR, so that there will be judicial factfinding to challenge.

## **F. Jury-Found Facts Beyond a Reasonable Doubt**

It is worth continuing to at least preserve the argument that the *Booker* "remedial" majority got it wrong, and that the facts must be submitted to a jury and found beyond a reasonable doubt. It is not unlikely that even after *Rita*, *Gall* and *Kimbrough*, the appeals courts will continue to enforce *de facto* mandatory guidelines. If so, it would seem that the Court would have to adopt the jury trial/reasonable doubt remedy. Four justices in *Rita* specifically said they were accepting the *Booker* remedy only because it was *stare decisis*. *See Rita*, 127 S. Ct. at 2470 (Stevens & Ginsburg, JJ., concurring); *id.* at 2475 (Scalia & Thomas, JJ., concurring in part and concurring in the judgment), and Justice Souter said Congress should enact binding guidelines with any fact necessary for an upper range guideline sentence to be determined by a jury. *Id.* at 2488 (Souter, J., dissenting).