No. 06-7949

In the Supreme Court of the United States

BRIAN MICHAEL GALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in assessing the reasonableness of a sentence outside of the advisory guidelines range under *United States* v. *Booker*, 543 U.S. 220 (2005), a court of appeals should require the strength of the justification for the sentence to bear a proportional relationship to the degree of the variance.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 129-139) is reported at 446 F.3d 884. The sentencing memorandum of the district court (J.A. 118-127) is reported at 374 F. Supp. 2d 758.

JURISDICTION

The judgment of the court of appeals (J.A. 140) was entered on May 12, 2006. A petition for rehearing was denied on July 7, 2006 (J.A. 141). On September 19, 2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 4, 2006. On November 1, 2006, Justice Alito further extended the time to and including November 22, 2006, and the petition was filed on that date. The petition was granted on June 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-30a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of conspiring to distribute methylenedioxymethamphetamine (MDMA or ecstasy), in violation of 21 U.S.C. 841(b)(1)(C) and 846. After calculating an advisory range under the United States Sentencing Guidelines (Sentencing Guidelines or Guidelines) of 30-37 months of imprisonment, the district court imposed a sentence of 36 months of probation. The court of appeals reversed the sentence and remanded for resentencing, concluding that the extraordinary extent of the variance was not justified by comparably strong justifications. J.A. 129-139.

1. In February or March 2000, petitioner entered into a conspiracy with Luke Rinderknecht and others to distribute ecstasy. In the first few months of the conspiracy, petitioner purchased several hundred ecstasy tablets from Rinderknecht and distributed them. J.A. 24, 130, 146, 147, 149, 150, 152.

In May 2000, petitioner decided to take on a larger role. Rinderknecht, who was moving to California, called a meeting with petitioner and another co-conspirator, Theodore Sauerberg, to discuss how the drug operation would work once Rinderknecht had moved. The three agreed that Rinderknecht would send ecstasy to Sauerberg, who would transfer it to petitioner, and petitioner would sell it to others for further distribution. J.A. 130, 147, 148-149, 150, 151.

Pursuant to that arrangement, Rinderknecht sent Sauerberg two shipments of 5000 ecstasy tablets each. Sauerberg distributed the ecstasy to petitioner in 1000-tablet incre-

ments. Petitioner, in turn, sold the ecstasy to his contacts for resale. J.A. 130-131, 147-149, 151.[1]

By September 2000, petitioner became worried about the risks involved in continuing to participate in the conspiracy. He informed Rinderknecht that month that he no longer wanted to be involved because he was very nervous that Sauerberg was telling too many people about the business. In total, petitioner made between $30,000 and $40,000 from the conspiracy. J.A. 123 n.3, 131, 148, 152.

Law enforcement authorities later discovered the conspiracy and arrested Rinderknecht and Sauerberg. Federal agents then interviewed petitioner, who acknowledged his participation. In 2004, after a warrant was issued for his arrest, petitioner surrendered to authorities in Iowa. J.A. 131.

2. On April 28, 2004, a federal grand jury sitting in the Southern District of Iowa returned an indictment charging petitioner and seven others with conspiracy to distribute ecstasy, cocaine, and marijuana, in violation of 21 U.S.C. 841(b)(1) (2000 & Supp. IV 2004) and 21 U.S.C. 846. J.A. 1, 8-11. On March 2, 2005, petitioner pleaded guilty, pursuant to a plea agreement, to conspiracy to distribute ecstasy. J.A. 12-23. As part of the plea agreement, the parties stipulated that petitioner was responsible for the distribution of at least 2500

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[1] Petitioner is incorrect in asserting (Br. 4) that the 10,000 tablets from those two shipments were the total distributed by the entire conspiracy during the period of his participation. Petitioner himself acknowledged distributing additional quantities before those two shipments. See J.A. 151; see also, *e.g.*, J.A. 130 (petitioner purchased 100 ecstasy tablets on six occasions before the shipments); J.A. 147 (petitioner purchased 200 to 3000 tablets at a time between March and May 2000); J.A. 149 (co-conspirator purchased 20 to 50 tablets from petitioner on four or five occasions in April 2000); J.A. 152 (customer purchased ecstasy from petitioner in February 2000). Moreover, others besides petitioner distributed ecstasy as part of the conspiracy. See J.A. 149-150 (co-conspirator purchased ecstasy directly from Sauerberg for distribution); J.A. 151 (petitioner suspected as much).

grams (or 10,000 tablets) of ecstasy. J.A. 25, 152. They also stipulated, based on petitioner's withdrawal from the conspiracy in September 2000, that the November 1, 1999, edition of the Sentencing Guidelines would apply to his sentencing. J.A. 13 n.1, 131.

3. Before petitioner's sentencing, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. *Id*. at 226-244. As a remedy for that constitutional violation (*id*. at 244-268), the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA or Act), 18 U.S.C. 3551 *et seq.* The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which required de novo review of decisions to depart from the Guidelines and cross-referenced excised Section 3553(b)(1). *Booker*, 543 U.S. at 259-261. The Court replaced that provision with review for "unreasonableness," under which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.

Petitioner faced a statutory maximum sentence of 20 years of imprisonment. 21 U.S.C. 841(b)(1)(C); J.A. 162. The Presentence Investigation Report (PSR) recommended a base offense level of 24 under Sentencing Guidelines § 2D1.1, based on the parties' stipulation that petitioner was responsible for the distribution of 10,000 ecstasy tablets. The PSR also recommended a two-level reduction for satisfying the safety-

valve criteria under Guidelines § 2D1.1(b), and a three-level reduction for acceptance of responsibility under Guidelines § 3E1.1. Those adjustments generated a total offense level of 19. That offense level, combined with petitioner's criminal history category of I, yielded a recommended Guidelines range of 30 to 37 months of imprisonment. J.A. 131-132, 152-154, 163.[2]

At sentencing, petitioner urged the district court to sentence him to probation, based on either a downward departure under the Guidelines or consideration of the other sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Petitioner emphasized that he had withdrawn from the conspiracy and rehabilitated himself and that his family and two contract employees depended on him. J.A. 72-82, 132-133. The government did not contest that petitioner had led a law-abiding life since withdrawing from the conspiracy. The government noted, however, that he had played a significant role in a serious drug conspiracy and earned a large profit as a result. The government also noted that Congress and the United States Sentencing Commission (Sentencing Commission or Commission) had concluded that ecstasy distribution was an even more serious offense than the 1999 Guidelines reflected and had substantially increased the associated penalties. See Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310,

[2] The PSR's conclusion that petitioner qualified for a reduction under Guidelines § 2D1.1 was incorrect. Petitioner did not qualify for that reduction under the version of the Guidelines in effect on November 1, 1999, which the parties had stipulated applied to his offense. Although petitioner satisfied the safety-valve criteria in Guidelines § 5C1.2, the two-level reduction under the applicable version of the Guidelines applied only if a defendant's offense level was 26 or greater, and petitioner's offense level was never greater than 24. See Sentencing Guidelines § 2D1.1(b)(6) (1998). The United States Sentencing Commission did not eliminate the offense-level restriction until 2001. See *id.* App. C, amend. 624 (effective Nov. 1, 2001). The government, however, did not object to the two-level adjustment under Section 2D1.1.

§§ 3661-3664, 114 Stat. 1241-1244; Sentencing Guidelines App. C., amends. 609, 621 (effective May 1, 2001, and Nov. 1, 2001). Imprisonment was therefore necessary, the government argued, to reflect the seriousness of the offense, to provide adequate general deterrence, and to avoid unwarranted disparity. J.A. 82-92, 133.

The district court adopted the Guidelines calculation in the PSR and rejected petitioner's arguments for a downward departure. J.A. 96, 119-122. The court, however, varied from the Guidelines range and imposed a sentence of 36 months of probation based on the sentencing factors in Section 3553(a). J.A. 9, 118. In explaining that decision, the court stated:

> The Court in particular has taken into account [petitioner's] voluntary and explicit withdrawal from the conspiracy in September of 2000; [his] exemplary behavior while on bond; the support manifested by family and friends who have attested to [his] character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of [petitioner].

J.A. 97.

In addressing petitioner's immaturity, the district court stated that this Court had based its decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), "on studies indicating adolescents are less culpable than adults for their actions." J.A. 98; see J.A. 123 n.2. Although *Roper* concerned only individuals who commit death-eligible crimes before turning 18, and petitioner was 21 at the time of his offense, the court stated that *Roper* was still relevant because a recent study from the National Institutes of Health suggests "that the critical region of the brain that inhibits risky behavior is not fully formed until age 25." J.A. 97-98; see J.A. 123 n.2. The court also noted that Sentencing Commission findings indicate that recidivism rates decrease as age increases. J.A. 98, 123 n.2. In

addressing the seriousness of the offense, the court stated that "the offense level based solely upon drug quantity does not adequately reflect the offense conduct." J.A. 100; see J.A. 127 n.5. The court refused to count petitioner's $30,000 to $40,000 in illegal profits against him, reasoning that petitioner, "who is from a working-class family and has few financial resources," showed fortitude in "turn[ing] his back on * * * 'easy money.'" J.A. 124 n.3. The court did not discuss how a probationary sentence would serve general deterrence.

4. The government appealed, arguing that the probationary sentence was unreasonable. The court of appeals agreed, and it therefore vacated petitioner's sentence and remanded for resentencing. J.A. 129-139.

The court of appeals stated that reasonableness review is "akin to our traditional review for abuse of discretion." J.A. 136 (citation omitted). The court further explained that sentences outside the Guidelines range "are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a)." J.A. 137 (citations omitted). In determining the adequacy of the justification, the court stated, it applies a principle of proportionality: "How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." *Ibid.* (citations omitted).

The court of appeals concluded that the difference between 30 months of incarceration and probation constituted an "extraordinary variance," and that the variance was "not supported by extraordinary justifications." J.A. 138. In particular, the court held that the district court had given too much weight to petitioner's withdrawal from the conspiracy and post-offense rehabilitation while giving too little consideration to the seriousness of his offense. J.A. 138-139. The court stressed that the offense was very serious because of the significant health risks and dangers from the use of ec-

stasy, the large quantities of ecstasy involved in the conspiracy, and the substantial illicit profit that petitioner had earned. *Ibid.* The court also stated that the district court had improperly relied on general studies indicating that a lack of maturity among adolescents can lead to impetuous actions without tying that conclusion to petitioner's specific maturity level when he committed the offense or explaining how his criminal conduct was impetuous or ill-considered. J.A. 138. Finally, the court concluded that the record failed to show that the district court had considered the extent to which a probationary sentence would result in unwarranted sentencing disparity. J.A. 139.

SUMMARY OF ARGUMENT

Courts of appeals reviewing sentences for reasonableness under *United States* v. *Booker*, 543 U.S. 220 (2005), should apply a principle of proportionality, under which a sentence that significantly varies from the advisory guidelines range should have a correspondingly strong justification. Such a framework is essential for appellate review to fulfill its function under *Booker* of ironing out sentencing differences and promoting Congress's goals of avoiding unwarranted sentencing disparities.

Contrary to petitioner's suggestion, proportionality review does not require an "extraordinary" justification for every non-Guidelines sentence. Only sentences that dramatically vary from the range require substantial justification. Similarly, proportionality review does not demand that every variance be supported by a "fact" that is not encompassed within the jury verdict or guilty plea. Considerations of policy, as well as facts, can support a variance; the test is the cogency and strength of the rationale, not whether it is fact-based. Proportionality review is a useful tool of appellate review, not a rigid presumption. Rather than mirroring the "presumption

of unreasonableness" for non-Guidelines sentences that this Court rejected in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), proportionality review reflects practical realities (*i.e.*, sentences that diverge widely from the Sentencing Commission's expert judgment present an empirically greater possibility of unreasonableness) and legal necessities (*i.e.*, greater scrutiny of sentences at the extremes is inherent in any substantive reasonableness review).

The proportionality principle is consistent with *Booker*'s recognition that appellate review in an advisory Guidelines system would continue to move sentencing in Congress's preferred direction of avoiding unwarranted disparities. And proportionality review can perform that function only if courts consult the Guidelines, rather than some other benchmark, in assessing whether a sentence is unreasonably severe or lenient. Indeed, it is unclear how the *Booker* remedial opinion's effort to reconcile the advisory Guidelines system with Congress's intent to reduce disparity can succeed without proportionality review. The Guidelines reflect application of the Section 3553(a) factors by an expert commission. They have evolved over time based on empirical data. And they reflect Congress's general policy judgments about sentencing. There is no other nationally uniform and legitimate source of objective guidance about typically reasonable sentences for categories of offenses and offenders.

The abuse-of-discretion standard adopted by *Booker* is not inconsistent with proportionality review. Requiring a stronger justification for a sentence that varies dramatically from the typical sentence is fully consistent with respecting the district court's superior vantage point in sentencing individual defendants. Proportionality review allows the courts of appeals to play a role that district courts cannot: surveying a broader range of cases and evaluating the cogency and persuasiveness of the district court's justification. And propor-

tionality review is necessary to avoid the disparity that would flourish if each district court had virtually unlimited freedom to impose any sentence (even one far from the Guidelines) for virtually any reason at all.

Significantly, petitioner and his amici offer no alternative form of appellate review that has any real capacity to restrain unwarranted disparity. Petitioner denies that appellate courts can review the balance of the Section 3553(a) factors struck by the district court, and he argues that only a wholly irrational sentence that *no* judge could possibly have imposed may be reversed as unreasonable. But this Court in *Booker* had substantial freedom to fashion a standard of appellate review, and it chose reasonableness review, not rationality review. Moreover, petitioner's approach would render appellate review toothless. It would effectively license almost unbounded discretion by sentencing judges, with erratic results that turned on the identity of the particular judge. It is impossible to conceive that the Congress that enacted the Sentencing Reform Act would approve that result.

Nothing in the Sentencing Reform Act commands the exceedingly limited appellate review that petitioner advocates. Section 3553(a) contains several factors that make the Guidelines relevant, and nothing that excludes their consideration on appeal (even when a judge permissibly decides to vary from them). And both Section 3553(a)(6)'s mandate to avoid unwarranted disparity and Section 3553(c)'s requirement of a specific reason for sentencing outside the range support the imposition of proportionality review. Such review will foster better explanations by district courts and thus will help the Sentencing Commission refine the Guidelines over time.

Nor is there anything in the Sixth Amendment that is offended by proportionality review. A judge is not required to support a sentence outside the range—even one signifi-

cantly outside the range—with a *fact* not found by the jury or admitted by the defendant. Rather, the issue is the persuasiveness of the justification in relation to the sentence imposed—regardless whether the justification is based on policy or fact. This Court has made clear that the Sixth Amendment line is crossed only when a sentencing scheme requires a court to find a fact to exceed a defined level. Since policy considerations can support a sentence different from the level recommended by the Guidelines, and since appellate decisions on reasonableness will not define rigid levels of maximum punishment, proportionality review is consistent with the Constitution. And proportionality review does not restore mandatory guidelines or otherwise prevent district courts from exercising discretion. It insists only that the reasons for the sentence be strong enough to support the balance struck among the Section 3553(a) factors. Moreover, petitioner's view of the Sixth Amendment would call into question not just the proportionality principle, but any meaningful appellate review for reasonableness. As such, petitioner's argument cannot be reconciled with the *Booker* remedial opinion.

In this case, the district court's balance of the Section 3553(a) factors was unreasonable. The judge correctly calculated an advisory range of 30-37 months of imprisonment for petitioner's serious drug trafficking offense, but dropped the sentence to probation. While the factors that the court cited, such as petitioner's withdrawal from the conspiracy, lack of significant criminal history, and behavior while on bond, could readily support *some* lesser sentence, the complete elimination of jail time—the most extreme lesser sentence available—was neither reasonably supported by the record nor consistent with the goals of just punishment, deterrence, and the avoidance of disparity embodied in Section 3553(a).

ARGUMENT

PETITIONER'S PROBATION SENTENCE WAS UNREASONABLE BECAUSE THE DISTRICT COURT DID NOT PROVIDE A SUFFICIENT JUSTIFICATION TO SUPPORT THE EXTENT OF THE VARIANCE FROM THE ADVISORY RANGE

In *Rita* v. *United States*, 127 S. Ct. 2456 (2007), this Court held that appellate courts may adopt a presumption of reasonableness on appeal for a sentence within the advisory Sentencing Guidelines range. That holding recognized that the Sentencing Commission, in formulating the Guidelines, and the sentencing judge, in imposing sentence, are "carrying out the same basic § 3553(a) objectives." *Id.* at 2363. When the judgments of the Commission and the sentencing judge coincide, there is good reason to assume that the sentence is reasonable. *Id.* at 2465. In contrast, when the sentence imposed is outside the Guidelines range, the basis for that practical assumption no longer exists. And when the sentence varies *extraordinarily* from the range, there is a significant risk that the sentence is unreasonable and will result in unwarranted disparity. Proportionality review by appellate courts serves to mitigate that risk. By ensuring that a judge's outside-the-range sentence has an appropriately strong justification under Section 3553(a), the proportionality principle provides a framework for appellate review that is consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), the SRA, and the Constitution, and that gives content to the "substantive" reasonableness review that *Booker* envisioned. See *Rita*, 127 S. Ct. at 2467-2468.

I. PROPORTIONALITY REVIEW IS CONSISTENT WITH *UNITED STATES* v. *BOOKER*, THE SENTENCING REFORM ACT, AND THE SIXTH AMENDMENT

In *United States* v. *Booker*, this Court preserved appellate review of sentences under the SRA. 543 U.S. at 260. The Court directed appellate courts to review the reasonableness of each sentence in light of the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004) and the district court's statement of reasons under 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). *Booker*, 543 U.S. at 261-264. The Court recognized that reasonableness review could not "provide the uniformity that Congress originally sought" when it enacted the SRA and its original scheme of mandatory Guidelines. *Id.* at 263. Nevertheless, reasonableness review would still "tend to iron out sentencing differences," *ibid.*, and thereby "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-265. To make good that promise, courts reviewing sentences for unreasonableness should apply a principle of proportionality to evaluate whether the sentences are justified based on the sentencing factors in Section 3553(a), as a majority of the courts of appeals have done.[3]

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[3] Nine courts of appeals have adopted proportionality review, and none has rejected it. See *United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States* v. *Manzella*, 475 F.3d 152, 161 (3d Cir. 2007); *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006); *United States* v. *Bishop*, 469 F.3d 896, 907 (10th Cir. 2006), cert. denied, 127 S. Ct. 2973 (2007); *United States* v. *Crisp*, 454 F.3d 1285, 1291-1292 (11th Cir. 2006); see also *United States* v. *Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005) (greater explana-

Proportionality review is essential to effectuate the remedial scheme adopted in *Booker*. It also promotes a balanced application of the Section 3553(a) factors, ensures that sentences are sufficient but not greater than necessary to accomplish the purposes of punishment, and verifies that they are supported by sufficiently specific reasons, as required by Section 3553(c). And nothing about proportionality review is inconsistent with the Sixth Amendment, because proportionality review does not require the finding of a fact in order to vary from the advisory Guidelines range. See pp. 34-44, *infra*.

At the outset, it is vital to clear up a misconception (which petitioner fosters) about the nature of proportionality review. Petitioner asserts (Br. 8) that proportionality review requires a court to find "'extraordinary' facts," beyond the verdict or plea, in order to sentence outside the Guidelines range. That statement is incorrect in two critical respects. A court does not need an "extraordinary" justification simply to vary from the range. Section 3353(c) requires a sentencing judge to state "the specific reason for * * * a sentence different from that described" in the Guidelines every time the judge sentences outside the Guidelines range, and that explanation can be reviewed to ensure that inappropriate considerations do not affect the sentence. But modest (or ordinary) deviations from the Guidelines do not require extraordinary justifications. Proportionality review thus does not demand an extraordinary justification for most non-Guidelines sentences. And even when it does demand a substantial justification—such as when a judge imposes probation where the Guidelines call for years of imprisonment—proportionality review does not require extraordinary *facts*. Persuasive policy judgments may satisfy the reviewing court that the variance, although

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tion is required for sentence outside Guidelines range), cert. denied, 547 U.S. 1085 (2006). Cf. *United States* v. *Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) (court "ha[s] yet to adopt this standard").

dramatic, is nonetheless reasonable. Consequently, proportionality review is not a "presumption of unreasonableness" for a non-Guidelines sentence going under another name. See Pet. Br. 10-12.[4]

A. Proportionality Review Is Essential To Effectuate The Remedial Scheme Adopted in *Booker*

1. Booker *envisioned that appellate review and the Guidelines would work together to advance the SRA's goal of reducing unwarranted sentencing disparity*

As this Court repeatedly emphasized in *Booker*, Congress's primary goal in enacting the SRA was to reduce the unwarranted disparity that had plagued the previous discre-

[4] This Court itself so recognized in *Rita* by rejecting a presumption of unreasonableness while reserving (in the same paragraph) the question whether proportionality review is valid. 127 S. Ct. at 2467. Petitioner argues (Br. 10-12) that proportionality review meets the "very definition of a 'presumption'" because (he asserts) it requires appellate courts to assume that outside-range sentences are unreasonable absent "affirmative evidence to the contrary." But assuming "unreasonableness" (which the proportionality principle does not do) is quite different from approaching a sentence significantly outside the advisory range with a question in mind—"Why is this (relatively extreme) sentence reasonable?" That judicial frame of mind does not constitute a "presumption." Rather, it is intrinsic to a practical theory of reasonableness review, in which it would be empirically expected that sentences at or near the margins of a range raise more of a question about their reasonableness (and thus warrant great judicial scrutiny) than sentences in or near the range. Cf. *Rita*, 127 S. Ct. at 2465 (presumption of reasonableness for within-range sentences reflects "real-world circumstance[s]"). And more searching scrutiny for more extreme sentences is intrinsic to any form of substantive reasonableness review, because substantive review inherently presupposes *some* limits on the length of sentences that lack adequate justification. Thus, an appellate court will necessarily give at least some sentences (*e.g.*, those at the extremes of a given range) more searching review than "average" sentences. Nothing in *Rita* suggests that the Court meant to invalidate useful appellate tools that help identify sentences warranting greater scrutiny and structuring the review of outside-range sentences for reasonableness.

tionary sentencing regime. *Booker*, 543 U.S. at 250, 252, 253, 255, 256, 267; *id.* at 292 (Stevens, J., dissenting); see *Rita*, 127 S. Ct. at 2467. The SRA sought to achieve that goal through the combination of mandatory Sentencing Guidelines promulgated by the Sentencing Commission and substantive review of sentences by the courts of appeals. See 18 U.S.C. 3742 (2000 & Supp. IV 2004); 28 U.S.C. 991(b)(1)(B), 994(f); S. Rep. No. 225, 98th Cong., 1st Sess. 65, 151 (1983). In *Booker*, this Court held that the mandatory Guidelines system enacted by the SRA violated the Sixth Amendment. 543 U.S. at 232-235. But the Court attempted to craft a remedy that would permit the SRA to continue to advance Congress's original goal as much as possible, consistent with the Constitution. *Id.* at 247. Indeed, the ability of *Booker*'s remedial scheme to achieve Congress's goals, including uniformity, was essential to the Court's conclusion that its remedial scheme was consistent with well-established principles of statutory construction and severance.

The Court concluded that the SRA would remain constitutional and still reduce unwarranted disparity if the Court severed the provisions that mandated compliance with the Guidelines but left intact the other critical features of the Act. *Booker*, 543 U.S. at 264. The Court identified two features of the SRA that would remain in place and work together "to move sentencing in Congress' preferred direction." *Ibid.* The first was a continued important role for the Sentencing Guidelines. See *id.* at 264-265. The second was the continuation of appellate review, under a reasonableness standard. See *id.* at 260-263. Appellate reasonableness review, together with the advisory Guidelines, would enable the modified SRA to further Congress's goal of increased sentencing uniformity because it would "tend to iron out sentencing differences." *Id.* at 263. The alternative—sentencing without the limits im-

posed by effective appellate review—"would cut the statute loose from its moorings to congressional purpose." *Id.* at 262.

2. Appellate review cannot limit unwarranted disparity unless it includes proportionality review based on a quantitative benchmark

As the Court recognized in *Rita*, the appellate review endorsed in *Booker* is substantive. See 127 S. Ct. at 2466-2467; *id.* at 2473 (Stevens, J., concurring). For that substantive review to function as envisioned in *Booker*, it must include proportionality review based on a quantitative benchmark.

Contrary to petitioner's contention (Br. 10), proportionality review does not mean that every non-Guidelines sentence must be supported by "extraordinary circumstances." No court of appeals has held that a district court must provide an extraordinary justification before it can sentence outside the advisory range. Indeed, the courts of appeals have rejected that proposition. See, *e.g.*, *United States* v. *Rivera*, 448 F.3d 82, 85 (1st Cir. 2006). Proportionality review "ask[s] little in the way of explanation for a sentence that varies little from the guidelines." *United States* v. *Poynter*, No. 05-6508, 2007 WL 2127353, at *9 (6th Cir. July 26, 2007). It is thus "unlikely to affect the review of sentences that vary slightly or even moderately from the" advisory range. *Ibid.* "The only time" it has "an effect on the validity of a sentence, is when the trial court varies substantially from the guidelines." *Ibid.*

But appellate review for reasonableness cannot reduce unwarranted disparity unless it includes a mechanism to ensure that sentences at the extremes of the statutory range are reserved for defendants who warrant the most lenient or most severe punishment. Some mechanisms must exist to identify potentially unreasonable sentences and to ensure that sentences that vary dramatically from the norm will not automatically be condemned as unreasonable. If typical defendants

can always receive sentences from probation to the statutory maximum without any means for correction on appeal, then appellate review will, contrary to the promise of *Booker*, fail to move sentencing in the direction of uniformity. And, by the same token, it will fail to promote differentiation in the punishment of those who truly warrant exceptionally lenient or severe sentences. See *United States* v. *Davis*, 458 F.3d 491, 499 (6th Cir. 2006) ("most extreme variance" for defendant who does not deserve the most lenient punishment "leav[es] no room to make reasoned distinctions" between him and other "more worthy defendants"), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006). To avoid that result, sentences that vary dramatically from the norm must be reserved for cases that present comparably strong justifications.

Courts of appeals cannot identify sentences that vary disproportionately from the norm without an objective and quantitative standard for ascertaining that baseline. Without such a benchmark, appellate courts would be forced in every case to construct anew the range of reasonable sentences for each particular defendant. But "[t]o construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective." *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 928 (2007). Thus, proportionality review based on an objective and consistent benchmark is vital if appellate courts are to assess whether sentences reasonably reflect the punishment warranted and to weed out extreme sentences that lack justification.

3. The Sentencing Guidelines provide the only appropriate benchmark for proportionality review

a. The Sentencing Guidelines are the only suitable benchmark for proportionality review. As the Court explained in *Rita*, the Guidelines were formulated, at Congress's direction,

to embody the same Section 3553(a) factors that are applied by sentencing courts. 127 S. Ct. at 2463-2465. The Guidelines thus reflect the expert and reasoned judgment of the Sentencing Commission about how to weigh those factors for particular categories of offenses and offenders. The Commission formulated the Guidelines after taking into account "the aggregate sentencing experiences of individual judges" across the country. *United States* v. *Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring), cert. denied, 127 S. Ct. 3046 (2007); see *Rita*, 127 S. Ct. at 2464. It has continued to revise the Guidelines over the past two decades based on additional "empirical" information, including district court sentencing determinations, appellate decisions reviewing those determinations, and "advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others." *Ibid.* In *Booker*, this Court understood that the Commission would continue to play that role and that the Commission's efforts would promote uniformity in sentencing. 543 U.S. at 264. And Congress has played an active role in shaping the Guidelines. It provided detailed guidance on the contours of the Guidelines in the SRA, and it has reviewed each Guideline before it took effect, rejecting some Guidelines, directing the Commission to modify others, and even enacting some itself. See *Mistretta* v. *United States*, 488 U.S. 361, 377, 393-394 (1989); U.S. Br. at 18, *Rita, supra*.

The "result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." *Rita*, 127 S. Ct. at 2464. Thus, "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives" in the mine run of cases. *Id.* at 2464-2465. Accordingly, the Guidelines provide an appropriate, concrete, and quantitative application of the factors in Section 3553(a) to general catego-

ries of federal offenses and offenders. See *United States* v. *Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005).[5]

b. No measure other than the Guidelines can serve as an effective benchmark for proportionality review. The non-Guidelines factors in Section 3553(a) supply a frame of reference, but they are too qualitative and too general to provide an effective benchmark for comparing sentences or identifying undue disparity. The sentencing purposes in Section 3553(a)(2) are only "broad, open-ended goals" that will be applied quite differently by different courts. *Koon* v. *United States*, 518 U.S. 81, 108 (1996); see *United States* v. *Davenport*, 445 F.3d 366, 370 (4th Cir. 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The nature of the offense and characteristics of the defendant, 18 U.S.C. 3553(a)(1), and the "kinds of sentences available," 18 U.S.C. 3553(a)(3), are more concrete, but they cannot be translated into a particular sentence absent a conceptual basis for linking them to the purposes of sentencing in Section 3553(a)(2). Thus, they ultimately supply no more quantitative or consistent a benchmark than the purposes of sentencing themselves. See *Poynter*, 2007 WL 2127353, at *9.

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[5] Petitioner and various amici contend (Pet. Br. 28 n.8; NACDL Br. 16-24; WLF Br. 5-10) that the Guidelines do not adequately account for the Section 3553(a) factors, have not actually reduced sentencing disparities, and often produce sentences that are greater than necessary to satisfy the statutory purposes of sentencing. As explained in the government's brief in *Rita* (at 16-22, 24-32), and in the Sentencing Commission's amicus brief in *Rita* and *Claiborne* v. *United States*, 127 S. Ct. 2245 (2007) (No. 06-5618) (at 17-30), the Guidelines ordinarily represent a reasonable application of the statutory factors and have reduced disparities arising from differences among sentencing judges. Those briefs also refute criticisms raised by petitioner's amici (*e.g.*, NACDL Br. 24-25; WLF Br. 10-23) that the Commission has consistently increased Guidelines ranges and that Guidelines sentences are unduly harsh. See U.S. Br. at 23-24, *Rita*, *supra*; Sentencing Commission Br. at 17-19, *Rita* and *Claiborne*, *supra*.

For the same reasons, the so-called "parsimony" provision, which directs courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in Section 3553(a)(2), also cannot provide an objective benchmark for proportionality review. 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). It contains no concrete measure of when a sentence is "sufficient," but simply refers to the highly general and potentially conflicting purposes of sentencing themselves. See *United States* v. *Navedo-Concepción*, 450 F.3d 54, 58 (1st Cir. 2006) (noting that the meaning of the provision "has proved hard to discern").

The mandate in 18 U.S.C. 3553(a)(6) "to avoid unwarranted sentencing disparity" supports use of the Guidelines in a proportionality analysis. No district court or court of appeals, guided solely by its own lights, can singlehandedly reduce the kind of disparity the SRA was intended to address—disparity *nationwide*. See, *e.g.*, *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006). Each district court sees only a random and limited portion of federal sentences imposed, even within its own circuit. Although district courts may see many cases that do not reach the courts of appeals, they have little institutional basis for forming a view on how other district courts in other districts, let alone nationwide, sentence similarly situated defendants. And while each court of appeals has a broader view of the types of sentences being imposed, a single circuit cannot effectively consider cases nationwide or establish nationwide standards. Thus, even if appellate courts could formulate a "common law of sentencing" (a highly doubtful proposition under the exceedingly narrow form of appellate review that petitioner and his amici would allow, see Pet. Br. 28; FPCD Br. 15-29), that regional common law could never attain the statutory goal of reducing unwarranted disparity nationally. See *Poynter*, 2007 WL 2127353, at *9, *10.

The Sentencing Commission, in contrast, has the institutional competence to consider sentencing practices on a national basis. It is charged with collecting and analyzing nationwide sentencing data and revising the Guidelines as appropriate. 28 U.S.C. 994(*o*) and (p); 28 U.S.C. 994(w) (Supp. IV 2004); *Rita*, 127 S. Ct. at 2464; *Booker*, 543 U.S. at 263-264. Unlike individual district or appellate courts, the Commission "can view the sentencing process as a whole, developing a broad perspective on sentencing, which will help it produce more consistent sentencing results among similarly situated offenders sentenced by different courts." *United States* v. *Rivera*, 994 F.2d 942, 950 (1st Cir. 1993).

Treating the Guidelines as a benchmark—but not a mandate—therefore provides the only reliable mechanism to reduce disparity on a nationwide basis. When a sentence varies significantly from the Sentencing Commission's expert and empirically grounded assessment of the appropriate sentence, it should prompt an appellate court to seek a substantial justification. That approach permits the courts of appeals to operate from a consistent nationwide starting point so that defendants do not receive inexplicably harsher or more lenient punishment in Des Moines than similarly situated defendants in Chicago or Los Angeles. And it provides the court of appeals with a concrete means of assessing whether the district court's reasoning provides a substantial justification for a sentence far from the norm. In that way, appellate judges in different circuits are able to apply uniform standards in furtherance of the congressional goals of equal treatment and reduced disparity. See *Davis*, 458 F.3d at 495-496.

4. Proportionality review is consistent with the reasonableness review contemplated by Booker

Petitioner contends (Br. 22-29) that proportionality review is inconsistent with the standard of appellate review adopted in *Booker*. That is incorrect.

"*Booker* expressly equated" the reasonableness review that it adopted "with the old abuse-of-discretion standard used to review sentencing departures" before enactment of the PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 670. *Rita*, 127 S. Ct. at 2471 n.2 (Stevens, J., joined by Ginsburg, J., concurring). Under the pre-2003 standard, a sentence was "reasonable" if the "reasons given by the district court" were "sufficient to justify the magnitude of the departure." *Williams* v. *United States*, 503 U.S. 193, 204 (1992). The evaluation of the reasons given in light of the "magnitude" of the departure is the essence of proportionality review. Proportionality review is therefore fully consistent with the standard of review adopted in *Booker*.[6]

Because the model for *Booker*'s reasonableness review included review of the magnitude of departures, petitioner and amicus NACDL are incorrect in arguing (Pet. Br. 24-25;

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[6] The Court noted in *Booker* that a similar reasonableness standard applied to review of sentences imposed following the revocation of supervised release, and it cited several cases as examples. See 543 U.S. at 262. Petitioner erroneously contends (Br. 24) that proportionality review is inconsistent with those cases. None of those cases rejects proportionality review. Moreover, supervised-release revocation cases typically involve narrower statutory ranges and implicate more limited goals, see Sentencing Guidelines Ch. 7, Pt. A(3)(b) (adopting primarily a "breach of trust" rationale). Thus, proportionality review may be of lesser use in that setting. But in initial federal sentencings, courts typically face broad statutory ranges and see a wide array of conduct and offenders. Those cases implicate more complex sentencing purposes and afford courts greater sentencing options. Even if a proportionality principle is not needed in the review of supervised-release-revocation sentences, it is needed for the review of the thousands of initial federal sentences.

NACDL Br. 13) that review of the magnitude of a variance is inconsistent with *Booker*'s excision of 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). One provision in Section 3742(e) called for review of whether "the sentence departs to an unreasonable degree from the applicable guidelines range." 18 U.S.C. 3742(e)(3)(C) (Supp. IV 2004). But *Booker* did not excise Section 3742(e) because of that provision. Nor does the *Booker* remedial opinion require any speculation as to why Section 3742(e) was excised. Instead, *Booker* makes clear that Section 3742(e) required de novo review of a decision to depart and "contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be excised." *Booker*, 543 U.S. at 259-261. *Booker* also did not excise Section 3742(f)(2), which like Section 3742(e)(3)(C), calls for the court of appeals to reverse a sentence if it departs from "the applicable guidelines range * * * to an unreasonable degree." 18 U.S.C. 3742(f)(2) (2000 & Supp. IV 2004).[7]

Petitioner and his amici also err in contending that proportionality review does not respect the district court's "institutional advantage" in "assess[ing] the evidence and render[ing] judgment based on the individual circumstances of the case." Pet. Br. 23-26; see FAMM Br. 16-23; NACDL Br. 29. Contrary to that contention, proportionality review does not displace the sentencing court's on-the-scene appraisal of the defendant's crime and its circumstances. Courts of appeals that apply proportionality review continue to defer to the district court's factual findings and case-specific determi-

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[7] Petitioner also incorrectly asserts (Br. 24-25) that review under Section 3742(e)(3)(C) was de novo. Although Section 3742(e), as amended by the PROTECT Act, required de novo review of the decision to depart, it did not require de novo review of the extent of a departure. See 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). The courts of appeals accordingly continued to review the extent of departures for abuse of discretion. See, *e.g.*, *United States* v. *Cooper*, 394 F.3d 172, 176 (3d Cir. 2005) (and cases cited therein).

nations about the offense and offender. See, *e.g.*, *United States* v. *Orozco-Vasquez*, 469 F.3d 1101, 1107 (7th Cir. 2006) (factual findings are reviewed for clear error), cert. denied, 127 S. Ct. 2281 (2007); *United States* v. *Walker*, 447 F.3d 999, 1008 (7th Cir.) ("review is necessarily deferential because the district court is uniquely positioned to determine an appropriate sentence"), cert. denied, 127 S. Ct. 314 (2006).

Petitioner is likewise mistaken in asserting that proportionality review is "essentially *de novo* review" that permits a court of appeals to reverse "solely because [it] would have imposed a different sentence than the district court." Pet. Br. 22; see FPCD Br. 9. Courts of appeals applying proportionality review understand that their review is for abuse of discretion. See, *e.g.*, *United States* v. *Spears*, 469 F.3d 1166, 1170 (8th Cir. 2006) (en banc), petition for cert. pending, No. 06-9864 (filed Mar. 2, 2007); *United States* v. *Reinhart*, 442 F.3d 857, 862 (5th Cir.), cert. denied, 127 S. Ct. 131 (2006). They recognize that imposing sentence is for the district courts, and they do not substitute their own judgment about the appropriate sentence for the district court's judgment. See, *e.g.*, *United States* v. *Jiménez-Gutierrez*, No. 06-1566, 2007 WL 1855644, at *5 (8th Cir. June 29, 2007) ("While we may not agree with the sentencing court's precise determination of the amount by which it decided to vary, the sentencing court, and not this appellate body, holds the discretion in this regard."); *United States* v. *Williams*, 425 F.3d 478, 481 (7th Cir. 2005) ("The question is not how we ourselves would have resolved the factors identified as relevant by section 3553(a) * * * nor what sentence we ourselves ultimately might have decided to impose on the defendant."). The courts of appeals instead review the sentence to determine whether it falls within the range of sentences that is reasonable under the Section 3553(a) factors, in light of the reasons given by the district court. If the district court's explanation logically coheres and

is consistent with the totality of the factors, the appellate court upholds the sentence as reasonable. Conversely, if "the sentencing court relied on improper factors, failed to consider relevant factors, or relied on only proper factors but demonstrated a clear error of judgment in weighing those factors," the court of appeals reverses the sentence as unreasonable. *Jiménez-Gutierrez*, 2007 WL 1855644, at *3. That approach appropriately balances deference to the district court and the normal appellate role of ensuring compliance with the law.[8]

Petitioner also incorrectly argues (Br. 26-27) that proportionality review is inconsistent with the appellate presumption of reasonableness for within-Guidelines sentences upheld in *Rita*. That argument is based on the premise that proportionality review "grant[s] greater deference" to the Sentencing "Commission than to the sentencing judge" and prevents the judge from "independently exercis[ing] its judgment" in imposing sentence. Br. 26. Contrary to that premise, proportionality review neither prevents the sentencing court from making an independent judgment nor subordinates its judgment to the Commission's. Instead, proportionality review simply recognizes that, when the district court's judgment diverges to an extraordinary degree from the Commission's, there is a greater risk that the individual court's judgment

[8] Petitioner asserts that the "most vivid illustrations" of de novo review are the "*numerous* opinions where the courts of appeals have instructed district courts that they *must* sentence within a particular range on remand." Br. 25 (initial emphasis added). Contrary to that assertion, in less than a handful of cases has a court of appeals set a specific limit on the sentence that the district court may impose on remand. Although the government agrees that a court of appeals should not dictate the sentence that the district court should impose under *Booker*, the fact that some courts of appeals have occasionally set a floor does not establish that they engaged in de novo review. Instead, they simply articulated what they viewed as the lowest *reasonable* sentence under the Section 3553(a) factors in light of the facts and circumstances of the case identified by the district court.

may exceed the range of reasonableness and create unwarranted disparity. Accordingly, consistent with the role of appellate review in reducing disparity, proportionality review subjects the justification for the divergent sentence to greater scrutiny to ensure that the sentence reasonably reflects the Section 3553(a) factors. There is no novelty in varying the degree of scrutiny within the overall context of abuse-of-discretion review when a particular situation or issue calls for that approach. See *Koon*, 518 U.S. at 98.

5. Appellate review without a proportionality principle threatens to restore the virtually unbounded sentencing discretion characteristic of the pre-SRA regime

Petitioner and his amici offer no form of appellate review that holds any promise of fulfilling the critical disparity-curbing role envisioned by *Booker*. Petitioner contends that courts of appeals have no authority to review or disagree with the weight, if any, a district court has given the factors in Section 3553(a). See, *e.g.*, Br. 19 ("[I]t is the sentencing judge, and the sentencing judge alone, who holds the authority to weigh the principles and factors relevant to punishment."). That is not appellate review but its abdication. Courts of appeals cannot carry out this Court's directive to "determin[e] whether [the] sentence 'is unreasonable, having regard for . . . the [Section 3553(a)] factors * * * and . . . the reasons for the imposition of the particular sentence, as stated by the district court,'" *Booker*, 543 U.S. at 261 (emphasis omitted), if they cannot review the weight the district court gave the various Section 3553(a) factors. Nor can appellate review "iron out sentencing differences," *id.* at 263, if it imposes no effective limit on the range of sentences that may be imposed in a particular case.

Petitioner proposes that substantive review be limited to ensuring that "the reasons given by the district court * * *

are not irrational or irrelevant," Br. 27-28, and that the sentence is not so arbitrary and capricious that "no rational judge in the same position could have potentially imposed" it, Br. 23. But if this Court intended review only for rationality, it presumably would have inferred a rationality standard of review, rather than a reasonableness standard of review. The Court recognized it had a relatively free hand to "infer appropriate review standards from related statutory language, the structure of the statute, and the '"sound administration of justice,"'" and it chose reasonableness. 543 U.S. at 260-261 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988) (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). Moreover, it is entirely unclear how petitioner's proposed standard of review would reduce disparity, which was a feature of the remedial scheme the *Booker* Court deemed critical. One cannot seriously contend that eliminating only those sentences no *rational* jurist could *potentially* have imposed will iron out sentencing differences, consistent with the goals of the SRA and the remedy adopted in *Booker*. Appellate review for rationality alone would do little to reduce the incidence of sentences that generate unwarranted disparity. Petitioner's proposed standard of review will thus invite the kind of unchecked sentencing discretion that existed in the pre-Guidelines regime and that caused the "shameful disparity in criminal sentences" that Congress sought to eliminate when it enacted the SRA. S. Rep. No. 225, *supra*, at 65.

Petitioner insists that the constricted review he proposes is not "an empty exercise" because "[c]ourts of appeals are still empowered to correct legal error" and to ensure that district courts have complied with "the statutory mandate to consider all relevant factors and determine the sentence that is 'sufficient but not greater th[a]n necessary.'" Br. 27 (quoting *Koon*, 518 U.S. at 98, 108). But petitioner does not explain whether those apparently procedural limitations have any

substantive component. And it is hard to see how they could, if courts of appeals are prohibited from reviewing the district court's application of the Section 3553(a) factors. Petitioner's proposed standard of review thus cannot be squared with this Court's holding in *Rita* that purely procedural review is not enough, and that *Booker* requires substantive review. See *Rita*, 127 S. Ct. at 2466-2467; *id.* at 2473 (Stevens, J., joined by Ginsburg, J., concurring).[9]

B. Proportionality Review Properly Implements The SRA

The proportionality principle also properly implements the SRA. As this Court recognized in crafting the *Booker* remedy, the SRA should be interpreted, to the greatest extent possible consistent with the Constitution, in the manner that best achieves Congress's goal of eliminating unwarranted sentencing disparity. See 543 U.S. at 247, 258-259, 265. Indeed, the degree to which the *Booker* remedial scheme achieved that goal was critical to the Court's acceptance of that regime as consistent with principles of statutory construction and severability and superior to the proposed alternatives. Viewed through that lens, the provisions of the SRA left intact by *Booker* fully support proportionality review.

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[9] The appellate review proposed by amicus FAMM is equally problematic. FAMM would limit review to determining whether the district court imposed the "*least severe* punishment necessary to achieve the specified purposes of the criminal law." FAMM Br. 22. This Court has already rejected that kind of one-way ratchet. See *Booker*, 543 U.S. at 257-258. And FAMM's version could not fulfill the purposes of appellate review envisioned in *Booker* because it does not guard against disparities caused by excessively lenient sentences. FAMM's proposal also rests on misreading the parsimony provision as a direction to be lenient. FAAM Br. 5-15. As explained below, that provision instead mandates that sentences be proportionate to the punishment that is warranted. See pp. 31-32, *infra*.

1. Proportionality review is consistent with Section 3553(a)

Proportionality review, using the Guidelines as a benchmark, promotes a balanced application of the sentencing factors in Section 3553(a). Petitioner does not dispute that proportionality review is consistent with at least three of those factors—Subsections (a)(4) and (5), which call for district courts to consider the Guidelines, and Subsection (a)(6), which requires them to consider avoiding unwarranted disparity. And proportionality review does not ignore the remaining factors—such as the nature of the offense and characteristics of the defendant, 18 U.S.C. 3553(a)(1), the need for the sentence imposed to advance the purposes of punishment, 18 U.S.C. 3553(a)(2), and the kinds of sentences available, 18 U.S.C. 3553(a)(3). Those are the factors that a district court will ordinarily invoke in explaining its reasons for imposing an out-of-Guidelines sentence. And they are the factors that the court of appeals will consider in determining whether the district court's rationale supports its variance from the advisory range. That review does not disregard the non-Guidelines factors. It merely respects the fact that the Commission considered the same factors in formulating the recommended range. "To permit district courts to rely on those factors to vary sentences substantially without asking them to give commensurate explanations is not to respect [those factors] but to exalt them—and in the process to make the avoidance of unwarranted sentencing disparities all but impossible." *Poynter*, 2007 WL 2127353, at *9.

Petitioner contends that proportionality review is inconsistent with Section 3553(a) because it "effectively forces the district court to give greater weight to a single factor—the range recommended by the Guidelines—than to all of the other factors and purposes listed in § 3553(a)." Br. 20. As just discussed, however, proportionality review does not force

the district court to give greater weight to the Guidelines range. Instead, it encourages the court to balance all the Section 3553(a) factors. At the same time, it provides an appropriate means for the court of appeals to review the reasonableness of the balance struck by the district court, particularly where a dramatic divergence from the balance struck by the Sentencing Commission suggests a heightened risk that the sentence may be unreasonable. Thus, nothing in proportionality review is inconsistent with the fact that Section 3553(a) "contains no hierarchy of factors." Br. 19.

Petitioner's argument that proportionality review conflicts with Section 3553(a) is based on the mistaken premise that "it is the sentencing judge, and the sentencing judge alone, who holds the authority" to weigh the Section 3553(a) factors. Br. 19. Nothing in the SRA suggests that the sentencing court has plenary and exclusive authority to weigh those factors. And, as discussed above, reading the SRA to give sentencing courts that authority would frustrate both the purpose of the Act and the role envisioned for appellate review in *Booker*. If each sentencing judge had limitless discretion to weigh the Section 3553(a) factors as the judge saw fit, there could be no hope that appellate review would further the SRA's goal of reducing sentencing disparity. In contrast, proportionality review advances that goal by requiring greater scrutiny of the district courts' application of the Section 3553(a) factors in cases in which those courts have imposed sentences far outside the customary range.

2. Proportionality review is consistent with the "parsimony" provision

Proportionality review also helps to implement the "parsimony" provision—Section 3553(a)'s mandate that the district court "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment set out in

Section 3553(a)(2). 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). That provision commands district courts to impose sentences that are proportionate to the punishment that is warranted—"sufficient" but "not greater than necessary." There is no better way to protect against excessively lenient or severe sentences than to require substantial justifications for sentences that diverge to an extraordinary degree from the norm. See *Poynter*, 2007 WL 2127353, at *10.

Petitioner contends (Br. 20-22) that proportionality review conflicts with the parsimony provision because it prevents a district court from sentencing outside the Guidelines range unless the facts of the case are extraordinary. Contrary to that contention, proportionality review does not require an extraordinary justification for all out-of-Guidelines sentences; most sentences can be justified as reasonable based on a relatively straightforward explanation, as is required in any event by Section 3553(c). And variances need not be justified solely on *factual* grounds but may, subject to appellate review, be based on reasoned policy considerations. See pp. 35-36, *infra*.

3. Proportionality review is supported by 18 U.S.C. 3553(c)

Proportionality review is also consistent with 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). Section 3553(c) requires a district court to state reasons for the sentence that it imposes, and Section 3553(c)(2) requires more specific reasons for a sentence outside the Guidelines range. For a non-Guidelines sentence, the court must state "the specific reason for the imposition of a sentence different from" the Guidelines recommendation, and that reason must generally be "stated with specificity in the written order of judgment and commitment." 18 U.S.C. 3553(c)(2) (Supp. IV 2004). *Booker* did not excise that provision, see 543 U.S. at 260, which is directed in part towards facilitating appellate review, see S. Rep. No. 225,

supra, at 80. See also *Rita*, 127 S. Ct. at 2468 (discussing the relevance of the statement of reasons for appellate review and noting that requiring a statement of specific reasons for a non-Guidelines sentence presents no Sixth Amendment problem).

The requirement in Section 3553(c)(2) that the district court explain why the sentence diverges from the Guidelines range provides practical and legal support for proportionality review. The Guidelines provide national standards that judges must "take * * * into account when sentencing" (*Booker*, 543 U.S. at 264), and the requirement that they provide specific reasons for not imposing a Guidelines sentence both assists and justifies closer scrutiny of sentences that vary substantially from the Guidelines range.

As the Court noted in *Rita*, Section 3553(c) also facilitates the evolution of the Guidelines in response to district court sentencing decisions. 127 S. Ct. at 2469. Amicus FPCD (Br. 3-29) argues that the proportionality principle stifles that evolution. On the contrary, proportionality review actually facilitates the evolution of the Guidelines, in much the same way as Section 3553(c)(2). The proportionality principle provides district courts with an incentive to explain fully (and with specific reference to the Guidelines) their reasons for imposing sentences that vary dramatically from the Guidelines range. Those explanations will provide the Commission with detailed information about potential problems with the Guidelines and thus "help the Guidelines constructively evolve over time." *Rita*, 127 S. Ct. at 2469. In contrast, the absolute deference to district court decisionmaking advocated by petitioner and FPCD would not promote the evolution of the Guidelines, because district courts would have little reason to provide more than the minimum explanation required by Section 3553(c). Moreover, if absolute deference were required, appellate courts would be unlikely to analyze in any detail the

reasons that district courts provide for variances—analysis that is also beneficial to Guidelines development. See *Booker*, 546 U.S. at 263. Thus, proportionality review works together with Section 3553(c) to promote the evolution of the Guidelines, as contemplated by the SRA and *Booker*.

C. Proportionality Review Is Consistent With The Sixth Amendment

1. Proportionality review does not violate the Sixth Amendment because it does not require the sentencing judge to find a fact to sentence outside the advisory Guidelines range

Petitioner and various amici (Pet. Br. 12-19; FCPD Br. 13-14; FAMM Br. 25-29; NACDL Br. 3, 5-11) contend that proportionality review violates the Sixth Amendment. Their arguments, however, are all based on the incorrect premise that the proportionality principle "forbids district courts from sentencing outside the Guidelines absent additional findings of fact." Pet. Br. 12; see FCPD Br. 13; FAMM Br. 26; NACDL Br. 5. Contrary to that premise, proportionality review does not require the sentencing judge to make any "additional findings of fact" in order to justify an out-of-Guidelines sentence, even one that varies to an extraordinary degree from the Guidelines range. Proportionality review therefore does not violate the Sixth Amendment.

a. As this Court has repeatedly made clear, the Sixth Amendment is not implicated when a judge exercises discretion "in imposing a sentence within a statutory range." *Booker*, 543 U.S. at 233 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000), and *Williams* v. *New York*, 337 U.S. 241, 246 (1949)); see *Rita*, 127 S. Ct. at 2466; *Cunningham* v. *California*, 127 S. Ct. 856, 866 (2007). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determina-

tion of the facts that the judge deems relevant." *Booker*, 543 U.S. at 233. The Court concluded, however, that the Sixth Amendment is violated if a judge may lawfully sentence outside a specified sentencing range only if the judge finds a fact beyond the "facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted); see *Rita*, 127 S. Ct. at 2466; *Cunningham*, 127 S. Ct. at 870. Thus, a guidelines system presents a Sixth Amendment problem only when it mandates some range, lower than the maximum for an offense specified by statute, that the judge may not lawfully exceed without finding a fact in addition to the facts found by the jury or admitted by the defendant.

The SRA, as it existed before *Booker*, presented that Sixth Amendment problem. See *Booker*, 543 U.S. at 233-235. To render the SRA constitutional, *Booker* made the Guidelines advisory by excising Section 3553(b)(1)'s limitation on the district court's authority to sentence outside the range. 543 U.S. at 259; see *Rita*, 127 S. Ct. at 2456. The proportionality principle does not reinstate that limitation: it does not require the judge to find an aggravating or mitigating fact that the Guidelines do not take into account. Nor, contrary to petitioner's argument (Br. 12), does it otherwise require the sentencing judge to find facts beyond those found by the jury or admitted by the defendant in order to sentence outside the Guidelines, even when the sentence varies to an extraordinary degree from the advisory range. Rather, a variance may be justified either by atypical facts, by persuasive policy reasons for concluding that the Guidelines do not appropriately reflect Section 3553(a)'s sentencing factors, or by a combination of facts and policy considerations. When a district court fails to provide an adequate justification for a sentence that varies to an extraordinary degree from the Guidelines range, "[w]hat is missing * * * is additional reasoning, not additional

factfinding." *Poynter*, 2007 WL 2127353, at *10. And "an ordinary explanation of judicial reasons as to why the judge has, or has not, applied the Guidelines triggers no Sixth Amendment 'jury trial' requirement." *Rita*, 127 S. Ct. at 2468.[10]

Under this Court's decisions, a court's ability to vary based solely on policy disagreements with the Guidelines avoids Sixth Amendment difficulties that would arise if judges were effectively required to find facts beyond those found by the jury or admitted by the defendant in order to sentence above the Guidelines range. Accordingly, this Court noted in *Rita* that the parties may argue at sentencing "that the Guidelines sentence should not apply * * * because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," 127 S. Ct. at 2465; may "contest[] the Guidelines sentence generally under § 3553(a)," *id.* at 2648; and may "argue[] that the Guidelines reflect an unsound judgment," *ibid.* Moreover, "[a]s far as the law is concerned, the judge could disregard the Guidelines" and impose the sentence the Guidelines would recommend for a case with special aggravating facts even "in the absence of the special facts." *Id.* at 2466. Thus, an extraordinary variance, like any other vari-

[10] Some courts have indicated that the justification for an extraordinary variance must be fact-based. See Pet. Br. 16 (citing cases). Those statements, however, do not reflect a requirement inherent in proportionality review itself. Instead, they reflect an independent proposition that has also been adopted by a majority of the courts of appeals—that district courts may not vary from the Guidelines based on a reasoned disagreement with Sentencing Commission policy. See, *e.g.*, *United States* v. *Borho*, 485 F.3d 904, 911 (6th Cir. 2007); *United States* v. *Trupin*, 475 F.3d 71, 76 (2d Cir. 2007), petition for cert. pending, No. 06-12034 (filed June 22, 2007). As discussed in the text, to the extent that those holdings require the sentencing court to find a *fact* to vary from the Guidelines range, they may create Sixth Amendment difficulties. But that is not a reason to reject the proportionality principle, which *is* fully consistent with this Court's Sixth Amendment jurisprudence.

ance, may be justified without the sentencing judge finding "special facts."[11]

Moreover, it must be acknowledged that petitioner's Sixth Amendment argument is less an attack on the proportionality principle than an attack on any meaningful form of appellate reasonableness review. Any system of substantive reasonableness review will result in some holdings that the reasons given in a particular case do not support the sentence imposed. Accordingly, petitioner's Sixth Amendment argument must be understood as an attack on *Booker*'s remedial holding and its inference of a reasonableness standard of review. But *Booker*'s remedial holding does not violate its Sixth Amendment holding. A majority of the Court held as much in

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[11] Although sentencing courts may impose non-Guidelines sentences based on policy disagreements with the Sentencing Commission, courts may not vary from the Guidelines under Section 3553(a) based on disagreements with policy choices mandated by Congress. See U.S. Br., *Kimbrough* v. *United States*, No. 06-6330. In addition, policy-based variances remain subject to proportionality review. Thus, the extent of the variance justified by a policy disagreement will depend on the persuasiveness of the district court's specific, articulated support for the disagreement. In evaluating the extent of the variance justified by a policy disagreement, a court of appeals should take into account that policy-based variances pose a greater risk of generating broad sentencing disparity than variances based on case-specific facts. A reviewing court should also recognize that district courts do not have the "institutional advantage" in making policy decisions that they have in assessing the application of the Section 3553(a) factors to the facts of a particular case. *Koon*, 518 U.S. at 98. District courts are far less well positioned than the Commission to marshal and evaluate the extensive and complex data necessary to make broad policy judgments, particularly about the culpability levels associated with categories of crimes or conduct. See *Rita*, 127 S. Ct. at 2463 (noting that the Commission operates at the "wholesale" level and district courts operate at the "retail" level). Accordingly, a policy-based variance is not entitled to as much deference as a fact-based variance. See *Koon*, 518 U.S. at 98 ("The deference that is due depends on the nature of the question presented.").

Booker, and the Court reaffirmed the point in *Rita*. See 127 S. Ct. at 2466-2467.

b. Petitioner asserts that "[n]o reported decision has upheld a non-Guidelines sentence" under the proportionality principle "based solely on the facts found by the jury." Br. 16. That may be true, but it is not problematic. Because sentencing under the advisory Guidelines (like traditional sentencing) routinely involves judicial factfinding, courts of appeals will rarely (if ever) review a case in which the district court has attempted to justify a variance based only on the facts reflected in the verdict or guilty plea. That presents no constitutional concern, however, because "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita*, 127 S. Ct. at 2465-2466. What would present a constitutional concern is a decision holding that, under the proportionality principle (or any other variant of reasonableness review), a non-Guidelines sentence *must be reversed* unless the sentencing court has found a fact in addition to those found by the jury. The government is not aware of any court of appeals decision that has so held, and any such decision would reflect a mistaken interpretation of proportionality review.

Petitioner and amicus NACDL also argue that proportionality review necessarily requires additional factfinding because "[t]he only means by which a judge can determine that a case is somehow different from the run of the mine—i.e., 'extraordinary'—is through additional findings of fact." Pet. Br. 17; see NACDL Br. 9. But proportionality review does not inherently require a judge to find that a case is "different from the run of the mine" in order to vary. An extraordinary justification is required only for a sentence that varies dramatically from the Guidelines range, and, even then, the justi-

fication can be based on policy considerations, rather than on specific findings of fact.

2. The Sixth Amendment does not require that a sentence at the statutory maximum be a reasonable one in every case

NACDL observes (Br. 9) that, under proportionality review, a sentence at the statutory maximum will not be reasonable in every case. Indeed, a sentence at the maximum will not be reasonable in a significant number of cases. (The same is true of a sentence at the minimum.) But that is not a consequence of proportionality review in particular. Rather, it is inherent in *any form* of substantive reasonableness review. See *Rita*, 127 S. Ct. at 2477 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); *Cunningham*, 127 S. Ct. at 876 (Alito, J., dissenting, joined by Kennedy & Breyer, JJ., dissenting). And this Court has correctly held that substantive reasonableness review is nonetheless consistent with the Sixth Amendment. See *Rita*, 127 S. Ct. at 2466-2467; *id.* at 2473 (Stevens, J., concurring).[12]

In any system under which judges sentence rationally within a statutory range, a sentence at the statutory maximum will be unavailable in a significant number of cases. When Congress enacts a broad sentencing range, it necessarily contemplates punishment alternatives for the full spectrum of offenders. Sentencing judges are expected to reserve the harshest punishment for the most culpable offenders and the most lenient punishment for the least culpable—and to

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[12] The Court has left open the question whether "some future unusually harsh sentence" could present a case-specific Sixth Amendment problem. *Rita*, 127 S. Ct. at 2473. So long as the judge's legal discretion extends to the maximum established in the United States Code, however, any such as-applied Sixth Amendment challenge must fail. In any event, this case does not present that question.

graduate punishment for offenders that fall in between those extremes. Imposing the most severe sentence on *all* defendants would conflict with Congress's provision of a range. See, *e.g.*, *Poynter*, 2007 WL 2127353, at *6 (explaining that "not all repeat sex offenders deserve what amounts to a life sentence; otherwise, Congress would not have set a statutory range of 0-60 years").

For that reason, even before the SRA, appellate courts would reverse a sentence at the statutory maximum when the sentencing judge had failed to exercise discretion in light of the circumstances of the individual offender, but had instead imposed the most severe sentence available based solely on the offense of conviction. See, *e.g.*, *United States* v. *Bowser*, 497 F.2d 1017, 1019 (4th Cir.), cert. denied, 419 U.S. 857 (1974); *United States* v. *Daniels*, 446 F.2d 967, 971 (6th Cir. 1971); *Woosley* v. *United States*, 478 F.2d 139, 143 (8th Cir. 1973); *United States* v. *Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985); *United States* v. *McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970) (per curiam); cf. *United States* v. *Roper*, 681 F.2d 1354, 1361 (11th Cir. 1982). Those courts recognized that, when Congress establishes a punishment range, it intends sentencing courts to take into account individualized circumstances rather than routinely to impose the maximum sentence. See *Barker*, 771 F.2d at 1367; *Daniels*, 446 F.2d at 971-972. Nothing in that principle raised any Sixth Amendment concern. Reasonableness review using a proportionality principle that has the same consequence is therefore also consistent with the Sixth Amendment.

This Court's *Apprendi* line of cases does not require a different conclusion. The existence of an appellate check on a sentencing court's authority to sentence at the maximum (absent a sufficient reason) does not create an identifiable lesser punishment that the court cannot lawfully exceed without engaging in judicial factfinding. And unless there is such

an identifiable lower limit to the lawfully available punishment, the *Apprendi* principle is not violated. See *Blakely*, 542 U.S. at 307 (*Apprendi* is triggered when there is "a lesser sentence" to which "the defendant has a legal *right*" absent some factual finding); *Harris* v. *United States*, 536 U.S. 545, 566 (2002) (plurality opinion) ("The Fifth and Sixth Amendments ensure that the defendant 'will never get *more* punishment than he bargained for when he did the crime.'") (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)); *Apprendi*, 530 U.S. at 489 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed range of penalties* to which a criminal defendant is exposed.") (emphasis added; citation omitted; brackets in original); *Rita*, 127 S. Ct. at 2466.

Reasonableness review using a proportionality principle does not create an ascertainable lower limit on the legally available punishment. It is not possible for a defendant to anticipate in any case the particular combination of facts and policy judgments on which the sentencing court may rely in determining the appropriate sentence. Nor is it possible to predict the maximum sentence that an appellate court might ultimately conclude is reasonable based on those fact- and policy-based justifications. Even when a court of appeals vacates a sentence as unreasonable and remands for resentencing, its ruling need not set a maximum sentence. An appellate court cannot anticipate all of the relevant facts and policy considerations that the district court on remand (or a future district court facing a similar case) could consider in conducting its Section 3553(a) analysis. Thus, proportionality review does not offend the Sixth Amendment.

3. Proportionality review does not restore mandatory guidelines or otherwise unconstitutionally constrain district courts' sentencing discretion

Amicus FPCD incorrectly contends (Br. 13-14) that the proportionality principle "effectively restores mandatory Guidelines" because it discourages district courts from imposing non-Guidelines sentences. This Court rejected a similar challenge to the appellate presumption of reasonableness for within-Guidelines sentences in *Rita*. The Court stated that the fact that "the presumption will encourage sentencing judges to impose Guidelines sentences" does not "change the constitutional calculus." *Rita*, 127 S. Ct. at 2467. That statement applies with equal force to proportionality review.[13]

In any event, FPCD's contention lacks factual support. The percentage of non-Guidelines sentences has increased significantly since *Booker* in virtually all circuits, including all but one that have adopted the proportionality principle. In the four fiscal years before this Court's decision in *Blakely*, available statistics indicate that district courts imposed non-Guidelines sentences on grounds other than government-sponsored departure in 9.4% of the cases. See App., *infra*, 31a. Between February 1, 2005 (a few weeks after *Booker* was decided), and March 31, 2007 (the latest date for which preliminary data are available), district courts imposed such sentences in 13.9% of the cases. *Ibid.* That represents a

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[13] For the same reason, FPCD errs in asserting (Br. 13-14) that it is problematic that proportionality circuits reverse a higher percentage of non-Guidelines sentences than other circuits. That fact simply indicates that the proportionality principle enables appellate review to further the SRA's goals of reducing unwarranted disparity and increasing sentencing uniformity. "The fact that [proportionality review] might help achieve these congressional goals does not provide cause for holding [it] unlawful as long as [it] remains constitutional." *Rita*, 127 S. Ct. at 2467. And, as discussed above, proportionality review is constitutional.

48.6% increase in the rate of out-of-Guidelines sentences. Moreover, non-Guidelines sentences have, on average, increased at a significantly greater rate in circuits that have adopted the proportionality principle than in circuits that have not adopted the principle. *Ibid.* The rate of increase is 71.3% in proportionality circuits and only 20.6% in other circuits. *Ibid.* Thus, sentencing data provides no sound basis for concluding that proportionality review discourages out-of-Guidelines sentences (although it may discourage excessive variances and encourage thoroughly reasoned variances).

NYCDL contends (Br. 2-3, 5-8) that the proportionality principle leads courts of appeals to invalidate most below-Guidelines sentences and to affirm most above-Guidelines sentences. That claim has no logical basis because the proportionality principle applies equally to sentences whether they are above or below the Guidelines range. See, *e.g.*, *Dean*, 414 F.3d at 729 ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.").

The difference in the rates of affirmance for below- and above-Guidelines sentences stems from other factors that provide no cause for concern. Upward variances are far rarer than downward ones. See United States Sentencing Commission, *Final Report on the Impact of* United States *v.* Booker *on Federal Sentencing* App. D-4 (2006) <http://www.ussc.gov/booker_report.pdf>; App., *infra*, 31a. And the government appeals a small percentage of sentences (less than 3%) on the ground of unreasonableness, while criminal defendants appeal

a high percentage (probably nearly all upward variances).[14] Both FPCD and NYCDL report more than 17 times as many defendant appeals as government appeals, see FPCD Br. at A8, *Rita*, *supra*, and *Claiborne* v. *United States*, 127 S. Ct. 2245 (2007) (No. 06-5618); NYCDL Br. App. 4a-6a, despite the fact that, since *Booker*, district courts have imposed below-Guidelines sentences almost eight times as often as above-Guidelines sentences, see App., *infra*, 31a. Indeed, FPCD figures show that defendants are nearly twice as likely to appeal even when their sentence is below the Guidelines range. FPCD Br. at A8, *Rita* and *Claiborne, supra* (counting 148 defendant appeals and 83 government appeals from below-Guidelines sentences). See also *United States* v. *McDonald*, 461 F.3d 948, 956 n.7 (8th Cir. 2006). Given the government's greater selectivity in appealing, it is unsurprising that appellate courts have reversed below-range sentences more frequently.

II. PETITIONER'S SENTENCE WAS UNREASONABLE

Petitioner's advisory Guidelines range was 30 to 37 months of imprisonment. J.A. 96. The district court did not impose any prison term, but instead sentenced petitioner to three years of probation. J.A. 99. That was an extraordinary variance, and under the proportionality principle, it required a correspondingly strong justification. The justification provided by the district court cannot reasonably be viewed as strong enough to justify the elimination of all prison time for a serious drug offense. The sentence was therefore unreasonable.[15]

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[14] Of the more than 150,000 federal sentences issued since *Booker*, see App., *infra*, 31a, the government has appealed fewer than 400.

[15] The court of appeals concluded that the variance was extraordinary because there is a 100% difference between some imprisonment and no imprisonment. J.A. 137. Amici WLF (Br. 23-25) and NYCDL (Br. 9, 16) criticize the

The district court identified five considerations as justifying the sentence: (1) petitioner's withdrawal from the conspiracy; (2) his "exemplary behavior while on bond"; (3) the support he received from family and friends; (4) his lack of a substantial criminal history, particularly a violent one; and (5) his "immaturity." J.A. 97. Those factors were appropriate considerations under Section 3553(a)(1), and the district court could reasonably have relied on them to impose a sentence below the Guidelines range. For several reasons, however, the court acted unreasonably in relying on them to impose a sentence of probation—the most lenient sentence available.

For reasonableness review to promote Congress's goal of avoiding unwarranted disparity, sentences at the top and bottom of the statutory range should generally be reserved for cases that warrant the most severe or most lenient punishment. See *Poynter*, 2007 WL 2127353, at *7 (reasoning that "the only way to 'avoid unwarranted sentencing disparities' is for appellate courts to preserve reasoned distinctions among offenders") (citation omitted). Just as the aggravating features of this case—petitioner's protracted distribution of a dangerous drug, from which he reaped tens of thousands of dollars in profits—would not reasonably justify a sentence

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court's focus on percentage alone as mechanical and argue that it unduly disfavors probationary sentences. The government agrees that appellate courts should not focus solely on the percentage deviation from the Guidelines range but should consider all relevant measures of the extent of a variance—including percentage, absolute time, and any difference in the nature of the punishment. See U.S. Br. at 29, *Claiborne, supra*. Even under that approach, however, the court of appeals was clearly correct in concluding that the variance in this case was extraordinary. Three years of probation represents dramatically less punishment than two-and-a-half years of imprisonment. The probationary term involves no incarceration at all, compared to 30 months of prison confinement. Moreover, a prison term would have triggered a minimum of three years of supervised release, which would have involved restrictions on petitioner's liberty equivalent to those entailed by probation. See p. 49, *infra*.

dramatically above the Guidelines range or at the statutory maximum of 20 years of imprisonment, the factors invoked by the district court cannot reasonably be viewed as justifying a sentence far below the advisory Guidelines range and at the bottom of the statutory range, particularly considering the seriousness of petitioner's offense and the need to deter other potential offenders.

The district court gave unreasonable weight to petitioner's withdrawal from the conspiracy. That action, although commendable, was motivated not by remorse but by a desire to avoid apprehension and punishment. Petitioner told Rinderknecht that he no longer wanted to be involved in the drug distribution business because he was nervous that Sauerberg was telling too many people about it. J.A. 131. Moreover, petitioner did not go to the police or take any other action to stop the distribution operation from continuing.

Petitioner's criminal history likewise cannot reasonably justify the extraordinarily lenient sentence he received. His criminal history was reflected in his Guidelines range. His relatively minor criminal record placed him in criminal history category I, see J.A. 132, and resulted in a two-level reduction in his offense level under the safety-valve provision, *ibid.*; see pp. 4-5 & n.2, *supra*. The fact that the Guidelines already reflect the defendant's criminal history does not bar a sentencing court from relying on criminal history to justify a variance in an appropriate case. Here, however, the court did not explain why petitioner's criminal record justified an extraordinarily lenient sentence. Nor does anything apparent in the record suggest that petitioner was less culpable than other offenders in the lowest criminal history category. On the contrary, petitioner was not a first-time offender but had two prior convictions, including one that was not reflected in his criminal history score, and a prior drug charge for which he received a deferred judgment. See J.A. 132.

In addition, the district court placed too much reliance on general studies showing that young people are more likely to engage in "risky behavior," J.A. 98, and on research in brain development, J.A. 97-98. The district court did not explain how those studies related to petitioner's criminal acts, and their relevance is not apparent. See *ibid.* Far from being "impetuous and ill-considered," J.A. 98, petitioner's conduct evinced a well-planned course of action by a college student who was capable of orchestrating significant business activities. In particular, after conferring with his co-conspirators, petitioner decided to take on a larger role in the conspiracy, and he withdrew from the conspiracy only after making a significant amount of money. J.A. 130-131.

As the court of appeals explained, the district court also failed to give sufficient weight to the seriousness of petitioner's offense. See J.A. 138-139; 18 U.S.C. 3553(a)(2)(A). Petitioner played a major role in a conspiracy to distribute an extremely dangerous drug. He served as a mid-level manager, obtained thousands of tablets of ecstasy that he distributed to his contacts for further distribution, and earned profits of $30,000 to $40,000 over a seven-month period. See J.A. 24-25, 130-131, 146-152. Congress and the Sentencing Commission have recognized the dangers associated with the distribution of ecstasy, including "the rapidly growing incidence of abuse[,] * * * the threat to public safety that such abuse poses," and the fact that the drug is "frequently marketed to youth." Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663(c)(2), 114 Stat. 1243; see United States Sentencing Commission, *Report to the Congress: MDMA Drug Offenses* 4-5, 10-16 (2001) <http://www.ussc.gov/r_ congress/mdma_final2.pdf> (Sentencing Commission Report) (reviewing harms from ecstasy and concluding that it ranks in seriousness between powder cocaine and heroin).

In 2000, the year that petitioner engaged in the ecstasy distribution conspiracy, Congress directed the Sentencing Commission to amend the Guidelines "to provide for increased penalties * * * that * * * reflect the seriousness of [ecstasy distribution] offenses and the need to deter them." Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663(b)(1), 114 Stat. 1243. In response to that directive, the Commission amended the Guidelines' drug conversion ratio so that one gram of MDMA, which had been treated as equivalent to 35 grams of marijuana, is now treated as equivalent to 500 grams of marijuana. Sentencing Guidelines § 2D1.1, comment. (n.10) (drug equivalency tables); see *id.* App. C, amends. 609, 621 (effective May 1, 2001, and Nov. 1, 2001). Under the amended Guidelines, petitioner would have been responsible for the equivalent of 1250 kilograms of marijuana, and his Guidelines range would have been 70 to 87 months of imprisonment. See J.A. 131-132, 138; Sentencing Guidelines Ch. 5, Pt. A (Sentenceing Table); see also Sentencing Commission Report 6 (middle-level distributors should generally receive ten-year sentences).[16]

Petitioner is thus far off the mark in contending that his probationary sentence was "wholly appropriate." Pet. Br. 33-34; see NYCDL Br. 9-21. Congress has recognized that a "sentence other than imprisonment" may be appropriate for

[16] -The amended Guideline was not applied to petitioner, and the government has taken the position that the Ex Post Facto Clause bars the retroactive application of severity-enhancing Guidelines even in the advisory system installed by *Booker*—a conclusion that depends in no small part on the significant role of the Guidelines in proportionality analysis on appellate review. See U.S. Br. in Opp., *Demaree* v. *United States*, No. 06-8377. But see *United States* v. *Demaree*, 459 F.3d 791, 794-795 (7th Cir. 2006) (holding that the Ex Post Facto Clause does not apply to advisory guidelines), cert. denied, 127 S. Ct. 3055 (2007). Even if the new MDMA Guideline may not be applied to petitioner, however, it nevertheless evinces a congressional policy that courts can consider under *Booker* in assessing the relative severity of an offense.

a "first offender who has not been convicted of a crime of violence or an otherwise serious offense," 28 U.S.C. 994(j), but it has also made clear that trafficking in a "substantial quantity of a controlled substance" is a serious offense that warrants a "substantial term of imprisonment," 28 U.S.C. 994(i)(5). Moreover, while three years of probation is not "zero punishment," NYCDL Br. 3, 9, it cannot reasonably be deemed to be "harsher than a short period of incarceration," as NYCDL suggests (*id.* at 16). Although probation imposed some "limitations on [petitioner's] freedom of movement and conduct," Pet. Br. 33, even a relatively brief sentence of imprisonment would have been followed by at least three years of supervised release, 21 U.S.C. 841(b)(1)(C), subject to the same limitations on his freedom. See 18 U.S.C. 3583(d); see also *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 542 (1989) (Probation "may engender 'a significant infringement of personal freedom,'" but "cannot approximate in severity the loss of liberty that a prison term entails.") (citation omitted). Petitioner's sentence was wholly inconsistent with the seriousness of his offense.

Furthermore, the district court gave no weight to the need for petitioner's sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. 3553(a)(2)(B). Even when a sentencing court perceives little need to deter the defendant before it, it cannot disregard the need to "afford adequate deterrence" to criminal conduct by others. Petitioner's sentence is unlikely to deter others who might be inclined to traffic in illegal drugs. On the contrary, it sends a message that an individual who plays a major role in a drug distribution conspiracy, and who ceases his criminal conduct only when the risk of detection becomes too great, faces at most a brief period of probation. Given the powerful financial incentive of "easy money" that petitioner's offense presented (J.A. 124 n.3), probation provides inadequate general deterrence for

that very serious crime. The district court's "failure to account for that important objective deprives [petitioner's] extraordinarily lenient sentence of the 'compelling justification' required to render it reasonable." *United States* v. *Duhon*, 440 F.3d 711, 721 (5th Cir. 2006) (Garza, J., concurring), petition for cert. pending, No. 05-11144 (filed May 18, 2006).

Finally, petitioner's lenient sentence illustrates the potential for wide disparity between similarly situated defendants. Most drug defendants who appear for federal sentencing will not obtain probation. Petitioner was able to make a case for probation in part because of socioeconomic advantages that hardly mitigate his crime. Petitioner was a college student who had many choices other than to engage in drug trafficking, yet he did so anyway. When he feared discovery, he ceased his criminal activity, but kept his illicit proceeds (giving him the opportunity to invest them in other endeavors). By the time he came to federal sentencing, his advantages in life enabled him to present himself as a college graduate and owner of a thriving small business who had turned his life around, *e.g.*, J.A. 94-95, in contrast to the many defendants who lack the financial resources, family support, and education to take those steps. No doubt those favorable equities could support a below-range sentence. But the no-imprisonment sentence in this case impairs the SRA's cardinal goal of avoiding unwarranted disparities among defendants who have committed similar crimes and have similar records. See 18 U.S.C. 3553(a)(6).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 3553 of Title 18 (2000 & Supp. IV 2004) provides:

> **Imposition of a sentence**
>
> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. 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;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

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

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

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

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to

be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

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

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

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In General—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that 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 should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only

[1] So in original. The period probably should be a semicolon.

the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses—

(A)[2] **Sentencing—**In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

> (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;
>
> (ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—
>
> > (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a)

[2] So in original. No subpart (B) has been enacted.

> of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;
>
> (II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and
>
> (III) should result in a sentence different from that described; or
>
> (iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

> (1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the courts statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to sec-

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[3] So in original. The second comma probably should not appear.

tion 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendants substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or

406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determina-

tion by the court that the defendant has complied with this requirement.

3. Section 3742 of Title 18 (2000 & Supp. IV 2004) provides:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular

sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) 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.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. Section 991 of Title 28 (2000 & Supp. IV 2004) provides:

> **United States Sentencing Commission; establishment and purposes**
>
> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney Generals designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.
>
> (b) The purposes of the United States Sentencing Commission are to—
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

5. Section 994 of Title 28 (2000 & Supp. IV 2004) provides:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanc-

tions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of

[1] So in original. Probably should be "incidence."

probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[2] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

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[2] So in original. Probably should be "incidence."

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the

maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure 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, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or

vocational training, medical care, or other correctional treatment.

(*l*) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the

Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(*o*) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of

the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing proce-

dure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 3/31/2007		% Change Post-Booker
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**150,270**		
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	18,541	12.3%	**43.2%**
Above-Range Sentences	306	0.6%	457	0.8%	541	0.8%	382	0.8%	1,686	0.7%	2,352	1.6%	**110.9%**
Out-of-Guidelines Sentences	6,433	11.7%	6,511	11.1%	5,437	8.3%	2,880	6.0%	21,261	9.4%	20,893	13.9%	**+48.6%**
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**1,090**		
Out-of-Guidelines Sentences	23	8.8%	26	6.3%	22	4.6%	24	5.9%	95	6.1%	179	16.4%	**+169.1%**
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**3,569**		
Out-of-Guidelines Sentences	151	10.2%	168	9.3%	156	8.5%	77	6.0%	552	8.6%	663	18.6%	**+115.5%**
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**9,707**		
Out-of-Guidelines Sentences	698	17.8%	716	17.6%	786	16.5%	494	14.4%	2,694	16.6%	2,440	25.1%	**+51.1%**
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**6,593**		
Out-of-Guidelines Sentences	213	8.3%	219	8.2%	231	8.3%	128	6.1%	791	7.8%	1,204	18.3%	**+132.9%**
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**13,454**		
Out-of-Guidelines Sentences	269	5.7%	230	4.6%	248	4.4%	170	4.1%	917	4.7%	1,604	11.9%	**+155.6%**
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**33,149**		
Out-of-Guidelines Sentences	1,622	14.5%	1,475	12.1%	1,121	8.4%	436	4.5%	4,654	10.0%	3,112	9.4%	**-6.2%**
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**11,214**		
Out-of-Guidelines Sentences	280	6.7%	275	6.2%	277	5.8%	191	5.6%	1,023	6.1%	1,814	16.2%	**+166.2%**
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**6,562**		
Out-of-Guidelines Sentences	162	6.8%	201	7.5%	166	5.5%	110	4.9%	639	6.2%	1,086	16.5%	**+167.7%**
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**10,835**		
Out-of-Guidelines Sentences	342	9.8%	376	10.5%	356	8.2%	196	5.6%	1,270	8.5%	1,683	15.5%	**+82.3%**
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**27,277**		
Out-of-Guidelines Sentences	1,996	16.8%	2,101	17.9%	1,463	11.0%	668	7.1%	6,228	13.5%	3,847	14.1%	**+4.8%**
Tenth Circuit	**2,980**		**3,833**		**4,476**		**3,728**		**15,017**		**12,469**		
Out-of-Guidelines Sentences	250	8.4%	308	8.0%	271	6.1%	190	5.1%	1,019	6.8%	1,496	12.0%	**+76.8%**
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**14,351**		
Out-of-Guidelines Sentences	427	7.1%	416	6.7%	340	5.3%	196	4.1%	1,379	5.9%	1,765	12.3%	**+108.7%**

Proportionality Circuits	**39,010**		**42,463**		**46,645**		**35,039**		**163,157**		**112,196**		
Out-of-Guidelines Sentences	3,716	9.5%	3,668	8.6%	3,166	6.8%	1,694	4.8%	12,244	7.5%	14,427	12.9%	**+71.3%**
Other Circuits	**16,079**		**16,221**		**18,526**		**13,212**		**64,038**		**38,074**		
Out-of-Guidelines Sentences	2,717	16.9%	2,843	17.5%	2,271	12.3%	1,186	9.0%	9,017	14.1%	6,466	17.0%	**+20.6%**

"Out-of-Guidelines Sentences" excludes government-sponsored downward departures, as defined in Appendix B of the Sentencing Commission's *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* (March 2006).
"Proportionality Circuits" are the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.
"Other Circuits" are the District of Columbia, Second, and Ninth Circuits.
"% Change Post-Booker" calculates the percent change, from the Total Pre-Booker to Post-Booker periods, in the rate of Out-of-Guidelines Sentences. Although "% Change Post-Booker" accurately shows the change in rate, calculations based on the percentages shown for Total Pre-Booker and Post-Booker may yield slightly different results due to rounding.

Sources: United States Sentencing Commission, 2005 Datafiles, USSCFY05, and Preliminary Data from USSCFY06 (October 1, 2005 through September 30, 2006); United States Sentencing Commission, 2001 and 2002 Datafiles, USSCFY01 and USSCFY02; United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics* , Table 26A; United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* , Table 26A.