



# WHITE COLLAR CRIME REPORT



VOL. 2, NO. 5 165-174

MARCH 30, 2007

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## SENTENCING

### Pending U.S. Supreme Court Cases May Lead To More Changes In Federal Sentencing That Would Favor White Collar Defendants

BY HARRY SANDICK & JOSHUA BLOCK

In an earlier article, we discussed the U.S. Supreme Court's decision to grant writs of certiorari in two cases, *Rita v. United States* and *Claiborne v. United States*, both of which raised questions about how the circuit courts of appeals were construing *United States*

*v. Booker*.<sup>1</sup> In that article, we reviewed the *Booker* decision and the post-*Booker* sentencing rules that the federal courts of appeals created in order to implement *Booker* and to give guidance to the district courts on sentencing. We also discussed the questions left open by *Booker* and predicted that the likely result from the *Rita* and *Claiborne* decisions would be enhanced sentencing discretion.

Since the publication of that article, the Supreme Court has received briefing and heard argument in *Rita* and *Claiborne*. Also, the court has decided another case, *Cunningham v. California*, that gives some hints about the views of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. (who were not members of the court when it decided *Booker*), and also suggests how Justice Ruth Bader Ginsburg, the swing vote in *Booker*, might view *Rita* and *Claiborne*. As discussed in more detail below, there is reason to think that *Rita* and *Claiborne* will lead to some significant changes in how defendants are sentenced in federal court that, on balance, may favor white collar defendants.

*Mr. Sandick, a partner in the New York office of Jenner & Block LLP, is a former Assistant United States Attorney in the Southern District of New York and, among other positions, he served as deputy chief appellate attorney in the Criminal Division, where he litigated several major post-Booker cases before the U.S. Court of Appeals for the Second Circuit. Mr. Sandick can be reached at [hsandick@jenner.com](mailto:hsandick@jenner.com). Joshua Block is an associate at Jenner & Block LLP who previously clerked for the U.S. Court of Appeals for the Second Circuit and whose practice involves appellate litigation and white collar criminal defense. The views expressed herein are those of the authors and do not necessarily represent the views of Jenner & Block LLP or its clients.*

<sup>1</sup> 543 U.S. 220 (2005).

## I. Hopes for Reduced Sentences Raised By *Booker* Dashed by Rigid Approach Urged By Some Circuits

In *Booker*, the Supreme Court held that the U.S. Sentencing Guidelines violated the Sixth Amendment right to a jury trial. The court concluded that the guidelines were unconstitutional because a defendant's maximum sentence could increase on the basis of facts that were found by a judge but were not proved to a jury beyond a reasonable doubt. For example, for a defendant with no criminal history who is convicted of embezzlement, the Sentencing Guidelines provide for a maximum punishment of six months' imprisonment if the defendant embezzled less than \$10,000. If the defendant embezzled more than \$10,000, the maximum sentence jumps to one year's imprisonment.<sup>2</sup> But the prosecutor never has to prove beyond a reasonable doubt the exact amount that the defendant stole. Instead, the judge makes that determination at sentencing on the basis of a lower standard of proof (typically, a preponderance of the evidence).

*Booker* was the culmination of a series of cases beginning in 2000 with *Apprendi v. New Jersey*,<sup>3</sup> in which the Supreme Court enunciated the principle that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>4</sup> Although five justices agreed that the U.S. Sentencing Guidelines were unconstitutional under this standard, they did not all agree on the appropriate remedy. Four of the justices thought that the court should leave the guidelines intact but require that the government prove all sentencing factors to the jury.

But Ginsburg instead opted for a remedy that was advocated by the four justices who had dissented from the *Apprendi* line of cases. As a result, *Booker* consisted of two separate majority opinions—a "merits opinion" and a "remedial opinion"—with only Ginsburg signing on to both. The separate *Booker* remedial opinion held that the constitutional problem could be cured by simply making the entire guidelines advisory. Sentencing would instead be governed by several factors set forth in 18 U.S.C. § 3553(a). These factors were always in force but meant little because other statutes required courts to follow the Sentencing Guidelines.

If the federal guidelines are no longer mandatory, then the maximum sentence for embezzlement would be the same (the statutory maximum) regardless of how

much money the defendant embezzled. The judge would be free to use her discretion to select the appropriate sentence without having to give determinative weight to any particular sentencing factor. The remedial opinion reasoned that advisory guidelines could thus avoid the Sixth Amendment problem identified in *Booker* while at the same time promoting sentencing uniformity. Although federal judges would not be required to follow the guidelines, appellate courts would still review sentences for reasonableness. The *Booker* remedial opinion did not elaborate on the standards that a reviewing court should use in determining whether a sentence is "unreasonable."

The reduced adherence to the guidelines figured to be a boon to white collar defendants, for whom the guidelines represented a deliberate increase in the length of sentences.<sup>5</sup> Some wondered whether district courts, if left to their own devices, would return to the historical practice and impose shorter sentences in white collar cases. In fact, many criminal defendants argued that under the advisory guidelines system, judges now had more leeway to give reduced sentences. For white collar defendants, in particular, appeals to leniency were accompanied by criticism of the guidelines as being too mechanistic and Draconian. Many white collar defendants wanted to present certain mitigating arguments at sentencing that related to their prior good works, to their strong community and family ties, to their employment history, to the aberrant nature of their offenses, and to their spotless prior record. Prior to *Booker*, however, these factors rarely, if ever, could justify a sentence outside the guidelines range. Judges appeared to be empowered by *Booker* to consider these traditional sentencing arguments again.

But in the wake of *Booker*, many appellate courts adopted presumptions that a guidelines sentence is reasonable and that a court must provide increasingly more persuasive reasons for giving a nonguidelines sentence, the further the judge deviates from the guidelines. In many instances, even in the minority of circuits that did not adopt formal presumptions of reasonableness, appellate courts nevertheless reversed as "unreasonable" the district courts' decisions to give white collar defendants reduced sentences. For example, in *United States v. Rattoballi*,<sup>6</sup> the Second Circuit faulted the district court for giving too lenient a sentence to a defendant convicted of antitrust crimes. The district court sentenced the defendant to one year of home confinement and five years' probation. But the Second Circuit decided that the lenient sentence "fail[ed] to take into account the Commission's view that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders."<sup>7</sup> According to the Second Circuit, "[t]he Guidelines reflect a considered determination by the Commission that jail terms are the

<sup>2</sup> U.S.S.G. § 2B1.1(a) provides for a base offense level of 6 so long as the conviction has a statutory maximum term of imprisonment of less than 20 years. U.S.S.G. § 2B1.1(b) provides that the base offense level should be increased by two points if the loss amount is greater than \$5,000 and increased by four points if the loss amount is greater than \$10,000. Under the Sentencing Table, the sentencing range for a defendant with no criminal history and an offense level of 8 is 0-6 months' imprisonment, and the range for a defendant with an offense level of 10 is 6-12 months' imprisonment.

<sup>3</sup> 530 U.S. 466 (2000).

<sup>4</sup> *Id.* at 490; see also *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004). The court specifically retained an exception that allowed courts to find the fact of a prior conviction, a rule originally laid out in a pre-*Apprendi* decision, *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998).

<sup>5</sup> See U.S.S.G. § 1A1.1, commentary (note 3) (stating that while the guidelines were largely based on a consideration of the actual sentences imposed in criminal cases, the U.S. Sentencing Commission departed from present practice in order to remedy certain "inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior").

<sup>6</sup> 452 F.3d 127 (2d Cir. 2006).

<sup>7</sup> *Id.* at 135 (internal quotation marks and citations omitted).

most effective deterrent for antitrust violations.”<sup>8</sup> In part due to decisions like *Rattoballi*, sentences for white collar defendants have actually increased in the post-*Booker* era despite the fact that judges now have the discretion to impose shorter sentences on the basis of a range of arguments that were previously unavailable.<sup>9</sup>

After nearly two years of advisory guidelines, the Supreme Court granted certiorari in *Rita* and *Claiborne* to determine whether a guidelines sentence should be considered presumptively reasonable and whether district courts should be required to give more specific reasons the further they deviate from the guidelines sentencing range.

## II. The Briefing in *Claiborne* and *Rita*

### A. *United States v. Claiborne*

In *Claiborne*, the Supreme Court will review a short decision by the Eighth Circuit in which that court reversed and remanded a 15-month sentence imposed on a defendant who distributed crack cocaine. This sentence was shorter than the sentence of 37 to 44 months’ imprisonment that the Sentencing Guidelines recommended for Claiborne. The district court justified its variance from the guidelines on the basis of “Claiborne’s lack of criminal history, young age, the small quantity of drugs involved [approximately 5 grams], and the court’s opinion that Claiborne was not likely to commit similar crimes in the future.”<sup>10</sup>

When the government appealed Claiborne’s sentence, the Eighth Circuit reversed. The appeals court explained that the district court’s reasoning did not support its decision to vary from the applicable guidelines range, ruling that the district court needed to offer a sufficiently “compelling” justification for the sentence that was “proportional to the extent of the difference between the advisory [guidelines] range and the sentence imposed.”<sup>11</sup> Here, Claiborne’s sentence could not be sustained because it was an “extraordinary variance . . . not supported by comparably extraordinary circumstances,” particularly because the mitigating factors identified by the district court were either taken into account as part of the guidelines calculations or unsupported by the facts.<sup>12</sup>

The Supreme Court granted certiorari on two questions. First, the court asked whether the district court’s choice of a below-guidelines sentence was reasonable. Second, the court asked whether it is consistent with *Booker* for the Eighth Circuit to have required that “extraordinary circumstances” support a sentence that varies substantially from the guidelines.<sup>13</sup>

#### 1. *Claiborne’s* Brief

In his brief to the Supreme Court, Claiborne (who has been released from jail but is subject to reincarceration if the Supreme Court affirms his sentence) made two

principal arguments. First, he contended that the district court’s decision to sentence him to a nonguidelines sentence was reasonable.<sup>14</sup> Claiborne argued that the district court properly recognized that he was a nonviolent, small-time crack cocaine dealer who had a good work history and who needed drug treatment.<sup>15</sup> Claiborne also argued that his 15-month sentence should be affirmed because it was not “greater than necessary” to serve the purposes of punishment, as required by Section 3553(a).<sup>16</sup> Claiborne asked the Supreme Court to treat reasonableness review as it is treated in the Second Circuit—where there is no presumption of reasonableness for guidelines sentences but where each sentence is considered on its merits in light of the factors set forth in Section 3553(a).<sup>17</sup>

Claiborne criticized the Eighth Circuit for reasoning that the guidelines “were fashioned taking the other [Section] 3553(a) factors into account,” and he argued that the guidelines do not take into account several potentially relevant sentencing factors, such as age, employment history, and family ties.<sup>18</sup> Claiborne also contended that according a presumption of reasonableness to the guidelines (as the Eighth Circuit has done) improperly elevates the guidelines over other sentencing factors, thereby reverting to a system that is no different from the mandatory guidelines scheme ruled unconstitutional in *Booker*.<sup>19</sup> “[T]he evolution of the Eighth Circuit’s presumption of reasonableness demonstrates that it is irreconcilable with the post-*Booker* requirement of appellate review of discretionary sentencing based on all the section 3553(a) considerations, the Guidelines being just one,” he claimed.<sup>20</sup>

Claiborne also argued that the Eighth Circuit’s rule requiring district judges to identify extraordinary circumstances in order to impose a nonguidelines sentence could not be reconciled with *Booker*, which made the guidelines advisory.<sup>21</sup> “The Eighth Circuit . . . has distorted *Booker’s* remedy by severely shrinking the discretion district courts have to impose sentences below the levels required by Guidelines-mandated and judicially-determined facts.”<sup>22</sup> In other words, he said, by “requiring extraordinary circumstances to sentence below the Guidelines, the Eighth Circuit remove[d] the discretion essential to an advisory Guidelines system.”<sup>23</sup>

Claiborne also pointed out that the Eighth Circuit’s emphasis on the “arithmetic variation” between the imposed sentence of 15 months and the guidelines range of 37 to 44 months “leads to overzealous [appellate] scrutiny of short sentences in which non-Guidelines factors important to the exercise of discretion under [S]ection 3553(a) play a more significant role.”<sup>24</sup> This problem, to Claiborne, was part and parcel of an appel-

<sup>14</sup> Brief for Petitioner at 8-29, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006).

<sup>15</sup> *Id.* at 9-12.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 15-18 (citing *United States v. Jones*, 460 F.3d 191 (2d Cir. 2006)).

<sup>18</sup> *Id.* at 20-21 (quoting *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006)).

<sup>19</sup> *Id.* at 22-26.

<sup>20</sup> *Id.* at 25-26.

<sup>21</sup> *Id.* at 29-41.

<sup>22</sup> *Id.* at 30.

<sup>23</sup> *Id.* at 31.

<sup>24</sup> *Id.* at 34.

<sup>8</sup> *Id.*

<sup>9</sup> See Harry Sandick, *Supreme Court Certiorari Grants Signal Expanded Judicial Discretion At Sentencing*, BNA WHITE COLLAR CRIME REP., Vol. 1, No. 23, at 750-756 (Dec. 8, 2006).

<sup>10</sup> *United States v. Claiborne*, 439 F.3d 479, 480 (8th Cir. 2006).

<sup>11</sup> *Id.* at 481.

<sup>12</sup> *Id.*

<sup>13</sup> *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006).

late approach that did not give sufficient deference to the factual findings made by the district court.<sup>25</sup>

## 2. The Government's Brief

The government's brief called for the Supreme Court to follow the logic of the Eighth Circuit's decision and to apply a "principle of proportionality to assess whether a non-guidelines sentence that varies significantly from the advisory range is a reasonable sentence."<sup>26</sup> According to the government, such an approach is "essential to fulfill *Booker's* expectation that appellate review would move sentences in Congress's preferred direction of greater uniformity," as Congress made its intent plain in the Sentencing Reform Act of 1984.<sup>27</sup> Proportionality review, then, "is a critical means of ensuring that appellate review succeeds in tending 'to iron out sentencing differences,' " it said.<sup>28</sup> The government argued at length that the Sentencing Reform Act was meant to reduce disparity in sentencing and that *Booker* meant for appellate review to advance this goal.<sup>29</sup>

The government contended that the Sentencing Guidelines are the most "suitable" and "appropriate" baseline for proportionality review because they are "the only nationally uniform, congressionally endorsed integration of the purposes of sentencing under the [Sentencing Reform Act]."<sup>30</sup> In particular, it said, the guidelines "provide concrete, quantitative applications of the factors in Section 3553(a) to various categories of federal offenses and federal offenders" and will "generally" select a reasonable sentence.<sup>31</sup> Moreover, the government claimed that no other measure can provide an appropriate benchmark for proportionality review; the other Section 3553(a) factors are "too qualitative and general to function as the exclusive benchmark for comparing sentences or identifying disparate applications of the factors."<sup>32</sup>

Even though proportionality review will limit the extent of variances from the guidelines range, the government argued that a proportionality test does not violate the Sixth Amendment because it does not require the judge to increase a sentence beyond a specified level based on judge-made findings.<sup>33</sup> After all, the government contended, "[a]s long as the judge provides a sufficiently persuasive justification, the judge may sentence all the way to the statutory maximum in the United States Code."<sup>34</sup> In truth, the government claimed, there is no requirement of "extraordinary circumstances" and there is no limit on "the universe of facts that can justify an out-of-Guidelines sentence."<sup>35</sup>

On the facts presented in *Claiborne's* case, the government argued that the sentence "violat[ed] the proportionality principle, and [was] unreasonable, because the district court varied substantially from the advisory Guidelines range without providing a substantial justifi-

cation."<sup>36</sup> The government contended that none of the five factors relied on by the district court supported its downward variance from the guidelines.<sup>37</sup>

## B. *Rita v. United States*

In *Rita*, the Supreme Court will review an unpublished Fourth Circuit decision in which the defendant was convicted of perjury, obstruction of justice, and false statements and sentenced to 33 months' imprisonment, within the applicable guidelines range.<sup>38</sup> Before the district court, *Rita* advanced several arguments in support of a shorter sentence, pointing to his 24 years of highly decorated service in the Marine Corps, his age (57) and ill health, and his belief that his prior work as an immigration asylum officer made him a target in prison for abuse from inmates who were convicted on the basis of his testimony in criminal and immigration matters.<sup>39</sup> The Fourth Circuit affirmed the 33-month sentence, but (like the district court) it never addressed the merits of *Rita's* specific sentencing arguments, stating only that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable."<sup>40</sup>

The Supreme Court granted certiorari on three questions. First, the court asked whether the sentence imposed was reasonable. Second, the court asked whether a presumption that a guidelines sentence was reasonable was consistent with *Booker*. Finally, the court asked if such a presumption can justify the imposition of a sentence without any explicit analysis by the district court of the factors that might arguably justify a lesser sentence.<sup>41</sup>

### 1. *Rita's* Brief

In his brief to the Supreme Court, *Rita* argued that his sentence was unreasonable and that the Fourth Circuit improperly relied on a presumption of reasonableness in reaching its decision. *Rita* argued that "a presumption of reasonableness, when applied to the review of sentences on appeal, simply resurrects the system rejected in *Booker*" because even though the presumption can be overcome, it signals to district courts that within-the-range sentences are more likely to be affirmed than nonguidelines sentences.<sup>42</sup> *Rita* claimed that this limitation on discretion means that sentences will again be determined largely on the basis of the judge-made factual findings that inform guidelines calculations.<sup>43</sup> *Rita* pointed out that courts have reversed only a single sentence out of the 1,152 cases in which defendants have appealed sentences that were within the applicable guidelines range, while the government prevailed in 85 percent of its appeals of below-guidelines sentences, leading to the conclusion that a within-guidelines sentence is 13 times more likely to be

<sup>25</sup> *Id.* at 36-39.

<sup>26</sup> Brief for Respondent at 8, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 9 (quoting *Booker*, 543 U.S. at 263).

<sup>29</sup> *Id.* at 13-19.

<sup>30</sup> *Id.* at 9, 21-25.

<sup>31</sup> *Id.* at 22.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 35-36.

<sup>35</sup> *Id.* at 37-39.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 42-47.

<sup>38</sup> *United States v. Rita*, 177 Fed. Appx. 357, 358 (4th Cir. 2006) (per curiam).

<sup>39</sup> Petition for Writ of Certiorari, *United States v. Rita*, No. 06-5754 (July 28, 2006), at 13, 15-17.

<sup>40</sup> *Rita*, 177 Fed. Appx. at 358 (quotations and citations omitted; ellipsis in original).

<sup>41</sup> *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006).

<sup>42</sup> Brief for Petitioner at 7, *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006).

<sup>43</sup> *Id.* at 28-31.

affirmed on appeal than one that is outside the recommended range.<sup>44</sup> These statistics show that following the guidelines is “the path of least resistance” for district courts, he argued.<sup>45</sup>

According to Rita, courts should instead be urged to look carefully at each of the Section 3553(a) factors and not treat the guidelines as a substitute for the individualized determination required by Section 3553(a).<sup>46</sup> Rita also placed great reliance on the so-called “parsimony” clause, which directs the sentencing court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [Section 3553(a)(2)],” which are, broadly speaking, punishment, deterrence, incapacitation, and rehabilitation.<sup>47</sup> It is no longer necessary, Rita claimed, for courts “to give presumptive or controlling weight to the Guidelines,” which often over-punish specific offenses and offenders; judges are now free to impose the sentence that best advances the purposes of sentencing.<sup>48</sup>

For Rita, the admonition to consider all the purposes of sentencing, including those not accounted for in the guidelines, was particularly significant given his personal circumstances. Rita had some 25 years’ military service, including tours of duty in Vietnam and in the initial Gulf War, for which he received more than 35 awards and medals.<sup>49</sup> In addition to his military service, he worked for the Immigration and Naturalization Service for many years. Rita also is now 59 years old and suffering from several physical ailments, including some resulting from his exposure to Agent Orange.<sup>50</sup> Rita contended that the district court’s implicit view—that the guidelines overcame these other factors—was based on the district court’s failure to understand and exercise its broad post-*Booker* discretion.<sup>51</sup>

Rita also argued that a district court must provide a statement of reasons at every sentencing that shows that it has reviewed all of the Section 3553(a) factors.<sup>52</sup> Rita contended that it was error for the district court here to have stated only that “[t]he Court is unable to find that the sentencing guideline range . . . is an inappropriate guideline range for that, and under [Section] 3553, certainly the public needs to be protected if it is true.”<sup>53</sup> Rita stated that the district court never resolved certain evidentiary issues, or discussed Rita’s health and military service, or explained how the sentence imposed addressed the goals of sentencing.<sup>54</sup> To Rita, such a rote application of the presumption of reasonableness is not supported by *Booker* or by Section 3553(a).<sup>55</sup>

## 2. The Government’s Brief

In its brief, the government defended the presumption of reasonableness, which has been recognized by

seven courts of appeals.<sup>56</sup> It argued that a guidelines sentence will ordinarily be a fair application of Section 3553(a) because the guidelines integrate the congressional sentencing objectives behind Section 3553(a) and because the guidelines are based on the considered judgment of the Sentencing Commission and the experiences of sentencing judges.<sup>57</sup>

Also, it said, a presumption of reasonableness will help lead to greater national uniformity in sentencing and thereby avoid unwarranted sentencing disparities.<sup>58</sup> The government rejected the notion that the parsimony clause was an “admonition to be lenient.”<sup>59</sup> Rather, it is a requirement that sentences neither be excessively long or insufficient to achieve the goals of sentencing, the government argued.<sup>60</sup>

The government also argued that the presumption of reasonableness did not make the guidelines effectively mandatory, in violation of *Booker*, as there is no presumption that a sentence outside the guidelines range is unreasonable.<sup>61</sup> The government also pointed out that a reason for the higher reversal rate on government appeals is that the government appeals very few sentences, less than 2 percent of all below-guidelines sentences, whereas defendants routinely appeal guidelines-range sentences.<sup>62</sup> The government commented on the sentencing data advanced by Rita and amici and concluded that the presumption of reasonableness has had no effect on the level of departures.<sup>63</sup>

The government contended that there is no statutory requirement that a court provide a detailed justification for every sentence imposed or to address every argument raised by a party, but that an appellate court should instead presume that the sentencing court exercised its discretion after considering all relevant factors.<sup>64</sup> Finally, the government argued that nothing about Rita’s sentence was unreasonable: He committed a serious crime, had committed a similar crime in the past, committed the current crime while employed as a federal employee, and expressed no remorse at sentencing.<sup>65</sup>

## C. The Amicus Briefs

Multiple amicus briefs have been filed in *Claiborne* and *Rita*. Two amicus briefs supported affirmance. One was filed on behalf of Sens. Edward Kennedy (D-Mass.), Orrin Hatch (R-Utah), and Dianne Feinstein (D-Calif.). The authors described the pre-guidelines sentencing system as “arbitrary, inconsistent and unfair” and explained that the bipartisan Sentencing Reform Act of 1984 (including the mandatory guidelines) was meant to channel judicial discretion in order to promote

<sup>44</sup> *Id.* at 30-31.

<sup>45</sup> *Id.* at 34 (quoting Michael W. McConnell, *The Booker Mess*, 83 *Denv. U. L. Rev.* 665, 682 (2006)).

<sup>46</sup> *Id.* at 9-10.

<sup>47</sup> *Id.* at 15-17.

<sup>48</sup> *Id.* at 18.

<sup>49</sup> *Id.* at 18.

<sup>50</sup> *Id.* at 18-19.

<sup>51</sup> *Id.* at 21-23.

<sup>52</sup> *Id.* at 7, 43-48.

<sup>53</sup> *Id.* at 48 (quoting district court at sentencing proceeding).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Brief for Respondent at 9, 11-12, *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006).

<sup>57</sup> *Id.* at 10, 15-24.

<sup>58</sup> *Id.* at 9, 24-26, 30-32.

<sup>59</sup> *Id.* at 27 (quoting *United States v. Navedo-Concepcion*, 450 F.3d 54, 58 (1st Cir. 2006)).

<sup>60</sup> *Id.* at 27-28.

<sup>61</sup> *Id.* at 9-10, 34-39.

<sup>62</sup> *Id.* at 36-37.

<sup>63</sup> *Id.* at 38. Rather, the circuits with higher departure rates pre-*Booker* have continued to have higher rates of nonguidelines sentences and have also declined to recognize a presumption of reasonableness.

<sup>64</sup> *Id.* at 10, 39-44.

<sup>65</sup> *Id.* at 10-11, 44-50.

uniformity and fairness in sentencing.<sup>66</sup> The legislators argued that after *Booker*, congressional intent can best be advanced through a system that requires consultation of the guidelines, deference to the Sentencing Commission, a statement of reasons at sentencing, and reasonableness review on appeal.<sup>67</sup> In short, they asked the court to rule “with the purpose of establishing a national law on sentencing: a body of principled rules, developed through the reasoned judgment of judges across the nation subject to appellate review, that promote fairness, transparency, and consistency.”<sup>68</sup> While they did not reject the notion that Claiborne could receive a nonguidelines sentence, they argued that the district court did not provide adequate support for its sentence.

The Sentencing Commission also submitted a brief in support of the government. Not surprisingly, the agency that promulgated the Sentencing Guidelines supports the presumption of reasonableness for guidelines sentences. The commission contended that it “has amassed a considerable expertise, informed by data collected from hundreds of thousands of past sentencing decisions and extended, rigorous debate between all sectors of the criminal justice system.”<sup>69</sup> The commission also defended the guidelines as an integration and a balancing of the multiple factors set out in Section 3553(a).<sup>70</sup>

Many organizations submitted amicus briefs in support of Claiborne and/or Rita. The Federal Public and Community Defenders, who represent indigent defendants in federal criminal proceedings, accused the Sentencing Commission and the Department of Justice of resisting *Booker*, the former by arguing that the guidelines are still entitled to controlling weight at sentencing and not changing the guidelines to respond to *Booker*, and the latter by seeking guidelines sentences in all or virtually all cases.<sup>71</sup> They also argued that the appellate standards of review have led to the creation of barriers to the imposition of below-guidelines sentences.<sup>72</sup> Finally, they argued that the guidelines-range calculations are themselves unworthy of a presumption of reasonableness because they are based on judge-made findings made by a preponderance of the evidence, acquitted conduct, hearsay evidence, and the testimony of cooperating witnesses.<sup>73</sup>

The National Association of Criminal Defense Lawyers also supported Claiborne and Rita. NACDL identified a host of factors that are not typically incorporated in guidelines analysis and therefore that make it inappropriate for the court to recognize a presumption of reasonableness. Many of these factors are present in

cases involving nonviolent offenses, such as white collar crimes. These factors include family obligations and ties, the influence of addiction, community good works, military service, and duress relating to personal financial hardship.<sup>74</sup> At the same time, NACDL contends that the guidelines’ inordinate concern with arithmetic measures of crime (like loss amount, which drives the sentence in fraud cases) make the guidelines unfair.<sup>75</sup> Moreover, NACDL argued that the guidelines have not been amended to respond to new data or developments in the common law of sentencing but instead have been amended largely to increase sentences.<sup>76</sup> Commentators have made precisely this final observation in the context of sentencing those who have committed large-scale frauds at public companies.<sup>77</sup>

The New York Council of Defense Lawyers submitted separate briefs in both *Rita* and *Claiborne*. Central to the NYCDL brief was an extensive statistical survey conducted by NYCDL of *Booker* appellate decisions from Jan. 1, 2006, through Nov. 16, 2006. The survey indicates that “the circuits are regularly reversing nearly every below-guidelines sentence appealed by the government, even when the district court’s judgment reflects thoughtful consideration of the facts and law.”<sup>78</sup> According to NYCDL, the courts of appeals have reversed 60 of the 71 below-guidelines sentences appealed by the government, which “suggest[s] a general resistance to and intolerance of any district court judgment to impose a sentence below the guidelines.”<sup>79</sup> By comparison, the courts of appeals have reversed only seven of the 154 above-guidelines sentences appealed by defendants.<sup>80</sup> NYCDL also pointed to statements by the Sentencing Commission that show how in certain areas—such as sentencing of first-time offenders and sentencing of crack-cocaine offenders—the commission itself believes that the guidelines overstate the appropriate criminal penalties.<sup>81</sup> NYCDL examined its statistical evidence to show that the presumption of reasonableness for the guidelines has resulted in a situation where the courts of appeals have universally affirmed within-guidelines sentences, reversing only one such sentence out of the 1,152 sentencing appeals.<sup>82</sup>

### III. *Cunningham v. California*: Court Suggests *Booker* Remedy May Be Re-examined

After the Supreme Court granted certiorari in *Rita* and *Claiborne*, but before it heard oral argument in those cases, the Supreme Court decided *Cunningham v.*

<sup>66</sup> Brief for Amici Curiae Sens. Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein at 5-10, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006).

<sup>67</sup> *Id.* at 19-25.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> Brief for Amicus Curiae U.S. Sentencing Commission at 5-6, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006), and *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006).

<sup>70</sup> *Id.* at 6, 24-25.

<sup>71</sup> Brief for Amicus Curiae Federal Public and Community Defenders and the National Association of Federal Defenders at 3-12, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006), and *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006).

<sup>72</sup> *Id.* at 12-22.

<sup>73</sup> *Id.* at 22-28.

<sup>74</sup> Brief for Amicus Curiae National Association of Criminal Defense Lawyers at 15-18, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006), and *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006).

<sup>75</sup> *Id.* at 18-20.

<sup>76</sup> *Id.* at 22-28.

<sup>77</sup> See, e.g., Frank Bowman, Economic Crimes: Model Sentencing Guidelines § 2B1, FEDERAL SENT’G REP. 330, 334 (2006).

<sup>78</sup> Brief for Amicus Curiae New York Council of Defense Lawyers at 3, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006).

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> *Id.* at 8-11.

<sup>82</sup> *Id.* at 3.

California,<sup>83</sup> in which it gave a strong signal that it did not approve of the manner in which the federal appellate courts were implementing “reasonableness” review of the advisory guidelines. The *Cunningham* opinion was particularly striking because it was authored by Ginsburg, the only justice to join both parts of the *Booker* opinion.

The petitioner in *Cunningham* argued that California’s state sentencing scheme violated the Sixth Amendment because—like the statutes in *Apprendi*, *Blakely*, and *Booker*—it raised the defendant’s maximum allowable sentence on the basis of facts found by the judge but not proved to the jury beyond a reasonable doubt. Under California’s sentencing scheme, the penal statutes define three possible sentences for various offenses, which are referred to as a “lower term,” a “middle term,” or an “upper term.”<sup>84</sup> The statutes direct the judge to sentence the defendant to the “middle term” of punishment unless aggravating factors justify raising the sentence to the “upper term” or mitigating factors justify reducing the sentence to the “lower term.” The California Supreme Court had concluded that this sentencing scheme did not violate the Sixth Amendment because in “operation and effect” the statute “simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range.”<sup>85</sup>

Ginsburg’s opinion emphatically rejected the approach of the California Supreme Court. The Supreme Court flatly stated that the *Apprendi* decisions “leave no room” for an examination of whether the sentencing system significantly implicates “the concerns underlying the Sixth Amendment’s jury-trial guarantee.”<sup>86</sup> In other words, courts could not avoid *Apprendi*’s rule by looking to whether a sentencing system with judicial factfinding upholds the underlying principles of the Sixth Amendment. Instead, the court stated that “[a]sking whether a defendant’s basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*’s ‘bright-line rule’ was designed to exclude.”<sup>87</sup>

The court’s emphatic reiteration of *Apprendi*’s bright-line rule was striking. But the most explosive portions of Ginsburg’s opinion were the footnotes, in which she rejected Alito’s arguments that California’s system should be upheld because it was identical to the one approved by the remedial portion of *Booker*. According to Alito’s dissent, *Booker* “approved a sentencing system that (1) requires a sentencing judge to ‘consult’ and ‘take into account’ legislatively defined sentencing factors and guidelines; (2) subjects a sentencing judge’s exercise of sentencing discretion to appellate review for ‘reasonableness’; and (3) requires sentencing judges to make factual findings in order to support the exercise of this discretion.”<sup>88</sup> Alito noted that “[e]very Court of

Appeals to address the issue has held that a district court sentencing post-*Booker* may rely on facts found by the judge by a preponderance of the evidence.”<sup>89</sup> Because of these similarities, Alito argued that the California sentencing system must be upheld “[u]nless the Court is prepared to overrule the remedial decision in *Booker*.”<sup>90</sup>

Ginsburg’s response left the impression that overruling the *Booker* remedial opinion may, indeed, be a possibility in the future. The *Cunningham* majority explained that “reasonableness review” is not a substitute for *Apprendi*’s rule that all facts raising the maximum sentence must be proved to a jury beyond a reasonable doubt: “*Booker*’s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless.”<sup>91</sup> In pointed terms, Ginsburg stated that Alito’s formulation “reads the remedial portion of the court’s opinion to render academic the entire first part of *Booker* itself.”<sup>92</sup> She then stated that “[t]here would have been no majority in *Booker* for the revision of *Blakely* essayed in his dissent.”<sup>93</sup> Without resolving how “reasonableness review” should operate under *Booker*, Ginsburg noted that the issue “will be aired later this term in *Rita* and *Claiborne*.”<sup>94</sup> *Cunningham* thus signaled that Ginsburg might be uneasy with the way lower courts have applied the *Booker* remedial opinion and hinted that she might use *Rita* and *Claiborne* to change course.

At least three other aspects of *Cunningham* stood out as new developments. First, the case provided the first opportunity for Roberts and Alito to weigh in on the *Apprendi* line of cases. Those cases have been decided by an unusual coalition of justices. The majority, consisting of Justices John Paul Stevens, Antonin Scalia, Clarence Thomas, David H. Souter, and Ginsburg, represents an alliance between justices considered to be the most liberal and the most conservative ones on the court. In dissent have been former Chief Justice William H. Rehnquist, former Justice Sandra Day O’Connor and Justices Stephen G. Breyer and Anthony M. Kennedy, who have been viewed as more pragmatic decisionmakers. In *Cunningham*, Alito (a former U.S. Attorney in New Jersey) joined Breyer and Kennedy as an *Apprendi* dissenter. In contrast, Roberts (a former clerk to Rehnquist) signed on to the majority opinion that reaffirmed *Apprendi*’s bright-line rule.

Second, the *Cunningham* majority rejected a proposal by Kennedy that might have modified the impact of *Apprendi*’s rule. In his dissent, Kennedy suggested that “[t]he Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not.”<sup>95</sup> Other commentators have proposed a similar approach.<sup>96</sup> The *Cunningham* majority, however, flatly ruled out any distinction between enhancements based on the offender and en-

<sup>83</sup> U.S. \_\_\_, 127 S. Ct. 856 (2007).

<sup>84</sup> *Id.* at 861-62 (describing California’s Determinate Sentencing Law).

<sup>85</sup> *People v. Black*, 35 Cal. 4th 1238, 1254, 111 P.3d 534, 543 (2005).

<sup>86</sup> *Cunningham*, 127 S. Ct. at 858.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 876 (Alito, J., dissenting).

<sup>89</sup> *Id.* at 875 n.4 (Alito, J., dissenting).

<sup>90</sup> *Id.* at 881 (Alito, J., dissenting).

<sup>91</sup> *Id.* at 870 (footnote omitted).

<sup>92</sup> *Id.* at 870 n.15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 872 (Kennedy, J., dissenting).

<sup>96</sup> See Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 55-57 (2006).

hancements based on the nature of the offense. According to the majority, “*Apprendi* itself . . . leaves no room for the bifurcated approach Justice Kennedy proposes” because it declares in categorical terms that, other than the fact of a prior conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>97</sup>

Finally, although *Cunningham* reaffirmed *Apprendi* in emphatic terms, parts of the opinion hinted that the Sixth Amendment problem might be avoided if judges’ sentencing decisions did not hinge on findings of fact. Alito argued in dissent that California’s system should not trigger *Apprendi* because California does not restrict which factors a judge may rely on to impose an aggravated sentence. Alito argued that a judge could rely on his own policy considerations or his subjective belief and that “[p]olicy considerations like these have always been outside the province of the jury and do not implicate the Sixth Amendment concerns expressed in *Apprendi*.”<sup>98</sup> In response, the majority rejected Alito’s characterization of California law. The majority pointed out that California’s sentencing statute repeatedly refers to facts that must be found by a preponderance of the evidence and noted that even California’s counsel at oral argument “acknowledged that he knew of no case in which a California trial judge had gone beyond the middle term based not on any fact the judge found, but solely on the basis of a policy judgment or subjective belief.”<sup>99</sup> The majority opinion thus rejected the dissent’s characterization of California law, but it did not rule out the possibility that if an advisory guidelines system did not involve findings of fact, then it might not trigger *Apprendi*.

#### IV. The Oral Arguments in *Rita* and *Claiborne*: Court Grapples With Balance Between Uniformity in Sentencing and Requirements of Sixth Amendment

On Feb. 20, 2007, the court heard two hours of oral argument in *Rita* and *Claiborne*. In general, nearly all the justices seemed to struggle with how to administer an advisory guidelines system that would be consistent with the Sixth Amendment but still prevent unwarranted disparities in judges’ sentencing decisions. The petitioner in *Rita* argued that ascribing a presumption of reasonableness to the guidelines would lead the district courts to give them an undue weight. He said the guidelines have a gravitational pull that is hard for district court judges to escape. At one point, Kennedy seemed frustrated that almost any reference to the guidelines provoked similar resistance from counsel: “So benchmarks are bad. Presumption is bad. Great weight, that’s bad?” Kennedy asked.<sup>100</sup> “That’s bad, too,” answered *Rita*’s counsel.<sup>101</sup>

The government, for its part, spent some time clarifying the concept of a presumption of reasonableness.

Deputy Solicitor General Michael Dreeben said that the “presumption of reasonableness” for sentences within the guidelines range should apply only to appellate courts that review the sentence, not to the district courts that make the initial sentencing decision. Dreeben told the court that “[o]nce the district judge has determined that the Guidelines sentence aligns with his own application of the Section 3553(a) factors, our submission here is that a court of appeals can generally presume that that is a reasonable sentence. The defendant of course has the opportunity, or the Government if the Government has appealed, to show that that presumption is overcome.”<sup>102</sup> Dreeben argued that this presumption should not have any binding effect on the district court: “The district judge does not operate and does not have to operate under the position that we’re arguing for with a presumption that the judge will impose a guidelines sentence unless persuaded otherwise.”<sup>103</sup> In response, Scalia quickly interjected: “He doesn’t have to do it unless he wants to be sure of being affirmed.”<sup>104</sup>

Other justices, however, indicated that this sort of chilling effect on district courts’ discretion could be valuable. Roberts repeatedly voiced concern that it would be inequitable for the courts of appeals to affirm diametrically opposed sentencing rationales for different defendants. He asked what the law should be when two criminal defendants “with the same identical background and everything else, one judge says, I think military service should be taken into account, so I’m going to depart from the guidelines by 3 years. The judge next door says, I don’t think it should be taken into account so I’m going to impose the guideline sentence. Both cases are appealed. They’re consolidated for argument. What is the court of appeals supposed to do? Uphold both of them?”<sup>105</sup>

Scalia later responded to Roberts’s hypothetical by pointing out that *Apprendi* does not prohibit appellate courts from requiring that similar defendants be treated similarly. It only prevents judges from determining whether defendants are similar or different on the basis of facts not proved to a jury: “[U]se the facts found by the jury and you can have the sentences as rigid as you like,” he said.<sup>106</sup> “It is really only . . . when you want to let the facts be found by the judge that you come into the difficulty that . . . we’re arguing about.”<sup>107</sup>

In contrast, during the *Claiborne* arguments, Ginsburg seemed more comfortable with the notion that “two judges, both reasonable, might approach the facts in this case very differently.”<sup>108</sup> She contrasted the district judge’s conclusion that the defendant was a first-time offender who sold a small amount of cocaine with the court of appeals’ conclusion that it would be unrealistic to assume that the defendant had not sold cocaine for weeks before getting caught. Ginsburg said that “those could be reasonable determinations, two different reactions that judges would have to the same set of

<sup>97</sup> *Cunningham*, 127 S. Ct. at 869 n.14 (quoting *Apprendi*, 530 U.S. at 490 (emphasis in *Cunningham*)).

<sup>98</sup> *Id.* at 879 (Alito, J., dissenting).

<sup>99</sup> *Id.* at 863.

<sup>100</sup> Transcript of Proceedings, Feb. 20, 2007, at 16, *Rita v. United States*, No. 06-0574, 2006 WL 2307774 (U.S. Nov. 3, 2006) (“*Rita* Tr.”).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 28.

<sup>103</sup> *Id.* at 29.

<sup>104</sup> *Id.*

<sup>105</sup> *Rita* Tr. 30-31.

<sup>106</sup> Transcript of Proceedings, Feb. 20, 2007, at 19, *Claiborne v. United States*, No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006) (“*Claiborne* Tr.”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 18-19.

facts.”<sup>109</sup> At another point in the argument, Ginsburg—who was the swing vote in *Booker*—voiced considerable sympathy with the sentencing judge’s decision in *Claiborne*. Ginsburg asked the government why it was unreasonable to try to calculate a sentence that would punish the defendant while ensuring he would not be, in effect, “thrown away.” Ginsburg said that the sentencing judge in *Claiborne* “tried to make a sentence that would be significant, 15 months, but that would not be so long that it would put him out of touch with his children and his wife and his work. . . . [B]y some measures that would be entirely reasonable. But on your measure, it isn’t reasonable.”<sup>110</sup>

Indeed, Scalia and Breyer both expressed concern about how the basic concept of appellate review could ever be reconciled with truly advisory guidelines. The *Cunningham* opinion had seemed to leave open the possibility that no Sixth Amendment problem would arise if a sentencing judge did not have to base his or her sentence on specific findings of fact. But Scalia argued that findings of fact will inevitably play a key role in the appellate review process. For example, the court of appeals might affirm a district court’s decision to give one defendant a lenient sentence because he possessed only 5.26 grams of cocaine, but then, in a subsequent case, hold that it would be unreasonable to give a lenient sentence to a defendant who possessed 30 grams of cocaine. “Now you have circuit law which says 30 grams, you get the guidelines sentence; 5.26 grams, you’re entitled to a lesser sentence,” said Scalia.<sup>111</sup> “It’s a judge who decides whether it’s 30 grams or 5.26 grams. What difference does it make whether that factual difference produces an entitlement to a sentence on the basis of the guidelines or on the basis of an opinion by or a series of opinion[s] by the court of appeals?” he asked. “Isn’t the Sixth Amendment equally violated?”<sup>112</sup>

Breyer also saw little distinction between sentencing guidelines and normal court of appeals precedent. But for Breyer—who has been one of the leading dissenters in the *Apprendi* line of cases—the similarities between appellate review and sentencing guidelines only reinforced his criticisms of the *Apprendi* rule. Breyer said that courts are supposed to use precedent to decide similar cases in a similar way: “What you do is you decide a case and you decide this is unfair, and then the thing that [you do] as a similar case comes along, is you decide it the same way. And if a district judge doesn’t follow that, you reverse it.”<sup>113</sup> Breyer said that, if *Apprendi* prevents the courts of appeals from applying precedent in this way, then it prevents the courts from ensuring that defendants are treated in a fair and evenhanded fashion. “[I]n other words, the Constitution of the United States prevents the courts themselves from trying to assure that . . . individuals who are in similar positions, commit similar crimes, will be treated in similar ways,” he said.<sup>114</sup>

One of the more surprising aspects of the oral argument was the extent to which many of the justices appeared to agree that under an advisory guidelines sys-

tem, a sentencing judge could simply disagree with the underlying policy behind a particular sentencing guideline. Some lower courts have, in contrast, indicated that even under the advisory guidelines, a sentencing judge may not lightly disregard the “policy judgments of the Sentencing Commission.”<sup>115</sup> But there seemed to be little support in the Supreme Court for requiring district courts to abide by the “policy determinations” of the Sentencing Commission. Scalia noted, for example, that a sentencing judge could disagree with the Sentencing Commission’s judgment that a white collar crime is “something that should justify incarceration.”<sup>116</sup> Breyer—one of the strongest supporters of the Sentencing Guidelines—stated several times during oral argument that a district court might be able to determine that a guideline itself is unreasonable. The government’s lawyer also conceded that *Apprendi* requires that a judge be able to disregard certain policy choices of the guidelines by, for example, disagreeing with the Sentencing Commission’s determination that a defendant’s military service is not ordinarily relevant to his or her punishment.<sup>117</sup>

Even Breyer, who helped draft the initial Sentencing Guidelines and who has been one of the strongest critics of *Apprendi*, expressed some disagreement with the approach of the courts of appeals. The government argued for a “proportionality” review adopted by many of the courts of appeals in which the sentencing judge must give stronger reasons for a sentence the further the sentence deviates from the guidelines range. But Breyer said, “I’m not certain what it means. That is, it sounds nice, as if you’re saying something, but proportional to what?”<sup>118</sup> For one thing, Breyer pointed out that the sentencing table itself is not proportional. When a defendant is at the low end of the sentencing table, a jump from one guidelines range to another represents a difference of only a few months. But at the upper levels, the difference between one guidelines range and the next one can equal several years. Even aside from this mathematical problem, Breyer asked why the amount of the deviation from the guidelines should play such an important role: “[W]hy should a bad reason justify a little departure [more] than a lot? And if he has a good reason, well, why doesn’t it justify a lot just as much as it might justify a little?”<sup>119</sup>

In many respects, the justices’ views during oral arguments seemed to break into familiar patterns. Scalia,

<sup>115</sup> See *United States v. Rattoballi*, 452 F.3d 127, 135 (2d Cir. 2006) (rejecting nonincarcerative sentence outside guidelines range for defendant convicted of antitrust criminal offense and ruling that “[t]he Guidelines reflect a considered determination by the Commission that jail terms are the most effective deterrent for antitrust violations”); see also *United States v. Castillo*, 460 F.3d 337, 359 (2d Cir. 2006) (rejecting district court’s decision to sentence crack cocaine offender on basis of different crack-to-power cocaine ratio than directed by Congress and observing that “if we uphold the practice of district courts’ applying different ratios here, would that not provide a rationale, contrary to Congress’s intent, for courts to revise other parts of the Guidelines with which they disagree? . . . [A] court might take issue with the loss amount table for economic crimes and adjust the relevant ranges. See U.S.S.G. § 2B1.1”).

<sup>116</sup> Rita Tr. 47.

<sup>117</sup> *Id.* at 35.

<sup>118</sup> *Claiborne* Tr. 34.

<sup>119</sup> *Id.* at 36.

<sup>109</sup> *Id.* at 19.

<sup>110</sup> *Id.* at 36-37.

<sup>111</sup> *Claiborne* Tr. 26-27.

<sup>112</sup> *Id.* at 27.

<sup>113</sup> Rita Tr. 40.

<sup>114</sup> *Id.* at 41.

Stevens, and Souter, who have been consistent supporters of *Apprendi*, all voiced skepticism about the government's position. In contrast, Breyer, Kennedy, and Alito, who have dissented from the *Apprendi* line of cases, expressed concern that without appellate review for reasonableness, courts could not ensure a basic amount of fairness and consistency in sentencing. Although Roberts had joined Ginsburg's opinion in *Cunningham*, his questions during oral argument seemed to indicate that he shared the *Apprendi* dissenters' concerns about uniformity.

On a more fundamental level, the arguments seemed to indicate that none of the justices is particularly happy with the post-*Booker* approach. Many of the justices who articulated the *Apprendi* rule disagreed with the whole premise of reasonableness review. At the same time, many of the justices who crafted the *Booker* remedy indicated that they continue to think that the *Apprendi* line of cases was wrongly decided. It remains to be seen whether the court will adhere to the uneasy compromise of *Booker* and merely fine-tune the application of advisory guidelines or if they will abandon the effort and instead adopt a "bright-line" solution to match *Apprendi*'s "bright-line" rule.

## V. *Rita* and *Claiborne*: How Will They Affect White Collar Defendants?

Bearing in mind the usual difficulties in predicting Supreme Court decisions, the clues from the *Cunningham* decision and from the oral arguments in *Rita* and *Claiborne* seem to suggest that white collar defendants in federal courts will soon face sentencing before district judges with enhanced discretion at sentencing. It appears that a majority of the court is dissatisfied with the way in which *Booker* has been implemented by the circuit courts of appeals. There are two ways in which this dissatisfaction might manifest itself in the final decision, both of which would figure to be more favorable to white collar defendants than the current regime.

First, it is at least theoretically possible that the five-vote remedial majority in *Booker* will lose one vote (either Ginsburg or Roberts, who sits in place of the late Chief Justice Rehnquist). This would give the remedial dissenters the opportunity (assuming they did not feel too encumbered by *stare decisis*) to revert to a mandatory guidelines regime, but one in which all necessary factual findings are made by a jury, beyond a reasonable doubt. In white collar cases, the defendants would have the right to present to the jury their factual contentions about all sentencing enhancements, including loss amount and role in the offense. After a defendant is convicted, the jury would hear evidence at a sentencing phase that related to these other enhancements. In fraud cases, where so much of a defendant's sentence is driven by the loss amount, this would be a huge benefit to many defendants. (It would be somewhat less of a change in narcotics cases, where drug quantity is already typically submitted for a jury determination.) If the defendant were convicted of the offense but found responsible only for a small enhancement based on loss amount, the defendant would avoid serving significant jail time. Given that loss amount is often subject to varying interpretations, it seems likely that raising the government's burden of proof may lead to shorter sentences.

On the other hand, Breyer has long argued that mandatory guidelines with jury sentencing would centralize more power in the hands of prosecutors to dictate a defendant's sentence by manipulating the "loss" amount they choose to allege. None of the parties or amici has asked for this result, but Scalia did suggest at oral argument that such a resolution would render moot the question about "reasonableness" review. Given the closeness of the vote in *Booker*, it is not entirely implausible to think that the remedial opinion could be overruled.

The second, more likely possibility is that the court will greatly expand the scope of judicial discretion in order to permit the guidelines to co-exist with the Sixth Amendment, as it has been construed by *Apprendi*. There are several ways in which this could be accomplished. First, the court could reject both the presumption of reasonableness and the proportionality principle. This would free up district courts to feel less encumbered by the Sentencing Guidelines. The guidelines would be more truly advisory—available to advise the court but not to control its consideration of what sentence to impose. On appeal, the courts of appeals would subject all sentences to a single standard of review, giving no more deference to sentences that are within the guidelines range than to sentences that are outside (or even far outside) the guidelines range. If this led appellate courts to be more deferential to district courts generally (in order to minimize the time spent considering sentences), this would largely be a benefit to defendants, particularly to white collar defendants who (like *Rita*) can identify sympathetic personal facts that support a shorter sentence. A more deferential standard of review could lead to increased national disparities, but it would also create opportunities for talented defense attorneys to engage in more meaningful sentencing advocacy. (At the same time, it should be noted that talented prosecutors may have more opportunities to argue for heightened sentences as well.)

The court could also make clear that district courts did not need to give any particular deference to the policy choices embodied in the guidelines. As Scalia stated at oral argument, they would be free to reject the conclusions by Congress and the Sentencing Commission that are embodied in the guidelines. For white collar defendants, the much-criticized loss table would no longer be as central to sentencing, as courts could entirely reject it, as some judges have seemed to do even under the current regime.<sup>120</sup> One judge has written that the loss amount in a complicated fraud case is rarely the result of any specific intent by a defendant to steal a particular amount of money.<sup>121</sup> Judges who share that

<sup>120</sup> See *United States v. Adelson*, 441 F. Supp. 2d 506, 507, 512 (S.D.N.Y. 2006) (commenting on "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guidelines calculations can visit on human beings if not cabined by common sense").

<sup>121</sup> See *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) ("The Guidelines place undue weight on the amount of loss involved in the fraud . . . In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence. To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim's security procedures as on Emmenegger's cupidity. . . . Were less emphasis placed on the

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view will would be free to virtually disregard the loss table in their sentencing decisions. Also, the long list of discouraged grounds for a downward departure—

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overly-rigid loss table, the identification of different types of fraud or theft offenses of greater or lesser moral culpability or danger to society would perhaps assume greater significance in assessing the seriousness of different frauds.”).

including age, addiction, employment record, family ties, military service, civic and charitable good works—would no longer need to be given any heed. Judges could consider those factors as they saw fit.

Whatever the result is to be, we will likely know it soon: A decision in *Rita* and *Claiborne* is expected before the end of this term.