The decision in United States v. Booker* marked a radical change in the way the Federal Sentencing Guidelines are used. In the past, the Guidelines carried the force of law and federal sentencing judges were bound to apply them when sentencing defendants.2 Under Booker, the Guidelines are advisory and sentencing judges have discretion to vary from the Guidelines range. Instead of applying the Guidelines as mandatory, judges are free to impose non-Guidelines sentence so long as those sentences are reasonable.3 But judicial experience post-Booker has shown that a judge’s discretion is limited about when and how far she can vary from the Guidelines.

This article presents some general principles for exercising discretion in varying from the Guidelines. Those principles are drawn from the federal appellate case law that has evolved since the Booker decision. The principles are not intended to substitute for judicial prerogative in sentencing or to provide a foolproof method for sentencing without being reversed. Rather, the principles are offered to assist federal sentencing judges in exercising their discretion to impose reasonable sentences that will survive appellate review.

To survive appellate review, a non-Guidelines sentence must be reasonable—both procedurally and substantively. The circuit courts agree that a reasonableness review consists of two components: (1) procedural reasonableness, and (2) substantive reasonableness.4 A circuit court will reach the second component—substantive reasonableness—if it determines a sentence is procedurally reasonable. If a circuit court determines that a sentence is procedurally unreasonable, it will remand the case to the district court for resentencing without addressing substantive unreasonableness.5 Thus, the first step in imposing a reasonable non-Guidelines sentence is to proceed in a procedurally reasonable manner.

I. Procedural Reasonableness
To be procedurally reasonable, a sentencing judge must first correctly calculate the Guidelines range.6 Although the circuit courts have provided little guidance about the amount of weight to afford the Guidelines, the circuits agree that a sentencing judge must calculate the Guidelines range.7 The procedures for calculating the Guidelines range have not changed post-Booker.8 The sentencing judge must follow the instructions in the Guidelines manual to calculate the Guidelines range.9 Properly calculating the Guidelines range includes making all the factual findings needed to determine the base offense level, make role adjustments, determine criminal history, and, where appropriate, depart from the Guidelines range. If the sentencing judge errs in calculating the Guidelines range, the resulting sentence will be based on an error of law. Because the circuit courts agree that a sentence based on an error of law is unreasonable, the sentence will be vacated as procedurally unreasonable.10 Consequently, a judge who seeks to vary from the Guidelines range must first calculate the Guidelines range, making all factual findings necessary for that calculation and avoiding errors in that calculation.

In addition to correctly calculating the Guidelines range, the sentencing judge must thoroughly explain her reasons for a non-Guidelines sentence in order to be procedurally reasonable.11 That reasoning must be articulated in terms of the factors listed in 18 U.S.C. § 3553(a)—commonly called the “3553(a) factors.” Many defendants have complained on appeal that the sentencing judge failed to address a particular factor or all of the factors, but the circuit courts do not require sentencing judges to recite and consider each 3553(a) factor when sentencing a defendant.12 Although no circuit court requires the sentencing judge to specifically address each factor, the circuit courts do require sentencing judges to demonstrate that they considered those factors.13 For a non-Guidelines sentence, a mere statement by the sentencing judge that she considered the factors, however, will not demonstrate that the sentencing judge considered the factors, especially where the defendant presents specific arguments for a non-Guidelines sentence.14 If a defendant raises a specific argument, the sentencing judge should address that argument. The only time a sentencing judge can avoid addressing an argument is if the argument is frivolous or lacks legal merit.15 If a circuit court has to “guess” or “speculate” about whether the sentencing judge considered the 3553(a) factors or the defendant’s particular arguments, the circuit court will vacate the sentence as procedurally unreasonable and remand for resentencing and a more detailed explanation.16 To avoid being reversed for...
procedural unreasonableness, a sentencing judge must ensure that the record reflects her reasons for varying in terms of the 3553(a) factors.

If a sentencing judge varies substantially from the Guidelines range, she must provide a particularly detailed explanation for the sentence. The circuit courts have indicated that the farther a sentencing judge varies from the Guidelines range, the more detailed the judge’s explanation must be. This rule especially applies where the sentencing judge varies downward from the Guidelines range. Where a sentencing judge varies downward, the circuit courts are less deferential to the sentencing judge’s explanation. Although a lack of deference almost always applies where the sentencing judge varies downward, more deference is sometimes afforded upward variances. For example, the Seventh Circuit has indicated that all that is necessary to sustain an upward variance is an “adequate” statement of the judge’s reasons for varying. Because all circuits require a sentencing judge to explain her reasons for a variance, a sentencing judge should carefully consider the 3553(a) factors in deciding whether to vary from the Guidelines sentence and explain her reasons specifically in terms of those factors if she varies from the Guidelines range.

In some jurisdictions, a sentencing judge must give notice before varying from the Guidelines range on a basis not identified in the presentence investigation report (PSR) or in a party’s pleading. If the judge fails to give notice, the reviewing court will determine the sentence is procedurally unreasonable. The basis for this error is Rule 32(h) of the Federal Rules of Criminal Procedure. Under Rule 32(h), the district judge must provide reasonable notice if she considers departing from the Guidelines range. Where a sentencing judge varies downward, the circuit courts have determined that Rule 32(h)’s notice requirement applies to variances. So far, the following circuits have determined that Rule 32(h)’s notice requirement applies to variances: Second, Fourth, Sixth, Ninth, and Tenth. If a sentencing judge in these jurisdictions considers varying on a basis that is not identified in the PSR or in a party’s pleading, some circuits have determined that Rule 32(h)’s notice requirement applies to variances. Second, Fourth, Sixth, Ninth, and Tenth. If a sentencing judge in these jurisdictions considers varying on a basis that is not identified in the PSR or in a party’s pleading, she should notify the defendant of her intention, continue the sentencing upon objection, and give the defendant an opportunity to address the grounds for the variance.

Finally, to satisfy procedural reasonableness, it must be apparent that the sentencing judge understood that she had discretion to vary from the advisory Guidelines range. This showing was problematic for sentences pending appeal at the time the Booker decision was issued because the sentencing judges in those cases would not have understood that they could vary from the Guidelines. As a result, the circuit courts remanded cases where the sentencing judge expressed any sentiment indicating that the Guidelines were mandatory. Most of those appeals, however, have been resolved and a sentencing judge’s decision to vary will demonstrate a judge’s understanding that the Guidelines are advisory.

II. Substantive Reasonableness

In addition to being procedurally reasonable, a sentence must also be substantively reasonable. Describing how to proceed in a substantively reasonable manner is more difficult than describing how to proceed in a procedurally reasonable manner. No court has defined substantive reasonableness, but the case law that has evolved thus far provides a basis for some general rules for varying from the Guidelines in a way that will survive appellate review. As the case law becomes more fully developed, more general principles will evolve to assist sentencing judges in understanding the boundaries of substantive reasonableness. Even without case law, however, one rule surfaces: to be substantively reasonable, a sentence must be reasoned; that is, the sentencing judge must give substantive reasons for the sentence. A circuit court will find it much more difficult to find substantive unreasonableness if the sentencing judge has provided substantive reasons for varying from the Guidelines range. Substantive reasoning forces the appellate court to consider the sentencing judge’s reasoning. Faced with substantive reasoning, the appellate court cannot simply conclude that a variance is unreasonable because it believes a sentence is too low or too high, but must explain why the reasoning does or does not support a variance. This task will be difficult if the sentencing judge’s explanation is detailed, individualized, and thoughtful.

The primary consideration in determining substantive reasonableness is the sentencing judge’s consideration of the 3553(a) factors. For a sentence to be substantively reasonable, the record for a variance must show that the sentencing judge gave meaningful consideration of the 3553(a) factors. “Generally, if the reasons justifying the variance are tied to § 3553(a) and are plausible, the sentence will be deemed reasonable.” “These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable.” If a judge does not sufficiently justify a variance in terms of the 3553(a) factors, the circuit court will vacate the sentence. Thus, a sentencing judge who decides to vary from the Guidelines range must justify a variance in terms of the 3553(a) factors.

Some jurisdictions have made it more difficult for sentencing judges to vary from the Guidelines by adopting a rebuttable presumption of reasonableness for a Guidelines sentence. In those jurisdictions, a defendant can rebut the presumption of reasonableness only by demonstrating that the Guidelines range sentence is unreasonable in terms of the 3553(a) factors. This requirement shows that the sentencing judge’s consideration of the 3553(a) factors is an essential part of the sentencing process even in jurisdictions that use a presumption. The presumption of reasonableness, however, does not relieve a sentencing judge of the obligation to explain to the parties and to the reviewing court why she
imposed a particular sentence. Because the Guidelines already account for many of the reasons a sentencing judge believes justify a variance, judges in jurisdictions with rebuttable presumptions may find it difficult to justify variances. Those judges must explain why the Guidelines sentence is inappropriate. A judge who varies from the Guidelines must carefully articulate her reasons for a variance in terms of the 3553(a) factors, especially in those jurisdictions that have adopted a rebuttable presumption of reasonableness.

To be substantively reasonable, the extent of a judge’s consideration of the 3553(a) factors must be proportionate to the extent of the variance. The farther a sentencing judge varies from the Guidelines, the more compelling the judge’s reasons for varying must be. The First Circuit has indicated that a sentencing court should deviate from the Guidelines for clearly identified and persuasive reasons. The Tenth Circuit has explained that the variance is a reasonable application of the 3553(a) factors “if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range.” The Eighth and Eleventh Circuits have stated that “[a]n extraordinary reduction must be supported by extraordinary circumstances.” Although the circuit courts have provided little guidance about what constitutes compelling reasons or extraordinary circumstances, the appellate courts have identified certain factors that do not support an extraordinary variance. For example, one court has indicated that a defendant’s drug-free status during pretrial proceedings is not a compelling reason to vary downward. To vary substantially from the Guidelines, a sentencing judge must have compelling reasons for why the case is exceptional, articulate those reasons on the record, and avoid reasons previously identified as not being compelling. Justifying a variance with as many reasons and as many details as possible will make it more difficult for a reviewing court to conclude that a sentence is substantively unreasonable.

A sentence may be substantively unreasonable if a sentencing court gives significant weight to an improper or irrelevant factor. The circuit courts have identified some sentencing court gives significant weight to an improper or substantial reasons that constitute improper grounds for varying from the Guidelines. For example, a sentence based on the difference between state sentencing and federal sentencing for the same substantive offense is unlikely to survive appellate review. Varying from the Guidelines solely on the basis of the disparity in sentencing between offenses involving crack cocaine and powder cocaine is unreasonable. Likewise, varying solely on the basis of the lack of a fast-track program is unreasonable. Some courts have indicated that comparing codefendants is not an appropriate basis for varying. Another court has determined that future deportation is not an appropriate factor in considering a variance. In addition, a sentence for a white-collar offense that does not include prison time is substantively unreasonable for failing to reflect the seriousness of the offense. A non-Guidelines sentence that a district court imposes in reliance on factors incompati-
shows that the circuit courts uphold upward variances more often than downward variances.6 This trend is so prevalent that a member of the Eighth Circuit observed that that circuit had affirmed upward variances at a rate of 92.3 percent while affirming downward variances at a rate of 15.8 percent.7 This trend, however, should not cause sentencing judges to avoid downward variances where the facts and circumstances of the case justify a variance.8 Many of the variances that have been vacated thus far are part of the natural evolution of post-Booker discretion. The first judges who varied from the Guidelines did so without the benefit of two years of case law addressing reasonableness. That case law provides some lessons learned that can help other judges avoid the same pitfalls.

The principles discussed in this article should help judges exercise their discretion in a manner that will avoid having their sentences vacated. Judges can minimize the potential for having a variance vacated by proceeding in a manner that is both procedurally and substantively reasonable. Thoroughly considering the 3553(a) factors and justifying a variance with case-specific facts and circumstances stated in terms of those factors will assist the sentencing judge in proceeding in a manner that is both procedurally and substantively reasonable. The more individualized details and reasons a judge provides to justify a variance, the more "reasoned" the sentence will be and the more difficult it will be for an appellate court to conclude that the sentence is unreasonable.

Notes

* Ms. Stone-Harris recently completed a fellowship with the Supreme Court of the United States. During her fellowship, Ms. Stone-Harris was assigned to the United States Sentencing Commission, where she researched the judicial response to the Booker decision. The views expressed in this article reflect the views of the author and do not reflect the official position of the Sentencing Commission or the Western District of Texas.

2 See Booker, 543 U.S. at 233 (observing that the Guidelines are mandatory as written); Mistretta v. United States, 488 U.S. 361, 367 (1989) (explaining that Congress settled on a mandatory guideline system rather than the other systems it studied).
3 See Booker, 543 U.S. at 261 (directing appellate courts to review sentences for unreasonableness); United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 928 (2007) ("Booker’s remedial solution makes it possible for courts to impose non-guideline sentences that override the guidelines, subject only to the ultimate requirement of reasonableness."); United States v. Charles, 467 F.3d 828, 830 (3d Cir. 2006) ("After Booker, the [g]uidelines have only advisory force and appellate courts must review sentences for reasonableness according to the ‘relevant Section 3553(a) factors’ that guide sentencing."); United States v. Denton, 434 F.3d 1104, 1113 (8th Cir. 2006) (explaining that post-Booker, sentences are subject to reasonableness review, whether within or outside the advisory Guideline range); United States v. Magallanez, 408 F.3d 672, 685 (10th Cir.), cert. denied, 126 S. Ct. 468 (2005) (stating that a sentencing court has latitude to depart from the Guidelines range subject to reasonableness review).

5 See United States v. Mashek, 406 F.3d 1012, 1015 (8th Cir. 2005); United States v. Kibby, 443 F.3d 1135, 1140 (9th Cir. 2006); United States v. Krnjez, 437 F.3d 1050, 1055 (10th Cir. 2006); United States v. Williams, 456 F.3d 1353, 1360 (11th Cir. 2006).
6 See United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005) (requiring a district court to first make the appropriate findings of fact and calculate the Guidelines range; then, to consider that range as well as other relevant factors set forth in the Guidelines and the factors set forth in § 3553(a) before imposing the sentence—if the court imposes a non-Guidelines sentence, it should explain its reasons for doing so); United States v. Stone, 432 F.3d 651, 655 (6th Cir. 2005) ("District courts . . . must . . . calculate the [g]uideline range as they would have done prior to Booker, but then sentence defendants by taking into account all of the relevant factors of 28 U.S.C. § 3553, as well as the [g]uidelines range."); United States v. Rivera, 439 F.3d 446, 448 (8th Cir. 2006) ("First, the district court should determine the [g]uidelines sentencing range. Second, the district court should determine whether any traditional departures are appropriate. Third, the district court should apply all other section 3553(a) factors in determining whether to impose a [g]uidelines or non-[g]uidelines sentence."); United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005) (explaining that sentencing involves two steps—first, the sentencing court calculates the Guidelines range; then, the sentencing court considers the § 3553(a) factors to determine a reasonable sentence).

7 See Jimenez-Beltre, 440 F.3d at 518; United States v. Vaughn, 430 F.3d 518, 525 (2d Cir. 2005), cert. denied, 126 S. Ct. 1665 (2006); United States v. Perez-Pena, 453 F.3d 236, 241 (4th Cir. 2006); United States v. Foreman, 436 F.3d 638, 643 (6th Cir. 2006); United States v. Rodriguez-Alvarez, 425 F.3d 1041, 1046 (7th Cir. 2005); United States v. Bueno, 443 F.3d 1017, 1022 (8th Cir. 2006); United States v. Cantrell, 433 F.3d 1269, 1279 (9th Cir. 2006).
8 See 18 U.S.C. § 3553(a)(4), (5) (West 2006) (instructing sentencing judge to consider the Guidelines, including the Guidelines’ policy statements); Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the [g]uidelines, must consult those [g]uidelines and take them into account when sentencing."); United States v. Mares, 402 F.3d 511, 519 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005) ("The [g]uideline range should be determined in the same manner as before Booker/Fant."); Magallanez, 408 F.3d at 685 (clarifying that although the Guidelines range is now advisory, the process of determining the correct Guideline range is the same).

9 See U.S. SENTENCING GUIDELINES MANUAL §1B1.1 (2005) (instructing courts about how to apply the Guidelines).

10 See United States v. Toro, 333 F.3d 1297, 1301 (9th Cir. 2003); United States v. Almas, 209 F.3d 763, 770 (9th Cir. 2000) ("The record must demonstrate the trial court gave meaningful consideration to the § 3553(a) factors."); United States v. Myers, 439 F.3d 415, 419 (8th Cir. 2006) (remanding for resentencing because the court of appeals could not evaluate the substantive reasonableness of the sentence that the court would have imposed if the Booker decision had been applied at the time the original sentence was imposed.")
where the Presentence Investigation Report contained conflicting accounts of the offense and the district court failed to address the varying accounts; United States v. Carty, 453 F.3d 1214, 1221 (9th Cir. 2006) (when imposing a sentence, a district court must provide on the record some articulation of its consideration of the § 3553(a) factors and explanation of the reasons underlying its sentence selection.

See United States v. Dixon, 449 F.3d 194, 205 (1st Cir. 2006); United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005); United States v. Harness, 453 F.3d 752, 757 (6th Cir. 2006); United States v. Tyra, 454 F.3d 686, 687 (7th Cir. 2006); United States v. Dieken, 432 F.3d 906, 909 (8th Cir. 2006); United States v. Scott, 426 F.3d 1324, 1329 (11th Cir. 2005).

See United States v. McBride, 434 F.3d 470, 476 n.3 (6th Cir. 2006) (“While the district court need not explicitly reference each of the section 3553(a) factors, there must still be sufficient evidence in the record to affirmatively demonstrate the court’s consideration of them.”); United States v. Cunningham, 429 F.3d 673, 680 (7th Cir. 2005) (reversing because the sentencing judge did not adequately explain the reasons for the sentence); United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005) (“We will not infer a reasoned exercise of discretion from a record that suggests otherwise or is silent.”).

See Cooper, 437 F.3d at 329 (explaining that “a rote statement of the § 3553(a) factors [will] not suffice if at sentencing either the defendant or the prosecution properly raises ‘a ground of recognized legal merit (provided it has a factual basis)’ and the court fails to address it’); Cunningham, 429 F.3d at 679 (“A judge who fails to mention a grounded of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight.”); United States v. Diaz-Argueta, 447 F.3d 1167, 1170 (9th Cir. 2006) (vacating the sentence because the sentencing judge “simply turned to the guidelines and used the sentencing range provided there” without mentioning any §3553(a) factor).

See Cooper, 437 F.3d at 332 (stating that “the record should demonstrate that the [sentencing] court considered the § 3553(a) factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the record.”); United States v. Gama-Gonzalez, 469 F.3d 1109, 1111 (7th Cir. 2006) (explaining that a district judge need not address insubstantial arguments for a lower sentence—instead, the judge must “deal with serious arguments”); Hall, Nos. 05-1205 & 05-1251, 2007 WL 155298, at *15 (“[W]hen a district court fails to consider a defendant’s non-frivolous argument that a variance from the guidelines is warranted under § 3553(a), . . . the failure renders the sentence procedurally unreasonable such that resentencing is required.”).

See McBride, 434 F.3d at 476 n.3 (“To the extent that the court hides its reasoning or requires us to ponder and speculate, the more likely we are to find procedural unreasonableness in the court’s sentencing determination.”); United States v. Lenover, 157 F. App’x 917, 920 (7th Cir. 2005), cert. denied, 127 S. Ct. 1030 (2007) (explaining that the court cannot review the appellant’s sentence for reasonableness because the “absence of an explanation leaves us in the dark as to the district judge’s reasons for rejecting the proffered § 3553 factors and requires that the case be remanded to the district court.”); United States v. Feemster, 435 F.3d 881, 884 (8th Cir. 2006) (remanding for the “imposition of sentence following more explicit and thorough consideration of the § 3553(a) factors”).

See United States v. Shafer, 438 F.3d 1225, 1228 (8th Cir. 2006) (vacating a forty-eight-month sentence that was to be served concurrent with unrelated state offenses and that was almost 70 percent below the statutory maximum as unreasonable because all the factors cited by the district court at sentencing weighed against leniency, the district court failed to explain why the § 3553(a) factors justified such a substantial variance, and nothing existed in the record to justify any variance at all); United States v. Bryant, 446 F.3d 1317, 1319-20 (8th Cir. 2006) (vacating a variance where the district judge’s explanation for an extraordinary reduction consisted of “only a brief reference to [the defendant’s] ‘previous good record’ and the fact that he had remained drug-free for nine months”). But see United States v. Pereira, 465 F.3d 515, 524 (2d Cir. 2006) (explaining that a more cursory explanation will support a sentence varying from the Guideline range to a less significant degree).

See United States v. Meyer, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (observing that the Eighth Circuit had affirmed upward variances at a rate of 92.3 percent, but affirmed downward variances at a rate of 15.8 percent); Tracking reasonableness review outcomes . . . final update?, http://sentencing.typepad.com/sentencing_law_and_policy (July 31, 2006) (listing four above-Guidelines sentences that have been reversed versus twenty-four that have been affirmed and thirty-nine below-Guidelines sentences that have been reversed versus six that have been affirmed); Summary of Findings, Amicus Briefs supporting writs of certiorari in Rita v. United States, No. 02-5754, & Claiborne v. United States, No. 06-5618, available at http://www.nycdl.org/newsDetails_public.html?itemID=368. United States v. Castro-Juarez, 425 F.3d 430, 436 (7th Cir. 2005) (“All that is necessary now to sustain a sentence above the guideline range is ‘an adequate statement of the judge’s reasons, consistent with section 3553(a), for thinking that the sentence that he has selected is indeed appropriate for the particular defendant.’”) (citations omitted). See also United States v. Colon, No. 05-3684, 2007 WL 210368, at *4 (3d Cir. Jan. 29, 2007) (“We will uphold an above-the-guidelines sentence so long as it is reasonable and the district court’s statement of reasons supports it.”).

See United States v. Anati, 457 F.3d 233, 237 (2d Cir. 2006); United States v. Davenport, 445 F.3d 366 (4th Cir. 2006); United States v. Cousins, 469 F.3d 572, 580 (6th Cir. 2006); United States v. Evans-Martinez, 448 F.3d 1163 (9th Cir. 2006); United States v. Atencio, No. 05-2279, 2007 WL 102977, at *8 (10th Cir. Jan. 17, 2007), cert. denied, 127 S. Ct. 1208, 1212 (11th Cir. 2006).

See Atencio, No. 05-2279, 2007 WL 102977, at *8.

See United States v. MacKinnon, 401 F.3d 8, 11 (1st Cir. 2005) (finding that the defendant demonstrated plain error when the sentencing court referred to the Guidelines sentence as obscene, mandatory and unwarranted by the particular defendant.’”) (citations omitted). See also United States v. Vatican Nation, 451 F.3d 189, 199-99 (3d Cir.), cert. denied, Banks v. United States, 127 S. Ct. 424 (2006); United States v. Walker, 447 F.3d 999 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006); United States v. Long Soldier, 431 F.3d 1120 (8th Cir. 2005); United States v. Izarry, 458 F.3d 1208, 1212 (11th Cir. 2006).

See MacKinnon, 401 F.3d 8, 11 (1st Cir. 2005) (finding that the defendant demonstrated plain error when the sentencing court referred to the Guidelines sentence as obscene, mandatory and unwarranted by the particular defendant’s conduct); United States v. Cruz, 418 F.3d 481, 485 (5th Cir.), cert. denied, 126 S. Ct. 770 (2005) (finding that the defendant demonstrated plain error when the district court stated that granting the defendant’s downward departure motion would require deviating from the Guidelines, and the district court commented that there was nothing anyone could do to help); United States v. Barnett, 398 F.3d 516, 527 (6th Cir.), cert. dismissed, 545 U.S. 1163 (2005) (vacating and remanding for resentencing where the district court imposed a sentence assuming the Guidelines were mandatory); United States v. Brown, 414 F.3d 976 (8th Cir. 2005) (determining that the appellant demonstrated plain error when the district court indicated that it was looking for ways...
to adjust the sentence, responded to defense counsel’s request for a sentence at the low end of the Guidelines by refusing to impose a higher sentence (based on the belief that the Guidelines sentence was more than sufficient), and commented about the severity of the sentence); United States v. Trujillo-Terrazas, 405 F.3d 814, 821 (10th Cir. 2005) (deciding that the defendant demonstrated plain error where the relatively trivial nature of his criminal history was at odds with a sixteen-level enhancement, the district court expressed sympathy to the defendant, and the court indicated its dissatisfaction with the mandatory sentencing system); United States v. Shelton, 400 F.3d 1325, 1332-33 (11th Cir. 2005) (holding that the defendant demonstrated a reasonable probability that the district court would have imposed a lesser sentence when the court, after expressing its view that the Guidelines sentence was too severe and that the Guidelines did not treat the defendant’s criminal history appropriately, sentenced the defendant to the lowest possible sentence it could under the Guidelines).

23 See Adam Lamparello, The Unreasonableness of “Reasonableness” Review: Assessing Appellate Sentencing Jurisprudence after Booker, 18 FED. SENT’G REP. 174, 178 (Feb. 2006) (observing that circuit courts have not defined the concept of reasonableness).

24 See United States v. Williams, 425 F.3d 478, 480 (7th Cir. 2005), cert. denied, 126 S. Ct. 1182 (2006) (stating that the record must show that the judge gave the 3553(a) factors meaningful consideration); United States v. Robinson, 454 F.3d 839, 843 (8th Cir. 2006) (explaining that a variance may be reasonable so long as the sentencing judge offers appropriate justification in terms of the 3553(a) factors).

25 Moreland, 437 F.3d at 434.

26 United States v. Hardin, 437 F.3d 463, 471 (5th Cir. 2006).

27 See United States v. Smith, 445 F.3d 1, 7 (1st Cir. 2006) (reluctantly vacating a sentence that was less than half the minimum range as unreasonable because “the offense is quite serious and the defendant’s record unpromising, and there are no developed findings to indicate that rehabilitation is a better prospect than usual”); Davenport, 445 F.3d at 372 (vacating a 120-month sentence as unreasonable and explaining that such a significant divergence from the Guidelines range—over three times the advisory Guidelines range—requires compelling reasons which were not reflected in the record); Cooper, 437 F.3d at 330 (explaining that the court of appeals must determine if the trial court considered the § 3553(a) factors and applied those factors reasonably to the circumstances of the case); Castro-Juarez, 425 F.3d at 437 (vacating a variance that was double the high end of the Guidelines range because the sentencing judge did not provide a sufficiently compelling justification); United States v. Kendall, 446 F.3d 782, 785 (8th Cir. 2006) (characterizing an eighty-four-month sentence that was 155 percent above the Guidelines range as an “extraordinary” increase and explaining that such an extraordinary increase was not justified because nothing really set the defendant’s case apart from other methamphetamine cases and because the defendant’s criminal record was not extraordinary); United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) (vacating a fifteen-month sentence that represented a 60 percent downward variance from the Guidelines range as unreasonable because the sentence was an extraordinary variance that was not supported by comparably extraordinary circumstances). See also United States v. Lee, 454 F.3d 836, 839 (8th Cir. 2006) (explaining that although the sentencing judge adequately articulated its reasoning, the court erred by varying from the Guidelines based primarily on the defendant’s age and history of drug abuse).

28 See Green, 436 F.3d at 457; United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); Williams, 425 F.3d at 481; United States v. Tobacco, 428 F.3d 1148, 1151 (8th Cir. 2005); Kristl, 437 F.3d at 1054; United States v. Dorcely, 454 F.3d 366, 377 (D.C. Cir. 2006).

29 See Green, 436 F.3d at 457 (explaining that a non-Guidelines sentence will be unreasonable if the district court provides an inadequate statement of reasons or relies on improper factors in departing from the Guidelines recommendation); Webb, 403 F.3d at 383 (stating that the presumption of prejudice can be rebutted in rare cases where the record contains clear and specific evidence that the district court would not have sentenced the defendant to a lower sentence under an advisory Guidelines regime); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (determining that a defendant can rebut the presumption of reasonableness only by demonstrating that his sentence is unreasonable when measured against the factors set forth in § 3553(a)); Kristl, 437 F.3d at 1054 (stating that the presumption can be rebutted by either the defendant or the government by demonstrating that the sentence is unreasonable when viewed against the 3553(a) factors delineated).

30 See United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006) (“This rebuttable presumption does not relieve the sentencing court of its obligation to explain to the partes and the reviewing court its reasons for imposing a particular sentence. Even when selecting a presumptively reasonable sentence within the [g]uidelines range, a district court must ‘articulate[] its reasoning sufficiently to permit reasonable appellate review, specifying its reasons for selecting’ the specific sentence within that range.”) (citations omitted).

31 See United States v. Zapete-Garcia, 447 F.3d 57, 61 (1st Cir. 2006) (vacating a forty-eight-month prison sentence—a sentence eight times the maximum Guideline range—as unreasonable because the district court’s reasons for varying upward from the Guidelines—that the defendant had deported twice before and was subject to an unexecuted bench warrant for a prior arrest—were already addressed by the Guidelines); United States v. Tucker, 473 F.3d 556, 564 (4th Cir. 2007) (vacating a sentence that was nearly five times the Guidelines range where many of the bases articulated by the district court were already contemplated by the Guidelines); Atencio, No. 05-2279, 2007 WL 102977, at *10 (“Explanations of variance are especially important for reasonableness review in light of the presumptively reasonable effect given to the [g]uidelines in this circuit.”).

32 See United States v. Thurston, 456 F.3d 211, 215 (1st Cir. 2006); Moreland, 437 F.3d at 434; United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006); United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); United States v. Mansan, 436 F.3d 871, 874 (8th Cir. 2006); United States v. Valtierra-Rojas, 468 F.3d 1235, 1239 (10th Cir. 2006).

33 See Jimenez-Beltran, 440 F.3d at 518-19.

34 Cage, 451 F.3d at 595.

35 Dalton, 404 F.3d at 1033. See United States v. Crisp, 454 F.3d 1285, 1291 (11th Cir. 2006) (quoting and agreeing with the Eighth Circuit).

36 See United States v. Bryant, 446 F.3d 1317, 1320 (8th Cir. 2006) (vacating a thirty-month sentence that was 57 percent below the bottom of the Guidelines range as unreasonable because the district court’s explanation did not support an extraordinary reduction and stating that “drug-free status is not an extraordinary factor sufficient to justify such a large variance”).

37 See Moreland, 437 F.3d at 434; Smith, 440 F.3d at 708; United States v. Haack, 403 F.3d 997, 1004 (8th Cir. 2005), cert. denied, 126 S. Ct. 276 (2005). See also Cooper, 437 F.3d at 329.

considering state sentencing practices is not per se unreasonable, deviating from the Guidelines simply because a defendant would have received a different sentence in state court without considering the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct is reasonable); United States v. Jeremiah, 446 F.3d 805, 807-08 (8th Cir. 2006) (rejecting the appellant’s argument that 18 U.S.C. § 3553(a)(6) requires the sentencing court to consider the sentences imposed in state courts for comparable conduct by similarly situated defendants and to impose a sentence designed to reduce the disparity between state and federal court sentences because “the possible discrepancy between state and federal sentences is a factor the [Sentencing] Commission considered but chose not to account for in the [g]uidelines”).

39 See Pho, 433 F.3d at 54 (“[A sentencing court may not impose a sentence] outside the advisory Guideline sentencing range based solely on its categorical rejection of the Guidelines’ disparate treatment of offenses involving crack cocaine, on the one hand, and powdered cocaine, on the other hand.”); United States v. Castillo, 460 F.3d 337, 361 (2d Cir. 2006) (“[N]othing in § 3553(a) or in Booker more generally that authorizes district courts to sentence defendants for offenses involving crack cocaine under a ratio different from that provided in the Sentencing [g]uidelines. . . . [D]istrict courts may give non-[g]uidelines sentences only because of case-specific applications of the § 3553(a) factors, not based on policy disagreements with the disparity that the [g]uidelines for crack and powder cocaine create.”); United States v. Eura, 440 F.3d 625, 634 (4th Cir. 2006) (vacating a sixty-month sentence—the mandatory minimum sentence—for a defendant convicted of possession with intent to distribute five grams or more of crack cocaine as unreasonable because (1) the sentence was based on the district court’s disagreement with congressional policy decisions about sentencing crack cocaine dealers; (2) the sentence did “not reflect the seriousness of the offense, promote respect for the law, or provide just punishment for the offense;” (3) the sentence will lead to sentencing disparities) (citations omitted); United States v. Tsep-Mejia, 461 F.3d 522, 527 (5th Cir. 2006) (“[A] court is not entitled to base its decision to give a non-Guideline sentence on its disagreement with policy established by Congress and the Commission that traffickers in crack cocaine should receive stiffer sentences than traffickers in powder cocaine.”); United States v. Miller, 450 F.3d 270, 275 (7th Cir. 2006) (expressing that district judges must continue to abide by the legislative decision to punish crack cocaine offenses more severely that powder cocaine offenses even though powerful reasons may exist for changing the disparity); United States v. Spears, 469 F.3d 1166, 1177-78 (8th Cir. 2006) (“A judge’s personal views regarding the Sentencing Commission’s recommendations [about sentences for offenses involving cocaine] cannot supersede Congress’s refusal to adopt those recommendations.”); United States v. McCullough, 457 F.3d 1150, 1172 (10th Cir. 2006) (agreeing with the circuits that have held that the district court erred by varying from the Guideline range because it disagrees with the crack cocaine/powder cocaine disparity.

40 See United States v. Martinez-Flores, 428 F.3d 22, 30 n.3 (1st Cir. 2005), cert. denied, 126 S. Ct. 1449 (2006) (“It is arguable that even post-Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress’ clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable.”); United States v. Montes-Pineda, 445 F.3d 375, 380-81 (4th Cir. 2006) (declining to require a sentencing court to deviate downward from the Guidelines based on solely on the existence of fast-track programs in other districts because such a requirement would conflict with Congress’s decision to limit the availability of sentence reductions to certain jurisdictions); United States v. Castro, 455 F.3d 1249, 1253-54 (11th Cir. 2006) (rejecting the defendant’s argument that his sentence was unreasonable because the district court refused to vary from the Guidelines range based on the lack of a fast-track program in the sentencing jurisdiction—“Any disparity created by section 5K3.1 does not fall within the scope of section 3553(a)(6). When Congress directed the Sentencing Commission to allow the departure for only participating districts, Congress implicitly determined that the disparity was warranted.”) (citations omitted).

41 United States v. Pisman, 443 F.3d 912, 916 (7th Cir. 2006) (explaining that a comparison of a defendant with codefendants is not a proper application of the mandate to minimize unwarranted disparities, in part, because that mandate focuses on unjustified differences in sentences across judges and districts, not among defendants in an individual case); United States v. Bullock, 454 F.3d 637, 640 (7th Cir. 2006) (stating that comparing codefendants is not usually enough to establish a sentencing disparity for purposes of § 3553(a)(6) and that the kind of disparity which § 3553(a)(6) addresses is an unjustified difference across judges (or districts) rather than among defendants in a single case). But see United States v. Plouffe, 436 F.3d 1062, 1063-64 (9th Cir.), cert. denied, 126 S. Ct. 2314 (2006) (determining that a sentence twice as long as that of a codefendant was not unreasonable where the district court’s approach was reasoned and addressed the § 3553(a) factors, and the defendant’s criminal record provided a reasonable basis for imposing the sentence); United States v. Shaw, 471 F.3d 1136, 1140-41 (10th Cir. 2006) (explaining that “[o]rdinarily, the disparity between co-defendants’ sentences is not a proper basis for a variance, but that a variance might be appropriate where the Guidelines ‘inadequately reflect a defendant’s criminal history or the seriousness of the offense’”). See also Thurston, 456 F.3d at 217 (explaining that the district court placed too much emphasis on codedefendant disparity because (1) the disparity Congress sought to reduce was nationwide disparity and (2) unlike the defendant, the codefendant pleaded nolo contendere). But see United States v. Lazenby, 439 F.3d 928, 934 (8th Cir. 2006) (vacating a within-Guideline-range sentence, in part, because the district court gave too little weight to the “extreme disparity between the sentences imposed on two similarly situated conspirators”).

42 See United States v. Wills, No. 06-0115, 2007 WL 366071, at *3 (2d Cir. Feb. 5, 2007) (making this determination, however, in the context of procedural unreasonableness).

43 See United States v. Rattoballi, 452 F.3d 127, 137 (2d Cir. 2006) (determining that a sentence of one year of home confinement and five years of probation was unreasonable for a defendant convicted of conspiracy to violate the Sherman Antitrust Act and conspiracy to commit mail fraud); United States v. Repking, 467 F.3d 1091, 1096 (7th Cir. 2006) (vacating former bank president’s one-day prison sentence as unreasonable where the district court relied on the defendant’s charitable works and restitution; those factors were overstated and other reasons the court gave for the sentence—the social stigma of being a convicted felon and the bar on obtaining federal jobs—are normal incidents of committing bank fraud); United States v. Tune, 450 F.3d 352, 359-60 (8th Cir. 2006) (vacating a tax-evader’s sentence as unreasonable because the sentence did not include a term of imprisonment); Crisp, 454 F.3d at 1292 (vacating a sentence
of five hours incarceration for former comptroller who participated in a “fraudulent scheme that bilked a bank out of nearly half a million dollars”); United States v. McCoy, 447 F.3d 1348, 1349 (11th Cir. 2006) (vacating a sentence of sixty months probation for a former chief financial officer, senior vice president, and treasurer of a company who participated in a massive, multimillion-dollar securities fraud); United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006) (vacating a seven-day sentence for a defendant convicted of conspiracy to commit securities fraud and mail fraud and falsely books and records as well as falsifying books and records). See also Thurston, 456 F.3d at 218 (explaining why the district court’s conclusion that a three-month sentence—a 95 percent variance—would deter future white-collar crimes was an inappropriate ground for varying so far from the Guidelines range—the Sentencing Commission has increased penalties for white-collar offenses and the district court gave no individualized reasons why a three-month sentence would deter similar crimes).

See Williams, 456 F.3d at 1369-71 (“[T]o say Congress’s choice of a 100-to-1 drug quantity ratio is never justified is a categorical rejection of congressional policy, not an individualized, case-specific consideration. Congress concluded the 100-to-1 ratio is justified, and the courts have no authority to change that.”). See also Cage, 451 F.3d at 593 (“When a district court makes a sentencing decision, it must interpret Congress’s intentions in passing sentencing laws.”).

See Williams, 456 F.3d at 1360 (“[A] sentence can be unreasonable, regardless of length, if the district court’s selection of the sentence was substantially affected by its consideration of impermissible factors.”).

See Jimenez-Belte, 440 F.3d at 519 (“The use of fast-track programs certainly permits disparities but they are the result of a congressional choice made for prudential reasons, implicitly qualifying the general aim of equality. . . . Whether it would even be permissible to give a lower sentence on the ground sought is itself an open question.”); United States v. Mejia, 461 F.3d 158, 164 (2d Cir. 2006) (agreeing that “a district court’s refusal to adjust a sentence to compensate for the absence of a fast-track program does not make a sentence unreasonable”); Wilis, No. 06-0115, 2007 WL 366071, at *5 (recognizing that § 3553(a) does not prohibit a district court from considering sentencing disparity among codefendants so long as the district court engages in a individualized consideration); United States v. Gunter, 462 F.3d 237, 249 (3d Cir. 2006) (“Post-Booker a sentencing court errs when it believes that it has no discretion to consider the crack/powder cocaine differential incorporated in the [guidelines, . . . .”); United States v. Parker, 462 F.3d 273, 277-78 (3d Cir. 2006) (“Although § 3553(a) does not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so. . . . Where appropriate to the circumstances of a given case, a sentencing court may reasonably consider sentencing disparity of co-defendants in its application of those factors.”); United States v. Stephen, 160 F. App’x 505, 508 (7th Cir. 2005), cert. denied, 126 S. Ct. 1811 (2006) (determining that although the court previously held that it was not unreasonable for the district court to refuse to depart downward on the discrepancy between Guidelines ranges for crack and powder cocaine, “[n]othing prevents the district court from considering the discrepancy in selecting a reasonable sentence.”); United States v. Kuntsinger, 449 F.3d 827, 830-31 (8th Cir. 2006) (affirming two below-Guidelines sentences where the district court sought to avoid sentence disparity between coconspirators and the conspirators committed the same crimes); United States v. Morales-Chaires, 430 F.3d 1124, 1130-31 (10th Cir. 2005) (discussing the district court split over whether the disparity in sentencing that results from fast-track programs is unwarranted disparity under § 3553(a)(6), but declining to decide the issue; instead, the court reviews the sentence for reasonableness); United States v. Davis, 437 F.3d 989, 997 (10th Cir.), cert. denied, 126 S. Ct. 1935 (2006) (explaining while conducting a reasonableness review that similar offenders who engaged in similar conduct should be sentenced equivalently, but disparate sentences between codefendants are allowed where the disparity is supported by the record); Williams, 456 F.3d at 1369 (“A sentence below the [guidelines range in a crack cocaine case may be reasonable, so long as it reflects the individualized, case-specific factors in § 3553(a)(6)”).

See United States v. Smith, 359 F. Supp. 2d 771, 779-83 (E.D. Wis. 2005) (deviating from the Guidelines to account for the harsh sentence produced under the Guidelines for crack cocaine; instead of a 100:1 ratio, using the 20:1 ratio recommended by the Sentencing Commission in imposing a sentence—the government appealed but later moved to dismiss the appeal); United States v. Beamon, 373 F. Supp. 2d 878, 886-87 (E.D. Wis. 2005) (exercising discretion under § 3553(a) in sentencing below the Guidelines range to account for the disparity in sentences between crack and powder cocaine—the sentencing ranges for cocaine result in lesser sentences for large-scale suppliers of powder cocaine than the street-level crack dealers who exist below them in the hierarchy of distribution; the 20:1 ratio recommended by the Sentencing Commission is more appropriate than the 100:1 ratio of the Guidelines)—neither party appealed); United States v. Perry, 389 F. Supp. 2d 278, 305-08 (D.R.I. 2005) (deviating from the Guidelines range based on the disparity in sentencing for crack cocaine versus powder cocaine—the advisory Guideline range for crack cocaine based on the 100:1 ratio cannot withstand the scrutiny imposed by sentencing courts when the § 3553 factors are applied; the 20:1 ratio suggested by the Sentencing Commission in its 2002 report makes more sense—parties’ appeals dismissed on joint motion); United States v. Fisher, No. S3 03 CR 1501 SAS, 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005), at *5-7 (after an extensive analysis of the crack/powder cocaine sentencing Guidelines, using a 10:1 ratio instead of a 100:1 ratio to punish the defendant because that ratio is sufficient to punish crack cocaine dealers more harshly than those who deal in powder cocaine and because a sentence based largely
on the crack/powder cocaine disparity is greater than necessary to satisfy the purposes of sentencing—no appeal); United States v. Ramirez-Ramirez, 365 F. Supp. 2d 728, 731-32 (E.D. Va. 2005) (deviating from the Guidelines in an illegal reentry case where the defendant’s sentence was enhanced based on a crime of violence; after considering the § 3553(a) factors, deviating, in part, based on the absence of a fast-track program in the district—government withdrew its notice of appeal); United States v. Santos, 406 F. Supp. 2d 320, 325-29 (S.D.N.Y. 2005) (imposing a non-Guidelines sentence in an illegal reentry case, because of sentencing disparity created by fast-track programs, because the Guidelines sentence double-counted the defendant’s nonviolent drug offenses, and because of the delay in taking the defendant into federal custody—no appeal); United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 963-64 (E.D. Wis. 2005) (opining that because fast-track programs in border districts for illegal reentry offenses are creating serious sentencing disparities, it may be appropriate in some cases for a sentencing court to exercise its discretion under Booker to minimize the sentencing disparity that fast-track programs create—no appeal); United States v. Medrano-Duran, 386 F. Supp. 2d 943, 944-48 (N.D. Ill. 2005) (discussing the disparity in sentence that occurs in illegal reentry case between jurisdictions with fast-track programs and those that do not have such programs: departing by three offense levels based on the average of the departures given in districts with early disposition programs—no appeal). The Department of Justice (DOJ) does not appeal all variances; instead, the DOJ is selective about the variances it appeals. Those variances can be categorized as follows: (1) sentences that include procedural defects—for example, where the sentencing judge fails to provide reasons for a variance or fails to provide notice of its intent to vary downward; (2) sentences the DOJ considers excessive or unreasonable—for example, a sentence for a white-collar offense that does not include a term of imprisonment; and (3) variances based on factors the DOJ considers improper—for example, a variance based solely on the sentencing judge’s disagreement with the crack/powder cocaine sentencing disparity. Michael R. Dreeben, Deputy Solicitor General, DOJ, Comments Made during the FJC 2006 Nat’l Sentencing Policy Institute, July 24, 2006.

See Rattoballi, 452 F.3d at 130-31.

See Rattoballi, 452 F.3d at 137.

See Ture, 450 F.3d at 355.

Id. at 359.

See United States v. Armendariz, 451 F.3d 352, 355-56 (5th Cir. 2006).

Armendariz, 451 F.3d at 358-59.

See United States v. Gall, 446 F.3d 884, 888-89 (8th Cir. 2006).

See Summary of Findings, Amicus Briefs supporting writs of certiorari in Rita v. United States, No. 02-5754, & Claiborne v. United States, No. 06-5618, available at http://www.nycdl.org/newsDetails_public.html?ItemID=368. See also Court of Appeals Review, Dec. 1, 2005-Nov. 30, 2006, available at http://www.fd.org/odstb_BookerMain.htm (purporting to be a “comprehensive review of court of appeals decisions between December 1, 2005, and November 30, 2006, showing the rates of affirmation and reversal of within, above and below-guideline sentences at the national and circuit levels, as well as a comparison of rates in presumption and non-presumption circuits.”); difference in rates of below-Guideline sentences imposed in circuits that have adopted a presumption of reasonableness and those that have not for the period Jan. 1, 2005–Nov. 27, 2006, available at http://www.fd.org/odstb_BookerMain.htm (“A graph and the data used to prepare it showing a widening gap between the rate of below-guideline sentences imposed in circuits that have adopted a presumption of reasonableness and those that have not.”).

Meyer, 452 F.3d at 1000.

Lynn Adelman & John Deitrich, Fulfilling Booker’s Promise, 11 Roger Williams U. L. R. 521, 531 (opining that judges must do what is just in a particular case despite fear that Congress may enact a legislative Booker-fix).