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SENTENCING

Supreme Court Approves Presumption of Reasonableness For Guidelines Sentences On Appeal But Warns District Judges Not to Hew Blindly to Sentencing Guidelines

BY HARRY SANDICK AND JOSHUA BLOCK

In earlier articles, we reviewed the briefing and the oral argument before the U.S. Supreme Court 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.¹ In this article, we review the Supreme Court's decision in *Rita* and explore its ramifications for white-collar criminal practitioners. *Rita* returns to the well-trod territory of the constitutional law of sentencing last explored in *Booker*.

In *Booker*, the Supreme Court held that the U.S. Sentencing Guidelines violated the Sixth Amendment because they required increases in defendants' maximum sentences based on facts that were found by a judge but were not admitted by the defendant or proved to a jury beyond a reasonable doubt (the so-called "merits" opinion). The court also held, in a second, "remedial" opinion, that the constitutional problem could be cured by making the guidelines advisory and by directing district courts instead to impose sentences based on the factors set forth in 18 U.S.C. § 3553(a). Sentences would be reviewed on appeal for "reasonableness."

Rita and *Claiborne* were meant to address two different, but related, questions left open by *Booker*. *Rita* asked whether it is constitutional, after *Booker*, for a court of appeals to presume that a sentence imposed within the applicable guidelines range is reasonable. *Claiborne*, in turn, asked whether it is consistent with *Booker* for a court of appeals to require that "extraordinary circumstances" exist for a sentence to vary substantially from the guidelines. As discussed below, the Supreme Court ruled in *Rita* that the circuit courts were

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¹ 543 U.S. 220 (2005).

permitted (although not required) to presume that a within-range sentence is reasonable. At the same time, the Supreme Court made it quite clear that district courts should not apply any such presumption at sentencing. Rather, judges are required, as *Booker* dictates, to consider all the factors in Section 3553(a) and are not permitted simply to impose a sentence within the applicable guidelines range. In other words, defense attorneys may now have an extremely hard time convincing an appellate court that a sentence within the properly calculated guidelines range is unreasonable. At the same time, defense attorneys are free to continue to urge district judges to impose lenient sentences based on facts not taken into account by the sentencing guidelines.

After *Rita*, there is still considerable uncertainty about the scope of a district court's authority at sentencing. This is partly because *Claiborne* was never decided: the petitioner, Mario Claiborne, died after briefing and argument but before the Supreme Court decided his case. As we explain, defense lawyers in white-collar cases should attempt to use this continuing uncertainty to their advantage by asking judges to reject the guidelines where they lead to unfairly harsh sentences, particularly in fraud cases. The only thing that is certain is that the Supreme Court will return to the constitutional law of sentencing again next term in two cases meant to explore further the post-*Booker* landscape.

The *Rita* Decision

The Majority Opinion

Justice Stephen G. Breyer, one of the original proponents and authors of the federal sentencing guidelines, wrote the court's majority opinion upholding the Fourth Circuit's decision that a properly determined guidelines sentence is presumptively reasonable.² Breyer was joined in his majority opinion by Chief Justice John G. Roberts Jr. and Justices John Paul Stevens, Anthony M. Kennedy, Ruth Bader Ginsburg, and Samuel A. Alito Jr. Stevens wrote a separate concurring opinion to explain more fully his reasoning; Ginsburg also joined in most of this concurrence. Justice Antonin Scalia wrote a separate opinion (in which Justice Clarence Thomas joined) that concurred in the judgment but disagreed with the court's reasoning. Justice David H. Souter dissented alone.

Although the court's decision upholds an appellate regime that gives significant deference to the guidelines, it also suggests that there may be more "play in the joints" of the system than district courts have thus far recognized. However, the decision also implicitly discourages district judges from testing the limits of the post-*Booker* system by giving a "safe harbor" on appeal to a judge who imposes a guidelines sentence. As will be seen, a sentence that is within the guidelines range will receive a less searching substantive examination on appeal, and it can probably be supported by a less detailed statement of reasons. In short, district judges who are interested in doing the work required to impose a nonguidelines sentence have the discretion to impose one, but the path of least resistance will be to impose a guidelines sentence.

² *Rita v. United States*, 127 S. Ct. 2456 (2007).

The Factual and Procedural Background

Breyer began the court's decision with a lengthy recitation of the facts that gave rise to Rita's convictions on charges of perjury, false statements, and obstruction of justice.³ These charges all arose out of Rita's false statements to a federal grand jury in the course of its investigation into a gun manufacturer.⁴ After Rita's conviction at trial, a probation officer prepared a presentence investigation report in advance of Rita's sentencing.⁵ On the basis of Rita's offense and his prior criminal history (he sustained one prior conviction for making false statements in connection with the purchase of firearms, but this conviction was too old to count toward his criminal history category), the presentence report determined that Rita faced a guidelines range of 33 to 41 months' imprisonment. The presentence report also reviewed Rita's personal background and circumstances, including his 25 years of highly decorated military service and his physical ailments.⁶

At sentencing, Rita advanced three reasons for a shorter sentence, which were either based on a downward departure from the guidelines or due to the operation of Section 3553(a).⁷ He first claimed that he was vulnerable to attack in prison on the basis of his prior employment in law enforcement. Second, he asserted that his military experience justified a shorter sentence. Finally, he argued that his physical condition also justified a shorter sentence than recommended by the sentencing guidelines. The government asked the district court to impose a sentence within the range of 33 to 41 months' imprisonment, stating that Rita, as a former employee in the criminal justice system, should have known better than to commit perjury before the grand jury.⁸

After hearing argument at sentencing, the district court imposed a sentence of 33 months' imprisonment, at the lowest end of the applicable guidelines range. The district judge did not make extensive findings, concluding that he was "unable to find that the [report's recommended] sentencing guidelines range . . . is an inappropriate guidelines range for that, and under § 3553 . . . the public needs to be protected if it is true, and I must accept as true the jury verdict."⁹ Accordingly, the district court found that a sentence of 33 months' imprisonment was "appropriate."¹⁰

Rita appealed his sentence, arguing that it was unreasonable for two principal reasons: first, because the district court did not give due consideration to his "history and characteristics;" and second, because the district court violated Section 3553(a) by imposing a sentence "greater than necessary to comply with the purposes of sentencing set forth in § 3553(a) (2)."¹¹

The Fourth Circuit affirmed, holding that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable" and explaining that while individual cases may arise in which a guidelines sentence is unreasonable, "we have no reason to

³ *Id.* at 2459-62.

⁴ *Id.* at 2459-60.

⁵ *Id.* at 2460.

⁶ *Id.* at 2460-61.

⁷ *Id.* at 2461-62.

⁸ *Id.*

⁹ *Id.* at 2462.

¹⁰ *Id.*

¹¹ *Id.*

doubt that most sentences will continue to fall within the applicable guidelines range.”¹²

The Supreme Court granted Rita’s petition for a writ of certiorari in order to resolve the question whether a circuit court is permitted to apply a “presumption of reasonableness” when reviewing a sentence imposed within the applicable guidelines range.¹³

The Court’s Reasoning

As noted, the Supreme Court ruled that the Fourth Circuit was entitled to “apply a presumption of reasonableness to a district court sentence that reflects a proper application of the sentencing guidelines.”¹⁴ Breyer offered several reasons in support of this conclusion. First, he stated that the presumption was not binding. It did not require, Breyer wrote, that one side “shoulder a particular burden of persuasion or proof lest they lose their case,” but only “reflects the fact that, by the time an appeals court is considering a within-guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.”¹⁵ In other words, “[t]hat double determination significantly increases the likelihood that the sentence is a reasonable one.”¹⁶

Second, Breyer stated that “the presumption reflects the nature of the guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task.”¹⁷ Breyer explained that the same sentencing objectives set forth in Section 3553(a) also instruct the Sentencing Commission in its crafting of the guidelines.¹⁸ “The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other, at wholesale.”¹⁹

In support of the court’s linkage between the sentencing guidelines and Section 3553(a), Breyer reviewed in some detail the work of the Sentencing Commission, which he stated has “made a serious, sometimes controversial, effort” to write a set of guidelines that embody the Section 3553(a) factors.²⁰ This effort has been difficult because it requires balancing the twin goals of uniformity (i.e., that similar conduct be punished similarly) and proportionality (i.e., that different conduct is punished differently).

Breyer, who was a participant in this process, explained that the philosophical differences over sentencing policy led the Sentencing Commission to take an “empirical” approach that looked at actual sentences in “tens of thousands” of cases, and it used these sen-

tences as a starting point in determining the guidelines.²¹

The court explained that the Sentencing Commission continues to modify the guidelines on the basis of sentences that are imposed by trial courts and reviewed by appellate courts and by considering the recommendations of “prosecutors, defense attorneys, law enforcement groups, civil liberties associations, experts in penology, and others.”²² As a result, the guidelines “seek to embody the § 3553(a) considerations, both in principle and in practice.”²³ Therefore, when a district court imposes a guidelines sentence, the court of appeals should be free to recognize “that when the judge’s discretionary decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.”²⁴

The court also provided some additional guidance on sentencing procedure after *Booker*. Although much of the court’s reasoning is already the law in most circuits in one form or another, the court’s analysis will no doubt be useful to resolve any lingering uncertainty.²⁵ First, the court made clear that the sentencing judge may not presume that the guidelines are necessarily the proper sentence to impose under Section 3553(a); the presumption is “an *appellate* court presumption. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”²⁶ Second, the court stated that the sentencing judge “will normally begin by considering the presentence report and its interpretation of the Guidelines.”²⁷ Then, the sentencing court will hear arguments about whether the guidelines sentence should apply, or whether the defendant is entitled to a downward departure under the guidelines, or a shorter sentence under Section 3553(a), “subjecting the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure.”²⁸

Next, the court specifically rejected two arguments made by Rita and his supporting amici curiae. First, the court rejected the argument that a presumption of reasonableness violates the Sixth Amendment because it would “increase the likelihood that courts of appeals will affirm such sentences, thereby increasing the likelihood that sentencing judges will impose such sentences.”²⁹ The court brushed aside this concern, holding that even if it increases this likelihood, there is no Sixth Amendment violation. It said, “A nonbinding ap-

²¹ *Id.* at 2464.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁴ *Id.* at 2465. The court stated that even those circuits in which there is no presumption of reasonableness still “recognize that a guidelines sentence will usually be reasonable, because it reflects both the Commission’s and the sentencing court’s judgment as to what is an appropriate sentence for a given offender.” (citing, *inter alia*, *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006)).

²⁵ See, e.g., *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (describing three-step process that district courts are to employ, which involves first determining the guidelines range, and then considering arguments for departure and for variance under Section 3553(a)).

²⁶ *Rita*, 127 S. Ct. at 2465 (emphasis in original).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

¹² *Id.*

¹³ *Id.* The Supreme Court observed in *Rita* that the circuits were divided over whether to apply a “presumption of reasonableness” to sentences imposed within the applicable guidelines range, noting that seven circuits had recognized the presumption, while four circuits had rejected the presumption; only the Ninth Circuit had not decided the issue in the approximately 30 months since the *Booker* decision.

¹⁴ *Id.*

¹⁵ *Id.* at 2463 (emphasis in original).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

pellate presumption that a guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the guidelines provide for the jury-determined facts standing alone.”³⁰ Moreover, the court explained that the circuit courts may not “presume that every variance from the advisory Guidelines is unreasonable.”³¹

The court also briefly commented that the presumption did not violate Section 3553(a), including its provision that the sentence imposed must be “sufficient, but not greater than necessary, to comply with the purposes” of sentencing set forth in that statute.³² The court explained that because the presumption only applies where both the district court and the sentencing judge have concluded that a particular sentence is appropriate, nothing in Section 3553(a) is violated by the presumption.

Next, the court addressed whether the sentencing judge complied with Section 3553(c) by giving a sufficient statement of reasons at sentencing.³³ The court took a middle-of-the-road approach on what the district court must state at sentencing. It is “sound judicial practice” for a judge to state his reasons because “[c]onfidence in a judge’s use of reason underlies the public’s trust in the judicial institution” and a statement of reasons “helps provide the public with the assurance that creates that trust.”³⁴ At the same time, Section 3553(c) does not “insist[] upon a full opinion in every case,” and how much explanation will be needed “depends upon circumstances.”³⁵ The court explained further:

In the present context, a statement of reasons is important. The sentence judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority. . . . Nonetheless, when a judge decides simply to apply the guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission’s own reasoning that the guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical.³⁶

While a guidelines sentence will often not require a detailed opinion, more explanation will be required where “nonfrivolous reasons” in support of a nonguidelines sentence are advanced.³⁷ More still is required for

³⁰ *Id.* at 2466 (emphasis in original).

³¹ *Id.* at 2467. Breyer commented that “a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance,” an approach that the Supreme Court will consider next term in *United States v. Gall*, No. 06-7949. The court had been prepared to address that issue in *United States v. Claiborne* until Claiborne was shot and killed during an apparent attempted robbery by him and another person.

³² *Rita* at 2467-68.

³³ *Id.* at 2468.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

a nonguidelines sentence; in such cases “the judge will explain why he has done so.”³⁸

Here, the Supreme Court found that the sentencing judge’s statement of reasons was “brief, but legally sufficient.”³⁹ The sentencing judge listened to the arguments of counsel and stated that the circumstances did not warrant a nonguidelines sentence. Breyer did add that the sentencing judge “might have said more,” for example, by stating “explicitly that he had heard and considered the evidence and argument” and that this sentence was appropriate for a perjury case of this type and that “Rita’s personal circumstances here were simply not different enough to warrant a different sentence.”⁴⁰ However, “Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.”⁴¹

Finally, returning to the facts of Rita’s case, the court found that the Fourth Circuit correctly concluded that Rita’s sentence was not unreasonable.⁴² The court described the facts of Rita’s case and concluded that “we simply cannot say that Rita’s special circumstances are special enough that, in light of § 3553(a), they require a sentence lower than the sentence the Guidelines provide.”⁴³ The court therefore affirmed.

The Concurring and Dissenting Opinions

But Breyer’s majority opinion may not be the last word. Even though a total of six justices formally joined Breyer’s opinion, all five justices who formed the initial majority opinion in *Apprendi v. New Jersey*⁴⁴ signed on to separate concurrences or dissents. None of these justices called outright for the *Booker* remedy to be overruled.⁴⁵ At the same time, however, they signaled that

³⁸ *Id.* at 2469. Breyer advanced another reason for articulation of reasons for imposition of sentence: that even a brief explanation helps assure appellate courts and the public that the judge exercised judgment and also helps inform the Sentencing Commission about the particular reasons for a given sentence.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2469-70.

⁴³ *Id.* at 2470.

⁴⁴ 530 U.S. 466 (2000). *Apprendi* was the first case in the line of decisions that led to *Booker* and continues with *Rita*.

⁴⁵ Souter came the closest when he noted that “it seems fair to ask just what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases.” *Rita*, 127 S. Ct. at 2488 (Souter, J., dissenting). But, while reiterating his disagreement with the *Booker* remedy, Souter indicated that it was up to Congress now to fix the court’s mistake: “*Booker*’s remedial holding means that only Congress can restore the scheme to what it had in mind, and in a way that gives full measure to the right to a jury trial.” *Id.* The other three justices who dissented from the *Booker* remedy all agreed that they would adhere to the decision as a matter of *stare decisis*. Stevens began his concurrence by noting that “[i]t is no secret that the Court’s remedial opinion in *United States v. Booker* was not unanimous. But *Booker* is now settled law and must be accepted as such.” *Id.* at 2470 (Stevens, J., concurring) (citations omitted). Similarly, Scalia (joined by Thomas) wrote that “[a]s a matter of statutory *stare decisis*, I accept *Booker*’s remedial holding that district courts are no longer bound by the Guidelines and that appellate courts should review the sentences imposed for reasonableness.” *Id.* at 2475 (Scalia, J., concurring).

they do not approve of the aggressiveness with which courts of appeals have applied “reasonableness” review to strike down sentences that fall outside the guidelines range.

Souter was the only justice who formally dissented from *Rita*. He argued that if within-guidelines sentences are given a presumption of reasonableness, then district courts will feel a “gravitational pull” to follow the guidelines in order to avoid being reversed. He argued that “[o]nly if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them.”⁴⁶ Although the other four justices in the *Apprendi* majority did not join Souter’s dissent, their concurring opinions indicated that, as a practical matter, they agreed that, in order for the sentencing guidelines to comply with the Sixth Amendment, district courts must remain free to give nonguidelines sentences without fearing reversal.

Scalia and Thomas proposed the most far-reaching solution. They argued that “reasonableness review cannot contain a substantive component at all.”⁴⁷ In their view, when courts of appeal review whether a sentence is substantively reasonable, they end up affirming or vacating sentences on the basis of the presence or absence of various facts about the defendant. Scalia and Thomas argued that this sort of appellate review functions as the effective equivalent of judge-created sentencing factors—and therefore violates *Apprendi*. They contended that, as a constitutional matter, “[i]t makes no difference whether it is a legislature, a Sentencing Commission or an appellate court that usurps the jury’s prerogative.”⁴⁸ Scalia and Thomas therefore concluded that “[t]he only way to assure district courts that they can deviate from the advisory Guidelines, and to ensure that judge-found facts are never legally essential to the sentence, is to prohibit appellate courts from reviewing the substantive sentencing choices made by district courts.”⁴⁹

Finally, Stevens and Ginsburg signed on to a separate concurrence that may well be the most influential opinion from *Rita*. Their concurrence endorsed the concept of a substantive review for reasonableness, but emphasized that courts of appeals should give a high level of deference to district judge’s sentencing choices regard-

less of whether the sentence falls inside or outside the guidelines range.

In arguing for deference to the sentencing court, Stevens and Ginsburg made two crucial points that could have far-reaching effects in future cases. **First**, the concurring opinion emphasized that post-*Booker* review for “reasonableness” should be applied with the same deference traditionally associated with an “abuse of discretion” test. Under this standard, “[w]hile reviewing courts may presume that a sentence within the advisory Guidelines is reasonable, appellate judges must still always defer to the sentencing judge’s individualized sentencing determination.”⁵⁰ **Second**, the concurrence argued that district court judges are required by Section 3553(a) to consider a wide range of factors that the guidelines do not take into account: “The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. . . . These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.”⁵¹

On the basis of these principles, Stevens and Ginsburg emphasized that “[a]ppellate courts must . . . give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range.”⁵² In pointed terms, their concurrence noted that the justices are “not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*,” and stated—perhaps as a warning to lower courts—that “those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory.”⁵³

It is important to note that Ginsburg joined Stevens in giving this warning. Ginsburg had been the crucial fifth vote for the *Booker* remedy. A few months earlier, in *Cunningham v. California*, she signaled that she disagreed with Breyer’s conception of reasonableness review.⁵⁴ By signing on to Stevens’s concurrence, Ginsburg confirmed that the lower courts have not been applying truly “advisory” guidelines the way that she envisioned when she joined the *Booker* remedy opinion.

Analysis

Practical Effect of *Rita* in Lower Courts

Nothing in *Rita* requires the courts of appeals to give within-guidelines sentences a “presumption of reasonableness.” The decision is therefore unlikely to change the current state in the circuit courts. For a time, it seemed possible that every sentence would receive a searching appellate review for reasonableness. But, as we have written elsewhere, most courts of appeals—both those that used presumptions of reasonableness and those that did not—gave only a cursory look at sentences imposed within the applicable guidelines range.

⁴⁶ *Id.* at 2488 (Souter, J., dissenting).

⁴⁷ *Id.* at 2476 (Scalia, J., concurring).

⁴⁸ *Id.* at 2479. The other justices in the *Apprendi* majority did not voice disagreement with Scalia and Thomas on this point. Rather, they argued that any constitutional problems with substantive reasonableness should be addressed through as-applied challenges rather than by eliminating substantive reasonableness review altogether. See *id.* at 2473 (Stevens, J., concurring).

⁴⁹ *Id.* at 2478 n.3 (Scalia, J., concurring). Technically, the Sixth Amendment would be violated only when courts of appeals review above-guidelines sentences, not below-guidelines sentences. That is because under *Harris v. United States*, 536 U.S. 545 (2002), the Sixth Amendment is not triggered by mandatory minimum sentences that do not increase the statutory maximum. Nevertheless, as a matter of statutory interpretation, Scalia and Thomas argued that “since reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high.” *Id.* at 2477 n.2 (citation omitted).

⁵⁰ *Id.* at 2472 (Stevens, J., concurring).

⁵¹ *Id.* at 2473.

⁵² *Id.* at 2473-74.

⁵³ *Id.* at 2474.

⁵⁴ See *Cunningham v. California*, 127 S. Ct. 856, 870 n.15 (2007) (Ginsburg, J.) (“There would have been no majority in *Booker* for the revision of *Blakely* essayed in [Alito’s] dissent [joined by Breyer and Kennedy].”).

Rita now affirms that decisions in sentencing appeals need not be searching, so long as the sentence imposed is within the guidelines range and so long as the district court gives an adequate statement of reasons.

For district courts, *Rita* gives more of a mixed message. On the one hand, *Rita* will undoubtedly encourage many district judges to impose guidelines sentences. First, district judges who wish to avoid reversal on appeal will surely recognize that a within-range sentence is the safer course. It is also the course that requires less fulsome explanations and statements of reasons. Judges who impose sentences outside the guidelines range run the risk that their reasoning will be scrutinized closely and ridiculed if found wanting by the court of appeals.⁵⁵ Breyer's decision sends a message to cautious judges: You can avoid this type of scrutiny by simply following the guidelines. As Souter noted in dissent, the upshot of the majority opinion in that by conforming their sentences to the guidelines, district courts will be able to render their sentences virtually "appeal-proof."⁵⁶

On the other hand, *Rita* makes it perfectly clear that the "presumption of reasonableness" is not for district courts to apply; it is an appellate presumption and nothing more. "[T]he sentencing court does not enjoy the benefit of the legal presumption that the Guidelines should apply."⁵⁷ The court stated that what legitimizes an appellate presumption of reasonableness is that the district court's own view of the proper sentence accords with the sentence recommended by the guidelines. By this reasoning, it does little good for the district court simply to impose a guidelines-range sentence without actually considering whether it is a fair sentence. To be sure, Section 3553(a) directs courts to consider the sentencing guidelines and other concerns related to uniformity.⁵⁸ But the "double determination" that Breyer describes only occurs if the district court is able to give a fair look at what the appropriate sentence should be apart from the guidelines.⁵⁹

Defense attorneys should use this "double determination" language as a basis for urging judges to try to engage in the thought experiment of what a fair sentence might be, apart from the guidelines. At least one lower-court case indicates that defendants may have some success in arguing for below-guidelines sentences by citing to the "double-determination" language along with the concurrence by Stevens and Ginsburg.⁶⁰

Unresolved Issues

Rita leaves open several significant questions. For example, how will the court review nonguidelines

sentences? Will that review take a similarly deferential approach, or will there be a more intrusive approach for a sentence that the court regards as simply too short (or too long)? Although Breyer successfully held together a majority in *Rita*, the separate opinions indicate that he may lose that majority in the next round of sentencing cases when the court will review whether and to what extent courts of appeals may vacate nonguidelines sentences as "unreasonable."

One of the open questions, posed by *Kimbrough v. United States*, No. 06-6330, will be the extent to which a judge may decide that the guidelines range for a particular offense does not, as a categorical matter, lead to a reasonable sentence because it is simply too long for the type of crime that was committed. If the court holds that district courts may reject the "policy judgments" embodied in the guidelines, the effect on white-collar cases would be substantial. As we have noted in previous articles, many appellate courts have faulted district courts for deviating from the guidelines and giving white-collar defendants little or no jail time. In the words of the Second Circuit, for example, a sentence that imposes no term of imprisonment for antitrust crimes would fail to take into account "the considered determination by the Commission that jail terms are the most effective deterrent for antitrust violations."⁶¹ Likewise, the Second Circuit has stated in dicta that a judge may not disregard the fraud guidelines in Section 2B1.1 simply because the judge does not approve of the manner in which the loss amount table operates.⁶²

This analysis now appears to be in tension with the views of at least five Supreme Court justices and perhaps with the majority opinion in *Rita* itself. Breyer's opinion contemplated the possibility that district courts could impose nonguidelines sentences "because the Guidelines sentence itself fails to properly to reflect the § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless."⁶³ It is certainly possible that this language could be read to allow a judge to conclude that a guidelines provision is too harsh for a particular crime. The resolution of this question will go a long way toward determining how the Supreme Court intends to strike a balance between proportionality and uniformity that is at the heart of the post-*Booker* debate over sentencing policy.

A second open issue, presented in *United States v. Gall*, No. 06-7949, is whether courts of appeals may require district courts to justify nonguidelines sentences by pointing to extraordinary circumstances the farther those sentences deviate from the guidelines range. In other words, unlike *Rita*, which focused on whether within-guidelines sentences could be presumed reasonable, *Gall* asks whether nonguidelines sentences can be imposed only where there are compelling reasons for such a variance from the guidelines range. This type of "proportionality" rule has the effect of making it more difficult for nonguidelines sentences to survive appellate review and thereby discourages district judges from exercising their authority under *Booker* to vary from the guidelines. A crucial issue underlying this debate is how much weight district courts must afford the guidelines in balancing all of the Section 3553(a) fac-

⁵⁵ In *United States v. Goldberg*, No. 07-1393, 2007 WL 1827645 (7th Cir. 2007), for example, the Seventh Circuit recently reversed a district court's below-guidelines sentence. In doing so, the court quoted mockingly from the district court's opinion and disparaged the judge's reasoning as "ill informed," "mistaken," "odd," and "idiosyncratic." *Id.* at *5.

⁵⁶ *Rita*, 127 S. Ct. at 2488 (Souter, J., dissenting).

⁵⁷ *Id.* at 2465 (majority opinion).

⁵⁸ 18 U.S.C. § 3553(a)(4), (5) and (6).

⁵⁹ *Rita*, 127 S. Ct. at 2463.

⁶⁰ See *United States v. Santoya*, No 06-82, 2007 WL 1830730, *3 (June 25, 2007) (Adelman, J.) (imposing nonguidelines sentence of more than four years below the guidelines range and noting that "while *Rita* spoke primarily to those courts of appeals who presumed reasonable a guidelines sentence, it also assured district courts that the guidelines are truly advisory").

⁶¹ *United States v. Rattoballi*, 452 F.3d 127, 135 (2d Cir. 2006).

⁶² *United States v. Castillo*, 460 F.3d 337, 359 (2d Cir. 2006).

⁶³ *Rita* at 2465.

tors. Although Stevens and Ginsburg signed on to Breyer's opinion, their concurrence appears to contradict the majority opinion on this point.

In the majority, Breyer argued that the guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice."⁶⁴ Many courts of appeals have similarly reasoned that the sentencing guidelines should be accorded special weight because they are an "integration" of the other factors in Section 3553(a) and that "the Sentencing Commission is an expert agency whose statutory charge mirrors the § 3553(a) factors that the district courts are required to consider."⁶⁵

The concurrence by Stevens and Ginsburg, however, seems to reject that argument. Under their view of post-*Booker* sentencing, district courts must consider a variety of factors under Section 3553(a) that are not taken into account by the guidelines. As the concurrence notes: "Matters such as age, education, mental or emotional condition, medical condition (including drug and alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civil, charitable, or public service are not ordinarily considered in the Guidelines."⁶⁶ But district courts must consider these individualized factors when applying Section 3553(a).

It remains to be seen whether this apparent disagreement will prompt Ginsburg and Stevens to split from Breyer's analysis in subsequent decisions.⁶⁷

⁶⁴ *Id.* at 2464.

⁶⁵ *Rattoballi* at 133; see also *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) ("[T]he guidelines cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors . . .").

⁶⁶ *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring).

⁶⁷ While sentencing judges, prosecutors, and defense attorneys wait another year for the Supreme Court to resolve these questions, lower courts have already begun grappling over whether *Rita* itself "requires [the] abandon[ment] [of] the proportionality principle" that many Circuit Courts have applied. *United States v. Poynter*, No. 05-6508, ___ F.3d ___, slip op. at 6 (6th Cir. July 26, 2007). In *Poynter*, Judge Sutton authored a thoughtful and balanced opinion in which he recognized that *Rita*'s rejection of a presumption of unreasonableness for outside-Guidelines sentences and the requirement of a "double determination" have made it problematic for appellate courts to demand a more persuasive justification for a sentence that is far outside the Guidelines range. *Id.* at 7. At the same time, the *Poynter* court concluded that several aspects of *Rita*—including, inter alia, its deferential treatment of the Guidelines, the requirement in Section 3553(a)(4) and (6) that sentencing courts consider proportionality, and the usefulness of the guidelines as a benchmark in assessing substantive reasonableness—made "the proportionality principle" an "indispensable tool of appellate review." *Id.* at 7-8.

Conclusion

In light of *Rita*, what should white-collar criminal defense attorneys be arguing? First, they should focus on the aspects of *Rita* that show that district judges retain their post-*Booker* authority to vary from the guidelines. They should be attentive to comments from district judges at sentencing that could be construed as applying a presumption in favor of the guidelines and be prepared to argue that such remarks amount to error. Already, the Sixth Circuit has reversed a sentence in which the district court required the defendant to "overcome the presumption of reasonableness with respect to the sentencing guidelines in this case." *United States v. Wilms*, No. 06-1896, ___ F.3d ___, 2007 WL 2077367, at *4 (6th Cir. July 23, 2007) ("If the sentencing judge presumes that the defendant should be sentenced within the applicable Guidelines range . . . it renders meaningless the fact that both the sentencing judge and the Sentencing Commission reached the same conclusion, as such a result would be preordained."). Defense attorneys should insist that district courts make the "double determination" that the Supreme Court required. Defense attorneys should object when a district court decides to impose a guidelines sentence not after consideration, but reflexively or thoughtlessly.

Second, until the Supreme Court resolves other open issues, defense attorneys should continue to challenge the fairness of the specific guidelines, particularly those that lead to sentences that might not pass muster under a "double determination." As we have discussed before, a particular focus for the white-collar bar should be the loss tables, which seem to have created a system in which every defendant who participated in a scheme to defraud a public company faces the statutory maximum sentence.⁶⁸ Defense attorneys should claim in these cases, "the Guidelines sentence itself fails properly to reflect Section 3553(a) considerations" or that "the case warrants a different sentence regardless."⁶⁹ These steps will give defense attorneys the best opportunity to win a lenient sentence and, failing that, to preserve the argument until the Supreme Court steps into the fray again next term.

⁶⁸ See *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (criticizing the high penalties in the fraud guidelines and noting "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense").

⁶⁹ *Rita*, 127 S. Ct. at 2465.