

*Guidelines or Higher: NYCDL’s Study of Reasonableness  
Review Patterns Reveals the Courts’  
Aversion to Parsimony*

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I. Introduction

In *United States v. Booker*, the Supreme Court declared the federal sentencing guidelines “effectively advisory” in order to cure the Sixth Amendment violation created by *requiring* judges to follow the guidelines.<sup>1</sup> The Court directed district judges to “consider” the guidelines, along with the other factors set forth in 18 U.S.C. § 3553(a), and instructed the courts of appeals to review district court sentencing decisions for “unreasonableness” “guid[ed]” by “Section 3553(a)[’s] ... numerous factors.”<sup>2</sup>

Justice Scalia was skeptical of the courts’ ability to review sentences for unreasonableness, asserting that “no one knows ... how advisory Guidelines and ‘unreasonableness’ review will function in practice.”<sup>3</sup> In the two years following the Court’s decision, there have been significant debates in the lower courts over the role that the guidelines should continue to play in sentencing determinations, as well as appellate review of sentences for unreasonableness. Seven courts of appeals have adopted a position giving the advisory-guidelines the preeminent role. These courts hold that sentences within a correctly calculated

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<sup>1</sup> 543 U.S. 220, 245 (2005).

<sup>2</sup> *Id.* at 261, 264.

<sup>3</sup> *Id.* at 311 (2005) (Scalia, J., dissenting in part).

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advisory-guidelines range are presumptively reasonable.<sup>4</sup> Five courts of appeals have declined to adopt this explicit presumption, but have given significant deference to the guidelines.<sup>5</sup>

These rulings have sent district courts a strong signal that applying the guidelines range will likely insulate sentences from reversal.<sup>6</sup> Over time, it has become apparent that all of the courts of appeals are placing great weight on the guidelines, and, for the most part, using the guidelines as the touchstone for unreasonableness review. In response, some district judges have suggested that the guidelines remain effectively binding after *Booker*.<sup>7</sup> Indeed, the Sentencing Commission recently reported that in the six months through September 30, 2006, district courts less frequently sentenced outside of the guidelines.<sup>8</sup>

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<sup>4</sup> The courts adopting the presumption are the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits. See *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006) (same); *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006).

<sup>5</sup> See, e.g., *United States v. Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006) (“We do not believe that any across-the-board presumption regarding the appropriate deference to give the Guidelines is in order.”); *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (“We do not find it helpful to talk about the guidelines as ‘presumptively’ controlling or a guidelines sentence as ‘per se reasonable’ ....”).

<sup>6</sup> See *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006) (“We recognize that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.”); *United States v. Talley*, 431 F.3d 784, 789 (11th Cir. 2005) (“[O]rdinarily we would expect a sentence within the Guidelines range to be reasonable.”); *United States v. Pelletier*, 2006 U.S. App. LEXIS 29214 (Nov. 28, 2006) (“[A] defendant who attempts to brand a within-the-range sentence as unreasonable must carry a heavy burden.”).

<sup>7</sup> See, e.g., *United States v. Hartley*, CR No. 2:06-00017, Tr. 7:24-9:24, Aug. 10, 2006, available at [www.fd.org/HartleyTranscript8.10.06](http://www.fd.org/HartleyTranscript8.10.06) (The Court: “[T]he Fourth Circuit Court of Appeals ... has established a pretty rigid view that the guidelines are not only presumptively reasonable, but the requirement is that in order to sentence outside the guidelines, you have to show that the guideline sentence is in some fashion unreasonable it almost seems.”).

<sup>8</sup> U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006, at p. 10, Figure A.

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A number of commentators have argued that adhering to the guidelines in this fashion effectively substitutes the *de jure* mandatory regime held unconstitutional in *Booker* with a *de facto* mandatory system that solves none of the problems the *Booker* Court identified.<sup>9</sup> Critics have asserted that reasonableness review tethered to the guidelines in this manner also contravenes *Booker*'s command that courts "consider" all of the seven factors in Section 3553(a), not just the guidelines, in fashioning sentences, as well as the statute's mandate to "impose a sentence sufficient, but not greater than necessary" to achieve the purposes of sentencing.<sup>10</sup> Some courts (and the government as a litigant) have responded that the guidelines were crafted to take account of the other Section 3553(a) factors, and have found little substance in the so-called "parsimony provision."<sup>11</sup> The Sentencing Commission's own reports, however, indicate

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<sup>9</sup> See, e.g., Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37, 53 (2006) ("Nearly two years' worth of experience with advisory guidelines has shown that the *Booker* remedy has succeeded in keeping judges empowered and juries marginal in the federal sentencing system. In the wake of *Booker*, federal judges continue to do all the fact-finding that the advisory guidelines recommend according to the same old lax sentencing procedures.") See also *Booker*, 543 U.S. at 313 (Scalia, J., dissenting in part) ("Will appellate review for 'unreasonableness' preserve de facto mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges? ... [W]ill it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion? Time may tell, but today's remedial majority will not."); *United States v. Cage*, 458 F.3d 537, 544 (6th Cir. 2006) (Clay, J., dissenting) ("The majority opinion in this case represents the latest step in an ongoing push within this Circuit to subvert *United States v. Booker*, 543 U.S. 220 (2005), and to make the sentencing Guidelines de facto mandatory.").

<sup>10</sup> See, e.g., Brief of the National Association of Criminal Defense Lawyers, as Amicus Curiae Supporting Petitioners, *Rita v. United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618, at 12-21 (2006).

<sup>11</sup> See, e.g., Brief of the United States, *Rita v. United States*, No. 06-5754, at 16-22 (2006); *United States v. Jimenez-Beltre*, 440 F.3d 514, 525 n.8 (1st Cir. 2006) (noting that the parsimony provision has received "scant attention"); *United States v. Wurzinger*, 467 F.3d 649, 653 (7th Cir. 2006) ("While we say nothing about whether a lower sentence would have been equally reasonable, age and illness do not, in the face of the circumstances presented here, make Wurzinger's sentence unreasonable."). But see *United States v. Carey*, 368 F. Supp. 2d 891, 895 n.4 (E.D. Wis. 2005) (Adelman, J.) ("When two sufficient and reasonable sentences are

that it did not consider all of the Section 3553(a) factors (or even all four of the purposes of sentencing set forth in 3553(a)(2)).<sup>12</sup> Critics of the courts of appeals' singular focus on the guidelines as the touchstone for reasonableness may draw some comfort from the Supreme Court's recent decision in *Cunningham v. California*,<sup>13</sup> striking down California's Determinate Sentencing Law, a system the dissenters described as "indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*."<sup>14</sup>

As post-*Booker* doctrines developed, Professor Douglas Berman took note on his blog of the emerging pattern of appellate review and periodically attempted to place cases in various categories including: within-guidelines sentences affirmed; above-guidelines sentences affirmed; and below-guidelines sentences reversed.<sup>15</sup> Circuit judges also occasionally acknowledged that, in general, courts of appeals were affirming within- and above-guidelines sentences while

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potentially applicable, the statute directs the court to choose the lesser one."); *United States v. Yopp*, 453 F.3d 770, 774 (6th Cir. 2006) (finding that a higher sentence imposed by the district court violated the parsimony provision where lower sentence that satisfied the purposes of sentencing was articulated); Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 83 (2005) ("the structure of section 3553(a)" where "the parsimony and proportionality principles are stated first, suggest[s] that they set overall limits on the crime-control and other purposes which follow").

<sup>12</sup> See, e.g., U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988) (suggesting that the Commission considered only "just deserts" and "crime control" rather than all of the statutory purposes when promulgating the guidelines); *United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting) ("The Commission has simply ignored many of the provisions of the statute that weigh in favor of leniency ...").

<sup>13</sup> 549 U.S. \_\_\_\_ (2007).

<sup>14</sup> *Id.* at \_\_\_\_ (Alito, J., dissenting).

<sup>15</sup> See, e.g., Douglas A. Berman, *Tracking reasonableness review outcomes*, Sentencing Law & Policy Weblog, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/06/tracking\\_reason.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/tracking_reason.html)

reversing below guidelines sentences.<sup>16</sup> However, apart from this helpful, but anecdotal, evidence of the patterns of appellate reasonableness review, there was no comprehensive study compiling and analyzing courts of appeals' decisions to assess the practical impact on sentences of the doctrines they were developing. Even the United States Sentencing Commission, the agency charged with compiling, analyzing, and disseminating important sentencing data, has not undertaken to study reasonableness review in application.

As the circuits staked out different positions on reasonableness review, it became clear that at some point either Congress or the Supreme Court would need to intervene, in order to bring some uniformity to sentencing review. Then, on November 3, 2006, the Supreme Court granted certiorari in *Rita v. United States* and *Claiborne v. United States* to address two main questions relating to the continuing role of the guidelines post-*Booker*. The first (presented in *Rita*), whether a presumption of reasonableness for within-guidelines sentences is consistent with *Booker*, has, as noted above, divided the circuits. If the answer to this question is *no*, it will once again significantly alter the sentencing process and review. Defendants will likely be able to demand a more comprehensive analysis of their individual circumstances in the district courts and courts of appeals will need to ensure that *all* of the statutory factors have been considered in a reasoned sentencing determination that does not rely disproportionately on the guidelines. If the Court rejects the presumption of reasonableness, its principal challenge will be to provide meaningful guidance on the how to determine whether sentences are “reasonable.”

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<sup>16</sup> See, e.g., *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (Heaney, J.) (stating that post-*Booker*, the Eighth Circuit was affirming upward variances at a rate of 92.3% and affirming downward variances at a rate of 15.8%); *United States v. Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring) (noting awareness of only one within-guidelines sentence reversal).

The second main question (presented in *Claiborne*), is whether requiring a substantial variance from the guidelines to be justified by extraordinary circumstances is consistent with *Booker*. The Court’s answer will provide guidance on the extent of district courts’ discretion to impose sentences both significantly higher and lower than the guidelines suggest based on an assessment of the other sentencing factors.

II. NYCDL’s Reasonableness Review Study

After certiorari was granted in *Rita* and *Claiborne*, counsel for the New York Council of Defense Lawyers (“NYCDL”), Latham & Watkins LLP, Professor Douglas Berman, and Cooley Godward Kronish LLP, began considering approaches to an amicus brief.<sup>17</sup> To fill the void of reasonableness review data—and to answer Justice Scalia’s question about how reasonableness review functions in practice—we decided to undertake the task of compiling and analyzing all post-*Booker* applications of reasonableness review. NYCDL would, therefore, compile the first comprehensive review of reasonableness review in practice in the courts of appeals. The theory underlying the study was that data about the rates of reversal of above-, within-, and below-guidelines sentences could potentially shed light on issues relevant to *Rita* and *Claiborne*. For example, the analysis could be relevant to whether a presumption of reasonableness for within-guidelines sentences effectively undermined the parsimony provision—and the other Section 3553(a) factors that *Booker* commands both district and circuit courts to consider.

A. Constructing the Study

The first step involved deciding upon search terms to enter into Westlaw. Based on the experience of the team of counsel, many of whom recently served as federal courts of appeals

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<sup>17</sup> NYCDL, with Alexandra A.E. Shapiro of Latham & Watkins LLP as counsel of record, also filed a brief in *Booker* that was favorably cited in the Court’s remedial opinion. 543 U.S. at 266.

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clerks, the first search terms constructed were: Booker & Reasonab! Unreasonab!<sup>18</sup> Counsel were also aware that as the courts of appeals continued to review sentencing appeals, they would occasionally dispense with a citation to *Booker*, often affirming sentences with little discussion or reference to case law, or instead preferring to cite circuit precedent. A second search was designed in an attempt to capture these, mostly unpublished, dispositions. The terms for this back-up search were: Sentenc! /3 Guideline /20 Reasonab! Unreasonab! (#Not /3 Reasonab!) & Da (Aft 1/11/2005) % Booker. These two searches collected more than seven thousand cases.

As counsel began reviewing cases, it became clear that a substantial number of the cases—in fact, a vast majority of all cases from 2005<sup>19</sup>—involved *Booker* issues other than reasonableness review. For example, most of the cases from 2005 involved whether a defendant who was sentenced pre-*Booker* was entitled to a remand for resentencing under the new advisory-guidelines scheme. Counsel decided to further date-restrict the searches to all cases decided in 2006 through an end date of November 16, 2006, approximately two weeks after the Court’s grants of certiorari. Counsel felt that restricting the searches to these eleven months would provide the greatest yield of reasonableness review cases and the best evidence of reasonableness review in practice. The first search, restricted using these dates, returned approximately 2,800 cases, and the second approximately 250 cases.

A large team of attorneys divided the cases by circuit and began reviewing them and compiling information. The database included nine categories of information: (1) case name

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<sup>18</sup> Thus, the search terms would collect any cases where the terms *Booker* and reasonable or *Booker* and unreasonable appeared.

<sup>19</sup> *Booker* was decided on January 12, 2005.

and citation; (2) type of crime;<sup>20</sup> (3) advisory guideline range; (4) sentence; (5) whether the sentence was within, above, or below the advisory range; (6) whether it was the government or the defendant that appealed; (7) whether the sentence was affirmed or reversed; (8) whether the government or the defendant prevailed in the appeal; and (9) if the sentence was vacated, whether the basis was procedural or substantive. Counsel encountered various challenges compiling and coding this information. To start, some of the courts of appeals' opinions neglected to mention various pieces of information, such as the advisory-guidelines range or the sentence. At times, however, the key piece of information—whether the sentence was within, above, or below the range—was not included. As a result, it became necessary in some instances to incur the significant cost—in terms both of time and money—to acquire the lower court sentencing memoranda or briefs, in order to ascertain pertinent information. Interestingly, it also became clear that, in some circuits, the courts were issuing near-uniform, cursory opinions with fill-in-the-blanks for the specific defendant's information. As the information was entered and the results started coming in circuit-by-circuit, a distinct pattern was apparent. We were not surprised at the results because it was consistent with Professor Berman's anecdotal evidence; we were surprised, however, at how stark the pattern appeared.

#### B. Summary of Results

After filtering decisions not addressing reasonableness out of the 3,000 cases captured by the search terms, the final database comprised 1,515 cases. The results showed that in these 1,515 cases, the courts of appeals were reflexively deferential to the guidelines—except when district courts imposed sentences *above* the guidelines range. Virtually all of these sentences were affirmed, even though the vast majority of below-guidelines sentences appealed by the

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<sup>20</sup> Crimes were grouped as follows: D = Drugs; I = Immigration; T = Theft/Fraud offenses; F = Firearms; S = Sex crimes; and O = Other.

government were reversed. Only seven of 154 appeals of above-guidelines sentences resulted in a sentence being reversed as unreasonably high.<sup>21</sup> On the other hand, a startling 60 of 71 below-guidelines sentences appealed by the government were reversed as unreasonably low, giving the government an 84.5% success rate. Defendants were unable to win a single one of 138 appeals of below-guidelines sentences.<sup>22</sup>

The remaining 1,152 appeals involved within-guidelines sentences appealed by defendants. Of these sentences, only 16 were vacated as unreasonable. Fifteen of the sixteen, moreover, were reversed for procedural reasons—almost uniformly because the court of appeals found that the district court did not adequately explain its reasons for selecting the sentence imposed; only 1 out of 1,152 sentences (0.0868%) was found to be substantively unreasonable. These findings, NYCDL argued in its brief, send a message to district courts that discourages the exercise of thoughtful discretion in service to the full range of considerations Congress articulated in Section 3553(a).

This message, we found, was noticeably stronger in the circuits that have adopted a formal presumption of reasonableness for within-guidelines sentences. In these circuits—the Fourth, Fifth Sixth, Seventh, Eighth, Tenth, and D.C. Circuits—93 above-guidelines sentences

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<sup>21</sup> Many of the findings discussed are summarized at pages 1a-5a of NYCDL’s database, which, along with all of the briefs and case materials, is available at <http://www.nycdl.org>.

<sup>22</sup> Although one would expect a lower success rate for below-guidelines appeals by defendants, it is interesting that not one sentence was found to be unreasonable. Indeed, some courts appear to have suggested that having received a below-guidelines sentence, a defendant has nothing legitimate to complain about. *See, e.g., United States v. Griffin*, 187 Fed. Appx. 13, at \*3 (1st Cir. 2006) (rejecting defendant’s argument for a lower sentence because “a sentence below the guideline range ... suggests mitigating factors are already at work”); *United States v. Peyla*, 2006 WL 3610113, at \*2 (7th Cir. 2006) (finding “nothing unreasonable” about a sentence that was already one month below the guidelines range). These findings reinforce the evidence that the courts of appeals have applied a guidelines-centric standard of review as opposed to a holistic Section 3553(a) approach.

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appealed by defendants were captured by the database. Eighty-eight of these sentences were affirmed; only 5 were vacated as unreasonably high. Of the 51 below-guidelines sentences appealed by the government, however, only 4 sentences were affirmed; 47 out of the 51 below-guidelines sentences appealed by the government were reversed. Of the remaining 693 within-guidelines sentences appealed by defendants, only 7 were vacated—6 for procedural reasons and 1 sentence was found substantively unreasonable by the Eighth Circuit.<sup>23</sup> The graph below shows the circuit-by-circuit breakdown for these courts of appeals.

**RESULTS FOR CIRCUITS THAT HAVE EXPLICITLY ADOPTED A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES**

Circuit	Above-guidelines sentences appealed by defendants and vacated	Within-guidelines sentences appealed by defendants and vacated	Below-guidelines sentences appealed by the government and vacated
4	1/10	0/201	9/9
5	1/28	0/86	5/5
6	2/17	1/91	½
7	0/8	1/86	4/6
8	1/22	2/118	27/28
10	0/8	3/108	1/1
DC	0/0	0/3	0/0
Total	5/93	7/693	47/51

The results in the circuits that have not adopted a formal presumption of reasonableness for within-guidelines sentences were not as pro-government as the presumption circuits, but the results were still strongly indicative of a guidelines-focused approach to reasonableness review. These circuits—the First, Second, Third, Ninth, and Eleventh Circuits—reviewed 61 above-guidelines sentences appealed by defendants. The courts were extremely deferential in these circumstances, finding only 2 of the sentences unreasonable and affirming 59 sentences. There

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<sup>23</sup> See *United States v. Goodwin*, 439 F.3d 928 (8th Cir. 2006).

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were 20 below-guidelines sentences appealed by defendants; the courts affirmed 7 of these sentences and reversed 13 sentences or approximately 65%. Of the remaining 459 within-guidelines sentences appealed by defendants, only 9 were vacated, each for procedural reasons. The table below shows the circuit-by-circuit breakdown for these courts of appeals.

**RESULTS FOR CIRCUITS THAT HAVE NOT EXPLICITLY ADOPTED A  
PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES**

Circuit	Above-guidelines sentences appealed by defendants and vacated	Within-guidelines sentences appealed by defendants and vacated	Below-guidelines sentences appealed by the government and vacated
1	1/3	0/30	4/4
2	0/6	1/60	2/3
3	0/10	1/71	1/1
9	1/19	6/107	1/3
11	0/23	1/191	5/9
Total	2/61	9/459	13/20

As we compiled the results from each circuit, we began to see that some circuits had results we described as more “non-parsimonious” than other circuits.<sup>24</sup> Interestingly, we discovered that the two circuits with some of the most extreme patterns of rigidly adhering to the

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<sup>24</sup> Another interesting finding involved the cases that the courts of appeals vacated to rehear en banc. Each of the cases involved a panel decision won by a defendant. In *United States v. Burns*, a panel of the Eighth Circuit rejected the government’s appeal and affirmed a below-guidelines sentence. The full Eighth Circuit then vacated the panel decision and reheard the case en banc. 438 F.3d 826 (8th Cir.), vacated by 2006 U.S. App. LEXIS 12239 (May 18, 2006). In *United States v. Vonner*, a panel of the Sixth Circuit vacated a within-guidelines sentence due to an inadequate explanation for the sentence, but the full court vacated the decision. 452 F.3d 560 (6th Cir.), vacated by 2006 U.S. App. LEXIS 27661 (Oct. 12, 2006). The case is being held in abeyance pending the Supreme Court’s decisions in *Rita* and *Claiborne*. And, the Ninth Circuit vacated two cases to rehear en banc, one involving what would have been the only below-guidelines sentence appealed by the defendant and vacated, *United States v. Zavala*, 443 F.3d 1165 (9th Cir.), vacated by 2006 U.S. App. LEXIS 21490 (Aug. 23, 2006), and another within-guidelines sentence vacated by the panel, *United States v. Carty*, 453 F.3d 1214 (9th Cir.), vacated by 2006 U.S. App. LEXIS 21490 (Aug. 23, 2006).

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guidelines, except when considering sentences above the guidelines, which were routinely affirmed, were the circuits from which the appeals in *Rita* and *Claiborne* came.

Mr. Claiborne's case was appealed from the Eighth Circuit. The data from that circuit show that only 2 out of 118 within-guidelines sentences appealed by defendants were held unreasonable—1 for procedural reasons and 1 for substantive unreasonableness. There were 22 appeals by defendants of above-guidelines sentences. Nearly all of these sentences—21—were affirmed; only 1 above-guidelines sentence was found to be unreasonably high. In stark contrast, however, the Eighth Circuit found unreasonable and vacated 27 out of 28 below-guidelines sentences that were appealed by the government.<sup>25</sup> Thus, the Eighth Circuit was extremely deferential to sentences above the guidelines range, but intolerant of sentences below the guidelines range. The data also show that the Eighth Circuit affirmed at least nine sentences that imposed imprisonment terms *more than double* the bottom of the advisory range, including one in which the bottom was *nearly tripled*.<sup>26</sup> In at least eight cases, the Eighth Circuit affirmed

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<sup>25</sup> In fact, in the one below-guidelines sentence appealed by the government that the Eighth Circuit allowed to stand, the court remarked that if not for some unusual circumstances, it would have been inclined to reverse. See *United States v. Krutsinger*, 449 F.3d 827, 829 (8th Cir. 2006).

<sup>26</sup> *United States v. Lyons*, 450 F.3d 834 (8th Cir.) (from 70 to 180 months), *cert. denied*, 127 S. Ct. 358 (2006); *United States v. Mallory*, 2006 WL 2441577 (8th Cir. 2006) (from 27 to 60 months); *United States v. Maurstad*, 454 F.3d 787 (8th Cir. 2006) (from 41 to 120 months); *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (from 180 to 270 months); *United States v. Porter*, 439 F.3d 845 (8th Cir. 2006) (from 57 to 120 months); *United States v. Nelson*, 453 F.3d 1004 (8th Cir. 2006) (from 4 to 24 months); *United States v. Porchia*, 180 Fed. Appx. 596 (8th Cir. 2006) (from 6 to 24 months); *United States v. Larison*, 432 F.3d 921 (8th Cir. 2006) (from 5 to 60 months); *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006) (from 6 to 18 months). Perhaps because the majority of within-guidelines sentences imposed nationwide are set at the bottom of the guidelines range, the Sentencing Commission's statistical analysis typically compares sentences to the bottom of the applicable range. See U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006. NYCDL followed this methodology, which is also consistent with the parsimony provision, in its analysis.

sentences that added five or more years of imprisonment to the bottom of the guidelines range.<sup>27</sup>

By contrast, the court has declared unreasonable at least 13 downward variances of less than five years.<sup>28</sup>

Mr. Rita's case arose in the Fourth Circuit—a presumption circuit—where all 201 within-guidelines sentences appealed by defendants were affirmed. Only a single sentence among 10 appeals by defendants of above-guidelines sentences was found unreasonable. On the other hand, all 9 below-guidelines sentences appealed by the government were held unreasonable and vacated.

### C. Post-Amicus Brief Update of Results

For purposes of this Article, we updated the Eighth and Fourth Circuit databases (from the closing date of NYCDL's database, November 16, 2006, through January 10, 2007) to

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<sup>27</sup> *Lyons*, 450 F.3d 834 (increase of more than 9 years); *Maurstad*, 454 F.3d 787 (increase of more than 6.5 years); *Meyer*, 452 F.3d 998 (increase of 7.5 years); *Porter*, 439 F.3d 845 (increase of 5 years); *United States v. Hawkman*, 438 F.3d 879 (8th Cir.) (increase of more than 5 years), *cert. denied*, 127 S. Ct. 281 (2006); *United States v. Sitting Bear*, 436 F.3d 929 (8th Cir. 2006) (increase of more than 6 years); *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (increase of more than 6 years); *United States v. Larrabee*, 436 F.3d 890 (8th Cir. 2006) (increase of 14.5 years); *United States v. Hacker*, 450 F.3d 808 (8th Cir. 2006) (increase of more than 7 years).

<sup>28</sup> *United States v. Smith*, 450 F.3d 856 (8th Cir. 2006) (from 262 to 204 months); *United States v. Medearis*, 451 F.3d 918 (8th Cir. 2006) (from 46 to 0 months); *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006) (from 12 to 0 months); *United States v. Rogers*, 448 F.3d 1033 (8th Cir. 2006) (from 51 to 12 months); *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006) (from 30 to 0 months); *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006) (from 70 to 12 months); *United States v. Myers*, 439 F.3d 415 (8th Cir. 2006) (from 37 to 12 months); *Claiborne*, 439 F.3d 479 (from 37 to 15 months); *United States v. Gatewood*, 438 F.3d 894 (8th Cir. 2006) (from 63 to 36 months); *United States v. Shafer*, 438 F.3d 1225 (8th Cir. 2006) (from 63 to 48 months); *United States v. McMannus*, 436 F.3d 871 (8th Cir. 2006) (from 57 to 24 months); *United States v. Bryant*, 446 F.3d 1317 (8th Cir. 2006) (from 70 to 30 months); *United States v. Givens*, 443 F.3d 642 (8th Cir. 2006) (from 24 to 0 months).

investigate whether the cert grants have had any effect on the courts' pattern of review.<sup>29</sup> These new findings indicate that these courts have continued routinely to affirm within- and above-guidelines sentences while reversing below-guidelines sentences.

In the Eighth Circuit we identified 34 cases. All sixteen involving within-guidelines sentences were affirmed. One below-guidelines sentence was appealed by the defendant, and his appeal was rejected. Every one of the four above-guidelines sentences appealed by defendants was affirmed as reasonable. Moreover, these four upward variances involved increases from the bottom of the guidelines range of 50%, 56%, 42%, and 131%.<sup>30</sup> There were also 13 below-guidelines sentences appealed by the government—and the Eighth Circuit reversed 12 of these as unreasonable. The court let stand one below-guidelines sentence, uncharacteristically disagreeing with the government's position. In *United States v. Wadena*, the defendant's advisory-guidelines range was 18-24 months' imprisonment.<sup>31</sup> The district court sentenced Wadena to five years' probation, based on the fact that the defendant was 67 years old, suffered from kidney disease that required 3 hours of dialysis treatments three times per week, and that he was the sole caretaker of an adopted adult son who suffered from fetal alcohol syndrome. According to the district court, these factors reduced the risk that the defendant would recidivate. The Eighth Circuit affirmed, stating that "we ultimately find that the sentence was reasonable

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<sup>29</sup> This updated database is also available on the NYCDL webpage, <http://www.nycdl.org>.

<sup>30</sup> *United States v. Herman*, 2006 WL 3334577 (8th Cir. 2006) (increase from 30 to 45 months); *United States v. Howard*, 2006 WL 3333024 (8th Cir. 2006) (increase from 77 to 120 months); *United States v. Garnette*, — F.3d —, 2007 WL 57594 (8th Cir. 2007) (increase from 180 to 255 months); *United States v. D'Andrea*, — F.3d —, 2007 WL 57593 (8th Cir. 2007) (increase from 78 to 180 months).

<sup>31</sup> 470 F.3d 735 (8th Cir. 2006).

because a number of factors, taken together, justify the district court’s decision to sentence Wadena to five years’ probation.”<sup>32</sup>

Adding this recent information to the database shows that the Eighth Circuit has reversed only 1 out of 134 (0.75%) within-guidelines sentences as substantively unreasonable. It has also affirmed 25 out of 26 (96%) above-guidelines sentences, and reversed 39 out of 41 (95%) below-guidelines sentences appealed by the government.

In the Fourth Circuit, we identified 38 cases decided since the close of NYCDL’s database. Each of the 3 above-guidelines sentences was affirmed by the Fourth Circuit. In one of the cases, a sentence three times the high end of the guidelines range was affirmed.<sup>33</sup> In another case, the sentence was more than *seven* times the bottom of the guidelines range.<sup>34</sup> There were also 3 below-guidelines sentences, each of which was appealed by the defendant, and each of which was affirmed. The remaining 32 cases reviewed were within-guidelines sentences. Consistent with the Fourth Circuit’s pattern, it affirmed all of these cases. Thus, of all cases since January 1, 2006, the Fourth Circuit has reviewed and affirmed all 233 within-guidelines sentences it has reviewed. Interestingly, we discovered that in nearly half (15 cases) of the 32 within-guidelines sentences reviewed in our supplemental database, defense counsel filed an *Anders* brief certifying that, in counsel’s opinion, there were no non-frivolous issues for

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<sup>32</sup> *Id.* The defendant was a Native American whose tribe had authority to issue vehicle titles. He was convicted of conspiracy to commit mail fraud, which involved obtaining clean vehicle titles and selling them to a Florida used-car salesman who then used the clean titles to sell junk cars that normally would require a brand on the title to alert potential buyers of the car’s condition. The government argued on appeal that Wadena’s condition did not support a downward variance because his crimes posed a danger to the public and he had a prior fraud conviction.

<sup>33</sup> *United States v. Hernandez-Villanueva*, — F.3d —, 2007 WL 60873 (4th Cir. 2007) (sentence of 18 months imposed where range was 0 – 6 months).

<sup>34</sup> *United States v. Connie*, 2007 WL 14579 (4th Cir. 2007) (increase from 8 to 60 months)

appeal.<sup>35</sup> The Commission has found that in the last six months, district courts have imposed non-guidelines sentences less frequently.<sup>36</sup> Now, at least in the Fourth Circuit, there is some evidence that even counsel are capitulating and certifying that appeals of within-guidelines sentences are *frivolous*. The updated findings in the Fourth and Eighth Circuits continue to support NYCDL's argument that the courts of appeals are applying reasonableness review in a manner inconsistent with Section 3553(a)'s requirement that district courts impose sentences "sufficient, but not greater than necessary" to comply with the purposes of sentencing, and that appellate courts review these sentences with reference to Section 3553(a)'s mandate.

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The data provide powerful evidence that the mandate of Section 3553(a) is not being followed and raise serious questions about whether the principles behind the *Booker* constitutional majority opinion are being effectively carried out by a remedy that treats the guidelines as advisory. Although the government may be somewhat more selective than most defendants in determining which sentences to appeal, it is highly improbable that this selectivity could explain why only one within-guidelines sentence out of over 1500 was reversed,<sup>37</sup> or the vast differences between the reversal rates of below- and above-guidelines sentences. And it certainly cannot explain why the Fourth and Eighth Circuit in particular have so consistently

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<sup>35</sup> See *Anders v. California*, 386 U.S. 738 (1967).

<sup>36</sup> U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006, at p. 10, Figure A.

<sup>37</sup> After *Booker*, the U.S. Department of Justice's official policy has been to urge district judges to adhere to the guidelines in the vast majority of cases, see U.S. Dep't of Justice, Comey Memorandum, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/dag\\_jan\\_28\\_comey\\_memo\\_on\\_booker.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf) ("we must take all steps necessary to ensure adherence to the Sentencing Guidelines"), and the government accordingly does not appeal within-guidelines sentences.

affirmed above-guidelines sentences that are double and even triple the bottom of the guidelines range.

The principles that drove the constitutional *Booker* decision are certainly in tension with a system of *de facto* mandatory guidelines. The data suggest that while *Rita* and *Claiborne* are pending—and the Supreme Court confronts the issue of whether the courts of appeals have created such a *de facto* system—there is unlikely to be any change in the current patterns, and the guidelines will continue to be the central factor in sentencing decisions. Data collected by the Sentencing Commission already show that district courts have becoming increasingly aware of the pattern of appellate review, and consequently are imposing fewer below-guidelines sentences. *Rita* and *Claiborne*, while only directly resolving the sentencing fates of two men, are the next big test of the Supreme Court’s commitment to its Sixth Amendment revolution.