Criminal Sentencing in the Second Circuit After Booker: Theoretical and Practical Considerations

Kevin J. Doyle
CRIMINAL SENTENCING IN THE SECOND CIRCUIT AFTER BOOKER: THEORETICAL AND PRACTICAL CONSIDERATIONS

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From 1987 to 2005, federal judges sentenced criminal defendants under the United States Sentencing Guidelines ("U.S.S.G."), a highly structured system designed in part to promote "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders."1 On January 12, 2005, however, the United States Supreme Court declared the federal sentencing system unconstitutional in United States v. Booker.2 Applying its decisions in Apprendi v. New Jersey3 and Blakely v. Washington,4 the Court held that the Sentencing Guidelines violated the Sixth Amendment because they authorized the imposition of an enhanced sentence "based on the sentencing judge's determination of a fact (other than a prior

1 U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, historical note, ch. 1, pt. A, n.3 (2003). See KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 11-13 (1998) (commenting on the mandatory sentencing regime created by the Guidelines, Professor Stith and Judge Cabranes note that "the federal Sentencing Guidelines... [sought] to replace the discretionary power of judges with an elaborate, less intuitive, and more scientific system for the elaboration of penal sanctions").


3 530 U.S. 466 (2000).

conviction) that was not found by the jury or admitted by the defendant."5

However, as is often the case with landmark Supreme Court precedent, the Justices left to the lower federal courts the practical implementation of its *Booker* mandate.6 Consequently, defendants and their counsel, the district courts, as well as prosecutors in the United States Attorneys' Offices have looked to the federal courts of appeals for guidance on the myriad of issues that have arisen in the wake of *Booker's* apparent dismantling of the federal system of sentencing. This Article is intended to provide a precis of sentencing law under the post-*Booker* regime in the United States Court of Appeals for the Second Circuit ("Second Circuit"). Although the focus primarily is on the Second Circuit's practical implementation of the Supreme Court's mandate thus far, this necessarily requires examination of the Supreme Court's recent Sixth Amendment jurisprudence, culminating in *Booker*.

Part I provides a brief overview of the *Booker* decision, examining the constitutional issues resolved and the remedy proposed. Part II examines the Second Circuit's implementation of *Booker* in its seminal *Crosby* decision. This includes current sentencing procedure in the district courts of the Second Circuit; appellate review of those sentences under a "reasonableness" standard; and disposition of those pre-*Booker* sentences that remain on direct review. Part III considers the Second Circuit's resolution of several discrete issues that have arisen after *Booker*: whether a presumption of reasonableness should apply to

5 *Booker*, 543 U.S. at 245. In this respect the substantive holding in *Booker* was unremarkable. In 2004, the Supreme Court found Washington State's determinate sentencing scheme unconstitutional under the Sixth Amendment because it permitted enhancement of a defendant's sentence beyond the statutory range based on "aggravating facts" found by the judge. *See Blakely*, 542 U.S. at 305. *Booker* simply applied the *Blakely* holding to the similar constitutional infirmities of the Sentencing Guidelines. As discussed in Part I.B. *infra*, it is not the Court's resolution of the Sixth Amendment challenge to the Sentencing Guidelines, but rather its proposed remedy, that has caused the divergence in the circuits' approaches to post-*Booker* sentencing issues. For a comprehensive historical treatment of the Sixth Amendment and criminal sentencing, see Susan R. Klein, *The Return of Federal Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 693–719 (2005).

6 See Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 355 (2006) (observing that while "answering the most basic questions about the Guidelines' status as a result of its *Blakely* ruling, the Supreme Court in *Booker* ultimately raised more questions than it answered concerning the day-to-day particulars of operating an advisory sentencing guideline system").
sentences within the Guidelines range; whether retroactive application of Booker to cases on direct appellate review violates ex post facto principles; whether Booker should apply retroactively to cases on collateral review; whether after Booker a defendant's sentence may be based on facts not alleged in the indictment; and whether sentence disparities between co-defendants in the same case may serve as a basis for a non-Guidelines sentence.

Part III concludes with a consideration of several miscellaneous subjects related to the issue of substantive sentencing law and procedure: whether after Booker the burden remains on the defendant to prove eligibility for safety-valve relief; whether a restitution order imposed as part of a defendant's sentence violates the Sixth Amendment because it is often based on facts not reflected in the jury verdict or admitted by the defendant; and whether Booker's protections apply when a district judge imposes additional imprisonment for a defendant's violation of conditions of release. Where appropriate, the approach of the Second Circuit on these issues is contrasted with that of the other circuits. Part IV provides a brief and general assessment of the Booker decision and the Second Circuit's implementing jurisprudence. Given the relatively brief life of the new advisory sentencing system, these observations must necessarily be tentative. The circuit courts are still in the process of working through the issues that have arisen with the implementation of Booker's mandate. Nevertheless, scholars and other commentators have begun examining the broader legal and policy issues arising from Booker, providing us with important insights on sentencing procedure going forward.7

The primary aim of this Article, however, is to provide practical guidance on how the Second Circuit is applying the Booker precedent. While the legal and theoretical implications of this evolving jurisprudence are given due consideration, it is simply too soon to make any definitive judgments on the new sentencing paradigm.

7 See id. at 356 (highlighting "how the 'Booker fix' (i.e., the major changes to the federal sentencing system that have been proposed in the wake of Booker) necessarily present significant legal, policy, and practical problems"); see also Bowman, supra note 2, at 1317 (examining the Court's constitutional ruling in Booker in light of the "broader ongoing debate about the state of sentencing in America").
I. THE BOOKER/FANFAN OPINION

A federal jury sitting in the Western District of Wisconsin found Freddie Booker guilty of possession with intent to distribute at least 50 grams of cocaine based on violation of 21 U.S.C. § 841(a)(1). The Sentencing Guidelines provided for a sentence of “not less than 210 nor more than 262 months in prison.” After taking evidence at Booker’s sentencing hearing, the district court found by a preponderance of the evidence that Booker had in fact possessed additional quantities of cocaine and obstructed justice. These findings mandated that the judge impose a sentence between 360 months and life imprisonment. Booker received a 30-year sentence. The jury did not find, nor did Booker admit, the facts supporting the sentence enhancement. The Seventh Circuit held that the resulting sentence violated Booker’s Sixth Amendment rights and remanded to the district court. Upon remand, the district court could either sentence Booker to the range of penalties supported by the facts as found by the jury at trial or convene a separate sentencing hearing at which facts supporting the enhancement could be found by a jury, thereby satisfying the requirements of the Sixth Amendment as articulated in Apprendi and Blakely.

In Fanfan’s case, a jury in the District of Maine convicted him of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine. The jury’s verdict authorized a maximum sentence of 78 months. At a subsequent sentencing hearing, the district court found additional facts that would have increased Fanfan’s sentencing range to 188-235 months. The district judge, however, read Blakely to preclude his application of these facts to support the enhancements provided for in the

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8 Booker, 543 U.S. at 227.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id. (noting that the jury only heard evidence as to Booker’s possession of 92.5 grams of cocaine; the judge found the facts to be true at a later post-trial sentencing proceeding).
14 Id. at 227–28.
15 Id. at 228.
16 Id.
17 Id.
18 Id.
Fanfan received a 78-month term of imprisonment, the sentence authorized by the jury's guilty verdict. The Supreme Court granted the petitions for writs of certiorari filed in both cases in order to determine if the Sixth Amendment is violated "by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." If the Court answered this substantive constitutional question in the affirmative, it would then have to consider whether it was appropriate to declare the Guidelines inapplicable entirely in cases where the Guidelines require the court to find a sentence-enhancing fact.

A. The Substantive Opinion

While the substance of the Court's Sixth Amendment holding is not doctrinally unprecedented, it is nevertheless a strong reaffirmation of the "deeply embedded" right to a jury trial that is fundamental to our system of criminal justice. It is an axiom of the common law, as well as our Constitution, that a criminal defendant may only be convicted "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In determinate sentencing systems, however, a sentencing judge is authorized to make

19 Id. at 228-29.
20 Id.
21 Id. at 229 n.1.
22 Id. at 229 n.2. The Booker decision resulted, rather unusually, in dual majority opinions. Justice Stevens, joined by Justices Scalia, Thomas, Souter, and Ginsburg, authored the substantive opinion announcing the Sixth Amendment holding in the case. Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg, wrote the "second" majority opinion announcing the remedial holding, i.e., rendering the Guidelines "advisory," as explained in Part I.B, infra.
23 Irwin v. Dowd, 366 U.S. 717, 721-22 (1961) (stating that even though Fourteenth Amendment does not require use of jury trials in State criminal procedure, "every State has constitutionally provided trial by jury").
24 Booker, 543 U.S. at 230 (quoting In re Winship, 397 U.S. 358, 364 (1970)).
25 A "determinate" sentencing system is one that prescribes a precise range of penalties that attaches to the criminal conduct for which a defendant is convicted. In such systems, judges are divested of a significant amount of discretion in determining the appropriate sentence in a particular case. For a description of such a system, see United States v. Fruchter, 411 F.3d 377, 383 (2d Cir. 2005), explaining that "[i]n a determinate sentencing regime, a jury finds facts that support a conviction. That conviction, in turn, authorizes the imposition of a sentence within a specified range, established either by statute or administrative guideline, which we call a determinate sentence." Id.
post-conviction findings of fact, which then may be used to impose an enhanced sentence.

For example, in *Apprendi v. New Jersey* the applicable state statute provided that conviction of possession of a firearm for an unlawful purpose was punishable by imprisonment for "between five years and 10 years." Under New Jersey’s separate "hate crime" statute, however, the ten-year statutory maximum sentence could be increased to anywhere "between 10 and 20 years." Reviewing the adequacy of New Jersey's sentencing procedure under the Due Process Clause of the Fourteenth Amendment, the Court concluded that "[o]ther 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." Significantly, the Court drew no distinction for purposes of the Sixth and Fourteenth Amendments between an "element" of an offense and a "sentencing factor." In other words, a criminal defendant is entitled to have the jury determine not only if the prosecution has established all the elements of the underlying substantive offense, but also any other facts that may in the end serve to increase the sentence beyond the statutory maximum for that offense. *Apprendi* therefore effectively treated facts that enhance the sentence beyond the statutory maximum as additional elements of the crime that must be proved to the jury.

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26 530 U.S. 466 (2000).
27 N.J. STAT. ANN. § 2C:43-6(a)(2) (West 2004) ("In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years."). New Jersey's "hate crime" statute provided for an enhanced sentence if the sentencing judge found that "the defendant committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Apprendi*, 530 U.S. at 469 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).
29 Id. at 478.
30 *Apprendi*, 530 U.S. at 490.
31 Id. at 478.
32 As the Court would later describe this portion of its *Apprendi* holding: The fact that New Jersey labeled the hate crime a 'sentence enhancement' rather than a separate criminal act was irrelevant for constitutional purposes. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect *Apprendi* from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label 'sentence enhancement' to describe the latter did not provide a principled basis for treating the two crimes differently. *United States v. Booker*, 543 U.S. 220, 231 (2005) (internal citations omitted).
Similarly, in Ring v. Arizona\textsuperscript{33} the Court held that a trial judge may not herself determine if the necessary aggravating factors are present under Arizona law to impose the death penalty.\textsuperscript{34} The Ring Court reiterated that the label a state places on this type of fact-finding is not dispositive of the constitutional inquiry.\textsuperscript{35} The fact remains that the resulting increased punishment is constitutionally illegitimate unless the jury has found the facts in support thereof. Thus, Apprendi and Ring represent the Supreme Court’s attempt to “preserv[e] an ancient guarantee under a new set of circumstances.”\textsuperscript{36} The unassailable common law right to a jury trial on allegations of criminality, the Court has explained, must be preserved in a system that places “increasing emphasis on facts that enhance[] sentencing ranges.”\textsuperscript{37} Because sentence enhancements “increase[d] the judge’s power and diminish[ed] that of the jury . . . the jury’s finding of the underlying crime became less significant [a]nd the enhancements became very serious indeed.”\textsuperscript{38} The Court’s interpretation of the Sixth Amendment to apply with equal force in the sentence enhancement context thus ensured “that the jury would still stand between the individual and the power of the government under the new sentencing regime.”\textsuperscript{39}

Finally, in Blakely v. Washington\textsuperscript{40} the Court applied Apprendi to prohibit a trial judge from enhancing a sentence beyond the state’s prescribed Guidelines range (not the statutory maximum) based on facts not found by the jury.\textsuperscript{41} Thus, Blakely was denied his Sixth Amendment right to a jury trial when the judge found facts supporting an enhancement beyond the state Guidelines range, but not ultimately in excess of the statutory maximum for

\textsuperscript{33} 536 U.S. 584 (2002).
\textsuperscript{34} Id. at 588–89. The Court stated that the Sixth Amendment does not allow defendants to receive penalties that exceed the minimum they would receive if they were punished “. . . according to facts present in the jury verdict alone.” Id. This reasoning governs even if State characterizes additional findings made by judge as “sentencing factors.” Id.
\textsuperscript{35} Id. at 602 (“Merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” (quoting Apprendi, 530 U.S. at 476).
\textsuperscript{36} Booker, 543 U.S. at 237.
\textsuperscript{37} Id. at 236.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 237.
\textsuperscript{40} 542 U.S. 296 (2004).
\textsuperscript{41} See id. at 301.
the offense.\textsuperscript{42} Given the similarity between Washington State's sentencing regime and the federal Sentencing Guidelines,\textsuperscript{43} it appeared to some federal district judges in advance of the \textit{Booker} decision that the Guidelines were no longer constitutionally valid.\textsuperscript{44} Indeed, several circuit courts explicitly held as much.\textsuperscript{45}

In finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the [\textit{Blakely} sentencing procedures],"\textsuperscript{46} the \textit{Booker} Court focused its analysis on the \textit{mandatory} nature of the federal Guidelines.\textsuperscript{47} Upon consideration of the prescribed offense level associated with the criminal conduct and the defendant's criminal history category, a district judge was required to impose the sentence specified in the Guidelines.\textsuperscript{48} In \textit{Booker}'s case, the district judge found facts related to the quantity of drugs in \textit{Booker}'s possession, which in turn enhanced his mandatory sentence an additional 10 years.\textsuperscript{49} Because the Court's precedent was clear by the time of \textit{Booker} that the Sixth Amendment required facts of such consequence to be found by a jury beyond a reasonable doubt, the federal Sentencing Guidelines failed to pass constitutional muster.\textsuperscript{50}

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\begin{itemize}
\item \textsuperscript{42} \textit{Id.} at 313–14.
\item \textsuperscript{43} \textit{See} \textit{Booker}, 543 U.S. at 231-32 (noting that both plans permitted judges to increase sentences upon a unilateral finding of aggravating facts).
\item \textsuperscript{44} \textit{See}, e.g., United States v. Mueffelman, 327 F. Supp. 2d 79, 82 (D. Mass. 2004) (determining that \textit{Blakely} applied to the federal Sentencing Guidelines and "that the Guidelines [were] rendered unconstitutional in their entirety by that application"); United States v. Croxford, 324 F. Supp. 2d 1230, 1238 (D. Utah 2004) (postulating that "the inescapable conclusion of \textit{Blakely} is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this one").
\item \textsuperscript{45} For a more thorough accounting of the jurisprudential path from \textit{Apprendi} to \textit{Blakely} to \textit{Booker}, see Douglas A. Berman, \textit{Punishment and Crime: Reconceptualizing Sentencing}, 2005 U. CHI. LEGAL F. 1 (2005).
\item \textsuperscript{46} \textit{Booker}, 543 U.S. at 233.
\item \textsuperscript{47} Indeed, the Court noted that "the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges." \textit{Id.} at 233. While 18 U.S.C. § 3553(a) listed the "established sentencing range" as one of several factors a district judge should consider, subsection (b) then \textit{required} the imposition of a Guidelines sentence. \textit{Id.} at 233–34.
\item \textsuperscript{48} \textit{See id.} at 235 (describing the Guidelines sentencing process on the facts of \textit{Booker}'s case).
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 243–44 (noting fairness and reliability have always outweighed expediency in criminal trials).
\end{itemize}
B. The Remedial Opinion

The Supreme Court responded by rendering the Guidelines "effectively advisory." The Court accomplished this by excising from the Sentencing Reform Act two provisions that made the Guidelines mandatory in application. The first provision, 18 U.S.C. § 3553(b)(1), "require[d] sentencing courts to impose a sentence within the applicable Guidelines range," and the second, 18 U.S.C. § 3742(e), "set[] forth standards of review on appeal, including de novo review of departures from the applicable Guidelines range." The Court emphasized that "[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives." Thus, although the Guidelines were no longer mandatory, district courts were nevertheless instructed to "consult those Guidelines and take them into account when sentencing." Upon determining a Guidelines sentence, however, district courts were to consider the seven factors set out in 18 U.S.C. § 3553(a) in arriving at the ultimate sentence determination. Tenth Circuit Judge Michael McConnell has succinctly described the resulting post-Booker sentencing landscape:

[I]t is permissible to enhance a sentence on the basis of judge-found facts so long as the district judge has discretion to impose a sentence either higher or lower than the Guidelines range, on the basis of broad statutory factors. Under this new system, sentences continue to be subject to appellate review, but variances from the Guidelines will be reversed only if the resulting sentence is "unreasonable."

Judge McConnell posits that the Booker opinion is susceptible of two interpretations. Under a reading which he terms "Booker maximalism," district judges "are liberated to sentence criminal

51 Id. at 245 (suggesting that although the Guidelines sentencing ranges are no longer mandatory, district judges should nevertheless consider them at sentencing).
52 Id. at 245-46.
53 Id. at 259.
54 Id. at 264.
55 Id.
56 Id. at 261.
58 Id.
defendants in accordance with the judge's sense of individualized justice, with the Guidelines merely taken into 'consideration' for what they are worth."\(^5\) This would appear to be at odds with the Booker Court's expressed intent to "maintain[] a strong connection between the sentence imposed and the offender's real conduct — a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."\(^6\) The other interpretation — "Booker minimalism" — holds that Booker has effected only a "modest adjustment" to sentencing procedure because the Guidelines range still enjoys a presumption of reasonableness and the district judge bears the onus of justifying his imposition of a sentence outside of that range.\(^6\)

II. THE SECOND CIRCUIT'S IMPLEMENTATION OF BOOKER

A. Sentencing in the District Courts After Booker

With the issuance of its opinion in United States v. Crosby,\(^6\) the Second Circuit became the first federal appeals court to delineate the effect of Booker on federal sentencing procedure.\(^6\) Booker, the court observed, "can be expected to have a significant effect on sentencing in federal criminal cases, although perhaps not as drastic an effect as some might suppose."\(^6\) Writing for a unanimous panel, Judge Jon O. Newman emphasized that:

\(^5\) Id.
\(^6\) See McConnell, supra note 57, at 666–67. Some commentators, particularly those in the defense bar, have criticized any so-called "presumption of reasonableness" as undercutting Booker's intention to remove the "mandatoriness" of the Guidelines regime. For one such example, see Posting of Yuanchung Lee to Second Circuit Blog, Crosby Redux: Circuit Clarifies Some Important Post-Booker Issues, http://circuit2.blogspot.com/2006/04/crosby-redux-circuit-clarifies-some.html (Apr. 4, 2006) in which the author criticizes as inconsistent the Second Circuit's refusal on the one hand to establish a presumption that a Guidelines sentence is reasonable with its observation that as a general matter a Guidelines sentence will fall within the broad range of sentences that would be deemed reasonable upon appellate review. Id. Incidentally, the courts of appeals do not uniformly agree on whether a Guidelines sentence should be considered presumptively reasonable, an issue that is addressed more thoroughly in Part III.A., infra.
\(^6\) 397 F.3d 103 (2d Cir. 2005).
\(^6\) Id. at 106.

\(^6\) Id. at 110-11. Although the Booker decision excised that portion of the statute making the Guidelines mandatory in application, sentencing judges are still required to consider the various factors of the guidelines. Id. at 111.
the excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded. On the contrary, sentencing judges remain under a duty with respect to the Guidelines – not the previously imposed duty to apply the Guidelines, but the continuing duty to 'consider' them, along with the other factors listed in section 3553(a).\(^{65}\)

The court then proceeded to lay out the mechanics of the sentencing process after *Booker*. First, in “considering” the Guidelines, district judges are required to calculate the Guidelines range as they did pre-*Booker*.\(^{66}\) This includes finding those facts that may enhance the sentence beyond the range that would result based only on facts admitted by the defendant or found by the jury.\(^{67}\) Because application of the Guidelines is no longer mandatory after *Booker*, such judicial fact-finding would no longer run afoul of the Sixth Amendment.\(^{68}\) Importantly, “the sentencing judge [is] entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to determination of a non-Guidelines sentence.”\(^{69}\)

Next, under 18 U.S.C. § 3553(a)(4), district judges are duty-bound to “consider” the resulting Guidelines range.\(^{70}\) But under a regime in which the Guidelines are only advisory, what precisely must a district judge do to satisfy his obligation to “consider” the Guidelines range? The Second Circuit declined in *Crosby*,\(^{71}\) and

\(^{65}\) *Id.* at 111. Among the factors outlined in § 3553(a) are: the nature and circumstances of the offense; the need for the sentence imposed to reflect the seriousness of the offense as well as provide just punishment and deterrence; the kinds of sentences and the sentencing range established for the applicable category of offense committed by the applicable category of defendant; pertinent policy statements issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among similarly situated defendants; and the need to provide restitution to victims of the criminal conduct. 18 U.S.C. § 3553(a).

\(^{66}\) *Crosby*, 397 F.3d at 112. The *Booker* decision still required sentencing judges to determine the applicable Guidelines range for the defendant. See *id*.

\(^{67}\) See *id*. A sentencing judge can only find facts relevant to the determination of a Guidelines sentence. *Id*.

\(^{68}\) See *id*. The Supreme Court found that the advisory Guidelines would allow the sentencing judge to find relevant facts for a Guidelines sentence without violating a defendant’s Sixth Amendment rights. *Id*.

\(^{69}\) *Id*.

\(^{70}\) *Id.* at 113.

\(^{71}\) See *id*. The court stated “We need not on this appeal endeavor to determine what degree of consideration is required,” and “[w]e will not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to ‘consider’ the Guidelines.” *Id*. Therefore, the court disposed of the case without mandating
has declined in subsequent cases, to engage in a semantic discussion of the precise meaning of the term.\textsuperscript{72} The court requires no "robotic incantations" by district judges to ensure that they have actually "considered" the $3553(a)$ factors.\textsuperscript{73} The

what a sentencing judge must "consider." \textit{Id.}

\textsuperscript{72} In United States v. Fleming, 397 F.3d 95 (2d Cir. 2005), a companion case to \textit{Crosby}, the Second Circuit elaborated on the district court's duty to "consider" the $3553(a)$ factors:

\begin{quote}
We appreciate that lexicographers, contemplating various contexts in which the word 'consider' is used, might infuse the word with a meaning that implies a measure of sustained reflection. But our context is that of experienced district judges, familiar with both the substantive content of relevant law and procedural requirements, who face the daunting task of administering heavy caseloads. In this context, we continue to believe that no specific verbal formulations should be prescribed to demonstrate the adequate discharge of the duty to 'consider' matters relevant to sentencing. As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.
\end{quote}

\textit{Id.} at 100.

\textsuperscript{73} \textit{Crosby}, 397 F.3d at 113. Albeit in a case of somewhat unusual procedural and factual background, the Second Circuit recently vacated and remanded a sentence because the district court inadequately considered the $3553(a)$ factors. \textit{See United States v. Toohey, 448 F.3d 542 (2d Cir. 2006).} Having heard two appeals of the sentences imposed in Toohey's case, the Second Circuit vacated the sentence and reassigned the case to a different judge for sentencing in accordance with its remand instructions. \textit{Id.} at 543-44. Briefly, Toohey was convicted of making a willful false statement on his income tax return. \textit{Id.} at 543. Although the then-mandatory Guidelines called for a sentencing range of 15-21 months' imprisonment, the district court downwardly departed and sentenced Toohey to two years' probation. \textit{Id.} On the first appeal, the Second Circuit vacated and remanded, \textit{inter alia}, on the ground that the district court's departure decision lacked sufficient explanation under 18 U.S.C. $3553(c). \textit{Id.} The district court imposed the same sentence on remand, which, now applying \textit{Booker}, the Second Circuit again vacated for lack of sufficient explanation. \textit{Id.} The district court was instructed to "consider all" the $3553(a)$ factors in determining if a Guidelines or non-Guidelines sentence should be imposed. \textit{Id.} at 544. The district court then imposed a fifteen-month sentence and stated on the record that the first two sentences reflected the prior professional relationship the district judge and the defendant enjoyed when the two were in law practice together. \textit{Id.} As the Second Circuit read the sentencing transcript, the district court based its sentencing decision on the appellate court's reasoning in its prior summary order vacating the previous sentence, its perceived need to "correct" its admittedly "sympathy-based" sentencing decision, and its desire not to "abuse the Sentencing Guidelines." \textit{Id.} at 545. These reasons, the Second Circuit held, "do not reflect an adequate consideration, either implicitly or explicitly, of the factors listed in $3553(a)$." \textit{Id.} The appellate court was particularly concerned that the district court imposed a prison term ostensibly because it interpreted previous remand orders from the circuit court essentially as prison term mandates. \textit{Id.} Citing \textit{Crosby}, the Second Circuit deemed the district court's sentence "unreasonable for legal error in the method of its selection." \textit{Id.} at 546. Therefore, in the \textit{Toohey} case the court gave an early indication of what "inadequate consideration" of the statutory factors looks like. Consistent with \textit{Crosby}, however, the \textit{Toohey} case maintains the Circuit's open-ended conception of the term "consider," finding only that the district court's minimalist approach to justifying Toohey's sentence was legally insufficient. Nevertheless, the burden on the district court at sentencing does not appear onerous; the court must simply apply the statutory factors to the particular factual circumstances of a defendant's case.
court has taken rather a common law approach to the issue, permitting the concept “to evolve as district judges faithfully perform their statutory duties.”

After considering the Guidelines range as well as the § 3553(a) factors, district judges must next decide whether “to impose the sentence that would have been imposed under the Guidelines . . . or to impose a non-Guidelines sentence.”

B. Appellate Review of Sentences After Booker

After Booker, appellate courts review sentences for “reasonableness,” an inherently pliable standard of review, and one that inevitably will require judicial interpretation going forward. It is clear, however, that “reasonableness” is “not limited to consideration of the length of the sentence.”

Regardless of length, a sentence is “unreasonable” if legal or procedural errors led to its imposition. The Second Circuit has

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74 Crosby, 397 F.3d at 113. Notwithstanding its flexible approach to determining when a district judge has “considered” the Guidelines, the Second Circuit was emphatic that after Booker, sentencing judges are in no way authorized to make judgment calls as to whether the Guidelines even need be consulted in a given case:

[It is important to bear in mind that Booker/Fanfan and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of the sentencing judge. Thus, it would be a mistake to think that, after Booker/Fanfan, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum.]

Id. Thus, the Second Circuit’s approach appears to be at least an implicit endorsement of what has been described as “Booker minimalism”; namely, that district judges’ sentencing discretion is significantly constrained by the requirement that they calculate a Guidelines range and apply the § 3553(a) factors. See United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005), which notes that a district court cannot “import [its] own philosophy of sentencing if it is inconsistent” with the § 3553(a) factors. Id.

75 Crosby, 397 F.3d at 113.
76 See id. at 114.

77 The Second Circuit indicated that the flexibility of “reasonableness” review is consonant with the spirit of Booker and thus declined to announce any abstract rules on “reasonableness”:

Because ‘reasonableness’ is inherently a concept of flexible meaning, generally lacking precise boundaries, we decline to fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline. Indeed, such per se rules would risk being invalidated as contrary to the Supreme Court’s holding in Booker/Fanfan, because they would effectively re-institute mandatory adherence to the Guidelines.

Id. at 115. In the language of then-Chief Judge Walker, “we have declined to adopt per se rules, opting instead to fashion the mosaic of reasonableness through case-by-case adjudication.” United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006).

78 Crosby, 397 F.3d at 114.
79 See id. at 114–15.
identified four potential procedural errors that would justify a finding of “unreasonableness”: (1) “making factual findings and mandatorily enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant”; (2) “mandatorily applying the applicable Guidelines range that was based solely on facts found by a jury or admitted by a defendant”; (3) failing to “consider” the applicable Guidelines range as well as the other § 3553(a) factors; and (4) “limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range . . . based on facts found by the court.”

In summary, reasonableness review in the Second Circuit is a two-pronged analytical process: (1) procedural reasonableness, in which the court will look to see if the district court identified the appropriate Guidelines range, treated the Guidelines as advisory, and considered the Guidelines alongside the other § 3553(a) factors; and (2) substantive reasonableness, in which the court will consider the length of the sentence imposed in light of the statutory factors.

80 Subsumed within this category of procedural errors is an incorrect Guidelines calculation itself. See United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) (“An error in determining the applicable Guidelines range . . . would be the type of procedural error that could render a sentence unreasonable under Booker.”); cf. United States v. Rubenstein, 403 F.3d 93, 98 (2d Cir. 2005) (“[W]e express no opinion as to whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable.”).

81 Crosby, 397 F.3d. at 114–15. It is evident that the Crosby court’s potential “procedural” errors are principally intended to dismantle notions of “mandatoriness” in sentencing procedure. This was the mandate of Booker/Fanfan and therefore on this point Crosby breaks no new ground. But as an implementing decision, Crosby gives an indication of how odd indeed sentencing law has now become. On the one hand, district judges may still find facts, but they commit legal error if they use those facts to mandatorily enhance the sentence beyond that justified by facts that were found in conformity with Sixth Amendment requirements, i.e., found by a jury or admitted to by the defendant. On the other hand, if they mandatorily impose a Guidelines sentence based only on facts admitted to or found by a jury they will also be found to have imposed an “unreasonable” sentence. The result is a regime in which sentencing judges should not exercise their discretion in so constricted a manner as they once did, but yet they are expected to follow certain standardized procedures (e.g., suggested Guidelines ranges, § 3553(a) factors) designed to foster the uniformity in sentences contemplated by the work of the Sentencing Commission.

82 See id. at 113–15 (stating that the Guidelines are no longer mandatory, and that the sentencing judge must consider the Guidelines and all other factors listed in section 3553(a); identify the applicable Guideline ranges; and then decide the appropriate sentence in light of these statutory factors).
C. Disposition of Pre-Booker Sentences Pending on Direct Review

In addition to elucidating the legal principles that would apply to appellate review of sentences after *Booker*, the court also considered more mundane procedural issues such as what to do with cases that were pending on direct review when *Booker* was issued. In reviewing sentences imposed after the *Booker* decision, the Second Circuit would be guided by ordinary prudential considerations such as the “plain error” test and the “harmless error” doctrine. For pre-*Booker* sentences pending on direct review in which a procedural error has occurred, the court found that remand was appropriate, “not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence.” As one pair of commentators has described the approach, “if, on remand, a sentencing judge determines that the sentence would essentially have been the same under the post-*Booker* regime, any procedural errors in the original sentencing resulting from a mistaken perception of the law will be harmless and not prejudicial under a plain error analysis.”

III. THE SECOND CIRCUIT’S RESOLUTION OF DISCRETE ISSUES AFTER CROSBY

Since *Booker* was decided just under two years ago, the Second Circuit has worked quickly in implementing the Supreme Court’s holding. While the following is not an exhaustive consideration of all *Booker* issues that have come before the court, it examines the key questions that have arisen thus far.

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83 Id. at 116.
84 Id. at 117 (emphasis added).
85 Martin Flumenbaum & Brad S. Karp, *Sentencing in the Post-'Booker' World*, 231 N.Y.L.J. 3 (2005). This so-called “Crosby remand” presents potentially serious implications for defendants. For example, with respect to those cases on direct review when *Booker* was decided, the question arises whether the imposition of a lengthier sentence on remand violates the Ex Post Facto Clause of Article I of the Constitution. Essentially, the argument is that such a result violates ex post facto principles because the application of the *Booker* advisory regime on remand subjects a defendant to a potentially greater sentence than he would have faced before *Booker*. Although the Second Circuit in *Crosby* deferred ruling on this constitutional issue, *Crosby*, 397 F.3d at 117 n.17, it subsequently held that retroactive application of *Booker*'s remedial holding to cases on direct review did not constitute an ex post facto violation. See United States v. Fairclough, 439 F.3d 76, 79 (2d Cir. 2006), discussed in Part III.B infra.
A. A Guidelines Sentence Is Not Presumptively Reasonable

Given the emphasis that Booker continued to place on the Guidelines even under an advisory regime, and Crosby's firm admonishment to district courts that the calculation of the appropriate Guidelines range is still a vital step in arriving at a sentence determination, the question becomes whether a Guidelines range sentence is consequently entitled to special deference on appellate review.

Several circuits have held that sentences within the applicable Guidelines range are presumptively reasonable. In establishing a rebuttable presumption of reasonableness, these circuits have explained that such a holding is faithful to both the merits analysis as well as the remedial portion of the Booker opinion. Once the presumption is established by a correctly determined and imposed Guidelines range sentence, a defendant can rebut the presumption by demonstrating its unreasonableness when measured against the other § 3553(a) factors. As the Seventh Circuit has realistically observed, "[t]he Guidelines remain an

86 See, e.g., United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) ("[I]f determine under the appropriate standard of review that the district court correctly determined the relevant Guidelines range, and if the defendant was subsequently sentenced to a term of imprisonment within that range, then the sentence is entitled to a rebuttable presumption of reasonableness on appeal"); United States v. Lewis, 436 F.3d 939, 946 (8th Cir. 2006) (holding that "[a] sentence falling within the applicable guideline range is presumptively reasonable"); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) (posing that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable" (quoting United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005))); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006) ("We . . . credit[] sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness"); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) ("We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable"); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (explaining that "the best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness").

87 See, e.g., Mykytiuk, 415 F.3d at 607 (stating that "while a per se or conclusively presumed reasonableness test would undo the Supreme Court's merits analysis in Booker, a clean slate that ignores the proper Guidelines range would be inconsistent with the remedial opinion").

88 See United States v. Booker, 543 U.S. 220, 261 (2005). "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." Id.; cf. Mykytiuk, 415 F.3d at 608. The Seventh Circuit candidly acknowledged, however, that "it will be a rare Guidelines sentence that is unreasonable." Id.
essential tool in creating a fair and uniform sentencing regime across the country.”  

Adopting the position of a minority of circuits, the Second Circuit has not established a presumption that a Guidelines sentence is reasonable. Writing for the court in Fernandez, Judge Jose A. Cabranes reiterated the court’s reluctance to formulate rules governing “reasonableness” review:

Although the Guidelines range should serve as ‘a benchmark or a point of reference or departure’ for the review of sentences, as well as for their imposition, we examine the record as a whole to determine whether a sentence is reasonable in a specific case. Accordingly, we do not hold that a Guidelines sentence, without more, is ‘presumptively reasonable.’

The Fernandez holding is no doubt designed to foster the kind of flexible reasonableness review articulated in Crosby. The Crosby court carefully noted that the creation of rules related to “reasonableness” could “effectively re-institute mandatory adherence to the Guidelines,” a result obviously foreclosed by Booker.

However, in United States v. Rattoballi, an important recent decision further explicating “the bounds of reasonableness

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89 Mykytiuk, 415 F.3d at 608.
90 See United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (“W do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable,'” because, “[a]lthough making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction; and anyway terms like 'presumptive' and 'per se' are more ambiguous labels than they at first appear’”); United States v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006) (declining to establish a rebuttable presumption of reasonableness because “[a]ppellants already bear the burden of proving the unreasonableness of sentences on appeal’’); United States v. Carty, 453 F.3d 1214, 1221 (9th Cir. 2006) (“Although several circuits have afforded a presumption of reasonableness to within-the-Guidelines sentences, we have not adopted this position”) (internal citations omitted).
91 United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (stating that the Second Circuit has a commitment to avoid the formulation of per se rules to govern the reasonableness standards, and thus declining to establish a rebuttable presumption).
92 Id. at 28 (internal citations omitted). The circuit split on the presumption of reasonableness may be resolved this term by the Supreme Court. On November 3, 2006, the Court granted certiorari on this question in Rita v. United States, No. 06-5754, an appeal from the Fourth Circuit, in which the Court will resolve, inter alia, whether the presumption is consistent with Booker.
93 United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005) (explaining that “reasonableness” is a concept of flexible meaning, and that the adoption of per se rules would risk reinstating mandatory adherence to the Guidelines).
94 452 F.3d 127 (2d Cir. 2006).
review,"95 the Second Circuit vacated and remanded a sentence as substantively unreasonable, the first time the court has done so since Booker.96 In the process, the court provided a significant restatement of its sentencing law, particularly with respect to the role of the Guidelines range in relation to the other § 3553(a) factors.

i. Rattoballi’s Renewed Emphasis on the Sentencing Guidelines

Rattoballi vividly illustrates the conceptual difficulties that arise as circuit courts attempt to administer an “advisory” Guidelines system while also retaining “the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”97 In other words, while Booker may have consigned the Guidelines to the status of simply one factor among others in § 3553(a), it seems reviewing courts should still accord them substantial deference for the collective sentencing wisdom they contain. As discussed in Part III.A, supra, one means of doing this is by creating a presumption of reasonableness for Guidelines range sentences. In those jurisdictions declining to adopt this presumption, such as the Second Circuit, courts inevitably engage in the difficult task of creating a coherent jurisprudence that respects the proper role of the Guidelines in the sentencing process. After all, a decision not to create per se rules or presumptions is intended to ensure that the Guidelines do not receive the undue emphasis disallowed in the post-Booker sentencing process. Yet if those same courts adopt a deferential posture toward the Guidelines, they run the risk of creating a de facto presumption of reasonableness anyway. In strong language, Rattoballi reaffirms the Sentencing Guidelines as an ordering principle in sentencing procedure.

Rattoballi was charged with conspiracy to rig bids in violation of the Sherman Act and conspiracy to commit mail fraud.98 He pleaded guilty and agreed to cooperate with the government in exchange for non-prosecution for any other crimes arising out of the same conduct as well as the government’s agreement to file a

95 Id. at 128.
96 Id. at 128–29.
97 Id. at 133.
98 Id. at 129.
letter recommending leniency at sentencing because of his cooperation with the government. At sentencing, the government urged a Guidelines range sentence of 27-33 months. The district court imposed a non-Guidelines sentence, ordering Rattoballi to serve one year of home confinement, five years' probation, and pay $155,000 in restitution. The district court's oral explanation for its sentence rested on Rattoballi's guilty plea, the effect the three-year investigation had on him personally and his business, the potential failure of his business were he to be imprisoned, and the need for him to work in order to pay restitution for his crimes.

The Second Circuit held that the "substantial deviation" from the Guidelines range was unreasonable and that the district court was statutorily obliged to include a written statement detailing specifically why it had decided to deviate from the recommended Guidelines range. The real significance of Rattoballi is found in its exposition of the law of "substantive reasonableness," which considers whether the length of the sentence is reasonable in light of the § 3553 factors.

With a deferential nod to the work of the Sentencing Commission in creating the Guidelines and the Congress in authorizing them, the court broadly justified the Guidelines as the embodiment of "the collective determination of...Congress, the Judiciary, and the Sentencing Commission— as to the appropriate punishments for a wide range of criminal conduct." The court approvingly cites language from the First Circuit that the Guidelines are not simply "another factor" to be considered under § 3553(a), but rather an integration of the other

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99 Id.
100 Id. at 130.
101 Id. at 131.
102 Id.
103 Id. at 128.
104 See id. at 131-32 (stating that second component of reasonableness review is "substantive reasonableness," where court uses factors listed in 18 U.S.C. § 3553(a) to determine if length of sentence is reasonable); see also United States v. Crosby, 397 F.3d 103, 113-15 (2d Cir. 2005) (discussing duty that judges have in considering the factors listed in 18 U.S.C. § 3553(a)).
105 See Rattoballi, 452 F.3d at 133 (commenting that court will "seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress").
106 Id. (quoting United States v. Cooper, 437 F.3d 324, 331 n.10 (3d Cir. 2006)).
After seemingly setting up this "first among equals" status for the Guidelines in relation to the other statutory factors, the court then articulates a series of principles governing substantive reasonableness, all of which effectively create a sliding-scale requiring greater justification by a district court the more it deviates from the recommended Guidelines range.108

ii. A De Facto Presumption?

The court will "view as inherently suspect a non-Guidelines sentence that rests primarily on factors that are not unique or personal to a particular defendant, but instead reflect attributes common to all defendants."109 Thus, in exercising their newfound discretion under Booker to impose non-Guidelines sentences based on the particular circumstances of the defendants before them, district courts' decisions will be scrutinized to ensure that the departure was truly justified by the uniqueness of the situation.110 In this regard, the court's suspicion is clearly premised on its desire to promote genuine uniformity in sentencing, an explicit aim of the Sentencing Commission in creating the Guidelines. In other words, a discretionary or advisory sentencing regime does not require courts to jettison their traditional concern for consistency in the resulting sentences.111

The court noted, but did not explicitly adopt, the practice in other circuit courts to require district courts to "offer a more compelling accounting the farther a sentence deviates from the advisory Guidelines range."112 Yet the court emphasized that "[its] own ability to uphold a sentence as reasonable will be

107 See id. (stating "[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 . . . " (quoting United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (italics in original))).

108 See id. at 133–34 (describing when and in what cases sentences will be declared substantively unreasonable).

109 Id. at 133.

110 See id. at 134 (noting that "[a] non-Guidelines sentence . . . may be deemed substantively unreasonable in the absence of persuasive explanation as to why the sentence actually comports with the § 3553(a) factors").

111 The court further noted that its reasonableness review includes determining if a non-Guidelines sentence was based on factors incompatible with the Sentencing Commission's policy statements. Id. at 134. Such a finding renders the sentence substantively unreasonable "in the absence of persuasive explanation as to why the sentence actually comports with the 3553(a) factors." Id.

112 Id.
informed by the district court’s statement of reasons (or lack thereof) for the sentence that it elects to impose.”113 Despite its refusal to explicitly endorse this practice, it may fairly be implied from Rattoballi that the Second Circuit sees real merit in the approach of its sister circuits. Such a rule also promotes uniformity in sentences and defers to the work of the Sentencing Commission because it requires district courts to hew close to the Guidelines, imposing non-Guidelines sentences only when substantially justified.114

The Second Circuit appears to reject the notion of “Booker maximalism,” under which district judges are purportedly vested with great discretion to do justice in an individual case, with only passing consideration of the Guidelines.115 Writing for the court, Chief Judge Walker indicated how closely tied a Guidelines range sentence and a “reasonable” sentence are:

[A] district court may be able to justify a marginal sentence by including a compelling statement of reasons that reflect consideration of § 3553(a) and set forth why it was desirable to deviate from the Guidelines. In the absence of such a compelling statement, we may be forced to vacate a marginal sentence where the record is insufficient, on its own, to support the sentence as reasonable.116

113 Id.

114 The Supreme Court recently heard argument in Claiborne v. United States, No. 06-5618, an appeal from the Eighth Circuit in which the Court will determine whether it is consistent with Booker “to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances.”

115 See McConnell, supra note 57, at 666 (describing “Booker maximalism” approach, under which a district court can sentence a defendant according to the judge’s sense of justice, with merely passing consideration of the Guidelines.”).

116 Rattoballi, 452 F.3d at 135. Perhaps Rattoballi’s apparent re-emphasis of the Guidelines is less dramatic than it first appears. Judge McConnell notes that “there are procedural and institutional considerations, built into the structure of sentencing, that nudge district judges in the direction of Guidelines compliance.” McConnell, supra note 57, at 682. For example, the Supreme Court in Booker instructs district courts to continue calculating the Guidelines sentence as part of their § 3553 considerations. United States v. Booker, 543 U.S. 220, 264 (2005). Furthermore, the Second Circuit in Crosby reminded district courts that the Guidelines range sentence remains a vital part of the sentencing process. United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005). One year after Booker, interestingly, sentences within the Guidelines range in the Second Circuit had fallen from 64% to 49%. See Alan Vinegrad & Douglas Bloom, “Booker”: One Year Later, N.Y.L.J. Jan. 13, 2006, at 3. The “procedural and institutional considerations” that encourage Guidelines compliance appear to have had less of an impact on district judges in the Second Circuit. It will be interesting to see if Rattoballi has a demonstrable effect on the percentage of Guidelines range sentences in the future.
While it reiterates that a Guidelines sentence is not presumptively reasonable in the Second Circuit, the onus Rattoballi places on district courts to justify a non-Guidelines sentence raises the question whether the court of appeals has nevertheless created a de facto presumption.

With respect to a district court’s need to justify its non-Guidelines sentence under 18 U.S.C. § 3553(c), Rattoballi indicates what a judge must do to meet this obligation. The court has emphasized that while a Guidelines sentence requires only that the district judge state his reason in open court, a non-Guidelines sentence requires also a specific written statement of reasons in the order of judgment and commitment. The non-Guidelines sentence justification need only be “a simple, fact-specific statement explaining why the Guidelines range did not account for a specific factor or factors under § 3553(a).”

117 In pertinent part, 18 U.S.C. § 3553(c) provides:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –
(1) is of the kind, and within the range, described in subsection (a)(4) [i.e., a Guidelines sentence] and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment.

118 See Rattoballi, 452 F.3d at 138 (discussing additional requirement of having district court state reasons in written order for imposing sentence different from Guidelines).

119 Id. On July 20, 2006, mere weeks after Rattoballi, Judge Rakoff in the Southern District of New York issued a Sentence Memorandum explaining his reasons for not imposing a Guidelines-range sentence. See United States v. Adelson, 441 F.Supp.2d 506 (2006). In justifying his sentencing of a white collar defendant to 42 months imprisonment instead of the Guidelines sentence of life imprisonment, Judge Rakoff articulated the shortcomings inherent in subjecting sentencing decisions to a systematic methodology. For example, the Guidelines’ “arithmetic approach” tends “to place great weight on putatively measurable quantities, such as the weight of drugs in narcotics cases or the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors.” Id. at 509. Judge Rakoff pointedly observed that Adelson’s case exposed “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.” Id. at 512. As a result, the court chose instead to focus on the non-guidelines factors of § 3553(a). The court noted that when a Guidelines-calculated sentence is “patently absurd” on its face, a greater emphasis on the other § 3553(a) factors yields a sentence more appropriate to a defendant’s unique circumstances. Adelson suggests that the Guidelines apply particularly incongruously in the white collar crime context. See Justin Bachman, Follow the Money — to Prison, BusinessWeek.com, http://www.businessweek.com/investor/content/nov2006/pi20061101_695231.htm?chan=search (Nov. 2, 2006). White collar crime sentences “rise to a duration that makes many legal experts question whether the justice system is shifting the role of deterrence into the
Interestingly, the Second Circuit has expressly declined to answer whether a district court's failure to abide by its § 3553(c) obligations in imposing a non-Guidelines sentence provides an "independent cause for remand."  

B. Retroactive Application of Booker Does Not Violate Ex Post Facto Principles

In two related decisions, Vaughn and Fairclough, the Second Circuit held that retroactive application of the advisory sentencing regime does not violate the Ex Post Facto Clause of the Constitution. Defendants who committed their crimes pre-Booker, but were sentenced post-Booker, argued that they were unconstitutionally disadvantaged because "before Booker, [they] were only exposed to sentences within the Guidelines range, and after the Booker remedy, they [were] exposed to sentences within an applicable statutory range." In the defendants' view, the new Booker sentencing regime clearly amounted to an impermissible ex post facto law.

Guided by the Supreme Court's holding in Rogers v. Tennessee, the Second Circuit reasoned that limitations on ex post facto judicial decision-making are rooted in "core concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." The Second Circuit discerned no ex post facto violation because the defendant "had fair warning that his conduct was criminal, that enhancements or upward departures could be applied to his sentence under the Guidelines based on

realm of overkill." Id.

120 Rattoballi, 452 F.3d at 138–39 (declining to decide "whether remand is also compelled by the district court's non-compliance with the written judgment requirements of § 3553(c)(2)" because the sentence should be remanded for "unreasonableness").

121 United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005).

122 United States v. Fairclough, 439 F.3d 78 (2d Cir. 2006).

123 Vaughn, 430 F.3d at 521 (holding that "the retroactive application of the remedial opinion in Booker, does not violate the ex post facto principle of the Due Process Clause of the Fifth Amendment); Fairclough, 439 F.3d at 79 (adopting Vaughn rationale in holding district court did not violate ex post facto principle by retroactively applying Booker's remedial holding).

124 Fairclough, 439 F.3d at 78.


126 Fairclough, 439 F.3d at 78.
judicial fact-findings, and that he could be sentenced as high as the statutory maximum." Therefore, the companion cases of Vaughn and Fairclough together reject ex post facto challenges to both a district court's application of Booker to sentencing as well as the circuit court's application of Booker to cases on direct review.128

C. Retroactive Application of Booker to Cases on Collateral Review

While Booker explicitly applied its holdings to "all cases on direct review,"129 it "made no explicit statement of retroactivity to collateral cases."130 The general rule is that new rules of criminal procedure "should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review."131 A new rule of constitutional law will be applied, however, if it is a "substantive or a watershed rule of procedure that affects the fundamental fairness and accuracy of the criminal proceeding."132

Applying the Supreme Court's retroactivity analysis, the Second Circuit determined in Guzman that Booker does not apply retroactively to cases on collateral review.133 In reaching this holding, the court found that while Booker did announce a new rule, it did not establish a "substantive" or "watershed" rule of criminal procedure and therefore none of the exceptions to non-retroactivity should apply.134 In the end, Booker does not alter

127 Id. at 79.
128 In concluding that Booker is properly applied to cases on direct review without violation of ex post facto principles, the Second Circuit becomes the sixth federal court of appeals to so hold. See United States v. Lata, 415 F.3d 107 (1st Cir. 2005); United States v. Scroggins, 411 F.3d 572 (5th Cir. 2005); United States v. Jamison, 416 F.3d 538 (7th Cir. 2005); United States v. Dupas, 417 F.3d 1064 (9th Cir. 2005), amended by 419 F.3d 916 (9th Cir. 2005); United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005).
129 United States v. Booker, 543 U.S. at 268.
130 Green v. United States, 397 F.3d 101, 103 (2d Cir. 2005) (per curiam).
132 Guzman v. United States, 404 F.3d 139, 140 (2d Cir. 2005) (internal quotation marks omitted).
133 Id.
134 Id. at 142-43. For example, Booker did not alter the substantive requirements for particular crimes or render formerly proscribed conduct lawful. For an illustration see, McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005), observing that "[n]o conduct that was forbidden before Booker is permitted today; no maximum available sentence has been reduced."
the substantive law of crimes; it “change[s] the degree of flexibility judges... enjoy in applying the guideline system.”\(^{135}\) In the court’s view, *Booker*’s alteration of the Guidelines system to conform with Sixth Amendment requirements does not amount to a “watershed” rule justifying its application on collateral review.\(^{136}\) The Second Circuit’s holding in *Guzman* is consistent with the majority of circuit courts to have considered the issue.\(^{137}\)

**D. Sentences May Be Based On Facts Not Alleged in the Indictment**

The *Apprendi-Blakely-Booker* line of cases makes clear that “[o]ther 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.”\(^{138}\) Under the Due Process Clause of the Fifth Amendment and the notice guarantee of the Sixth Amendment, a criminal defendant is entitled to have the facts supporting his alleged criminality charged in a federal indictment.\(^{139}\) Extending this principle to the *Booker* arena, a defendant argued to the Second Circuit that the Fifth and Sixth Amendments require that district courts may only *sentence* defendants based on facts alleged in the indictment.\(^{140}\)

Given the recent attention the Supreme Court has devoted to ensuring that Sixth Amendment jury trial guarantees are strictly observed, the challenge is a logical one. The Second Circuit

\(^{135}\) *Guzman*, 404 F.3d at 143 (citation omitted).

\(^{136}\) Id.

\(^{137}\) See Padilla v. United States, 416 F.3d 424, 427 (5th Cir. 2005); Lenford Never Misses a Shot v. United States, 413 F.3d 781, 783 (8th Cir. 2005); Lloyd v. United States, 407 F.3d 608, 610 (3d Cir. 2005); Cirilo-Munoz v. United States, 404 F.3d 527, 533 (1st Cir. 2005); United States v. Price, 400 F.3d 844, 845 (10th Cir. 2005); Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005); McReynolds, 397 F.3d at 481.


\(^{139}\) *Jones* v. United States, 526 U.S. 227, 243 n.6 (1999) (stating that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt”).

\(^{140}\) United States v. Sheikh, 433 F.3d 905, 906 (2d Cir. 2006) (considering defendant’s argument that the “district court violated his constitutional rights by enhancing his sentence on the basis of a fact... not alleged in the indictment”).
examined the issue in *United States v. Sheikh*, a case in which the defendant pled guilty to mail fraud and conspiracy to commit securities fraud and mail fraud. The indictment charged Sheikh with raising “approximately $538,000” in fraudulent securities transactions, but it did not allege “a specific loss amount attributable to [his] conduct.” Sheikh was sentenced under the advisory Guidelines regime and the district court imposed a 14-level enhancement under U.S.S.G. § 2B1.1(b)(1)(H) because the crimes resulted in a loss more than $400,000, but not more than $1,000,000. The 46-month concurrent sentence Sheikh received was below the statutory maximum for each offense of conviction. Because Sheikh’s sentence did not exceed the statutory maximum, the express holding of *Apprendi* alone enabled the court to resolve the case in summary fashion:

So long as the facts found by the district court do not increase the sentence beyond the statutory maximum authorized by the verdict or trigger a mandatory minimum sentence not authorized by the verdict that simultaneously raises a corresponding maximum, the district court does not violate a defendant’s Fifth or Sixth Amendment rights by imposing a sentence based on facts not alleged in the indictment.

The more difficult question, and one that the Second Circuit’s *Sheikh* holding implicitly resolved, is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence results in a sentence violative of the Fifth and Sixth Amendments. *Apprendi* and its progeny instruct that such a scenario is constitutionally impermissible.

141 *Id.* at 905 (addressing defendant’s challenge to the district court’s calculation of his sentence, based on facts that were not proved to a jury or admitted by him in his plea).
142 *Id.*
143 *Id.* at 906.
144 *Id.* (“The district judge adopted the government’s Guidelines calculation . . . stating that she ‘believed that the guideline sentence is a reasonable sentence’

145 *Id.* at 905.
146 *Id.* at 906.
147 The Supreme Court considered a related question in United States v. Cotton, 535 U.S. 625 (2002). There, the issue before the Court was “whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence, even though the defendant did not object in the trial court.” *Id.* at 627. Defendants were found guilty of various crimes related to cocaine distribution. However, the superseding indictment did not allege any of the threshold levels of drug quantity that ultimately resulted in enhanced penalties at sentencing. *Id.* at 627-28. After hearing testimony at trial, the district court made
E. Co-Defendant Disparity Not a Basis for Non-Guidelines Sentence

On appeal, defendants may argue that their lengthy sentences should be reduced to conform to a co-defendant’s more lenient sentence. It is true that in determining an appropriate sentence, the district court must consider, inter alia, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” The Second Circuit has noted, however, that Congress intended the Guidelines to eliminate sentencing disparities on a national level, not necessarily among co-defendants in the same case. For example, under pre-Booker sentencing procedure, the court declined to make mitigating role adjustments based solely on a given defendant’s role in the criminal conduct vis-a-vis his co-defendants.

findings of fact with respect to drug quantities and, consequently, defendants received enhanced sentences. Id. at 628. Reviewing the proceedings in the lower court for plain error, the Court upheld the sentence because the evidence of drug quantity found by the district court was “overwhelming” and therefore the omission in the indictment did not seriously affect the fairness or integrity of the proceedings in the district court. Id. at 633. The decision in Cotton, however, is of limited relevance because it predated Booker and therefore does not address the Sixth Amendment violations attendant upon having the district court find facts that enhance the statutory maximum sentence.

149 United States v. Tejeda, 146 F.3d 84, 87 (2d Cir. 1998) (discussing Congress’ objective in eliminating disparity on a national level); accord United States v. Joyner, 924 F.2d 454, 460 (2d Cir. 1991) (commenting on elimination of nationwide disparity as Congress’ objective).
150 See U.S.S.G. § 3B1.2 (2006) (providing for decreases in a defendant’s offense level based on the defendant’s “minimal” or “minor” role in the offense).
151 For discussion of this issue see, United States v. Carpenter, 252 F.3d 230, 235 (2d Cir. 2001), instructing that “[a] reduction [pursuant to U.S.S.G. §3B1.2] will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant’s conduct must be ‘minor’ or ‘minimal’ as compared to the average participant in such a crime,” quoting United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) (per curiam). Rather than simply compare the defendant’s level of involvement with his criminal cohorts, “the district court is required to gauge the [defendant’s] culpability relative to elements of the offense of conviction as well as in relation to the co-conspirators.” United States v. Neils, 156 F.3d 382, 383 (2d Cir. 1998) (per curiam). The Second Circuit has explained the rationale for this rule: “if participation in the offense were measured solely in relation to the co-defendants, the anomaly would arise that a deeply involved participant would be rewarded with a downward adjustment, just because his co-defendants were even more culpable.” Id. at 383. In addition, such an approach to downward adjustments undercuts the purpose of the Guidelines, which is to impose similar sentences on similarly situated defendants regardless of their culpability relative to other members of the criminal conspiracy. See Carpenter, 252 F.3d at 235 (citing United States v. Sentamu, 212 F.3d 127, 134 (2d Cir. 2000)).
In *United States v. Florez*,¹⁵² the Second Circuit considered whether § 3553(a)(6) permits district courts to consider sentencing disparities between co-defendants in the same case.¹⁵³ Defendant Florez asserted that his 210-month sentence, 52 months less than the low end of his Guidelines range, was unreasonable because of its disparity with his brother's 120-month sentence.¹⁵⁴ The district court expressed doubt about the leniency of the 120-month sentence,¹⁵⁵ but nevertheless "impos[ed] a non-Guidelines sentence [on Florez] that reduced somewhat the disparity in the brothers' sentences."¹⁵⁶ Florez's *Booker* argument on appeal was that the district court did not adequately consider § 3553(a)(6) and therefore did not sentence him with an objective of reducing the disparity between the two sentences.¹⁵⁷

The court rejected this argument, noting that "the requirement that a sentencing judge consider an 18 U.S.C. § 3553(a) factor is not synonymous with a requirement [that] the factor be given determinative or dispositive weight in the particular case."¹⁵⁸ "[T]he weight to be given such disparities, like the weight to be given any § 3553(a) factor, is a matter firmly committed to the discretion of the sentencing judge and is beyond our [appellate] review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented."¹⁵⁹ Therefore, while the *Florez* court did not disturb the district court's decision to take into account co-defendant disparity as the basis for a non-Guidelines sentence, preferring instead to review the

¹⁵² 447 F.3d 145 (2d Cir. 2006).
¹⁵³ *Id.* at 157. One month prior to the *Florez* decision, the Second Circuit acknowledged that "[t]he plain language of § 3553(a)(6) seems not to prohibit judges from considering disparities between co-defendants." *United States v. Fernandez*, 443 F.3d 19, 32 n.9 (2d Cir. 2006). There the court identified the nub of the issue: "In light of the [Sentencing Reform Act's] goal of national consistency in sentencing, there is disagreement over whether § 3553(a)(6) may support a non-Guidelines sentence for the purpose of preventing a disparity between sentences imposed on co-defendants." *Id.* at 32. The *Fernandez* court, however, left resolution of the question "for another day." *Id.* Two weeks after its decision in *Florez*, the Second Circuit again declined to resolve the issue. See *United States v. Toohey*, 448 F.3d 542, 547 n.1 (2d Cir. 2006).
¹⁵⁴ *Florez*, 447 F.3d at 157.
¹⁵⁵ *Id.* at 149 (explaining that Florez's brother pleaded guilty and was sentenced before a different judge).
¹⁵⁶ *Id.* at 158.
¹⁵⁷ *Id.* at 157 (discussing Florez's challenge that the district court had committed a procedural error in not fully considering § 3553(a)(6)).
¹⁵⁸ *Id.* (internal quotation marks and citation omitted, emphasis added).
¹⁵⁹ *Id.* at 158 (quoting *United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006)).
reasonableness of the sentence under the totality of the circumstances, it did not squarely decide whether co-defendant disparity is even an appropriate consideration under § 3553(a)(6).

F. Safety-Valve Relief – Restitution – Supervised Release

Finally, the Second Circuit has resolved several miscellaneous Booker challenges related to the issue of substantive sentencing law and procedure, which are briefly summarized below.

i. Safety-Valve Relief

Federal law provides that a defendant may be sentenced to less than the statutory minimum for an offense if he, inter alia, “has truthfully provided to the government all information and evidence the defendant has concerning the offense.” Before Booker, the burden fell on the defendant to prove to the court that he had provided the necessary information warranting the government’s recommendation of a shorter sentence. In response to a Booker challenge that the burden of proof should shift to the government to prove by a preponderance of the evidence that a defendant is ineligible for safety-valve relief, the court has ruled that the defendant retains the burden to demonstrate his eligibility for such relief.

ii. Restitution

After conviction in the typical federal criminal trial, district courts may order, as part of the sentence, “that the defendant make restitution to any victim of [the] offense, or if the victim is deceased, to the victim’s estate.” In order to provide appropriate restitution, the district court is authorized by statute to order the probation officer “to obtain and include in its presentence report . . . information sufficient for the court to

161 See United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997) (explaining that plain language of 18 U.S.C. § 3553(f) places burden on defendant to provide truthful information to government in order to become eligible for reduced sentence and reasoning that it logically follows that defendant must bear burden of proving to court that he has in fact provided such information).
162 See United States v. Jimenez, 451 F.3d 97, 103 (2d Cir. 2006) (upholding precedent set in Gambino and stating that defendant continues to bear burden of proving to court that he provided required information).
exercise its discretion in fashioning a restitution order.”164 Most importantly for Booker purposes, this presentence report contains “a complete accounting of the losses to each victim.”165 Given Booker’s statement that the Sixth Amendment “is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant,”166 the purported Sixth Amendment violation becomes readily apparent. Nevertheless, the Second Circuit has held that orders requiring defendants to make restitution for loss amounts not admitted in their plea allocutions or found by a jury do not violate defendants’ rights under the Sixth Amendment as articulated in Booker.167 Perhaps most persuasively, the court observed that Booker intended only to excise two provisions from the Sentencing Reform Act and explicitly considered the restitution provision to function validly and independently from the problematic portions of the statute.168

165 Id.
167 See United States v. Reifler, 446 F.3d 65, 120 (2d Cir. 2006) (rejecting defendants’ Sixth Amendment challenges to restitution orders supported by facts not found by jury or admitted by defendants at trial and holding that restitution calculations made by judge in such manner do not violate the Sixth Amendment as enunciated in Booker); accord United States v. Leahy, 438 F.3d 328, 331 (3d Cir. 2006) (en banc) (concluding that restitution “is not the type of criminal punishment that evokes Sixth Amendment protection” and concluding “the amount a defendant must restore to his or her victim need not be admitted by the defendant or proved to a jury beyond a reasonable doubt”); United States v. Miller, 419 F.3d 791, 792–93 (8th Cir. 2005) (stating “the preponderance-of-evidence burden in restitution cases is unchanged by the United States Supreme Court’s recent decision” in Booker); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005) (agreeing with “sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment”); United States v. King, 414 F.3d 1329, 1331 & n.1 (11th Cir. 2005) (emphasizing that “every circuit that has addressed this issue directly has held that Blakely and Booker do not apply to restitution orders” thus concluding that “the district court’s error, if any, was not plain”); United States v. Gordon, 393 F.3d 1044, 1051 n.2 (9th Cir. 2004) (concluding that restitution orders are unaffected by Blakely); United States v. Wooten, 377 F.3d 1134, 1144–45 & n.1 (10th Cir. 2004) (holding that Apprendi and Blakely did not apply to challenge restitution orders because amount did not exceed any statutory maximum); United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (holding that restitution calculations are not affected by Apprendi).
168 Reifler, 446 F.3d at 116 (noting that the Booker Court considered most of statute to be “perfectly valid” standing independently without the excised sections and emphasizing that the Booker Court specifically considered restitution order provision to be one of those retaining independent validity).
iii. Supervised Release

In addition to imposing a term of imprisonment, district courts are also authorized by statute to require that defendants be placed on supervised release upon completion of their prison terms.\textsuperscript{169} If a defendant violates the conditions of his release, the court may revoke supervised release "and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release."\textsuperscript{170} In order to impose this penalty, the district court is required only to "find[] by a preponderance of the evidence that the defendant violated a condition of supervised release."\textsuperscript{171} If the sentence for violation of conditions of release, coupled with the original sentence served, exceeds the statutory maximum for the initial underlying offense, must a jury under \textit{Booker} find beyond a reasonable doubt that the defendant was in violation?

The Second Circuit holds that \textit{Booker} does not affect sentences for violations of supervised release.\textsuperscript{172} Consequently, a defendant does not have a right to have a jury to determine beyond a reasonable doubt whether he violated his supervised release when "the sentences imposed – (i) for the initial conviction and (ii) for violation of supervised release – exceeded in the aggregate the Guidelines range applicable at the initial conviction."\textsuperscript{173}

The court has conceded, however, that "the supervised release scheme is in some tension with the rationale of \textit{Blakely} and \textit{Booker}."\textsuperscript{174} A serious argument can be made that under certain circumstances a sentence imposed for violation of supervised release appears to implicate \textit{Booker} concerns.\textsuperscript{175} Consider the

\begin{itemize}
  \item \textsuperscript{169} 18 U.S.C. § 3583(a) (2006) (granting court power to include as part of sentence a term of supervised release after imprisonment).
  \item \textsuperscript{170} 18 U.S.C. § 3583(e)(3) (2006).
  \item \textsuperscript{171} \textit{Id}.
  \item \textsuperscript{172} United States v. Fleming, 397 F.3d 95, 97-101 (2d Cir. 2005) (upholding two-year prison sentence imposed for violation of supervised release following a 30-month sentence for conspiracy to assault a prisoner which fell outside of 5-11 month range recommended by guidelines despite lack of jury finding beyond a reasonable doubt because these considerations have always been discretionary and thus remain unaffected by \textit{Booker}).
  \item \textsuperscript{173} United States v. McNeil, 415 F.3d 273, 276 (2d Cir. 2005).
  \item \textsuperscript{174} \textit{Id}.
  \item \textsuperscript{175} \textit{Id.} at 276-77 (noting that unlike parole considerations, sentences for violations of supervised release can potentially exceed parameters of prison sentences for original crime or conviction and "if a sentence for violation of supervised release were nothing but a sentencing enhancement, beyond the punishment justified by the conviction, it could be
facts in the McNeil176 case, for example. Defendant is sentenced to 33 months for an offense that carries a statutory maximum of 41 months imprisonment.177 He serves the sentence, and is later charged with violating the conditions of his supervised release.178 The district court then imposes a 15-month sentence on revocation, which when added to the original 33-month sentence, exceeds the statutory maximum for the underlying offense by 7 months.179 Without question, if “a sentence for violation of supervised release were nothing but a sentencing enhancement, beyond the punishment justified by the conviction, it could be constitutionally infirm.”180 Nevertheless, the Second Circuit has declined to apply Booker to this circumstance, largely because current law permits the imposition of a sentence upon revocation that exceeds the time a defendant could have served based on his original conviction.181

IV. ASSESSING BOOKER AND THE SECOND CIRCUIT'S IMPLEMENTING JURISPRUDENCE

As one commentator has noted, the Booker decision itself is a challenge to even comprehend.182 Perhaps one reason for this is that the proposed remedy does not seem to correspond to the perceived violation.183 The decision emerged from a recent shift in the Supreme Court's Sixth Amendment jurisprudence that called into question the decades-long practice of judicial fact-finding to arrive at an appropriate sentence.184 Yet the Court's

constitutively infirm”).

176 Id. at 275 (explaining facts behind defendant's prison sentence of 15 months for violation of supervised release after serving 33 months for crime which corresponded to a 41 month maximum sentence under the guidelines).
177 Id. at 276.
178 Id. at 275.
179 Id. at 276.
180 Id. at 277.
181 Id.
182 Berman, supra note 6, at 345 (discussing the lack of brevity and clarity in the Booker opinions).
183 See McConnell, supra note 57, at 677. “The most striking feature of the Booker decision is that the remedy bears no logical relation to the constitutional violation.” Id. “The violation . . . is that judges were permitted to make factual findings that properly were the province of the jury.” Id. “The remedy . . . was to give judges more power than they had previously.” Id.
184 See Jones v. United States, 526 U.S. 227, 242 (1999) (questioning how the Supreme Court precedent “recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: when a jury
solution was not to accord the jury a greater role in sentencing, but rather to retain judicial fact-finding within an “advisory” system. Professor Berman has captured the irony of *Booker*:

[T]he remarkable *Booker* decision found a way to further obscure the Supreme Court’s conceptually muddled sentencing jurisprudence. Through the amalgam of dual rulings from dueling majorities, the Court declared in *Booker* that the federal sentencing system could no longer rely upon mandated and tightly directed judicial fact-finding. But, as a remedy, the Court produced a system which now relies upon discretionary and loosely directed judicial fact-finding. Thus, to culminate a jurisprudence seemingly seeking to vindicate the role of the jury in modern sentencing systems, *Booker* devised a remedy which ultimately gave federal judges new and expanded sentencing powers.\(^{185}\)

Judge McConnell and others contend, persuasively, that the *Booker* opinions are lacking in consistency and coherence.\(^ {186}\) He argues that the remedial opinion’s flaws can be traced to the “gaping doctrinal hole” in *Booker*’s Sixth Amendment holding.\(^ {187}\) The Stevens’ majority acknowledged that the Sixth Amendment is not violated by a fully discretionary sentencing scheme, i.e., one in which the judge is permitted to set a sentence anywhere within the statutory range.\(^ {188}\) For example, in sentencing a defendant convicted of violating the federal felon-in-possession of a firearm statute, the district court may impose imprisonment for “not more than 10 years.”\(^ {189}\) In settling on the precise number of
determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime;’); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting) (remarking “[t]hat it is genuinely doubtful whether the Constitution permits a judge... to determine by a mere preponderance of the evidence... a fact that increases the maximum penalty... is clear enough from [the Court’s] prior cases....”).

\(^{185}\) Berman, *supra* note 6, at 345 (emphasis added).

\(^{186}\) McConnell, *supra* note 57, at 677 (noticing the faults in the *Booker* holding).

\(^{187}\) *Id.* at 680 (postulating that “[b]ecause the Sixth Amendment majority reaffirmed the constitutionality of discretionary judging, it left itself wide open to a remedial holding that enhanced judicial discretion rather than eliminating judicial fact-finding”).

\(^{188}\) United States v. Booker, 543 U.S. 220, 233 (2005) (positing that “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant”).

months or years the defendant should serve, the trial judge, not the jury, finds facts relevant to this determination. This strikes at the heart of the Sixth Amendment’s core requirements; namely, that the jury should find the facts supporting the penalty. As Judge McConnell notes, the Booker Court does not attempt to square its endorsement of discretionary sentencing with its Sixth Amendment holding. In placing its imprimatur on discretionary judging, the Supreme Court “left itself wide open to a remedial holding that enhanced judicial discretion rather than eliminating judicial factfinding.” Thus resulted the remedial holding, devoid of much of its Sixth Amendment bite: the Sixth Amendment is not offended by judicial factfinding, so long as the Guidelines themselves are not mandatory in application.

It also remains to be seen if Booker will remedy the oft-criticized complexity of the Sentencing Guidelines. It would seem that Booker’s apparent restoration of discretion to district judges might reduce the traditional Guidelines emphasis on mechanical precision in calculating sentences. Yet it may be that the complexity inherent in the Guidelines system will be replaced by a different sort of complexity. Where few rules or presumptions exist to guide the district courts’ exercise of discretion (as in the Second Circuit), sentencing law will take on a patchwork quality, as the body of cases upheld as “reasonable” increases. “Over time, precedents governing the exercise of Booker discretion will develop in a common law-like fashion, and these precedents will constitute an increasingly intricate body of

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190 See U.S. Const. amend. VI (providing that in criminal prosecutions, the accused shall enjoy the right to be tried by impartial jury); see also Blakely v. Washington, 542 U.S. 296, 308–09 (2004) (stating that the Sixth Amendment is a reservation of jury power).

191 McConnell, supra note 57, at 679 (commenting that “the Booker Court never explained how such a system could be squared with its interpretation of the requirements of the Sixth Amendment”).

192 Id. at 680.

193 See, e.g., Sandra Guerra Thompson, The Future of Federal Sentencing: Introduction, 43 Hous. L. Rev. 269, 270 n.7 (2006). “Deep dissatisfaction with the Guidelines has been expressed from the moment they were adopted to the present.” Id. “The list of sins includes their being overly complex, overly rigid, placing too much emphasis on quantifiable factors such as monetary loss and drug quantity.” Id. Booker may have done nothing to improve the sentencing and “appears to have only slightly mitigated the rigidity and severity of the federal sentencing system, and it has perhaps aggravated the system’s overall complexity.” See also Berman, supra note 6, at 349.
law governing sentencing, which must be consulted in addition to the body of law interpreting the Guidelines.”

The decisional law of the Second Circuit has been largely faithful to the Supreme Court’s Booker mandate. The Second Circuit has done an admirable job of elucidating how sentencing procedure functions in an “advisory” paradigm. Perhaps the court has been too reluctant to craft rules or presumptions that might aid in streamlining the sentencing process, but this is at least consistent with Booker’s attempt to restore some measure of discretion to the district courts. Given the conceptual difficulties inherent in Booker, the court has crafted a workable sentencing procedure for the federal courts of New York, Connecticut, and Vermont. It has answered a sizeable number of legal questions that have arisen after Booker, sometimes following the majority of its sister circuits, sometimes retaining a minority approach to the issues, sometimes leading its sister circuits, as in its early Crosby decision, thought by some to be “a template for the future of sentencing.” Particularly in light of the recent Rattoballl decision, the future of sentencing in the Second Circuit will likely further examine the role of the traditional Sentencing Guidelines in the discretionary sentencing regime. It remains to be seen if the current common law approach to sentencing will ultimately serve the rule of law or further mire sentencing in inconsistency and complexity. In practical effect, early statistical analyses suggest that Booker has worked to the benefit of defendants in the Second Circuit:

The Second Circuit, which exhibited higher-than-average levels of downward departures before Booker and the nation’s highest levels of downward departures and variances after Booker, has been well below the national norm in upward departures and variances, both before and after the decision. This

194 McConnell, supra note 57, at 682. Other commentators, however, are hopeful that a common law of sentencing will eventually give meaningful guidance on what constitutes a “reasonable” sentence. For one example of such a view, see David J. D’Addio, Note, Sentencing After Booker: The Impact of Appellate Review on Defendants’ Rights, 24 YALE L. & POL’Y REV. 173 (2006), who notes that despite the conceptual difficulty with determining what is “reasonable” in the abstract, “[o]ver time, case by case, appellate courts will make clear what constitutes a reasonable sentence; perhaps the elusive common law of sentencing will finally bloom.” Id. at 194 n.97.

suggests that discretion in the Second Circuit is principally exercised in favor of the defendant.\textsuperscript{196}

Perhaps this is not a useful way to gauge the success or failure of the advisory Guidelines system. In the end, sentencing should be directed at doing justice in individual cases according to law, without undue emphasis on the resulting statistics. In striving to uphold the guarantees of the Sixth Amendment in dispensing criminal justice, the federal courts of appeals are serving a vital role as they assist in the development of sentencing law.

\textsuperscript{196} McConnell, \textit{supra} note 57, 675–76.