A Reasonable "Reasonableness" Standard: Reconciling the Constitutional and Remedial Holdings of *United States v. Booker*

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I. Introduction

On January 12, 2005, the Supreme Court handed down its much awaited decisions in the consolidated cases of *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. *United States v. Booker*, –S. Ct.–, 2005 WL 50108 (Jan. 12, 2005). In the constitutional-majority portion of the opinion, Justice Stevens explained for the Court that *Blakely* did, in fact, apply to the United States Sentencing Guideline scheme, rendering them unconstitutional as written. In a separate, remedial-majority opinion, Justice Breyer determined that reviewing courts must now apply a "reasonableness" standard of review to sentence determinations on appeal. In support of his finding, Justice Breyer referenced the "reasonableness" standard of review that existed before the 2003 amendments to the Guidelines. As explained in detail below, wholesale application of the pre-2003 reasonableness standard to the now-advisory Guideline scheme would maintain a mandatory, and thus unconstitutional, guideline system and would be inconsistent with the constitutional-majority opinion.

In order to reconcile the dual majority opinions, it is logical and necessary to read Justice Breyer's opinion as requiring application of only the portion of the pre-2003 reasonableness standard that is not tied specifically to the Guidelines. This portion of the pre-2003, multi-part

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reasonableness standard is essentially an abuse of discretion standard of review. Although some might characterize Justice Breyer's reference to the pre-2003 standard as a call for the return of the entire pre-2003 standard, such a reading conflicts with the constitutional-majority opinion. Accordingly, Justice Breyer's opinion must be read to mean that the courts of appeals should retain only the second portion of the multi-part, pre-2003 standard. Many circuits have previously interpreted this portion to require an examination of whether the sentencing court had abused its discretion by awarding an unreasonable sentence in light of the factual circumstances.

The courts of appeals should reconcile the two portions of the *Booker* opinion in this fashion when applying the reasonableness standard. These courts do have an analogous sentencing context that should provide guidance. For years, the circuit courts have treated the Guidelines as advisory in the context of revocations of supervised release and have applied an abuse of discretion standard when reviewing these revocation sentences for reasonableness.

II. The "Unreasonableness" Standard of Review

In the remedial-majority opinion, Justice Breyer concluded that "we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guideline range (in the absence of circumstances that justify a departure), *see* 18 U.S.C. §3553(b)(1) (Supp. 2004), and the provision that sets forth standards of review on appeal, including de novo review of departures from the applicable Guidelines range, *see* §3742(e)(main ed. and Supp. 2004)." *Booker*, 2005 WL, at * 24. The Court further determined that 18 U.S.C. § 3742(e) provides an implicit standard of review for the new advisory application of the sentencing scheme. As the Court noted, this section "impl[ies] a practical standard of review already familiar to appellate courts: review for

'unreasonable[ness].'" *Id.* at * 25. The Court finds such a standard familiar because "until 2003, §3742(e) explicitly set forth that standard." *Id; see* 18 U.S.C. §3742(e)(3) (1994 ed.).[1] Justice Breyer interpreted this statutory text to mean that "in other words, the text told appellate courts to determine whether the sentence 'is unreasonable' with regard to §3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable."[2] *Id*. at * 25.

If the reasonableness standard proposed by Justice Breyer is interpreted to mean that reasonableness is still defined in light of the relevant Guideline range, then the system would remain one of mandatory ranges–with district court judges permitted to depart from the applicable range only if they could articulate exceptional reasons to justify such a departure.[3]

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[1] In 2003, Congress amended the Guidelines to include the recently-excised *de novo* standard of review for departures. As the Court noted, the "pre-2003 text directed appellate courts to review sentences that reflected an applicable Guidelines range for correctness, but to review other sentences–those that fell 'outside the applicable Guideline range'–with a view toward determining whether such a sentence is unreasonable. . . ." *Id.* at *25. The pre-2003 text of section 3742(e)(3) instructed courts of appeals to determine if sentences were "unreasonable, having regard for. . . the factors to be considered in imposing a sentence, as set forth in chapter 227 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)." *Id.*

[2] 18 U.S.C. § 3553(a) states in part that "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. . . (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.

[3] In his dissent, Justice Scalia aptly points out the problems inherent in returning to the pre-2003 "reasonableness" standard of review. Specifically, Scalia argues that "there is no one-size-fits-all

This result would be inconsistent with the constitutional requirements of Justice Steven's opinion, and therefore, Justice Breyer's opinion cannot be read in this impermissible way.[4]

As discussed further below, the pre-2003, multi-part reasonableness standard embodied in the older version of the mandatory Guidelines has no place in an advisory system. Instead, the courts of appeals should interpret this reasonableness standard as an abuse of discretion standard consistent with the standard of review employed in the related and largely analogous context of revocation sentences. This interpretation would accomplish the necessary reconciliation of the constitutional requirements of Justice Steven's opinion with the remedial requirements of Justice Breyer's opinion.

III. Applying the "Unreasonableness" Standard in an Advisory System

As Justice Breyer noted, the pre-2003 text directed appellate courts to review sentences

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'unreasonableness' review. The power to review a sentence for reasonableness arises only when the sentencing court has departed from 'the applicable guideline range.'" *Id.* at * 48; §372(f)(2). Justice Scalia takes note of a 1993 case before the First Circuit in which then-Circuit Chief Judge Breyer noted that "the sentencing statutes . . . provide [a defendant] with only a very narrow right of appeal" because the power "to set aside a departure that is 'unreasonable' appears 'in the context of other provisions that permit defendants to appeal only upward . . . departures.'" *Booker*, 2005 WL, at *48; (citing *United States v. Soltero-Lopez*, 11 F.3d 18, 19 (1st Cir. 1993) (Breyer, C. J.)). As Scalia confirms, "[a]lthough a 'reasonableness' standard did appear in §3742(e)(3) until 2003, it never extended beyond review of deliberate departures from the Guideline range." *Booker*, 2005 WL, at * 48. Scalia also noted that "any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional." *Id.* at * 50. Scalia believes that the reasonableness standard, rooted in the pre-2003 Guidelines, "may lead some courts of appeals to conclude–may indeed be designed to lead some courts of appeals to conclude–that little has changed." *Id.* Scalia concludes his dissent by proposing the following question: "Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside the Guidelines range?" *Id.* at * 50.

[4] It is possible to read the final section of Justice Breyer's opinion to provide support for the position that the guidelines remain essentially mandatory. His description of the "prudential doctrines" that may obviate the need for re-sentencings seems to fit the idea that the guidelines are presumptively reasonable. This section, however, appears to be limited to the context of cases currently "on direct review," and there is no indication that this language is meant to apply prospectively to post-*Booker* sentencing.

within the applicable Guideline range simply to determine if the court had correctly calculated the range. Those sentences that fell outside the applicable Guideline range, in contrast, were reviewed "with a view toward determining whether such a sentence is unreasonable." *Booker*, 2005 WL, at * 25. This standard is founded on the principle that the guidelines were mandatory and thus has no place in a truly advisory system. Instead, Justice Breyer must have intended to retain only those portions of the standard which can logically apply to the now-advisory system.

Before the 2003 amendments, the Fourth Circuit applied the reasonableness standard to departures in a multi-part fashion, "derived from [its] reading of 18 U.S.C. §3742 (West 1985 & supp. 1990) in conjunction with 18 U.S.C. §3553(b)(West Supp. 1990)."[5] *United States v.*

[5] Although this section concentrates on the Fourth Circuit's interpretation of the pre-2003 reasonableness standard, the majority of circuits employed similar multi-part tests. Some circuits divided their tests into two, three, or four part tests. Common to all circuits reviewed, however, is the fact that the first half of each reasonableness test required an inquiry into whether the sentence was reasonable in light of the applicable Guideline range. The first half of each of these reasonableness tests, like the Fourth Circuit's test, assumed that the Guidelines were mandatory, referred to departures (which can no longer exist in an advisory system), and considered sentences that fell within the applicable Guideline range presumptively reasonable. The second halves of these tests, however, employ either a reasonableness or abuse of discretion standard to determine if the sentence imposed is reasonable in light of the particular facts of each defendant's case. It is the second half of these pre-2003 reasonableness tests that Justice Breyer must intend the courts of appeals to apply in the future. *See United States v. Dethlefs*, 123 F.3d 39 (1st Cir. 1997) (explaining that the First Circuit "reviews departures for abuse of discretion, employing an analysis which, like all Gaul, is divided into three parts. First, we determine as a theoretical matter whether the stated ground for departure is permissible under the guidelines. If the ground is theoretically appropriate, we next examine whether it finds adequate factual support in the record. If so, we must probe the degree of the departure in order to verify its reasonableness)(citations ommitted); *United States v. Khalil*, 214 F.3d 111 (2d Cir. 2000) (noting that the Second Circuit applies a three part test when reviewing a departure and noting that: "First, we determine whether the reasons articulated by the district court for the departure are of a kind or degree that may be appropriately relied upon to justify the departure. Second we examine whether the findings of fact supporting the district court's reasoning are clearly erroneous. Finally, we review the departure for reasonableness. In assessing reasonableness, the court should look to the amount and extent of the departure in light of the grounds for departing . . . and examine the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of a particular sentence.")(citations omitted); *United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999) ("This Court employs a three-part approach in reviewing a district court's decision to depart upward from the applicable guideline range. First, we ask whether the grounds for the departure were appropriate. Second, we must ensure that the district court's factual findings regarding the departure were not clearly erroneous. Third, we consider whether the extent of the resulting

Hummer, 916 F.2d 186, 192 (4th Cir. 1990). Under this test, the Fourth Circuit "first examine[d] *de novo* the specific reasons cited by the district court in support of its sentence outside the Guideline range to ascertain whether those reasons encompass factors 'not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.'" *Id.* If the district court had, in fact, identified a factor that "potentially warrant[ed] departure," then the Fourth Circuit would proceed to apply a clearly erroneous standard of review and would review the facts in the record that related to the identified circumstances. *Id.* Once the court determined that there was an "adequate factual basis" for the factors, the court would apply an abuse of discretion standard to ascertain whether "the cited departure factors are of sufficient importance in the case such that a sentence outside the Guideline range 'should result.'" *Id.* If the court of appeals determined that the district court judge had not abused his discretion in departing, the reviewing court would then re-apply the abuse of discretion standard to determine if the extent of departure was reasonable. *Id.*

It is critical to note that this reasonableness standard was historically applied only to departures. Under a truly advisory system, however, departures no longer exist. Accordingly, the courts of appeals should retain only the abuse of discretion portion of the multi-part review. In an advisory system where departures are extinct, courts of appeals must disregard the initial inquiry into whether the trial court has cited factors "not adequately taken into account by the

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upward departure was reasonable.") (citations ommitted); *United States v. Proffit*, 304 F.3d 1001 (10th Cir. 2002) (determining that the Tenth Circuit "considers four factors in reviewing the propriety of a district court's upward departure from the U.S. Sentencing Guidelines Manual. They are: (1) whether the factual circumstances supporting a departure are permissible departure factors; (2) whether the departure factors relied upon by the district court remove the defendant from the applicable sentencing guideline heartland thus warranting a departure; (3) whether the record sufficiently supports the factual basis underlying the departure; and (4) whether the degree of departure is reasonable.")(citations omitted).

Guidelines." *Hummer*, 196 F.2d at 192. Otherwise, the Guidelines are still mandatory. Thus, in order to reconcile the constitutional and remedial portions of the *Booker* decision, Justice Breyer's opinion must be read as retaining the second part of the pre-2003 reasonableness inquiry while discarding the first. This interpretation results in an abuse of discretion standard of review to be used when determining if sentences are "unreasonable."

Although district courts must now receive and consider the advice provided by the Guidelines, they may act without being constrained thereby. Inherent in an advisory system is the discretion to ignore the advice provided. Thus, an abuse of discretion standard is the only standard consistent with an advisory and therefore discretionary scheme. The courts of appeals are familiar with this standard in the sentencing context because it formed one part of the pre-2003 reasonableness inquiry. Furthermore, courts of appeals have applied the abuse of discretion standard for years in the related and analogous context of revocation sentences.

IV. Abuse of Discretion Standard of Review

The Guidelines provide policy statements to guide district court judges in conducting revocations of defendants' supervised release. These policy statements include a table of sentencing ranges to guide courts in assessing the appropriate sentence upon revocation. *See* U.S.S.G. § 7B1.4(a). As the Fourth Circuit noted in *United States v. Davis*, 53 F.3d 638, 640 (4th Cir. 1995),[6] the "Chapter 7 policy statements. . . are not binding on the courts. They provide

[6] In *Davis*, the defendant first argued that the district court had abused its discretion when it departed from the range of imprisonment provided by Chapter 7 of the Guidelines. *Id.* at 640. The Fourth Circuit disagreed, holding that "having considered Chapter 7's policy statements, the district court was free to exercise its informed discretion to reject the suggested sentence of twelve months and to impose a statutorily-authorized sentence of twenty-four months." *Id.* at 642-43. After the court dismissed this argument upon a finding that the trial judge had not abused his discretion, the court

helpful assistance to courts in sentencing, but are not mandatory." The court noted that district court judges are "free to exercise [their] informed discretion to reject the suggested sentence. . . ." *Id.* at 642-43. Thus, the Fourth Circuit has, for many years, applied an abuse of discretion standard to the review of revocation sentences. Interestingly, the court went on to note that "the fact that the district court did not mention the three to nine month range provided by the policy statement is not dispositive. A court need not engage in ritualistic incantation in order to establish its consideration of a legal issue. It is sufficient if, as in the case at bar, the district court rules on issues that have been fully presented for determination. Consideration is implicit in the court's ultimate ruling." *Id.*

The First Circuit summarized the standards applied by other courts of appeals in their review of revocation sentences in *United States v. Ramirez-Rivera*, 241 F.3d 37 (1st Cir. 2001). The court noted that while "[s]everal circuits have expressly employed an 'abuse of discretion' analysis where district courts have imposed revocation sentences in excess of the range recommended by Chapter 7," several "other circuits have applied a 'plainly unreasonable' standard of review." *Ramirez-Rivera*, 241 F.3d at 40 n4. (citing *United States v. McClanahan*, 136 F.3d 1146, 1149 (7th Cir. 1998) ("A defendant's revocation sentence is subject to review under the 'plainly unreasonable' standard because 'no guideline establishes a mandatory range of such a sentence.'")). Although "the courts of appeal have not characterized the scope of review in an entirely consistent fashion . . . all agree upon a deferential standard of appellate review."

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addressed the defendant's argument that "the district court nonetheless erred because it failed even to consider the policy statements before imposing sentence." *Id.* at 642. In response to this argument, the court noted that the "flaw in Davis' argument here is his assumption that the district court did not consider the relevant policy statement." *Id.* Noting that the policy statement and applicable range were cited in the probation officer's worksheet and were included in the oral and written arguments of the defendant's counsel, the Fourth Circuit found that "the relevant policy statement was obviously within the

Id. The First Circuit chose to apply the abuse of discretion standard in *Ramirez-Rivera*, but only after noting that there is very little difference between the abuse of discretion and reasonableness standards. Specifically, the court noted that "the practical import of this difference in language is not immediately evident." *Id.* Thus, as the First Circuit has noted, all of the courts of appeals apply a standard of review that is "between an abuse of discretion standard and something more deferential, such as a 'plainly unreasonable' standard." *United States v. Darby*, 2001 U.S. App. LEXIS 19032, at *6 (1st Cir., Aug. 22, 2001) (unpublished disposition).[7] In practice, the abuse of discretion and reasonableness standards function very similarly, and courts of appeals should recognize and embrace these similarities in the new context of reviewing advisory guidelines.[8]

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district court's contemplation." *Id.*

[7] Although the *Darby* court declined to resolve the question of what standard of review applies in the First Circuit, the court chose to apply "the less deferential 'abuse of discretion' standard" to the case at issue. *Id.* at *6-7. Thus, it is worth noting that on the continuum of review standards, the abuse of discretion standard is arguably "less deferential" than the "plainly unreasonable" standard.

[8] For example, in *United States v. Pelensky*, 129 F.3d 63, 69 (2nd Cir. 1997), the Second Circuit reviewed a sentence imposed for a violation of supervised release and held that such sentences will be affirmed provided that: "(1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable." *Id.* at 69. This standard closely tracks the reasoning of the Fourth Circuit in *Davis*. In *Davis*, the Fourth Circuit noted that

V. Conclusion

The courts of appeals' experience with the review of revocation sentences may serve as a valuable model as they begin to interpret and reconcile the dual majority opinions of *Booker*. As noted above, the courts of appeals should read Justice Breyer's reference to the pre-2003 reasonableness standard as a call to adopt and return to only those portions of that multi-part standard of review that can logically exist in an advisory sentencing scheme. The portion of the standard that remains after application of the Court's constitutional holding in *Booker* is necessarily congruent with the abuse of discretion standard long used in the review of revocation sentences.

Thus, courts of appeals should review post-*Booker* sentences by inquiring whether: (1) the district court judge considered the applicable policy statements, Guideline range, and section 3553(a) factors; (2) remained within the range provided for by statute; and (3) properly used their informed discretion in a reasonable manner when determining the appropriate sentence. This standard would test the reasonableness of all sentences while maintaining a truly advisory sentencing system. Additionally, this standard would harmonize the constitutional-majority and remedial-majority opinions in the *Booker* decision.

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