No. 06-5754

In the Supreme Court of the United States

VICTOR A. RITA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. 3553(a) factors and any other factors that might justify a lesser sentence?

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OPINION BELOW

The opinion of the court of appeals (J.A. 112-113) is not published in the Federal Reporter but is reprinted in 177 Fed. Appx. 357.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2006. The petition for a writ of certiorari was filed on July 28, 2006, and was granted on November 3, 2006, limited to the questions specified by the Court. 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 jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623, two counts of making false statements, in violation of 18 U.S.C. 1001, and one count of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed.

1. In 2003, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigated whether InterOrdnance of America (InterOrdnance), a licensed firearms dealer in Monroe, North Carolina, had illegally imported machine-gun parts kits. The ATF determined that federal law classified certain items sold by InterOrdnance, including a parts kit that could be used to assemble a PPSH-41 submachine gun, as machine guns that could not be possessed legally without registration. In April 2003, ATF agents began a nationwide recall of the PPSH-41 parts kits, contacting customers who had purchased the kits from InterOrdnance and asking the customers to turn the kits over to the ATF. One of the customers reported that he had discussed the recall with an InterOrdnance employee, who had advised him not to turn the kit over to the ATF. J.A. 16-19, 21-22; Sealed J.A. 119; Supp. J.A. 1-2, 11, 13; see 26 U.S.C. 5841, 5845(a)(6) and (b), 5861.

Petitioner had purchased a PPSH-41 parts kit from InterOrdnance in January 2003. At the time, petitioner was an asylum officer with the Department of Homeland Security (DHS). ATF Agent Bonnie Levin subsequently contacted petitioner and informed him of the recall. During a telephone conversation on September 4, 2003, petitioner agreed that he

would turn the kit over to the agent the following week. Sealed J.A. 119-120, 128-129; Supp. J.A. 5-8.

After speaking with Agent Levin, petitioner placed a call to InterOrdnance. Two days later, he mailed the PPSH-41 parts kit to the company. Petitioner did not attend the scheduled meeting with Agent Levin. Through his attorney, petitioner subsequently turned over to the ATF a different parts kit that he had purchased from InterOrdnance, one that was not the subject of a recall. J.A. 23-24; Sealed J.A. 120; Supp. J.A. 2-5, 8-10, 13-14.

On October 27, 2003, petitioner testified before a federal grand jury in the Western District of North Carolina that was investigating InterOrdnance's sales of the PPSH-41 parts kits. Petitioner denied having had any telephone conversation with InterOrdnance before he returned the kit to the company. Petitioner also claimed that Agent Levin had not asked him to turn over the PPSH-41 parts kit to the ATF. J.A. 19; Sealed J.A. 120-121; Supp. J.A. 11-12.

2. Based on the two false statements before the grand jury, petitioner was charged in an indictment with two counts of perjury, two counts of making false statements, and one count of obstruction of justice. A jury found him guilty of all five charges. J.A. 7-13, 94, 103; Sealed J.A. 118.

3. After the verdict but before sentencing, see J.A. 2, 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), 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 effec-

tively 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." 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 had served to reinforce the mandatory nature of the Guidelines. The Court replaced that provision with a general standard of 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.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). The purposes set forth in paragraph (2) are that the sentence imposed

> (A) "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense";
>
> (B) "afford adequate deterrence to criminal conduct";
>
> (C) "protect the public from further crimes of the defendant"; and
>
> (D) "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. 3553(a)(2). Section 3553(a) also provides that, "in determining the particular sentence to be imposed," courts "shall consider" seven factors:

> (1) "the nature and circumstances of the offense and the history and characteristics of the defendant";

> (2) "the need for the sentence imposed" to satisfy the purposes set forth in paragraph (2);
>
> (3) "the kinds of sentences available";
>
> (4) "the kinds of sentence and the sentencing range established for * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines * * * issued by the Sentencing Commission";
>
> (5) "any pertinent policy statement * * * issued by the Sentencing Commission";
>
> (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."

18 U.S.C. 3553(a) (2000 & Supp. IV 2004).

4. a. Because petitioner's crimes involved obstructing the investigation of a criminal offense and perjury in respect to a criminal offense, the Presentence Investigation Report (PSR) calculated petitioner's Sentencing Guidelines offense level using the cross-references in the guidelines for obstruction of justice and perjury, Sections 2J1.2(c) and 2J1.3(c). The cross-references required application of the guideline for accessories after the fact, Section 2X3.1(a)(1), which provides for a base offense level six levels lower than the offense level for the underlying offense. The underlying offense in this case was InterOrdnance's importation of defense articles without authorization, in violation of 22 U.S.C. 2778(b)(2). Under the guideline applicable to that offense, Section 2M5.2(a)(1), the base offense level is 26. The PSR therefore determined that

petitioner's base offense level was 20. Because there were no applicable upward or downward adjustments, petitioner's total offense level was also determined to be 20. Sealed J.A. 122-125.

In calculating petitioner's criminal history, the PSR noted that he had been convicted in 1986 of making false statements in connection with the purchase of firearms, in violation of 18 U.S.C. 922(a)(6), and had received a probationary sentence. The conduct that resulted in that conviction involved petitioner's providing false addresses on 19 ATF-4473 forms when he purchased 27 firearms of various types. At the time, petitioner was a criminal investigator with the Immigration and Naturalization Service (INS); the INS suspended him because of the conviction. The PSR determined that the 1986 conviction resulted in no criminal history points, apparently because, under Section 4A1.2(e) of the Guidelines, the conviction was too old. Since petitioner had no other prior convictions, the PSR determined that he was in criminal history category I. Sealed J.A. 125, 129.

The combination of offense level 20 and criminal history category I yielded an advisory Guidelines range of 33 to 41 months of imprisonment. Sealed J.A. 132.

Petitioner did not challenge the PSR's calculation of the Guidelines range. He did move for a downward departure, however, on three asserted grounds: (1) his prior military service (petitioner had been a member of the Marine Corps, Army, and Army Reserve, had served in the Vietnam War and Operation Desert Storm, and had received a number of medals and awards); (2) his medical condition (petitioner had several health problems, including diabetes, an enlarged prostate, a herniated disk, excess lipids in his blood, arthritis, sleep apnea, and skin rashes and infections he claimed were the result of exposure to Agent Orange); and (3) the possibility that his prior involvement in criminal cases as an employee

of the INS and DHS would make him susceptible to abuse in prison. J.A. 40-47, 49-73; Sealed J.A. 127-129.

b. At sentencing, the district court held a lengthy colloquy with petitioner's counsel about his arguments for a below-Guidelines sentence and the evidence he submitted. J.A. 51-73. The court also confirmed that petitioner sought "a departure from the guidelines or a sentence under [18 U.S.C.] 3553 that is lower than the guidelines" based on the three grounds described above. J.A. 64-65. The court suggested, however, that petitioner's military service would not entitle him to "special treatment" unless it was "extraordinary," J.A. 65; noted that "the federal prison system is equipped to handle people with diabetes and many other difficult situations," J.A. 71; and questioned the assistance petitioner had provided in criminal investigations, J.A. 57-58.

The prosecutor urged the district court to impose a sentence within the Guidelines range. J.A. 74-77. He argued that a Guidelines sentence was warranted because petitioner had obstructed an important investigation into the unlawful importation of machine guns, J.A. 74-75; because petitioner had previously been convicted of "lying on firearm permit applications," J.A. 76; because petitioner's "history as a law enforcement officer" makes him particularly undeserving of a lenient sentence, J.A. 77; and because petitioner's conviction in this case might compromise criminal cases in which petitioner had been involved when he worked for the government, J.A. 76-77.

Petitioner gave a lengthy allocution. J.A. 78-86. He stated, repeatedly, that he had not provided false testimony to the grand jury, J.A. 80, 83, 85; that he was "innocent" of the crimes of which the jury had found him guilty, J.A. 81, 83, 84; and that Agent Levin had perjured herself at his trial, J.A. 79, 85. Petitioner also claimed that the prosecutor had "purposely misled" the grand jury and trial jury, J.A. 85, and that

petitioner was the "victim" of "a modern day version of the Inquisition," J.A. 80.

c. In announcing its sentence, the district court stated that it had "reviewed the sentencing guidelines with respect to the charges here," which it found to be "serious matters." J.A. 86. The court then stated that it was "unable to find that the sentencing guideline range * * * is an inappropriate guideline range" for the charges. J.A. 87. The court also stated that, "under [18 U.S.C.] 3553, certainly the public needs to be protected if [the charges are] true, and I must accept as true the jury verdict that [petitioner] violated the laws that he is accused of violating, all five of them." *Ibid.* The court imposed a sentence of 33 months of imprisonment, the bottom of the advisory Guidelines range. J.A. 87, 103-111.

5. Petitioner appealed. The "sole issue on appeal" was "whether the sentence imposed by the district court was reasonable." J.A. 112. The court of appeals held that it was and therefore affirmed. J.A. 112-113.

The court of appeals explained that, after *Booker*, district courts are "no longer bound by the range prescribed by the sentencing guidelines" but are "still required to calculate and consider the guideline range," together with "the [other] factors set forth in 18 U.S.C. § 3553(a)." J.A. 112-113. Quoting one of its prior decisions, the court then stated that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable." J.A. 113 (quoting *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006)) (internal quotation marks omitted). The court concluded that the district court in this case had "properly calculated the guideline range," "appropriately treated the guidelines as advisory," and "sentenced [petitioner] only after considering the factors set forth in § 3553(a)." *Ibid.* On the basis of "these factors," and because the district court had "sentenced [petitioner] within the applicable guideline range

and the statutory maximum," the court of appeals found that "[the] sentence of thirty-three months' imprisonment is reasonable." *Ibid*.

SUMMARY OF ARGUMENT

I. A sentence within a properly calculated Guidelines range is entitled to a presumption of reasonableness on appeal. That conclusion is fully consistent with *United States* v. *Booker*, 543 U.S. 220 (2005). In concluding that district court consideration of advisory Guidelines, with appellate review for unreasonableness, would promote uniformity in sentencing (the principal objective of the SRA), *Booker*'s remedial holding emphasized the critical role that the Guidelines would continue to play in moving sentencing in the direction of greater uniformity. See 543 U.S. at 263-264. According a presumption of reasonableness to a sentence within the advisory Guidelines range also reflects a recognition that a within-Guidelines sentence will ordinarily represent a reasonable application of the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). That is so for several reasons. The Guidelines are written and revised by an expert agency, with an intent to integrate the Section 3553(a) factors and with input from Congress and sentencing judges across the country. Moreover, a presumption of reasonableness for Guidelines sentences is the only practicable way to avoid unwarranted sentencing disparities, which is itself an enumerated concern under Section 3553(a). In addition, the imposition of a Guidelines sentence means that two actors occupying different positions in the system—the sentencing judge and the Sentencing Commission—have jointly determined that a Guidelines sentence is appropriate in that case. Presuming that a sentence within the Guidelines range is reasonable does not make the Guidelines effectively mandatory, in violation of *Booker*'s Sixth Amendment holding. The presumption does not mean that a

sentence *outside* the Guidelines range is presumptively *un*-reasonable, let alone mandate additional factfinding by the judge to justify a non-Guidelines sentence.

II. The SRA requires a judge to state the reasons for the sentence imposed. 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). When a district court imposes a sentence within the Guidelines range, and satisfies the requirement of Section 3553(c) by providing the general reasons for the sentence imposed, the court is not required to analyze explicitly the Section 3553(a) factors or all of the possible justifications for a lesser sentence. Because the imposition of a within-Guidelines sentence reflects agreement with the Sentencing Commission's assessment of the Section 3553(a) factors as applied to the case before the court, Section 3553(c) requires "little explanation" for a within-Guidelines sentence. *E.g.*, *United States* v. *Sam*, 467 F.3d 857, 864 (5th Cir. 2006). Courts are not required to furnish "specific verbal formulations" to demonstrate that the district court considered the Section 3553(a) factors. *United States* v. *Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Nor is a court required to address every argument raised by a party for a sentence above or below the Guidelines range. Sentencing records generally confirm the presumption that the court has exercised its discretion after considering the arguments of the parties and the court's statutory duties. Rather than vacate such a sentence for a fuller explanation, a court should proceed to review its substantive reasonableness.

III. Petitioner's sentence, which was at the bottom of the advisory Guidelines range, was reasonable. Because the district court considered the factors in Section 3553(a) and provided a statement of reasons as required by Section 3553(c), the within-Guidelines sentence is entitled to a presumption of reasonableness. Petitioner cannot rebut that presumption. Petitioner relies on personal mitigating factors, but the judge

was entitled to weigh the significant aggravating factors as well. As the district court found, petitioner's crimes were "serious," J.A. 86; petitioner committed a similar crime in the past, and committed both the past and the present crimes while employed as a federal immigration official; and he expressed no remorse at sentencing. Under these circumstances, petitioner cannot show that a sentence at the bottom of the Guidelines range is outside the range of reasonableness.

ARGUMENT

I. A SENTENCE WITHIN A PROPERLY CALCULATED GUIDELINES RANGE IS ENTITLED TO A REBUTTABLE PRESUMPTION OF REASONABLENESS ON APPEAL

Since this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), seven courts of appeals have held that a sentence within a properly calculated Guidelines range is presumptively reasonable on appellate review.[1] That presumption means that a within-Guidelines sentence is accorded substantial deference by the court of appeals. See, *e.g.*, *United States* v. *Rivera*, 463 F.3d 598, 602 (7th Cir. 2006); *United States* v. *Candia*, 454 F.3d 468, 473 (5th Cir. 2006). But it does not mean that such a sentence is reasonable *per se* (*i.e.*, the presumption is not a conclusive one). See, *e.g.*, *United States* v. *Boscarino*, 437 F.3d 634, 637 (7th Cir. 2006), petition for cert. pending, No. 05-1379 (filed Apr. 27, 2006); *United*

[1] See *United States* v. *Dorcely*, 454 F.3d 366, 376 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006), petition for cert. pending, No. 06-5275 (filed July 11, 2006); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States* v. *Lincoln*, 413 F.3d 716, 717 (8th Cir.), cert. denied, 126 S. Ct. 840 (2005); *United States* v. *Kristl*, 437 F.3d 1050, 1053-1054 (10th Cir. 2006).

States v. *Richardson*, 437 F.3d 550, 554 n.2 (6th Cir. 2006). Even a within-Guidelines sentence must be vacated if the party challenging it can show that, under the facts and circumstances of the case, the sentence imposed was unreasonable in light of the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004).[2]

Application of a presumption of reasonableness accords with *Booker* and with sound principles of appellate review.

A. *Booker* Makes Clear That The Guidelines Will Continue To Play A Critical Role In Sentencing

1. *Booker* held that the Sixth Amendment is violated when a defendant's sentence is increased based on judicial factfinding under mandatory Guidelines. 543 U.S. at 226-244. As a remedy for that violation, the Court excised 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which made the Guidelines mandatory, and 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), an appellate-review provision that reinforced the Guidelines' mandatory nature. 543 U.S. at 244-268. As a consequence of *Booker*'s remedial holding, the Guidelines are now advisory and federal sentences are reviewable for unreasonableness. *Booker*'s remedial holding rested on the conclusion that "Congress would likely have preferred the excision of * * * the

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[2] Although four circuits have declined to adopt a presumption of reasonableness for within-Guidelines sentences, those courts agree that a sentence within a properly calculated advisory Guidelines range will seldom be unreasonable. See *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (Guidelines "continue * * * to be an important consideration * * * on appeal"), cert. denied, No. 06-5727 (Jan. 8, 2007); *United States* v. *Fernandez*, 443 F.3d 19, 27 (2d Cir.) (Guidelines sentence will be reasonable "in the overwhelming majority of cases"), cert. denied, 127 S. Ct. 192 (2006); *United States* v. *Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) ("a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range"); *United States* v. *Talley*, 431 F.3d 784, 788 (11th Cir. 2005) (Guidelines sentence is "ordinarily" reasonable).

[SRA's] mandatory language[]" to any other remedy, *id.* at 249, largely because that excision is most consistent with "Congress' basic goal in passing the [SRA]," which was "to move the sentencing system in the direction of increased uniformity," *id*. at 253; accord *id.* at 250, 252, 255-256.

In concluding that an advisory Guidelines regime with appellate review for unreasonableness was most likely to foster uniformity in sentencing, the Court emphasized that the Guidelines, although advisory, would continue to play an important role. For example, responding to the argument that the reasonableness standard would lead to "excessive sentencing disparities," *Booker*, 543 U.S. at 263 (quoting *id*. at 311 (Scalia, J., dissenting in part)), the Court observed that the Sentencing Commission would "continue to collect and study appellate court decisionmaking," would "continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices," and would "thereby promote uniformity in the sentencing process." *Ibid*. Then, in explaining why "the [SRA] without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent," *id*. at 264, the Court said the following:

> [T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to 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 (citations omitted).

A presumption that a sentence within the advisory Guidelines range is reasonable is obviously consistent with *Booker*'s emphasis on the Guidelines' continuing importance. Indeed, given the Court's recognition of the Guidelines' critical role in avoiding unwarranted sentencing disparities and its statement that appellate review would "tend to iron out sentencing differences," 543 U.S. at 263, it is entirely in keeping with *Booker* to presume that a sentence within the advisory Guidelines range is reasonable on appellate review.

2. The Court stated in *Booker* that the reasonableness standard of review applies "across the board." 543 U.S. at 263. Petitioner and a number of his amici contend that it violates that principle, and therefore conflicts with *Booker*, to apply a presumption of reasonableness to sentences within the Guidelines range but not to sentences outside it. Pet. Br. 6-7, 24-25; Families Against Mandatory Minimums (FAMM) Br. 23-24; Fed. Publ. & Cmty. Defenders (FPCD) Br. 15. That is not correct. When the Court said that the standard applies "across the board," *Booker*, 543 U.S. at 263, it meant only that *all* sentences are to be reviewed for reasonableness —not merely, as was the case when the Guidelines were mandatory, sentences resulting from Guidelines "departures" and sentences in cases "where there was no applicable Guideline," *id.* at 262 (citing 18 U.S.C. 3742(e)(3) and 18 U.S.C. 3742(a)(4), (b)(4), and (e)(4)). That remains true whether or not appellate courts apply a presumption of reasonableness to within-Guidelines sentences. For all sentences, the standard of review is the same: whether the sentence is reasonable in light of the factors in Section 3553(a). See *Booker*, 543 U.S. at 260-265. The presumption merely recognizes that, when the Sentencing Commission and the individual district court reach

essentially the same conclusion, the resulting within-Guidelines sentence ordinarily satisfies that standard.

The Court also stated in *Booker* that it was "fair * * * to assume judicial familiarity with a 'reasonableness' standard," because the SRA had long required the application of such a standard in reviewing departures and sentences with no guideline. 543 U.S. at 262-263. In support of that proposition, the Court cited (*id*. at 262) six court of appeals decisions that had applied a "reasonableness" standard in reviewing sentences imposed for a violation of probation or supervised release—sentences for which the Guidelines recommended non-binding sentencing ranges in a policy statement, see Sentencing Guidelines § 7B1.4. Petitioner suggests that a presumption of reasonableness is inconsistent with *Booker* because the decisions cited by the Court "d[id] not afford * * * a presumption of reasonableness to sentences imposed within the recommended [Guidelines] range." Pet. Br. 26. But those decisions had no occasion to consider whether a within-Guidelines sentence should be presumed reasonable, because all the sentences imposed in those cases were *outside* the Guidelines range.[3] *Booker*'s citation of those cases therefore lends no

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[3] See *United States* v. *White Face*, 383 F.3d 733 (8th Cir. 2004) (for one defendant, Guidelines range was 3 to 9 months and sentence was 12 months; for two defendants, Guidelines range was 3 to 9 months and sentence was 24 months; for one defendant, Guidelines range was 5 to 11 months and sentence was 48 months; for one defendant, Guidelines range was 8 to 14 months and sentence was 18 months); *United States* v. *Tsosie*, 376 F.3d 1210 (10th Cir. 2004) (Guidelines range was 3 to 9 months and sentence was 18 months), cert. denied, 543 U.S. 1155 (2005); *United States* v. *Salinas*, 365 F.3d 582 (7th Cir. 2004) (Guidelines range was 3 to 9 months and sentence was 24 months); *United States* v. *Cook*, 291 F.3d 1297 (11th Cir. 2002) (per curiam) (Guidelines range was 5 to 11 months and sentence was 24 months); *United States* v. *Olabanji*, 268 F.3d 636 (9th Cir. 2001) (Guidelines range was 3 to 9 months and

support to the notion that the Court implicitly rejected a presumption of reasonableness for within-Guidelines sentences.

B. A Presumption Of Reasonableness For Guidelines Sentences Recognizes That A Sentence Within The Guidelines Range Will Ordinarily Reflect A Reasonable Application Of The Factors In 18 U.S.C. 3553(a)

According a presumption of reasonableness to within-Guidelines sentences is also consistent with *Booker* because it reflects a recognition that a sentence within the Guidelines range will, in all but the most unusual cases, be within the range of sentences that a district court, in the exercise of its discretion, could reasonably determine best satisfies the considerations in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). As explained below, that is true for four related reasons: the Guidelines integrate the factors in Section 3553(a); they reflect the Sentencing Commission's extensive consideration of past practice and sound policy, including Congress's directions regarding appropriate sentences for certain crimes; they are a critical tool for achieving Congress's goal of sentencing uniformity; and, finally, a Guidelines sentence reflects a joint determination by the sentencing judge and the Sentencing Commission that a sentence within the Guidelines range complies with the factors in Section 3553(a).

1. The Guidelines integrate the congressional sentencing objectives in 18 U.S.C. 3553(a)

Booker holds that "reasonableness" review requires appellate courts to determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261. It is appropriate to accord a presumption of reasonableness

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sentence was 12 months and one day); *United States* v. *Ramirez-Rivera*, 241 F.3d 37 (1st Cir. 2001) (Guidelines range was 3 to 9 months and sentence was 24 months).

to a sentence within the advisory Guidelines range because, rather than being "something separate and apart from Congress's objectives in § 3553(a)," the Guidelines "embody many of those objectives." *United States* v. *Johnson*, 445 F.3d 339, 343 (4th Cir. 2006) (Wilkinson, J.). Indeed, the Guidelines "are the only *integration* of the *multiple* factors" in Section 3553(a). *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (Boudin, C.J.), cert. denied, No. 06-5727 (Jan. 8, 2007).

a. In the SRA, Congress provided detailed guidance to the Sentencing Commission about how to formulate the Guidelines. See *Mistretta* v. *United States*, 488 U.S. 361, 374-377 (1989). Congress's charge to the Commission is "a virtual mirror image" of the factors sentencing courts are directed to consider in Section 3553(a). *United States* v. *Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005).

Congress specifically directed the Commission to formulate Guidelines that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. 991(b)(1)(A); see 28 U.S.C. 994(f) and (m). Congress also required that, in formulating the Guidelines, the Commission consider the appropriate role and weight, in light of Congress's policy choices, of various factors relating to the nature and circumstances of the offense and the history and characteristics of the defendant. See *Mistretta*, 488 U.S. at 375-376; compare 28 U.S.C. 994(c)-(d) (directing Commission to consider "the circumstances under which the offense was committed" and to determine whether various characteristics of the offender "have any relevance to * * * an appropriate sentence") with 18 U.S.C. 3553(a)(1) (requiring sentencing courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"). And Congress's command in 28 U.S.C. 991(b)(1)(B) that the Commission establish sentencing practices and policies that "avoid[]

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" is virtually identical to the requirement of 18 U.S.C. 3553(a)(6) that sentencing courts consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Congress has also played a direct role in formulating the Guidelines. Guidelines issued by the Commission must be submitted to Congress and do not take effect for a period of 180 days, during which time Congress may "modif[y] or disapprove[]" the proposed guidelines. 28 U.S.C. 994(p). Even after Guidelines have taken effect, Congress can "revoke or amend" them "at any time." *Mistretta*, 488 U.S. at 393-394. Congress has in fact exercised that authority, and rejected proposed guidelines. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334 (28 U.S.C. 994 note). Congress has also directed the Commission to review and, if appropriate, amend Guidelines, see 28 U.S.C. 994 note (Provisions for Review, Promulgation, or Amendment of Federal Sentencing Guidelines), and has enacted Guidelines amendments itself, see PROTECT Act, Pub. L. No. 108-21, § 401(b), (g) and (i), 117 Stat. 668, 671 and 672.

Congress's role in actively influencing the Guidelines strongly suggests that they are consistent with the sentencing factors that Congress included in Section 3553(a). "It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, * * * the resulting Guidelines did not well serve the underlying congressional purposes [behind sentencing]." *United States* v. *Cage*, 451 F.3d 585, 593 (10th Cir.

2006) (quoting *United States* v. *Wilson*, 350 F. Supp. 2d 910, 915 (D. Utah 2005)).

b. Petitioner and several of his amici claim that, regardless of whether the Commission was *directed* to incorporate the Section 3553(a) factors in formulating the Guidelines, it did not in fact do so. That claim lacks merit.

To begin with, the Commission has not "disavow[ed] any adherence to the enumerated purposes of punishment" or "acknowledg[ed] that [it] was unable to reconcile [the] purposes of sentencing or apply them directly in crafting the Guidelines," as petitioner contends. Br. 13; accord Nat'l Ass'n of Criminal Def. Lawyers (NACDL) Br. 14-15; N.Y. Council of Def. Lawyers Br. (NYCDL) Br. 16. Consistent with Congress's directive, the Commission sought to "balance all the objectives of sentencing" described in 18 U.S.C. 3553(a)(2) in formulating the Guidelines. United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16 (1987) (*Supplementary Report on the Guidelines*). The Commission began by analyzing current sentencing practices. *Id.* at 16-17; see 28 U.S.C. 994(m) (requiring Commission, "as a starting point," to "ascertain the average sentences imposed" in "particular categories of cases"). It recognized that its empirical approach would "help[] [to] resolve its philosophical dilemma" concerning the purposes of sentencing by "looking to those distinctions judges and legislators have in fact made over the course of time." *Supplementary Report on the Guidelines* 17. Those "established distinctions," the Commission explained, were ones that the community had concluded were important in achieving the purposes of criminal punishment. *Ibid.* The Commission's "pragmatic approach," therefore, did not "imply that philosophical issues were ignored." *Ibid.* Rather, the Commission attempted to formulate Guidelines that were

"consistent with the differing philosophies" of sentencing represented in Section 3553(a). *Ibid.*[4]

Petitioner and his amici are also mistaken in their contention that the Commission could not have taken the Section 3553(a) factors into account in formulating the Guidelines because, whereas Section 3553(a)(1) requires sentencing courts to consider "the history and characteristics of the defendant," the Guidelines, see, *e.g.*, Sentencing Guidelines §§ 5H1.1 to 5H1.6, 5H1.11 to 5H1.12, prohibit or discourage departures based on certain characteristics of the defendant. Pet. Br. 13-14, 27; FAMM Br. 20; NACDL Br. 15-16; Nat'l Veterans Legal Servs. Program (NVLSP) Br. 4-13; NYCDL Br. 17-18. Consideration of the history and characteristics of the defendant entails a determination of what, if any, weight should be given to a particular circumstance; it does not require that positive weight be given to every circumstance. The Guidelines reflect the Commission's considered judgment that the purposes of sentencing in Section 3553(a)(2) are best achieved by giving little or no weight to offender characteristics such as education and vocational skills, employment record, family ties and responsibilities, and community ties. See Sentencing Guidelines §§ 5H1.2, 5H1.5, 5H1.6. Congress itself was of the view that it is "general[ly] inappropriate[]" to consider those characteristics, 28 U.S.C. 994(e), because of

[4] A good example of the Commission's accommodation of the variety of purposes of sentencing is its adoption of the criminal history axis for the Sentencing Table. The Commission recognized that the SRA "sets forth four purposes of sentencing," and designed its criminal history categories to reflect all of them. Sentencing Guidelines Ch. 4, Pt. A, intro. comment. Thus, rather than focus on a defendant's potential for recidivism alone, "[t]he Sentencing Commission currently uses the criminal history measure as a tool to measure offender culpability, to deter criminal conduct, and to protect the public from further crimes of the defendant." United States Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 1 (2004).

the possible "inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties," S. Rep. No. 98-225, at 175 (1983). And Congress directed the Commission to ensure that the Guidelines reflect that legislative judgment. 28 U.S.C. 994(e).

Petitioner's amici also err in contending that amendments to the Guidelines "ha[ve] not been accompanied by empirical data that tie the [amendments] to the purposes of sentencing." NACDL Br. 23; accord Miller Br. 16-18. As the Sentencing Commission explains in its *amicus* brief, the use of sentencing data is reflected in the explanations accompanying many of the amendments to the Guidelines. United States Sentencing Comm'n (USSC) Br. 11 n.8 (citing examples).

Finally, in light of Congress's role in superintending the Guidelines, see p. 18, *supra*, it seems difficult to maintain that the Commission has systematically disregarded Congress's direction to consider the Section 3553(a) factors. To the contrary, experience suggests that Congress knows how to intervene when it finds a proposed guideline wanting and that Congress does not intervene frequently. Together those factors belie the suggestion that the Guidelines generally ignore Congress's mandate.

c. Treating a within-Guidelines sentence as presumptively reasonable because the Guidelines incorporate the Section 3553(a) factors does not mean, as petitioner suggests, that the Guidelines are a "substitute" for the other Section 3553(a) factors. Br. 10. As *Booker* makes clear, see 543 U.S. at 259-261, sentencing courts are required to consider *all* the factors in Section 3553(a), including, in light of the Guidelines' now-advisory status, many factors "that were specifically prohibited by the guidelines," *United States* v. *Long*, 425 F.3d 482, 488 (7th Cir. 2005). Likewise, on appellate review, if the appellant can demonstrate that the Section 3553(a) factors as

applied to the facts of the case are such that a within-Guidelines sentence is unreasonable, the sentence will be vacated.

Petitioner is also mistaken in contending that, because the Guidelines themselves are one of the factors that must be considered, 18 U.S.C. 3553(a)(4)-(5) (2000 & Supp. IV 2004), it would render the other considerations in Section 3553(a) "superfluous" to say that the Guidelines incorporate them. Pet. Br. 10; accord FAMM Br. 18-19. There is neither inherent circularity nor incompleteness in the fact that Section 3553(a) refers to the Guidelines. That fact only underscores the reasonableness of using the Guidelines as a reference point. The Guidelines are generalities that reflect the relevant Section 3553(a) factors and are designed to address typical defendants. The sentencing judge must consider the particular defendant's circumstances in light of the statutory factors. But it remains true that the Guidelines account for the most important sentencing factors that judges have historically considered, strive to implement the multiple purposes of sentencing, and incorporate years of fine-tuning based on significant research. As a consequence, the Guidelines ranges ordinarily provide a reliable index of the application of the Section 3553(a) factors.

2. The Guidelines reflect the considered judgment of an expert agency, Congress, and sentencing judges across the country

The Guidelines do not merely incorporate the factors in Section 3553(a); they are "the expert attempt of an experienced body to weigh those factors in a variety of situations." *United States* v. *Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006). As explained in detail in the Commission's brief (at 6-13), the Commission's evaluation of the Section 3553(a) factors is based on nearly two decades of "close attention to federal sentencing policy," *Johnson*, 445 F.3d at 342, and "careful

consideration of the proper sentence for federal offenses," *United States* v. *Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005), taking into account "the aggregate sentencing experiences of individual judges" across the country and "the input of Congress" on what sentences and factors promote the SRA's objectives, *United States* v. *Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring), petition for cert. pending, No. 06-6155 (filed Aug. 24, 2006). In formulating the Guidelines, the Commission "analyzed and considered detailed data drawn from more than 10,000 presentence investigations," as well as "less detailed data on nearly 100,000 federal convictions during a two-year period." *Supplementary Report on the Guidelines* 16. As this Court noted in *Booker*, moreover, the Commission has continued to "collect[] information about actual district court sentencing decisions," to "collect and study appellate court decisionmaking," to "undertak[e] research," and to "revis[e]" and "modify" the Guidelines "in light of what it learns." 543 U.S. at 263-264. Indeed, "Congress necessarily contemplated that the Commission would periodically review the work of the courts" and make "revisions to the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). "It would be an oddity, to say the least, if a sentence imposed pursuant to this congressionally sanctioned and periodically superintended process w[ere] not presumptively reasonable," *Johnson*, 445 F.3d at 342—*i.e.*, if it were not a "generally * * * accurate application of the factors listed in § 3553(a)," *Terrell*, 445 F.3d at 1265.

Petitioner contends that the Guidelines "have developed largely in response to political concerns," not empirical ones, and that Guidelines ranges have therefore moved in only one direction: upward. Pet. Br. 41. It is not obvious that this observation—were it accurate—would demonstrate a deviation from the Section 3553(a) factors or Congress's underlying intent. In any event, petitioner's contention ignores the fact

that a number of Guidelines amendments, including several with broad application, have had the effect of lowering Guidelines ranges. See Sentencing Guidelines § 1B1.10(c) (listing 24 amendments resulting in lower Guidelines ranges that may apply retroactively to defendants already serving sentences). The drug-trafficking guideline, for example, has been amended by the Commission to reduce the upper limit of the Drug Quantity Table from offense level 42 to offense level 38, *id.* App. C, amend. 505 (Nov. 1, 1994); see *id.* § 2D1.1(c)(1); to authorize a two-level reduction in the offense level for defendants who satisfy the "safety valve" criteria, *id.* App. C, amend. 515 (Nov. 1, 1995); see *id.* § 2D1.1(b)(9); and to reduce the base offense level for defendants who receive a mitigating-role adjustment, *id.* App. C, amend. 640 (Nov. 1, 2002); see *id.* § 2D1.1(a)(3). Any suggestion that it would be inappropriate to presume that Guidelines sentences are reasonable because the Guidelines are too harsh is also undermined by the fact that, in all of the cases cited in *Booker* as exemplifying the type of reasonableness review the Court had in mind, 543 U.S. at 262, the courts of appeals approved the decision to impose a sentence *above* the advisory Guidelines range, *ibid.*; see note 3, *supra*.

3. A presumption of reasonableness helps to prevent unwarranted sentencing disparities

a. Before the passage of the SRA, Congress had "delegated almost unfettered discretion to the sentencing judge" to sentence a defendant to any term of imprisonment that fell within a "customarily wide" statutory range. *Mistretta*, 488 U.S. at 364. Under that system,"[s]erious disparities in sentences * * * were common," *id.* at 365, including disparities correlated with constitutionally suspect characteristics like race and sex. See, *e.g.*, Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*,

80 J. Crim. L. & Criminology 883, 883-887 & n.3, 895-897 & nn.73-74, 77 & 82 (1990). Congressional concern about the "shameful disparity in criminal sentences" was a principal reason for the enactment of the SRA. S. Rep. No. 98-225, at 65. In *Booker*, this Court noted repeatedly that Congress's main objective in enacting the SRA was to diminish sentencing disparities,[5] and dissenting Justices made the same observation, see 543 U.S. at 292 (Stevens, J., dissenting in part) ("The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim."). Indeed, that concern is reflected in the text of Section 3553(a) itself. See 18 U.S.C. 3553(a)(6). A presumption that a sentence within the advisory Guidelines range is reasonable on appeal fosters uniformity, thereby "mov[ing] sentencing in Congress' preferred direction," *Booker*, 543 U.S. at 264, without restricting district courts' discretion to impose sentences outside the Guidelines range.

The Guidelines are the only numerical benchmarks in selecting an appropriate sentence; the remaining Section 3553(a) factors have no quantitative values and permit a district court to consider a wide array of facts. "[C]onstruct[ing] a reasonable sentence starting from scratch in every case" would therefore "defeat any chance at rough equality," which "remains a congressional objective." *Jiménez-Beltre*, 440

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[5] See, *e.g.*, 543 U.S. at 250 ("Congress' basic statutory goal" was "a system that diminishes sentencing disparity."); *id.* at 252 ("[T]he sentencing statute's basic aim" was "ensuring similar sentences for those who have committed similar crimes in similar ways."); *id.* at 253 ("Congress' basic goal in passing the [SRA] was to move the sentencing system in the direction of increased uniformity."); *id.* at 255 ("Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing."); *id.* at 256 ("Congress' basic statutory goal" was "uniformity in sentencing."); *id.* at 267 ("Congress' basic objective" was "promoting uniformity in sentencing.").

F.3d at 519. The only practicable way for sentencing courts to fulfill Congress's goal of increasing sentencing uniformity is to anchor their analysis to the Guidelines, which are "an indispensable tool in helping courts achieve [that] mandate." *United States* v. *Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006); see *Booker*, 543 U.S. at 263 (Sentencing Commission "promote[s] uniformity in the sentencing process"). And when a district court exercises its discretion to impose a sentence within the advisory Guidelines range, an appellate presumption that the sentence is reasonable appropriately recognizes that sentences within the Guidelines range are more likely to further Congress's goal of avoiding unwarranted disparities than are sentences outside the range.

b. Petitioner acknowledges that "Congress sought to reduce sentencing disparity overall with passage of the [SRA]" (Br. 36 n.23) but contends that the goal of uniformity should be subordinated to other sentencing objectives. That contention lacks merit.

Petitioner argues that Congress placed primary emphasis on the purposes of sentencing in 18 U.S.C. 3553(a)(2), which "d[o] not include uniformity as a purpose worthy of consideration by the sentencing judge." Br. 15. But Congress intended its specification of the purposes of sentencing to help reduce the disparities that existed under the previous system, which had left "each judge * * * to apply his own notions of the purposes of sentencing." S. Rep. No. 98-225, at 38. Indeed, considerations of undue disparity are inherent in at least some of the sentencing purposes specified in Section 3553(a)(2), because a system that permits significant disparity in sentences imposed on similarly situated offenders fails to "promote respect for the law" or "provide just punishment." 18 U.S.C. 3553(a)(2)(A); see S. Rep. No. 98-225, at 75-76. And 18 U.S.C. 3553(a)(6) explicitly requires that, in deciding what sentence best meets "the purposes * * * in paragraph (2),"

courts consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Avoiding unwarranted disparities is thus complementary, not subordinate, to the purposes of sentencing in Section 3553(a)(2).

Petitioner also argues (Br. 12-18) that federal sentencing must be guided above all by the so-called "parsimony" provision of Section 3553(a), which directs courts to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes in Section 3553(a)(2). As Chief Judge Boudin has explained, however, that provision is not "an admonition to be lenient." *United States* v. *Navedo-Concepción*, 450 F.3d 54, 58 (1st Cir. 2006). It merely requires courts to impose a sentence that is consistent with the broad purposes in Section 3553(a)(2), most of which "hardly connote less punishment." *Ibid.*

The history of the provision confirms that point. The "sufficient, but not greater than necessary" language was a last-minute amendment to the Senate bill (S. 1762, 97th Cong., 2d Sess. (1984)), which had been made part of a continuing appropriations resolution in the House of Representatives (H.J. Res. 648, 97th Cong., 2d Sess. (1984)). See 130 Cong. Rec. 29,870 (1984). Nothing suggests that the amendment was intended to alter the bill in any fundamental way. On the contrary, as Senator Hatch, a sponsor of the bill, observed, "[t]he language * * * is simply of a clarifying nature. It does not change in any way the policy already contained in the Senate-passed bill." *Id.* at 29,685. Instead, he explained, the language merely reinforces the requirement that sentences "be designed so that they fully meet the various purposes of sentencing. Those purposes cannot be met by sentences that are plainly 'excessive' or by sentences that are plainly insufficient." *Ibid.* Consistent with the legislative history, courts of appeals since *Booker* have uniformly inter-

preted the parsimony provision merely as a directive that the sentence imposed be consistent with the general purposes of sentencing.[6]

c. Petitioner also contends that placing substantial weight on the Guidelines is not an appropriate means for sentencing courts to avoid unwarranted disparities. That contention is likewise without merit.

i. Petitioner argues that, before adding the language that became 18 U.S.C. 3553(b)(1) (Supp. IV 2004) (and made the Guidelines mandatory), Congress expected that the Guidelines range would be "merely one of several considerations relevant to sentencing." Br. 16. He suggests that *Booker*'s excision of that language therefore eliminated any basis for giving the Guidelines greater weight than any other factor in Section 3553(a). Br. 16-18. Contrary to petitioner's claim, and putting to one side the inherent difficulties in ascertaining the evolution of Congress's intent, the SRA's history, purpose, and structure demonstrate that Congress intended that substantial weight be given to the Guidelines even before it added the language that became Section 3553(b)(1).

That language first appeared in a floor amendment to S. 1437, 95th Cong., 1st Sess. (1977) (entitled "Criminal Code Reform Act of 1977"), a precursor to the SRA. See 124 Cong. Rec. 382-383 (1978). The amendment, which was not controversial, received very limited debate, and was passed by voice vote. See *ibid.* It was clearly not intended as a radical change in the role or weight of the Guidelines. It was intended

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[6] See *United States* v. *Smith*, No. 06-4358, 2006 WL 3823174, at *2 (4th Cir. Dec. 29, 2006) (parsimony provision does not require conclusion that sentence at bottom of Guidelines range is sufficient to satisfy purposes of Section 3553(a)); *United States* v. *Dragon*, 471 F.3d 501, 506 (3d Cir. 2006) (parsimony provision does not require district court to state that sentence imposed is minimum sentence necessary to satisfy purposes of Section 3553(a)); *Navedo-Concepción*, 450 F.3d at 57-58 (same).

merely to make more explicit the existing understanding of the bill, as both Senator Hart, the sponsor of the amendment, and Senator Kennedy, the principal sponsor of the bill, made clear. See, *e.g.*, *id.* at 383 (statement of Sen. Hart) ("all this amendment does is state the obvious effect of what the entire purpose of the bill is"); *ibid.* (statement of Sen. Kennedy) ("it makes clearer what was the basic understanding of the members of the committee that support the legislation").

That Congress always intended the Guidelines to be given substantial weight in sentencing is confirmed by the Committee Report on S. 1437. Explaining the version of the bill that existed *before* the addition of what became Section 3553(b)(1), the Report said the following:

> [The bill] requires that, if the sentence is outside the range set out in the sentencing guidelines, the court state the specific reason that the sentence imposed is outside the range. [This] requirement would essentially be a statement of why the court felt that the guidelines did not adequately take into account all the pertinent circumstances of the case at hand. If the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range. The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it would have promulgated a different range.

S. Rep. No. 95-605, at 892-893 (1977). The Report also expressed the Committee's "expect[ation]" that "most sentences will fall within the ranges recommended in the sentencing guidelines." *Id.* at 1056.

That Congress intended the Guidelines to be given substantial weight even before the addition of what became Section 3553(b)(1) is confirmed by two additional facts. First, one of the primary purposes of the legislation was to create a Sentencing Commission and Sentencing Guidelines. It is unlikely that Congress would have invested resources in establishing the Commission and the Guidelines if the Guidelines were to have no greater weight than the other factors in what became Section 3553(a). Second, one of the key structural aspects of the legislation was the establishment of limited judicial review of sentences and a related requirement that district courts explain the basis for sentencing defendants outside the Guidelines range. Those provisions were present in early bills, before the addition of what became Section 3553(b)(1), and operated to reinforce the role and weight of the Guidelines under what became Section 3553(a)(4) and (5). See, *e.g.*, S. Rep. No. 95-605, at 883 ("The [bill] encourages adherence to the guidelines by requiring that all sentences outside the guidelines be accompanied by a statement of reasons justifying the deviation and by requiring that all such sentences be subject to appellate review.").

ii. Petitioner and a number of his amici also claim that the Guidelines as written have not succeeded in fostering uniformity in sentencing. They argue that defendants who should be treated similarly are often treated differently, principally because of regional differences in the application of the Guidelines, differences in charging and plea-bargaining practices, differences in the Guidelines' treatment of crack cocaine and powder cocaine, and differences between the Guidelines' treatment of defendants who are classified as "career offenders" and defendants who are not. Pet. Br. 35-37; Law Professors Who Study Sentencing Reform (LPWSSR) Br. 15-16; NACDL Br. 18-21; NYCDL Br. 19-22. As explained at greater length in the Sentencing Commission's brief (at 26-

30), petitioner's general claim is refuted by "[r]igorous statistical study both inside and outside the Commission," which "confirm[s] that the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted sentencing disparity arising from differences among judges." United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 140 (2004) (*Fifteen Years of Guidelines Sentencing*). As explained below, petitioner's more specific arguments are likewise without merit.

Studies have shown that "legally relevant differences among cases explain the vast majority of variation among * * * regions in sentence length." *Fifteen Years of Guidelines Sentencing* 101. And although it is true that disparities in sentencing may result from differences in charging and plea-bargaining practices, the Guidelines, as *Booker* recognized, "try to move the system in the right direction, *i.e.*, toward greater sentencing uniformity," 543 U.S. at 256, by requiring that sentences be based on "relevant conduct," not merely charged conduct, and by helping sentencing judges decide whether to reject a plea agreement that does not reflect all relevant conduct, Sentencing Guidelines § 1B1.3; *id.* Ch. 6, Pt. B. The Department of Justice has also taken steps to address disparities that may arise from charging and plea-bargaining decisions. See Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors (Sept. 22, 2003) <http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm> (Department policy concerning charging criminal offenses, disposition of charges, and sentencing).

As for the drug-trafficking guideline's crack-powder ratio and the career-offender provision, Sentencing Guidelines §§ 2D1.1(c) and 4B1.1, each reflects a congressional judgment

about appropriate sentencing policy. The former reflects a "policy decision that crack offenders should be punished more severely" and a "choice as to how much more severe the punishment should be," *United States* v. *Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006), petition for cert. pending, No. 06-7352 (filed Oct. 19, 2006); see 21 U.S.C. 841(b) (2000 & Supp. III 2003); the latter reflects a "policy [decision] that repeat drug offenders receive sentences 'at or near' the * * * statutory maximum[]," *Williams*, 456 F.3d at 1370; see 28 U.S.C. 994 (2000 & Supp. III 2003). Sentencing disparities that arise from congressional policy judgments are not "unwarranted."

Finally, even if the Guidelines have not fully achieved the sentencing uniformity that Congress intended, according judges unfettered discretion in sentencing could hardly be thought a means of reducing unwarranted disparities. On the contrary, studies have shown that, under the mandatory Guidelines system, "[w]hen disparity [wa]s found, it [wa]s more prevalent in cases receiving a departure than in cases sentenced within the guideline range." *Fifteen Years of Guidelines Sentencing* 118.

4. A Guidelines sentence reflects a joint determination by the sentencing judge and the Sentencing Commission that the sentence complies with the factors in 18 U.S.C. 3553(a)

As *Booker* emphasized, although the Guidelines are now advisory, district courts are still required to "consult th[e] Guidelines and take them into account when sentencing." 543 U.S. at 264; see 18 U.S.C. 3553(a)(4) and (5) (Supp. IV 2004). To "consult" the Guidelines, a district court must first correctly determine the advisory Guidelines range. See, *e.g.*, *United States* v. *Mix,* 457 F.3d 906, 911 (9th Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 686 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006);

United States v. *Dixon*, 449 F.3d 194, 204 (1st Cir. 2006). The court must then consider the other sentencing factors in Section 3553(a) and determine, based on the facts and circumstances of the case, the appropriate sentence for the defendant. See *Booker*, 543 U.S. at 245-246.

When a district court decides to impose a sentence within the Guidelines range, the court has determined that such a sentence complies with the factors in Section 3553(a). The sentencing judge's individualized agreement with the determination of the Sentencing Commission is significant. It means that two actors, occupying different positions in the sentencing system and approaching the question at different levels of generality, have jointly determined that a Guidelines sentence is appropriate—both in general, as applied to the "applicable category of offense committed by the applicable category of defendant," 18 U.S.C. 3553(a)(4)(A) (Supp. IV 2004), and in particular, as applied to the individual defendant in that case. The presumption of reasonableness "respects the alignment of the[se] views." *Buchanan*, 449 F.3d at 736 (Sutton, J., concurring).

Petitioner contends that this rationale "begs the question of whether the * * * within-Guidelines sentence was reasonable in light of the other factors * * * in § 3553(a)" and "produces only one result—affirmance." Pet. Br. 28. But the fact that the sentencing judge and the Sentencing Commission have each determined that the Section 3553(a) factors warrant a sentence within the Guidelines range does not mean that the sentence imposed is *per se* reasonable and must be affirmed. It means only that the sentence should be *presumed* to be reasonable on appeal; the sentence will still be subject to vacatur if the party challenging it can demonstrate that it is substantively unreasonable in light of the Section 3553(a) factors as applied to the particular record.

C. According A Presumption Of Reasonableness To Within-Guidelines Sentences Does Not Make The Guidelines Effectively Mandatory

1. *Booker*'s holding that the Sentencing Guidelines violate the Sixth Amendment "rest[ed] on the premise" that the Guidelines were "mandatory and impose[d] binding requirements on all sentencing judges." 543 U.S. at 233; accord *id.* at 259. Applying a presumption of reasonableness to within-Guidelines sentences does not reinstitute a mandatory Guidelines regime, in contravention of *Booker*'s Sixth Amendment holding. If a sentence within the Guidelines range is treated as presumptively reasonable, "it does not follow that a sentence outside the guidelines range [will be] unreasonable." *United States* v. *Myers*, 439 F.3d 415, 417 (8th Cir. 2006). It does not even follow that such a sentence will be *presumed* unreasonable. On the contrary, "there is no presumption of unreasonableness that attaches to a sentence that varies from the [Guidelines] range." *United States* v. *Jordan*, 435 F.3d 693, 698 (7th Cir.) (emphasis omitted), cert. denied, 126 S. Ct. 2050 (2006); accord, *e.g.*, *United States* v. *Valtierra-Rojas*, 468 F.3d 1235, 1238-1239 (10th Cir. 2006); *United States* v. *Foreman*, 436 F.3d 638, 644 (6th Cir. 2006). Even if *that* presumption could be thought to "transform an 'effectively advisory' system * * * into an effectively mandatory one," *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.) (quoting *Booker*, 543 U.S. at 245), cert. denied, 126 S. Ct. 2054 (2006), a presumption that a within-Guidelines sentence is reasonable is fundamentally different, and has no such effect.

2. One of petitioner's amici essentially acknowledges that a presumption of reasonableness for within-Guidelines sentences does not make the Guidelines mandatory. See NACDL Br. 7 n.3 ("It may well be that in theory a 'presumption of reasonableness' for Guidelines sentences * * * does not raise

* * * Sixth Amendment concerns if it does not * * * equate with a 'presumption of *unreasonableness*' for *non*-Guidelines sentences."). But petitioner himself contends otherwise, Br. 6-7, 28-35, as do a number of his other amici, FPCD Br. 28; LPWSSR Br. 13; Miller Br. 10; NYCDL Br. 7-9, 13-15. Their arguments lack merit.

a. Petitioner argues that presuming a within-Guidelines sentence to be reasonable "places an additional burden on the district court to justify [a] non-Guidelines sentence[]," by requiring "an additional explanation" why the factors considered by the court are "sufficient" to warrant a non-Guidelines sentence. Br. 33. Echoing that view, one of petitioner's amici argues that a presumption of reasonableness means that district courts must follow the Guidelines unless "the defendant can prove that a guidelines sentence is inappropriate." NYCDL Br. 13. Another group of amici goes even further, suggesting that a presumption of reasonableness means that district courts cannot impose a non-Guidelines sentence unless there is a ground for a departure. Miller Br. 10.

Those assertions are simply wrong. As Chief Judge Easterbrook has explained, "[t]o say that a sentence within the [Guidelines] range presumptively is reasonable is not to say that district judges ought to impose sentences within the range." *United States* v. *Gama-Gonzales*, 469 F.3d 1109, 1110 (7th Cir. 2006) (emphasis omitted). "It is only to say that, *if* the district judge does use the Guidelines, then the sentence is unlikely to be problematic." *Ibid.*[7]

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[7] Petitioner also argues that the presumption of reasonableness "unduly burdens" a party appealing a within-Guidelines sentence with "the nearly impossible task of proving a negative." Br. 33-34. But whether a Guidelines sentence is presumed reasonable or not, *Booker*'s standard of review *necessarily* requires an appellant to "prove a negative"—*i.e.*, that the sentence imposed was *not* reasonable.

b. Noting that appellate courts almost always affirm within-Guidelines sentences when the defendant appeals and often vacate below-Guidelines sentences when the government appeals (Br. 30-32), petitioner argues that those decisions impose "a *de facto* restraint on [district] courts" (Br. 7) by deterring them from sentencing outside the Guidelines range. It would be astonishing to assume, however, that sentencing courts will routinely abandon their obligation under *Booker* to treat the Guidelines as advisory and consider all the Section 3553(a) factors, and instead "return to the pre-*Booker* mandatory Guidelines," *ibid.*, simply to minimize the rigor of appellate review. This Court has previously rejected "any presumption that a decision of this Court will 'deter' lower federal * * * courts from fully performing their sworn duty," *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993), and it should likewise reject any presumption that decisions of courts of appeals will lead district judges to "ignor[e] their oath," *ibid.*, in order to increase their chances of being affirmed.

c. Petitioner nevertheless insists that a district judge who was "once, or twice, reversed for sentencing outside the Guidelines" would "reasonably conclude" that the law "all but require[d] him or her to impose a sentence within the Guidelines" range. Br. 30. That argument ignores the reality that —whatever the standard of review—the government does not reflexively appeal whenever there is a below-Guidelines sentence. Between February 1, 2005 (the beginning of the first month after *Booker* was decided) and September 30, 2006 (the latest date for which preliminary data have been released), district courts imposed more than 14,000 below-Guidelines sentences that were not the result of a government-sponsored departure. App., *infra*, 31a. Yet the government appealed fewer than 300 of those sentences on the ground of unreasonableness, or approximately 2%. See also FPCD Br. App. A11-

A17 (identifying 83 decisions on government appeals of below-Guidelines sentences between December 1, 2005, and November 30, 2006); NYCDL Br. App. 5a-6a (identifying 71 decisions on government appeals of below-Guidelines sentences between January 1, 2006, and November 16, 2006). Even if one indulges the assumption that district judges focus on the likelihood of an appeal being filed and the relative rigor of appellate review, a judge would conclude that a below-Guidelines sentence would not precipitate an appeal, let alone reversal.

Moreover, in the relatively few cases in which the government has appealed a below-Guidelines sentence, if the sentence is vacated, the court of appeals has not held that the district judge acted unreasonably in failing to impose a Guidelines sentence. In the vast majority of such cases, the basis for the decision is either that the sentence was *too far* below the Guidelines range or that the district court's explanation for the below-Guidelines sentence was inadequate. See, *e.g.*, *Cage*, 451 F.3d at 596 (although facts of case might "justify some discrepancy from the advisory guidelines range," they were "not dramatic enough to warrant such an extreme downward variance"); *Myers*, 439 F.3d at 419 (remanding for "imposition of sentence following more explicit and thorough consideration" of the Section 3553(a) factors, "without expressing any opinion on the reasonableness of the sentence that should be imposed").

d. Even if it were true, as petitioner contends, that the "consistent affirmance of within-Guidelines sentences" (Br. 30) encouraged district courts to sentence within the Guidelines range, that phenomenon could not be the result of the application of a presumption of reasonableness. As petitioner acknowledges, *all* the courts of appeals, whether they apply such a presumption or not, have affirmed almost all within-Guidelines sentences as reasonable. Br. 30-31; see note 2, *supra*. Indeed, petitioner and his amici identify only one

court of appeals decision that vacated a within-Guidelines sentence on the ground that it was "substantively unreasonable," Br. 31; see NYCDL Br. 5; NYCDL Br. App. 3a, 156a, and that decision was issued by a court—the Eighth Circuit—that applies the presumption. See *United States* v. *Lazenby*, 439 F.3d 928, 933-934 (2006). Rather than being a product of the presumption of reasonableness, the courts of appeals' "consistent affirmance of within-Guidelines sentences" (Pet. Br. 30) reflects the sensible conclusion that a sentence within the Guidelines range will virtually always fall within the range of reasonableness.

Petitioner notes that district courts in circuits that apply a presumption of reasonableness "impose below-Guidelines sentences in one-third fewer cases than [district] courts in other circuits." Pet. Br. 32; see FPCD Br. 12-13; FPCD Br. App. A1. But that disparity cannot be attributed to the presumption either, because it existed long before *Booker*. Indeed, the disparity has actually *decreased* since *Booker*. During the four fiscal years preceding this Court's decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004), district courts in the five circuits that have not adopted a presumption of reasonableness imposed below-Guidelines sentences in 10.7% of cases, compared with 6.9% of cases in circuits that have. App., *infra*, 31a. Since *Booker*, district courts in non-presumption circuits have imposed below-Guidelines sentences in 14.5% of cases, compared with 10.8% of cases in presumption circuits. *Ibid.* Thus, while district courts in non-presumption circuits have imposed below-Guidelines sentences at a rate about *one third* higher than the rate in presumption circuits *since Booker*, district courts in non-presumption circuits imposed below-Guidelines sentences at a rate about *one half* higher than the rate in presumption circuits *before Booker*. The higher rate of below-Guidelines sentences in the non-presumption circuits is traceable, not to their decision not

to adopt a presumption of reasonableness for within-Guidelines sentences, but to the consistently high rate of below-Guidelines sentencing in the Second and Ninth Circuits, which together account for well over half the sentences in non-presumption jurisdictions. See *ibid.*

Nor do the data suggest that, in circuits that apply a presumption of reasonableness, more below-Guidelines sentences were imposed before the adoption of the presumption than after. On the contrary, data collected by the Sentencing Commission indicate that the rate of below-Guidelines sentencing has remained remarkably stable since *Booker*, both in circuits that have adopted a presumption of reasonableness and in those that have not. See USSC Br. App. 2a-13a.

II. WHEN A DISTRICT COURT IMPOSES A SENTENCE WITHIN THE GUIDELINES RANGE AND COMPLIES WITH THE REQUIREMENT OF 18 U.S.C. 3553(c) TO STATE THE REASON FOR THE SENTENCE, THE COURT NEED NOT EXPLICITLY ANALYZE ALL OF THE SECTION 3553(a) FACTORS AND OTHER FACTORS THAT MIGHT JUSTIFY A LESSER SENTENCE

A. The SRA Requires Only A General Explanation For A Sentence Within The Guidelines Range

1. Section 3553(c) of Title 18 directs district courts to state, at the time of sentencing, the reasons for the sentence imposed. Although Section 3553(c) requires a statement of "the reasons for [the] imposition of the particular sentence" in all cases, 18 U.S.C. 3553(c) (2000 & Supp. IV 2004), it requires a statement of "the *specific* reason for the imposition of [the] sentence" only when the sentence is outside the Guidelines range, 18 U.S.C. 3553(c)(2) (Supp. IV 2004) (emphasis added). The statute thus makes clear that a *general* statement of reasons is sufficient for within-Guidelines sentences. *Booker* did not excise or otherwise alter Section

3553(c). See, *e.g.*, *United States* v. *Miqbel*, 444 F.3d 1173, 1177 n.6 (9th Cir. 2006); *United States* v. *Lewis*, 424 F.3d 239, 244 (2d Cir. 2005); *United States* v. *Hughes*, 401 F.3d 540, 546 n.5 (4th Cir. 2005); see also *Booker*, 543 U.S. at 305 (Scalia, J., dissenting in part).[8]

When a district court imposes a sentence within the Guidelines range, no detailed statement is necessary to comply with Section 3553(c)'s directive that the court provide general reasons for the sentence. The Guidelines generally reflect an accurate application of the Section 3553(a) factors, see Point I.B, *supra*, and a district court's imposition of a within-Guidelines sentence indicates that the court agreed with the Sentencing Commission's assessment of the statutory factors as applied to the facts of the case. For that reason, a Guidelines sentence requires "little explanation." *E.g.*, *United States* v. *Sam*, 467 F.3d 857, 864 (5th Cir. 2006); *United States* v. *Tyra*, 454 F.3d 686, 688 (7th Cir. 2006).

2. Nor does the obligation imposed by Section 3553(a) to "consider" the factors listed there create any independent obligation to address those factors explicitly or provide a more specific statement of reasons for a within-Guidelines sentence. Although a district court may choose to discuss particular factors, "no specific verbal formulations" are necessary to "demonstrate the adequate discharge of the duty to 'consider' matters relevant to sentencing." *United States* v. *Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (Newman, J.).[9] That

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[8] Section 3553(c) also requires that, when the Guidelines range exceeds 24 months, the district court give "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. 3553(c)(1). Because petitioner's Guidelines range was 33 to 41 months, that provision does not apply here.

[9] See, *e.g.*, *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006) (no requirement that court "explain on the record how the § 3553(a) factors justify the sentence"), petition for cert. pending, No. 06-5217 (filed July 7, 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (district

is especially true when the district court chooses to sentence within the Guidelines range.

Indeed, in the absence of contrary indications in the record, a court of appeals may presume that the district court understood its obligations and adequately considered the Section 3553(a) factors, since "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990), overruled on other grounds by *Ring* v. *Arizona*, 536 U.S. 584 (2002). As long as "the [district] judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable," and "nothing in the record indicates misunderstanding about such materials or misperception about their relevance," it is appropriate to conclude that "the requisite consideration [of the Section 3553(a) factors] has occurred." *Fleming*, 397 F.3d at 100. Accordingly, when a district court imposes a within-Guidelines sentence and complies with Section 3553(c)'s requirement that it state "the reasons for its imposition of the particular sentence," the court is ordinarily not required to provide a further explanation of its weighing of the Section 3553(a) factors to establish that they have been considered.

Contrary to petitioner's contention (Br. 42-43, 45-46), *United States* v. *Taylor*, 487 U.S. 326 (1988), does not support the view that district courts must articulate their consideration of the Section 3553(a) factors on the record. In *Taylor*, the Court addressed the standard for reviewing a district

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court's consideration of Section 3553(a) factors "need not be evidenced explicitly"), petition for cert. pending, No. 06-5275 (filed July 11, 2006); *United States* v. *Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005) ("nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors"); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.) ("checklist" not required).

court's dismissal of an indictment with prejudice under the Speedy Trial Act of 1974, 18 U.S.C. 3162(a). The Court held that, in light of the statute's text and legislative history, district courts must articulate on the record how they evaluated the statutory factors in deciding whether to dismiss a case with or without prejudice. *Taylor*, 487 U.S. at 336-337, 342-343. The SRA differs from the Speedy Trial Act, in that the SRA specifically directed the Sentencing Commission to formulate Guidelines that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)," 28 U.S.C. 991(b)(1)(A), and a correctly calculated Guidelines range already "takes into account" the factors set forth in Section 3553(a), *United States* v. *Scott*, 426 F.3d 1324, 1330 (11th Cir. 2005). Because the Section 3553(a) factors are "built into the Guidelines," *Johnson*, 445 F.3d at 343, a district court that exercises its discretion to impose a sentence within the Guidelines range need not explicitly discuss those factors.

B. The District Court Need Not Explicitly Address Every Argument That Might Justify A Sentence Outside The Guidelines Range

Section 3553 of Title 18 requires a district court to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing in Section 3553(a)(2), 18 U.S.C. 3553(a) (2000 & Supp. IV 2004); to "consider," in determining an appropriate sentence, the factors listed in Section 3553(a), *ibid.*; and to "state in open court the reasons for its imposition of the particular sentence," 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). But neither Section 3553 nor any other statute requires a district court to address every argument for a sentence higher or lower than the one imposed. Accordingly, if a district court decides to impose a sentence within the Guidelines range, and complies with the requirements of Section 3553, the court need not consider and

reject every argument for a sentence outside the range. A number of courts of appeals have correctly so held. See, *e.g.*, *United States* v. *Turbides-Leonardo*, 468 F.3d 34, 40 (1st Cir. 2006); *United States* v. *Jones*, 445 F.3d 865, 871 (6th Cir.), cert. denied, 127 S. Ct. 251 (2006); *United States* v. *Fernandez*, 443 F.3d 19, 30 (2d Cir.) (Cabranes, J.), cert. denied, 127 S. Ct. 192 (2006).

Other courts of appeals, however, require district courts to address any ground for a non-Guidelines sentence that is not obviously without merit. See *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1116-1118 (10th Cir. 2006); *United States* v. *Cooper*, 437 F.3d 324, 329 (3d Cir. 2006); *United States* v. *Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). The apparent justification for that requirement is that sentencing after *Booker* is discretionary and that a court of appeals "ha[s] to satisfy [itself], before [it] can conclude that the [district] judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." *Cunningham*, 429 F.3d at 679. That requirement, as a general rule, is unfounded. A general requirement that a district court must explicitly address every non-frivolous argument for leniency lacks any basis in the sentencing statute.

In any event, even the courts that have imposed such a requirement recognize that district courts need not address *every* argument for a higher or lower sentence. As one of those courts has put it, "[a] sentencing judge has no more duty than * * * appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." *Cunningham*, 429 F.3d at 678; accord *Sanchez-Juarez*, 446 F.3d at 1117; *Cooper*, 437 F.3d at 329. At least one of those courts has also recognized that "[a] response by the district court [i]s not required" when the party seeking a

higher or lower sentence "perfunctorily raise[s] only run-of-the-mill contentions." *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1223 (10th Cir. 2006), petition for cert. pending, No. 06-5217 (filed July 7, 2006). And even when a party makes an argument that those courts would require to be addressed, it can often be inferred from the record as a whole that the argument was considered and rejected, despite the absence of any explicit statement to that effect by the district court. See *Jiménez-Beltre*, 440 F.3d at 519 ("a court's reasoning can often be inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did").

Accordingly, as long as the record, viewed as a whole, does not indicate that the district court failed to give independent consideration to the Section 3553(a) factors, and as long as the district court provided a general statement of the reasons for the sentence as required by Section 3553(c), a sentence within the correctly calculated Guidelines range should not be set aside as procedurally unreasonable for failure to address explicitly particular arguments for a lesser sentence. Instead, the court of appeals should affirm unless the appellant can show that the facts and circumstances of the case are such that the Section 3553(a) factors required a sentence outside the Guidelines range.

III. PETITIONER'S SENTENCE, AT THE BOTTOM OF THE GUIDELINES RANGE, WAS REASONABLE

The district court sentenced petitioner to 33 months of imprisonment, the bottom of the advisory Guidelines range. Nothing in the record indicates that the court did not exercise its discretion on the basis of the Section 3553(a) factors, and the district court provided an adequate statement of reasons for the sentence under Section 3553(c). Petitioner's within-Guidelines sentence, moreover, is entitled to a presumption of

reasonableness, and he cannot rebut the presumption. The sentence should therefore be affirmed.

A. The District Court Considered The Factors In 18 U.S.C. 3553(a)

There is no "record evidence suggesting" that the district court did not "faithfully discharge[] [its] duty to consider the statutory factors" in sentencing petitioner. *Fernandez*, 443 F.3d at 30. On the contrary, the record affirmatively shows that the district court considered the factors in Section 3553(a).

At the sentencing hearing, after ascertaining that petitioner was not challenging the PSR's calculation of the Guidelines range, J.A. 49-50, the district court asked petitioner's counsel whether he was going to offer evidence to show that, "under 3553, your client would be entitled to a different sentence than he should get under sentencing guidelines," J.A. 52, and it reminded counsel that "under 3553 you * * * have a right to show why your client should be considered for a sentence of less than he would get under the guidelines," J.A. 53. The court then heard from petitioner's counsel at length with respect to the considerations that, in petitioner's view, warranted a below-Guidelines sentence—namely, his military service, physical condition, and asserted vulnerability to abuse in prison. J.A. 51-73. During the course of those remarks, the court actively questioned counsel about his arguments and closely examined the evidence he submitted.[10] The court also confirmed the three grounds on which petitioner

[10] See J.A. 56-62 (examining records relating to petitioner's testimony in other criminal cases and clarifying petitioner's claim that he "should be treated differently" because he might be "subject to retribution" in prison); J.A. 63-66 (questioning counsel about petitioner's military service); J.A. 66-73 (reviewing medical records and inquiring whether there was "medical evidence" indicating which of petitioner's symptoms were caused by exposure to Agent Orange).

was relying for "a departure from the guidelines or a sentence under 3553 that is lower than the guidelines." J.A. 64-65. Thus, even without a presumption that a sentencing court has considered the Section 3553(a) factors, the record demonstrates that that those factors were considered here. The district court explicitly recognized its authority to impose a below-Guidelines sentence based on the factors in Section 3553(a), and gave petitioner a full and fair opportunity to identify any relevant considerations that would make a below-Guidelines sentence appropriate. The court then carefully considered the evidence and arguments that petitioner presented.

The record thus refutes petitioner's contention that the district court "considered only * * * the Guidelines range" (Br. 19) and "ignored" the other factors in Section 3553(a) (Br. 8). Petitioner's other contentions are mistaken as well.

First, petitioner contends that the district court did not give consideration to the Section 3553(a) factors other than the Guidelines range because the court was "compelled by circuit precedent to view * * * the Guidelines range as presumptively correct." Br. 20. The Fourth Circuit has not held, however, that a Guidelines sentence is presumptively *correct* in the *district court*, in the sense that a court *must* impose such a sentence unless the defendant (or the government) can "justify a sentence outside of the recommended Guidelines range." *Ibid.* It has only held that, if the district court *chooses* to impose a Guidelines sentence in the exercise of its discretion, the sentence is presumptively *reasonable* in the *court of appeals*. And the Fourth Circuit did not adopt even *that* presumption until eight months *after* the sentence in this case was imposed. See *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006). There is thus no Fourth Circuit precedent to support petitioner's con-

tention that the district court believed itself bound to consider only the Guidelines.

Second, petitioner contends (Br. 3, 21-22 & n.11) that the district court did not properly consider even the Guidelines, because, according to petitioner, the court should not have used the accessory-after-the-fact guideline, Section 2X3.1, which resulted in a higher offense level. That challenge has been waived, however, because petitioner conceded in the district court that the Guidelines range was correctly calculated. J.A. 49-50. In any event, the contention lacks merit. The district court applied the accessory-after-the-fact guideline, not because it "found," without evidence, that petitioner "was an accessory after the fact" to InterOrdnance's crime, as petitioner contends, Br. 22 n.11, but because the perjury and obstruction-of-justice guidelines each direct the sentencing court to apply the accessory-after-the-fact guideline when the perjury or obstruction of justice involved a "criminal offense," Sentencing Guidelines §§ 2J1.2(c)(1), 2J1.3(c)(1), and the crimes of which petitioner was found guilty were committed in connection with a grand-jury investigation.

Nor did petitioner take the position in the district court that a below-Guidelines sentence was warranted because the accessory-after-the-fact guideline overstates the seriousness of his crimes. And the court's obligation to consider the Section 3553(a) factors did not require it to "search for grounds not clearly raised on the record" that might support a sentence outside the Guidelines range. *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006). In any event, the cross-references to the accessory-after-the-fact guideline reflect the Sentencing Commission's reasonable view that perjury or obstruction of justice that involves a criminal offense should be punished more severely than perjury or obstruction of justice that does not, and that the severity of punishment

should vary with the gravity of the underlying obstructed crime.

B. The District Court Adequately Explained Its Sentence

The district court also complied with its obligation to state "the reasons for the imposition of the particular sentence." 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). During its colloquy with petitioner's counsel, the court questioned the nature and extent of the assistance petitioner had provided in other investigations. J.A. 57-58. It likewise questioned whether petitioner had "performed such good and extraordinary service for our country that he is entitled to special treatment." J.A. 65. And the court observed that "the federal prison system is equipped to handle people with diabetes and many other difficult [medical conditions]." J.A. 71. Then, in announcing its sentence, the court stated that the crimes of which petitioner was convicted were "serious matters" and that, "under 3553, certainly the public needs to be protected." J.A. 86-87; see 18 U.S.C. 3553(a)(2) (requiring court to consider need for sentence to "reflect the seriousness of the offense" and "protect the public"). Together with the court's comments in response to petitioner's arguments, those statements provided a sufficient explanation of the court's conclusion that, in light of the seriousness of petitioner's crimes, and despite the mitigating circumstances that petitioner identified, a sentence within the Guidelines range was appropriate.

The court's statement of reasons surely could have been lengthier, or more detailed. But it did not have to be. The district court's decision to impose a Guidelines sentence necessarily reflected its agreement with the Sentencing Commission's application of the Section 3553(a) factors to the case, and the sentence therefore required "little explanation." *E.g.*, *Sam*, 467 F.3d at 864; *Tyra*, 454 F.3d at 688.

Petitioner contends that the statement of reasons was inadequate because the district court "did not resolve open evidentiary issues in the record, including the nature of Mr. Rita's medical conditions or his military and civil service." Br. 48. But there were no such issues to resolve, inasmuch as the facts supporting petitioner's arguments for a below-Guidelines sentence were undisputed. See, *e.g.*, J.A. 73. The district court must therefore be understood, not to have disregarded the facts proffered by petitioner, but to have concluded that they did not warrant leniency.

C. Petitioner Cannot Rebut The Presumption That The Within-Guidelines Sentence Was Reasonable

The district court considered the factors in Section 3553(a) and provided an adequate statement of reasons under Section 3553(c), and its within-Guidelines sentence is entitled to a presumption of reasonableness on appeal. Petitioner cannot rebut that presumption.

As the prosecutor pointed out at sentencing, the essential "nature and circumstances of the offense" (18 U.S.C. 3553(a)(1)) is that petitioner obstructed an investigation into the unlawful importation of machine guns. J.A. 74-75. As the district court explicitly found, that is a "serious" crime. J.A. 86. As the prosecutor also pointed out at sentencing, "the history and characteristics of the defendant" (18 U.S.C. 3553(a)(1)), in addition to the characteristics identified by petitioner, are that he was previously convicted of "lying on firearm permit applications," J.A. 76, and committed both the present crimes and the prior crime while working as a federal immigration official, J.A. 76-77. Moreover, far from accepting responsibility for his crimes at sentencing, petitioner continued to insist that he was innocent, J.A. 80-85; accused the ATF agent of perjury and the prosecutor of intentionally misleading the grand and petit juries, J.A. 79, 85; and claimed to

be the "victim" of "a modern day * * * Inquisition," J.A. 80. Under these circumstances, a sentence at the low end of the advisory Guidelines range was not unreasonable.

Petitioner contends that his personal characteristics "clearly support a lesser sentence," Br. 21, but that contention is not nearly sufficient to rebut the presumption that a within-Guidelines sentence is reasonable. The fact that certain considerations "support" a lower sentence does not mean that they *require* one. Had the district court been persuaded by petitioner's arguments and imposed a lower sentence, its sentence might well have been reasonable. But the fact that, in the exercise of its discretion, the district court rejected petitioner's arguments and imposed a higher sentence does not mean that its sentence was *un*reasonable. As Judge Posner has explained, "reasonableness is a range, not a point." *Cunningham*, 429 F.3d at 679. For the reasons stated in Point I.B, *supra*, it would be a rare case in which the Guidelines range is not within the "broad range of reasonable[ness]," *Fernandez*, 443 F.3d at 34, and it would be a rarer case in which the *bottom* of the Guidelines range is not within that range. This is not such a case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2007

APPENDIX

CONSTITUTION 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

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

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 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;

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

(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) 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 section 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.

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

(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 determination 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 sen-

tencing 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 sanctions, 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;

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

(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 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;

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

(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.

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 commis-

sion 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 procedure, 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 - 9/30/2006	
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**114,318**	
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	14,059	12.3%
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**812**	
Below-Range Sentences	22	8.5%	24	5.8%	21	4.4%	20	4.9%	87	5.6%	111	13.7%
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**2,568**	
Below-Range Sentences	145	9.8%	158	8.7%	143	7.8%	66	5.2%	512	8.0%	421	16.4%
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**7,301**	
Below-Range Sentences	683	17.4%	692	17.0%	764	16.0%	465	13.6%	2,604	16.1%	1,768	24.2%
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**5,128**	
Below-Range Sentences	201	7.8%	194	7.3%	206	7.4%	115	5.5%	716	7.1%	859	16.8%
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**10,333**	
Below-Range Sentences	228	4.8%	197	3.9%	216	3.8%	128	3.1%	769	3.9%	1,125	10.9%
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**25,506**	
Below-Range Sentences	1,563	14.0%	1,360	11.1%	999	7.5%	361	3.7%	4,283	9.2%	1,952	7.7%
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**8,518**	
Below-Range Sentences	261	6.2%	240	5.4%	256	5.3%	175	5.1%	932	5.5%	1,245	14.6%
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**5,008**	
Below-Range Sentences	139	5.8%	180	6.7%	136	4.5%	82	3.7%	537	5.2%	740	14.8%
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**8,214**	
Below-Range Sentences	319	9.2%	335	9.4%	308	7.1%	165	4.7%	1,127	7.6%	1,166	14.2%
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**20,658**	
Below-Range Sentences	1,944	16.3%	2,016	17.2%	1,311	9.9%	596	6.4%	5,867	12.7%	2,557	12.4%
Tenth Circuit	**2,980**		**3,833**		**4,476**		**3,728**		**15,017**		**9,548**	
Below-Range Sentences	230	7.7%	286	7.5%	246	5.5%	165	4.4%	927	6.2%	1,008	10.6%
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**10,724**	
Below-Range Sentences	392	6.6%	372	6.0%	290	4.5%	160	3.3%	1,214	5.2%	1,107	10.3%
Presumption Circuits	**29,247**		**32,182**		**36,108**		**27,281**		**124,818**		**67,939**	
Below-Range Sentences	2,762	9.4%	2,622	8.1%	2,182	6.0%	1,096	4.0%	8,662	6.9%	7,347	10.8%
Other Circuits	**25,842**		**26,502**		**29,063**		**20,970**		**102,377**		**46,379**	
Below-Range Sentences	3,365	13.0%	3,432	12.9%	2,714	9.3%	1,402	6.7%	10,913	10.7%	6,712	14.5%
Comparison												
Difference in Rates		**+3.6%**		**+4.8%**		**+3.3%**		**+2.7%**		**+3.7%**		**+3.7%**
% Difference in Rates		**+37.9%**		**+58.9%**		**+54.5%**		**+66.4%**		**+53.6%**		**+33.8%**

"Below-Range 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).
"Presumption Circuits" are the District of Columbia, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.
"Other Circuits" are the First, Second, Third, Ninth, and Eleventh Circuits.
"Difference in Rates" and "% Difference in Rates" calculate the difference, in absolute terms and as a percentage, between the rate of Below-Range Sentences in Presumption Circuits and the rate of Below-Range Sentences in Other Circuits. Calculations based on the percentages shown for Presumption Circuits and Other Circuits 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.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 9/30/2006		% Change Post-Booker
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**114,318**		
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	14,059	12.3%	**42.7%**
Above-Range Sentences	306	0.6%	457	0.8%	541	0.8%	382	0.8%	1,686	0.7%	1,816	1.6%	**114.1%**
Out-of-Guidelines Sentences	6,433	11.7%	6,511	11.1%	5,437	8.3%	2,880	6.0%	21,261	9.4%	15,875	13.9%	**+48.4%**
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**812**		
Out-of-Guidelines Sentences	23	8.8%	26	6.3%	22	4.6%	24	5.9%	95	6.1%	131	16.1%	**+164.4%**
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**2,568**		
Out-of-Guidelines Sentences	151	10.2%	168	9.3%	156	8.5%	77	6.0%	552	8.6%	474	18.5%	**+114.1%**
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**7,301**		
Out-of-Guidelines Sentences	698	17.8%	716	17.6%	786	16.5%	494	14.4%	2,694	16.6%	1,851	25.4%	**+52.4%**
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**5,128**		
Out-of-Guidelines Sentences	213	8.3%	219	8.2%	231	8.3%	128	6.1%	791	7.8%	924	18.0%	**+129.8%**
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**10,333**		
Out-of-Guidelines Sentences	269	5.7%	230	4.6%	248	4.4%	170	4.1%	917	4.7%	1,287	12.5%	**+167.0%**
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**25,506**		
Out-of-Guidelines Sentences	1,622	14.5%	1,475	12.1%	1,121	8.4%	436	4.5%	4,654	10.0%	2,405	9.4%	**-5.8%**
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**8,518**		
Out-of-Guidelines Sentences	280	6.7%	275	6.2%	277	5.8%	191	5.6%	1,023	6.1%	1,371	16.1%	**+164.9%**
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**5,008**		
Out-of-Guidelines Sentences	162	6.8%	201	7.5%	166	5.5%	110	4.9%	639	6.2%	798	15.9%	**+157.7%**
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**8,214**		
Out-of-Guidelines Sentences	342	9.8%	376	10.5%	356	8.2%	196	5.6%	1,270	8.5%	1,298	15.8%	**+85.5%**
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**20,658**		
Out-of-Guidelines Sentences	1,996	16.8%	2,101	17.9%	1,463	11.0%	668	7.1%	6,228	13.5%	2,908	14.1%	**+4.6%**
Tenth Circuit	**2,980**		**3,833**		**4,476**		**3,728**		**15,017**		**9,548**		
Out-of-Guidelines Sentences	250	8.4%	308	8.0%	271	6.1%	190	5.1%	1,019	6.8%	1,125	11.8%	**+73.6%**
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**10,724**		
Out-of-Guidelines Sentences	427	7.1%	416	6.7%	340	5.3%	196	4.1%	1,379	5.9%	1,303	12.2%	**+106.2%**
Proportionality Circuits	**36,449**		**39,807**		**43,862**		**32,953**		**153,071**		**80,419**		
Out-of-Guidelines Sentences	3,503	9.6%	3,449	8.7%	2,935	6.7%	1,566	4.8%	11,453	7.5%	10,061	12.5%	**+67.2%**
Other Circuits	**18,640**		**18,877**		**21,309**		**15,298**		**74,124**		**33,899**		
Out-of-Guidelines Sentences	2,930	15.7%	3,062	16.2%	2,502	11.7%	1,314	8.6%	9,808	13.2%	5,814	17.2%	**+29.6%**

"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, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.
"Other Circuits" are the District of Columbia, Second, Third, 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. 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.